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STATE SOVEREIGN IMMUNITY IN SUITS TO ENFORCE FEDERAL RIGHTS

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I. INTRODUCTION

A citizen's ability to obtain enforcement of protective federal constitutional and statutory provisions often depends on his[1] right to sue a state or its officials. In many instances, however, the doctrine of state sovereign immunity precludes relief. Most states forbid suits against themselves in state court except in limited classes of cases in which consent to suit has been established by statute or by court decision.[2] Where the source of the claimed right is in the federal law such consent is usually absent.

State courts, contrary to a literal reading of the supremacy clause,[3] are not compelled to enforce federal rights except to the extent they

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1. I use the masculine pronoun rather than the feminine, or some substitute, to refer to persons of either sex in accordance with the older grammatical practices, with apologies to those of both sexes who may be offended, and with the hope that my efforts towards affirmative action in other areas may in some measure make up for my difficulty in adjusting to the new grammar.

2. Some progress has been made in eliminating sovereign immunity defenses by state legislative and judicial action. The modifications have been piecemeal, however, and in almost all states general immunity remains. *See* K. DAVIS, ADMINISTRATIVE LAW, §§ 25.01-.02 (3d ed. 1972).

3. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary not withstanding."

arise in connection with state law claims.[4] Moreover, although the federal claim may otherwise warrant adjudication, state courts are not obliged to ignore state immunity laws.[5] Consequently, a citizen precluded from suit in state court must attempt to vindicate his rights in a federal forum.

State immunity, however, is also an obstacle to suit in federal court. The eleventh amendment limits access to the federal courts in those cases in which a citizen seeks relief from a state other than his own:

> 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.[6]

In *Hans v. Louisiana*,[7] the Supreme Court held that state sovereign immunity also precludes federal court suit by a citizen against his own state. Although the source of immunity is not the same, *Hans* implies the same breadth of immunity in suits by a state citizen as the eleventh amendment requires in suits by a non-citizen.[8] Clearly, suits against states on non-federal claims are barred. In addition, several recent cases have denied relief to citizens seeking federal court enforcement of federal rights.[9] Consequently, a thorough review of the doctrine of state sovereign immunity, as embodied in the eleventh amendment and in *Hans*, is necessary.

The language of the eleventh amendment is broadly prohibitive. Section II of this Article concludes it is more prohibitive than originally intended. Read literally, the amendment precludes all suits against states, including both suits arising under the federal Constitution and laws, and Supreme Court review of state court cases in which a state and a non-citizen are opposing parties.[10] Under the strict terms of the amendment, there is no forum in which a non-citizen can enforce his federal rights against a state, unless the state consents to suit by establishing jurisdiction in its own courts or by waiving its immunity. Similarly, *Hans* would forbid both review of state court cases and original

4. *See* Testa v. Katt, 320 U.S. 386 (1947).

5. *See* Musgrove v. Georgia R.R. & Banking Co., 335 U.S. 900 (1949) (per curiam).

6. U.S. CONST. amend. XI.

7. 134 U.S. 1 (1889).

8. *See id.* at 15.

9. *See* notes 175-90 *infra* and accompanying text.

10. *See* text accompanying note 6 *supra*.

federal jurisdiction of suits against a state brought by a citizen of the same state.

State sovereign immunity, however, has not been strictly observed. This Article attempts to clarify the doctrine and its exceptions in its application to federal question cases. First, section II identifies the concept of state sovereign immunity. Section III discusses the liability of state officials, the doctrine principally used to avoid state immunity. Although the cases in section III involve non-federal claims, they are important because of their pervasiveness in the non-federal area and because they have often been applied without close analysis in federal question cases.[11]

Section IV, the heart of this Article, discusses the application of the doctrine of state sovereign immunity in federal question cases. The conclusions in section IV are based upon three recent Supreme Court decisions which hold that the Constitution gives Congress specific legislative powers which allow it to override state immunity.[12] Because the cases in which this power has been recognized were all filed by a citizen against his own state, it is unclear whether the Court would recognize

11. *See* notes 86-91 *infra* and accompanying text.

12. The recognition of congressional power to create state liability has, in some instances, transformed the Supreme Court's role from that of constitutional to statutory interpreter. In the first of these cases, Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), the Court held that although Congress had the power to extend the benefits of the Fair Labor Standards Act to certain state employees, and had done so, it had not clearly expressed the intention to subject the states, or their officials, to federal court suit for back wages and penalties. Therefore, the suit against the state and its officials was barred. The following year in Edelman v. Jordan, 415 U.S. 651 (1974), the Supreme Court held that although a class action could be brought in federal court against state officials for failure to make timely payments of welfare benefits as required by federal law, the statutes authorized injunctive relief only. The claimants were thus barred from recovering the back benefits due them. In this case it is not clear whether the Court was holding that the statutes did not allow the recovery, or that if the statutes did allow recovery they would be unconstitutional. *See* notes 206-22 *infra* and accompanying text.

Section V of the fourteenth amendment, which was enacted subsequent to the eleventh amendment, specifically gives Congress the power to enact legislation appropriate and necessary for the enforcement of the amendment's first section. Because section I of the fourteenth amendment specifically applies to states, one may make a strong argument that the fourteenth amendment created an exception to the eleventh amendment. The Supreme Court, after having successfully avoided this issue for over 100 years, held, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that the fourteenth amendment overrides the eleventh and allows Congress to enact legislation that creates state liability to citizens for damages that result from sex discrimination. *See* notes 202-05 *infra* and accompanying text.

the same congressional power if the suit were filed by a non-citizen and thus fell within the specific terms of the eleventh amendment.[13]

There is confusion in identifying the doctrine of state sovereign immunity and courts have experienced difficulty in conforming precedent to varied factual situations. If the cases are carefully analyzed, however, rules useful to both judges and lawyers may be derived. The doctrine of state sovereign immunity has a definite, though limited, place in the constitutional scheme. In a federal system where the Constitution itself denies the states many attributes of sovereignty, some degree of immunity is necessary to protect state autonomy. This same federal system, however, allows Congress to enact legislation that creates liability on the part of states and their officers. Abstract concepts relative to the immunity of sovereigns should not be used to test the validity of this legislation. Instead, the exercise of congressional power under specific constitutional provisions should be examined in light of the language and purpose of such provisions and should be balanced against the protection of state activity afforded by other constitutional provisions, such as the tenth amendment. Until recently, the Court had not applied the eleventh amendment to federal question cases, although it had avoided doing so only by narrowing the definition of "federal question."

II. The Concept of State Sovereign Immunity

Whether the eleventh amendment incorporates some notion of sovereign immunity of states into the Constitution or is simply a bar to federal court jurisdiction has not been resolved.[14] Nevertheless, there

13. To the extent that such legislation is based on equal protection or denial of due process, we can conclude that Congress may create state liability to suit by "any person" whether citizen or non-citizen of the defendant state. If the legislation is based on abridgement of "privileges and immunities of citizens of the United States," reassessment of the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), might be necessary in order to determine whether Congress has the power to create liability of states in suits by non-citizens.

14. The cases are in such contradiction that the question may not be capable of resolution. In a recent case, Justice Thurgood Marshall viewed the restriction as an absence of jurisdictional power to hear such cases in federal courts rather than as a restriction related to common law sovereign immunity. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 293-94 (1973) (concurrence). In dealing with the cases holding that the state may consent to such suits, he is reduced to stating:

> [I]t may be that the recognized power of States to consent to the exercise of federal judicial power over them is anomalous in light of present-day con-

are indications that courts have identified the amendment with the common law doctrine although the term "sovereign immunity" does not appear therein.[15]

At the time the United States Constitution was ratified, English law recognized the doctrine of sovereign immunity in a broad, abstract form.[16] It was narrowly applied, however, allowing the Crown, at its discretion, to protect the Kingdom from grave injury. By the eighteenth century, the doctrine was rarely invoked, emphasizing the extraordinary nature of the danger that activated its use and was its justi-

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cepts of federal jurisdiction. Yet if this is the case, it is an anomaly that is well established as a part of our constitutional jurisprudence.

Id. at 294 n.10.

The recent decision in Edelman v. Jordan, 415 U.S. 651 (1974), on the other hand, rests on common law sovereign immunity because the case was a suit against a state by its own citizen and, therefore, not within the specific proscription of the eleventh amendment. The plaintiffs were allowed to obtain prospective relief against a state, relief which they could not have received if there had been a complete jurisdictional bar. In dealing with the difficult question of waiver by the state's appearance and failure to raise the immunity defense earlier in the proceedings, Justice Rehnquist, for the majority, stated: "[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.

15. Perhaps the strongest indication is in Hans v. Louisiana, 134 U.S. 1 (1890), where the Court held that suits against a state by its own citizens were also barred. Because this conclusion clearly cannot be based on a literal reading of the eleventh amendment, it must be based upon the immunity granted to the sovereign under the English common law. *See* note 16 *infra* and accompanying text.

16. No one has improved upon Professor Jaffe's exploration of the status and meaning of the doctrine of sovereign immunity in English law at the time of the enactment of the American Constitution. He concluded:

> [T]he so-called doctrine of sovereign immunity was largely an abstract idea without determinative impact on the subject's right to relief against government illegality . . . . Perhaps the major effect of the doctrine of sovereign immunity was procedural. Claims in form "against the Crown" were to be pursued by petition of right. These included certain of the claims involving property in which the Crown had an apparent interest, but by no means all of them. The *monstrans de droit* at common law, the petition in the Exchequer, bills, it may be, in Chancery, and the prerogative writs might determine claims to real and personal property, and to money in the Treasury. Contracts could be enforced by petition of right. There was a wide range of actions for damages against officials. Officials who acted in excess of jurisdiction or refused to act would be reached by prerogative writs. The one serious deficiency was the nonliability of government for torts of its servants . . . . The decision between writ and petition was not made as the consequence of a fiction: it was recognized that in either case the outcome bore on government.

Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 18-19 (1963). Jaffe's reference to fiction is made in order to refute the contention that officer liability was merely a legal fiction created to allow liability against the state in fact, although against the officer in name.

fication. Similarly, analysis of state sovereign immunity cases in the United States Supreme Court indicates that the doctrine is properly related to pragmatic considerations of political power and structure.

A. *Article III Debates*

The supremacy clause[17] clearly removes some attributes of sovereignty from the states. The Framers, however, relied on the continued existence of some state immunity in defending article III against predictions that allowing suits against the states for Revolutionary War debts would prove disastrous to the new nation.[18] Most of this debt was represented by inflated notes and currency issued by the states and subsequently purchased by speculators.[19] The debate, therefore, focused specifically on whether a state, presumably refusing to be sued in its own court, could be sued in federal court on its debts. The proponents of ratification often used broad language in formulating their article III defenses. Because state liability in other circumstances was not at issue, however, they probably did not intend as broad a construction of their words as has subsequently been suggested. Alexander Hamilton stated:

> It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion, which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent.* This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . [T]here is no colour 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 compulsive force. They confer no right of action, independent of the

17. *See* note 3 *supra.*

18. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 30-34 (1972).

19. *Id.* at 33.

> sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident that it could not be done, without waging war against the contracting state: and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[20]

Although Hamilton's argument may be interpreted to mean a state can never be sued in federal court without its consent, a narrower reading is also possible: A state can not be sued in federal court without its consent on a debt contracted and existing solely as a matter of state law. Hamilton recognized the surrender of some sovereignty by the states under the Constitution when he noted that "unless . . . there is surrender of this immunity" from suit on state debt, it would remain. The supremacy clause ensures a partial surrender of state sovereignty and prevents states and their citizens from freely ignoring federal law. Hamilton's words, therefore, logically mean that because claims on contract debts arise solely under state law, absent a valid federal constitutional or statutory question, there is no reason for this claim to be originally litigated in or reviewed by a federal court.

James Madison also argued that the article III provision for federal judicial power in controversies between a state and citizens of another state[21] was limited to cases in which a state sued a citizen of another state, because "it is not in the power of an individual to call a state into court."[22] He may not have viewed the states as immune from suit on federal questions, however, because he also stated:

> The first class of cases to which its [federal court] jurisdiction extends are those which may arise under the Constitution; and this is to extend to equity as well as law. It may be a misfortune that, in organizing any government, the explication of its authority should be left to any of its coordinate branches. There is no example in any country where it is otherwise. There is a new policy in submitting it to the judiciary of the United States. That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these

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20. THE FEDERALIST No. 81, at 601-02 (J. Hamilton ed. 1869).

21. U.S. CONST. art. III, § 2. cl. 6.

22. J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 533 (2d ed. 1836).

> restrictions. They may involve equitable as well as legal controversies. With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to.[23]

John Marshall not only repeated Madison's argument with respect to state suability,[24] but also defended the federal question jurisdiction in the same document:

> Is it not necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?[25]

Thus, the Framers understood the concept of sovereign immunity to mean the states could not be sued against their will on their own contractual obligations in either federal or state court. They agreed, however, that the states lost certain rights of sovereign governments under the terms of the Constitution. This interpretation is consistent with the conclusion reached by Professor Nowak[26] in reconciling the early view of Professor Warren,[27] that suits against states were not at all contemplated, with the more recent view of Professor Jacobs,[28] that no state sovereign immunity remained after ratification. Professor Nowak argues that suits against states on their debts were forbidden, but that no consensus was reached on the status of immunity in other circumstances.[29]

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23. *Id.* at 532.

24. Marshall stated:

> With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. . . . The intent is, to enable states to recover claims of individuals residing in other states.

Id. at 555-56 (emphasis original).

25. *Id.* at 554.

26. 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, 1423-28 (1975).

27. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 9 (1922).

28. C. JACOBS, *supra* note 18, at 40.

29. Nowak, *supra* note 26, at 1428. Nowak goes on to argue that the delegates understood that states retained sovereign immunity against actions implied by the judiciary, but not those provided by Congress. This is a popular explanation of recent Supreme Court decisions in the area. *See* Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About*

B. *Conceptual Difficulties*

Even before ratification, during the period of the Articles of Confederation, the states were subject to a federal system and division of powers alien to the absolute power exercised by a true sovereign. A narrow theory of state immunity is therefore logical. Moreover, in addition to the supremacy clause, the constitutional guarantee of a republican form of government in each state is inimical to the concept of sovereign rule. Other constitutional provisions, forbidding states from entering into treaties, coining money, laying duties on imports or exports, or engaging in war, deny the states the comprehensive power base of a sovereign entity.[30]

In defining the concept of a state's sovereign rights, almost every clause in the Constitution can be taken to have some bearing on the question of how much "sovereignty" was surrendered or retained by the states. Nevertheless, the most immediate focus of attention after ratification was again article III, section 2 of the Constitution—both the clause extending the federal judicial power to "controversies . . . between a state and citizens of another state" and the distributive clause.[31] The latter provision grants original jurisdiction to the Supreme Court in specified cases, including those "in which a state shall be a party," and appellate jurisdiction in all other cases to which the federal judicial power extends with exceptions permitted by congressional regulation. Because Congress did not authorize federal question jurisdiction, ex-

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Federalism, 89 HARV. L. REV. 682, 693-94 (1975). It implies, however, that the framers had a sophisticated view of judicial implication. More likely, it was felt then, as now, that the proper function of the judiciary is to interpret legislation to determine whether its draftsmen intended to create a cause of action. Hamilton, in The Federalist No. 80, justified federal jurisdiction in diversity suits on the basis of the need to effectuate the privileges and immunities clause. Nowak attempts to harmonize Hamilton's rationale for diversity jurisdiction with his remarks from The Federalist No. 81. (*See* text accompanying note 20 *supra*.) Nowak states that together they make sense "only if Hamilton intended that only Congress should have the power to grant jurisdiction over cases against the state." Congress, however, is not mentioned in the passages cited. Moreover, Hamilton specifically referred to all of the diversity cases, not just those in which Congress should have created jurisdiction; this included cases arising under state law. In The Federalist No. 80, Hamilton was probably referring only to diversity cases 1) by a state against another state or, 2) by citizens of one state against citizens of another state. To the extent that Hamilton recognized suit against a state by a citizen of another state, he was simply inconsistent with what he said in No. 81.

30. Attributing traditional sovereignty to states seems most anomalous in the case of those 37 states that did not form part of the original union, but were instead either created out of pre-existing federal territory, purchased, or conquered.

31. U.S. CONST. art. III, § 2, para. 2.

cept briefly,[32] for almost 100 years, the Court did not have many opportunities to consider the relationship of the clause granting federal courts jurisdiction in controversies between a state and a citizen of another state and the clause granting federal court jurisdiction in all cases "arising under this Constitution" and "the laws of the United States."[33] One reason for Congress' failure either to create statutory federal question jurisdiction or to enact substantive federal legislation that would create direct liability of states, was that the Federalists had pushed central government to its limits. Not until the constitutional aftermath of the Civil War, which conclusively established the federal government's supremacy, was further encroachment on state government politically possible.

C. *The Eleventh Amendment*

The question of a state's suability first arose in connection with a suit in which no federal question was raised. In *Chisholm v. Georgia*,[34] the United States Supreme Court held that an ordinary suit on a contract, brought against a debtor state by a creditor citizen of another state, could be filed as an original action in the Supreme Court under article III and section 13 of the Judiciary Act of 1789.[35]

The Court paid little attention to the statutory basis of jurisdiction. The language of the statute deserves some attention, however:

> *And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.[36]

The reasonable meaning of these words is that in all but two instances the Supreme Court had exclusive jurisdiction over cases in which

32. Act of Feb. 13, 1801, ch. 4, § 11, 2 Stat. 92 (repealed by Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132).

33. U.S. CONST. art. III, § 2.

34. 2 U.S. (2 Dall.) 419 (1793). Although there is some mention of the contract clause by Justice Wilson, *id.* at 461, he rests his decision on the power to hear suits between a state and citizens of another state. *Id.* at 466. Justice Wilson wrote the most extensive of the seriatim opinions. None of the other members of the Court suggested constitutional jurisdictional grounds other than the character of the parties.

35. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (current version at 28 U.S.C. § 1251 (1970)).

36. *Id.*

a state was a party. The second stated exception occurred when the suit was between a state and a citizen of another state, as in *Chisholm v. Georgia,* in which case the statute provided the Court with either original or appellate jurisdiction. The language of the first stated exception, suit between a state and its own citizen, can be interpreted to mean either that the Supreme Court had only appellate jurisdiction or that it had no jurisdiction at all. The former is more likely; if the Court had no jurisdiction, there would have been no point in specifying suits between a state and its own citizens or in making those cases an exception to the exclusive jurisdiction of the Supreme Court.

The statute is important because it indicates what Congress at that time believed were the constitutional restrictions on its power to create federal court jurisdiction. Suits between a state and its own citizens are not elsewhere included in article III and, therefore, it appears that Congress contemplated suits against states where federal judicial power otherwise extended—specifically, in suits which might arise under the Constitution and federal laws.

As a consequence of the Court's practice of having each judge issue his own opinion, there is no majority opinion in *Chisholm.* Justice Wilson, one of the chief authors of article III,[37] wrote the principal opinion and found authority to hear the case in the relevant constitutional and statutory provisions. He perceived the central issue to be whether, despite the inclusive constitutional language, the states, because of their sovereignty, were immune from suit by citizens of other states. In our republican government, Wilson concluded, sovereignty resides in the people of the nation and not in the states. The people have the power to vest judicial authority over the states in the courts of the general government and once they exercised that power (as he found they had done in article III of the Constitution), sovereignty may not be claimed by the states as a basis for their immunity from suit by a United States citizen.[38]

The lone dissenter, Justice Iredell, charged that there was no federal statutory jurisdiction and implied there might also be no constitutional power. Iredell's interpretation of section 13 was more clever than convincing, however. According to his reading of this section, the jurisdic-

37. *See* C. JACOBS, *supra* note 18, at 18, 25.

38. 2 U.S. (2 Dall.) at 449-50. *Accord,* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-04 (1819).

tion of the Supreme Court was "original but not exclusive," and, therefore, it was concurrent. Because Congress had not otherwise provided jurisdiction in the lower federal courts, and because the states had no such jurisdiction, there was no jurisdiction with which the Supreme Court's could be concurrent; therefore, the Court had no jurisdiction.[39] A logical reading leads to the contrary conclusion that Congress had recognized lower federal court jurisdiction in at least some cases—conceivably only in suits arising under the federal constitution and laws—involving states and citizens of other states. In any event, Congress might also have been providing for appellate jurisdiction in cases in which a state either sued a citizen of another state in another state court, or consented to be sued in its own court.

Professor Nowak concedes that the eleventh amendment was enacted to reverse *Chisholm*. He argues that the amendment was intended as a bar only to judicially created causes of action, however, and not to actions authorized by Congress. He believes none of the Justices in *Chisholm* found congressional authorization for Supreme Court jurisdiction of a suit against the state of Georgia.[40]

Professor Nowak's reading of the case is oversimplified. Attorney General Randolph, in argument, recognized the need for congressionally authorized jurisdiction and relied on section 13 of the Judiciary Act to satisfy this requirement.[41] In addition, Justice Blair, criticizing that portion of Iredell's dissent which is premised on the Court's inability to enforce execution of a judgment against a state, stated that although this reasoning has some force in the construction of "doubtful Legislative Acts," it is misused "against the clear and positive directions of an Act of Congress and of the Constitution."[42] The clarity of the jurisdictional grant, amplified by Justice Iredell's illogical dissent,[43] is the best explanation for the failure of other Justices to discuss section 13 in their opinions.

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39. 2 U.S. (2 Dall.) at 436-47 (dissenting opinion).

40. *See* Nowak, *supra* note 26, at 1431.

41. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 420 (1793).

42. *Id.* at 450-51.

43. A stronger argument for the state could have been based on the Rules of Decision Act, ch. 20, § 34 of the Judiciary Act of 1789, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1970)), which provides: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

Under this statute, state liability to suit in cases that might be brought in federal

The important fact in *Chisholm* with regard to the interpretation of the eleventh amendment is that although Congress implemented the constitutional provision that created jurisdiction based on the parties, no federal constitutional or statutory question arose in the case. The eleventh amendment therefore, in reversing *Chisholm*, decreed as a matter of constitutional law that Congress could not provide federal court jurisdiction in suits against a state by a citizen of another state on a state law contract debt. It is at least arguable that the amendment was intended to have no application to federal question suits against a state by a citizen of another state.

