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# A Dialogic Defense of Alden

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# A DIALOGIC DEFENSE OF *ALDEN*

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I find myself in the odd position of arguing that *Alden v. Maine*[1] is right, or at least not wrong. Do not misunderstand—I do not like the result in *Alden* any more than the next guy. But to not like the result and to argue that *Alden* is wrong as a matter of constitutional principle are two different matters. I am willing to argue that *Alden* is consistent with, albeit not compelled by, constitutional principle.

Implicit in the last sentence is the assumption that, had *Alden* been decided in accordance with Justice Souter's rather than Justice Kennedy's views, it would still have been consistent with constitutional principle. This assumption may seem impossible to maintain, since *Alden* appears to be a decision about the scope of Article III and the Eleventh Amendment, and the views of Justice Souter and his three fellow dissenters on the scope of the constitutional immunity of states appear flatly at odds with the views of Justice Kennedy's majority. To suggest that both views can be maintained is to say that *Alden* is not a constitutional decision, but rather a prudential decision about the best way to give effect to the fundamental structure of the Constitution. Implicit in this suggestion is the further proposition that, as a prudential decision, *Alden* is subject to modification, or even reversal, at some future point.

This last claim, though giving some faint hope to those who oppose *Alden*, would appear easily refuted by the language of *Alden*, which certainly does not sound prudential in its tone.[2] I agree with this refutation, to a degree. I have no intention of defending the reasoning of either Justice Kennedy or Justice Souter. But I do intend to defend the result, which was within the range of permissible constitutional choice—as was Justice Souter's contrary proposed result.

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1 119 S. Ct. 2240 (1999).

2 *See id.* at 2246 ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts."); *id.* at 2266 (discussing "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts").

Briefly stated, my defense is this: The question posed in *Alden*, *Seminole Tribe*,[3] and other Eleventh Amendment cases is a part of the three fundamental structural questions that underlie the range of subjects that are loosely grouped within the subject area that we call "Federal Courts": first, the proper relationship between state and federal courts; second, the proper relationship between these courts and the legislative and executive branches of government (at both the state and the federal levels); and third, the proper relationship between the Supreme Court and the lower federal courts. In recent years, the views on these questions have tended to divide into two camps.[4] The first is the "nationalist" camp, which sees a strong (and, with respect to the enforcement of federal rights, primary) role for federal courts in relation to the state courts and the state and federal legislative and executive branches.[5] The second is the "federalist" camp, which seeks to preserve both a stronger role for state courts in the enforcement of federal rights and the prerogatives of the state executive and legislative branches as against federal authority.[6] The problem with both camps is that, although they can be powerful analytical and narrative tools, they fail at the level of description; there are cases and doctrines that seem inconsistent with the theories.[7] A theory that is inconsistent

3 Seminole Tribe v. Florida, 517 U.S. 44 (1996).

4 For a development of this dichotomy, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988).

5 This camp is also consistent with, and often a part of, the broader claim for a strong role for the national government (Congress, the Presidency, and the federal courts) in matters otherwise subject to regulation by state governments. *Cf.* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Congress's Commerce Clause power to enact the Civil Rights Act of 1964 that prevented private individuals from discriminating on the basis of race in the provision of public accommodations); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress's Commerce Clause power to enact the National Labor Relations Act and delegate responsibility for the Act's enforcement to the NLRB).

6 This camp is consistent with, and often a part of, the broader claim for the preservation of the sovereignty, prerogatives, and dignity of the various branches of the state government (the state courts, the legislature, and the governor) in matters arguably subject to regulation by the national government. *Cf.* Printz v. United States, 521 U.S. 898 (1997) (holding that Congress cannot compel state executive to perform functions mandated by federal legislation); United States v. Lopez, 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority); New York v. United States, 505 U.S. 144 (1992) (holding that Congress cannot seek to compel states to enact legislation concerning disposal of hazardous waste); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts must apply state substantive law in all diversity cases).

7 For some of the cases and doctrines, see Fallon, *supra* note 4, at 1164–1224.

with legal fact cannot constitute an adequate description of the field of "Federal Courts."

As many law-and-economic scholars have contended, the process of adequate theoretical description can be an essential first step in the process of understanding law.[8] Like these scholars, I begin with an orientation toward description—description that can account for such seemingly irreconcilable decisions as *Alden*, *Seminole Tribe*, and *Union Gas*.[9] Obviously, standard nationalist and federalist accounts cannot do this; their internal structures require that they pronounce one or more of these decisions "wrong."

The only adequate descriptive theory of which I am aware is a dialogic one. This theory contends, perhaps counterintuitively, that the fundamental constitutional role of each court system is to engage the other system in a dialogue about the extent and shape of the other system's rights, obligations, and entitlements.[10] Thus, state courts must be constitutionally guaranteed the opportunity to engage in a discussion about the scope of *federal* rights, and the federal courts must comparably be given the right to engage in a discussion about *state* rights. Of course, this notion of a sustained dialogue across the state-federal divide has a number of important limitations. Most of them lie beyond the boundaries of this present Essay. Nonetheless, one limitation that is germane to the *Alden* problem is the following: A court (whether state or federal) need not participate in each and every case raising a right (whether federal or state) created by the other system; it is enough that the court has the opportunity to comment over a range of cases on the nature and extent of the right.

Applied to *Alden*, the state courts generally have the opportunity to participate in a dialogue with the federal system on the scope and shape of the Federal Labor Standards Act (FLSA), the statute at issue in *Alden*.[11] Application of the FLSA to the State of Maine raised no

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8 For some law-and-economics efforts that claim to be descriptive rather than normative, see, WILLIAM A. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 19–24 (1987), RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 2.2 (4th ed. 1992), and Mark F. Grady, *A New Positive Economic Theory of Negligence*, 92 YALE L.J. 799 (1983). This effort to understand "law as it is" grows out of one of the many branches of legal realism. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824 (1935); Brian Leiter, *Legal Realism*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261 (Dennis Patterson ed., 1996).

9 Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

10 For simplicity's sake, I will refer to the full package of rights, obligations, entitlements, and interests with which a court might concern itself as "rights."

