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The Eleventh Amendment: An Endangered Species

PETER W. THORNTON*

“[Q]uestions as to the jurisdiction of the federal courts are not mere details of procedure, but go to the very heart of a federal system and affect the allocation of power between the United States and the several states.”¹

The above statement is particularly true of the eleventh amendment, and the tension between strong nationalist and state philosophies of government remains as real today as when the amendment was adopted in 1798. Its adoption was a measure then deemed necessary to protect the states from what was thought to be a serious threat to their continued existence and stability. The amendment simply provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

The premise of this article is that the Constitution as originally drafted did not recognize state sovereign immunity from suit in federal courts, and that the eleventh amendment is narrow in scope and limits judicial power only where the sole basis of jurisdiction is the character of the parties.

The case of *Chisholm v. Georgia*² was seen as a threat to the sovereign immunity of the states and was the catalytic event which produced the eleventh amendment. It was an action against the state, initiated in the Supreme Court by the executor of a deceased South Carolina merchant who had sold war supplies to Georgia. The state contended that, as a sovereign, it was immune from suit without its consent. The Supreme Court held that article III of the Constitution extended the judicial power to a case against a state by a citizen of another state or by an alien, and that this grant of power to the national government was binding on the states.

The reaction in Congress was swift. Two days after the decision was announced, a resolution was introduced in the Senate proposing a constitutional amendment which was almost identical to the one actually passed by both branches of Congress and ratified by the correct number of states within two years thereafter.³

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¹ C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 205 (3d ed. 1976).

² 2 U.S. (2 Dall.) 419 (1793).

³ C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 64-67 (1972).

One reason traditionally assigned for the speed and for the near unanimity in the adoption of the eleventh amendment was the financial position of the states. Largely as a consequence of the war they had accumulated substantial debts to both foreign and domestic creditors, and some had circulated new paper money as a painless way of meeting their obligations.⁴ Historians and courts have viewed the amendment as a means of avoiding the states' obligations to pay those debts, particularly those owing to Tory and British creditors.⁵

Another traditional view is that the motivation in adopting the amendment was to correct what was considered as the error made by the Court in *Chisholm* with respect to the scope of the judicial power, and to thus reaffirm the "general understanding" existing at the time that the Constitution was ratified, to the effect that the states had sovereign immunity and could not be sued without their consent.⁶

The pertinent Constitutional provision is article III, which defines the judicial power and lists as one of the headlands of coverage, "controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens."

⁴ *Id.* at 8.

⁵ Chief Justice Marshall said:

It is part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases, and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821). *But see C. JACOBS, supra* note 3, at 69-70, who states that the national government had assumed a major portion of the states' debts and that state governments were mostly able and willing to meet their obligations. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1438-40 (1975), agrees with Jacobs that the states were financially able, but denies that they were willing. He indicates that in 1794 there was great anti-British feeling and the possibility of a war, and that even the Federalists had no political alternative but to vote for an amendment that would prevent suits by Tories and British creditors against states.

⁶ For a judicial adoption of this view, see *Hans v. Louisiana*, 134 U.S. 1 (1890).

The validity of the traditional view that the eleventh amendment reestablished state immunity depends on whether the somewhat ambiguous constitutional language quoted above originally recognized it. Did it extend the judicial power to all controversies between such parties regardless of whether the state is plaintiff or defendant, or only to controversies between such parties where the state is plaintiff? In other words, did article III implicitly recognize the exemption of states, as sovereigns, from unconsented suits by individuals?

The records of the Philadelphia Convention of 1787 apparently cast no direct light on the matter, and the article, when proposed, seemed to have occasioned no debate, and no commentary in the correspondence of the convention delegates.⁷

After the submission of the Constitution to the states for ratification, however, the proposed judiciary article did arouse comment in some of the state conventions. Professor Jacobs concludes that there was no uniform agreement on the issue.⁸ He states that the anti-Federalists believed that the provision made a state suable as defendant; that the ratifying conventions of four of the states suggested delimiting or qualifying amendments to the proposed provision in order to clarify that states were immune from suit; and that the nationalists, known as Federalists, were themselves split on the issue. Edmund Randolph and James Wilson, two of the five members of the Committee on Detail which drafted article III, strongly argued against sovereign immunity in the Virginia and Pennsylvania conventions respectively. Randolph later was the attorney for the plaintiff in *Chisholm*, while Wilson, a judge in that case, sustained state suability. On the other hand, James Madison, John Marshall, and Alexander Hamilton, in his much quoted *The Federalist No. 81*,⁹ argued that a state could not be sued without its

⁷ C. JACOBS, *supra* note 3, at 19, 21-22.

⁸ *Id.* at 39.

⁹ It is inherent in the nature of the sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal . . . there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsory force. They confer no right to action independent of the sovereign will.

THE FEDERALIST No. 81 (A. Hamilton) 501, 508 (H. Lodge ed.).

consent.

The views of these three famous men have been relied on as showing a consensus on the part of the Framers that sovereign immunity was a doctrine inherent in article III as originally adopted.¹⁰ Nevertheless two of these three made inconsistent statements as well.

In deciding the case of *Cohens v. Virginia*,¹¹ which involved the eleventh amendment, Chief Justice John Marshall spoke of article III as follows: "In its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to the parties."¹² Alexander Hamilton, in *The Federalist No. 80*, stated:

And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow that, in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.¹³

Jacobs' conclusion, based on historical analysis sketched briefly above, is that on balance the weight of opinion was with those who believed that article III did make a state suable by an individual without its consent, rather than with those who believed that it implicitly recognized state immunity.¹⁴

Contrary to Professor Jacobs' conclusion, the traditional view is that there was broad agreement among those who had framed and ratified the Constitution that states were to be immune from suits by individuals. That view of the meaning of article III was the basis of judicial holdings¹⁵ that the eleventh amendment was enacted to

¹⁰ See *Hans v. Louisiana*, 134 U.S. 1, 13-14 (1890).

¹¹ 19 U.S. (6 Wheat.) 264 (1821).

¹² *Id.* at 412.

¹³ THE FEDERALIST No. 80 (A. Hamilton) 494, 497 (H. Lodge ed.).

¹⁴ C. JACOBS, *supra* note 3, at 40. Professor Nowak indicates that criticism of jurisdiction in suits against states centered on the possibility of enforcement of state debts, and that none of the attacks were directed at congressional power to grant jurisdiction to federal courts. He suggests that *Federalist No. 80* is consistent with *Federalist No. 81* in that Hamilton may have intended that only Congress have the power to grant federal court jurisdiction over cases against states, but that the judiciary lack inherent power to assume such jurisdiction. He states that *Federalist No. 80* emphasized the need for federal court jurisdiction over national laws, and defended jurisdiction in suits against states because of the need for the national government to enforce the privileges and immunities clause of article IV, section 2. This view, Professor Nowak states, is consistent with Federalist philosophy. Nowak, *supra* note 5, at 1429-30.

¹⁵ *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting Hamilton's *Federalist No. 81*). For a more recent discussion, see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949).

overrule the holding of *Chisholm* and to return to the pre-existing understanding of state immunity.

As compared to the traditional interpretation that article III precluded individual actions against states in federal courts without state consent and that the eleventh amendment restored the status quo, the opposite view that article III conferred power to hear actions against states by individuals and that the eleventh amendment is a limit on that power leaves greater room for interpretation of the scope of the eleventh amendment.

This article will explore what has been done by later decisions. They indicate a strong trend, though never uniform or unanimous, to reduce the area of state protection given by the amendment. Further, based on the belief that the amendment, whether or not ill-conceived at the time of its adoption, has outlived its purpose, the article will indicate several approaches, gleaned from the opinions, that could be used to further reduce the size of the protective shield of the eleventh amendment.

THE "ERROR": *Chisholm v. Georgia*

Each of the five members of the *Chisolm* Court wrote separately, in accordance with the then existing practice of delivering opinions. Justice Iredell's opinion appeared first, though it turned out that he was the sole dissenter.

His opinion purported to be based on the narrow issue of whether assumpsit might be instituted against a state by an individual, rather than on the broad issue of whether a state may in any instance be sued. Justice Iredell, however, did admit that "everything I have to say . . . will affect every kind of suit, the object of which is to compel the payment of money by a State."¹⁶

The jurisdiction of the Court, he maintained, derived not from the Constitution alone, but also required implementing congressional legislation. After stating that every state remained a sovereign to the extent that such sovereignty was not delegated to the United States, and that the United States is sovereign as to all powers surrendered to it by the states, he discussed the judicial power. That power exists where certain parties are concerned, although the subject of the controversy is unrelated to matters delegated to the national government, and Congress may pass laws to give the judicial power effect. It was admitted that article III could be interpreted as authorizing Congress to provide for the decision of *all* controver-

¹⁶ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 430 (1793).

sies in which a state is involved with an individual. However, it was noted, the Judiciary Act, in granting the Supreme Court jurisdiction of all controversies between a state and citizens of another state, granted only concurrent jurisdiction. It was concluded that this could only mean concurrent with the courts of the several states, and therefore the Supreme Court could exercise no authority but that which a state court was competent to exercise. A historical discussion of the concept of governmental immunity from suit supported his statement that at the time of the Constitution and passage of the Judiciary Act no state authorized a compulsory suit for recovery of money against itself in its own courts.

In what Justice Iredell himself labeled as dictum, he stated that his present opinion was strongly against construing the Constitution, under any circumstances, as authorizing compulsive suits in federal courts against a state for the recovery of money.

As to Justice Iredell's view that Supreme Court original jurisdiction depends on implementing legislation, it is now stated as hornbook law that the provisions of article III concerning original jurisdiction of the Supreme Court are self-executing, and thus a direct grant of jurisdiction, needing no implementation.¹⁷ Such legislation is required, however, to confer jurisdiction on inferior courts. In contrast to Iredell's holding that when a federal court's jurisdiction is concurrent with a state court's, limitations on state court jurisdiction necessarily limit the federal courts, the Supreme Court held in *Parden v. Terminal Railway*¹⁸ that a provision in the Federal Employers Liability Act for concurrent jurisdiction did not indicate congressional intent to limit the jurisdiction of the federal courts, but merely provided an alternative forum in state courts.

Though Justice Iredell's opinion was stated to be based on the absence of clear statutory implementation of article III, he noted that the then existing Judiciary Act provided, "the Supreme Court shall have . . . jurisdiction of all controversies of a civil nature . . . between a State and citizens of other States, or aliens."¹⁹ The reasoning Iredell used to find insufficient statutory implementation seems contrived, and the foundation of his opinion may rest in his own self-proclaimed dictum, that the Constitution does not, under any circumstances authorize compulsive suits against a state for the

¹⁷ C. WRIGHT, *supra* note 1, at 556 (citing *Chisholm* and *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 96 (1860)).

¹⁸ 377 U.S. 184, 190 (1964). *But see* *Hans v. Louisiana*, 134 U.S. 1, 18-19 (1890) (admitting that the majority in *Chisholm* did not agree, but that the Court preferred Justice Iredell's view on this point).

¹⁹ 2 U.S. (2 Dall.) at 431.

recovery of money. This understanding of the Iredell opinion is implicit in *Hans v. Louisiana*,²⁰ where the Court equated Justice Iredell's view with those Hamilton expressed in *The Federalist No. 81*,²¹ and stated that the eleventh amendment, on the question of the suability of states by individuals, shows that the highest authority of this country (the people) was in accord with the minority rather than with the majority in the decision of *Chisholm*.

It has been said that the separate opinions written by the majority of four in *Chisholm* were based on a close observance of the letter of the Constitution, without regard to former experience and usage.²² Though in one sense correct, the statement does not do justice to the majority opinions.

In all four opinions, the justices assumed that the Constitution directly conferred original jurisdiction on the Supreme Court. It is also true that all four of the justices in the majority pointed out that the language of article III, "between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens," was clear, and susceptible only to the interpretation that this included any such controversy whether the state was plaintiff or defendant. However, particularly in the opinions of Justice Wilson and Chief Justice Jay, the history, purpose and philosophy underlying the Constitution were carefully addressed.

Justice Wilson's opinion emphasized the fundamental philosophy underlying the newly formed union: the people of the United States are the sole sovereign in this country. He stated that the concept of a government being sovereign is European in origin, is based on the attributes of feudal tenure, and is thus alien to our Constitution where the people have reserved the ultimate power to themselves. The state, he said, is but an aggregate of free men, and in justice ought to fulfill obligations just as the law binds the individuals who make up the aggregate. The people created a national government and gave it certain powers, thereby intending to bind the states; one of these was the judicial power set forth in article III.

Chief Justice Jay agreed basically with these fundamental concepts to the effect that the sovereignty of the British Crown, upon the Declaration of Independence, passed to the people as sovereigns of all the country. He called the Constitution a compact by the people to govern themselves in a certain manner, and stated that it transferred many prerogatives to the national government, intend-

²⁰ 134 U.S. 1 (1890).

²¹ *Id.* at 12-14.

²² *Id.* at 19.

ing to bind the States.

He expressed the view that suability is not incompatible with state sovereignty, to the extent that the latter exists. He reasoned that the state is but an aggregate of persons, and asked, if an individual can sue the corporation of Philadelphia, why may he not sue the state of Delaware? He stated that clearly one state is suable by another state, and that fact alone proves that suability and state sovereignty are not incompatible. These views were, as Chief Justice Jay's opinion points out, generally believed, though not unanimously held.

After finding that the Constitution extended judicial power to the instant case, he expressed his personal view on the wisdom of such provision. This statement bears repetition. It states beliefs basic to our democracy.

The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice without respect of persons, and by securing individual citizens as well as states, in their respective rights, performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring state; because it obviates occasions of quarrels between states on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded, by appearing with each other in their own courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of constitutional law and government can ensure the continuance and enjoyment of them.²³

²³ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793).

THE "ERROR" CORRECTED: THE ELEVENTH AMENDMENT

The judicial opinion which is famous for holding that the eleventh amendment corrected the error of *Chisholm*, and which restored the original "general understanding" that the Judiciary Article implicitly recognized state sovereign immunity, is *Hans v. Louisiana*.²⁴

The case involved an action on a debt, in the form of interest coupons on bonds, brought against the state. The complaint alleged that a state constitutional provision repudiated the coupons, and that the state by adopting the provision had thereby impaired the validity of contract in violation of article I section 10 of the Constitution. Plaintiff was a citizen of Louisiana. The state excepted on the ground that it could not be sued without its consent. Both the trial court and the Supreme Court agreed.

The question posed was whether a citizen could sue his own state upon a suggestion that the case arose under the Constitution.²⁵ Plaintiff argued that a case "arising under" is within the jurisdiction of the federal courts without regard to parties, and that a state can claim no immunity.

