

SOUTER, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 98–436

JOHN H. ALDEN, ET AL., PETITIONERS v. MAINE

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT
OF MAINE

[June 23, 1999]

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

In *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44 (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), see *id.*, at 72, 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.

Today’s issue arises naturally in the aftermath of the decision in *Seminole Tribe*. The Court holds that the Constitution bars an individual suit against a State to enforce a federal statutory right under the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.* (1994 ed. and Supp. III), when brought in the State’s courts over its objection. In thus complementing its earlier decision, the Court of course confronts the fact that the state forum renders the Eleventh Amendment beside

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the point, and it has responded by discerning a simpler and more straightforward theory of state sovereign immunity than it found in *Seminole Tribe*: a State's sovereign immunity from all individual suits is a "fundamental aspect" of state sovereignty "confirm[ed]" by the Tenth Amendment. *Ante*, at 2, 3. As a consequence, *Seminole Tribe*'s contorted reliance on the Eleventh Amendment and its background was presumably unnecessary; the Tenth would have done the work with an economy that the majority in *Seminole Tribe* would have welcomed. Indeed, if the Court's current reasoning is correct, the Eleventh Amendment itself was unnecessary. Whatever Article III may originally have said about the federal judicial power, the embarrassment to the State of Georgia occasioned by attempts in federal court to enforce the State's war debt could easily have been avoided if only the Court that decided *Chisholm v. Georgia*, 2 Dall. 419 (1793), had understood a State's inherent, Tenth Amendment right to be free of any judicial power, whether the court be state or federal, and whether the cause of action arise under state or federal law.

The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law. Nor does the Court fare any better with its subsidiary lines of reasoning, that the state-court action is barred by the scheme of American federalism, a result supposedly confirmed by a history largely devoid of precursors to the action considered here. The Court's federalism ignores the accepted authority of Congress to bind States under the FLSA and to provide for enforcement of federal rights in

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state court. The Court's history simply disparages the capacity of the Constitution to order relationships in a Republic that has changed since the founding.

On each point the Court has raised it is mistaken, and I respectfully dissent from its judgment.

I

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,” *ante*, at 2, an aspect which the Court understands to have survived the ratification of the Constitution in 1788 and to have been “confirm[ed]” and given constitutional status, *ante*, at 3, by the adoption of the Tenth Amendment in 1791. If the Court truly means by “sovereign immunity” what that term meant at common law, see *ante*, at 25, 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*, *supra*, at 132–142, 160–162, and n. 55 (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. I set out this position at length in my dissent in *Seminole Tribe* and will not repeat it here.¹

¹The Court inexplicably protests that “the right to trial by jury and the prohibition on unreasonable searches and seizures . . . derive from the common law,” *ante*, at 23, but are nonetheless indefeasible. I cannot imagine how this could be thought relevant to my argument.

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The Court does not, however, offer today's holding as a mere corollary to its reasoning in *Seminole Tribe*, substituting the Tenth Amendment for the Eleventh as the occasion demands, and it is fair to read its references to a "fundamental aspect" of state sovereignty as referring not to a prerogative inherited from the Crown, but to a conception necessarily implied by statehood itself. The conception is thus 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, see *ante*, at 6, a characterization that does not require, but is at least open to, a natural law reading.

I understand the Court to rely on the Hamiltonian formulation with the object of suggesting that its conception of sovereign immunity as a "fundamental aspect" of sovereignty was a substantially popular, if not the dominant, view in the periods of Revolution and Confederation. There is, after all, nothing else in the Court's opinion that would suggest a basis for saying that the ratification of the Tenth Amendment gave this "fundamental aspect" its constitutional status and protection against any legislative tampering by Congress.² The Court's principal rationale

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These rights are constitutional precisely because they are enacted in the Sixth and Fourth Amendments, respectively, while the general prerogative of sovereign immunity appears nowhere in the Constitution. My point is that the common-law rights that were not enacted into the Constitution were universally thought defeasible by statute.

²I am assuming that the Court does not put forward the theory of the "fundamental aspect" as a newly derived conception of its own, necessarily comprehended by the Tenth Amendment guarantee only as a result of logic independent of any intention of the Framers. Nor does the Court argue, and I know of no reason to suppose, that every legal advantage a State might have enjoyed at common law was assumed to

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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. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.

A

The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; "antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states," 1 J. Story, *Commentaries on the Constitution* §207, p. 149 (5th ed. 1891). Several colonial charters, including those of Massachusetts, Connecticut, Rhode Island, and Georgia, expressly specified that the corporate body established thereunder could sue

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be an inherent attribute of all sovereignties, or was constitutionalized wholesale by the Tenth Amendment, any more than the Ninth Amendment constitutionalized all common-law individual rights.

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and be sued. See 5 Sources and Documents of United States Constitutions 36 (W. Swindler ed. 1975) (Massachusetts); 2 *id.*, at 131 (Connecticut); 8 *id.*, at 363 (Rhode Island); 2 *id.*, at 434 (Georgia). Other charters were given to individuals, who were necessarily subject to suit. See Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1897 (1983). If a colonial lawyer had looked into Blackstone for the theory of sovereign immunity, as indeed many did, he would have found nothing clearly suggesting that the Colonies as such enjoyed any immunity from suit. “[T]he law ascribes to the king the attribute of *sovereignty*, or pre-eminence,” said Blackstone, 1 W. Blackstone, Commentaries *241 (hereinafter Blackstone), and for him, the sources for this notion were Bracton³ and Acts of Parliament that declared the Crown imperial. *Id.*, at

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³Bracton is the earliest source for the common-law immunity of the King, and his explanation is essentially practical: “*Si autem ab eo petatur, cum breve non currat contra ipsum, locus erit supplicationi, quod factum suum corrigat et emendet.*” That is, “If [justice] is asked of him, since no writ runs against him there will [only] be opportunity for a petition, that he correct and amend his act.” 2 Bracton, *De Legibus et Consuetudinibus Angliae* 33 (G. Woodbine ed., S. Thorne transl. 1968) (London 1569 ed., folio 5b, Bk. I, ch. 8). The fact that no writ ran against the King was “no peculiar privilege; for no feudal lord could be sued in his own court.” 3 W. Holdsworth, *History of English Law* 465 (3d ed. 1927). “He can not be compelled to answer in his own court, but this is true of every petty lord of every petty manor; that there happens to be in this world no court above his court is, we may say, an accident.” See *Nevada v. Hall*, 440 U. S. 410, 415, n. 6 (1979) (quoting 1 F. Pollock & F. Maitland, *History of English Law* 518 (2d ed. 1899)). It was this same view of the immunity that came down to Blackstone, who cited Finch for the view that the King must be petitioned and not sued. See H. Finch, *Law, or a Discourse Thereof, in Four Books* 255 (1678 ed. reprinted 1992) (“Here in place of action against the King petition must be made unto him in the Chancery, or in Parliament, for no action did ever lie against the K[ing] at the Common Law, but the party is driven to his petition” (footnotes omitted)); 1 Blackstone *242.

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*241–*242. It was simply the King against whom “no suit or action can be brought . . . even in civil matters, because no court can have jurisdiction over him.” *Id.*, at *242.⁴ If a person should have “a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion.” *Id.*, at *243.

It is worth pausing here to note that after Blackstone had explained sovereign immunity at common law, he went on to say that the common-law tradition was compatible with sovereign immunity as discussed by writers on “natural law”:

“And this is entirely consonant to what is laid down by the writers on natural law. ‘A subject,’ says Puf-

⁴As I explain, *infra* this page and 8–9, this common-law conception of sovereign immunity differed from the natural-law version, which understood immunity as derived from the fact that the sovereign was the font of the law, which could not bind him. I do not dispute, indeed I insist, that in England it was the common-law version that existed, and so it is beside the point for the Court to protest that the King could not be sued under French law in his own courts, see *ante*, at 25; naturally not, since the common-law conception was not couched in terms of who was the font of the law. This said, I note that it is surprising for the Court to say that “[i]t is doubtful whether the King was regarded . . . as the font of the traditions and customs which formed the substance of the common law,” *ibid.* Although Bracton said that “law makes the king,” 2 Bracton, at 33, he also said that the unwritten law of England could properly be called law only to the extent that “the authority of the king or prince [has] first been added thereto,” *id.*, at 19, and he spoke of “these English laws and customs, by the authority of kings,” *id.*, at 21. The judges who announced the common law sat “in the place of the king,” *id.*, at 20, and so in practice the common law certainly derived from him. Thus, at least for the most part, “[t]he custom of the king’s court is the custom of England, and becomes the common law.” 1 Pollock & Maitland, *supra* n. 3, at 184. But for this, Blackstone would probably not have remarked that the natural law theory produced a result “consonant” with the common law, 1 Blackstone *243; see *infra* this page and 9.

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fendorf, so long as he continues a subject, hath no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws.’ For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him.” *Ibid.* (footnote omitted).⁵

Next Blackstone quoted Locke’s explanation for immunity, according to which the risks of overreaching by “a heady prince” are “well recompensed by the peace of the public and security of the government, in the person of the chief magistrate, being thus set out of the reach of danger.” *Ibid.* (quoting J. Locke, Second Treatise of Civil Government §205 (1690 J. Gough ed. 1947)). By quoting Pufendorf and Locke, Blackstone revealed to his readers a legal-philosophical tradition that derived sovereign immunity not from the immemorial practice of England but from general theoretical principles. But although Blackstone thus juxtaposed the common-law and natural law⁶ concep-

⁵For the original of the quoted passage, see 1 S. Pufendorf, De Jure Naturae et Gentium Libri Octo 915 (1688 ed. reprinted 1934); for a modern translation, see 2 S. Pufendorf, De Jure Naturae et Gentium Libri Octo 1344–1345 (transl. C. & W. Oldfather 1934) (hereinafter Pufendorf). Elsewhere in the same chapter, Pufendorf expressly derives the impossibility of enforcing a King’s promises against him from natural law theory: “Therefore, since a king enjoys natural liberty, if he has discovered any fault in a pact of his making, he can of his own authority serve notice upon the other party that he refuses to be obligated by reason of that fault; nor does he have to secure of the other [party to the pact] a release from a thing [namely, the pact] which, of its own nature, is incapable of producing an obligation or right.” *Id.*, at 1342–1343.

