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Alden v. Maine and State Sovereign Immunity Original Intent or an Intent Congenial to the Court's Desires

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ALDEN v. MAINE AND STATE SOVEREIGN IMMUNITY ORIGINAL INTENT OR AN INTENT "CONGENIAL TO THE COURT'S DESIRES"?

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I. INTRODUCTION

In *Alden v. Maine*[2] the Supreme Court considered whether Congress, pursuant to its Article I powers, can subject a nonconsenting state to a private suit for damages in the state's own courts. Alternatively viewed, the question was whether a state has sovereign immunity which precludes such suits. The petitioners were employees of the State of Maine who sought monetary damages from the State for violations of the Fair Labor Standards Act of 1938 (FLSA),[3] which specifically authorized such a suit. The Maine courts had dismissed the suit on sovereign immunity grounds.

The Supreme Court affirmed, holding that Article I of the Constitution does not grant Congress the power to subject a nonconsenting state to a private suit for damages in the state's own courts.[4] The Court explained that state immunity to private suits "neither derives from nor is limited by the terms of the Eleventh

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[2]527 U.S. 706 (1999).

[3]29 U.S.C. §§ 201-207 (1994).

[4]*See Alden*, 527 U.S. at 712.

Amendment."[5] Rather, such immunity "is a fundamental aspect of the sovereignty which the States enjoyed" prior to entering the federal system.[6] The states retain this immunity "except as altered by the plan of the [Constitutional] Convention or certain constitutional amendments."[7] This is implicit in the federal structure and confirmed by the Tenth Amendment.[8] The decision represents a direct extension of the federalism developed by the Court in *Seminole Tribe of Florida v. Florida,*[9] and is philosophically consistent with other recent "states rights" cases such as *New York v. United States,*[10] and *Printz v. United States.*[11]

This note will review the history of state sovereign immunity and congressional power to subject states to lawsuits. Next, this note will examine the holdings and opinions in *Alden.* Finally, the underlying basis for the *Alden* decision will be analyzed.

II. BACKGROUND

Alden v. Maine[12] represents the most recent major development in a long-running debate about the nature and extent of state sovereign immunity under the Constitution. Article III of the Constitution provides that "the judicial Power [of the United States] 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*."[13] It provides further that "In all Cases . . . *in which a State shall be a Party*, the Supreme Court shall have original Jurisdiction."[14] By its text then, Article III taken alone appears to confer both federal question and diversity jurisdiction on the federal courts when a state is a party to a suit. The meaning of this text and its relationship to congressional powers granted elsewhere in the Constitution are at the heart of the sovereign immunity debate.

Disagreement about state sovereign immunity dates back to the pre-ratification period. At that time, many states were saddled with Revolutionary War debt and were thus "vitally interested" in whether, under Article III, they would be subject to federal court suits on these debts.[15] Consequently, the ratification debates addressed

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[5]*Id*. at 713.

[6]*Id.*

[7]*Id.*

[8]*See id.* at 713-14.

[9]517 U.S. 44 (1996).

[10]505 U.S. 144 (1992).

[11]521 U.S. 898 (1997).

[12]527 U.S. 706 (1999).

[13]U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

[14]U.S. CONST. art. III, § 2, cl. 2 (emphasis added).

[15]*See, e.g.,* Nevada v. Hall, 440 U.S. 410, 418 (1979).

the state sovereign immunity question primarily within the context of this potential debt enforcement.[16]

Alexander Hamilton, in *The Federalist No. 81*, considered whether, under Article III, "an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts."[17] His position was that:

> [I]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent . . . . Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.[18]

Although Hamilton was "plainly talking about a suit subject to a federal court's jurisdiction under the Citizen-State Diversity Clauses of Article III,"[19] he did not specifically reconcile the apparent conflict between his position and Article III's diversity jurisdiction language. In supporting and expanding on Hamilton's theme at the Virginia ratifying convention, however, James Madison suggested that the purpose of the citizen-state diversity jurisdiction clause was to provide for federal jurisdiction only when a state was a plaintiff, not a defendant, or when a state otherwise consented to suit.[20] John Marshall, speaking after Madison at the Virginia convention, likewise argued that the clause was only intended to cover suits in which a state was the plaintiff.[21]

Disputing the views of Madison and Marshall in favor of the plain meaning of the text of Article III, Edmund Randolph argued that "any doubt respecting the construction that a state may be a plaintiff, and not defendant, is taken away by the words *where a state shall be a party*."[22] Similarly, James Wilson expressed a strong anti-immunity position at the Pennsylvania Convention, arguing that the concept of impartiality inherent in the Constitution requires a federal forum in which individuals and states receive equal treatment.[23] Wilson's view was "that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare."[24]

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[16] *See Alden*, 527 U.S. at 772-73 (Souter, J., dissenting).

[17] THE FEDERALIST No. 81, at 125 (Alexander Hamilton) (M. Walter Dunne ed. 1901).

[18] *Id.* at 125-26.

[19] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 144-45 (1996) (Souter, J., dissenting).

[20] *See* 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 533 (2d ed. 1836) [hereinafter ELLIOT'S DEBATES]; *Alden*, 527 U.S. at 718 (citing 3 ELLIOT'S DEBATES 533); *Alden*, 527 U.S. at 776 (Souter, J., dissenting) (citing 3 ELLIOT'S DEBATES 533).

[21] *See* 3 ELLIOT'S DEBATES 555; *Alden*, 527 U.S. at 718 (citing 3 ELLIOT'S DEBATES 555); *Alden*, 527 U.S. at 776 (Souter, J., dissenting) (citing 3 ELLIOT'S DEBATES 555).

[22] *Alden*, 527 U.S. at 776 (Souter, J., dissenting) (citing 3 ELLIOT'S DEBATES 573).

[23] *See id.* at 777 (citing 2 ELLIOT'S DEBATES 491).

[24] *Id.* (citing 2 ELLIOT'S DEBATES 443).

The ratification debates did not resolve the issue.[25] Consequently, to hedge their positions, some states in their formal ratification documents issued declarations or proposed amendments which specifically provided for some form of state immunity in federal court.[26] The New York and Rhode Island Conventions declared that "the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state."[27] The Rhode Island Convention went on to propose that

> [t]o remove all doubts or controversies respecting the same, . . . it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states . . . in liquidating and discharging the public securities of any one state.[28]

The Virginia and North Carolina conventions proposed amendments which would have entirely eliminated the diversity jurisdiction language in Article III.[29]

Despite this early disagreement, Article III was ratified with the disputed jurisdictional provisions intact.[30] Two years later, the Judiciary Act of 1789 incorporated this language in its grant of authority to the Supreme Court, providing:

> [T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states and aliens, in which latter case it shall have original but not exclusive jurisdiction.[31]

The meaning of the diversity jurisdiction language in Article III and the Judiciary Act went untested for five years[32] until the case of *Chisholm v. Georgia*[33] reached the United States Supreme Court.

In *Chisholm*, the question was presented in the form of a motion to compel an appearance by the State of Georgia, on danger of default, in a common law assumpsit action brought in federal court against the State by Chisholm, a citizen of

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[25]*See id*. at 778.

[26]*See id.* at 718, 778-79 (Souter, J., dissenting).

[27]*Alden*, 527 U.S. at 778-79 (Souter, J., dissenting) (citing 1 ELLIOT'S DEBATES 329, 336).

[28]*Id.* at 779-80 (citing 1 ELLIOT'S DEBATES 336).

[29]*See id.* at 724-25, 780 (Souter, J., dissenting).

[30]*See id.* at 778 n.18 (Souter, J., dissenting).

[31]Judiciary Act of 1789, 1 Stat. 73, 80 (1789).

[32]In an earlier case, Van Stophorst v. Maryland, 2 U.S. 401 (1791), the State of Maryland was sued by a foreign citizen for debts owed by the state. Maryland submitted to process and subsequently settled the case rather than risking an adverse ruling on immunity. *See Alden*, 527 U.S. at 789 n.25 (Souter, J., dissenting).

[33]2 U.S. 419 (1793).

South Carolina, to collect on a Revolutionary War debt.[34] The Governor and Attorney General of Georgia had been served with notice,[35] but the state "refuse[d] to appear and answer. . . [arguing] she [was] a sovereign State and therefore not liable to such actions."[36] The Court rejected this immunity defense and granted the motion in what was effectively a four-to-one majority decision.[37] The four concurring Justices, in individual opinions, essentially found that the Constitution meant what it said. They all found a clear authorization for citizen-state diversity jurisdiction in the text of Article III.[38] Each rejected a construction of this text which would allow a grant of jurisdiction only when a state was a plaintiff and not a defendant.[39] Additionally, at least two of the concurring Justices believed that the concept of state sovereign immunity advanced by Georgia was inconsistent with the principle of popular sovereignty on which the Constitution was based.[40]

Justice Iredell, the lone dissenter, argued that the Court did not have jurisdiction. However, his argument was not based on a theory of constitutional state sovereign immunity, but rather, on the grounds that Congress had not conferred jurisdiction on the federal courts over unconsenting states. He noted that although the Judiciary Act provided for original jurisdiction in the Supreme Court over all civil controversies "between a State and citizens of another State"[41] it went on to provide that any writs issued by the federal courts not specifically provided for by statute must be "agreeable to the principles and usages of law."[42] Justice Iredell interpreted this latter language as directing the Court to issue non-statutory writs only in accordance with the law of a particular state or "[p]rinciples of law common to all the States"

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[34]*See id*. at 419-20. *See also*, Atascadero v. Scanlon, 473 U.S. 234, 281 (1985) ("Chisholm was an action in assumpsit by a citizen of South Carolina for the price of military goods sold to Georgia in 1777.").

[35]*See Chisholm*, 2 U.S. at 419.

[36]*Id*. at 469.

[37]*See id*. at 479.

[38]*See, e.g., id.* at 466 (Justice Wilson concurring) ("[W]e may safely conclude . . . that the State of Georgia is amenable to the jurisdiction of this Court . . . . [T]his doctrine . . . is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself.").

[39]*See, e.g., id.* at 476 (Jay, C.J., concurring)

> If the Constitution really meant to extend these powers only to those controversies in which a State might be a Plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it.

[40]*See, e.g., Chisholm*, 2 U.S. at 470-71 (Jay, C.J., concurring) ("[T]he people exercised . . . their own proper sovereignty. . . establishing a Constitution by which it was their will, that the State Governments should be bound, and to which the State Constitutions should be made to conform."); *id.* at 454 (Wilson, J. concurring) ("To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place it could have been used with propriety. . . . [The framers] might have announced themselves 'SOVEREIGN' people of the United States . . .").

[41]*Id.* at 431 (Iredell, J., dissenting).

[42]*Id*. at 434.

derived from the common law.[43] Believing that no state authorized compulsory suits for damages against itself, and that state sovereign immunity was a part of the existing common law, Justice Iredell argued that any contrary holding by the Supreme Court would violate the terms of the Judiciary Act.[44] Because he based his dissent on the terms of the Judiciary Act, Justice Iredell specifically reserved judgment on the question of whether Congress had the power to abrogate this common law immunity.[45]

The *Chisholm* decision proved immediately controversial as it directly affected the ability of the states to revoke their war debts.[46] In response, "the proposal adopted as the Eleventh Amendment was introduced in the Senate" soon afterwards.[47] This proposal received prompt attention and "little more than two months after its introduction it had been endorsed by both Houses and forwarded to the States"[48] which adopted the Amendment.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[49] By its text, which closely tracks language in Article III, the Amendment appears to be specifically directed toward eliminating federal citizen-state diversity jurisdiction.[50] Whether the Eleventh

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[43] *Id*.

[44] *See Chisholm*, 2 U.S. at 436-37.

[45] *Id*. at 449.

> But it is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose since no part of the existing law applies, this alone is sufficient to justify my determination in the present case.

Id.

[46] *See*, *e.g. Alden*, 527 U.S. at 720 ("The States, in particular, responded with outrage to the decision.").

