Alden v. Maine: Protecting the States at the Expense of the People

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The jurisdiction of the Court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.¹

I. INTRODUCTION

*Alden v. Maine*² presented the Supreme Court with a constitutional question of first impression. There, probation officers filed suit in federal court against their employer, the state of Maine, under the Fair Labor Standards Act of 1938 (the “FLSA”) alleging the State had violated the Act’s overtime provisions. The United States District Court for the District of Maine dismissed the suit on the basis of the Supreme Court’s ruling in *Seminole Tribe of Florida v. Florida.*³ Petitioners refiled their suit in state court. The Maine Supreme Judicial Court affirmed the trial court’s dismissal of the action on the grounds that the provision of the FLSA that authorized private suits against a state in its own courts violated the principle of sovereign immunity. The Supreme Court affirmed in an opinion authored by Justice Kennedy holding that the Eleventh Amendment⁴ merely confirmed the principle of sovereign immunity that was implicit in the Constitution. Although earlier Eleventh Amendment cases⁵ rendered the result in *Alden* predictable,
the Court stepped beyond Eleventh Amendment jurisprudence by asserting that sovereign immunity found its basis not in that Amendment, but in the structure and history of the Constitution and the Tenth Amendment. In reaching this conclusion, the Court examined the debates surrounding the ratification of the Constitution and adoption of the Bill of Rights, pre-Constitution state law, writings of members of the founding generation, and prior Eleventh Amendment jurisprudence. The Court concluded that the founding generation did not contemplate state suability in their scheme of federalism, asserting that sovereign immunity had always been a part of the American consciousness. In doing so, the Court relied on a literal interpretation of some of the founders' words, but ignored the evolutionary nature of American government envisioned by those men. This reliance on federalism to support the right of state sovereign immunity was a misapplication of modern and, arguably, 1787 concepts of federalism.

The Founders sought to create a system that would permit Congressional action to promote unity, while considering the people's fears of an overreaching central government. By 1787 many citizens recognized the need for a central national authority to prevent states from destroying the Articles of Confederation. Accordingly, certain powers were ceded to the federal government in order to insure stability and security, both of which had been lacking under the Articles of Confederation. By permitting the states to invoke the right of sovereign immunity through the structure and

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7. James Wilson, who would later write with the majority in *Chisholm v. Georgia*, recognized the necessity of unity, stating: The tables at length began to turn. No sooner were the State Governments formed than their jealousy and ambition began to display themselves. Each endeavored to cut a slice from the common loaf, to add to its own morsel, till at length the confederation became frittered down to the impotent condition in which it now stands. *Id.* at 127.

8. Shay's rebellion stands as the most striking example of the problems under the Articles of Confederation where Revolutionary War veterans formed small armies to prevent the collection of debts. 1 Alan Brinkley, et al., American History: A Survey 159-60 (8th ed. 1991).
history of the Constitution, the *Alden* Court undermined the concept of federalism because state sovereign immunity ultimately permits states to ignore the federal government in federal issues, and leaves individuals unprotected.

The *Alden* majority provides only one side of the constitutional debate on state sovereign immunity. The true intentions of the founders are ultimately impossible to discern, but their ideas on sovereign immunity serve a vital purpose in interpreting the meaning behind the words of the Constitution. The Court, looking only to the words of a few men from the founding generation, ignored the fundamental purpose of the Constitution. The object of the Constitution was not the protection of states, but the protection of individuals. The federal system served to protect the people from any government becoming too strong. The Court ignored the sovereignty of the people in *Alden* by crafting a view of federalism in which more rights are accorded to the states than to the citizens.

The majority opinion presents a flawed interpretation of history as reliance on authorities cited by the majority permits the conclusion that opinions differed as to the existence of state sovereign immunity. Also, even if state sovereign immunity could definitively be found to exist in 1787, this does not mean state sovereign immunity is compatible with today’s form of government. The government has changed since 1787, even the founding generation recognized the fluidity of the Constitution, and, by relying on their interpretation of events over two centuries ago, the *Alden* majority departs from the modern scheme of government.

Section two of this paper examines the reasoning of the majority and dissenting opinions in *Alden*. An analysis of the historical nature of federalism comprises the third section. The fourth section consists of an analysis of the change in the balance of government precipitated by the Civil War. The final part of the paper examines *Alden*’s implications on the Supremacy Clause and the Tenth Amendment, as well as the case’s practical consequences.

II. ALEN V. MAINE

A. The Majority

The Court begins its analysis by examining the understanding of sovereign immunity at the time of ratification. According to Justice Kennedy, the states did not surrender the right of sovereign immunity upon entering the Union because it had existed in state

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constitutions throughout the period of revolution and under the Articles of Confederation. To support this contention, the Court argued that the right of sovereign immunity remained with the states because the Constitution reserved to the states a "substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." Although the Constitution delegated certain matters to the national government, the founding generation intended to create a "system in which the State and Federal Governments would exercise concurrent authority over the people—who were... the only proper objects of government." Because the states remained sovereign, they retained their right to immunity from suits by citizens and other states.

The right of sovereign immunity originated in English common law. Under common law principles a suit could not be brought against the sovereign unless the Crown consented. The King could never be sued in any court because he was sovereign over all. Lower vassals could, however, be subjected to suits by higher sovereigns. Thus, in British history, the King as sovereign could never be brought into court, nor could suits be instituted against lords in their own courts, but suits could be brought against people in courts where they were subjects, not sovereigns. The majority urged that the states universally accepted this British practice, and as such did not understand the Constitution to remove state sovereign immunity.

The American Revolution and the heavy debts incurred by the states during those years made state sovereign immunity a concern of state legislatures. The states wanted to insure they would not have to defend themselves against creditors, because such claims would lead to ruination and insolvency. The Alden Court relied on the words of Alexander Hamilton, James Madison, and John Marshall. Hamilton wrote that suits could not be commenced against a

11. Id. at 714, 119 S. Ct. at 2247.
12. Id.
13. The Court also relied on the language of the Tenth Amendment to support its contention that the right of sovereign immunity remained with the state as "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Id. at 739, 119 S. Ct. at 2259; U.S. Const. amend. X.
14. 527 U.S. at 741-42, 119 S. Ct. at 2260; Nevada v. Hall, 440 U.S. 410, 415, 99 S. Ct. 1182, 1185 (1979) ("The King's immunity rested primarily on the structure of the feudal system and secondarily on a fiction that the King could do no wrong").
15. 527 U.S. at 715-16, 119 S. Ct. at 2248.
16. Id. at 716, 119 S. Ct. at 2248.
17. Id.
sovereign without its consent, and because the states did not cede such power at the Constitutional Convention, it still existed. Madison and Marshall voiced this same idea at the Virginia Convention. Because the retention of the right of sovereign immunity served the states' financial interests, there existed a valid basis for the argument in favor of state sovereign immunity.

