THE SOLDIER AND THE STATE: WHETHER THE ABROGATION OF STATE SOVEREIGN IMMUNITY IN USERRA ENFORCEMENT ACTIONS IS A VALID EXERCISE OF THE CONGRESSIONAL WAR POWERS

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I. Introduction

The Uniformed Services Employment and Reemployment Rights Act (USERRA)[1] provides many rights for both Reserve and National Guard military members who leave their employment for a period of time due to federal military service.[2] Some of the more commonly known features and rights under USERRA include the prohibition on discrimination against servicemembers;[3] the right of servicemembers to continue to accrue seniority in their civilian positions during their period of federal service;[4] the right of servicemembers to reenroll in employee-

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[1] 38 U.S.C. §§ 4301–4334 (2000).

[2] The term "federal service" is used in its broad, generic sense. For the specific periods of Guard and Reserve service to which USERRA applies, see *id.* § 4303(13).

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

Id.

[3] *Id.* § 4311.

[4] *Id.* § 4316(a).

sponsored health care plans upon termination of their federal service;[5] and the right of servicemembers to accrue benefits in employee pension plans during the period of federal service.[6] Perhaps the best-known right provided under USERRA is the servicemember's right to be reemployed by his or her pre-service employer after the completion of military service.[7] The term "employer" as used in USERRA is broadly defined, and specifically includes state governments.[8] The inclusion of states as employers, however, becomes a problem of constitutional dimensions when it comes to the enforcement mechanisms Congress has placed in the statute. The USERRA permits an individual whose reemployment rights have been violated by a state government employer to file suit for damages against that state, in a state court.[9] Such suits, on their surface, seem to violate the principle of state sovereign immunity as embodied in the Eleventh Amendment to the Constitution.[10] Since the Supreme Court decided *Seminole Tribe of Florida v. Florida* in 1996,[11] lower courts have routinely held that federal statutory provisions permitting private, individual suits against states violate principles of state sovereign immunity, and are prohibited by the Eleventh Amendment.[12] No court, however, including the Supreme Court, has thoroughly examined the issue of whether USERRA's enforcement provision permitting private suits against state government employers is a valid exercise of the Congressional War Powers.[13] This article examines the constitutionality

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[5] *Id.* § 4317.
[6] *Id.* § 4318.
[7] *Id.* §§ 4312–4313.
[8] *Id.* § 4303(4)(A) ("[T]he term 'employer' means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . a State . . . .").
[9] *Id.* § 4323(b)(2) ("In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.").
[10] U.S. CONST. amend. XI ("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."). Although by its plain terms, the Eleventh Amendment applies to cases brought against states by citizens of another state, the amendment has historically been held to apply to suits by a citizen against his own state as well. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Eleventh Amendment also prohibited suits by citizens against their own state if that state did not consent to be sued).
[11] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
[12] *See* discussion *infra* Part II.C.
[13] U.S. CONST. art. I, § 8, cls. 11–16.

> [Congress shall have the power to] declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land

of USERRA's enforcement provisions as a legitimate exercise of congressional War Powers, beginning with a brief historical survey of congressional legislation providing reemployment rights to servicemembers. This article then analyzes the most recent Supreme Court cases governing state sovereign immunity issues, including *Seminole Tribe of Florida v. Florida*, *Alden v. Maine*, and *Central Virginia Community College v. Katz*, and applies the methodology used in those cases to an analysis of USERRA and congressional War Powers. The article further analogizes USERRA enforcement actions to *qui tam* suits, ultimately concluding that the USERRA enforcement provision in relation to state actors is a valid exercise of the congressional War Powers for three primary reasons. First, USERRA is a valid abrogation of state sovereign immunity, as Congress passed USERRA pursuant to its War Powers. Second, a private suit under USERRA enforces a critical federal power, i.e., the power to raise and support armies (in making this assertion, this article analogizes a USERRA enforcement action to a *qui tam* suit). Third, as opposed to the situations in other state sovereign immunity cases, an individual bringing suit under USERRA gains the ability to sue solely due to his or her status as a member of the federal government. Last, this article recommends certain statutory changes to USERRA that could withstand potential scrutiny by the federal courts.[14]

II. A Brief History of Service-Related Reemployment Rights Legislation as Applicable to State Government Employers

A. World War II to *Seminole Tribe*

During the World War II era, reemployment rights for military members were governed on the federal level by the Selective Training

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> and Water; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . . .

Id.

[14] *See* discussion *infra* Part VII.

and Service Act of 1940 (1940 Act).[15] Unlike USERRA, which is concerned primarily with Guard and Reserve service,[16] the 1940 Act pertained to draftees, and was passed to address the "need to train and induct a substantial number of civilians into the small standing military establishment."[17] The 1940 Act provided reemployment rights to individuals employed either by private companies or by the federal government, so long as those individuals met the statute's requirements. The statutory requirements included "induct[ion] into the land or naval forces . . . for training and service," as well as "satisfactor[y] complete[tion of] such period of training and service."[18] If a person had to leave his job because of induction, the 1940 Act provided a reemployment right, under which the employer had to restore an individual "to such position or to a position of like seniority, status, and pay"[19] as the employee had previously. This right was subject to several limitations. For example, the person seeking reemployment had to still be "qualified to perform the duties of such position."[20] Furthermore, the individual seeking reemployment had to apply "within forty days after [being relieved] from such training or service."[21] The 1940 Act

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[15] Selective Training and Service Act of 1940, Pub. L. No. 783, 76th Cong., 54 Stat. 885, 890 (1940) (*repealed by* Pub. L. No. 759, § 17, 62 Stat. 625 (1948)). *See generally* Jeffrey M. Hirsch, *Can Congress Use Its War Powers to Protect Military Employees from State Sovereign Immunity?*, 34 SETON HALL L. REV. 999, 1013–14 (2004) (discussing USERRA's historical predecessors and a brief history of USERRA); Lieutenant Colonel H. Greg Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F. L. REV. 55, 56 (1999) (providing a brief historical overview of USERRA-like statutes).

[16] 38 U.S.C. § 4301(a) (2000).

> The purposes of this chapter are—(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service; (2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for prompt reemployment of such persons upon their completion of such service; and (3) to prohibit discrimination against persons because of their service in the uniformed services.

Id.

[17] Manson, *supra* note 15, at 56.

[18] Selective Training and Service Act of 1940, § 8(a).

[19] *Id.* § 8(b)(A)–(B).

[20] *Id.* § 8(b).

[21] *Id.*

permitted a person whose private employer violated the provisions of the 1940 Act to file suit in federal court.[22]

The 1940 Act recognized that some individuals who would otherwise have been protected by the statute may have been employed by state or local governmental bodies. Congress did not, however, directly apply the provisions of the statute to state employers. The 1940 Act specifically stated that if a person "was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person *should be* restored to such position or to a position of like seniority, status, and pay."[23] The statute did not *require* that states do anything regarding reemployment of their former employees. Additionally, the 1940 Act contained no enforcement mechanism against state actors.

The next congressional action regarding reemployment rights for military members came after World War II with the Military Selective Service Act (1948 Act).[24] Passed after the conclusion of World War II and towards the beginning of the tensions between the United States and the Soviet Union, the effect of the 1948 Act was to "support the conscription-based force management policies that existed for the first twenty-five years of the Cold War."[25] The 1948 Act contained provisions similar to those in the 1940 Act, but expanded the scope of reemployment rights. Where the 1940 Act required reemployment so long as the servicemember was "still qualified to perform the duties of such position,"[26] the 1948 Act required, in certain cases, that the employer provide the servicemember with a position of "like seniority, status, and pay, or the nearest approximation thereof."[27] Like the 1940 Act, however, the 1948 Act did not apply to state employers, and contained references regarding state employers that were similar to those in the 1940 Act. For example, the 1948 Act stated that it was the sense of the Congress that an individual leaving state employment because of induction should be reemployed by a state employer.[28] Additionally, the provisions of the 1948 Act allowing for private suits in federal district

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[22] *Id.* § 8(e).
[23] *Id.* § 8(b)(C) (emphasis added).
[24] Manson, *supra* note 15, at 56.
[25] *Id.*
[26] Selective Training and Service Act of 1940, § 8(b).
[27] The Military Selective Service Act of 1948, Pub. L. No. 759, § 9(b)(B)(ii), 62 Stat. 604, 615 (*repealed by* Pub. L. No. 93-508, § 405, 88 Stat. 1600 (1974)).
[28] *Id.* § 9(b)(C).

courts applied to "private employer[s] [who] fail[ed] or refuse[d] to comply"[29] with the statute, but not to state employers.