This argument does not seem to do violence to early views on the subject. It should be noted that one of the fears of the states' rights group was that the states might be forced by the federal courts to pay their debts.²⁶ In his famous *Federalist No. 81*, which was quoted in *Hans*, Hamilton stated that some feared that the Constitution would enable suits against states on *public securities* issued by the states. In response to that fear, Hamilton noted that by the adoption of the Constitution state governments were not divested of the privilege of *paying their debts* in their own way, and that *contracts* with an individual are only binding on the conscience of the sovereign.²⁷ Additionally, it is important to note that even Justice Iredell's dissent in *Chisholm* considered only whether a state was suable by an individual for debt.²⁸

²⁴ 134 U.S. 1 (1890).

²⁵ Plaintiff relied on article III and on the Act of March 3, 1875, 18 Stat. 470 (1875) which granted jurisdiction to the circuit courts, using the same language. Note, however, there was no general federal question jurisdiction until the Act of 1875 except for a one-year period from 1801-02. See *Steffel v. Thompson*, 415 U.S. 452, 464 n.14 (1974). The present successor is 28 U.S.C. § 1331 (1976). As to the "suggestion" that this particular case arose under the Constitution, the case would not seem to meet the test as stated in the cases. *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Louisville & N. R.R. v. Mottley*, 211 U.S. 149 (1908); *Albright v. Teas*, 106 U.S. 613 (1883).

²⁶ See note 5 & accompanying text *supra*.

²⁷ THE FEDERALIST No. 81 (A. Hamilton) 501, 508 (H. Lodge ed.).

²⁸ 2 U.S. (2 Dall.) at 430.

Had plaintiff's cause of action been one directly created by federal statute or the Constitution, his argument would have been stronger, and he clearly would have been supported by the reasoning of Chief Justice Marshall in *Cohens v. Virginia*.²⁹ In fact, the suit was an action on debt, a breach of contract. Nevertheless, the Court spoke of the case as one "arising under" the Constitution. It then cited *Louisiana v. Jumel*,³⁰ *Hagood v. Southern*³¹ and *In re Ayers*,³² which like *Hans* all involved actions on debt, for the proposition that a state cannot be sued by a citizen of another state or of a foreign state on the mere ground that the case is one "arising under" the Federal Constitution or federal laws.³³ Following those authorities, the Court held that the action was precluded by the eleventh amendment.

Plaintiff contended that because he was a citizen of Louisiana the action was not precluded by the eleventh amendment.³⁴ The Court admitted that the language of the amendment did not cover the plaintiff, but concluded that it would be anomalous if a citizen could sue his own state and a non-citizen could not. The mere thought of this anomaly shocked the Court, which stated that such a result would be no less startling than was the decision of *Chisholm v. Georgia*.³⁵ The Court then discussed the *Chisholm* case.

Chisholm, it said, created such a shock that it produced the eleventh amendment, the effect of which was to overrule the *Chisholm* opinion. The amendment showed that the people of the United States were in accord with Justice Iredell's dissent in *Chisholm*, which held that the Constitution did not intend to create new and unheard of remedies by subjecting sovereign states to actions by individuals. The Constitution only authorized Congress to invest the federal courts with jurisdiction to hear controversies between specified parties, and properly susceptible to litigation in courts.³⁶

In his concurring opinion, Justice Harlan disagreed with the Court's comments about the *Chisholm* case. He said that they were not necessary to the opinion and stated that *Chisholm* was based on a sound interpretation of the Constitution at that time.³⁷ His

²⁹ 19 U.S. (6 Wheat.) 264, 383 (1821).

³⁰ 107 U.S. 711 (1882).

³¹ 117 U.S. 52 (1886).

³² 123 U.S. 443 (1887).

³³ 134 U.S. at 10.

³⁴ Plaintiff had very clear statements of Chief Justice Marshall in *Cohens* precisely stating the law to be as he argued, 19 U.S. (6 Wheat.) at 383, but the Court in *Hans* called those statements dictum. 134 U.S. at 20.

³⁵ *Id.* at 11.

³⁶ *Id.* at 12.

³⁷ *Id.* at 21 (Harlan, J., concurring).

view, contrary to the majority holding that article III implicitly recognized the state's sovereign immunity from suit in the federal courts, leaves article III as interpreted in *Chisholm*, except to the extent that the eleventh amendment limited the judicial power therein defined. This view leaves open the question as to what limits were imposed by the amendment.

ELEVENTH AMENDMENT ELASTICITY AND SOME QUALMS ABOUT SOVEREIGN IMMUNITY

Article III reads, "The judicial power shall extend to" The eleventh amendment reads, "The Judicial Power of the United States shall not be construed to extend to" The parallel language indicates that the latter is jurisdictional in nature, and the decision in *Hans* indicates that Congress cannot grant federal courts jurisdiction precluded by the eleventh amendment. *Edelman v. Jordan*³⁸ treated the eleventh amendment as jurisdictional, holding that it was not waived by failure to raise it in the trial court, but could be raised for the first time on appeal.³⁹ The courts have not viewed the jurisdictional language as binding.⁴⁰

A major departure from the jurisdictional nature of the amendment is the state's right to waive its eleventh amendment defense.⁴¹ This right is contrary to the basic rule that parties cannot confer jurisdiction on a federal court by mutual agreement, nor by any concept of waiver or estoppel.⁴² Justice Brennan, in *Employees v. Missouri Public Health Department*,⁴³ clearly expressed the conceptual problem.

The literal wording is thus a flat prohibition against the federal judiciary's entertainment of suits against even a consenting State brought by citizens of another State or by aliens It is true that cases since decided have said that the federal courts do have power to entertain suits against consenting states. None

³⁸ 415 U.S. 651 (1974).

³⁹ "[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . ." *Id.* at 678.

⁴⁰ Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 147 (1977). Mr. Baker noted that the jurisdictional nature of the eleventh amendment is strained and that the courts have not felt bound by the precise language of the amendment.

⁴¹ *Parden v. Terminal Ry.*, 377 U.S. 184, 187 (1964); *Gunter v. Atlantic Coast Line R. R.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

⁴² *Sosna v. Iowa*, 419 U.S. 393 (1975); *Knee v. Chemical Leaman Tank Lines, Inc.*, 293 F. Supp. 1094 (E.D. Pa. 1968).

⁴³ 411 U.S. 279, 310 (1972) (Brennan, J., dissenting).

has yet offered, however, a persuasively principled explanation for that conclusion in the face of the wording of the Amendment.

The Court has refused to expand the language of the amendment to cover suits against a state by the United States or by another state. In *United States v. Texas*,⁴⁴ the Court stated that the permanence of the union might be endangered if there were no tribunal authorized to settle controversies between the United States and a state. A suit by the United States against a state was held not to infringe state sovereignty because it was based on state consent, which was given when the state was admitted to the union upon an equal footing with the other states. Similarly, in *Kansas v. Colorado*,⁴⁵ the Supreme Court held that a state may be sued by another state of the union, and in *Monaco v. Mississippi*, that such jurisdiction is inherent in the Constitutional plan.⁴⁶

However, as discussed in *Monaco* the amendment's limiting effect on the judicial power has been expanded beyond its precise language in some instances. *Hans*⁴⁷ is the prime example. It held that a suit against a state by one of its own citizens is precluded. The Court believed that it would be incongruous if the amendment were construed to permit such suits while prohibiting suits by citizens of another state or by aliens. Similarly, in *Smith v. Reeves*,⁴⁸ when an action was brought by a federally created corporation, based on the argument that plaintiff was not a citizen of a state and thus not precluded by the amendment, the Court rejected the argument, relying on the *Hans* case.

In *Monaco v. Mississippi*,⁴⁹ initiated in the Supreme Court, the plaintiff, a foreign state, sued on bonds issued by Mississippi. Plaintiff relied on both the Supreme Court's original jurisdiction to determine controversies between a state and a foreign state, conferred by article III, and the argument that jurisdiction was not prohibited by the eleventh amendment. The Court expressed its view that neither the meaning of article III nor that of the eleventh amendment rests merely upon the words used. It said,

Behind the words of the constitutional provisions are postulates which limit and control . . . There is also the postulate that

⁴⁴ 143 U.S. 621, 643-46 (1892).

⁴⁵ 206 U.S. 46, 83 (1907).

⁴⁶ 292 U.S. 313 (1934). "The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates." *Id.* at 330.

⁴⁷ 134 U.S. 1 (1890).

⁴⁸ 178 U.S. 436 (1900).

⁴⁹ 292 U.S. 313 (1934).

the States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention." The Federalist, No. 81.⁵⁰

After discussing and quoting *Hans* at great length, the Court concluded that there was no surrender of immunity which would dispense with the need for a state to consent to be sued by a foreign state.

The *Hans* and *Monaco* cases are permeated with the concept of sovereign immunity. Both indicate that article III and the eleventh amendment implicitly embrace the immunity doctrine and they merge the amendment with the doctrine of sovereign immunity, save where there has been a "surrender in the plan of the convention." It appears that this merger of the eleventh amendment and the doctrine of sovereign immunity⁵¹ explains why, though ordinarily jurisdiction cannot be waived, a state may waive the eleventh amendment. This concept was borrowed from the doctrine of sovereign immunity.⁵²

Professor Jacobs states that the rationale underlying the doctrine of sovereign immunity has not been thoroughly discussed by the courts, and he suggests that the historical basis as stated by Justice Iredell in his dissent in *Chisholm* is the most persuasive.⁵³ It is difficult to dispute that the doctrine was recognized by the states as a part of the common law. However, the majority opinions in *Chisholm* suggest the thought that Justice Iredell himself may have overlooked the history, circumstances and purposes underlying the adoption of the Constitution. Both Justice Wilson and Chief Justice Jay eloquently explained that the surrender of sovereign immunity by the states was essential to give effect to the grand purposes of the Constitution, the giving of liberty and justice to all.

While the eleventh amendment overruled the holding of *Chisholm*, the rationale underlying the majority opinion did not die. The tension⁵⁴ between the view that states should be accountable in

⁵⁰ *Id.* at 322 (footnotes omitted).

⁵¹ Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) ("the Eleventh Amendment and the principle of state sovereignty which it embodies").

⁵² See Baker, *supra* note 40, at 154, 158.

⁵³ C. JACOBS, *supra* note 3, at 150-53.

⁵⁴ The tension was stated in *Prout v. Starr*, 188 U.S. 537 (1903).

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provi-

federal courts for injury caused by breach of federal rights, and the view that states are sovereign and should be immune from suit, continues as strong as ever.

From judicial statements and those of commentators, it appears that the concept of sovereign immunity has lost much of its popularity. Justice Frankfurter assayed the situation as follows: "In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling"⁵⁵ In the same opinion he also stated: "'Sovereign immunity' carries an august sound. But very recently we recognized that the doctrine is in 'disfavor'."⁵⁶ He then quoted the following language from his dissenting opinion in *Great Northern Life Ins. Co. v. Read*:

Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see *Kawananakoa v. Polyblank*, 205 U.S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago, that "it is a wholesome sight to see 'the Crown' sued and answering for its torts." 3 Maitland, *Collected Papers*, 263.⁵⁷

Justice Brennan in *Employees v. Missouri Public Health Department* stated:

In a nation whose ultimate sovereign is the people and not government, a doctrine premised upon kingship—or, as has been suggested, "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 v. Polyblank*, 205 U.S. 349, 353 (1907)—is indefensible. . . .⁵⁸

sions which confer power on Congress . . . which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. . . . On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several States, in proper cases, the immunity intended by the Eleventh Amendment.

Id. at 543.

⁵⁵ *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting).

⁵⁶ *Id.* at 723 (Frankfurter, J., dissenting).

⁵⁷ 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting).

⁵⁸ 411 U.S. 279, 311 (1973) (Brennan, J., dissenting).

Professor Jacobs states that the doctrine of sovereign immunity is "by practically any standard, morally indefensible in a modern society,"⁵⁹ and suggests that it is, "as the Court has more than once intimated, an unfortunate excrescence of a political and legal order which no longer enlists support."⁶⁰

On the other hand, some judicial statements emphasize the importance of the immunity doctrine. Justice Rehnquist in *Edelman v. Jordan*, spoke of "the important constitutional principle embodied in the eleventh amendment,"⁶¹ and in *Quern v. Jordan*⁶² he referred to "the importance of the States' traditional sovereign immunity."⁶³

Two recent cases have been called frontal assaults on the doctrine of sovereign immunity.⁶⁴ In *Nevada v. Hall*,⁶⁵ the Supreme Court refused to hold that the Constitution implicitly recognizes a state's sovereign immunity from suit in the courts of a *sister state*. The California courts rendered a civil judgment in favor of a California resident against Nevada in a tort action arising out of a motor vehicle collision in California. The vehicle was owned by the state of Nevada and was driven by an employee of the state on official business. The California Supreme Court held that as a matter of California law, the state of Nevada was amenable to suit. It denied Nevada's request that the action be dismissed or that the judgment be limited to \$25,000 pursuant to Nevada's statutory waiver of sovereign immunity in its own courts. The case was one of first impression in the Supreme Court. Nevada argued that, despite the absence of an express constitutional provision, the understanding prevalent when the Constitution was framed (that no sovereign is amenable to suit without its consent) was implicit in the Constitution. The

⁵⁹ C. JACOBS, *supra* note 3, at 159.

⁶⁰ *Id.* at 160.

⁶¹ 415 U.S. 651, 666 (1974).

⁶² 99 S. Ct. 1139, 1146 (1979).

⁶³ The Supreme Court of Maine, discussing suit in its own courts, said:

The immunity of the sovereign from suit is one of the highest attributes inherent in the nature of sovereignty. Accordingly, the large majority of jurisdictions hold it necessary that the sovereign's consent to be sued be given by the Legislature, as the only appropriate body to speak in this regard on behalf of the sovereign. In the absence of specific authority conferred by an enactment of the Legislature, therefore, the sovereign's immunity from suit cannot be waived through the imposition of procedural requirements or be deemed forfeited by procedural defaults. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974)(other citations deleted).

Drake v. Smith, 390 A.2d 541, 543 (Me. 1978).

⁶⁴ *Speiser, Inroads on Sovereign Immunity*, NAT'L L.J. 20 (July 30, 1979).

⁶⁵ 99 S. Ct. 1182 (1979).

Court stated that the doctrine of sovereign immunity is an amalgam of two concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign.