11 Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–94 (1994 & Supp. III 1997)).

peculiar issues not presented by cases involving private employers in Maine; hence, as long as Maine courts could engage in a dialogue about the scope and extent of the FLSA in other cases, there was no constitutional reason to *require* that Maine state courts be held open to discuss the scope and extent of the FLSA in cases involving the State of Maine as an employer. Whether to *allow* Maine state courts to do so was essentially a matter of prudential judgment, on which reasonable minds can differ. My own judgment is that the majority made a wrong call on this prudential decision, but it made a permissible constitutional choice.

This argument hinges on three propositions: (1) the value of engaging in descriptive theoretical work, (2) the exposition and descriptive accuracy of a dialogic theory, and (3) the successful application of the theory to *Alden*. Each of the three propositions deserves a better development and defense than I can provide within the limitations of this Essay. I hope to return to the task soon. For now, let me sketch the main lines of the argument.

## I. THE OBLIGATION OF ADEQUATE DESCRIPTION

No legal system in history has produced a scholarship with the richness, breadth, and depth of the American system. For the most part, the "best" scholarship in our system is analytical, self-referent, and normative: it develops practical legal consequences (the "oughts") from unprovable yet uncontestable first principles. The great values of this scholarship are its holding forth of certain ideals—the ideals represented by the uncontestable first premises—and its spinning out of a coherent legal system developed from these ideals. The great deficiency of this scholarship is its inability to account for "wrong" decisions—decisions that violate the coherence of the system or deviate irreconcilably from first principles.[12] Within normative scholarship, there are three moves available to address "wrong" decisions: treat the decision as wrong and maintain the consistency of the original system, find a way to explain the result from within the logic and language of the original system, or abandon the system.[13]

My own intellectual predilictions make me skeptical of normative theory, at least when it seeks to maintain a system in the face of the contrary evidence of the real world. No theory that conflicts with the facts of the real world—here, the facts of actual legal decisions—is

12 By "decisions" I mean not only decisions of courts, but also decisions of other entities charged with establishing legal rules.

13 A fourth choice—to adjust the system to account for the new decision—is a special case of abandoning the original system.

adequate.[14] And as useful as inadequate theories can be as a spur to imagination and insight, there remains the fatal objection: they are not "true," in the sense that they do not correspond to the actual legal world.

Lost in the normativity of most legal scholarship is the value of adequate theoretical description. Descriptive scholarship seeks, obviously, to describe the actual state of legal rules (the "is"). Description alone, however, is uninteresting; *Alden* could be described as a "United State Supreme Court decision," or as a "decision on the scope of Article III and the Eleventh Amendment," or even as a "decision of a court filed on June 23, 1999." None of these descriptions provides any framework for deeper understanding of legally relevant categories. Description must therefore be joined with theory. A description must be a powerful source of ideas. Descriptive scholarship must adumbrate consequences of importance for the understanding and development of legal rules; it must, in other words, have normative aspirations. None of the descriptions developed above adds much to our understanding of *Alden*, or anything to the development of legal rules (the "ought").

Obviously, a description that is inaccurate is of little aid to understanding or development.[15] Indeed, unlike normative scholarship, which is first concerned with the "ought," descriptive scholarship, which is first concerned with the "is," necessarily collapses when it fails adequately to capture and explain legal decisions that fairly lie within the compass of the theory. Thus, any adequate theoretical description is subject to change as new legal decisions are generated. Sooner or later, some actual legal decision will seem to conflict with the theory. At that point, only two moves are available to the descriptive scholar: explain the decision within the logic and language of the descriptive account, or abandon the system.[16] The move of declaring the new legal decision "wrong" and maintaining the correctness of the old paradigm is not available.

Adequate theoretical description is a difficult task, not as often attempted in law as in other disciplines, such as the sciences, with

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14 *See* ALFRED NORTH WHITEHEAD, PROCESS AND REALITY 3 (David Ray Griffin & Donald W. Sherburn eds., 1978).

15 It is useful to the extent that it serves as a source of ideas about legal decisions, just as normative scholarship does.

16 Abandonment includes the possibility of revising or broadening the description in a way that now makes it adequate. *See supra* note 13. Of course, care must be taken not to so broaden the description to the point that the description loses any normative or predictive value.

stronger traditions of accounting for physical data.[17] The method requires only two things: an aptitude for simplification and a willingness to stand apart from the usual normative debates in search of a metastructure within which the normative debates can not only be tolerated, but also flourish.

The standard strands in "Federal Courts" scholarship—nationalism and federalism—are normative theories, both in the sense that they proceed from first principles of constitutional structure and in the sense that, sooner or later, some case or doctrine can be found to contradict the theory. My guess is that, for virtually all those inclined to nationalist outlooks and even for many inclined to federalist outlooks, *Alden* cannot be explained from within the confines of the theory that they have developed. An available move, especially for those whose theories are most profoundly shaken by *Alden*, is therefore to pronounce the case "wrong." Those of a strong federalist bent might find vindication in *Alden*, though these strong theories cannot adequately explain other decisions—perhaps including *Ex Parte Young*,[18] *Monroe v. Pape*,[19] *Fitzpatrick v. Bitzer*,[20] *Brown v. Allen*,[21] *Fay v. Noia*,[22] *General Oil Co. v. Crain*,[23] or *Tarble's Case*[24]—that suggest a broader role for federal courts and federal law in relation to the states.

My interest, as you might gather, is in attempting to craft an adequate theoretical description of "Federal Courts."[25] Therefore,

17 *Cf.* Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1463 (1987) ("Law professors need not be lexicographers in putting together materials for course study, although providing definition to an area of law represents perhaps the highest form of that enterprise as scholarship."); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (attempting a descriptive dialogic theory of judicial review).

18 209 U.S. 123 (1908).

19 365 U.S. 167 (1961).

20 427 U.S. 445 (1976).

21 344 U.S. 443 (1953).

22 372 U.S. 391 (1963). *Fay*, of course, was first limited and then largely overruled by *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Coleman v. Thompson*, 501 U.S. 722 (1991). *Cf.* 28 U.S.C. § 2254(e)(2) (Supp. III 1998) (describing circumstances under which an evidentiary hearing should be held when a petitioner fails to develop the record in his or her state criminal trial). The fact that *Fay* was overrruled may blunt the force of the federalist critique, but one cannot avoid the fact that *Fay* must still be accounted for in any description of the permissible reach of "Federal Courts."