[47] *Id*. at 721 (A constitutional amendment which would have granted the states extensive immunity in federal court had been immediately proposed in the House of Representatives but was not acted on.) *See Seminole Tribe*, 517 U.S. at 111 (citing GAZETTE OF THE UNITED STATES 303 (Feb. 20, 1793)). (Souter, J., dissenting). The amendment, proposed by Theodore Sedgewick of Massachusetts provided that,

> [N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

Seminole Tribe, 517 U.S. at 111.

[48] *Alden*, 527 U.S. at 721.

[49] U.S. CONST. amend. XI.

[50] *See, e.g.*, *Seminole Tribe*, 517 U.S. at 54 ("the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts.").

Amendment had implications for state sovereign immunity beyond this textual construction of its terms was the subject of *Hans v. Louisiana*.[51]

Hans, like *Chisholm*, was a federal court suit brought by an individual in federal court against a state to compel payment on the state's debt obligations.[52] The State of Louisiana had issued coupon bearing bonds in 1874 and concurrently amended its constitution to declare that the bonds created a valid contract by the state.[53] In 1879, the state adopted a new constitution which superseded the previous constitution and provided that interest on the 1874 bonds falling due on January 1, 1880 would be defrayed to meet other state expenses.[54] Hans, a citizen of Louisiana, held bond coupons affected by this provision and sued the state in federal court for $87,500 plus accrued interest.[55] He alleged an impairment of a valid contract by the state in violation of Article I, section 10 of the United States Constitution.[56] Louisiana contended it had sovereign immunity under the Eleventh Amendment and the trial court dismissed the suit on that basis.[57]

Whereas *Chisholm* involved a state law claim brought against Georgia by a citizen of another state, *Hans* involved a federal constitutional claim brought against Louisiana by one of its own citizens. *Hans* thus presented the Court with two distinct questions. Hans first contended that the Eleventh Amendment by its terms barred only diversity jurisdiction in federal courts and had no application when a federal question was being contested.[58] He noted that Article III extends federal judicial power to "all cases in law and equity arising under this Constitution" with no qualification as to the character of the parties.[59] Consequently, Hans contended that "a state can claim no exemption from suit, if the case is really one arising under the Constitution."[60]

The Court rejected this limited reading of the Eleventh Amendment, citing as precedent the cases of *Louisiana v. Jumel*,[61] *Hagood v. Southern*,[62] and *In re Ayers*.[63] Those cases involved similar constitutional claims brought against states by citizens of other states. The Court summarized these precedents by stating "[i]t was not

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[51]134 U.S. 1 (1890).

[52]*See Hans*, 134 U.S. at 1.

[53]*See id*. at 2.

[54]*See id*. at 2-3.

[55]*See id.* at 3.

[56]*Id. (*The Constitution provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1.).

[57]*See Hans*, 134 U.S. at 3-4.

[58]*See id*. at 9.

[59]*Id.* (quoting U.S. CONST. art. III, § 2, cl. 1.).

[60]*Id*.

[61]107 U.S. 711 (1883).

[62]117 U.S. 52 (1886).

[63]123 U.S. 443 (1887).

denied that they presented cases arising under the Constitution [rather than diversity jurisdiction alone]; but, notwithstanding that, they were held to be prohibited by the [Eleventh Amendment]."[64]

This position gave rise to Hans' second argument which was that even if the Eleventh Amendment applied to federal question jurisdiction, it did not serve to bar his suit because the "amendment only prohibits suits against a state which are brought by the citizens of another state."[65] The Court conceded "[i]t is true the amendment does so read,"[66] but rejected the argument nonetheless. On this point, the Court initially noted that because it had extended Eleventh Amendment immunity to federal question suits, if Hans' argument was upheld, it would produce the "anomalous result" that in such cases, "a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states."[67] However, the Court primarily supported its decision with the broader argument that the states entered the Union with sovereign immunity and that this immunity had not been abrogated by the Constitution.[68]

To support this broader argument, the Court drew on the positions taken by Hamilton, Madison and Marshall during the ratification debates,[69] and Justice Iredell's dissent in *Chisholm*. The Court characterized the *Chisholm* decision as an overly textual misconstruction of Article III which was inconsistent with the underlying principle of state sovereign immunity.[70] It viewed the Eleventh Amendment as an overruling of the Supreme Court on this point. Thus, in the Court's view, the Eleventh Amendment did not establish or define the limits of state sovereign immunity; rather, because it specifically reversed the *Chisholm* decision, the Court understood the Amendment to confirm the existence of a broader immunity.[71]

The rationale behind *Hans,* that the principle of state sovereign immunity in federal court was not specifically limited by the precise text of the Eleventh Amendment, was expanded in subsequent cases.[72] In *Smith v. Reeves*[73] the Court

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[64]*Hans*, 134 U.S. at 10.

[65]*Id.*

[66]*Id.*

[67]*Id.*

[68]*See id.* at 16. ("The suability of a state, without its consent, was a thing unknown to the law.").

[69]*See supra* text accompanying notes 17-21.

[70]*See Hans*, 134 U.S. at 12.

> The [concurring] justices were more swayed by a close observance of the letter of the constitution, without regard to former experience and usage; and because the letter said that the judicial power shall extend to controversies 'between a state and citizens of another state;' and 'between a state and foreign states, citizens or subjects,' they felt constrained to see in this language a power to enable the individual citizens of one state, of a foreign state, to sue another state of the Union in the federal courts.

[71]*See id.* at 11-12.

[72]*See Alden*, 527 U.S. at 728.

[73]178 U.S. 436 (1900).

held that sovereign immunity barred federal court suits against states brought by federal corporations.[74] In *Principality of Monaco v. Mississippi*,[75] the Court held that states were similarly immune to suits brought by foreign states.[76] In *Blatchford v. Native Village of Noatak,*[77] the Court relied on *Monaco* to further extend the states' federal court immunity to cover suits brought by Indian Tribes,[78] and, in *In re New York*,[79] the Court held that state sovereign immunity extends to suits in admiralty even though "the [Eleventh] Amendment speaks only of suits in law or equity."[80]

While the cases in the *Hans* line espoused the principle of a broad state sovereign immunity, the cases, like Justice Iredell's *Chisholm* dissent, still did not squarely address the question of whether Congress has the power to abrogate this immunity.[81] In the federal court context, that question was addressed and initially answered in the affirmative in two key cases.

The first, *Fitzpatrick v. Bitzer*,[82] involved a suit filed in federal district court by employees of the State of Connecticut against various officials of that state.[83] The employees alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964.[84] In 1972, pursuant to section 5 of the Fourteenth Amendment,[85] Congress had amended Title VII to specifically authorize private suits of this type.[86] The district court granted the plaintiffs a prospective injunction but denied money

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[74]*See Reeves*, 178 U.S. at 449.

[75]292 U.S. 313 (1934).

[76]*See Monaco*, 292 U.S. at 330-31.

[77]501 U.S. 775 (1991).

[78]*See Blatchford*, 501 U.S. at 780-82.

[79]256 U.S. 490 (1921).

[80]*New York*, 256 U.S. at 497. Further refinements of the *Hans* doctrine were provided by the cases of *Nevada v. Hall*, 440 U.S. 410 (1979), and *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89 (1984). In *Hall*, the State of Nevada was named a defendant in a civil suit brought in a California state court. The California Supreme Court held that the trial court had proper jurisdiction and following a trial, judgment was entered against Nevada. *See Hall*, 440 U.S. at 411-12. The United States Supreme Court affirmed, holding that a state's sovereign immunity under the Eleventh Amendment does not extend to suits brought in the courts of another state. *See id*. at 426-27. More recently, in *Pennhurst*, the Court held that a state's Eleventh Amendment immunity bars a federal court, in an exercise of pendent jurisdiction, from enforcing a state's own laws against officials of that state when the state itself is the real party in interest. *See Pennhurst*, 465 U.S. at 121.

[81]*See, e.g*., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 68 (1996). ("It is true that we have not had occasion previously to apply established Eleventh Amendment principles to the question whether Congress has the power to abrogate state sovereign immunity . . .").

[82]427 U.S. 445 (1976).

[83]*See Fitzpatrick*, 427 U.S. at 457 (Brennan, J., concurring).

[84]*See id*. at 448.

[85]Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV § 5.

[86]*See Fitzpatrick*, 427 U.S. at 448-49.

damages on state sovereign immunity grounds.[87] The Court of Appeals affirmed on this point.[88] The question presented to the Supreme Court was whether "Congress ha[d] the power to authorize federal courts to enter . . . [an award of money damages to a private individual] against [a] state as a means of enforcing the substantive guarantees of the Fourteenth Amendment" or whether such power was precluded by the "shield of sovereign immunity afforded the State by the Eleventh Amendment."[89]

The *Bitzer* majority, in an opinion by Justice Rehnquist, acknowledged the principle of state sovereign immunity set forth in *Hans*, but held that this otherwise effective immunity was specifically limited by the authority granted to Congress by the Fourteenth Amendment.[90] As explained by the Court, the Civil War Amendments represented a "shift in the federal-state balance" and granted Congress the power to intrude into the states' spheres of autonomy with respect to matters embraced by those Amendments.[91] Applying this view to the facts at hand, Justice Rehnquist wrote "[w]e think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[92]

Justice Brennan concurred in the judgment but rejected the notion of a broad constitutionally based state sovereign immunity. In Justice Brennan's view, the states, by ratifying the Constitution, had surrendered their immunity with respect to all of the enumerated powers granted to Congress.[93] Justice Brennan believed Congress could have validly enacted the legislation under either its Commerce Clause or Fourteenth Amendment powers.[94] In a separate concurring opinion, Justice Stevens agreed with Justice Brennan on this point, writing, "the commerce power is broad enough to . . . provide[] the necessary support for the 1972 Amendments to Title VII."[95] This commerce power question was put squarely before the Court in the second key case, *Pennsylvania v. Union Gas Co*.[96]

Union Gas was an appeal by the State of Pennsylvania of a federal court of appeals decision finding the state subject to a private suit[97] brought pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980

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[87]*See id*. at 450.

[88]*See id*.

[89]*Id*. at 448.

[90]*See id.* at 456.

[91]*Fitzpatrick*, 427 U.S. at 455.

[92]*Id*. at 456.

[93]*See id*. at 457-58 (Brennan, J. concurring).

[94]*See id.* The Commerce Clause provides that "Congress shall have power to . . . regulate commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

[95]*Fitzpatrick,* 427 U.S. at 458 (Stevens, J., concurring).

[96]491 U.S. 1 (1989).

[97]*See Union Gas,* 491 U.S. at 6.

(CERCLA).[98] Congress enacted CERCLA and the subsequent Superfund Amendments and Reauthorization Act of 1986 (SARA)[99] pursuant to its Commerce Clause powers to provide a mechanism to clean up hazardous waste sites.[100]

In the district court, Pennsylvania argued that the private claim against it was barred by its Eleventh Amendment immunity.[101] The Court of Appeals ultimately rejected this argument, holding that CERCLA, as amended by SARA, clearly expressed congressional intent to subject states to private suits for monetary damages and that Congress had the power to do so under the Commerce Clause.[102] The Supreme Court granted certiorari and affirmed in a plurality decision which again revealed the two opposing views in the Court on the sovereign immunity debate.

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, in an opinion announcing the judgment of the Court set forth the "pro-congressional power" view. He began by noting that, although the Court had never "squarely resolved" the question of Congress's Commerce Clause authority vis-a-vis state immunity, the relevant precedent, including *Fitzpatrick*, supported a decision in favor of congressional power.[103] The fundamental underpinning of Justice Brennan's argument was that, "in approving the commerce power, the States consented to suits against them based on congressionally created causes of action."[104] Justice Brennan stated:

> Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable.[105]

Justice Brennan rejected the idea that *Hans* conflicted with or precluded this conclusion. He noted that while *Hans* had indeed upheld a principle of sovereign immunity, it had not tested the question of whether that immunity was constitutional

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[98]42 U.S.C. §§ 9601-75 (1994). CERCLA provided for the hazardous waste "Superfund" program.

[99]Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified as amended at 42 U.S.C. § 9613 (1994).

[100]*See Union Gas,* 491 U.S. at 7. The United States sued Union Gas Company under CERCLA to recover costs of an environmental cleanup (the country's first "Superfund" site) and Union Gas filed a third party complaint against Pennsylvania, alleging that the State was at least partially liable for the costs. *See id.* at 6.

