

# NOTE

## *ALDEN V. MAINE:* RIGHTS WITHOUT REMEDIES\*

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### I. INTRODUCTION

Many Americans would be astonished to learn that, despite the general accessibility of the judicial system, state governments often enjoy broad immunity from private lawsuits. Nevertheless, this is precisely what the doctrine of state sovereign immunity

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provides.<sup>1</sup> The mere supposition that government might elude court jurisdiction in a political system designed for accountability seems outlandish.<sup>2</sup> Perhaps for this reason, sovereign immunity has proved troublesome in practice—two centuries of irreconcilable case law have engendered profound confusion. The perplexities have arisen partly from historical disagreements in constitutional interpretation,<sup>3</sup> partly from latent ambiguities in the Eleventh Amendment,<sup>4</sup> and partly from an apparent unwillingness to follow principles of *stare decisis*.<sup>5</sup> As a result, current state sovereign immunity doctrine represents a befuddled doctrinal quagmire.<sup>6</sup>

As a threshold matter, the conceptual validity of state sovereign immunity in America is unsettled. The doctrine is not the product of American political ingenuity; rather, it is a legacy of the King's monarchical privilege in England.<sup>7</sup> Read literally,

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1. Black's Law Dictionary defines "sovereign immunity" as "[a] government's immunity from being sued in its own courts without its consent." BLACK'S LAW DICTIONARY 753 (7th ed., 1991). State immunity from suit derives from the recognition that states are "sovereign entities" coupled with the maxim that a sovereign may not be sued by individuals without its consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890), which based this finding upon THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

2. The American government was designed for accountability through the democratic process. See, e.g., John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1143-44 (1996) (discussing the separation of powers in the national government and asserting, "To effectuate popular sovereignty, the framers designed a democratically-accountable federal government so that the people could dictate the decisions on critical government functions, such as spending, taxation, or war"); cf. *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J. concurring) (asserting that the strategy adopted by the Framers in establishing the Appointments Clause was expected to "ensure accountability"). The ability of state governments to avoid redressing wrongs by asserting immunity is difficult to square with this paradigm of accountability. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 3-4 (1988) (recognizing that sovereign immunity "is in tension" with the principle of governmental accountability).

3. The Constitution, as ratified in 1789, was silent as to sovereign immunity. The topic was discussed, however, in several of the constitutional ratification debates. Refer to note 31 *infra* and accompanying text (chronicling the complex sovereign immunity issue arising from the state ratification debates).

4. The Eleventh Amendment provides the only explicit support for sovereign immunity in the Constitution. Refer to notes 32-33 & 41 *infra* and accompanying text (examining the constitutional bases supporting sovereign immunity).

5. E.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 653 (2000) (Stevens, J., dissenting in part and concurring in part) (tracing the history of overruled cases and opining that "by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law").

6. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) ("The eleventh amendment today represents little more than a hodgepodge of confusing and intellectually indefensible judge-made law.").

7. *Id.* at 1895-96 (referring to evidence that the sovereign immunity concept

the Constitution of 1789 rejected state sovereign immunity by authorizing suits between states and citizens in federal court.<sup>8</sup> The simple text of the Eleventh Amendment, which amends Article 3, Section 2 of the Constitution, seemingly provides only a limited immunity in the federal courts.<sup>9</sup> Nevertheless, historical case law has intentionally read undisclosed meaning into both the Constitution and the Eleventh Amendment.<sup>10</sup> Supreme Court opinions have varied broadly. Justice Frankfurter once characterized the sovereign immunity doctrine as “an anachronistic survival of monarchical privilege[] [that] runs counter to democratic notions of the moral responsibility of the State.”<sup>11</sup> The more modern Supreme Court, while fractionated, has been far more receptive to the doctrine.<sup>12</sup> Despite varied sentiments and wavering jurisprudence, one point seems clear: The scope of state sovereign immunity is an increasingly significant issue in this country.<sup>13</sup>

Recent sovereign immunity cases have superimposed an added complexity; they incorporate the distinct issue of whether

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originated in the British monarchy and was personal to the monarch).

8. Refer to note 32 *infra* and accompanying text (positing that the Constitution “contained no textual provision establishing state sovereign immunity”).

9. Refer to note 41 *infra* and accompanying text (setting forth the Eleventh Amendment text demonstrating the states’ limited immunity in federal courts).

10. The decision in *Alden v. Maine*, 527 U.S. 706 (1999), provides a good example. Refer to notes 137–38 *infra* and accompanying text (evidencing the confusion surrounding sovereign immunity case law).

11. *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting).

12. The Justices’ opinions have varied widely. Justice Brennan has argued that the scope of the Eleventh Amendment is narrower than conventionally thought. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–99 (1985) (Brennan, J., dissenting) (surveying the history of the Eleventh Amendment and discouraging its broad application). Another approach has recognized that although states may not be sued directly, state officers may be subject to suit. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 664–65 (1974) (recognizing the *Ex parte Young* doctrine and distinguishing between prospective and retrospective relief). Other justices have readily found consent to suit or waiver of immunity. *See, e.g., Parden v. Terminal Ry. of the Ala. State Docks Dep’t*, 377 U.S. 184, 196–97 (1964), *overruled by Welch v. Texas Dept. of Highways and Pub. Transp.*, 483 U.S. 468 (1987). Recently, certain Justices have been willing to recognize a Congressional abrogation power whereas other Justices have limited such an approach. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (recognizing an abrogation power when Congress acts pursuant to Section 5 of the Fourteenth Amendment); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (recognizing an abrogation power when Congress acts pursuant to Article I, Section 8); *cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Union Gas* and holding that Congress’s Article I, Section 8 power is insufficient to abrogate state sovereign immunity).

13. *See Jackson, supra* note 2, at 3 (describing the Eleventh Amendment as “an enigma of increasing concern to the Supreme Court and to scholars”). A research synopsis and digest search, using Westlaw, for the term “sovereign immunity” resulted in 39 Supreme Court cases during the 1940s and 1950s, 74 Supreme Court cases during the 1960s and 1970s, and 169 Supreme Court cases during the 1980s and 1990s.

Congress may abrogate state sovereign immunity as an enforcement mechanism for otherwise valid legislation.<sup>14</sup> Federal laws purporting to authorize suits against the states necessarily entail two considerations; whether the states enjoy sovereign immunity in the particular context and, if so, whether the federal abrogation is constitutionally valid.

Unlike the state sovereign immunity issues, which affect the relationship between states and citizens, the issue of abrogation power underlies the relationship between the federal and state governments. Historically, the balance of power between the state and national governments, a hallmark of federalism, has been in constant flux;<sup>15</sup> as the federal government's grasp has waxed, the state governments' reach has waned and vice-versa.<sup>16</sup> Currently, the scales seem to be tipping in the states' favor.<sup>17</sup> Recent Supreme Court decisions reflect an increasing militancy in protecting states' rights and a concomitantly decreasing amenability to the exercise of national governmental authority. Over the past seven years, the Supreme Court has invalidated a host of federal laws as either exceeding Congress's reach or

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14. Refer to note 12 *supra* and accompanying text.

15. See, e.g., GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 141-227 (13th ed. 1997) (examining the oscillating scope of the Commerce Clause power over the last two hundred years). Early Commerce Clause jurisprudence refused to judicially narrow the scope of federal congressional power. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (opining that restraints on the congressional exercise of the Commerce Clause power must proceed from political rather than judicial processes). The early twentieth century witnessed a departure from this *laissez-faire* approach; the Court frequently struck down regulatory laws premised on the Commerce Clause power. See GUNTHER & SULLIVAN, *supra*, at 141. See also *Carter v. Carter Coal Co.*, 298 U.S. 238, 309-11 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (declaring the National Industrial Recovery Act of 1933 unconstitutional); *Hammer v. Dagenhart*, 247 U.S. 251, 276-77 (1918) (refusing to uphold a federal law that excluded the products of child labor from interstate commerce). Beginning in 1937, a clear shift back to a permissive approach occurred. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30-31 (1937) (upholding the National Labor Relations Act of 1935); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding the Fair Labor Standards Act of 1938); *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (upholding the Agricultural Adjustment Act of 1938). For almost sixty years, the Supreme Court consistently refused to invalidate federal laws based on the Commerce Clause. See GUNTHER & SULLIVAN, *supra* at 141.

16. The Tenth Amendment establishes the periphery of state sovereignty—states retain those powers that are neither expressly given to the national government nor prohibited to the states. See 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.”). The Tenth Amendment recognizes that with the exception of those powers prohibited entirely to government, the national and federal governments share the entire sovereignty pie. *Id.* Thus, an expanded slice for the national government means a diminished slice for the state governments and vice-versa.

17. The 1990s witnessed a shift back towards increased judicial scrutiny of national power. Refer to note 18 *infra* and accompanying text.

infringing upon the states' sphere of autonomy.<sup>18</sup> Recent sovereign immunity case law is necessarily infused with this resurgence in states' rights activism.

In 1996, the Supreme Court decided *Seminole Tribe of Florida v. Florida*,<sup>19</sup> a case foreshadowing both the issues and holding of *Alden v. Maine*. In *Seminole Tribe*, the Court held that the Eleventh Amendment provides the states with immunity from private suits for damages in federal court.<sup>20</sup> Further, Congress's Article I, Section 8 power is insufficient to abrogate this immunity notwithstanding a clear statement of intent to authorize private suit against the State.<sup>21</sup> In short, despite a state's violation of a valid federal law, a private citizen may not sue in federal court unless the state has consented to suit.

*Alden v. Maine*<sup>22</sup> arose against this backdrop of increasing concern over states' rights in the scheme of federalism, incongruous sovereign immunity jurisprudence, and the *Seminole Tribe* decision. *Alden* involved probation officers suing their employer, the State of Maine, for violations of the overtime provisions of the Fair Labor Standards Act (FLSA).<sup>23</sup> The case was originally filed in federal court, but was dismissed following the Supreme Court's decision in *Seminole Tribe*.<sup>24</sup> The plaintiffs refiled in state court, where Maine claimed sovereign immunity despite a FLSA provision purporting to authorize suits against states in their own courts.<sup>25</sup> The Maine Supreme Judicial Court affirmed the state trial court's holding that Maine was immune from suit in its own courts.<sup>26</sup> Because *Alden* conflicted with a

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18. See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that the interim provisions of the Brady Handgun Violence Prevention Act, which imposed background check requirements upon chief law enforcement officers, were not a valid exercise of the "necessary and proper clause" and, therefore, exceeded Congress's power under Article I, Section 8); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67–68, 72–73 (1996) (holding that the Eleventh Amendment provides the states with immunity from private suits for damages in federal court and that Congress's Article I, Section 8 power is insufficient to abrogate this immunity); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (holding that the Gun-Free School Zones Act, a federal criminal statute prohibiting the knowing possession of a firearm in a school zone, exceeded Congress's Article I, Section 8 powers); *New York v. United States*, 505 U.S. 144, 174–75 (1992) (holding that the "take title provision" of the Low-Level Radioactive Waste Policy Act, which obligated the States to "take title" to low-level radioactive waste whose disposal had not been provided for, violated the Tenth Amendment).

