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ALDEN V. MAINE AND THE WEB OF ENVIRONMENTAL LAW

*William D. Araiza**

In *Alden v. Maine*,¹ the Supreme Court held that states were immune from private party lawsuits in state court seeking back pay against their state government employer.² Of course, *Alden*'s consequences extend much farther than the Fair Labor Standards Act (FLSA), the statute authorizing the lawsuits disallowed in *Alden*.³ *Alden* enunciated a broad rule that state governments enjoy a constitutionally-based immunity from private party lawsuits seeking retrospective relief for violations of federal law when those lawsuits are brought in state court. It finished the job started by *Seminole Tribe v. Florida*,⁴ which refused to read Article I as granting Congress the power to abrogate state sovereign immunity from suits in federal court when that suit sought retrospective relief.⁵ Thus, *Alden* extended *Seminole Tribe*'s state immunity shield against federally-created causes of action to include suits brought in state court.⁶ When combined with the holdings and analysis in the two *Florida Prepaid* cases announced the same day as *Alden*,⁷ the result is a significant expansion of state sovereign immunity. Indeed, taken together, *Alden* and the *Florida Prepaid* cases (which limited two other

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1. 119 S. Ct. 2240 (1999).

2. *See id.* at 2246.

3. The Fair Labor Standards Act purported to authorize these lawsuits. *See* Fair Labor Standards Act of 1938 § 16, 29 U.S.C. § 216 (1994); Fair Labor Standards Amendments of 1974 § 6, 29 U.S.C. § 203 (1994).

4. 517 U.S. 44 (1996).

5. *See id.* at 47.

6. *See Alden*, 119 S. Ct. at 2246.

7. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999).

methods by which states could be sued for retrospective relief)⁸ make such retrospective relief nearly unobtainable at the behest of private parties, save in one very limited circumstance.⁹

Justice Stevens's dissent in *Seminole Tribe* argued that the immunity thus conferred on states would have wide-ranging consequences for the enforcement of a variety of federal rights, from those based on copyright and patent law to those concerning bankruptcy and environmental law.¹⁰ Even after *Seminole Tribe*, though, it was thought—or perhaps just assumed—that such rights could continue to be enforced against states through the mechanism of suing states in their own courts.¹¹ *Alden's* extension to state courts of *Seminole Tribe's* prohibition on retrospective relief thus requires careful consideration of Justice Stevens's statement. With state courts now subject to essentially the same state immunity rules as Article III courts, it is appropriate to begin assessing the damage that has been done to the enforcement of federal rights and to examine whether that damage is federalism's necessary price.

This paper attempts such a preliminary damage assessment tour by examining *Alden's*—and *Seminole Tribe's*—effect on federal environmental law. It begins by attempting to place *Alden* within the structural constitutional law created by the Supreme Court—law significantly altered in recent years. The two structural doctrines most relevant to *Alden's* effect on environmental law are, of course, federalism, discussed in Part I, but also separation of powers, specifically,

8. In particular, *College Savings Bank* overruled the doctrine under which states were thought to have implicitly waived their sovereign immunity from suits alleging violations of statutes enacted pursuant to the Commerce Clause simply by engaging in interstate commerce. See *College Sav. Bank*, 119 S. Ct. at 2228-29. *Florida Prepaid* limited Congress's ability to abrogate state sovereign immunity by means of legislating pursuant to Section 5 of the Fourteenth Amendment. It did so by imposing significant hurdles for a statute to be considered a legitimate use of Congress's Section 5 authority. See *Florida Prepaid*, 119 S. Ct. at 2207.

9. The remaining circumstance appears to be limited to where Congress has validly legislated pursuant to its power to enforce the Civil War Amendments. See *Alden*, 119 S. Ct. at 2267; *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996); Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976).

10. See *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting).

11. See, e.g., Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 503 & n.39 (1997).

the law of standing, which is discussed in Part II. The Court has used both of these doctrines to restrict the ability of private parties to vindicate federal rights, while enshrining more static and less politically flexible relationships between different parts of the government.¹² They both relate to environmental law because the Court's recent restrictions on standing have called into question the ability of plaintiffs to seek certain types of relief in certain circumstances, exactly when the Court's federalism jurisprudence has led to other, sometimes conflicting, limits being imposed on private parties seeking to sue states.¹³ Parts I and II attempt to make sense of these sometimes cross-cutting requirements and to analyze their impact on plaintiffs' attempts to vindicate federal law.

After this attempt to place *Alden* within the context of the current Court's constitutional structure jurisprudence, the paper moves on, in Part III, to consider *Alden*'s impact on environmental law. Before reaching its main focus, Part III addresses a preliminary question about the availability of even prospective relief. In *Seminole Tribe*, the Court, after concluding that Congress had no Article I power to abrogate state sovereign immunity from private lawsuits seeking damages, considered whether the plaintiffs in that case could bring their suit as one seeking prospective relief under the doctrine of *Ex parte Young*.¹⁴ The Court rejected that attempt, finding that Congress in the Indian Gaming Regulatory Act (IGRA)¹⁵ had displaced the *Young* cause of action with a statutorily-specific one.¹⁶ The first portion of Part III asks whether this exception to the otherwise general availability of *Young* relief against states applies also to suits brought in state court. In other words, does *Alden* adopt *Seminole Tribe*'s analysis concerning the availability of *Young* relief? And if it does (as this paper suggests that it might), do the remedial schemes found in federal environmental statutes displace *Young*, just as the remedial scheme in the IGRA displaced *Young* in

12. See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

13. See, e.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

14. 209 U.S. 123 (1908).

15. Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721 (1994); 18 U.S.C. §§ 1166-1168 (1994).

16. See *Seminole Tribe v. Florida*, 517 U.S. 44, 74-76 (1996).

Seminole Tribe? This paper suggests that the remedies in environmental law should not be viewed as having that sort of displacing effect.

Having decided that private environmental lawsuits against states in state court can go forward at least to the extent that they are cast as *Young* suits, Part III then goes on to consider the impact of *Alden's* holding that the Constitution prohibits Congress from authorizing private parties to sue states in state courts on federal law causes of action seeking retrospective relief such as damages. The main question here is how much damage to federal environmental law is done by the restriction on suits for retrospective relief brought by private parties. After examining the importance of retrospective relief and private party litigation, Part III concludes that, depending on the statute, *Alden's* limitations may not be extraordinary, but will probably impact state compliance with federal environmental law in more than trivial ways.

Part IV considers judicial and legislative responses to *Alden*. One response to *Alden's* immunity rule is simply to limit it, along lines already visible in other aspects of federalism law. Specifically, the Court has at times explicitly balanced federal and state interests when determining whether the federally-created burden or liability can be imposed on the state. Part IV asks first whether this balancing can be extended to the limitation *Alden* recognizes as absolute: the prohibition on private party suits seeking retrospective relief from states for federal law violations based on sources of authority other than the Civil War Amendments.¹⁷ Can courts hope to determine when the federal interest in statutory enforcement beyond that allowed by *Alden* is so important as to trump the immunity found in *Alden*? Past experience with such balancing suggests that this approach will fail.

Part IV then considers legislative responses. Beyond its Article I-based power to enact environmental laws, Congress also has the spending power, which has been used in the past to attach to federal grants to states conditions that could not have been legislated.

17. The Civil War Amendments have historically been viewed as so limiting state autonomy as to justify congressional creation of private rights of action for retrospective relief against states. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976).

Federal grants can impose such conditions, subject to (thus far) relatively deferential review by the Court. The spending power may thus allow Congress to reach the result denied it in *Alden*. Another source of congressional leverage is its power to delegate administration of federal environmental law to the states. State administration of federal regulatory programs—so-called “cooperative federalism”—both relieves the federal government of enforcement burdens while involving state governments in important regulatory programs and allowing the states to tailor implementation of those programs to local needs and pressures. As a condition of such delegations, Congress should be able to require that states waive their immunity from suit. Such conditions make logical sense and should be able to pass constitutional muster since they are logically related to the delegation decision and not so coercive as to present the state with no realistic choice.

I. *ALDEN* AND THE NEW LAW OF FEDERALISM

It is a commonplace observation that the Supreme Court is rewriting the law of federalism. Between 1992 and 1999, the Court decided at least seven significant cases dealing either with the scope of federal power over states, or, in the case of *United States v. Lopez*,¹⁸ with the scope of federal power over private activities traditionally regulated by states.¹⁹ Thus, before examining *Alden*'s impact on environmental law, it is necessary to consider its place in the overall scheme of the Court's new federalism.

One way to view the recent federalism cases is as erecting a constitutional barrier to federal attempts to make states accountable to federal authority. The most obvious examples of this idea are the commandeering cases, *New York v. United States*²⁰ and *Printz*, with their focus on the federal “commandeering” of state government

18. 514 U.S. 549 (1995).

19. See *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

20. 505 U.S. 144 (1992).

institutions.²¹ The same theme is visible in the Court's state sovereign immunity jurisprudence, which until *Alden* had focused on a state's immunity from suit in federal courts.²² This is not a new concept: the *Ex parte Young* fiction, for example, is based on the supposed distinction between a plaintiff seeking relief against a state and a plaintiff seeking relief against a state official. However, the Court's elaboration of that distinction, in *Idaho v. Coeur d'Alene Tribe*,²³ to mean something more than the simple line between prospective and retrospective relief,²⁴ indicates that the Court is applying that distinction aggressively, protecting state governments against an assertion of federal court authority against them, even when a formalistic application of *Young* would suggest that the plaintiff's suit could go forward. Even the Court's now-abandoned *National League of Cities v. Usery*²⁵ jurisprudence could be fitted within this conception of state sovereignty, with that doctrine's requirement that the challenged statute regulate "States as States"²⁶ and impact its ability to perform "traditional governmental functions."²⁷

Alden does not fit as easily within this scheme of direct federal regulation. The law itself—the FLSA—does not directly regulate state political processes,²⁸ either at the enforcement or the legislative

21. *But see* *Reno v. Condon*, 120 S. Ct. 666, 671-72 (2000) (rejecting commandeering argument against statute limiting the sale of driver's license information).

22. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued."); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring in the result) (noting the basis of Eleventh Amendment issues in "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other").

23. 521 U.S. 261 (1997).

24. The prospective/retrospective relief line was explicitly embraced by the Court in *Edelman v. Jordan*, 415 U.S. 651 (1974).

25. 426 U.S. 833 (1976).

26. *Id.* at 854.

27. *Id.* at 852; *see also* *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-88 (1981) (citing *National League of Cities*).