[101]*See id.*

[102]*See id.*

[103]*See id.* at 14-15. Justice Brennan also cited Parden v. Terminal Railway of Alabama Docks Dept., 377 U.S. 184 (1964) and Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279 (1973).

[104]*Union Gas,* 491 U.S. at 22.

[105]*Id.* at 19-20.

in nature or whether, as federal common law, it was subject to abrogation by Congress.[106] Expanding on this point in his concurring opinion, Justice Stevens wrote that, while the diversity jurisdiction immunity granted to the states by the literal text of the Eleventh Amendment, (the Amendment's "legitimate scope") *is* constitutional in nature and beyond congressional power, all subsequent extensions of the Eleventh Amendment via the *Hans* line of cases are nothing more than non-constitutional judge-made law and subject to change by Congress.[107]

Justice White concurred in the decision but wrote separately to express his view that CERCLA did not include a sufficiently clear statement of Congress's intent to abrogate state immunity.[108] However, conceding that this view had not prevailed, he voted to affirm stating, "I agree . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the states".[109]

The "pro-immunity" or federalism point of view was argued by Justice Scalia in his dissenting opinion joined by Chief Justice Rehnquist, Justice O'Connor and Justice Kennedy. Justice Scalia rejected a straight textual interpretation of Article III and the Eleventh Amendment in favor of a recognition of certain background postulates which must be taken into account when interpreting the meaning of the Constitution.[110] He argued that one such postulate was the principle of sovereign immunity and that, while the states had surrendered some aspects of this immunity in ratifying the Constitution, they had not surrendered immunity to suits by private individuals.[111] Because, in Justice Scalia's view, this retained immunity was a background assumption under which the Constitution was adopted, such immunity possessed a constitutional dimension and thus could not be abrogated by statute.[112] Justice Scalia argued that *Hans* served to validate his argument, stating:

> What we said in *Hans* was, essentially, that the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away.[113]

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[106] *See id.* at 18-19.

[107] *Id.* at 23-24 (Stevens, J. concurring).

> It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment . . . In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*.

Id. at 23 (citation omitted).

[108] *See Union Gas*, 491 U.S. at 55-56 (White, J. concurring).

[109] *Id.* at 57.

[110] *Id.* at 32-33 (Scalia, J., dissenting).

[111] *Id.*

[112] *Id.* at 33-34.

[113] *Union Gas*, 491 U.S. at 31-32 (Scalia, J., dissenting).

Thus, in Justice Scalia's view, "state immunity from suit in federal courts is a structural component of federalism" which cannot be abridged by Congress pursuant to its Article I powers.[114]

Justice Scalia distinguished *Fitzpatrick* on the grounds that the law in question in that case had been enacted pursuant to Congress's Fourteenth Amendment authority rather than its Article I powers. Because the Fourteenth Amendment, unlike Article I, had been adopted subsequent to the Eleventh Amendment, Justice Scalia contended that, with respect to its provisions, it represented a surrender by the states of the background principle of sovereign immunity embodied by the Eleventh Amendment.[115]

Seven years later, the Court reconsidered the Article I/Commerce Clause question in *Seminole Tribe of Florida v. Florida*.[116] The two opposing views remained the same but the makeup of the Court had shifted in favor of the federalism position.[117] Consequently, the Court overturned *Union Gas*[118] and set out the rule that Congress, pursuant to its Article I powers, may not authorize private suits for money damages against unconsenting states in federal courts.[119] The decision led one lower federal court to complain: "It is unfortunately a tragic consequence of the Supreme Court's inability to maintain the status of its own precedents that all this time and effort has been wasted. Compare *Seminole Tribe* (holding that Congress lacks power) with *Pennsylvania v. Union Gas Co*. . . . (upholding Congress's power)."[120]

Writing for a majority, Chief Justice Rehnquist, joined by the other *Union Gas* dissenters Justices O'Connor, Scalia and Kennedy as well as Justice Thomas, defended this deviation from the general principle of stare decisis. Initially, the majority characterized *Union Gas* as a "deeply fractured" plurality decision, noting that Justice Brennan's *Union Gas* opinion had been joined by only three other justices and that Justice White, who had provided the decisive vote, had written a separate opinion "in order to indicate his disagreement with the plurality's rationale."[121] Additionally, citing the lower court decision in *Seminole Tribe* itself

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[114]*Id*. at 38.

[115]*Id.* at 41-42.

[116]517 U.S. 44 (1996). The petitioners in *Seminole Tribe* had brought suit against the State of Florida in federal district court alleging violation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701-21 (1994), which Congress had enacted pursuant to its (Indian) Commerce Clause powers. *Id.* at 52-53.

[117]In 1990, Justice Souter replaced Justice Brennan; in 1991, Justice Thomas replaced Justice White; in 1993, Justice Ginsburg replaced Justice Blackmun.

[118]*See Seminole Tribe*, 517 U.S. at 66.

[119]*Id*. at 73.

[120]Mills v. Maine, No. 92-410-P-H, 1996 WL 400510 (D.Me. 1996) (citations omitted).

[121]*Seminole Tribe*, 517 U.S. at 64. It may not be accurate though, to imply that Justice White's purpose in writing separately was to express his disagreement with Justice Brennan's views on the Commerce Clause question. While it is true that Justice White wrote separately in *Union Gas*, his opinion was devoted almost entirely to his argument that CERCLA as amended by SARA did not contain an unmistakable statement of congressional intent to abrogate the Eleventh Amendment immunity of the states. Justice White devoted just two

along with one other case, the majority stated that *Union Gas* had "created confusion among the lower courts."[122] Finally, Justice Rehnquist complained that *Union Gas* had "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*."[123] This last point may be the most telling in that it highlights the incompatibility of *Union Gas* with the majority's view of the *Hans* line of cases.

While *Seminole Tribe* effectively cut off the federal courts as a forum for suits against unconsenting states by private individuals under Commerce Clause legislation, the case did not directly address the related question of Congress's power to authorize such suits in state courts. This state court question had, however, been previously considered in *Hilton v. South Carolina Public Railways Commission.*[124] *Hilton* was a private suit against an arm of the State of South Carolina which operated a railroad engaged in interstate commerce as a common carrier.[125] The petitioner, Kenneth Hilton, was an employee of the railroad who sought to recover, pursuant to the terms of the Federal Employers' Liability Act (FELA),[126] for alleged job related injuries.[127] FELA provided that "[e]very common carrier while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."[128] A similar FELA claim brought in federal court had been upheld against a state sovereign immunity defense in the 1964 case of *Parden v. Terminal Railway of the Alabama State Docks Department.*[129] The *Parden* Court had held that, by referring to "every common carrier" in FELA, Congress had intended to create a cause of action against even state-owned railroads[130] and further, that by operating a railroad in interstate commerce a state

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sentences to the question of whether the Commerce Clause grants Congress this abrogation authority, stating:

> This brings me to the question whether Congress has the constitutional power to abrogate the States' immunity. In that respect, I agree with the conclusion reached by Justice Brennan . . . that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning.

Union Gas, 491 U.S. at 57 (White, J. concurring). By the same token, Justice White's statement does not necessarily support the conclusion that the *Union Gas* plurality opinion was "deeply fractured" because Justice White did not elaborate on the nature of his disagreement with Justice Brennan's reasoning.

[122] *Seminole Tribe*, 517 U.S. at 64.

[123] *Id.*

[124] 502 U.S. 197 (1991).

[125] *Id.* at 199.

[126] 45 U.S.C. § 51 (1994).

[127] *Hilton*, 502 U.S. at 199.

[128] *Id.* at 201 n.1.

[129] 377 U.S. 184 (1964).

[130] *Id.* at 190.

implicitly consented to FELA suits and waived its Eleventh Amendment immunity defense.[131]

Against the background of *Parden*, Hilton initially filed his suit in federal district court. However, while Hilton's suit was pending, the U.S. Supreme Court in *Welch v. Texas Department of Highways and Public Transportation*,[132] effectively held that FELA did not contain a statement of congressional intent to abrogate a state's Eleventh Amendment immunity which was sufficient to support the constructive waiver theory of *Parden*,[133] and *Parden* was consequently overruled to the extent it was inconsistent with *Welch*.[134]

In light of *Welch*, Hilton refiled his suit in South Carolina state court. The state trial court dismissed the suit and the South Carolina Supreme Court affirmed.[135] The basis for the dismissal was not that the state had immunity, but that FELA did not create a cause of action against the state in state court.[136] The South Carolina Supreme Court, relying on *Welch's* holding that FELA did not contain language sufficiently clear to create a cause of action in federal courts, concluded that the statute likewise did not sufficiently evidence congressional intent to create a cause of action against the states in state court.[137]

The issue before the United States Supreme Court in *Hilton*, then, was whether FELA "create[d] a cause of action against a state-owned railroad, enforceable in state court."[138] The Court reversed the South Carolina Supreme Court and held that the statute did create such a cause of action and ordered that Hilton's suit be allowed to proceed.[139] The Court acknowledged the decision in *Welch* but stated that the "unmistakably clear language" test for determining whether Congress intended to abrogate state immunity in federal courts was not necessarily dispositive in

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[131]*See id*. at 192.

[132]483 U.S. 468 (1987)

[133]*See Welch,* 483 U.S. at 472. In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), the Court held that, when acting pursuant to its authority under section 5 of the Fourteenth Amendment, Congress could only abrogate state immunity in federal court "by making its intention unmistakably clear in the language of the statute." *Id.* at 242. In applying this test to *Welch*, the Court assumed arguendo that Congress's power to abrogate state immunity was not limited to the Fourteenth Amendment. *See Welch*, 483 U.S. at 475. Because FELA did not pass the "unmistakably clear language" test, it was not necessary to resolve any additional constitutional question and the Court expressly refrained from deciding whether Congress had abrogation power pursuant to the Commerce Clause. *Id*. at 478 n.8.

[134]*See Welch*, 483 U.S. at 478.

[135]*Hilton*, 502 U.S. at 200.

[136]*See* Hilton v. S.C. Pub. Ry. Comm'n, 306 S.C. 260 (1990). The South Carolina Supreme Court affirmed in a one paragraph opinion, citing its decision in the essentially identical case of *Freeman v. S.C. Pub. Ry. Comm'n*, 302 S.C. 51 (1990).

[137]*Freeman*, 302 S.C. at 55.

[138]*Hilton*, 502 U.S. at 199.

[139]*Id*. at 207.

determining whether Congress intended to impose monetary liability on the states.[140] Thus, the Court noted that *Welch* had overruled *Parden* only with respect to its Eleventh Amendment (federal court) waiver theory but not with respect to *Parden's* closely related holding that Congress intended to include state-owned railroads within FELA's terms.[141] The Court stated that, in recognition of stare decisis, it would not "reexamine this longstanding statutory construction."[142]

Although the direct question in *Hilton* was one of statutory construction, underlying the decision was the assumption that Congress can create a private cause of action for money damages, good against the states in state court, if it so intends. If this had not been the case, the discussion of congressional intent would have been superfluous. The decision itself makes clear this underlying assumption. After explaining that a "clear statement inquiry" was not required because *Parden* had already established that Congress, in enacting FELA, "intended to create a cause of action against the states,"[143] the Court stated "when the rule [of a clear statement of congressional intent] is either overcome or inapplicable so that a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court."[144]

Justice O'Connor, in a dissenting opinion joined by Justice Scalia, did not contend that states have immunity from federal question suits in their own courts. Rather, she argued that the "clear statement" test *was* applicable and had not been met. Justice O'Connor wrote, "a federal statute requiring the States to entertain damages suits against themselves in state courts is precisely the kind of legislation that requires a clear statement, because of the long-established principle that a State cannot *normally* be sued in its own courts without its consent."[145] Justice O'Connor's primary argument was that the decision in *Welch,* finding no "unmistakably clear" statement of congressional intent to abrogate Eleventh Amendment immunity, mandated a similar finding with respect to whether FELA created a valid private cause of action against a state in the state's own courts.[146] She rejected the idea that the two inquiries were not the same.[147] Thus, the dissenting opinion also rested on the assumption that Congress does have the power to abrogate a state's immunity in state courts if the "clear statement" standard is met.