19. 517 U.S. 44 (1996).

20. *Id.* at 72–73.

21. *Id.* at 56.

22. 527 U.S. 706 (1999).

23. *Id.* at 711–12 (detailing the case history).

24. *Id.*

25. *Id.* at 712.

26. *Id.*

prior Arkansas Supreme Court decision,<sup>27</sup> the United States Supreme Court granted writ of certiorari to resolve the issue.

The Court's holding in *Alden* was unsurprising; it mirrored the decision in *Seminole Tribe*. The primary difference is that, in state court, the basis for immunity from suit is the Tenth, rather than the Eleventh, Amendment. Viewed narrowly, *Alden* stands for the simple proposition that Congress may not, pursuant to its Article I, Section 8 powers, abrogate a state's sovereign immunity in that state's own courts. *Alden*'s practical reach, however, far exceeds its literal holding. Individual cases do not exist in vacuums; instead, they constitute discrete puzzle pieces the juxtaposition of which define the state of the law. Viewed in this context, *Alden* has a much broader significance: Private citizens have no legal remedies for past violations of many federal laws when the perpetrator is a state or an arm of the state.

## II. BACKGROUND AND RECITATION OF THE CASE

### A. Historical Perspective

The concept of sovereign immunity predates the Constitution.<sup>28</sup> In eighteenth-century England, the sovereign could not be sued except with its consent.<sup>29</sup> The term "sovereign" referred to the King. Several historical scholars have argued that such immunity did not extend to the government or its officers.<sup>30</sup> Nevertheless, the comments of several of the Founding Fathers during the Ratification Debates reflected an apparent intent to incorporate governmental immunity from suit into the constitutional design.<sup>31</sup>

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27. See *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773, 778 (Ark. 1998) (holding that, in light of *Seminole Tribe*, the Supremacy Clause compels the validity of FLSA provisions purporting to waive state sovereign immunity in state court).

28. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242 (1765) (describing the doctrine of sovereign immunity as insulating the King from suit because no court could exercise jurisdiction over him).

29. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437-46 (1793) (Iredell, J., dissenting) (surveying historical English practice).

30. See Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4-5 (1924); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 9-16 (1963); Gibbons, *supra* note 6, at 1895-96.

31. See, e.g., THE FEDERALIST No. 81, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will

Whatever the intent of the Founding Fathers might have been, the Constitution of 1789 contained no textual provision establishing state sovereign immunity. Instead, the literal language of Article III, Section 2, which creates the scope of federal jurisdiction, appears inconsistent with state sovereign immunity in the federal courts:

The judicial Power [of the federal courts] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . . between a State and Citizens of another State . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>32</sup>

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remain with the states, and the danger intimated must be merely ideal . . . . [T]here is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorise suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

*Id.* (emphasis added). James Madison made similar comments at Virginia's Ratification Convention:

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court.

. . . .

It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (Jonathan Elliot ed., 2d ed. 1854). John Marshall's comments at the Ratification Debates echoed a similar theme:

With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant . . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

*Id.* at 555–56.

32. U.S. CONST. art. III, § 2.

Article III, Section 2 thus creates two bases for federal jurisdiction. First, it creates federal court jurisdiction for cases "arising under" the United States Constitution, federal laws or treaties, irrespective of the nature of the parties. Second, it creates federal court jurisdiction for cases "between" certain parties, irrespective of the nature of the controversy. These types of jurisdiction are commonly referred to as "federal question jurisdiction" and "diversity jurisdiction," respectively.<sup>33</sup>

The Eleventh Amendment and the American doctrine of state sovereign immunity both trace their lineage to the wording of Article III, Section 2 and an early case interpreting it. In *Chisholm v. Georgia*,<sup>34</sup> the Supreme Court rejected Georgia's argument that the Constitution and the Judicial Act of 1789 preserved Georgia's common law immunity from suit by private individuals in federal court. Although the decision generated four separate concurrences, each commonly opined that the Constitution specifically authorized the suit.<sup>35</sup> *Chisholm* was a citizen of South Carolina<sup>36</sup> and thus the action in assumpsit<sup>37</sup> fell within the diversity jurisdiction gambit of Article III, Section 2.<sup>38</sup> Justice Iredell's lone dissent urged that neither the Constitution nor the Judiciary Act of 1789 authorized the suit and expressed doubt as to congressional power to extend such jurisdiction.<sup>39</sup> The reaction to *Chisholm v. Georgia* was swift,<sup>40</sup> and, within a year, Congress adopted and ratified the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted

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33. 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 3561 & 3601 (2d ed. 1987) (discussing the constitutional origins of both bases for federal jurisdiction).

34. 2 U.S. (2 Dall.) 419 (1793).

35. *Id.* at 451 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 469 (Cushing, J.); *id.* at 478 (Jay, C.J.).

36. *Id.* at 420.

37. *See id.* An action in assumpsit refers to "[a] common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal." BLACK'S LAW DICTIONARY 120 (7th ed. 1999). As a simple state law cause of action, Supreme Court jurisdiction over an action in assumpsit was based on diversity, rather than federal question, jurisdiction.

38. Therefore, the action was between a state and a citizen of another state. U.S. CONST. art. III, § 2, cl. 1. In so holding, the Supreme Court declined to adopt Georgia's suggestion that Article III, Section 2 had been intended to provide jurisdiction only if the state was the plaintiff. *See Chisholm*, 2 U.S. (2 Dall.) at 420-21, 425.

39. *Chisholm*, 2 U.S. (2 Dall.) at 432-37, 449 (Iredell, J., dissenting).

40. Almost one hundred years later, in *Hans v. Louisiana*, Justice Bradley described the reaction of the country to the *Chisholm* decision as a "shock of surprise." 134 U.S. 1, 11 (1890).

against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>41</sup>

Several questions arose in the aftermath of the Ratification Debates, the *Chisholm* decision, and the Eleventh Amendment. To what extent did the original constitutional design immunize the states against private suit in federal and state court? Was *Chisholm* properly decided based upon the Constitution’s literal text or did the Court fundamentally misinterpret the newly-enacted Constitution? Did the Eleventh Amendment, as its literal text suggests, narrowly tailor a limited sovereign immunity by amending the diversity jurisdiction prong of Article III, Section 2? Or, conversely, did the Eleventh Amendment broadly reaffirm a more extensive doctrine implicit in the constitutional design? These poignant questions are as controversial today as they were two centuries ago. The answers to these questions are absolutely fundamental to a determination of the proper scope of state sovereign immunity.

If the Constitution comprehended a coherent fabric of sovereign immunity in federal and state court, and Article III, Section 2 did not contemplate subjecting the states to private suits as defendants, then *Chisholm* was poorly decided. Under this view, the Eleventh Amendment merely overruled *Chisholm* and reaffirmed the original constitutional design. Alternatively, if the Constitution meant what it said, and Article III, Section 2 explicitly authorized private suits against the states in federal court, then *Chisholm* was correctly decided. Accordingly, the Eleventh Amendment constitutes the entirety of state immunity from suit, at least in federal court. Under this second view, a latent ambiguity in the Eleventh Amendment surfaces: it may be construed either as merely recognizing an immunity when the cause of action is founded on diversity jurisdiction or, conversely, as implementing a broader immunity from suit in federal court irrespective of the basis for jurisdiction.

The Court interpreted the Eleventh Amendment narrowly during the initial years following its adoption.<sup>42</sup> For example, the Marshall Court decided that the Amendment was inapplicable to controversies between a citizen and his own state.<sup>43</sup> Similarly, the Amendment did not preclude suits against state officers for the

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41. U.S. CONST. amend. XI.

42. See *Gibbons*, *supra* note 6, at 1941 (noting that the Supreme Court decisively rejected early attempts to construe the Eleventh Amendment beyond its narrow language).

43. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821) (holding that because Cohens was a citizen of Virginia, the case did not fall within the scope of the Eleventh Amendment).

recovery of state funds due under federal law.<sup>44</sup> The Marshall and Taney Courts narrowly applied the Amendment in cases where jurisdiction was based on diversity.<sup>45</sup> Moreover, both prospective and retrospective relief (damages) were available against state officers, even when such relief had an impact the state treasury.<sup>46</sup>

The post-Reconstruction era marked a fundamental departure from prior Eleventh Amendment analysis. As Professor Gibbons explained, political pressure had escalated in the face of mounting state debt repudiation.<sup>47</sup> In 1890, the Supreme Court decided *Hans v. Louisiana*,<sup>48</sup> a case in which a citizen of Louisiana sued the State of Louisiana in federal court to enforce the terms of bonds issued by Louisiana. Although fundamentally a breach of contract action, the plaintiff alleged a federal question under Article I, Section 10 of the United States Constitution.<sup>49</sup> The plaintiff contended that jurisdiction was proper because the Eleventh Amendment does not preclude private suits against a state by one of its citizens.<sup>50</sup> Justice Bradley's majority opinion rejected the plaintiff's assertion, finding that such an interpretation would result in the anomaly that a citizen could maintain a federal question cause of action against his own state in federal court whereas a citizen of another state could not.<sup>51</sup> Instead, the *Hans* Court formulated a much broader approach, finding, in Justice Bradley's opinion, that the *Chisholm* decision had produced a "shock of surprise" across the nation by its literal constitutional interpretation.<sup>52</sup> Justice Bradley reasoned that the plaintiff's requested construction of the Eleventh Amendment, much like the *Chisholm* Court's literal interpretation of the Constitution, would "strain the [Amendment] . . . to a construction never imagined or dreamed of."<sup>53</sup> A lasting significance of Justice Bradley's "shock of surprise" theory is the suggestion that *Chisholm* was wrongly decided and that Justice Iredell's dissent somehow captured the essence of the founding generation's intent.

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44. See *United States v. Peters*, 9 U.S. (5 Cranch) 115, 115-18 (1809).

45. Gibbons, *supra* note 6, at 1968 (analyzing the narrow application of the Eleventh Amendment by the Marshall and Taney Courts).

46. *Id.*

47. *Id.* at 1894 (depicting the historical context affecting the early Eleventh Amendment decisions).

48. 134 U.S. 1 (1890).

49. *Id.* at 3.

50. *Id.* at 10-11.

51. *Id.* at 10.

52. *Id.* at 11.

53. *Id.* at 15.