28. Of course, during the period in which *National League of Cities* was good law, particular applications of the FLSA were challengeable by states as intruding on their Tenth Amendment prerogatives. But the Court's analysis in *Alden* does not turn on whether a particular application of the statute to a state would fail the *National League of Cities* test; instead, it rejects any attempt to

level, and the case deals with a state's immunity from suit in its own courts, not the courts of the federal government. Of course, the law sought to be applied against the state originates with the federal government. But in *Alden* the federal law does not directly command state governments in the same way as did the statutes in the commandeering cases, nor is a burden directly imposed on a state by a federal court. Instead, there is the mediating influence of the state court, which presumably should be seen as mitigating the impact on whatever sovereignty interest the state has. Indeed, given that the federal policy is by definition the state policy,²⁹ it is difficult to see how the sovereignty interest of the state is compromised when its compliance with that policy is judged by its own court.³⁰

Nevertheless, *Alden* establishes that there is little practical difference between subjecting a state to suit in federal or state court.³¹ Since it is now constitutionally irrelevant that the state is being sued in federal as opposed to state court, understanding state sovereign immunity requires shifting the focus from the character of the forum to the character of the state. Clearly, there is something unique about the nature of the state—again, as opposed to the nature of the forum in which it is being sued—that requires immunity. This new development in the constitutional structure of federalism³² may be analogous to new developments in another constitutional structural area: the separation of powers and, specifically, standing doctrine. Before

seek retrospective relief against a state for violations of the statute. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538-39 (1985) (collecting cases where lower courts attempted to determine, under *National League of Cities*, which state functions were constitutionally immune from federal regulation).

29. *See Testa v. Katt*, 330 U.S. 386, 392 (1947) (citing *Mondou v. New York, New Haven & Hartford R.R. Co.*, 223 U.S. 1, 57 (1912) (federal policy imputed to state government)).

30. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240, 2289 (1999) (Souter, J., dissenting).

31. As Justice Souter noted in dissent, the *Alden* decision essentially renders reliance on the Eleventh Amendment superfluous, as a background principle of state sovereign immunity does the important constitutional work. *See id.* at 2269 (Souter, J., dissenting).

32. The *Alden* majority argues that its rule of state sovereign immunity is consistent with, among other things, the Framers' intent. *See id.* at 2247-63. The novelty of the development lies in the fact that *Alden* represents the first time that the Court squarely confronted this issue.

examining *Alden*'s effect on environmental law, this Article will now briefly examine the Supreme Court's new standing jurisprudence. That new jurisprudence, by restricting certain types of lawsuits seeking injunctive relief, may significantly influence *Alden*'s ultimate impact on environmental law.

II. ALDEN AND THE NEW LAW OF STANDING

In order to place *Alden* within the context of structural constitutional law, it becomes necessary to also consider the law of standing, specifically, the law of citizen standing to enforce federal law. During the last decade the Court has significantly limited the scope of private lawsuits seeking to ensure that other private parties, states, or the federal government itself, comply with federal law.

A. The Court's Recent Standing Jurisprudence

The Court's recent limits on standing began in earnest in 1992, with *Lujan v. Defenders of Wildlife*.³³ The plaintiffs in *Defenders of Wildlife* challenged a decision of the Interior Department not to require other governmental agencies to consult with the department about the environmental effects of their actions when those actions took place on foreign territory.³⁴ In support of their standing argument, the plaintiffs alleged that they were researchers interested in studying certain species living in foreign countries that might become extinct as a result of U.S. government action.³⁵ The Court found this basis for standing inadequate, in light of the absence of facts indicating that the plaintiffs had concrete plans, e.g., a plane ticket, to visit the areas where the species lived.³⁶ A plurality also questioned whether any injunction requiring the Interior Department to abide by the law—in this case, to insist that all government agencies consult with it about the environmental effects of their actions—would in fact redress any injury that the plaintiffs might suffer from having the species become extinct.³⁷

33. 504 U.S. 555 (1992).

34. *See id.* at 558-59.

35. *See id.* at 562-63.

36. *See id.* at 563-64.

37. *See id.* at 568-71. Justices Kennedy and Souter, who provided the fifth and sixth votes for the rest of the opinion, did not join in the discussion of re-

But most important for our purposes, the Court refused to find in the statute's citizen-suit provision³⁸ a "procedural right" to have government comply with the law.³⁹ According to the Court, deprivation of such a right amounted to a generalized grievance and thus did not provide the type of particularized injury necessary for Article III standing.⁴⁰ Instead, such a lawsuit, lacking a foundation of a particularized injury suffered by the plaintiff, amounted to abstract enforcement of the laws by courts, acting at the behest of private parties.⁴¹ To the majority, this constituted an inappropriate delegation to the courts of the President's Article II authority to execute the laws.⁴²

The Court's restriction on standing continued in *Steel Co. v. Citizens for a Better Environment*.⁴³ In *Steel Company* the Court held that the plaintiffs in a suit under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA)⁴⁴ did not have standing to sue a company that failed to provide timely reports of toxic discharges, as required by the statute, when the company corrected the omission, albeit tardily.⁴⁵ For our purposes, the important point about the Court's analysis is its holding that a request for fines, to be paid to the Treasury as called for in the statute, did not redress any injury the plaintiffs may have suffered. For the Court, such a request suffered from an analogous flaw as the *Defenders of Wildlife* plaintiffs' claim of a "procedural injury." As the *Steel Company* Court put it:

although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a

dressability.

38. Endangered Species Act of 1973 § 11, 16 U.S.C. § 1540(g) (1994).

39. See *Defenders of Wildlife*, 504 U.S. at 571-78.

40. See *id.* at 573-74.

41. See *id.* at 576-77.

42. See *id.* at 577.

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

Id.

43. 523 U.S. 83 (1998).

44. 42 U.S.C. § 11046 (1986).

45. See *Steel Co.*, 523 U.S. at 86-88, 109.

wrongdoer gets his just desserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.⁴⁶

Two cases before the Court this Term raise very similar issues. The first, *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*,⁴⁷ raises the same analysis as in *Steel Company*, but in the slightly different context of mootness. In *Laidlaw*, citizen plaintiffs again sued a corporation alleged to have violated environmental laws, i.e., this time, the Clean Water Act.⁴⁸ In this case, the trial court, while finding past violations, also found that the defendant had substantially complied with the statute for several years, and thus denied the request for declaratory and injunctive relief. The court's findings left only the plaintiffs' claims for penalties to be paid, as in *Steel Company*, to the Treasury. Following *Steel Company*, the Fourth Circuit held that the lawsuit was moot, explaining that the plaintiffs no longer had standing because the civil penalties requested would not redress any injury suffered by the plaintiffs.⁴⁹ The Supreme Court reversed, holding that such penalties might well redress ongoing or future violations, due to their deterrent effect.⁵⁰ The Court distinguished *Steel Company* on the ground that that case did not feature any allegation of ongoing or imminent violations and that "no basis for such an allegation appeared to exist."⁵¹ By contrast,

46. *Id.* at 107.

47. 120 S. Ct. 693 (2000).

48. *See id.* at 701-02; *see also* Federal Water Pollution Control Act Amendments of 1972 § 505, 33 U.S.C. § 1365 (1999).

49. *See Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998), *rev'd*, 120 S. Ct. 693 (2000).

50. *See Laidlaw*, 120 S. Ct. at 700. To be precise, the appellate court assumed that the plaintiffs had standing, but then concluded that the case was moot, based on an inquiry that was explicitly modeled on the standing question. *See Laidlaw*, 149 F.3d at 306-07. The Supreme Court concluded, first, that the plaintiffs did have standing and then held that the mootness inquiry, though related, was distinct from the standing inquiry. *See Laidlaw*, 120 S. Ct. at 707-09. The Court then concluded that the case was not moot, at least as the record had been presented to the Court. *See id.* at 710-11.

51. *Laidlaw*, 120 S. Ct. at 707 (citing *Steel Co.*, 523 U.S. at 108).

in *Laidlaw* the plaintiffs had made allegations of ongoing or imminent violations.⁵²

Another case before the Court potentially raises an even greater threat to the concept of citizen suits. In *United States ex rel. Stevens v. Vermont Agency of Natural Resources*,⁵³ the Second Circuit upheld the constitutionality of a qui tam action against a state agency.⁵⁴ The Court originally granted certiorari to determine whether a state was a “person” within the False Claims Act that authorized the qui tam action, and if so, whether such suits against unconsenting states violated the Eleventh Amendment. Several months after the grant, however, the Court ordered the parties to brief the question whether “a private person [has] standing under Article III to litigate claims of fraud upon the government.”⁵⁵ The Court’s interest in this issue, not addressed by the appellate court,⁵⁶ raises the specter of close scrutiny of the entire concept of qui tam actions, and thus close scrutiny of all types of suits in which citizens are enlisted to vindicate federal law.

B. *Alden and the New Law of Standing*

Where does this new, more restricted, standing law leave our examination of *Alden*? While *Alden* is concerned with state immunity, and thus not with standing per se, nevertheless the skepticism the Court has shown about citizen standing percolates into *Alden*’s grant of immunity to the states. By restricting to other governmental entities the ability to sue in order to “punish” state wrongdoing by means of retrospective penalties, or to compensate victims of such wrongdoing, *Alden*—and for that matter *Seminole Tribe*—can be read as embracing the same structural concerns animating cases like

52. *See id.* at 711.

53. 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

54. *See id.* at 198.

55. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 523, 523 (1999) (mem.). The order was issued on November 19, 1999, while the original grant of certiorari was dated June 24, 1999.

56. Judge Weinstein dissented from the decision, allowing the lawsuit to proceed, but only on Eleventh Amendment grounds. He did, however, suggest that “[False Claims Act] qui tam suits stand on shaky constitutional ground with respect to the principle of separation of powers as embodied in Article II’s Appointments and Take Care Clauses and Article III’s standing requirements.” *United States ex rel. Stevens*, 162 F.3d at 219 (Weinstein, J., sitting by designation, dissenting).

Defenders of Wildlife and *Steel Company*. In particular, these two doctrines converge at the point of imposing structure-based limits on private law enforcement. Just like *Defenders of Wildlife* and *Steel Company* disapprove of private parties invoking courts to take over the role of “pure” enforcers of federal law, i.e., enforcers of federal law with no concrete self-interest that can be vindicated by a federal court, so too *Alden* and *Seminole Tribe* disapprove of private parties punishing state non-compliance with federal law. In both situations the Court has reserved enforcement power to a government entity; the executive branch in the standing cases, and the federal or state government in the sovereign immunity cases.⁵⁷

The Court’s decisions in these cases reflect the thought that law enforcement in these situations implicates structural concerns about the appropriate law enforcer. The standing cases prohibit Congress from deputizing private parties as enforcers of federal law beyond their personal stake in the controversy,⁵⁸ while the sovereign immunity cases prohibit even injured private parties from suing the state itself, either formally or in essence.⁵⁹ Somebody else—the government—has those jobs, and the reason is based in structure. In the standing cases, the structural concern is the executive’s sole authority to execute federal law.⁶⁰ In the sovereign immunity cases, the issue focuses on the uniqueness of the state as a defendant, given the uniqueness of states as sovereign entities.

Of course, state sovereign immunity is not absolute: states and the federal government can sue states, while private parties can sue state officials under certain circumstances. The Court has explained the first of these limitations as a consequence of the unique nature of the federal system, with its two levels of sovereignty. Thus, the idea

57. A similar concern provides one of the lines of reasoning leading the Court in *Printz v. United States*, 521 U.S. 898 (1997), to strike down federal “commandeering” of state law enforcement resources. Justice Scalia expressed concern that such law enforcement commandeering would place the enforcement of federal law in the hands of individuals beyond the control of the executive. See *id.* at 922.