The *Alden* Court also examined prior Eleventh Amendment jurisprudence in order to support its contention that sovereign immunity existed implicitly within the structure and understanding of the Constitution. The Court had repeatedly rejected the argument that the authors of the Eleventh Amendment intended it to be applied literally, narrowing the scope of subject matter jurisdiction by amending Article III. Just over one hundred years ago, the Court in *Hans v. Louisiana* settled the issue of state sovereign immunity under the Eleventh Amendment. By ignoring the literal language of Article III and the Eleventh Amendment, the *Hans* Court held that sovereign immunity prevented a suit by a citizen against his own state. In the opinion of the *Hans* Court, rejecting sovereign immunity would have strained the "Constitution and the law to a construction never imagined or dreamed of."

Subsequent Supreme Court decisions adhered to this general understanding that the Eleventh Amendment was intended to overturn the decision of *Chisholm v. Georgia* and clarify the principle that sovereign immunity had not been surrendered with the adoption of the Constitution. Although prior to *Alden* the Court recognized the Eleventh Amendment as confirming the principle of sovereign immunity, such statements served as dicta to the main point that the Eleventh Amendment protected the right of state sovereign immunity.

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19. 527 U.S. at 717-18, 119 S. Ct. at 2249.
21. 134 U.S. 1, 10 S. Ct. 504 (1890).
22. Id. at 15, 10 S. Ct. at 507; see also 527 U.S. at 728, 119 S. Ct. at 2253.
23. 2 U.S. (2 Dall.) 419 (1793).
B. The Dissent

The dissent, authored by Justice Souter, reiterated his opinion in Seminole Tribe, but also recognized that the majority’s opinion rendered prior Eleventh Amendment jurisprudence unnecessary. Justice Souter argued that the majority, by relying on the Tenth Amendment and the inherent concepts surrounding the Constitution, eliminated the debate about the meaning of the Eleventh Amendment. The dissent analyzed whether sovereign immunity existed as a principle of natural law at the time of ratification; the dissent viewed this as the only means which supported the majority’s reasoning. Ultimately, Justice Souter concluded that sovereign immunity had its basis in common law, not natural law. Therefore, state sovereign immunity could be abridged by statute because it did not inhere in the structure of the Constitution or the Bill of Rights.

The dissent pointed to numerous founders who believed that sovereign immunity did not exist and to states which did not maintain the right of sovereign immunity prior to ratification. If, as the


26. "[T]he Court’s enhancement of the [Eleventh] Amendment was at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism." Seminole Tribe, 527 U.S. at 760, 119 S. Ct. at 2269 (Souter, J., summarizing his position in Seminole Tribe).

27. If the Eleventh Amendment was meant to add sovereign immunity to the Constitution then the majority’s holding in Alden did not stand on historical precedent, but rather on a new interpretation of history. If the majority was correct in its analysis of sovereign immunity as inherent in the Constitution’s history and structure, then the Eleventh Amendment was not intended to correct any lack of sovereign immunity in the Constitution, but was meant to be a diversity limitation on subject matter jurisdiction in cases. The majority, however, did not reach such a conclusion.

28. The majority rejected the dissent’s implication that the majority’s reasoning was founded in natural law, stating: “[w]e do not contend the founders could not have stripped the States of sovereign immunity . . . but only that they did not do so." Id. at 734, 119 S. Ct. at 2257. The majority’s contention is debatable because their argument that sovereign immunity inhere in the Constitution lends support to natural law roots of sovereign immunity, as the dissent pointed out. The dissent’s argument as to natural or common law roots has no relevance to the concept of federalism. The dissent missed an opportunity to authoritatively refute the majority’s interpretation of federalism.

29. Men such as Edmund Randolph (who would later argue against the state of Georgia in Chisholm) and Charles Pickney did not believe sovereign immunity had been retained. Also, the four justices in Chisholm (Jay, Blair, Cushing, and Wilson) did not believe in the inherency of sovereign immunity. James Madison and John Marshall recognized the right, but dealt with sovereign immunity in terms of state debt problems and did not focus on theoretical issues of natural or common law. Id. at 775, 119 S. Ct. at 2277 (Souter, J., dissenting). The states of
majority reasoned, sovereign immunity inhered in the national consciousness prior to ratification, it seems they overlooked the conflicting ideas of prominent men, most specifically the opinions of the Justices in *Chisholm*. By failing to examine the majority opinion in *Chisholm*, the *Alden* majority ignored its own premise of original intent. The *Chisholm* opinion was written by men who had taken part in the Constitutional Convention, and thus helps provide a glimpse into the understanding of sovereign immunity at that time.\(^3\)

The dissent also rebutted the majority’s argument that sovereign immunity inhered in the concept of federalism. Relying on historical precedent, the dissent argued that states did not retain their sovereignty with respect to federal issues.\(^3\) *McCulloch v. Maryland*, authored by Chief Justice John Marshall, further supports the conclusion of the dissent that federalism did not provide for the retention of state sovereign immunity because the Constitution created a system in which each sphere of government retained sovereignty within the bounds of its powers.\(^3\) Essentially, the *Alden* majority completely misunderstood federalism because the state of Connecticut, Rhode Island, and Pennsylvania did not recognize sovereign immunity in their state constitutions. Thus, the understanding of sovereign immunity was not as unanimous as the majority represented. *Id.* at 769-71, 119 S. Ct. at 2273-74. Connecticut and Rhode Island considered themselves without immunity. This was indicated by their adoption of colonial charters as state constitutions without amending the suability provisions. *Id.* at 769, 119 S.Ct. at 2273. In 1787, Pennsylvania had laws that permitted the Comptroller General to settle accounts. Appeal to the Pennsylvania Supreme Court was allowed if a dispute arose over such settlements. In 1790, Pennsylvania adopted a new constitution which explicitly gave the state legislature the authority to provide for suits against the state. *Id.* at 770-71, 119 S. Ct. at 2274.

30. James Wilson, prior to appointment as a Supreme Court Justice, expressed his opinion on state sovereign immunity vehemently at the Constitutional Convention arguing, “the government of each state ought to be subordinate to the government of the United States.” *Id.* at 776, 119 S. Ct. at 2277 (citing 3 Elliot’s Debates at 490).


32. *17 U.S. (4 Wheat.) 316, 410 (1819).* The dissent in *Alden* succinctly summarized the definition of federalism with its reference to *McCulloch v. Maryland* where Chief Justice Marshall wrote, “In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other”. *Id.* at 410. The majority throughout its opinion relied on Marshall’s words at the Virginia convention supporting the retention of state sovereign immunity. *Alden, 527 U.S. at 718, 119 S. Ct. 2249.* This ignores the larger issue of federalism that Marshall viewed as necessary to maintaining the Union. The early court under the leadership of Chief Justice Marshall, understood the states not to retain sovereignty as to powers granted to the federal government, and lacking sovereignty, the states could not retain sovereign immunity as to those powers.
Maine "[was] not sovereign with respect to . . . the FLSA. It [was] not the authority that promulgated the FLSA, on which the right of action in [that] case depends. That authority [was] the United States . . . "

For the Alden majority, given the prevailing British practice of sovereign immunity that was continued in America, the states' war debts, and the adoption of the Eleventh Amendment, the Constitution did not remove from the states the right of sovereign immunity. The Eleventh Amendment, previously understood to correct the holding in Chisholm, under Alden expressly confirmed the concept of sovereign immunity that the majority believed inhered in the concept of federalism. Because the dissent disposed of the federalism issue without elaborate discussion, an examination of the history of the Constitution and federalism jurisprudence is necessary.