The *Hans* approach proved too restrictive in several respects. In particular, it provided no privately enforceable judicial remedy for a state's ongoing violation of federal law. In 1908, the *Ex parte Young*<sup>54</sup> decision devised a legal fiction to address this shortcoming. The *Young* Court held that a state official acting in violation of federal law was acting *ultra vires*, or outside of his authority, and could, therefore, be sued individually.<sup>55</sup> Thus, a private citizen could effectively reach the state where the cause of action was, in essence, a federal question. Subsequently, the Court's decision in *Edelman v. Jordan*<sup>56</sup> delineated the contours of the *Ex parte Young* doctrine; a private citizen may bring a claim for prospective (injunctive) relief, but may not bring a claim for retrospective (compensatory) relief, which would be satisfied from the state's treasury.<sup>57</sup>

Constructive waiver of sovereign immunity furnishes another means by which to surmount the harsh realities of the doctrine. *Parden v. Terminal Railway of the Alabama State Docks Department*<sup>58</sup> involved a private suit for damages in federal court against a state-owned railway, alleging violations of the Federal Employers' Liability Act (FELA), which purported to abrogate state sovereign immunity for FELA-based claims.<sup>59</sup> The Supreme Court first held that, by empowering Congress to regulate commerce, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.<sup>60</sup> The Court acknowledged that, as a general proposition, a state may not be sued by an individual without the state's consent.<sup>61</sup> By entering into ownership of a railway after the enactment of FELA, however, Alabama had effectively consented to the suit.<sup>62</sup>

In 1991, the Supreme Court decided *Hilton v. South Carolina Public Railways Commission*,<sup>63</sup> a case mirroring *Parden*

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54. 209 U.S. 123 (1908).

55. *Id.* at 159–60.

56. 415 U.S. 651 (1974).

57. *Id.* at 666 (“We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury . . .”).

58. 377 U.S. 184 (1964).

59. *Id.* at 184–86.

60. *Id.* at 192.

61. *Id.*

62. *Id.* at 192, 196–97 (“[W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.”).

63. 502 U.S. 197 (1991).

but filed in state court.<sup>64</sup> The issue in *Hilton* was whether South Carolina could claim sovereign immunity from FELA suits in its own state courts. Justice Kennedy's majority opinion reaffirmed the decision in *Will v. Michigan Department of State Police*<sup>65</sup> that the "Eleventh Amendment does not apply in state courts."<sup>66</sup>

Since the mid-1970s, the Court has granted certiorari to a flurry of sovereign immunity cases.<sup>67</sup> These cases, rather than focusing on the scope of sovereign immunity, have targeted federal laws purporting to abrogate state sovereign immunity pursuant to a variety of congressional powers. *Fitzpatrick v. Bitzer*<sup>68</sup> involved allegations by male employees of Connecticut that the Connecticut State Employees Retirement Act discriminated based on gender, thus violating the 1972 Amendments to Title VII of the Civil Rights Act of 1964.<sup>69</sup> Justice Rehnquist's majority opinion held that Congress may, when enacting "appropriate legislation" pursuant to the enforcement power of Section 5 of the Fourteenth Amendment, provide for private suits against states or state officials.<sup>70</sup> Thus Congress was entitled to authorize a private damages suit against Connecticut.<sup>71</sup> Nevertheless, even when legislating pursuant to Section 5 of the Fourteenth Amendment, Congress may abrogate state sovereign immunity in federal court only by making its intention unmistakably clear in the language of the statute.<sup>72</sup>

In the context of abrogation, Congress's Article I, Section 8 powers have proved to be an enigma. *Parden* had previously held

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64. Actually, *Hilton* had dismissed his original federal court action following the Supreme Court decision in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 471-72 (1987), that the Jones Act did not abrogate the States' Eleventh Amendment immunity from suit in federal court. *Hilton*, 502 U.S. at 199-200. *Hilton* had anticipated that *Welch* would also apply to FELA actions. *Id.*

65. 491 U.S. 58 (1989). The *Will* decision, however, involved a 42 U.S.C. § 1983 action rather than a FELA action. *See id.* at 60. This distinction is significant because, as will be discussed *infra*, Congress may abrogate State sovereign immunity pursuant to a valid exercise of Section 5 of the Fourteenth Amendment. A state court may not refuse to hear a federal question case that could otherwise be filed in federal court. *Testa v. Katt*, 330 U.S. 386, 394 (1947). Therefore, the quote from *Will* was not central to its holding and was merely dictum.

66. *Hilton*, 502 U.S. at 205 (quoting *Will*, 491 U.S. at 63-64).

67. Refer to note 12 *supra*.

68. 427 U.S. 445 (1976).

69. *Id.* at 448-49.

70. *Id.* at 456.

71. *Id.* at 450-51, 457 (reversing the court of appeals' decision to dismiss the portion of the cause of action demanding back-pay damages).

72. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246-47 (1985) (holding that, despite being passed pursuant to Section 5 of the Fourteenth Amendment, the Rehabilitation Act failed to clearly articulate an intent to abrogate the States' sovereign immunity).

that Congress's Article I, Section 8 Commerce Clause powers provided ample basis for authorizing private suits against the states when necessary to enforce valid regulation of interstate commerce.<sup>73</sup> Two decades later, the Supreme Court expressly overruled *Parden* to the extent it was inconsistent with the "unmistakably clear" language requirement and impliedly cast suspicion on that portion of *Parden* that recognized an Article I, Section 8 abrogation power.<sup>74</sup> Then, in 1989, in *Pennsylvania v. Union Gas Co.*,<sup>75</sup> a four-Justice plurality of the Supreme Court held that Congress could abrogate state sovereign immunity in federal court through legislation passed pursuant to its Article I, Section 8 powers.<sup>76</sup>

*Union Gas* was short-lived, however. In 1996, the Supreme Court decided *Seminole Tribe of Florida v. Florida*.<sup>77</sup> In that case, the Seminole Tribe of Florida filed suit in federal court against Florida to compel negotiations under the Indian Gaming Regulatory Act (IGRA).<sup>78</sup> Although recognizing that IGRA expressed Congress's intent to abrogate state sovereign immunity for IGRA-based claims, the Court held that Article I, Section 8 power was insufficient for that purpose.<sup>79</sup> By so holding, the Court explicitly overruled *Union Gas*.<sup>80</sup>

The particular dispute culminating in *Alden v. Maine* began in federal court in 1996.<sup>81</sup> The plaintiffs, state probation officers, alleged violations of the overtime provisions of FLSA and demanded back pay.<sup>82</sup> The district court, deciding the case in the wake of *Seminole Tribe*, dismissed for lack of federal

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73. See *Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 197–98 (1964) (stating that Congress has given no indication to remove this authorization of lawsuits by private parties).

74. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 478 & n.8 (1987) (expressing no desire to consider the validity of the additional holding in *Parden*).

75. 491 U.S. 1 (1989).

76. *Id.* at 19–20 (holding that the power to regulate interstate commerce "would be incomplete without the authority to render States liable in damages"). The swing vote in *Union Gas*, however, was supplied by Justice White's concurrence, in which he articulated his disagreement with "much of [the plurality's] reasoning." *Id.* at 57 (White, J., concurring in judgment in part and dissenting in part).

77. 517 U.S. 44 (1996).

78. *Id.* at 51–52.

79. *Id.* at 59–66 (stating that the IGRA was not passed pursuant to a constitutional provision granting Congress the power to abrogate).

80. *Id.* at 66.

81. *Mills v. Maine*, Civ. No. 92-410-P-H, 1996 WL 400510, at \*1 (D. Me. July 3, 1996).

82. *Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997).

jurisdiction.<sup>83</sup> The United States Court of Appeals for the First Circuit affirmed the district court's decision.<sup>84</sup> The plaintiffs subsequently filed an essentially identical action in state court.<sup>85</sup> The Superior Court dismissed the claim on the basis of sovereign immunity, and the plaintiffs appealed to the Supreme Judicial Court of Maine.<sup>86</sup>

Maine's highest court affirmed the Superior Court decision.<sup>87</sup> The court first reiterated the reasoning of the *Seminole Tribe* decision that the Eleventh Amendment is not limited by its narrow text, but, instead, confirms a broader principle.<sup>88</sup> Additionally, the Supreme Judicial Court of Maine traced the history of several prior Maine decisions concluding that sovereign immunity protects the state from suit in its own courts even when the cause of action derives from federal law.<sup>89</sup> If Congress cannot force the states to defend a suit in federal court, it similarly cannot force the states to defend one in their own courts. Holding otherwise, the court reasoned, would "effectively vitiate the Eleventh Amendment."<sup>90</sup>

Meanwhile, the Supreme Court of Arkansas had decided a similar case differently. In *Jacoby v. Arkansas Department of Education*,<sup>91</sup> the Arkansas court held that the State was not immune from FLSA actions filed by private individuals.<sup>92</sup> Echoing a previous Tennessee Supreme Court holding,<sup>93</sup> Arkansas' highest court reasoned that the Supremacy Clause<sup>94</sup> requires the validity of the FLSA provisions purporting to authorize suits against the states in state court, especially in

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83. *Id.* at 41, 43 (eschewing the plaintiffs' contention that jurisdiction can be sustained under Section 5 of the Fourteenth Amendment).

84. *Id.* at 40-41.

85. *See Alden v. State*, 715 A.2d 172, 173 (Me. 1998) (tracing the lineage of the case).

86. *Id.*

87. *Id.*

88. *Id.* at 174 (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996), for the proposition that the Eleventh Amendment "stand[s] not so much for what it says, but for the presupposition . . . which it confirms").

89. *Id.*

90. *Id.* But see *id.* at 176-78 (Dana and Rudman, JJ., dissenting) (vigorously dissenting based on *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), and the Supremacy Clause of the United States Constitution).

91. 962 S.W.2d 773 (Ark. 1998).

92. *Id.* at 778.

93. *Clover Bottom Hosp. and Sch. v. Townsend*, 513 S.W.2d 505, 507-08 (Tenn. 1974) (affirming the trial court's refusal to dismiss FLSA claims filed against a state hospital by private individuals in state court).

