

# Case Comments

## Section 1983, Statutes, and Sovereign Immunity

*Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc).

This Comment argues that a significant, but unnoticed, way around state sovereign immunity has become available under current law. Although sovereign immunity now generally prohibits actions against states for violations of the Americans with Disabilities Act (ADA),<sup>1</sup> a plaintiff should be able to use 42 U.S.C. § 1983<sup>2</sup> to seek damages from state officials for ADA violations.<sup>3</sup> Using the leading case on the topic, *Alsbrook v. City of Maumelle*,<sup>4</sup> the Comment will show that when the current Supreme Court closed one door through its federalism cases, it opened another through § 1983.

It might appear that the Supreme Court's recent sovereign immunity jurisprudence has all but eliminated Congress's power to subject states to private damage actions for violations of federal statutes. In the line of cases beginning with *Seminole Tribe v. Florida*,<sup>5</sup> and including *Alden v. Maine*,<sup>6</sup>

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1. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified as amended in scattered sections of 42 U.S.C.).

2. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

3. Due to space constraints, this Comment discusses only the ADA. However, if one is permitted to plead ADA violations through § 1983, one should also be permitted to use § 1983 to enforce other federal statutes that have been held, on sovereign immunity grounds, to be unenforceable against states via damage actions.

4. 184 F.3d 999 (8th Cir. 1999) (en banc).

5. 517 U.S. 44 (1996).

6. 527 U.S. 706 (1999).

the Court has consistently (if controversially) found that Congress has no power under Article I of the Constitution to subject states to private damage actions, in either federal or state courts, for violating federal statutes. Although Congress retains power to subject states to damage suits by individuals through its power to enforce the Fourteenth Amendment,<sup>7</sup> that power has been reined in substantially in recent years by the line of cases beginning with *City of Boerne v. Flores*<sup>8</sup> and including *Board of Trustees of the University of Alabama v. Garrett*.<sup>9</sup> The result is a number of important federal statutes, including the ADA<sup>10</sup> (the subject of *Garrett*), in which congressional schemes for private damage suits have been held invalid on Eleventh Amendment grounds.<sup>11</sup> These statutes are theoretically still legitimate legislation under the Commerce Clause, and states are still obliged to obey them—and yet an injured party is unable to seek monetary relief if they are violated. Countless commentators have noticed, and lamented, this breach of the rule-of-law principle.<sup>12</sup>

Nonetheless, damage suits for violations of federal law that are in essence suits against states happen all the time. They are suits under 42 U.S.C. § 1983. Section 1983 has been recognized since 1961<sup>13</sup> as providing

7. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (holding that Congress has the right to subject states to damage actions when it is doing so through a valid use of its enforcement power under Section 5 of the Fourteenth Amendment).

8. 521 U.S. 507 (1997).

9. 531 U.S. 356 (2001) (holding that Title I of the ADA is not valid Fourteenth Amendment legislation and therefore could not abrogate the Eleventh Amendment).

10. 42 U.S.C. § 12,101 (1994).

11. *Garrett* held only that Title I of the ADA, which deals with employment discrimination against the disabled, could not be enforced by private parties against states. It left open the question of whether Title II of the ADA, which prohibits discrimination against the disabled in public services, is also unenforceable against the states. *Garrett*, 531 U.S. at 360 n.1. Most circuits have found, since *Garrett*, that Title II is not enforceable on Eleventh Amendment grounds, which is an almost inevitable consequence of *Garrett's* logic. See *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Erickson v. Bd. of Governors*, 207 F.3d 945, 948 (7th Cir. 2000) (questioning the continued authority of *Crawford v. Indiana Department of Corrections*, 115 F.3d 481, 487 (7th Cir. 1997), which upheld Title II as a valid abrogation of state sovereign immunity), *cert. denied*, 531 U.S. 1190 (2001); *Alsbrook*, 184 F.3d at 1009-10; *cf. Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 707 (4th Cir. 1999) (holding that a regulation enacted pursuant to Title II did not validly abrogate state sovereign immunity). *But see Kiman v. N.H. Dep't of Corr.*, 301 F.3d 13, 24 (1st Cir. 2002) (allowing Title II actions against states "at least as that Title is applied in cases in which a court identifies a constitutional violation by the state"); *Garcia v. SUNY Health Scis. Ctr.*, 280 F.3d 98, 111-12 (2d Cir. 2001) (holding that Title II actions may be brought against states if the "violation was motivated by discriminatory animus or ill will based on the plaintiff's disability"); *cf. Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812, 815 (6th Cir. 2002) (*en banc*) (agreeing that Title II is not a valid abrogation of sovereign immunity when Congress is enforcing the Equal Protection Clause, but holding that it is permissible when Congress is enforcing the Due Process Clause). Only the Ninth Circuit, in a remarkably brief opinion, has asserted that Title II of the ADA abrogates state sovereign immunity after *Garrett*. See *Hason v. Med. Bd.*, 279 F.3d 1167, 1170-71 (9th Cir. 2001).