58. This rule even goes so far as to require the plaintiff to demonstrate standing for each form of relief sought. See *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 120 S. Ct. 693, 706 (2000).

59. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-02 (1984).

60. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576-77 (1992).

of a national government ultimately supreme over the states requires that the federal government be able to sue states to ensure their compliance with federal law.⁶¹ This power is nothing more than another version of the power asserted by the Supreme Court in *Martin v. Hunter's Lessee*⁶² to review state court interpretations of federal law; in both situations, the federal government seeks to ensure that the state government honors federal law. The rule that states can be sued by other states⁶³ is justified as a means of ensuring a peaceful and orderly resolution of disputes between sovereign states.⁶⁴

The rule—explicated most famously in *Ex parte Young*⁶⁵—that private parties can sue state officials for certain types of relief derives from a distinct structural provision, the role of courts in providing remedies for deprivations of rights. This is as basic a structural idea as the concern that the executive branch is responsible for enforcing the law.⁶⁶ In *Marbury v. Madison*,⁶⁷ for example, the conclusion that Marbury had a right to the commission as a magistrate provided the basis for Chief Justice Marshall's conclusion that the executive branch was amenable to suit in order to vindicate that right.⁶⁸ Allowing prospective relief makes a remedy available in every case in which there is a right. This allows a federal court to play its traditional role of vindicator of federal rights, at the behest of an injured plaintiff, a role cited—in a more general form—by *Defenders of Wildlife* in defense of its refusal to allow federal courts to enforce compliance with federal law in the absence of a plaintiff suffering a particularized injury.⁶⁹

61. See *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

62. 14 U.S. (1 Wheat.) 304 (1816).

63. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 487 (1987).

64. See *Alden v. Maine*, 119 S.Ct. 2240, 2267 (1999).

65. 209 U.S. 123 (1908).

66. For a discussion of the historical origins of this idea, see Ned Miltenberg, *The Revolutionary Right to a Remedy*, TRIAL, Mar. 1998, at 48.

67. 5 U.S. (1 Cranch) 137 (1803).

68. See *id.* at 166 (“where a specific duty is assigned by law [to an executive branch official], and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy”).

69. See *Defenders of Wildlife*, 504 U.S. at 576-77.

The important point here is that structure—understood as the proper role of particular institutions in the governing process—can provide explanations for both *Young* and *Defenders of Wildlife*. Perhaps more interestingly, recent trends in both areas have moved in the same direction, away from a more fluid, flexible conception of institutional roles and toward stricter formulas. In the standing context, the *Defenders of Wildlife* Court rejected the idea that citizen standing could be viewed as the price Congress exacts for broad delegations to agencies, a built-in check on the otherwise broad discretion provided in many statutory grants.⁷⁰ By contrast, the *Defenders of Wildlife* Court embraced a more rigid conception of standing. The Court required not only injury, but injury so concrete and particularized that the majority both required the researchers concerned about possible extinctions to have a plane ticket to the areas where the species lived, and rejected a standing theory that focused on the professional interests of the plaintiffs in observing and studying the threatened species.⁷¹

Similarly, the Court's sovereign immunity jurisprudence has gone a long way toward rejecting the theory, embraced in *Garcia*, that the political process provides the main protection for state interests at the federal level. That theory, which characterizes sovereign immunity as based on common law (and thus, defeasible)⁷² and requires merely a plain legislative statement before Congress will be considered to have abrogated it, reflects a more fluid, politically-responsive immunity, as opposed to the constitutionally-based and thus unabridgable immunity enshrined in *Alden*.

These trends toward more rigid rules clearly will impact federal environmental regulation. Sovereign immunity is obviously relevant, to the extent the state is either an environmental violator, and perhaps even to the extent that the state administers the federal

70. See *id.* at 603-05 (Blackmun, J., dissenting); see also Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (arguing that, historically, courts have played a broader role in ensuring compliance with law than suggested by the majority opinion in *Defenders of Wildlife*).

71. See *Defenders of Wildlife*, 504 U.S. at 565-67.

72. See generally *Alden*, 119 S. Ct. at 2269 (Souter, J., dissenting) (illustrating that the Constitution's capacity to order relationships has changed since this country's founding).

program under a scheme of cooperative federalism. The standing rules become important in the sovereign immunity analysis because the Court's sovereign immunity jurisprudence has drawn an important distinction concerning the type of relief available against a state, while at the same time it has decided standing issues, especially in environmental cases, in a way that limits the extent to which certain types of relief will support a plaintiff's standing. Thus, the similar trends in these two areas converge. *Alden's* completion of *Seminole Tribe's* restriction on Congress's Article I-based abrogation power provides an appropriate opportunity to assess what this convergence means for federal regulation in general, and environmental law in particular.

The next section of this Article discusses the impact *Alden*, and the sovereign immunity rule it enshrines, may have on environmental regulation.

III. ALDEN AND ENVIRONMENTAL LAW

It seems clear that *Alden* does not affect the ability of private party plaintiffs to seek forward-looking relief, such as an injunction, when sought against state officials.⁷³ While the *Alden* Court does not explicitly say so, its analysis suggests that it does not distinguish, at least for the most part, between state and federal courts when considering the source of the state's constitutional immunity and the strength of its interest in that immunity.⁷⁴ If the source of the immunity is the same for claims of immunity from federal and state court actions, then so should the scope and limitations of that immunity. Logically, then, *Alden's* effect is simply to equate federal and state court immunity, with the result that damages and other retrospective

73. *See id.* at 2267.

74. The Court does provide some discussion of the specific issue of state sovereign immunity from federal law-based lawsuits commenced in state courts. *See id.* at 2257-66. But, even much of this discussion applies to the general issue of sovereign immunity, applicable regardless of whether the suit is brought in federal or state court. *Cf. id.* at 2269 (Souter, J., dissenting) (arguing that the result in *Alden* made the Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), superfluous, as *Alden's* broad Tenth Amendment-based immunity includes *Seminole Tribe's* narrower conception of immunity, based on the implications of the Eleventh Amendment).

relief are generally⁷⁵ not available at the behest of a private plaintiff against a non-consenting⁷⁶ state, regardless of whether the suit is brought in federal or state court.

A. *The Availability of Prospective Relief After Alden*

1. Relief against the state as regulator

State sovereign immunity jurisprudence, now seemingly made applicable to actions brought in state court, does not make a completely hard and fast distinction between prospective relief, which is allowed, and retrospective relief, which is not allowed. For example, the Court has held that where relief runs against the state, its nature as prospective is irrelevant. An obvious instance of such an unconstitutional lawsuit is one in which the state is sued in its own name.⁷⁷ But even lawsuits that seek only prospective relief against state officials may run afoul of this rule. For example, in *Idaho v. Coeur d'Alene Tribe*,⁷⁸ a majority of the Court concluded that the relief sought—a judicial declaration that the plaintiff Indian tribe owned certain land claimed by the state as its own and injunctive relief preventing state officials from exercising the state's authority over it—so impacted the state's sovereignty as to run against the state, in violation of *Young*.⁷⁹ While there was a dispute within the majority over proper application of *Young*,⁸⁰ there was a majority for the proposition that the declaratory relief requested by the tribe was not

⁷⁵ But see *supra* note 9 (noting the continued availability of such relief when Congress legislates under its power to enforce the Civil War Amendments).

⁷⁶ In a case decided the same day as *Alden*, the Court significantly narrowed the conception of state consent to suits in federal court. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) (overruling the theory of constructive waiver articulated in *Parden v. Terminal Railway*, 377 U.S. 184 (1964)).

⁷⁷ See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984) (citing cases).

⁷⁸ 521 U.S. 261 (1997).

⁷⁹ See *id.* at 265. The lawsuit originally named both the state of Idaho and several officials, but the claims against the state were rejected by lower federal courts and not considered by the Supreme Court. See *id.*

⁸⁰ Compare *id.* at 269-70 (Kennedy, J., joined by Rehnquist, C.J.) with *id.* at 291-96 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and concurring in the judgment).

proper *Young*-type relief, as it was equivalent to a request for a quiet title declaration and thus implicated the state's interests, not just those of the state officials.⁸¹ A majority of the Court saw such relief as implicating too intimately the state's own interests to constitute proper relief under *Young*.

While courts interpreting *Coeur d'Alene* have characterized the facts as quite unusual,⁸² imaginative state government attorneys could seek to stretch that holding to cover situations where the environmental law results could be significant. For example, a claim that the state, through its officers, was illegally polluting the environment probably would not so implicate state sovereignty interests as to come within the scope of *Coeur d'Alene*'s rule. But what about a claim that a state was not properly implementing a federal environmental statute? The Clean Air Act, for example, authorizes states to implement the statute's requirements by promulgating and administering a State Implementation Plan (SIP).⁸³ The citizen suit provision of the Clean Air Act allows suits against states for failure to regulate.⁸⁴ Would a judicial decision accepting such a claim and requiring changes in the state's enforcement of the SIP so implicate the autonomy and integrity of the state's regulatory authority as to in effect enjoin the state itself—as opposed to its officers—from acting in a certain way?

What makes such an injunction at least potentially problematic is the character of the challenged government action; that is, government acting as a regulator, not as a generator of pollution like any private party. It should be noted that prior cases have not drawn such a line. In *Edelman v. Jordan*,⁸⁵ for example, while the Court disallowed the relief sought, it did so on the ground that the relief sought was retrospective and thus ran against the state, not because the state

81. *See id.* at 281-88 (Kennedy, J., joined by Rehnquist, C.J.); *see also id.* at 289-91, 296-97 (O'Connor, J., concurring in part and concurring in the judgment).

82. *See, e.g.,* Froebel v. Meyer, 13 F. Supp. 2d 843, 854 (E.D. Wis. 1998) (characterizing the facts of *Coeur d'Alene* as "extraordinary").

83. *See* 42 U.S.C. § 7410 (1999).

84. *See, e.g.,* American Lung Ass'n v. Kean, 871 F.2d 319 (3d Cir. 1989) (holding that the Clean Air Act authorized private parties to sue a state to compel it to promulgate and enforce ozone emissions regulations).

