Closing the Gap: The Fourth Circuit's Narrowing of the *Ex Parte Young* Exception in *Virginia v. Reinhard* and the Implications for Federal Rights

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INTRODUCTION

The legal debate over state sovereign immunity has persisted practically since the founding.[1] Under the sovereign immunity doctrine,

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[1] *See generally* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); *see also* Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 487–88 (2001)

states cannot be sued without their consent even for violations of the Constitution or federal law.[2] Sovereign immunity, thus, kindles the lasting tension between the supposed supremacy of federal law and the separate sovereignty of the states.[3] Since its initial recognition of state sovereign immunity in *Hans v. Louisiana*, the Supreme Court has recognized several exceptions to the doctrine designed to secure state compliance with federal law.[4] One such exception is the *Ex Parte Young* doctrine. In *Ex Parte Young*, the Court announced that individual state citizens could bring suit against state officers in federal court for an ongoing violation of federal law.[5] As discussed further below, the Court based this exception on the legal fiction that a suit against a state officer in violation of federal law is not a suit against the state at all, but rather, a suit against a rogue state officer stripped of his authority.[6] The *Ex Parte Young* exception has survived subject only to some refinement. In recent decades, however, the Supreme Court has vastly expanded the bar of sovereign immunity as an integral part of the "federalist revival" begun by the Rehnquist Court.[7] As explored in further detail below, the Court recently has incorporated the "anti-commandeering" principles from parallel federalism cases into its sovereign immunity jurisprudence, resulting in a significant narrowing of federal judicial power to hear claims against the states. Against this backdrop, the United States Court of Appeals for the Fourth Circuit confronted a novel issue of sovereign immunity with major implications for administrative law.

In *Virginia v. Reinhard*, the Fourth Circuit confronted a question of first impression about the applicability of the *Ex Parte Young* exception. That case presented the issue of whether a state administrative agency could bring suit in federal court against another

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(describing the overwhelming hostility toward sovereign immunity in the academic community).

[2] Hans v. Louisiana, 134 U.S. 1, 9 (1890). After the Supreme Court's decision in *Alden v. Maine*, the doctrine of sovereign immunity encompasses states' immunity from suit in its own courts without the consent of its legislature as well as the more traditionally recognized immunity from suit in federal court and the courts of other states. Because *Virginia v. Reinhard* involved a state's immunity from suit in federal court, sovereign immunity, as the term is used in this paper, refers to a state's immunity from suit in federal court without its consent.

[3] *See* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L. J. 1167, 1178–79 (2003).

[4] Hans v. Louisiana, 134 U.S. 1 (1890).

[5] Ex Parte Young, 209 U.S. 123, 159–60 (1908)

[6] *See id.* at 160.

[7] *See generally* Ernest Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM AND MARY L. REV. 1601 (2000).

state agency to secure its compliance with federal law.[8] In holding that the agency could not bring suit under *Ex Parte Young*, the Court of Appeals issued a decision with major implications for administrative law and how state agencies may enforce state compliance with federal regulatory schemes. This article examines and explicates the basis of the court's decision in *Reinhard* and considers the decision's consequences. The Court of Appeals' rationale goes to the most fundamental principles and structure of the system of dual federalism. Part II begins by examining the *Reinhard* decision. Examination of both the district court's decision and the Fourth Circuit's decision proves helpful in fully understanding the rationale. As shown, the Fourth Circuit drew primarily from recent Supreme Court authority incorporating principles of political accountability and protection of special sovereignty interests into the sovereign immunity doctrine. For this reason, an examination of the Supreme Court's major sovereign immunity decisions is crucial to understanding *Reinhard*. Part III develops the Supreme Court's sovereign immunity jurisprudence. It begins by recounting the origins of sovereign immunity and proceeds to trace the Supreme Court's subsequent incorporation of anti-commandeering theory and additional limits to shield unique, core state functions into the sovereign immunity doctrine. Part IV evaluates the Court of Appeals' application of these concepts in *Reinhard* and offers insight into the practical consequences of the decision. This article ultimately concludes that *Reinhard* merely constitutes a natural extension of the sound theoretical principles announced in the Supreme Court's most recent sovereign immunity cases. Moreover, the practical consequences for state agency enforcement of federal regulatory schemes will be minimal because of the remaining avenues available for enforcing federal rights.

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[8] Virginia v. Reinhard, 568 F.3d 110, 114 (4th Cir. 2009). The Court of Appeals noted that other courts had proceeded to the merits in cases despite the presence of state agencies as opposing parties. *Id.* at 118 n.1. It distinguished those cases, however, because they involved suits brought by private protection and advocacy systems set up by states and not actual public state agencies. *Id.* More precisely, therefore, *Reinhard* is the first instance in which a court confronted public state administrative agencies on opposing sides of litigation.

THE *REINHARD* DECISION

A. The United States District Court for the Eastern District of Virginia's Decision

In *Virginia v. Reinhard*, a Virginia administrative agency brought suit against the officers of three other Virginia administrative agencies. The Virginia Office for Protection and Advocacy ("VOPA") filed a complaint against the officers of the Department of Mental Health, Mental Retardation and Substance Abuse Services ("DMHMRSAS"), the Central Virginia Training Center ("CVTC"), and the Central State Hospital ("CSH") in their official capacities.[9] VOPA is an agency charged with protecting and advocating the rights and interests of disabled persons within the Commonwealth.[10] Although a state agency, it constitutes a protection and advocacy system created under the authority of federal enabling statutes to safeguard federal rights.[11] Congress incentivizes state legislatures to create such administrative agencies by providing funding for protection and advocacy systems that meet the requirements of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 ("DDA") and the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI").[12]

These federal statutes grant state advocacy systems such as VOPA authority to investigate incidents of abuse and neglect of disabled persons in state custody.[13] The DDA provides that in order for state advocacy systems to receive funding they must "have authority to investigate incidents of abuse and neglect of individuals if the incidents

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[9] Virginia v. Reinhard, No. 3:07cv734, 2008 U.S. Dist. LEXIS 54922, at *1–2 (E.D. Va. July 18, 2008), *rev'd*, 568 F.3d 110, 114 (4th Cir. 2009).

[10] *Id.* at *2. The relevant Virginia statute establishing VOPA provides, "The Department for Rights of Virginians with Disabilities is hereby established as an independent state agency to be known as the Virginia Office for Protection and Advocacy. The Office is designated as the agency to protect and advocate for the rights of persons with mental, cognitive, sensory, physical or other disabilities and to receive federal funds on behalf of the Commonwealth of Virginia to implement the federal Protection and Advocacy for Individuals with Mental Illness Act, the federal Developmental Disabilities Assistance and Bill of Rights Act, the federal Rehabilitation Act, the Virginians with Disabilities Act and such other related programs as may be established by state and federal law." Va. Code. Ann. § 51.5-39.2 (2009).

[11] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *2 (citing Development Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 15001, *et. seq.* (2006), and its implementing regulations, 45 C.F.R. § 1385, *et. Seq.* (2008); Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. § 10801, *et. seq.* (2006)).

[12] *Reinhard*, 568 F.3d at 114 (citing 42 U.S.C. §§ 15001–15115; 42 U.S.C. §§ 10801–10851).

[13] *Id.* (citing 42 U.S.C. §§ 15043, 10805; Va. Code Ann. § 51.5-39.4 (2009)).

are reported to the system or if there is probable cause to believe that such incidents occurred."[14] The PAIMI similarly provides that advocacy systems have the authority to "investigate incidents of abuse and neglect of individuals with mental illness if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred."[15] In addition, federal law allows such agencies to access the records of individuals subject to investigation under certain circumstances, such as where the agency has probable cause to believe the individual has suffered abuse or neglect.[16] The DDA provides that advocacy systems shall "have access to all the records of any individual with a developmental disability in a situation in which a complaint has been received by the system about the individual with regard to the status or treatment of that individual . . . or there is probable cause to believe that such individual has been subject to neglect or abuse."[17] Similarly, the PAIMI grants systems authority to "have access to all records of any individual (including an individual who has died or whose whereabouts are unknown) with respect to whom a complaint has been received by the system or with respect to whom . . . there is probable cause to believe that such individual has been the subject of abuse or neglect."[18]

In *Reinhard*, VOPA sought declaratory and injunctive relief to enforce these provisions for access to records.[19] Specifically, VOPA sought access to records relating to certain deaths and injuries of individuals in the custody of DMHRSAS and residing at CVTC and CSH.[20] DMHMRSAS responded that the records were protected under Virginia's peer review privilege and refused to provide them to VOPA.[21]

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[14] 42 U.S.C. § 15043(B).

[15] 42 U.S.C. § 10805(a)(1)(A).

[16] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *2–3 (citing 42 U.S.C. §§ 15043, 10805, 10806).

[17] 42 U.S.C. § 15043(a)(2)(I)(ii)(III).

[18] 42 U.S.C. § 10805(a)(4)(B)(iii). The applicable federal regulations essentially restate this grant of authority to investigate where probable cause of abuse or neglect exists. 42 C.F.R. 51.41(b)(2)(iii). A subsequent provision states that "'records"' includes reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports or incidents of abuse, neglect, and injury occurring at such facility that describe incidents of abuse, neglect, and injury occurring at such facility and the steps taken to investigate such incidents, and discharge planning records." 42 U.S.C. § 10806(b)(3)(A).

[19] *See Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *2, 3–4.

[20] *Id.* at *3.

[21] *Id.* Presumably DMHMRSAS was arguing privilege under Va. Code Ann. § 8.01-581.17 which provides, "The proceedings, minutes, records, and reports of any (i) medical staff committee, utilization review committee, or other committee, board, group, commission or other entity as specified in § 8.01-581.16; (ii) nonprofit entity that

Whether DMHRSAS could assert this privilege seems subject to doubt because the reports in question arguably were not prepared for quality assurance.[22] The court, however, did not address the merits of the privilege assertion.[23] Subsequently, VOPA brought suit in the United States District Court for the Eastern District of Virginia against the respective officers of the three agencies in their official capacities, asserting that they were violating federal law by refusing to turn over the records.[24] The officers filed a Rule 12(b)(6) motion to dismiss, arguing *inter alia* that sovereign immunity prohibited VOPA from suing the Commonwealth of Virginia in federal district court without its consent.[25] The Eastern District of Virginia thus initially confronted the issue of whether one state administrative agency could hail another agency from the same state into federal court consistent with sovereign immunity.

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provides a centralized credentialing service; or (iii) quality assurance, quality of care, or peer review committee established pursuant to guidelines approved or adopted by (a) a national or state physician peer review entity, (b) a national or state physician accreditation entity, (c) a national professional association of health care providers or Virginia chapter of a national professional association of health care providers, (d) a licensee of a managed care health insurance plan (MCHIP) as defined in § 38.2-5800, (e) the Office of Emergency Medical Services or any regional emergency medical services council, or (f) a statewide or local association representing health care providers licensed in the Commonwealth, together with all communications, both oral and written, originating in or provided to such committees or entities, are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a circuit court, after a hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications . . . Oral communications regarding a specific medical incident involving patient care, made to a quality assurance, quality of care, or peer review committee established pursuant to clause (iii), shall be privileged only to the extent made more than 24 hours after the occurrence of the medical incident." Va. Code Ann. § 8.01-581.17(B) (2007).

