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I. INTRODUCTION

Toward the end of her article, *The History of Mainstream Legal Thought*, Elizabeth Mensch identifies federalism as a dominant theme in recent Supreme Court decisions.[1] The Court's focus on questions of federalism, however, cannot be directly attributed to the emergence of any specific social or political issues dividing champions of strong central government from defenders of state sovereignty. Instead, the Court's scrutiny seems to have arisen from a perplexing, frustrating, and self-contradictory body of Eleventh Amendment jurisprudence and the perpetual call for judicial clarification it has produced.

While the text of the Eleventh Amendment is unambiguous[2]—its language specifically bestows immunity upon states sued in federal court by non-citizens of the defendant state—subsequent case law has expanded this grant of state immunity considerably. The roots of this movement can be found in the seminal, century-old case of *Hans v. Louisiana*.[3] In *Hans*, the Court held that the Eleventh

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1. *See* Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 23, 46 (David Kairys ed., 1998). Professor Mensch claims that federalism became a prevalent issue during the U.S. Supreme Court's 1996-1997 term; she is most likely referring to the controversial decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), where the Court held that Congress does not have the power to abrogate the states' sovereign immunity and authorize suits by Indian tribes against states to enforce legislation enacted pursuant to the Indian Commerce Clause:

> [W]e reconfirm that the background principle of state sovereign immunity ... is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

Id. at 72.

Professor Mensch, like this Author, is essentially concerned with how courts mediate state and federal sovereignty and justify the dispensation of legislative or judicial power to one entity at the expense of the other: "Without an essentialist epistemology that recognizes some matters as 'by their very nature' local (as earlier courts once believed), how does one define the boundaries that mark spheres of autonomy [between the state and federal governments]?" Mensch, *supra* at 47.

2. 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.

3. 134 U.S. 1 (1890).

Amendment bars federal suits by citizens against their own states.[4] The result, in effect, was to immunize states not only from diversity suits but also suits involving questions of federal law.[5]

Like a doctrinal rubber band, the Eleventh Amendment was recently stretched to its outer limits in *Alden v. Maine*,[6] in which the Court ruled that the state of Maine cannot be subject to suit in its own courts for violating the Fair Labor Standards Act of 1938 (FLSA).[7] Through its decisions, the Supreme Court has broadened the Eleventh Amendment from a procedural rule of narrow, precise application to an overriding, absolute principle of state sovereign immunity. Although it acknowledged that the text of the amendment does not explicitly warrant such a ruling, the Court nonetheless declared the sovereign immunity of the states in any forum—state or federal—to be a fundamental, unwavering precept of universal recognition. According to the Court, such immunity is not only inherent in the constitutional scheme as envisioned by the Founders, but is also a philosophical postulate that predates our constitutional history.[8]

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4. *See id.* at 20-21.

5. The Court in *Hans* explained that to grant immunity to states only in suits brought by noncitizens would produce results not intended by the Founders:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Id. at 15.

6. 527 U.S. 706 (1999). In *Alden*, the action was brought by a group of probation officers employed by the State of Maine. The plaintiffs alleged that the State had disregarded the overtime provisions of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-19 (1994 & Supp. 1998). *See* Alden v. Maine, 527 U.S. at 711-12. The United States District Court for the District of Maine dismissed the suit in light of the Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). *See supra* note 1 for a discussion of *Seminole Tribe*. After the Court of Appeals ruled in *Mills v. Maine*, 118 F.3d 37, 40-41 (1st Cir. 1997), that the holding of *Seminole Tribe* barred federal suits for overtime pay brought by state employees, and that a provision of the FLSA granting federal court jurisdiction for such cases was unconstitutional, the *Alden* petitioners filed suit in Maine Superior Court for Cumberland County. The action was dismissed on appeal by the Maine Supreme Judicial Court, sitting as the Law Court. *See* Alden v. Maine, 1998 ME 200, ¶ 13, 715 A.2d 172, 175-76. Concerned that the Law Court's judgment conflicted with a decision by the Supreme Court of Arkansas, *see* Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998), the Supreme Court granted certiorari. *See* Alden v. Maine, 527 U.S. at 712.

7. 29 U.S.C. §§ 201-19. The provision at issue in *Alden* authorizes private suits to be filed "in any Federal or State court of competent jurisdiction." *Id.* § 216(b).

8. The Court stated:

> We have ... sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States)....

Alden v. Maine, 527 U.S. at 713.

By ruling that states are immune from prosecution in their own courts for alleged violations of federal labor law, *Alden* has produced an inequitable result to the extent that all citizens are protected by the congressional safeguards of the FLSA, except for the limited minority who are employed by state governments.[9] But perhaps even more troubling than the result reached by the *Alden* Court is the methodology it employed to circumvent the limited language of the Eleventh Amendment and proclaim the elastic scope of state immunity: scrutinizing the historical record of the Constitutional Convention and insisting that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."[10]

There are three irreconcilable problems with *Alden*'s historical approach. First, there is no evidence that the precise question *Alden* presents—whether a state can be sued in its own courts when the remedy sought by the private plaintiff derives not from the state but from the Federal Government—was ever discussed at the Philadelphia Convention in 1787. Second, while admittedly some of the Founders contemplated the general issue of state sovereignty, it is abundantly clear that there was no consensus among them that the states enjoyed unfettered immunity in either the established state courts or the soon-to-be-created federal courts. Third, the vast sea of historical time and perspective that separates the Philadelphia Convention from the Civil War, the Reconstruction, the Civil Rights Movement of the 1960s, and the other momentous departures from state sovereignty has stretched to a point where the Framers' thoughts on the immunity of the states are somewhat irrelevant to contemporary jurisprudence. Thus, in light of the shift in legal and political power from the states to the federal government in the name of precious federal rights, which distinguishes our post-bellum history, the *Alden* Court's insistence on divining the original meaning of the Eleventh Amendment stands as an exercise in critically misleading historicism.

This Article will argue that federalism is not a historically fixed vision of the constitutional balance of power between the state and federal governments, but rather a contested terrain upon which competing visions perpetually engage in a historiographical and ideological tug-of-war.

Part II will trace the doctrinal expansion of state immunity from the literal parameters of the Eleventh Amendment to its apotheosis as a non-rebuttable presumption of political theory by the *Alden* Court. This Part will debunk *Alden*'s assertion that a comprehensive solution to the unique question presented by the

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9. The Court suggested that while a state employee cannot bring a private suit against a state, the FLSA authorizes the United States to bring suit on such an employee's behalf:

> The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits of the first kind but not of the second.

Id. at 759-60. Nevertheless, the reality is that the limited resources of the Justice Department prevent the federal government from bringing suit every time a private cause of action is barred by the Eleventh Amendment. Therefore, this alternative remedy is available only to the extent that the United States is willing to prosecute a particular violation of the FLSA. As for the *Alden* petitioners, "the United States apparently found [their] interests insufficient to justify sending even a single attorney to Maine to prosecute this litigation." *Id.* at 759.

10. *Id.* at 715.

case may be extracted from the historical record of the 1787 Convention and the early days of our constitutional experiment. Having concluded that state sovereign immunity is neither historically nor philosophically a categorical postulate reflecting a "settled doctrinal understanding"[11] of federalist government, Part III will explore the discourse of constitutional redress and its role in the ongoing debate over sovereignty. Finally, Part IV will consider why the Court, in establishing an infallible rule of state immunity, felt compelled to resolve this weighty constitutional question in such sweeping absolutist terms. This Part advances an alternative minimalist approach to the elusive and obfuscated doctrine surrounding the Eleventh Amendment: a doctrine that does not understand sovereign immunity as a universal corollary to the 'law of nations,'[12] but rather seeks to balance the absolutist view of immunity and its juridical antipodes—the proposition that for every violation of a prescribed right, a judicial remedy shall exist—and reconcile these polar principles of law.

II. "THE GENERAL PRACTICE OF MANKIND": THE ABSOLUTIST MESSAGE OF *ALDEN* AND THE EVER-EXPANDING UNIVERSE OF STATE SOVEREIGN IMMUNITY

It is paradoxical that the Eleventh Amendment is referenced so often within the *Alden* opinion when one considers that the question presented by the case—whether a state's court system must entertain a suit alleging that state's violation of federal labor standards—does not technically raise an Eleventh Amendment issue. Textually speaking, the Eleventh Amendment neither discusses nor remotely implicates any judicial forum other than the federal system. The amendment does not read, "the Judicial power of the States," but rather, "the Judicial power of the United States."[13] Nevertheless, by characterizing governmental immunity as an absolute precept of political and legal tradition—and indeed, "the general practice of mankind"[14]—*Alden* conveniently sidesteps the textual limitations of the amend-

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11. *Id.* at 728.

12. E. Randolph, Convention of Virginia, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 573 (J. Elliot, 2d ed., 1941) (1836) [hereinafter ELLIOT'S DEBATES] (emphasis omitted). This Article employs the term, "law of nations," as Edmund Randolph invoked the phrase during the Virginia ratification debates: "I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party.*" *Id.* Similar language appeared in *Seminole Tribe* when the Court said that the broad state immunity recognized in *Hans* "found its roots not solely in the common law of England, but in the much more fundamental 'jurisprudence in all civilized nations.'" Seminole Tribe v. Florida, 517 U.S. at 69 (quoting Hans v. Louisiana, 134 U.S. at 17 (quoting Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858))).

13. *See supra* note 2 for the text of the Eleventh Amendment.