It is almost certain that at that time non-federal question suits against a state brought by a citizen of the same state were also prohibited simply because they were not recognized under article III. Arguably, the drafters of the eleventh amendment deliberately omitted a prohibition of suits against a state by its own citizens because the language is otherwise so broad. It is also possible to construe the amendment as precluding federal question suits against a state brought by a non-citizen, but not those brought by a citizen. A federal question suit by a citizen against his own state was allowable under either of these interpretations.

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court, for whatever reason, would have been determined according to state law, in the absence of a federal claim affecting the issues. This argument was not raised in *Chisholm v. Georgia*, perhaps for the simple reason that Georgia did not choose to appear and be heard.

The subsequent appearance of counsel for the state, continuance, and protracted settlement of the claim by the state, might lead to the inference that *Chisholm v. Georgia* was to some extent friendly or contrived litigation. For a description of the facts leading up to and following the decision, see Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 222-24 (1968).

More likely, it was not argued that the Act applied because Georgia had enacted a statute that waived her immunity from suit. *See* Justice Iredell's dissent, 2 U.S. (2 Dall.) at 434-35.

Although the federal court might have had jurisdiction of the parties and subject matter under this line of reasoning, it would have had to dismiss the suit under any controlling rule of state law that provided for immunity of the state. The rule, however, would not necessarily have superseded federal law with respect to federal question claims since the states were subject to federal law under the supremacy clause. Because of the rapid proposal and ratification of the eleventh amendment, the question of whether state liability to suit could to any extent be avoided by the Rules of Decision Act did not arise again. (*See* C. JACOBS, *supra* note 18, at 65-67). Nevertheless, the Supreme Court later held the question of state consent to suit to be answered at least in part by reference to the law of the state. Smith v. Reeves, 178 U.S. 436, 441 (1889). *Cf.* Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975) (whether state university is arm of state or independent political subdivision for eleventh amendment purposes is determined according to state law.)

III. OFFICER LIABILITY

A. *Osborn v. Bank of the United States*

The primary method of enforcing rights against a state has been by suit against a state officer. Although courts recognize official immunity as a defense where certain acts are within the officer's discretion, officer suability has been used for more than 150 years to avoid the prohibitive language of the eleventh amendment.

The Supreme Court developed the doctrine of officer liability,[44] in part, to postpone deciding two important issues: First, whether the eleventh amendment precluded federal question jurisdiction in suits against states and, second, whether suits involving states were, as the distributive clause suggests, exclusively within the Supreme Court's original jurisdiction.[45]

In the leading case, *Osborn v. Bank of the United States*,[46] the Supreme Court held the eleventh amendment a bar to suit only where the state was actually named as a party-defendant. The Court permitted suit and awarded relief against state officials who seized money and notes from the Bank of the United States under the provisions of a state statute. The action was illegal because the statute unconstitutionally authorized a confiscatory tax on the Bank.

Chief Justice Marshall, for the Court, refused to extend eleventh amendment immunity to state officers.[47] Part of the reason for granting relief against the officer was the state's unavailability; the state, if suable, may have been a necessary party.[48] Because the state was not amenable to suit, however, the Court focused on whether relief could properly be granted against the officers. Marshall did not regard this as a constitutional issue: The eleventh amendment, he concluded, only bars suits in federal court brought against a state and does not similarly protect state officials.[49] Although by using this approach the state may escape liability if the officers are not held responsible, plaintiffs receive

44. In fact, the doctrine of officer liability has its basis in the common law. *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

45. *See* notes 96-102 *infra* and accompanying text.

46. 22 U.S. (9 Wheat.) 738 (1824).

47. *Id.* at 857-59.

48. *Id.* at 847.

49. *Id.* at 851-59.

a determination on the merits rather than a dismissal for want of jurisdiction.

It is unclear whether the rule determining officer liability in *Osborn* derived from federal or state common law. Following state law is dangerous because of the state's ability to create immunity for their officers by statute or court decision. Perhaps this explains why Marshall devoted so much attention to the establishment of a federal right entitled to supremacy clause protection in *Osborn*,[50] even though he did not hold that the existence of a federal question alone was sufficient to override eleventh amendment immunity. The existence of a federal question justified development of federal common law to determine officer liability. The establishment of a federal right also avoided the Rules of Decision Act which required the federal courts to follow state law unless federal law clearly provided otherwise.[51] If for no other reason, the development of federal common law officer liability is appropriate in federal question cases to preserve a remedy for federal rights.

B. *Louisiana v. Jumel*

The *Osborn* rule of officer liability was followed[52] and expanded to

50. *Id.* at 817-28.

51. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (current version at 28 U.S.C. § 1652 (1970)) *see* note 43 *supra.*

Although in Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), this Act was held to require federal courts to follow only state statutes, the original intent, at least partially restored in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), was to incorporate state common law precedent also. *See* Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923). There is no explicit suggestion that this was a factor in the *Osborn* decision.

52. The one case sometimes cited to the contrary is Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it had been conceded that federal jurisdiction existed under the admiralty laws. The circuit court had held that the libellant, Madrazo, could recover a group of slaves from the Governor of Georgia along with the proceeds from a sale of some of the group. The Governor had taken possession through a Georgia statute that permitted him to seize slaves illegally imported into the United States. Madrazo had originally owned a ship and its cargo of slaves, but both had been seized by a pirate and illegally brought into Georgia territory. Madrazo, who had already recovered his ship in a libel proceeding in district court in South Carolina, filed a separate libel for the cargo in the Georgia district court. The Governor had filed a separate proceeding to establish his ownership of the slaves. His case and Madrazo's case were consolidated. On appeal, the circuit court dismissed the Governor's claim and directed restitution to Madrazo on his claim.

The Supreme Court reversed both rulings despite a strong dissent by Justice Johnson. The case is sometimes cited to show that Marshall had repudiated the holding in *Osborn*

include suit on state obligations.[53] A state interest in the property subject to suit was insufficient to divest a court of jurisdiction in an action against a state officer.[54] In *Louisiana v. Jumel*,[55] however, the Supreme Court reversed this expansive trend by finding no liability on the part of officers who complied with state legislative and constitutional provisions that deprived state bondholders of their contract rights.[56]

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about being bound by the named party. The language of Marshall's opinion, however, does not support this view. Marshall pointed out that the Governor was sued and brought suit only in his official capacity and that no one was sued individually:

> But were it to be admitted, that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress; and has done nothing in violation of any law on the United States.
>
> The decree is not to be considered as having been made in a case in which the governor was a defendant, in his personal character; a decree against him in that character could not be supported.

Id. at 124.

It is clear that the case was not dismissed because it was considered to be against the state, but only because it had been considered to be against the individual officer, and he had committed no actionable wrong.

53. In Davis v. Gray, 83 U.S. (16 Wall.) 203 (1873), the Governor of Texas was enjoined from disturbing a railroad's possession of property previously granted by patent. The Texas constitutional amendment under which the Governor had acted, was held to be a violation of the contract clause, U.S. CONST. art. 1, § 10, even though the railroad had not completed all the improvements necessary to finalize the patent. The Court stated:

> Where the State is concerned, the State should be made a party if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officer of the state in all respects as if the State were a party to the record.
>
> . . . In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.

Id. at 220.

In Board of Liquidation v. McComb, 92 U.S. 531 (1876), the Supreme Court enjoined state officers from diluting a state bond issue despite subsequent legislation that authorized issuance of more bonds than originally called for. The new legislation was held to violate the state's contractual obligations to the bondholders under the original issue. Both *McComb* and *Gray* granted relief through enforcement of the state contracts.

54. In United States v. Peters, 9 U.S. (5 Cranch) 115 (1809), the Court held the heirs of a deceased treasurer of Pennsylvania could be sued in federal court and required to disgorge funds that were acquired by the treasurer in his official capacity from the sale of a vessel libelled as a prize by the state. The basis of the suit was plaintiff's prior claim to the vessel acquired by an act of the Continental Congress.

55. 107 U.S. 711 (1882).

56. The first mention of the possible denial of liability because of its effect on

The majority attempted to follow the concepts laid down in *Osborn*. The Court did not say the officer enjoyed the immunity of the state, which would have required dismissal for lack of jurisdiction, but refused instead to find individual liability. Although the state could not be sued, it had violated its contract obligations and was therefore an indispensable party. Liability to the plaintiff-bondholders did not result from any wrongdoing on the part of the officers but was effected by the state through its legislative change in the law. Nevertheless, Justice Harlan's dissent correctly characterized the majority opinion as holding that the eleventh amendment barred suit against the officer because of the state's involvement.

Chief Justice Waite, in his opinion for the Court, carefully articulated those factors which had led in *Osborn* to individual officer liability, but could not justify a different result based solely on distinctions in official behavior. He was ultimately persuaded by the political questions raised when a federal court interferes with state legislative prerogatives:

> The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done.[57]

Furthermore,

> The remedy sought, in order to complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and

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the sovereign was in United States v. Lee, 106 U.S. 196 (1882), a suit against a federal officer. Jurisdiction was upheld and relief granted in favor of the heirs of Robert E. Lee who recovered possession of Lee's Arlington estate which had been bought by the United States in what was held to be an invalid tax sale. The action of ejectment was held to lie. Although the *Lee* case is still in line with the *Osborn* principles, the dissenting opinion of Justice Grey, joined by three other Justices, suggested that this was a case so directly affecting the property right of the sovereign that suit against an officer should be barred. This was the first time such an opinion was expressed. The defendant was not a state, however, but the United States, which has a stronger claim to the rights of a sovereign than would a state.

57. 107 U.S. at 721.

> disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power.[58]

The state's legislative repudiation of the bond obligation significantly influenced Justice Waite's decision. Although previous cases prohibited officer actions that deprived citizens of rights under state contract, *Jumel* recognized the danger to the federal system in allowing the state taxing power to be disturbed.[59]

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58. 107 U.S. at 727-28.

59. The case may be based more upon the political question doctrine than upon the eleventh amendment. The political question doctrine has been used to limit judicial review where the Court felt that the Constitution granted exclusive decision-making powers to another branch of government. The areas in which it applies do not fall into any easily categorizable pattern. *Cf.* Coleman v. Miller, 307 U.S. 433 (1939) (declining to rule on whether a state legislature could ratify a constitutional amendment after previously rejecting it). Majority and concurring opinions in *Coleman*, as well as in Colegrove v. Green, 328 U.S. 549 (1946) (denying relief in a suit to enjoin a congressional election because of inequality of population in the districts), were based on a finding that judicial consideration was precluded because the Constitution had specifically given Congress the absolute power to determine such issues. The basis for this conclusion was subsequently repudiated, at least as to redistricting, in Wesberry v. Sanders, 376 U.S. 1 (1964).

Yet the idea seems particularly appropriate when dealing with the question of state obligations, payment of which depends ultimately on the taxing power granted to the state legislatures. There is first the question of whether a court structure is practically suited to functioning in place of a legislature. Secondly, there is a suggestion that even if a court can so function, it is not proper because in a constitutional structure it is necessary for the branches to play distinct roles. Although the Court might have ruled the other way in *Jumel*, it is arguable that a case requiring the legislature to appropriate tax proceeds for a purpose in opposition to the wishes of elected representatives is different than ordinary judgments against a state official which involve no direct confrontation with the people. This theory suggests the *Jumel* rule should be limited to suits

C. *Application of Jumel*

Jumel has been followed in those limited cases in which the court has been asked to alter the state's political decision with regard to tax appropriations.[60] In cases where relief can be granted by other means, the officer has been held responsible. The Supreme Court held in the *Virginia Coupon Cases*[61] that where Virginia issued bonds and attached coupons suitable for tax payments and the bondholder tendered the coupons for this purpose, a state official, despite the subsequent repudiation of the coupon provision by the state legislature, could be sued and restrained from seizing the taxpayer's property for non-payment.