[22] *See* Witzke v. Martha Jefferson Surgery Ctr., L.L.C., 70 Va. Cir. 217 (Albemarle County 2006).

[23] Indeed, the merits DMHMRSAS's assertion of peer review privilege was not crucial to the real issue of whether a state agency could sue another state agency under *Ex Parte Young*. At no point did the courts suggest that DMHMRSAS's refusal to turn over the reports based on privielege as opposed to some other reason was material to the outcome of the case.

[24] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *3–4.

[25] *See id.* at *4. As discussed further below, although VOPA had in fact brought suit against officers of a state administrative agency, the United States Supreme Court has long recognized that a suit against an officer acting under authority of state law, who has no personal interest in the case, is for all intents and purposes a suit against the state itself. *See, e.g.*, Ex Parte Young, 209 U.S. 123, 151 (1908) (internal citations omitted). Therefore, in suing the officers of DMHMRSAS, CVTC, and CSH, VOPA was suing the Commonwealth of Virginia in federal district court.

Judge Payne prefaced his analysis by stating the general rule that states enjoy sovereign immunity from private suits, a proposition for which he cited to *Alden v. Maine*, one of the more recent landmark sovereign immunity cases.[26] Drawing on United States Supreme Court precedent, he then proceeded to outline the recognized exceptions to sovereign immunity.[27] Having dispensed with other exceptions, the court proceeded to consider whether *Ex Parte Young* applied and allowed VOPA to bring suit against Virginia.[28] Judge Payne prefaced his *Ex Parte Young* analysis by acknowledging that VOPA had brought action against state officials in their official capacities, a necessary "predicate" for the exception.[29] VOPA argued that under the Rule 12(b)(6) standard, its complaint fairly pled the *Ex Parte Younger* exception because it alleged a continuing violation of federal law and sought injunctive relief.[30] Judge Payne concluded that under the *Verizon Maryland v. Public Service Commission* standard, the *Ex Parte Young* doctrine applied and the case could proceed.[31] In alleging that the defendants refused to provide the records as required by the statutes, VOPA had

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[26] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *7 (citing Alden v. Maine, 527 U.S. 706 (1999)).

[27] *Id.* at *7–8 (internal citations omitted). The Supreme Court has recognized two exceptions to sovereign immunity in addition to *Ex Parte Young*. First, Congress may abrogate state sovereign immunity if it acts pursuant to its enforcement power under Section 5 of the Fourteenth Amendment and "it has 'unequivocally expressed its intent to abrogate the immunity'" in the relevant statute. *Id*. at *7 (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55, 59 (1996)). Second, states may voluntarily waive sovereign immunity either by consenting to suit or by accepting federal funding that is expressly conditioned waiver. *Id.* at *8 (citing College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985)).

[28] Abrogation was not applicable to the case because the federal enabling statutes contained no express language providing for abrogation. *See id.* at *8; *see also* 42 U.S.C. § 15001, *et. seq*.; 42 U.S.C. § 10801, *et. seq.* As to waiver, the court set out the requirement that Congress must explicitly state that receipt of federal funding under the statute in question depends on consent to suit to secure waiver. *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *8 (quoting Madison v. Virginia, 474 F.3d 118, 130 (4th Cir. 1996)). Based on Fourth Circuit precedent, Judge Payne determined that in order to secure waiver, a statutory provision must actually use the term "sovereign immunity" to signal to states their consent to suit. Thus, the provision on which VOPA relied did not convey the "requisite expression of 'a clear intent to condition participation . . . on a State's consent to waive its constitutional immunity.'" *Id.* at *12–13 (citing *Madison*, 474 F.3d at 131).

[29] *Id.* at *14.

[30] *Id.*

[31] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *16 (citing Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635, 645 (2002)). Under *Verizon*, in order to overcome a Rule 12(b)(6) motion to dismiss in an *Ex Parte Young* action, the plaintiff must plead an ongoing violation of federal law by a state actor and seek prospective injunctive relief. *Id.*

alleged an ongoing violation of federal law.[32] Moreover, because VOPA sought an injunction, it sought only prospective relief—that the defendants release the records.[33]

As a final consideration, Judge Payne addressed whether VOPA's claim implicated Virginia's "special sovereignty interest" which would remove the case from the *Ex Parte Young* exception under the Supreme Court's decision in *Coeur d'Alene Tribe of Idaho v. Idaho*.[34] The defendants posited that federal courts could not intervene in an intramural dispute between administrative agencies or branches within a state government because such disputes implicated internal government processes, a vital sphere of state sovereignty.[35] VOPA responded that this argument transcended the recognized limits of special sovereign interests protected by the Eleventh Amendment.[36] Judge Payne agreed that the case did not implicate Virginia's special sovereignty interests.[37] He observed that cases where federal courts should bow out due to special sovereignty interests are those involving issues "that are uniquely a state's concern, most commonly the state's internal budgetary arrangements."[38] By contrast, the administration of a federal program did not interfere with any state sovereign prerogative.[39]

Judge Payne relied on *Antrican v. Odom*, in which the Fourth Circuit held that sovereign immunity did not bar a suit to enjoin

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[32] *Id.*

[33] *Id.* As explained further below, only suits for prospective injunctive relief are permitted under *Ex Parte Young* because monetary damages would assuredly be paid out of the state treasury; therefore, the state would be the true party in interest and the fiction of *Ex Parte Young* would break down.

[34] *See id.* As discussed further below, in *Coeur d'Alene Tribe of Idaho v. Idaho*, the United States Supreme Court based its decision that the *Ex Parte Young* exception did not apply on the premise that land ownership was a strong sovereign interest retained by the state and that interference with that interest would be "as intrusive as almost any conceivable retroactive levy upon the funds of the Treasury." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287–88. The Court also made clear that "[w]here, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials." *Id.* at 276.

[35] *Id*. at *16–17.

[36] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *17.

[37] *Id.*

[38] *Id.* (citing Kelley v. Metropolitan County Bd. of Educ., 836 F.2d 986, 998, 989 (6th Cir. 1987) (holding that whether taxes for desegregation should fall on the state or individual school districts was an internal dispute between two government entities which a federal court should not adjudicate); Stanley v. Darlington County Sch. Dist., 84 F.3d 707, 716 (4th Cir. 1996) (declining to interfere in state finances); Harris v. Angelina County, 31 F.3d 331, 338 (5th Cir. 1994)).

[39] *See id.* at *18–19 (citing Antrican v. Odom, 290 F.3d 178, 189 (4th Cir. 2002)).

compliance with the Medicare Act because "'[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude application of *Ex Parte Young*.'"[40] The court observed, "Defendants would have this Court refrain from deciding any cases brought by a state agency against another state agency. However, Defendants have cited no decision which supports such a broad rule. It is the nature of the issue to be decided, not who brings the suit that potentially implicates sovereignty interests."[41] Thus, Judge Payne held that the case could proceed. In so doing, he found that the application of the *Ex Parte Young* exception did not depend on the identity of the plaintiffs. Rather, the nature of the action governed the exception Virginia, however, swiftly appealed the decision to the United States Court of Appeals for the Fourth Circuit, which would review the district court's decision *de novo*.[42]

B. The United States Court of Appeals for the Fourth Circuit's Decision

A three judge panel of the Fourth Circuit Court of Appeals prefaced its decision by confirming, "State sovereign immunity is a bedrock principle of 'Our Federalism.'"[43] In so doing, the Court of Appeals signaled its intention to take a broad approach to state sovereign immunity, drawing on the structural principles defining the Supreme Court's recent federalism jurisprudence. Continuing, it cited to Supreme Court precedent for the proposition that sovereign immunity's central purpose "'is to "accord the States the respect owed them as" joint sovereigns.'"[44] Upon entering the union, the states retained certain

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[40] *Id.* at *19 (quoting *Antrican*, 290 F.3d at 189).

[41] *Reinhard*, 2008 U.S. Dist. LEXIS 54922, at *19.

[42] *Reinhard*, 568 F.3d at 115.

[43] *Id.* (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)). In *Younger*, the United States Supreme Court expounded on the notion of "Our Federalism:" "The concept does not mean blind deference to 'States Rights' any more than it means centralization of control over every important issue in our National Government and its courts . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. Based on this concept, the Supreme Court held that a federal injunction against a state prosecution under a facially unconstitutional statute was not an appropriate use of the *Ex Parte Younger* doctrine. *Id.* at 49, 52–53. Thus, from the start, the Court of Appeals signaled its intention to leave internal state processes free from intervention by federal courts.

[44] *Reinhard*, 568 F.3d at 115 (quoting Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002)).

crucial attributes of sovereignty, one of which is immunity from suit without their consent.[45] The Court of Appeals, however, recognized the three major exceptions to sovereign immunity: congressional abrogation, waiver, and the *Ex Parte Young* doctrine.[46] Because the parties agreed that Virginia's sovereign immunity barred VOPA's suit against the agency officials absent one of the exceptions, the Court of Appeals, like the district court below, proceeded to consider the exceptions' applicability in turn.[47] The core of the decision, however, focused on *Ex Parte Young*.

VOPA continued to argue that under the *Verizon* standard, *Ex Parte Young* applied to its suit because it had alleged an ongoing violation of federal law by the defendants' failure to turn over the records and it sought prospective injunctive relief.[48] To this the Court of Appeals responded that "it is hardly so simple," signaling a departure from the cursory analysis of Judge Payne below.[49] The Court of Appeals elaborated:

> [T]his case differs from *Ex Parte Young* in a critical respect: the plaintiff there was not a state agency. Instead, the plaintiffs in *Ex Parte Young* were private parties. And while no subsequent decision has

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[45] *Id.* (citing Alden, 527 U.S. at 714, 715–19; Fed. Mar. Comm'n, 535 U.S. at 751–52; Seminole Tribe of Fla., 517 U.S. at 54). The Court of Appeals, thus, alluded to Supreme Court precedent recognizing that sovereign immunity rests on constitutional structure and extends beyond the limited language of the Eleventh Amendment.

[46] *Id.* (internal citations omitted).