The meaning of *Hilton* with respect to other assertions of state immunity in state courts was evaluated differently by lower courts in subsequent cases. In the 1998 case of *Jacoby v. Arkansas Department of Education, Vocational and Technical Education Division*,[148] the Arkansas Supreme Court upheld a private federal question

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[140]*Id*. at 205-06 (differentiating between "application of a rule of constitutional law" and "an ordinary rule of statutory construction").

[141]*Id*. at 204-05.

[142]*Id.* at 202.

[143]*Hilton*, 502 U.S. at 200.

[144]*Id*. at 207.

[145]*Id*. at 208 (O'Connor, J., dissenting) (emphasis added).

[146]*Id*.

[147]*Id*. at 208-09.

[148]962 S.W.2d 773 (Ark. 1998).

suit against the State of Arkansas, holding that *Hilton* had established that states have no constitutional sovereign immunity superior to the Supremacy Clause.[149] That same year, in an essentially identical case, *Alden v. State*,[150] the Supreme Judicial Court of Maine reached a conflicting conclusion, ruling that state sovereign immunity did prevail in the state's own courts when the state is sued for violating a federal statute.[151] The Maine court acknowledged *Hilton*, but held that, in the light of *Seminole Tribe*, *Hilton* was no longer dispositive of the question.[152]

III. THE DECISION

A. Facts and Procedural History

Alden v. Maine,[153] like *Jacoby*, its Arkansas counterpart, involved a claim against a state pursuant to the Fair Labor Standards Act of 1938 (FLSA).[154] The FLSA was enacted by Congress pursuant to its Commerce Clause powers and imposes standards such as minimum wages and maximum hours on all covered employers.[155] Prior to *Alden* and *Seminole Tribe*,[156] the FLSA had been the subject of a series of Supreme Court cases testing the threshold question of whether application of the FLSA to the states was a valid exercise of the commerce power or whether implicit constitutional principles of state sovereignty served to make the states immune to federal Commerce Clause regulation when the states acted in performance of their governmental functions. This question was broader than the question subsequently raised in *Alden*, of whether state sovereign immunity precludes congressional authorization of private suits for damages against the states as a means to enforce the FLSA.

As originally enacted, the FLSA excluded the states from its requirements. In 1966 Congress amended the law to cover employees of hospitals, institutions and schools, including those operated by the states or their political subdivisions.[157] In *Maryland v. Wirtz*, Maryland and twenty-seven other states challenged this expansion of the Act on grounds of state sovereignty.[158] Specifically, the states argued that an otherwise valid exercise of Congress's commerce power is unconstitutional when it interferes with the states in "the performance of governmental functions."[159] The Court specifically rejected the idea that the

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[149]*Id.* at 775-76.

[150]715 A.2d 172 (Me. 1998).

[151]*Id.* at 175 ("[W]e conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.").

[152]*Id.*

[153]527 U.S. 706 (1999).

[154]29 U.S.C. § 201-19 (1994).

[155]*See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 186-87 (1968).

[156]Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[157]*Wirtz*, 392 U.S. at 185-87.

[158]*Id.* at 187.

[159]*Id.* at 195.

commerce power is inferior to state sovereignty when that power is used to regulate state governmental functions.[160] Finding the FLSA to be a valid exercise of the commerce power, the Court upheld the 1966 amendments.[161]

Eight years later, the Court reconsidered the question in *National League of Cities v. Usery*.[162] *National League of Cities* was a challenge to 1974 amendments to the FLSA which had the effect of expanding the law to cover almost all state employees.[163] As in *Wirtz*, the appellant States argued that the law transgressed recognized constitutional principles of state sovereignty.[164] This time the Court sided with the states. In an opinion written by Justice Rehnquist, the Court overruled *Wirtz*[165] and held that Congress may not, pursuant to its commerce power, directly regulate the states in areas involving traditional government functions.[166] Contrary to *Wirtz*, the Court in *National League of Cities* concluded that the federal system of government set forth in the Constitution implicitly precluded such regulation.[167]

Rather than settling the matter, the decision in *National League of Cities* led to a dispute between the federal government and the states, and disagreement in the lower courts, as to which state activities constituted traditional government functions and were thus immune from regulation under the Commerce Clause. This question reached the Supreme Court in the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*.[168] In *Garcia*, the Court overruled *National League of Cities* and rejected the "traditional government function" test as unworkable.[169] The Court stated that any scheme which required characterization of state governmental functions as "traditional", "integral" or "necessary" as a prerequisite for immunity from federal regulation would be incompatible with constitutional principles of federalism in that the ultimate immunity decision would inevitably be made by an unelected federal judge.[170] In effect, the federal judiciary would be passing judgment on whether or not it favored a particular state policy. The Court stated that a judicial role of this type "disserves principles of democratic self-governance"[171] and explained further that the Constitution protected state sovereign interests by giving the states a role in the selection of the national government, not through "judicially created limitations on federal power."[172] *Garcia* then, by removing the commerce

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[160] *Id.*

[161] *Id.* at 188.

[162] 426 U.S. 833 (1976).

[163] *Id.* at 836-37.

[164] *Id.* at 841.

[165] *Id.* at 855.

[166] *Id.* at 852.

[167] *National League of Cities*, 426 U.S. at 851.

[168] 469 U.S. 528, 530-31 (1985).

[169] *Id.* at 531.

[170] *Id.* at 546.

[171] *Id.* at 547.

[172] *Id.* at 552.

power limitations established in *National League of Cities*, appeared to have cleared the way for private FLSA suits against the states.[173] Little did the *Garcia* majority know that in doing so, the Court had helped to set the stage for *Alden*.

The *Alden* litigation originated in federal district court as *Mills v. Maine*.[174] That suit was filed in 1992 by probation officers employed by the State of Maine seeking overtime pay pursuant to the FLSA.[175] In 1996, in the wake of *Seminole Tribe*, the district court dismissed the suit for lack of subject matter jurisdiction, leading to that court's bitter complaint about the failure of the Supreme Court to follow its own precedent.[176] The dismissal was affirmed by the Court of Appeals for the First Circuit.[177]

Subsequently, John Alden and other probation officers filed the *Mills* complaint in Maine Superior Court in 1996.[178] The Superior Court dismissed the suit on the basis of state sovereign immunity and the Maine Supreme Judicial Court affirmed.[179] Because this decision conflicted with that of the Arkansas court in *Jacoby*, the United States Supreme Court granted *certiorari* to squarely address whether the states have an immunity to private suits in their own courts comparable to the federal court immunity set out in *Seminole Tribe*.[180]

B. The Decision

Alden was argued before the Supreme Court in March of 1999, three years after *Seminole Tribe* was decided, and in many ways *Alden* parallels that earlier decision. As in *Seminole Tribe*, the Court favored the "federalism" position, and affirmed the decision of the Maine court to dismiss Alden's suit. The *Alden* decision was carried by the same five to four majority which prevailed in *Seminole Tribe*[181] and many of the arguments on both sides of the case had been employed or foreshadowed in *Seminole Tribe,* or earlier, in *Union Gas.*[182]

1. The Majority Opinion

In an opinion delivered by Justice Kennedy, the Court held that Congress does not have the power under Article I of the Constitution to "subject nonconsenting

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[173]The *Garcia* plaintiffs never prevailed on their claim though. On remand the district court refused to apply the Supreme Court decision retroactively and the appellate court affirmed. *See* Garcia v. San Antonio Metro. Transit Auth., 838 F.2d 1411 (5th Cir. 1988).

[174]Mills v. Maine, 839 F. Supp. 3 (D.Me. 1993); Mills v. Maine, 853 F. Supp. 551 (D.Me. 1994); Mills v. State, 1996 WL 400510 (D.Me. 1996).

[175]*See* Alden v. State, 715 A.2d 172, 173 (Me. 1998).

[176]*See supra* text accompanying note 120.

[177]*See* Mills v. Maine, 118 F.3d 37 (1st Cir. 1997).

[178]*See Alden*, 715 A.2d at 173.

[179]*See id.*

[180]*See* Alden v. Maine, 527 U.S. 706, 712 (1999).

[181]*See Alden*, 527 U.S. at 710.

[182]Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

states to private suits for damages in state courts."[183] Although this holding was announced in terms of a limitation on Congress's powers under Article I, it is perhaps more descriptive to characterize it as crystalizing a new unwritten state immunity element of the Constitution.[184] Because the remedial provision of the FLSA on which the *Alden* petitioners relied conflicted with this unwritten element, that part of the FLSA was unconstitutional and struck down. The decision expands the concept of the "underlying postulate" of state sovereign immunity from that of a federal court immunity anchored in the Eleventh Amendment as per *Seminole Tribe*, to a broader federal and state court immunity which is "confirmed" by the language of the Tenth Amendment and independent of the Eleventh Amendment.[185]

The Court summarized its position and rationale for the decision by stating that immunity from private suit was a "fundamental aspect of the sovereignty which the states enjoyed" prior to ratifying the Constitution and that this immunity continues "except as altered by the plan of the Convention or certain constitutional amendments."[186] In the Court's view, neither the powers granted to Congress by Article I, nor the Supremacy Clause, nor the jurisdictional grants of Article III constituted an effective alteration of this "fundamental aspect" of state sovereignty.

The Court supported its position with two primary arguments.[187] Initially, and most fundamentally, the Court contended that state sovereign immunity having the parameters established in *Alden*, was an "original understanding" upon which the Constitution was ratified. To buttress this original intent argument, the Court advanced the structural argument that a Congressional power to abrogate this state immunity would be inconsistent with the system of divided state and federal authority set out by the Constitution. Throughout its opinion, the Court also drew support from history and precedent, canvassing its prior immunity decisions beginning with *Hans*[188] to find both a "settled doctrinal understanding" that state sovereign immunity is implicit in the Constitution[189] as well as "theory and reasoning . . . suggest[ing]" that this immunity extends to state courts.[190] These arguments are summarized in more detail in the following sections.

a. Original Intent

According to the Court's historical analysis, at the time of ratification, the English Crown had enjoyed an unqualified immunity from suit,[191] and, although Americans

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[183]*Alden*, 527 U.S. at 712.

[184]*See*, *e.g.*, *id*. at 739-40 ("[T]he Constitution reserves to the States a constitutional immunity from private suits in their own courts which cannot be abrogated by Congress.").

[185]*See id.* at 712-14.

[186]*Id*. at 713.

[187]*See, e.g.*, *Alden*, 527 U.S. at 713 (referring to the Constitution's history and structure).

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

[189]*Alden*, 527 U.S. at 728.

[190]*Id*. at 745.

[191]*See id.* at 715 (Quoting 1 W. Blackstone, Commentaries on the Laws of England 234-35, (1765).

"had rejected other aspects of English political theory," this English concept of sovereignty had been universally adopted by the states.[192] Reflecting this underlying assumption, the Court began its discussion of original intent by stating "[t]he generation that designed and adopted our federal system considered immunity from private suit central to sovereign dignity."[193] As evidence of this, the Court cited Alexander Hamilton's statement in *The Federalist No. 81* that the states would retain their sovereign immunity unless it was surrendered pursuant to plan of the convention, as well as the supporting statements of James Madison and John Marshall made at the Virginia ratifying convention.[194] The Court drew further support from the fact that several states, prior to ratification, had proposed amendments or issued declarations designed to limit or eliminate any language in Article III which appeared to impinge on state immunity.[195]

Of course, one significant event in the historical record which might directly contradict the idea that an unconditional state immunity was a fundamental view of the founding generation is the *Chisholm*[196] decision. Just five years after ratification, when directly presented with the question, four of the five Supreme Court justices concluded that the provisions of Article III describing federal court jurisdiction over the states, precluded any conflicting state immunity.[197] Consequently, an essential component of the Court's rationale, both in *Seminole Tribe* and *Alden*, was that *Chisholm* was an incorrect decision and contrary to a true fundamental understanding of the founders.