⁶The Court says that to call its approach “natural law” is “an appar-

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tions of sovereign immunity, he did not confuse them. It

ent attempt to disparage,” *ante*, at 50. My object, however, is not to call names but to show that the majority is wrong, and in doing that it is illuminating to explain the conceptual tradition on which today’s majority draws, one that can be traced to the Court’s opinion from its origins in Roman sources. I call this conception the “natural law” view of sovereign immunity, despite the historical ambiguities associated with the term, because the expression by such figures as Pufendorf, Hobbes, and Locke, of the doctrine that the sovereign might not be sued, was associated with a concept of sovereignty itself derived from natural law. See Pufendorf 1103–1104; T. Hobbes, *Leviathan* Part 2, chs. 17–18 (1651), in 23 *Great Books of the Western World* 99–104 (1952) (hereinafter *Leviathan*) (describing sovereignty as the result of surrender of individual natural rights to single authority); J. Locke, *Second Treatise of Civil Government* §§95–99 (1690 J. Gough ed. 1947) (describing political community formed by individual consent out of a state of nature). The doctrine that the sovereign could not be sued by his subjects might have been thought by medieval civil lawyers to belong to *jus gentium*, the law of nations, which was a type of natural law; or perhaps in its original form it might have been understood as a precept of positive, written law. The earliest source for this conception is a statement of Ulpian’s recorded in the *Digest*, I.3.31, and much interpreted by medieval jurists, “*Princeps legibus solutus est*”; “The emperor is not bound by statutes.” See 1 *The Digest of Justinian* 13 (T. Mommsen & P. Krueger eds., A. Watson transl. 1985); Tierney, *The Prince Is Not Bound by the Laws: Accursius and the Origins of the Modern State*, 5 *Comparative Studies in Society and History* 378 (1963); K. Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* 77–79 (1993). Through its reception and discussion in the continental legal tradition, where it related initially to the Emperor, but also eventually to a King, to the Pope, and even to a city-state, see *id.*, at 90, this conception of sovereign immunity developed into a theoretical model applicable to any sovereign body. Thus Hobbes could begin his discussion of the subject by saying, “The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws.” *Leviathan* ch. 26, p. 130. There is debate on the degree to which different medieval interpreters of the maxim *Princeps legibus solutus est* understood natural or divine law to limit the prince’s freedom from the statutes. See Tierney, *supra*, at 390–394; Pennington, *supra*, at 206–208; J. Canning, *The Political Thought of Baldus de Ubaldis* 74–79 (1987).

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was as well he did not, for although the two conceptions were arguably “consonant” in England, where according to Blackstone, the Crown was sovereign,⁷ their distinct foundations could make a difference in America, where the location of sovereignty was an issue that independence would raise with some exigence.

B

Starting in the mid-1760s, ideas about sovereignty in colonial America began to shift as Americans argued that, lacking a voice in Parliament, they had not in any express way consented to being taxed. See B. Bailyn, *The Ideological Origins of the American Revolution* 204–219 (1968); G. Wood, *The Creation of the American Republic, 1776–1787*, pp. 347–348 (1969). The story of the subsequent development of conceptions of sovereignty is complex and uneven; here, it is enough to say that by the time independence was declared in 1776, the locus of sovereignty was still an open question, except that almost by definition, advocates of independence denied that sovereignty with respect to the American Colonies remained with the King in Parliament.

As the concept of sovereignty was unsettled, so was that of sovereign immunity. Some States appear to have understood themselves to be without immunity from suit in their own courts upon independence.⁸ Connecticut and

⁷A better formulation would have clarified that sovereignty resided in the King in Parliament, which was the dominant view by the later 17th century. See, *e.g.*, G. Wood, *The Creation of the American Republic, 1776–1787*, p. 347 (1969).

⁸The Court claims that the doctrine of sovereign immunity was “universal in the States when the Constitution was drafted and ratified,” *ante*, at 5, but the examples of Connecticut and Rhode Island suggest that this claim is overstated. It is of course true that these States’ preservation without comment of their colonial suability could be construed merely as a waiver of sovereign immunity, and not as a

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Rhode Island adopted their pre-existing charters as constitutions, without altering the provisions specifying their suability. See *Gibbons*, 83 Colum. L. Rev., at 1898, and nn. 42–43. Other new States understood themselves to be inheritors of the Crown’s common-law sovereign immunity and so enacted statutes authorizing legal remedies against the State parallel to those available in England.⁹ There, although the Crown was immune from suit, the contemporary practice allowed private litigants to seek legal remedies against the Crown through the petition of right or the *monstrans de droit* in the Chancery or Exchequer. See 3 Blackstone *256–257. A Virginia statute provided:

“Where the auditors according to their discretion and judgment shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at

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denial of the principle. But in light of these States’ silence as to any change in their status as suable bodies, it would be tendentious so to understand it. The Court relies for its claim on Justice Iredell’s statement in *Chisholm v. Georgia*, 2 Dall. 419 (1793), that there was “no doubt” that no State had “any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State . . . either when the Constitution was adopted, or at the time the judicial act was passed.” *Ante*, at 5 (quoting *Chisholm*, *supra*, at 434–435). But as the cases of Rhode Island and Connecticut demonstrate, Justice Iredell was simply wrong. 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. See *Seminole Tribe of Fla. v. Florida*, 517 U. S. 44, 107, n. 5 (1996) (dissenting opinion).

⁹The Court seems to think I have overlooked this point, that the exceptions imply a rule, see *ante*, at 15 (provisions for chancery petitions “only confir[m]” immunity enjoyed by these States). The reason for canvassing the spectrum of state thought and practice is not to deny the undoubted place of sovereign immunity in most States’ courts, but to examine what turns out to be the scanty evidence that the States understood sovereign immunity in the infeasible, civilian, natural law sense, necessary to support the Court’s position here.

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liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity.” 9 W. Hening, *Statutes at Large: Being a Collection of the Laws of Virginia* 536, 540 (1821); see Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. Rev. 899, 939–940, and n. 142 (1997).

This “petition” was clearly reminiscent of the English petition of right, as was the language “shall proceed to do right thereon,” which paralleled the formula of royal approval, “*soit droit fait al partie*,” technically required before a petition of right could be adjudicated. See 3 Blackstone *256; Pfander, *supra*, at 940, and nn. 143–144. A New York statute similarly authorized petition to the court of chancery by anyone who thought himself aggrieved by the state auditor general’s resolution of his account with the State. See An Act Directing a Mode for the Recovery of Debts due to, and the Settlement of Accounts with this State, March 30, 1781, in *The First Laws of the State of New York* 192 (1782 ed., reprinted 1984); see also Pfander, *supra*, at 941, and n. 145.

Pennsylvania not only adopted a law conferring the authority to settle accounts upon the Comptroller General, see Act of Apr. 13, 1782, ch. 959, 2 *Laws of the Commonwealth of Pennsylvania* 19 (1810), but in 1785 provided for appeal from such adjudications to the Pennsylvania Supreme Court, where a jury trial could be had, see *id.*, at 26–27; Pfander, *supra*, at 941, n. 147. Although in at least one recorded case before the Pennsylvania Supreme Court the Commonwealth, citing Blackstone, pleaded common-

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law sovereign immunity, see *Respublica v. Sparhawk*, 1 Dall. 357, 363 (Pa. 1788), the Supreme Court of Pennsylvania did not reach this argument, concluding on other grounds that it lacked jurisdiction.¹⁰ Two years after this decision, under the influence of James Wilson, see C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 25, and 169, n. 53 (1972), Pennsylvania adopted a new constitution, which provided that “[s]uits may be brought against the commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct.” Pa. Const., Art. IX, §11 (1790), reprinted in 8 *Sources and Documents of United States Constitutions*, at 293; see also Pfander, *supra*, at 928, n. 101.¹¹

Around the time of the Constitutional Convention, then, there existed among the States some diversity of practice with respect to sovereign immunity; but despite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State, see, *e.g.*, Pennsylvania Constitution, Art. III (1776), 8 *Sources and Documents of United States Constitutions*, *supra*, at 278 (“That the people of this State have the sole, exclusive and inher-

¹⁰In a suit against Virginia in the Court of Common Pleas for Philadelphia County, Virginia pleaded sovereign immunity in natural law terms, and the sheriff was excused from making return of the writ attaching Virginia’s goods, see *Nathan v. Virginia*, 1 Dall. 77, n. (1781), but this was only after the Supreme Executive Council of the Commonwealth had already ordered the goods returned and, in any event, involved the immunity of one State in the courts of another, and not the distinct immunity of a State in her own courts, see *Nevada v. Hall*, 440 U. S., at 414.

¹¹Whether this formulation was a constitutional waiver of sovereign immunity or an affirmative repudiation of its applicability is uncertain, but the broad language opening the courts to all suits, and the apparent desire to exceed the previously available statutory scheme, would appear to support the latter interpretation.

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ent right of governing and regulating the internal police of the same”), no State declared that sovereign immunity was one of those rights. To the extent that States were thought to possess immunity, it was perceived as a prerogative of the sovereign under common law. And where sovereign immunity was recognized as barring suit, provisions for recovery from the State were in order, just as they had been at common law in England.

C

At the Constitutional Convention, the notion of sovereign immunity, whether as natural law or as 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.¹² In the subsequent ratification debates, however, the issue of jurisdiction over a State did emerge in the question whether States might be sued on their debts in federal court, and on this point, too, a variety of views emerged and the diversity of sovereign immunity conceptions displayed itself.

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¹²The Court says, “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 States of the immunity.” *Ante*, at 31–32. In fact, a stalwart supporter of the Constitution, James Wilson, laid the groundwork for just such a view at the Pennsylvania Convention, see *infra*, at 18–19. For the most part, it is true, the surviving records of the ratifying conventions do not suggest that much thought was given to the issue of suit against States in their own courts. But this 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.

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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:

"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 [that States might be sued on their debts in federal court] must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will." *The Federalist* No. 81, pp. 548–549 (J. Cooke ed. 1961).