[47] *Id.* (internal citations omitted). Beginning with abrogation, the Court of Appeals agreed with the district court that this exception did not apply because Congress did not unequivocally express its intent to abrogate state sovereign immunity in the statutory language. *Id.* at 115–16 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)). The Court of Appeals, however, was quick to clarify that it was not holding that Congress could not abrogate sovereign immunity under the present facts. *Id.* at 116. Both the Supreme Court and the Fourth Circuit have held that Section 5 of the Fourteenth Amendment is a valid grant of constitutional authority to abrogate sovereign immunity to protect the rights of disabled persons. *Id.* (citing United States v. Georgia, 547 U.S. 151, 159 (2006); Tennessee v. Lane, 541 U.S. 509, 533–34 (2004); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 490 (4th Cir. 2005)). With this extended treatment of abrogation, the Court of Appeals cautiously reassured the federal government that it was not powerless to enforce federal rights and protection advocacy systems by enabling private individuals to bring suit in federal court. However, the Court of Appeals upheld the district court's decision. Likewise, the Court of Appeals upheld the district court's decision on waiver without any significant departure from its reasoning. *See id.* at 116–17. Again, however, the Court of Appeals was cautious to reassure Congress that it could extract waiver from the states under the present circumstances. *See id.* at 118.

[48] *Id.*

[49] *Reinhard*, 568 F.3d at 118.

> expressly limited the application of *Ex Parte Young* to suit by a private plaintiff, many decisions have recognized this basic element of the doctrine . . . VOPA has cited no case, nor have we found any holding that—or even analyzing whether—the *Ex Parte Young* doctrine applies equally when the plaintiff is a state agency.[50]

Thus, the Court of Appeals incorporated a new limitation to application of *Ex Parte Young* in addition to those recognized by the Supreme Court in *Verizon*: the plaintiff seeking prospective injunctive relief for an ongoing violation of federal law must be a private individual and not a state government agency. To support this new limitation on *Ex Parte Young*, the Court of Appeals drew primarily on historical and structural analysis which has characterized the Supreme Court's recent jurisprudence in the area of federalism.

Drawing from the Supreme Court's historical analysis in *Alden v. Maine*, the Court of Appeals initially posited that the absence of prior case law recognizing *Ex Parte Young* in the context of a state agency plaintiff is significant because states retain immunity from actions that were "'anomalous and unheard of when the constitution was adopted.'"[51] The Court of Appeals adopted the Supreme Court's recent assumption

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[50] *Id.* (citing *Semiole Tribe of Fla.*, 517 U.S. at 71 n.14 ("[A]n individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law . . . ."); *Garrett*, 531 U.S. at 374 n.9 (referring to Ex Parte Young suits by "private individuals"); *Ex Parte Young*, 209 U.S. at 143).

[51] *Id.* (citing Alden v. Maine, 527 U.S. 706, 727 (1999)). In *Alden v. Maine*, the Supreme Court rendered a sovereign immunity decision that appeared to pay significant homage to the anti-commandeering line of cases discussed further in section III below. Having determined in *Seminole Tribe of Florida v. Florida* that Article I did not grant Congress authority to abrogate sovereign immunity in federal courts, the Court confronted the novel issue of whether it gave Congress the power to subject nonconsenting states to suit in their own courts. *See id.* at 741. The Court harkened to *New York v. United States*, 505 U.S. 14 (1992) and *United States v. Printz*, 521 U.S. 818 (1997) for the principle that states maintain a concurrent power to affect citizens. *Id.* at 713, 730. The Supreme Court asserted that the "power to press a State's own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately *commandeer* the entire political machinery of the State against its will and at the behest of individuals." *Id.* at 749 (citing *Coeur d'Alene Tribe*, 521 U.S. at 276). Moreover, the Court found that federal power to subject states to suit raised the political accountability problems recognized in the anti-commandeering cases. *See id.* at 750. Drawing again on *Printz*, the Court asserted that when the federal government asserts control over the state's internal political processes, it interferes with the states' ability to remain accountable to their own citizens. *Id.* at 751 (citing *Printz*, 521 U.S. at 920). In light of these structural considerations, the Supreme Court held that states retain sovereign immunity from private suit in their own courts which Congress cannot abrogate under Article I. *Id.* at 754.

that ratification essentially froze the boundaries of sovereign immunity at their contemporaneous reaches. Although below Judge Payne had cited cases addressing the merits of *Ex Parte Young* actions where the plaintiff was an agency, the Court of Appeals distinguished these cases because the plaintiffs were in fact not public agencies, but private advocacy systems.[52] Thus, the Court of Appeals assigned paramount importance to the official, public status of the plaintiff agency. VOPA responded that the identity of the plaintiff was simply irrelevant.[53] The court indicated, however, that this dismissive approach ran contrary to the guidelines announced in *Coeur d'Alene*, where the Supreme Court cautioned against "'reflexive reliance'" and "'empty formalism'" when considering application of *Ex Parte Young*.[54] Rather, application of *Ex Parte Young* must account for the structure of the federalist system and the sovereign interests at stake.[55] Therefore, the court proceeded to consider "whether the Eleventh Amendment bar should be lifted" when the plaintiff is a state agency in light of the structure of dual federalism and the sovereign interests of the state.[56]

The Court of Appeals departed from the premise that sovereign immunity safeguards the dignity of the states and, therefore, prohibits federal courts from intruding into the internal processes and cacophony of state government.[57] "[F]ederal court adjudication of an 'intramural contest' between a state agency and state officials encroaches more severely on the dignity and sovereignty of the states than an *Ex Parte Young* action brought by a private plaintiff," reasoned the Court of Appeals[58] The ability of a state agency to force a state to answer to a federal court would constitute a violation of a state's sovereign dignity. Allowing a federal court to act as the referee between two elements of fractured state authority would be "antithetical to our system of dual

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[52] *Id*. at 118 n.1 (internal citations omitted).
[53] *Id.* at 119.
[54] *Reinhard*, 568 F.3d at 119. (quoting *Coeur d'Alene*, 521 U.S. at 270, 281).
[55] *Id.* (quoting *Coeur d'Alene*, 521 U.S. at 270).
[56] *See id.* (quoting *Seminole Tribe of Fla.*, 517 U.S. at 74).
[57] *Id.* at 119–20.
[58] *Id.* (citing Va. Office for Prot. & Advocacy v. Reinhard, 405 F.3d 185, 191 (4th Cir. 2005) (Wilson, J., concurring). *Virginia Office for Protection and Advocacy v. Reinhard* was a prior case involving the same parties as the case under discussion. In that case, the Court of Appeals held that VOPA could not bring a Section 1983 claim against the defendants because VOPA was a state agency. *Reinhard*, 568 F.3d at 120 n. 2. Although the case did not raise the issue of sovereign immunity, Judge Wilson observed that such an action brought by a state agency against a state in federal court constituted a serious indignity to the state. *Id.*

sovereignty."[59] Sovereign immunity shields the states from "federal meddling" in their internal affairs.[60] As support for this proposition, the court drew primarily on the *Alden* decision's expansive language regarding the protection of state government machinery.[61]

The *Alden* Court based its holding that Article I did not give Congress the power to abrogate state sovereign immunity in states' own courts on the aphorism that such abrogation power would constitute the power "to turn the State against itself and ultimately commandeer the political machinery of the State against its will."[62] By requiring state courts to hear cases against state officers, Congress was essentially playing the state judiciaries off of state legislatures and executives. Giving the federal government such power "'would strike at the heart of political accountability so essential to our liberty and republican form of government.'"[63] The Court of Appeals perceived a comparable danger in allowing a state agency to bring suit against another state agency in federal court under *Ex Parte Young.* Federal courts would essentially have the power to play state agencies off of each other, which would result in indignity to the states.[64] Moreover, allowing federal courts to serve this mediating function between state agencies would undermine political accountability because state citizens dissatisfied with the outcome of the federal court's decision would have nowhere to turn for redress.[65] Presumably, the court meant that the normal pressures inherent in the electoral process normally applicable to state actors and bodies would be useless against the federal judiciary. Thus, implicitly drawing on *Alden* and the anti-commandeering line of cases discussed further below, the Court of Appeals perceived the danger that federal interference in conflicts between state agencies could displace the normal processes of state government.

Here, the Court of Appeals arguably overlooked the argument that citizens and states would have recourse to Congress. If dissatisfied with a federal court's interpretation of federal law, citizens could lobby their national representatives to change federal law. The Court of Appeals, however, may have been accounting for such barriers as legislative inertia and the fact that the few interested parties in any given

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[59] *Reinhard*, 568 F.3d at 120.
[60] *Id.*
[61] *See id.*
[62] *Id.* (quoting *Alden*, 527 U.S. at 749).
[63] *Id.* (quoting *Alden*, 527 U.S. at 751).
[64] *Reinhard*, 568 F.3d at 121.
[65] *Id.* (citing *Alden*, 527 U.S. at 751).

case might not have sufficient political leverage to affect such a redress. Convincing Congress to change the law could be a difficult hill to climb especially when the greater costs of the law are not immediately apparent to the public. The Court of Appeals, however, did not limit its rationale to the political accountability principles underlying the anti-commandeering line. It also found that VOPA's action raised special sovereignty interests crucial to the dignity of the states.

In a separate section of the opinion, the Court of Appeals also found that a suit under *Ex parte Young* in these circumstances would implicate special sovereignty interests similar to those identified by the Supreme Court in *Coeur d'Alene*.[66] Citing to a series of cases holding that municipalities political subdivisions of states could not obtain relief under federal law against the application of state statutes, the Court of Appeals suggested that states have special sovereignty interests in "intramural state conflicts" with which federal courts should not interfere.[67] Based largely on these anti-commandeering and special sovereignty principles incorporated into sovereign immunity jurisprudence in *Alden* and *Coeur d'Alene*, the Court of Appeals determined that *Ex Parte Young* should not be extended to cases with state agencies on opposing sides.[68] Arguably, *Reinhard* implicated a Congressional interest not present in *Coeur d'Alene*. In *Coeur d'Alene*, the plaintiff challenged state violation of a federal statute fixing the boundaries of an Indian Reservation.[69] In *Reinhard*, on the other hand, VOPA challenged state violation of federal laws intended to promote equal treatment for disabled and mentally ill persons, implicating Congress' supreme power under the Fourteenth Amendment. Nowhere in *Coeur d'Alene*, however, did the court suggest that sovereign immunity depended on weighing the relative strength of state interests against federal interests. Rather, the court simply announced that when an action under *Ex Parte Young* intrudes on states' special sovereignty interests, the exception should not apply.

The Court of Appeals reiterated as a final observation, however, that all of these problems could be avoided by either proper congressional abrogation pursuant to Section 5 of the Fourteenth

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[66] *Id.* at 121–23 (internal citations omitted).

[67] *Id.* at 122 – 23 (citing Williams v. Mayor of Balt., 289 U.S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); City of Trenton v. New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937 (1923); Stewart v. City of Kansas City, 239 U.S. 14, 36 S. Ct. 15, 60 L. Ed. 120 (1915); Hunter v. City of Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151 (1907)).

[68] *Id.* at 121.

[69] *Coeur d'Alene*, 521 U.S. at 264.