III. THE FOUNDERS' FEDERALISM

The Alden Court relied on a one sided interpretation of history to reach its conclusion that state sovereign immunity inheres in the Constitution. The dissent's argument that sovereign immunity derives from common law not natural law, while correct, did not point out the main problems with the majority's federalism analysis. The majority completely ignored part of history to support the idea of state sovereign immunity, and while invoking elements of natural law to support its argument, focused primarily on the political and legal history of the Constitution.

A. Historical Perspective—The Founding Generation

The Alden majority looked to state laws in existence at the time of the adoption of the Constitution, reasoning that the States did not give up sovereign immunity unless the Constitution provided for express surrender of that right. The majority's analysis on this point was incorrect for two reasons. First, the majority claimed that sovereign immunity existed universally prior to ratification. Second, even if all of the states did recognize the principle of sovereign immunity, Article III, as understood by the Chisholm Court, relieved states of such immunity on federal issues by listing the instances in which the federal courts could exercise jurisdiction.

33. 527 U.S. at 800, 119 S. Ct. at 2288.
34. State sovereign immunity does not derive from natural law because "sovereign immunity may be invoked only by the sovereign that is the source of the right upon which suit is brought," since the sovereign is the one that makes the law and can exempt himself from following that law. Id. at 796, 119 S. Ct. at 2286.
35. 2 U.S. (2 Dall.) 419 (1793).
The majority claimed sovereign immunity existed throughout the states at the time of ratification; however, three states did not recognize sovereign immunity. As such, this principle did not inhere in all citizens' or states' beliefs. For those states that did not have the right of sovereign immunity, that right remained with the people as provided under the Tenth Amendment. Such a system, in which only some states could assert state sovereign immunity as to federal law, would have rendered federal law chaotic and created a system in which some states could disregard federal law without worrying about suits from private citizens. The purpose of the Constitution was to unify the country under national law, but under the majority's analysis such unification could never have occurred.

Chisholm v. Georgia decided just two years after the adoption of the Constitution and Bill of Rights, provides a clear glimpse into the understanding of state suability in federal courts by members of the founding generation. The Alden majority ignored the analysis of the Chisholm Court which upheld Mr. Chisholm's right to sue the state of Georgia for the collection of debts. Instead, the Alden majority used Justice Iredell's dissent to argue sovereign immunity was universally accepted at the time of ratification and inhere in the understanding of the Constitution at its adoption. This reliance on the dissent, however, provides no evidence of sovereign immunity inhering in the understanding of the Constitution as Justice Iredell focused not on the Constitution, but on whether the Legislature acted to permit suit by states.

If the members of the Constitutional Convention had intended to confer immunity from federal law on states, Article III would have explicitly granted such immunity or prevented suits against states.

37. See supra note 13.
38. 2 U.S. (2 Dall.) 419 (1793). Mr. Chisholm was a citizen of South Carolina.
39. In a four to one decision, the Court, looked directly to the text of Article III, and found no intent on the part of the framers to preserve sovereign immunity. Each justice wrote a separate opinion, and of greatest importance was the conclusion reached by each member of the majority that the Constitution did permit suits by private citizens against a state. The majority focused on the strict language of Article III which places "controversies, between a State and citizens of another State," under the judicial power of the United States to determine state sovereign immunity was not preserved by the Constitution. U.S. Const. art. III, § 2, cl. 1. Of primary importance was the Court's conclusion that the people were sovereign, and as such the people had, through the Constitution, granted the United States judiciary the power to hear cases involving private suits against States. *Chisholm*, 2 U.S. at 462, 464. The Court also examined the prevailing views of Federalists and Anti-federalists alike in concluding that the people permitted suit against a state.
Each word in the Constitution was hotly debated; thus, the text should not be read to include ideas that are nowhere stated or implied. Even if the individual states recognized sovereign immunity prior to joining the Union, by agreeing to be bound by federal law the states were no longer sovereign as to those powers granted to the federal government through the Constitution.

B. Historical Perspective—British Common Law

The majority's reliance on British common law was also misplaced as the Crown retained sovereign immunity in all courts because the King was the only person in whom sovereignty was vested. The creation of a federal system rendered such reliance on common law impractical as two governments each retaining their own separate realms of sovereignty were created. Thus, the federal government cannot interfere in purely local matters, and states cannot interfere or claim immunity in matters on the national level. The states can be compared to lords or lower vassals who, while not subject to suit in their own courts, could be sued in a higher court.

C. Historical Perspective—Federalist No. 81

The Court repeatedly relied on Hamilton’s *Federalist No. 81* to support its decision allowing states to assert sovereign immunity. Hamilton explicitly asserted that states did not lose sovereign immunity under the new government because they did not specifically give up that right through the text of the Constitution. Hamilton’s words, read literally, clearly support the majority’s opinion that state sovereign immunity inhered in the Constitution. This interpretation of *Federalist No. 81*, however, is shortsighted.

43. Hamilton wrote: It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

   It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
44. The dissent in *Seminole* argued that *Federalist, No. 81* “has nothing to do with federal question cases,” but rather refers to diversity jurisdiction under Article III. The dissent relied on Hamilton’s assertion “that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities,” to illustrate that Hamilton’s support of state sovereign immunity remains limited only to diversity
Hamilton, as well as John Jay and James Madison, wrote in an attempt to garner support for the ratification of the Constitution, which some feared would strip states of their sovereignty.\(^4\)

Federalist No. 81, while supportive of the majority's contention, stands as just one document in which ratification was propagandaized. Hamilton, in order to achieve ratification of the Constitution, was attempting to allay anti-federalist fears that the new government would be too strong.\(^5\) Also, Hamilton may have been of the opinion that states had not given up sovereign immunity. Thus, Federalist No. 81 might reflect Hamilton's own impression of the Constitution, but at the time of the Constitution numerous views existed concerning the best means of creating a workable government. As one historian noted, the Constitutional Convention was full of "complex, unpredictable, paradoxical" men; men who were "compounded of rationality and irrationality, moved by selfishness and by altruism, by love and by hate and by anger."\(^6\) Any attempt to look at the views of those men should be made with the realization that numerous complexities surrounded the writing of the Constitution.\(^7\)

In examining what the framers intended to be inherent in the Constitution, the views of those who attended the Constitutional Convention, the state delegates who voted to ratify the Constitution, and works such as The Federalist Papers prove extremely useful, but should not be examined in isolation.

In Federalist No. 81 Hamilton urged the supremacy of the judiciary, and the creation of federal district courts. As part of his reasoning for the creation of numerous lower federal courts throughout the country, Hamilton argued that States should not be allowed to hear cases involving national laws, because state judges did not have the independence required to execute national law and the "local spirit" may have been too prevalent for proper adjudication of federal law to occur.\(^8\) Thus, Hamilton recognized the need for federal judges to hear cases involving federal law. Although Hamilton may have opposed state suability in 1787, in the interest of maintaining national unity today States should not be allowed to assert sovereign immunity as a means of avoiding the myriad of federal laws now in existence.