23 209 U.S. 211 (1908).

24 80 U.S. (13 Wall.) 397 (1872).

25 In this Essay, I will assume that "Federal Courts" is a definable package of legal decisions that is an appropriate subject of adequate theoretical description. How such packages are determined is, in and of itself, a difficult question facing the descriptive effort.

although my own sympathies lie unapologetically in the nationalist direction, I do not have the luxury of declaring *Alden* wrong. Any theoretical description of "Federal Courts" must adequately account for *Alden* or else be abandoned. The dialogic theory provides an adequate account.

## II. DIALOGUE AND SOME OF ITS LIMITS

I am not the first to propose a dialogic understanding of the relationship between state and federal courts and between the federal courts and other branches of state and federal government. Robert Cover has argued that the fostering of dialogue justifies the federal courts' diversity jurisdiction,[26] Martin Redish has argued that the relationship between the state and federal courts is best understood as "interactive,"[27] and Barry Friedman has argued that federal courts should and do engage in a dialogue with Congress over the proper scope of federal rights.[28] The theories of Cover and Redish contend that the use of one court system to decide cases arising under the law of another system advances important values,[29] while Friedman's theory focuses on the value of dialogue among the various branches of the national government. In this regard, my dialogic theory follows the theories of Cover and Redish, and expands upon them.

The fundamental point of the dialogic theory is that an essential constitutional function of federal courts is to engage state courts in a dialogue regarding the scope of *state-created* rights, while an essential constitutional function of state courts is to engage federal courts in a

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26 *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); *cf.* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE. L.J. 1035, 1036 (1977) (arguing that, in habeas cases, the Warren Court "chose redundancy and indirection as its remedial strategy" and suggesting that "[t]his strategy structured a dialogue on the future of constitutional requirements in criminal law in which state and federal courts were required both to speak and to listen as equals").

27 Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985).

28 *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990); *cf.* Friedman, *supra* note 17 (developing a dialogic theory of judicial review).

29 Cover identifies these values as "interest" (the ability of an alternate system to avoid self-interested judicial behavior in the first forum), "ideology" (the ability of another system to challenge, or conversely to affirm, the established ethos or ideology of the first system's social order), and "innovation" (the ability of another system to help provide a fresh set of ideas for the legal rules of a system). *See* Cover, *supra* note 26, at 658–80.

dialogue about the scope of *federally created* rights.[30] This intuition is one with which neither nationalists nor federalist can accede. Nationalists—who typically regard the creation and protection of federal rights as the *raison d'etre* of federal courts[31]—might accept the notion that federal courts should determine questions of state law, but would be unwilling to give state courts this central a role with regard to federal rights. Conversely, federalists—who typically regard state courts as perfectly adequate protectors of federal rights but are suspicious of federal involvement in matters of state law[32]—might be willing to embrace state courts' engagement with federal law, but would be unwilling to concede so central a role to the federal courts in the exposition of state law. The dialogic theory mediates between the two standard attitudes in "Federal Courts" scholarship, though not in a fashion that either side might find helpful.[33]

A dialogic theory has necessary limits that fall, loosely, into three categories. The first set of limits concerns the needs associated with any well-functioning adjudicatory system. For instance, predictability and certainty impose ultimate limits on dialogue, and require an ultimate decisionmaker on matters of both state and federal law. Not unreasonably (though not necessarily), the ultimate arbiter of federal

30 Also implicit in the nature of dialogue, of course, is the ability of each court system to address itself to the exposition and development of rights arising from within its own system; thus, federal courts must have opportunity to discuss questions of federal rights, and state courts must have the opportunity to discuss questions of state rights.

31 *Cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (arguing for Supreme Court review of state decisions construing federal law because "[t]he constitution has presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice" and because of "the importance, and even necessity of *uniformity* of decisions throughout the whole United States").

32 *Cf.* Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) ("Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States.").

33 *Cf.* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 108 (1995) (underscoring "the strength of federalism as *itself* a dialogue about government" and arguing that neither nationalist nor federalist views are "rhetorically or normatively complete without the other"); Fallon, *supra* note 4, at 1224–51 (arguing that "Federal Courts" jurisprudence should attempt to mediate between the nationalist and federalist poles).

matters would be the United States Supreme Court,[34] and the ultimate arbiter of state matters would be a state's court of last resort.[35]

A second set of constraints on the theory is essentially efficiency-based. For instance, in order to obtain the benefits of intersystem dialogue, it is not necessary that such dialogue occur in each and every case. Certain barriers that operate in a way not systematically discriminatory to the ultimate obligation of dialogue in a particular category of right can be raised. It is, for instance, an entirely defensible (though not constitutionally compelled) position to raise barriers that make state courts the primary expositors of state rights and federal courts the primary expositors of federal rights. Indeed, in order that true intersystem dialogue can occur, it is essential that certain barriers be established; otherwise, hypothetically, federal courts could end up deciding all questions of state law or state courts all questions of federal law.[36] Thus, neutral barriers such as complete diversity[37] or a minimum amount in controversy[38] should be anticipated.

A third set of limits derives from constitutional concerns such as separation of powers and federalism. As with the last type of limitation, this limitation must generally operate in a way that does not systematically discriminate against the obligation of dialogue with regard to certain categories of right. For instance, in certain areas Congress might regard the uniform exposition of federal law to be so critical that it removes the possibility of dialogue. Thus, the development of certain federal rights might be exclusively entrusted to the jurisdiction

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34 *See Martin*, 14 U.S. (1 Wheat.) at 348.

35 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1935); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875). The problem of interwoven state and federal rights presents a difficult problem beyond the scope of the present Essay. *Cf.* Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920) (holding that when state and federal rights are interwoven and the state law ground of decision obviates the need to decide the federal question, the Supreme Court can examine a state court's determination of the state law ground to ensure that it has "fair or substantial support").

36 This last statement assumes that, pursuant to its Article III, Section 1 powers to "ordain and establish" lower federal courts and its Article III, Section 2 powers to create "exceptions and regulations" to the Supreme Court's appellate jurisdiction, Congress could remove all federal jurisdiction over claims invoking federal rights. *See* U.S. CONST. art. III, § 1; U.S. CONST. art. III, § 2, cl. 2. Whether Congress enjoys such power is unclear. *See Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 370–73 (4th ed. 1996).