Hamilton chose his words carefully, and he acknowledged the possibility that at the Convention the States might have surrendered sovereign immunity in some circumstances, but the thrust of his argument was that sovereign immunity was "inherent in the nature of sovereignty."¹³

¹³In *Seminole Tribe*, I explained that Hamilton had in mind state sovereign immunity only with respect to diversity cases applying state contract law. See 517 U. S., at 145–149 (dissenting opinion). Here I intend simply to point out that with respect to state law, in the main Hamilton spoke consistently with deriving sovereign immunity from a natural law model. That he did so is consistent with his focus on state

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An echo of Pufendorf may be heard in his reference to “the conscience of the sovereign”;¹⁴ and the universality of the phenomenon of sovereign immunity, which Hamilton claimed (“the general sense and the general practice of mankind”), is a peculiar feature of the natural law conception. The apparent novelty and uniqueness of Hamilton’s employment of natural law terminology to explain the sovereign immunity of the States is worth remarking, because it stands in contrast to formulations indicating no particular position on the natural-law-versus-common-law origin, to the more widespread view that sovereign immunity derived from common law, and to the more radical stance that the sovereignty of the people made sovereign immunity out of place in the United States. Hamilton’s view is also worth noticing because, in marked contrast to its prominence in the Court’s opinion today, as well as in *Seminole Tribe*, 517 U. S., at 54, and in *Hans v. Louisiana*, 134 U. S. 1, 13 (1890), cf. *Great Northern Life Ins. Co. v.*

 law; Hamilton almost certainly knew that the natural law theory of sovereign immunity extended only to rights created by the sovereign, and so would not have applied to federal-question claims against a State in either state or federal court. Thus when the Court claims that subjecting States to suit in state court “would turn on its head the concern of the founding generation— that Article III might be used to circumvent state-court immunity” *ante*, at 34, it has failed to realize that even those Framers who, like Hamilton, aimed to preserve state sovereign immunity, had in mind only state immunity on state-law claims, not federal questions.

¹⁴Pufendorf’s discussion of sovereign immunity, just before the passage quoted by Blackstone, begins (in a modern translation): “Now although promises and pacts are as binding upon the conscience of a king as upon that of any private citizen, there is, nevertheless, this difference between the obligation of a king and that of subjects, namely, that it is no trouble for the former to exact what is owed him from a subject, when he demurs, while a citizen, so long as he remains such, has no means within his power to recover his due from a king against his will.” 2 Pufendorf 1344–1345.

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Read, 322 U. S. 47, 51 (1944), it found no favor in the early Supreme Court, see *infra*, at 21–22.

In the Virginia ratifying convention, Madison was among those who debated sovereign immunity in terms of the result it produced, not its theoretical underpinnings. He maintained that “[i]t is not in the power of individuals to call any state into court,” 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed. 1836) (hereinafter *Elliot’s Debates*), and thought that the phrase “in which a State shall be a Party” in Article III, §2, must be interpreted in light of that general principle, so that “[t]he only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.” *Ibid.*¹⁵ John Marshall argued along the same lines against the possibility of federal jurisdiction over private suits against States, and he invoked the immunity of a State in its own courts in support of his argument:

“I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court.” *Id.*, at 555.

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*, 2 Dall. 419 (1793). He contented himself with agnosticism on the significance of what Hamilton had called “the general practice

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¹⁵Madison seems here to have overlooked the possibility of concurrent jurisdiction between the Supreme Court’s original jurisdiction and that of state courts.

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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*.” 3 Elliot’s Debates 573. 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 suiter 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.” 2 *id.*, at 490. For Wilson, “[t]he answer [was] plain and easy: the government of each state ought to be subordinate to the government of the United States.” *Ibid.*¹⁶ Wilson was also pointed in commenting

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¹⁶The Court says this statement of Wilson’s is “startling even today,” *ante*, at 15, but it is hard to see what is so startling, then or now, about the proposition that, since federal law may bind state governments, the state governments are in this sense subordinate to the national. 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*, 4 Wheat. 316 (1819), had never been decided.

Nor is the Court correct to say that the views of Wilson, Randolph, and General Charles Cotesworth Pinckney, see n. 17, *infra*, “cannot bear the weight” I put upon them, *ante*, at 15. Indeed, the yoke is light, since I

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on federal jurisdiction over cases between a State and citizens of another State: “When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.” *Id.*, at 491. Finally, Wilson laid out his view that sovereignty was in fact not located in the States at all: “Upon what principle is it contended that the sovereign power resides in the state governments? The honorable gentleman has said truly, that there can be no subordinate sovereignty. Now, if there cannot, my position is, that the sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of the power as were conceived necessary for the public welfare.” *Id.*, at 443.¹⁷ While this statement did

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intend these Framers only to do their part in showing that a diversity of views with respect to sovereignty and sovereign immunity existed at the several state conventions, and that this diversity 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.

Finally, the Court calls Wilson’s view “a radical nationalist vision of the constitutional design,” *ante*, at 15, apparently in an attempt to discount it. But while Wilson’s view of sovereignty was indeed radical in its deviation from older conceptions, this hardly distanced him from the American mainstream, and in October 1787, Washington himself called Wilson “as able, candid, & honest a member as any in Convention,” 5 Papers of George Washington: Confederation Series 379 (W. Abbot & D. Twohig eds. 1997).

¹⁷Nor was Wilson alone in this theory. At the South Carolina Convention, General Charles Cotesworth Pinckney, who had attended the Philadelphia Convention, took the position that the States never enjoyed individual and unfettered sovereignty, because the Declaration of Independence was an act of the Union, not of the particular States. See 4 Elliot’s Debates 301. In his view, the Declaration “sufficiently confutes the . . . doctrine of the individual sovereignty and independence of the several states. . . . The separate independence and individ-

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not specifically address sovereign immunity, it expressed the major premise of what would later become Justice Wilson's position in *Chisholm*: that because the people, and not the States, are sovereign, sovereign immunity has no applicability to the States.

From a canvass of this spectrum of opinion expressed at the ratifying conventions, one thing is certain. No one was espousing an infeasible, natural law view of sovereign immunity. The controversy over the enforceability of state debts subject to state law produced emphatic support for sovereign immunity from eminences as great as Madison and Marshall, but neither of them indicated adherence to any immunity conception outside the common law.

D

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.¹⁸

 ual 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.” *Ibid*.

¹⁸ “[T]he grand objection, that the states were made subject to the action of an individual, still remained for several years, notwithstanding the concurring dissent of several states at the time of accepting the constitution.” St. G. Tucker, 1 Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia, App. 352 (1803). In a footnote, Tucker specified that “[t]he several conventions of Massachusetts, New Hampshire, Rhode Island, New York, Virginia,

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The New York Convention's statement of ratification included a series of declarations framed as proposed amendments, among which was one stating "That the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state." 1 Elliot's Debates 329.¹⁹ Whether that amendment was meant to alter or to clarify Article III as ratified is uncertain, but regardless of its precise intent, New York's response to the draft proposed by the Convention of 1787 shows that there was no consensus at all on the question of state suability (let alone on the underlying theory of immunity doctrine). There was, rather, an unclear state of affairs which it seemed advisable to stabilize.

The Rhode Island Convention, when it finally ratified on

and North Carolina, proposed amendments in this respect." *Ibid.* The proposed amendments of the latter four States, which may be found in Elliot's Debates, are discussed immediately *infra*, at 21–23. The extant published versions of the proposed amendments of Massachusetts and New Hampshire do not include such a proposed amendment. See, e.g., 1 Elliot's Debates, 322–323 (nine proposed amendments of Massachusetts); 2 *id.*, at 177–178 (same); H. R. Doc. No. 398, 69th Cong., 1st Sess., 1018–1020 (1927) (same); 1 Elliot's Debates, 325–326 (12 proposed amendments of New Hampshire); H. R. Doc. No. 398, *supra*, at 1025–1026 (same).

¹⁹It is conceivable that the New York Convention, which was after all the intended audience for *The Federalist*, thought that the States had some sort of an inherent right against being sued in federal court. But this is unlikely, because numerous other of the proposed amendments declared so-called "rights" in no uncertain terms, see, e.g., 1 Elliot's Debates 328 ("[T]he people have an equal, natural, and unalienable right freely and peaceably to exercise their religion"; trial by jury is "one of the greatest securities to the rights of a free people"; "[T]he people have a right peaceably to assemble together"), whereas the proposed amendment regarding suits against States simply stated that the judicial power "does not extend . . . to authorize any suit by any person against a state," and said nothing about any rights, inherent or otherwise. *Id.*, at 329.

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June 16, 1790, called upon its representatives to urge the passage of a list of amendments. This list incorporated language, some of it identical to that proposed by New York, in the following form:

“It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state; but, to remove all doubts or controversies respecting the same, that it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states . . . in liquidating and discharging the public securities of any one state.” 1 *id.*, at 336.

Even more clearly than New York’s proposal, this amendment appears to have been intended to clarify Article III as reflecting some theory of sovereign immunity, though without indicating which one.

Unlike the Rhode Island proposal, which hinted at a clarification of Article III, the Virginia and North Carolina ratifying conventions proposed amendments that by their terms would have fundamentally altered the content of Article III. The Virginia Convention’s proposal for a new Article III omitted entirely the language conferring federal jurisdiction over a controversy between a State and citizens of another State, see 3 *id.*, at 660–661, and the North Carolina Convention proposed an identical amendment, see 4 *id.*, at 246–247. These proposals for omission suggest that the conventions of Virginia and North Carolina thought they had subjected themselves to citizen suits under Article III as enacted, and that they wished not to

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have done so.²⁰ There is, thus, no suggestion in their resolutions that Article III as drafted was fundamentally at odds with an indefeasible natural law sovereignty, or with a conception that went to the essence of what it meant to be a State. 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*.

E

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*, 2 Dall. 419 (1793). Yet that view did not appear in any of them. And since a bare two years before *Chisholm*, the Bill of Rights had been added to the original Constitution, if the Tenth Amendment had been understood to give federal constitutional status to state sovereign immunity so as to endue it with the equivalent of the natural law conception, one would be certain to find such a development mentioned somewhere in the *Chisholm* writings. In fact, however, not one of the opinions espoused the natural law view, and not one of them so much as mentioned the Tenth Amendment. Not even Justice Iredell, who alone among the

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²⁰The Court says “there is no evidence that [the proposed amendments] were directed toward the question of sovereign immunity or that they reflect an understanding that the States would be subject to private suits without consent under Article III as drafted.” *Ante*, at 15. No evidence, that is, except the proposed amendments themselves, which would have omitted the Citizen-State Diversity Clause. If the proposed omission is not evidence going to sovereign immunity to private suits, one wonders what would satisfy the Court.