\(^5\) Id. at 481.
\(^7\) For example, Federalist No. 81 also refers specifically to the collection of debts. The Federalist No. 81, at 488. Arguably, it reflects the Founders' fear of a rush by individuals to collect debts from states which would destabilize the infant American economy.
\(^8\) Id. at 486.
D. The Eleventh Amendment

Congress reacted to the ruling in *Chisholm* by passing the Eleventh Amendment in 1794 and sending it to the states for ratification.\(^5\) The *Alden* majority’s contention that the Eleventh Amendment merely confirmed the principle of sovereign immunity that inhered in the Constitution provided only one historical perspective of the ratification of that Amendment. Contrary to the belief of the *Alden* majority, the passage of the Eleventh Amendment indicates that states did not understand sovereign immunity to inhere in the Constitution. Two days after the *Chisholm* decision Senator Caleb Strong drafted a version of the Eleventh Amendment.\(^51\) Senator Strong’s draft closely resembled the text of the Eleventh Amendment, but the change from the draft to the final version lends support to the argument that the Eleventh Amendment did not grant sovereign immunity to the states as the initial draft prevented suit by any person whether a citizen or foreigner against any state.\(^52\) Strong deleted the phrase preventing suit “by any foreign State or by any Individual or Individuals whether Citizens or Foreigners,” in the proposal he submitted to Congress.\(^53\) This purposeful omission indicates that suit could be commenced against a state under federal law by a state’s own citizens. This proposal also never came to a vote. However, in the next session Congress passed his proposal that had been resubmitted with only minor changes\(^54\) and by the next year, 1795, the Eleventh Amendment

\(^50\) The year delay between the *Chisholm* decision and the passage of the Eleventh Amendment resulted not from political opposition, but from an amendment to the bill that excluded all holders of the Bank of the United States from membership in Congress. This amendment would have resulted in the exclusion of approximately twenty percent of the Congress. The proposing Congressman, however, erroneously thought the bill was so popular that it would pass anyway. William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 198 (1995).

\(^51\) The previous day Congressman Theodore Sedgwick proposed the first draft of the Eleventh Amendment which provided that no state could be made a defendant by any person or entity. This draft never came to a vote. *Id.* at 197.

\(^52\) The full text of Strong’s initial proposal provided: The Judicial Power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted by any foreign State or by any Individual or Individuals whether Citizens or Foreigners, against any one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State. *Id.*

\(^53\) Thus the proposal Senator Strong presented to Congress in 1793 provided: “The Judicial Power of the United States shall not extend to any Suits in Law or Equity, commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.” *Id.*

\(^54\) Strong added the words “be construed to.” *Id.*
became part of the Constitution, upon ratification by three-fourths of the states.\textsuperscript{55}

The passage of the Eleventh Amendment provided supporters of state sovereign immunity an opportunity to insure that future generations would understand that state sovereign immunity had not been lost upon entry into the Union. But these supporters did not take such action. The \textit{Alden} majority did not deal with the passage of the Eleventh Amendment, but presumably could have argued that the drafters thought sovereign immunity apparent. However, this argument is flawed because the \textit{Chisholm} Court ignored state sovereign immunity as to foreign citizens. Thus, Congress, in prohibiting suits against states by non-citizens, could have also prevented suits against states by their own citizens. Congress did not act, and their silence, given the circumstances, should be understood to have confirmed state suability under federal law. The Eleventh Amendment only narrowly overturns \textit{Chisholm} as to diversity jurisdiction, it does not overturn the idea that a suit may be brought against a state by its citizen under federal law.\textsuperscript{56}

\textsuperscript{55} See supra note 4.

\textsuperscript{56} Further evidence regarding the meaning of the Eleventh Amendment is found in \textit{Respublica v. Cobbett}, 3 U.S. (3 Dall.) 467 (1798), where the Court rejected a petition brought by a British subject against Pennsylvania to have his criminal suit removed to federal court. The Court in \textit{Respublica} wrote that the Eleventh Amendment settled the issue of state suability. This case, though, did not establish the precedent that the Eleventh Amendment granted states absolute sovereign immunity. However, its language did provide ammunition for supporters of state sovereign immunity, as the Court wrote, "[W]hen the judicial law [Eleventh Amendment] was passed, the opinion prevailed that States might be sued, which by this Amendment is settled otherwise." \textit{Id.} at 475. When read out of context the Court's words indicate the Eleventh Amendment granted sovereign immunity to the states. \textit{Respublica}, while seemingly supportive of state sovereign immunity, actually highlights flaws in the \textit{Alden} majority's reasoning. The \textit{Respublica} Court asserted that the prevailing opinion in the country from 1787 to 1795 (when the Eleventh Amendment was passed) permitted suits against states in federal court. Also, \textit{Respublica} dealt with a British subject suing a state which the Eleventh Amendment clearly prohibits. Thus, the sovereign immunity referred to in \textit{Respublica} should only be interpreted to encompass suits brought by foreigners against a state, and not to suits brought against a state by its own citizens. The \textit{Alden} majority also refers to \textit{Hans v. Louisiana}, 134 U.S. 1, 10 S. Ct. 504 (1890), to support its holding that a private citizen cannot sue a state for violations of federal law. In \textit{Hans} a citizen of Louisiana brought suit in Federal Court against Louisiana in an attempt to collect payment of coupons on state bonds which had become due in 1880. A unanimous Court held the state to be immune to suits brought by its own citizens. Of historical importance to the discussion in \textit{Hans} is the concurrence of Justice Harlan who wrote that \textit{Chisholm} "was based upon a sound interpretation of the Constitution as that instrument then was." \textit{Id.} at 21, 10 S. Ct. at 509. Harlan understood the Eleventh Amendment to alter the Constitution, overturn \textit{Chisholm}, and confer a right of sovereign immunity on the states. While the \textit{Alden} majority gave great weight to Justice Iredell's dissent in \textit{Chisholm},
IV. MODERN FEDERALISM

In recent jurisprudence the Court summarized the structure of government succinctly, stating that the founders had “split the atom of sovereignty.”\(^{57}\) The Constitution sought to create a union composed of multiple independent states united under national law. Under this scheme of government the states retained sovereign immunity under state law unless consent to suit was given through the state legislature. In matters of federal law, however, consent to suit was given upon entry into the Union. The Constitution created a system whereby states consented to give up certain powers to join the Union in return for the benefits that unity provides.\(^{58}\) The sovereignty of the states remained only for state matters; the Constitution and federal law superseded state authority for national concerns.

A. The Civil War

By relying heavily on the history surrounding the adoption of the Constitution and the Bill of Rights, the \textit{Alden} majority rendered a holding incompatible with the current state of American government. The majority relied on thoughts two centuries removed, and failed to recognize the dramatic change the United States has undergone since the Civil War. Until 1861, the Constitution served to protect the individual from the federal government. The view that state governments were best able to protect their citizens was firmly entrenched in the minds of the American people as evidenced by the Court’s ruling in \textit{Barron v. Mayor of Baltimore}.\(^{59}\) The Civil War, and

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\(^{58}\) Such benefits, for example, include the building of interstate roads, protection from invasion, stability of economy, the post office, and freedom from internal tariffs. The states learned from the chaos of the Articles of Confederation that without a stronger national government the Confederation would not survive.

