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Alden v. Maine: Infusing Tenth Amendment and General Federalism Principles into Eleventh Amendment Jurisprudence

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NOTE

ALDEN V. MAINE: INFUSING TENTH AMENDMENT AND GENERAL FEDERALISM PRINCIPLES INTO ELEVENTH AMENDMENT JURISPRUDENCE

INTRODUCTION

Judged simply by its text, the Eleventh Amendment prohibits federal courts from exercising jurisdiction in one category of cases—those in which a citizen of one state or foreign country brings suit against another state in federal court.[1] The Eleventh Amendment has been construed, however, to deny federal jurisdiction in other categories, such as those in which a citizen of a state brings suit against that state,[2] a foreign country brings suit against a state,[3] and a citizen brings suit against a state in admiralty court.[4] In each instance, the denial of jurisdiction was predicated on the legal concept of state sovereign immunity.[5] In the 1998 Term, the Supreme Court construed the amendment in *Alden v. Maine*[6] to prevent Congress from providing citizens of a state the right to sue that state in its own courts with-

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[1] The text of the Eleventh Amendment reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. *See also* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989) (arguing that the Eleventh Amendment should only prevent federal jurisdiction over cases expressly described by the text of the Amendment).

[2] *See* Hans v. Louisiana, 134 U.S. 1 (1890).

[3] *See* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

[4] *See Ex parte* New York, 256 U.S. 490 (1921).

[5] Sovereign immunity, originally an English common law doctrine, held that the Crown could not be sued in its own courts. The doctrine was carried over to the American colonies under British rule and became a part of American legal jurisprudence upon independence. *See* Alden v. Maine, 527 U.S. 706, 715-17 (1999). *See generally* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963) (tracing the development of sovereign immunity in English common law and its subsequent transferal to American law).

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

out its consent.[7] Although the Court cited state sovereign immunity as its rationale,[8] a very different doctrine explains the outcome in *Alden*. The *Alden* Court infused Tenth Amendment and general federalism principles[9] into the Eleventh Amendment, thereby construing the Amendment, textually limited to federal court jurisdiction, to bar state court jurisdiction.

Alden presented the issue of whether nonconsenting states are subject to suit in their own courts for alleged violations of the federal Fair Labor Standards Act.[10] *Alden*'s holding, that Congress lacked authority under Article I to authorize such suits, placed the future of federal law enforcement against states in limbo. Moreover, *Alden* will have far-reaching effects on the balance of power between federal and state governments.

This Note will analyze the Supreme Court's decision in *Alden*, focusing on how Tenth Amendment and general federalism principles impacted the decision and reshaped Eleventh Amendment jurisprudence,[11] especially *Alden*'s implications for the enforcement of federal law against the states and the balance of power between federal and state governments. Part I of this Note will discuss the development of Eleventh Amendment jurisprudence, following it through its gradual expansion prior to the Court's 1996 decision in *Seminole Tribe v. Florida*.[12] This discussion will attempt to focus on how such decisions have been influenced by and dealt with general federalism principles. Part II will then analyze the Supreme Court's decisions in *Seminole Tribe* and *Alden* to determine how the Court infused Tenth Amendment and general federalism principles, and how such infusion has changed the Eleventh Amendment's impact. Part III will criticize this infusion as overly restrictive of the federal government's ability

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[7] *See id.* at 706.

[8] *See id.* at 749 ("[A] congressional power to authorize private suits against nonconsenting States in their own courts would be . . . offensive to state sovereignty . . . .").

[9] While there is little or no difference between Tenth Amendment and general federalism principles, a distinction between the two is made throughout this Note in order to distinguish between those principles when each is infused into Eleventh Amendment jurisprudence by the Court. *Compare Alden*, 527 U.S. 706 (1999) (infusing Tenth Amendment jurisprudence), *with* Seminole Tribe v. Florida, 517 U.S. 44 (1996) (infusing general federalism principles).

[10] 29 U.S.C. §§ 201-19 (1994).

[11] Although this idea was forcefully proposed over ten years ago by Professor Calvin Massey, this Note attempts to show specifically and in detail how the language and rationale used by the Supreme Court in its recent Eleventh Amendment decisions are influenced by Tenth Amendment and general federalism principles. *See* Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 66 (1989) (suggesting that "both the dimensions of [state sovereign] immunity and its constitutional anchor are more properly found in the Tenth Amendment"). *See also* Melvyn R. Durchslag, *Accommodation by Declaration*, 33 LOY. L.A. L. REV. 1375 (2000) (agreeing with Professor Massey's basic thesis); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 62 & n.5 (1984) (making the same suggestion five years before Professor Massey, but only in passing).

[12] 517 U.S. 44 (1996).

to enforce its legislation against states and of injured individuals' available remedies against states. Finally, this Note will argue that if the Tenth Amendment is needed to construe the Eleventh Amendment to apply to state courts, Congress should be permitted to use its enumerated powers to subject nonconsenting states to private suits in their own courts.

I. ELEVENTH AMENDMENT JURISPRUDENCE PRIOR TO INFUSION

Since 1890, there has been an ongoing debate about the history of state sovereign immunity as it relates to the Eleventh Amendment.[13] Much has been written about this history, from both sides of the argument, by members of the bench[14] and scholars.[15] It is not the

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[13] In *Hans v. Louisiana*, 134 U.S. 1, 11-16 (1890), the Supreme Court held for the first time that Article III of the Constitution did not alter the original understanding of state sovereign immunity, according to which the states are not subject to suit without their consent. The Court also held that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was incorrectly decided and that the Eleventh Amendment's only purpose was to reaffirm the doctrine of state sovereign immunity incorporated in the Constitution. Although this view of history has been accepted by the Supreme Court, not all of the *Hans* Court agreed. *See Hans*, 134 U.S. at 21 (Harlan, J., concurring) (denying "assent to many things said in the opinion," especially "[t]he comments made upon the decision in *Chisholm v. Georgia*").

[14] *Compare Alden*, 527 U.S. at 727-29 (holding that the history of the Constitution shows that state sovereign immunity is an element of constitutional design), *with id.* at 762-64 (Souter, J., dissenting) (arguing the incorrectness of the Court's analysis of state sovereign immunity history prior to the Eleventh Amendment). *See also* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983) (arguing, from the perspective of a sitting judge, that the Eleventh Amendment "applied only to cases in which the jurisdiction of the federal court depends solely upon party status").

[15] *See, e.g.*, CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY at viii (1972) (taking exception to the traditional notion that the Eleventh Amendment exempts "the nation or the states, from unconsented suits by individuals"); JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 152 (1987) (recognizing "the need to limit sovereign immunity" under the Eleventh Amendment); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1427 (1987) (arguing that "no governmental entity can enjoy plenary 'sovereign' immunity"); William Burnham, *Taming the Eleventh Amendment Without Overruling* Hans v. Louisiana, 40 CASE W. RES. L. REV. 931 (1989-90) (arguing that *Hans v. Louisiana* does not stand for the proposition that the Eleventh Amendment bars federal law claims); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 549 (1977) ("The eleventh amendment does not confer upon the states a substantive right to enjoy sovereign immunity."); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1130 (1983) (suggesting that the Eleventh Amendment was adopted with the "purpose of requiring that the state-citizen diversity clause of Article III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6 (1988) (arguing that sovereign immunity should be "[u]nderstood as a form of federal common law" rather than as a "constitutionalized rule" under the Eleventh Amendment); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1395 (1989) (refuting the claim that "state immunity from suit in federal courts was intended to apply only to cases brought against the state in diversity"); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1468 (1975) (arguing that the Supreme Court has

purpose of this Note to describe, analyze, or add to this historical debate.[16] Instead, this section focuses on the jurisprudence of the Eleventh Amendment, specifically those cases in which federalism principles have influenced the Court's Eleventh Amendment jurisprudence.[17]

A. The Supreme Court's First Impression

Although the Supreme Court held in 1798 that the Eleventh Amendment was part of the Constitution,[18] it was not until 1821 that the Court first interpreted the scope and meaning of the amendment. In *Cohens v. Virginia*,[19] the Court decided whether it had jurisdiction over a writ of error filed against Virginia by a citizen of that same state. Writing for the Court, Chief Justice Marshall held that the Court did have such jurisdiction.[20] The Chief Justice reasoned that the states had relinquished some of their sovereignty to the federal government when the country was formed in order to create a federal government with "ample powers" to operate for the benefit of the people.[21] Furthermore, the Constitution granted "to every person having a claim upon a State, a right to submit his case to the Court of the nation."[22] Thus, federal jurisdiction was necessary to provide individuals with access to an unbiased court "exempt from the prejudices by which the legislatures and people are influenced."[23]

In so holding, the *Cohens* Court identified the general purpose of the Eleventh Amendment as protecting the states from their creditors.[24] Chief Justice Marshall rejected the argument that its purpose

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properly limited the scope of federal jurisdiction over suits against state governments); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1275-81 (1998) (challenging the Supreme Court's broad interpretation of sovereign immunity).

[16] For a comprehensive summary and analysis of state sovereign immunity from English common law through the adoption of the Eleventh Amendment (including a discussion of the Constitutional Convention and the ratification debates), see MELVYN DURCHSLAG, THE ELEVENTH AMENDMENT pt. 1 (forthcoming 2001).

[17] Even when general federalism principles have not affected outcomes, the Court has discussed federalism principles in other Eleventh Amendment cases, as well. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 445-46 (1793) (Iredell, J.) (relying upon the Judiciary Act of 1789 and English common law for the holding, but mentioning that dependence upon state legislatures "for the execution of their own contracts" alleviates the need for private suits against nonconsenting states).