In *Poindexter v. Greenhow*,[62] one of the coupon cases, the Court based liability entirely on federal law.[63] The officer's reliance on the repudiating state statute as a defense was convincingly refuted:

> [D]efendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a

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on state debt filed against state officials, where such officials have been forbidden to pay the debt by directly elected state representatives.

Unfortunately, the language of the eleventh amendment is not suited to the consideration of such distinctions. Much of the confusion results from an attempt to tailor the uncompromising terms of the eleventh amendment to workable doctrines that will protect essential state functions.

60. *Cf.* Hagood v. Southern Ry., 117 U.S. 52 (1886) (refusing to order state officers to enforce repealed state law that required collection and appropriation of taxes for retirement of revenue scrip); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883) (refusing to require state officers to consider second series bondholders of railroad, which was acquired by state in mortgage foreclosure to be on a par with first series bondholders where state chose to redeem only first series bonds).

61. 114 U.S. 269 (1884).

62. 114 U.S. 270 (1884). *Poindexter* did not present a true eleventh amendment or sovereign immunity issue, although the Court discussed it as if it did. The taxpayer brought this action against the collector in a Virginia state court. *Id.* at 273. The highest Virginia court that ruled on the matter dismissed the action, not because of state immunity, but because the taxpayer failed to follow the Virginia statutory remedy after his tender of coupon had been rejected. *Id.* at 274. If the Virginia court correctly interpreted Virginia law to allow the state officer to be sued and merely erred on the merits, the case would normally be reviewable in the Supreme Court and all federal issues could be raised. It is unlikely, however, that the Supreme Court would reverse the Virginia court on the question of whether Virginia could be sued in its own courts, particularly where the decision allowed the suit.

63. 114 U.S. at 287.

> defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence.[64]

The language in *Poindexter* appears to contradict *Jumel*'s high regard for state legislative judgments. The facts, however, reveal very different political situations. In *Poindexter*, the officer was enjoined from seizing property after tender of the coupons. The legislature was not required to appropriate taxes in a particular manner or for a particular purpose. There was no disruption of the taxing function except to prohibit collection by means of a tortious act—wrongful levy. The Court's compromise at once refrained from forcing the state to honor affirmatively any fiscal obligation while it protected the citizen's property rights.

The narrow scope of the holding in *Poindexter* became apparent in *In re Ayers*[65] when the Court refused to enjoin Virginia officials from filing suit to collect taxes for which the famous coupons had previously been tendered. The Virginia statute under which the suits were filed allowed the taxpayers to defend on the basis of tender, but placed on them the difficult burden of proving the genuineness of the coupon.

The *Ayers* opinion harmonized the conflicting precedent by distinguishing a suit to enjoin an officer from seizing property, as in *Poindexter*, from a suit to prevent him from filing a suit that may subsequently authorize the property seizure. In the latter case, the citizen

64. *Id.* at 288.
65. 123 U.S. 443 (1887).

may seek judicial review of the proceeding, including writ of error to the Supreme Court from the highest court of the state, prior to being deprived of his property. This distinction suggests abstention[66] as the underlying rationale for the decision.

The idea that ultimate reviewability through state courts is the crucial consideration in *Ayers* is a departure from traditional views. There are two basic lines of analysis offered to explain the conflicting precedent which in some cases holds the state officer liable where he is "stripped" of official character by the invalidation of a state statute, and yet maintains his immunity, in other situations, despite similarly invalid legislation.

Professor Jaffe categorized the cases and found state consent required in suits against an officer: (1) to enforce state contracts, (2) to recover from the state treasury for tort liability, and (3) to recover property.[67] In other situations, suit against the officer for either mandamus, injunction, or damages could be brought without the state's consent.[68]

Most of the cases fit this model. For example, *Poindexter* is consistent with *Ayers* because the former involved a tortious act—wrongful seizure—whereas the latter sought only to prevent the lawful filing of suit. Under this theory, however, allowing suit against the officer is logical only if one fictionalizes the officer's loss of official character when he acts pursuant to an invalid statute.

Professor Engdahl's theory does not involve the use of this fiction. An officer could always be sued, Engdahl found, if there were a valid cause of action on the merits.[69] Suits to require the officer to carry out the state's contract were a logical exception because the officer was not liable under any common law theory. Engdahl points out that liability of officials was often the sole means of enforcing government responsibilities. Presumably, if the government did not come to the aid of its officials, people would refuse public service. To some extent, therefore, the government would be forced to comply with judgments against one of its officials.[70]

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66. *See* notes 223-29 *infra* and accompanying text.
67. *See* Jaffe, *supra* note 16, at 29.
68. *Id.* at 28-29.
69. *See* Engdahl, *supra* note 44, at 15-19.
70. *Id.*

The series of cases beginning with *Louisiana v. Jumel*, disallowing suits against officers because the state was the real party in interest, are not viewed as an exception to the rule of official liability. Engdahl states that under older precedent the officers in *Jumel* would not have been individually liable on the merits for the wrong committed by the state because they were not personally parties to the broken contract, or in any way responsible.[71] The Court was wrong only in using language which indicated it was deprived of jurisdiction under the eleventh amendment because the state was the substantial party in interest. According to Engdahl, these cases involve neither questions of jurisdiction nor of sovereign immunity but a lack of personal liability and, at most, common law official immunity.[72]

Although Engdahl's view may obviate the need for use of a legal fiction to "strip" the officer of immunity, it fails to harmonize the results as well as Jaffe's categorical explanation. It is difficult to understand why the defendant officers in cases such as *Jumel* and *Ayers* would not have been subject to common law writ of mandamus or prohibition. On the other hand, Engdahl's analysis has the virtue of a supporting rationale and is confirmed by analyzing the language of many of the opinions.[73] On their facts, the cases are consistent with either analysis. Those in which suit was dismissed because in substance it was against the state usually fall into those categories in which the official would not

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71. *Id.* at 20.

72. Official or "executive" immunity is based on the idea that government is not possible if officials can be sued for acts properly performed within the scope of their duties. This doctrine is generally considered separate and distinct from the doctrine of sovereign immunity which is claimed on behalf of the state rather than the officer. The doctrines are related to the extent that the liability of the officer to suit on a state contract obligation may depend on whether the violation of the contract is by authority of the state or at the mere whim of the officer. In the latter case, relief may be granted in the form of mandamus, injunction, or damages. In actions other than contract, however, the officer can usually be sued, despite official state authority for his violation, where such authority is itself invalid. Engdahl, in 1972, expressed alarm about recent cases that increased both the sovereign immunity of the state and the official immunity of the officer. The net result is a double loss of governmental responsibility. *Id.* at 41. The trend noted by Engdahl continues. Sovereign immunity has been raised and applied in a variety of new situations. *See* notes 175-90 *infra* and accompanying text. In Scheuer v. Rhodes, 416 U.S. 232 (1974), a tort suit against officials arising out of the Kent State incident, the Court refused to find that sovereign immunity protected allegedly unconstitutional and unlawful acts but, in remanding, noted the likely application of official immunity. *Id.* at 247-48.

73. *See* Engdahl, *supra* note 44. The case law analyses contained in this article are excellent and need not be repeated here.

have been individually liable regardless of whether suit was claimed to be against the sovereign. Neither analysis, however, can adequately explain all the decisions.

A third view, suggested here, is that suits against officers have been permitted in all but two classes of cases. The first class comprises those cases, like *Jumel*, which (1) are in the direct line of *Chisholm*—suits to collect on a state debt—and (2) require a court to interfere with the most basic state legislative function—levying and appropriating taxes. The second class includes suits that minimally disturb state tax collection procedures but, in addition, are reviewable in the state courts.

This analysis is also useful in the federal question area. First, Congress should carefully consider encroaching on the state legislature's tax appropriation methods, regardless of whether its power to create federal causes of action against a state is otherwise unlimited. Secondly, if state sovereign immunity or the eleventh amendment are to be used by the Supreme Court to invalidate congressional legislation, the suggested analysis provides an appropriate basis for judicial determination.

The opinion in *Ayers*, unfortunately, thoroughly confused the issues. In an effort to distinguish precedent, the *Ayers* Court supplemented the common law sovereign immunity of states with a twisted jurisdictional concept. The Court correctly stated the negative implication of *Osborn* that if the state, which could not be joined, was the real party in interest and officers were merely nominal parties against whom relief was unavailable, the suit against the officers must fail. The *Ayers* Court, however, misinterpreted this proposition by holding that it had no jurisdiction over the parties because the state was in fact, though not in form, the defendant.[74] The Court thus adopted a jurisdictional

74. The *Ayers* court misread Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), see note 52 *supra*. The Court first quoted Chief Justice Marshall's opinion in *Madrazo*: "If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant." *Id.* at 123. The Court took this to mean: "It was therefore held, in that case, that the State was in fact, though not in form, a party defendant to the suit, and that, consequently, the Circuit Court had no jurisdicion to pronounce the decree appealed from." *In re* Ayers, 123 U.S. 443, 489 (1887). It consequently concluded:

> The inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.

Id.

doctrine with no basis in the history or language of the Constitution or the eleventh amendment. In his dissent, Justice Harlan noted the absence of any question of jurisdiction.[75]

Ayers is also a forerunner of the abstention doctrine. The Court would not have allowed seizure of the coupon holder's property without the existence of state judicial process subject to Supreme Court review. The Court insisted the coupon holder make his defenses under the procedure the state had created for that purpose. If the state treated him unfairly, his contract clause defense could still be raised on certiorari to the highest state court.[76] The language used by the Court, however, also implied that certain categories of cases could be characterized as "substantially" suits against the state and dismissed for this reason alone.

The resulting confusion, illustrated by several examples, continues to plague the case law. In *Smyth v. Ames*,[77] the Court allowed non-citizen stockholders of a railroad to bring suit against corporate and state officials to enjoin enforcement of allegedly unconstitutional maximum transportation rates. Justice Harlan, writing for the majority, found no eleventh amendment obstacle. The case illustrates the rule that permits suit against officials to prevent illegal acts and denies defenses that rely on statutes subsequently held unconstitutional.

Two years later, in *Fitts v. McGhee*,[78] Justice Harlan modified his position in *Smyth* and held that suit would not lie against state officers to restrain them from reducing the tolls collected on a bridge owned by a railroad company. Harlan followed the *Ayers* suggestion that where the officer is enforcing a law which could be judicially tested, by writ of error to the Supreme Court if necessary, the plaintiffs should first exhaust their local remedies.[79] In *Fitts*, indictments were pending against officers of the plaintiff-railroad; however, if the pendency, rather than the mere possibility, of state criminal proceedings was the basis of distinction, the Court did not say so.