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Justices thought that a State could not be sued in federal court, echoed Hamilton or hinted at a constitutionally immutable immunity doctrine.

Chisholm presented the questions whether a State might be made a defendant in a suit brought by a citizen of another State, and if so, whether an action of assumpsit would lie against it. See *id.*, at 420 (questions presented).²¹ In representing Chisholm, Edmund Randolph,

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²¹The case had first been brought before the Federal Circuit Court for the District of Georgia, over which Justice Iredell and District Judge Nathaniel Pendleton had presided. Ultimately, Justice Iredell held that the Circuit Court had no jurisdiction in the case because Congress had not conferred such jurisdiction on it. See 5 Documentary History of the Supreme Court of the United States, 1789–1800, pp. 128–129, 154 (M. Marcus ed. 1994). Georgia had maintained that it was “a free, sovereign, and independent State, and . . . cannot be drawn or compelled, nor at any Time past hath been accustomed to be, or could be drawn or compelled to answer against the will of the said State of Georgia, before any Justices of the federal Circuit Court for the District of Georgia or before any Justices of any Court of Law or Equity whatever.” Plea to the Jurisdiction, Oct. 17, 1791, *id.*, at 143. Chisholm demurred to the plea on the apparent ground that while the plea alleged that Georgia could not be compelled to appear before any court, Article III expressly declared that the federal judicial power extended to all controversies between a State and citizens of another State. Demurrer, *id.*, at 144. In his unreported opinion, Justice Iredell dispensed with this demurrer. He first stated that the plea sufficiently alleged that the District Court lacked jurisdiction. *Id.*, at 150. He added that in any case, the existence of Congress’s constitutional authority to create courts to hear controversies between a State and citizens of another State did not mean that Congress had in fact created such courts. *Id.*, at 151. Third, Justice Iredell pointed out that the right to create courts for cases in which a State was a party did not mean that Congress could confer jurisdiction in cases like the one at bar, because the word “controversies” in Article III might refer only to situations “where such controversies could formerly have been maintained” in state court. Since “under the jurisdiction of a particular State Sovereigns may be liable in some instances but not in others,” just as “[i]n England the property in possession of the crown can be affected by an adverse Process, tho’ certainly the King cannot be sued

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the Framers²² and then Attorney General, not only argued for the necessity of a federal forum to vindicate private rights against the States, see *id.*, at 422, but rejected any traditional conception of sovereignty. He said that the sovereignty of the States, which he acknowledged, *id.*, at 423, was no barrier to jurisdiction, because “the present Constitution produced a new order of things. It derives its origin immediately from the people The States are in fact assemblages of these individuals who are liable to process,” *ibid.*

Justice Wilson took up the argument for the sovereignty of the people more vociferously. Building on a conception of sovereignty he had already expressed at the Pennsylvania ratifying convention, see *supra*, at 18–19, he began by noting what he took to be the pregnant silence of the Constitution regarding sovereignty:

“To the Constitution of the *United States* the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who *ordained* and *established* the Constitution. They *might* have announced themselves ‘SOVEREIGN’ people of the *United States*: But serenely conscious of the *fact*, they avoided the *ostentatious declaration*.” 2 Dall. at 454.

As if to contrast his own directness²³ with the Framers’

for the recovery of a sum of money,” *ibid.*, it appeared to Justice Iredell that under some conditions Article III did not authorize suits against States.

²² Framer but not signer.

²³ Justice Wilson hinted that in his own private view, citizens of the States had not conferred sovereignty in the sense of absolute authority upon their state governments, because they had retained some rights to themselves: “[A]ccording to some writers, every State, which governs itself without any dependence on another power, is a sovereign State.

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delicacy, the Framer-turned-Justice explained in no uncertain terms that Georgia was not sovereign with respect to federal jurisdiction (even in a diversity case):

“As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of *Georgia*, when they acted upon the large scale of the *Union*, as a part of the ‘People of the United States,’ did *not* surrender the Supreme or Sovereign Power to that State; but, *as to the purposes of the Union*, retained it to themselves. *As to the purposes of the Union*, therefore, *Georgia is NOT a sovereign State.*” *Id.*, at 457.

This was necessarily to reject any natural law conception of sovereign immunity as inherently attached to an American State, but this was not all. Justice Wilson went on to identify the origin of sovereign immunity in the feudal system that had, he said, been brought to England and to the common law by the Norman Conquest. After quoting Blackstone’s formulation of the doctrine as it had developed in England, he discussed it in the most disapproving terms imaginable:

“This last position [that the King is sovereign and no court can have jurisdiction over him] is only a branch of a much more extensive principle, on which a plan of

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Whether, with regard to her own citizens, this is the case of the State of *Georgia*; whether those citizens have done, as the individuals of *England* are said, by their late instructors, to have done, surrendered the Supreme Power to the State or Government, and reserved nothing to themselves; or whether, like the people of other States, and of the *United States*, the citizens of *Georgia* have reserved the Supreme Power in their own hands; and on that Supreme Power have made the State *dependent*, instead of being sovereign; these are questions, to which, as a Judge in this cause, I can neither know nor suggest the proper answers; though, as a citizen of the *Union*, I know, and am interested to know, that the most satisfactory answers can be given.” *Chisholm*, 2 Dall. 457, at (1793) (citation omitted).

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systematic despotism has been lately formed in *England*, and prosecuted with unwearied assiduity and care. Of this plan the author of the Commentaries was, if not the introducer, at least the great supporter. He has been followed in it by writers later and less known; and his doctrines have, both on the other and *this* side of the Atlantic, been implicitly and generally received by those, who neither examined their *principles* nor their *consequences*[.] The principle is, that all human law must be prescribed by a *superior*. This principle I mean not now to examine. Suffice it, at present to say, that another principle, very different in its nature and operations, forms, in my judgment, the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *sovereign*, when traced to his source, must be found in the *man*.” *Id.*, at 458.

With this rousing conclusion of revolutionary ideology and rhetoric, Justice Wilson left no doubt that he thought the doctrine of sovereign immunity entirely anomalous in the American Republic. Although he did not speak specifically of a State’s immunity in its own courts, his view necessarily requires that such immunity would not have been justifiable as a tenet of absolutist natural law.

Chief Justice Jay took a less vehement tone in his opinion, but he, too, denied the applicability of the doctrine of sovereign immunity to the States. He explained the doctrine as an incident of European feudalism, *id.*, at 471, and said that by contrast,

“[n]o such ideas 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* (unless the *African* slaves among us may be so called) and have none to govern but *them-*

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selves; the citizens of *America* are equal as fellow citizens, and as joint tenants in the sovereignty.” *Id.*, at 471–472.

From the difference between the sovereignty of princes and that of the people, Chief Justice Jay argued, it followed that a State might be sued. When a State sued another State, as all agreed it could do in federal court, all the people of one State sued all the people of the other. “But why it should be more incompatible, that all the people of a State should be sued by *one* citizen, than by one hundred thousand, I cannot perceive, the process in both cases being alike; and the consequences of a judgment alike.” *Id.*, at 473. Finally, Chief Justice Jay pointed out, Article III authorized suits between a State and citizens of another State. Although the Chief Justice reserved judgment on whether the United States might be sued by a citizen, given that the courts must rely on the Executive to implement their decisions, he made it clear that this reservation was practical, and not theoretical: “I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens.” *Id.*, at 478. Although Chief Justice Jay did not speak specifically to the question of state sovereign immunity in state court, his theory shows that he considered not the States, but the people collectively, to be sovereign; and there is thus no reason to think he would have denied that the people of the Nation could override any state claim to sovereign immunity in a matter committed to the Nation.

Justice Cushing’s opinion relied on the express language of Article III to hold that Georgia might be sued in federal court. He dealt shortly with the objection that States’ sovereignty would be thereby restricted so that States

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would be reduced to corporations: “As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers?” *Id.*, at 468. Observing that the Constitution limits the powers of the States in numerous ways, he concluded that “no argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole.” *Ibid.* From the opinion, it is not possible to tell with certainty what Justice Cushing thought about state sovereign immunity in state court, although his introductory remark is suggestive. The case, he wrote, “turns not upon the law or practice of *England*, although perhaps it may be in some measure elucidated thereby, nor upon the law of any other country whatever; but upon the Constitution established by the people of the *United States*.” *Id.*, at 466. It is clear that he had no sympathy for a view of sovereign immunity inherent in statehood and untouchable by national legislative authority.

Justice Blair, like Justice Cushing, relied on Article III, and his brief opinion shows that he acknowledged state sovereign immunity, but common-law immunity in state court. First, Justice Blair asked hypothetically whether a verdict against the plaintiff would be preclusive if the plaintiff “should renew his suit against the State, in any mode in which she may permit herself to be sued in her own Courts.” *Id.*, at 452. Second, he commented that there was no need to require the plaintiff to proceed by way of petition:

“When sovereigns are sued in their own Courts, such a method may have been established as the most respectful form of demand; but we are not now in a State-Court; and if sovereignty be an exemption from suit in any other than the sovereign’s own Courts, it follows that when a State, by adopting the Constitu-

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tion, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty.” *Ibid.*

It is worth noting that for Justice Blair, the petition brought in state court was properly called a suit. This reflects the contemporary practice of his native Virginia, where, as we have seen, *supra*, at 10–11, suits as of right against the State were authorized by statute. Justice Blair called sovereignty “an exemption from suit in any other than the sovereign’s own Courts” because he assumed that, in its own courts, a sovereign will naturally permit itself to be sued as of right.

Justice Iredell was the only Member of the Court to hold that the suit could not lie; but if his discussion was far-reaching, his reasoning was cautious. Its core was that the Court could not assume a waiver of the State’s common-law sovereign immunity where Congress had not expressly passed such a waiver. See 2 Dall., at 449 (dissenting opinion). Although Justice Iredell added, in what he clearly identified as dictum, that he was “strongly against” any construction of the Constitution “which will admit, under any circumstances, a compulsive suit against a State for the recovery of money,” *ibid.*,²⁴ he made it

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²⁴The basis for the dictum may be found earlier in the opinion, where Justice Iredell explained that it was uncertain whether Article III’s extension of the federal judicial power to cases between a State and citizens of another State “is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the Legislature to provide laws for the decision of all possible controversies in which a State may be involved with an individual, without regard to any prior exemption.” *Id.*, at 436. Justice Iredell seems to have believed that Article III authorized only the former; in other words, that the Framers intended to permit Article III jurisdiction in suits against a State only where some other existing court could also hear such a claim. Because in Justice Iredell’s view, state courts could nowhere hear suits against a State at the time of ratification, see *id.*, at

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equally clear that he understood sovereign immunity as a common-law doctrine passed to the States with independence:

“No other part of the common law of *England*, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every State in the *Union* in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as compleatly sovereign, as the *United States* are in respect to the powers surrendered. The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved. It must necessarily be so, because the *United States* have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.” *Id.*, at 435.