[18] *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

[19] 19 U.S. (6 Wheat.) 264 (1821).

[20] *See id.* at 430.

[21] *See id.* at 380-82. Later in his opinion, Chief Justice Marshall would also note that the Constitution was a change in form and structure of government from the Articles of Confederation, deemed necessary so that the federal government was not forced to act through the states but could "act on individuals directly." *Id.* at 388.

[22] *Id.* at 383.

[23] *Id.* at 386.

[24] *See id.* at 406.

was "to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation."[25] Thus, the Court held that the Eleventh Amendment was only intended to apply to those cases "in which some demand against a State is made by an individual in the Courts of the Union."[26] Chief Justice Marshall recognized that preventing individuals from bringing suit against states in state courts would change the relationship between federal and state authority to such a degree that it would "strip the government of the means of protecting, by the instrumentality of its Courts, the [C]onstitution and laws from active violation."[27] This is the other side of the two-way street that is federalism: the federal government possesses powers limiting the sovereignty of the states, expressly granted to protect the rights and interests of individuals.

B. When Federalism Prevents Federal Jurisdiction

Almost seventy years after *Cohens*, Eleventh Amendment jurisprudence changed forever in *Hans v. Louisiana*.[28] Declaring *Chisholm v. Georgia*[29] a "startling and unexpected" decision,[30] *Hans* held that a nonconsenting state could not be sued in federal court by its own citizens. Interpreting the Eleventh Amendment broadly, the *Hans* Court decided to "trust" the states to provide remedies for those individuals injured as a result of a state's unlawful actions.

Furthermore, the Court declared that it was unwilling to judge state decisions on whether to provide remedies for their unlawful conduct. The Court opined that states were

> called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except

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[25] *Id.* Though *Cohens* dealt only with a writ of error against the state, Chief Justice Marshall engaged in a general "consideration of the [Eleventh] Amendment." *Id.* at 405. Although this discussion may technically be dicta, it has greatly influenced the Court's application of the Eleventh Amendment.

[26] *Id.* at 407.

[27] *Id.*

[28] 134 U.S. 1 (1890).

[29] 2 U.S. (2 Dall.) 419 (1793). *Chisholm*, decided prior to the adoption of the Eleventh Amendment, held that the "Constitution vests a jurisdiction in the Supreme Court over a State, as a defendant, at the suit of a private citizen of another State." *Id.* at 421.

[30] *See Hans*, 134 U.S. at 11. This theory, that the overwhelming negative reaction by the states toward *Chisholm* proves that the Constitution was intended to preserve the states' sovereign immunity, has been dubbed the "profound shock theory." 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (1922). It is still cited with regularity by the Court. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 720 (1999) ("The Court's decision [in *Chisholm*] 'fell upon the country with a profound shock.'") (quoting 1 WARREN, *supra*, at 96 (1922)); Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996) ("[The *Chisholm*] decision created 'such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.'") (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

> for reasons most cogent, (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself.[31]

Although claiming that states would be punished for failing to correct any injuries their unlawful actions might cause, the Court failed to address how an injured individual whose rights are violated by a state might gain compensation. The Court failed to address this issue because it felt that to do so would be intruding upon an area of exclusive state authority and would disrupt the balance of federal and state power.

The Court's Eleventh Amendment analysis was next influenced by federalism principles in *Principality of Monaco v. Mississippi*.[32] The government of Monaco attempted to sue Mississippi in the Supreme Court to collect upon bonds the state had issued. Once again, the Court expanded the Eleventh Amendment beyond its text, holding that a foreign state cannot sue nonconsenting states in federal court. In reaching this holding, the Court was forced to explain why state sovereign immunity does not prevent suits by the federal government or other states but does prevent a foreign state, a sovereign in its own right, from suing a state without its consent.

In explaining this distinction between a foreign state and the federal government or other states, the Court relied upon the federalism principles inherent in the Constitution's structure. In ratifying the Constitution, states consented to federal jurisdiction over suits between states.[33] Likewise, "it is inherent in the constitutional plan" that the federal government can sue nonconsenting states;[34] however, "[t]he foreign State lies outside the structure of the Union."[35] Therefore, suits against a nonconsenting state by the federal government or other state do not disrupt the system of federalism created by the Constitution, but subjecting nonconsenting states to suit by foreign states would infringe upon state sovereignty.[36] The Court reasoned that, to preserve the constitutionally created sovereign nature of states, state sovereign immunity must prevent foreign states from suing nonconsenting states in federal court, just as the Eleventh Amendment prevents individuals from suing nonconsenting states.

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31 *Hans*, 134 U.S. at 21.
32 292 U.S. 313 (1934).
33 *See id.* at 328-29.
34 *Id.* at 329.
35 *Id.* at 330.
36 *See id.*

C. When Federalism Supports Jurisdiction

Notwithstanding the denial of federal jurisdiction in *Hans* and *Monaco*, the Court has refused to construe the Eleventh Amendment as a bar to all suits against states. Instead, the Court, relying on federalism principles, has created exceptions to Eleventh Amendment immunity. These exceptions allow suits against states to proceed in federal court and in the courts of other states under limited circumstances.

In *R.B. Parden v. Terminal Railway of the Alabama State Docks Department*,[37] the Court held that Alabama consented to private suits under the Federal Employers' Liability Act when it began operating an interstate railroad after enactment of the Act.[38] The "conclusion that this suit may be maintained [against Alabama]," the Court opined, "is in accord with the common sense of the Nation's *federalism*."[39] Because Alabama had left the "sphere that is exclusively its own," it had subjected itself to federal regulation and allowed the federal government to authorize private suits against it.[40]

According to the Court, to hold otherwise would "bear the seeds of substantial impediment to the efficient working of our *federalism*."[41] The federal government's position in the constitutional structure requires that it regulate in certain areas, and this includes the power to authorize suits by private parties.[42] Therefore, to preserve the Constitution's balance of federal and state power, the federal government must be able to authorize private suits against nonconsenting states when the states venture into a sphere of federal authority, such as interstate commerce.

The influence of federalism principles enabled the Court to create another important exception to the Eleventh Amendment in *Fitzpatrick v. Bitzer*.[43] In *Fitzpatrick*, the Court held that Congress, pursuant to its powers under Section 5 of the Fourteenth Amendment, may subject nonconsenting states to private suits in federal court. This exception was predicated on "[t]he impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States."[44]

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[37] 377 U.S. 184 (1964), *overruled by* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).

[38] *See id.* at 192. The Federal Employers' Liability Act authorized suit in federal court against every railroad carrier engaged in interstate commerce by any individual injured while working for such a railroad. *See* 45 U.S.C. §§ 51-60 (1994).

[39] *Parden*, 377 U.S. at 196 (emphasis added).

[40] *Id.*

[41] *Id.* at 197 (emphasis added).

[42] *See id.* at 198 ("To preclude this form of regulation in all cases of state activity would remove an important weapon from the congressional arsenal . . . .").

[43] 427 U.S. 445 (1976).

[44] *Id.* at 453.

The Fourteenth Amendment altered the constitutional balance of power by expanding Congress's powers, thus causing a "diminution of state sovereignty."[45] According to the Court, this shift in the constitutional system of federalism gave Congress authority, pursuant to Section 5, to intrude upon states' sovereign immunity by subjecting nonconsenting states to private suit. The Court continues to rely upon the "impact" rationale when upholding this exception in current Eleventh Amendment cases.[46]

The Court also relied upon the constitutional structure in *Nevada v. Hall*,[47] holding that a nonconsenting state may be subject to private suits in the courts of another state. The federalism created by the Constitution "is not a union of 50 wholly independent sovereigns. . . . [Instead,] any one State's immunity from suit in the courts of another State is [nothing] other than a matter of comity."[48] As the Court would later explain in *Alden*,[49] because there was no agreement in the constitutional structure "between the States to respect the sovereign immunity of one another,"[50] each state could determine whether to respect other states' sovereignty. In *Hall*, California choose not to respect Nevada's sovereignty and subjected Nevada to a private suit in California's courts.

Despite this apparent trend of using federalism principles to limit the reach of the Eleventh Amendment, in *Atascadero State Hospital v. Scanlon*,[51] the Court used federalism principles to extend the reach of the amendment beyond its text. The *Scanlon* Court was presented with the issue of whether, in light of the Eleventh Amendment's protection of states' sovereign immunity, the Rehabilitation Act subjected nonconsenting states to private suits for damages.[52] In holding that Congress had not subjected nonconsenting states to private suits under the Rehabilitation Act, the Court required Congress to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."[53]

This holding was required because "the Eleventh Amendment implicates the fundamental constitutional *balance between the Federal Government and the States*"[54] "held by the Framers of the Constitution."[55] According to the Court, requiring Congress to "une-

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[45] *Id.* at 455.

[46] *See infra* text accompanying note 86.

[47] 440 U.S. 410 (1978).

[48] *Id.* at 425.

[49] *See infra* text accompanying notes 117-18.

[50] *Hall*, 440 U.S. at 425.

[51] 473 U.S. 234 (1985).

[52] *See id.* at 235.

[53] *Id.* at 243. The Court additionally held that California had not waived its immunity to suit. *See id.* at 247.

[54] *Id.* at 238 (emphasis added).

[55] *Id.* at 238 n.2.

quivocally express" its intention to abrogate state sovereignty ensures the maintenance of this constitutional balance of federal and state power.[56] Thus, Congress may authorize private suits against nonconsenting states only pursuant to Section 5.[57] Therefore, courts ensure that, in subjecting nonconsenting states to private suits, Congress has not altered the Constitution's balance of power.