The next major piece of legislation regarding reemployment rights of servicemembers was the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (hereinafter 1974 Act),[30] which became the current USERRA's "immediate predecessor."[31] The 1974 Act, like the 1940 and 1948 Acts before it, pertained primarily to inductees rather than to Reservists.[32] Unlike the 1940 and 1948 Acts, however, the 1974 Act contained a provision regarding job protection for Reserve Component Soldiers absent from their employment because of a Reserve obligation.[33] Probably the most notable aspect of the 1974 Act, however, was its expansion of federal authority over state governments: unlike the 1940 and 1948 Acts, the 1974 Act was binding upon state, as well as private, employers.[34] Under provisions of the 1974 Act, federal courts had jurisdiction over suits brought by servicemembers against state employers who violated the statute's provisions.[35]

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[29] *Id.* § 9(d).

[30] Manson, *supra* note 15, at 57.

[31] Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules, 70 Fed. Reg. 75,246, 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002).

[32] 38 U.S.C. § 2021(a) (1976) ("In the case of a person who is inducted into the Armed Forces of the United States under the Military Selective Service Act . . . .").

[33] *Id.* § 2021(b)(3).

> Any person who holds a position described in clause (A) or (B) of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

Id. The 1974 Act was not, however, the first congressional legislation intended to protect the employment of Reserve component Soldiers. *See generally* Monroe v. Std. Oil Co., 452 U.S. 549, 555 (1981) (discussing 1950s-era congressional legislation regarding employment protections for Reserve Component members).

[34] 38 U.S.C. § 2021(a)(B) (1976) ("[I]f such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall . . . be restored by such employer . . . to such position or to a position of like seniority, status, and pay . . . .").

[35] *Id.* § 2022.

> If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021 (a), (b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political

Federal court decisions applying the 1974 Act to state employers reveal that the courts were largely unimpressed with the sovereign immunity defenses presented by the states. In fact, some courts dismissed state Eleventh Amendment concerns almost out of hand. For example, the U.S. District Court for the Eastern District of Michigan almost peremptorily dismissed the State of Michigan's concerns about the federal legislation, saying that "Congress has acted within its authority to secure reemployment rights to veterans . . . . In doing so, Congress has preempted all state law to the contrary."[36] The constitutionality of the new provision was addressed by at least two circuit courts, both of which came down firmly on the side of federal power. In *Jennings v. Illinois Office of Education*, the Seventh Circuit directly addressed the issue of whether the reemployment provisions of the 1974 Act violated the Eleventh Amendment.[37] In deciding the issue, the Seventh Circuit analyzed precedent regarding congressional War Powers, the Tenth Amendment,[38] and the Eleventh Amendment, finally holding that "in this case the war powers serve as the vehicle for overriding the bar of the Eleventh Amendment."[39] Although recognizing that the "proper interpretation of the Eleventh Amendment and the common law doctrine of sovereign immunity has been a fertile source of controversy for both courts and commentators,"[40] the Seventh Circuit felt

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> subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.

Id.

[36] Fitz v. Bd. of Educ., 662 F. Supp. 1011, 1014 (E.D. Mich. 1985). Although the court was addressing whether Michigan's own laws kept it from complying with the terms of the federal statute, and not the issue of sovereign immunity, this quotation demonstrates concisely an attitude that state laws are of little, if any, concern when applying the federal law.

[37] Jennings v. Ill. Office of Educ., 589 F.2d 935, 937 (7th Cir. 1979). "[T]he judgment below was proper unless the [1974 Act] is unconstitutional under the Eleventh Amendment."

[38] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[39] *Jennings*, 589 F.2d at 938.

[40] *Id.* at 938–39.

that, at least under the 1974 Act, "the congressional action [was] proper and enforceable."[41]

Similarly, in *Peel v. Florida Department of Transportation*, the Fifth Circuit considered the question of "whether the [T]enth [A]mendment or the [E]leventh [A]mendment prevents a federal court from ordering a state agency to reinstate a former employee under the Veteran's Reemployment Rights Act."[42] The Fifth Circuit recognized that even though "Congress has the power under its war power and the necessary and proper clause . . . to provide for the nation's defense, the [E]leventh [A]mendment limits the power of the federal judiciary to enforce private actions against the states."[43] Notwithstanding the friction between state sovereign immunity and the enforcement provisions of the 1974 Act, the Fifth Circuit, after analyzing Supreme Court precedent, held that "the express language in the Act authorizing suits against the states is sufficient to overcome the potential bar of the [E]leventh [A]mendment."[44]

Congress passed what is substantially the current version of USERRA in 1994.[45] By this time, the military draft had been abolished,[46] and the primary purpose of employment legislation was no longer to protect the jobs of inductees. Rather, USERRA was passed primarily to encourage noncareer military service, including service in the Reserve Component.[47] The USERRA, like the 1974 Act, established federal court jurisdiction over servicemember suits against state employers who violated the statute's provisions.[48] After the federal cases interpreting the 1974 Act, the power of Congress to establish this jurisdiction seemed firmly established.

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[41] *Id.* at 939.
[42] Peel v. Fla. Dep't. of Transp., 600 F.2d 1070, 1072 (5th Cir. 1979).
[43] *Id.* at 1074.
[44] *Id.* at 1081.
[45] Uniformed Services Employment and Reemployment Rights Act of 1994 Final Rules, 70 Fed. Reg. 75,246, 75,246 (Dec. 19, 2005) (codified at 20 C.F.R. pt. 1002).
[46] Manson, *supra* note 15, at 57.
[47] 38 U.S.C. § 4301(a) (1994); *see also supra* note 16.
[48] *See id.* § 4301(a)(2) (regarding a private cause of action). "A person may commence an action for relief with respect to a complaint . . . ." *Id.* § 4301(b) (regarding the authority of a federal court). "In the case of an action against a State as a employer, the appropriate district court is the court for any district in which the State exercises any authority or carries out any function." *Id.*

B. The *Seminole Tribe* Case

In March 1996, the Supreme Court decided *Seminole Tribe of Florida v. Florida*.[49] The case involved the constitutionality of the Indian Gaming Regulatory Act (IGRA), passed by Congress pursuant to its powers under the Indian Commerce Clause.[50] The IGRA generally set forth "a statutory basis for the operation and regulation of gaming by Indian tribes."[51] The IGRA divided Indian gaming into three different categories,[52] the category termed class III being "the most heavily regulated."[53] Class III gaming was permitted only under certain circumstances, one of the requirements being an agreement (termed a "compact") between the tribe and the state in which it was located.[54] States were required to negotiate the compact in good faith,[55] and this requirement was enforceable by Indian tribes in federal court.[56] The *Seminole Tribe* case arose when the Seminole Tribe of Florida attempted to enforce the good-faith requirement against the State of Florida in federal court.[57] A primary question the Court faced was whether "the Eleventh Amendment prevent[ed] Congress from authorizing suits by Indian tribes against States for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause."[58]

In a five to four decision,[59] the Court held that the provision of the IGRA allowing Indian tribes to sue states in federal court was a violation of state sovereign immunity as embodied in the Eleventh Amendment.[60] The Court stated that even if the Constitution provided for exclusive federal control over a particular area, such as regulating commerce with Indian tribes, that exclusive control did not authorize Congress to violate the Eleventh Amendment by allowing citizens to sue states in federal

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[49] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 44 (1996).
[50] *Id.* at 47. The Commerce Clause in general, including the Indian Commerce Clause, states: "The Congress shall have power to . . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art. I, § 8, cl. 3.
[51] *Seminole Tribe*, 517 U.S. at 48.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 48–49.
[55] *Id.* at 49.
[56] *Id.*
[57] *Id.* at 51–52.
[58] *Id.* at 53.
[59] *Id.* at 46.
[60] *Id.* at 72.

court.[61] The Court used language that was much broader than needed to simply invalidate the unconstitutional provisions of the IGRA. Rather, the Court's dicta seemed to cover a wide range of congressional activity, potentially including activity commenced under the War Powers Clause.[62]