Amendment or valid waiver.[70] In such circumstances, citizens could hold Congress or state governments accountable for the results of litigation between state agencies.[71] Moreover, such suits would impart no indignity to the states because the states would have consented either through their Congressional representatives or by accepting conditional federal resources.[72] Thus, the court seemed to suggest that Congress should vindicate federal interests through abrogation or waiver and not *Ex Parte Young*. As shown, the Court of Appeals rested its decision on the abstract structural theory that has characterized the Supreme Court's recent federalism. Indeed, the underlying rationale of *Reinhard* proves difficult to comprehend without a thorough examination of the Supreme Court's sovereign immunity jurisprudence. Recently, the Court has incorporated the anti-commandeering principles of political accountability into sovereign immunity. In addition, it has recognized unique sovereign interests that should remain free of federal adjudication. These more recent theories form the basis of *Reinhard*. The origins of the sovereign immunity doctrine, however, are the proper starting point for this examination.

ORIGINS AND DEVELOPMENT OF SOVEREIGN IMMUNITY JURISPRUDENCE APPLIED IN *REINHARD*

A. The Early Development of Sovereign Immunity and the Ex Parte Young Doctrine

The origins of sovereign immunity extend back to ancient English common law, certain remnants of which prevailed at the time of ratification.[73] The consensus among the Founders appeared to be that the states retained their sovereign immunity after ratification as an inherent attribute of sovereignty.[74] The passage of the Eleventh Amendment and the United States Supreme Court's decision in *Hans v. Louisiana* confirmed that states have retained their sovereign immunity in our system. Thus, although sovereign immunity derives from ancient

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[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *See* DONALD L. DOERNBERG, SOVEREIGN IMMUNITY OR THE RULE OF LAW: NEW FEDERALISM'S CHOICE 71–80 (Carolina Academic Press, 2005); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 493–98 (2001). Under the ancient common law of England, the sovereign could not be sued in courts which it had created by its own power.
[74] Hill, *supra* note 73, at 495–98.

traditions, it has to some extent been incorporated into the Constitution.[75] Although the Supreme Court has sometimes conceptualized sovereign immunity as emanating from the Eleventh Amendment, it has made clear that sovereign immunity extends beyond that limited language. Thus, although paid homage and incorporated by the Constitution, sovereign immunity derives from ancient, fundamental principles of government. As such its precise contours prove amorphous and difficult to define. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[76] To the Supreme Court fell the task of determining the precise limits imposed on federal jurisdiction by this language and the constitutional structure.

In *Hans*, a Louisiana citizen had brought suit in federal court against the state of Louisiana, alleging that an amendment to the state constitution, prohibiting the state from paying interest on certain bonds, violated the Contracts Clause of the federal Constitution.[77] The Supreme Court, therefore, confronted the novel question of whether a state could be sued by one of its own citizens in federal court because the case arises under the Constitution or federal law.[78] At this point, the Court's decisions had established that the Eleventh Amendment prevented a state from being sued in federal court by a citizen of another state or a foreign country based on federal question jurisdiction.[79] The plaintiff claimed that because he was a citizen of Louisiana, he did not fall into either of these prohibited categories and could bring suit against his own state.[80]

The Supreme Court, however, rejected this argument, finding that the Eleventh Amendment stood for a prohibition far broader than its simple language.[81] With the Eleventh Amendment, "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed."[82] The Court further

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[75] *See* Jonathan Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L. J. 1167, 1173–75 (2003).

[76] U.S. CONST. AMEND. XI.

[77] RICHARD H. FALLON, JR., DANIEL J. MELTZER, DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 973 (5th ed. 2003).

[78] *Hans*, 134 U.S. at 9 (1890).

[79] *Id.* at 10 (citing Louisiana v. Jumel, 107 U.S. 711 (1883); Hagood v. Southern, 117 U.S. 52 (1886); In re Ayers, 123 U.S. 443 (1887)).

[80] *Id.*

[81] *Id.* at 12, 13–16. The Court asserted that the passage of the Eleventh Amendment signaled acceptance of Justice Iredell's dissent in *Chisolm v. Georgia*, positing that a state simply cannot be sued without its consent. *Id.* at 16.

[82] *Id.* at 12, 15.

announced, "It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent . . . and the exemption . . . is now enjoyed by the government of every State in the Union."[83] Thus, sovereign immunity derived not so much from the actual text of the Eleventh Amendment but from the inherent nature of sovereign statehood. The Supreme Court thus incorporated ancient, common law notions of sovereignty into the constitutional structure. Recognizing the clear tension between sovereign immunity and the supremacy of federal law, the Court asserted:

> The legislative department of a State represents its polity and its will; and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate public obligations . . . But to deprive the legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge public debts, would be attended with greater evils than such failure can cause.[84]

In the Court's view, the state legislature, directly accountable to the citizens of a state, must maintain control of the state fisc, free from federal intervention. *Hans*, therefore, announced the rule that a state is not amendable to suit in federal court by its own citizens even in the face of a constitutional violation by the state.[85]

Relatively soon after *Hans*, the Court seemingly sought to resolve the tension between expansive sovereign immunity and the supremacy of federal law by carving out an exception. In *Ex Parte Young*, Minnesota shareholders of various railroad corporations brought suit in federal court, seeking to enjoin the Attorney General of Minnesota from enforcing state railroad rate regulations.[86] The shareholders alleged that the regulations were confiscatory in violation of the Fourteenth Amendment Due Process Clause.[87] The federal trial court entered a temporary restraining order prohibiting the attorney general from enforcing the regulations, and when he violated the injunction, the federal circuit court held him in contempt.[88] Throughout the proceedings, the attorney general maintained that the Eleventh

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[83] *Hans*, 134 U.S. at 13.
[84] *Id.* at 21.
[85] *See id.*
[86] John Harrison, *Ex Parte Young*, 60 STAN. L. REV. 989, 992 (2008).
[87] *Id.*
[88] Ex Parte Young, 209 U.S. 123, 149 (1908); Harrison, *supra* note 86, at 993.

Amendment barred the plaintiff's suit against him because it effectively constituted an action by citizens against their own state.[89] The Supreme Court reviewed the trial court's determination. The Court recognized that a suit against state officers who have no personal stake in the subject matter of the suit and defend only as representatives of the state is virtually a suit against the state itself.[90] Only the state has any real interest in the action. Therefore, although the suit named an individual state officer as defendant, it was in fact a suit against Minnesota by Minnesota citizens which would appear to fall under the prohibition announced in *Hans*.

Through a legal fiction, however, the Court articulated the rule of law that a suit against a state officer who is violating federal law is not a suit against the state.[91] The court reasoned:

> The act to be enforced is alleged to be unconstitutional, and if it be so the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of the state official in attempting by the use of the name of the state to enforce a legislative enactment which is void because it is unconstitutional.[92]

Therefore, a suit against a state officer in violation of federal law does not fall within the sovereign immunity prohibition because it is not a suit against the state, but a suit against a rogue officer acting without state authority because the state has no authority to enact an unconstitutional law. If the rate regulations were in fact unconstitutional, then the attorney general "proceeding under such enactment comes into conflict with the superior authority of that constitution and he is . . . stripped of his representative character and is subjected in his person to the consequences of his individual act."[93] Thus, by somewhat convoluted logic, the Supreme Court carved out an exception to sovereign immunity by which a state citizen may sue a state officer when the state officer is violating federal law. The Supreme Court and commentators have consistently labeled this rogue officer theory a "legal

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[89] *Ex Parte Young*, 209 U.S. at 143–44 (1908).
[90] *Id.* at 151 (citing *In re Ayers*, 123 U.S. 443 (1887)).
[91] *See id.* at 159–60.
[92] *Id.* at 159.
[93] *Id.* at 159–60.

fiction" because the officer in question is, in fact, acting pursuant to state authority.[94] Seeming to recognize the precarious footing of this legal fiction, the Court subsequently refined the *Ex Parte Young* doctrine to incorporate additional protections for state sovereignty.

In *Edelman v. Jordan*, the Court held that *Ex Parte Young* only created an exception to sovereign immunity for suits brought for prospective injunctive relief and not retrospective money damages.[95] There, the plaintiff brought an individual class action against state agency officials, alleging that they were violating federal regulations in dispensing benefits under the federal-state programs of Aid to the Aged, Blind, or Disabled.[96] Finding the state officers in violation of federal regulations, the federal district court granted a permanent injunction requiring compliance with the regulations and also ordered the officers to pay benefits wrongfully withheld.[97] On review, the Supreme Court held that *Ex Parte Young* permitted the element of the judgment that constituted a prospective injunction requiring compliance with federal law.[98] The order to dispense funds, however, constituted retrospective relief barred by sovereign immunity.[99] The Court explained, "'[W]hen the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are the nominal defendants.'"[100] State immunity barred such retroactive monetary relief that would "to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials . . . ."[101] By thus restricting application of *Ex Parte Young* to suits for prospective injunctive remedies, the Supreme Court preserved the fiction that the suit was not in fact one against the state.

Synthesizing the principles of *Ex Parte Young* and *Edelman*, the Supreme Court recently articulated a simple formula to determine the applicability of the *Ex Parte Young* doctrine in *Verizon Maryland, Inc. v. Public Service Commission*.[102] Federal courts must conduct "a straightforward inquiry into whether the complaint alleges an ongoing

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[94] *See* Harrison, *supra* note 86, at 995.
[95] Edelman v. Jordan, 415 U.S. 651, 664–66 (1974).
[96] *Id.* at 653.
[97] *Id.* at 669.
[98] *Id.* at 664.
[99] *Id.*
[100] *Edelman*, 415 U.S. at 663 (quoting Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945)).
[101] *Id.* at 668.
[102] Verizon Md. Inc. v. Public Serv. Comm'n, 535 U.S. 635 (2002).

violation of federal law and seeks relief properly characterized as prospective."[103] Thus, under the Court's current jurisprudence the *Ex Parte Young* exception to the sovereign immunity bar applies when a plaintiff seeks injunctive relief against a state officer in violation of federal law. This seemingly simple framework, however, has been complicated by two recent lines of cases that exemplify the Supreme Court's revival of federalist principles—the anti-commandeering cases and the more recent sovereign immunity cases focusing on abrogation and special state sovereign interests. Examination of these cases demonstrates that sovereign immunity implicates far more complex issues political accountability and state dignity. These cases form the theoretical basis of the Fourth Circuit Court of Appeals' decision in *Reinhard*.

B. The Anti-Commandeering Cases and the Modern Expansion of Sovereign Immunity

In a line of cases that has come to be known as the "anti-commandeering" cases, the Supreme Court drastically curtailed the power of the federal government to interfere in the internal administration and process of state governments.[104] Although these cases did not specifically address sovereign immunity, they mark the Court's adoption of a broad structuralist approach in its federalism jurisprudence based on the "'essential postulates'" of the constitution.[105] The Court derived limits on the reach of federal authority from the historical understanding of the proper relationship between the federal government and the states.[106] The aphorisms adopted by the Court in these cases form a crucial basis of its current sovereign immunity jurisprudence and the *Reinhard* decision.[107] Therefore, an understanding of the anti-

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[103] *Id*. at 645.