The culmination of state rate regulation cases is *Ex parte Young*.[80] Although the facts are remarkably similar to *Fitts v. McGhee*, the result

75. *Id.* at 515-16.
76. *Id.* at 509 (Field, J., concurring).
77. 169 U.S. 466 (1897).
78. 172 U.S. 516 (1899).
79. *Id.* at 529-32.
80. 209 U.S. 123 (1908).

is diametrically opposed. The attorney general of Minnesota was held in civil contempt by the circuit court for refusing to dismiss a mandamus action he had brought in state court to compel the railroad to charge a lower rate. The Supreme Court affirmed. Although the *Young* opinion emphasized the heavy penalties under the statute, and the necessity for equitable intervention because of the risk of incurring such penalties, there was no pending criminal suit for enforcement of penalties. There was merely the mandamus action which could have been resolved through state court processes.[81] Nevertheless, the Court allowed the injunction against the attorney general to stand. *Fitts* was distinguished on the specious reasoning that there was no showing there that the officers played a specific role in the enforcement of the unconstitutional statute.[82]

In *Young*, as in *Smyth v. Ames*, the suits were filed by railroad stockholders against both corporate and state officers. Although in *Smyth* plaintiffs sought diversity jurisdiction, in *Young* they did not. Nevertheless, the strategic inclusion of company officers forced the court to consider the possibility of a federal court order forbidding the railroad officials from charging the lowered rates, contradicting an existing state court order requiring them to do so. This conflict distinguishes *Young* from *Fitts* because it created a compelling case for equitable intervention, not only for the stockholders, but for the defendant railroad officials as well.

Young is often cited as authority for the rule that suit for an injunction against a state officer will lie though a suit for damages might not.[83] Yet no damages were sought and, in fact, *Young* merely follows the line of cases holding officers individually liable for unconstitutional acts. Justice Harlan, dissenting in *Young*, strongly emphasized the availability of relief through state proceedings. Had *Ayers* and *Fitts* been correctly analyzed as cases for abstention, *Young* might well have been decided solely on the issue of whether there was an adequate state court remedy. Later courts would then have been spared the impossible task of determining when an officer is "stripped" of his immunity.[84]

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81. *Id.* at 133, 159.

82. *Id.* at 156-58.

83. *See* Edelman v. Jordan, 415 U.S. 651, 664 (1974).

84. The straightforward approach suggested here was undertaken in Georgia R.R. & Banking v. Redwine, 342 U.S. 299 (1952), where the Court found state remedies inadequate and allowed suit against officers who threatened to tax property in violation of the plaintiff's previously chartered exemption.

There is no rational way of determining when the state is the real party in interest or, instead, when the officer is individually liable. This becomes increasingly apparent in cases involving newly created federal rights. The old method of cataloging officer liability is not useful in these cases. The courts have begun to look for implied waiver by the states and to pay less attention to analysis of the state officer's activities.[85]

D. *Distinguishing Federal Question Cases*

Because of the political nature of the policies underlying officer liability, the doctrine's beneficiaries have changed over the years. State immunity, encompassed by the eleventh amendment, initially protected state taxpayers from the unpopular claims of speculators and displaced loyalists that arose from the Revolutionary War.[86] Similarly, the eleventh amendment allowed Southern States to delay payment or repudiate debts incurred as a result of the Civil War.[87] Other important cases involved state attempts to repeal tax exemptions granted to corporations by special charter,[88] and regulated industry allegations that maximum rates were confiscatory.[89] The hardship imposed by the state's immunity to suit, therefore, fell on corporate plaintiffs and individual bondholders who were denied access to the courts when seeking relief from the state.

More recent cases involve individual or class actions that seek to enforce federal statutory rights.[90] Although large sums of money may be sought from state treasuries, it is usually an aggregation of small individual claims. Moreover, these cases do not involve obligations repudiated by the state legislature. In *Jumel*, the Court recognized the state's right to repudiate burdensome government obligations, but federal law was not at issue. Subsequent cases erroneously suggest that

85. *See* notes 143-89 *infra* and accompanying text.

86. *See* C. JACOBS, *supra* note 18, at 70.

87. *See* W. SCOTT, THE REPUDIATION OF STATE DEBTS, A STUDY IN THE FINANCIAL HISTORY OF 13 STATES (1969). Forbidden to pay Civil War obligations to friends and local bondholders, citizens in Southern States found it easy to repudiate debts incurred for what were alleged to be, and sometimes were, fraudulent acts of "carpetbag" governments and debts owed to the northern banks. *Id.* at 233-37. It seems that a great part of this debt was incurred in schemes to aid local railroad and banking enterprises which later failed. *Id.* at 217.

88. *See* Atlantic Coast Line Ry. v. Phillips, 332 U.S. 168 (1947).

89. *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944).

90. *See* notes 175-90 *infra* and accompanying text.

state officers enjoy an absolute privilege to ignore federal claims even absent legislative repudiation of the claim. The transformation of the doctrine of state immunity, from a protection from state government abuse to an excuse for a state's noncompliance with federal laws benefitting the poor and working classes, is more than a reflection on the possession of political power: It reflects a basic confusion about the kind of sovereign immunity enjoyed by the states.

The various theories of state sovereign immunity have survived despite consistent, well reasoned criticism from legal scholars.[91] Undoubtedly, the survival is for practical reasons related to the protection of state government integrity. The strong feelings of the people can be ignored only to a degree without inviting confrontation.[92] While not

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91. *See* K. DAVIS, *supra* note 2. *See also* Borchard, *Government Liability in Tort,* 34 YALE L.J. 1, 43, 129-43, 229-58 (1926); Engdahl, *supra* note 44, at 60-75.

92. A judgment too onerous on the public, as reflected in its use of state funds, will in fact be unenforceable without resort to the military. Armed force was used to obtain compliance with the judgment in United States v. Peters, 9 U.S. (5 Cranch) 115 (1809). *See* note 54 *supra. See* C. JACOBS, *supra* note 18, at 80. More recently, physical force has been used to enforce federal court judgments against reluctant state officials. *See* Cooper v. Aaron, 358 U.S. 1 (1958). Neither of these cases, however, involved a judgment entered in violation of the express terms of the eleventh amendment. In *Peters,* judgment ran only against the officer and in *Cooper* the United States had intervened and was the party on whose behalf the injunction against the state officials (and local school board) was issued.

In a pre-eleventh amendment case, Oswald v. New York, 2 U.S. (2 Dall.) 401 (1792), an award of damages to the heir of the state printer of New York for work performed between 1776 and 1783 was finally entered in 1792, but apparently not satisfied. C. JACOBS, *supra* note 18, at 44-46. Indeed, in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), the leading case holding that a state could be sued by a citizen of another state prior to the eleventh amendment, there was never a complete collection of judgment without state legislative approval.

In *Chisholm,* the Supreme Court, in February 1794, decided that Georgia could be sued by the executor of a merchant who had sold nearly $170,000 worth of supplies to be used by the colonial troops, but had not been paid (apparently because the officials commissioned by the state to make the purchase had converted the money). Thereafter, in December 1794, Georgia settled the case by issuing certificates for £ 7586. Although some of the certificates were sold to meet expenses, £ 5000 worth were not redeemed until 1847 after lapse of a limitation period for collection when, upon petition to the legislature, it was agreed to pay out $22,222.22 within 10 years. *See* Mathis, *The Eleventh Amendment: Adoption and Interpretation,* 2 GA. L. REV. 207 (1968).

The facts are set forth to illustrate the difficulties in collection even if judgment is entered against a state, and the political considerations that accompany even the attempt to collect such judgments. These considerations may not be the same in all types of cases. At least in non-federal question suits against officers, the political difficulties attached to collection have been relevant in determining whether the eleventh amendment ought to apply. It might be argued that it is as much a breakdown in

suggesting the courts succumb to mob rule, a strong legislative expression by the people, as taxpayers, is what the eleventh amendment draftsmen sought to protect.

Although there are cases where an existing paramount federal right must be enforced, a rule granting the state the freedom to deny the appropriation of taxes to pay ordinary state law debts is within the purposes of the eleventh amendment. If limited to non-federal claims, such a rule effectuates the purposes of the amendment, though the state is not, in name, a party. A blanket extension of this rule in federal question cases, however, reveals a basic misunderstanding of the older cases in which suit against the officer was denied.

IV. State Immunity in Federal Question Cases

A. *Introduction*

Consideration of the role of state immunity in suits to enforce federally created rights begins with the relevant constitutional sections. The first clause of article III, section two, extends federal judicial power "to all Cases, in law and equity, arising under this Constitution, the Laws of the United States and Treaties." In addition, the sixth clause of the same section permits federal courts to hear controversies "between a State and Citizens of another State."

The distributive clause, the second paragraph of article III, section two, grants original jurisdiction to the Supreme Court in certain cases including those in which a state is a party. The Supreme Court's appellate jurisdiction encompasses all other cases within the federal judicial authority "with such Exceptions, and under such Regulations as the Congress shall make."[93]

These clauses must be considered along with the eleventh and fourteenth amendments. Because the literal terms of the eleventh amendment[94] withdraw all federal judicial power in suits "commenced or prosecuted" against a state, it is possible to conclude that state court

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the judicial machinery for a judgment not to be issued simply because it might be uncollectible. The practical answer to this is that judgments, once issued, remain on the record for a substantial period of time and in most states can be periodically revived to last indefinitely. Consequently, the issuance and continued existence of a judgment casts a shadow over state government financing, because a state or federal court might later decide that the judgment is enforceable.

93. U.S. Const. art. III, § 2, para. 2.

94. *See* text accompanying note 6 *supra*.

judgments in favor of a state, whether on the merits or on sovereign immunity grounds, may not be reviewable by appeal to the Supreme Court. The question of reviewability may also depend on whether the appealing party is a citizen of the state and whether the state is initially plaintiff or defendant. In addition, both initiation and review of a suit against a state in federal court may be precluded if the amendment is read as an absolute bar, even if the state has consented to suit in its own courts. Again, the result would be different if the plaintiff or appellant were a citizen of the state sued.

This staggering array of combinations and permutations is not meant to befuddle the reader. But, because the questions overlap, it is difficult to isolate and discuss any one issue without implicating others. One must, therefore, avoid jumping to broad conclusions when analyzing the various decisions that touch upon state liability in federal question cases.

B. *The Early Decisions*

Analysis must begin with the case of *Cohens v. Virginia*[95] in which Chief Justice John Marshall addressed several of the issues raised above. The *Cohens* case was initiated by the State of Virginia against its own citizens as a simple criminal prosecution and came to the Supreme Court by way of writ of error to a Virginia court.

The State, relying on Marshall's dicta in *Marbury v. Madison*,[96] argued that the Supreme Court's original and appellate jurisdiction were mutually exclusive and therefore *Cohens* was not reviewable: if the Court had any jurisdiction, it was original, because the state was a party to the suit.[97] Marshall disagreed; had he not been confronted with his own, now repudiated,[98] dictum in *Marbury*, the eleventh amendment obstacle to federal question suits might have been eliminated.

Rather than explicitly reverse his *Marbury* position, Marshall drew careful distinctions between those cases in which federal jurisdiction

95. 19 U.S. (6 Wheat.) 264 (1821).

96. 5 U.S. (1 Cranch) 137, 174-75 (1803).