C. *Seminole Tribe*'s Impact on USERRA

Seminole Tribe created a split in the lower federal courts' applications of the USERRA provisions permitting servicemember suits against state employers in federal court. In *Velasquez v. Frapwell*,[63] the Seventh Circuit revisited the issue of the constitutionality of the enforcement provisions of USERRA as applied to state actors. The Seventh Circuit explained the Supreme Court's reasoning in *Seminole Tribe* as, "Congress cannot abrogate a state's sovereign immunity by a federal statute based on Congress's power over various forms of commerce, because that power was conferred on Congress by the original Constitution, which predates the Eleventh Amendment and so cannot limit it."[64] The Seventh Circuit recognized that USERRA was passed under the War Powers Clauses rather than any type of commerce clause,[65] but interpreted *Seminole Tribe* as applying to "all federal statutes based on Article I [of the Constitution]."[66] In invalidating the provisions of USERRA rendering state violations privately enforceable in federal court, the *Velasquez* court stated that the "subject matter of the suit to which the defense of sovereign immunity is interposed is . . . irrelevant,"[67] and that *Seminole Tribe* "point[ed] to the conclusion that legislation founded on the war power does not override state sovereign immunity."[68]

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[61] *Id.*
[62] *See* discussion *infra* Part III.A (providing a more detailed discussion of the Court's reasoning in the *Seminole Tribe* case).
[63] Velasquez v. Frapwell, 160 F.3d 389 (7th Cir. 1998).
[64] *Id.* at 391; *see also* Palmatier v. Mich. Dep't of State Police, 981 F. Supp. 529, 532 (W.D. Mich. 1997) (stating that under *Seminole Tribe*, Congress could not abrogate state sovereign immunity using its War Powers). *But see* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 (1st Cir. 1996) (stating that the *Seminole Tribe* rationale did not apply to a War Powers analysis).
[65] *Velasquez*, 160 F.3d at 392.
[66] *Id.* at 394.
[67] *Id.* at 393.
[68] *Id.* at 394.

The First Circuit, on the other hand, still permitted individual suits against state employers instituted under the Veteran's Reemployment Rights Act of 1968. The court relied on a prior First Circuit precedent allowing such suits notwithstanding a state's Eleventh Amendment claims,[69] and specifically said that *Seminole Tribe* "does not control the War Powers analysis."[70] The First Circuit, however, did not analyze how *Seminole Tribe* may have affected the War Powers analysis, if at all, instead relying solely on the First Circuit precedent.

The Supreme Court did not address the split in the circuit courts concerning the power of Congress to abrogate states' sovereign immunity pursuant to its constitutional War Powers. Congress itself seemingly made the issue a moot point when it revised USERRA in 1998, ostensibly removing federal jurisdiction over servicemembers' private USERRA-related causes of action against state employers.[71] In amending USERRA to remove federal jurisdiction over these private causes of action, some members of Congress felt that they were solving the constitutional issue.[72] The current version of USERRA, with the

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[69] *Diaz-Gandia*, 90 F.3d at 616. As precedent, the First Circuit relied on *Reopell v. Massachusetts*, 936 F.2d 12 (1st Cir. 1991).
[70] *Diaz-Gandia*, 90 F.3d at 616.
[71] Velasquez v. Frapwell, 165 F.3d 593, 593 (7th Cir. 1999).
[72] *See* 144 CONG. REC. H34, 1397–1398 (statement of Cong. Evans):

> The need for this legislation became apparent after the Supreme Court's 1996 ruling in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, that Congress was precluded by the Eleventh amendment from providing a federal forum for suits under laws enacted pursuant to the Commerce Clause of the United States Constitution. Although the authority for laws involving veterans benefits is derived from the War Powers clause, several courts have held the reasoning of the *Seminole Tribe* case precludes federal court jurisdiction of claims to enforce federal rights of State employees under the Uniformed Service Employment and Re-employment Rights Act (USERRA).

Id.; *see also* 144 CONG. REC. S151, 12934 (statement of Sen. Rockefeller):

> However, several states have taken the position that the Eleventh Amendment to the Constitution bars USERRA from applying to State agencies as employers. This argument is based on the 1996 Supreme Court decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), which held that Congress was unable to enact a law that allowed individuals to sue states for violating federal statutes under the Eleventh amendment. Several district courts have applied the *Seminole* decision to dismiss USERRA cases against states as employers.

1998 amendments, specifically envisions that the United States, rather than a servicemember acting in his or her private capacity, would bring a case in federal court against state employers who violate the statute.[73] USERRA's enforcement scheme still envisions, however, that servicemembers can bring private enforcement actions against state employers in state courts.[74] The constitutionality of this provision has likewise been called into question as a result of the Supreme Court's decision in *Alden v. Maine*, which generally applied the *Seminole Tribe* rationale to actions by private parties attempting to enforce federal statutorily-created rights in state courts.[75] Notwithstanding the *Alden* decision, the USERRA provision providing enforcement by individuals in state courts remains in force. The *Seminole Tribe* and *Alden* decisions, in conjunction with the congressional amendments to USERRA, seem to have eviscerated any enforcement provisions permitting private service-member suits against state employers who violate USERRA. The *Seminole Tribe* and *Alden* decisions, however, concerned statutes passed pursuant to the Commerce Clause, while USERRA is a War Powers statute. This raises several important questions. First, how did the Court in *Seminole Tribe* and *Alden* examine how congressional Commerce Powers interacted with state sovereign immunity under the Eleventh Amendment? Second, how is such an analysis related to a War Powers analysis? Are the congressional War Powers on an equal footing with the Commerce Clause Powers, or does the judiciary treat War Powers legislation differently? How did the Founding Fathers view the Constitution as a check upon state sovereignty in both the War Powers and the Commerce Powers areas? The remainder of this article examines

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> Title II would substitute the United States for an individual veteran as the plaintiff in cases where the Attorney General believes that a state has not complied with USERRA. This restores the ability of veterans who are employed by a state to seek redress for violations of their reemployment rights.

Id.

[73] 38 U.S.C. § 4323(a)(1) (2000) ("In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action."); *see* § 4323(b)(1) (jurisdiction) ("In the case of an action against a State (as an employer) or a private employer commenced by the United States, the district courts of the United States shall have jurisdiction over the action.").

[74] *Id.* § 4323(b)(2) ("In the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.").

[75] Alden v. Maine, 527 U.S. 706, 712 (1999) ("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.").

these questions, demonstrating that the USERRA abrogation of state sovereign immunity is on a much firmer constitutional foundation than the commerce legislation analyzed in *Seminole Tribe* and *Alden*. The analysis begins by examining the Supreme Court's methodology in *Seminole Tribe* and other modern Eleventh Amendment cases, and then examines the traditional judicial views of War Powers legislation.

III. The Supreme Court's Methodology in Modern Eleventh Amendment Jurisprudence

A. *Seminole Tribe*: The Rebirth of the Eleventh Amendment

The specific question before the Supreme Court in the *Seminole Tribe* case was "Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause?"[76] While the issue in the case as enunciated by the Court is quite narrow on its face, the Court used a very broad constitutional analysis to answer it. The Court, citing primarily *Hans v. Louisiana*,[77] recognized that the Eleventh Amendment is not simply a jurisdictional limit—rather, the Eleventh Amendment is the constitutional embodiment of the proposition that states are sovereign entities that cannot be sued by citizens without the state's consent.[78] In certain circumstances, Congress has the power to abrogate a state's sovereign immunity, but any statute seeking to abrogate must be "a valid exercise of Congressional power."[79] In other words, laws passed by Congress must comply with the limitations in the Eleventh Amendment.

The Court stated that it had found valid exercises of congressional authority to abrogate in only two situations: Fourteenth Amendment cases (citing *Fitzpatrick v. Bitzer*[80]) and certain Commerce Clause cases

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[76] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53 (1996).
[77] Hans v. Louisiana, 134 U.S. 1 (1890).
[78] *Seminole Tribe*, 517 U.S. at 54.
[79] *Id.* at 55.
[80] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that the 1972 amendments to the Civil Rights Act of 1964 permitting private suits against State actors was not prohibited by the Eleventh Amendment, as it was a valid exercise of congressional power under the Fourteenth Amendment).

(citing *Pennsylvania v. Union Gas Co.*[81]). The Court, stating that *Union Gas* was only a plurality opinion which would, if followed consistently, effectively render *Hans* and its progeny impotent, expressly overruled the *Union Gas* decision.[82] The *Union Gas* case, in the Court's opinion, had come to stand for the proposition "that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III,"[83] a proposition that the five-member majority in *Seminole Tribe* emphatically rejected. The Court explained the different result in *Fitzpatrick* by stating that the Fourteenth Amendment, because it was adopted after the Eleventh Amendment, "altered the preexisting balance between federal and state power achieved by Article III and the Eleventh Amendment."[84] The Court's approach in explaining *Fitzpatrick* has sometimes been called the chronological approach.[85] Apparently recognizing and accepting that such an approach would invalidate almost any congressional attempts to abrogate pursuant to its enumerated powers, the Court left a small loophole, explaining that "states [are] immune from suits without their consent save where there has been a surrender of this immunity in the plan of the convention."[86] In other words, if the states had waived their immunity as part of ratification of a certain constitutional provision, then abrogation by Congress could be valid. However, the Court made an extremely sweeping pronouncement on the scope of their decision:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh

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[81] Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that Congress had the authority under the Commerce Clause to enable private Superfund suits for damages against state actors who violated the Comprehensive Environmental Response, Compensation, and Liability Act of 1980), *rev'd*, 517 U.S. 44 (1996)).
[82] *Seminole Tribe*, 517 U.S. at 66.
[83] *Id.* at 65.
[84] *Id.* at 66.
[85] *See, e.g.*, Hirsch, *supra* note 15, at 1005.
[86] *Seminole Tribe*, 517 U.S. at 68.