[104] *See* Jennifer L. Greenblatt, *What's Dignity Got to Do with It?: Using Anti-Commandeering Principles to Preserve State Sovereign Immunity*, 45 CAL. W. L. REV. 1, 11–15 (2008) (internal citations omitted); William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069, 1073–78 (2000) (internal citations omitted).

[105] *See generally* Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM AND MARY L. REV. 1601 (2000) (observing that these cases mark the conservative majority's turning away from textualism and originalism to jurisprudence based on an understanding of the historical relationship between the states and the federal government).

[106] *Id.*

[107] *See* Alden v. Maine, 527 U.S. 706, 737–54 (1999) (consistently relying on *Printz v. United States*); Virginia v. Reinhard, 568 F.3d 110, 120 (4th Cir. 2009) (relying in large part on *Alden*).

commandeering cases is crucial to grasping the Fourth Circuit's decision. Two cases are particularly noteworthy and go practically hand-in-hand.

In *New York v. United States*, the Court addressed the constitutional validity of the Low-Level Waste Policy Amendment Act of 1985, designed to encourage state level disposal of radioactive waste.[108] In the statute, Congress essentially sought to force states to dispose of waste by either joining regional compacts with other states or providing a disposal facility within the state itself.[109] To this end, the statute provided *inter alia* that if a state did not dispose of waste through one of these two options by a certain date, the state would essentially "take title" to the waste and be liable for any damages flowing from it.[110] New York argued that this provision impermissibly directed the states to regulate waste disposal in contravention of the principal of dual sovereignty.[111] The precise issue, therefore, was whether Congress could direct the states to regulate in a particular manner.[112] Writing for the majority, Justice O'Connor initially stated that "Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[113] While Congress undoubtedly can act directly on the citizens in "areas of intimate concern to the states," Congress cannot order the states to govern in accordance with its will.[114] The Court reasoned:

> In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly

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[108] New York v. United States, 505 U.S. 144, 149–51 (1992) (internal citations omitted).

[109] *See id.* 151–52 (internal citations omitted).

[110] *Id.* at 153–54 (citing 42 U.S.C. § 2021e(d)(2)(C) (1992)).

[111] *Id.* at 159–60 (internal citations omitted).

[112] *Id.* at 161.

[113] *New York*, 505 U.S. at 161.(quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)).

[114] *Id.* at 162.

> to compel the States to require or prohibit those acts.[115]

Thus, Congress cannot compel the states to create administrative agencies and thereby indirectly regulate state citizens. The Court explained that these limits of dual sovereignty are crucial to the political accountability of both state and federal officials.[116] If state citizens deem federal policy contrary to their interests or decide that resources are better expended elsewhere, they are free to elect state representatives who will decline to participate in a federal regulatory program.[117] In that case, if the federal government decides to overpower state objections by regulating citizens directly, it may do so "in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular."[118] On the other hand, if the federal government can commandeer the state machinery and compel state legislatures to regulate, state representatives will face public hostility, and federal officials can insulate themselves from the electoral consequences of their actions.[119] Therefore, allowing Congress to conscript the state legislatures into doing its "dirty work" would essentially undermine the popular check on federal representatives. By giving states the ultimatum of either complying with federal regulations or taking title to radioactive waste and suffering the hazardous consequences, the statute coerced the states to act and commandeered state governments.[120] Thus, the particular provision in question was beyond the powers of the federal government.[121] Congress cannot commandeer state legislatures to implement federal policy through state regulations.

Shortly thereafter, in *Printz v. United States*, the Supreme Court considered substantially the same issue as applied to state executive officers.[122] In *Printz*, the Court addressed the constitutionality of certain interim provisions of the 1993 amendments to the Gun Control Act of

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[115] *Id.* at 166 (citing *FERC v. Mississippi*, 456 U.S. at 762–66; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. at 288–89; *Lane County v. Oregon*, 74 U.S. (7 Wall.) at 76, 19 L. Ed. 101).

[116] *Id.* at 168.

[117] *Id.*

[118] *New York*, 505 U.S. at 168.

[119] *Id.* at 169 (citing Merritt, 88 COLUM. L. REV., at 61–62; La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 639–65 (1985)).

[120] *Id.* at 175–76.

[121] *Id.* at 176.

[122] *Printz*, 521 U.S. 818, 902 (1997); *see also* Greenblatt, *supra* note 104, at 14–15.

1968.[123] These interim provisions required the chief law enforcement officers ("CLEOs") of state municipalities to conduct background investigations of individuals seeking to purchase handguns.[124] The provisions, thus, directed state law enforcement officers to administer federal regulations.[125] The petitioners argued that such congressional action compelling state officers to execute federal laws violated the constitution.[126] Writing for the majority, Justice Scalia analyzed the question in light of "historical understanding and practice" and the "structure of the Constitution."[127] He first found that such use of state officials by the federal government was contrary to the framework of dual federalism. The Court initially recognized that "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."[128] The Constitution contemplates a system "'establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'"[129] The states, therefore, retain a residual sovereign sphere of action, and "[i]t is no more compatible with this independence and autonomy that their officers be dragooned . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws."[130]

In addition, the Court quickly shot down the United States' assertion that requiring state officers to perform ministerial tasks did not raise the same accountability dangers as coercion of state legislatures in *New York*.[131] By requiring state governments to absorb the administrative costs attending enforcement of federal laws, federal

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[123] *Printz*, 521 U.S. at 902–03. The 1993 amendments were collectively known as the "Brady Act." *Id.* at 902.

[124] *Id.* at 903 (citing 18 U.S.C. § 922(s)(2) (1997)). Specifically, the provisions required CLEOs to "'make a reasonable effort to ascertain within 5 business days whether receipt or possession [of a handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.'" *Id.*

[125] *Id.* at 904.

[126] *Id.* at 905.

[127] *Id.*

[128] *Printz*, 521 U.S. at 919–20 (citing The Federalist, No. 15, at 109).

[129] *Id.* at 920 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

[130] *Id.* at 928.

[131] *Id*. at 929–30.

representatives could claim credit for solving policy problems without requiring their constituencies provide the necessary funding.[132] By requiring the states to do the "dirty work," Congress could reap all of the benefits with none of the electoral costs that usually come with tough policy decisions. Even if no substantial monetary costs attend enforcement of the federal scheme, the states may still take the blame for the burdens and defects that attend such a scheme.[133] Therefore, the same basic problem of political accountability present in the legislative context in *New York* applies likewise in the executive context. Congress can come up with complex and potentially costly regulatory schemes and make the states "play the bad guys" by enforcing them. The Supreme Court, therefore, reaffirmed that "'[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" and held that the interim provisions violated this rule.[134] The federal government cannot compel the states to enact a federal regulatory program and cannot "circumvent that prohibition by conscripting the State's officers directly."[135] Subsequently, in *Alden*, the Supreme Court would incorporate the "essential postulates" laid out in *New York* and *Printz* into its sovereign immunity jurisprudence, greatly expanding the sovereign immunity bar.[136] The Fourth Circuit Court of Appeals alluded to these anti-commandeering principles in *Reinhard* and identified political accountability problems as one major peril of allowing federal courts to mediate power struggles between rival state agencies. In addition, the Supreme Court's sovereign immunity jurisprudence has adopted a distinct theoretical nuance, likewise not lost on the *Reinhard* court. Under this line of decisions, a category of unique, core state government functions remains outside the *Ex Parte Young* orbit.

The seminal case on special sovereignty interests, decided exactly one week prior to *Printz*, while not explicitly relying on the anti-commandeering line, certainly proved consistent with the Supreme Court's adoption of the structural approach to issues of dual federalism. In *Coeur d'Alene Tribe of Idaho v. Idaho*, the Court adopted new limitations on the *Ex Parte Young* doctrine, partially relied on by the

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[132] *Id.* at 930.

[133] *Printz*, 521 U.S. at 930 (citing Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580, n. 65 (1994)).

[134] *Id.* at 933 (quoting *New York*, 505 U.S. at 188).

[135] *Id.* at 935.

[136] Alden v. Maine, 527 U.S. 706, 713, 714, 731, 748, 751, 752, 754 (1999) (citing *Printz* and *New York*).

Fourth Circuit in *Reinhard*.[137] The Coeur d'Alene Tribe ("Tribe") asserted ownership of the submerged lands and banks of all navigable waters within the original boundaries of the Coeur d'Alene Reservation as established by federal statute.[138] The Tribe brought suit in federal court against the State of Idaho and various state agencies and officials.[139] It sought a declaratory injunction that it was entitled to exclusive use and enjoyment of the lands in question and a permanent injunction prohibiting the state from regulating its exclusive use and occupancy.[140] The defendants argued that sovereign immunity barred the Tribe's suit against the state and its officers.[141] The Supreme Court, therefore, addressed the issue of whether the Tribe's claim could proceed under *Ex Parte Young*.[142]

From the beginning, the Court sought to narrow the gap in sovereign immunity created by the exception. Justice Kennedy observed that allowing a claim to proceed in federal court whenever a plaintiff sought prospective injunctive relief for a violation of federal law would reduce *Ex Parte Young* to an "empty formalism" and undermine the Eleventh Amendment as a real limit on federal question jurisdiction.[143] The Court asserted that "[a]pplication of the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction."[144] Therefore, *Ex Parte Young* should apply primarily where no state forum is available to vindicate the plaintiffs' federal rights.[145] I n this case, the Idaho state courts were open to adjudicate the dispute and an effective state remedy was available, making a federal forum far less necessary.[146] Moreover, the Court emphasized that "[n]either in theory or in practice has it been shown problematic to have federal claims resolved in state courts where Eleventh Amendment immunity would be

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[137] *See* Coeur d'Alene Tribe of Idaho v. Idaho, 521 U.S. 261, 270–71, 275–81, 281–82 (1997); *Reinhard*, 568 F.3d at 119 (relying on *Coeur d'Alene*).

[138] *Coeur d'Alene*, 521 U.S. at 264. The Tribe advanced several theories of its ownership, including aboriginal right, which are not terribly important for the purposes of this paper.

[139] *Id.* at 265.

[140] *Id.*

[141] *See id.* The Supreme Court previously had recognized that Indian tribes maintained the same status as foreign sovereigns, against whom the states enjoy Eleventh Amendment immunity. Therefore, the Tribe's suit against Idaho did raise the sovereign immunity issue. *Id.* at 268–69.

[142] *See id.* at 263, 266.

[143] *Coeur d'Alene*, 521 U.S. at 270.

[144] *Id.*

[145] *Id.* at 270–71.

[146] *Id.* at 274.

applicable in federal court but for an exception based on *Young*."[147] In fact, to allow a case to proceed in federal court "based on the inherent inadequacy of state forums would run counter to the basic principles of federalism" because interpretation and application of federal law within their own judiciaries is a "proprietary concern" of the states.[148] The Fourth Circuit Court of Appeals explicitly relied on the availability of Virginia state forums for its decision in *Reinhard*.[149] The Court of Appeals noted, "The state officials concede, and VOPA does not dispute, that [it] may bring this suit in state court and obtain the same relief that it seeks here."[150] Thus, the Court of Appeals appears to have followed Justice Kennedy's inclination to channel disputes involving state administrative agencies into state courts in order to allow states to tailor federal law to their unique needs and traditions.