12. See, e.g., Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the Alden Trilogy*, 109 YALE L.J. 1927 (2000).

13. *Monroe v. Pape*, 365 U.S. 167 (1961).

a way to sue state officials for damages stemming from violations of federal law. The § 1983 damages suit proceeds under the legal fiction that one is suing a state official in his individual capacity for a violation of § 1983. Section 1983, in turn, creates no substantive rights; rather, it provides a remedy against officials who act under color of state law to violate a right guaranteed by federal law. The paradigm case for a § 1983 violation has been a violation of the federal Constitution, and many commentators refer to § 1983 cases as “constitutional torts.”<sup>14</sup> Ever since *Maine v. Thiboutot*,<sup>15</sup> however, § 1983 has been read *also* to permit suits against state officials acting in their individual capacities for violations of federal statutes. One can sue a state official for violating a federal statute, just as one can sue the official for violating a duty under the Constitution.

The key point, for Eleventh Amendment purposes, is the legal fiction that § 1983 suits against individual officers are *not* suits against a state. They thus do not, in theory, raise Eleventh Amendment issues at all. The state, although it serves as the “deep pocket,” is liable only indirectly, usually through an indemnification contract or policy in which the state implicitly or explicitly agrees to reimburse monetary judgments against its officers. In this way, the courts have permitted what amounts to a modified regime of tort liability for state governments that violate federal law.

If all of this is true—if the ADA still applies to the states, and if one can plead statutory violations against state officials in their individual capacities for violations of federal statutes—then why don’t plaintiffs’ lawyers simply sue individual state officials under § 1983 for violating their obligations under federal law? Instead of bringing a suit under the ADA directly against a state, why not sue a state official under § 1983 for his violation of the ADA? Such a method would limit the power of *Seminole Tribe* and render cases like *Garrett* almost irrelevant in practice.

*Alsbrook v. City of Maumelle*<sup>16</sup> demonstrates why commentators<sup>17</sup> and plaintiffs’ lawyers have not embraced the § 1983 approach. In *Alsbrook*, the

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14. See, e.g., William Burnham, *Separating Constitutional and Common-Law Torts*, 73 MINN. L. REV. 515, 516 (1989); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 53 (1998).

15. 448 U.S. 1 (1980).

16. 184 F.3d 999. Another circuit has also rejected the notion that the ADA may be separately pled under § 1983. See *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1531 (11th Cir. 1997). However, this decision predates *Garrett* and circuit court decisions that have found Title II of the ADA unenforceable on Eleventh Amendment grounds. Thus, *Holbrook* is not relevant for the central issue raised by *Alsbrook*. The only § 1983/ADA circuit decision that postdates *Garrett* comes from the Ninth Circuit, where direct actions against states may still be brought under Title II of the ADA. See *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002).