Pennsylvania v. Union Gas Co.[58] was one of the last pre-*Seminole Tribe* Eleventh Amendment cases influenced by federalism principles. In *Union Gas*, the Court held that Congress had the authority to subject nonconsenting states to private suit in federal court when legislating pursuant to the Commerce Clause.[59] In reaching this decision, the Court relied upon the balance of federal and state power, specifically holding that the Commerce Clause (like the Fourteenth Amendment) "both expands federal power and contracts state power."[60] Because Congress may authorize private suits against states under *Scanlon*, to deny Congress the same power under the Commerce Clause would unduly limit the federal power granted by the Constitution. Thus, Congress does not alter the constitutional balance by subjecting nonconsenting states to private suit in federal court when legislating pursuant to its Commerce Clause powers.

Parden, *Fitzpatrick*, *Hall*, and *Union Gas* illustrate the influence of federalism principles in limiting the reach of the Eleventh Amendment. When the Court, as in *Fitzpatrick*, finds that the constitutional system of federalism has been altered by expanding federal power at the expense of state power, Congress's creation of jurisdiction (if legislating pursuant to this expanded power) over nonconsenting states does not affect the *original* federal/state relationship. Likewise, when the Court finds that this *original* federal/state relationship includes Congress's ability to regulate the states, as in *Union Gas*, Congress's authorization of private suits is held to be constitutional.

Additionally, when a state, like Alabama in *Parden*, leaves the "sphere that is exclusively its own," thereby entering a "sphere" that is subject to federal regulation, the state consents to private suits. This does not alter the balance of federal and state power because federal regulation of states in such a manner was part of the *original* constitutional system of federalism. Furthermore, a nonconsenting state could be subject to suit in the courts of another state, as in *Hall*, because such jurisdiction does not alter the constitutional balance of

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[56] *See id.* at 242-43.

[57] *See id.* at 243.

[58] 491 U.S. 1 (1989) (plurality opinion), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

[59] *See id.* at 5.

[60] *Id.* at 17.

power. Such jurisdiction does not affect the constitutional system of federalism because states were not granted immunity from such jurisdiction and, thus, there is no diminution in the power granted states by the Constitution.

Conversely, when the Court finds that subjecting nonconsenting states to private suit alters the constitutional balance of power, the Court will prevent the exercise of such jurisdiction, even if that means expanding the Eleventh Amendment beyond its text. The Court will use the Eleventh Amendment to preserve the balance when Congress attempts to expand federal power at the expense of state power, as in *Scanlon*. Furthermore, even if there is no corresponding expansion of federal power, as long as the exercise of jurisdiction over a nonconsenting state would alter the balance by decreasing state power or sovereignty, the Court will expand the Eleventh Amendment beyond its text to preserve the constitutional system of federalism, as in *Monaco* and *Hans*.

II. INFUSION BEGINS

Almost since its first appearance in the Supreme Court's jurisprudence, Eleventh Amendment analysis has been influenced, although perhaps only slightly, by general federalism principles. It was not until recently, however, in *Seminole Tribe v. Florida*,[61] that the Court infused general federalism principles into the Eleventh Amendment to such a degree that it significantly altered Eleventh Amendment doctrine and restricted federal enforcement powers against the states. Thereafter, in *Alden v. Maine*,[62] the Court further restricted Congress's ability to enforce its legislation against states by infusing general federalism principles and, for the first time, explicitly incorporating Tenth Amendment principles into the Eleventh Amendment.

Prior to *Seminole Tribe*, the Eleventh Amendment was not viewed as an impenetrable restriction upon federal legislative power. In most instances, Congress was able to use its powers to avoid the jurisdictional bar of state sovereign immunity and subject nonconsenting states to private suit in federal court.[63] After *Seminole Tribe*, Congress may not use its Article I powers to authorize suits by private individuals against nonconsenting states in federal court.[64]

In the wake of *Seminole Tribe*, there remained some question as to whether Congress could, under its Article I powers, subject non-

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61 517 U.S. 44 (1996).
62 527 U.S. 706 (1999).
63 *See supra* text accompanying notes 43-60.
64 *See Seminole Tribe*, 517 U.S. at 64-65.

consenting states to private suit in the states' own courts.[65] *Alden* answered this question, holding that Congress lacked the power under Article I to authorize private suits against nonconsenting states in their own courts.[66] In *Alden*, the Court used general federalism principles, first incorporated into Eleventh Amendment jurisprudence in *Seminole Tribe*, to restrict Congress's power to enforce its constitutional legislation, and then utilized Tenth Amendment principles to apply what was previously a bar on federal jurisdiction to state court jurisdiction.

A. Seminole Tribe v. Florida

To fully understand the Court's decision in *Alden*, a brief discussion of *Seminole Tribe* is necessary, as it can be argued that *Alden* was an extension of *Seminole Tribe*.[67] The Indian Gaming Regulatory Act ("IGRA"),[68] enacted by Congress under the Indian Commerce Clause,[69] allows Indian tribes to conduct certain gaming activities pursuant to a valid compact between the tribe and the state in which the activities are located. IGRA imposes a duty upon states to negotiate in good faith with a tribe to form such a compact. Congress authorized tribes to bring suit in federal court against a state to compel performance of that duty.[70]

The Seminole Tribe of Florida sued Florida in federal court for violating IGRA by refusing to negotiate in good faith toward the formation of a compact. Florida argued that the suit violated its sovereign immunity and moved to dismiss the complaint. Relying on the Supreme Court's decision in *Union Gas*,[71] the district court denied the motion.[72] On appeal, the Eleventh Circuit reversed, holding that the tribe's suit was barred by the Eleventh Amendment,[73] and the Supreme Court affirmed the Eleventh Circuit. The Court held that Congress lacked the power under Article I to subject nonconsenting states

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[65] *Compare* Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998) (holding that Congress may authorize private suits in a nonconsenting state's courts), *with* Alden v. State, 715 A.2d 172 (Me. 1998) (holding that Congress may not authorize such suits).

[66] *See Alden*, 527 U.S. at 754 ("States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.").

[67] *See id.* at 760 (Souter, J., dissenting) ("Today's issue arises naturally in the aftermath of the decision in *Seminole Tribe*.").

[68] 25 U.S.C. §§ 2701-21 (1994).

[69] U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power . . . [t]o regulate Commerce with . . . the Indian Tribes . . . .").

[70] *See* 25 U.S.C. § 2710(d)(7) (granting jurisdiction to the federal district courts).

[71] *See supra* notes 58-60 and accompanying text.

[72] *See* Seminole Tribe v. Florida, 801 F. Supp. 655, 661 (S.D. Fla. 1992) ("[A] majority of the Supreme Court in *Union Gas* held that Congress had the power to abrogate the States' immunity under the Interstate Commerce Clause . . . .").

[73] *See* Seminole Tribe v. Florida, 11 F.3d 1016, 1027 (11th Cir. 1994) ("[W]hen examined in the proper light, *Union Gas* is distinguishable from the cases before us and does not govern our disposition of this issue.").

to private suit in federal courts.[74] The most important aspect of the decision for purposes of this Note is the Court's discussion of the question: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate [states' immunity from private suits in federal court]?"[75] In answering this question in the negative, the Court was influenced by general federalism principles in addition to its Eleventh Amendment jurisprudence.

The Court started its analysis by declaring that one of the main purposes of the Eleventh Amendment was to prevent "'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'"[76] Although the Court did not explain the importance of protecting states' dignity or further discuss its relation to congressional powers under Article I, the concern for protecting states' dignity greatly influenced its decision in *Seminole Tribe*.

Although the state dignity argument is an established part of Eleventh Amendment jurisprudence,[77] it is inherently a general federalism principle. The assertion that the Eleventh Amendment protects states' dignity relies on the premise that the original structure of government recognizes states as sovereign entities in certain areas that the federal government may not invade. This premise is central to federalism: that the Constitution created states that are sovereign in certain areas and that the federal government may not interfere therein.[78]

The Court next discussed the only two provisions of the Constitution under which Congress had been deemed to possess authority to subject states to private suits in federal court: Section 5 of the Fourteenth Amendment and the Commerce Clause.[79] In comparing the two provisions—eventually holding that Congress could not authorize private suits against nonconsenting states under Article I but could under Section 5—the Court examined the way in which each affected the Constitution's balance of federal and state power.

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[74] *See* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996).

[75] *Id.* at 59. Prior to addressing this issue, the Court decided that evidence of congressional intent to subject the states to private suits in federal court under IGRA was provided in a "clear legislative statement." *Id.* at 55. Additionally, the Court held that the *Ex parte Young* doctrine was not available to support a claim against the governor of Florida. *See id.* at 73-76.

[76] *Id.* at 58 (quoting Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

[77] *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997) (discussing how immunity to private suits protects states' dignity).

[78] This premise also appears to be at the heart of recent Tenth Amendment jurisprudence. *See* Printz v. United States, 521 U.S. 898, 912 (1997) (holding that state executive officials are not subject to federal direction); New York v. United States, 505 U.S. 144, 176-77 (1992) (holding that a federal statute which gives the state no option other than that of implementing federal law is inconsistent with the principles of federalism).

[79] *See Seminole Tribe*, 517 U.S. at 59. *See also supra* notes 43-46, 58-60 and accompanying text.