37 *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

38 *See* 28 U.S.C. § 1332(a) (1994 & Supp. III 1997) (establishing a "more than $75,000" amount in controversy requirement in diversity cases).

of federal courts or adjudicatory agencies.[39] Similarly, federalist concerns for the uniformity of state law in certain critical areas might lead to the exclusive entrustment of certain state or federal claims to state courts or adjudicatory agencies.[40] Such exclusive arrangements should be narrowly construed,[41] especially when concerns for federalism rather than separation of powers are at stake.[42]

I am unable within the confines of this short Essay to develop the political and theoretical arguments for the superiority of a dialogic theory, or to defend it against criticisms that it is historically, politically, or theoretically inferior.[43] But such arguments are, to some extent, beside the point. The main issue for me, at least at the present time, is that the theory adequately describes the subject of "Federal Courts." This Section of the Essay was designed to do no more than suggest that a dialogic theory might in fact constitute an adequate explanation of the broad array of the issues of concern to "Federal Courts." The theory cannot be adequate, however, unless it can explain *Alden*. To that task I now turn.

## III. EXPLAINING *ALDEN*

### A. *The Basic Account*

*Alden* held that Congress could not require that state courts be held open to claims that a state has violated the Fair Labor Standards Act. The FLSA is a statute of general applicability; private employers

39 *See, e.g.*, 28 U.S.C. §§ 1333, 1334, 1338 (1994) (providing exclusive federal jurisdiction in admiralty, bankruptcy, and patent cases); General Inv. Co. v. Lake Shore & Mich. S. R.R. Co., 260 U.S. 261 (1922) (holding that federal jurisdiction in Sherman Act and Clayton Act civil antitrust actions is exclusive).

40 *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943) (requiring federal abstention in cases raising issues within purview of specialized state adjudicatory structure). Of course, in cases in which *Burford* abstention is invoked, the Supreme Court remains available to hear, within its usual rules for review of state court judgments, any claims that the state court improperly decided the question of federal right.

41 *See* Tafflin v. Levitt, 493 U.S. 455 (1990) (describing presumption of concurrent state and federal jurisdiction); New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (tightening scope of *Burford* abstention).

42 This last proposition deserves greater defense than I can give it here.

43 On the question of the historical validity of such a theory, see Redish, *supra* note 27, at 882–88. For an ever-so-brief argument on the political and theoretical superiority of the theory, see *infra* text accompanying note 78. For criticisms of other dialogic theories, see Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1306–14 (1999) (critiquing dialogic understanding of judicial review in rulemaking context), and Michael Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465 (1991) (critiquing dialogic understanding of federal courts' role in establishing federal jurisdiction).

as well as states are subject to its terms.[44] Since the FLSA was a statute enacted pursuant to Congress's Commerce Clause powers, the holding of *Alden* can be generalized as follows: Congress cannot abrogate a state's immunity from suit in its own courts when it legislates pursuant to its Article I powers. Taken together with the Court's prior decision in *Seminole Tribe*, which held that Congress cannot abrogate a state's immunity from suit in federal court when it legislates pursuant to the Indian Commerce Clause (or, by reasonable extension, pursuant to any of its other Article I powers),[45] *Alden* effectively makes a state immune from suit in *any* court for claims for damages that are premised on rights created by Congress under Article I. Both *Alden* and *Seminole Tribe* made clear, however, that *Fitzpatrick v. Bitzer*,[46] which held that Congress could abrogate a state's sovereign immunity from suit in federal court when it enacted legislation pursuant to Section 5 of the Fourteenth Amendment, remained good law.[47] The net effect of these three cases (*Seminole Tribe*, *Alden*, and *Fitzpatrick*) is to preclude congressional abrogation of a state's immunity for damages actions in any court (state or federal) when it legislates pursuant to its Article I

44 *See* 29 U.S.C. §§ 203(d), 216(b) (1994). Although *Alden* addresses the issue in only cursory form, *see* Alden v. Maine, 119 S. Ct. 2240, 2246 (1999) (noting that Alden's lawsuit "calls into question the constitutionality of the provisions of the FLSA *purporting to* authorize private actions against States in their own courts without regard for consent") (emphasis added), 29 U.S.C. §§ 203(b), 203(d), 203(e), 203(x), and 216(b) (1994 & Supp. III 1997) appear to evince a sufficiently clear congressional statement to subject states to suit for violations of the FLSA. Given the richness of the "unmistakably clear statement" analysis in other cases, *see, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 55–57 (1996); Pennsylvania v. Union Gas Co., 491 U.S. 1, 7–13 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985), the absence of that analysis in *Alden* is surprising.

45 *See Seminole Tribe*, 517 U.S. at 62 (noting that the Indian Commerce Clause "accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause"); *id.* at 73 ("Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

46 427 U.S. 445 (1976).

47 *See Alden*, 119 S. Ct. at 2267; *Seminole Tribe*, 517 U.S. at 59; *see also* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219, 2224 (1999). The Court has never held whether Section 5 of the 14th Amendment permits Congress to abrogate the state's immunity from suit in its own courts. *Cf.* Howlett v. Rose, 496 U.S. 356 (1990) (requiring state courts to entertain actions against local school board under § 1983, which was passed pursuant to Section 5, when state courts were open to similar § 1983 and state-law claims); General Oil Co. v. Crain, 209 U.S. 211 (1908) (requiring state courts to entertain injunctive suits against state officials that violate federal rights). On the scope of Congress's power under Section 5, see *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000), *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999), and *City of Boerne v. Flores*, 521 U.S. 507 (1997).

powers, but to permit abrogation in (at least) federal court when Congress legislates pursuant to Section 5 of the Fourteenth Amendment.