94. U.S. CONST. art. VI, cl.2.

light of *Seminole Tribe*.<sup>95</sup> Further, the Arkansas Supreme Court opined that, in view of *Hilton v. South Carolina Public Railways Commission*<sup>96</sup> and *Nevada v. Hall*,<sup>97</sup> it was “well nigh impossible” to conclude that the Eleventh Amendment provides immunity in both state and federal courts.<sup>98</sup>

Justice Kennedy’s majority opinion in *Alden v. Maine*, affirming the Maine Supreme Judicial Court’s dismissal, is founded on two basic premises: First, state immunity from private suit is a “fundamental aspect” of sovereignty;<sup>99</sup> and second, except where consistent with the constitutional design, the essence of federalism limits Congress’s power to abrogate this immunity in state court.<sup>100</sup> Part I of the five-part decision outlines the historical recognition of the states as sovereign entities, details the early views on sovereign privileges, and concludes that state immunity from private suit is an intrinsic attribute of sovereignty unless the state has waived such immunity.<sup>101</sup> Part II, after dismissing and distinguishing prior Supreme Court decisions, opines that the history, practice, precedent, and structure of the Constitution severely limits Congress’s ability to abrogate this immunity.<sup>102</sup> Part III not only asserts that the good faith of the states is an important assurance that valid federal laws will be obeyed, but also recognizes that several limitations on state sovereign immunity do exist.<sup>103</sup> Part IV determines that Maine has not waived its immunity.<sup>104</sup> Finally, Part V concludes,

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95. 517 U.S. 44 (1996).

96. 502 U.S. 197 (1991).

97. 440 U.S. 410 (1979).

98. *Jacoby v. Arkansas Dep’t of Educ.*, 962 S.W.2d 773, 775 (Ark. 1998) (expressing an unwillingness to extend the reach of the Eleventh Amendment to include immunity in state court).

99. *Alden v. Maine*, 527 U.S. 706, 713 (1999). According to Justice Kennedy, the states have retained the immunity they enjoyed prior to joining the Union except where the Constitutional framework and subsequent Amendments dictate otherwise. *Id.*

100. *Id.* at 730–31.

101. *Id.* at 712–30.

102. *Id.* at 730–54.

103. *Id.* at 754–57.

104. *Id.* at 757–58. The Maine Supreme Judicial Court stated, “This Court regards the immunity from suit as ‘one of the highest attributes inherent in the nature of sovereignty.’” *Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1980) (quoting *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978)). According to Justice Kennedy, the State of Maine adheres to the general rule that voluntary waiver of immunity may only be effected by an enactment of the legislature. *Alden*, 527 U.S. at 757–58. Although the petitioners in *Alden* did not suggest such a manifestation of consent by Maine, they did contend that Maine had discriminated against federal law by asserting sovereign immunity against the FLSA action. *Id.* at 758. According to Justice Kennedy, however, “[T]here is no evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action.” *Id.* Thus, Maine has neither expressly nor implicitly waived its immunity.

in line with recent federalism cases, that "Congress has vast power but not all power."<sup>105</sup>

### B. *Recitation of the Case*

1. *The Source of Immunity in State Court.* Justice Kennedy's majority opinion commences with the assertion that state sovereign immunity "neither derives from, nor is limited by, . . . the Eleventh Amendment."<sup>106</sup> Instead, the states' immunity from suit by private parties is a "fundamental aspect" of sovereignty, which derived from the common law and survived the ratification of the Constitution.<sup>107</sup> Consequently, although neither the text of the Constitution nor any of the Amendments provide for immunity from suit in state court, the Tenth Amendment reserves for the states this aspect of sovereign dignity.<sup>108</sup>

According to the Court, the Founding Fathers considered immunity from private suit a fundamental attribute of the sovereign entity.<sup>109</sup> Justice Kennedy opined that, although the

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105. *Alden*, 527 U.S. at 758. As the Court noted, although Congress has "ample means" to enforce valid federal laws, it must nevertheless respect the states' sovereignty. *Id.* According to Justice Kennedy, Congress may not circumvent the federal design by regulating the states directly. *Id.*

106. *Id.* at 713 (observing that although the states' immunity from suit is often referred to as "Eleventh Amendment immunity," the term is somewhat of a misnomer).

107. *Id.* Nevertheless, Justice Kennedy recognized that the scope of immunity has diminished to the extent dictated by the constitutional structure as well as subsequent Amendments. *Id.*

108. *See id.* at 713-14 ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."). As discussed *infra*, though, the Tenth Amendment was originally devised as a limit on the federal government whereas state sovereign immunity reflects the balance between the state and its citizens. Thus, while the Tenth Amendment might logically serve to limit the federal government's ability to regulate the states in an abrogation context, it seems ill-suited for the purpose of dictating the state-citizen relationship. Refer to notes 172-74 *infra* and accompanying text.

109. *Id.* at 715 (opining that at the time of the Ratification, it was well established in England that the Crown could not be sued without its consent in its own courts). Professor Gibbons, however, has argued that such a position is historically inaccurate:

[W]hile the British monarch enjoyed a nominal personal immunity from the processes of the common law courts, this personal immunity had no real relevance to the accountability of the government to individuals. The immunity was personal to the monarch; it was not enjoyed by other government officers, all of whom were subject to ordinary legal process, and it was not enjoyed by corporate bodies. More important, by the eighteenth century, the petition of right, the writ by which suit could be brought against the monarch, was entertained routinely, and thus had become for all practical purposes nondiscretionary.

Gibbons, *supra* note 6, at 1895-96.

individual states had rejected other aspects of England's monarchical rule, they had uniformly adopted the doctrine of sovereign immunity.<sup>110</sup> Moreover, according to the Court, the constitutional debates clearly underscored the presumption that the states' immunity from suit would survive the ratification of the Constitution.<sup>111</sup> Similarly, asserted Justice Kennedy, the state conventions made clear that they understood the Constitution to preserve the states' immunity from private suit.<sup>112</sup> Although recognizing that this perspective cannot be reconciled with the *Chisholm* decision, Justice Kennedy echoed the *Hans* Court's conclusion that the rapid adoption of the Eleventh Amendment evidenced a common conviction that *Chisholm* was poorly decided.<sup>113</sup>

Justice Kennedy further argued that the significance of the Eleventh Amendment was to *restore* the constitutional design, not to alter it.<sup>114</sup> The Amendment was drafted narrowly, not because it was intended to provide a restrictive immunity, but because of the general presumption that *Chisholm* was a small

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110. *Alden*, 527 U.S. at 715–16 (citing Justice Iredell's dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), and Justice Day's majority opinion in *Hans v. Louisiana*, 134 U.S. 1 (1890), for the proposition that the doctrine of sovereign immunity was well engrained in the Founding Generation).

111. *Id.* at 716 (asserting that the "leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity"). As its primary examples, the Court cited the assurances of Alexander Hamilton, James Madison, and John Marshall. *Id.* at 716–18. Refer to note 31 *supra* for citations and excerpts.

112. *Alden*, 527 U.S. at 718–19 (citing both the Rhode Island Convention and the New York Convention for support of this premise).

113. *Id.* at 719–21. An initial proposal to amend the Constitution was introduced the day after the *Chisholm* decision was announced and the version ultimately adopted as the Eleventh Amendment was introduced shortly thereafter. *Id.* at 721. Moreover, according to Justice Kennedy, all attempts to narrow the Amendment failed despite several suggestions. *Id.* As discussed *infra*, though, what Justice Kennedy fails to mention is that Congress also failed to adopt a broader version of the Eleventh Amendment. Nevertheless, the Supreme Court has willingly read that breadth into the Amendment. See, e.g., *Alden*, 527 U.S. at 727 ("As a consequence, we have looked to 'history and experience, and the established order of things,' . . . rather than '[a]dhering to the mere letter' of the Eleventh Amendment in determining the scope of the States' constitutional immunity from suit.") (alteration in original) (citations omitted).

114. See *id.* at 722 (arguing that the *Chisholm* Court was mistaken and that the Eleventh Amendment cannot logically be viewed as a departure from the original understanding of the Constitution). This is critical to Justice Kennedy's argument. On the one hand, if *Chisholm* was properly decided and the original constitutional design did not incorporate a state sovereign immunity from private suit, then the Eleventh Amendment must be viewed as limited exception to a broader rule that states are not immune from suit. On the other hand, if *Chisholm* was improperly decided because the Founding Fathers had incorporated such a doctrine, then the Eleventh Amendment merely overruled the *Chisholm* Court and resurrected the full scope of sovereign immunity. The *Alden* majority, of course, has adopted the latter perspective. *Id.* at 723.

hole in an otherwise coherent fabric of sovereign immunity.<sup>115</sup> In short, the Eleventh Amendment merely overruled *Chisholm*.<sup>116</sup> This perspective is critical to the majority's view. If the Constitution as ratified did not comprehend the existence of a broad immunity from suit, the literal terms of the Eleventh Amendment simply cannot provide it.

In view of this significance, Justice Kennedy carefully stressed that the Court has consistently interpreted the adoption of the Eleventh Amendment as "conclusive evidence" that *Chisholm* was poorly decided and that Justice Iredell's dissent reflected the original understanding of the Constitution.<sup>117</sup> Because the Eleventh Amendment confirmed rather than established state sovereign immunity, the scope of immunity is "demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."<sup>118</sup> Thus, according to the *Alden* majority, the scope of sovereign immunity far exceeds the apparent strictures of the Eleventh Amendment.<sup>119</sup>

2. *Congress's Power to Abrogate the Immunity.* The Fair Labor Standards Act specifically authorizes private suits against the states in their own courts.<sup>120</sup> Thus, Justice Kennedy's conclusion that Maine enjoys sovereign immunity against private suits does not conclude the inquiry. Instead, a second issue arises—whether the Fair Labor Standards Act provision purporting to abrogate State sovereign immunity in state courts is valid. Clearly, concepts of federalism are strongly implicated.

By its very words, the Eleventh Amendment restrains the federal judiciary, not the federal legislature.<sup>121</sup> Despite acknowledging that the Eleventh Amendment text limits only "[t]he Judicial Power of the United States,"<sup>122</sup> Justice Kennedy refused to conclude that the Amendment implicitly authorizes

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115. *Id.* at 724 (opining that because Congress understood the Constitution to preserve the States' immunity from suit, there was no need to "draft [the Eleventh Amendment] with a broader brush").

116. *Id.*

117. *See id.* at 727 (explaining that because the original Constitution encompassed a broader state immunity, the Eleventh Amendment has historically been read beyond its literal text).

118. *Id.* at 728–29.

119. *See id.*

120. 29 U.S.C. § 216(b) (1994) ("An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court . . .").

121. *See Alden*, 527 U.S. at 730 (recognizing that the literal terms of the Eleventh Amendment do not authorize a proscription on legislative abrogation).

122. *Id.* (quoting the text of the Eleventh Amendment).

congressional abrogation of sovereign immunity.<sup>123</sup> Instead, abrogation statutes premised on Article I, Section 8 powers are valid only if there is “compelling evidence” that the constitutional design dictated such a result.<sup>124</sup>

The majority opinion then addressed the petitioners’ arguments that the Constitution and the prior case law indicated that the states were indeed required to relinquish this aspect of sovereignty.<sup>125</sup> In response to the petitioners’ contention that the Supremacy Clause<sup>126</sup> mandated an abrogation power when appropriate to implement a valid federal law, the Court countered that the Supremacy Clause is only relevant where the federal law is held to be valid.<sup>127</sup> In other words, the threshold question is whether the abrogation power is constitutional; if it is not, appeal to the Supremacy Clause is irrelevant.

