AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism/Sovereign Immunity

**Alden v. Maine, 527 U.S. 1 (1999)**

In 1992, a group of nearly 100 state probation officers filed suit in federal district court against their employer, the state of Maine, seeking compensation and monetary damages for violations of the overtime provisions of the federal Fair Labor Standards Act (FLSA). Maine had classified probation officers as professional employees and therefore exempt from federal overtime requirements. The officers had been unsuccessful in persuading the state that court decisions elsewhere had suggested that such a classification was inappropriate. The officers won some key preliminary decisions in district court, leaving the amount of back pay owed by the state as the primary question still to be resolved when *Seminole Tribe* was handed down by the U.S. Supreme Court. In light of *Seminole Tribe*, the state promptly moved to have the case dismissed from the federal courts on the grounds of state sovereign immunity, and the district court reluctantly granted the motion. Most of the probation officers then filed their suit in state court, but the state court dismissed the suit on the grounds of sovereign immunity.

The Maine Supreme Judicial Court affirmed the trial court’s ruling. It held that a provision of the FLSA authorizing such private suits against the state governments in state courts without state consent was unconstitutional. The U.S. Supreme Court accepted a cert petition in the case, and a 5–4 decision affirmed the Maine court’s ruling. The justices’ conflicting views echo debates that were initially rehearsed 200 years earlier, during the Court’s first decade.

After their loss in the courts, the state employees union in Maine took up the probation officers’ cause in the legislature. The legislature soon passed a bill appropriating funds to provide back pay and legal expenses for the officers (less than $300,000, a somewhat lower amount than the union had sought) and later passed a bipartisan statute waiving state sovereign immunity for a limited range of similar suits in the future. In general, the state sovereign immunity cases narrowed the ability of individuals to win monetary awards from state governments based on violations of federal statutes that did not relate to civil rights. Congress still had other options to enforce such statutory requirements against the states, including persuading states to waive their sovereign immunity, allowing prospective relief in private lawsuits, and authorizing direct enforcement by federal agencies. Why might Congress try to waive state sovereign immunity to allow private lawsuits to enforce federal statutes? Is immunity from such suits a useful check on congressional power?

JUSTICE KENNEDY, delivered the opinion of the Court.

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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. We decide as well that the State of Maine has not consented to suits for overtime pay and liquidated damages under the FLSA. On these premises we affirm the judgment sustaining dismissal of the suit.

The Eleventh Amendment makes explicit reference to the States’ immunity from suits “commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” We have, as a result, 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, and 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) except as altered by the plan of the Convention or certain constitutional Amendments.

Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document “specifically recognizes the States as sovereign entities.” Seminole Tribe of Florida *v.* Florida (1996). . . . Various textual provisions of the Constitution assume the States’ continued existence and active participation in the fundamental processes of governance. See Printz *v.* United States (1997). . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. . . .

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status. The States “form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.” The Federalist No. 39. . . .

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation’s rejection of “the concept of a central government that would act upon and through the States” in favor of “a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton’s words, ‘the only proper objects of government.’ ” Printz. . . .

The States thus retain “a residuary and inviolable sovereignty.” The Federalist No. 39. They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.

The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity. When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts. See Chisholm *v.* Georgia (1793) (Iredell, J., dissenting) (surveying English practice). . . .

Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. See Chisholm (Iredell, J., dissenting); Hans *v.* Louisiana (1890).

The ratification debates, furthermore, underscored the importance of the States’ sovereign immunity to the American people. Grave concerns were raised by the provisions of Article III which extended the federal judicial power to controversies between States and citizens of other States or foreign nations. . . .

The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity. . . .

Despite the persuasive assurances of the Constitution’s leading advocates and the expressed understanding of the only state conventions to address the issue in explicit terms, this Court held, just five years after the Constitution was adopted, that Article III authorized a private citizen of another State to sue the State of Georgia without its consent. Chisholm *v.* Georgia. . . .

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The Court’s decision “fell upon the country with a profound shock.” . . .

The States, in particular, responded with outrage to the decision. The Massachusetts Legislature, for example, denounced the decision as “repugnant to the first principles of a federal government,” and called upon the State’s Senators and Representatives to take all necessary steps to “remove any clause or article of the Constitution, which can be construed to imply or justify a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.” . . .

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. . . By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court . . .

. . . Given the outraged reaction to Chisholm, as well as Congress’ repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment:

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.” Hans.

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In short, the scanty and equivocal evidence offered by the dissent establishes no more than what is evident from the decision in Chisholm—that some members of the founding generation disagreed with Hamilton, Madison, Marshall, Iredell, and the only state conventions formally to address the matter. The events leading to the adoption of the Eleventh Amendment, however, make clear that the individuals who believed the Constitution stripped the States of their immunity from suit were at most a small minority.