*Seminole Tribe* was a horrible blow to nationalists who view the essential function of lower federal courts to be the protection of federal rights. *Alden* rubbed salt in the wound, for it removed even the backstop of state courts (whose decision on federal law could have ultimately been reviewed by the Supreme Court).[48] *Alden's* removal of the backstop also poses a problem for those federalists who have contended that, in the absence of federal court enforcement of federal rights, state courts were constitutionally compelled to enforce these rights.[49]

The inability of these theories to explain the outcome in *Alden* poses insurmountable difficulties for their adequacy. The dialogic theory faces no comparable difficulty. Since the FLSA is a federal right, the dialogic theory posits that state courts should be able to participate in a dialogue with federal courts about the shape of the FLSA. *Alden* does not deprive state courts of that essential obligation. State courts are still able—and here is the critical point—to engage in a dialogue with the federal courts about the FLSA, since state courts are still open to FLSA cases involving *private* employers. State courts just may not adjudicate FLSA cases involving an unconsenting *state* as an employer. Unless FLSA cases against states present a unique contextual setting or unique interpretative questions that cannot be presented in cases involving private employers—and there are no indications in *Alden* that this was true—there is no constitutional reason to require that state courts entertain FLSA actions against the states.

This last conclusion has two limitations, one implicit and one explicit. The implicit limitation is that the Court has a principled reason to exclude state courts from adjudicating state-as-employer FLSA claims. I have posited three such categories of neutral principled reasons: reasons inhering in the nature of adjudication, efficiency reasons, and reasons that advance or are consistent with the constitutional structure.[50] *Alden* does not fit within the first category, and it appears not to fit within the second.[51] It does, however, fit

48 *See* 28 U.S.C. § 1257 (1994); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

49 *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) ("In the scheme of the Constitution, [state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.").

50 *See supra* notes 34–42 and accompanying text.

51 It is evident that *Alden* is not compelled by such adjudicative norms as accuracy, certainty, or finality. Since the combined effect of *Seminole Tribe* and *Alden* appears to be the elimination of *all* FLSA cases against states, *Alden* also cannot be easily ex-

within the third. Concerns for proper state-federal relations permeate the Constitution and the cases interpreting it. The Court *could* (not *must*, or even *should*, but *could*) legitimately believe that this relational concern was given best effect by excluding state-as-employer FLSA cases from the ambit of the state-federal dialogue about the nature and interpretation of the FLSA. Of course, the Court *could* also have found that the relational concerns were not sufficiently strong to justify the exclusion of these claims. The arguments about how this question should have been answered—properly understood as arguments of policy, comity, and restraint rather than as arguments of constitutional compulsion[52]—are developed in *Alden*'s majority and dissenting opinions. Seen in this light, the outcome in *Alden* rests on a prudential judgment of state-federal relations, not on an absolute constitutional command.

A second, express limitation on my account of *Alden* is that a state-as-employer FLSA claim presents no unique interpretive contexts—in other words, the federal right was not intended to apply differently to states than to private citizens. Federal rights that apply to states as states (rather than to states as participants in conduct also undertaken by private persons) are different. Here the requisite dialogue concerning the scope of federal rights is impossible unless the states (or at least their officials or instrumentalities) are subject to suit. An immunity of a state from damages actions in state and federal court could no longer be constitutionally maintained.

The dialogic theory is therefore consistent with—albeit on terms different than the Court's mindless historical assertion that the Fourteenth Amendment came later than the Eleventh Amendment, which came later than Article I[53]—the Court's simultaneous unwillingness to provide Congress with abrogation powers under Article I while preserving Congress's abrogation powers in Section 5 of the Fourteenth Amendment and the result in *Fitzpatrick v. Bitzer*. The Fourteenth Amendment serves as the conduit through which most constitutional

plained on grounds of an efficient allocation of scarce federal resources. The efficiency argument does not usually reach so far as to allow the outright elimination, rather than the partial reallocation, of entire categories of claims from federal or state court jurisdiction.

52 As noted earlier, a dialogic theory can explain the outcome in *Alden* but not the reasoning, which framed the issue in constitutional terms. *See supra* note 2 and accompanying text. *Cf.* David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 62 (1984) (suggesting that "flexible doctrines of construction, comity, and constraint" could do the work of the present 11th Amendment analysis).

53 *See* Alden v. Maine, 119 S. Ct. 2240, 2267 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).

obligations are brought home against states acting in a governmental capacity.[54] Since the discussion and development of these governmental obligations is, by hypothesis, a central function of federal *and* state courts, and since these obligations have no precise analog in the obligations of private citizens, the dialogic theory suggests that there must be avenues created through which the necessary discussion and development of these obligations can occur.

The possible avenues are many, and include allowing the individuals aggrieved by the state's violation of its obligation to assert the violation as a defense against state action taken against the individual,[55] the judicial creation of direct remedies for violation,[56] and legislation enacted pursuant to Section 5 to vindicate the individual's right.[57] As long as adequate discussion and development of the right is possible, no particular avenue is necessarily required—though congressional action to establish a particular remedial scheme should be, in accordance with usual principles of constitutional democracy, given appropriate deference by the judicial branch. Hence, the outcome in *Fitzpatrick v. Bitzer*, which upholds § 1983 against a challenge that it violates the Eleventh Amendment, is correct—and may indeed be (from within the dialogic theory) the only case in recent Eleventh Amendment jurisprudence that is constitutionally compelled.[58]

Conversely, however, when Congress enacts legislation pursuant to Article I, it does not impose obligations against states in their governmental capacity; rather, the obligations are ones that can be (and are) imposed on private citizens as well. There is no reason inherent

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54 There are others. For instance, the Supremacy Clause imposes certain obligations on state courts. *See* U.S. CONST. art. VI, cl. 2; *see also infra* notes 59, 64 and accompanying text. Other post-11th Amendment delegations of authority to Congress to "enforce" the constitutional provisions at stake include Section 2 of the 13th Amendment, Section 2 of the 15th Amendment, Section 2 of the 19th Amendment, Section 2 of the 23rd Amendment, and Section 2 of the 26th Amendment. Presumably, on the Court's present historical analysis, Congress could also abrogate the immunity of states when it properly enacts legislation pursuant to one of these powers.

55 *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).

56 *Cf.* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (creating direct damages remedy against federal officials for violation of Fourth Amendment); *Ex Parte* Young, 209 U.S. 123 (1908) (creating direct injunctive remedy against state officials for violation of 14th Amendment).

57 *See supra* note 46 and accompanying text. I will not debate the scope of Section 5 here, except to say that Section 5 must be understood against a dialogic background.