This did not mean, of course, that the States had not delegated to Congress the power to subject them to suit,

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434–435, it followed that Article III probably did not authorize such suits. Justice Iredell’s reasoning, it must be said, differed markedly from the reasoning the Court adopts today. Justice Iredell believed simply that the Clause in Article III extending jurisdiction to controversies between a State and citizens of another State did not confer any extra law-making authority on Congress that was not found elsewhere in the Constitution. Because he could conceive of no other constitutional provision authorizing Congress to create a private right of action against a State, he concluded that none could exist. Today, of course, it is established that the commerce power authorizes Congress to create private rights as against the States. See *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985). The Court today takes the altogether different tack of arguing that state immunity from suit in state court was an inherent right of States preserved by the Tenth Amendment. Whatever Justice Iredell might have thought of this argument, it gets no support from his opinion.

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but merely that such a delegation would have been necessary on Justice Iredell's view.

In sum, then, in *Chisholm* two Justices (Jay and Wilson), both of whom had been present at the Constitutional Convention, took a position suggesting that States should not enjoy sovereign immunity (however conceived) even in their own courts; one (Cushing) was essentially silent on the issue of sovereign immunity in state court; one (Blair) took a cautious position affirming the pragmatic view that sovereign immunity was a continuing common law doctrine and that States would permit suit against themselves as of right; and one (Iredell) expressly thought that state sovereign immunity at common-law rightly belonged to the sovereign States. Not a single Justice suggested that sovereign immunity was an inherent and indefeasible right of statehood, and neither counsel for Georgia before the Circuit Court, see *supra*, at 24, n. 21, nor Justice Iredell seems even to have conceived the possibility that the new Tenth Amendment produced the equivalent of such a doctrine. This dearth of support makes it very implausible for today's Court to argue that a substantial (let alone a dominant) body of thought at the time of the framing understood sovereign immunity to be an inherent right of statehood, adopted or confirmed by the Tenth Amendment.²⁵

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²⁵It only makes matters worse for the Court that two States, New York and Maryland, voluntarily subjected themselves to suit in the Supreme Court around the time of *Chisholm*. See Marcus & Wexler, *Suits Against States: Diversity of Opinion In The 1790s*, 1993 J. Sup. Ct. Hist. 73, 74–78. At the Court's February Term, 1791, before *Chisholm*, Maryland entered a plea (probably as to the merits) in *Van Staphorst v. Maryland*, see 1993 J. Sup. Ct. Hist., at 74, a suit brought by a foreign citizen for debts owed by the State, but then settled the suit to avoid the establishment of an adverse precedent on immunity, see *id.*, at 75. In *Oswald v. New York*, an action that commenced before *Chisholm* but that was continued after it, New York initially objected to

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The Court's discomfort is evident in its obvious recognition that its natural law or Tenth Amendment conception of state sovereign immunity is insupportable if *Chisholm* stands. Hence the Court's attempt to discount the *Chisholm* opinions, an enterprise in which I believe it fails.

The Court, citing *Hans v. Louisiana*, 134 U. S. 1 (1890), says that the Eleventh Amendment "overruled" *Chisholm*, *ante*, at 12, but the animadversion is beside the point. The significance of *Chisholm* is its indication that in 1788 and 1791 it was not generally assumed (indeed, hardly assumed at all) that a State's sovereign immunity from suit in its own courts was an inherent, and not merely a common-law, advantage. On the contrary, the testimony of five eminent legal minds of the day confirmed that virtually everyone who understood immunity to be legitimate saw it as a common-law prerogative (from which it follows that it was subject to abrogation by Congress as to a matter within Congress's Article I authority).

The Court does no better with its trio of arguments to undercut *Chisholm*'s legitimacy: that the *Chisholm* majority "failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted," *ante*, at 11; that "the majority suspected the decision would be unpopular and surprising," *ibid.*; and that "two Members of the majority acknowledged that the United States might well remain immune from suit despite" Article III, *ante*, at 12. These three claims do not, of course, go to the question whether state sovereign immunity was understood to be "fundamental" or "inherent," but in any case, none of them is

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jurisdiction, see 1993 J. Sup. Ct. Hist., at 77, but the suit was tried to a jury in the Supreme Court, and after New York lost, it paid the full jury verdict out of the State's treasury, *id.*, at 78.

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convincing.

With respect to the first, Justice Blair in fact did expressly refer to the practice of state sovereign immunity in state court, and acknowledged the petition of right as an appropriate and normal practice. This aside, the Court would have a legitimate point if it could show that the *Chisholm* majority took insufficient account of a body of practice that somehow indicated a widely held absolutist conception of state sovereign immunity untouchable and untouched by the Constitution. But of course it cannot.²⁶

As for the second point, it is a remarkable doctrine that would hold anticipation of unpopularity the benchmark of constitutional error. In any event, the evidence proffered by the Court is merely this: that Justice Wilson thought the prerevolutionary conception of sovereignty misguided, 2 Dall., at 454–455; that Justice Cushing stated axiomatically that the Constitution could always be amended, *id.*, at 468; that Chief Justice Jay noted that the losing defen-

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²⁶The Court thinks that Justice Iredell's adversion to state practice gives reason to think so, see *ante*, at 11 (“[D]espite the opinion of Justice Iredell, the majority failed to address . . .”). Even if Justice Iredell had been right about state practice, failure to respond to a specific argument raised by another Justice (as opposed to counsel) has even less significance with respect to this early Supreme Court opinion than it would have today, because the Justices may not have afforded one another the opportunity to read their opinions before they were announced. See 1 J. Goebel, *the Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, Antecedents and Beginnings to 1801*, p. 728 (1971) (“There are hints . . . that there may have been no conference and that each Justice arrived at his conclusion independently without knowing what each of his brethren had decided”). Indeed, since “opinions were given only orally in the Supreme Court in the 1790s,” 5 *Documentary History of the Supreme Court*, *supra* n. 21, at 164, n., it is possible that the opinion as reported by Dallas followed a document prepared by Wilson after the oral announcement of the opinion, *ibid.*; see also *id.*, at xxiv–xxv, in which case it is possible that the other Justices never heard certain arguments until publication.

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dant might still come to understand that sovereign immunity is inconsistent with republicanism, *id.*, at 478–479; and that Attorney General Randolph admitted that the position he espoused was unpopular not only in Georgia, but also in another State, probably Virginia.²⁷ These items boil down to the proposition that the Justices knew (as who could not, with such a case before him) that at the ratifying conventions the significance of sovereign immunity had been, as it still was, a matter of dispute. This reality does not detract from, but confirms, the view that the Framers showed no intent to recognize sovereign immunity as an immutably inherent power of the States.

As to the third objection, that two Justices noted that the United States might possess sovereign immunity notwithstanding Article III, I explained, *supra*, at 28, that Chief Justice Jay thought this possibility was purely practical, not at all legal, and without any implication for state immunity vis-à-vis federal claims. Justice Cushing was so little troubled by the possibility he raised that he wrote, “If this be a necessary consequence, it must be so,” *Chisholm*, *supra*, at 469, and simply suggested a textual reading that might have led to a different consequence.

Nor can the Court make good on its claim that the enactment of the Eleventh Amendment retrospectively reestablished the view that had already been established at the time of the framing (though eluding the perception of all but one Member of the Supreme Court), and hence

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²⁷The circumlocution “another State, whose will must be always dear to me,” *Chisholm*, 2 Dall., at 419, hints at Randolph’s home State. It seems odd to suggest that Randolph’s acknowledgment of the unpopularity of his position in two States would somehow support the thought that the view was incorrect. Randolph himself had urged the same position at the Virginia ratifying convention, see *supra*, at 16–17, and so knew perfectly well that Virginia had ratified with full knowledge that his position might be the law.

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“acted . . . to restore the original constitutional design,” *ante*, at 12.²⁸ There was nothing “established” about the position espoused by Georgia in the effort to repudiate its debts, and the Court’s implausible suggestion to the contrary merely echoes the brio of its remark in *Seminole Tribe* that *Chisholm* was “contrary to the well-understood meaning of the Constitution.” 517 U. S., at 69 (citing *Principality of Monaco v. Mississippi*, 292 U. S. 313, 325 (1934)). The fact that *Chisholm* was no conceptual aberration is apparent from the ratification debates and the several state requests to rewrite Article III. There was no received view either of the role this sovereign immunity would play in the circumstances of the case or of a conceptual foundation for immunity doctrine at odds with *Chisholm*’s reading of Article III. As an author on whom the Court relies, see *ante*, at 14, has it, “there was no unanimity among the Framers that immunity would exist,” D. Currie, *The Constitution in the Supreme Court: The First Century* 19 (1985).²⁹

²⁸It is interesting to note a case argued in the Supreme Court of Pennsylvania in 1798, in which counsel for the Commonwealth urged a version of the point that the Court makes here, and said that “[t]he language of the amendment, indeed, does not import an alteration of the Constitution, but an authoritative declaration of its true construction.” *Respublica v. Cobbet*, 3 Dall. 467, 472 (Pa. 1798). The Court expressly repudiated the historical component of this claim in an opinion by its Chief Justice: “When the judicial law [*i.e.*, the Judiciary Act of 1789] was passed, the opinion prevailed that States might be sued, which by this amendment is settled otherwise.” *Id.*, at 475 (M Kean, C. J.).