> Amendment prevents congressional authorization of suits by private parties against unconsenting states.[87]

The Court decided that the suit by the Seminole Tribe of Florida against a state government was "barred by the Eleventh Amendment and must be dismissed for lack of jurisdiction."[88]

B. *Alden v. Maine*: Expanding the Court's Historical Approach

Alden v. Maine applied *Seminole Tribe* to actions pursued against states in state courts under color of federal law. The *Alden* case involved a suit by probation officers against Maine for an alleged violation of the Fair Labor Standards Act of 1938 (FLSA).[89] After the federal case was dismissed in the wake of the *Seminole Tribe* decision, the parole officers filed suit in the state court system of Maine,[90] and the case eventually reached the Supreme Court. The *Alden* Court interpreted its prior *Seminole Tribe* decision as "ma[king] it clear that Congress lacks power under Article I to abrogate the States' sovereign immunity from suits commenced or prosecuted in the federal courts."[91] The Court, reiterating the understanding of the Constitution outlined in *Seminole Tribe*, stated that Congress's Article I powers in conjunction with the Necessary and Proper clause[92] did not amount to "incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers."[93] The Court stated that the rationale of the line of cases upholding Eleventh Amendment sovereign immunity of states in federal courts applied in state courts as well.[94] Since *Alden* presented what was essentially a case of first impression, however, the Court went on to engage in a lengthy discussion of the

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[87] *Id.* at 72.
[88] *Id.* at 76.
[89] Alden v. Maine, 527 U.S. 706, 710 (1999).
[90] *Id.* at 712.
[91] *Id.* Note that this view of *Seminole Tribe*'s holding is much broader than the narrow issue presented in that decision. This is most likely a result of the extremely broad language the Court used to justify the result in *Seminole Tribe*.
[92] U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have power to . . . . make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").
[93] *Alden*, 527 U.S. at 732.
[94] *Id.* at 733.

specific issue presented (i.e., could Congress abrogate a state's sovereign immunity in state court).[95]

In analyzing the issue, the Court delved into history in the way originally hinted at in *Seminole Tribe*, and attempted to ascertain "whether there is 'compelling evidence' that this derogation of the States' sovereignty is 'inherent in the constitutional compact,' . . . ."[96] In doing so, the Court analyzed four separate factors: first, "evidence of the original understanding of the Constitution";[97] second, "early congressional practice";[98] third, the "theory and reasoning of our earlier cases";[99] and fourth, "whether a congressional power to subject nonconsenting States to private suits in their own courts is consistent with the structure of the Constitution."[100] The first two parts of the analysis draw heavily from history, and is thus referred to as an historical analysis.[101] In its historical analysis of the issue, the *Alden* Court argued that the "founder's silence [on the issue] is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity [in their own courts.]"[102] This immunity was "so well established that no one conceived it would be altered by the new Constitution."[103] The Court reasoned that the lack of legislation from the early Congresses providing for personal causes of action in state courts points to the conclusion that the "early Congresses did not believe they had the power to authorize private suits against the States in their own courts."[104]

C. *Central Virginia Community College v. Katz*: The Historical Approach Trumps State Sovereign Immunity

In *Central Virginia Community College v. Katz*,[105] the Supreme Court used the historical methodology to an even greater degree, basing its decision almost entirely on a historical analysis of the Bankruptcy

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[95] *Id.* at 741.
[96] *Id.*
[97] *Id.*
[98] *Id.* at 743.
[99] *Id.* at 745.
[100] *Id.* at 748.
[101] *See, e.g.*, Hirsch, *supra* note 15, at 1022.
[102] *Alden*, 527 U.S. at 741.
[103] *Id.*
[104] *Id.* at 744.
[105] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

Clause.[106] The *Katz* case involved a "court-appointed liquidating supervisor of [a] bankrupt estate . . . . [seeking] to avoid and recover alleged preferential transfers to [the state]."[107] The State of Virginia attempted to invoke its sovereign immunity, and the Supreme Court was called to answer whether a purported congressional abrogation of state sovereign immunity was valid in the bankruptcy context.[108] The Court recognized that dicta in *Seminole Tribe* "reflected an assumption that the holding in that case would apply to the Bankruptcy Clause,"[109] but rejected this dicta as an erroneous assumption.[110] The Court held that Virginia's sovereign immunity defense was invalid, stating that congressional power to treat states as any other creditor "arises from the Bankruptcy Clause itself; the relevant 'abrogation' is the one effected in the plan of the Convention, not by statute."[111] In so holding, the Court examined the historical underpinnings of the Bankruptcy Clause in great detail.[112] After examining the "wildly divergent schemes for discharging debtors and their debts"[113] in the colonies, the Court determined that the constitutional grant of authority to Congress to establish uniform bankruptcy laws was "a unitary concept rather than an amalgam of discrete segments."[114] At the time of ratification, the states had

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[106] *See, e.g.*, Anthony J. Enright, Note*: The Originalist's Dilemma:* Katz *and the New Approach to the State Sovereign Immunity Defense*, 81 NOTRE DAME L. REV. 1553, 1555 (2006).

> Katz is remarkable not merely for its outcome, but also because of the different approaches reflected in the majority and dissenting opinions. Although much of the Court's sovereign immunity jurisprudence has been characterized by sharply divided, 5–4 opinions, all of the Justices have recognized history as playing an important role in determining what the law is today. Katz goes a step further with respect to its use of history. Although it is a 5–4 decision, the central inquiry for both the majority and the dissent in Katz is an originalist one: How was Congress's Article I bankruptcy power understood by the Constitution's framers?

Id.

[107] *Katz*, 546 U.S. at 360.

[108] *Id.* at 359–60.

[109] *Id.* at 363.

[110] *Id.*

[111] *Id.* at 379.

[112] The four-member dissent, while not disputing the historical methodology of the majority, took issue with the majority's interpretation of history. *See id.* at 385 (Scalia, J., dissenting) ("The majority also greatly exaggerates the depth of the Framers' fervor to enact a national bankruptcy regime.").

[113] *Id.* at 365.

[114] *Id.* at 370.

recognized that historically, courts acting in bankruptcy "had the power to issue ancillary orders enforcing their *in rem* adjudications."[115] This indicates that the drafters of the Bankruptcy Clause would "have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property."[116] As far as state sovereign immunity was implicated in this power, by ratifying the Constitution "the States agreed in the plan of the Convention not to assert that immunity,"[117] at least in the bankruptcy context. The Court went on to analyze early congressional statutes,[118] which provided evidence that "the Bankruptcy Clause of Article I, the source of Congress'[s] authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood the Eleventh Amendment to exemplify."[119]

There are clear differences between the enforcement provisions of USERRA and the bankruptcy provisions at issue in *Katz*. First, bankruptcy primarily involves in rem jurisdiction, and hence "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."[120] Additionally, respondent Katz was not enforcing any type of individual congressionally-created rights; he was overseeing the liquidation of Wallace's Bookstore's bankrupt estate, as he was appointed by the federal bankruptcy court to do.[121] In this manner, he was essentially acting at the behest of the federal government. However, as the *Katz* case represents the Court's tentative retreat from its sweeping dicta in *Seminole Tribe* and *Alden*, it is necessary to look at its analysis in analyzing the USERRA issue. Are the congressional War Powers, like the powers conferred by the Bankruptcy Clause, a "unitary concept" necessitating state subordination to federal decisions? If so, does the USERRA enforcement provision at issue validly fall under that power?

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[115] *Id.*
[116] *Id.* at 372.
[117] *Id.* at 373.
[118] *See id.* at 373–76 (examining the Bankruptcy Act of 1800, which gave habeas corpus power to the federal courts in situations where debtors had been arrested by the states after discharge in bankruptcy).
[119] *Id.* at 375.
[120] *Id.* at 362.
[121] *Id.* at 360.