Similarly, Justice Kennedy dismissed the petitioners’ argument that the Necessary and Proper Clause authorizes a congressional abrogation power as a means of achieving valid federal objectives.<sup>128</sup> While recognizing that prior Supreme Court jurisprudence supported the petitioners’ position,<sup>129</sup> Justice Kennedy clarified that such cases have been overruled by more recent decisions.<sup>130</sup> Although these decisions addressed

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123. *Id.* (“To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in *Chisholm*.”).

124. *Id.* at 730–31 (opining that this structural principle is not directly related to Article III of the Constitution but rather “inheres in the system of federalism established by the Constitution”).

125. *Id.* at 731.

126. U.S. CONST. art. VI, cl. 2.

127. *Alden*, 527 U.S. at 731 (“Appeal to the Supremacy Clause alone merely raises the question whether a law is a valid exercise of the national power.”).

128. *Id.* at 732 (noting that although several prior Supreme Court cases have endorsed Congress’s authority to subject states to private suits as a means of achieving objectives specifically delegated to Congress, such cases have been overruled). The Supreme Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 555–56 (1985) validated statutory provisions subjecting state employers to the Fair Labor Standards Act. *Id.* Thus, state compliance with the FLSA provisions is presumably a valid objective.

129. *Alden*, 527 U.S. at 732 (referring to *Parden v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184, 190–92 (1964) (proclaiming that the Commerce Clause represents the states’ partial surrender of their sovereignty to Congress) and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13–16, 19 (1989) (rejecting Pennsylvania’s claim of immunity under the Eleventh Amendment)).

130. *Alden*, 527 U.S. at 732 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63–66 (1996), which dismissed *Union Gas* as wrongly contracting the Court’s earlier establishment of Article III jurisdictional boundaries and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), which expressly overruled *Parden* as an anomaly in both constitutional jurisprudence and sovereign immunity).

congressional abrogation in federal court, Justice Kennedy extended their logic to state-court suits.<sup>131</sup>

After addressing constitutional concerns, Justice Kennedy turned to the petitioners' argument that, under prior case law, the Eleventh Amendment does not apply in state courts. While accepting that "isolated statements" in several prior cases support this proposition, Justice Kennedy reiterated that the Eleventh Amendment is not limited to its "bare text" and opined that these prior cases do not address whether the states are immune in state court notwithstanding an attempted congressional abrogation.<sup>132</sup>

According to Justice Kennedy, three of the cases relied upon by the petitioners contained dicta, which, while supportive, were unnecessary to the holdings.<sup>133</sup> Indeed, the supportive passages in two of these cases consisted of "footnote digressions" that were not relevant to the rationale of the decisions.<sup>134</sup> Justice Kennedy recognized, however, that *Hilton* and *Hall* required closer attention.<sup>135</sup>

According to the *Alden* majority, the *Hilton* decision stands for the narrow proposition that certain states consented to be sued in their own courts by injured workers covered by FELA.<sup>136</sup> Justice Kennedy pointed out that the broader reading of *Hilton*—as supportive of constructive waiver—was directly overruled by the *College Savings Bank* decision.<sup>137</sup> Perhaps most important to the *Alden* majority, the *Hilton* decision addressed waiver of sovereign immunity, rather than the congressional power to

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131. *Alden*, 527 U.S. at 733.

132. *Id.* at 735–36 (proposing as a "truism" that, under a literal reading, the Eleventh Amendment is inapplicable in state courts).

133. *Id.* at 736 (dismissing as irrelevant *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which questioned whether the founders would have ratified the Constitution had they believed the sovereign authority of states could be curbed absent an express constitutional provision; *Maine v. Thiboutot*, 448 U.S. 1 (1980), which concluded that no Eleventh Amendment issue exists in state court actions; and *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), which accepted the notion that the Eleventh Amendment does not apply in state courts).

134. *Alden*, 527 U.S. at 736 (rejecting *Atascadero* and *Thiboutot*).

135. *Id.*

136. *Id.* at 737–38 (endorsing this limited reading of the *Hilton* decision). Justice Kennedy also authored the *Hilton* decision. As discussed below, Justice Kennedy's narrow view of *Hilton* seems fundamentally inconsistent with the text of the decision. In *Hilton*, Justice Kennedy reiterated that "the Eleventh Amendment does not apply in state courts." *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 204–05 (1991) (quoting *Will*, 491 U.S., at 63–64). Justice Kennedy's statement would have been highly superfluous had some other principle performed a similar function in state court.

137. *Alden*, 527 U.S. at 737 (citing *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), as overruling the *Parden* decision's theory of constructive waiver).

abrogate it. Moreover, *Hilton* was litigated and decided just following *Union Gas* and prior to the *New York*, *Printz*, and *Seminole Tribe* decisions.<sup>138</sup> Thus, *Hilton* was decided at a time when it might have appeared that Congress's power to abrogate state sovereign immunity was sanctioned by the Constitution.<sup>139</sup> In short, *Hilton* addressed waiver rather than abrogation, and, in any event, the Supreme Court's receptivity to congressional abrogation of state sovereign immunity had significantly lessened since the *Hilton* decision.

The Court next addressed the significance of *Nevada v. Hall*.<sup>140</sup> *Hall* is distinguishable from the present case, per Justice Kennedy, because *Hall* involved the issue of whether one sovereign state could subject another sovereign state to suit in the first sovereign's courts.<sup>141</sup> The *Alden* majority pointed to clear differences between immunity principles in the sovereign's own courts and immunity in the courts of another sovereign.<sup>142</sup> According to the Court, the *Hall* decision addressed neither of the issues germane to the present case; namely, the existence of a State's immunity in its own courts, and the extent of Congress's power to abrogate that immunity.<sup>143</sup>

Justice Kennedy similarly distinguished two other cases relied upon by petitioners—*Reich v. Collins*<sup>144</sup> and *Howlett v. Rose*.<sup>145</sup> According to the Court, *Reich* differed from *Alden* inasmuch as that petitioner had relied upon the State's promise of "a 'clear and certain' post-deprivation remedy." Accordingly,

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138. *Alden*, 527 U.S. at 737 (attributing the State's strategy in *Hilton* to the recent *Union Gas* decision).

139. *Id.* (recognizing a paradigm shift when the court moved from the *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), decision to the *New York v. United States*, 505 U.S. 144 (1992), *Printz v. United States*, 521 U.S. 898 (1997), and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), decisions).

140. 440 U.S. 410 (1979).

141. *Alden*, 527 U.S. at 738 (citing *Hall* for the proposition that "[t]he doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign") (alteration in original).

142. *Id.* at 738 (stating that "[o]nly the sovereign's own consent could qualify the absolute character of [its] immunity" in its own courts, but that the Constitution does not "reflect an agreement between the States to respect the sovereign immunity of one another").

143. *Id.* at 739. Justice Kennedy went on to assert that the differences between sovereign immunity in the sovereign's own courts and sovereign immunity in another sovereign's courts are not only consistent with immunity from private suits in the sovereign's own courts, but also with a proscription on Congress's ability to abrogate such immunity. *Id.* at 739–40.

144. 513 U.S. 106 (1994).

145. 496 U.S. 356 (1990).

due process required enforcement of that promise.<sup>146</sup> *Howlett*, wrote Justice Kennedy, differed in an unrelated capacity—the plaintiffs could have brought the action in federal court, and the state could not discriminate against a federal cause of action if the defense of sovereign immunity would not have been available in federal court.<sup>147</sup>

After concluding that the prior case law did not address Congress's ability to abrogate a state's sovereign immunity in its own courts, Justice Kennedy addressed the issue as a question of first impression,<sup>148</sup> and in doing so, turned to the Constitution's history, practice, precedent, and structure.<sup>149</sup>

The original understanding of the Constitution, according to the *Alden* majority, underscored a common belief that a state's immunity in its own courts was unqualified.<sup>150</sup> Concerns were, of course, raised as to the extent of state immunity in the federal courts. Justice Kennedy pointed out, however, that implicit in concerns about state sovereignty in the federal courts is an underlying presumption of a state's immunity in its own courts.<sup>151</sup> As an historical summation, Justice Kennedy concluded that the Constitution would most likely not have been ratified had the states believed it stripped them of immunity in their own courts.<sup>152</sup>

Turning to early congressional practice, the Court noted that, although various federal statutes have authorized federal suits in state court, none of the early statutes purported to authorize suits against nonconsenting states in their own courts.<sup>153</sup> In the wake of *Parde*'s theory of constructive waiver and *Union Gas*'s recognition of federal abrogation of State immunity, recent federal statutes have purported to subject

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146. *Alden*, 527 U.S. at 740 (linking the due process obligation in *Reich* to the Constitution, rather than to Congress).

147. *See id.* (differentiating between the state, which can assert a sovereign immunity defense, and a school board, which cannot).

148. *Id.* at 741.

149. *Id.*

150. *Id.* (explaining that silence on the subject was best explained by the fact that no one conceived that a state's immunity in its own courts would be challenged).

151. *Id.* at 742–43 (suggesting that sovereign immunity in federal court would have been meaningless unless sovereign immunity existed in state court). This premise is, arguably, problematic. Just as a particular litigant may desire federal court jurisdiction premised on diversity, a state may prefer to defend lawsuits in its own courts.

152. *Id.* at 743 (recounting steps taken by the founding generation to protect the sovereign immunity of the States).