As in *Hans* a century earlier, the majority described the *Chisolm* decision as resulting from an overemphasis on the text of Article III, with insufficient weight given to "either the practice or the understanding that prevailed in the States at the time the Constitution was adopted."[198] In contrast, Justice Iredell's *Chisholm* dissent, with its focus on then existing state practice, is cited throughout *Alden* as reflecting the true implicit constitutional design.[199] Consistent with this idea, the Court stated that the *Chisholm* decision created "profound shock" in the nation and cited statements to this effect from both the Massachusetts and Georgia legislatures.[200] As primary proof of its position, though, the Court pointed to the subsequent enactment of the Eleventh Amendment, noting the "swiftness and near unanimity with which . . . [it] was adopted."[201]

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[192]*Id*.

[193]*Id*.

[194]*See id.* at 716-18; *see also*, *supra* text accompanying notes 17-21.

[195]*See supra* notes 26-29 and accompanying text; *Alden*, 527 U.S. at 719 (referring to "the expressed understanding of the only state conventions to address the issue in explicit terms.").

[196]Chisholm v. Georgia, 2 U.S. 419 (1793).

[197]*See supra* notes 33-45 and accompanying text.

[198]*Alden*, 527 U.S. at 721.

[199]*See*, *e.g.*, *id*. at 720.

[200]*Id*.

[201]*Id*. at 724.

In the Court's view, the Eleventh Amendment served not to create an immunity limited to diversity actions in federal courts but, rather, to restore the original constitutional design which implicitly included a broader "English" type of immunity good against any suit brought by an individual against a state. The Court specifically rejected as unsupportable the idea that *Chisholm* was a correct interpretation of the Constitution and that the Eleventh Amendment therefore, constituted a change to the constitutional design.[202]

Finally, as circumstantial support for its original intent argument, the Court looked at early congressional practice to provide contemporaneous evidence of the Constitution's meaning. In this inquiry, the Court uncovered no instance in which an early Congress enacted a statute which would have subjected nonconsenting states to private actions in state courts. From this fact, the Court inferred that early Congresses had assumed they did not have the power to authorize such suits.[203]

b. Structuralism

Consistent with its original intent position, the Court argued that the constitutional system of divided state and federal authority is incompatible with a congressional power to subject states to private suits in their own courts. In the Court's view, congressional power to abrogate state sovereign immunity in this way would jeopardize the federal structure by tipping the balance of power too strongly in favor of the federal government.

The Court noted that the Constitution reserves a "vital role" for the states in the "fundamental processes of governance."[204] This can be seen both in those textual provisions of the Constitution which expressly mention the states and assume their continued existence, and in the fact that the Constitution grants only limited powers to the federal government.[205] Further, the Tenth Amendment confirms "the constitutional role of the states as sovereign entities."[206] These aspects of the constitutional design "reserve[] to . . . [the states] a substantial portion of the Nation's primary sovereignty" and entitle[] them to "the dignity and essential attributes" of sovereignty.[207] The states, therefore, exist as sovereign bodies, not "mere provinces or political corporations," and when operating within their sphere of sovereignty, the states are supreme and independent of the federal government.[208] On this foundation, the Court argued that granting Congress the power to subject the states to private suits in their own courts would create an unacceptable compromise of constitutional federalism.

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[202]*See Alden*, 527 U.S. at 721-22.

[203]*See id*. at 744.

[204]*Id.* at 713.

[205]*See id*.

[206]*Id.* The Tenth Amendment provides that "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." U.S. CONST. amend. X.

[207]*Alden*, 527 U.S. at 714.

[208]*Id*. at 715.

Initially, the Court described a direct threat to state sovereignty, noting that private suits could create unacceptable financial burdens on the states, thereby giving Congress a leverage over state governments which would not be consistent with the constitutional design.[209] Ultimately, in the Court's view, such suits could effectively constitute a federal power to "comandeer the entire political machinery of the State against its will and at the behest of individuals."[210] Additionally, by blurring the line between federal and state authority, and by pitting state judiciaries against the states' political branches, a congressional power to subject states to private suits in their own courts would directly affect the political accountability of state governments which is central to our system of representative democracy. On this point, the Court stated that private suits would place an "unwarranted strain on the States' ability to govern in accordance with the will of their citizens."[211]

As a second structural point, the Court noted that whereas the Articles of Confederation had provided for regulation of the states as political entities, the founders had deliberately rejected that system in favor of one in which the Congress, concurrently with the states, regulates the citizenry directly.[212] Consequently, in the Court's view, even when the federal government is operating within its own sphere (i.e., within its constitutional powers), Congress may be precluded from acting directly upon or through the states.[213]

This position served as the basis for the Court's rejection of the petitioners' argument that the powers of Congress enumerated in Article I, together with the Supremacy Clause, evidenced a relinquishment by the states of any sovereign immunity they might have had with respect to suits brought under federal law. The Court pointed out that while the Supremacy Clause makes federal acts the supreme law of the land, binding on judges in every state, the Clause only applies to laws made pursuant to the Constitution.[214] Because the FLSA[215] and similar laws would violate the implicit constitutional principle of state sovereign immunity, they can not be said to have been enacted pursuant to the Constitution and, so, are outside the aegis of the Supremacy Clause.[216] The Court applied this same reasoning with

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[209]*See id.* at 750.

[210]*Id.* at 749.

[211]*Id.* at 750-51.

[212]*See Alden*, 527 U.S. at 714 (quoting J. MADISON, 2 RECORDS OF THE FEDERAL CONVENTION of 1787 9 (1911)) ("In this the founders achieved a deliberate departure from the Articles of Confederation: Experience under the Articles had 'exploded on all hands'the 'practicality of making laws, with coercive sanctions, for the States as political bodies.'").

[213]*See id.* ("[E]ven as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of 'the concept of a central government that would act upon and through the States'").

[214]*See id.* at 731. The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the judges in every State shall be bound thereby." U.S. CONST. art. VI, § 2.

[215]29 U.S.C. § 201-207 (1994).

respect to the Necessary and Proper Clause, essentially arguing that any law which violates state sovereign immunity is not a "proper" exercise of congressional power.[217]

c. Precedent

Throughout its opinion, the Court drew on prior decisions in the *Hans* line of cases ("authoritative interpretations by this Court"[218]) to support its positions.[219] Although conceding that these earlier cases dealt directly only with immunity in federal courts, the majority argued that the logic of the decisions is equally applicable to litigation in state courts.[220] Accordingly, the majority cited extensively to prior cases to establish that "[t]he theory and reasoning of our earlier cases suggest the states do retain a constitutional immunity in their own courts."[221] Despite its reliance on these precedents, the Court acknowledged that the rationales underlying prior immunity cases were not always consistent with respect to the state court question,[222] and attempted to reconcile, dismiss or distinguish the various cases which appear to conflict with *Alden.* Of these, the Court singled out *Hilton v. South Carolina Public Railways Commission*[223] and *Nevada v. Hall*[224] as meriting more than just a brief comment.[225]

Nevada v. Hall dealt with the issue of whether one state can be sued in the courts of another state (rather than in its own courts) and, on the basis of that factual difference, the Court argued that language from the case was not relevant to the question presented in *Alden*.[226] *Hilton,* on the other hand, did deal directly with the state court question presented in *Alden* and the Court acknowledged that the case

[216]*See Alden*, 527 U.S. at 732 ("The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives . . . from the national power.").

[217]*See id*. at 732-33 (quoting Printz v. United States, 521 U.S. 898, 923-24 (1997)). The Necessary and Proper Clause grants Congress the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing [Article I] powers." U.S. CONST. art. I, § 8, cl. 18.

[218]*Alden*, 527 U.S. at 713.

[219]*See, e.g., id*. at 727-28 (citing *Hans*, *Seminole Tribe*, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) and many others).

[220]*See Alden*, 527 U.S. at 733.

[221]*Id*. 745-46 (citing 13 cases in support of this proposition).

[222]*See id.* at 735 ("There are isolated statements in some of our cases suggesting that the Eleventh Amendment is inapplicable in state courts.").

[223]502 U.S. 197 (1991); *see supra* text accompanying notes 124-47.

[224]440 U.S. 410 (1979); *see supra* note 80.

[225]*See Alden*, 527 U.S. at 736.

[226]*See id.* at 739. ("The decision addressed neither Congress's power to subject States to private suits nor the States' immunity from suit in their own courts.").

could be read to support the petitioners' position.[227] However, the Court found several ways to distinguish *Hilton*, first noting that because the respondent in *Hilton* had not advanced sovereign immunity as a defense, that issue had not been squarely presented.[228] The Court also seemed to imply that the concept of waiver of immunity or consent to suit which had supported the *Parden* decision in the federal court context (prior to *Welch*), had in some way been a factor in the *Hilton* decision.[229] Finally, the Court characterized *Hilton* as having been simply a pragmatic decision to uphold stare decisis in light of the substantial reliance by states and workers on FELA.[230]

The Court effectively tied together its "prior decisions" arguments by stating that it is "settled doctrine" (i.e., "settled" by *Seminole Tribe*) that the states possess a sovereign immunity in federal court which Congress can not abrogate under its Article I powers and, that its prior decisions imply that the states retain an equivalent immunity in their own courts. Thus when considered together, these two ideas lead to the conclusion that states possess an immunity in their own courts which is superior to Congress's Article I power.[231]

d. Conclusion

In concluding its opinion the Court stressed the fact that state sovereign immunity to private suits would not render the states completely immune to federal regulation and noted several ways in which states could still be subject to judicial review of their compliance with federal law.[232] States might, for example, voluntarily consent to private suits and their consent to suits brought by the federal government is implicit in the Constitution.[233] Additionally, as per *Fitzpatrick v. Bitzer*,[234] the states' sovereign immunity does not extend to private causes of action created by Congress under the enforcement clause of the Fourteenth Amendment.[235] Finally, the Court pointed out that sovereign immunity applies only to states and not to lesser entities such as municipal corporations, and that state officers, under the doctrine of *Ex parte Young*,[236] could be subject to private suit as individuals.[237]

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[227]*See id.* at 737. ("There is language in *Hilton* which gives some support to the position of petitioners here").

[228]*See id.*

[229]*See id.* In distinguishing *Hilton*, the Court stated: "Furthermore, our decision in *Parden* was based on concepts of waiver and consent. Although later decisions have undermined the basis of *Parden's* reasoning . . . we have not questioned the general proposition that a State may waive its sovereign immunity and consent to suit." *See Alden*, 527 U.S. at 737.

[230]*See id.*

[231]*See id.* at 748.

[232]*See id.* at 755.

[233]*See id.*

[234]427 U.S. 445 (1976). *See supra* text accompanying notes 82-95.

[235]*See Alden*, 527 U.S. at 756.

[236]209 U.S. 123 (1908).

2. The Dissenting Opinion

In a dissenting opinion which was joined in by the other *Seminole Tribe* dissenters,[238] Justice Souter rejected the *Alden* decision in its entirety. The dissent contested each element of the *Alden* majority's position and concluded that the decision was indefensible and unrealistic.[239]

a. Original Intent

Justice Souter devoted the bulk of his dissent to contesting the Court's original intent argument. In this regard, he first considered the nature of the state sovereign immunity which was set forth in the majority's opinion and then he examined whether there is any evidence that such a concept of immunity was so fundamental to the founding generation that it should be held to be implicit in the constitutional design.

In relation to the first point, Justice Souter argued that despite the majority's references to an English origin for the American concept of sovereign immunity of the states, the immunity established in *Alden* is not actually consistent with the principles on which the sovereignty of the English Crown was based.[240] Specifically, drawing from Blackstone, Brackton and other authorities, he contended that English immunity was a common law concept under which "no feudal lord could be sued in his own court."[241] In England, Acts of Parliament declared the Crown imperial and there was no court above the King's, thus no writ could run against him.[242] This was the common law basis for the King's immunity. On the other hand, the sovereign immunity of the states established in *Alden*, exists even beyond their own courts and is indefeasible by statute. Thus, this type of sovereign immunity could not historically have been an incorporation or continuation of the traditional understanding in England.

In light of this inconsistency with the English common law concept of sovereign immunity, Justice Souter examined the contours of the immunity established by the majority and concluded that what the Court had found to be implicit in the constitutional design was the "natural law" concept of sovereign immunity, under which immunity from private suits is seen as an inherent and absolute element of the sovereignty of the states.[243]

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[237]*See Alden*, 527 U.S. at 756-57. The Court's final concluding point was a finding that the State of Maine had not waived its immunity or consented to Alden's suit. *See id.*

[238]*See id*. at 760. Justice Souter was joined by Justices Stevens, Ginsburg and Breyer.