The former, as it developed at common law, had roots in the feudal system. No lord could be sued by a vassal in his own court, but each lord was subject to suit in the court of a higher lord. There was no lord above the King, and thus no court in which he could be sued. This system, and the fiction that the King could do no wrong, was stated to be the basis of the King's immunity from suit without consent. In the United States the fiction was rejected and immunity was based on the ground that there can be no legal right as against the authority that makes the law on which the right depends. That ground, however, is no support for a claim of immunity from suit in another sovereign's court. Such immunity depends on the law of the other sovereign.

Nevada claimed that California was not free to apply its own laws, but was bound by a federal rule, implicit in the Constitution, to recognize the doctrine of sovereign immunity as it existed when the Constitution was adopted. The Court found that the framers' concern with sovereign immunity dealt only with suits against states in federal court, not suits in the courts of another state, and that neither article III nor the eleventh amendment provide any basis, explicit or implicit, to limit the powers of the California court.

Nevada claimed that the full faith and credit clause required California to respect Nevada's waiver statute, which only consents to suits in Nevada courts, and only for a limited amount. However, the Supreme Court held that the full faith and credit clause does not require a state to apply another state's law in violation of its own legitimate public policy. Here the Court found that California had a substantial interest in providing full protection to persons injured on California highways, whether by residents or by non-residents. In implementation of that interest California has completely waived its own immunity. This substantial interest was held to justify California's refusal to be bound by the Nevada statute.

Nevada further argued that the Constitution implicitly established a union which reciprocally obligated each state to respect the sovereignty of the others. The Court listed specific constitutional limitations on state sovereignty as demonstrating that we do not have a union of wholly independent states, but found nothing that implied that a state's immunity from suit in another state is anything but a matter of comity. The Court observed that the tenth amendment, which reserves to the states those powers not delegated to the federal government, suggests caution in concluding that un-

stated limitations on state power were intended. California has adopted a policy of full compensation for injuries on its highways, and nothing in the Constitution, said the Court, authorizes or obligates frustration of that policy out of enforced respect for the sovereignty of Nevada. It said that a holding so limiting California would intrude on the sovereignty of the states, and the power of the people, in our union.

Both dissenting opinions would find a constitutional basis for immunity. Justice Blackmun would find that a guaranty to each state of immunity from suit in the courts of another state is implied as an essential component of federalism. He believes that the decision will place severe strains on our system of cooperative federalism. Justice Rehnquist concluded that the eleventh amendment is built on the postulate that states are not amenable to suit in the courts of a sister state without consent. Otherwise, he states, the peculiar result is that states cannot be sued by citizens of another state in the neutral federal forum, but can be sued in the courts of sister states.

In *Mills Music, Inc. v. Arizona*,⁶⁶ the Court of Appeals for the 9th Circuit found that the eleventh amendment did not protect a state from suit for copyright infringement by use of plaintiff's song for the promotion of its state fair. The court found that the Copyright Act of 1909⁶⁷ did, by the use of the phrase "any person", authorize suit against a class of defendants which includes states. This intent was based on the sweeping language of the statute; on the fact that the statute is a comprehensive regulation; and on the additional fact that, by statute, the United States is liable for infringement. It was then determined that the copyright and patent clause,⁶⁸ was a specific grant of constitutional power to legislate to effectuate the clause. The clause, it held, contains inherent limitations on state sovereignty, abrogating a state's eleventh amendment immunity, preventing a state from nullifying rights created by a statute enacted pursuant to the clause.⁶⁹

⁶⁶ 591 F.2d 1278 (9th Cir. 1979).

⁶⁷ Copyright Act of 1909, ch. 320, 35 Stat. 1075 (current version at 17 U.S.C. §§ 1-215 (1976)).

⁶⁸ U.S. CONST. art. I, § 8, cl. 8.

⁶⁹ In respect to the modern trend against sovereign immunity in other areas, see the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (providing that immunity of foreign states shall be decided by the United States courts rather than the executive branch, and dispensing with immunity in actions based on commercial activity or on tort). See also Comment, *Avoiding the Eleventh Amendment: A Survey of Escape Devices*, 1977 ARIZ. ST. L.J. 625, 644 (stating that in regard to suits against a state in its own courts, the trend in the recent years has been for state courts and legislatures to abolish or severely

Similar to the *Mills* case is *Peel v. Florida Department of Transportation*.⁷⁰ There the Court of Appeals for the 5th Circuit held that the eleventh amendment did not preclude an action against a state for reinstatement as an employee and compensation for lost wages and benefits for dismissal contrary to the Veteran's Reemployment Rights Act.⁷¹ The statute was interpreted to show congressional intent to abrogate eleventh amendment immunity of the states and to authorize an action for both types of relief. The Act was within the legitimate scope of the war power. When Congress acts under an article I, section 8 delegated power, it has the authority to provide for federal court enforcement of private damage actions against states.

The above cases illustrate the subordination of the concept of state sovereign immunity from suit without its consent to the principle of state accountability for its wrongs. The *Hall* case, having no relationship to federal courts or the enforcement of federal rights, is very far-reaching. It will no doubt have reverberations, and may well become a *cause celebre*.

This article will now explore the cases to see to what extent the principle of state accountability has developed in the federal courts, rendering the states amenable to suit for invasion of Federal Constitutional and statutory rights. It is a complex body of law, which has eroded much of the protective shield of the eleventh amendment.⁷²

LIMITATIONS ON THE SCOPE OF THE ELEVENTH AMENDMENT

The Fiction of the Individual Defendant

*Ex parte Young*⁷³ was a major landmark in the lengthy struggle between the ideal of enforceability of federal rights at the federal trial court level and the concept of state immunity from suit in the federal courts. Through a simple fiction it greatly limited the scope of the eleventh amendment.

Minnesota had enacted a law reducing railroad rates. Railroad

limit the doctrine of sovereign immunity). Note also that bills have been introduced in Congress proposing to amend the Civil Rights Act, 42 U.S.C. § 1983 (1976), to allow private causes of action against states for violation of federally created rights. See Nowak, *supra* note 5, at 1422, referring to H.R. REP. No. 10,049 and H.R. REP. No. 10,304, 94th Cong., 1st Sess. (1974).

⁷⁰ 600 F.2d 1070 (5th Cir. 1979).

⁷¹ 38 U.S.C. §§ 2021-2026 (1976).

⁷² See Comment, *supra* note 69, at 644.

⁷³ 209 U.S. 123 (1908).

stockholders sued in federal court to enjoin their companies from complying, claiming that despite confiscatory rates the severe criminal penalties for noncompliance would induce compliance. The Attorney General of Minnesota was made a defendant, and a preliminary injunction restrained him from enforcing compliance in the state courts. Nevertheless, the next day the Attorney General sought mandamus in a state court to compel the railroads to comply with the statute. The district court found him in contempt. His application to the Supreme Court for habeas corpus raised the question whether the district court lacked jurisdiction on the ground that the injunction was issued in an action against the state of Minnesota.

The Court found that the eleventh amendment did not apply because there was no action against the state. It refused to pass on whether the fourteenth amendment in any way altered or limited the effect of the earlier eleventh amendment.⁷⁴ The Court noted that the *Osborn v. United States Bank*⁷⁵ holding that the amendment applied only to suits in which the state was a party on the record, was expanded by *Governor of Georgia v. Madrazo*⁷⁶ to a case where a state officer was sued officially for moneys in the state treasury, and by *Hagood v. Southern*⁷⁷ to a case where the relief was in substance specific performance of a contract made by the state, but held these cases not to be applicable.

The lever to lift the eleventh amendment bar, to justify jurisdiction of federal actions against state officials and to enjoin them from enforcing unconstitutional state statutes, was the fiction that such an action is not one against the state, but against the state officer in his individual capacity.

The clearest explanation is in the court's own language:

The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes

⁷⁴ *Id.* at 150.

⁷⁵ 22 U.S. (9 Wheat.) 738, 846, 857 (1824).

⁷⁶ 26 U.S. (1 Pet.) 110, 122-23 (1828).

⁷⁷ 117 U.S. 52, 67 (1886).

into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.⁷⁸

Justice Harlan dissented. It would be difficult to dispute the force of his argument that the suit was in reality one against the state and deprived the state of the right to enforce its own statutes in its own courts.⁷⁹ A more sovereign function would be difficult to imagine than enforcement of state statutes in state courts.

Professor Wright made the observation that the fiction has its own illogic because the enforcement of the statute by the Attorney General is treated as state action for purposes of the fourteenth amendment and individual wrongdoing for purposes of the eleventh amendment. He further disclosed the irony that when the case was decided on the merits, the statute was sustained. Therefore, the Attorney General was not enforcing an unconstitutional statute; he was not stripped of state authority; and the federal suit was in actuality one against the state, though the ultimate outcome did not defeat the jurisdiction invoked by the complaint.⁸⁰

The majority obviously knew what it was doing. Like all legal fictions, this one was adopted with a particular end in view. The purpose was to provide federal court protection for constitutional rights against state invasion at the trial court level, rather than relegate the injured party to the state courts, with possible review in the Supreme Court. The result permits greater speed and efficiency in enforcing federal rights, and provides the benefit of a federal court's role in fact findings.⁸¹

⁷⁸ *Ex parte Young*, 209 U.S. 123, 159-60 (1886).

⁷⁹ *Id.* at 174 (Harlan, J., dissenting).

Of course, the Court well knew that the attorney general was still attorney general while he was enforcing the statute, and the Court well knew that the effect of enjoining the attorney general was to enjoin the state from carrying out the unconstitutional statute. From that day to this the false pretense made by the Court in *Ex parte Young* has been the mainstay in challenging governmental action through suits for injunctions and declaratory judgments.

Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962) (footnote omitted). See *Hutto v. Finney*, 437 U.S. 678, 699 (1978), where the Court stated: "their injunctive suit against prison officials was, for all practical purposes, brought against the State."

⁸⁰ C. WRIGHT, *supra* note 1, at 208.

⁸¹ More recently, in a different context, the Court stated:

It is true that, after . . . rejection of his federal claims by the state courts, a litigant could seek direct review in this Court But such review, even when

Ex parte Young greatly altered the relations between the nation and the states. Federal power to restrain state officers from enforcing unconstitutional state statutes subjected states to restrictions of the Constitution that they might otherwise safely ignore. The fiction of the individual defendant permitted the use of injunctive relief to compel states to honor their constitutional obligations.⁸²

The Court has stated⁸³ that “[a] ‘storm of controversy’ raged in the wake of *Ex parte Young*.” Professor Jacobs stated: “[T]he antagonism engendered by suits against officers was intense, verging, in one instance, it was said, upon open rebellion. The outcry was reminiscent of that following the decision of *Chisholm v. Georgia*.”⁸⁴

The outcry was muted by legislation requiring the convening of a three judge court to decide an action seeking injunctive relief against the enforcement of a state statute on the ground of unconstitutionality.⁸⁵

A later statute softening the blow was the Johnson Act of 1934,⁸⁶ which deprived district courts of the power to enjoin enforcement of state administrative orders affecting rates chargeable by public utilities unless, among other things, there is no plain, speedy and efficient remedy in the state courts.

A similar statute, The Tax Injunction Act of 1937,⁸⁷ deprived

available by appeal rather than only by discretionary writ of certiorari, is an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts. This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. “It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.” *Townsend v. Sain*, 372 U.S. 293, 312.

England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964).

⁸² “Had this fiction been pressed to its logical conclusion, it may well be that sovereign immunity would have been practically reduced to an exemption from suit *eo nomine*.” C. JACOBS, *supra* note 3, at 149.

⁸³ *Steffel v. Thompson*, 415 U.S. 452, 465 (1974).

⁸⁴ C. JACOBS, *supra* note 3, at 146.

⁸⁵ 28 U.S.C. §§ 1253, 2281 (1976) (§ 2281 was repealed in 1976). The theory was to provide a court of greater dignity, with three judges, one of them a circuit court judge; to require notice to the governor and attorney general before hearing the request for a preliminary injunction; and for direct appeal to the Supreme Court. Because of the drain on federal judicial manpower and the mandatory nature of Supreme Court review, in 1976 the three judge court requirement was practically abolished, *see* 28 U.S.C. § 2284 (1976), remaining only for malapportionment cases and where provided by other act of Congress. The latter covers certain cases under the Civil Rights Act of 1964 and the Voting Rights Act of 1965. *See* [1976] U.S. CODE CONG. AND AD. NEWS 3168; C. WRIGHT, *supra* note 1, at 214.

⁸⁶ 28 U.S.C. § 1342 (1976). Note that this covers the facts of *Ex parte Young*.

⁸⁷ 28 U.S.C. § 1341 (1976).

district courts of the power to enjoin the assessment, levy or collection of state taxes where a plain, speedy and efficient remedy is available in the state courts.

Ex parte Young was based on a strong nationalist belief that the Constitution provides for the primacy of the federal judiciary in deciding questions of federal law, and on impatience with the eleventh amendment. The Three Judge Court Act when extant⁸⁸ did not diminish the power of federal courts to act under *Young*, but only required that the power be exercised within a particular procedural format. The Johnson Act and the Tax Injunction Act limited the courts' power to enjoin, but they applied only within narrow spheres. Thus, these statutory limitations left the *Ex Parte Young* doctrine substantially unimpaired.

Later attempts to limit federal court injunctions restraining the enforcement of state statutes were judicial not legislative, and did not involve jurisdiction. They are court made rules of self restraint, based on the avoidance of needless friction with state courts, and concepts of "Our Federalism."⁸⁹

One such judicial limitation is the *Younger v. Harris*⁹⁰ abstention doctrine, which developed in response to a case in which federal injunctive relief was sought to prevent state officials from further prosecution of pending state criminal proceedings under an unconstitutional state statute. The doctrine has the vital consideration of "Our Federalism" as its basis. If the federal plaintiff can raise his constitutional ground in the pending state litigation, federal injunctive and declaratory relief will be withheld absent a showing of great and immediate irreparable injury. The defense of a single state prosecution brought in good faith is not sufficient. It must appear that the defendants are acting in bad faith and for the purpose of harrassment, or that the statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, or that other unusual circumstances are present.⁹¹

The *Younger* doctrine is a practical limitation on the use of the *Ex parte Young* power. That power had emerged as a potent force

⁸⁸ See *supra* note 85.

⁸⁹ This has been described in *Younger v. Harris*, 401 U.S. 37, 44 (1971), as a vital consideration, the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

⁹⁰ 401 U.S. 37 (1971).