14. Alden v. Maine, 527 U.S. at 716-17 (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). In arguing that the immunity of the states was in fact envisioned by the Founders, the Court invoked the position of Alexander Hamilton in THE FEDERALIST No. 81:

> 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.

ment.[15]

That the Court felt comfortable transgressing the parameters of the Amendment's language is neither surprising nor unprecedented. If our metaphor for *Alden's* broadening of state immunity through the extra-textual interpretation of the Eleventh Amendment is the ever-expanding universe in which celestial bodies are perpetually moving outward and away from each other, then *Hans v. Louisiana*[16] was the 'Big Bang' that set things in motion. By concluding the Eleventh Amendment grants immunity in federal court to states not only from suits by citizens of other states, but also from suits by the defendant-state's own citizens on the basis of federal question jurisdiction, *Hans* deemed states to be exempt from compliance with an array of federal statutory regulation.[17]

A century after *Hans*, in *Seminole Tribe v. Florida*,[18] the Court expanded its prior holding, explaining that the Constitution does not grant Congress the power to abrogate the states' immunity and establish judicial remedies for violations of federal law.[19] By so ruling, the Court once again ignored the narrow text of the

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Id. (quoting THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton)). In a dissent from an earlier decision, Justice Brennan expressed doubt that Hamilton truly espoused the absolute immunity of the states. He noted that Hamilton, while celebrated by the majority as the champion of state sovereignty, believed that "the power of the federal courts under federal-question jurisdiction had to be congruent with the power of Congress to legislate under Article I." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 278 n.27 (1985) (citing THE FEDERALIST No. 80, at 535 (A. Hamilton) (Jacob E. Cooke ed., 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number.")).

15. The Court readily admitted that it was not following the precise, textual dictates of the Eleventh Amendment, but explained that state immunity derives not from the amendment, but from general notions of state sovereignty that predate the states' ratification of the Constitution. *See* Alden v. Maine, 527 U.S. at 713 ("the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment" but is derived from general notions of state sovereignty).

16. 134 U.S. 1 (1890).

17. *See id.* Professor Ann Althouse believes that *Hans* should be "stigmatized as every bit as much of a legal fiction as [*Ex parte*] *Young*, [209 U.S. 123 (1908)]," a decision in which the Supreme Court allowed state officials to be sued in federal court because a state official in violation of federal law cannot be said to be a representative of the state. Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1137 (1989). According to Althouse:

> *Hans* claims constitutional status for an idea that has no tie to any constitutional language. Article III says nothing about state immunity. In particular, the state-citizen diversity clause suggests ... just the opposite. The [E]leventh [A]mendment refers only to suits brought by noncitizens of a state. In finding constitutional immunity for suits brought by citizens suing their own states, *Hans* constructs a nonexistent scenario—proposing the idea of federal question jurisdiction in a suit brought by a citizen against his own state and imagining the framers of the [E]leventh [A]mendment rejecting that jurisdiction as well—and then treats the amendment as if that scenario had taken place.

Id. at 1137-38.

18. 517 U.S. 44 (1996).

19. *Id.* at 47. The *Seminole Tribe* Court, however, did recognize one important exception to this rule—that Congress could abrogate the states' immunity in order to execute the Fourteenth Amendment, a provision that, "by expanding federal power at the expense of state autonomy, ... fundamentally alter[s] the balance of state and federal power struck by the Constitution," and therefore supersedes the Eleventh Amendment. *Id.* at 59 (relying on Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976)).

Eleventh Amendment in favor of an absolutist understanding of sovereign immunity:[20] "we long have recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"[21] Justice Stevens dissented from the majority's endorsement of a constitutional principle not inscribed in the Constitution: "The fundamental error that continues to lead the Court astray is its failure to acknowledge that its modern embodiment of the ancient doctrine of sovereign immunity 'has absolutely nothing to do with the limit on judicial power contained in the Eleventh Amendment.'"[22]

Three years after *Seminole Tribe*, the *Alden* Court took the Eleventh Amendment one step further by recognizing the immunity of the states in state court as well as federal court.[23] The consequence of this judgment was to leave the petitioners without any state or federal remedy for their employer's failure to respect the FLSA's overtime safeguards.[24] Writing for the majority, Justice Kennedy justified state immunity in state court by relying upon "what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system."[25] The Court located the origins of the general rule of sovereign immunity in English law and the English notion that "the Crown could not be sued without consent in its own courts."[26] It is rather curious that the Court would

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20. For an account of the extra-textual expansion of Eleventh Amendment immunity in *Seminole Tribe*, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1279 n.42 (1998) (noting that "[t]oday, we tend to discuss Eleventh Amendment issues in terms of 'sovereign immunity,' despite the fact that the Constitution never mentions the word 'sovereign' and does not by its terms confer immunity on any government body"). *See also* Aakhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1475-76 (1987) (noting that "[n]ot only does the text [of the Eleventh Amendment] nowhere mention 'state sovereign immunity,' but the limitations in the text itself are inexplicable if we assume (as does the Court) that the Amendment's purpose was to secure general immunity .... If coherence of general sovereign immunity doctrine is achieved only by mangling the Amendment's text, the obvious lesson should be that the Amendment was not designed to embody any such doctrine.").

21. Seminole Tribe v. Florida, 517 U.S. at 69 (quoting Principality of Monaco v. Mississippi, 292 U.S. 313, 326 (1934) (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890))). In an earlier case, Justice Scalia adopted a similar approach:

> [T]he Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 31-32 (1989) (Scalia, J., concurring in part and dissenting in part) (interpreting Hans v. Louisiana, 134 U.S. 1 (1890)).

22. Seminole Tribe v. Florida, 517 U.S. at 95 (Stevens, J., dissenting) (quoting Pennsylvania v. Union Gas Co., 491 U.S. at 25 (Stevens, J., concurring)).

23. *See* Alden v. Maine, 527 U.S. 706, 754 (1999).

24. *See id.*

25. *Id.* at 758.

26. *Id.* at 715. The Court then quoted English legal theorist Sir William Blackstone, insisting that Blackstone's works were revered by the Founders: "And, first, the law ascribes to the king the attribute of sovereignty, or pre-eminence .... Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power ...." *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *234-35) (alteration in original).

suggest a continuity between principles of English jurisprudence and the political philosophy of the Founders, for the Constitutional Convention was precisely an attempt to bury the old-world politics of royalism and establish the sovereignty of the people.[27] Nevertheless, the Court insisted that "the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was ... ratified"[28] and that this doctrine was indisputably "the general practice of mankind."[29]

Despite the majority's macro-historical posture—that because a sovereign's immunity from suit "has been enjoyed as a matter of absolute right for centuries" it is necessarily inherent in the constitutional design[30]—a more complete inquiry into the historical record suggests that the delegates who attended the Constitutional Convention were hardly of one mind on the issue of states' sovereignty. First, it is important to realize that the precise question presented by *Alden*—whether a state is immune from suit in its own courts for violating federal law—was never pondered at the Convention or at subsequent state ratifying conventions simply because, at the time, the enormous proliferation of federal statutory law that defines our modern political history could not have been envisioned by the Founders.

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27. Chief Justice Jay articulated this historical paradox in *Chisholm v. Georgia*, holding that Article III authorized suits against a state by private citizens of another state:

> No such ideas [of sovereign dignity] obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects ... and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471-72 (1793) (emphasis omitted). *Chisholm* was overruled by the adoption of the Eleventh Amendment a year later. *See* Alden v. Maine, 527 U.S. at 720-21 (discussing the public response to *Chisholm* and the resulting enactment of the Eleventh Amendment).

Professor Amar argues that the American colonists' notion of sovereignty marked a radical departure from the British concept that "sovereignty resided in the King-in-Parliament, that indivisible entity consisting of King, Lords, and Commons." Amar, *supra* note 20, at 1431. According to Amar:

> Rather different ideas were brewing on the other side of the Atlantic. During the 1760's and 1770's, many colonial leaders argued that various parliamentary enactments were void because they violated higher principles of the British Constitution reflected in revered texts like Magna Charta, and in fundamental unwritten and common law traditions.

Id. at 1432. Amar believes that the overriding purpose of the Philadelphia Convention was to transfer sovereignty from the government to the people:

> [T]he heart of the issue [at the Convention] was sovereignty. The Articles [of Confederation] had crumbled because they had been erected on the uneven and shifting foundation of the sovereignty of the People in each state. The [British] imperial model had failed because it asserted the omnipotent sovereignty of the central assembly, Parliament. Yet to state the matter this way was to glimpse a third and more promising alternative: Sovereignty must be vested in the People of the United States as a whole. Such a system could shore up the inherent instability of the Articles of Confederation. It could also avoid the monumental centralism of the imperial model by relocating sovereignty from the national assembly to the People of the nation. The People could limit the delegated authority of the national government and stipulate that certain powers be reserved for the government of each state.

Id. at 1449. A critical analysis of Amar's 'Unitary People' thesis will follow in Part III. *See* discussion *infra* notes 52-65 and accompanying text.

28. Alden v. Maine, 527 U.S. at 715-16.

29. *Id.* at 716-17 (quoting THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton)).

30. *Id.* at 715 (quoting Nevada v. Hall, 440 U.S. 410, 414 (1979)).

Surely the idea of government regulation of wages, state or federal, was premature in the late eighteenth century and would have been anathema to the prevailing laissez-faire mindset of the day.[31] Thus, although concededly general notions of sovereignty were debated,[32] as Justice Souter observed in his *Alden* dissent, "[f]rom a canvass of [the] spectrum of opinion expressed at the ratifying conventions, one thing is certain. No one was espousing an indefeasible, natural law view of sovereign immunity."[33]

The Court's overriding ambition in *Alden* was arguably to assure its audience that the Founders did indeed champion the sovereign immunity of the states. In addition to Alexander Hamilton's absolutist statement that immunity from suit is "inherent in the nature of sovereignty"[34]—an assertion which the dissent attacks as "[n]atural law thinking on the part of a doubtful few"[35]—the Court cited the views of James Madison and John Marshall, two of the statesmen who advocated

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31. *See id.* at 772 (Souter, J., dissenting). Justice Souter concluded that:

> At the Constitutional Convention, the notion of sovereign immunity, whether as natural law or common law, was not an immediate subject of debate, and the sovereignty of a State in its own courts seems not to have been mentioned. This comes as no surprise, for although the Constitution required state courts to apply federal law, the Framers did not consider the possibility that federal law might bind States, say, in their relations with their employees.

Id. In response to the dissent's assertion that immunity was not specifically addressed at the Convention, the majority remarked:

> We believe ... that the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity .... [T]he silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.