\(^{59}\) 32 U.S. 243 (1833). Barron sued the city of Baltimore alleging the city
the passage of the Fourteenth Amendment shortly thereafter, changed the balance between state and federal governments.

The Fourteenth Amendment was the “centerpiece” of a “new structure of law that emerged in the post-Civil War era.”\textsuperscript{60} This structure of law recognized that the states were incapable of protecting the basic right of individuals and as such the federal government assumed that role. The Court noted in 1972 that following the Civil War “the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established.”\textsuperscript{61} Ultimately, the inability of Southern states to protect their citizens’ rights necessitated the passage of the Civil War Amendments, and created an alteration in the balance of government. Congress, in passing the Fourteenth Amendment and the Civil Rights Act of 1871, as the Court later observed, “clearly conceived that it was altering the relationship between the States and the Nation with respect to the protection of federally created rights.”\textsuperscript{62}

deprived him of his Fifth Amendment property right. The city’s public works improvements caused the Baltimore harbor water level to drop, thus ships could not reach Barron’s wharf, rendering the wharf valueless. Barron wanted compensation for this taking of property absent due process. The Supreme Court held the Fifth Amendment applicable only to the federal government, stating that individuals had to look to their state constitutions for protection from state governments.

60. Mitchum v. Foster, 407 U.S. 225, 239, 92 S. Ct. 2151, 2160 (1972). Mitchum, an individual, brought suit against the state of Florida in federal court for the closure of his bookstore under state proceedings. Mitchum relied on 42 U.S.C. § 1983 (1972), the federal civil rights statute, permitting suits in equity or other proper proceeding to redress “deprivation of any rights, privileges, or immunities secured by the Constitution” under color of state law. The issue before the Court was whether the anti-injunction statute, 28 U.S.C. § 2283 (1972), prohibited the federal courts from granting relief in state court proceedings. The Court held 42 U.S.C. § 1983 expressly authorized federal court relief, and thus was an exception to the anti-injunction statute.

61. \textit{Id.} It would take more than half a century before the Court recognized this shift, as the Court sharply curtailed incorporation of the Bill of Rights through the privileges and immunities clause in the \textit{Slaughterhouse Cases}. 83 U.S. 36 (1873). The Supreme Court did not recognize the extension of the Bill of Rights to the States until 1925. Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625 (1925). This began the berry-picking process of rights that has brought about the incorporation of most of the provisions of the Bill of Rights. Ironically, in the first session of Congress in 1789, Madison introduced an amendment that provided, “No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.” Creating the Bill of Rights: The Documentary Record from the First Federal Congress 13 (Helen E. Veit, et al. eds., 1991). Madison believed this amendment necessary to insure the protection of individuals from state governments, as some states had no Bill of Rights, while others did not adequately protect citizens. Had this amendment been adopted, citizens would have benefitted from greater protection of their individual rights.

62. \textit{Mitchum}, 407 U.S. at 242, 92 S. Ct. at 2162. The Court continued, “[Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication
B. The Seventeenth Amendment

The twentieth century has seen the necessary expansion of the national government commencing with the Food and Drug Administration, continuing with federal programs that provided jobs, security, and improved infrastructure during the Great Depression, and culminating in the Civil Rights Acts. In each of these instances, Congress acted pursuant to its Interstate Commerce Clause powers, and in doing so assisted millions of Americans whose states had failed to protect them. No one in 1787 could have contemplated the vast expansion the American government has undergone during the last century, but simply because this change was not contemplated does not mean the founders would disapprove. The Constitution ought to be interpreted in light of contemporary needs. Such interpretation does not change the Constitution, but rather insures that the Constitution will remain viable to generations of Americans.

In 1913 the Constitution was altered to provide for the direct election of the United States Senate with the adoption of the Seventeenth Amendment. Several have argued this change upset the balance between the State and the Federal governments, disturbing the careful system of checks and balances created by the Constitution. The Constitution's requirement that the state legislatures elect their Senators insured the states a voice in the operation of the national government, and served to protect the states from an overreaching central government. Delegates to the 1787 Constitutional Convention voiced two different reasons for requiring of those rights; and it believed that these failings extended to the state courts.”

63. The Seventeenth Amendment provides in pertinent part, “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.” U.S. Const. amend. XVII, cl. 1. This alters Article I, Section 3, clause 1 which provided, “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”


65. Bybee, supra note 64, at 504 (citing The Federalist No. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961)) (“The equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and the instrument for preserving that residuary sovereignty”).
the election of Senators by the state legislature. Some delegates sought this form of election of Senators as they believed it would create a more refined, cautious, aristocratic body of men, and thus represent America's wealth. Alternatively, others thought election of the Senate by the state legislatures created a check on the national government as states had a direct role in the election of one house of Congress. In 1787 both of these reasons had validity, as government was believed to be for those who were independently wealthy, and America's elite feared too much democracy.

Although members of the Constitutional Convention intended the indirect election of Senators to serve as a check on federal power and a means for the states to protect their interests by the twentieth century this seemed unnecessary. The corruption associated with indirect election and the belief that America should move closer towards democracy increased the desire of the people to have a popularly elected Senate. In 1912, Congress passed the Seventeenth Amendment and sent it to the States for ratification, which occurred less than a year later. With the adoption of the Seventeenth Amendment, Senators became accountable directly to the people rather than political bosses, or state legislatures.

Multiple authors argue the direct election of Senators represents a dramatic shift in the structure of the federal government. If the States had utilized the Senate more actively perhaps this would be true. Also, the States consented to the relinquishment of any power they exercised through the indirect election of Senators by ratifying the Seventeenth Amendment. On a more basic level though, the purpose of the Senate, even prior to the direct election of Senators,

66. Bybee, supra note 64, at 510.
67. Id. at 510-11.
68. This fear of democratic excesses as well as a need for the State to balance national interests is also reflected in the creation of the electoral college which provides that the electors choose the President and requires: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. U.S. Const. art. II § 1, cl. 2.
69. Bybee, supra note 64, at 510-11.
70. In addition to the multiple Senators who were found to have bribed state legislators in order to reach the Senate, the corruption of machine politics also fueled the movement for direct election of Senators. Hoebeke, supra note 64, at 91, 97, 98.
71. Madison's fear of the excesses of democracy proved true as the direct election of Senators permitted demagogues, such as Huey Long and Joseph McCarthy, not popular with the political machine but with the voters, the right to a Senate seat. Hoebeke, supra note 64 at 190.
72. Bybee, supra note 64; Hoebeke, supra note 64, at 478; Rossum, supra note 64.
had been to represent the people of their state. Thus, the Seventeenth Amendment made Senators directly accountable to the people of the State, rather than the state legislatures.

The House of Representatives and the Senate differ with respect to the people represented. Representatives serve the people of their district whose interests on the national level could differ widely from the interests of constituents in another district within the same state. Senators are charged with the duty of representing the collective interests of the people of their state. Thus, even with popular election of Senators the interests of States are served because what is in the interest of the people of the State is in the interest of the State.