97. 19 U.S. (6 Wheat.) at 300-01. *See* text accompanying note 93 *supra.*

98. The Supreme Court's original jurisdiction may be made concurrent with jurisdiction in the lower federal courts. *See* Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898); Ames v. Kansas *ex rel.* Johnston, 111 U.S. 449 (1884); Bors v. Preston, 111 U.S. 252 (1884).

was based upon the nature of the case, including cases arising under the "Constitution, the laws of the United States" etc., and those in which jurisdiction arose from the character of the parties, such as controversies "between a State and Citizens of another State." The original jurisdiction of the Supreme Court, in cases in which a state was a party, was deemed exclusive only in those cases that came within the federal court jurisdiction *because* the state was a party.[99] Cases in which jurisdiction arose because of the federal question involved, such as *Cohens*, were within the Supreme Court's appellate jurisdiction regardless of whether a state was a party.[100]

A corollary of Marshall's analysis is that the federal question jurisdiction, even in lower federal courts, is unaffected by the character of the parties. The logical next step, therefore, would be to disregard the eleventh amendment—a jurisdictional prohibition in cases in which the state is a party—where a federal question exists. Marshall failed to reach this question, however, because *Cohens*, a state criminal prosecution, could not be initiated in federal court at all. Holding the state's participation of no consequence to the Supreme Court's appellate jurisdiction in that case did not finally resolve the issue with respect to cases that might be commenced in federal court. As a result, any indication in *Cohens* that cases raising federal questions stood on their own

99. 19 U.S. (6 Wheat.) at 392-93.

100. Marshall reasoned that the appellate jurisdiction of the Supreme Court was mandated by the Constitution particularly in cases such as *Cohens*. *Cohens* could not have been initiated in federal court at all because the prosecution did not involve a federal question and because it was a suit between a state and its own citizens, a category not included in article III. His thinking is in harmony with the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (current version at 28 U.S.C. § 1652 (1970)), which provides that the Supreme Court shall have exclusive jurisdiction in cases "where a state is a party, except between a state and its citizens; and except also between a state and citizen of other states or aliens, in which latter case it shall have original but not exclusive jurisdiction."

The draft of the bill originally provided: "The Supreme Court shall have jurisdiction of all controversies of a civil nature, where any of the United States or a foreign State is a party." The Senate eliminated "or a foreign state," and added "except between a state and its citizens." *See* Warren, *supra* note 51, at 93. Warren concluded that the addition was probably made to lessen fears that article III would authorize suits by a state's own citizen. *Id.* In light of the further alteration of the final version, and the opinions in *Chisholm* and *Cohens*, it seems more correct to interpret the statute as follows: that the Court should have exclusive and original jurisdiction in all cases that involve a state, except those between a state and its own citizen, where the jurisdiction would be only appellate, and those between a state and citizen of another state, where its jurisdiction might in some cases be original and in others, appellate. *See* Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110, 130-31 (1828) (Johnson, J., dissenting).

jurisdictional grounds without regard to the character of the parties was subsequently ignored. In fact, despite an opportunity to promote the independence of federal question jurisdiction from character of the parties jurisdiction in *Osborn v. Bank of the United States*,[101] Marshall used the doctrine of officer liability and thereby avoided the issue.[102] Consequently, while narrowing the applications of both the eleventh amendment and the exclusive original jurisdiction distribution to cases in which the state is the actual, named party, Marshall assured *Cohens*' implications would continue to be disregarded.[103]

It was not only because of the independence of federal question jurisdiction that the eleventh amendment was not an obstacle to suit in

101. 22 U.S. (9 Wheat.) 738 (1824).

102. In *Osborn*, federal court jurisdiction arose from a federal statute that gave the bank power to sue and be sued. Nevertheless, because a state was a party, it was alleged that the Supreme Court must take original jurisdiction. Marshall stated that where specifically given, the Supreme Court's original jurisdiction was exclusive, but held that *Osborn* was a suit against the officer and not the state. He ignored *Cohens*' suggestion that the federal question provided appellate jurisdiction regardless of the state's presence. By not addressing the issue, however, Marshall cannot be assumed to have authored the demise of *Cohens*' suggestion.

103. Marshall confronted a similar distributive clause-eleventh amendment conflict in Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110 (1828). In *Madrazo*, a citizen libelled the Governor of Georgia to recover certain property (slaves and the proceeds from a partial sale thereof) which came into the Governor's hands through legal processes, although it had previously been illegally taken from the claimant. After Marshall held that the governor was not individually liable, *see* note 52 *supra*, he stated, "[T]he decree cannot be sustained as against the State, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court." *Id.* at 124. The stress on the distributive clause was in part due to a companion case which was initiated by the Governor, and thus not subject to any immunity claim. It was dismissed simultaneously. *Id.* at 124. Although *Madrazo* retreated from *Cohens* with respect to the distributive clause, it left open whether the federal question jurisdiction, in this case admiralty, was affected by the eleventh amendment. *But see Ex parte* New York, 256 U.S. 490 (1921) (holding that existence of admiralty jurisdiction alone does not make a state liable as a private individual). The subsequent one paragraph opinion of Justice Marshall which denied an original suit in the Supreme Court, *Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627 (1833), because "no private person has a right to commence an original suit in this court against a state," suggests immunity exists even in federal question cases filed in the right federal court. By this time, however, there was no admiralty jurisdiction and therefore no federal question was raised here. The claimant in the intervening seven years apparently acquired an extra "z" in his name, but never retrieved his slaves. Any feelings of relief must be tempered by the statement in Judge Johnson's dissent that although the Governor initially attempted to transfer the slaves to the colonizing society, the Georgia legislature intervened and gave them back to the man who had purchased them from the pirate who had previously stolen them from Madrazo. This fact explains the Governor's belated arguments for denial of jurisdiction, 26 U.S. at 126.

Cohens. Marshall held that a petition for review in the Supreme Court was not the commencement or prosecution of a suit and, therefore, was not prohibited by the eleventh amendment.[104] Marshall did not, however, state the holding so broadly as to approve reviewability regardless of who commenced the original action. On the contrary, he emphasized that the original defendants raised their federal claim in defense to the state prosecution.[105] The opinion amplifies Marshall's concern with the identity of the party initiating the action and suggests a different result in situations where the state did not do so. *Cohens*, therefore, does not assure a forum for vindication of all federal claims against a state, but only those arising by way of defense to a suit filed by the state. In addition, Marshall held that the eleventh amendment was inapplicable regardless of whether review was within the proscribed commencement or prosecution of a case because *Cohens* was a suit between a state and a citizen of the same state.[106]

C. *Supreme Court Review*

Although the Court has, on occasion, based the denial of original federal court jurisdiction on the availability of Supreme Court review of state court rulings, it has done so only in cases where the state itself has initiated the proceedings.[107] Consequently, the sufficiency of such Supreme Court review as a means of enforcing federal rights depends solely on state suability in state court because, in many cases, the citizen must commence the action in order to protect his rights. Absent a case requiring a state to allow suit on federal questions against itself or its officers in its own court, therefore, reviewability is an inadequate protection for many federally created rights. In general, state courts are required by the supremacy clause to enforce federal laws and to recognize federal causes of action, at least where analogous state actions exist; but this is not so where the state is a defendant. Although the issue is not free of doubt, state sovereign immunity has usually overridden the supremacy clause to the extent that a state court need not take jurisdiction of a case that alleges a state's denial of federal rights.[109]

104. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 409 (1821).

105. *Id.* at 410-11.

106. *Id.* at 412. *See* notes 131-39 *infra* and accompanying text.

107. *See In re* Ayers, 123 U.S. 443 (1887), discussed in text accompanying notes 65-66 *supra*.

108. *See* Testa v. Katt, 330 U.S. 386 (1947).

109. In Louisiana v. Jumel, 107 U.S. 11 (1882), *see* notes 55-59 *supra* and accom-

D. *Statutory Federal Jurisdiction*

After the Civil War, the Supreme Court began to recognize Congress' power to create actions enforceable against state officers based on federal rights. The *Virginia Coupon Cases*,[110] usually considered examples of the categorical approach to officer liability,[111] exemplify this trend. Close examination of the cases indicates the Court was abandoning its prior concern with the effect on state legislative autonomy and allowing suit where Congress had authorized federal jurisdiction.[112]

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panying text, the Court cited the dismissal of a similar suit in state court as part of its reason for denying suit in federal court. This clearly implied that no federal law required the Supreme Court, on writ of error, to reverse the state court and force the action.

In Georgia R.R. & Banking v. Musgrove, 335 U.S. 900 (1949) (per curiam), the Supreme Court held a state court's denial of jurisdiction of an uncontested suit against state officers to be an adequate state ground and dismissed the appeal. This per curiam ruling was later approved in Georgia R.R. & Banking v. Redwine, 342 U.S. 299, 301 (1952).

In General Oil Co. v. Crain, 209 U.S. 211 (1908), however, the Supreme Court reviewed on the merits a final state court judgment that had dismissed suit against an officer even though unconstitutional acts had allegedly been committed; the state court had held it had no jurisdiction. The Court made an emphatic statement of policy:

> Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment which is directed at state action, could be nullified as to much of its operation.

Id. at 226.

The indefinite state of the law on this question is reflected in Justice Douglas' majority opinion in Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), which finds the federal statute that authorizes employee suits in "any Court of competent jurisdiction" to "arguably" permit suit in state court. *Id.* at 287. Justice Marshall, in concurrence, argued that state courts were required to hear them under *Testa* and *Crain*. Justice Brennan, in dissent, questioned Congress' ability to lift immunity in state court, if unable to do so in federal court. Brennan's logic is the most persuasive; if there is a complete jurisdictional bar because of a lack of article III power, the Court has no authority to force jurisdiction in the state courts. The states have split, allowing suit under the federal statute in Clover Bottom Hosp. School v. Townsend, 513 S.W.2d 505 (Tenn. 1974) (Tennessee was the state appealed from in *Crain*), but denying such suits in Weppler v. School Bd. of Dade County, 311 So. 2d 409 (Fla. Dist. Ct. App. 1975), and Mossman v. Donahey, 46 Ohio St. 2d 1, 346 N.E.2d 305 (1976).

110. 114 U.S. 269 (1884).

111. *See* notes 61-64 *supra* and accompanying text.

112. There was a 70 year delay in considering the question of state immunity in

In *White v. Greenhow*,[113] the tax collector, after refusing tendered coupons as tax payment, seized plaintiff's property, valued at $3000. The Court held that the circuit court had jurisdiction under the Act of 1875 because the cause arose under the Constitution and the amount in controversy exceeded the then required $500.[114] *Carter v. Greenhow*[115] presented similar facts except the amount in controversy was only $200. The court denied suit and also held that the Act of 1871 did not provide a remedy because Congress provided redress for violation of the contract clause only under the Act of 1875 if the amount in controversy exceeded $500 or by writ of error to state court judgments.[116]

The Court did not explain how an impairment of contract arose under the Constitution for purposes of the 1875 Act, but did not deprive a right, privilege, or immunity reserved by the Constitution under the 1871 Act. The Court's only reference was to dictum in the *Civil Rights Cases*[117] in which Justice Bradley contradictorily implied that an Act of Congress drawing contract litigation into the federal courts would be invalid, but that impairment of contract claims might be heard under the 1875 Act.[118] Although the Court has not always been consistent, it is not difficult to distinguish contract clause claims from other cases which arise under the federal laws.[119] The contract

federal question cases because of the absence of general statutory federal question jurisdiction until the enactment of the Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13, and the Act of March 3, 1875, ch. 137, 18 Stat. 470. These enactments provide the basis for present federal court jurisdiction in civil rights disputes, *see* 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970), and federal question cases, *see* 28 U.S.C. § 1331(a) (1970). Initially, the Acts granted federal court jurisdiction only in cases that raised constitutional claims, but they were subsequently broadened in recodification to include those claims that arise under the federal statutes. *See* Note, *The Propriety of Granting a Federal Hearing for Statutorily Based Actions Under the Reconstruction-Era Civil Rights Acts*: Blue v. Craig, 43 GEO. WASH. L. REV. 1343 (1975). The importance of this distinction is lessened because if a substantial constitutional claim is merely alleged, a federal statutory claim will be adjudicated as a pendant claim, even if the constitutional claim fails. *See* Hagans v. Lavine, 415 U.S. 528 (1974).