Not only do the ratification debates and the events leading to the adoption of the Eleventh Amendment reveal the original understanding of the States’ constitutional immunity from suit, they also underscore the importance of sovereign immunity to the founding generation. Simply put, “The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.” Atascadero State Hospital *v.* Scanlon (1985). . . .

The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence “that the decision in Chisholm was contrary to the well-understood meaning of the Constitution,” Seminole Tribe. . . . As a consequence, we have looked to “history and experience, and the established order of things,” rather than “adhering to the mere letter” of the Eleventh Amendment, in determining the scope of the States’ constitutional immunity from suit.

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In this case we must determine whether Congress has the power, under Article I, to subject nonconsenting States to private suits in their own courts. As the foregoing discussion makes clear, the fact that the Eleventh Amendment by its terms limits only “the Judicial power of the United States” does not resolve the question. To rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected in interpreting the scope of the States’ sovereign immunity since the discredited decision in Chisholm. . . .

. . . In exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is “compelling evidence” that the States were required to surrender this power to Congress pursuant to the constitutional design. . . .

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A general federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens. Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of the State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. Since all cannot be satisfied in full, it is inevitable that difficult decisions involving the most sensitive and political of judgments must be made. If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen. . . .

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This case at one level concerns the formal structure of federalism, but in a Constitution as resilient as ours form mirrors substance. Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

In an apparent attempt to disparage a conclusion with which it disagrees, the dissent attributes our reasoning to natural law. We seek to discover, however, only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system. We appeal to no higher authority than the Charter which they wrote and adopted. Theirs was the unique insight that freedom is enhanced by the creation of two governments, not one. 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. Although the Constitution begins with the principle that sovereignty rests with the people, it does not follow that the National Government becomes the ultimate, preferred mechanism for expressing the people’s will. The States exist as a refutation of that concept. In choosing to ordain and establish the Constitution, the people insisted upon a federal structure for the very purpose of rejecting the idea that the will of the people in all instances is expressed by the central power, the one most remote from their control. The Framers of the Constitution did not share our dissenting colleagues’ belief that the Congress may circumvent the federal design by regulating the States directly when it pleases to do so, including by a proxy in which individual citizens are authorized to levy upon the state treasuries absent the States’ consent to jurisdiction.

. . . The judgment of the Supreme Judicial Court of Maine is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

In Seminole Tribe of Florida. *v.* Florida (1996), a majority of this Court invoked the Eleventh Amendment to declare that the federal judicial power under Article III of the Constitution does not reach a private action against a State, even on a federal question. In the Court’s conception, however, the Eleventh Amendment was understood as having been enhanced by a “background principle” of state sovereign immunity (understood as immunity to suit), that operated beyond its limited codification in the Amendment, dealing solely with federal citizen-state diversity jurisdiction. To the Seminole Tribe dissenters, of whom I was one, the Court’s enhancement of the Amendment was at odds with constitutional history and at war with the conception of divided sovereignty that is the essence of American federalism.

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The Court rests its decision principally on the claim that immunity from suit was “a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution,” an aspect which the Court understands to have survived the ratification of the Constitution in 1788 and to have been “confirmed” and given constitutional status, by the adoption of the Tenth Amendment in 1791. If the Court truly means by “sovereign immunity” what that term meant at common law, its argument would be insupportable. While sovereign immunity entered many new state legal systems as a part of the common law selectively received from England, it was not understood to be indefeasible or to have been given any such status by the new National Constitution, which did not mention it. See Seminole Tribe (Souter, J., dissenting). Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution. Congress exercising its conceded Article I power may unquestionably abrogate such immunity. . . .

. . . The conception [of sovereign immunity in the majority opinion] is . . . not one of common law so much as of natural law, a universally applicable proposition discoverable by reason. This, I take it, is the sense in which the Court so emphatically relies on ­Alexander Hamilton’s reference in The Federalist No. 81 to the States’ sovereign immunity from suit as an “inherent” right, a characterization that does not require, but is at least open to, a natural law reading.

. . . The Court’s principal rationale for today’s result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791)?

The answer is certainly no. There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. . . .

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The only arguable support for the Court’s absolutist view that I have found among the leading participants in the debate surrounding ratification was the one already mentioned, that of Alexander Hamilton in The Federalist No. 81, where he described the sovereign immunity of the States in language suggesting principles associated with natural law. . . .

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There was no unanimity among the Virginians either on state- or federal-court immunity, however, for Edmund Randolph anticipated the position he would later espouse as plaintiff’s counsel in Chisholm *v.* Georgia (1793). He contented himself with agnosticism on the significance of what Hamilton had called “the general practice of mankind,” and argued that notwithstanding any natural law view of the nonsuability of States, the Constitution permitted suit against a State in federal court: “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.” Randolph clearly believed that the Constitution both could and in fact by its language did trump any inherent immunity enjoyed by the States; his view on sovereign immunity in state court seems to have been that the issue was uncertain (“whatever the law of nations may say”).