⁹¹ See generally *id.* at 47-54.

in the civil rights area. Following the Civil War, a pervasive sense of nationalism led to the Civil Rights Act of 1871,⁹² and *Mitchum v. Foster*⁹³ held that the Civil Rights Act is an "expressly authorized" exception to the anti-injunction statute,⁹⁴ and authorizes, in appropriate cases, injunctive relief against ongoing state litigation.⁹⁵ However, the limitation of the *Younger* doctrine only applies to state criminal prosecutions and to civil proceedings by the state brought to vindicate important state policies.⁹⁶ The *Younger* doctrine is a doctrine of comity and discretion. It recognizes that the judicial power, as determined in *Ex parte Young*, authorizes injunctions against state officers enforcing unconstitutional state statutes, despite the eleventh amendment.⁹⁷

The Waiver Cases

A state's immunity from suit has been said to be rooted in "the inherent nature of sovereignty."⁹⁸ However, the immunity may be waived; a state is not protected from a suit to which it has consented.⁹⁹

*Parden v. Terminal Railway*¹⁰⁰ purports to apply the waiver doctrine. The Terminal Railway, consisting of about fifty miles of tracks, was wholly owned and operated by Alabama, for profit, and it conducted substantial operations in interstate commerce. An injured employee sued Alabama in federal court on a cause of action created by the Federal Employer's Liability Act (FELA).¹⁰¹ The

⁹² Civil Rights Act, ch. 22, § 1, 17 Stat. 13 (1971) (current version at 42 U.S.C. § 1983 (1976)). See *Steffel v. Thompson*, 415 U.S. 452 (1974).

⁹³ 407 U.S. 225 (1972).

⁹⁴ *Id.* at 243. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1976).

⁹⁵ 407 U.S. at 242.

⁹⁶ *Moore v. Sims*, 99 S. Ct. 2371 (1979); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue Ltd.*, 420 U.S. 592 (1975).

⁹⁷ For a good discussion of the *Younger* doctrine, see *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274-1330 (1977); in respect to its application to collateral claims see *Federal Courts-Younger Doctrine*, 52 N.Y.U.L. Rev. 1212 (1977).

⁹⁸ *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944).

⁹⁹ *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

¹⁰⁰ 377 U.S. 184 (1964).

¹⁰¹ 45 U.S.C. § 51 (1976), provides: "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," and 45 U.S.C. § 56 (1972), provides: "Under this chapter an action may be brought in a district court of the United States."

state moved to dismiss on the ground that it had not waived its sovereign immunity from suit. The Supreme Court held that the motion must be denied.

The Court stated that state immunity is not divested merely because the case arises under the Constitution or laws of the United States, citing *Hans*,¹⁰² but noted that in *Hans* the action was a contractual one, where the federal question of impairment of obligation of contract lurked in the background. It said that a suit, as in *Hans*, on a state debt obligation, without the state's consent, was precisely the "evil" against which the eleventh amendment was directed.¹⁰³ It contrasted the instant suit as brought upon a cause of action expressly created by Congress, and posed two questions. First, did Congress in enacting the FELA intend to subject a state to suit? Second, did it have the power to do so, as against the state's claim of immunity?

The majority answered the first question affirmatively by pointing to the language in the statute, "every common carrier," to the legislative history and to earlier cases holding that similarly worded statutes, viz. the Safety Appliance Act and the Railway Labor Act, applied to state owned railroads.¹⁰⁴

The second question was also answered affirmatively, although the conceptual basis is not crystal clear. First, the Court dealt with the doctrine of state surrender of sovereignty by the grant of powers to Congress. Specifically it stated that the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.¹⁰⁵ After quoting *Gibbons v. Ogden*¹⁰⁶ and *United States v. California*¹⁰⁷ the Court stated:

By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty

¹⁰² 134 U.S. 1 (1890).

¹⁰³ 377 U.S. at 187.

¹⁰⁴ *Id.* at 188. The Court cites *United States v. California*, 297 U.S. 175 (1936) and *California v. Taylor*, 353 U.S. 553 (1957). *But see* the dissent in *Parden* which states: "It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another." 377 U.S. at 198 (White, J., dissenting). It was stated that an express declaration that a state would be deemed to waive by undertaking regulable conduct was necessary.

¹⁰⁵ *Parden v. Terminal Ry.*, 377 U.S. 184, 191-92 (1964).

¹⁰⁶ "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . the sovereignty of Congress, though limited to specific objects, is plenary as to those objects. . . ." 22 U.S. (9 Wheat.) 1, 196-97 (1824).

¹⁰⁷ A state's operation of a railroad in interstate commerce "must be in subordination to the power to regulate interstate commerce The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." 297 U.S. at 183-84.

that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.¹⁰⁸

This would seem, in and of itself, a sufficiently strong basis on which to deny state immunity. Of course, it is an action by an individual, and the eleventh amendment as expanded by *Hans* to suits by a citizen of the same state, must be considered. One might have expected the Court to conclude its discussion by stating that the eleventh amendment does not afford a state protection from suit where, in accordance with the plan of the convention, sovereignty has been surrendered by the states.¹⁰⁹ Instead, the Court stated that recognition of power to make a state suable under the FELA doesn't mean that the eleventh amendment is overridden; the state may not be sued by an individual without its consent.

Consent was found because Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in a federal court as provided in the statute. By thereafter operating a railroad in interstate commerce Alabama "must be taken to have" accepted that condition and thus have consented to suit. Alabama argued that under its constitution and case law, the state could not be made a defendant in any court, and that no one had the authority to waive this immunity. However, the Court found the ordinary rule that waiver is a question of intent and is resolved by state law to be inapposite. It held that the question of waiver is one of federal law whenever it is asserted to arise from state action within the realm of congressional regulation.

The theory that the state consented seems contrived. In the view of the four dissenters, it appears to be an automatic and compulsory "waiver," neither knowing nor intelligent.¹¹⁰ The source of the consent theory apparently was *Petty v. Tennessee-Missouri Bridge Commission*.¹¹¹ That case involved a suit against a bi-state authority

¹⁰⁸ 377 U.S. at 192.

¹⁰⁹ See *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 299 (1973) (Brennan, J., dissenting). Justice Brennan had previously authored the *Parden* decision. "*Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce." *Id.* at 299.

¹¹⁰ 377 U.S. 184, 200 (White, J., dissenting). See Field, *The Eleventh Amendment and other Sovereign Immunity Doctrines, Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1209-10, 1214-15 (1978). See *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1081 (5th Cir. 1979), where the court viewed the requirement of consent as unnecessary and viewed compelled consent as fiction.

¹¹¹ 359 U.S. 275 (1959).

whose creation required congressional consent pursuant to the compact clause of the Constitution. In approving it, Congress attached a proviso which was construed as a condition of amenability to suit in the federal courts. It took some ingenuity to transfer the condition concept from that contractual context to the FELA.¹¹² It may be that the consent theory was used in *Parden* as a convenient way to avoid a direct answer to the premise of Alabama that Congress lacks power to directly strip a state of its sovereign immunity. The closing portion of the opinion is interesting, the last sentence being, "Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be . . . hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will."¹¹³

Employees v. Missouri Public Health Department,¹¹⁴ the second of the waiver cases, refused to read *Parden* as holding that sovereign immunity cannot preclude a federally created cause of action because the states surrendered their sovereignty when they granted Congress the power to regulate commerce. Instead, it deemed that state consent, based on operating the railroad, was an essential part of the *Parden* holding.¹¹⁵

In the *Employees* case, state employees sued the state for overtime compensation under the Fair Labor Standards Act (FLSA),¹¹⁶ which expressly covers employees in state hospitals, institutions or schools. The central issue was whether *Parden* was distinguishable. The court found that it was. Unlike the FELA involved in *Parden*, the FLSA did not authorize suits by individuals against a state. The Court found nothing in the legislative history of the statute to indicate congressional intent that individuals could sue a state, and pointed to provisions authorizing the secretary of labor to sue a state for restitution in behalf of state employees. Absence of clear intent to authorize individual suits was the basis for the decision.¹¹⁷

¹¹² The Court in *Petty* emphasized that it was "called on to interpret not unilateral state action but the terms of a consensual agreement" between the States and Congress, *id.*, at 279, and held that the States who join such a consensual agreement "by accepting it and acting under it assume the conditions that Congress under the Constitution attached."

Edelman v. Jordan, 415 U.S. 651, 696 (1974) (Marshall, J., dissenting).

¹¹³ 377 U.S. at 198.

¹¹⁴ 411 U.S. at 279 (1973).

¹¹⁵ *Id.* at 280-81 n.1. Note, however, that the Court's finding that in enacting the FLSA Congress did not intend to subject states to suits by individuals in federal courts, makes this discussion of *Parden*'s consent requirement unnecessary to the opinion. *Id.* at 285.

¹¹⁶ Fair Labor Standards Act of 1938, ch. 676, § 16b, 52 Stat. 1069 (1938) (current version at 29 U.S.C. § 216b (1976)).

¹¹⁷ Discussion at 411 U.S. 286-87 could be taken to mean that if Congress had clearly

Justice Marshall, in his concurring opinion, found that Congress did intend to subject states to suit by individuals. He also found, however, that the state did not consent. He believed that the choice of either ceasing operation of vital public service or "consenting" to federal suit showed that there was no true choice. Therefore, he agreed that the eleventh amendment precluded suit in federal court. He noted however that the FLSA authorized suit to be brought in any court of competent jurisdiction. He then stated, citing *Testa v. Katt*,¹¹⁸ that while individuals could not enforce their FLSA action against a state in federal court, they could do so in a state court because of the constitutional obligation of state courts, under the supremacy clause, to enforce federally created causes of action, even if they conflict with state policy.

Despite Justice Brennan's comment that it is paradoxical to conclude that a state can frustrate vindication of federal rights in federal court, but not in its own courts,¹¹⁹ Justice Marshall's suggestion is an ingenious approach that would sharply reduce state immunity, and would permit the enforcement of federally created causes of action against states, thus indirectly limiting the eleventh amendment. Of course, in *Testa v. Katt*, which is the basis of this idea, the state was not required to hear an action in its own courts *against itself*. Would *Testa* stretch as far as Justice Marshall suggested in a situation where the state had eleventh amendment immunity from suit in the federal court?

Justice Brennan's dissent in the *Employees* case was the most interesting of the opinions. He also believed that the intent to allow individual suits against states was clear both from the text of the statute and its legislative history; he then discussed his view of the eleventh amendment. He stated that there was an ancient doctrine

authorized individual suits against states it would have lifted sovereign immunity (no discussion of consent here). Additionally, the Court stated: "The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." *Id.* at 283.

¹¹⁸ 330 U.S. 386 (1947). *But see* *Drake v. Smith*, 390 A.2d 541, 546 (Me. 1978), where the Maine Supreme Court held that an action in the state court for money due under a federal-state aid program under the Social Security Act was not justified by a statute waiving state immunity from tort liability, stating:

It is not plausible to believe that the Legislature's authorization of the State's participation as a partner with the federal government in the AABD program allowed the State's immunity (as protected by the 11th Amendment to the Constitution of the United States) to continue as against actions brought in the federal courts for monies claimed past due under the AABD program, *Edelman v. Jordan*, *supra*, but yet simultaneously waived the State's immunity as against suits to impose such a liability which are brought in the courts of the State.

¹¹⁹ 411 U.S. at 316.

of sovereign immunity that existed before the Constitution. He further stated that there was a surrender of that immunity to the extent that enumerated powers were granted to the national government, because effective exercise of such enumerated powers required state surrender of immunity to empower Congress, where necessary, to subject states to suit. There was no surrender in regard to prohibitions imposed by the states on themselves, such as the contract clause, which is not an enumerated power, and as to which the states granted Congress no power of enforcement by means of subjecting the states to suit or otherwise. He rejected the view that *Hans* extended the coverage of the eleventh amendment to suits against a state brought by its own citizen.¹²⁰ He believed that in *Hans* the state was protected by the non-constitutional ancient doctrine of sovereign immunity, which was not waived in respect to the contract clause action. This approach is based on that of Chief Justice Marshall in *Cohens v. Virginia*,¹²¹ who said that the eleventh amendment did not bar a federal-question suit brought against a state by its own citizen. Marshall's view was that article III extended judicial power to *all* federal question controversies regardless of the litigants, and that the eleventh amendment expressly withdrew such power only as to suits against states by citizens of other states or by aliens.

Thus, Justice Brennan would hold, on the *Employees* facts, that as a citizen sued his own state, the eleventh amendment was irrelevant; as Congress had provided for suit against states under an enumerated power, the commerce power, the states had surrendered their ancient sovereign immunity; and that in such cases no consent is necessary.¹²²

¹²⁰ *Id.* at 298 (Brennan, J., dissenting). *But see* *Edelman v. Jordan*, 415 U.S. at 662, which said: "While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *See also* 415 U.S. at 663: "The Court of Appeals in this case, while recognizing that the *Hans* line of cases permitted the State to raise the Eleventh Amendment as a defense to a suit by its own citizens, nevertheless . . ."

¹²¹ 19 U.S. (6 Wheat.) 264, 383 (1821).

¹²² The last point, *i.e.*, the absence of need for consent, seems inconsistent with Justice Brennan's opinion in *Parden* which emphasized consent; however, there he was faced with the *Hans* opinion which is generally viewed as having held that the eleventh amendment *did* apply to a suit against a state by its own citizens, and he had to obviate that hurdle with the concept of consent. Here, he is expressing his own view, not that of the Court. For Brennan's description of the *Parden* holding which does not include consent as an element, *see* 411 U.S. at 279.

Note that even though Congress does act under an enumerated power, its regulation will be ineffective if it impairs the states' integrity, or their ability to function effectively in a

This approach bears close watching. It has a kind of inexorable logic despite the apparently incongruous result that in *Employees* the state would have been suable by its own citizen but not by a citizen of another state. However, the probabilities are great that the vast majority of state employees desiring to sue the state under the FLSA would be state citizens.

Justice Brennan's interpretation certainly would be a major step in restricting the scope of eleventh amendment immunity.

Edelman v. Jordan,¹²³ the last of the trilogy of consent cases, like the majority opinion in *Employees*, never really had to discuss the concept of consent.

This was a class action against state officials of Illinois who were allegedly administering federal-state programs of Aid to the Aged, Blind, or Disabled (AABD) in a manner inconsistent with federal regulations and the fourteenth amendment. Under the Social Security Act the program was funded by the state and federal governments. The Department of Health, Education and Welfare had issued regulations prescribing time limits for processing applications. Defendants were operating pursuant to Illinois regulations. The complaint alleged that the federal time limits were not being followed, and that grants were improperly commenced in the month in which the application was approved, without including prior eligibility months. The district court declared the Illinois regulations invalid insofar as contrary to the federal regulations, granted an injunction requiring future compliance with federal regulations, and ordered the state officials to release AABD payments wrongfully withheld. On appeal, the officials contended that the eleventh amendment barred the retroactive benefits. The Supreme Court agreed and reversed that portion of the order directing payment of retroactive benefits.