153. *Id.* at 744 (citing *Printz v. United States*, 521 U.S. 898, 905–07 (1997), which details nineteenth-century statutes that imposed an obligation on state courts to enforce federal statutes, and *Testa v. Katt*, 330 U.S. 386, 389–90 (1947), which credits the first Congress with conferring jurisdiction on state courts to enforce certain federal laws).

nonconsenting states to private suits.<sup>154</sup> Justice Kennedy, however, dismissed the significance of these recent statutes for two reasons. First, their strength was “far outweighed by almost two centuries of apparent congressional avoidance of the practice.”<sup>155</sup> Second, said Justice Kennedy, the recent statutes do not suggest that Congress’s power to abrogate immunity is greater in state court than in federal court.<sup>156</sup> Thus, the *Alden* majority viewed these recent statutes as invalid attempts to subject the states to certain federal causes of action in reliance upon the erroneous views espoused by *Parden* and *Union Gas*.<sup>157</sup>

In addition to history and congressional practice, the Court asserted that its own precedent supported this decision. First, prior cases have often described the states’ immunity from private suit in “sweeping terms,” without reference to whether the suit was in federal or state court.<sup>158</sup> Second, the *Alden* majority identified a host of cases that suggest the states retain immunity from private suits prosecuted in their own courts.<sup>159</sup> Finally, the Court asserted, prior Eleventh Amendment case law has often been grounded in the premise that the states enjoy immunity from private suit in their own courts.<sup>160</sup> In view of the “settled doctrine” provided by *Seminole Tribe*, Justice Kennedy concluded, the proscription on congressional abrogation of state immunity encompasses both federal and state courts.<sup>161</sup>

Lastly, the Court considered whether the structure of the Constitution was consistent with a congressional power to subject nonconsenting States to suits in their own courts.<sup>162</sup> Federalism, the majority suggested, requires Congress to respect the dignity of the states as “residuary sovereigns and joint participants in the governance of the Nation.”<sup>163</sup> The Court

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154. *Alden*, 527 U.S. at 744 (explaining that *Parden* was the first Supreme Court case in which a State’s claim of sovereign immunity clashed with a federal statute that, purportedly, specifically created a cause of action against a State).

155. *Id.* at 744 (quoting *Printz v. United States*, 521 U.S. 898, 918 (1997)).

156. *Id.* at 745 (interpreting the recent statutes as purporting to create causes of action against the States in both federal and state court).

157. *See id.* (observing that such attempts depart from the historic respect accorded sovereign immunity of the States).

158. *Id.* (citing a series of cases supporting this proposition).

159. *Id.* at 745–46 (referencing almost 150 years of sovereign immunity jurisprudence).

160. *Id.* at 746–47 (citing *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890), as illustrating that early Eleventh Amendment cases presumed state immunity from suit in their own courts).

161. *Id.* at 748.

162. *Id.* (examining both the principles of federalism and the role delegated to the state courts by the Constitution).

163. *Id.* at 748–49 (concluding that “the principle of sovereign immunity . . . ‘accords

suggested that not only would an abrogation power be coercive, but, in many ways, such a power would be even more offensive when used to subject states to suits in their own courts.<sup>164</sup> Moreover, Justice Kennedy added, the federal government retains immunity from suit in both federal and state court, and a reciprocal privilege should be provided to the states.<sup>165</sup>

Beyond these federalism concerns, several practical considerations influenced the Court's decision. Justice Kennedy noted that private suits, especially for money damages, pose a significant risk to the financial integrity of the states.<sup>166</sup> In addition, other subtle risks concerned the Court. A general congressional power to authorize suits for money damages would strain the states' ability to govern in accordance with the voters' wishes,<sup>167</sup> and would blur the responsibilities of both the state and national governments, as well as the judicial and political branches of the state governments.<sup>168</sup> The majority added that, if Congress could abrogate state immunity in state court, the federal government would wield greater power in the state courts than in the federal courts.<sup>169</sup>

3. *Limits on State Noncompliance.* According to Justice Kennedy, the right to assert its sovereign immunity does not confer upon a state the right to disregard valid federal laws.<sup>170</sup> Several factors encourage states to comply with federal law. First, the "good faith of the States" provides some guaranties of

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the States the respect owed them as members of the federation").

164. *Id.* at 749, stating:

A power to press a State's own courts into federal service to coerce the other branches of the State, furthermore, is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.

*Id.*

165. *Id.* at 749–50 (acknowledging the constitutional basis for state sovereignty).

166. *Id.* at 750 (regarding as "indisputable" the theory that states could have been forced into insolvency shortly after the founding had they not possessed immunity from private suits).

167. *Id.* at 750–51.

168. *Id.* (criticizing Congress's actions as "striking" at the heart of the political accountability" necessary to a republic). The Court continued:

If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

*Id.*

169. *Id.* at 752 (emphasizing Congress's inability to abrogate the States' sovereign immunity in federal court).

170. *Id.* at 754–55 (acknowledging that the States and their officers are bound by the Constitution, as well as by valid federal laws).

compliance with both the Constitution and federal law.<sup>171</sup> Beyond this, sovereign immunity only bars private suits in the absence of consent—the states are free to voluntarily consent to suit.<sup>172</sup> Additionally, each state consented to suit by the United States or by other states by ratifying the Constitution.<sup>173</sup> Consequently, the United States may sue any state to enforce federal law.

The *Alden* opinion also makes clear that several other limits exist on the states' sovereign immunity. By reaffirming *Fitzpatrick v. Bitzer*,<sup>174</sup> the majority acknowledged Congress's power to authorize suits against states pursuant to the Section 5 enforcement power of the Fourteenth Amendment.<sup>175</sup> Another important limit on state sovereign immunity is that suits are barred against states, but are allowed against lesser entities that are not "arm[s] of the State."<sup>176</sup> Moreover, certain claims against state officers are actionable.<sup>177</sup>

### III. ANALYSIS

#### A. *The Source of the Immunity*

The literal text of the Constitution, as ratified in 1789, did not address sovereign immunity in either federal or state court. Following the *Chisholm* decision in 1793, the Eleventh Amendment was ratified.<sup>178</sup> Although the literal text of the Eleventh Amendment provides only a limited immunity in federal court based on diversity jurisdiction, subsequent decisions have accorded the Amendment significant breadth. Its reach, however, has not gone unbounded. In *Hilton v. South Carolina Public Railways Commission*,<sup>179</sup> Justice Kennedy

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171. *Id.* at 755.

172. *Id.* ("Many States, on their own initiative, have enacted statutes consenting to a wide variety of suits. The rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign.'").

173. *Id.* at 755–56 (distinguishing private suits from those "commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed.'" (citation omitted)).

174. 427 U.S. 445 (1976).

175. *Alden*, 527 U.S. at 756 (quoting *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 59 (1996), for the proposition that the Fourteenth Amendment "fundamentally altered the balance of state and federal power struck by the Constitution").

176. *Id.* at 756 (recognizing municipal corporations as entities separate from the State).

177. *Id.* at 756–57 (stressing the difference between suits to be satisfied from the officers personally and those to be satisfied from the State Treasury).

178. U.S. CONST. amend. XI (ratified 1798).

179. 502 U.S. 197 (1991).

addressed the applicability of the Eleventh Amendment in state court: “[A]s we have stated on many occasions, ‘the Eleventh Amendment does not apply in state courts.’”<sup>180</sup> The *Alden* majority’s solution—that the Tenth Amendment provides immunity in state court—engenders a new and more significant problem: It renders the Eleventh Amendment entirely unnecessary and conjures a rule inconsistent with American history.<sup>181</sup>

As the recent *Hilton* decision recognized, the Eleventh Amendment cannot secure state sovereign immunity in state court. In addressing the scope of the Eleventh Amendment, the majority placed great significance upon the fact that none of the less expansive versions of the Eleventh Amendment were adopted.<sup>182</sup> The majority fails, however, to consider the myriad of versions of the Eleventh Amendment that would have recognized a broader doctrine. Justice Bradley’s decision in *Hans* developed the “shock of surprise” theory advocated by the *Alden* majority.<sup>183</sup> Under Justice Bradley’s theory, the country was dumbfounded by the *Chisholm* decision.<sup>184</sup> Indeed, under this theory, any doubt as to the Supreme Court’s willingness to interpret literally the constitutional text evaporated after the *Chisholm* decision. As such, had the scribes of the Eleventh Amendment intended to recognize a sweeping immunity, a clear, comprehensive statement would have emerged in the ensuing Eleventh Amendment.<sup>185</sup> Yet, by its words, the Eleventh Amendment appears to have intended only to overcome the diversity prong of jurisdiction in federal court.

Unable to find support in the Eleventh Amendment for state sovereign immunity in state court, Justice Kennedy concluded that the Tenth Amendment incorporates such principles by constitutional design.<sup>186</sup> As Justice Souter’s dissent recognizes,

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180. *Id.* at 204–05.

181. See *Alden*, 527 U.S. at 760–61 (Souter, J., dissenting) (pointing out that the majority’s analysis renders the Eleventh Amendment entirely unnecessary inasmuch as the majority’s Tenth Amendment construction now provides ample immunity in both state and federal court).

182. *Id.* at 721 (relating that proposals to weaken the Amendment were defeated by Congress).

183. See *Gibbons*, *supra* note 6, at 2001 (characterizing the *Chisholm* decision as contradictory to the original understanding of state immunity from private suit).

184. Refer to notes 110–15 *supra* and accompanying text.

185. For example, the majority has clearly stated that sovereign immunity exists only against private suits but not against suits by the federal or state governments. Refer to note 172 *supra* and accompanying text.

186. *Alden*, 527 U.S. at 713–14 (crediting the federal system incorporated by the Constitution with reserving part of the Nation’s primary sovereignty to the States and with rejecting an exclusively centralized form of government).

such a principle would have rendered the Court's analysis in *Seminole Tribe* unnecessary.<sup>187</sup> If Justice Kennedy's Tenth Amendment argument is believed, it provides ample support for state immunity in both federal and state court. An even more fundamental problem may exist with Justice Kennedy's analysis—because the Tenth Amendment was ratified just two years before the *Chisholm* decision, the *Chisholm* Court must have been keenly aware of its existence. Nevertheless, none of the *Chisholm* Justices—including Justice Iredell—suggested the possibility that the Tenth Amendment might guarantee state immunity in federal court.<sup>188</sup> Given this, it seems unlikely that the scriveners of the Tenth Amendment intended it to provide states with immunity in state court, especially on questions of federal law.

The Tenth Amendment has often been recognized as a curb on federal power.<sup>189</sup> By its very words, it limits the national government's authority over both states and citizens.<sup>190</sup> In short, the Tenth Amendment speaks to the relationship between the federal and state governments, as well as the relationship between the federal government and its citizens. State sovereign immunity, in contrast, involves the relationship between citizens and state governments. Thus, while the Tenth Amendment properly applies in the federalism context,<sup>191</sup> it is simply inappropriate in a state sovereign immunity context.

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187. See *id.* at 760–61 (Souter, J., dissenting) (comparing the Court's *Alden* and *Seminole Tribe* opinions and criticizing their incongruity).

188. See *id.* at 789 (Souter, J., dissenting). As Justice Souter opined:

In sum, then, in *Chisholm* two Justices (Jay and Wilson), one of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts; one (Cushing) was essentially silent on the issue of sovereign immunity in state court; one (Blair) took a cautious position affirming the pragmatic view that sovereign immunity was a continuing common law doctrine and that States would permit suit against themselves as of right; and one (Iredell) expressly thought that state sovereign immunity at common law rightly belonged to the sovereign States.

*Id.* (Souter, J., dissenting).