IV. The Congressional War Powers and State Rights

The Supreme Court's analytical approaches in *Seminole Tribe*, *Alden* and *Katz* render it necessary to analyze the congressional War Powers in their historical context, and then apply that analysis to the USERRA provisions permitting individual servicemember suits against state employers who violate the statute. The essential question then becomes whether the congressional exercise of its War Powers includes the power to subject states to suits by individual servicemembers. This analysis begins with a brief examination of the Framers' views of congressional War Powers.

A. Congressional War Powers at the Time of Ratification

From the beginnings of the Republic, the War Powers of Congress have been considered almost absolute vis-à-vis the states. In *The Federalist Number 23*, Alexander Hamilton wrote that

> [t]he authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed . . . . [T]here can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the National Forces.[122]

It is important to note that Hamilton wrote this sweeping language as an argument *for* the adoption of the Constitution over the Articles of Confederation, which itself "granted Congress a near-monopoly of

[122] THE FEDERALIST NO. 23 (Alexander Hamilton).

overtly war-related and foreign relations powers."[123] Although the use of the War Powers to override state sovereign immunity from private suits was not overtly discussed at the Constitutional Convention, in the Articles of Confederation Congress already had a substantial measure of control over the states when it came to the power to raise armies. For example, to "provide military forces, Congress could 'build and equip' a navy and set the size of land forces, 'mak[ing] requisitions from each State for its quota, in proportion to the number of white inhabitants in such State . . . .'"[124] This power of requisitioning was not the same as a direct draft. Although the federal government under the Articles of Confederation did have this power to requisition troops from the states, the Framers found this power inadequate. Alexander Hamilton wrote that the "power of raising armies by the most obvious construction of the articles of Confederation is merely a power of making requisitions upon the States for quotas of men."[125] Hamilton found this method of raising armies "replete with obstructions to a vigorous and to an economical system of defense."[126] A large potential problem with this method of raising armies, a problem that actually presented itself during the Revolution, was that states far from the war would not meet their personnel quotas.[127] In this respect, the expansion of federal power under the Constitution in the area of "rais[ing] and support[ing] Armies"[128] was based in part on the need of the federal government to coerce the states into providing troops for a national Army.

Another War Powers clause which was a cession of power to the federal government was the Militia Clause.[129] Militias had normally been under exclusive state control, and had for some time been considered as protection against the dangers of a standing army.[130] Nonetheless, the Constitution envisioned that the federal government would exercise a great deal of control over the militia. Because militias were commonly seen as a defense against a standing army, the "remarkable feature of the militia clause is . . . not the existence of

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[123] Charles Lofgren, *War Powers, Treaties, and the Constitution*, *in* THE FRAMING AND RATIFICATION OF THE CONSTITUTION 242, 242 (Leonard Levy & Dennis Mahoney, eds., 1987).
[124] *Id.*
[125] THE FEDERALIST NO. 22 (Alexander Hamilton).
[126] *Id.*
[127] *Id.*
[128] U.S. CONST. art. I, § 8, cl. 12.
[129] *Id.* art. I, § 8, cl. 15. Congress has the power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel invasions."
[130] Lofgren, *supra* note 123, at 249.

limitations but the grant itself . . . ."[131] Hamilton explained the necessity for at least some measure of federal control over the militia as follows:

> It requires no skill in the science of war to discern that uniformity in the organization and discipline of the militia would be attended with the most beneficial effects, whenever they would be called into service for the public defense. It would enable them to discharge the duties of the camp and of the field with mutual intelligence and concert—an advantage of particular moment in the operations of an army; and it would fit them much sooner to acquire the degree of proficiency in military functions which would be essential to their usefulness. This desirable uniformity can only be accomplished by confiding the regulation of the militia to the direction of the national authority.[132]

Based upon the understanding of the War Powers clauses at the time of ratification, it is clear that exclusive power to raise and control armies and to regulate militias is in the hands of the Congress, and that such power is absolute as opposed to the states. Such an understanding did not exist, however, regarding both the Commerce Clause and the Bankruptcy Clause, the constitutional provisions examined in *Seminole Tribe*, *Alden*, and *Katz*. For example, in the whole of *The Federalist Papers*, the Bankruptcy Clause is mentioned only once.[133] Additionally, the commerce power of the federal government was limited to the regulation of interstate commerce. Intrastate commerce, which is completely internal to a particular state, was not subject to federal regulation.[134]

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[131] *Id.*

[132] THE FEDERALIST NO. 29 (Alexander Hamilton).

[133] THE FEDERALIST NO. 42 (James Madison).

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question.

Id.

[134] *See* United States v. Lopez, 514 U.S. 549, 553 (1995) (quoting Gibbons v. Ogden, 22 U.S. 1, 194 (1824)) (discussing the application of the Commerce Clause).

B. Judicial Deference to Congressional War Powers Decisions

Federal courts have long recognized that statutes passed by Congress pursuant to the War Powers clauses are qualitatively different than those passed pursuant to its other enumerated powers. The Supreme Court has indicated in dicta that certain of the War Powers, even if not enumerated in the Constitution, would have adhered to the federal government simply due to its nature as supreme sovereign in the land.[135] In other words, the very nature of the sovereign federal government is that it can wage war, and raise and support armies to do that, at the expense of the states, if such governmental rights are at cross purposes. The Supreme Court has always held that congressional War Powers are extremely broad; when the Court addresses the issue, it speaks in terms as broad, if not broader, than the sovereign immunity language in *Seminole Tribe* and its progeny. In upholding the constitutionality of statutes passed pursuant to congressional War Powers, the Court almost always speaks of Congress's power in this regard as being superior to the rights of individual citizens or of the states.

For example, in *Tarble's Case*, the Supreme Court rejected the claim that a state judge could, through the use of the writ of habeas corpus,

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> It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would certainly be inconvenient, and is certainly unnecessary.

Id.

[135] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. Although there is a difference between the power to declare and wage war (which is external, focused on other nations) and the power to raise armies (which is internal, focused towards the citizens and the states), the former cannot occur without the latter, and the same deference is generally given to each by the courts. *But see* Velasquez v. Frapwell, 160 F.3d 389, 393 (7th Cir. 1998) (arguing that the history as provided by the *Curtiss-Wright* Court may very well be erroneous).

order the release of a Soldier from his service in the federal army.[136] The Court rejected that argument, stating that even if an individual were illegally held by the United States, that person had recourse only in the federal courts.[137] In establishing the primacy of the federal government's actions taken pursuant to its War Powers, the Court stated in extremely broad dicta that the

> execution of the [War Powers] falls within the line of [the Federal government's] duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies should be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned . . . . No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service.[138]

This broad statement seemed to indicate that the federal constitutional power to raise and support armies trumped absolutely any state power that conflicted with it.

Using similar reasoning and deference, the Court upheld the constitutionality of compulsory military service in the *Selective Draft Law Cases* of 1918.[139] The Court answered multiple constitutional arguments in this case, every time coming down firmly on the side of congressional War Powers in opposition to other perceived individual or state rights. Regarding an argument that the power to raise armies was only applicable to a volunteer force, the Court said that "a governmental power which has no sanction to it and which therefore can only be exercised provided the citizen consents to its exertion is in no substantial sense a power."[140] The same argument could conceivably be made as

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[136] Tarble's Case, 80 U.S. 397, 401–02 (1872).
[137] *Id.* at 411.
[138] *Id.* at 408.
[139] Selective Draft Law Cases, 245 U.S. 366, 366 (1918).
[140] *Id.* at 378.

applicable to the states themselves. The Court rejected Thirteenth Amendment[141] challenges based upon involuntary servitude, stating that "we are constrained to the conclusion that the contention to that effect is refuted by its mere statement."[142]

The *Selective Draft Law Cases* also included language upholding federal authority at the expense of the states. Regarding state control of militias, the states only had "undelegated control of the militia to the extent that such control was not taken away by the exercise of Congress of its power to raise armies."[143] In other words, even in the militia realm, where the states had primacy prior to the adoption of the Constitution, the states could only act when Congress left it open for them to do so. The Militia Clause simply left to the states "an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared."[144] Under this analysis, the Militia Clause enabled Congress to place some of the responsibility for militia training on the state level, although such training was to be directed by Congress, and Congress could decide to act in that area to the fullest extent of its powers at any time.[145] In no event, however, could states intrude upon the federal prerogative of the congressional exercise of its War Powers. When Congress exercised such power, it was "complete to the extent of its exertion and dominant."[146] Congressional War Powers actions were completely controlling upon the states. There was no wiggle room.