The Court cited its long-held principle that the Fourteenth Amendment, "by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution."[80] Therefore, because Article I predated this expansion of federal power, Congress could not, using its Article I powers, subject nonconsenting states to private suit in federal court.[81] To hold otherwise, according to the Court, would "deviate[] sharply from our established *federalism* jurisprudence."[82]

Although this was not the only reason given for the Court's holding, it was arguably the central reason. The Court reasserted its commitment to preserving, under Article III, state autonomy and the "'balance of state and federal power struck by the Constitution.'"[83] Therefore the Court concluded: "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[84]

This rationale is heavily influenced by federalism concerns. Any general discussion of federalism will include an examination of the balance of federal and state power and how this balance affects the ability of each to govern.[85] Accordingly, it appears that the rationale for the holding in *Seminole Tribe* was the preservation of the system of federalism created by the Constitution, except as *explicitly* altered by the Fourteenth Amendment.

Further evidence of the importance of federalism in Eleventh Amendment jurisprudence is found in the Court's continued support of *Fitzpatrick.* In *Seminole Tribe,* the reason stated for allowing Congress to use its Section 5 power to subject nonconsenting states to suit was the Fourteenth Amendment's alteration of the "balance of state and federal power struck by the Constitution."[86] This shows the importance of federalism in Eleventh Amendment jurisprudence—only when the power of the federal government is expanded at the expense of state power, thus altering the constitutional balance, is Congress permitted to intrude upon states' immunity provided by the Eleventh Amendment.

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[80] *Seminole Tribe,* 517 U.S. at 59 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

[81] The detailed reasoning leading to this conclusion is that because the Eleventh Amendment stands for, but did not create, the constitutional principle of state sovereign immunity contained in Article III, Congress cannot use its Article I powers to expand federal court jurisdiction beyond that contained in Article III. *See id.* at 64-65.

[82] *Id.* at 64 (emphasis added).

[83] *See id.* at 59 (quoting *Fitzpatrick,* 427 U.S. at 455).

[84] *Id.* at 72.

[85] *See, e.g.,* BLACK'S LAW DICTIONARY 627 (7th ed. 1999) (defining federalism as the "relationship and distribution of power between the national and regional governments within a federal system of government").

[86] *Seminole Tribe,* 517 U.S. at 59 (citing *Fitzpatrick,* 427 U.S. at 455).

Some commentators have noted the similarity between *Seminole Tribe* and recent Tenth Amendment holdings, including their combined effect on federalism.[87] In *New York v. United States*,[88] a Tenth Amendment case, the Court held that the Constitution prohibits Congress from requiring state legislatures to pass certain laws or regulate according to federal directive. Specifically, the Court held that the portion of a federal statute requiring states to "choose" between two forms of commands—neither of which could be independently imposed by the federal government—was an impermissible form of federal coercion and therefore unconstitutional.[89]

The Court cited two reasons for declaring the *New York* statute unconstitutional. First, Congress did not have constitutional power to "commandeer" state legislatures by forcing them to enact laws or regulate.[90] Second, the Court held that the statute blurred the lines of political accountability because federal politicians could take credit for solving problems by enacting legislation, while state officials would be subject to criticism for executing such legislation.[91]

Five years later in *Printz v. United States*,[92] the Supreme Court read *New York* as a clear-cut rule against federal "commandeering" of state legislatures and executive officials. Relying on this rule, *Printz* held unconstitutional a federal statute requiring local law enforcement officials to perform background checks on anyone attempting to purchase a handgun. The Court found this portion of the statute unconstitutional because Congress did not possess the power under the Constitution to command (or "commandeer") state executive officials to administer or enforce federal programs.[93] The similarity between *Seminole Tribe* and these two Tenth Amendment cases did not expressly infuse the principles established in *New York* and *Printz* into Eleventh Amendment jurisprudence. *Alden* explicitly infused what *Seminole Tribe* implicitly infused.

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87 *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2208-09 (1998) (noting, while analyzing constitutional federalism as a constraint on national power, that some of the rationales in *Printz* and *Seminole Tribe* are similar); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 820 (1999) (observing the similarity between recent Eleventh and Tenth Amendment decisions).

88 505 U.S. 144 (1992).

89 *See id.* at 175-76.

90 *See id.* at 180.

91 *See id.* at 181-83.

92 521 U.S. 898 (1997).

93 *See id.* at 932-35.

B. Alden v. Maine

The Supreme Court's next significant Eleventh Amendment case was *Alden v. Maine*.[94] The *Alden* litigation began before the Supreme Court decided *Seminole Tribe*, when a group of probation officers filed suit in federal court against their employer, the State of Maine. Seeking compensatory and liquidated damages, the probation officers alleged that Maine had violated the overtime provisions of the Fair Labor Standards Act ("FLSA").[95] Prior to the decision in *Seminole Tribe*, the district court ruled that the probation officers were entitled to some coverage under FLSA and were eligible to receive damages.[96] After *Seminole Tribe* was decided, the district court dismissed the probation officers' suit.[97]

Unable to gain compensation in federal court for the wages owed them, the probation officers turned to state court. They argued that Congress had, under FLSA and pursuant to its Article I powers, authorized private suits for damages against states in their own courts, in addition to authorizing suit in federal court. The state trial court dismissed the probation officers' suit, finding that it violated Maine's sovereign immunity.[98] The Maine Supreme Judicial Court affirmed.[99]

The Supreme Court similarly affirmed, holding that Congress lacked the power under Article I to subject nonconsenting states to private suits in their own courts.[100] The *Alden* opinion consists of essentially five parts, only two of which are important for purposes of this Note.[101] The first discusses how the structure of the Constitution, history of sovereign immunity, and past Eleventh Amendment decisions combine to illustrate that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh

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[94] 527 U.S. 706 (1999).

[95] 29 U.S.C. § 207 (1994).

[96] *See* Mills v. Maine, 839 F. Supp. 3 (D. Me. 1993) (holding that probation officers are covered under FLSA because they are engaged in law enforcement); Mills v. Maine, 853 F. Supp. 551 (D. Me. 1994) (holding that probation officers are entitled to liquidated damages under FLSA).

[97] *See* Mills v. Maine, No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

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

[99] *See id.* This decision conflicted with the decision of the Supreme Court of Arkansas. *See* Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998). The United States Supreme Court granted certiorari to resolve the conflict. *See* Alden v. Maine, 525 U.S. 981 (1996).

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

[101] The third part of the opinion discusses how federal law is still binding on states and the various enforcement options available after *Alden* and *Seminole Tribe*. This is examined *infra* Part III. The fourth part of the opinion merely states that Maine had not waived its immunity. The fifth part consists of a brief conclusion and response to the dissent. Neither of the final two parts of the opinion will be discussed in this Note. While these three parts are technically part of the opinion, they did not impact the outcome or rule of the case, as both were decided in the first two parts of the opinion.

Amendment."[102] The system of federalism created by the Constitution's structure was a primary rationale for the Court's belief that the original constitutional design included state sovereign immunity. This alone illustrates the importance of general federalism principles to the holding of *Alden*. The *Alden* Court, however, also relied upon Tenth Amendment principles.

The Court determined that the Constitution's structure of government recognizes the states as sovereign entities:

> Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The [Tenth] Amendment confirms the promise implicit in the original document . . . .[103]

The Court's reliance on *Printz* and *New York* further illustrates the Tenth Amendment's influence on this section of the opinion.

The Court next discussed two ways in which the "federal system established by our Constitution preserves the sovereign status of the States."[104] First, the Constitution reserves a portion of the government's sovereignty to the states, as well as the dignity that accompanies such sovereignty. Second, it establishes a system of government in which the state and federal governments exercise simultaneous and equal authority over the people. Based upon these two observations, the Court held that the states "retain the dignity, though not the full authority, of sovereignty."[105]

This section of the Court's opinion is crucial to the final holding of *Alden*. The Court first had to establish that the doctrine of state sovereign immunity was not limited by the text of the Eleventh Amendment. If the Court had been unable to show that the Eleventh Amendment did not create, and therefore did not contain in its text the boundaries of, state sovereign immunity, the Court would not have been able to hold that states were protected from unwanted suits in state courts, as well as in federal court. The Court chose also to rely upon Tenth Amendment and general federalism principles for this proposition. This argument seems very similar to the argument in *Seminole Tribe*, except that *Seminole Tribe* did not rely upon Tenth Amendment principles. In *Alden*, the Court employed the Tenth Amendment principles enunciated in *Printz* and *New York* to extend the protection provided states by sovereign immunity, which is es-

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[102] *Alden*, 527 U.S. at 713.
[103] *Id.* at 713-14.
[104] *Id.* at 714.
[105] *Id.* at 715.

sential to the Constitution's system of federalism, to state courts. It can hardly be considered coincidence that the Court extended the Eleventh Amendment to state courts and relied upon Tenth Amendment principles in Eleventh Amendment jurisprudence for the first time in the same case.[106]

By infusing Tenth Amendment and general federalism principles into Eleventh Amendment jurisprudence, the Court concluded "that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."[107] This proposition is essential to the Court's extension of the Eleventh Amendment to state courts.

In the second part of the *Alden* opinion, the Court turned to the issue of the case, "whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts."[108] To answer this, the Court examined the Supremacy Clause, the Necessary and Proper Clause, and its prior Eleventh Amendment cases to determine what, if anything, about this issue had been decided before.

The Court held that the Supremacy Clause[109] does not automatically allow substantive law to override state sovereign immunity. It cited *Printz* for the proposition that the Supremacy Clause only elevates federal laws passed in "accord with the constitutional design."[110] Because the Court had previously determined that subjecting nonconsenting states to suit was not in accord with the constitutional design,[111] the Court rejected the premise "that substantive federal law by its own force necessarily overrides the sovereign immunity of the States."[112] In this discussion, the Court combined *Printz*'s prohibition against commandeering state governments with a concept influenced by federalism, that the sovereign states cannot be subject to private suit, to hold that the Supremacy Clause alone does not allow substantive federal law to subject nonconsenting states to private suit in their own courts.