[239]*See id.* at 761 (Souter, J. dissenting) ("On each point the Court has raised it is mistaken, and I respectfully dissent from its judgment.").

[240]*See id*. at 762-63.

[241]*Alden*, 527 U.S. at 765 n.3 (Souter, J. dissenting) (quoting 3 W. Holdsworth, History of English Law 465 (3d ed. 1927)).

[242]*See id*. (quoting 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 518 (2d. ed. 1899)) ("[T]hat there happens to be . . . no court above his court is, we may say, an accident.").

[243]*See Alden*, 527 U.S. at 767 n.6 (Souter, J. dissenting). In his *Seminole Tribe* dissent, Justice Souter elaborated on the two sovereign immunity doctrines:

Having defined the immunity in question, Justice Souter then posed what he saw as the fundamental question: whether it could be said that this natural law view of sovereign immunity was widely held in the pre-ratification era.[244] He concluded that, rather than showing a prevailing acceptance of a well-defined immunity, the available evidence brought to light disagreement, uncertainty and ambiguity as to whether state sovereign immunity existed and if it did exist, what its contours were.[245]

In arriving at that conclusion, Justice Souter first looked at early American history, noting that prior to independence, the American Colonies were not sovereign entities and that some colonial charters were held by corporations or entities which were subject to suit.[246] Following independence, two states adopted as constitutions existing charters which provided for suit against the state,[247] while other states appeared to have incorporated the common law immunity of England.[248] Justice Souter summarized this historical information as indicating that "[a]round the time of the Constitutional Convention . . . there existed among the states some diversity of practice with respect to sovereign immunity," but he found no evidence that any state had adopted the natural law type of immunity.[249]

With respect to the Constitutional Convention itself and the ratification debates, Justice Souter agreed with the majority that the subject of the immunity of a state in its own courts was not specifically addressed.[250] However, while the majority took this as evidence that such immunity was so well settled as to be beyond discussion,[251] Justice Souter's view was that the silence on the issue simply indicated that the founders never specifically considered whether state courts might be forums for federal question suits against the states.[252]

The issue of state sovereign immunity in the *federal* courts was discussed at the ratification debates though, and Justice Souter acknowledged the statements by Hamilton, Madison, and Marshall which indicate that state immunity in federal fora would be maintained under the Constitution. However, he pointed out that other

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> The one rule [natural law] holds that the King or the Crown, as the font of law, is not bound by the law's provisions; the other [common law] provides that the King or Crown, as the font of justice, is not subject to suit in its own courts . . . . The one rule limits the reach of substantive law; the other, the jurisdiction of the courts.

Seminole Tribe, 517 U.S. at 103 (Souter, J., dissenting).

[244]*See Alden*, 527 U.S. at 763.

[245]*See id.* at 764 ("There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable.").

[246]*See id.* (Souter, J. dissenting).

[247]*See id.* at 769. The states were Connecticut and Rhode Island. *Id.*

[248]*See Alden*, 527 U.S. at 769-70.

[249]*Id.* at 772.

[250]*See id.* at 772-73 (Souter, J. dissenting).

[251]*See id.* at 741-42.

[252]*See id.* at 772 (Souter, J. dissenting). "[T]he issue was not on the participants' minds because the nature of sovereignty was not always explicitly addressed." *See Alden*, 527 U.S. at 772 n.12.

notable debate participants such as Edmond Randolph, James Wilson, and General Charles Cotesworth Pinckney expressed opposing views.[253] Further, even those who argued that immunity would continue did not specifically address the nature of the immunity about which they were talking, i.e., whether the immunity would extend to federal questions and/or whether it would be defeasible by statute.[254] Justice Souter noted that even Hamilton's statement in *The Federalist No. 81* (that immunity to suit is inherent in the nature of sovereignty) which seems to most directly support the natural law view, is not entirely unambiguous, pointing out that Hamilton's statement was a response to his own self-posed hypothetical question involving state contract law (rather than a federal question)[255] and that Hamilton qualified his statement by allowing that there might be some surrender of this immunity in the constitutional design.[256]

As a final point, Justice Souter considered the fact that some states, on ratifying the Constitution, had issued statements of their understanding of Article III or proposed amendments altering its terms. While the majority interpreted this as evidencing a fundamental understanding of a sovereign immunity that Article III did not abrogate,[257] Justice Souter viewed it as evidence that those states either believed that Article III as written did subject them to private suits, or at least considered the meaning of Article III to be uncertain.[258]

Turning next to the *Chisholm* decision, Justice Souter argued that regardless of the subsequent adoption of the Eleventh Amendment, the significance of the *Chisholm* decision to *Alden* is that it demonstrates that at the time of ratification there was no general understanding "that a state's sovereign immunity from suit in its own courts was an inherent [natural law], and not merely a common-law [defeasible by statute], advantage."[259] Justice Souter argued that while the five *Chisholm* opinions displayed a divergence of view on the question, none of them, not even that of Justice Iredell, espoused the "Hamiltonian" concept of an immutable, constitutional state sovereign immunity.[260] "This dearth of support," Justice Souter contended, seriously undercut the majority's original understanding rationale.[261]

Consistent with his interpretation of the *Chisholm* decision, Justice Souter rejected the majority's position that the Eleventh Amendment serves to restore an original understanding of the Constitution which includes *Alden*-type state sovereign immunity. Justice Souter contended that because there was no such prevailing

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[253]*See id.* at 772-78. ("[O]n this point, too, a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself."). *Id.* at 773.

[254]*See*, *e.g.*, *id.* at 778 (Souter, J. dissenting). ("[N]either of them [Madison nor Marshall] indicated adherence to any immunity conception outside the common law").

[255]*See id*. at 773 n.13.

[256]*See Alden*, 527 U.S. at 773 n.13.

[257]*See id.* at 718-19.

[258]*See id*. at 780 n.20 and accompanying text (Souter, J. dissenting).

[259]*Id.* at 790.

[260]*See id*. at 781.

[261]*Alden*, 527 U.S. at 789.

understanding at the time of ratification, that understanding could not have been re-established by the adoption of the Eleventh Amendment.[262] He viewed the Eleventh Amendment as a fact-driven development in an evolving area of constitutional law which served only to settle the limited question of citizen-state diversity jurisdiction in federal court.[263]

To leave no stone unturned, Justice Souter also assumed arguendo that the natural law theory of state sovereign immunity in state courts had in fact been the original understanding of the founders, and asked whether that would justify the majority's decision.[264] He concluded that, even under that assumption, the decision would be unsupportable because the natural law theory of sovereign immunity, as it was known to the founders, was based on the proposition that a law can not be held against the authority that made it.[265] In England, where the Crown was then considered the font of all law, the practical effect of the natural law theory would have been no different from that of England's common law based immunity.[266] However, in the United States, the states were not the font of federal legislation. Consequently, if the founders had intended to adopt the natural law theory of sovereign immunity, it would not have implied an immunity from suits arising under federal law, even if the suits were brought in the states' own courts.[267]

Finally, addressing the Court's historical argument that early congresses had never enacted legislation which would have authorized private suits against states in state courts, Justice Souter was apparently willing to acknowledge the majority's claim that there may have been no such federal statutes to prior to FELA.[268] Rather than taking this as evidence that Congress lacks such power, Justice Souter explained the absence of such statutes as the necessary consequence of an earlier belief that Congress did not have the power under the Commerce Clause to regulate the states on certain subjects. Because *Garcia* had established that the States *are* subject to federal law, even when acting in pursuance of traditional government functions, the earlier record was not directly relevant in Justice Souter's view.[269]

b. Structuralism

Justice Souter disputed both of the majority's principal structural arguments. First, he argued that while the system of federalism inherent in the Constitution makes the States sovereign within their own spheres, it does not make them

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[262]*See id.* at 792-94 (Souter, J. dissenting).

[263]*See id*. at 793-94.

[264]*Id.* at 795-96.

[265]*See id.* at 796.

[266]*See Alden*, 527 U.S. at 765 n.4.

[267]*See id.* at 798.

[268]*See id*. at 804 (Souter, J., dissenting).

[269]*See id.* at 804-07. "[T]he dearth of prior private federal claims entertained against the states in state courts does not tell us anything, and reflects nothing but an earlier and less expansive application of the commerce power." *Id*. at 806.

sovereign with respect to the powers delegated to the federal government.[270] Consequently, he rejected the Court's position that private suits are inconsistent with constitutional federalism because they might threaten political accountability or fiscal health within the states. In Justice Souter's view, if such a threat to a state were to arise, it would only be due to a state's contravention of the will of the entire nation in an area within the federal power. In such a situation, any resulting strain on the state should be seen as the intended effect of the federal system.[271] Similarly, Justice Souter dismissed the majority's contention that the states' sovereign dignity must be protected, arguing that sovereign dignity was a concept which developed in the context of monarchies and, hence, is completely out of place with a republican state.[272]

The dissent also contested the majority's second structural point that because the Constitution grants power to the federal government to directly regulate the citizenry, it precludes federal regulation of the states. Justice Souter argued that the problem with the Articles of Confederation, which necessitated the Constitutional Convention, was that the federal government had too little power to bind the states, not too much.[273] The fact that the Constitution gave the federal government certain limited powers to circumvent the states and regulate the people directly does not mean that the federal government is precluded from any direct regulation of the states themselves.[274] Indeed, Justice Souter pointed out that the applicability of the FLSA to the states had already been settled by *Garcia*.[275]

c. Precedent

As might be expected, the dissent's reading of Supreme Court precedent is also at odds with that of the majority. Justice Souter argued that, like *Seminole Tribe*, *Alden* is inconsistent with *Garcia* and serves to make the FLSA substantially unenforceable.[276] Additionally, Justice Souter contended that the decision is inconsistent with *Hilton*, noting that the Court in *Hilton* did not even hint at any constitutional bar to the suit against South Carolina, and, further, that if such a bar had existed, the Court would not have had subject matter jurisdiction to hear the case.[277]

As for *Hans* and the other cases in that line relied on by the majority, Justice Souter did not cover them directly, referring instead to his dissent in *Seminole Tribe* where he discussed the cases at length.[278] In the *Seminole Tribe* dissent, Justice

[270]*See Alden*, 527 U.S. at 800 (Souter, J., dissenting) ("The State of Maine is not sovereign with respect to the national objective of the FLSA.").

[271]*See id.* at 800-03.

[272]*See id.* at 802-03.

[273]*See id.* at 776 n.16.

[274]*See id.* at 809 n.39.

[275]*See Alden*, 527 U.S. at 808-09 (Justice Souter suggests that the *Alden* decision has vitiated *Garcia*). *See id*. at 810.

[276]*See id.* at 809-11.

[277]*See id.* at 804 n.37.

[278]*See id.* at 762.

Souter had argued that the purpose behind the Eleventh Amendment was to address the pressing concern of the states that federal jurisdiction over common law diversity suits would defeat their ability to repudiate Revolutionary War debts.[279] In extending the specific diversity jurisdiction language of the Amendment to cover federal question suits as well, the *Hans* Court made a fundamental error which "destroyed the congruence of the judicial power under Article III with the substantive guarantees of the Constitution."[280] The error was continued and extended throughout the *Hans* line and, finally, in *Seminole Tribe* erroneously elevated from common law to constitutional status.[281] Justice Souter offered evidence that the "great weight of scholarly commentary agree[d]" with this view.[282]

Finally, Justice Souter noted that in recognizing a principle of sovereign immunity as in *Alden*, the Court had abandoned the traditional belief that "where there is a right, there must be a remedy."[283] He concluded by analogizing the Court's position on state sovereign immunity to the economic substantive due process doctrine of the *Lochner* era[284] and predicted that the *Seminole Tribe/Alden* doctrine would be equally fleeting.[285]

IV. ANALYSIS

In *Seminole Tribe*,[286] the question was the extent of Congress's Commerce Clause powers, in relation to the question of federal jurisdiction. On the one hand, Article III grants federal courts jurisdiction over states in certain private suits and, on the other hand, the Eleventh Amendment limits this jurisdiction. In this context, the Court viewed the specific text of the Eleventh Amendment as being just one aspect of a broader principle of state sovereign immunity which is an unwritten part of the constitutional design. Although it is this broader concept of immunity rather than the precise text of the Amendment which barred the suit against the state of Florida, the

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[279]*See* Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 112-13 (1996) (Souter, J., dissenting).