189. See, e.g., Pete du Pont, *Federalism in the Twenty-First Century: Will States Exist?*, 16 HARV. J.L. & PUB. POL'Y 137, 139 (1993) (asserting that the founders wished to limit the powers of the federal government to those "few and defined" powers set out in the Constitution).

190. See 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.").

191. For example, it is an appropriate consideration in the abrogation analysis. As the court stated in *Printz v. United States*, 521 U.S. 898, 919 (1997):

Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, §8, which implication was rendered express by the

In short, neither the Tenth nor Eleventh Amendment is a suitable source of state sovereign immunity in state court, at least with respect to valid federal laws.

### B. *The Abrogation Power*

Justice Kennedy's majority opinion also relies on a limited view of Congress's abrogation power. Inasmuch as the Fair Labor Standards Act (FLSA) has been upheld as validly subjecting the states to the overtime benefits provisions,<sup>192</sup> Justice Kennedy's analysis requires that Congress's abrogation power be so narrow as to prohibit Congress from imposing remedial legislation designed to foster state cooperation with valid federal laws.

In our nation's system of federalism, the national government is a government of limited power.<sup>193</sup> Unlike the state governments, the national sovereign is limited to those powers specifically enumerated in the Constitution.<sup>194</sup> Nevertheless, since near the time of the nation's founding, the Supreme Court has recognized that, where Congress acts pursuant to an enumerated power, the exercise of that power is plenary.<sup>195</sup> Moreover, Congress may also pass legislation that is "necessary and proper" for carrying those plenary powers into execution.<sup>196</sup> Chief Justice Marshall articulated the often repeated test almost two hundred years ago: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."<sup>197</sup>

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Tenth Amendment's assertion that "[t]he 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."

*Id.* (alteration in original).

192. Refer to note 127 *supra*.

193. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers.").

194. See, e.g., *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 493-94 (1870) (stating that the sovereign powers thought necessary by the framers were expressly enumerated).

195. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 ("The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse.").

196. *McCulloch*, 17 U.S. at 323-24. As Chief Justice Marshall asserted, "Even without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted." *Id.*

197. *Id.* at 421 (footnote omitted).

In the present context, Congress's subjection of the states to suits for violations of the FLSA was a means by which the substantive FLSA provisions, such as the overtime benefits, were given effect.<sup>198</sup> Thus, the FLSA's abrogation provisions serve legitimate ends. Moreover, the abrogation provisions are adapted to that end by encouraging the states to comply with valid federal laws.<sup>199</sup> There is no constitutional provision prohibiting such legislation. Therefore, the abrogation provisions are valid unless they are inconsistent with the "letter and spirit of the Constitution."<sup>200</sup>

For several reasons, the FLSA provisions are not inconsistent with the constitutional design. First, as Justice Souter asserted, the Constitution's design is flexible and intended to accommodate changes throughout our country's evolution.<sup>201</sup> Even Madison, whom Justice Kennedy cites approvingly in the majority opinion, recognized such a principle:

If therefore, as has been elsewhere remarked, the people should in future become more partial to the federal than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due: But even in that case, the State governments could have little to apprehend, because it is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered.<sup>202</sup>

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198. See 29 U.S.C. § 216(b) (1994), which states:

An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

*Id.*

199. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-26, at 185-86 (2d ed. 1988) ("Congress, acting in accordance with its article I powers as augmented by the necessary and proper clause . . . can effectuate the valid substantive purposes of federal law by (1) compelling states to submit to adjudication in federal courts and/or (2) compelling states to entertain designated federal claims in their own courts.").

200. Refer to note 196 *supra* and accompanying text.

201. See *Alden v. Maine*, 527 U.S. 706, 761 (1999) (Souter, J., dissenting) (recognizing "the capacity of the Constitution to order relationships in a Republic that has changed since the founding").

202. THE FEDERALIST No. 46, at 262-68 (James Madison) (Clinton Rossiter ed., 1961).

Second, failing to recognize an abrogation power implicates Supremacy Clause issues and promotes inconsistencies in administering the FLSA. As the Supreme Court of Arkansas recently recognized in *Jacoby v. Arkansas Department of Education*:<sup>203</sup>

If the matter is left to the individual states to determine whether state sovereign immunity offers state employers sufficient protection, the result may well be a patchwork quilt of FLSA enforcement with some state courts permitting FLSA claims against state employers and other state courts declining to do so.<sup>204</sup>

Thus, the Supreme Court of Arkansas recognized that declining Congress an abrogation power would promote variance from state to state of national laws that ought to be implemented uniformly across the nation. Because the FLSA abrogation provisions are necessary for the practical enforcement of the substantive—and valid—FLSA provisions, they fall within Congress's Article I, Section 8 powers.

### C. *The Rationale of Federalism*

Recent years have witnessed a significant shift away from the national exercise of power and towards recognizing the sovereignty of the States.<sup>205</sup> Outside the sovereign immunity context, however, these prior cases have stressed objectives that directly benefit the public, such as fostering government accountability and protecting civil liberties. For example, Chief Justice Rehnquist's opinion in *United States v. Lopez*,<sup>206</sup> which held the Gun-Free School Zones Act of 1990 unconstitutional, began with the recognition that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."<sup>207</sup> According to Chief Justice Rehnquist, upholding the Gun-Free School Zones Act of 1990 would have required a willingness to recognize a broad national police power.<sup>208</sup> Thus, the *Lopez* decision was guided by the desire to shield the nation from the ominous threat of an overly powerful national government.<sup>209</sup>

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203. 962 S.W.2d 773 (Ark. 1998).

204. *Id.* at 777.

205. Refer to note 18 *supra* and accompanying text.

206. 514 U.S. 549 (1995).

207. *Id.* at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

208. *Id.* at 567.

209. *Id.* at 567–68.

It is difficult—perhaps impossible—to reconcile the *Lopez* logic with the *Alden* holding. Recognizing the private right to sue states in state court for violations of federal law protects, rather than endangers, the security of private individuals in their civil liberties. In the present context, the danger lies in failing to recognize the ability to bring suit against a state. Indeed, by forcing individual citizens to rely upon an inefficient and unreliable mechanism for enforcing rights,<sup>210</sup> the Supreme Court has granted the states an implicit license to violate valid federal laws designed to protect individuals.<sup>211</sup>

Justice O'Connor's majority opinion in *New York v. United States*,<sup>212</sup> which struck down certain provisions of the Low-Level Radioactive Waste Policy Act, stressed a separate concern—accountability.<sup>213</sup> According to Justice O'Connor, Congress may not compel the state governments to regulate—even if Congress could pre-empt the field—because accountability to the public would be diminished:

[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished. If the citizens of New York, for example, do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. That view can always be pre-empted under the Supremacy Clause if it is contrary to the national view, but in such a case it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views

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210. *Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) (“[W]here Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy.”).

211. *Id.* at 803, n.36 (Souter, J., dissenting) (observing that leaving to the state legislatures the decision of whether to pay citizens what they are owed under the FLSA “comes perilously close to legitimizing political defiance of valid federal law”).

212. 505 U.S. 144 (1992).

213. *Id.* at 168–69.

of the local electorate in matters not pre-empted by federal regulation.<sup>214</sup>

In short, federalism demands that Congress accept responsibility for its actions. In *Printz v. United States*,<sup>215</sup> Justice Scalia's majority opinion advanced a similar accountability argument:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.<sup>216</sup>

Both the *New York* and *Printz* decisions focused on attributing credit and blame to the proper source of government. In this way, both cases stand for the proposition that the public derives a direct benefit when the government is held accountable for its actions.

The *Alden* decision is inconsistent with the rationale of accountability advanced in *New York* and *Printz*. Indeed, the direct result of the *Alden* holding is to shield states from liability for their transgressions thereby decreasing the states' accountability.<sup>217</sup> Not surprisingly, a number of states were highly supportive of Maine's position. In fact, a total of thirty-eight states—enough to amend the Constitution<sup>218</sup>—filed briefs with the Supreme Court in favor of Maine.<sup>219</sup> Had Justice Souter's dissenting position prevailed, those same states could have overruled the decision by amendment to the Constitution. It is doubtful, however, that they would have undertaken such an unpopular course, which would unfold in full view of the public and require accountability.

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214. *Id.*

215. 521 U.S. 898 (1997).

216. *Id.* at 930.

217. "Accountability" means "an obligation or willingness to accept responsibility or to account for one's actions." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 8 (10th ed. 1999). It is precisely because Maine cannot be sued by its victims that Maine has evaded accountability.

218. The Constitution provides that amendments may be ratified by, among other means, the legislatures of three-fourths of the states. U.S. CONST. art. V.

219. Brief of Amici Curiae State of Maryland et al., *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436); Brief of Amicus Curiae Commonwealth of Kentucky, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436); Brief for Respondent, *Alden v. Maine*, 527 U.S. 706 (1999) (No. 98-436).

### D. Rights Without Remedies

Perhaps the most troubling aspect of the *Alden* decision is the Court's denigration of the inveterate principle that each right is accompanied by a remedy. In *Garcia v. San Antonio Metropolitan Transit Authority*<sup>220</sup>—a case that is still good law<sup>221</sup>—the Court held that Congress has the power under the Commerce Clause to bind the states as employers.<sup>222</sup> Simply put, *Garcia* recognized that state employees, like private employees, have rights under the FLSA. In the present case, all parties agree that Maine violated the petitioners' rights under the FLSA.<sup>223</sup> Consequently, the Court's decision to affirm the dismissal of the petitioners' case is, in effect, an admission that the petitioners have a right for which they may exact no remedy.

The Court's notion that a remedy need not accompany a right is seriously at odds with our nation's history, which is infused with the fundamental principle that a remedy is the *sine qua non* of a right.<sup>224</sup> Nevertheless, Justice Kennedy's mechanical

220. 469 U.S. 528 (1985).

221. The majority in *Alden* does not address the *Garcia* decision. As Justice Souter points out in his dissent, Congress has the authority to "extend FLSA coverage to state employees . . . [and that authority] is not contested here." *Alden*, 527 U.S. at 800 (Souter, J., dissenting).

222. *Garcia*, 469 U.S. at 555–56 ("This analysis makes clear that Congress' action in affording [San Antonio Metropolitan Transit Authority] employees the protections of the wage and hour provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause.").

223. *Alden*, 527 U.S. at 759–60 (noting that "it is conceded by all that the State has altered its conduct so that its compliance with federal law cannot now be questioned"). Prior to the Supreme Court's decision in *Seminole Tribe*, the District Court held that the *Alden* petitioners were not exempt from the benefits of the FLSA and were entitled to damages. *Mills v. Maine*, 839 F. Supp. 3, 6 (D. Me. 1993).