The Court held that when the action is for recovery of money from the state, the state is the real, substantial party in interest and can invoke sovereign immunity; if the liability must be paid from public funds in the state treasury, suit is barred by the eleventh amendment. Despite the argument that the award was in the nature of

federal system. Such violation of state sovereignty, reserved to the states by the tenth amendment, would be in excess of Congress' constitutional power. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979) the court stated: "In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions." *Id.* at 1083.

¹²³ 415 U.S. 651 (1974).

equitable restitution and justified by *Ex parte Young*¹²⁴ the Court stated that not all equitable relief can be justified by *Young*. The relief there was prospective only. Here the relief was retrospective in nature, being compensation for past breaches of legal duty. The funds would not come out of the pockets of the officials, but must inevitably come from the general revenues of the state. It is not easy to demarcate permissible from impermissible relief. The injunction in *Young* was not without effect on state revenues, and later cases¹²⁵ have prohibited the denial or termination of welfare benefits. But in those cases the consequences to state treasuries resulted from compliance with injunctions prospective in nature, and were thus ancillary to permissible relief.

The Court refused to find that the state had waived its eleventh amendment protection by participating in the AABD program. There clearly was no evidence of voluntary intentional waiver by the state. Constructive consent is not ordinarily sufficient for surrender of constitutional rights and, it was said, the mere participation in a federal program which aids the state's public aid system is not enough. The only possibility was waiver under federal law based on the *Parden*¹²⁶ rule which turns on whether Congress intended to abrogate state immunity and whether the state, by participation, had in effect consented thereto. Here, the Court stated, the threshold fact of congressional intent, or as the opinion phrased it, authorization to sue a class which literally includes states, was lacking. The only language in the Social Security Act purporting to provide a sanction against a participating state for nonconformity to federal law was the termination of future allocation of federal funds.

The decision in *Edelman* thus, like that in *Employees*, never reached the question of what kind of activity by the state could be viewed or considered as consent under the *Parden* rule, because the basic predicate, i.e., a finding that Congress intended, within the ambit of its constitutional power, to create state liability in federal courts, was absent.

The dissent by Justice Douglas took a practical approach. Whether, in a welfare case, the decree is only prospective or requires payments for skipped periods, the nature of the impact on the state treasury is precisely the same, and he points to Supreme Court cases which affirmed judgments of the latter type.¹²⁷

¹²⁴ 209 U.S. 123 (1908).

¹²⁵ *Graham v. Richardson*, 403 U.S. 365 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹²⁶ See note 18 & accompanying text *supra*.

¹²⁷ Among others he cited *Shapiro v. Thompson*, 394 U.S. 618 (1969). Note that in the majority opinion the Court stated that the *Shapiro* case was of precedential value on this

Justice Brennan's dissent reiterated his views in *Employees*¹²⁸ to the effect that the eleventh amendment had no application to a suit against a state by its own citizen, and that as the Social Security Act was enacted pursuant to article I, an enumerated power, the states surrendered their ancient sovereign immunity.

Probably the most important result of the *Edelman* opinion was the impetus it gave to the concept that prospective relief is valid, even though it necessarily requires expenditures out of the state treasury, provided that they are ancillary to the prospective relief.

This is illustrated by the decision in *Milliken v. Bradley*.¹²⁹ The district court found de jure segregation in Detroit schools and made a desegregation order which included a requirement that specified remedial educational programs be instituted for school children who had been subjected to past acts of de jure segregation. The district court directed that the additional cost of the new programs be paid equally by the Detroit School Board and the state defendants (the State Board of Education, the Governor, and the Attorney General). The court of appeals affirmed. The state defendants appealed from the remedial part of the order and from the state's obligation to pay part of its costs. The Supreme Court found the remedial order warranted. It also held that the eleventh amendment was not violated, relying on *Edelman*, despite the argument that the order was indistinguishable from an award of money damages based on asserted prior misconduct of state officials. The decree to share future costs of the remedial programs was held to fit within the prospective compliance exception, reaffirmed in *Edelman*, which had its genesis in *Ex parte Young*,¹³⁰ permitting federal courts to enjoin state officials to conform their conduct to requirements of federal law despite a direct and substantial impact on the state treasury. The Court pointed out that the programs are part of a plan which operates *prospectively*. It noted that there was no monetary award to plaintiffs, and that the case did not involve individual citizens conducting a raid on the state treasury for an accrued monetary liability.

To emphasize the impact on the state treasury Justice Powell's concurring opinion stated that the state was ordered to pay about \$5,800,000.

point, but expressly disapproved *Shapiro's* eleventh amendment holding to the extent that it was inconsistent with the instant opinion, not feeling obliged to follow stare decisis because the Court was dealing with a constitutional question.

¹²⁸ 411 U.S. 279, 310 (1972) (Brennan, J., dissenting).

¹²⁹ 433 U.S. 267 (1977). See also *New York State Ass'n for Retarded Children v. Carey*, 596 F.2d 27 (2d Cir. 1979); *Kimble v. Soloman*, 599 F.2d 599 (4th Cir. 1979).

¹³⁰ See note 73 & accompanying text *supra*.

Statutory Implementation of the Fourteenth Amendment

*Fitzpatrick v. Bitzer*¹³¹ was a class action on behalf of present and retired employees of the state of Connecticut against state officials of Connecticut. The plaintiffs alleged that provisions in the state statutory retirement plan discriminated against them because of sex, in contravention of Title VII of the Civil Rights Act of 1964. Title VII was amended in 1972 to include state governments as employers within the statutory coverage. The district court held that the state statute violated Title VII and granted prospective injunctive relief. Petitioners also sought an award of retroactive retirement benefits for losses caused by the discrimination. It is clear from the language of the 1972 Amendments to Title VII that Congress intended to authorize a private suit for backpay by state employees against the state. Nevertheless, the district court and the court of appeals both held that under the eleventh amendment and the decision in *Edelman v. Jordan* the federal action for retroactive damages was not constitutionally permissible.¹³²

The Supreme Court, finding the retroactive award constitutional, distinguished *Edelman*. It reasoned as follows: *Edelman* held that an award of monetary relief to welfare plaintiffs for earlier wrongfully denied benefits violated the eleventh amendment; *Edelman* further held that the doctrine of waiver expounded in *Parden*¹³³ was inapplicable because the necessary predicate for that doctrine was congressional intent to abrogate state immunity and no such intent was found in the statutes relied on by plaintiffs.

Here, the Court held, there was no doubt that the retroactive benefits were indistinguishable from those sought in *Edelman*. However, the predicate of congressional intent to authorize individual suit against the state was clearly present.

The Court then indicated its awareness of the factual differences between the state's activity of operating a railway in *Parden*, which was viewed as consent, and that involved in the present case. This suggests that the Court might have found it difficult to base waiver on state conduct which was governmental in nature, but the Court did not consider the question of consent. It proceeded upon an alternative ground. It noted that the power of Congress involved in *Parden* was based on the commerce clause, but that here the legislation was passed pursuant to Congress' authority under section 5 of

¹³¹ 427 U.S. 445 (1976).

¹³² 415 U.S. 651 (1974).

¹³³ 377 U.S. 184 (1964).

the fourteenth amendment.¹³⁴

Relying on the much earlier case of *Ex parte Virginia*,¹³⁵ the Court reasoned that the fourteenth amendment, ratified by the states after the Civil War, clearly contemplates limitations on state sovereignty. The substantive provisions are expressly directed at the states; the provisions imposed duties on the states in respect to private individuals; and Congress is given power to enforce the imperatives by appropriate legislation. All this expanded Congress' powers, with the corresponding diminution of state sovereignty. The eleventh amendment, and the principle of state sovereignty it embodies, are necessarily limited by the enforcement provisions of section 5 of the fourteenth amendment. Under section 5, the Court stated, Congress can provide for private suits against states which are constitutionally impermissible in other contexts. The latter would seem to be dictum, despite the strong and clear language of the Court.

Fitzpatrick thus came up with a holding which cut away a large portion of eleventh amendment protection.

It is interesting to compare Justice Brennan's opinion. He reasserted his view from *Employees*¹³⁶ that the eleventh amendment does not bar this action, and that the ancient doctrine of sovereign immunity does not either because immunity was surrendered insofar as the states granted Congress specifically enumerated powers. Title VII, he said, is based on congressional authority in the commerce clause, and in section 5 of the fourteenth amendment, which are two of the enumerated powers granted to Congress.

The importance of the basic holding in *Fitzpatrick* cannot be overemphasized. It made clear that Congress has plenary power to set aside state immunity from retroactive relief in order to enforce the fourteenth amendment.

Attorney's Fees

In *Hutto v. Finney*,¹³⁷ the Court dealt with the question of whether

¹³⁴ Section 1 No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV.

¹³⁵ 100 U.S. 339 (1879).

¹³⁶ 411 U.S. 279 (1972).

¹³⁷ 437 U.S. 678 (1978).

the award of attorney's fees against a state is prohibited by the eleventh amendment.

Litigation began ten years before the decision. The district court found that conditions in the Arkansas penal system constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Initially it directed the Department of Correction to start improving conditions, and to file reports. Later it issued guidelines. For a while there seemed to be improvement and the court ceased supervision, warning that prior decrees remained in effect and that sanctions, costs and attorney's fees would be imposed for violations. Thereafter it found that conditions had deteriorated. The court ordered specific remedial steps. It also found that petitioners had acted in bad faith and awarded counsel "a fee of \$20,000.00 to be paid out of [the] Department of Correction funds."¹³⁸ The court of appeals affirmed and assessed the state an additional \$2,500 to cover the fees and expenses of appeal. The Supreme Court sustained both provisions over the objections of the eleventh amendment.

As to the district court award, it was based on a finding that petitioners acted in bad faith. The Court restated the *Ex parte Young*¹³⁹ power to grant prospective injunctive relief against state officers, and the *Edelman*¹⁴⁰ holding that the eleventh amendment grants a state immunity from retroactive monetary relief, but not from costs of compliance ancillary to a prospective order, and pointed out that the difference is not always clear. On the instant facts, the Court found the attorney's fees to be ancillary.

The theory was that when granting a prospective injunction the court need not merely hope for compliance. Contempt may be punished by imprisonment or fine, and civil contempt may result in a remedial fine, compensating the opponent. If state officers disobey an order, it was stated that the principles of federalism surely do not require enforcement by sending high ranking state officials to jail. The less intrusive fine is ancillary to the power to impose injunctive relief. Here the award of attorney's fees for bad faith served the same purpose as a remedial fine imposed for civil contempt. Compensation was not the sole motive. The award vindicated the court's authority and induced further compliance. Thus the award was ancillary to the prospective order made earlier and violated in bad faith.

¹³⁸ *Id.* at 685.

¹³⁹ See notes 73-78 & accompanying text *supra*.

¹⁴⁰ See notes 123-28 & accompanying text *supra*.

As to the court of appeals award, it was not based on any finding of bad faith, but on the Civil Rights Attorney's Fees Awards Act of 1976.¹⁴¹ The Court, cited *Fitzpatrick*¹⁴² for the proposition that Congress has plenary power to set aside the state's immunity from retroactive relief in order to enforce the fourteenth amendment. It then found that when the Fees Awards Act was passed, Congress undoubtedly intended to use that power and to authorize fee awards payable by the state when their officials are sued in their official capacities. Intent was found from the broad language "in any action" to enforce certain laws; from the fact that the covered laws were specifically passed to restrain state action; and from the clear legislative history which contemplated state liability for attorney fees.

The Attorney General argued that this was not enough; that Congress must use express language in order to abrogate state immunity. The Court gave several answers. First, unlike *Edelman*, this case did not concern retroactive liability for prelitigation conduct, but expenses incurred by plaintiff in seeking only prospective relief. Thus, attorney's fees were ancillary to prospective relief within the meaning of the *Edelman* rule. Second, it was said that the Act imposes attorney's fees as a part of costs, and the Court has never viewed the eleventh amendment as barring such awards, even in suits between states and individual litigants, because of the inherent power of a court in the orderly administration of justice between litigants. It said it was too late to single out attorney's fees as the one kind of litigation cost whose recovery cannot be authorized by Congress without an express waiver of state immunity. Third, the Court said that whatever degree of clarity of expression might be required in a case like *Employees*, where the statute was based on an article I power, here the statute was based on the enforcement provision of the fourteenth amendment. Applying a "standard appropriate" to such a case, the Court found the statute clear enough to authorize attorney's fees.

¹⁴¹ 42 U.S.C. § 1988 (1976), provides that in suits under the Civil Rights Act, 42 U.S.C. § 1983 (1976), and certain other statutes, federal courts may award prevailing parties reasonable attorney's fees "as part of the costs."

¹⁴² 427 U.S. 445 (1976).

THE CIVIL RIGHTS ACT OF 1871

Municipal Liability

In *Monell v. Department of Social Services*,¹⁴³ the Supreme Court expressly overruled the decision of *Monroe v. Pape*,¹⁴⁴ which held that local governments were wholly immune from suit under The Civil Rights Act of 1871.¹⁴⁵ The Court in *Monell* expressly disavowed that it was addressing the question of state liability under section 1983.¹⁴⁶ Therefore, *Monell* does not directly affect the eleventh amendment. Nevertheless, the holding is closely related to the thrust of this article.

The *Monroe* Court concluded that on the basis of legislative history Congress did not intend municipal corporations to be within the definition of "persons" subject to liability under section 1983.¹⁴⁷ In *Monell*, the Court made a fresh and detailed analysis of the debates on the proposed statute, and of the case law which each side mustered in its support. It reached the conclusion that Congress *did* intend municipalities and other local government units to be within the coverage of section 1983.¹⁴⁸

This interpretation permits suits directly against local governmental bodies for monetary, declaratory or injunctive relief where the alleged unconstitutional activity implements or executes a policy statement, an ordinance, a regulation, or a decision officially adopted and promulgated by that body's officers.¹⁴⁹ Moreover, though the touchstone of action against a government body is that official policy be responsible for a deprivation of constitutional

¹⁴³ 436 U.S. 658 (1978).

¹⁴⁴ 365 U.S. 167 (1961).

¹⁴⁵ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

¹⁴⁶ "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." 436 U.S. at 690 n.54.

¹⁴⁷ 365 U.S. at 191.

¹⁴⁸ 436 U.S. at 690. The Court by its holding cleared what had become a quagmire of conflicting lower court authority on the question as to which state boards and agencies might be viewed as "persons," and whether an officer might be proceeded against individually or officially. See Smith & Singer, *Limitations on Federal Judicial Power in Civil Rights Cases: "Persons," Eleventh Amendment, Immunities, Vicarious Liability*, 14 WAKE FOREST L. REV. 711, 712-13 (1978).