²⁹The Court might perhaps respond that if the role of state sovereign immunity was not the subject of universal consensus in 1792, the enactment of the Eleventh Amendment brought the doctrine into the constitutional realm. The strongest form of this view must maintain that, notwithstanding the Amendment’s silence regarding state courts and its exclusive focus on the federal judicial power, the motivation of the Framers of the Eleventh Amendment must have been affirmatively to embrace the position that the States enjoyed the immunity from suit previously enjoyed by the Crown. On this account, the Framers of the

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It should not be surprising, then, to realize that although much post-*Chisholm* discussion was disapproving (as the States saw their escape from debt cut off), the decision had champions “every bit as vigorous in defending their interpretation of the Constitution as were those partisans on the other side of the issue.” Marcus & Wexler, *Suits Against States: Diversity of Opinion In The 1790s*, 1993 J. Sup. Ct. Hist. 73, 83; see, *e.g.*, 5 Documentary History of the Supreme Court, *supra*, at 251–252,

Eleventh Amendment said nothing about sovereign immunity in state court because it never occurred to them that such immunity could be questioned; had they thought of this possibility, they would have considered it absurd that States immune in federal court could be subjected to suit in their own courts.

The first trouble with this view is that it assumes that the Eleventh Amendment was intended to reach all federal law suits, and not only those arising under diversity jurisdiction. If the Framers of the Eleventh Amendment had in mind only diversity cases, as the Court was prepared to concede in *Seminole Tribe*, see 517 U. S., at 69–70 (“The text dealt in terms only with the problem presented by the decision in *Chisholm* [I]t seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States”), then it might plausibly follow that the Framers of that Amendment assumed that States possessed sovereign immunity in their own courts with respect to state law. But it certainly does not follow that the Amendment’s authors would have thought that States enjoyed immunity in state court on questions of federal law. To accept this would require one to believe that the Framers of the Eleventh Amendment were blind to an extremely anomalous application of sovereign immunity, under which a State is immune even when it is not the font of the law under which it is sued, cf. *infra*, at 39, 41. The Court today may labor under the misapprehension that sovereign immunity can apply where the sovereign is not the font of law, but the Court adduces no evidence to suggest that the Framers of the Eleventh Amendment held such a view. And the Framers were much closer than the Court to the theory of sovereign immunity according to which the font of law may not be subject to suit under that law. This leaves the Court in the position of supporting its view of what the Eleventh Amendment means by the “historical” assertion that the Framers must have intended it to mean the same.

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252–253, 262–264, 268–269 (newspaper articles supporting holding in *Chisholm*); 5 Documentary History, *supra* n. 17, at 616 (statement of a Committee of Delaware Senate in support of holding in *Chisholm*). The federal citizen-state diversity jurisdiction was settled by the Eleventh Amendment; Article III was not “restored.”

F

It is clear enough that the Court has no historical predicate to argue for a fundamental or inherent theory of sovereign immunity as limiting authority elsewhere conferred by the Constitution or as imported into the Constitution by the Tenth Amendment. But what if the facts were otherwise and a natural law conception of state sovereign immunity in a State’s own courts were implicit in the Constitution? On good authority, it would avail the State nothing, and the Court would be no less mistaken than it is already in sustaining the State’s claim today.

The opinion of this Court that comes closer to embodying the present majority’s inherent, natural law theory of sovereign immunity than any other I can find was written by Justice Holmes in *Kawananakoa v. Polyblank*, 205 U. S. 349 (1907).³⁰ I do not, of course, suggest that Justice

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³⁰The temptation to look to the natural law conception had shown up occasionally before Justice Holmes’s appointment, and goes back at least to *Beers v. Arkansas*, 20 How. 527 (1858), in which Chief Justice Taney wrote for the Court that “[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission,” *id.*, at 529. But nothing turned on this pronouncement, because the outcome in the case would have been the same had sovereign immunity been understood as a common-law property of the States. In *Nichols v. United States*, 7 Wall. 122 (1869), Justice Davis wrote that “[e]very government has an inherent right to protect itself against suits The principle is fundamental, [and] applies to every sovereign power” *Id.*, at 126. This description came in dicta, and the origin of the immunity had no bearing on the decision. Justice Bradley quoted both Hamilton and Chief Justice

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Holmes was a natural law jurist, see “Natural Law,” in O. Holmes, *Collected Legal Papers* 312 (1920) (“The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted . . . as something that must be accepted”). But in *Kawananakoa* he not only gave 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

 Taney in *Hans v. Louisiana*, 134 U. S. 1, 13, 17 (1890), but nothing there depended on the natural law approach, and in the main the opinion, whatever its other demerits, see *Seminole Tribe*, *supra*, at 119 (SOUTER, J. dissenting), understood state sovereign immunity as a common-law concept, see *Hans*, *supra*, at 16 (“The suability of a State without its consent was a thing unknown to the law”). And the Court in *Seminole Tribe* may possibly have intended to hint at the natural law background of sovereign immunity when it said approvingly that the decision 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*, *supra*, at 69 (quoting *Hans*, *supra*, at 17, in turn quoting *Beers v. Arkansas*, *supra*, at 529). The Court’s occasional seduction by the natural law view should not, however, obscure its basic adherence to the common-law approach. In *United States v. Lee*, 106 U. S. 196 (1882), the Court explained that “the doctrine is derived from the laws and practices of our English ancestors,” *id.*, at 205, and added approvingly that the petition of right “has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the King in legal controversies among themselves,” *ibid.* The Court went on to notice that at common law one reason given for sovereign immunity was the “absurdity” of the King’s writ running against the King, *id.*, at 206, but, recognizing the distinct situation in the United States, the Court admitted candidly that “it is difficult to see on what solid foundation of principle the exemption from liability to suit rests,” *ibid.* Even the dissent there discussed in great detail the common-law heritage of the doctrine. See *id.*, at 227–234 (opinion of Gray, J.).

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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.” *Kawananakoa, supra*, at 353.

His cited authorities stand in the line that today’s Court purports to follow: Hobbes, Bodin, Sir John Eliot, and Baldus de Ubaldis. Hobbes, in the cited work, said this:

“The sovereign of a Commonwealth, be it an assembly or one man, is not subject to the civil laws. For having power to make and repeal laws, he may, when he pleaseth, free himself from that subjection by repealing those laws that trouble him, and making of new; and consequently he was free before. For he is free that can be free when he will: nor is it possible for any person to be bound to himself, because he that can bind can release; and therefore he that is bound to himself only is not bound.” *Leviathan* ch. 26, §2, p. 130.

Jean Bodin produced a similar explanation nearly three-quarters of a century before Hobbes, see J. Bodin, *Les six livres de la republique*, Bk. 1, ch. 8 (1577); *Six Books of the Commonwealth* 28 (M. Tooley transl. 1967) (“[T]he sovereign . . . cannot in any way be subject to the commands of another, for it is he who makes law”). Eliot cited Baldus for the crux of the theory: majesty is “a fulness of power subject to noe necessitie, limited within no rules of publicke Law,” 1 J. Eliot, *De Jure Maiestatis: or Political Treatise of Government* 15 (A. Grosart ed. 1882), and Baldus himself made the point in observing that no one is bound by his own statute as of necessity, see *Commentary of Baldus on the statute Digna vox in Justinian’s Code* 1.14.4, *Lectura super Codice folio 51b* (Chapter *De Legibus et constitutionibus*) (Venice ed. 1496) (“*nemo suo statuto*

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ligatur necessitative”).

The “jurists who believe in natural law” might have reproved Justice Holmes for his general skepticism about the intrinsic value of their views, but they would not have faulted him for seeing the consequence of their position: if 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. See *Kawananakoa*, 205 U. S., at 353, 354 (District of Columbia not immune to private suit, because private rights there are “created and controlled by Congress and not by a legislature of the District”). Since the law in this case proceeds from the national source, whose laws authorized by Article I are binding in state courts, sovereign immunity cannot be a defense. After *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U. S. 528 (1985), Justice Holmes’s logically impeccable theory yields the clear conclusion that even in a system of “fundamental” state sovereign immunity, a State would be subject to suit *eo nomine* in its own courts on a federal claim.

There is no escape from the trap of Holmes’s logic save recourse to the argument that the doctrine of sovereign immunity is not the rationally necessary or inherent immunity of the civilians, but the historically contingent, and to a degree illogical, immunity of the common law. But if the Court admits that the source of sovereign immunity is the common law, it must also admit that the common-law doctrine could be changed by Congress acting under the Commerce Clause. It is not for me to say which way the Court should turn; but in either case it is clear that Alden’s suit should go forward.

II

The Court’s rationale for today’s holding based on a

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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,” see *Seminole Tribe*, 517 U. S., at 72, but to a structural basis in the Constitution’s creation of a federal system. Immunity, the Court says, “inheres in the system of federalism established by the Constitution,” *ante*, at 21, its “contours [being] determined by the founders’ understanding, not by the principles or limitations derived from natural law,” *ante*, at 25. Again, “[w]e look both to the essential principles of federalism and to the special role of the state courts in the constitutional design.” *Ante*, at 39. That is, the Court believes that the federal constitutional structure itself necessitates recognition of some degree of state autonomy broad enough to include sovereign immunity from suit in a State’s own courts, regardless of the federal source of the claim asserted against the State. If one were to read the Court’s federal structure rationale in isolation from the preceding portions of the opinion, it would appear that the Court’s position on state sovereign immunity might have been rested entirely on federalism alone. If it had been, however, I would still be in dissent, for the Court’s argument that state court sovereign immunity on federal questions is inherent in the very concept of federal structure is demonstrably mistaken.

A

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*,” cf. Bailyn, *The Ideological Origins*

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of the American Revolution, at 223.³¹ Once “the atom of sovereignty” had been split, *U. S. Term Limits, Inc. v. Thornton*, 514 U. S. 779, 838 (1995) (KENNEDY, J., concurring), the general scheme of delegated sovereignty as between the two component governments of the federal system was clear, and was succinctly stated by Chief Justice Marshall: “In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.” *McCulloch v. Maryland*, 4 Wheat. 316, 410 (1819).³²

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.³³ It is not the authority that

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³¹The authority of the view that Parliament’s sovereignty must be indivisible had already been eroded in the decade before independence. Iredell himself, as early as 1774, rejected the applicability of the theory “to the case of several *distinct and independent legislatures* each engaged within a *separate* scale and employed about *different* objects,” in the course of arguing for the possibility of a kind of proto-federalist relationship between the Colonies and the King. Iredell, Address to the Inhabitants of Great Britain, in 1 G. McRee, *Life and Correspondence of James Iredell* 205, 219 (1857, reprinted 1949); see Bailyn, *The Ideological Origins of the American Revolution*, at 224–225, and n. 64.