Id. at 741. The dissent countered:

> [T]his silence does not tell us that the Framers' generation thought the prerogative so well settled as to be an inherent right of States, and not a common law creation. It says only that at the conventions, the issue was not on the participants' minds because the nature of sovereignty was not always explicitly addressed.

Id. at 772-73 n.12.

32. *See* THE FEDERALIST No. 8 at 8-27 (J. Jay), No. 15 at 94-97, No. 16 at 100, 102, No. 32 at 200-03 (A. Hamilton), No. 40 at 261-62 (J. Madison) (Jacob E. Cooke ed., 1961).

33. *Id.* at 778. The crux of the dissent's argument is that there was a wide gamut of opinion regarding the sovereignty of the several states, and not, as the majority claims, a unanimous adoption of the absolute sovereignty theory rooted in English doctrine: "As I have had occasion to say elsewhere, that an assertion of historical fact has been made by a Justice of the Court does not make it so." *Id.* at 769 n.8.

34. *Id.* at 716 (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton)).

35. *Id.* at 764 (Souter, J., dissenting) ("There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable."). In addition to the dissent's argument that a historical approach to the Alden problem is inevitably indeterminate considering the diversity of views on state sovereignty, Justice Souter assaulted the natural law formulation of the majority's avowal of Maine's immunity from suit:

> [I]n Kawananakoa, [Justice Holmes] gave not only a cogent restatement of the natural law view of sovereign immunity, but one that includes a feature (omitted from Hamilton's formulation) explaining why even the most absolutist version of sovereign immunity doctrine actually refutes the Court's position today: the Court fails to realize that under the natural law theory, sovereign immunity may be invoked only by the sovereign that is the source of the right upon which suit is brought. Justice Holmes said so expressly: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends ....

state immunity at the Virginia ratifying convention.[36] Marshall, for example, vehemently protested the scope of federal judicial power: "I hope no Gentleman will think that a state will be called at the bar of the federal court."[37]

The obvious problem with the Court's reliance on these passages is that none of them address the specific question of suing a state in state court. A more fundamentally historical problem, however, is the majority's failure to account for the overwhelming opposition to state sovereignty—a position shared by many Founders that arguably characterizes the constitutional design to a degree greater than the Court was willing to recognize. For example, George Washington, serving as chairman of the Philadelphia Convention, understood the critical need to curb the sovereignty of the states as delineated under the existing Confederate scheme: "Thirteen sovereignties ... pulling against each other, and all tugging at the foederal head, will soon bring ruin on the whole."[38]

We know from Justice Souter's dissent that General Washington was not the only Virginian who felt uneasy about state sovereignty under the new constitutional order. Souter invoked the viewpoint of Edmund Randolph, the Governor of Virginia, who "clearly believed that the Constitution both could, and in fact by its language did, trump any inherent immunity enjoyed by the States."[39] Perhaps, by ignoring Randolph's sentiments, the Court undermined its noble claim "to discover ... only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system,"[40] because Randolph was, arguably, as instrumental in designing the Constitutional scheme as any man at the Philadelphia Convention. It was Randolph who put forth the Virginia Resolves, also known as the Virginia Plan or the Randolph Plan,[41] a suggestive blueprint for governance that featured a national executive, a national judiciary, and a national legislature made up of two branches.[42] Two days after unfurling his plan, Randolph voiced his concern that "a union merely federal will not accomplish the objects

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> [I]f the sovereign is not the source of the law to be applied, sovereign immunity has no applicability. Justice Holmes indeed explained that in the case of multiple sovereignties, the subordinate sovereign will not be immune where the source of the right of action is the sovereign that is dominant.

Id. at 796-98 (quoting Kawananakoa v. Polyblank, 205 U.S. 349, 354 (1907) (holding the District of Columbia not immune from suit because private right upon which action was based was "created and controlled by Congress and not by a legislature of the District")).

36. *See id.* at 717-18.

37. *Id.* at 718 (quoting J. Marshall, Virginia, *in* 3 ELLIOT'S DEBATES 555).

38. CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA 33 (1966) (quoting G. Washington).

39. Alden v. Maine, 527 U.S. at 776.

40. *Id.* at 758.

41. Although the Virginia Resolves were first presented by Randolph, Madison's biographers insist that he authored the plan. Madison himself, however, reportedly viewed the work as "the result of a 'consultation among the deputies.'" BOWEN, *supra* note 38, at 38.

42. *See id.* at 37-41. Randolph's original sketch called for the first legislative branch (the representatives) to be elected by the people at large, and the second branch (the senate) to be elected by the first branch. While the Randolph Plan was altered by the end of the Convention, Bowen writes that the plan "would form the basis of the Convention's procedure—and the basis of the United States Constitution—to be debated clause by clause in Committee of the Whole, with every Resolve reconsidered, reargued, passed, or discarded." *Id.* at 38. Randolph—who ultimately declined to sign the Constitution because he believed that the state ratifying conventions should be permitted to propose amendments to the Philadelphia plan to be submitted to a second general convention—later served as plaintiff's counsel in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). *See generally*, Alden v. Maine, 527 U.S. at 777-86 (Souter, J., dissenting) (discussing Randolph's role in the *Chisholm* litigation).

proposed"[43]—the replacement of the Articles of Confederation—and suggested "*a national* government, consisting of [separate] supreme legislative, executive and judicial [branches of government]."[44] While aspects of Randolph's prospectus were modified throughout the Convention, his anxieties about state sovereignty were ultimately enshrined in provisions like the Supremacy Clause. The *Alden* Court, therefore, cannot justify its decision in the self-heralded terms of historical objectivity by disregarding the resonance of Randolph's views.

The *Alden* majority also dismissed the reflections of two other Philadelphia delegates—James Wilson and Charles Cotesworth Pinckney—describing their viewpoint as "a radical nationalist vision of the constitutional design that not only deviated from the views that prevailed at the time but ... remains startling even today."[45] Wilson, who Justice Souter characterized as "the furthest extreme from Hamilton" and his natural law formulation of sovereignty, argued at the Pennsylvania ratifying convention that federal law may bind state governments—a notion embodied in the Supremacy Clause.[46] Indeed, Wilson—perhaps anticipating the absolutist, natural law reading of sovereign immunity adopted by *Alden*—asked rhetorically, "[u]pon what principle is it contended that the sovereign power resides in the state governments?"[47] Pinckney espoused a similar view at the South Carolina convention, emphasizing the fact that the Declaration of Independence was not an act of the individual states, but rather an act of the newly contrived Union and, as a consequence, "sufficiently confutes the ... doctrine of the individual sovereignty and independence of the several states."[48] Surely, the echoes

43. BOWEN, *supra* note 38, at 43 (quoting E. Randolph).

44. *Id.* at 42 (quoting E. Randolph).

45. Alden v. Maine, 527 U.S. at 725.

46. *See id.* at 776 (Souter, J., dissenting). Justice Souter explained that "[f]or Wilson, 'the answer was plain and easy: the government of each state ought to be subordinate to the government of the United States.'" *Id.* (alteration in original) (quoting J. Wilson, Pennsylvania, *in* 2 ELLIOT'S DEBATES 443). Wilson's conviction that "sovereignty resides in the people," is reminiscent of Professor Amar's 'Unitary People' thesis (a historical understanding of sovereignty which interprets the Constitution as having established the popular sovereignty of the American citizenry). *See* Amar, *supra* note 20, at 1425, 1475-76.

47. Alden v. Maine, 527 U.S. at 777 (quoting J. Wilson, Pennsylvania, *in* 2 ELLIOT'S DEBATES 443). In defending his invocation of Wilson to demonstrate that the "diversity of views with respect to ... sovereign immunity ... at the several state conventions ... stands in the way of the Court's assumption that the founding generation understood sovereign immunity in the natural law sense as indefeasibly 'fundamental' to statehood," Justice Souter reminded the majority of the historical impetus for the Convention and longstanding constitutional precedent:

> The Court seems to have forgotten that one of the main reasons a Constitutional Convention was necessary at all was that under the Articles of Confederation Congress lacked the effective capacity to bind the States. The Court speaks as if the Supremacy Clause did not exist, or *McCulloch v. Maryland* had never been decided.

Alden v. Maine, 527 U.S. at 776 n.16 (Souter, J., dissenting) (citation omitted).

48. C. Pinckney, South Carolina, *in* 4 ELLIOT'S DEBATES 301. Pinckney shared Wilson's belief that sovereignty under the federal design is to be structured hierarchically in favor of the newly contrived Union:

> The separate independence and individual sovereignty of the several states were never thought of by the enlightened band of patriots who framed this Declaration; the several states are not even mentioned by name in any part of it—as if it was intended to impress this maxim on America, that our freedom and independence arose from our union, and that without it we could neither be free nor independent.

Alden v. Maine, 527 U.S. at 788 (Souter, J., dissenting) (quoting C. Pinckney, South Carolina, *in* 4 ELLIOT'S DEBATES 301).

of Wilson and Pinckney suggest that there was not, as *Alden* contends, a perceptible consensus in 1787 on the question of state sovereignty.

In light of the dissent's historical refutation, *Alden*'s originalism fails. What we are left with is a complex spectrum of historical personas and their perspectives on sovereignty. These range from the rigid, Anglophilic absolutism of Hamilton—which seems to have mesmerized the *Alden* Court with its doctrinal simplicity—to the radical, demos-driven populism of Wilson and Pinckney, with one championing a federal hierarchy to be maintained under the umbrella of the Supremacy Clause and the other underscoring the revolutionary moment when independence was declared and the thirteen colonies as a singular, indivisible People procured their sovereignty.