C. Expanding the Federal Government

New Deal legislation forced the dramatic enlargement of the federal government experienced under the leadership of a determined President and a Congress who recognized its duty to work for the citizens. An argument could be made that, had indirect election of Senators remained, the Senate never would have approved the expansion of the federal government through the interstate commerce clause. This argument bears little merit because the people, frustrated with the inaction of their Senators, would elect state legislators willing to vote for Senators who would alleviate the problems of the Great Depression. Although such a process would take longer, inevitably the outcome would have remained the same. Also, by the twentieth century, Senators did not necessarily follow the directives of the state legislatures, nor did most state legislatures take an active role in instructing their Senators. The Court eventually acceded to this use of the interstate commerce clause to enact federal legislation that impacted local interests. Thus, Article

73. This assumes a majority of the States were against aid from the federal government to deal with the Great Depression, and there is no evidence to indicate the States were alarmed by the activism of the federal government, especially because the programs restored the confidence of the American people and alleviated some problems.

74. Bybee, supra note 64, at 527.

75. The Court initially found some of the New Deal programs unconstitutional. President Roosevelt threatened to push through legislation that would enlarge the size of the Supreme Court, and permit him to appoint Justices sympathetic to his ideology. The Court in National Labor Relations Board v. Jones and Laughlin Steel, 301 U.S. 1, 57 S. Ct. 615 (1937), reversed its prior jurisprudence and rejected the claim that the National Labor Relations Act preventing unfair labor practices, "invad[ed] the reserved powers of the States over their local concerns," in response to Roosevelt's court packing plan. Id. at 29, 57 S. Ct. at 620. The Court held that Congress had the power to regulate such activity through the interstate commerce clause because it had a substantial effect on interstate commerce. The Court in 1942 extended the reach of the interstate commerce clause holding that the
I breathed new life into the federal government that was unimaginable to the founders, but nevertheless in conformity with the Constitution.\textsuperscript{76}

New Deal programs forced enlargement of Congress' interstate commerce power, expanding Article I jurisdiction and paving the way for the enactment of the Civil Rights Acts\textsuperscript{77} a quarter-century later. The Civil Rights Acts illustrate the necessary expansion of the federal government to protect American citizens' fundamental rights to life, liberty and property, both from state abuse and other citizens. The Fourteenth Amendment\textsuperscript{78} served as the rallying call of the Civil Rights movement, but without the interstate commerce clause racial discrimination by non-state actors would not have been subject to federal intervention. The Court readily endorsed the constitutionality of the Civil Rights Act of 1964 in Heart of Atlanta Motel v. United States\textsuperscript{79} and Katzenbach v. McClung\textsuperscript{80} finding that

\begin{quote}
Agricultural Adjustment Act setting quotas on wheat sold intrastate, interstate, and consumed on the farm in which it was raised was constitutional. Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82 (1942). In Wickard the Court held that Congress has the power to regulate this activity because something local, even if it is not commerce can be regulated if it has an effect on interstate commerce. There, the plaintiff had a small farm where all wheat grown was consumed on the farm. The Court held this affected interstate commerce because if all individuals took such action then the amount of wheat sold interstate would diminish, thus adversely affecting interstate commerce. \textit{Id.}

\textsuperscript{76} U.S. Const. Art. I, § 8, cl. 3.


\textsuperscript{78} The Fourteenth Amendment is dealt with here as it relates to the expansion of Congressional power. Fourteenth Amendment sovereign immunity issues have not been discussed as the focus of the paper is Article I. Fourteenth Amendment state sovereign immunity is treated under a different line of case law since the states expressly surrendered sovereign immunity to Congress, whereas under Article I such surrender is only implied. Under § 5 of the Fourteenth Amendment, Congress may explicitly abrogate state sovereign immunity to insure state compliance with the Fourteenth Amendment. The states ratified this Amendment with full knowledge of their surrender of state sovereign immunity as to those issues falling under the Fourteenth Amendment.

\textsuperscript{79} 379 U.S. 241, 85 S. Ct. 348 (1964). The Court held a hotel in downtown Atlanta, bordering two interstate highways, could not refuse service to African-Americans. Seventy-five percent of their customers were from out of state, and the hotel solicited business through the national media. Congress' enactment of the Civil Rights Act of 1964 preventing such racial discrimination was a valid use of its interstate commerce clause power because interstate commerce existed both before and after people visited the hotel. The Court wrote, "[t]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." \textit{Id.} at 258, 85 S. Ct. at 358.

\textsuperscript{80} 379 U.S. 294, 85 S. Ct. 377 (1964). Ollie's Barbeque in Birmingham, a white restaurant with a take out window for African-Americans, far from the
the activities in each effected interstate commerce, and citing as precedent the aggregation principle of *Wickard v. Filburn*. Without *Wickard* the Court may have been less likely to find attenuated effects on interstate commerce susceptible to federal jurisdiction due to the divisive political atmosphere stemming from racial prejudices.

**D. Reconciling Expansion with the Constitution**

Although the current structure of American federalism does not resemble that designed more than two centuries ago, each government still fulfills its function as a protector of the people. The federal government serves to protect the people from the states and represent the people's interest as a nation. The state governments have a duty to protect their people from an overreaching federal government and fulfill the local needs of their constituents. While the Constitution in 1787 contemplated the federal and state governments competing against each other in an effort to balance their powers, such a protection is no longer necessary to the current scheme of government. The federal and state governments still remain sovereign with respect to their different powers, and by retaining this sovereignty protect the interests of the people. The federal government protects citizens through the Supremacy Clause, insuring uniform application of federal law. The states protect the people through Congress, specifically the Senate, as each Senator represents the citizens of their state, not just the people of one district. The people are the State and by creating a body that represents the people as a state, the balance of power remains. If the citizens believe the federal government has encroached upon their local interests, then the democratic process, *i.e.*, election, permits citizens to check the federal government.

Americans in 1787 embarked upon an experiment in creating the Constitution. A republican form of government represented a sharp departure from the monarchies of Great Britain and the rest of Europe, thus, the Founder's desire to balance the government stemmed from the world's inexperience with democracy. A highway with no real out of state business fell within Title II of the Civil Rights Act. Half the food bought by Ollie's from an in state supplier originated from an out of state supplier. The Court held Congress had the power to regulate Ollie's and businesses similarly situated, because Congress "had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce." *Id.* at 304, 85 S. Ct. at 384. This restaurant's conduct was representative of similar conduct throughout the country which had an aggregate effect on interstate commerce.

81. "For the adoption of the Constitution made [the States] members of a novel federal system that sought to balance the States' exercise of some sovereign
republic, rather than a democracy was created; however, the Constitution left room for democratic evolution by providing a process for amending the Constitution. The Fourteenth and Seventeenth Amendments illustrate such an evolution. To rely solely on the Constitution as conceived in 1787 ignores the societal, technological, and legal advances the United States has made over more than two centuries.