Courts have traditionally given this broad deference to congressional action in War Powers cases. For example, *Rotsker v. Goldberg*, which the Supreme Court decided in 1981, involved congressional authority under the Fifth Amendment to require registration of males only for the draft.[147] In the opinion, the Court laid out its traditional view of deference to Congress in general constitutional issues. The Court stated that "Congress is a coequal branch of government whose Members take

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[141] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").
[142] *Selective Draft Law Cases*, 245 U.S. at 390.
[143] *Id.* at 383.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] Rostker v. Goldberg, 453 U.S. 57, 59 (1981).

the same oath we do to uphold the Constitution of the United States."[148] Because of this, the Court normally would defer to Congress and give their determinations "great weight"[149] in determining whether or not a particular statute is constitutional. However, the Court stated that "in perhaps no other area has the Court accorded Congress greater deference"[150] than in the exercise of its War Powers. In reviewing War Powers legislation, the Court recognized that "the lack of competence on the part of the courts [to act in this area] is marked."[151]

The Court illustrated its traditional deference to Congress in the War Powers area by citing a long list of precedents. These precedents included *Parker v. Levy*,[152] which the *Rotsker* Court interpreted as requiring a different standard of constitutional analysis in the military context.[153] The Court stated that this deference to the War Powers decisions of Congress was also evident in *Greer v. Spock*,[154] "where the Court upheld a ban on political speeches by civilians on a military base,"[155] and *Brown v. Glines*,[156] "where the Court upheld regulations imposing a prior restraint on the right to petition of military members."[157] Although the Court recognized that Congress cannot "disregard the

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[148] *Id.* at 64.
[149] *Id.*
[150] *Id.* at 64–65.
[151] *Id.* at 65.
[152] Parker v. Levy, 417 U.S. 733 (1974) (expressing the view that Congress had greater flexibility in legislation regarding the armed forces, notwithstanding concerns that the legislation may raise constitutional issues if applied to civilian society).
[153] *Rostker*, 453 U.S. at 66 (quoting *Parker*, 417 U.S. at 756, 758).

> "Congress is permitted to legislate both with greater breadth and flexibility" when the statute governs military society, and that "[while] the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."

Id.
[154] Greer v. Spock, 424 U.S. 828 (1976) (explaining that regulations on Fort Dix prohibiting some forms of free speech did not violate the Constitution, as the basic function of Fort Dix was to train Soldiers, not to provide an open forum, and that the post commander traditionally had the power to exclude all civilians from the post).
[155] *Rostker*, 453 U.S. at 66.
[156] Brown v. Glines, 444 U.S. 348 (1980) (holding that Air Force regulations requiring command approval for circulation of petitions on the base were not prima facie violations of the First Amendment).
[157] *Rostker*, 453 U.S. at 66.

Constitution when it acts in the area of military affairs . . . the tests and limitations to be applied may differ because of the military context."[158]

Although the cases cited by the *Rotsker* Court involved individual citizens' rights rather than states' rights, the Court has been just as deferential to congressional War Powers actions affecting the latter. In *Perpich v. Department of Defense*,[159] the Court considered whether a federal statutory limit on a governor's ability to disapprove of the state's National Guard training in a foreign country was constitutional.[160] The case involved the Montgomery Amendment to the Armed Forces Reserve Act of 1952, which withdrew the gubernatorial consent required for National Guard training outside of the United States.[161] The Governor of Minnesota argued that the Montgomery Amendment was unconstitutional based upon the language of the Militia Clause, which purported to allow the federal government to call out the militia for the three limited purposes enunciated in the clause.[162] Although the Court ultimately decided the issue based upon the status of the National Guard members as members of the Reserve forces of the United States, [163] the Court revisited the reasoning in the *Selective Draft Law Cases* regarding the primacy of the federal government over the state militia. The Court rejected the Minnesota governor's argument that the interpretations of the Militia Clause had "the practical effect of nullifying an important State power that is expressly reserved in the Constitution."[164] The Court stated that instead, past precedent "merely recognizes the supremacy of the federal power in the area of military affairs."[165]

This brief historical review establishes that the Framers placed absolute control of the power to raise and support armies in the federal government. Additionally, the Framers placed an almost exclusive control over the militia in the federal government, subject only to the discretion of Congress in exercising that power. Such deference by the federal courts has traditionally been lacking when it comes to a Commerce Clause analysis. Most Commerce Clause jurisprudence prior to 1887 involved decisions regarding "the Commerce Clause as a limit

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[158] *Id.* at 67.
[159] Perpich v. Dep't of Def., 496 U.S. 334 (1990).
[160] *Id.* at 336.
[161] *Id.*
[162] *Id.* at 347.
[163] *Id.*
[164] *Id.* at 351.
[165] *Id.*

on state legislation that discriminated against interstate commerce"[166] rather than as a limit on federal power. Once Commerce Clause cases regarding the limits of federal power reached the Supreme Court, however, the Court was far from deferential, "import[ing] from our negative Commerce Clause cases the approach that Congress could not regulate activities such as 'production,' 'manufacturing,' and 'mining.'"[167] The Court's general approach was that "[a]ctivities that affected interstate commerce directly were within Congress'[s] power; activities that affected interstate commerce indirectly were beyond Congress' reach."[168] This attitude toward federal power in the commerce clause realm changed substantially during the New Deal,[169] but "even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[170]

In short, the War Powers are of such a nature that congressional acts taken pursuant to them require the greatest deference from the courts, and that deference has been traditionally granted. On the other hand, the courts have traditionally not deferred to congressional acts passed pursuant to the Commerce Clause. Even in the post-New Deal era, where more deference has been given to Commerce Clause legislation, federal courts have not provided nearly the amount of deference provided to War Powers legislation. The judiciary has given deference to War Powers legislation, even when such legislation has seemingly run afoul of other important constitutional concerns, such as the rights guaranteed to American citizens by the Bill of Rights, as well as the perceived rights of the states to conduct their own military affairs. The question remains, how does the USERRA provision permitting private suits against state governments fit into this constitutional scheme? Is the sovereign immunity of the states recognized by the Eleventh Amendment such that it overrides the enforcement mechanism of provisions passed pursuant to the War Powers? In analyzing this question, it becomes apparent that courts have overlooked fundamental aspects of the USERRA legislation.

As discussed previously,[171] federal circuit courts holding the pertinent enforcement provisions of USERRA unconstitutional have

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[166] U.S. v. Lopez, 514 U.S. 549, 553 (1995).
[167] *Id.* at 554.
[168] *Id.* at 555.
[169] *Id.*
[170] *Id.* at 556–57.
[171] *See* discussion *supra* Part II.C.

relied almost solely on the broad dicta of *Seminole Tribe*. For example, in *Velasquez v. Frapwell*, the Seventh Circuit has argued convenience, stating that "[i]t's a lot simpler to have a rule that the Eleventh Amendment applies to all federal statutes based on Article I than to have to pick and choose among the numerous separate powers conferred on Congress by that article."[172] Whatever the merits that this "simplicity" argument may have, *Velasquez* was decided prior to *Katz*, which carves out at least a narrow exception to the Eleventh Amendment sovereign immunity. It should be noted that the Seventh Circuit eschewed the historical analysis approach, stating that the "historical analysis in [*Seminole Tribe*] is not binding"[173] and that "judges do not have either the leisure or the training to conduct responsible historical research or competently umpire historical controversies."[174] The historical analysis approach is, however, the approach that started with *Seminole Tribe*, gained ground in *Alden*, and was finally dispositive in favor of abrogation in *Katz*. On the other hand, courts upholding the constitutionality of USERRA-like enforcement provisions have virtually ignored *Seminole Tribe*. The First Circuit gave short shrift to state sovereign immunity in *Diaz-Gandia*, instead relying on its old First Circuit precedent *Reopell v. Massachusetts*. The major problem with the First Circuit's method, however, was that *Reopell* was based in large part on *Union Gas*,[175] which was expressly overruled in *Seminole Tribe*.[176] None of the circuit courts' problems in this area disappeared with the 1998 amendments to USERRA, as individual servicemembers are still permitted, under the terms of the statute, to file suit against state employers in state courts. So, the question remains as to how the historical analysis of War Powers affects the analysis of the constitutionality of USERRA's purported abrogation of state sovereign immunity.