85. 415 U.S. 651 (1974).

was acting as a regulator (in that case, an administrator of a social welfare program).⁸⁶ Similarly, in *College Savings Bank* the state was acting like a market participant, marketing a financial instrument to private parties, and the Court held that retrospective relief was inappropriate.⁸⁷ The Court explicitly rejected the argument that the character of the state's action merited treating it less like a state under normal Eleventh Amendment analysis.⁸⁸

This analysis suggests that a suit against the state seeking an injunction requiring changes in its implementation of its SIP could go forward. But one cannot be too sure. It is true that the Court's concern for suits implicating the state qua state (as opposed to state officials) relates not to the character of the conduct that is being regulated, but rather to the nature of the interests implicated by the relief: an injunction against a state official (acceptable under *Young*) versus an injunction requiring the state to divest itself of sovereign control over a given piece of territory (unacceptable under *Coeur d'Alene*). But there is not a clean line between acceptable prospective relief that necessarily affects how the state regulates and unconstitutional prospective relief of the type sought in *Coeur d'Alene*.⁸⁹ A Court that is seeking to protect states more than they have been protected before could easily conclude that an injunction requiring the state to enforce its SIP more stringently "falls on the Eleventh Amendment side of the line."⁹⁰ This is especially true given the Court's recent solicitude for protecting the integrity of state governmental processes, as reflected in its "commandeering" jurisprudence.⁹¹ While federal limitations and controls on the state's administration of a federal regulatory program would probably survive a commandeering challenge, given the voluntary nature of the state's participation in

86. *See id.* at 677.

87. *See* *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2230-31 (1999).

88. *See id.*

89. *See, e.g., Coeur d'Alene*, 521 U.S. at 281 ("the 'difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night'") (quoting *Edelman*, 415 U.S. at 667).

90. *Coeur d'Alene*, 521 U.S. at 281.

91. *See* *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

the program,⁹² the underlying idea of commandeering—that state governmental operations have constitutionally guaranteed protection from federal interference—might well inform a court’s determination whether federal court interference with a state-administered program “falls on the Eleventh Amendment side of the line” by impacting the state’s own interests.

There is an irony here: since such suits could probably go forward if brought against the U.S. Environmental Protection Agency (EPA), but might not be allowed against a state regulator, the result might be less delegation to the states, on the ground that their regulatory conduct is less accountable through judicial review. This irony has already been noted, in a slightly different context, in the commandeering debate.⁹³ But the basic point is clear: after *Coeur d’Alene*, even some types of prospective relief against states will be unavailable, and the unavailable relief might well include injunctions requiring a state to take a particular regulatory or enforcement course.

2. Citizen suit provisions and “detailed remedial schemes”

Another way in which prospective relief may be limited is through *Seminole Tribe*’s discussion of legislative displacement of *Young* relief. In *Seminole Tribe*, the Court rejected the tribe’s request for injunctive relief, on the ground that the statute prescribed a “detailed remedial scheme” that, according to the Court, implicitly preempted whatever relief might be granted under *Young*.⁹⁴ Of course, the statutorily-prescribed relief was not in fact available to the plaintiff, since *Seminole Tribe* also held that Article I of the Constitution did not authorize Congress to abrogate state sovereign

92. See *New York*, 505 U.S. at 167 (distinguishing from commandeering the “cooperative federalism” programs in which states can choose whether or not to become the administrators of federal regulatory programs, and explicitly identifying the Clean Water Act and RCRA as examples of such constitutionally valid schemes).

93. See, e.g., *Printz*, 521 U.S. at 959 (Stevens, J., dissenting) (arguing that the Court’s resolution of the commandeering issue has the perverse effect of encouraging the federal government to aggrandize itself by increasing its own law enforcement network rather than relying on that of the states).

94. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996).

immunity.⁹⁵ But since Congress was operating under a different constitutional rule when it enacted the statute,⁹⁶ the *Seminole Tribe* Court read the statutory grant of relief to reflect Congress's judgment on the appropriate amount and type of relief available against a state, to the implicit exclusion of other types of relief, such as that available in an *Ex parte Young* suit.

The question is whether the citizen suit provisions in federal environmental statutes constitute the same sort of "intricate and detailed" program of relief, so as to preclude relief under *Young*, regardless of whether that suit is brought in federal or state court.⁹⁷

95. *See id.* at 73.

96. The IGRA was enacted in 1988, one year before the Court decided in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Article I gave Congress authority to abrogate state sovereignty. The *Union Gas* plurality suggested that its holding was a logical conclusion from prior cases. *See id.* at 14 (citing an "unmistakable trail" of precedent), while the *Seminole Tribe* Court characterized it as a "solitary departure" from settled law. *Seminole Tribe*, 517 U.S. at 66. Regardless, the issue in *Union Gas* was clearly not definitively settled in 1988; thus, the drafters of the IGRA may have reasonably concluded that they did, in fact, have the authority to impose the remedial scheme they enacted into law.

97. An important threshold issue here is whether citizen suit provisions in federal environmental law authorize suit in state court. The general rule presumes concurrent state court jurisdiction over federal causes of action. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458-60 (1990). For jurisdiction to be properly divested, the Court has required "an explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests." *Id.* at 459-60 (quoting *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981)). In *Davis v. Sun Oil Co.*, 148 F.3d 606 (6th Cir. 1998), *cert. denied*, 525 U.S. 1018 (1998), the Sixth Circuit concluded that RCRA's citizen suit provision did not provide for exclusive federal jurisdiction. The relevant part of RCRA's citizen suit provision—dealing with jurisdiction—is essentially identical to the corresponding parts of most other citizen suit provisions. *See, e.g.,* 42 U.S.C. § 6972(a):

Any action under paragraph (a)(1) of this subsection shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur. Any action brought under paragraph (a)(2) of this subsection may be brought in the district court for the district in which the alleged violation occurred or in the District Court of the District of Columbia. The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, regulation, condition, requirement, prohibition, or order, referred to in paragraph

The *Seminole Tribe* Court itself provided a partial answer, by citing provisions of three statutes—including two environmental law statutes—as examples of Congress implicitly authorizing *Young* relief.⁹⁸ One of these statutes, a provision of the Emergency Planning and Community Right-to-Know Act (EPCRA), requires that state governors take certain actions with regard to forming emergency planning committees, and that the governor take certain emergency planning actions if the governor does not appoint a committee to do so.⁹⁹ Another environmental provision cited in *Seminole Tribe* is the citizen suit provision of the Clean Water Act (CWA).¹⁰⁰ That provision authorizes “any citizen” to bring a suit against “any person” (defined to include any person or government agency or instrumentality) alleged to be in violation of a CWA effluent standard.¹⁰¹ Finally, the *Seminole Tribe* opinion cited a provision of the federal habeas corpus statute directing, under certain circumstances, an “appropriate State official” to turn over a record of the state court proceedings to the federal court hearing the habeas petition.¹⁰²

The *Seminole Tribe* Court’s focus on these statutes’ provision of relief against individuals, as opposed to the state itself, suggests one of the criteria for determining the fate of citizen suit provisions. Most citizen suit provisions survive this first test. The important criterion is reflected in the Clean Water Act’s citizen suit provision, explicitly validated in *Seminole Tribe*. That provision allows suit “against any person (including (i) the United States, and (ii) any

(1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B), to order such person to take such other action as may be necessary, or both, or to order the Administrator to perform the act or duty referred to in paragraph (2), as the case may be, and to apply any appropriate civil penalties under section 6928(a) and (g) of this title.

Cf. 42 U.S.C. § 7604 (1994) (the Clean Air Act’s citizen suit provision, similarly worded); 33 U.S.C. § 1365(a) (1999) (the Clean Water Act’s citizen suit provision, similarly worded).

98. See 517 U.S. at 75 n.17.

99. See 42 U.S.C. § 11001 (1999) (cited in *Seminole Tribe*, 517 U.S. at 75 n.17).

100. 33 U.S.C. § 1365(a) (cited in *Seminole Tribe*, 517 U.S. at 75 n.17).

101. *Id.*

102. 28 U.S.C. § 2254(f) (1999). The *Seminole Tribe* Court erroneously cited this provision as subsection (e). See 517 U.S. at 75 n.17.

other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution).¹⁰³ That language is repeated exactly in a large number of environmental statutes' citizen suit provisions.¹⁰⁴ To the extent that the *Seminole Tribe* Court was concerned about statutes that—like the IGRA—explicitly authorized relief against “states,”¹⁰⁵ the citizen suit provisions seem to survive. A Ninth Circuit panel construing the Lanham Act's analogously-worded civil liability provision came to the same conclusion.¹⁰⁶

But it might also be suggested that *Seminole Tribe* was concerned about the actual relief authorized, and not just the party against whom it could be imposed. As noted above, the concern is that when Congress enacts a remedy that is more limited than what would have been available under *Young*, the Court should not allow the implicitly precluded *Young* relief. For example, in *ANR Pipeline Co. v. Lafaver*,¹⁰⁷ the Tenth Circuit held that the limitations on federal court relief imposed by the Tax Injunction Act (TIA)¹⁰⁸ precluded the plaintiff from seeking relief under *Young*, since the TIA imposed limits on federal jurisdiction not present under *Young*. By contrast, in *Marie O. v. Edgar*,¹⁰⁹ the Seventh Circuit held that language in the Individuals with Disabilities Education Act (IDEA)¹¹⁰ that provided that a court “shall grant such relief as [it] determines is appropriate” did not limit a federal court's remedial powers in a way

103. 33 U.S.C. § 1365(a).

104. See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9659; Clean Air Act, 42 U.S.C. § 7604 (1994); Solid Waste Disposal Act, *id.* § 6972; Noise Control Act, *id.* § 4911; Public Health Service Act, *id.* § 300j-8; Endangered Species Act, 16 U.S.C. § 1540(g) (1999); Toxic Substances Control Act, 15 U.S.C. § 2619 (1994); see also Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994) (using the same language except for the actual words “any person” and “including”).

105. See *Seminole Tribe*, 517 U.S. at 75 n.17 (noting that the IGRA's remedial scheme “repeatedly refer[s] exclusively to ‘the State’”).

106. See *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1185 (9th Cir. 1997).

107. 150 F.3d 1178 (10th Cir. 1998).

108. 28 U.S.C. § 1341 (1994).

109. 131 F.3d 610 (7th Cir. 1997).

110. 20 U.S.C. § 1471 (1994).

as to make *Young* relief inappropriate.¹¹¹ These two extremes—the TIA’s significant restriction on federal court relief, and the IDEA’s authorization of whatever relief the federal court thinks appropriate—bookend the inquiry on the environmental law citizen suit provisions.¹¹²

These concerns suggest that the most general citizen suit authorizations will survive, either in federal or state court. For example, the Clean Water Act citizen suit provision, cited approvingly in *Seminole Tribe* (albeit for a different proposition),¹¹³ does nothing more than to authorize suits against “any person . . . alleged to be in violation of (A) an effluent standard or limitation . . . or (B) an order issued . . . with respect to such a standard or limitation. . . .”¹¹⁴ In turn, it authorizes courts “to enforce such an effluent standard or limitation . . . or such an order.”¹¹⁵ As before, the citizen suit provisions in other environmental statutes have essentially identical language,¹¹⁶ although some statutes provide the court with additional

111. *Edgar*, 131 F.3d at 616 (alteration in original) (quoting 20 U.S.C. § 1480(1)).