In examining the Necessary and Proper Clause,[113] the Court employed essentially the same approach used regarding the Supremacy

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[106] *Cf.* James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 821 (2000) (stating that "*Alden*'s version of state sovereign immunity owes as much to the process federalism of *New York v. United States* and *Printz v. United States* as to earlier decisions on the scope of the Eleventh Amendment") (footnotes omitted).

[107] *Alden*, 527 U.S. at 729.

[108] *Id.* at 730.

[109] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .").

[110] *Alden*, 527 U.S. at 731.

[111] *See supra* notes 80-82 and accompanying text.

[112] *Alden*, 527 U.S. at 732.

[113] U.S. CONST. art. I, § 8 ("Congress shall have the Power . . . [t]o make all Law which shall be necessary and proper for carrying into execution the foregoing powers, and all

Clause. The Court began with the maxim: a law that "'violates the principle of state sovereignty'" is not a law *proper* for carrying Article I powers into execution.[114] Combined with the principle that subjecting nonconsenting states to private suit violates state sovereignty—because it alters the balance of federal and state power—the Court had reached its conclusion. Congress does not have, "by virtue of the Necessary and Proper Clause . . . , the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers."[115]

The Court also distinguished all prior Eleventh Amendment cases suggesting that the Amendment was inapplicable in state courts.[116] In doing so, the Court struggled to distinguish *Hall*, which held that California could subject the State of Nevada to suit in California state courts. The Court distinguished *Hall* on Tenth Amendment grounds: the Tenth Amendment granted states all powers not expressly delegated to the national government nor expressly denied the states. Therefore, because "the Constitution did not reflect an agreement[117] between the States to respect the sovereign immunity of one another," states were permitted to individually determine whether to respect the other states' sovereignty.[118] Regardless of whether this distinction is valid,[119] it is undeniably dependent on the difference between the balance of power between federal and state governments established by the Tenth Amendment and that between the individual states.

Based upon its examinations of the Supremacy and Necessary and Proper Clauses and prior Eleventh Amendment cases, the Court decided that the issue of whether Congress has authority under Article I to subject nonconsenting states to private suit in their own courts was one of first impression. In what is arguably the heart of its opinion, it next looked to historical practice and constitutional structure to resolve the issue.

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other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.").

[114] *Alden*, 527 U.S. at 732 (quoting Printz v. United States, 521 U.S. 898, 923-24 (1997)).

[115] *Id.* This conclusion illustrates how *Alden* allows Congress to create a right without a remedy. This problem is further discussed *infra* Part III.D.

[116] *See Alden*, 527 U.S. at 735-40.

[117] It does not appear that the Court describes state sovereignty as an "agreement" between the states and the federal government in comparable situations. Furthermore, if state sovereign immunity is to be understood as a broad constitutional protection of states' "dignity," it does not appear to matter who is subjecting the nonconsenting state to private suit. Even if it is a state that authorizes the suit, it still offends the nonconsenting state's sovereignty and dignity.

[118] *Alden*, 527 U.S. at 738.

[119] *See* Gary J. Simson, *The Role of History in Constitutional Interpretation: A Case Study*, 70 CORNELL L. REV. 253 (1985) (criticizing the Court's use of history in *Nevada v. Hall*).

Prior to *Alden*, an absence of prior congressional practice of a specific type had only been used in Tenth Amendment cases to show that Congress lacked that specific power.[120] However, *Alden*'s discussion of congressional practice relied on an absence to show that Congress lacked power under Article I to subject nonconsenting states to private suit in state courts.

For this proposition, the Court again cited *Printz* to the effect that, because Congress has passed many statutes in the past authorizing suits in state courts, none of which subjected states to suit, Congress assumed it lacked such power to subject nonconsenting states.[121] Furthermore, the Court quoted *Printz* to explain why recent federal statutes authorizing private suits against states in their own courts did not provide evidence of Congress's power to do so: "'they are of such recent vintage that they are [not] probative . . . of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice.'"[122]

In using the structure of the Constitution to show that Congress lacks the power under Article I to subject nonconsenting states to private suit, the Court looked "to the essential principles of federalism,"[123] focusing on how Congress's exercise of such power would affect the balance of federal and state power. The Court reasoned that to permit Congress such power would disrupt political accountability. This may be the Court's most obvious infusion of Tenth Amendment principles into Eleventh Amendment jurisprudence, as this is the rationale of *New York v. United States*.[124]

The Court began by holding that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[125] The remainder of this section of the opinion is a discussion of how, by subjecting nonconsenting states to private suit, Congress has not done so.

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[120] *See* Printz v. United States, 521 U.S. 898, 907-08 (1997). *See also* Jackson, *supra* note 87, at 2187-90 (criticizing the Court's analysis of past congressional practice in *Printz*); Pfander, *supra* note 106, at 823-24 (criticizing the Court's "argument from novelty" and noting its origin in Tenth Amendment cases).

[121] *See Alden*, 527 U.S. at 743-45. This argument ignores the fact that prior to *Seminole Tribe*, Congress presumed it possessed the power to subject nonconsenting states to suit in federal court, so there was no need for Congress to enlist state courts.

[122] *Id.* at 744 (quoting *Printz*, 521 U.S. at 918).

[123] *Id.* at 748.

[124] This may also be the Court's least persuasive use of Tenth Amendment principles in *Alden*. The argument is criticized *infra* Part III.A.

[125] *Alden*, 527 U.S. at 748 (citing *Printz*, 521 U.S. at 935; United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring)); New York v. United States, 505 U.S. 144, 188 (1992)).

This appears to be essentially the same argument employed by the Court in its discussion of how the concept of state sovereign immunity was an essential part of the original constitutional design.[126] The Court held that state sovereign immunity was essential to the Constitution's federalism. Its importance to the balance of federal and state power is illustrated and affirmed by Tenth Amendment principles. Furthermore, because state sovereign immunity was part of the original constitutional design, and the Tenth Amendment prohibits the federal government from exercising powers not granted it by the Constitution, this protection from unwanted suit should not be limited to federal court, but should protect the states in their own courts. Thus, the Court used federalism to expand the Eleventh Amendment beyond its text, and then used Tenth Amendment principles to support this expansion and apply it to state courts.

Once again, the Court held that one of the purposes of state immunity is to "preserve the dignity of the States."[127] In all prior Eleventh Amendment cases in which the Court claimed to be preserving state "dignity," the Court dealt only with state immunity from suit in federal court.[128] In *Alden*, however, the Court held that "a congressional power to authorize private suits against nonconsenting States in their own courts would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum."[129] The heightened offense, as the Court perceived it, would result because such power "is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State . . . . Such plenary federal control . . . denigrates the separate sovereignty of the States."[130]

In *Alden*, as in *Seminole Tribe*, it seems that this rationale is basically an argument that state sovereign immunity is an essential method for preserving the Constitution's balance of power. While preserving state "dignity" is an established rationale in Eleventh Amendment cases, the argument is premised on the central principle of federalism: the Constitution created states that are sovereign in

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[126] *See supra* notes 104-07 and accompanying text.

[127] *Alden*, 527 U.S. at 749. See also *supra* notes 76-78, for the suggestion that this argument is actually one based on concepts inherent in federalism.

[128] *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996).

[129] *Alden*, 527 U.S. at 749. *But see* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 966-67 (2000) (citing Supreme Court precedent holding that it is more deferential to state sovereignty to decide federal claims against states in state courts than in federal courts).

[130] *Alden*, 527 U.S. at 749 (citation omitted). The Court listed other reasons that the power to subject states to private suit in their own courts is offensive. *See id.* at 750-51 (listing, as offensive, the potential threat to states' fiscal integrity, interference with states' creation of public policy, and "unwarranted strain on the [s]tates' ability to govern in accordance with the will of their citizens").

certain areas in which the federal government may not interfere. Furthermore, *Alden*'s use of this argument is influenced by Tenth Amendment principles. Though the Court did not explicitly rely upon the anti-commandeering rule established in *New York* and *Printz*, it did employ the rule as a reason why congressional power to subject nonconsenting states to private suit in state court is more offensive than the power to do so in federal court.

Perhaps the most obvious use of Tenth Amendment principles in *Alden* is the Court's use of the principle of political accountability. It is a Tenth Amendment principle that political accountability limits the means used by the national government to regulate states.[131] In its discussion of the Constitution's structure, the Court held that when Congress authorizes private suits against nonconsenting states in state courts, it "asserts authority over a State's most fundamental political processes, [and] strikes at the heart of the political accountability so essential to our liberty and republican form of government."[132]

In *New York* and *Printz*, the Court discussed political accountability in terms of preventing the federal government from usurping state legislative and executive powers by forcing states to implement federal mandates. The problem, according to the Court, is that state governments will suffer politically from citizen anger over what are really federal programs. The federal statute at issue in *Alden*, however, did not raise political accountability concerns; it merely provided a federal cause of action for citizens whose rights have been violated by a state. Nevertheless, the *Alden* Court argued that by authorizing private suits against the states to recover damages, the federal government avoids the political responsibility for its actions.[133] Therefore, subjecting nonconsenting states to private suits in state court not only disrupts the balance of state and federal power created by the Constitution, but it also disrupts the system of political accountability inherent in the Tenth Amendment.

Overall, Tenth Amendment and general federalism principles greatly influence current Eleventh Amendment jurisprudence. Prior to *Seminole Tribe*, the Court presumed constitutionality so long as Congress used its enumerated powers to intrude upon the Eleventh Amendment. In *Seminole Tribe*, the Court prevented Congress from using its enumerated powers to subject nonconsenting states to private suits in federal court, in order to preserve the Constitution's balance

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[131] *See* Printz v. United States, 521 U.S. 898, 920 (1997) (explaining that the Constitution establishes two parallel political systems, federal and state, each with a direct relationship to the people).