58 I hedge a bit in making this claim because I do not mean to suggest that § 1983 is itself constitutionally compelled; in the absence of § 1983, other constitutionally adequate avenues for discussion of the relevant federal rights might still exist.

to the dialogic process that such obligations must be enforced against the states in the courts.

Moreover, the dialogic theory rather easily leaps an adequacy hurdle that more traditional nationalist and federalist theories find more challenging: the reconciliation of *Testa v. Katt*,[59] *Reich v. Collins*,[60] and *Alden*. *Testa* (read broadly) held that state courts cannot refuse to hear federal claims over which Congress has given them jurisdiction; *Reich* (read broadly) held that state courts are constitutionally required to hold themselves open to provide a repayment remedy for taxpayers who pay a state tax that violates federal law (which may have as its source an Article I enactment);[61] and *Alden* held that state courts cannot be compelled to hold themselves open to monetary claims premised on violations by states of federal laws enacted pursuant to Article I. *Alden* plausibly distinguished *Testa* by noting that *Testa* involved a case against a private citizen and not a state, so that nothing in *Testa* requires that state courts be held open to federal claims against states.[62] Fair enough. But the reconciliation of the *Reich* line of cases with *Alden* seems far more problematic for nearly everyone: nationalists that view *Reich* as standing for a broad principle of the supremacy of federal rights, federalists that view state courts as the ultimate backstop for the enforcement of federal rights, and federalists that believe that states retain an absolute immunity from suit.

A dialogic theory finds these cases more easily reconcilable. To begin with the harder *Reich-Alden* "conflict," the critical point is that taxation is a function that involves the state *qua* state; unlike the obli-

59 330 U.S. 386 (1947).

60 513 U.S. 106 (1994).

61 In *Reich*, the claim was that the state tax scheme violated the statutorily codified intergovernmental tax immunity doctrine. *See Reich*, 513 U.S. at 108; Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 813 (1989) (recognizing the doctrine has an underlying constitutional basis). In *Ward*, another case seemingly requiring a state court remedy to recoup state taxes paid in violation of the laws and Constitution of the United States, the underlying source of the right not to be taxed was a treaty ratified by Congress pursuant to Article I. *See* Ward v. Board of County Comm'rs, 253 U.S. 17, 19 (1920); *see also* McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990) (holding that the Due Process Clause requires meaningful opportunity to secure postpayment relief when State denied prepayment relief, tax is collected in violation of the dormant Commerce Clause, and State had waived immunity from suit in state court for refund actions, suggesting that a state could in the alternative avoid allegations of discrimination by collecting the tax from taxpayers' competitors).

62 *See* Alden 119 S. Ct. at 2240, 2261, 2265. I am merely repeating the distinction suggested (though never fully articulated) by the Court. *See id.* at 2259–60 (distinguishing *Howlett*, a decision in the *Testa* line, on similar grounds). Whether the spirit of *Testa* supports this distinction is another matter.

gations at stake in *Alden*, the nature and scope of the federal limitations on a state's taxing scheme cannot be adequately developed through litigation between private citizens. Hence, the only way in which the state and federal courts can engage in a dialogue about the scope of the federal right allegedly violated by the state's taxing scheme is for state courts to hear, on a prepayment or postpayment basis, the claims of taxpayers against the state.[63] The same was not true of FLSA claims, in which the dialogue can continue in private employer suits.

Accounting for the "conflict" between *Testa* and *Alden* is also not difficult, though the explanation differs from the Court's. The critical point is the dialogic preference for state court involvement in the shaping of the scope of federal legislation. State courts cannot decline their constitutional obligation to assist in the process of shaping federal rights, except in the three situations discussed earlier.[64] As in *Alden*, neither the adjudicatory nor the efficiency exception pertained in *Testa*. As in *Alden*, the third exception—structural concerns of separation of powers and federalism—did pertain. Unlike *Alden*, however, the acceptance of the state's argument in *Testa* would have meant that state courts could have shirked entirely their constitutional obligation to participate in the shaping of the scope of federal legislation; since the structural exception cannot swallow the constitutional obligation of intersystem dialogue, *Testa* was clearly correct. In *Alden*, on the other hand, acceptance of the state's argument still left open state court adjudication of FLSA rights in cases involving private employers. Thus, *Alden* was within the bounds of its permissible judgment to hold as it did.

### *B. Three Drawbacks*

This dialogic account of *Alden* has three drawbacks, one largely hypothetical and two quite pressing and real. The hypothetical drawback is this: Suppose that Congress, pursuant to its Article I powers, were to have enacted the FLSA only against the states; in other words, the FLSA did not apply to private employers. In this situation, the objection would run, state and federal courts could engage in a dia-

63 But for the operation of the Tax Injunction Act, 28 U.S.C. § 1341 (1994), federal courts could also hear such claims. The federal end of the dialogic bargain can, however, be upheld by Supreme Court review of the final decisions of a state's court of last resort.

64 *See supra* notes 34–42 and accompanying text. The "valid excuse" doctrine, which permits state courts to refuse to entertain federal causes of action when there exists a non-discriminatory and valid reason for not doing so, *see* Howlett v. Rose, 496 U.S. 356, 369–75 (1990), easily fits within the three exceptions of the dialogic theory.

logue about the scope of the FLSA only in lawsuits against the states. Nothing in *Alden* suggests that such lawsuits would be countenanced. Hence, the dialogic theory stumbles.

My response to this objection is threefold. First, I think the objection is highly speculative. Congress is unlikely to pass such legislation, nor is the Court's response to such a hypothetical statute, which is far different than the FLSA, entirely clear. Second, even if the Court would not uphold the statute insofar as state employees could sue, other mechanisms through which such dialogue might occur—for instance, suits by the United States against the offending state and injunctive suits or damages actions against state officials—would still exist.[65] Finally, on the assumption that Congress refused to provide such mechanisms, that the Court refused to imply them, and that the hypothetical statute were constitutional, then the dialogic theory as presently described would indeed encounter a fatal descriptive roadblock. Such is the ultimate fate of all descriptive theories.[66] But I am not quite ready to write the theory's obituary because of this hypothetical statute. It strikes me that such a statute, which puts states at a disadvantage as an employer in relation to private industry, would likely be unconstitutional; Congress cannot discriminate against states by creating federal rights that (a) do not affect the state *qua* state and (b) apply to the states but not to private participants engaged in similar conduct. One (though not the only) way to block the enforcement of such a statute is to permit a state to retain its immunity from suit against discriminatory legislation. This much of *Seminole Tribe* and *Alden*—a far narrower constitutional slice than these cases suggest—may therefore be constitutionally compelled.