¹⁴⁹ 436 U.S. at 690.

rights, like every other "person" local governments may be sued for constitutional deprivations pursuant to governmental "custom," even though such custom has not received formal approval through the body's official decision making channels.¹⁵⁰

A clear limitation on the scope of section 1983 was made, however, by the further holding that it does not authorize municipal liability based on the doctrine of respondeat superior.¹⁵¹ The Court stated that the section itself compels the conclusion that municipalities were not to be held liable unless action pursuant to official policy of some nature caused a constitutional tort. The government, under color of some official policy, must *cause* an employee to commit the wrongful act. A municipality cannot be held liable vicariously solely on the basis of an employer-employee relationship with the tortfeasor.¹⁵² The Court made it clear, however, that it did not address the question of what the full contours of municipal liability under section 1983 might be, preferring to leave that to another day.

Prior to *Monell*, while *Monroe* still precluded the bringing of civil rights actions against municipalities under section 1983, a number of cases dealt with the question whether actions against municipalities could be based directly on the fourteenth amendment relying on the principle utilized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,¹⁵³ thus circumventing section 1983 and its restrictive definition of "person."

In *Bivens*, the Court sustained a complaint for damages against individual federal agents who, acting in the name of the United States under color of official authority, violated plaintiff's fourth amendment protection against unreasonable searches and seizures. The Court held that although the fourth amendment does not specifically provide for an award of money damages, it is well settled that where federally protected rights have been invaded, courts will adjust their remedies so as to grant the necessary relief.¹⁵⁴

The courts disagreed about whether a direct cause of action could be based on the fourteenth amendment. Some circuits declined to infer a cause of action based directly on the due process clause of the fourteenth amendment.¹⁵⁵ Some said the issue was an open question.¹⁵⁶ Other circuits inferred a direct cause of action from the four-

¹⁵⁰ *Id.* at 690-91.

¹⁵¹ *Id.* at 691.

¹⁵² *Id.* at 692.

¹⁵³ 403 U.S. 388 (1971).

¹⁵⁴ *Id.* at 396.

¹⁵⁵ *Kostka v. Hogg*, 560 F.2d 37, 42 (1st Cir. 1977).

¹⁵⁶ *Patzig v. O'Neil*, 577 F.2d 841 (3d Cir. 1978).

teenth amendment on the basis of *Bivens*.¹⁵⁷ These latter circuits justified an action against a municipality under the general federal question statute, 28 U.S.C. 1331, rather than section 1983. They, however, drew the line by holding that such direct cause cannot be based on the doctrine of respondeat superior. They required that the municipality itself be culpable. *Turpin v. Mailet*,¹⁵⁸ decided one day before *Monell*, relied on the *Bivens* holding, stating that its intentment was that only those directly responsible for unconstitutional behavior may be called to task for their wrongful course of conduct.

Jones v. City of Memphis, was decided after *Monell*, and in its holding on respondeat superior relied directly on *Monell*, believing that it would be incongruous to hold that the doctrine of respondeat superior can be invoked against a municipal corporation under section 1331, when it clearly has no application in an action under section 1983.¹⁵⁹ This holding, which appears eminently logical, forecloses the possibility that an implied direct cause of action based on the fourteenth amendment can give broader possibilities of recovery against a municipality than those provided by section 1983.¹⁶⁰

An interesting district court opinion, *Naughton v. Bevilacqua*,¹⁶¹ dealt with the liability of a state which by statute had waived its sovereign immunity with regard to suits in both state and federal court.¹⁶² The court held that regardless of the waiver, the state would not be subject to suit either under 1983 (even if the statutory waiver authorized a 1983 suit), or under an implied cause of action, solely on the doctrine of respondeat superior. It said that the question paralleled that of municipal liability, and that it was not enough that the state is merely the employer of offending officials, but that

¹⁵⁷ *Jones v. City of Memphis*, 586 F.2d 622 (6th Cir. 1978), cert. denied, 99 S. Ct. 1230 (1979); *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.), vacated sub nom., *City of West Haven v. Turpin*, 99 S. Ct. 554, cert. denied, 99 S. Ct. 586 (1978), modified, 591 F.2d 426 (2d Cir. 1979). In *Davis v. Passman*, 99 S. Ct. 2264 (1979), the Supreme Court inferred a cause of action directly from the due process clause of the fifth amendment based on sex discrimination in termination of employment, in favor of an employee of a federal congressman who, not being in the competitive service, was not within the coverage of Title VII of the Civil Rights Act of 1964. Whether the same result would be reached in regard to the fourteenth amendment is uncertain. The fact that it is state power sought to be restrained, that a remedy exists under 1983 against the officer, and now against the local governmental body might suggest otherwise. See *Smith & Singer*, supra note 148, at 718-19.

¹⁵⁸ 579 F.2d at 164.

¹⁵⁹ 586 F.2d 622, 625 (6th Cir. 1978), cert. denied, 99 S. Ct. 1230 (1979).

¹⁶⁰ See Case Comment, *Judicial Refusal to Imply a Cause of Action Against Municipality Under Fourteenth Amendment After Monell*, 13 SUFFOLK U. L. REV. 1150 (1979), which suggests legislation amending 1983 to include actions against municipalities based on respondeat superior.

¹⁶¹ 458 F. Supp. 610 (D.R.I. 1978).

¹⁶² R.I. GEN. LAWS § 9-31-1 (Supp. 1978).

it must itself have caused the injury.

Given the preceding cases, there remains one open question concerning federal suits against municipalities based on the doctrine of respondeat superior. In a section 1983 civil rights action against municipal employees, in a state whose law provides that local governments lack sovereign immunity, and provides for vicarious liability for the tortious conduct of municipal employees, may a state law respondeat superior claim against the municipality be entertained under the pendent jurisdiction doctrine of *United Mine Workers v. Gibbs*?¹⁶³ The Supreme Court in *Aldinger v. Howard*,¹⁶⁴ a case decided at a time when section 1983 did not permit suits against municipalities, refused pendent party jurisdiction (that is, jurisdiction over a non-federal claim against a defendant other than the defendant against whom the federal claim is interposed) of the claim against the municipality grounded in state law because the principal claim was based on section 1983, which *then* excluded municipalities.¹⁶⁵ It held that congressional exclusion could not be circumvented by bringing the municipality back on the ground of the common fact basis of both claims.¹⁶⁶ Now, of course, a municipality can be sued under section 1983, but not if the only theory is vicarious liability. The question posed is whether the reasoning of *Aldinger* will be applicable. The answer is likely to be yes. It might be held that section 1983 excludes vicarious liability claims against municipalities, and that to permit the municipality to be brought in as a pendent party on such claims would be violative of congressional intent.

State Liability

Justice Brennan stated, in his concurring opinion in *Hutto v. Finney*, that "it is surely at least an open question whether §1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment."¹⁶⁷ Later, in a separate opinion in *Quern v. Jordan*,¹⁶⁸ joined by Justice Marshall, he took the firm stand that section 1983 does permit actions against states, in federal court, even for retroactive monetary relief.

¹⁶³ 383 U.S. 715 (1966).

¹⁶⁴ 427 U.S. 1 (1976).

¹⁶⁵ *Id.* at 16-17.

¹⁶⁶ *Id.*; see also *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978) (pendent party concept).

¹⁶⁷ 437 U.S. 678, 703 (1978) (Brennan, J., concurring).

¹⁶⁸ 99 S. Ct. 1139, 1149 (1979) (Brennan, J., concurring).

His conclusion was founded on the *Fitzpatrick* holding that Congress can, by legislation enacted under section 5, the enforcement provision of the fourteenth amendment, provide for private suits against states,¹⁶⁹ and the enactment of section 1983 under section 5.¹⁷⁰ He then found that a state *was* intended to be included within the words "every person" used to describe the class of prospective defendants in section 1983.¹⁷¹ The conclusion followed that state immunity under the eleventh amendment was abrogated by section 1983.¹⁷²

He noted that *Edelman* held that section 1983 did not abrogate state immunity. However, that holding was based on the then existing view that section 1983 was not intended to include municipal corporations and therefore, could not have been intended to include states as parties defendant.¹⁷³ *Edelman's* premise, however, was undercut by *Monell*¹⁷⁴ which reversed earlier law, and interpreted section 1983 to include municipalities.

In finding the congressional intent to include states in section 1983, Justice Brennan relied on several factors. First, the historical context of section 1983 is that it was adopted shortly after the Civil War, in 1871, for the purpose of enforcing the provisions of the fourteenth amendment, which are directed at the states themselves. Second, the plain meaning of the language "any persons" is shown by the Dictionary Act,¹⁷⁵ which provided that in construing statutes the word "person" shall be applied to "bodies politic and corporate" unless the context shows that a more limited meaning was intended, and that at that time the phrase "bodies politic and corporate" was understood to include governmental bodies, both local and state. Third, the legislative history, evidenced in detail by statements made in debates surrounding the enactment of the Civil Rights Act, shows the intent of Congress to protect personal rights as against the states themselves.¹⁷⁶

Justice Brennan's view seems to have been repudiated by language in the majority opinion in *Quern*.¹⁷⁷ There, the Court pointed out that the *Monell* case, which interpreted section 1983 to cover municipalities, expressly limited the holding to "local governmental

¹⁶⁹ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

¹⁷⁰ See *Quern v. Jordan*, 99 S. Ct. 1139, 1150 n.3 (1979) (Brennan, J., concurring).

¹⁷¹ *Id.* at 1154.

¹⁷² *Id.* at 1150.

¹⁷³ *Id.*

¹⁷⁴ See note 146 *supra*.

¹⁷⁵ For judicial discussion of this act, see *Quern v. Jordan*, 99 S. Ct. 1139, 1145 (1979).

¹⁷⁶ *Id.* at 1152-58 (Brennan, J., concurring).

¹⁷⁷ 99 S. Ct. 1139 (1979).

units . . . not considered part of the State for Eleventh Amendment purposes."¹⁷⁸ Further, after *Monell*, the Court decided *Alabama v. Pugh*,¹⁷⁹ which was said to dispel any doubt on the question by holding that, in an action based on section 1983, the eleventh amendment precluded joining a state as defendant.¹⁸⁰ The Court was not convinced by Justice Brennan's opinion, and believed that neither the language of the statute nor its legislative history showed congressional intent to abrogate state immunity.¹⁸¹

The *Quern* case is a most unusual one, and is actually a sequel to *Edelman*.¹⁸² Following remand to the district court in *Edelman*, defendant state officials were ordered to send a notice to members of the plaintiff class explaining that the federal suit was at an end, and advising that there were state administrative procedures available to obtain a state determination of their eligibility for past benefits. The Court rejected the argument that such notice would lead inexorably to payment of state funds for retroactive benefits and therefore was, in effect, a monetary award. The notice was held to be merely informational and the matter one for resolution by the state.¹⁸³ The notice, the Court held, was properly viewed as "ancillary to the prospective relief already ordered by the Court."¹⁸⁴ The propriety of the notice was the only issue in the case, nevertheless, during the opinion, the Court answered respondent's suggestion that *Edelman* had been undercut by *Monell* and that section 1983 should be held to include states.¹⁸⁵

Justice Brennan, though concurring in the judgment, treated the majority discussion of section 1983 as dictum, despite the author's protestations to the contrary. The Court's holding that the notice was ancillary to prospective relief was sufficient to support the decision that it was not barred by the eleventh amendment, therefore the discussion of the section 1983 issue was unnecessary to the holding. He also denied that *Alabama v. Pugh* held "that a State is not a 'person' for purposes of section 1983."¹⁸⁶ *Pugh* was an extremely brief per curiam opinion involving a mandatory injunction to eradicate cruel and unusual punishment in the Alabama prison system. The state was a party in addition to a state board and state officers.

¹⁷⁸ *Id.* at 1144 (quoting *Monell v. Department of Social Serv.*, 436 U.S. 658, 690 n.54 (1978)).

¹⁷⁹ 438 U.S. 781 (1978).

¹⁸⁰ *Id.* at 782.

¹⁸¹ 99 S. Ct. at 1145.

¹⁸² *Id.* at 1141.

¹⁸³ *Id.* at 1142, 1148-49 (discussing *Edelman*).

¹⁸⁴ *Id.* at 1149.

¹⁸⁵ *Id.* at 1144-47.

¹⁸⁶ *Id.* at 1151 (Brennan, J., concurring).

The question was, "[w]hether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. §1983."¹⁸⁷ As Justice Brennan noted, the *Pugh* opinion did not discuss section 1983. It addressed only the question whether Alabama had consented to being sued; found that it had not; and held that the state was not properly made a defendant. Justice Brennan contended that the Court decided the first half of the question, but not the second half in respect of section 1983.¹⁸⁸ This seems to accord with the view of Justice Stevens. The latter, in his dissent in *Alabama v. Pugh*, stated that nothing was accomplished by the case except the correction of harmless error. Though the state is stricken as defendant, if state officers disobey the injunction, financial penalties may be imposed on the state agencies.¹⁸⁹ He also stated: "Surely the Court does not intend to resolve summarily the issue [are States 'persons' within 1983] debated by my Brothers [Brennan and Powell] in their separate opinions in *Hutto v. Finney*"¹⁹⁰

Though there may be merit in Justice Brennan's contention that the question of the scope of section 1983 was not necessary to the opinion in *Quern*, the case did say in clear language that states are not "persons" within section 1983. It would seem unlikely that in the near future the majority of the Court will accept the contrary view.

Justice Brennan's interpretation of section 1983 was carefully and logically presented, and if adopted, would shrink the contours of the eleventh amendment close to those which Chief Justice Marshall drew in *Cohens*.¹⁹¹ For all practical purposes, the federal judicial power would extend to all cases arising under the Constitution, law or treaties of the United States regardless of the parties.

It would seem, in light of the Court's statements in *Quern*, that the above result might be simpler to accomplish by legislative amendment of section 1983, than by judicial interpretation.

SUGGESTED INTERPRETATIONS

Though the divergent political philosophies of nationalism and states-rights which existed at the time of the adoption of the Consti-

¹⁸⁷ 438 U.S. 781, 782 n.2 (1978).

¹⁸⁸ 99 S. Ct. at 1151.

¹⁸⁹ 438 U.S. at 782-83 (Stevens, J., dissenting).

¹⁹⁰ *Id.* at 783 (citation omitted) (Stevens, J., dissenting).