113. 114 U.S. 307 (1884).

114. *Id.* at 308.

115. 114 U.S. 317 (1884).

116. *Id.* at 322.

117. 109 U.S. 3 (1883).

118. *Id.* at 12-13.

119. Justice Thurgood Marshall disagrees with this distinction and in Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973), he noted his dismay with Justice Brennan's view that contract clause

clause is the one clause of the Constitution capable of transforming ordinary state debt suits into federal question cases. It is precisely such suits which were the primary target of the eleventh amendment and which were not thought allowable under article III.[120]

Moreover, the contract clause was originally not intended to prohibit a state from evading its own obligation, but only to prohibit the states from interfering with, or abolishing, the obligations of their citizens.[121] Although the Court has consistently held that the contract clause prohibits the states from violating their own agreements,[122] it has generally refused to allow suit against the state on its obligation to be premised on an alleged violation of the contract clause.[123] Although the denial of suit was often supported by reference to the eleventh amendment or sovereign immunity, in cases arising after federal question jurisdiction was authorized[124] the Court has asserted that the contract clause was not self-enforcing, and therefore did not create a federal cause of action.[125]

Hans v. Louisiana[126] held that a citizen could not sue his own state in federal court to collect upon a repudiated bond obligation.[127] To reach this result, Justice Bradley, borrowing from Justice Iredell's dissent in *Chisholm v. Georgia*,[128] found no article III power to hear

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rights are inferior to rights created by Congress under the commerce clause. *Id.* at 293, 297-98.

120. *See* section II A of this article (notes 17-29 *supra* and accompanying text).

121. *See* B. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 6-7, 16, 26 (1938).

122. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

123. *See, e.g.*, Louisiana v. Jumel, 107 U.S. 711 (1882).

124. *See* note 112 *supra*.

125. The Supreme Court stated: "that constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so only indirectly and incidentally." Carter v. Greenhow, 114 U.S. 317, 322 (1884).

126. 134 U.S. 1 (1889).

127. Mr. Justice Bradley, who befuddled legal scholars for many years with his ability to explain how words do not mean what they say, *see* The Civil Rights Cases, 109 U.S. 3 (1883), demonstrated equal skill in *Hans* by finding meaning where there were no words.

128. 2 U.S. (2 Dall.) 419 (1793). Justice Iredell based his dissent on a lack of statutory authority, but dictum indicates his doubts about constitutional authority as well:

> My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly

cases against a state without its consent because these actions were not cognizable at common law.[129] Justice Bradley, perhaps realizing that an absolute constitutional enshrinement of state sovereign immunity was unsupported by the case law, also noted a lack of statutory jurisdiction.[130]

Bradley, borrowing a separate page from Justice Iredell, argued that the Act of 1875 did not confer jurisdiction because it only established jurisdiction over federal question cases in the circuit courts "concurrent with the Courts of the several States."[131] Because the state courts could entertain suits by individuals against a state only with the state's consent, the circuit court could have no concurrent power.[132] It is generally assumed, however, that prior to 1875, the states had jurisdiction to enforce federal law in cases that raised federal questions. Otherwise there would have been no forum to litigate such questions.[133] Justice Bradley's argument, therefore, failed to consider the more general jurisdiction given in those federal question cases where the state is not a party. Furthermore, it ignores the possibility that some states may have waived, or might in the future waive, their immunity, or that Congress may have been given the power to impose liability.

Another factor to be considered is that *Hans* was a contract clause suit of the most invasive sort, calling for exactly the same take-over of the state legislative function as was denied in *Louisiana v. Jumel* where suit was filed against the officer, rather than against the state. In the context of earlier cases which denied contract clause relief even after

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> against any construction of it, which will admit, under any circumstances a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.

Id. at 449-50. Reliance on Iredell's dissent is inappropriate because in the intervening period Congress extended federal court jurisdiction to federal question cases. *See* note 112 *supra.*

129. 134 U.S. at 15-17. *But see* Jaffe, *supra* note 16 (sovereigns suable even at time of adoption of Constitution).

130. 134 U.S. at 18.

131. Act of March 3, 1875, ch. 137, 18 Stat. 470 (current version at 28 U.S.C. § 1331 (1970)).

132. 134 U.S. at 18. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 436 (1793) (dissenting opinion).

133. *See* note 108 *supra* and accompanying text.

1875, it is difficult to see how *Hans* itself could have been decided otherwise. But its indiscriminate application to other federal question cases, not involving suit on state debt and supported only by impairment of contract as a basis of federal jurisdiction, seems to ignore all the history, including *Chisholm* and article III itself.[134]

It is appropriate to read *Hans* narrowly, moreover, in order to reconcile it with the earlier holding in *Cohens v. Virginia*[135] that state sovereign immunity was not a bar to suit against a state by its own citizens.[136] The *Hans* Court criticized the final holding of *Cohens*,[137] but this holding itself was phrased by John Marshall in a limited way. After stating the third holding of *Cohens* (that appeal to the Supreme Court was not "prosecution" of a suit against a state), Marshall added a fourth, stating only that if he were wrong on the third holding, the error did not affect the case because the appeal was prosecuted by a citizen of the same state.[138] Thus, the fourth holding was not a broad holding that a citizen could always sue his own state. It was a narrow holding that in a suit commenced by a state, the eleventh amendment would not bar an appeal to the Supreme Court by a citizen-defendant who asserted a federal question claim.

Justice Bradley, in *Hans*, characterized this holding as dictum, but did not repudiate the words entirely.[139] If one accepts the idea that the contract clause does not raise a federal question, there is no inconsistency between *Cohens* and *Hans*. *Cohens* is applicable to the federal question situation which did not arise in *Hans*. Bradley's remarks, therefore, are of limited force and merely disapprove *Cohens* to the extent that it did not recognize the common law sovereign immunity of states from suit on state contract debts.

Moreover, the *Hans* Court did not dispute *Cohens'* holding that federal question jurisdiction was not removed because a state is a

134. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973); notes 175-90 *infra* and accompanying text.

135. 19 U.S. (6 Wheat.) 264 (1821).

136. *Id.* at 412.

137. 134 U.S. at 20-21.

138. 19 U.S. (6 Wheat.) at 412.

139. Justice Brennan characterized Justice Bradley's remarks about *Cohens* as amounting to "at most a reservation." Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 314 (1973) (dissenting opinion).

party.[140] This holding is still in effect notwithstanding the occasional disallowance of suits against state officers in cases involving federal questions. At first glance, these cases suggest that *Cohens*' holding has been abandoned because there is no basis for such disallowance if the state itself could be sued. The suits that disallowed officer liability, however, were suits in which the contract clause allegedly presented a federal question.[141] The dismissal of these cases is therefore reconcilable with *Cohens* because the use of the contract clause as a means of allowing federal court suit against states on their contract debts flies in the face of the eleventh amendment's implicit prohibition of ordinary, unconsented debt suits against states.[142] By creating federal question jurisdiction, Congress did not necessarily intend to create a cause of action based only on the state's impairment of its own contract and, if it did, the law might be unconstitutional. On its facts, therefore, *Hans* is not necessarily an incorrect decision. It should not, however, be indiscriminately applied and especially not where Congress has expressly created a cause of action.

E. *Consent or Waiver of Immunity*

1. *Express Consent*

Because of the confusion and inadequacy of the officer liability theory, courts, in recent years, have assessed a state's suability in terms of whether immunity has been waived by the state's express or implied consent to suit. One early case liberally construed "consent," finding waiver of immunity where the state intervened in a pending federal court action.[143] In another case, a state statute that authorized suit in a "court of competent jurisdiction in Travis County, Texas" was held to include the federal court at Austin.[144]

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140. 19 U.S. (6 Wheat.) at 378-92. Arguably, *Hans* repudiated *Cohens*' holding that the federal question jurisdiction was unaffected by the character of the parties. Of course, the question turns on whether the contract clause creates a cause of action that arises under the Constitution. *See* notes 117-25 *supra* and accompanying text. If not, *Hans*' effect on *Cohens* is minimal. *But see* Engdahl, *supra* note 44, at 61 (*Hans* is wrongly decided and inconsistent with *Cohens*).

141. *See, e.g., In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern Ry., 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1882).

142. *See* text accompanying note 42 *supra.*

143. Clark v. Barnard, 108 U.S. 436 (1883). *See also* Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906).

144. Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894).

As the doctrine developed, however, the courts narrowed the circumstances from which express state consent was discernible. In *Smith v. Reeves*,[145] a suit against the state treasurer for a tax refund was denied because the suit was considered to be against the state. Although the state tax laws authorized suit against the treasurer for refund of taxes in state court, the statute permitted the treasurer to insist the suit be filed in the Superior Court of Sacramento County. The Supreme Court refused to construe this as consent to suit in the federal courts.[146] Similarly, in *Chandler v. Dix*,[147] the Court held a state statute that required a state official to be a party in state court actions to set aside sales for delinquent taxes did not amount to consent to similar proceedings in federal court. In both cases,[148] the Court noted the availability of Supreme Court review of constitutional issues by writ of error to the state court.

In *Great Northern Life Insurance Co. v. Read*,[149] the leading case on statutory waiver, the issues turned on interpretation of the legislative intent:

> When a state authorizes a suit against itself to do justice to taxpayers who deem themselves injured by an exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts. Federal courts, sitting within states, are for many purposes courts of that state, Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239, 255, . . . but when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.[150]

Close analysis again suggests abstention rather than jurisdictional grounds for the decision. Although the Court found no express constitutional bar to suit, it chose to limit the statute's express waiver of immunity. Consent to suit was admittedly contained in the statute, but was narrowly construed to comply with undefined federalistic guidelines. Justice Frankfurter's dissent insisted that, given its natural mean-

145. 178 U.S. 436 (1899).

146. *Id.* at 441. The Court cited Louisiana v. Jumel, 107 U.S. 711 (1882), and noted its own reluctance to assume a state executive function.

147. 194 U.S. 590 (1903).

148. *Id.* at 591; 178 U.S. at 445.

149. 322 U.S. 47 (1944).

150. *Id.* at 54 (citations omitted).

ing, the language of the statute implied waiver and because abstention was inappropriate in this case its natural meaning was compelling.[151]

In *Ford Motor Co. v. Department of Treasury*,[152] the Court held a state statute that allowed suit for refunds of taxes in "a court of competent jurisdiction" did not include federal court. At the same time, by allowing an eleventh amendment argument to be presented despite the state's general appearance and failure to raise the issue in the lower courts, the Court sub silentio overruled two earlier contrary holdings.[153]

A similar result was reached in *Kennecott Copper Corp. v. State Tax Commission*.[154] In addition to diversity as a basis for federal jurisdiction, the plaintiff claimed that the collection of the state gross receipts tax on its federal subsidies interfered with the Emergency Price Control Act and thus presented a federal question. The Court neglected to discuss the federal claim as a separate basis for allowing the suit, emphasizing instead the language of the eleventh amendment and the jurisdictional nature of the bar.[155] By doing so, the Court contradicted the more fundamental logic that the bar arises from a form of common law sovereign immunity.