To conclude that there was no general agreement on the state sovereignty question and that the historical record is inconclusive, however, does not solve the perplexing federalism question presented by *Alden*. Recognizing this historical indeterminacy merely frames the issue. Yet even Justice Souter—after decrying the majority's simplex absolutism—could not resist advancing his own rendition of constitutional historicism and couching his stance on immunity in an equally absolutist, if antithetical, discourse of individual rights. "[T]here is much irony," wrote Souter, "in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy."[49] Justice Souter also summoned the wisdom of Sir William Blackstone, who "considered it 'a general and indisputable rule, that where there is a legal right, there is also a legal remedy ... whenever that right is invaded.'"[50] That the majority in *Alden* relied on Blackstone for the countervailing axiom that "no suit or action can be brought against the king ... because no court can have jurisdiction over him" suggests that Justice Souter understood the paradox presented by state immunity questions—the tension between the sovereign's insusceptibility to private suit on the one hand and the vindication of individual rights on the other.[51] In order to determine whether one postulate is any more inherent in the Constitutional scheme than the other, we must scrutinize this concept of complete remedy and ask whether it is simply another creature of dead-end originalism or does, in fact, transcend the understanding of the founding generation.

III. THE ANTI-SOVEREIGNTY DISCOURSE OF REMEDY: A META-ORIGINALIST NARRATIVE

Professor Akhil Reed Amar insists that the time-honored principle, *ubi jus, ibi remedium*—where there is a right, there is a remedy—is central to resolving the Eleventh Amendment quagmire.[52] "Few propositions of law are as basic today,"

49. *Id.* at 811. Furthermore, Justice Souter invoked Chief Justice Marshall's celebrated rhetorical question in *Marbury v. Madison*: "If [Marbury] has a right, and that right has been violated, do the laws of his country afford him a remedy?" *Id.* at 812 (Souter, J., dissenting) (quoting Marbury v. Madison, 2 U.S. (1 Cranch) 137, 162 (1803)).

50. *Id.* at 812 (quoting BLACKSTONE, *supra* note 26, at 23).

51. *Id.* at 715 (quoting BLACKSTONE, *supra* note 26, at 234-35); *see also* discussion *supra* note 26.

52. *See* Amar, *supra* note 20, at 1486.

Amar exclaims, "and were as basic and universally embraced two hundred years ago as [this] ancient legal maxim."[53] While Justice Souter alluded to the absolutism of this notion in his *Alden* dissent,[54] he never explored the relationship between federal rights and the constitutional structure as envisioned in 1787 other than invoking the Supremacy Clause in a single paragraph toward the end of his lengthy dissent—a juristic afterthought yielding more confusion than certainty.[55] In its bold insistence that the overarching achievement of the Constitution was to replace governmental sovereignty with popular sovereignty, Professor Amar's 'Unitary People' thesis offers an alternative, or 'alter-narrative,' to the *Alden* majority's historical version of sovereignty.

Amar essentially understands federal power and the Federalists' seminal decision to establish a national government as a sociopolitical narrative of a national people ideologically bound by the notion that the governmental structure should reflect an overriding concern for popular rights.[56] Amar's 'neo-Federalist' vision rests upon a principle of dynamic interdependence between state and federal sovereigns, a system under which "[e]ach government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by [the other] government's misconduct."[57] The centerpiece of Amar's neo-Federalist scheme is the 'converse-1983' statute, a proposed state remedy available to private citizens for unconstitutional conduct by federal officials which would *invert* the text of its older brother, section 1983,[58] the current federal remedy for

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53. *Id.* at 1485-86.

54. Alden v. Maine, 527 U.S. at 810-12.

55. *See id.* at 801.

56. For Amar, the systemic symmetry of dual sovereignty provides the clearest structural evidence that the Federalist scheme intrinsically presupposes the superseding purpose of government—the vindication of the people's rights:

> Unlike the Confederations of the 1780's and 1860's, the Federalist Constitution securely rests on the sovereignty of a unitary People. Although the Constitution does divide power among competing agents, it does so precisely to protect that unitary People: The Constitution's compound structure is in harmony with its substantive themes of popular sovereignty and limited government.

Amar, *supra* note 20, at 1519 n.368.

57. *Id.* at 1428. Professor Amar characterizes his reading of the Eleventh Amendment as 'neo-Federalist' because it takes account of the contemporary role of substantive federal law while "preserv[ing] various basic structural principles of the original Constitution repudiated by the Court's doctrine" such as "the coextensiveness of judicial and legislative power; ... the structural superiority of the federal judiciary to state judiciaries; the special role of federal judges in protecting individual rights against states; and the need for suits against states themselves to enforce these rights." *Id.* at 1483. Amar finds precedent for this neo-Federalist concept in decisions like *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388 (1971), in which the Court—"[i]n the best tradition of the remedial principles set forth in *Marbury v. Madison*"—honored a cause of action for damages incurred during an unconstitutional search of the plaintiff's home by federal law enforcement officials. Amar, *supra* note 20, at 1507 (citation omitted). *Bivens*, as Amar explains, was significant because prior to its holding, the only available remedy lay in state trespass law, a remedy that was typically precluded by the defendant's claim of federal empowerment. *See id.*

58. *See* 42 U.S.C. § 1983 (1994 & Supp. 1999).

misconduct by state officials.[59] In response to assertions that such a statutory creature would violate the constitutional architecture, Amar contends that converse-1983's check against federal wrongdoing is central to the Madisonian precept that "[t]he different governments will control each other, at the same time that each will be controlled by itself."[60]

By accepting Amar's 'Unitary People' interpretation of sovereignty and applying neo-Federalism's remedial plug to the question presented by *Alden*, the solution is more or less clear: principles of federalism obligate the state of Maine to provide a remedy in its courts to redress its violations of the FLSA so long as such a remedy may not be sought in federal court by virtue of *Seminole Tribe* and other Eleventh Amendment decisions. As Amar proclaims, "federalism abhors a remedial vacuum."[61] In other words, while the *Seminole Tribe* Court made clear that the Eleventh Amendment precludes Congress from abrogating states' immunity in federal court, the remedial imperative of neo-Federalism compels state judiciaries to effectuate that which the federal judiciary cannot and provide a forum for redress. While Amar's converse-1983 statute addresses the problem of unconstitutional behavior by federal agents, the remedial tapestry spun by the 'Unitary People' thesis presumably extends to state abuse: if federal courts are called upon to regulate state misconduct in section 1983 suits, and state courts may be imagined to regulate federal misconduct under the proposed converse-1983 legislation, then why shouldn't state courts be duty bound to protect citizens from the conduct of their own officials when the federal forum is unavailable as a matter of Eleventh Amendment law?[62] Such reasoning may have been more palatable to the *Alden*

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59. *See id.* Amar's hypothetical inversion of section 1983 would read something like this:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of [the United States], subjects, or causes to be subjected, any citizen of [this state] or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. at 1513.

60. *Id.* at 1493 (quoting THE FEDERALIST No. 51, at 323 (James Madison)). Amar's defense of the states' power to regulate federal abuse revolves around the proposition that "[c]onstitutional federalism is a two-edged sword for justice" with which a private citizen may invoke the remedial powers of one sovereign to ensure constitutional conduct from the other. *Id.* at 1492. According to Amar: "Congress enjoys no explicit power to preempt state remedies for unconstitutional federal conduct. Moreover, whereas congressional power to create federal remedies for federal constitutional wrongs seems obviously 'necessary and proper,' the power of Congress to destroy state remedies is not so obviously implicit in our constitutional structure." *Id.* at 1518 (emphasis omitted).

61. *Id.* at 1506.

62. The proposal for converse-1983 type legislation surely emphasizes the legislative function of government's remedial obligations, but Amar clearly recognizes the ability of judicial bodies to vindicate the principle *ubi jus, ibi remedium* and suggests a flexible and imaginative approach to pursuing this cardinal function of constitutional government: "All those who wield the power of government—Court and Congress, *state judge* and state legislator—should take seriously the obligation to use that power to promote the ultimate sovereignty of the People as embodied in the Constitution." *Id.* at 1519 (emphasis added).

Court than the drastic alternative of overruling *Hans* or *Seminole Tribe* thereby opening wide the doors of federal court.[63]

Amar's discourse of absolute remedy—although some may find it preferable to the harsh rhetoric of absolute sovereignty—still does not satisfy our historical inquiry. For example, as quickly as the *Alden* Court claims Alexander Hamilton as the doctrinal champion of governmental immunity, a legacy evidenced by The Federalist No. 81,[64] Amar summons Hamilton's wisdom in The Federalist No. 28 to support his proposition that the Founders envisioned a dual, interdependent system of checks and balances:

> [I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.[65]

The problem presented by No. 28—as is often the general problem when deciphering the mystically nonspecific papers of Publius—is one of vagueness. Although Hamilton waxes heroic about rights, redress, and the people, he never specifies *which* rights shall be safeguarded. Does Hamilton mean constitutional rights? Rights created by federal statute? Natural rights? This textual quandary is especially pertinent to the matter of *Alden* because the right at issue in the case—the right to minimum wage as determined by Congress—cannot be readily earmarked as a fundamental right that must be vindicated notwithstanding any theory of sovereignty or principle of forum allocation.[66] In the end, the same historical indeterminacy that undermines the *Alden* Court's divination of unbounded state sovereignty haunts Amar's absolutist narrative of popular remedy. Because the Constitution and apocrypha like the Federalist Papers and the Ratification Debates fail to explicate the exact role of state courts in holding states answerable to federal law,

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63. This proposal, compelling a state to provide a judicial forum to remedy federal violations committed by the state's government, challenges Professor Pfander's position that "[f]ederal ... power existed, at least in part, to secure state accountability to the rules of federal law, on the theory that state courts were inadequate to that task." Pfander, *supra* note 20, at 1380. However, the fact that the Constitution does not provide for any federal courts other than a singular Supreme Court (leaving the decision to create lower federal courts to Congress) demonstrates that the Founders contemplated and accepted a system of judicial review under which state courts would uphold federal law. For an elaboration on this argument, see discussion *infra* Part IV.C. and accompanying notes.

64. *See* Alden v. Maine, 527 U.S. 706, 716 (1999) (citing THE FEDERALIST No. 81, at 487-88 (Alexander Hamilton)).