¹⁹¹ 19 U.S. (6 Wheat.) 264, 383 (1821).

tution still exist, by whatever name, the economic and political emotions that propagated the eleventh amendment have long since dissipated. To the extent that the amendment supports the doctrine of sovereign immunity it seems inconsistent with the fundamental policies underlying the later Civil War amendments which "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress,"¹⁹² and equally inconsistent with the "pervasive sense of nationalism"¹⁹³ underlying the Civil Rights Act of 1871¹⁹⁴ which extended protection to individuals against violation, under color of state law, of rights guaranteed by federal Constitution and law, and with the Judiciary Act of March 3, 1875¹⁹⁵ which conferred on lower federal courts general federal question jurisdiction empowering them to vindicate federal rights.

More fundamentally, the eleventh amendment is inconsistent with the theory of article III, as originally construed in *Chisholm v. Georgia*, which neither explicitly nor implicitly recognized that states had a sovereign right of immunity from suit in the federal courts.¹⁹⁶

Additionally, it seems to some that the eleventh amendment has been interpreted more broadly than intended by its drafters, and that an interpretation which precludes federal courts from vindicating federally created rights, even where a state is the transgressor, undercuts the philosophy underlying the Constitution.¹⁹⁷

Though the cases discussed above, particularly *Ex parte Young*¹⁹⁸ through its fiction of the individual defendant, have to a large extent drained the eleventh amendment of its sovereign immunity concept, *Edelman v. Jordan* has drawn a distinction between prospective relief and retrospective monetary relief. Apparently the eleventh amendment precludes the latter even though the plaintiff seeks to vindicate federally created rights.

Believing that *Edelman* draws the line at the wrong place, this article now espouses two theories, drawn from the cases, which would redraw the line and narrow the scope of eleventh amendment immunity.

¹⁹² *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

¹⁹³ *Steffel v. Thompson*, 415 U.S. 452, 463 (1974).

¹⁹⁴ Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 3 (1871) (codified at 42 U.S.C. § 1983 (1976)).

¹⁹⁵ Judiciary Act of March 3, 1875, ch. 137, §§ 1-2, 18 Stat. 470 (1875) (codified at 28 U.S.C. § 1331 (1976)).

¹⁹⁶ See notes 16-23 & accompanying text *supra*.

¹⁹⁷ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382-84 (1821).

¹⁹⁸ See notes 73-97 & accompanying text *supra*.

Citizen Suits not Precluded by the Eleventh Amendment

Justice Brennan's dissent in *Employees* took the position that *Hans*¹⁹⁹ did not extend the eleventh amendment to suits against a state by its own citizens.²⁰⁰ He believed that the Court protected the state against its own citizen's suit, which was based on contract, by invoking the ancient common law doctrine of sovereign immunity from suit without consent.²⁰¹ A careful reading of the case indicates this to be plausible and logical analysis.

On this view, essentially based on the opinion in *Cohens*,²⁰² the eleventh amendment only precludes suits against a state when brought by citizens of another state or by aliens, which is exactly what it says.

In a suit by the state defendant's own citizen the question is whether "in the plan of the convention" the state surrendered its immunity upon joining the Union. Justice Brennan explained the *Hans* result, favorable to the state, on the ground that there was no surrender of sovereign immunity by the states in respect to constitutional limits on state power, such as the contract clause, as to which no enforcement power was granted to Congress. Surrender, he stated, occurred only as to the enumerated powers granted to Congress in article I.²⁰³

Thus, on this theory, the result would have been favorable to the state in the *Hans* fact pattern even if the eleventh amendment had never been adopted.²⁰⁴

If the cause of action is based on a statute implementing an enu-

¹⁹⁹ 134 U.S. 1 (1890).

²⁰⁰ 411 U.S. 279, 313 (1972) (Brennan, J., dissenting).

²⁰¹ *Id.*

²⁰² 19 U.S. (6 Wheat.) 264 (1821).

²⁰³ See notes 120-22 & accompanying text *supra*.

²⁰⁴ This view has been briefly stated in *Ex parte New York*, 256 U.S. 490 (1921), citing *Hans* among other cases, as follows:

That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Id. at 497 (emphasis added). See also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 458 (1976) (Stevens, J., concurring) ("Even if the Eleventh Amendment does cover a citizen's suit against his own state"—expressing doubt as to the *Hans* holding) (emphasis added). Stevens cited the holding in *Cohens v. Virginia* and Brennan's dissent from *Employees*.

merated power, this theory would permit a citizen of the state to sue while a non-citizen or alien could not. Though such result might offend one's sense of balance, it would probably avoid the bar of the eleventh amendment in most federal question cases; the probability is that citizens are most likely the persons injured by state conduct. Further, the theory does apply the eleventh amendment as clearly written. The uneven result would not appear to be produced by illogic in the theory, but by the drafters of the eleventh amendment, who, though they did not so state, seemed to have had in mind only article III jurisdiction based on the character of the parties and not that based on the nature of the cause.

Federal Question Cases not Precluded by the Eleventh Amendment

Chief Justice Marshall wrote a stirring opinion in *Cohens v. Virginia*²⁰⁵ clearly detailing the purpose and spirit of the Constitution as he saw it. The Constitution, definitely nationalist in concept and origin, created a central government that had the power to directly affect the people and to bind the states, and was designed to cure the weaknesses of the Articles of Confederation. The supremacy clause made the Constitution, the law and the treaties of the United States the supreme law of the land, binding on the judges in every state. The powers ceded by the people and the states to the federal government are limited in number, but in regard to those powers the federal government is supreme; the sovereignty of the states was surrendered to that extent.

The opinion involved a writ of error to a state court in Virginia, which had convicted Cohens for selling lottery tickets in violation of a Virginia statute. The defense was that a federal statute, which incorporated Washington, District of Columbia, authorized it to create a national lottery, and that the sale of the tickets was thus justified by federal law which supersedes contrary state law.

The major point of the state's motion to dismiss the writ, for our purposes, was that it was an action against the state brought by a citizen of the state, and that a sovereign independent state is not suable without its consent.

The Chief Justice, early in his opinion, characterized Virginia's position in such a manner as to foretell its futility.

They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exer-

²⁰⁵ 19 U.S. (6 Wheat.) 264 (1821).

cised in the last resort by the Courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable.²⁰⁶

Looking first to article III, he said that it gave jurisdiction in two classes of cases. In the first class, jurisdiction depends on the character of the cause, whoever may be the parties, and comprehends all cases in law and equity arising under the Constitution, laws and treaties of the United States. This clause extends to all such cases, without exception and without regard to parties. In the second class, jurisdiction depends solely on the character of the parties, and comprehends "controversies between two or more states, between a state and citizens of another state," and "between a state . . . , and foreign states, citizens or subjects."²⁰⁷ If the parties to the suit fall within the second class the subject-matter is unimportant.²⁰⁸

The instant case was held to be within the first class. A case "arises under" not only when a plaintiff comes into court to demand something conferred on him by federal law, but may consist of a defendant's right as well. It is enough that its correct decision depends on federal law.²⁰⁹

The jurisdiction of the Court, he pointed out, was extended by the letter of the Constitution to *all* cases "arising under" it or the laws of the United States. It contains no exceptions. The argument is that a sovereign independent state can't be sued without consent, but that consent is not requisite in each particular case, and rather may be given in a general law. Then he held that in the Constitution the states surrendered that portion of sovereignty involving immunity from suit. This holding was based on the supremacy clause and the spirit of the Constitution, which requires that the federal government be capable of deciding issues arising out of its own Consti-

²⁰⁶ *Id.* at 377.

²⁰⁷ U.S. CONST. art. III, § 2, cl. 1.

²⁰⁸ "[C]ases between a State and one of its own citizens, do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last."

19 U.S. (6 Wheat.) at 390.

²⁰⁹ This view continues to the present in regard to Supreme Court review of state decisions, but as to the original jurisdiction of the district courts, the view is that a case "arises under" when plaintiff seeks to vindicate federal rights but not when the defense is based on federal law. See *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Louisville & N. R.R. v. Mottley*, 211 U.S. 149 (1908).

tution and laws so that the delegated powers cannot be set at naught by variant applications or lack of enforcement in state courts. He said, "We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."²¹⁰

The Court then turned to the eleventh amendment, which it found was adopted because of state fears that debts might be enforced against them in the federal courts.²¹¹ It was argued that this writ of error was a suit commenced or prosecuted against a state. In rejecting that argument it held that the amendment only covered cases in which an individual makes a demand against a state in the federal courts. Here, the case was commenced in the state court by the state against the individual and transferred, not to make a claim against the state, but to assert a defense against a claim made by the state. The Court continued,

But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign State." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.²¹²

The Court then disposed of the argument that Supreme Court appellate jurisdiction cannot be exercised over the judgment of a state court because the federal judiciary is completely foreign to that of a state. It held that in our federal system, where the national government is supreme to the extent of its delegated powers, such review is essential to avoid contradiction and confusion in state courts and to assure uniformity of interpretation of federal law. The judicial power to entertain jurisdiction in *all* cases "arising under" could not be effectively exercised without such power of review.²¹³

²¹⁰ 19 U.S. (6 Wheat.) at 383. There can be no doubt from this powerful decision that the Court construed article III as did the majority in *Chisholm v. Georgia*. It clearly held that the article does not have implicit within it a recognition of the common law doctrine of sovereign immunity from suit, but that such rights were surrendered on joining the Union. As to the second class of cases, *i.e.*, those dependent on the character of the parties, there is jurisdiction though the state is a defendant. *Id.* at 383-84. "The constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation." *Id.* at 343.

²¹¹ *Id.* at 406.

²¹² *Id.* at 412.

²¹³ It is interesting to note that following the strong decision supporting the jurisdiction of the Supreme Court, after argument on the merits the Court found for Virginia, interpreting

Chief Justice Marshall's opinion in *Cohens* is the basis of the second theory suggested in this article, viz. that states are subject to suit in federal courts on cases "arising under" the Federal Constitution and laws, regardless of the eleventh amendment.

A reexamination of the purposes and policies underlying the Constitution, of the function and scope of the eleventh amendment, and of the cases, suggests the soundness of the theory.

It could well be concluded that the function of the eleventh amendment was to reverse the holding of *Chisholm*.²¹⁴ In *Chisholm* the individual plaintiff sought to enforce a contract claim against the defendant state, and the Court found jurisdiction based on that part of article III covering controversies between a state and citizens of other states or of foreign states. The decision interpreted such provision as granting jurisdiction whether the state was plaintiff or defendant. The eleventh amendment provides that the judicial power of the United States shall *not* be construed to extend to a suit commenced against a state by a citizen of another state or of a foreign state.

If the purpose of the eleventh amendment was to reverse the *Chisholm* case, that was neatly accomplished. The fear of states that their debts would be enforceable in federal courts²¹⁵ was laid to rest. It appears that the amendment, in effect, turned that part of article III providing jurisdiction of all controversies between the specified individuals and states into a one-way street, covering only those controversies in which the state is plaintiff.

The amendment's language is broad, but there is little to suggest that it was intended to change the article III headland of jurisdiction covering cases "arising under" the Constitution, laws and treaties of the United States. Suits under that headland were not then commonplace, as there was no general implementing statute until the Act of March 3, 1875.

In *Cohens*, Chief Justice Marshall held that article III gave jurisdiction over *all* cases "arising under" regardless of whether a state was the defendant²¹⁶ and then found that the eleventh amendment did not apply in that case for either of two reasons: the writ of error was not a suit "commenced or prosecuted" against a state; or petitioner was neither a citizen of another state nor a foreign state.²¹⁷

the federal statute in question as not superseding the state statute. *Id.* at 440-42.

²¹⁴ "This amendment . . . actually reversed the decision of the Supreme Court." *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

²¹⁵ See note 5 *supra*.

²¹⁶ 19 U.S. (6 Wheat.) at 383, 391.

²¹⁷ *Id.* at 412-13.

The basic justification for Supreme Court jurisdiction to review state court decisions was that without such power the Court could not perform the important task enjoined on it by the Constitution, that is to determine all controversies "arising under" federal law. It would seem that the same motivation, proper performance of that duty, should be strong enough to justify entertaining all federal question suits at the federal trial court level rather than merely having Supreme Court review of state court judgments, though a state be defendant, and regardless of who is plaintiff.²¹⁸

Chief Justice Marshall's view that the eleventh amendment was limited to cases where jurisdiction is based on the character of the parties seems clearly stated in a case decided shortly thereafter, *Osborn v. Bank of the United States*,²¹⁹ where he stated, "[t]he amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens."²²⁰

If the eleventh amendment were so construed, there would be no occasion, under the present Judiciary Act, for a state to invoke the eleventh amendment in the inferior courts because there is no statute implementing that part of article III predicated on the character of the parties. The amendment's function would be to preclude suits against states by citizens of another state or by aliens in the original jurisdiction of the Supreme Court, which suits had been allowed by *Chisholm*.

An apparent major hurdle to the above suggestion is the *Hans*²²¹ case, where the specific argument made by the plaintiff was that a state has no immunity from suit if the case arises under the Constitution, laws or treaties of the United States. The Court, in clear language held to the contrary, "That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases."²²²

The court cited three cases for this proposition, *Louisiana v. Jumel*,²²³ *Hagood v. Southern*,²²⁴ and *In re Ayers*,²²⁵ referring to them

²¹⁸ According to the Court, review of state court decisions is an inadequate substitute for federal trial court determination of federal issues. See note 81 *supra*.

²¹⁹ 22 U.S. (9 Wheat.) 738 (1824).

²²⁰ *Id.* at 857-58.

²²¹ 134 U.S. 1 (1890).

²²² *Id.* at 10.

²²³ 107 U.S. 711 (1882).

as cases "arising under" the Constitution, upon laws complained of as impairing the obligation of contracts, and stating that it was not denied that they presented cases arising under the Constitution.

The first, *Jumel*, was a suit on state bonds (as was the suit in *Hans*) and the other two were in effect actions for specific performance of an agreement made by the state to accept state-issued scrip and coupons in payment of taxes. In each it was claimed that the repudiation of the state's contractual obligation was based on state constitutional and statutory provisions violative of article I, section 10 of the Constitution, which forbids any state to pass laws impairing the obligation of contracts. All three found that the actions, though nominally against state officers, were in essence actions against the state.

The nature of the actions in these three cases was discussed at length in *In re Ayers*.²²⁶ The Court there held that article I, section 10 created no direct action for impairment of contract, and that no action existed under the Civil Rights Act of 1871. It stated that article I, section 10, so far as it can be said to confer any individual rights, does so only indirectly. The only action for denial of a contract right is by action on the contract itself. If the contract is between individuals, a party is entitled to enforce it despite the invalid state provision purporting to impair it, but when the contract is between an individual and the state, the eleventh amendment precludes an action on the contract against the state.