That USERRA's constitutional basis derives from the congressional War Powers is beyond doubt.[177] The primary purpose of USERRA is to

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[172] Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir. 1998).
[173] *Id.* at 393.
[174] *Id.*
[175] Reopell v. Mass., 936 F.2d 12, 16 (1st Cir. 1991) ("The VVRA, to be sure, was not enacted under the Commerce Clause, the focus of *Union Gas*. But the Court's rationale for holding that Commerce Clause enactments abrogate the Eleventh Amendment equally supports War Powers abrogation.").
[176] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996).
[177] Although Congress did not explicitly state its constitutional basis for passing USERRA, even courts striking down the enforcement provisions against state actors have

encourage membership in the Reserve and Guard forces.[178] Such a purpose is clearly consistent with the constitutional duty of Congress to raise and support Armies.[179] If a noncareer servicemember's civilian job were not protected by federal legislation, there would exist less of an incentive for those servicemembers to remain in the Armed Forces. Similarly, if a potential applicant to the noncareer uniformed service knew that his or her job would not be protected, he or she would possibly be less likely to commit. The USERRA, in this respect, is a valuable recruiting and retention tool, and as such is a valid exercise of congressional authority. Whether or not an employer is a private company or a state government simply makes no difference when it comes to these concerns.

Assuming that USERRA is a valid exercise of the congressional War Powers, however, it is still necessary to analyze how the USERRA enforcement mechanism works under the Constitution. In so doing, it is essential to recognize two important aspects of USERRA that the circuit courts did not address. First, although a servicemember who is suing a state under USERRA provisions is an aggrieved party,[180] the federal government is also an aggrieved party.[181] The servicemember suing a state employer is not only enforcing an individual statutorily created right; he or she is enforcing a right of the federal government given to it by the express terms of the Constitution (i.e., the power to raise armies). Second, the servicemember suing a state employer has gained the right to sue not simply through statute, but as a direct result of his or her federal service. In this sense, the individual given the right to bring suit under USERRA is not bringing suit simply as a private person, but also as an employee of the federal government.[182] These two factors must be kept in mind at all times when analyzing the constitutional aspects of

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recognized that the legislation was based in the War Powers. *See Velasquez*, 160 F.3d at 392.

[178] 38 U.S.C. § 4301(a) (2000).

[179] U.S. CONST. art. I, § 8, cl. 12.

[180] 38 U.S.C. § 4323(a)(2) ("A person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer . . . .").

[181] *Id.* § 4323(a)(1) ("In the case of such an action against a State (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.").

[182] A good analogy for this is the Federal Tort Claims Act (FTCA). Under the FTCA, a member of the military is included in the term "employee of the government." *See* 28 U.S.C. § 2671 (2000). If a servicemember is "acting in line of duty," the servicemember is within the scope of his employment for FTCA purposes. *See id.* Similarly, an individual entitled to sue a state under USERRA has gained that right due to his status as an employee of the government acting within the scope of his service.

USERRA's enforcement mechanism. Although USERRA does not explicitly say this, an individual suing in state court can be seen as suing on the federal government's behalf. Because of this, it is helpful to examine state sovereign immunity in *qui tam* cases as an analogy to the USERRA cases.

V. For Our Lord the King: *Qui Tam* and an Alternative Approach to USERRA Sovereign Immunity Issues

A. A Brief Comparison of *Qui Tam* and USERRA

Qui tam is an abbreviated form of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequiter*, which is translated in English as "who pursues this action on our Lord the King's behalf as well as his own."[183] Probably the most popular *qui tam* statute is the False Claims Act, originally passed in 1863, which provided for a private individual (the "relator") to bring suit on behalf of the federal government to enforce the Act's provisions.[184] Although the relator brings suit, he or she must inform the government, who has the discretion to intervene (or not to intervene) as a party.[185] The relator receives a percentage of the proceeds of the action, the percentage depending in large part whether or not the United States intervenes as a party.[186] Although USERRA is not explicitly a *qui tam* statute, the analogy is clear: a Soldier suing under USERRA enforces a federal law (and, in fact, enforces a federal constitutional power). The USERRA does not overtly state this, but the fact that the United States is a party in interest in USERRA legislation shows that, like the False Claims Act, an important governmental interest is at stake.

B. *Stevens v. Vermont Agency of Natural Resources*: The Second Circuit Rules that *Qui Tam* Trumps Sovereign Immunity

The Supreme Court has left open the question whether the Eleventh Amendment prohibits an individual from suing a state actor under the False Claims Act. At least one circuit court, however, has held that the

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[183] Vt. Agency of Natural Res. v. Stevens, 529 U.S. 765, 768 (2000).
[184] *Id.*
[185] *Id.* at 770.
[186] *Id.*

Eleventh Amendment does not prohibit this. In *United States* ex rel. *Jonathan Stevens v. Vermont Agency of Natural Resources*,[187] the Second Circuit directly addressed the issue. The decision arose from a *qui tam* suit filed by Jonathan Stevens alleging that the Vermont Agency of Natural Resources (hereinafter the Agency) had violated the False Claims Act.[188] Stevens, who worked for the Agency, alleged that the Agency falsified documents regarding time that Agency employees worked on federally funded actions, which resulted in the Agency's receipt of federal funds to which it was not entitled.[189] The United States did not intervene in the action, leaving the action in effect a private suit against a state government.[190] Vermont moved to dismiss based upon, among other things, Eleventh Amendment sovereign immunity.[191]

The Second Circuit saw the question as "whether a *qui tam* suit under the FCA should be viewed as a private action by an individual, and hence barred by the Eleventh Amendment, or one brought by the United States, and hence not barred."[192] The Second Circuit, in rejecting Vermont's sovereign immunity defense, drew broad distinctions between *qui tam* cases and normal suits. The court stated that

> [t]he real party in interest in a *qui tam* suit is the United States . . . . It is the government that has been injured by the presentation of such claims; it is in the government's name that the action must be brought; it is the government's injury that provides the measure of damages that are to be trebled; and it is the government that must receive the lion's share—at least 70%—of any recovery. To be sure, the *qui tam* plaintiff has an interest in the action's outcome, but his interest is less like that of a party than that of an attorney working for contingent fees.[193]

The Second Circuit also cited various rights of the government during the proceedings, including the right to intervene, the right to be informed

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[187] Vt. Agency of Natural Res. v. Stevens, 162 F.3d 195 (2d Cir. 1998), *rev'd on other grounds*, 529 U.S. 765 (2000).
[188] *Id.* at 198.
[189] *Id.*
[190] *Id.* at 199.
[191] *Id.*
[192] *Id.* at 202.
[193] *Id.*

of discovery, the primacy of any federal investigations or suits, and the right to control dismissals over the wishes of the *qui tam* plaintiff.[194]

C. The Supreme Court Avoids the Issue

The Supreme Court, in reversing the Second Circuit decision, left open the question of whether the Second Circuit's Eleventh Amendment analysis was accurate. The Court held that a state was not a "person" within the meaning of the statute and was therefore not amenable to suit by a relator.[195] However, regarding the "question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment,"[196] the Court expressed no opinion (but the Court did express the view that there was "serious doubt"[197] that such a case was permissible under the Eleventh Amendment). The dissent, of course, disagreed, stating that even under *Seminole Tribe*, the state's Eleventh Amendment defense was invalid, as "(1) respondent is, in effect, suing as an assignee of the United States, . . . [and] (2) the Eleventh Amendment does not provide the States with a defense to claims asserted by the United States."[198] The majority concluded that at the most, the "FCA can reasonably be regarded as effecting a partial assignment of the Government's damages claim."[199]

Concerning Eleventh Amendment jurisprudence, the Supreme Court's opinion in *Vermont v. Stevens* is as important for what it did not do as for what it did. The Court essentially dodged the issue of Eleventh Amendment sovereign immunity in *qui tam* cases, relying instead on statutory construction alone to reverse the Second Circuit. Although the Court indicated it may be willing to invalidate *qui tam* cases against state governments, it seemed to have trouble reconciling its Eleventh Amendment jurisprudence to the fact that in a *qui tam* suit, the United States is the real party in interest. This reluctance on the Court's part makes the case for servicemember USERRA suits against state employers even stronger, as there are multiple reasons why suits allowed in USERRA have a firmer constitutional basis than *qui tam* suits.

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[194] *Id.* at 202–03.
[195] Vt. Agency of Natural Res. v. Stevens, 529 U.S. 765, 787 (2000).
[196] *Id.*
[197] *Id.*
[198] *Id.* at 802 (Stevens, J., dissenting).
[199] *Id.* at 773.