At the farthest extreme from Hamilton, James Wilson made several comments in the Pennsylvania Convention that suggested his hostility to any idea of state sovereign immunity. First, he responded to the argument that “the sovereignty of the states is destroyed” if they are sued by the United States, “because a suitor in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner.” For Wilson, “the answer [was] plain and easy: the government of each state ought to be subordinate to the government of the United States.” . . .

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At the close of the ratification debates, the issue of the sovereign immunity of the States under Article III had not been definitively resolved, and in some instances the indeterminacy led the ratification conventions to respond in ways that point to the range of thinking about the doctrine. Several state ratifying conventions proposed amendments and issued declarations that would have exempted States from subjection to suit in federal court. . . .

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. . . At all events, the state ratifying conventions’ felt need for clarification on the question of state suability demonstrates that uncertainty surrounded the matter even at the moment of ratification. This uncertainty set the stage for the divergent views expressed in Chisholm.

If the natural law conception of sovereign immunity as an inherent characteristic of sovereignty enjoyed by the States had been broadly accepted at the time of the founding, one would expect to find it reflected somewhere in the five opinions delivered by the Court in Chisholm *v.* Georgia (1793). Yet that view did not appear in any of them. . . .

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The Court’s rationale for today’s holding based on a conception of sovereign immunity as somehow fundamental to sovereignty or inherent in statehood fails for the lack of any substantial support for such a conception in the thinking of the founding era. The Court cannot be counted out yet, however, for it has a second line of argument looking not to a clause-based reception of the natural law conception or even to its recognition as a “background principle” . . . but to a structural basis in the Constitution’s creation of a federal system. . . .

The National Constitution formally and finally repudiated the received political wisdom that a system of multiple sovereignties constituted the “great solecism of an imperium in imperio”. . . . Once “the atom of sovereignty” had been split, U.S. Term Limits, Inc. *v.* Thornton (1995) (Kennedy, J., concurring), the general scheme of delegated sovereignty as between the two component governments of the federal system was clear.

Hence the flaw in the Court’s appeal to federalism. The State of Maine is not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see Garcia *v.* San Antonio Metropolitan Transit Authority (1985), and is not contested here.

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It is symptomatic of the weakness of the structural notion proffered by the Court that it seeks to buttress the argument by relying on “the dignity and respect afforded a State, which the immunity is designed to protect,” and by invoking the many demands on a State’s fisc. Apparently beguiled by Gilded Era language describing private suits against States as “ ’­neither becoming nor convenient,’ ” the Court calls “immunity from private suits central to sovereign dignity,” and assumes that this “dignity” is a quality easily translated from the person of the King to the participatory abstraction of a republican State. . . . It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own. Whatever justification there may be for an American government’s immunity from private suit, it is not dignity.

It is equally puzzling to hear the Court say that “federal power to authorize private suits for money damages would place unwarranted strain on the States’ ability to govern in accordance with the will of their citizens.” So long as the citizens’ will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of the State: the strain then is not only expected, but necessarily intended.

Least of all does the Court persuade by observing that “other important needs” than that of the “judgment creditor” compete for public money. The “judgment creditor” in question is not a dunning bill-collector, but a citizen whose federal rights have been violated, and a constitutional structure that stints on enforcing federal rights out of an abundance of delicacy toward the States has substituted politesse in place of respect for the rule of law.

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If today’s decision occasions regret at its anomalous versions of history and federal theory, it is the more regrettable in being the second time the Court has suddenly changed the course of prior decision in order to limit the exercise of authority over a subject now concededly within the Article I jurisdiction of the Congress. . . .

In 1974, Congress . . . amended the FLSA, this time “extending the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions.” . . . [In] National League of Cities v. Usery (1976), the Court held the extension of the Act to these employees an unconstitutional infringement of state sovereignty. . . .

But National League of Cities was not the last word. In Garcia, decided some nine years later, . . . the Court overruled National League of Cities, this time taking the position that Congress was not barred by the Constitution from binding the States as employers under the Commerce Clause. . . . Garcia remains good law, its reasoning has not been repudiated, and it has not been challenged here.

The FLSA has not, however, fared as well in practice as it has in theory. The Court in Seminole Tribe created a significant impediment to the statute’s practical application by rendering its damages provisions unenforceable against the States by private suit in federal court. Today’s decision blocking private actions in state courts makes the barrier to individual enforcement a total one.

. . . It is true, of course, that the FLSA does authorize the Secretary of Labor to file suit seeking damages, but unless Congress plans a significant expansion of the National Government’s litigating forces to provide a lawyer whenever private litigation is barred by today’s decision and Seminole Tribe, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy. Facing reality, Congress specifically found, as long ago as 1974, “that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily.” . . .

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So there is much irony 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. . . .

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. . . The resemblance of today’s state sovereign immunity to the Lochner era’s industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court’s late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.