A second, more pressing drawback is the "no right without a remedy" objection. The effect of *Seminole Tribe* and *Alden* is, of course, to deny the most effective remedy (money) to victims of a state's past violations of federal rights. The forward-looking *Ex parte Young* remedy is a scant remedy—indeed, no remedy at all—in cases in which the unlawful conduct or harmful consequences are no longer ongo-

65 The Court made clear in dicta in *Seminole Tribe* and *Alden* that these other methods of enforcement of obligations against states are not subject to the 11th Amendment. *See* Seminole Tribe v. Florida, 517 U.S. 44, 71 n.14 (1996); *id.* at 73 n.16; *Alden*, 119 S. Ct. at 2267–68; *cf.* United States v. Vermont Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999) (raising issue whether *qui tam* actions brought against states on behalf of the United States by private parties violate the 11th Amendment).

66 *See* ALFRED NORTH WHITEHEAD, ADVENTURES OF IDEAS 203 (1933) ("Each method of limited understanding is at length exhausted."); *see also supra* note 16 and accompanying text.

ing; and the increasing instability of the *Ex parte Young* injunction[67] makes it a less than certain remedy even when the violation is ongoing. The remedy of enforcement by the federal government is as uncertain as the political pressures placed on, and the workload of, government lawyers.[68] Damages actions against individual state violators are meaningless if the violators are insolvent, and may not be available in certain cases involving violations of federal statute.[69] Even if the principle is not implicit in the very nature of adjudication,[70] the "no right without a remedy" principle is ingrained in the American notion of adjudication.[71] Surely no theory, dialogic or otherwise, that tolerates such a breach of a fundamental principle can be tolerated.

I have great sympathy for this criticism; indeed, it is one of the reasons that I would have preferred a different outcome in *Seminole Tribe* and *Alden*. But I do not regard it as fatal, for three reasons. First, as a statement of fundamental American law, the "no right without a remedy" principle has never been absolute.[72] Second, and relatedly,

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67 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997); *Seminole Tribe*, 517 U.S. at 73–76.

68 The United States is authorized—but not required—to file suit against any employer that violates the FLSA. Any recovery in such a suit is to be held in a special deposit account and paid, upon order of the Secretary of Labor, to the affected employees. *See* 29 U.S.C. § 216(c) (1994).

69 *Compare* Wright v. City of Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987) (requiring "express provision or other specific evidence from the statute itself that Congress intended to foreclose" a § 1983 remedy), *with* Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n., 453 U.S. 1, 20 (1981) (denying § 1983 remedy when allegedly violated federal statute provides other "quite comprehensive enforcement mechanisms" and "so many statutory remedies"), *and* Maine v. Thiboutot, 448 U.S. 1 (1980) (providing damages action under § 1983 against state officials who illegally denied benefits under the Social Security Act).

70 *See* Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1736–40 (1992).

71 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

72 *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778 (1991) ("*Marbury*'s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained."); *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735 (1992).

> If *Marbury*'s fundamental tenet were correct, we would expect to find a tight congruence in constitutional law between right and remedy. What emerges from a study of the law of remedy and enforcement, however, is the picture of a system in which there is tremendous flexibility in the fit between right and remedy and therefore a system in which rights receive far less respect than the rhetoric would suggest.

*Id.* at 738; *see also* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) (stating that present law essentially requires a finding of fault

the various remedies that I have already listed—*Ex parte Young* injunctions, federal enforcement, and damages suits against responsible state officials—are significant, even if not equally effective; the *Marbury* "no right without a remedy" principle has never been understood to require that the most effective remedy is constitutionally compelled. Third, the problem with the "no right without a remedy" principle—to the extent that *Alden* irreconcilably conflicts with it—lies with the principle and not with *Alden*. Recall that the project that animates this Essay is the development of an adequate theoretical description of the law of "Federal Courts." If *Alden* conflicts with the "no right without a remedy" principle, then that principle cannot be viewed as a necessary component of an *adequate* theoretical description of "Federal Courts." To the extent that the dialogic theory can encompass, but not insist on, a strong "no right without a remedy" principle, its adequacy passes over yet another hurdle.

The third drawback is perhaps the most significant. The objection runs as follows: As a general proposition, courts must enforce legislative commands unless they are unconstitutional; put differently, it is generally thought that a court's only legitimate justification for failing to enforce a statute is the statute's unconstitutionality. Relatedly, as I suggested earlier, a court should generally defer to the methods created by Congress for the enforcement of federal rights.[73] Turning these principles on *Alden*, Congress made the states liable in damages actions for FLSA violations.[74] After *Alden* and *Seminole Tribe*, however, no court can entertain a damages action against an unconsenting state. If *Seminole Tribe* and *Alden* are not grounded in constitutional bedrock, then under what authority can the Court ignore Congress's democratically expressed will and refuse to permit suits against states to be entertained?

My only replies to this criticism are two pleas in avoidance. First, although it is true that courts are generally to accede to Congress's wishes on the scope of legislation, the Court has not always done so in the area of congressionally established remedies.[75] Indeed, the

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before providing monetary remedies for constitutional violations and arguing that this requirement has certain benefits).

73 *See supra* text following note 57.

74 At least it apparently did. *See supra* note 44.

75 *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (denying § 1983 injunctive remedy against state officials); Seminole Tribe v. Florida, 517 U.S. 44, 73–76 (1996) (denying § 1983 injunctive remedy for Governor's violation of federal law, despite clear statement from Congress that it intended to create a federal remedy); Teague v. Lane, 489 U.S. 288 (1989) (denying habeas remedy to most petitioners seeking release for violations of a "new rule," even though text of former 28 U.S.C.