112. It bears repeating here that, even though these statutes, and the *Seminole Tribe* “detailed remedial scheme” analysis to which they are subject, all deal with federal courts, there is no reason to think that the analysis is any different for state courts. *Alden* itself strongly suggests that the Eleventh Amendment rules, *Young*’s exception to those rules, and the limits on *Young* relief all apply equally to state courts. See *Alden v. Maine*, 119 S. Ct. 2240 (1999). In *Alden* the Court refused to extend a state’s sovereign immunity to three things: suits filed in state court against municipal corporations or other governmental entities that are not an arm of the state; “certain actions against state officers for injunctive or declaratory relief;” and suits for monetary damages “against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.” *Id.* at 2267. *Alden* extended immunity to suits against state officers “if the suits are, in fact, against the State.” *Id.* at 2267.

113. See *supra* note 100 and accompanying text.

114. 33 U.S.C. § 1365(a). That provision also authorizes suits against the EPA for failure to perform any nondiscretionary act. Since this latter authorization does not implicate the states, it should not bear on the “detailed remedial scheme” analysis.

115. *Id.* The statute also authorizes the courts to order the EPA to perform the type of nondiscretionary act which a plaintiff can also seek to enforce. See *id.*

116. See 42 U.S.C. § 7604(c); 42 U.S.C. § 300j-8.

authority,¹¹⁷ and another statute words a similar mandate slightly differently.¹¹⁸ This type of relief clearly reflects congressional authorization of a *Young*-type suit to force the defendant to come into compliance with the federal law. The relief is not limited, but instead implicitly provides the court with the full panoply of equitable powers necessary to “enforce” the law, as reflected in the “standard,” “limitation,” or “order.” As the Court has recently stated in construing the Clean Water Act’s citizen suit provision, under that provision “the district court has discretion to determine which form of relief is best suited to abate current violations and deter future ones.”¹¹⁹ The authority in the Clean Water Act citizen suit provision—and thus, in most of the other environmental law citizen suit provisions—does not appear anywhere near the carefully delimited authority the *Seminole Tribe* Court considered in the IGRA.

B. The Relative Importance of Prospective and Retrospective Relief

Thus, it appears that the citizen suit provisions may well survive *Seminole Tribe*—and, by extension, *Alden*—unscathed. But this only protects the authority of courts to issue prospective relief, and, indeed, as reflected in *Coeur d’Alene*, only certain types of prospective relief. There well may be times when such relief is ineffective in vindicating the right at issue. The most obvious example is a state’s one-time, or otherwise completed, violation of a federal environmental law, for example, a state facility’s violation of a pollution permit due to an accidental discharge, or the one-time failure to

117. See 42 U.S.C. § 9659 (authorizing the court not merely to enforce standards or regulations, but also “to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation”); 42 U.S.C. § 6972 (authorizing the court not just to enforce standards or regulations, but also “to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste . . . [or] to order such person to take such other action as may be necessary”).

118. See Noise Control Act, 42 U.S.C. § 4911 (authorizing courts “to restrain . . . person[s] from violating such noise control requirement” that is in effect).

119. *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv., Inc.*, 120 S. Ct. 693, 699 (2000). A court also has the power under the CWA to impose civil penalties. See *id.*

disclose information about toxic releases.¹²⁰ Vindication of federal law may, in these circumstances, require the type of retrospective relief—damages or fines—that is now unavailable to private party plaintiffs who sue states. Of course, since the Court has placed separation of powers-based restrictions on plaintiffs' ability to seek fines that go to the federal government,¹²¹ this sort of relief might be beyond plaintiffs' grasp even absent the sovereign immunity bar. But since those separation of powers-based restrictions may not operate in state court proceedings, *Alden's* sovereign immunity bar may become even more relevant as a distinct hurdle for plaintiffs to overcome.

1. Continuing versus single violations

In order to assert a claim for injunctive relief, a plaintiff suing a state will need to allege a continuing violation, or one that is likely to recur in the future. Obviously, the availability of such a claim will depend on the facts of each case. However, it might be expected that, in order to make such allegations credible, the plaintiff will need to allege that the violation consists not just of the one-time transgression of a discharge limit, but, instead, consists of a systemic breakdown within the facility's emissions control system. If the violation can be cast at that more general level it might become easier to view the violation as ongoing or likely to recur, thus making injunctive relief more appropriate.¹²²

The other possibility here is that courts may consider injunctive relief appropriate to enforce standards that are violated in a way that is neither systemic nor ongoing. Most citizen suit provisions authorize courts to "enforce" the standards or permits called for in the statute.¹²³ If a court can be convinced that such enforcement should consist of injunctive relief against the violator, even though there is no pattern of violation or systemic flaw in the violator's

120. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

121 *See id.*

122. *See id.* at 108-09 (holding that injunctive relief would not redress the plaintiff's injury given the one-time nature of the violation).

123. *See, e.g.*, 33 U.S.C. § 1365(a) (1999) (the Clean Water Act's citizen suit provision); 42 U.S.C. § 7604(a) (1994) (the Clean Air Act's citizen suit provision).

emissions operations, then it might be possible to avoid *Seminole Tribe* and *Alden*'s state immunity limits on private plaintiffs. The availability of this path is open to question, however, given the normally extraordinary nature of injunctive relief. Moreover, in *Steel Company* the Court exhibited skepticism about the appropriateness of such relief when there was no realistic possibility of the violation recurring.¹²⁴ In that case, the Court declined to find a basis for the plaintiff's standing in a request for injunctive relief, when the defendant had conceded that it had violated the statute, and had come into compliance. According to the Court, a generalized interest in deterrence—presumably served by an injunction limiting the defendant's conduct—was not enough to justify the granting of injunctive relief in this sort of “one-shot violation” situation.¹²⁵ The Court also rejected the analogy to the mootness doctrine's principle that a case is not mooted by the defendant's voluntary cessation of the offending conduct. According to the Court, this theory would be unjustifiably expanded were it to serve as the basis for arguing that a plaintiff had standing to seek an injunction in response to a defendant's one-time statutory violation.¹²⁶

Thus, while *Seminole Tribe* and *Alden* suggest that injunctive relief will be allowed in private party suits against states, *Steel Company* suggests that such injunctive relief will not be allowed in situations marked by “single-event” statutory violations, unless the plaintiff can make a credible claim that the violation is part of an ongoing pattern, or that future violations are imminent.¹²⁷ *Steel Company*'s limited vision of redressability means that injunctive relief—the main avenue for suing a state consistent with *Seminole Tribe* and *Alden*—may often not be available. The limited availability of injunctive relief, when combined with the significant role retrospective relief could conceivably play in redressing environmental violations, means that *Alden*'s final closing of the door to retrospective relief looms even larger.

124. See *Steel Co.*, 523 U.S. at 108-09.

125. See *id.*

126. See *id.* at 109.

127. See *id.* (requiring that “the allegations of future injury be particular and concrete”).

2. The structure of the statute

Beyond the facts of the particular violation, the structure of the statute itself may influence the degree to which injunctive relief is available. The distinction here is between statutes primarily focused on regulation of ongoing conduct, and those focused on creating legal liability for past conduct.¹²⁸ No environmental statute is purely “regulatory” or purely “liability creating.” Indeed, the normal approach is for a statute to regulate ongoing conduct with compliance policed largely by the threat of liability—fines or damages—for violating those rules. But at least one important example of a primarily “liability creating” statute exists in CERCLA, the Superfund statute.¹²⁹ This statute may be more vulnerable than most to *Seminole Tribe* and *Alden*’s restriction on retrospective relief against states. CERCLA concerns itself with the aftermath of toxic waste dumping, as opposed to the regulation of ongoing disposal activities (which are regulated by the Resource Conservation and Recovery Act (RCRA)).¹³⁰ Its basic structure is to make a broad range of parties linked to a toxic waste disposal site legally responsible for any costs incurred to clean up the site, whether undertaken by an innocent party¹³¹ or another liable party.¹³² In these types of situations, injunctive relief against a state and at the behest of the private party¹³³ cleaning up the site may well be unavailable. First, the existence of a cost-recovery or a contribution remedy would presumably constitute a detailed remedial scheme that would make *Young* relief unavailable.¹³⁴ But even more germane to the present point, such

128. “Past conduct” is not limited to conduct that happened before the statute was enacted, but also includes conduct that happened post-enactment but was completed before the filing of the lawsuit.

129. See 42 U.S.C. § 9601 (1994).

130. See *id.*

131. See 42 U.S.C. § 9607(a)(4)(A)-(B) (1996).

132. See 42 U.S.C. § 9613(f) (1994). The government may also order the responsible parties to perform the actual clean up or to compensate the government for expenses incurred in performing the task. Such liability to the government is less important from the standpoint of sovereign immunity, since the federal government retains the constitutional authority to sue states.

133. See *id.*

134. Indeed, such a remedy might well be unavailable even against private parties, on the basis of the general rule—unrelated to sovereign immunity—that a statute’s explicit provision of a particular remedy should be taken as an implicit preclusion of other types of remedies. See, e.g., *Schweiker v.*

injunctive relief simply makes no sense in this factual context; indeed, the only type of injunction available—to participate in the cleanup¹³⁵—might be mooted either by the fact that the cleanup has already been completed or by the fact that EPA has ordered the plaintiff to do the work. In fact, it was exactly this situation—where the federal government ordered a private party to clean up the site and the private party sued a state to contribute financially to the cost of the clean up—that led to *Pennsylvania v. Union Gas Co.*,¹³⁶ where the Court—in a decision later overruled by *Seminole Tribe*—held that Congress's Commerce Clause power included the power to abrogate state sovereign immunity.

At the other extreme, the structure of some statutes may fit quite easily within *Seminole Tribe* and *Alden*'s limits on the types of relief private plaintiffs can seek against states. In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,¹³⁷ the Supreme Court interpreted the Clean Water Act's citizen suit provision to authorize suits only against ongoing or intermittent statutory violations; citizens could not sue for discreet violations that were completed and had no realistic prospect of recurring. Obviously, the types of violations for which citizens can sue under these sorts of statutes are those for which injunctive relief is perfectly appropriate, especially given the broad range of relief authorized (which negates the claim that the statute falls within *Seminole Tribe*'s detailed remedial scheme limit on *Young* relief).¹³⁸

It is important, of course, not to conflate the character of the violation (i.e., ongoing or completed) with the character of the remedy. In other words, the fact that the Clean Water Act limits citizen suits to situations where the defendant is continuing to violate the

plicit preclusion of other types of remedies. *See, e.g., Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (recommending "judicial deference to indications that congressional inaction [in authorizing a particular remedy] has not been inadvertent").

135. Styling the contribution remedy as injunctive relief would presumably be rejected by a court applying the distinction between prospective and retrospective relief. *Cf. Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (rejecting the argument that monetary relief could be styled as "equitable restitution" and thus falls within the *Ex parte Young* exception to the Eleventh Amendment).

136. 491 U.S. 1 (1989).

137. 484 U.S. 49 (1987).