[280]*Id.* at 119.

[281]*See id*. at 124-27.

[282]*Id*. at 110 n.8.

[283]*Alden*, 527 U.S. at 811.

[284]The Lochner era, named for Lochner v. New York, 198 U.S. 45 (1905), was characterized by a laissez faire judicial philosophy under which economic rights, such as freedom to contract, were held to be constitutionally protected liberty interests. The era came to an end in the mid-1930s when the Court, under political pressure engendered by the great depression, began upholding state economic regulations. *See, e.g*., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW, 829-35 (1996).

[285]*See Alden*, 527 U.S. at 814.

> The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution.

Id.

[286]Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

decision was nevertheless expressly limited to federal courts and it can thus be properly seen as an extension of the *Hans*[287] line of Eleventh Amendment cases.

In *Alden*,[288] though, federal jursidiction was not an issue. Article III and the Eleventh Amendment were not actual points of contention and there was no express constitutional jurisdiction question. The case constituted a more direct test of the extent of Congress's Article I power in connection with the Supremacy Clause and implicit structural notions of federalism. Article III and the Eleventh Amendment were implicated in the case only to the extent that they shed light on the true issue presented in *Alden*, which was whether there was in fact a fundamental understanding of state sovereign immunity held by the founding generation which should be held to be part of the constitutional design and, if so, what the nature of that understanding was and what the contours of the immunity should be.

The Court noted both the similarity and difference between *Alden* and the *Hans* line of cases, at one point differentiating *Alden* state court immunity as a "separate and distinct structural principle . . . not directly related to the scope of the judicial power established by Article III,"[289] but later aligning *Alden* with the prior cases by stating that the logic of the *Hans* line of cases can be extended to cover the question in *Alden.*[290] In extending the original intent logic of *Hans* and *Seminole Tribe* to find a constitutional immunity unsupported by any actual textual provision of the Constitution (other than the broad language of the Tenth Amendment), *Alden* represents a clear demonstration of the power of originalism as a method of constitutional interpretation and provides an opportunity to examine originalism as applied.

It is true that the Court also relied on structuralism and precedent to support its decision. These arguments, though, can be seen as secondary to, and contingent upon, the original intent rationale. For example, in rejecting the structural argument that the Supremacy Clause made the FLSA the supreme law of the land, the Court reasoned that the Act was unconstitutional, and thus outside the scope of the Supremacy Clause because it was inconsistent with the original understanding of the founders.[291] Clearly the Court's position here rests entirely upon the original intent argument. With respect to precedent, the cases relied on by the Court amount to circumstantial support at best. As the majority acknowledged, the question in *Alden* had never before been squarely presented.[292] Original intent then, clearly serves as the primary theoretical underpinning for the decision.

In his 1989 essay *Originalism, the Lesser Evil*,[293] Justice Scalia set out both the purported advantages of originalism (as opposed to non-originalist "values" based theories of constitutional interpretation), as well as the methodology required to

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

[288]Alden v. Maine, 527 U.S. 706 (1999).

[289]*Alden*, 527 U.S. at 730.

[290]*See id.* at 733.

[291]*See supra* notes 214-16 and accompanying text.

[292]*Alden*, 527 U.S. at 741 ("Whether Congress has authority under Article I to abrogate a State's immunity from suit in its own courts is, then, a question of first impression").

[293]Antonin J. Scalia, *Originalism, the Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

properly apply originalism. On the first point, Justice Scalia argued that if the Constitution were assumed to have no fixed and ascertainable meaning, but were instead, an "invitation to apply current societal values," then the legislature, not the courts, would be the appropriate body to ascertain constitutional meaning.[294] For this reason, non-originalism could be said to undermine the whole doctrine of judicial review first set forth in *Marbury v. Madison,*[295] which rests on the idea that it is the duty of the *courts* to ascertain the meaning of the law.[296]

To realize the advantages of originalism, however, the doctrine must be properly employed, and on this point Justice Scalia stated that the "greatest defect" of originalism is "the difficulty of applying it correctly."[297] It is this second concern, the proper application of originalism, that can be seen as the main point of contention between the majority and the dissent.

In his essay, Justice Scalia noted that, in the case of constitutional interpretation, originalist doctrine requires consideration of an enormous body of evidence, such as the records of the state ratification debates, along with an assessment of the reliability of such evidence.[298] Accordingly, the *Alden* Court did appear to consider a large body of material from the founding period and the majority clearly identified the specific evidence of original intent on which it relied. This consisted of "the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm,*"[299] the positions of the "only state [ratification] conventions formally to address the matter,"[300] and the "events leading to the adoption of the Eleventh Amendment."[301] Additionally, the Court stated as historical fact that the states had adopted from England "the doctrine that a sovereign could not be sued without its consent" and that this doctrine was "universal in the States when the Constitution was drafted and ratified."[302]

While this evidence might seem convincing when first read, all of it is contradicted by the dissent, either through equally credible but conflicting interpretations or by presentation of the dissent's own equally credible but conflicting evidence.[303] Clearly the two positions can not be reconciled. However, Justice Scalia's essay offers some further guidelines which help in evaluating the opinions under originalism principles. Justice Scalia stated that proper application of originalism requires "immersing oneself in the political and intellectual atmosphere of the time," factoring out information not known in the earlier period, and adopting the "beliefs, attitudes, philosophies, predjudices and loyalties" of the time in

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[294] *Id*. at 854.

[295] 5 U.S. 137 (1803).

[296] *See* Scalia, *supra* note 293, at 854.

[297] Scalia, *supra* note 293, at 856.

[298] *See id*. at 856.

[299] *Alden*, 527 U.S. at 727.

[300] *Id*. at 726 (referring to New York, Virginia, Rhode Island and North Carolina).

[301] *Id*.

[302] *Id.* at 715-16.

[303] *See supra* text accompanying notes 238-85.

question.[304] In at least two areas, the thinking behind this admonition seems to favor the dissent rather than the majority opinion.

First, with respect to the ratification debates, both the majority and the dissent agreed that whatever was said about state sovereign immunity was said in the context of the then pressing issue of potential suits to enforce Revolutionary War debt repayment.[305] The majority presented no evidence that any of their cited speakers had considered, or intended to take a position on, immunity when federal regulation based on the Commerce Clause was at issue. The same point can be made with respect to the adoption of the Eleventh Amendment. While it is beyond doubt that the Amendment was intended to eliminate citizen-state diversity jurisdiction in federal court and the debt enforcement such jurisdiction threatened, it is something else again to read into that intent a generally held awareness or concern that some day federal laws enacted by Congress under the Commerce Clause might directly regulate the states, and an understanding that the states were to be inherently immune from any private suits that might result. By taking statements and actions out of their actual ratification era context and applying them to today's questions, the Court seems to be violating Justice Scalia's originalism guideline.

The second area where Justice Scalia's rule is useful is in considering the majority's contention that the original states uniformly adopted from English precedent a sovereign immunity which was indefeasible, good in both state and federal courts and on both state and federal questions. The majority supports this position with statements from *Hans*, Justice Iredell's *Chisholm* dissent, Hamilton's comments in *The Federalist No. 81*, and Blackstone's description of the sovereignty of the English Crown.[306] However, none of these statements are truly "on point" and must be read in the light of subsequent events, such as Commerce Clause legislation to provide support for the majority's position.

Justice Souter, in contrast, appears to be more diligent in following Justice Scalia's admonition to take into account the attitudes and beliefs of the time. He noted that prior to independence, the American Colonies had no sovereignty of their own,[307] and that, following independence, the Constitution set out an unprecedented system of government which split "the atom of sovereignty."[308] Consequently, even assuming that the original states had adopted an English concept of sovereign immunity, there would have been no existing tradition or understanding as to how that immunity would fit into the American federal system or what the limits of the immunity would be. Against this background, Justice Souter presented evidence which tends to paint a picture of disagreement or uncertainty among the founders regarding the nature or extent of sovereign immunity rather than a well-defined and

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[304]Scalia, *supra* note 293 at 856-57.

[305]*Compare Alden*, 527 U.S. at 715-20 and *id.* at 772-73 (Souter, J., dissenting).

[306]*See id.* at 715-17.

[307]*See id.* at 764 (Souter, J. dissenting).

[308]*Id.* at 799-800 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

widely held understanding.[309] Additionally, Justice Souter noted that no state had declared in its constitution that sovereign immunity was an inalienable or natural right.[310]

Another of Justice Scalia's comments is telling here. After noting the difficulty of throwing off present-day prejudices and of taking on the attitudes of an earlier time, he stated that the proper application of originalism is "a task sometimes better suited to the historian than the lawyer."[311] The Court only partially heeded this advice. For example, the majority cited to the works of legal historian David Currie four times for support of its original intent arguments,[312] but ignored his disclaimer that "[t]his is not to say the [*Chisholm*] decision was necessarily wrong. Madison, Marshall and Hamilton notwithstanding, there was no unanimity among the Framers that immunity would exist."[313]

Even if these first three originalism guidelines (consider the entire historical record, take on attitudes of the period in question, and heed the historians) do not provide sufficient criteria to evaluate *Alden* as an application of originalism, Justice Scalia provides one other guideline which is directly relevant. He noted that one way to identify a pseudo-originalist opinion is to find that it "ignor[es] strong evidence of original intent that contradict[s] the minimal recited evidence of an original intent congenial to the court's desires."[314] While it may not be fair to describe the majority's evidence as minimal, the amount of contradictory evidence that is ignored or dismissed is so large as to fairly raise the question whether the Court was, in fact, looking for an original intent congenial to its desires.

For example, while relying on Hamilton, Madison and Marshall, the majority dismissed the views of Randolph, Wilson, and Pinckney as "scanty and equivocal evidence."[315] The pre-*Chisholm* decision of Maryland to submit to process in *Van Stophorst v. Maryland*[316] and a similar decision by New York are dismissed as not "reflect[ive] of a widespread understanding."[317] The early proposals by Virginia and North Carolina to eliminate the citizen-state diversity jurisdiction language in Article III are characterized as reflecting only a generalized dissatisfaction with federal jurisdiction rather than a belief that Article III, as written, negated state immunity.[318] The fact that the original constitutions of Connecticut and Rhode Island provided for

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[309]*See supra* text accompanying notes 237-83; *see also*, *Alden*, 527 U.S. at 761 (Souter, J., dissenting) ("There is no evidence . . . that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law.").

[310]*See Alden*, 527 U.S. at 772 (Souter, J., dissenting).

[311]Scalia, *supra* note 293, at 857.

[312]*See Alden*, 527 U.S. at 720-24.

[313]DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 19 (1985). Justice Souter noted this omission in his dissent. *See Alden*, 527 U.S. at 793 (Souter, J., dissenting).

[314]Scalia, *supra* note 293, at 852.

[315]*Alden*, 527 U.S. at 726.

[316]Van Stophorst v. Maryland, 2 U.S. 401 (1791); *see supra* n.31.

[317]*See Alden*, 527 U.S. at 726.

[318]*See id.* at 725.

suits against these states is said to confirm a uniform view of state sovereign immunity rather than indicate some diversity of view on the subject.[319]

Of even greater significance, the *Chisholm* decision itself is written off as an overly literal misinterpretation of the Constitution.[320] In *Chisholm*, five prominent members of the founding generation directly addressed the question and none of them, not even Justice Iredell, stated a belief that the states have a constitutional sovereign immunity.[321] This would seem to be strong evidence that the founders had no fundamental understanding to the contrary. The *Alden* majority dismissed *Chisholm*, though, on the grounds that the *Chisholm* Justices, other than Justice Iredell, had failed to address the prevailing understanding in making their decision.[322] Not only might this be seen as specious reasoning (i.e., the decision was not a reflection of the original understanding because it failed to take into account the *true* original understanding), but, beyond that, it simply is hard to believe that the five *Chisholm* Justices would have failed to recognize or credit a truly fundamental understanding on the matter. Chief Justice Jay, for example, had been a co-author with Alexander Hamilton of *The Federalist*. He surely would have known, better than the *Hans* court of one hundred years later, exactly what Hamilton's views were and whether those views were so pervasively held as to be implicit in the Constitution when it was ratified.