In the *Reinhard* case, for instance, the Virginia courts arguably would have been in a better position to reconcile the investigatory provisions of the DDA and PAIMIA with Virginia's peer review privilege statute because of its special competence in the area of Virginia law. Indeed, at no point did VOPA argue that the state courts were closed to its claim.[151] Indeed, the parties agreed that "Virginia's sovereign immunity would not bar an original action by VOPA for a writ of mandamus brought in the Virginia Supreme Court."[152] VOPA always had the option of proceeding in Virginia courts to obtain access to the records. Indeed, the Supremacy Clause would require Virginia courts to enforce the federal rights in question.[153] In *Testa v. Katt*, the Supreme Court held that the Supremacy Clause requires state courts to adjudicate federal causes of action absent a valid excuse such as a lack of judicial resources.[154] The Court has subsequently clarified that state courts cannot discriminate against federal questions based on disagreement with the policies embodied in federal law.[155] Rather, a state court may only refuse to adjudicate and enforce federal rights on the basis of a neutral rule of judicial administration.[156] Therefore, as long as state courts

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147 *Id.* at 274–75.
148 *Coeur d'Alene*, 521 U.S. at 275.
149 *Reinhard*, 568 F.3d at 123.
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.* (citing U.S. CONST. art VI, cl. 2; Testa v. Katt, 330 U.S. 386, 389, 391, 394 (1947); *Printz*, 521 U.S. at 928–29).
154 *Testa*, 330 U.S. at 389, 814–15.
155 *See* Howlett v. Rose, 496 U.S. 356, 371–75 (1990) (internal citations omitted).
156 *Id.* at 374.

remained in operation, the Constitution would require them to adjudicate a suit arising under federal law and to enforce federal rights. Thus, the Fourth Circuit Court of Appeals determined that VOPA's fears that disabled persons could not adequately assert their rights without access to federal courts was illusory.[157] Absent special circumstances, state courts remain obligated to vindicate federal rights. Thus, VOPA could have resorted to Virginia courts to resolve the conflict between the federal law and Virginia's peer review privilege statute.[158]

Some would doubtless argue that the Congress' passage of the Judiciary Act of 1875[159] and the subsequent establishment of general federal question jurisdiction through 28 U.S.C. section 1331 and removal jurisdiction through 28 U.S.C. section 1441 intended to promote the

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[157] *Reinhard*, 568 F.3d at 123.

[158] At least one of the attorneys for VOPA has called this assertion into question. *See* E-mail from Seth Galantar, Of Counsel, Morrison & Foerster, LLP, to Harrison Gates, author (Mar. 24, 2010, 14:14 EST) (on file with author). Mr. Galantar has suggested that the principle that the Supremacy Clause requires a state court to hear a federal cause of action against state defendants cannot be reconciled with *Alden*'s language suggesting that the Constitution does not require state courts to do what it cannot require federal courts to do. *Id.* Moreover, he suggests that *Alden* could not have reaffirmed a simple non-discrimination principle against hearing federal causes of action in state courts because in that case, the State of Maine permitted suits against itself in state court for monetary relief, including wage claims for violations of the State's minimum-wage law. *Id.* (citing Me. Rev. Stat. Ann. tit. 26, §§ 664, 670 (1998)). Yet, the Supreme Court still found that the state courts did not have to entertain an analogous claim under the federal Fair Labor Standards Act. Mr. Galanter's point is well taken. The Supreme Court appears to have applied inconsistent principles and failed to articulate a clear rule. Neverthless, it may be possible to reconcile the anti-discrimination principle with the *Alden* holding. If it is not possible, then the Supreme Court should clear up this ambiguity at its next opportunity. In Alden, the court tersely dismissed the argument that Maine had abused its sovereign immunity by discriminating against the FLSA claims, stating: "[T]here is no evidence that the State has manipulated sovereign immunity in a systematic fashion to discriminate against federal causes of action. To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." *Alden*, 527 U.S. at 759. The meaning of this statement is unclear. On the one hand, the first sentence could mean that plaintiffs must demonstrate a general pattern of using sovereign immunity to keep federal claims out of state court to show discrimination against federal claims. On the other hand, the second sentence could mean that a state's assertion of its sovereign immunity is itself a neutral justification for refusal to entertain a federal claim. E-mail from Seth Galantar, Of Counsel, Morrison & Foerster, LLP, to Harrison Gates, author (Mar. 24, 2010, 17:43 EST) (on file with author). This latter interpretation appears to run contrary to *Howlett v. Rose*, where the Court found that under the *Testa* line of cases, state cannot assert its sovereign immunity against a federal action if it waives such immunity for similar state actions and cannot discriminate against federal causes of action based only on the content of federal law. 496 U.S. at 371–75. The Supreme Court should work to bring bring these inconsistencies into alignment.

[159] Judiciary Act of 1875, 18 Stat. 470 (1875).

uniformity of federal law by circumventing divergent state interpretation of federal law envisioned by Justice Kennedy.[160] Indeed, the driving purpose behind the Judiciary Act of 1875—the forerunner to modern federal question and removal jurisdiction—was to promote uniform application of federal laws in an increasingly nationalized commercial setting.[161] General federal question jurisdiction, however, is not necessarily inconsistent with the more narrow restraints of the Supreme Court's subsequent sovereign immunity jurisprudence. First, numerous scholars have argued that the concern driving the Judiciary Act of 1875 was not so much the need to vindicate individual federal rights against the states, but to avoid the prejudice to private business prevailing in state courts applying federal law.[162] Thus, initially relegating citizens' suits against states for violations of federal law to state courts does not run counter to federal question jurisdiction's more general objective of opening the federal courts to suits arising under federal law between private individuals. Second, the Supreme Court addressed the implications of the Judiciary Act of 1875 in *Hans v. Louisiana*.[163] In

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[160] *See, e.g.*, Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction*, 1984 WIS. L. REV. 1315, 1331–32 (1984).

[161] *See* James H. Chadbourn & Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 641–42 (1942).

[162] *See* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 64–65 (MacMillan, 1927); LAWRENCE MEIR FRIEDMAN, A HISTORY OF AMERICAN LAW 381 (Simon & Schuster, 1973); HAROLD MELVIN HYMAN, A MORE PERFECT UNION 536–40 (Knopf, 1973); STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 157–58 (Univ. of Chicago, 1968); Chadbourne & Levin, *supra* note 147, at 641–55; Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 727–29 (1986) (internal citations omitted); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM J. LEGAL HIST. 341 (1969). At the time of passage of the Judiciary Act of 1875, industrial and entrepreneurial interests were confronting unfriendly state regulation and state court decisions not only in the former Confederacy, but also in the burgeoning Midwest. Collins, *supra*, at 727 (citing Wiecek, *supra*, at 341). In the early 1870s, the Granger movement and its animosity towards railroads were at their height in state and local governments. *Id.* at 727–28 (citing Friedman, *supra*, at 391). Congress, therefore, "appreciated the business community's 'unwillingness . . . to rely upon state courts for the vindication of [their] constitutional rights' and . . . intended them as one of the beneficiaries of the federal question removal provisions." *Id.* at 728 (citing Frankfurter & Landis, *supra*, at 65 n.31). Although the passage of the Judiciary Act of 1875 was contemporaneous with the Civil Rights Act of 1875 and other statutes designed to protect individual federal rights, most of these statutes included their own jurisdictional provisions. *Id.* at 727 n.55. Thus, the Judiciary Act of 1875 likely represents an expansion of federal jurisdiction in response to state prejudice against growing financial and industrial interests as opposed to a superfluous jurisdictional grant to protect individual rights.

[163] Hans v. Louisiana, 134 U.S. 1, 9 (1890) ("The ground taken is that under the constitution, as well as under the act of congress passed to carry it into effect, a case is

Hans, the Court reasoned that the Act gave federal courts original jurisdiction "'concurrent with the courts of the several states.'"[164] Therefore, because "state courts have no power to entertain suits by individuals against a state without its consent" and federal jurisdiction is coextensive with that of the states, it follows that federal courts cannot take jurisdiction of a suit against a state by an individual.[165] Moreover, the Court recognized a structural, constitutional prohibition against proceedings that were "anomalous" and "unheard of" when the constitution was adopted.[166]

Coeur d'Alene and *Reinhard*, therefore, in channeling suits involving state agencies into state courts, have not ignored Congress' policy of uniform application of federal law as reflected in the Judiciary Act of 1875. Rather, the Supreme Court recognized long ago in *Hans* that the authoritative structure of the Constitution confines that policy to a certain context. The Court's sovereign immunity jurisprudence has not tried to undermine these statutes but merely has recognized that suits against the states themselves raise special considerations which elevate them above Congress' preference for strict uniformity. General federal question jurisdiction leaves room for the notion that when a state is sued under federal law, it has a proprietary concern in interpreting that law itself. Nowhere in the statutes does Congress expressly abrogate sovereign immunity. Therefore, a better understanding of Justice Kennedy's argument in *Coeur d'Alene* is that state courts have a strong interest in interpreting federal law when it touches on the state's sovereign functions or status. Indeed, *Couer d'Alene* recognized that the state's interest is particularly strong in the context of complex intertwinement of federal law and state administrative law as was present in *Reinhard*. In sum, a structural, constitutional predilection for "home cooking" prevails when a suit against a state implicates its core sovereign functions or interests. Furthermore, as the Fourth Circuit Court of Appeals pointed out in *Reinhard*, the Supreme Court maintains the authority to review state court decisions on federal law even if sovereign immunity would bar original federal jurisdiction.[167] Therefore, federal

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within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the constitution or laws of the United States . . . The language relied on is . . . the corresponding clause of the act conferring jurisdiction upon the circuit court . . . as found in the act of March 3, 1875 . . . .).

[164] *Id.* at 18 (quoting 18 Stat. 470 (1875)).

[165] *Id.*

[166] *Id.*

[167] *Reinhard*, 568 F.3d at 123 (citing McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 30–31 (1989)).

courts would always be able to counter state interpretations that strayed too far from Congressional intent.

The *Coeur d'Alene* plurality opinion submitted that state courts have a special interest in adjudicating claims involving state administrative agencies and officials. The plurality recognized, "It is a principal concern of the court system in any State to define and maintain a proper balance between the State's courts on the one hand, and its officials and administrative agencies on the other."[168] Indeed, this is crucial to the coherent development of administrative law because "state courts and state agencies work to elaborate an administrative law designed to reflect the State's own rules and traditions concerning the respective scope of judicial review and administrative discretion."[169] The plurality went on to identify the present case as one which would give states the opportunity to augment administrative law.[170] The plurality recognized, "Where, as here, the parties invoke federal principles to challenge state administrative action, the courts of the State have a strong interest in integrating those sources of law within their own system for the proper judicial control of state officials."[171] This concern for preserving the healthy "give and take" between state administrative agencies and state courts certainly was not lost on the *Reinhard* court.