138. *See supra* notes 94-119 and accompanying text.

statute does not necessarily mean that the only remedy that a citizen-plaintiff might logically request is purely prospective. Damages compensating the plaintiff for past harm may still be an appropriate remedy for an ongoing violation, while fines—even if paid not to the plaintiff but instead to the U.S. Treasury—could be viewed as deterring future conduct that could otherwise harm the plaintiff.¹³⁹ Indeed, in *Friends of the Earth, Inc., v. Laidlaw Environmental Services, Inc.*,¹⁴⁰ the Supreme Court recognized the deterrent value of such “public” fines in finding those fines to redress the plaintiff’s injury caused by ongoing pollution violations.¹⁴¹ The Court’s acceptance of fines as a remedy for ongoing violations only increases their utility as remedial tools, and thus makes their unavailability in suits against states all the more relevant to the larger question of whether effective remedies now exist for federal law violations committed by states.

C. *The Importance of Private Plaintiffs*

When considering the importance of private plaintiffs in environmental law, two basic questions need to be asked. First, in general terms, how important is private enforcement of environmental laws? And second, how important are fines and other retrospective relief to that private enforcement?

1. Private enforcement in general

a. *the state as polluter versus the state as regulator*

It is impossible to give a precise answer to a question as broad as the importance of private plaintiffs in environmental law adjudication. On the one hand, the potential exists for individual environmental law violations to have significant, almost uniquely, national effects, thus making it more likely that there will be involvement by the federal government or other states. Pollution that crosses state or international borders, or adversely affects the national symbols such

139. See, e.g., *Steel Co.*, 523 U.S. at 108 (detering future violations by the defendant “can of course be ‘remedial’ for Article III purposes, when threatened injury is one of the gravamens of the complaint”).

140. 120 S. Ct. 693 (2000).

141. *Id.* at 698.

as the Grand Canyon, are obvious examples. Indeed, cross-border pollution is one of the main justifications cited for the federalization of environmental law.¹⁴² Moreover, the familiar “race to the bottom” thesis, positing that states will compete with each other for business investment by reducing environmental protection, argues for a national approach to environmental regulation,¹⁴³ as does the national market for products that would otherwise be subject to varying state regulations.¹⁴⁴ This national interest—essentially, an interest in ensuring an optimal level of environmental regulation unhindered by competition that might lower the regulatory bar below an optimal level¹⁴⁵—can be contrasted with much other regulation under the Commerce Clause, which, while ultimately having some effect on interstate commerce, is less structurally national than the cross-border effects of pollution.¹⁴⁶

142. See, e.g., Thomas W. Merrill, *International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 *ECOLOGY L.Q.* 485, 486 (1994) (noting the spillover argument); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 *YALE L.J.* 1196, 1211-19 (1977) (listing “the tragedy of the commons and national economies of scale,” “disparities in effective representation,” “spillovers,” and “moral ideals and the politics of sacrifice” as the driving forces behind federalization in environmental policy).

143. For a recent explanation and evaluation of the race to the bottom thesis, see Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 *YALE J. ON REG.* 67 (1996).

144. See 42 U.S.C. § 7543(a) (1999) (providing federal government with exclusive authority to promulgate emissions standards for new motor vehicles). *But see id.* § 7543(b) (effectively allowing California to maintain its own emissions standards as long as they are at least as stringent as federal standards); *id.* § 7507 (allowing other states to adopt California’s standards).

145. See, e.g., Kirsten H. Engel & Scott R. Saleska, “*Facts Are Stubborn Things*”: *An Empirical Reality Check in the Theoretical Debate Over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 *CORNELL J.L. & PUB. POL’Y* 55 (1998) (describing the problem as one of optimal regulation).

146. See also, e.g., 18 U.S.C. § 844(i) (1999) (making arson a federal offense); *United States v. Jones*, 178 F.3d 479 (7th Cir. 1999) (holding that the statute did not violate the Commerce Clause when applied to the destruction of a private residence), *cert. granted sub nom.*, *Jones v. United States*, 120 S. Ct. 494 (1999); *cf.*, e.g., Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 *ARIZ. L. REV.* 793, 818 (1996) (contrasting the farming activity in *Wickard v. Filburn*, 317 U.S. 111 (1942), which was ultimately connected to a national market, with the possession of guns in schools, regulated by the stat-

But while this rationale may well help explain why environmental regulation *in general* has been largely federalized, it does not necessarily suggest that states themselves will be the main violators, or that the effectiveness of environmental regulation depends on its enforceability against states. In other words, while federalization of environmental law may have responded to the problems inhering in the existence of different rules in different jurisdictions—i.e., by the failure of states as *regulators*—it does not suggest that there will be any particular problem with the states themselves acting as *polluters*.

Nevertheless, a more limited version of this justification does suggest an incentive for active involvement by other states. This more limited version relies once again on the concept of the state as *regulator*, as opposed to the state as a *polluter*.¹⁴⁷ To the extent that a state violates its duties as a regulator—say, by enacting an inadequate Clean Air Act SIP, or failing to enforce it—a spillover/externalities neighboring victim state would probably suffer substantially more damage and would have a correspondingly greater incentive to sue than if the state was merely operating a polluting facility whose emissions traveled across state lines.¹⁴⁸ Thus, while New Jersey might not have a particularly strong incentive to sue Pennsylvania if one of Pennsylvania's government facilities pollutes air that then travels to New Jersey, it might have a much stronger incentive to sue if Pennsylvania's SIP is so inadequate, or is enforced so poorly, that a whole host of facilities based in that state—public or private—pollute air that then migrates to New Jersey. While a state regulatory plan adopted pursuant to a federal environmental statute might well be considered federal law¹⁴⁹ and thus would probably be

ute struck down in *United States v. Lopez*, 514 U.S. 549 (1995), on the ground that the effects of the latter theory were “localized” and did “not interlock at the national level like a market”).

147. See *supra* Part III.A.1.

148. Cf. Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Assessment Group for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356 (1998) (requiring states to modify their Clean Air Act State Implementation Plans to minimize the interstate migration of ozone).

149. Compare, e.g., *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994) (noting that the State's Clean Air Act SIP “has the force and effect of federal law”), with *Froebel v. Meyer*, 13 F. Supp. 2d 843, 855 (E.D. Wis. 1998) (discussing whether a water pollution permit issued by a state authorized

subject to *Seminole Tribe* and *Alden*'s restrictions, a suit brought by a neighboring state might not be so subject, given the special latitude given suits against states brought by other states or the federal government.¹⁵⁰

b. the structure of the environmental statute

As with the importance of prospective relief, the structure of the environmental statute at issue helps determine the importance of private party enforcement and the likelihood of government enforcement.¹⁵¹ CERCLA provides examples of situations where, depending on the provision, either the private or the government enforcement role is paramount. Under section 106 of the statute,¹⁵² the EPA may order liable parties to clean up waste sites, or to reimburse the federal government for expenses incurred in a federal clean-up effort. The federal government—in addition to non-liable private parties—may also sue to establish joint and several liability for whatever clean up costs are incurred.¹⁵³ By contrast, under section 113, liable parties can seek contribution from their fellow tortfeasors.¹⁵⁴ The contribution remedy in section 113 speaks much more to private law arrangements, as joint tortfeasors sort out who is responsible for what proportion of the total liability. By contrast, sections 106 and 107 reflect a more important government role as plaintiff.¹⁵⁵ Thus, while sections 106 and 107 may not suffer inordinately because of *Seminole Tribe* or *Alden*, section 113 contribution liability will clearly suffer to the extent that a state is sued as a contribution defendant. *Seminole Tribe* and *Alden* are especially problematic for a CERCLA contribution plaintiff seeking to sue a state, since under sections 106 and 107 the EPA may impose the entire cost of a clean-up on any one liable party, leaving that party to seek

to administer the federal Clean Water Act permit system falls under federal or state law).

150. See *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999).

151. See *supra* Part III.B.2.

152. 42 U.S.C. § 9606 (1994).

153. See *id.* § 9607.

154. See *id.* § 9613.

155. This is especially true in light of the trend in the courts to reserve section 107 actions to innocent parties. Normally, private parties having sufficient involvement in a waste site to incur remediation costs will not be innocent, thus, effectively reserving section 107 actions to the federal government.

proportionate recovery from other liable parties.¹⁵⁶ If those other parties are judgment proof—or, as in this case, immune from claims for such retrospective relief—the third party plaintiff may be left with the “orphan share.”¹⁵⁷

How much does this limitation matter to CERCLA? Certainly, any CERCLA-liable private party will be less willing to accept the federal government’s allegation that it is liable, or a government order requiring it to commence clean up, if it suspects that a state is also a liable party but will be unable to sue that state for contribution. The resulting reticence on the part of the private party may then harm government enforcement by increasing litigation costs and delaying the ultimate clean-up of the waste site.¹⁵⁸ Thus, even in a situation where the government itself does not seek recovery of its costs from a state, the absence of the state as a possible third-party defendant impairs federal enforcement, beyond *Seminole Tribe* and *Alden*’s more direct impact on private party plaintiffs who might wish to recover from states.¹⁵⁹

The federal government could remedy this problem simply by shifting its enforcement focus toward the states; that is, it could capitalize on its nearly unique power to sue states by doing so more frequently, thus relieving private parties of the burden of being left with joint and several liability and fewer parties to turn to for contribution defendants. Similarly, the Court in *Alden* stated that if the Fair Labor Standards Act violation in that case was so important, the

156. The liability in such a case is usually, though not always, several, but not joint and several. See William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 206 (1996). But see *Browning-Ferris Indus. of Ill. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999) (holding that, in some cases, CERCLA contribution liability may be joint).

157. See Araiza, *supra* note 156, at 206 (discussing the “orphan share” problem).

158. Much of this analysis is also provided in the plurality’s opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20-22 (1989) (Brennan, J., plurality opinion).

159. The ultimate effect of such limits on the efficient settlement of CERCLA cases depends on the importance of the state-polluter’s disposal activities at the individual site. If the state’s contribution to the problem at the site is quite small, the fact that it will not be available as a contribution defendant will play a lesser role in a private party’s decision whether or not to settle with the federal government.

federal government could sue on behalf of the state employees that had been denied their overtime pay.¹⁶⁰ Transferring this argument in the CERCLA context—and in the context of all environmental statutes where the same dynamic can be expected—would engender the same response that the dissenters gave in the commandeering cases: namely, that it was a strange federalism that required the central government to disturb the normal comity existing between the states and Washington by either preempting all state participation in the regulatory scheme or creating a larger federal enforcement apparatus instead of relying on the state's own law enforcement resources.¹⁶¹ Logic aside, though, it might well be asked whether such increased federal enforcement against the states is likely. That issue is discussed later in this paper;¹⁶² in short, though, the unique relationship between the federal government and states suggests that such increased enforcement will not be forthcoming.

CERCLA may be a somewhat unusual example in the environmental area, as it is primarily a liability-creating statute, that is, a statute that does not so much regulate conduct as provide a tort-like right to compensation for past behavior. Thus, "regulation" of the type normally done by government is somewhat less important, and private litigation is much more important. Accordingly, CERCLA may be more susceptible than most environmental statutes to being severely impacted by *Alden's* restriction on private party lawsuits against states.