³²This is entirely consistent with, and indeed is a corollary of, the statement quoted by the Court that the States are “no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.” *Ante*, at 4 (quoting *The Federalist* No. 39, p. 245 (J. Madison)). The point is that matters subject to federal law are within the federal sphere, and so the States are subject to the general authority where such matters are concerned.

³³It is therefore sheer circularity for the Court to talk of the “anomaly,” *ante*, at 43, that would arise if a State could be sued on federal law in its own courts, when it may not be sued under federal law in federal court, *Seminole Tribe, supra*. The short and sufficient answer is that the anomaly is the Court’s own creation: the Eleventh Amendment was

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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*, 469 U. S. 528 (1985), and is not contested here.

Nor can it be argued that because the State of Maine creates its own court system, it has authority to decide what sorts of claims may be entertained there, and thus in effect to control the right of action in this case. Maine has created state courts of general jurisdiction; once it has done so, the Supremacy Clause of the Constitution, Art. VI, cl. 2, which requires state courts to enforce federal law and state-court judges to be bound by it, requires the Maine courts to entertain this federal cause of action. Maine has advanced no “valid excuse,” *Howlett v. Rose*, 496 U. S. 356, 369 (1990) (quoting *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377, 387–88 (1929)), for its courts’ refusal to hear federal-law claims in which Maine is a defendant, and sovereign immunity cannot be that excuse, simply because the State is not sovereign with respect to the subject of the claim against it. The Court’s insistence that the federal structure bars Congress from making States susceptible to suit in their own courts is, then, plain mistake.³⁴

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never intended to bar federal-question suits against the States in federal court. The anomaly is that *Seminole Tribe*, an opinion purportedly grounded in the Eleventh Amendment, should now be used as a lever to argue for state sovereign immunity in state courts, to which the Eleventh Amendment by its terms does not apply.

³⁴ Perhaps as a corollary to its view of sovereign immunity as to some degree indefeasible because “fundamental,” the Court frets that the “power to press a State’s own courts into federal service to coerce the other branches of the State . . . is the power first to turn the State against itself and ultimately to commandeer the entire political ma-

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B

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,” *ante*, at 39 (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U. S. 261, 268 (1997)), and by invoking the many demands on a State’s fisc, *ante*, at 41–42. Apparently beguiled by Gilded Era language describing private suits against States as “neither becoming nor convenient,” *ante*, at 39 (quoting *In re Ayers*, 123 U. S. 443, 505 (1887)), the Court calls “immunity from private suits central to sovereign dignity,” *ante*, at 4, and assumes that this “dignity” is a quality easily translated from the person of the King to the participatory abstraction of a republican State, see, *e.g.*, *ante*, at 40 (“[C]ongressional power to authorize private suits against nonconsenting States in their own courts would be . . . offensive to state sovereignty”). The thoroughly anomalous character of this appeal to dignity is obvious from a reading of Blackstone’s description of royal dignity, which he sets out as a premise of his discussion of sovereignty:

“First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects. . . . The law therefore ascribes to the king . . . certain attributes of a great and

 chinery of the State against its will and at the behest of individuals.” *Ante*, at 40. But this is to forget that the doctrine of separation of powers prevails in our Republic. When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State’s executive any more than we turn against the Federal Executive when we apply federal law to the United States: it is simply upholding the rule of law. There is no “commandeering” of the State’s resources where the State is asked to do no more than enforce federal law.

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transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.” 1 Blackstone *241.

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.³⁵ See *United States v. Lee*, 106 U. S. 196, 208 (1882).

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.” *Ante*, at 41-42. 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.

³⁵ Furthermore, the very idea of dignity ought also to imply that the State should be subject to, and not outside of, the law. It is surely ironic that one of the loci classici of Roman law regarding the imperial prerogative begins with (and is known by) the assertion that it is appropriate to the Emperor’s dignity that he acknowledge (or, on some readings, at least claim) that he is bound by the laws. See *Digna Vox*, Justinian’s Code 1.4.14 (“*Digna vox maiestate regnantis legis alligatum se principem profiteri*”) (“It is a statement worthy of the majesty of the ruler for the Prince to profess himself bound by the laws”); see Pennington, *The Prince and the Law, 1200–1600*, at 78, and n. 6.

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Least of all does the Court persuade by observing that “other important needs” than that of the “judgment creditor” compete for public money, *ante*, at 42. 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.³⁶

III

If neither theory nor structure can supply the basis for the Court’s conceptions of sovereign immunity and federalism, then perhaps history might. The Court apparently believes that because state courts have not historically entertained Commerce Clause-based federal-law claims against the States, such an innovation carries a presumption of unconstitutionality. See *ante*, at 34 (arguing that absence of statutes authorizing suits against States in state court suggests an assumed absence of such power). At the outset, it has to be noted that this approach assumes a more cohesive record than history affords. In *Hilton v. South Carolina Public Railways Comm’n*, 502 U. S. 197 (1991) (KENNEDY, J.), a case the Court labors mightily to distinguish, see *ante*, at 26–27,³⁷ we held that

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³⁶The Court also claims that subjecting States to suit puts power in the hands of state courts that the State may wish to assign to its legislature, thus assigning the state judiciary a role “foreign to its experience but beyond its competence . . .” *Ante*, at 43. This comes perilously close to legitimizing political defiance of valid federal law.

³⁷In its discussion of *Hilton*, the Court attempts to explain away the State’s failure to raise a sovereign immunity defense by acknowledging candidly that when that case was decided, “it may have appeared to the State that Congress’ power to abrogate its immunity from suit in any court was not limited by the Constitution at all.” *Ante*, at 27. The reasoning of *Hilton* suggests that it appeared not only to the State, but

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a state-owned railroad could be sued in state court under the Federal Employers' Liability Act, 45 U. S. C. §§51–60, notwithstanding the lack of an express congressional statement, because “the Eleventh Amendment does not apply in state courts.” *Hilton, supra*, at 205 (quoting *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 63–64 (1989)).³⁸ But even if the record were less unkempt, the

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 also to the Court, that Congress could abrogate state sovereign immunity in state court. If Congress could not, then there would have been no jurisdiction in the case. The Court never even hinted that constitutional structure, much less the Tenth Amendment, might bar the suit, even though the dissent stressed that “the principle of federalism underlying the [Eleventh] Amendment pervades the constitutional structure,” 502 U. S., at 209 (opinion of O'CONNOR, J.).

³⁸Nor does *Poindexter v. Greenhow*, 114 U. S. 270 (1885), one of the Virginia Coupon Cases, fit comfortably with the assumption that state courts have exercised no disputed jurisdiction over their own governments on federal questions. Under its Funding Act of 1871, Virginia had issued bonds that specified on their face that the attached coupons should be receivable at and after maturity for all taxes, debts, dues, and demands due the State. *Id.*, at 278. In 1882, however, Virginia passed a law requiring its tax collectors to accept nothing but gold, silver, or currency in payment of taxes. *Id.*, at 275. After the bonds reached maturity, Poindexter used them to pay state property taxes; Greenhow, the local tax collector, ignored the payment and took possession of an office desk in Poindexter's possession to sell it for unpaid taxes. Poindexter brought a common-law action in detinue against the tax collector in state court for recovery of the desk, arguing that the later Virginia statute barring use of the coupons violated the Contracts Clause. Greenhow defended, *inter alia*, on the theory that the suit was “substantially an action against the State of Virginia, to which it has not assented.” *Id.*, at 285. The Court rejected this claim by applying to the State of Virginia reasoning akin to, though broader than, that later adopted in *Ex parte Young*, 209 U. S. 123 (1908). We held that, where state legislative action is unconstitutional, it “is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name,” 114 U. S., at 290. Because the original bonds were binding contracts, the obligation of which Virginia could not constitutionally impair, “[t]he true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it.” *Id.*, at 293. It therefore could not be

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problem with arguing from historical practice in this case is that past practice, even if unbroken, provides no basis for demanding preservation when the conditions on which the practice depended have changed in a constitutionally relevant way.

It was at one time, though perhaps not from the framing, believed that “Congress’ authority to regulate the States under the Commerce Clause” was limited by “certain underlying elements of political sovereignty . . . deemed essential to the States’ separate and independent existence.” See *Garcia*, 469 U. S., at 547–548 (quoting *Lane County v. Oregon*, 7 Wall. 71, 76 (1869)). On this belief, the preordained balance between state and federal sovereignty was understood to trump the terms of Article I and preclude Congress from subjecting States to federal law on certain subjects. (From time to time, wage and hour regulation has been counted among those subjects, see *infra*, at 52.) As a consequence it was rare, if not unknown, for state courts to confront the situation in which federal law enacted under the Commerce Clause provided the authority for a private right of action against a State in state court. The question of state immunity from a Commerce Clause-based federal-law suit in state court thus tended not to arise for the simple reason that acts of Congress authorizing such suits did not exist.

Today, however, in light of *Garcia*, *supra* (overruling

argued that the tax collector was acting on behalf of the State, because “[t]he State of Virginia has done none of these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without her authority, but contrary to her express commands.” *Ibid*. Although the tax collector had done nothing more than collect taxes under duly enacted state law, he was held to be liable to suit. Thus in the only case to have come before this Court specifically involving a claim of state sovereign immunity of constitutional magnitude in a State’s own court, jurisdiction was upheld.

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National League of Cities v. Usery, 426 U. S. 833 (1976)), the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty. “[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the States as States’ is one of process rather than one of result.” *Garcia, supra*, at 554. Because the commerce power is no longer thought to be circumscribed, the dearth of prior private federal claims entertained against the States in state courts does not tell us anything, and reflects nothing but an earlier and less expansive application of the commerce power.

Least of all is it to the point for the Court to suggest that because the Framers would be surprised to find States subjected to a federal-law suit in their own courts under the commerce power, the suit must be prohibited by the Constitution. See *ante*, at 31–34 (arguing on the basis of the “historical record” that the Constitution would not have been adopted if it had been understood to allow suit against States in state court under federal law). The Framers’ intentions and expectations count so far as they point to the meaning of the Constitution’s text or the fair implications of its structure, but they do not hover over the instrument to veto any application of its principles to a world that the Framers could not have anticipated.

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 any one of them, for a

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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. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. 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.” *Missouri v. Holland*, 252 U. S. 416, 433 (1920) (Holmes, J.).