224. For example, in *Parden v. Terminal Railway of the Alabama State Docks Department*, the Court asserted:

To read a "sovereign immunity exception" into the Act would result, moreover, in a right without a remedy; it would mean that Congress made "every" interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability. We are unwilling to conclude that Congress intended so pointless and frustrating a result.

*Parden v. Terminal Ry. of the Ala. State Docks Dep't*, 377 U.S. 184, 190 (1964) *overruled*, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *see also* *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 624 (1838) ("[T]he power to enforce the [remedy] must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765) (recognizing a "general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that

application of syllogistic logic arrives at the seemingly absurd result that a right may exist absent a remedy.<sup>225</sup> As the *Alden* result demonstrates, however, a purported right lacking a remedy represents little more than an unenforceable promise: the petitioners will likely never collect the benefits promised them under the FLSA. Even worse, by championing the principle that remedies need not accompany rights, the Supreme Court has opened a Pandora's Box.

### *E. Due Process and Takings Clause Concerns*

In addition to the "rights without remedies" problem, constitutional considerations render the *Garcia* and *Alden* decisions irreconcilable. In particular, inasmuch as state employees are unequivocally entitled to the FLSA overtime benefits,<sup>226</sup> the petitioners have a property interest in the benefits. The deprivation of this property interest implicates both Due Process and Takings concerns.

In *Goldberg v. Kelly*,<sup>227</sup> the Supreme Court recognized that welfare benefits, a matter of statutory entitlement for those qualified to receive them, were a property interest protected under the Due Process Clause of the Fourteenth Amendment.<sup>228</sup> Because the State had discontinued the plaintiff's welfare benefits without any pre-termination evidentiary hearing, the State had not afforded the plaintiff due process.<sup>229</sup> Maine has similarly denied *Alden* and the other petitioners due process. The FLSA overtime benefits—like the welfare benefits in *Goldberg*—are a statutory entitlement under federal law.<sup>230</sup> Again, *Garcia*

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right is invaded").

225. Although not directly addressing the rights without remedies argument, Justice Kennedy's opinion does insist that the national government may enforce private rights by suing State governments in federal court for violations of federal law. Refer to note 160 *supra* and accompanying text. However, as Justice Souter's dissent recognizes, "where Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy." *Alden*, 527 U.S. at 810 (Souter, J., dissenting). Even assuming, *arguendo*, that the national government pursued such a program, the resulting "remedy" would be unsatisfactory unless the national government stood ready to vindicate each affected individual's rights.

226. Both the *Alden* majority and the State of Maine recognize that Maine was not in compliance with the FLSA overtime provisions. *Alden*, 527 U.S. at 759.

227. 397 U.S. 254 (1970).

228. *Id.* at 261-62 & n.8.

229. *Id.* at 264.

230. See 29 U.S.C. § 207 (1994). Although the Supreme Court did not consider whether the *Alden* petitioners had a property interest in the FLSA overtime benefits, the Court did address Due Process considerations in two sister cases to the *Alden* decision. In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the

makes clear that the petitioners are entitled to the benefits.<sup>231</sup> Nevertheless, Maine denied the petitioners those benefits and has effectively avoided rendering due process through its claims of sovereign immunity.

Takings Clause concerns also arise in the wake of the *Alden* decision. The Fourteenth Amendment prohibits the taking of property by state government without just compensation.<sup>232</sup> In performing a takings analysis, the Supreme Court has historically examined a number of factors.<sup>233</sup> Probably the most significant factor is “diminution in value”—the extent to which the government action has diminished the value of the property interest.<sup>234</sup> Another consideration is reciprocity of advantage—whether the property owner affected by the government taking has received some reciprocal advantage.<sup>235</sup> A third relevant factor considered by the Court is “investment backed expectations”—whether the government taking sabotaged the reasonable expectations of the owner in investing in the property.<sup>236</sup>

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Supreme Court held that the petitioner’s right to be free from a business competitor’s false advertising about its own product and the right of the petitioner to be secure in its own business interests, as guaranteed by the Lanham Act, did not constitute property interests protected by the Due Process Clause. 527 U.S. 666, 672 (1999). The Court reasoned that a “hallmark of a protected property interest is the right to exclude others.” *Id.* at 673. The Court also recognized that other rights granted by the Lanham Act may constitute property interests. *Id.* (“The Lanham Act may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks, which are the ‘property’ of the owner because he can exclude others from using them.”).

231. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985).

232. *Dolan v. City of Tigard*, 512 U.S. 374, 383–84 (1994).

233. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014–19, 1022–29 (1992) (examining the historical considerations in a takings analysis).

234. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As the Court explained:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

*Id.*

235. *E.g., id.* at 415 (noting that where all property in a given area is placed under the same restrictions for the common benefit of all affected individuals, there is an “average reciprocity of advantage”).

236. *E.g., Lucas*, 505 U.S. at 1019 n.8 (recognizing that the economic impact of regulation on investment-backed expectations is “keenly relevant” to the takings analysis).

Each of these factors supports the proposition that Maine's failure to pay the FLSA overtime benefits constitutes a compensable government taking. By denying the probation officers overtime benefits, Maine has gone beyond *diminishing* the value of the overtime benefits; it has *eradicated* their value. In theory, one could argue that Alden and the other Maine employees receive some form of reciprocity of advantage: After all, the State of Maine presumably uses the unpaid benefits to provide public services, some of which would be enjoyed by the affected state employees. This, of course, is preposterous. It is fairer to say that Maine's employees are subsidizing the more fortunate citizens of Maine who are capable of vindicating their rights in court. Finally, a consideration of investment-backed expectations may be appropriate. It is unclear whether Alden and the other petitioners accepted employment with the State of Maine based on the expectation that Maine would follow the FLSA overtime provisions. It is unreasonable, though, to suggest that a typical employee would not seriously consider overtime benefits alongside other employee benefits when making employment decisions. In summary, the factors articulated by the Supreme Court in a typical takings analysis strongly favor a finding that Maine has effected a governmental taking of the petitioner's property.

These due process and takings issues are going to be pervasive given the Supreme Court's recent policy on sovereign immunity. The tension created by upholding congressional legislation creating private rights against the states while denying citizens the ability to vindicate those rights will surely create additional constitutional problems.

#### IV. CONCLUSION

If the State of Maine's "dignity" were more important than individual rights secured by valid federal laws, one might reasonably conclude that the United States Supreme Court's decision in *Alden v. Maine* was justified. Nevertheless, neither our Constitution, our national conscience, nor common sense can support such a proposition. The Court's willingness to adopt this perspective signals both a fundamental departure from historical principles and a basis for serious concern.

The *Alden* case encompasses questions of both state sovereign immunity and federalism. Properly viewed, the Court's decision is an extension of a recent string of federalism decisions aimed at limiting the exercise of national power. Whereas some recent federalism decisions—including *United States v. Lopez*,

*New York v. United States*, and *Printz v. United States*—were fueled by valid objectives, such as avoiding government abuses and increasing government accountability, the *Alden* result furthers no direct public benefit. The only indirect public benefit—allowing the states to use funds for public services rather than for complying with the individual rights of Maine employees—comes at the unjustifiable cost of forcing a few government employees to subsidize those individuals whose rights can be vindicated in court. This indirect benefit is one in which neither the Supreme Court nor the nation should take pride.

The two prerequisites to Justice Kennedy's majority opinion are a constitutionally justifiable source of state sovereign immunity in state court and a similarly justifiable limitation on Congress's Article I abrogation power.<sup>237</sup> On both fronts, the majority opinion is flawed. With regard to the former, neither the Eleventh nor Tenth Amendment may serve as the basis for state sovereign immunity in state court,<sup>238</sup> especially where the source of the law is federal legislation. The Tenth Amendment, while relevant in defining the relationship between the federal and state governments, does not speak to the relationship between citizens and the various States.<sup>239</sup> Thus, it can neither serve as the source nor define the contours of state sovereign immunity, a relationship between citizens and state governments. The Eleventh Amendment fails for a different reason: Recent Supreme Court case law explicitly recognizes that the Eleventh Amendment carries no weight in state court.<sup>240</sup> Although

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237. If Maine is not entitled to immunity from private suit in the present action, it is irrelevant whether Congress has the right to abrogate any such immunity. Similarly, assuming, *arguendo*, that such immunity exists, Maine cannot prevail if Congress possesses an abrogation power and makes a clear statement of intent to abrogate state immunity. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) ("In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has 'unequivocally express[ed] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'" (alteration in original) (citations omitted)). The FLSA makes clear Congress's intent to abrogate states' immunity:

There can be little doubt that the FLSA, in its current form, makes clear Congress' intention to abrogate state immunity from suit in federal court in private FLSA actions. . . . [T]he Act, as amended, provides in pertinent part that, "An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees."

*Mills v. Maine*, 118 F.3d 37, 42 (1st Cir. 1997) (citations omitted).

238. Refer to notes 181–89 *supra* and accompanying text.

239. Refer to notes 187–88 *supra* and accompanying text.

240. Refer to notes 178–94 *supra* and accompanying text. Again, it was Justice Kennedy—the author of the *Alden* decision—who wrote the *Hilton* decision, in which he

historically the Court has often stretched the Eleventh Amendment's meaning beyond its literal text, the flexibility of the Amendment is not unbounded.

Turning to the congressional abrogation power, subjecting the states to suit in state court for violation of a valid federal law is nothing more than remedial legislation designed to foster state cooperation with valid federal laws. As such, it is clearly within the scope of Congress's Article I powers.<sup>241</sup>

Even assuming, *arguendo*, that Justice Kennedy's support for state sovereign immunity in state court and an accompanying limitation on Congress's abrogation power are justifiable, the *Alden* decision is plagued with other—and equally serious—problems. In particular, because well-settled law recognizes that the FLSA validly subjects states to the FLSA overtime provisions, the petitioners are clearly entitled to those benefits.<sup>242</sup> Consequently, by failing to abide by the FLSA provisions, Maine deprived the petitioners of their property interest in the benefits. This deprivation of a protected property interest engenders both due process and government takings concerns.

Of equal importance is the Court's willingness to deny the petitioners' judicial redress for violations of their federal rights and the denigration of the inveterate principle that where there is a right, there is also a remedy. This principle, which was well established prior to the founding of this country, was strongly endorsed by both the Framers of the Constitution and subsequent generations.<sup>243</sup> Now, the Court's willingness to recognize that individual rights can exist where they may not be vindicated opens Pandora's Box and forebodes a future parade of abuses by states against their own citizens.

*Russell A. Chorush, Ph.D.*

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explained that "as we have stated on many occasions, 'the Eleventh Amendment does not apply in state courts.'" *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991).

241. Refer to notes 193–97 *supra* and accompanying text.

242. Refer to note 230 *supra* and accompanying text.

243. Refer to note 221 *supra* and accompanying text.