However, at the same time, the tort-like character of CERCLA's remedies raises a possibility for evading *Alden's* restrictions. In *Testa v. Katt*,¹⁶³ the Supreme Court held that a state court could not discriminate against a federal law cause of action. That is, when a state court would enforce a claim based on a particular state law right, *Testa* held that the court could not refuse to hear a claim based on an analogous federal law right.¹⁶⁴ This is relevant to CERCLA—and potentially to other environmental laws—if it could be shown

160. See 119 S. Ct. at 2269.

161. See *Printz v. United States*, 521 U.S. 898, 959 (1997) (Stevens, J., dissenting).

162. See *infra* Part III.C.2.b.

163. 330 U.S. 386 (1947).

164. See *id.* at 394.

that a state had waived its sovereign immunity to suits against itself alleging an analogous state law right. Thus, for example, if the state had waived its sovereign immunity to tort claims, under *Testa*, the court would have to hear the quasi-tort CERCLA contribution cause of action.

This argument would probably fail. As Professor Jackson similarly noted,

[s]uch waivers of immunity would lay the basis for a [*Testa*-like] discrimination claim if state courts refuse to entertain analogous federal claims against states. Only if the United States Constitution is construed as giving states an affirmative, substantive immunity from privately enforceable federal liabilities . . . could a contrary result be reached.¹⁶⁵

With *Alden*, though, the Constitution has in fact been “construed as giving states an affirmative, substantive immunity from privately enforceable federal liabilities. . . .”¹⁶⁶ A fallback argument fails as well: while in an earlier day it might have been at least plausible to argue that the state’s waiver of immunity from state law claims implicitly constituted waiver of its immunity from federal law claims, given the state’s awareness of the *Testa* doctrine, the current Court’s inhospitable attitude toward claims of implicit sovereign immunity waivers¹⁶⁷ suggests that this response will not save the *Testa* argument.

One more point needs to be made. The Clean Water Act recognizes the cross-border effects of pollution in part by authorizing governors to sue when a violation in one state causes pollution in the

165. Jackson, *supra* note 11, at 505 n.41 (citing Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1717 (1997)).

166. *Id.*

167. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219 (1999) (overruling the holding of *Parden v. Terminal Ry. of Ala. Docks Dep’t*, 377 U.S. 184 (1964), that a state’s participation in interstate commerce constitutes an implicit waiver of its Eleventh Amendment immunity from federal court lawsuits alleging a violation of a statute regulating interstate commerce). The fact that “a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation,” *College Sav. Bank*, 119 S. Ct. at 2226 (citing *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900)), provides an analogy supporting what would presumably be the holding of the current Court.

governor-plaintiff's state, without regard to the standard notice requirements normally found in citizen suit provisions.¹⁶⁸ But, perhaps significantly, the statute limits its authorization to suits "against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation . . . the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State."¹⁶⁹ While this provision does not authorize suits against other states,¹⁷⁰ the more important question is whether it implicitly precludes a governor's suit against another state under the statute's general citizen suit provision. In other words, does this provision implicitly preclude, on a *Seminole Tribe* "detailed remedial scheme" ground, the type of suit suggested above: a suit by a governor against another state for failing to regulate properly? The answer is, "probably not," since the Court has referred to a state's ability to sue another state as having constitutional structural importance.¹⁷¹ Because of the constitutional importance of such suits, it is doubtful that a court would read that ambiguous provision as implicitly precluding such a suit.¹⁷²

2. Private enforcement seeking retrospective relief

How important is retrospective relief to private suits under environmental law? One way to approach such an admittedly broad question is to consider the character of the statute and of the environmental problem it is designed to address. CERCLA, for example, as primarily a liability-creating rather than a regulatory statute, would appear to be more severely impacted by *Alden*'s ban than statutes such as the Clean Air Act or RCRA, which aim more at

168. See 33 U.S.C. § 1365(h) (1999).

169. *Id.*

170. The term "administrator" is not defined in the statute, see *id.* § 1362, thus suggesting that it should be limited to its usual meaning, i.e., the Administrator of the EPA.

171. See, e.g., *supra* notes 63-64 and accompanying text. Of course, such a suit would have to be consistent with the statute's general citizen suit provision, that is, it would have to allege a "violation" of "an effluent standard or limitation" or "an order issued . . . with respect to such a standard or limitation . . ." 33 U.S.C. § 1365(a).

172. It may be that such a suit would have to follow the notice provisions of the citizen suit provision, as any other citizen suit.

regulating ongoing activities and thus might be more readily vindicated through injunctive relief. Most environmental statutes appear to fall within the latter category, suggesting that, at least on this ground, most environmental statutes will retain at least some effectiveness at the behest of private party plaintiffs suing state polluters.

Obviously, damages, fines, and other retrospective relief play an important role in regulatory statutes as well. Such relief attempts to ensure that a violator bears the cost of the harm it has caused, or to deter future violations, or both. *Alden's* restriction on such relief naturally leads to speculation that state government violators will simply violate the statute until an injunction forces them to stop, thus reaping the benefit of the violation during the meantime without having to bear the commensurate burdens. This prediction will have to await empirical validation, but it is feasible to believe that the possibility of federal enforcement, or enforcement by other states, will temper the temptation to "violate until enjoined," since federal or state enforcement will continue to have damages and fines available as remedial tools.

This latter insight leads to a major variable in determining *Alden's* effect: the extent to which the federal government will increase its own enforcement efforts to make up for the limitations the Court has now placed on individuals suing states. Thinking generally about the types of suits that *Alden* limits yields the initial suspicion that increased federal enforcement efforts might not be forthcoming. Essentially, the type of suit that is unlikely to be brought is one in which (1) damages or fines are necessary either in order to motivate the plaintiff or deter future violations and (2) the federal government chooses not to prosecute. Two distinct—though related—considerations indicate that both of these phenomena may well be present in a significant number of cases.

a. cooperation versus deterrence in environmental law

Recent trends in environmental enforcement suggests that, even leaving aside the character of the defendant, the future may witness a decline in government lawsuits seeking fines or other retrospective penalties from polluters. Formerly, the standard method of ensuring compliance with environmental laws was through the deterrent effects of civil or criminal law enforced by the government augmented,

in the case of civil enforcement, by citizen-plaintiffs. But the 1990s have witnessed the rise of a model that focuses instead on obtaining compliance by having government cooperate with the polluter to minimize or reduce pollution. These cooperative efforts range from government provision of technical advice to small businesses on matters such as emissions control or waste management, to the provision of liability protection for compliance lapses discovered in self-audits and remedied within a short period of time.¹⁷³ The crucial characteristic of this effort is the removal of penalties imposed for past violations as a central feature of the enforcement program and its replacement with methods designed to ensure future compliance on a more or less non-coerced and self-initiated basis.

The increased focus on cooperation rather than deterrence obviously has implications for the availability of retrospective relief against state governments that violate pollution laws. At a general level, it suggests that government—the only entity truly able to engage in “cooperative” behavior with polluters¹⁷⁴—may be less willing to take up the slack left by the closing of the courthouse door to private plaintiffs seeking penalties against state governments. If there is to be a traditional enforcement action taken by the government, the cooperative attitude reflected in this new mode of environmental enforcement suggests that it will take the form of prospective relief, for example, an injunction or (even more likely) a consent order, rather than a penalty for past violation. Indeed, one of the precepts of the new cooperative regulatory philosophy is that penalties are to be used only as a threat, and are to be withdrawn if the violator presents a credible plan to comply in the future.¹⁷⁵

b. the politics of a federal suit against a state

Beyond this concern with government strategies to achieve optimal compliance, this reticence on the part of the federal

173. See generally Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998) (discussing ways to reform environmental enforcement).

174. This is the case since only the government can provide liability protection—both substantively, by changing the law, and realistically, by preempting citizen suits—and only the government has the resources to provide a large scale compliance assistance program.

175. See, e.g., Rechtschaffen, *supra* note 173, at 1188.

government to impose penalties is presumably even greater when dealing with state government entities. The relationship between the federal and state governments is unique. The states exercise the residual sovereign power not delegated to the federal government,¹⁷⁶ and, just as importantly, administer a variety of federal programs under the cooperative federalism model of American government. As a result, states stand distinct from private parties, even when both operate industrial facilities that violate federal pollution laws.¹⁷⁷ Given the special status of states, their relationship to the federal government amounts to far more than that between a regulated party and the source of the law that regulates it. Fundamentally, that relationship is political. For example, a state's chief executive and a majority of its lawmakers will be active members of either the political party that occupies the presidency or the party in opposition. As described by prevailing constitutional doctrine, states are officially represented in the national political process,¹⁷⁸ thus suggesting that they enjoy a constitutionally guaranteed conduit by which they can settle disagreements with the federal government.

The political nature of this relationship will undoubtedly affect the extent to which the federal government will seek fines against state governments. There is a significant constitutional dimension to this dynamic. For example, Judge Weinstein, dissenting in a case upholding the constitutionality of *qui tam* actions against states, concluded that such suits were unconstitutional because they disrupted the normal politically-based process by which states and the federal government resolved their disputes.¹⁷⁹ Such disputes might still be settled by lawsuits, but, in Judge Weinstein's view, the litigation decision had to be made by the government and not a private plaintiff.

176. See U.S. CONST. amend. X. The scope of that residual power is an open question after the Court, in *United States v. Lopez*, 514 U.S. 549 (1995), struck down for the first time in over half a century a federal law on the ground that it exceeded Congress's power under the Commerce Clause.

177. Cf. *College Sav. Bank*, 119 S. Ct. at 2230-31 (rejecting the argument that states should be subject to suit just as private parties should to the extent that states are acting as participants in the economic marketplace).

178. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552-56 (1985).

179. See *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 208 (2d Cir. 1998) (Weinstein, J., dissenting), *cert. granted*, 119 S. Ct. 2391 (1999).

The uniquely political quality of disputes between the federal government and the states suggests that pure enforcement concerns will not govern decisions about whether and how to sue. Such a view might even be consistent with a version of the federalism vision reflected in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁸⁰ which also viewed state immunity from federal law as a matter of states' political influence in Washington.¹⁸¹

Constitutional issues aside, however, the uniqueness of the federal-state relationship means that if any polluter is going to reap the benefits of a nonlitigation-based enforcement system, it will most likely be state governments. The political relationship between the various elected officials involved may well affect the decision whether or not to sue. At the bureaucratic level, the fact that states are the main partner in cooperative federalism¹⁸² schemes indicates

180. 469 U.S. 528 (1985).

181. *See id.* at 556. Of course, the "political safeguards of federalism" view adopted in *Garcia* would allow the federal government to abrogate state sovereign immunity from private party lawsuits, the abrogation legislation having been approved by Congress, within which states were thought to be represented. The type of political process check suggested by Judge Weinstein is different; under his vision, states should be amenable to suit, at least in *qui tam* actions, only by the federal government and not by private parties, in order to preserve the fundamentally political nature of dispute resolution between the states and the federal government. Thus, while the *Garcia* majority would allow the national political process—which, in the majority's view, provided the states with a voice—to delegate enforcement of federal duties against states to private parties, *see Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), Judge Weinstein's vision would require the federal-state political dynamic to be present at all stages of the process, from the creation of the duty (i.e., the enactment of legislation) to its enforcement (i.e., only through litigation brought by the federal government). *See Vermont Agency of Natural Resources*, 162 F.3d at 228-29 (Weinstein, J., dissenting).