Justice Kennedy somewhat grudgingly went on to recognize, however, that according to precedent, when a plaintiff seeks prospective relief for an ongoing violation of federal law, sovereign immunity is not a bar.[172] He observed, however, that the *Ex Parte Young* exception may not apply when the suit "would 'upset the balance of federal and state interests that it embodies'" because "the exception has been 'tailored to conform as precisely as possible to those situations in which it is necessary to vindicate federal rights.'"[173] Writing for the majority, Kennedy then found that the Tribe's suit implicated Idaho's "special sovereignty interests" and, therefore, *Ex Parte Young* should not apply.[174] Idaho had a sovereign interest in its lands and waters which were

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[168] *Id.* at 276.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Reinhard*, 568 F.3d at 277. Presumably, Kennedy went on to decide the case within the *Ex Parte Younger* framework because he could not get a majority of the justices to agree that the *Ex Parte Young* exception was simply not applicable. The majority, thus, had occasion to articulate another limitation to the exception.
[173] *Id.* (quoting Papasan v. Allain, 478 U.S. 265, 277 (1986)).
[174] *Id.* at 280, 287–88.

implicated in the suit.[175] Intrusion into such a sacred area of state sovereignty would be for more offensive than any retroactive award of damages that the Court had prohibited in *Edelman*.[176] Thus, a majority of the Court recognized that even where a plaintiff seeks prospective relief for an ongoing violation of federal law, *Ex Parte Young* may be inapplicable if the suit implicates special sovereignty interests which are within the state's traditional sphere of control. Moreover, a plurality of the Court recognized that state courts have special interests in adjudicating disputes centering on administrative law. The Court of Appeals recognized both of these limits to sovereign immunity in *Reinhard*, and grounded its decision on both of them.

While the Supreme has yet to expound further on the special sovereignty interests that it identified in *Coeur d'Alene*, multiple circuit courts of appeals have weighed in as to precisely which state functions fit into this category. In *ANR Pipeline Co. v. LaFaver*, the Tenth Circuit determined that a state "has a special and fundamental interest in its tax collection system" that lies at the "core of state sovereignty."[177] Indeed, the court posited that a state would cease to exist without the power to tax.[178] Therefore, the plaintiff-appellants could not bring suit against state officials in federal court to enjoin the enforcement of unequal taxation.[179] The relief sought—recertification of the state's tax assessments—would be "'fully as intrusive' into the state's sovereignty as would be a retroactive money judgment against excessive property taxes."[180] Thus, tax collection has been deemed to fall into this limited category.

The Fourth Circuit took a more narrow approach to special sovereignty interests in *Antrican v. Carmen*. In that case, particularly applicable in *Reinhard*, the court determined that a "'state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex Parte Young*.'"[181] Therefore, sovereign immunity did not bar claims by Medicaid recipients alleging failure by state officials to comply with the Medicaid Act.[182] Judge Payne cited to *Antrican* for the

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[175] *Id.* at 287.
[176] *Id.* at 287–88.
[177] ANR Pipeline Co. v. LaFaver, 150 F.3d 1178, 1193 (10th Cir. 1998).
[178] *Id.*
[179] *Id.* at 1182–85.
[180] *Id.* at 1194 (quoting *Coeur d'Alene*, 117 S. Ct. at 2043).
[181] Antrican v. Carmen, 290 F.3d 178, 189–90 (4th Cir. 2002) (quoting J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1287 (10th Cir. 1999)).
[182] *Id.* at 190.

proposition that sovereign immunity did not bar VOPA's claim because the state had no special state interest in the administration of the advocacy system.[183] He averred that only functions that are "uniquely the state's concern" such as fiscal matters may qualify as special sovereignty interests.[184] Furthermore, the fact that the plaintiff was a state agency did not affect this determination.[185] The issue and not the identity of the party counts. The Court of Appeals, however, found that the "*nature of the party* making the claim" made all the difference because VOPA's identity as a state agency "implicated the state's interest in keeping its internal authority intact."[186] Thus, while control over a partially federally funded welfare program might not have constituted a core sovereign interest, freedom from interference in a legal battle between state agencies was. The identity of the plaintiff as a state agency fundamentally changed the nature of the litigation. Virginia had a special sovereignty interest in settling its own internecine disputes without federal interference. In sum, as shown above, the anti-commandeering principles incorporated into the sovereign immunity doctrine and the special sovereignty interest in keeping state authority intact form the basis of *Reinhard*. The next section considers whether the theory underlying *Reinhard* withstands scrutiny. Moreover, it addresses what will be foremost in the minds of many—the practical consequences of *Reinhard* for administrative law.

ANALYSIS OF THE FOURTH CIRCUIT'S EXTENSION OF THE *ALDEN* AND *COEUR D'ALENE* RATIONALES TO LIMIT *EX PARTE YOUNG*

The *Reinhard* decision clearly presents major implications for both the law of sovereign immunity and administrative law. By making application of *Ex Parte Young* depend in part on the identity of the party bringing suit, the Fourth Circuit Court of Appeals further narrowed a frequent exception to the sovereign immunity bar. This may become the most recent trend in the continuing revival of the limitations inherent in federalism. Moreover, *Reinhard*, for all intents and purposes, closes off a means for state administrative agencies charged with protecting federal rights to secure state compliance with federal law and to fulfill their statutory functions. Private parties may still attempt to enforce federal statutory rights against recalcitrant state administrative agencies. Such enforcement, however, raises the specter of standing problems in cases

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[183] *Reinhard*, 2008 U.S. Dist. LEXIS 54922 at *18–19.
[184] *Id.* at *16–17.
[185] *Id.* at *19.
[186] *Id.* at *27.

like *Reinhard* where the agency arguably did not deprive the individual beneficiary of anything. Moreover, for obvious reasons, the beneficiaries of such federal welfare programs may not have the resources or the wherewithal to bring suit against state agencies. *Alden* did acknowledge that the federal government could bring suit against the states to "'take care that the laws be faithfully executed.'"[187] Therefore, the government can bring suit *in parens patriae* to vindicate the federal rights of such individuals. The federal government, however, has limited resources which it will use sparingly and strategically and will not be able to vindicate the rights of every citizen in every case.[188] *Reinhard*, thus raises the danger that federal regulatory schemes which require the participation and cooperation of the states will go unenforced. Given these potential consequences, two questions become important: whether the Court of Appeals had a sound basis for its holding; and what the actual impact of its holding will be.

A. The Fourth Circuit's Application of the Alden and Coeur d'Alene Principles

The *Reinhard* rationale appears somewhat amorphous and difficult to grasp. The Court of Appeals appeared to exhibit a strong aversion to federal adjudication of an internal struggle among state agencies. The reasons for this aversion, however, seem unclear from the opinion. The Court of Appeals relied largely on the principles announced in *Alden* and stated that allowing the suits to go forward would raise political accountability problems.[189] It becomes necessary, however, to delve beneath such surface rhetoric and determine the state sovereignty interests and principles of dual sovereignty that the Court of Appeals sought to protect. In full view of these essential structural postulates, the *Reinhard* decision constitutes a sound, logical development in the emerging federalism jurisprudence.

Several potential criticisms of *Reinhard* deserve attention. From one perspective, *Reinhard* appears to be a misapplication of the accountability rationale in *Alden*. The *Alden* Court based its holding on the premise that allowing Congress to authorize suits for money damages in state courts pursuant to Article I would endanger political accountability by displacing elected state branches as the policy-

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[187] *Alden*, 527 U.S. at 755–56 (quoting U.S. CONST., ART. II § 3).

[188] William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069, 1086 (2000).

[189] *Reinhard*, 568 F.3d at 120–21.

makers.[190] In so doing, Congress was essentially requiring the states to pay out money by circumventing the political process and opening up the courts to private claims. This is an example of creating federal rights and then requiring the states to do "the dirty work," a practice denounced in the anti-commandeering cases. *Reinhard* applied this same prohibition against interference in state internal processes to a struggle between state administrative agencies in federal court.

The stakes in *Reinhard*, however, were arguably somewhat different. First, because VOPA was proceeding under *Ex Parte Young* and not congressional abrogation, it could not seek retrospective relief for money damages under the *Edelman* holding.[191] Therefore, the allocation of scarce resources so central to the political process arguably was not implicated. Moreover, Congress had not attempted to subject nonconsenting states to suit for this purpose. *Reinhard* was not a situation in which Congress created a costly regulatory scheme and then opened up the state courts to private suits to force states to pay up and thus avoid the wrath of their constituents. On the contrary, the federal government had provided funds to the states for the very purpose of enforcing the regulatory scheme. Therefore, the states would not have had to pay out additional funds and bear the burden of explaining such expenditures to their citizens. In addition, because the suit was brought in federal court and not state court, a state branch would not be forced into service against its own state counterpart. From this perspective, therefore, *Reinhard* misapplied the political accountability principles underlying *Alden*.

These potential criticisms of *Reinhard*, however, ignore some of the more subtle considerations necessary in our system of dual federalism. These considerations demonstrate that *Reinhard* rested on a sound basis. The mere fact that money was not at stake in *Reinhard* does not end concerns as to accountability. Actions for injunctive relief under *Ex Parte Young* may burden state budgets to a comparable degree as actions for money damages.[192] Although requiring the state officials to turn over the records at issue in *Reinhard* may have been relatively inexpensive, other actions against state agencies under *Ex Parte Young* could result in injunctions to institute complex distribution or grievance procedures. Complying with such procedures could require expenditure of additional funds from the state fisc, which would incur the wrath of state citizens. Thus, accountability is not wholly absent in the *Ex Parte*

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[190] *Alden*, 527 U.S. at 750–51.
[191] *Edelman*, 415 U.S. at 664–66.
[192] Marshall & Cowart, *supra* note 187, at 1083.

Young scenario confronted in *Reinhard*. Moreover, as the Court of Appeals suggested, the source of relief for state citizens in the wake of an unpopular decision by a federal court is unclear. Presumably, the citizens would have to lobby Congress to repeal the relevant provisions. As the Court seemed to recognize in *New York* and *Printz*, however, many citizens may direct their dissatisfaction at the state representatives who tax them for compliance with the court's mandate. This potential for confusion of lines of federal and state accountability appeared to be a significant factor underlying the *Reinhard* decision.

While in this case, Congress did not attempt to subject nonconsenting states to suit in federal courts through abrogation, the reality is that it need not do so to expose states to suit. At least one commentator has recognized that even if Congress does not abrogate, individuals can circumvent that bar and still enforce the relevant federal law through an *Ex Parte Young* action.[193] If *Ex Parte Young* constitutes an available exception in the face of an ongoing violation of federal law even when Congress has not expressly abrogated, then the efficacy of the sovereign immunity bar appears subject to significant doubt. The Court of Appeals, therefore, may have thought of *Reinhard* as closing a breach in the sovereign immunity wall, preventing the federal government from forcing the states to shoulder costly burdens by more subtle means than abrogation or waiver. *Reinhard* puts teeth into sovereign immunity.