“We must never forget,’ said Mr. Chief Justice Marshall in *McCulloch*, [4 Wheat., at] 407, ‘that it is a Constitution we are expounding.’ Since then this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed.” *Olmstead v. United States*, 277 U. S. 438, 472 (1928) (Brandeis, J. dissenting).

IV A

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 conceded within the Article I jurisdiction of the Congress. The FLSA, which requires employers to pay a minimum wage, was first enacted in 1938, with an exemption for States acting as employers. See *Maryland v. Wirtz*, 392 U. S. 183, 185–186 (1968). In 1966, it was amended to remove the state

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employer exemption so far as it concerned workers in hospitals, institutions, and schools. See *id.*, at 186–187, and n. 6. In *Wirtz*, the Court upheld the amendment over the dissent’s argument that extending the FLSA to these state employees was “such a serious invasion of state sovereignty protected by the Tenth Amendment that it is . . . not consistent with our constitutional federalism.” *Id.*, at 201 (opinion of Douglas, J.).

In 1974, Congress again amended the FLSA, this time “extend[ing] the minimum wage and maximum hour provisions to almost all public employees employed by the States and by their various political subdivisions.” *National League of Cities*, 426 U. S., at 836. This time the Court went the other way: in *National League of Cities*, the Court held the extension of the Act to these employees an unconstitutional infringement of state sovereignty, *id.*, at 852; for good measure, the Court overturned *Wirtz*, dismissing its reasoning as no longer authoritative, see 426 U. S., at 854–855.

But *National League of Cities* was not the last word. In *Garcia*, decided some nine years later, the Court addressed the question whether a municipally owned mass-transit system was exempt from the FLSA. 469 U. S., at 534, 536. In holding that it was not, the Court overruled *National League of Cities*, see 469 U. S., at 557, this time taking the position that Congress was not barred by the Constitution from binding the States as employers under the Commerce Clause, *id.*, at 554. As already mentioned, the Court held that whatever protection the Constitution afforded to the States’ sovereignty lay in the constitutional structure, not in some substantive guarantee. *Ibid.*³⁹

³⁹*Garcia* demonstrates that, contra the Court’s suggestion, the FLSA does not impermissibly act upon the States, see *ante*, at 4. Rather, the FLSA, enacted lawfully pursuant to the commerce power, treats the States like other employers. The Court seems to have misunderstood

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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.

B

The Court might respond to the charge that in practice it has vitiated *Garcia* by insisting, as counsel for Maine argued, Brief for Respondent 11–12, that the United States may bring suit in federal court against a State for damages under the FLSA, on the authority of *United States v. Texas*, 143 U. S. 621, 644–645 (1892). See also *Seminole Tribe*, 517 U. S., at 71, n. 14. It is true, of course, that the FLSA does authorize the Secretary of Labor to file suit seeking damages, see 29 U. S. C. §216(c), but unless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer

Hamilton's statement in The Federalist No. 15 that the citizens are "the only proper objects of government," *ante*, at 4 (quoting *Printz v. United States*, 521 U. S. 898, 919–920 (1997)). Hamilton's point is not, as the Court seems to think, that the National Government should dictate nothing to the States in order to protect their residual sovereignty. To the contrary, Hamilton, who was arguing against the extreme respect for state sovereignty in the Articles of Confederation, meant precisely that the National Government should not act as the leader of a "league," The Federalist No. 15, p. 95 (J. Cooke ed. 1961), mediating among several sovereignties, but as a "national government," *ibid.*, with power to produce obedience through the "COERCION of the magistracy," *ibid.* Hamilton is therefore the wrong person to quote for the proposition that the National Government may not act upon the States, since his point was that the National Government should not be limited to acting through the medium of the States.

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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." S. Rep. No. 93-690, p. 27 (1974). One hopes that such voluntary compliance will prove more popular than it has in Maine, for there is no reason today to suspect that enforcement by the Secretary of Labor alone would likely prove adequate to assure compliance with this federal law in the multifarious circumstances of some 4.7 million employees of the 50 States of the Union.⁴⁰

The point is not that the difficulties of enforcement should drive the Court's decision, but simply that where Congress has created a private right to damages, it is implausible to claim that enforcement by a public authority without any incentive beyond its general enforcement power will ever afford the private right a traditionally adequate remedy. No one would think the remedy adequate if private tort claims against a State could only be brought by the National Government: the tradition of private enforcement, as old as the common law itself, is the benchmark. But wage claims have a lineage of private enforcement just as ancient, and a claim under the FLSA is a claim for wages due on work performed. Denying private enforcement of an FLSA claim is thus on par with closing the courthouse door to state tort victims unaccompanied by a lawyer from Washington.

⁴⁰The most recent available data give 4,732,608 as the total number of employees of the 50 States of the Union, see State Government Employment Data: March 1997, <http://www.census.gov/pub/govs/apes/97stus.txt>.

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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. Lord Chief Justice Holt could state this as an unquestioned proposition already in 1702, as he did in *Ashby v. White*, 6 Mod. 45, 53–54, 87 Eng. Rep. 808, 815 (K.B.):

“If an Act of Parliament be made for the benefit of any person, and he is hindered by another of that benefit, by necessary consequence of law he shall have an action; and the current of all the books is so.” *Ibid.* (citation omitted).⁴¹

Blackstone considered it “a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.” 3 Blackstone *23. The generation of the Framers thought the principle so crucial that several States put

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⁴¹The principle is even older with respect to rights created by statute, like the FLSA rights here, than it is for common-law damages. Lord Holt in fact argued that the well-established principle in the context of statutory rights applied to common law rights as well. See *Ashby v. White*, 6 Mod., at 54, 87 Eng. Rep., at 816 (“Now if this be so in case of an Act of Parliament, why shall not common law be so too? For sure the common law is as forcible as any Act of Parliament”). A still older formulation of the statutory right appears in a note in Coke's Reports: “[W]hen any thing is prohibited by an Act, although that the Act doth not give an action, yet action lieth upon it.” 12 Co. Rep. 100. Coke's Institutes yield a similar statement: “When any act doth prohibit any wrong or vexation, though no action be particularly named in the act, yet the party grieved shall have an action grounded upon this statute.” 1 E. Coke, *The Second Part of the Institutes of the Laws of England* 117 (1797) (reprinted in 5B 2d *Historical Writings in Law and Jurisprudence* (1986)). In our case, of course, the statute expressly gives an action.

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it into their constitutions.⁴² And when Chief Justice Marshall asked about Marbury, “If he has a right, and that right has been violated, do the laws of his country afford him a remedy?,” *Marbury v. Madison*, 1 Cranch 137, 162 (1803), the question was rhetorical, and the answer clear:

“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.” *Id.*, at 163.

Yet today the Court has no qualms about saying frankly that the federal right to damages afforded by Congress under the FLSA cannot create a concomitant private remedy. The right was “made for the benefit of” petitioners; they have been “hindered by another of that benefit”; but despite what has long been understood as the “necessary consequence of law,” they have no action, cf. *Ashby, supra*, at 55, 87 Eng. Rep., at 815. It will not do for the Court to respond that a remedy was never available where the right in question was against the sovereign. A State is not the sovereign when a federal claim is pressed against it, and even the English sovereign opened itself to recovery and, unlike Maine, provided the remedy to complement the right. To the Americans of the founding generation it would have been clear (as it was to Chief Justice Marshall) that if the King would do right, the democratically chosen

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⁴²See, e.g., A Declaration of Rights and Fundamental Rules of the Delaware State §12 (1776), 2 Sources and Documents of United States Constitutions, at 197, 198; Md. Const. Art. XVII (1776), 4 *id.*, at 372, 373; Mass. Const. Art. XI, (1780), 5 *id.*, at 92, 94; Ky. Const. Art. XII, cl. 13 (1792), 4 *id.*, at 142, 150; Tenn. Const. Art. XI, §17 (1796), 9 *id.*, at 141, 148.

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Government of the United States could do no less.⁴³ The Chief Justice's contemporaries might well have reacted to the Court's decision today in the words spoken by Edmund

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⁴³Unfortunately, and despite the Court's professed "unwilling[ness] to assume the States will refuse to honor the Constitution and obey the binding laws of the United States," *ante*, at 46, that presumption of the sovereign's good-faith intention to follow the laws has managed somehow to disappear in the intervening two centuries, despite the general trend toward greater, not lesser, government accountability. Anyone inclined toward economic theories of history may look at the development of sovereign immunity doctrine in this country and see that it has been driven by the great and recurrent question of state debt, both in the aftermath of *Chisholm* and in the last quarter of the 19th century, see *Seminole Tribe*, 517 U. S., at 120–122 (SOUTER, J., dissenting). And no matter what one may think of the quality of the legal doctrine that the problem of state debt has helped to produce, one can at least argue that States' periodic attempts to repudiate their debts were not purely or egregiously lawless, because those who held state-issued bonds may well have valued and purchased them with the knowledge that default was a real possibility.

Maine's refusal to follow federal law in the case before us, however, is of a different order. Far from defaulting on debt to eyes-open creditors, Maine is simply withholding damages from private citizens to whom they appear to be due. Before *Seminole Tribe* was decided, petitioners here were the beneficiaries of a District Court ruling to the effect that they were entitled to some coverage, and hence to some amount of damages, under the FLSA. *Mills v. Maine*, 839 F. Supp. 3 (Me. 1993). Before us, Maine has not claimed that petitioners are not covered by the FLSA, but only that it is protected from suit. Indeed, Maine acknowledges that it may be sued by the United States in federal court for damages on the very same claim, Brief for Respondent 12–13, and we are told that Maine now pays employees like petitioners overtime as covered by the FLSA, *id.*, at 3. Why the State of Maine has not rendered this case unnecessary by paying damages to petitioners under the FLSA of its own free will remains unclear to me. The Court says that "it is conceded by all that the State has altered its conduct so that its compliance with federal law cannot now be questioned." *Ante*, at 50. But the ambiguous qualifier "now" allows the Court to avoid the fact that whatever its forward-looking compliance, the State still has not paid damages to petitioners; had it done so, the case before us would be moot.

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Randolph when responding to the objection to jurisdiction in *Chisholm*: “[The Framers] must have viewed human rights in their essence, not in their mere form.” 2 Dall., at 423.

V

The Court has swung back and forth with regrettable disruption on the enforceability of the FLSA against the States, but if the present majority had a defensible position one could at least accept its decision with an expectation of stability ahead. As it is, any such expectation would be naïve. 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.