[132] *Alden*, 527 U.S. at 751.

[133] *See id.* at 751-52. This argument can only be understood if it is considered, as it is in *Alden*, *see id.* at 755-56, along with the federal government's right to bring suits against a state on behalf of individuals whose federal rights were violated by the state. Justice Kennedy's argument is further discussed *infra* Part III.A.

of federal and state power. Then, in *Alden*, the Court went one step further, holding "that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."[134] According to the Court, state sovereignty, affirmed and further protected by the Tenth Amendment, necessitated such an extension of Eleventh Amendment jurisdiction.

III. PROBABLE CONSEQUENCE OF INFUSION

The most obvious, and troubling, consequence of the Court's recent infusion of Tenth Amendment and general federalism principles into the Eleventh Amendment is its effect on Congress's powers to regulate the states. As a result of this infusion, the Eleventh Amendment prohibits Congress from using its Article I powers to enlist any court to police state compliance with federal legislation.[135] Furthermore, the Tenth Amendment prohibits Congress from mandating that the states use their legislative or executive resources to enforce federal law.[136]

The cumulative effect of the Court's recent use of the Tenth and Eleventh Amendments severely limits the means by which Congress can regulate states in areas within Congress's Article I powers.[137] Therefore, despite the validity of applying FLSA against the states and Maine's alleged violation, the only remedies available to injured parties are injunctive relief, prohibiting the appropriate state officer from further violating FLSA, or to enlist the federal government to sue on the injured parties' behalf.[138] Neither remedy is adequate; the former does not compensate injuries, while the latter is an unlikely occurrence. Thus, FLSA and similar statutes create rights for which there are insufficient remedies.

Such is the incongruity between federal rights and available remedies. As long as Congress acts within its Article I powers, it is not a violation of state autonomy for Congress to force states to conform to federal standards. However, it is a violation of state autonomy for Congress, even if it acts under its Article I powers, to use any court to enforce its constitutionally valid legislation against states. Professor Durchslag has commented on this paradoxical jurisprudence: "If the Tenth Amendment is not read to protect the states' autonomy because prior judicial decisions have granted such a wide berth to Congress under Article I, the Eleventh Amendment will suf-

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[134] *Alden*, 527 U.S. at 754.

[135] *See supra* Part II.

[136] *See supra* notes 88-93 and accompanying text.

[137] *See* Durchslag, *supra* note 11, at 1377-79.

[138] *See Alden*, 527 U.S. at 754-57 (discussing an individual's option for relief against a state following *Seminole Tribe* and *Alden*).

fice to deny Congress the power to enforce its policies against the states."[139]

Professor Durchslag's comment is perfectly illustrated by the recent decision in *Kimel v. Florida Board of Regents*.[140] In *Kimel*, the Court was asked to decide whether Congress had validly authorized private suits against nonconsenting states under the Age Discrimination in Employment Act ("ADEA"). Previously, the Court had "held that the ADEA constitutes a valid exercise of Congress' power . . . [under] Art. I, § 8, cl. 3, and that [ADEA] did not transgress any external restraints imposed on the commerce power by the Tenth Amendment."[141] Notwithstanding and consistent with Professor Durchslag's comment, the Supreme Court proceeded to hold that Congress lacked the power to subject nonconsenting states to private suits under ADEA.[142]

One would think that logical arguments, sound policy, accurate history, and constitutional text would support the decisions largely responsible for this strange constitutional analysis, *Seminole Tribe* and *Alden*.[143] Instead, these decisions are largely the result of the Court's infusion of Tenth Amendment and general federalism principles into the Eleventh Amendment.

In completing this infusion, the Supreme Court has relied upon four main arguments: political accountability, preserving state dignity and fiscal resources, the "*Hans* argument," and the "balance argument." Of these four arguments, the first two are Tenth Amendment and federalism arguments, infused into the Eleventh Amendment. The third is based on what is largely considered erroneous history, while the fourth is the result of *Seminole Tribe* and *Alden*'s influence on Eleventh Amendment jurisprudence. None of these four arguments are persuasive reasons for limiting Congress's enforcement powers and preventing individuals from having a legitimate remedy if their rights are violated by a state.

A. Political Accountability

The argument that political accountability is destroyed when the federal government requires state institutions to obey federal man-

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[139] *See* Durchslag, *supra* note 11, at 1379.

[140] 120 S. Ct. 631 (2000).

[141] *Id.* at 643 (citing EEOC v. Wyoming, 460 U.S. 226, 243 (1983)).

[142] *Id.* at 640. The Court's decision focused almost exclusively on Congress' power under § 5 of the Fourteenth Amendment to subject nonconsenting states to private suit because the Court had already established in *Seminole Tribe* and *Alden* that Congress lacked such power under any other provision of the Constitution. *See supra* Part II.

[143] *But see* William P. Marshall, *Understanding* Alden, 31 RUTGERS L.J. 803, 806 (2000) (observing "that text, history, and policy do not explain *Alden*").

dates originated in *FERC v. Mississippi*,[144] and later rose to prominence in *New York* and *Printz*. It was not until *Alden*, however, that the Supreme Court argued that the Eleventh Amendment reinforces political accountability.[145]

Although the Court has varied its explanation of how the Eleventh Amendment reinforces political accountability,[146] its best argument is that by authorizing private suits against the states to recover damages rather than suing the state itself, the federal government avoids political responsibility for its actions.[147] Furthermore, according to this argument, important protections for the states are lost when the federal government authorizes individuals to recover damages against states. In such cases, the individual's motivation is her personal claim—concerns for the public good are not likely to be considered. Federal officials, the argument goes, are more likely to be influenced by considerations of the public good because of the relationship between federal and state entities. Therefore, federal officials would not be focused on the possible gains available from litigation, but would be motivated by long-term enforcement strategies and maintaining federal-state relations.

The political accountability argument is of limited value; it applies only to federal legislation authorizing private suits in state courts. Federal legislation subjecting nonconsenting states to private suits in federal court does not violate political accountability. When a federal court orders a state to compensate an individual, the federal government is in no way dodging political responsibility, especially when the federal statute authorizing the private suit imposes the obligation on the state. Even when applied to federal legislation subjecting nonconsenting states to private suits in state courts, the argument

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[144] 456 U.S. 742, 775 (1982) (O'Connor, J., concurring in part and dissenting in part). *See generally* Eric M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power:* New York v. United States *Revisited*, 15 CONST. COMMENTARY 355 (1998) (examining the historical basis for political accountability); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993) (analyzing the validity of political accountability).

[145] *Cf.* William P. Marshall & Jason S. Cowart, *State Immunity, Political Accountability, and* Alden v. Maine, 75 NOTRE DAME L. REV. 1069 (2000) (addressing whether the political accountability argument as used in *Alden* supports the decision in *Alden*).

[146] The Court relates the issue of political accountability to federal and judicial interference with the state budgetary/fiscal process at two points in its *Alden* opinion. *See* Alden v. Maine, 527 U.S. 706, 751 (1999) ("If the principle of representative government is to be preserved to the States, the balance between competing [legislative claims for compensation] must be reached after deliberation by the political process established by the citizens of the States, not by judicial decree mandated by the Federal Government and invoked by the private citizen."); *id.* at 752 ("A State is entitled to order the processes of its own governance, assigning to the political branches, rather than the courts, the responsibility for directing the payment of debts."). This argument is discussed *infra* Part III.B.

[147] *See Alden*, 527 U.S. at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

that the Eleventh Amendment reinforces political accountability is flawed for two reasons.

First, forcing a state into court under federal legislation impairs political accountability without respect to the relief sought. If, as according to *Alden*, subjecting nonconsenting states to private suits in state courts violates political accountability, nonconsenting states should never be subject to private suits authorized by federal legislation. This is not the case, however. States are still subject to private suits brought to obtain injunctive relief against state officials based upon federal law. Not only should political accountability concerns apply equally, regardless of the relief sought by the individual, but prospective relief might actually violate political accountability issues more than damage relief.[148]

Prospective relief may be more intrusive because an injunction against a state officer prevents the state from enforcing its own policies, directly interfering with the structure of political responsibility by nullifying the state legislative decision. On the other hand, an individual who successfully sues the state does not directly interfere with political accountability.[149] When an individual receives damages from a state, although interfering with political accountability by forcing the state to pay the individual money originally allocated for other purposes, the state still has the ability to choose where the money to pay damages comes from and to do so consistent with prior state legislative decisions. When an individual gains an injunction against a state officer, however, the state must follow the court's order, completely nullifying state autonomy.

Second, the Court's political accountability argument in *Alden* can only be understood when considered with the exception that allows the federal government to sue the states on behalf of individuals for prospective and retroactive relief.[150] This explanation of the argument actually creates a system of two-level accountability. Congressional enactment of the law creates the first level, subjecting nonconsenting states to private suits for damages and protecting certain rights of individuals. The second level is then imposed when the federal executive branch enforces the law by bringing suit against the state.[151]

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[148] *See* William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 847 (2000) (arguing that affirmative injunctions, those ordering state officers to perform specific acts, are the most intrusive form of relief, when considered in terms of common law and equitable doctrines).

[149] *See* Marshall, *supra* note 143, at 824 (explaining that suits for damages do not threaten state survival).

[150] *See* Durchslag, *supra* note 11, at 1382.