17. See Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After Garrett*, 28 J.C. & U.L. 41, 76-77 (2001) (claiming that § 1983 statutory enforcement suits to enforce the ADA and similar statutes are probably barred by preemption); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1323-24 (2001) (same).

plaintiff, an aspiring policeman, sued an Arkansas state agency for violating Title II of the ADA. He also sued the agency's commissioners in their individual capacities for violating § 1983 by failing to comply with their obligations under Title II of the ADA. The agency had refused to waive a vision requirement for local police hiring. Therefore, Alsbrook claimed, it had denied him equal access to employment opportunities because of a correctable disability. The Eighth Circuit saw the case as an opportunity to explain why damage suits under the ADA are impermissible on sovereign immunity grounds. First, the court (anticipating *Garrett*) found that the ADA did not abrogate state sovereign immunity under the Fourteenth Amendment, and that, therefore, there could be no private damage action under the ADA directly against a state. More importantly, however, the *Alsbrook* court also rejected the claim that the suit could go forward as a suit that pled the violation of the ADA through § 1983.

The court made two points. First, relying on a doctrine propounded by the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,<sup>18</sup> the court found that, because Congress had developed a comprehensive remedial scheme under the ADA, it had foreclosed the plaintiff's recourse to § 1983. Second, it held that because individual state officials could not be sued directly under the ADA, § 1983 could not create a suit against officials "acting in their individual capacity," because such a suit would "expand" substantive rights under the ADA, whereas § 1983 creates only "procedural" rights.

To understand why the Eighth Circuit's approach is misguided, we must start with its misreading of *Sea Clammers*. *Sea Clammers* responded to a practical problem that arose when, in *Maine v. Thiboutot*,<sup>19</sup> the Supreme Court decided that *any* federal statute could be pled through § 1983. This created a presumption that any federal statute could give rise to a private right of action. But what of cases in which Congress, without expressly foreclosing a cause of action under § 1983, had invested considerable energy in developing a *different* remedial scheme? How should courts read congressional intent in such cases? In *Sea Clammers*, the Court modified the baseline presumption that a § 1983 suit would always be available to enforce a federal statute. That case imposed the following limitation: A separate "comprehensive remedial scheme" provided in a statute is good evidence of congressional intent to foreclose a § 1983 action.<sup>20</sup> Thus, under this doctrine, § 1983 could not be used to enforce a

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18. 453 U.S. 1 (1981).

19. 448 U.S. 1.

20. 453 U.S. at 20. *Sea Clammers* involved an attempt to use § 1983 to enforce two acts related to water pollution. The Court found that because these statutes already involved a number of remedial provisions—including, most importantly, special citizen-suit provisions with restrictive statutes of limitations—Congress could not have intended these statutes to be enforced through § 1983. *Id.* at 8.

statute when Congress had expressly established another mechanism for private enforcement.

There are good reasons for the limits imposed by *Sea Clammers*. Unbounded permissive pleading through § 1983 would allow anyone who could demonstrate injury caused by a state's noncompliance with federal law to bring a suit for damages, even where the federal law in question was vague or did not give an enforceable right to an individual. The ironic result might be a Congress wary of passing useful statutes for fear of giving rise to unanticipated private enforcement.

What is clear from the cases, however, is that a showing of congressional intent to foreclose the § 1983 remedy is not easily made. The Court has noted that "we do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy,"<sup>21</sup> and has emphasized the significance of the "burden" on the state to show that Congress foreclosed the remedy.<sup>22</sup> The strong presumption is that a § 1983 cause of action is available to enforce a federal statute.

Before *Garrett*, there was a very good argument that the *Sea Clammers* preemption doctrine prevented pleading the ADA through § 1983. Like the environmental statutes at issue in *Sea Clammers*, the ADA contains express provisions for citizen suits.<sup>23</sup> As Cass Sunstein has explained, evidence that Congress expressly designed a mechanism for the enforcement of private rights demonstrates very convincingly that Congress has decided to preempt a separate § 1983 cause of action.<sup>24</sup> Why would Congress have designed a particular statutory private remedy if it intended also to retain the default § 1983 action? Before the recent wave of sovereign immunity cases, courts used similar logic to find that the Age Discrimination in Employment Act and the Rehabilitation Act preempt a § 1983 remedy.<sup>25</sup>

The change in sovereign immunity doctrine, however, alters the *Sea Clammers* analysis dramatically. After *Garrett*, the *Sea Clammers* bar to pleading the ADA through § 1983 makes much less sense. If, as *Thiboutot* tells us, there is a presumptive right to plead statutes through § 1983, that presumption should spring back into force once an alternative congressional remedy has been eliminated. There are at least two reasons why this should be so. First, the major goal of *Sea Clammers* is ensuring consistency and coherence in federal law. That goal evaporates once a statutory remedy has been barred on Eleventh Amendment grounds. Permitting two remedies, one under a statute and one under § 1983, might cause unbearable

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21. *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

22. *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 520-21 (1990).