65. Amar, *supra* note 20, at 1494 (quoting THE FEDERALIST No. 28, at 180-81 (Alexander Hamilton)) (emphasis omitted).

66. The Universal Declaration of Human Rights identifies a right to a remedy: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Universal Declaration of Human Rights*, G.A. Res.217A(III), U.N. GAOR, U.N. Doc. A/810 (1948). Because minimum wage is not recognized as a fundamental right by American law, this provision would most likely be insufficient to overcome the remedial gap left by *Alden*. Nevertheless, it is interesting to note that this concept of international law, which seems to suggest that a right without a corresponding remedy, is essentially meaningless.

the quest for original intent remains essentially a matter of phrenology—reliance on these records reveals no more insight into Framers' minds than feeling the bumps on their head.

The neo-Federalist discourse of remedy, however, does not exclusively rest on the fixed ideations of the Founders, and must be commended for moving beyond original intent and appreciating the meta-originalist dimension of federalism. While Professor Amar is clearly fascinated with the Convention and the internal discourse of the Framers, he understands that originalism in resolving matters of Eleventh Amendment law only solves part of the riddle because it fails to account for the evolution of constitutional concepts in the two hundred-some years following ratification—most notably, the Civil War Amendments. By redistributing the balance between state and federal power, these Amendments "establish[ed] the supremacy of the ... national People."[67] For example, Amar believes that "the Reconstruction Amendments ... perfect[ed] the Federalist Constitution by trimming off its confederate vestiges"; that regardless of the Framers' original intent, the abolition of slavery, recognition of national birthright citizenship, establishment of equality of franchise, and other provisions implemented by the Thirteenth, Fourteenth, and Fifteenth Amendments transformed the original document to the extent that they further secured the sovereignty of the people.[68] Against this background of constitutional evolution, *Hans*'s interpretation of the Eleventh Amendment—so far as it curtails the right to constitutional redress against the states for violating federal law—countervails the principle of popular sovereignty underpinning these other amendments.[69] Amar explains that he characterizes his viewpoint as *neo*-Federalist because he is reading Federalist writings "at a distance of two centuries and through a lens colored by intervening historical events ... and current schools of legal thought."[70] In recognizing the subsequent development of the Constitution and the gradual shift away from state sovereignty that denotes our recent national history—if not the recent jurisprudence of the Court—he injects a much needed dose of pragmatism into the historiographical debate over federalism.[71]

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67. Amar, *supra* note 20, at 1492.

68. *Id.* at 1464. Amar also notes that the later amendments of the Progressive era "carry on the Reconstruction tradition, both in extending participation to a group of persons previously excluded from politics by definitional fiat (women's suffrage) and in further eroding the Senate Clause of Article V (direct election of senators)." *Id.* at 1464 & n.166 (discussing the relationship between sovereignty and passage of the Seventeenth and Nineteenth Amendments to the Federal Constitution) (citation omitted).

69. *Id.*

70. *Id.* at 142 n.9.

71. In his *Alden* dissent, Justice Souter seemed to recognize a similar need to account for the abundance of federal power in contemporary times:

> If the Framers would be surprised to see States subjected to suit in their own courts under the commerce power, they would be astonished by the reach of Congress under the Commerce Clause generally. The proliferation of Government, State and Federal, would amaze the Framers, and the administrative state with its reams of regulations would leave them rubbing their eyes. But the Framers' surprise at, say, the FLSA, or the Federal Communications Commission, or the Federal Reserve Board is no threat to the constitutionality of ... them, for a very fundamental reason: "[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters .... The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

Like the rhetoric of unconditional sovereignty, the discourse of absolute remedy does not provide an immediate resolution to the *Alden* problem. Professor Amar's neo-Federalist interpretation elucidates the sovereign immunity debate to the extent that it looks beyond the static history of the Constitutional Convention—which fails to reveal any concrete, dispositive insight on the question of state suability—and regards constitutional federalism as an evolving process which in its post-bellum incarnation would seem to champion federal power and the federal plaintiff. In the end, however, the opposing narratives of the *Alden* Court and Amar must be seen as ideologies that represent the poles of the discussion, not as readily applicable solutions. Certainly, there are situations where the maxim of *ubi jus, ibi remedium* should be sustained, and others where a state's immunity is palatable, if not completely proper. Counterpoising these two absolutes in a workable doctrinal framework is the challenge to which we now turn.

IV. DISPUTING THE INDISPUTABLE: SOVEREIGNTY AND MINIMALISM

In deciding whether states are immune from suit in their own courts, the *Alden* Court constructed its opinion in sweeping terms.[72] Rather than deciding this complex issue on a narrow basis, which may have left many questions open for further discussion, the Court decreed that sovereign immunity—with the singular exception of state suability for violations of the Fourteenth Amendment[73]—was an absolute maxim of law.[74] The peril of *Alden*'s absolutist construction lies in the Court's application of the Eleventh Amendment—a constitutional provision which merely grants the states immunity from being sued in federal court—to a case which presented the distinct question of whether a state could be sued in its own courts. Rather than examine the pertinent, if separate, issue of state judiciaries and their obligations, the Court chose instead to rule upon state immunity in a broader context. Although such an approach does produce the advantage of doctrinal congruence, it also dictates another, more disturbing consequence: a plaintiff who has been injured by a state's breach of federal law is denied any opportunity to pursue a remedy in either federal or state court.

This Part argues that absolutism in constitutional adjudication distorts the complexity of sensitive political and legal issues. Moreover, an absolutist position is especially precarious in light of an historical record that does not suggest a consensus amongst the Framers on state sovereignty, but instead presents a clear ideological division on the subject. This Part will also examine the notion of judicial minimalism and apply its analytical lessons to the sovereign immunity debate and the jurisdictional quandaries that flow from the Eleventh Amendment. Ultimately,

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Alden v. Maine, 527 U.S. 706, 807 (1999) (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920) (Holmes, J.)). However, in the final analysis, this argument appears secondary to Souter's principal originalist position that at the ratification debates "a variety of views [on state immunity] emerged and the diversity of sovereign immunity conceptions displayed itself." *Id.* at 773. The majority expressly rejected any approach that would substitute present-day interpretations of federalism and the distribution of power among the state and federal governments for originalist readings of the Convention: "We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the Founders must yield to the politics of the moment." *Id.* at 758-59.

72. *See id.* at 714-15.

73. *See supra* note 20 and accompanying text.

74. *See supra* note 20 and accompanying text.

questions of state immunity must be resolved on a case-by-case basis, so that this uncertain area of the law receives the public deliberation it deserves before the dictates of *Alden* permanently close the courthouse doors to citizens who have been injured by the actions of state governments.

A. Can Eleventh Amendment Jurisprudence Proceed "One Case at a Time" After Alden? The Case for Judicial Minimalism

> Minimalists refuse to freeze existing ideals and conceptions; in this way they retain a good deal of room for future deliberation and choice. This is especially important for judges who are not too sure that they are right. Like a sailor on an unfamiliar sea—or a government attempting to regulate a shifting labor market—a court may take small, reversible steps, allowing itself to accommodate unexpected developments.[75]

In a recent work entitled *One Case at a Time*, Professor Cass Sunstein suggests that the current Supreme Court can be distinguished by a pattern of judicial 'minimalism,' or that the Court is hesitant to make far-reaching constitutional decisions about such politically sensitive and publicly debatable topics as affirmative action, gay rights, and the right to physician-assisted suicide.[76] Sunstein contends that democracy functions more effectively when courts decide cases narrowly rather than declare wide-ranging, bright-line rules that too often reflect an absolutist position on highly politicized issues.[77] He believes that when courts issue sweeping judgments on such issues, both the public and political institutions outside the judiciary such as Congress are excluded from the dialogue and the deliberative component of democratic pluralism is subverted.[78] Sunstein, therefore, is suspicious of courts that choose to adjudicate in unconditional terms and beget answers to cosmic social and political questions rather than limit their analyses to the facts of the particular case at bar.[79] For example, he argues that in *Roe v. Wade*,[80] the Court should have decided the abortion question on a more narrow basis—for instance, by holding that the state of Texas may not prohibit abortions in cases of rape or incest, or that some anti-abortion laws might be tolerable even though the Texas statute at issue was impermissibly vague—rather than declare outright a constitutional right to privacy.[81] But Sunstein's minimalism is rooted in

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75. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259 (1999) [hereinafter SUNSTEIN].

76. *See id.* at 83-84, 122-23, 138-39; *see also* Regents of the University of California v. Bakke, 438 U.S. 265, 319-20 (1978) (holding that public universities may consider race as a factor in admissions process, but are prohibited from establishing quotas); Romer v. Evans, 517 U.S. 620, 634-36 (1996) (holding state constitutional amendment forbidding legislation that confers protected status upon homosexuals does not withstand rational basis review because of the "animus" motivating the amendment); Washington v. Glucksberg, 521 U.S. 702, 736 (1997) (O'Connor, J., concurring) (finding no need to reach the "question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death").

77. *See* SUNSTEIN, *supra* note 75, at 26-27.

78. *See id.*

79. *See id.*

80. 410 U.S. 113 (1973).