[151] *See id.*

B. State Dignity and Fiscal Resources

Another of the Supreme Court's arguments in *Seminole Tribe* and *Alden* is that the Eleventh Amendment protects states' fiscal resources and dignity. In other words, by preventing individuals from recovering monetary damage awards against nonconsenting states, the Eleventh Amendment allows states to decide how to allocate public fiscal resources.[152] Also, in both cases, the Court argued that when a nonconsenting state is made subject to suit by federal law, the dignity of the state is violated. Both of these arguments are extremely under-inclusive and thus flawed.

The argument that *Alden* protects state fiscal resources and allows state governments to make difficult decisions regarding the allocation of public resources is under-inclusive.[153] There are too many ways in which state fiscal resources and decision-making abilities are subject to federal invasion for this argument to be persuasive. *Alden* expressly approved actions brought under federal legislation enacted pursuant to Section 5 of the Fourteenth Amendment or directly by the federal government.[154] Actions brought by individuals seeking injunctive relief, if successful, could possibly cost the state more money in adjusting their policies than actions seeking damages.[155] Furthermore, states may be sued in the courts of other states.[156] Even private suits for damages, not directly against the state itself,[157] could end up invading state fiscal resources, if the state chooses to indemnify their officers or assume some of the liable municipalities' costs. Therefore, if protecting states' fiscal resources is the purpose of the Eleventh Amendment, the limited immunity provided in *Seminole Tribe* and *Alden* will not accomplish that purpose.

The argument that the Eleventh Amendment preserves states' dignity is also extremely under-inclusive. According to the Court's

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[152] *See Alden*, 527 U.S. at 750 ("The potential national power would pose a severe and notorious danger to the States and their resources.").

[153] *But see* Marshall, *supra* note 15, at 1385-87 (arguing that the most important purpose of the Eleventh Amendment, and that purpose best supported by history, is to protect the states' fiscal integrity and their right to decide how to allocate such resources).

[154] *See Alden*, 527 U.S. at 756 ("[I]n adopting the Fourteenth Amendment, the people required the States to surrender a portion of their sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.").

[155] *Cf.* Edelman v. Jordan, 415 U.S. 651, 682 (1974) (Douglas, J., dissenting) (arguing that "the nature of the impact on the state treasury is precisely the same" when an injunction is granted as it is when a damage award is assessed); *but cf. id.* at 668 (majority opinion) (replying to Douglas that "[s]uch an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*").

[156] *See supra* notes 47-50 and accompanying text.

[157] *See Ex parte* Young, 209 U.S. 123 (1908) (holding that a state officer acting as an agent of the state is not immune from suit under the Eleventh Amendment); Lincoln County v. Luning, 133 U.S. 529 (1890) (holding that cities and political subdivisions are not immune from suit).

reasoning, states' dignity is equally violated by a state being subject to suit in another state's court, at the hands of the federal government, or under federal law enacted pursuant to Section 5 of the Fourteenth Amendment, as it would by an individual suing pursuant to federal law enacted under Congress's Article I powers. Furthermore, it is difficult to understand how states' dignity is violated when it is sued in its own courts. If states are protected from suit in federal court yet subject to suits in their own state courts, they gain considerable protections for their dignity. For example, states will have the luxury of having their own judges and, possibly more importantly, procedures used.[158]

The Court is not asking the correct question when it makes these arguments about protecting state fiscal resources and dignity through the Eleventh Amendment. The Court should ask whether these concerns are sufficient to justify depriving injured individuals of the ability to seek compensation. In *Alden*, not only were the probation officers injured by the state and denied compensation, but they had, theoretically, succeeded politically in gaining federal protection and remedies against the states. Asking this question most likely requires the Court to adopt a balancing test in Eleventh Amendment jurisprudence and change its current policy of simply ruling in favor of the states.[159]

C. The Hans *Argument*

The *Hans* argument is based upon an interpretation of the history of state sovereign immunity history prior to the adoption of the Eleventh Amendment. The Supreme Court in *Hans* adopted this interpretation, holding that the Eleventh Amendment merely reaffirmed Article III and thus did not alter the original understanding of state sovereign immunity.[160] According to this original understanding, states are not subject to suit without their consent. Furthermore, this understanding, preserved by Article III, would be of no import if Congress could, under Article I, create jurisdiction that subjects nonconsenting states to private suit.

Assuming that *Hans* was correctly decided, this argument is powerful support for *Seminole Tribe*. If Article III does not grant federal courts jurisdiction over private suits brought against noncon-

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[158] *See* Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 288-89 (1973) (Marshall, J., concurring) (noting that state judicial procedures may protect that dignity of a state).

[159] *See* Durchslag, *supra* note 11, at 1394-97 (suggesting the adoption of a balancing test in Eleventh Amendment law).

[160] *See supra* notes 28-31 and accompanying text.

senting states, Congress, according to *Marbury v. Madison*,[161] does not possess the authority to expand the jurisdiction of the federal courts to include such cases. Although there has been a great deal of debate regarding *Hans*, the Court has largely ignored such debate, and *Hans* has been binding authority for more than a century. Furthermore, the current majority of the Court does not seem to have any inclination to revisit *Hans*. Even assuming *Hans* was correctly decided, this argument has at least one major flaw preventing it from being sufficient to justify the enforcement problem created by *Seminole Tribe* and *Alden*.

This argument's biggest flaw is the Court's creation of exceptions to Eleventh Amendment immunity. It is nonsensical to hold that a state's sovereign immunity is violated when called into federal court, but not when it is called into another state's courts. If defending actions in a foreign jurisdiction violates state sovereign immunity, then it should not matter whether the foreign jurisdiction is a federal court or a court in another state. Either way, a nonconsenting state is subject to suit in the courts of another sovereign.

It is similarly nonsensical to argue that a state's sovereign immunity is violated when called into federal court to defend against allegations brought by an individual, but not when the federal government, acting on behalf of the individual, forces the state to defend against those allegations.[162] According to the *Hans* argument, a state's sovereign immunity is violated when it is forced to defend its actions in a foreign jurisdiction. Therefore, it should not matter if the opposing party is the federal government or an individual, especially when identical claims would be asserted. In both instances, the state, without its consent, is called into a foreign jurisdiction and forced to stand trial against the same allegations.

Finally, it does not make sense that a state's sovereign immunity is violated when sued under legislation enacted pursuant to Congress's Article I powers, but not when sued under legislation enacted pursuant to Section 5 of the Fourteenth Amendment.[163] The main rationale of the *Hans* argument is that a state's sovereign immunity is violated whenever it is subjected to private suit in federal courts, without its consent. Accordingly, it should not matter under which

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[161] 5 U.S. (1 Cranch) 137, 174 (1803) ("If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.").

[162] *See* Alden v. Maine, 527 U.S. 706 (1999) (reaffirming the ability of the federal government to sue nonconsenting states on behalf of individuals).

[163] *See id.* at 756 (asserting the ability of Congress to abrogate state sovereign immunity in federal court under § 5 of the Fourteenth Amendment); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding that Congress may subject nonconsenting states to private suit in federal court under § 5 of the Fourteenth Amendment).

power Congress is legislating when authorizing private suits against nonconsenting states. Regardless of whether Congress is acting pursuant to Article I or Section 5, the nonconsenting state is still subjected to private suits in federal court.

The effect of these exceptions can be partially explained in one of two ways. Either the Eleventh Amendment, in protecting state sovereign immunity, is extremely under-inclusive, or the Eleventh Amendment cannot be justified by claiming that it protects sovereign immunity. In either case, the *Hans* argument fails to support the Court's denial, in *Seminole Tribe* and *Alden*, of a remedy to individuals whose rights have been violated.

A lesser flaw, at least in respect to *Alden*'s holding, is the limited historical evidence cited by the Court. The Court discussed how history shows that states did not waive their sovereign immunity to suit in federal court when they ratified the Constitution and joined the United States. This history does not answer, let alone even mention, the issue of whether Congress, when acting pursuant to constitutionally legal powers, can subject nonconsenting states to suits in their own courts.[164]

The *Alden* Court attempts to cover this flaw by arguing that if Congress thought it possessed the power to subject nonconsenting states to private suits in state courts, it would have exercised this power long ago.[165] This cover is unpersuasive, however—until *Seminole Tribe* in 1996, Congress thought it could authorize private suits in federal court against nonconsenting states,[166] obviating any reason for Congress to resort to state courts. Therefore, the *Hans* argument is poor support for *Alden*. To support *Seminole Tribe*, the Court could have relied upon the history adopted in *Hans*, but it did not do so, instead relying on general federalism principles.

D. The Balance Argument

The final, and arguably most persuasive, argument used to justify the holdings in *Seminole Tribe* and *Alden* is that Eleventh Amendment jurisprudence creates an acceptable balance between federal supremacy and state sovereignty.[167] It does so by providing remedies for the most important federal rights, while preserving the

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[164] *Cf.* Printz v. United States, 521 U.S. 898, 907-08 (1997) (distinguishing between the federal government commandeering state executive processes, which is unconstitutional, and commandeering state courts, which is constitutional because of the Supremacy Clause).

[165] *See Alden*, 527 U.S. at 743-45.

[166] *See supra* notes 58-60 and accompanying text.