V. BEYOND "ELEVENTH AMENDMENT IMMUNITY" 82

The Supreme Court in Alden moved the issue of state sovereign immunity from the Eleventh Amendment to the text of the Constitution and the Tenth Amendment. Effectively, removal of state sovereign immunity from Eleventh Amendment jurisprudence leaves only Article III jurisdictional issues to that Amendment. However, basing state sovereign immunity on the text of the Constitution and the Tenth Amendment causes problems for the Supremacy Clause, and indicates the willingness to use that Amendment as a vehicle for voicing states' rights' ideology.

A. Supremacy Clause

The Court rendered the Supremacy Clause 83 useless for those citizens who seek to enforce federal law against non-compliant states. 84 As to rights of private citizens against states for failure to follow state law, there exists no reason for passing a law if states have no incentive to follow it. The ruling in Alden essentially brings the country back to a confederation type of government. If the Supreme Court may not entertain cases involving private suits against states under federal law then a large portion of federal law potentially remains unenforceable. Congress should not be permitted to act beyond its Article I powers, but the Court, by sustaining state prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy," Seminole Tribe of Florida v. Florida, 517 U.S. 44, 150, 116 S. Ct. 1114, 1169 (1996) (Souter, J., dissenting).

82. This term used in referring to states' immunity from suits, while "convenient shorthand," is according to the Alden Court incorrect. "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." Alden v. Maine, 527 U.S. 706, 713, 119 S. Ct. 2240, 2246 (1999).

83. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI.

84. The federal government may still institute suit against a non-compliant state, thus citizens are not left completely unprotected.
sovereign immunity, permits states to violate validly enacted federal laws with no consequences. Although the majority in *Alden* contended that the people could rely on the good faith of the state in following federal laws, this does not solve the problem of what remedies are available to individuals if the state violates federal law. Also, it seems impractical to expect the Justice Department to sue a state on behalf of an individual whenever a state violates federal law.

A potential remedy to the lapse of enforcement of federal law over states created by *Alden* would require suits to be brought by the Justice Department on behalf of large numbers of individuals adversely affected by non-compliant states. This scheme, however, causes problems for individuals as well as states. Adequate protection of individuals would not be guaranteed because enough people would have to be injured in order for the Justice Department to find it worthwhile to bring suit.\(^8\) States, potentially, would be subject to greater liability in a suit brought by the federal government. The effect on a state treasury due to a large verdict or settlement in one of these suits could deplete the state budget. Also, the state has a diminished ability to reach a compromise because the federal government would be seeking to protect the collective interests of the affected individuals. In private suits, there exists a greater possibility of compromise as the individual seeks compensation, whereas the federal government has a punitive interest.\(^6\) The federal government acts as an agent for those individuals harmed by a non-compliant state, thus the state cannot completely avoid suit. The *Alden* Court upsets the balance of government by upholding the principle of state sovereign immunity, leaving the States their dignity, but ignoring the purpose of federal law as a means of protecting individuals.

The Supremacy Clause embodies the principle of American federalism, as it declares federal law to be above all other. States cannot override federal law, but instead are bound by the work of the national government. Bracton's maxim, cited by the *Chisholm* Court concisely summarizes the role of the Supremacy Clause within the nature of federalism: “[i]t would be superfluous to make laws, unless

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85. Also, this could lead to the enlargement of the executive office depending on the President's policy. A President concerned with such issues would enlarge the Justice Department, thus upsetting the balance of power between the three branches of government. Thus, the *Alden* majority concerned with maintaining a proper balance between federal and state governments, upsets the system of checks and balances within the federal system by forcing the enlargement of the executive branch.

86. The federal government has as its interest insuring federal law remains the supreme law, and may be less likely to compromise with a state who defies federal law.
those laws, when made, were to be enforced.”

Alden undermines the authority of Congress to make laws. Although the majority argued their decision did not give states the right to disregard federal law, this assertion causes problems since it certainly does not provide any incentive for states to comply with federal law. Prior jurisprudence recognized that where “a federal statute does impose liability upon the States, the Supremacy Clause makes that statute the law in every State, fully enforceable in state court.” Thus, by permitting the assertion of state sovereign immunity on a federal law claim, the majority in Alden clearly ignored its prior regard for the Supremacy Clause and removed state liability to citizens under federal law.

B. Tenth Amendment Implications

The majority in Alden brushed over the implications that their decision has on Tenth Amendment jurisprudence. Members of the Chisholm Court utilized the Tenth Amendment in order to demonstrate the sovereignty of the people, but not to recognize retention of state sovereign immunity. If the Court today invokes history to support its contention that state sovereign immunity inheres in the nature of the Constitution, more weight should be given to the reasoning of the majority in Chisholm, particularly their understanding of the Tenth Amendment.

Through the Constitution the people granted certain rights to the federal government in order to create a strong and stable country. Since the people acted through their states in granting these powers, all those powers not specifically conferred through the Constitution remained with the States (as enunciated in the Tenth Amendment). Also, in utilizing history, the majority in Alden, neglected to account for the addition of the Bill of Rights as a political persuasion tool intended to insure ratification by the states with a large anti-federalist contingency. These anti-federalists did not think separation of powers an adequate means of protecting against a tyrannical national government.

The Court in recent cases relied on the Tenth Amendment to assert the need for the protection of states in their capacity as

88. Even Madison, as he and the country aged, recognized the need to protect the national government from Constitutional imbalance. Edward McNall Burns, James Madison, Philosopher of the Constitution 157 (1938). In Alden, the Court tipped the scale in favor of state governments against the national government.
sovereign states. The Tenth Amendment provides for the retention of sovereignty in the people, and the protection of the people occurs through the political process. The people remain sovereign as they retain ultimate power to approve or disapprove of actions taken by Congress or the President. The Court assumes a dangerous role by relying on states’ rights ideology to restrain the federal government. By protecting the states, the Court ignores the purpose of the Constitution and the Tenth Amendment as a protector of the people from any unlawful government encroachment. A balanced government is necessary to insure protection of individuals, not to insure the protection of states, and the Court in its effort to protect states’ rights ignores the ultimate source of sovereignty, the people.

C. Practical Considerations

Although the debate over state sovereign immunity exists on a historical and philosophical level, Alden impacts a broad range of issues relating to everyday Americans’ lives. As seen in Alden, state employees had no means of seeking redress against Maine for its violation of the FLSA’s overtime provision. Alden also renders citizens unable to sue states on intellectual property disputes, reverses Union Gas, and causes numerous problems in other areas of law.

In matters of intellectual property Alden creates an array of problems that could stifle development of innovative ideas and products. Such problems could arise, for example, in cases where a professor’s research conclusions are sold by his university with no compensation to the professor for his work. If the university is a private entity, the professor seeks relief in court to recover the profits the university made from the sale of his work. If the professor is employed by a state university, however, he cannot recover the loss he suffered as a result of the university selling his ideas because, under Alden, states are immune from private suits brought for infringement of federal intellectual property law.


Court's recent jurisprudence essentially authorizes state theft of intellectual property as the victims have no federal remedy available to discourage the state from taking such action. Thus, the holding in *Alden* coupled with the *Florida Prepaid* cases leaves individuals defenseless against the state, and threatens development of novel ideas.