81. SUNSTEIN, *supra* note 75, at 251-52. Professor Sunstein qualifies his analysis of *Roe* by acknowledging that the decision was most likely "correct as a matter of substantive constitutional theory," but argues that a more narrow formulation of Roe's right to an abortion might have decreased the animosity which has characterized the subsequent abortion debate in the United States. Sunstein's position on *Roe* was first articulated in an earlier work:

more than just a socio-political concern that the Court will make sweeping decisions on divisive issues which undercut democratic processes; it also arises out of a philosophy of fundamental jurisprudence which favors a contextual approach to deciding cases and is suspicious of broad rule-making which too often results in obtuse, over-generalized law.[82]

The Court's decision in *Alden* is a deviation from Professor Sunstein's thesis that the current Rehnquist Court prefers a minimalist approach. Rather than limiting the issue to states' liability to suit in state court for state violations of federal law, the Court proclaimed sovereign immunity to be a fundamental canon of government and law.[83] In an attempt to understand the over-inclusive effect of *Alden*, it may be helpful to look at an earlier case in which the Court, according to Sunstein, took a dangerously "maximalist"[84] approach:

> In *Dred Scott*, the Court decided several crucial issues about the relationship between the Constitution and slavery. Most important, the Court struck down the Missouri Compromise, which abolished slavery in the territories, and also ruled that freed slaves could not qualify as citizens for purposes of the diversity of citizenship clause of Article III .... One of the notable features of the case was that instead of deciding only those issues that were necessary for disposition, the Court decided every issue that it was possible to decide. There was no need for the Court to have been so ambitious .... After concluding that it lacked jurisdiction under Article III, the Court might have refused to discuss Congress's power to abolish slavery in the territories. Or the Court could have rested content—as it had initially voted to do—with a narrow judgment stating that Missouri law controlled the question of Scott's legal status. In that event, the large issues in the case would have been a relatively unimportant episode in American law.[85]

Obviously, a comparison of *Alden* to *Dred Scott* is a stretch—it would be difficult to rival the perverse absolutism of the latter. However, when one considers

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> It would not be especially hard to reach the conclusion that laws forbidding abortion are constitutionally troublesome because they discriminate against women, a politically vulnerable group .... But—and this is an important qualification—it does not follow that the Supreme Court was correct to invalidate such laws in ... *Roe* .... The Court would have done far better to proceed slowly and incrementally, and on grounds that could have gathered wider social agreement and thus fractured society much less severely .... Such narrow grounds would have allowed democratic processes to proceed with a degree of independence—and perhaps to find their own creative solutions acceptable to many sides. In this way a narrow, incompletely theorized agreement could have been possible in the Court, in a way that would have been much healthier for democratic processes in the United States. And in this fashion other branches of government might have participated in the evolving interpretation of the Constitution, with a possible conclusion, from democratic sources, that the right to sex equality is broader than the Court (properly in light of its institutional position) understands it.

CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 180-81 (1996) [hereinafter SUNSTEIN, LEGAL REASONING].

82. *See id.* at 135 ("[I]deal justice outstrips rules; it adapts ... to the particulars of the case. ... If human frailties and institutional needs are put to one side, particularized judgments, based on the relevant features of the single case, represent the highest form of justice.").

83. *See* Alden v. Maine, 527 U.S. 706, 714-15 (1999).

84. Professor Sunstein employs the term "maximalist" as a "shorthand reference for those who seek to decide cases in a way that sets broad rules for the future and that also gives ambitious theoretical justifications for outcomes." SUNSTEIN, *supra* note 75, at 9-10.

85. *Id.* at 36-37 (citing Dred Scott v. Sanford, 60 U.S. 393 (1857)).

the breadth of the *Alden* opinion—how it completes the circle of state immunity by precluding the plaintiff's suit in both federal and state court—one can see how it takes on certain characteristics of maximalism: the Court, in effect, decided once and for all that the states are indeed immune.[86]

Why the Court was inclined to decide the troublesome federalism question presented by *Alden* in such a sweeping manner and thereby deviate from the judicial minimalism observed by Professor Sunstein is an interesting question. Perhaps the Court, frustrated with the incoherence of its Eleventh Amendment doctrine, seized the opportunity of *Alden* to affirm the immunity of states in indisputable, inviolable terms and set forth an absolute rule of sovereignty. Doctrinal harmony notwithstanding, the absolutist tone of the Court's decision is alarming to those who understand the complexity of the issues involved. With this in mind, this Article will next consider the minimalist alternatives.[87]

B. The Diversity-Only Approach: Minimalist Compromise or Historicized Rule?

One approach to deciphering the text of the Eleventh Amendment taken by scholars is to perceive only what the amendment appears to literally provide—a grant of state immunity in diversity cases—and refuse to infer a similar privilege of immunity when a state must defend itself against a claimed violation of an individual's federal statutory rights.[88] Justice Brennan advocated this diversity-only approach in his dissent in *Atascadero State Hospital v. Scanlon*,[89] in which he

86. As argued in the preceding Section, the *Alden* Court relied on originalism in reaching its judgment. *See* Alden v. Maine, 527 U.S. at 713-26. Sunstein has noted the connection between originalist theories of interpretation and absolutist outcomes: "Originalism, as a guide to constitutional interpretation, is a form of maximalism; this is one reason that it is simultaneously attractive and repulsive. I have argued here ... that it does not promote democracy, rightly understood. It is therefore an unacceptable form of maximalism—judicial hubris masquerading as judicial modesty." SUNSTEIN, *supra* note 75, at 261-62.

87. This is not to say, however, that minimalist concepts are foreign to the jurisprudence of governmental immunity. In fact, it is arguable that *Ex parte Young*, 209 U.S. 123 (1908), holding that the Eleventh Amendment does not bar suits against state officials who act contrary to federal law, is essentially a minimalist judgment in that it does not denounce or remove state immunity but curtails the doctrine considerably by introducing into Eleventh Amendment law the fiction of *ultra vires*. The minimalism of *Young* is also reflected in the judgment's mangled formulation. In other words, rather than revoking *Hans* altogether, the *Young* Court carved out an exception for suing state officials that undercut the broad rule of *Hans* in a minimalist fashion. For example, Professor Althouse contends that the awkwardness of *Young*'s language of legal fiction is the consequence of an overly broad (and essentially incorrect) judgment in *Hans*. *See* ALTHOUSE, *supra* note 17, at 1138-39 ("The contorted and self-contradictory nature of the *Young* opinion may have resulted from the Court's attempt to state its rule in 'the language of *Hans*.' If *Hans* were overruled, the Court could reach the same result in a simple and straightforward manner."). However, so long as the Court insists on limiting the *Young* commitment to providing federal remedies in suits against state officials, the Constitution's promise of popular sovereignty will remain only partially fulfilled.

88. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); 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 (1983).

89. 473 U.S. 234, 247 (1985). Justice Brennan's position may be said to rest on an argument of derivative law in which he acknowledges the pre-constitutional common law source of state immunity in diversity suits, but contends that state immunity in federal question cases stems only from *Hans*—an essentially incorrect decision "rest[ing] on misconceived history and misguided logic"—and therefore should not be read into the Eleventh Amendment:

confronted the reasoning of *Hans v. Louisiana*.[90] Brennan disputed *Hans*: "If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct."[91] Poetic vehemence notwithstanding, Brennan's diversity-only interpretation of Article III and the Eleventh Amendment has been rejected by the current Court.

One of the appealing features of the diversity-only school is its treatment of history. Rather than scrutinize the records of the Convention at which state immunity was not an express or outspoken issue, the diversity-only approach draws attention to the particular late eighteenth-century quandary of the states' debts incurred during the Revolutionary War and does not rely on a clumsy, overly broad, macro-historical interpretation which proclaims sovereign immunity the indisputable rule. In other words, those who believe as Justice Brennan did, that the Eleventh Amendment operates only to the extent that it revokes the narrow holding of *Chisholm v. Georgia*,[92] emphasize that the Framers did not debate a broad spectrum of state immunity issues. The Framers, in fact, limited this discussion to the narrow issue of states' obligations for wartime debts under the new constitutional system.[93] Accordingly, the diversity-only approach treats the two species of federal subject matter jurisdiction—diversity and federal question—and their relation to state suability differently.

At first glance, the diversity-only approach provides a quintessentially minimalist outcome in which a narrow, procedural judgment (i.e., that states are

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> The Eleventh Amendment can and should be interpreted in accordance with its original purpose to reestablish the ancient doctrine of sovereign immunity in state-law causes of action based on the state-citizen and state-alien diversity clauses; in such a state-law action, the identity of the parties is not alone sufficient to permit federal jurisdiction. If federal jurisdiction is based on the existence of a federal question or some other clause of Article III, however, the Eleventh Amendment has no relevance.

Id. at 301-02.

90. 134 U.S. 1 (1890).

91. Atascadero State Hosp. v. Scanlon, 473 U.S. at 302.

92. 2 U.S. (2 Dall.) 419 (1793). *See also* discussion *supra* note 27.

93. *See, e.g.*, PFANDER, *supra* note 20. Professor Pfander suggests that the Eleventh Amendment should be understood as a narrow and precise modification of the state suability provisions of Article III which appears to authorize suits against states in both the diversity and federal question context, and not as a broad immunization of states from suit in all circumstances:

> *Chisholm* was shocking (at least among the Federalists whose support of the Eleventh Amendment was crucial to its proposal and ratification) less because it contemplated the suability of the states as corporate bodies than because it threatened to require the states to honor old obligations to individual suitors in specie, without regard to the states' traditional freedom to adopt strategies of agrarian finance.

Id. at 1278. Pfander finds support for his historical interpretation in Chief Justice Marshall's chronicle of the Eleventh Amendment in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), in which Marshall recognized the problem of state debts as the motivating force behind the enactment of the amendment:

> It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, [the Eleventh Amendment] was proposed in Congress ....

Id. at 1342-43 (quoting Cohens v. Virginia, 19 U.S. at 406).

immune from suits by citizens from other states based on state law but not from suits involving a federal question) eclipses a sweeping, substantive declaration (i.e., the states, by virtue of their sovereign character, are immune from suit notwithstanding the nature of subject matter jurisdiction). One could argue that such minimalism stands as a functional compromise between the ideological extremes of absolute sovereignty and absolute remedy—two opposing schools of thought in a legal dilemma to which there is no "originalist" solution readily extractable from the historical archive. In other words, if states cannot be sued all the time, at least they can be sued when the case arises under a question of federal law. By diluting the harshness of absolute immunity in some cases while preserving its force in others, this rapprochement seems to create a workable procedure for state jurisdiction and stands as a compromise between the two absolutist standpoints of unconditional sovereignty and unqualified remedy.