In addition, the Court of Appeals may have silently been taking a play from Justice Kennedy's plurality decision in *Coeur d'Alene*. As discussed above, in that case, Justice Kennedy posited that interpretation and application of federal law governing state administrative agencies should be left to the states so that states can tailor the law to their own unique needs and interests.[194] In this way, state judiciaries can weave pertinent federal law into their own states' administrative law and mitigate the often constrictive "one-size-fits-all" nature of federal legislation.[195] For this reason, the Fourth Circuit Court of Appeals may have deemed it appropriate to divert such claims into state court where judges would be more in touch with state interests.

Some might argue that this reasoning disregards the compelling federal interests in the promotion of equality which prompt Congress to pass laws like the DDA and the PAIMIA in the first place. An obvious riposte to this argument, however, is that if such federal interests are

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[193] Julie Jensen Nelson, *Ex Parte Young and Congressional Abrogation*, 2003 UTAH L. REV. 949, 951 (2003).

[194] *Coeur d'Alene*, 521 U.S. at 276.

[195] *See id.*

sufficiently compelling to warrant vindication in a federal court, then Congress may accomplish that end by explicitly abrogating sovereign immunity in the statute or securing valid waiver. Indeed, such a requirement would help ensure that only truly compelling federal interests jealously guarded and promoted by Congress according to its Fourteenth Amendment powers would overcome lesser state interests.

The prospect of diverting state administrative agencies' federal causes of action into state courts raises another concern—whether state courts would even be obligated to adjudicate such cases. The fear arises as to whether state agencies could vindicate federal rights at all absent express abrogation or waiver due to state courts' refusal to hear the cases and enforce federal law. As discussed above, *Testa v. Katt* prohibits state courts from discriminating against federal causes of action absent a valid excuse.[196] *Alden* held, however, that Congress lacks power under Article I to compel states to exercise jurisdiction over suits brought against them without their consent.[197] Therefore, the Supreme Court implicitly recognized that *Testa* does not require state courts to adjudicate claims that would implicate the state's sovereign immunity interests.[198] The question thus arises whether a state court must adjudicate a federal claim brought by a state agency against another state agency since such a case arguably violates sovereign immunity. The Fourth Circuit correctly recognized, however, that these fears prove illusory. First, the Supreme Court has held that if a state statute waives sovereign immunity in comparable actions under state law, then it essentially discriminates against the federal cause of action in violation of *Testa*.[199] The Court has emphasized that the Supremacy Clause prohibits state court refusal to enforce of federal law because of disagreement with its content.[200] In *Alden*, the Court suggested that a state court may not "manipulate[] its immunity in systematic fashion to discriminate against federal causes of action."[201] *Alden*, therefore, did not simply eliminate the *Testa* holding whenever a federal cause of action implicates state sovereign immunity. State courts may only refuse to hear federal questions on the basis of a neutral rule of judicial administration such as discouraging frivolous claims.[202] Therefore, state

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196 Testa v. Katt, 330 U.S. 386, 389, 814–15 (1947).
197 Alden v. Maine, 527 U.S. 706, 752 (1999).
198 *See id.* at 752.
199 Howlett v. Rose, 496 U.S. 356, 264–66 (1990).
200 *Id.* at 371.
201 *Alden*, 527 U.S. at 758.
202 *Id.* at 374–75.

courts could not refuse to hear a federal claim by a state agency against another state agency out of mere disagreement with the content or policies embodied in the federal law. Rather, if a state waives sovereign immunity for comparable state law claims, it must do the same for federal claims.

Furthermore, a suit by a state agency against another state agency in state court arguably does not implicate sovereign immunity because the special sovereign interest underlying *Reinhard* is not present. The Fourth Circuit found that federal adjudication of the claim "implicated the state's interest in keeping its internal authority intact."[203] In other words, only the federal court's exercise of jurisdiction over an intramural dispute between state agencies constituted the violation of state sovereign immunity. When a state court adjudicates such a claim, however, the state's internal authority remains intact because the federal court does not referee the contest. Therefore, the Fourth Circuit's assurance that state courts remain open to such suits proves well-founded. Indeed, the both parties in *Reinhard* conceded that VOPA could have brought its claims in state court.[204] The Court of Appeals explicitly confirmed that *Testa* would require state courts to hear such claims.[205]

As a final consideration, some might argue that the Fourth Circuit misperceived the conflict between VOPA and DMHMRAS, CVTC, and CHS. Unlike other administrative agencies, VOPA's primary function is to advocate for third parties—the recipients of mental health services.[206] Therefore, the conflict in *Reinhard* arguably was not one between two state administrative agencies for power and resources. Rather, the conflict arguably was between state government caregivers—DMHRAS, the CVTX, and CHS—and the mental health patients to whom they had a duty under federal law. Under this conception, VOPA was serving as an advocate for the private patients' interests and not for its own institutional interests. Therefore, the internecine political struggle perceived by the Fourth Circuit was illusory, and the contest really boils down to one by private individuals against state agencies for ongoing violations of federal law.[207] This conception fits neatly into the

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[203] *Reinhard*, 568 F.3d at 122.
[204] *Id.* at 123.
[205] *Id.* (citing *Testa*, 330 U.S. at 386, 389, 391, 394).
[206] *See* Va. Code. Ann. § 51.5-39.2.
[207] VOPA actually did advance an argument similar to this in the Fourth Circuit Court of Appeals. It asserted, "'This is not, as the state officials mischaracterize it, simply an intramural contest between state agencies . . . [T]he question is whether the state officials are required to comply with federal law.'" *Reinhard*, 568 F.3d at 121 (citation omitted).

Ex Parte Young paradigm and is far less intrusive of state sovereign immunity.

Such a fine and imperceptible line as whose interests are really at stake, however, would prove extremely difficult to apply in practice. Many, if not most, administrative agencies advocate for or at least, act for the benefit of individual third parties. Moreover, the efficacy with which an administrative agency serves the interests of third parties will often determine that agency's share of resources and power. Therefore, conflicts between state agencies cannot be neatly divided into those for scarce resources and those brought solely to vindicate the rights of third parties. Such a test would prove exceedingly difficult to apply and would undermine the simplicity and predictability of the *Reinhard* rule. Although such a bright line rule may appear to frustrate Congress' intent to protect third party rights, Congress is hardly without recourse.

As discussed further below, Congress may explicitly abrogate state sovereign immunity or secure valid waiver in exchange for federal resources. In addition, the state courts remain available forums for state agencies to vindicate federal rights. In sum, *Reinhard* is simply a natural extension of the prevailing sovereign immunity jurisprudence, aimed at maintaining political accountability, preserving the dignity of the states, and giving states the necessary leeway to adapt federal law to their unique needs. The decision rests on the solid theoretical bases of ensuring political accountability and preserving the sovereign interests of the states. Nevertheless, many doubtless find the potential consequences of *Reinhard*—inability to vindicate federal rights—exceedingly troublesome.

B. The Consequences of the Reinhard Decision

As discussed above, the Court of Appeals was quick to point out that state administrative agencies could bring suit against the states provided Congress either abrogated sovereign immunity by unmistakable language or expressly conditioned receipt of federal resources on waiver of sovereign immunity.[208] Thus, the court appeared almost to reassure VOPA and state agencies similarly situated that all was not lost. As long as Congress includes unmistakable language to the effect that sovereign immunity does not apply, then the wall comes down and the federal

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The Court of Appeals disposes of this argument by finding that "federal law must be applied 'in a manner consistent with the constitutional sovereignty of the States.'" *Id.* (quoting *Alden*, 527 U.S. at 732). Therefore, although it did not address the contention in any great detail, it clearly did not find it persuasive.

[208] *Reinhard*, 568 F.3d at 120–21.

courts are open to suits by state agencies against the states. The decision, therefore, to a significant extent simply punts the ball to Congress. In the waiver context, if Congress passes laws that offer the states federal funds to create particular administrative agencies or perform certain functions, it can easily incorporate language which makes acceptance of the federal gift or gratuity contingent on waiving immunity to suit. Congress can extract such a waiver under any of its Article I powers. Thus, federal courts will always be open to suits against states by state administrative agencies if Congress offers conditional funding in the enabling statute. At least one commentator has predicted that such conditional waiver will increase dramatically in the future precisely because of the narrowing of *Ex Parte Young* and the abrogation power.[209] In addition, although the Supreme Court has determined that the abrogation power under Section 5 is not unlimited, Congress may abrogate state sovereign immunity by statute provided the statute is congruent and proportional to the goals of the Fourteenth Amendment.[210] In *Nevada Department of Human Resources v. Hibbs*, for instance the Court upheld Congressional abrogation of sovereign immunity under the Family and Medical Leave Act.[211] *Reinhard* does little more than place the ball firmly in Congress' court.

In addition, as discussed above, even absent congressional abrogation or waiver, state agencies are not left without recourse for the enforcement of federal rights. Rather, under *Testa*, the Supremacy Clause compels state courts to adjudicate federal questions and enforce federal rights. Sovereign immunity does not afford state courts a valid excuse to refuse jurisdiction because under *Reinhard*, only federal adjudication of a conflict between state agencies violates sovereign immunity. As Justice Kennedy averred in *Coeur d'Alene* and the Fourth Circuit confirmed in *Reinhard*, state courts are perfectly competent to adjudicate such federal questions. In addition, the states have an interest in interpreting and applying federal law when it relates to state administrative law. In such a context, states may effectively resolve conflicts between federal laws and their own, and interpret and apply federal law so as not to frustrate the unique policy goals of the state. In

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[209] *See generally* Michael T. Gibson, *Congressional Authority to Induce Waivers of State Sovereign Immunity: The Conditional Spending Power (and Beyond)*, 29 HASTINGS CONST. L. Q. 439 (2002).

[210] *See* Jesse H. Choper & John C. Yoo, *Who's Afriad of the Eleventh of Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 241–43 (2006).

[211] *Id.* at 241 (citing 538 U.S. 721 (2003)).

sum, the actual impact on state administrative agencies' enforcement of federal regulatory schemes likely will be minimal.

CONCLUSION

Reinhard marks a legal crossroads on a number of levels. On one level it is the crossroads between *Ex Parte Young* and the anti-commandeering principles incorporated into the Supreme Court's sovereign immunity jurisprudence in *Alden*. On another level, it represents the cross-roads between the law of sovereign immunity and administrative law. *Reinhard* narrows the means by which state administrative agencies may secure state compliance with the federal scheme which they discharge. State agencies must resort to other avenues to secure such compliance. Ultimately, however, it will be up to Congress to take responsibility for such enforcement and either abrogate or secure state consent to suit.