182. The "cooperation" in "cooperative federalism" programs differs from the "cooperation" referred to in the discussion of enforcement versus cooperative means of ensuring compliance with environmental law. "Cooperative federalism" refers to the practice of enlisting state assistance in administering federal regulatory programs, among other reasons, in order to involve the state government in making important regulatory decisions and to ensure that regulations are best tailored to the particular circumstances of the state. *See generally* Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This Any Way to Run a Government?*, 15 ENVTL. L. REP. 10039 (1985) (discussing cooperative federalism under the Surface Mining Control and Reclamation Act).

that they would be the entities least likely to be sued by the federal government, especially for fines, given how such a lawsuit might well impair that cooperation.¹⁸³ In stark contrast, individual plaintiffs who have suffered injury from violations by state entities have no reason to refrain from suing to seek penalties even against their own state. Most of these plaintiffs presumably have less of a stake in the larger and longer-term direction of environmental compliance, being more concerned with the injury to their own interests. Given the recognized deterrent effects of fines and damages,¹⁸⁴ such retrospective relief might be sought even by plaintiffs with a more generalized interest in environmental protection (such as an environmental organization). But of course, *Alden* shuts the door to such relief at the behest of any private plaintiff, from an individual whose property is damaged by state-created pollution to an environmental organization whose members have a stake in the continued existence of a clean river. Its completion of *Seminole Tribe's* immunizing work might therefore be expected to have real consequences in terms of reducing the frequency of lawsuits seeking retrospective relief against states.

Thus, it appears that the character of the defendant as a state entity may make it less likely that the federal government will enforce environmental laws via lawsuits of any sort, especially those seeking retrospective relief. When combined with the overall trend away from such litigation-focused enforcement (regardless of the defendant), it might be thought highly unlikely that the federal government will respond to *Alden* by mounting a more aggressive litigation-based enforcement strategy against the states. Especially in an age

183. The variety of levels which the federal government interacts with states makes this statement something of an oversimplification. If the state government polluting entity is structurally distant from the state's environmental administrator or enforcing authority, then the relationship between that polluting entity and the federal enforcement authorities will more closely resemble that between the federal authority and a run-of-the-mill private entity. But, even with such a structurally distant state entity, the fact remains that its status as a state government instrumentality gives it friends in the state capitol that no private entity can match, even the largest and most effective lobbyist among them. And this, in turn, might suffice to make it a more likely candidate for what is sometimes alleged to be the "soft touch" of a cooperative enforcement scheme.

184. See *Laidlaw*, 120 S. Ct. at 700.

marked by at least a rhetorical commitment to devolution, decentralization, and more equal intergovernmental cooperation, such a hierarchical, nonconsensual approach to state compliance with federal law cannot be expected as the most likely federal response to *Alden*.

IV. JUDICIAL AND LEGISLATIVE RESPONSES TO *ALDEN*

The above discussion suggests that there may be a fundamental collision between two basic principles: the provision of a remedy for every right legitimately created, and state sovereign immunity. Both are basic to the American structure of government, and yet it is difficult to give full rein to one without trenching on the other. It may be appropriate, then, to conclude this paper with a brief consideration of the possibility of balancing the two. Specifically, it may be appropriate to consider balancing the importance of federal environmental rights with state sovereign immunity.

The foundations for such balancing have already been laid. The Court has accepted, for example, the balancing function played by the *Young* fiction.¹⁸⁵ In *Coeur d'Alene*, Justice Kennedy, joined by Chief Justice Rehnquist, embraced an even more explicit balancing inquiry in Eleventh Amendment cases, advocating a case-by-case balancing of the interests at stake when a state asserts a sovereign immunity defense.¹⁸⁶ Going farther afield, the Court embraced such a balancing as well on the broader question of whether particular federal rights could even be created against states at all. In *National League of Cities*, the Court adopted such a balancing principle when it explained why very similar wage controls could be enforced against the states when part of an emergency wage and price freeze, but not when enforced as a simple feature of the Fair Labor Standards Act.¹⁸⁷ When part of the emergency economic action, the

185. See, e.g., *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights."); *Perez v. Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part) ("*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.")

186. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270-80 (1997).

187. See *National League of Cities v. Usery*, 426 U.S. 833, 852-55 (1976). Justice Blackmun, the fifth vote for the *National League of Cities* holding, ex-

federal interest was recognized as sufficient to justify the intrusion on state sovereignty.¹⁸⁸

The question thus arises whether a balancing jurisprudence could be engrafted onto *Alden*'s rule of state immunity from lawsuit in a state's own courts. The idea would be that the national interest in enforcement of environmental law against the states outweighs the state's interest in immunity in that area, and thus justifies limitations on that immunity beyond those already recognized by the Court.¹⁸⁹ Rather than a return to *National League of Cities*, since the federal law would apply against states and could be enforced in ways already recognized, this balance would instead weigh the state's interest in immunity with the national interest in private party suits seeking retrospective relief against states.

But even simply to state this idea is to recognize its difficulties. The most obvious one, of course, is that this sort of judicial balancing requires the courts to make ad hoc judgments about matters even more complex than those underlying the *National League of Cities* calculus. These matters include the frequency and magnitude of state violations, the deterrent effects of injunctive relief, and the probable effectiveness of federal enforcement of environmental laws against the states, all against a backdrop of a presumed congressional determination that private enforcement is necessary to vindicate rights properly created against states. Judicial deference to that legislative determination, justified as deference to the superior factfinder, risks turning the balancing rule into the familiar charade of rational basis review under the Equal Protection Clause, nothing but a theoretical limitation that is always surmounted (or, perhaps even worse, nearly always surmounted, save for the occasional, unpredictable, and arbitrary seeming instance when the Court would find the federal interest insufficient). On the other hand, were the Court to employ its balancing jurisprudence aggressively, frequently blocking private enforcement of environmental laws against state violators, it would be accused—fairly—of usurping the domain of the political

plicitly based his vote on the understanding that this balancing analysis was in fact being adopted. *See id.* at 856 (Blackmun, J., concurring).

188. *See id.* at 853.

189. *See, e.g., Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) (recognizing *Young* suits, as well as suits brought by other states and by the federal government, as exceptions to the states' constitutionally-based immunity).

branches at the behest of a nontextually-based principle applied in an ad hoc fashion. None of this is particularly novel; the same objections could easily have been leveled against the Court's *National League of Cities* jurisprudence. And, indeed, when the Court repudiated that jurisprudence in *Garcia*, it noted the ad hoc quality of the decision-making that *National League of Cities* had forced lower courts to perform.¹⁹⁰

If we do not trust courts to make these sorts of judgments, is there any way to ensure vindication of federal environmental law beyond exploiting the exceptions to *Seminole Tribe* and *Alden*'s rule about state sovereign immunity? First, it should be noted that the exceptions—the availability of injunctive relief at the behest of private parties, and the availability of retrospective relief at the behest of other states and the federal government—are potentially powerful weapons to ensure state compliance with federal law. This would be especially true were the Court to reconsider its view, expressed in *Steel Company*, that injunctive relief is an inappropriate response to one-time violations.¹⁹¹ But even if the Court continues to reject such a view, consideration of one-time violations as symptomatic of larger, ongoing patterns of conduct likely to lead to future violations would effectively harness the power of injunctions to prevent future damage to the environment.

Even more importantly, though, there is more than the Commerce Clause available when Congress wishes to enforce its preferences on the states, even when those preferences concern state amenability to lawsuits. Most obviously, Congress has the spending power, which might well be construed as including the power to condition grants to the states on the state's waiver of its immunity in related areas. The majority and dissent in *College Savings Bank* discuss the Spending Clause only fleetingly. The dissent notes the significant pain that might be caused by federal withdrawal of financial support to the state;¹⁹² in response, the majority suggests that the

190. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 538 (1985) (discussing seemingly incomprehensible distinctions drawn by lower courts attempting to apply *National League of Cities*).

191. See *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 108-09 (1998).

192. See *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2236 (1999) (Breyer, J., dissenting).

degree of financial inducement might in fact cross the line from legitimate pressure to improper compulsion of the state's waiver (and thus an inappropriate use of the spending power).¹⁹³ Resolution of the pressure-compulsion issue will have to await a further case; clearly, though, if the Court finds a funding condition to constitute unconstitutional coercion of a state action that the federal government could not otherwise achieve, it will have performed a major revolution in federalism. It would be ironic if that revolution ends up being triggered by a congressional attempt to circumvent the more modest, though still significant, changes in the federal-state balance wrought by *Alden*.

As a less controversial method of obtaining state immunity waivers, there is no intuitive reason why Congress could not condition state participation in federal environmental programs—as, for example, administrators of such programs—on the state's agreement to waive its immunity from lawsuits alleging a violation of the underlying statute. There is a logic to such a requirement: if the state is to be considered sufficiently committed to the goals of a federal environmental program as to entrust it with the program's administration, then at the very least it should express its support for the goals of the program by agreeing to be bound by its substantive provisions. Since the prospect of state administration of federal programs holds great attraction for states—given the flexibility and autonomy state governments can thereby enjoy—this may be a bargain many states will accept. Conversely, it cannot reasonably be argued that withholding federal delegation of this power to a state is coercive. Indeed, the decision to delegate that power to a state appears far more gratuitous than the grants of revenue to which states may have become addicted over the course of decades.

This is not to suggest that such a solution is cost-free to the federal government; it means, in fact, that the federal government will have to shoulder the burden of administering the federal program within any state that refuses to waive its immunity. While the prospect of having to take charge of administering plans in additional states might suggest that the EPA would not lightly take such a step if the decision was left to its own discretion, there is no reason that

193. *See id.* at 2231.

Congress could not simply require a state to waive its immunity as a condition of EPA approval of a state request to administer a federal program.

V. CONCLUSION

Alden is best understood as another step in the current Court's movement toward both stronger state sovereign immunity and a more rigid approach to structural relationships between various branches of government. Just as the Court's standing jurisprudence is moving toward a more classical model of courts as adjudicators of individual claims and nothing more, and just as it has developed a commandeering doctrine that harkens back to the days of dual federalism, so too the Court's sovereign immunity jurisprudence has provided substantive content to the states' status as more than private parties. In all of these areas the Court has rejected arguments that interbranch relationships are more flexible and, within broad parameters, politically contingent.

The substantive protection *Alden* provides states requires careful examination of the methods best suited to ensure state compliance with federal law. That examination requires consideration of both the structure of the particular environmental statute at issue, and the availability and effectiveness of alternative relief, including injunctions at the behest of private parties and retrospective relief at the behest of state or federal plaintiffs. Such relief may go a long way toward limiting the damage to federal environmental policy created by *Alden*'s expanded vision of state immunity. However, legislative responses, from funding conditions to conditions on the state administration of federal environmental programs, may ultimately be required in order for state immunity and federal law to be more appropriately balanced.