Court's record on acceding to Congress's apparent remedial intention is sufficiently irregular that the ignoring of the FLSA remedy in *Alden* is not so different in kind as it is in quality. It may be true that, in the area of fashioning remedies, the Court has a peculiar role to play—a role in which the will of Congress is but one factor to consider.[76] Second, and more to the point, this broader role of nullifying congressio-

§ 2254 (1994) suggested no such distinction); Middlesex County Sewage Auth. v. National Sea Clammers Ass'n 453 U.S. 1 (1981) (denying § 1983 monetary remedy for state official's violation of federal law, without a clear statement from Congress that it intended to eliminate such a remedy); Stone v. Powell, 428 U.S. 465 (1976) (denying habeas remedy for Fourth Amendment violations by state officials, even though text of 28 U.S.C. § 2254 (1994 & Supp. III 1997) suggested no such denial); Younger v. Harris, 401 U.S. 37 (1971) (denying § 1983 injunctive remedy when state criminal prosecution is ongoing, despite lack of statutory authority to do so). Lest the list appear too one-sided, the Court has also created remedies not clearly intended by Congress. *See* J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) (creating direct right of action for violation of section 14(a) of the Securities Exchange Act of 1934 when such an action would be a "necessary supplement" to congressionally created remedies). Although the denial of remedies Congress has declared and the creation of additional or supplemental remedies that Congress did not declare strike me as two different questions, the creation of remedies further demonstrates the independence that the Court feels in the matter of remedies.

It is also true that the Court itself has not always felt constrained by Congress's will in the allocation of federal jurisdiction. *See* Friedman, *supra* note 28; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). Though this fact provides some further indication of the independence the Court feels from congressional will in matters of special importance to the judiciary, there is a categorical difference between this type of willful ignorance and the problem in *Alden*, in that in the jurisdictional cases another forum still remains open in which a claim can be pressed.

76 *Cf.* Cort v. Ash, 422 U.S. 66 (1975) (holding that in determining whether a private right of action should be created for violation of federal law, congressional intent was merely one factor of four and that another factor was a federalist one—the traditional role of states in regulating conduct). Of course, the *Cort* test has for the most part fallen out of favor, and has been replaced by a test that is much closer to the line of expressed congressional intent. *See* Touche Ross & Co. v. Redington, 442 U.S 560 (1979). Even today, however, congressional intent is not the sole touchstone for the creation of private rights of action. *See* Morse v. Republican Party, 517 U.S. 186 (1996) (finding implied right of action under section 10 of the Voting Rights Act); Herman & MacLean v. Huddleston, 459 U.S. 375 (1983) (reaffirming private right of action under section 10(b) of the Securities Exchange Act of 1934 and section 10b-5 of the Securities and Exchange Commission's regulations enforcing section 10(b)). In the related area of determining the scope of the lower federal courts' statutory jurisdiction, the Court has also relied on factors other than congressional intent. *See* Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 810 (1986) ("We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system.").

nally mandated remedies is not precluded by the dialogic theory. The critical question under this theory is the engagement of both state and federal systems in the development of state and federal rights. So long as that function is neither destroyed in its entirety nor destroyed for impermissible reasons, there is no constitutional difficulty with remedial nullification; in other words, as long as the Court does not so constrain the remedy that the development of the right is as a legal or practical matter impossible, and as long as any limited remedial nullification can be justified on adjudicatory, efficiency, or structural grounds,[77] the terms of the dialogic theory have been met. As I have suggested, *Alden*'s remedial limitation fits within these grounds.

My project has been a descriptive, not a normative, one. As descriptive accounts of the law of "Federal Courts," nationalist theories, as well as the federalist paradigm of state courts being the ultimate backstop in the enforcement of federal rights, have now collapsed. Both of the latter two criticisms of my theory—the "no right without a remedy" principle and the impropriety of avoiding Congress's will for non-constitutional reasons—are ultimately normative arguments that must bend before the stubborn legal fact of *Alden*. The time has come to search for new, and hopefully useful, descriptive paradigms that engage the law where it is, and where it is likely to be into the foreseeable future.

That does not mean that I can accept *Alden* easily. I believe that the Court's insufficient adherence to the "no right without a remedy" principle makes *Alden* an unwise decision. Its refusal to accept the judgment of Congress makes *Alden* a profoundly unwise decision—certainly at the very edges of the Court's permissible judgment. But not, according to the dialogic theory, beyond it.

## IV. CONCLUSION

To say that the Court was within the bounds of its permissible judgment is a faint defense of *Alden*. The dialogic theory, which seeks an adequate theoretical explanation of the case, admits no more—but also no less.

A fuller explanation and defense of the theory—including the strongly progressive impulses that the theory generally entails—must await another day. But it is on that progressive impulse that I should end. Change is assured; progress is not.[78] To create structures within which change will occur, and progress will hopefully occur, is the most

77 *See supra* notes 34–42 and accompanying text.

78 *See* ALFRED NORTH WHITEHEAD, MODES OF THOUGHT 131 (1938); WHITEHEAD, *supra* note 14, at 29, 187.

that can reasonably be accomplished by a system of government. Sometimes in such structures progress fails, and changes in settled understandings cause more harm than good. This may be true of *Alden*. But, at least in the long view, perhaps not. *Alden* might stimulate a reinvigoration and expansion of state-created labor rights in an area that has been subject to capture by federal law for the past sixty years. Since the inevitable consequence of capture is that further progress is eventually stymied, a competitive state-initiated complement to federal labor standards can be viewed as a positive development. Perhaps, after a period of such destabilization, the federal labor standards will find a new harmony that blends the best of the state and federal efforts, and states will no longer be viewed as immune from these standards' reach. *Alden* will be overruled. The absence of immunity will then hold until the next period of desirable destabilization.

On the other hand, such innovation in labor standards might not occur, and states might respond to the new freedom provided in *Alden* by failing either to develop complementary laws or to operate cooperatively with the federal government over a range of matters subject to Congress's general Article I regulation. From a progressive perspective, this second course would not be a positive development. Although it is too early to make any claims with certainty, I candidly expect the second, destructive course to be the more likely—an expectation that makes me regard *Alden* as deeply *and* profoundly unwise.

Nothing, however, can prevent the second course, or guarantee the first. *Alden* will either stymie true progress or it may (at least for a time) advance it. I would hope that the fate of *Alden*, which the dialogic theory does not regard as a constitutional constant, ultimately hinges on which of these two possibilities comes to pass.