Although there exist important similarities between *qui tam* suits under the False Claims Act and servicemember suits brought under provisions of USERRA, a brief analysis of the two establishes that a USERRA plaintiff's constitutional claim against state sovereign immunity is stronger. For example, although the aggrieved individual in a USERRA case has obviously suffered more monetary damage than a *qui tam* relator, in an important sense the aggrieved party is still the United States. If a state does not re-employ a Reserve or Guard servicemember after that servicemember's federal service, and because of that servicemember's federal service, it is directly impinging upon the federal government's constitutional power to raise and support armies. Although the monetary amount from a USERRA case depends on lost wages and benefits due to the servicemember involved,[200] those benefits accrue only because of the servicemember's federal status. In that sense, the aggrieved individual and the United States are virtually the same party. The *qui tam* plaintiff's interest is generally only pecuniary, and in this way the USERRA plaintiff is in an even stronger position, as his or her interest is pecuniary as well as constitutional. In a very real sense, an action under USERRA is more than a private enforcement of a statutorily created right, whether *qui tam* or otherwise—it is also a method that Congress has chosen to enforce its sovereign federal powers.

VI. Combining It All: Suggestions for Changes to USERRA

Of course, a USERRA case is not statutorily a *qui tam* case. Although Congress amended USERRA subsequent to the *Seminole Tribe* case, the amendments tended to lessen rather than to increase servicemembers' options at enforcement.[201] Additionally, by still permitting individual servicemember suits in state courts, Congress did nothing to lessen the constitutional issues involved.[202] Clearly, then, USERRA is still in need of amendment. Any amendments to USERRA should maximize the enforcement options of the aggrieved servicemember, while being written in such a way as to withstand scrutiny by the judicial branch. Appendix A provides a suggested revision to the current version of USERRA that will accomplish those goals.

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[200] 38 U.S.C. § 4323(d) (2000).
[201] *See* discussion *supra* Pt. II.C.
[202] *See supra* Pt. III.B (discussing *Alden v. Maine*).

First, the revised statute retains the ability of the U.S. Attorney to file suit against a state employer in the name of the United States. This obviously is not a constitutional issue. However, the revision would replace the previously rescinded provisions allowing the servicemember to sue a state employer in federal court. The language in the proposed statute at Appendix A permitting individual servicemember suits against state employers is adapted from the False Claims Act's *qui tam* provisions,[203] and clarifies that the individual bringing suit is acting not only on his or her behalf, but on behalf of the U.S. Government and in his or her official capacity as a servicemember. Both of these aspects of the proposed legislation will guard it against any Eleventh Amendment attack. Additionally, the proposed changes explicitly state that USERRA is War Powers legislation. This explicit statement should ensure that any court reviewing the legislation does so with the traditional deference provided to Congress in War Powers cases.

It is hard to conceive that such a revision to USERRA could not withstand judicial scrutiny. The War Powers Clause jurisprudence, in conjunction with the analogous *qui tam* jurisprudence as well as the direct link between the servicemember and the federal government in USERRA cases, would make it difficult for any court to declare such provisions unconstitutional. From a judicial perspective, preserving the proposed legislation does not weaken any of the traditional sovereign immunity cases, but would merely carve out an exceedingly narrow exception. It is hard to conceive of another area where legislation could be so narrowly tailored that a judicial authority could combine the traditional deference to War Powers legislation with a firm nexus between a plaintiff and the federal government to abrogate a state's sovereign immunity. Such a narrowly tailored statute is, in this respect, helpful to both the legislative and judicial branches, leaving Eleventh Amendment jurisprudence intact while allowing for statutory right to accrue to a certain class of individuals. Ultimately, such a statute is clearly in the best interests of those Reserve and Guard citizen-Soldiers

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[203] 31 U.S.C. § 3730(b)(1) (2000).

> A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

Id.

who are also employees of states, and who are called to serve their country.

VII. Conclusion

Although certain Supreme Court cases have raised problematic issues, the historical approach used by the Supreme Court in *Alden* and *Katz* demonstrates that under a War Powers analysis, there exists a strong argument for the constitutionality of USERRA's enforcement provisions. Servicemember USERRA enforcement actions are analogous to *qui tam* suits, wherein individual plaintiffs enforce federal legislation. Because a servicemember in a USERRA suit is actually a member of the federal government, and is enforcing a federal, constitutional right rather than simply enforcing federal legislation, the USERRA enforcement provisions are stronger from a constitutional standpoint than the provisions in a *qui tam* suit. This article's proposed revisions to the current USERRA would re-implement a servicemember's right to sue a state government in federal court for violations of the statute, and would withstand constitutional scrutiny by the judicial system.

With the foregoing analysis, it is clear that even if analyzed under the *Seminole Tribe* line of cases, USERRA should pass constitutional muster as it is currently written, and should have passed constitutional muster as it was written prior to the 1998 amendments.[204] Congress has enacted USERRA pursuant to its constitutional power to raise and support Armies. Such a power, like the bankruptcy power analyzed in *Katz*, is a "unitary concept."[205] It is a power that resides solely and completely in the federal government—states cannot encroach on that power, nor can they weaken it through reliance on state sovereign immunity, an immunity that is ineffective against the federal government. USERRA ultimately is a congressional attempt to aid in the raising and supporting of the Army by providing reemployment rights to servicemembers. Because of this, USERRA is a valid exercise of the congressional War Powers, and hence is binding upon state as well as private employers.

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[204] *See* discussion *supra* Part II.C.
[205] Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 370 (2006).

Appendix A

Suggested Statutory Revision to USERRA

Following is a suggested revision to USERRA which re-establishes the ability of servicemembers to sue state employers who violate USERRA in federal court. In conjunction with the other provisions of USERRA, the proposed statute makes explicit the nexus between the servicemember's ability to sue a state with that servicemember's federal status, provides for a qui-tam-like ability of a servicemember to sue on behalf of the federal government, and makes explicit that USERRA is a War Powers piece of legislation. In addition to the proposed changes, the current 38 U.S.C. § 4323 would have to be amended to apply only to private employers. This proposed 38 U.S.C. § 4323a mirrors the current 38 U.S.C. § 4323, with changes denoted in bold. Additionally, proposed changes to 38 U.S.C. § 4301 denoting the constitutional basis for the legislation are in bold.

Title 38, United States Code, § 4301. Purposes; sense of Congress

(a) **Pursuant to Article I, Section 8 of the Constitution, and implementing this Chapter to aid in raising and supporting Armies, providing for and maintaining a Navy, and providing for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, it is the purpose of Congress in enacting this chapter -**

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter.

Title 38, United States Code, § 4323a. Enforcement of rights with respect to a State employer.

(a) Action for relief.

(1) **[SAME AS CURRENT 38 U.S.C. § 4323(a)(1)]** A person who receives from the Secretary a notification pursuant to section 4322(e) of this title

[38 USCS § 4322(e)] of an unsuccessful effort to resolve a complaint relating to a state (as an employer) or a private employer may request that the Secretary refer the complaint to the Attorney General. If the Attorney General is reasonably satisfied that the person on whose behalf the complaint is referred is entitled to the rights or benefits sought, the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter [38 USCS §§ 4301 et seq.] for such person. In the case of such an action against a state (as an employer), the action shall be brought in the name of the United States as the plaintiff in the action.

(2) [**SAME AS CURRENT 38 U.S.C. § 4323(a)(1), except "private employer" is deleted]**A person may commence an action for relief with respect to a complaint against a State (as an employer) if the person—

(A) has chosen not to apply to the Secretary for assistance under section 4322(a) of this title [38 USCS § 4322(a)];

(B) has chosen not to request that the Secretary refer the complaint to the Attorney General under paragraph (1); or

(C) has been refused representation by the Attorney General with respect to the complaint under such paragraph.

(3) A person commencing an action under section 4323a(a)(2) of this title [38 USCS § 4323a(a)(2) will commence a civil action for the person and for the United States Government. The action shall be brought in the name of the Government. For purposes of an action brought under this paragraph, a person commencing an action against a State (as an employer) will be considered as acting on behalf of a federal agency in his or her official capacity, as well as acting in his or her own behalf.

(b) Jurisdiction.

(1) In the case of an action against a State (as an employer) commenced by the United States, the district courts of the United States shall have jurisdiction over the action.

(2) In the case of an action against a State (as an employer) by a person, the action may be brought in **the district courts of the United States** or a State court of competent jurisdiction in accordance with the laws of the State.

(c) Venue. In the case of an action by the United States or by a person against a State (as an employer), the action may proceed in the United States district court for any district in which the State exercises any authority or carries out any function.

(d-j) [**SAME AS CURRENT 38 U.S.C. § 4323(d-j), except references to "private employers" are deleted]**