The majority, of course, pointed to the subsequent adoption of the Eleventh Amendment as proving its argument that the *Chisholm* Court had failed to account for a fundamental postulate of *Alden*-type immunity implicit in the constitutional design. In doing so, however, the Court, as in *Hans*, was forced to dismiss contradictory evidence yet again, that evidence being the plain language of the Amendment itself, which addresses the diversity jurisdiction of federal courts, not a grander concept of immunity.

This conflict between the *Hans/Seminole Tribe/Alden* view of sovereign immunity and the language of the Constitution is not limited to a clash with the Eleventh Amendment though. The plain text of Article III, as well as the Supremacy Clause, must be likewise supplemented, adjusted or dismissed to conform to the view of original understanding set forth in *Alden*. Like the *Chisholm* decision, the text of the Constitution appears to present evidence, too strong to ignore, that there was no fixed idea of absolute state sovereign immunity to private suits which was taken for granted during the ratification era.[323]

In response to this conflict with the constitutional text, the Court, throughout its opinion, warned that, in determining what the founders meant, you can not always rely on what they said. With respect to the Eleventh Amendment and Article III, the

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[319]*See id*. at 724-25.

[320]*See id* at 721-24.

[321]*See supra* text accompanying notes 33-45.

[322]*See Alden*, 527 U.S. at 720.

[323]Justice Souter made this same point in his *Seminole Tribe* dissent when in response to the majority's charge that his textual analysis of the Eleventh Amendment was directed at a "straw man" he quipped "plain text is the Man of Steel in a confrontation with 'background principles' and 'postulates which limit and control'" *Seminole Tribe*, 517 U.S. 444 at 1152 n.13 (Souter, J., dissenting).

Court rejected reliance on the "mere letter"[324] or "bare text"[325] of the law, the "mere literal application" of the law,[326] the "ahistorical literalism" of resting on the words alone,[327] and "blind reliance upon the text."[328] While this kind of wholesale disparagement of textualism might be expected in an opinion based on what Justice Scalia refers to as nonoriginalism,[329] it does not seem consistent with the underlying principle of originalism that the Constitution is "an enactment that has a fixed meaning . . . ascertainable to those learned in the law."[330] In the context of *Alden*, this continual denigration of the constitutional text has the effect of emphasizing the underlying problem - which is that if the majority's view is correct, we must assume that the founders chose to express a fundamental understanding in language virtually certain to create conflicting interpretations.[331]

Of course, all the conflicting evidence notwithstanding, it might still be hypothesized that the *Alden* majority did in fact capture a true fundamental understanding of the founding generation in their decision. Even according this possibility a presumption of validity, though, the strong dissent of Justice Souter and the apparent discrepancies between the majority's reasoning and the tenets of originalism expounded by Justice Scalia, make it fair to consider whether there might actually be a different explanation for the decision. In his essay, Justice Scalia addressed such a possibility, noting that "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law."[332] This thought is consistent with Justice Scalia's earlier warning that originalism can be misused to support a decision designed to set forth "an original intent congenial to the court's desires."[333] Both comments may well shed some light on *Alden,* in that the Court's recent federalism decisions appear to show a definite predilection for limiting federal power and expanding "states' rights."

In 1985, the Court decided *Garcia* which held that Congress could regulate the states as states under its Commerce Clause power (barring some defect in the national legislative process). The Court reasoned that the sovereignty of the states

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[324]*Alden*, 527 U.S. at 727.

[325]*Id*. at 736.

[326]*Id*. at 729.

[327]*Id*. at 730.

[328]*Id*.

[329]Scalia, *supra* note 293, at 855.

[330]*Id.* at 854.

[331]Discussing the text of Article III in his *Chisholm* concurrance, Justice Wilson opined that even a "great master" of the "strictest legal language" would have been unable to more precisely or accurately provide for a diversity suit by a citizen against a state. *Chisholm*, 2 U.S. at 466 (Wilson, J., concurring).

[332]Scalia, *supra* note 293, at 863. Expanding on this concept Justice Scalia warned, "It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are 'fundamental to our society.'" *Id*.

[333]*See* Scalia, *supra* note 293, at 852.

was properly protected by the prominent role in the national political process accorded them by the Constitution, not through discrete limitations on congressional power created by the judiciary. As the make-up of the Court began to change in the 1990s, however, that philosophy gave way to one which favored judicial involvement so as to further direct limitations on Congress. This trend can be seen in cases throughout the last decade.

In the 1992 case of *New York v. United States*,[334] the Court held that the Low Level Radioactive Waste Policy Amendments Act of 1985,[335] requiring States to either regulate disposal of radioactive waste produced in the state in accordance with federal guidelines or take title to the waste, exceeded the limits of congressional power under the Commerce Clause.[336] The Court found that the Act, through coercion, effectively commandeered the state governments into federal regulatory service in a way which was inconsistent with the Tenth Amendment and state sovereignty.[337] Five years later, similar reasoning was extended to cover individual state officers in *Printz v. United States.*[338] The *Printz* Court held that provisions of the Brady Handgun Violence Prevention Act,[339] requiring local law enforcement officers to conduct background checks on prospective handgun purchasers in accordance with the federal statute's mandate, constituted an unconstitutional attempt to conscript state officers into service as federal regulatory agents.[340] The Court in *Printz* stated that such conscription was "fundamentally incompatible with our constitutional system of dual sovereignty."[341]

In the 1995 case of *United States v. Lopez*,[342] the Court struck down the Gun Free School Zones Act of 1990, which made firearm possession in a school zone a federal offense, on the ground that such a prohibition was not sufficiently related to interstate commerce as to be valid legislation under the Commerce Clause. The Court reasoned that any link between school zone gun possession and interstate commerce was so attenuated that the Act could not be considered a rational commerce regulation measure.[343] Additionally, the Court warned of the danger of allowing the Commerce Clause become the basis for a general federal police power equivalent to the police power enjoyed by the states.[344] The following year, *Seminole Tribe* constitutionalized state sovereign immunity from private suits for damages in

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[334]505 U.S. 144 (1992).

[335]42 U.S.C. § 2021(b)-(j) (1994).

[336]*See New York*, 505 U.S. at 149.

[337]*See id*. at 175-76.

[338]521 U.S. 898 (1997).

[339]18 U.S.C. §§ 921-30 (1994 & Supp. 1999).

[340]*See Printz*, 521 U.S. at 935.

[341]*Id*.

[342]514 U.S. 549 (1995).

[343]*See Lopez*, 514 U.S. at 567.

[344]*See id*.

federal courts.[345] *Alden* followed in June, 1999 and the Court's trend can be seen in other recent immunity cases.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[346] decided the same day as *Alden*, the Court held that Trademark Remedy Clarification Act (TCRA), which amended the Trademark Act of 1946 to authorize private suits against the states, was ineffective against state sovereign immunity.[347] College Savings Bank argued that Congress enacted the TCRA pursuant to its powers under section 5 of the Fourteenth Amendment and thus, as per *Fitzpatrick v. Bitzer*,[348] state sovereign immunity should not serve to bar its TCRA based suit.[349] The Court, however, found that the TCRA could not be seen as enforcing any provision of the Fourteenth Amendment,[350] rather, being just an exercise of Article I power, the TCRA was not effective to abrogate state sovereign immunity (as per *Seminole Tribe*).[351] Additionally, the Court held that the State of Florida had not effectively waived its sovereign immunity. In making this latter ruling, the Court expressly overruled *Parden*[352] to the extent it had survived *Welch*,[353] and fully repudiated the constructive waiver principle on which *Parden* was based.[354]

In the case of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[355] the Court held that the Patent and Plant Varieties Protection Remedy Clarification Act (Patent Remedy Act) which authorized private suits against states to remedy patent law violations could not "be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause."[356] Consequently, the private suits authorized by the Act were barred by state sovereign immunity.

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[345] *See supra* notes 116-123 and accompanying text.

[346] 527 U.S. 666 (1999).

[347] *See id* at 690.

[348] 427 U.S. 445 (1976).

[349] *See College Savings Bank*, 527 U.S. at 673.

[350] *See id*. at 674. College Savings Bank (College) created and marketed a tuition savings plan. The State of Florida subsequently offered a similar plan and College filed suit claiming it was injured by misrepresentations which Florida made about its own (Florida's) plan in violation of the TCRA. The Court held that any injury of College arising from such false advertising did not constitute a deprivation of a protected property interest within the meaning of the Fourteenth Amendment. *See id.*

[351] *See id*. at 673.

[352] Parden v. Terminal Railway of the Ala. State Docks Dep't, 377 U.S. 184 (1964).

[353] Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987).

[354] *See College Savings Bank*, 527 U.S. at 683.

[355] 527 U.S. 627 (1999).

[356] *Id.* at 630. In this suit, College Savings Bank alleged violations of its patent by the State of Florida in violation of the Patent Remedy Act. Because Congress had not identified a pattern of such violations by states prior to enacting the Patent Remedy Act, the Court held that the Act was not a valid remedial or preventative measure for purposes of section 5 of the Fourteenth Amendment. *See id.* at 647.

Most recently in *Kimel v. Florida Board of Regents*,[357] the Court held that the Age Discrimination in Employment Act of 1967 (ADEA), while valid legislation under the Commerce Clause,[358] was "not a valid exercise of Congress's power under section 5 of the Fourteenth Amendment."[359] Consequently, as with the TCRA and the Patent Remedy Act, the provisions of the ADEA which authorized private suits against States were held to be unconstitutional violations of state sovereign immunity.[360] With the exception of *New York v. United States*, all of these cases were decided by the same five-to-four majority that operated in *Alden*.

In the last eight years, then, *Union Gas* has been overturned, *Hilton* has been effectively overturned, *Garcia* has been substantially undermined, the constructive waiver theory of *Parden* has been overruled, the "substantial effects" test for economic regulation under the Commerce Clause has been made more stringent (*Lopez*), and congressional power under the Fourteenth Amendment has been repeatedly constrained. This record indicates a break with prior federalism decisions and marks a more activist course which corresponds to the establishment of the present political make-up of the Court's membership. Regardless of whether *Alden* is considered to be substantively good or bad for the country, when viewed in light of all the circumstances, the decision can be most realistically explained as a further step along the Court's current political path rather than as a true determination of some fundamental understanding of two hundred years ago.[361]

V. CONCLUSION

The record of the major federalism cases of the last decade reveals a sharp ideological split within the Court on the nature and extent of state sovereign immunity as well as the broader question of the role of the judiciary in protecting or defining state sovereignty itself. As long as the present "federalist" majority is maintained or increased, the course established in the 1990s is likely to continue. If the make-up of the Court shifts in favor of the present dissenters, however, *Seminole Tribe*[362] and *Alden*[363] are unlikely to survive. In a strong dissenting opinion in *Kimel v. Florida Board of Regents*,[364] Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, made it clear that he rejects *Seminole Tribe* as valid controlling precedent.[365]

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[357]*Id.* at 631 (1999).

[358]*Id.* at 643.

[359]*Welch*, 527 U.S. at 650.

[360]*Id.*

[361]As Justice Souter pointed out, the rationale behind *Alden* was broad enough to encompass *Seminole Tribe* without any need for reliance on the Eleventh Amendment. The fact that *Seminole Tribe* was decided first without mention of the broader *Alden* Tenth Amendment rationale suggests a developing course rather than an application of pre-existing principles. *See Alden*, 527 U.S. at 761.

[362]Seminole Tribe of Fla. v. Fla., 517 U.S. 44 (1996).

[363]Alden v. Maine, 527 U.S. 706 (1999).

[364]528 U.S. 62 (1999).

[365]*Id.* at 97 (Stevens, J., dissenting).

Even if *Alden* and *Seminole Tribe* do survive the current membership of the Court, the lack of textual support for state sovereign immunity as a constitutional principle and the flexibility of the original intent doctrine as it was applied in *Alden*, will continue to make the decisions subject to reversal.