The Court in *Union Gas* recognized the importance of permitting a private suit against a state in matters of national concern.94 Those problems national in nature require uniform remedial measures. Through CERCLA, Congress made everyone, including states, potentially liable for the costs of hazardous waste cleanup. The enormous cleanup costs necessitated such broad measures because the federal government could not shoulder the costs or the time for all hazardous waste cleanups. Congress, as a means of encouraging cleanup, allowed those entities partly responsible for hazardous waste sites that voluntarily cleaned up those sites to sue other potentially responsible parties for recovery of a portion of the cleanup costs.95 The States "comprise[d] a significant class of owners and operators of hazardous waste sites."96 Rendering the States immune from suits by private citizens would defeat the motivation of private citizens to shoulder the responsibility of hazardous waste cleanup, and stifle the ability of Congress to deal with the problem of hazardous waste.

VI. CONCLUSION

Private suits against states can only arise on federal question issues,97 thus state sovereign immunity gained increasing relevance with the expansion of federal legislation. Prior to *Seminole*,98 a state

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95. *Id.* at 21-22, 109 S. Ct. at 2285.
96. *Id.* at 22, 109 S. Ct. at 2285.
97. Although debate exists as to the breadth of state suability under the Eleventh Amendment there exists no dispute that it prevents suit against a state on diversity jurisdiction grounds, as it prohibits suits "against one of the United States by Citizens of another State." U.S. Const. amend. XI; see also *Union Gas*, 491 U.S. at 23-24, 109 S. Ct. 2273, 2286-87 (Stevens, J., concurring).
alleged to have violated federal law could be privately sued in federal court. Seminole and Alden provide no relief under federal legislation to a citizen injured by a state unless the federal government decides to intervene.

Given the holding in Seminole, the Court's ruling in Alden came as no surprise because if a state could not be sued in federal court on federal law then a state would also not be amenable to suit in its own courts on issues of federal law. The ruling in Seminole, however, left the petitioners in Alden with no alternative but to seek redress in their own state courts. Alden did not require the majority to rely on issues of federalism and the inherency of sovereign immunity, as simple reasoning provides the same outcome. If a state was not found to have consented to suit in federal court, it would not be found to have

U.S.C. § 2710(d)(3)(A) (1996). Id. at 47; 116 S. Ct. at 1119. Congress passed the Indian Gaming Regulatory Act pursuant to its Article I, Indian Commerce Clause powers. U.S. Const. art. I, § 3, cl. 3. Section 2710(d)(7) of the Act explicitly authorized suits against states who failed to comply with the good faith requirement. Seminole, 517 U.S. at 47, 116 S. Ct. at 1119. The Court held that the Eleventh Amendment prevented Congress from exercising its Article I powers to abrogate state sovereign immunity.

99. The Court in the years following Hans did broaden the reach of state sovereign immunity by going beyond the literal words of the Eleventh Amendment. The Court found it improper to leave a state open to suits in admiralty, just as it had been unacceptable to allow private suits against a state in federal court. In re State of New York, 256 U.S. 490, 41 S. Ct. 588 (1921). Relying on the necessity of consent for a state to be sued, the Court ignored the reference of the Eleventh Amendment to "suits in law or equity," and extended immunity to admiralty suits. Id. The Court in the next decade held that "the 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent." Principality of Monaco v. Mississippi, 292 U.S. 313, 329, 54 S. Ct. 745 (1934). In Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974), the Court used the Eleventh Amendment to bar the federal court from awarding retroactive payment of benefits found to have been wrongfully withheld by the state.

However, the precedent leading to Union Gas also indicates the surrender of sovereignty, and thus the surrender of sovereign immunity by the states with the ratification of the Constitution. In Parden v. Terminal Railway, 377 U.S. 184, 192, 84 S. Ct. 1207, 1212 (1964), the Court held that by empowering "Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." In Employees v. Missouri Pub. Health Dept., 411 U.S. 279, 93 S. Ct. 1614 (1973), the Court concluded that Congress had authority to override state claims of immunity when acting pursuant to Commerce Clause powers. The Court in subsequent cases upheld the authority of Congress to abrogate state sovereign immunity when it validly exercised its Article I powers. Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468, 107 S. Ct. 2941 (1987); County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226, 105 S. Ct. 1245 (1985). Thus, Union Gas reflected the concept that by ratifying the Constitution, the states consented to Congressional authority for Article I powers, and Article I by its existence permitted Congressional abrogation of state sovereign immunity.
consented to suit in its own court on federal law. This result occurs because in their constitutions states expressly consent to suits, and if a state argues it has not consented to suit on federal law in federal court, then practically the state will not have made itself amenable to suit in state courts on federal law. The state will not argue state sovereign immunity in federal court if it can be sued in state court under the same law. States invoke state sovereign immunity as a means of dismissing a suit, not as a means of removing the suit to their own court. The inability to sue a state rejects principles of federalism, as it leaves citizens unprotected from the state governments. The majority opinions in Seminole and Alden while purporting to uphold the principles of the founders, with their reasoning undermined the concept of American government.

The Court, in dealing with sovereign immunity, should focus on what action is being taken against that state, and whether Congress has the constitutional authority to enact such legislation under Article I or Section 5 of the Fourteenth Amendment. The state should not be immune from federal law simply because it is a state. The Constitution created a federal system in which states surrendered their power as to those issues enunciated in the Constitution. The extent of the federal government’s powers under the Constitution remained susceptible to expanding or shrinking interpretations. Article I provides clear Congressional authority on all matters falling within that Article. This implies that upon entry into the Union the states ceded any Article I powers they had to the federal government, thus relinquishing sovereign immunity as to Article I provisions. This surrender occurred in full compliance with the principles of federalism as understood by members of the founding generation as well as modern America.

The majority in Alden only further removes American citizens’ ability to seek redress against a non-compliant state. Alden indicates the Supreme Court’s desire to expand state power at the expense of the federal government and, ultimately, the people. The dissent missed the opportunity to refute the flawed logic of the majority, and redeem modern federalism. Theoretically, the states being closer to the people should be best able to protect its citizens, however, modern history has shown otherwise. The Constitution created a government in which states granted certain powers to the federal government; implicit in the granting of such powers was the inability of states to claim sovereign immunity as the states were no longer sovereign as to these powers. The Court ultimately is substituting its own opinion for that of Congress, and the Constitution did not intend the judiciary to sit as super legislature. The Court, by ignoring its role as an independent judiciary, threatens the balance of American government.
The Eleventh Amendment neither confirmed nor introduced the idea of state sovereign immunity, but rather served as a rule for diversity cases in federal courts. The language of the Eleventh Amendment, given the decisions exercised by its drafters, should be read literally. The broad interpretation the Court gives to state sovereign immunity undermines the concept of federalism and the Constitution. It elevates the states to an equal immune footing with the federal government in matters that are within the realm of federal jurisdiction leaving the citizens powerless to defend themselves from the abuses of state government.

Sarah Louise House*

100. One author has commented that the reason for the Eleventh Amendment was to prevent foreign countries, specifically Great Britain, from suing debtor states. This would have weakened the states. 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 (1975).

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