23. 42 U.S.C. §§ 12,117, 12,133 (1994).

24. Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 427-28 (1982).

25. *E.g.*, *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999) (holding that the Rehabilitation Act, which remains enforceable against the states, cannot be enforced through § 1983).

confusion and frustrate a congressional enforcement scheme. Permitting a § 1983 enforcement mechanism once the statutory enforcement mechanism has been struck down presents no such problem. Eliminating the original statutory remedy on Eleventh Amendment grounds also eliminates the problem *Sea Clammers* was designed to prevent.

Second, in the ADA, Congress has already made it clear that it wants a private enforcement remedy that is quite similar to the § 1983 enforcement suit. There is thus an irony to the *Alsbrook* reading of *Sea Clammers*: When Congress plainly states its intent to create a private cause of action, a court will find that Congress foreclosed its only constitutionally permissible means of creating such an action. This reading of congressional intent is blind to the obvious. Congress, when it states that it would like to see a private cause of action to enforce one of its laws, would rather have an equivalent private cause of action in place than no remedy at all. The *Sea Clammers* doctrine hinges on a court's assessment of congressional intent, and it distorts the doctrine wildly to use it to prevent a private cause of action where Congress has made plain that it wants one.

The Eighth Circuit in *Alsbrook* sought to find a way around this problem by calling for a clear-statement rule. Congress, not the courts, it reasoned, should speak clearly about the decision to permit pleading through § 1983.<sup>26</sup> The court found support for its theory of congressional statement in *Seminole Tribe*. In that case, the Supreme Court found both that Congress had no power to abrogate state sovereign immunity under a provision of the Indian Gaming Regulatory Act,<sup>27</sup> and that by creating an elaborate remedial scheme under that provision, Congress intended to preclude a remedy for injunctive relief under the *Ex Parte Young*<sup>28</sup> doctrine.<sup>29</sup> The Court concluded that Congress, not the Court, should make plain how the Act was to be enforced, and therefore refused to permit an *Ex Parte Young* action even as it removed all other remedies under the Act.

But *Seminole Tribe* is distinguishable from *Alsbrook*. The Indian Gaming Regulatory Act included a truly elaborate enforcement mechanism, whereas the ADA's simpler remedial provision—a private suit for damages—is very similar to the § 1983 remedy. More importantly, the analogy ignores the fact that § 1983, unlike the judge-made law of the *Ex Parte Young* doctrine, is a *statute*—a fact that must weigh heavily in any

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26. 184 F.3d at 1011.

27. 25 U.S.C. § 2710 (2000).

28. 209 U.S. 123 (1908).

29. *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996). Oddly, the Eighth Circuit itself now seems to have retreated from an expansive interpretation of *Seminole Tribe*'s rule on elaborate remedial schemes preempting *Ex Parte Young* injunctive relief. In *Gibson v. Arkansas Department of Correction*, 265 F.3d 718, 721-22 (8th Cir. 2001), that court found that Congress's use of a remedial scheme to enforce the ADA was not intended to preempt the use of injunctive relief for ADA violations under *Ex Parte Young*.

serious attempt by a court to ascertain congressional intent. It is one thing to hold, as the Court did in *Seminole Tribe*, that Congress should have made clear whether or not it wished to have an intricate, complicated statute enforced against states by means of a judicial fiction. It is quite another thing to hold that such a clear-statement rule should prevent the application of a statute already firmly written into law. To ask for a clear-statement rule in the face of plain statutory law is not to exercise judicial restraint in the face of an opaque congressional statute—it is to defy openly the plain intent of the legislature.