In *Hans* the plaintiff sought to recover on state-issued bond coupons which had been repudiated by the same state constitutional provision involved in *Jumel*.²²⁷

Justice Brennan later stated: "Such a suit on state debt obligations without the State's consent was precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed."²²⁸

It would seem that by applying the standards of "arising under" as *presently* understood, neither *Hans* nor the three cases on which it relied arose under the Constitution or federal laws. The cases, as stated above in *In re Ayers*, were based on contract, whose obligation had its genesis in state law. The Federal Constitution did not create the right the plaintiff sought to vindicate; the Constitution was raised in anticipation of the defendant's defense based on a

²²⁴ 117 U.S. 52 (1886).

²²⁵ 123 U.S. 443 (1887).

²²⁶ *Id.* at 503-05.

²²⁷ 107 U.S. 711 (1882).

²²⁸ *Pardeen v. Terminal Ry.*, 377 U.S. 184, 187 (1964).

state statute or constitutional provision.²²⁹

The *Hans* "holding" that cases "arising under" federal law are precluded by the eleventh amendment can be viewed as unnecessary to the case, as the cause involved did *not* arise under federal law; the case only involved a suit to enforce a state's debt obligation.

The Court could well refuse to treat *Hans* as binding precedent on this point. In *Edelman*,²³⁰ the Court said that in dealing with a constitutional question it is less constrained by the principles of *stare decisis* than in other areas of the law, and disregarded its earlier holding that an individual was permitted to recover retroactive payments from a state under a federal statute. Also, in a related area, dealing with the scope of the Civil Rights Act of 1871, the court in *Monell*,²³¹ showed little reluctance, upon reevaluating the meaning of the statute, to overrule its prior holding that municipalities were not subject to suit under the statute.²³²

The cases decided after *Hans* generally conform to the theory that the eleventh amendment does not preclude an individual from suing a state in a federal court on a cause "arising under" federal law.²³³

The *Parden* Court emphasized that this was the first time a state's immunity claim had been raised in the Supreme Court against a cause of action expressly created by Congress.²³⁴ The *Parden* decision purportedly is based in part on the concept of consent. It appears, however, that the whole discussion of consent may have been unnecessary to the opinion.²³⁵ In his dissent in *Employees Justice Brennan*, who wrote the *Parden* opinion, while discussing

²²⁹ *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936); *Louisville & N. R.R. v. Mottley*, 211 U.S. 149 (1908); *Albright v. Teas*, 106 U.S. 613 (1882). In *Gully*, the Court stated: "Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions." 299 U.S. at 113. Justice Brennan in *Parden*, called *Hans* a commonplace suit in which the federal question did not itself give rise to the alleged cause of action against the state but merely lurked in the background. 377 U.S. at 187 n.3. He similarly referred to *Smith v. Reeves*, 178 U.S. 436 (1899), where plaintiff sought recovery of taxes paid under improper assessments, and *Ex parte New York*, 256 U.S. 490 (1921), an admiralty suit for property damage due to negligence. See also *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (holding that admiralty claims do not arise under the Constitution, laws or treaties of the United States as that phrase is used in article III and in 28 U.S.C. § 1331). Brennan similarly referred to *Duhne v. New Jersey*, 251 U.S. 311 (1920), a suit to restrain the state from enforcing the eighteenth amendment on the ground that the amendment was invalid.

²³⁰ 415 U.S. 651 (1974).

²³¹ 436 U.S. 658 (1978).

²³² See notes 143-48 & accompanying text *supra*.

²³³ *Alabama v. Pugh*, 438 U.S. 781 (1978), may be viewed to the contrary. It is, however, a brief per curiam opinion which only discussed the absence of consent by the state and apparently relied on the *Hans* "holding." See notes 186-90 & accompanying text *supra*.

²³⁴ 377 U.S. 184, 187 (1964).

²³⁵ See notes 105-13 & accompanying text *supra*.

actions under regulatory statutes founded on the commerce clause, clearly stated *Parden's* rationale: "*Parden* held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce."²³⁶ That statement does not include the concept of waiver by current state activity, but waiver of immunity by adoption of the Constitution.

The *Employees* decision, which denied jurisdiction of an individual action against a state under the Fair Labor Standards Act, did not deny that the states surrendered sovereignty when they granted Congress the power to regulate commerce. The holding was based on a finding that neither the statute nor its legislative history indicated that Congress intended to authorize individual suits against states in federal courts.²³⁷

*Edelman v. Jordan*²³⁸ made a distinction between prospective injunctive relief requiring state officers to comply with federal law, and retroactive money awards for past wrongdoing payable out of state funds. The latter type of relief was held to have made the action one against the state. Though the opinion discussed consent and waiver, jurisdiction was denied on the same basis as in *Employees*. The court found that the Social Security Act's AABD program did not disclose a congressional intent to authorize suits against states for retroactive damages.

Fitzpatrick v. Bitzer,²³⁹ went part way in holding that the eleventh amendment does not preclude actions "arising under" federal law. It found that the Title VII of the Civil Rights Act of 1964 did clearly authorize suits for retroactive damages by individuals against states for employment discrimination. The Court found it unnecessary to consider the consent or waiver concept of *Parden* because the statute was enacted by Congress under section 5 of the fourteenth amendment, which authorizes legislation to enforce its principles. It reasoned that the fourteenth amendment was intended to diminish state sovereignty, and that the eleventh amendment is limited by the enforcement provision of section 5. Thus, *Fitzpatrick* holds that the eleventh amendment does not preclude individual actions against states where the cause of action "arises under" a statute enacted to enforce the fourteenth amendment.²⁴⁰

²³⁶ 411 U.S. 279, 299-301 (1972) (Brennan, J., dissenting).

²³⁷ *Id.* at 285.

²³⁸ 415 U.S. 651 (1974).

²³⁹ 427 U.S. 445 (1976).

²⁴⁰ The question whether the eleventh amendment may have been limited by the later

The Court stated that under the enforcement provision of the fourteenth amendment Congress may provide for private suits against states which would be constitutionally impermissible in other contexts.²⁴¹ This statement, though contrary to the view being discussed in this article, that is, that *all* cases "arising under" should be outside the eleventh amendment, was unnecessary to the opinion. Further it seems inconsistent with the statement in *Ex parte Virginia*,²⁴² which the Court relied on and cited at length. There it was said,

Nor can she [a state] deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the State. It is carved out of them.²⁴³

Section 5 of the fourteenth amendment does not seem to be as unique as suggested in *Fitzpatrick*.²⁴⁴ In that part of *Ex parte*

enacted fourteenth amendment even without statutory implementation has not been decided by the Supreme Court. See, e.g., *Edelman v. Jordan*, 415 U.S. at 694. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir.), cert. denied, 432 U.S. 910 (1976), held that the two amendments must be balanced, and that the interests of both are supported when state officials are enjoined from enforcing a statute which deprives plaintiff of fourteenth amendment rights, and the states' fiscal interests are preserved under the eleventh amendment by the denial of money damages. *Fitzpatrick v. Bitzer* was said not to affect this in the absence of specific legislation under section 5. *Accord*, *Litton Indus., Inc. v. Colon*, 587 F.2d 70 (5th Cir. 1978). It has been stated that such legislation must expressly authorize suits against state governments as did the statute involved in *Fitzpatrick*. *Ahmad v. Burke*, 436 F. Supp. 1307 (E.D. Pa. 1977); *Summers v. Civis*, 420 F. Supp. 993 (W.D. Okla. 1976). See *Yuran Jen Cuk v. Lackner*, 448 F. Supp. 4 (N.D. Cal. 1977); *Hoke v. Board of Medical Examiners*, 445 F. Supp. 1313 (W.D. N.C. 1978). See also *Davis v. Passman*, 99 S. Ct. 2264 (1979), which held that a cause of action and a damages remedy were implied directly under the Constitution when the due process clause of the fifth amendment was violated.

²⁴¹ 427 U.S. at 456.

²⁴² 100 U.S. 339 (1879).

²⁴³ *Id.* at 346.

²⁴⁴ An express grant of power to Congress is not peculiar to the fourteenth amendment. Such grants are contained in the thirteenth, fifteenth, eighteenth, nineteenth, twenty-third, twenty-fourth and twenty-sixth amendments, and such grant is also a part of the proposed equal rights amendment. See *Turpin v. Mailet*, 579 F.2d 152 (2d Cir.), vacated sub nom., *City of West Haven v. Turpin*, 99 S. Ct. 554, cert. denied, 99 S. Ct. 586 (1978), modified, 591 F.2d 426 (2d Cir. 1979).

See *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979) (finding Arizona liable for copyright infringement). On reasoning similar to that in *Fitzpatrick v. Bitzer*, the court found that the copyright and patent clause is a specific grant of constitutional power that contains inherent limitations on state sovereignty. Implementing legislation is authorized by article I, § 8, cl. 8. Such legislation, intending to include states in the class of defendants, was held to abrogate the states' eleventh amendment immunity. Similarly, *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979), found that the state could be sued for reinstatement and compensation for back wages for violation of the Veterans' Reemployment Rights Act,

Virginia quoted in *Fitzpatrick*, the Court said that were it not for section 5, there might be room for argument that the fourteenth amendment is only declaratory of the moral duty of the state, but that section 5, in respect to the contents of the fourteenth amendment, performed the same function that the necessary and proper clause²⁴⁵ did in respect to the legislative powers listed in article I.²⁴⁶ This point was specifically made by the Court in *Katzenbach v. Morgan*.²⁴⁷ It was this understanding which induced Justice Brennan, in his concurring opinion in *Fitzpatrick*,²⁴⁸ to state, “[C]ongressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I. §8, cl. 3, and in §5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution.”

Hutto v. Finney,²⁴⁹ following the *Fitzpatrick* case, sustained awards of attorney’s fees against a state on the grounds that they were ancillary to prospective relief within the meaning of *Edelman*²⁵⁰ and that they were authorized by statute enacted to implement the fourteenth amendment.

The statement in *Hans*, that a state cannot be sued in a federal court by an individual on the mere ground that the case “arises under” the Constitution or laws of the United States,²⁵¹ should no longer be regarded as binding precedent. *Fitzpatrick*, despite its language, has within it, as indicated above, the basis of a holding that the eleventh amendment does *not* preclude actions against states in federal courts if the cause of action against the state was created by a statute implementing one of the specifically enumerated powers of Congress.²⁵² Even more broadly, it should be held, as Chief Justice Marshall believed,²⁵³ that the eleventh amendment

38 U.S.C. §§ 2021-26 (1976), a statute which created such cause of action in an employee, intending to abrogate the state’s eleventh amendment immunity, where the statute was based on the war power and enacted under the necessary and proper clause.

²⁴⁵ “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

²⁴⁶ *Fitzpatrick v. Bitzer*, 427 U.S. at 455.

²⁴⁷ 384 U.S. 641 (1966). “By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. 1, § 8, cl. 18.” *Id.* at 650. The Court pointed out in footnote 9 that earlier drafts of the proposed amendment employed the “necessary and proper” terminology to describe the scope of congressional power, and that the substitution of the “appropriate legislation” formula was not thought to diminish the scope of the power.

²⁴⁸ 427 U.S. at 458 (Brennan, J., concurring).

²⁴⁹ 437 U.S. 678 (1978).

²⁵⁰ See notes 137-40 & accompanying text *supra*.

²⁵¹ See note 222 & accompanying text *supra*.

²⁵² See *Peel v. Florida Dep’t of Transp.*, 600 F.2d 1070, 1080 (5th Cir. 1979).

²⁵³ See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

limited the judicial power only in respect to that portion based solely on the character of the parties; thus it does not preclude jurisdiction of actions "arising under" federal law even though a state is the defendant.

CONCLUSION

The premise of this article is that the concept of sovereign immunity, in the sense of immunity of the states of the Union from suit in the federal courts without their consent, was not recognized by the Constitution as originally drawn; and that the eleventh amendment is narrow in scope, and limits only that portion of the judicial power set forth in article III authorizing jurisdiction over cases based solely on the character of the parties.

The Court, realizing that an expansive interpretation of the eleventh amendment would make the form of government conceived by the Framers of the Constitution unworkable, and would effectively deprive individuals of rights created in them by Constitution or federal statute, has reduced the area of state immunity.

The major inroad on the scope of the eleventh amendment is based on the fiction that an action to restrain a state officer from enforcing an unconstitutional state statute is not an action against the state, but against the officer as an individual. This device has developed well beyond the prohibition of future illegal conduct, to the extent that it permits mandatory orders requiring a state, through its officers, to perform its constitutional obligations. Though such injunctions sometimes have vast pecuniary results to a state, they do not violate the eleventh amendment provided that future state expenditures are but ancillary to future compliance with the Court's order.

Thus, the protection remaining to the states was limited to immunity to suits for retroactive damages. Inroads, however, have been made even into this protected zone.

The Supreme Court has held that where Congress created a cause of action by statute enacted to implement one of its enumerated powers, it could condition state activity within the area of statutory coverage on amenability to suit in the federal courts. Such condition allows money damage actions against states which, by activity in the area, may be said to have consented to suit.

Also, the Supreme Court has held that Congress may impose money damages on states in the federal courts in accordance with a statute enacted under the enforcement provision, section 5, of the fourteenth amendment.

This article has suggested that even greater incursions be made by adopting the two following interpretations of the eleventh amendment, each dealing with cases "arising under" the Constitution, laws or treaties of the United States. First, interpret the eleventh amendment, in accordance with its terms, to preclude suits against states by citizens of another state and by citizens of a foreign state, but not to preclude those suits by citizens of the same state which are within the judicial power because they arise under a federal statute implementing an enumerated power. Second, interpret the eleventh amendment as a limitation of the judicial power set forth in article III, only with respect to the headland based upon the character of the parties, viz., controversies "between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects," but not as a limitation of the judicial power to determine cases arising under federal law, regardless of who the parties are.

Court adoption of either of these approaches will place the concept of sovereign immunity from suit in federal courts close to the position it had at the adoption of the Constitution, as interpreted by the majority of the Supreme Court in *Chisholm*, and to the position it had after the adoption of the eleventh amendment, as interpreted by Chief Justice Marshall in *Cohens*.

The second approach will come closer to the goal and be more comprehensive in scope and in application because it will permit suits against states regardless of the citizenship of the individual plaintiff, and whether the cause arose under a statute implementing an enumerated power, or directly under the Constitution.

If this theory is applied, the eleventh amendment will still serve an important function. It will prevent Congress from granting jurisdiction to inferior courts and will prevent the Supreme Court from exercising its original jurisdiction over actions against states based solely on the ground that the plaintiff is a citizen of another state, or of a foreign state. The eleventh amendment will then be limited to the function for which it seems to have been originally intended.