Upon closer examination, however, the diversity-only approach repels minimalist values in a fundamental way. By revoking state immunity in federal question suits, the diversity-only approach overrules *Hans* and one hundred-ten years of precedent—something that may cause the cautious, 'Sunsteinian' judge to hesitate. The product of this approach is a rigid, procedural rule—immunity in diversity cases, suability in federal question cases—that is arguably every bit as obstinate and intractable as the *Hans* rule of immunity applicable to both categories of suits. Not only does such a provision offend principles of minimalism in its definitiveness and formalism, but it is also based on a particular historical reading that, though it may reconcile the historical circumstances of the 1790s, offers no compelling rationale for why it should be maintained into the present day. Certainly, to evaluate the current meaning of the Eleventh Amendment in light of the states' debts from the Revolutionary era is an affront to a central tenet of minimalist wisdom—*Cessante rationae, cessat ipsa lex,* or "when the reason of a rule ceases, so should the rule itself."[94]

From a minimalist perspective, the more considerable shortcoming of the diversity-only approach with regard to *Alden* is that it does not speak to the duty of state courts to entertain suits barred from federal court by the Eleventh Amendment. Had the Court adopted the diversity-only solution, *Alden* could have then filed his suit in a federal district court. However, such an outcome would have contravened the goals of minimalist adjudication, not only by broadly subjecting states to suit whenever they violate federal law, but also by dodging the specific, more confined issue of how the Eleventh Amendment concerns state courts. In an effort to advance a more relevant analysis of the *Alden* problem, the following Section examines the unique role of state courts within the scheme of dual sovereignty.

C. Supremacy, Sovereign Dignity, and the State Courts

In arguing that state judges cannot be compelled to hear federal claims barred by the Eleventh Amendment, the *Alden* Court maintained that state courts do not

94. SUNSTEIN, LEGAL REASONING, *supra* note 81, at 125-26. Professor Sunstein attributes this guiding principle to Sir Edward Coke and considers it indispensable to sound minimalist judging. *See id.*

have jurisdictional responsibilities that exceed those of the federal courts.[95] Justice Kennedy conceded that the Supremacy Clause directs state judges to implement federal law, but scoffed at the suggestion that the Clause "imposes greater obligations on state-court judges than on the Judiciary of the United States itself."[96] However, Article III of the Constitution, in outlining the judicial scheme of the new Republic, envisions this very scenario.[97] Article III does not create federal courts other than a singular Supreme Court, reserving the decision to create lower federal courts to Congress. This resolution, remembered by constitutional historians as the 'Madisonian Compromise' between nationalist-minded Federalists and Anti-Federalists advocating states-rights, indicates that the Founders imagined a system of judicial review under which state courts could hear federal claims.[98] Furthermore, there is nothing in the Judiciary Act of 1789—the congressional act which created the lower federal courts—that relieved state judges of their federal judicial powers. Although there is a distinction to be made between a state court's capacity to apply federal law and an affirmative constitutional duty to do so, interpreting the Supremacy Clause as compelling such an obligation when a state employee's federal claim is barred by the Eleventh Amendment would conciliate the conflicting principles of state immunity and individual remedy in an ideal, minimalist fashion.

Professor Richard Seamon does not rely on the Eleventh Amendment to find fault with the Supremacy Clause argument. Seamon instead looks to the anti-

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95. *See* Alden v. Maine, 527 U.S. at 753.

96. *Id.* ("[Article III] in no way suggests ... that state courts may be required to assume jurisdiction that could not be vested in the federal courts and forms no part of the judicial power of the United States.").

97. The relevant passage from Article III, Section 1 reads: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish." U.S. CONST. art. III, § 1, cl. 1 (emphasis added).

98. *See, e.g.*, Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145 (1984) (contending that the Compromise implies a state court duty to entertain federal claims notwithstanding the "valid excuse" doctrine of the Tenth Amendment). *But cf.* Alden v. Maine, 527 U.S. at 753 ("The text of Article III, § 1, which extends federal judicial power to enumerated classes of suits but grants Congress discretion whether to establish inferior federal courts, does not give strong support to the inference that state courts may be opened to suits falling within the federal judicial power."); Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39 (1995). Professor Collins argues that despite the Compromise and the "permissive language" of Article III, arguments that state courts would be obligated to hear all federal claims are "largely modern constructs." Collins, *supra* at 44. According to Professor Collins:

> [W]hile there may have been some uncertainty whether state courts could entertain all Article III judicial business, there was almost no suggestion before this century that they were under any obligation to do so, or that Congress could compel them. Indeed, the ability to refuse unwanted jurisdiction once came close to an absolute prerogative on the part of state courts. This was true even though, after ratification, some continued to maintain that state judges could also serve as federal judges ....
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> It is therefore extremely difficult to argue from the debatable assumption that state courts would be under an obligation to take all Article III judicial business in the first instance—as a quid pro quo for the Constitution's noninclusion of any reference to lower federal courts—to the conclusion that such a duty still existed when the second half of that bargain was decisively rejected (in the Madisonian Compromise, no less).

Id. at 135, 144.

commandeering principle of the Tenth Amendment,[99] contending that it entitles a state court to decline jurisdiction over a federal claim if its reason for doing so "relates to judicial administration and neither discriminates against nor is inconsistent with federal law."[100] Seamon argues that state sovereign immunity law provides state courts with such a reason, or "valid excuse,"[101] since state immunity rules are neutral—that is to say, they operate merely as an administrative measure to streamline the number of cases which flow through state court dockets, not to snub federal dictates.[102] The problem with this characterization of state nonsuability law as neutral, however, is that there is a substantive legal policy underlying sovereign immunity doctrines that goes far beyond pure judicial management. In fact, not once in the *Alden* opinion did the Court discuss the neutral, administrative function of sovereign immunity. The Court went to great lengths to argue that sovereign immunity is necessary to protect "the financial integrity of the States," or to prevent the prospect of a state "being thrust, by federal fiat and against its will, into the disfavored status of a debtor."[103] The very purpose of state immunity in state court, therefore, is to discriminate against federal law by seeking not only to reserve judicial time and energy for other matters, but also to protect state treasuries from penalties prescribed by Congress.

Professor Seamon might respond to this argument by concluding that state immunity is nonetheless non-discriminatory because it applies to both federal and state claims. By circumventing the Supremacy Clause, however, state immunity to federal claims is hostile to federal law in a manner beyond any so-called "valid excuse." What Seamon fails to account for is the Supremacy Clause's distinct reference to "the Judges in every State" and their obligation to uphold federal law.[104] So although the anti-commandeering principle has been applied to invali-

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99. The Tenth Amendment reads: "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.

100. Richard H. Seamon, *The Sovereign Immunity of States in Their Own Courts*, 37 BRANDEIS L.J. 319 (1998) (arguing that the anti-commandeering principle as applied to state legislative officials in *New York v. United States*, 505 U.S. 144 (1992), and state executive officials in *Printz v. United States*, 521 U.S. 898 (1997), should similarly bar federal commandeering of state judicial officials). Seamon believes that by using its Article I powers to compel state courts to hear individual suits against their own non-consenting states, Congress "could cause particular harm to the system of dual sovereignty ... [by turning] the state against itself." Seamon, *supra* at 366.

101. *Id.* Professor Seamon's argument rests upon the Court's "valid excuse" doctrine as articulated in *Howlett v. Rose*, 496 U.S. 356, 357, 369 (1990).

102. *See id.*

103. Alden v. Maine, 527 U.S. at 749-50.

> [A]n unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.

Id. at 750.

104. U.S. CONST. art. VI, cl. 2. The Supremacy Clause reads in full:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

Id.

date federal laws that commandeer the resources of state legislative and executive officials,[105] the Supremacy Clause's specific fiat to state judges suggests that application of the anti-commandeering doctrine may very well be confined to the legislative and executive branches of state government.

The interpretive problem that remains is whether the Supremacy Clause's command to apply federal law comprehends a duty to entertain federal claims in the first place. Seamon contends that although the clause requires state judges to strike down state laws that enable state courts to discriminate against federal causes of action, it does not "otherwise expand the jurisdiction of state courts."[106] Surely, to say that the Supremacy Clause compels a state court to hear every federal claim that appears on its docket would be a dangerous assertion of constitutional absolutism. However, when a state employee's suit is filed in state court because it is barred from federal court by the Eleventh Amendment, the state court is arguably obligated to hear the case. For a court to do otherwise would be to disregard the equally important, though countervailing, constitutional principle of *ubi jus, ibi remedium* as established in *Marbury v. Madison*,[107] the seminal decision in American constitutional law. Maintaining the sovereignty of the states in federal court (as called for by the Eleventh Amendment) while allowing the suit against the state to proceed in its own court may seem counter-intuitive. Nevertheless, such a resolution would achieve a much needed compromise between the doctrinal poles of absolute immunity and absolute remedy without disturbing the holdings of *Hans* and *Seminole Tribe*.

D. Of the Remediless: The Relationship Between Congressional Abrogation of the Eleventh Amendment and the Constitutional Value of Equal Protection

Notwithstanding the need to counterbalance the equally valid, if conflicting, principles of sovereignty and remedy, it does not follow that by virtue of the Supremacy Clause state courts should be compelled to hear every federal claim that names a state as the defendant. To declare such a heavy-handed principle would strike a blow to the conception of narrow, constrained adjudication championed by this Article. However, when one considers the remedial configuration left in the doctrinal wake of *Alden*—that is to say, who is protected by the FLSA and who is

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105. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). For an account of these decisions and their relation to the anti-commandeering principle, see SEAMON, *supra* note 100, at 331-35.

106. SEAMON, *supra* note 100, at 358. Seamon believes that the anti-commandeering principle delineates the extent to which the Supremacy Clause compels state courts to entertain federal claims:

> The Supremacy Clause, standing alone, leaves a state with significant control over the volume and types of cases that its courts can hear. The Clause does not prevent a state court from declining, on the basis of a neutral rule of judicial administration, to hear a federal action. Those neutral rules include doctrines that limit the volume and type of litigation, including ... the doctrine of sovereign immunity. At stake, then, is Congress's power to compel state courts to hear federal claims that would be barred from those courts under neutral state laws of judicial administration, including the state law of sovereign immunity.

Id. (footnotes omitted).

107. 2 U.S. (1 Cranch) 137, 162 (1803); *see also* discussion *supra* notes 49-51, 59 and accompanying text.

not—it becomes more apparent that the claims of these particular plaintiffs should have gone forward. Although the Eleventh Amendment may forbid Congress from abrogating state immunity in some cases, it should not preclude the exercise of such power in situations where the well-established constitutional value of equal protection is undermined by precluding an identifiable group of individuals from seeking a legal remedy available to others.