More generally, the choice to require a clear-statement rule in this situation reverses the *Thiboutot* presumption that federal statutes can be pled through § 1983. If we really have a strong presumption that federal statutes can be pled through § 1983, and preemption of that right is an exception, then why should we ask Congress to provide a clear statement of what is normally presumed? The Eighth Circuit's understanding transforms *Sea Clammers* and *Thiboutot* beyond recognition. *Alsbrook* replaces a presumption that any statute can be pled through § 1983 with a clear-statement rule for the imposition of § 1983 liability, and reads a doctrine designed to expand Congress's power as reducing it.

What, then, of the Eighth Circuit's second reason for refusing to permit pleading through § 1983? The *Alsbrook* court found that because suits cannot be brought against individuals under the ADA, § 1983 could not be used to enforce the statute against individual state officials. Such a use of § 1983, the circuit court reasoned, would impermissibly grant new "substantive" rights under the ADA via § 1983's purely "procedural" remedy.<sup>30</sup> But this reasoning makes little sense. Although the ADA itself does not provide a cause of action against an individual, there is no reason—provided that a general remedial scheme has not otherwise preempted the § 1983 suit—that § 1983 should not provide a cause of action against an individual officer to facilitate enforcement of the law. Section 1983 is then merely providing a means of enforcement, not adding a substantive right. Indeed, almost all § 1983 suits against state officials are brought under laws that do not, by their own terms, provide a direct right of action against individual officials. Constitutional provisions target state action, not individual officers. Nor do statutes under which plaintiffs have for years pursued § 1983 actions specifically target individuals—the provisions of the Social Security Act at issue in *Thiboutot*, for example, did not create liability for individual officers.<sup>31</sup> To call a § 1983 suit against an

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30. *Alsbrook*, 184 F.3d at 1011-12. The Eighth Circuit had never previously found that suits against individuals were impermissible under Title II of the ADA, the portion of the ADA at issue in the case. See *id.* at 1005 n.8.

31. See 42 U.S.C. § 602(a)(7) (1994).

official for failure to comply with a federal law a "substantive" expansion would be to undermine the entire law of § 1983.

Thus, the *Alsbrook* court's reasoning appears simply incorrect. Neither the *Sea Clammers* doctrine nor any other provision prohibits pleading a statute like the ADA through § 1983. Other circuits have not yet ruled on this issue, and they should not repeat *Alsbrook*'s mistakes. So long as they avoid the Eighth Circuit's faulty reasoning, a functional equivalent of a damages remedy under statutes like the ADA could well be preserved, even after *Seminole Tribe* and *Garrett*.

One more point should be made. It is clear that Congress, if it so desires, can expressly allow a § 1983 action to enforce a damages remedy. There is, to be sure, little precedent for Congress doing so. Prior to *Seminole Tribe*'s holding that it lacked Article I power to impose private damage remedies on the states, Congress had no reason to believe that any damage remedy it imposed would not be enforced. It is clear, however, that the *Sea Clammers* doctrine of § 1983 preemption is nothing more than statutory interpretation. Thus, there is no reason why Congress cannot, if it wishes, make clear that § 1983 suits against individual state officers are an acceptable means of enforcing the ADA. Such an act would not raise Eleventh Amendment concerns because the remedy would run against the individual state official, not the state.<sup>32</sup>

Courts, lawyers, commentators, and Congress should recognize that § 1983 still gives individuals a way to recover damages for state violations of important federal statutes. A link between right and remedy remains intact.

—Nick Daum

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32. In *Edelman v. Jordan*, the Court did hold that a § 1983 action against an officer was barred on Eleventh Amendment grounds when it sought money directly "from the State's treasury." 415 U.S. 651, 677 (1974). This doctrine has consistently been interpreted, however, only to apply to situations in which the parties seek retroactive payment of benefits, such as back pay or contract wages, and not to such tort-like violations as the ADA would remedy. See Jeffries, *supra* note 14, at 61-68.