[167] While this argument is not expressly made in either *Seminole Tribe* or *Alden*, it is implied in both cases when the Court discusses how there are still enforcement options available to prevent the states from violating federal law. *See Alden*, 527 U.S. at 754-57; Seminole Tribe v. Florida, 517 U.S. 44, 73-76 (1996).

authority and status of the sovereign states. This argument is largely based on the three primary exceptions to the Eleventh Amendment: (1) allowing individuals to gain an injunction to prevent state officials from violating federal law,[168] (2) allowing the federal government to enforce federal law by suing states,[169] and (3) allowing Congress to subject nonconsenting states to private suits under Section 5 of the Fourteenth Amendment.[170] Furthermore, these exceptions are only necessary when states have chosen to violate federal law—which the Court is "unwilling to assume"[171]—and no state remedy is provided. Essentially, this argument can be summed up as "the system ain't broke so there is no need to fix it."[172]

However, this argument begs the question: is the system really not broken—that is, does it work? An injunction does not provide a remedy providing adequate compensation to an individual whose rights were violated.[173] Furthermore, it seems politically and administratively unlikely that the federal government will sue states on behalf of individuals. Politically, an agency suing a state on behalf of an individual is likely to suffer congressional backlash.[174] Administratively, the federal government does not possess the resources to investigate, let alone commence an action for, each allegation of state violation of individuals' federal rights. Moreover, it has been suggested that the Court might remove the federal government's ability to sue on behalf of individuals,[175] as it has done with states.[176] Finally, the Court seems to be on course for restricting Congress's ability to use Section 5 of the Fourteenth Amendment to subject nonconsenting states to private suits,[177] thus eliminating even more remedies available to individuals against states.

An example of how the system created by the Eleventh Amendment "works" can be found in *Alden*. In the case of the probation officers, the State of Maine violated federal law by not paying suffi-

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[168] *See Ex parte* Young, 204 U.S. 123, 167 (1908).

[169] *See* United States v. Texas, 193 U.S. 621, 624-26 (1892).

[170] *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[171] *Alden*, 527 U.S. at 756.

[172] Durchslag, *supra* note 11, at 1386.

[173] *See generally* Vicki C. Jackson, Seminole Tribe, *the Eleventh Amendment, and the Potential Evisceration of Ex parte* Young, 72 N.Y.U. L. REV. 495 (1997) (analyzing *Seminole Tribe*'s effect upon the *Ex parte Young* exception to the Eleventh Amendment).

[174] *See* Durchslag, *supra* note 11, at 1387-88.

[175] *See id.*; Massey, *supra* note 11, at 68.

[176] *See* New Hampshire v. Louisiana, 108 U.S. 76 (1883) (holding that the Eleventh Amendment barred cases where a state attempted to sue another state on behalf of its citizens because the real parties in interest were the individuals, not the plaintiff state).

[177] *See* Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding that Congress' power under § 5 of the Fourteenth Amendment is to be construed narrowly); *see also* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 860-61 (2000) (suggesting that the Court may narrow alternative mechanisms of relief).

cient overtime wages—the two district court rulings made before *Seminole Tribe* was decided make it clear that Maine had, in fact, violated the FLSA.[178] If state remedies were available to the probation officers, they would not have been forced to first sue in federal court and then sue in state court under a federal cause of action. There was no reason to seek an injunction against the appropriate state official, as it would not compensate them for their back pay. Obviously, the federal government did not sue on their behalf and the rights they sought to enforce were not covered by Section 5 of the Fourteenth Amendment. Therefore, a group of individuals, granted the right to overtime pay by Congress, had their federal rights violated by the State of Maine without a means for receiving compensation for their losses. It appears from this example that perhaps the system is broken.

E. The Tenth Amendment

The Court's most persuasive argument to support the effect of Eleventh Amendment jurisprudence on federal enforcement power is that, because it protects states while allowing enforcement of individuals' most important constitutional rights, it should not be changed. The current criticism of this argument, that it is based on a false premise (that the system works), is subject to subjective individual interpretation of current Eleventh Amendment jurisprudence. It is possible that reasonable people may disagree on whether the system works and, therefore, disagree on whether *Seminole Tribe* and *Alden* were "correctly" decided. It may be that the Court, by infusing Tenth Amendment principles into the Eleventh Amendment, has in fact provided a less subjective rebuttal to the balance argument and provided further proof that *Alden* was wrong.

The Tenth Amendment reserves to the states all powers neither granted to the federal government nor prohibited to the states by the Constitution.[179] While this amendment stands for the "truism" that states possess sovereign powers that cannot be infringed by the federal government acting unconstitutionally,[180] it also stands for the proposition that the federal government can intrude upon states' sovereignty by using powers granted in the Constitution.

Assuming, as is argued here, the Court did infuse the Tenth Amendment principles into Eleventh Amendment jurisprudence and relied on those principles in applying the Eleventh Amendment to state courts, it would appear that Congress should be able to use its

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[178] *See supra* note 96.

[179] The Tenth Amendment states: "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.

[180] *See* United States v. Darby, 312 U.S. 100, 124 (1941).

enumerated powers to intrude upon states' Eleventh Amendment sovereignty from suit, as long as such suit is limited to the state's own courts. In its simplest form, the argument is that state sovereign immunity in a state's own courts, if in fact preserved by the Tenth Amendment, is subject to Congress's enumerated powers. Thus, Congress, pursuant to its enumerated powers, and under the Necessary and Proper Clause, can subject nonconsenting states to private suits in their own courts. Therefore, *Alden* was incorrectly decided. Although the Eleventh Amendment is part of the Constitution, it is limited by its text to apply to only federal court jurisdiction and, therefore, should not be expanded to prevent such jurisdiction in state courts.

Congress's ability to subject nonconsenting states to private suits in state court is not inconsistent with current Tenth Amendment jurisprudence. When exercised, Congress has not usurped state legislative power. Instead, Congress has, acting pursuant to powers expressly granted it under the Constitution, provided a federal remedy for individuals against states that violate federally guaranteed rights. Because a federal statute is being employed to provide the remedy, the federal government will be politically accountable for its actions.

Furthermore, the state being sued would be provided protections inherent in its own judicial system—use of the states' judges, judicial procedures, and rules. Forcing individuals to sue the state in its own courts would not alter the constitutional balance of state and federal power because of the protections afforded the state by its own judicial system. In fact, Professor Jackson has argued that Supreme Court precedent holds that it is more deferential to state sovereignty for state courts to decide federal claims against the states in state courts rather than in federal courts.[181] Therefore, allowing Congress to authorize such suits would be consistent with the Court's recent infusion of general federalism principles into Eleventh Amendment jurisprudence, and its accompanying concern for preserving the Constitution's balance of federal and state power.

Finally, permitting Congress this power would solve the enforcement problems created by *Seminole Tribe* and *Alden*. Congress would have a constitutionally permissible means—Article I—to exercise its powers against states. This may also eliminate the need for many of the exceptions that have evolved throughout the history of Eleventh Amendment jurisprudence.

The Court could respond that the Constitution does not in fact grant Congress the power to subject nonconsenting states to private suits, regardless of the forum in which the suit is brought. According to the Court, state sovereign immunity is part of the original constitu-

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[181] *See* Jackson, *supra* note 129, at 966-67.

tional design. Not only is this argument circular, but it is also persuasive only if the view of history advanced in *Alden* is accepted. However, four current Justices[182] and an overwhelming majority of scholars[183] find this history incorrect. Therefore, it seems that by allowing Congress, pursuant to its Article I powers, to subject nonconsenting states to private suits in their own courts, the Court will be able to preserve the balance of state and federal power created by the Constitution (which seems to be the current goal of Eleventh Amendment jurisprudence) and provide individuals a remedy under federal law against states.

CONCLUSION

Prior to *Seminole Tribe* and *Alden*, Eleventh Amendment jurisprudence started with the presumption that Congress, acting pursuant to its enumerated powers, could intrude upon states' Eleventh Amendment immunity from suit. This presumption was necessary to protect individuals' federal rights against states that in many instances were unwilling to adopt regulatory programs consistent with national policy. Beginning in *Seminole Tribe*, however, the Court shifted its focus in Eleventh Amendment jurisprudence from the protection of individual rights to the balance of federal and state power.

In *Seminole Tribe*, the Court held that Congress did not possess the power under Article I to subject nonconsenting states to private suits in federal court. The Court found it necessary to thus limit congressional power to preserve the constitutional balance of state and federal power. Then, in *Alden*, the Court held that Congress could not authorize, under its Article I powers, private suits against the states in their own courts. The Court relied upon the Tenth Amendment to extend the Eleventh Amendment, textually limited to federal courts, to state courts; thus, the Court prevented Congress from altering the balance of state and federal power created by the Constitution and protected by the Tenth Amendment.

These cases effectively prevent Congress from having any constitutionally permissible means by which to enforce federal legislation, constitutionally enacted pursuant to Article I, against states. This enforcement problem does not allow the federal government, historically entrusted with protecting individual liberties and rights, to effectively prevent states from violating individuals' federal rights. Furthermore, the arguments advanced by the Court in defense of this

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[182] *See* Alden v. Maine, 527 U.S. 706, 760 (1999) (Souter, J., dissenting, joined by Stevens, J., Ginsburg, J., Breyer, J.) ("There is no evidence that the Tenth Amendment constitutionalized a concept of state sovereignty as inherent in the notion of statehood.... The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding.").

[183] *See* sources cited *supra* note 15.

enforcement problem are flawed and do not justify, even if taken together, denying all practical remedies to those whose rights are violated by states.

Finally, it appears that if in fact the Court is relying upon Tenth Amendment principles to construe the Eleventh Amendment to apply to state courts, incorrect historical analysis is the only barrier preventing Congress from using its enumerated powers to subject nonconsenting states to private suits in their own courts. Such suits would be more deferential to the states' dignity and sovereignty by providing the defendant states with many protections not provided in federal court. Therefore, it seems that by limiting the permissible means available to Congress in enforcing its Article I powers to authorizing private suits against states only in state courts, the Constitution's balance of power will not be significantly altered. Furthermore, this limitation will also help to clean up the exceptions that currently dominate Eleventh Amendment jurisprudence, as they will no longer be needed to enforce federal law against states.

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