While federalism as a philosophy insists that the state and federal governments are separate and autonomous entities, the interplay between federal regulatory law and the countervailing doctrine of state immunity should not operate to create a distinct class of citizens without remedy, and thereby subvert the principle of equal protection that underlies much of the constitutional scheme.[108] To the extent that every worker in the United States, except those employed by their state's government, is entitled by law to a federally mandated minimum wage, *Alden* yields such a class of non-plaintiffs—a particularized minority united by a similar fate of under-compensation. Technically speaking, state employees do qualify for federal minimum wage. As the Court observed, "[t]he State of Maine has not questioned Congress' power to prescribe substantive rules of federal law to which it must comply."[109] Nevertheless, by precluding state workers from litigating their claim for federally mandated overtime compensation, state courts deny a remedy that is available to the overwhelming majority of United States citizens who are employed either by the federal government or private employers.

Equal protection under the law is a longstanding, constitutional principle to which Americans attach a seminal, overriding value. Not only does the concept of equal protection pervade several provisions of the Constitution,[110] but it also qualifies conflicting provisions such as the Eleventh Amendment. One such example is the Court's indication in *Seminole Tribe* that section five of the Fourteenth Amendment allows Congress to abrogate the states' Eleventh Amendment immunity so that the Amendment's all-important restraints on state action may be enforced.[111] Unfortunately for the petitioners in *Alden*, the *Seminole Tribe* exception was of no avail because the case—as framed by the Court—did not implicate the exercise of Congress' section five power under the Fourteenth Amendment, but its Article I

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108. The value of equal protection is reflected throughout the Constitution. First and most obviously, the Fourteenth Amendment guarantees "the equal Protection of the laws." U.S. CONST. amend. XIV. However, this value is also expressed in the Fifth and Fourteenth Amendment provisions guaranteeing "due process of law," U.S. CONST. amend. V, XIV, § 1, the Fifteenth Amendment's commitment to the right to vote regardless of "race, color, or previous condition of servitude," U.S. CONST. amend. XV, § 1, and the Nineteenth Amendment's parallel pledge concerning women's right to vote, *see* U.S. CONST. amend. XIX.

109. Alden v. Maine, 527 U.S. at 759.

110. *See* discussion *supra* note 108 and accompanying text (addressing the pervasiveness of the value of equal protection).

111. Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996). The Court stated that:

> [T]hrough the Fourteenth Amendment, federal power extend[s] to intrude upon the province of the Eleventh Amendment and therefore [section] 5 of the Fourteenth Amendment [providing that Congress shall have power to enforce, by appropriate legislation, the provisions of this article] allow[s] Congress to abrogate immunity from suit guaranteed by that Amendment.

Id.; *see also* discussion *supra* note 20 and accompanying text.

powers to regulate the national economy.[112] Nevertheless, the federal right to minimum wage—insofar as it is a right provided by Congress to all United States citizens—might be understood as a right which touches upon equal protection values even though it is created by virtue of Article I.[113]

By not allowing state employees to pursue a remedy in the only judicial forum available to them after their suit had been dismissed in federal court,[114] the state court might be said to have denied the employees equal protection as prescribed by the FLSA.[115] Under this minimalist formulation, the Court could have justified abrogation in this particular case on the limited grounds that unless Maine is forced to comply with the federal minimum wage law, an entire class of employees would be denied the socioeconomic protection enjoyed by all other working citizens and, as a consequence, the federal interest in upholding the value of equal protection would wither. Instead, the Court ruled broadly, producing an alarming, remedial imbalance.

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112. "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts." Alden v. Maine, 527 U.S. at 712. Professor Seamon has suggested that Congress cannot use its Article I powers to identify a "property" interest—such as the minimum wage—under the Due Process Clause of the Fourteenth Amendment and then invoke its Section Five powers to authorize individual suits against states for deprivations of that property. *See* SEAMON, *supra* note 100, at 411. If Congress did possess such a power, Seamon explains, "Congress seemingly could circumvent *Seminole Tribe*, which prevents Congress from using Article I powers to abrogate the Eleventh Amendment directly." *Id.* (relying on City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (holding that Congress's powers under Section Five of the Fourteenth Amendment are limited to establishment of remedies for preexisting constitutional rights)). The argument set forth in this Article, however, relies not on Congress's power to define property for Due Process purposes and punish state deprivations of that property, but on its power to abrogate the states' immunity in circumstances when an identifiable group is denied equal protection under the law.

113. While equal protection principles are typically associated with minorities delineated by race or gender, economic disparities have also been subject to Fourteenth Amendment scrutiny. *See, e.g.*, Department of Agric. v. Moreno, 413 U.S. 528, 538 (1973) (holding that exclusion of unrelated persons from food stamp program is not rationally related to Congressional purpose of raising nutritional levels and strengthening the agricultural economy).

114. *See* Mills v. Maine, 118 F.3d 37, 52 (1st Cir. 1997) (holding that, absent specialized state statute, it is federal trial court's duty to dismiss suit if it finds that jurisdiction does not exist). It is unlikely that the Court would recognize the "right" to minimum wage as a "fundamental right," thereby triggering application of the strict scrutiny test. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 484-85 (1970) (applying the rational basis standard because economic and social rights are not fundamental rights for purposes of strict scrutiny). Nevertheless, the argument set forth here does not depend on such a finding. Even if the Court were to apply the less critical "rational basis" test, it is difficult to perceive the rationality of a state court's decision to prohibit a suit against its own state for failing to comply with the FLSA. While the state would most likely invoke the principle of sovereign immunity as its rational basis and argue that exposing the state to liability would cripple fiscal policy by interfering with predetermined budgetary decisions, the counterargument is that if the state had paid its employees the federal minimum wage and had calculated such expenses into its budget in the first place, then *Alden*-type suits to enforce state compliance would not trigger unforeseen deviations in the state's fiscal scheme for a given year. Moreover, I am not arguing that Congress's power to abrogate the Eleventh Amendment in limited circumstances rests on a judicial determination that the Fourteenth Amendment has been violated. Rather, I am suggesting that there is a federal interest in promoting the value of equal protection, which derives from the constitutional scheme as a whole.

V. CONCLUSION

While the words and the history of the Eleventh Amendment suggest that the pre-constitutional immunity of the states survives only in diversity actions brought in federal court, the Court in *Alden* insisted that the amendment encompasses a principle of absolute immunity. This principle protects the states from federal statutory claims brought against them in state court as well as in federal court. This Article perceives an acute crisis in the absolutist adjudication that plagues current Eleventh Amendment thinking. Not only does such absolutism misrepresent the historical indeterminacy surrounding state sovereign immunity—a concept which received nominal attention at the Constitutional Convention—but it disregards the countervailing remedial impulse central to our understanding of individual rights.

The minimalist alternative accomplishes several things. First, by focusing on the capacity of state courts to hear federal claims against states, it keeps the holdings of *Hans* and *Seminole Tribe* intact.[116] While one may agree with Justice Brennan that the existing doctrine "lacks a textual anchor, a firm historical foundation, or a clear rationale,"[117] the juridical goal of minimalism is to supplant grandiose holdings, which often lead to political upheaval, with narrow decisions—especially when judges are unable to solve the historical puzzle of original intent.[118]

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115. While there was no particular state statute in *Alden* that, in and of itself, potentially violated equal protection principles, it may be argued that the Superior Court of Cumberland County, Maine, in dismissing the petitioners' suit, encroached upon these litigants' right to equal protection under the law. In fact, Fourteenth Amendment jurisprudence recognizes that the actions of state courts and state judges may violate the Equal Protection Clause. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 16 (1948) (holding that a Missouri court's affirmation of a restrictive covenant intended to preclude the occupancy as owners or tenants of property by non-whites violated the Fourteenth Amendment because "state action in violation of the [Fourteenth] Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute").

116. Perhaps if the real concern is the federal commandeering of the state judiciaries as Professor Seamon contends, *see* SEAMON, *supra* note 100, then it would make more sense to maintain *Alden* and overrule *Hans* and *Seminole Tribe* so that the federal courts would bear the responsibility of hearing federal claims. Nevertheless, from a minimalist perspective, the overruling of *Hans* and *Seminole Tribe* would likely cause more shock waves than the alternative and therefore might not be the most sensible avenue for the anti-sovereignty judge to pursue.

117. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 257 (1985) (Brennan, J., dissenting). While Justice Brennan was no longer sitting on the Court when *Seminole Tribe* was heard, his discussion of Congress's power to abrogate the Eleventh Amendment pursuant to its Article I powers in *Atascadero* strongly suggests that he would have opposed the *Seminole Tribe* result:

> Federal courts are instruments of the National Government, seeing to it that constitutional limitations are obeyed while interpreting the will of Congress .... In the Eleventh Amendment context, however, the Court instead relies on a supposed constitutional policy disfavoring suits against States as justification for ignoring the will of Congress; the goal seems to be to obstruct the ability of Congress to achieve ends that are otherwise constitutionally unexceptionable and well within the reach of its Article I powers.

Id. at 255.

118. *See* SUNSTEIN, *supra* note 75, at 262-63 ("The case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling.").

Second, by allowing Congress to abrogate the Eleventh Amendment when a remedial imparity threatens the constitutional value of equal protection under the law, the minimalist approach relies on modern notions of equality—a post-Civil War conception of the constitutional design that acknowledges the federal government's enhanced role in the vindication of rights in the face of state power—rather than stabbing at the impenetrable core of original intent.[119] Finally, minimalism in Eleventh Amendment jurisprudence effects a compromise between defenders of the nationalist vision who accept Congress' power to create non-abrogable remedies, and the state rights activists who insist that state sovereign immunity is an instinctive, constitutional truth. So long as reasonable minds disagree on the balance of power within our system of dual sovereignty, judicial absolutism must be avoided so that the competing constitutional principles of remedy and immunity may be harmonized through a more deliberative process.

119. *See id.*