In neither *Read, Kennecott Copper,* nor *Ford Motor* did the majority adequately rationalize application of the eleventh amendment. Because all three suits were filed by residents of the same state whose officials were sued, the amendment is not compelling.[156] In addition, these cases indicate a departure from the principles of officer liability to suit developed in *Poindexter* and *Ex parte Young*.[157] The consent question need not have been reached because if the state statute under which the officer collected the tax were invalid, the officer would be stripped of immunity from suit. In *Read,* the Court ineptly distinguished *Young* on the ground that a suit for tax refund is different from a suit for wrongful seizure of property.[158] Yet it is difficult

151. *Id.* at 60-63.

152. 323 U.S. 459 (1945).

153. *See* Smith v. Reeves, 178 U.S. 436 (1899); Clark v. Barnard, 108 U.S. 436 (1883).

154. 327 U.S. 573 (1946).

155. *Id.* at 576.

156. *See* Tribe, note 29 *supra,* at 698 n.80 (1975) (all three cases would have to be discarded for any consistent theory to be developed); text accompanying note 223 *supra.*

157. *See* notes 62-64, 80-84 *supra* and accompanying text.

158. 322 U.S. at 50. Perhaps sensing the inadequacy of the categorical approach to officer liability, the Court emphasized the waiver arguments.

to conceptualize the taxpayer's greater right to go into federal court because he refuses to pay the tax and allows the collector to levy on his property, than if he pays the tax and sues for a refund. The only acceptable rationale is the Court's abstention based on available state court relief.

2. *Implied Consent*

"Express consent" refers to alleged consent to suit under a state statutory provision or by the filing of suit, or the entering of a general appearance by a state official. In implied consent cases, the question is whether one can imply consent to be sued by state participation in federal activities. Implied consent has two forms. The first arises from the states' role in ratification of the Constitution which, although often thought of as express consent,[159] the courts construe to imply consent to suit on federal questions. The second is consent implied by state participation in a federal activity authorized by legislation which provides for liability.

Petty v. Tennessee-Missouri Bridge Commission[160] was the first implied consent case and the most far-reaching because of the absence of specific congressional authorization for suit. The Court held two states had consented to federal court suit under the Jones Act[161] for the death of a bi-state agency employee. The interstate compact that established the agency contained a "sue and be sued" clause,[162] and the congressional act that approved the compact contained a clause pre-

159. It is incorrect to construe ratification of the Constitution as the states' consent and waiver of immunity to suit. Chief Justice Marshall noted that the original states assented to the constitutional terms at least to the extent of their sovereign capacity by simply calling the ratifying conventions. Nevertheless, he believed the actual ratification was not by the states themselves, but by the people, as the true sovereign. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 403-05 (1819). The important point is that the states assented to the extent of their power and the people, by ratification and adoption to the extent of their sovereign power, allowed Congress to create state liability. Consequently, the "ratification" terminology will suffice to represent this concept.

160. 359 U.S. 275 (1959).

161. 46 U.S.C. § 688 (1970).

162. 359 U.S. at 277.

serving federal court jurisdiction over navigable waters and interstate commerce.[163]

The Court's plurality opinion in *Petty* assumed the suit was against the state rather than the officers.[164] Three other Justices concurred in a cryptic opinion, however, without reaching the question of whether the eleventh amendment immunized the compact agency, probably because they found the officers liable.[165] Three Justices dissented on the grounds that the language of the compact was not intended to create a waiver and that Congress' approval of the compact, required by article I, section 10, had nothing to do with jurisdictional matters.[166] Although the Court's reasoning was joined by only three Justices, *Petty* has not been reversed and more recent cases are careful to distinguish it.

In *Parden v. Terminal Railway*,[167] the Court held the state, by operating a railroad in interstate commerce, impliedly waived immunity from suit in federal court under the Federal Employees' Liability Act.[168] Justice Brennan, writing for the majority, cited *Hans* and noted the state's immunity from federal court suit even if initiated by one of its own citizens. Although Brennan also admitted the fact that the suit arose under the Constitution or federal laws was alone insufficient to divest the state of immunity,[169] he distinguished *Hans* on the issue of actual liability:

> This case is distinctly unlike Hans v. Louisiana, supra, where the action was a contractual one based on state bond coupons, and the plaintiff sought to invoke the federal-question jurisdiction by alleging an impairment of the obligation of contract. 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. Here, for the first time in this Court, a State's claims of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress.[170]

The Court held that by ratification of the Constitution the states gave Congress the power to regulate commerce and surrendered any

163. Act of Oct. 26, 1949, ch. 758, 63 Stat. 930.
164. 359 U.S. at 279.
165. *Id.* at 283.
166. *Id.*
167. 377 U.S. 184 (1964).
168. 45 U.S.C. §§ 51-60 (1970).
169. 377 U.S. at 186.
170. *Id.* at 186-87 (footnotes omitted).

portion of their sovereignty that would stand in the way of such regulation.[171] Concluding that Congress had the power to condition operation of a railroad upon amenability to FELA suit, the Court held that Alabama had accepted the condition by operating the railroad.[172]

The operative facts that created consent in *Parden* are 1) ratification, giving Congress power to regulate, and 2) the valid exercise of that power, creating liability. Although the state's operation of the railroad was an operative fact that created ultimate liability, reference to the state's activity as express consent has caused needless confusion in later cases.

The dissenting opinion illustrates the mistaken emphasis on the state's operation of the road. The four dissenting Justices conceded that Congress had the power to subject state railroad operators to liability,[173] but argued that states should not be divested of immunity without "unmistakable clarity" in legislative language.[174] By accepting the argument that the statute was not intended to create state liability, only the second operative fact is altered: If Congress' intention was to maintain state immunity, the operation of the railroad would not have resulted in state liability. In short, the consent comes from Congress and the Constitution, not the state.

In *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*,[175] the Court adopted the reasoning of the minority in *Parden*. The Court denied relief and held that, although state hospital employees were covered by the Fair Labor Standards Act,[176] Congress had neither specifically swept away the state's immunity nor conditioned operation of the facility upon waiver.[177] In order to distinguish *Parden*, the opinion suggested that, where the state engages in a governmental rather than a proprietary function, the congressional intention must be even more clearly expressed.[178] Justice Marshall, in his concurring opinion, suggested that the commerce power

171. *Id.* at 192.
172. *Id.* at 196.
173. *Id.* at 198.
174. *Id.* at 199-200.
175. 411 U.S. 279 (1973).
176. 29 U.S.C. §§ 201-219 (1970).
177. 411 U.S. at 258.
178. *Id.* Note that if one abandons the fiction that the state's action, notwithstanding ratification, influences the consent determination, one avoids such functional distinctions, and can properly decide the case as a question of statutory construction.

allowed Congress to override the state's immunity and subject it to FLSA liability in state court, but not in federal court without the state's consent.[179] He thus rejected ratification of the Constitution as authorization for Congress to legislate state suability in federal courts under any of its powers. Marshall, rejecting the argument that continued operation of the hospitals was sufficient, insisted on a true waiver or consent.[180] By using *Parden* as a model, he acknowledged that state suability is a question of federal law but viewed *Parden*'s finding of implied consent as the outer limit.

Justice Brennan, in a lone dissent, found the state's consent and surrender of immunity in ratification, and valid congressional authorization for suit in the FLSA.[181] Because the case was filed by citizens of the state sued, he insisted that only *Hans* and common law immunity were applicable and thus no constitutional question was raised. Brennan, therefore, believed that further consideration of implied consent was unnecessary.

All but two of the Justices in *Employees* acknowledged that Congress had the power to subject states to liability on the basis of ratification of the Constitution.[182] The denial of liability was based on interpretation of the statute and indicates an absence of constitutional barriers to state suability.

In *Edelman v. Jordan*,[183] plaintiffs sued state officials to force compliance with a federal law that required payments to eligible welfare recipients, under a joint federal-state funded program, to be made within thirty days after application.[184] The defendants conceded that under *Ex parte Young*[185] they could be ordered to comply with the federal rule.[186] The issue was limited to whether the members of plaintiff's class who had not received timely benefits prior to the district court order could recover previously accrued benefits.[187] The Court held

179. *Id.* at 292.
180. *Id.* at 296-97.
181. *Id.* at 301-02.
182. Although *Employees* involved a suit filed against state officers as well as a state department, the Court did not discuss the officer's potential liability. Evidently, the plaintiffs did not pursue the officer liability theory because of the expansion of implied waiver under *Parden*.
183. 415 U.S. 651 (1974).
184. 45 C.F.R. § 206.10(a)(3) (1973).
185. 209 U.S. 123 (1908).
186. 415 U.S. at 664.
187. *Id.*

that *Ex parte Young* did not authorize payment of funds from the state treasury.[188] The majority refused to consider waiver by ratification because the state's participation in the program could not be taken as implied consent absent legislative authorization for suit.[189]

It is puzzling that the Court found jurisdiction for the suit at all. Arguably, the Court distinguished between suits against officers and those against states. Justice Rehnquist's opinion can be read as allowing suit against the officer for an injunction until it became obvious that relief was available only from the state treasury and such relief was denied.

Justice Douglas, in dissent, like Justice Rehnquist for the majority, failed to consider whether liability for retroactive benefits was allowable in officer liability cases. He addressed only the waiver issue:

> Yet petitioner asserts that money damages may not be awarded against state offenses, as such a judgment will expend itself on the state treasury. But we are unable to say that Illinois on entering the federal-state welfare program waived its immunity to suit for injunctions but did not waive its immunity for compensatory awards which remedy its willful defaults of obligations undertaken when it joined the cooperative venture.
>
> It is said however, that the Eleventh Amendment is concerned not with immunity of States from suit, but with the jurisdiction of the federal courts to entertain the suit. The Eleventh Amendment does not speak of "jurisdiction"; it withholds the "judicial power" of federal courts "to any suit in law or equity . . . against one of the United States . . . ." If that "judicial power," or "jurisdiction" if one prefers the concept, may not be exercised even in "any suit in . . . equity" then *Ex parte Young* should be overruled. But there is none eager to take the step. Where a State has consented to join a federal-state co-operative

188. *Id.* at 666-67. *Edelman* denies retrospective relief, but presumably does not allow the state officials to disregard the prospective aspect of the order and later claim immunity from liability for benefits accrued after ordered to make the payments. *See* Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974) (approving the award of $100 per applicant compensatory damages in civil contempt proceedings, after state officials had failed to comply with the district court's order to abide by federal laws).

189. The Court relied on Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944), and Murray v. Wilson Distilling Co., 213 U.S. 151 (1909), to overcome any argument of actual consent by the state. The reliance is misplaced, however, because *Read* is one of the state tax cases where the Court refused to allow federal suit because there was an adequate state remedy. Similarly, the *Murray* case is a suit to enforce a state contract, barred by almost every precedent.

> project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation. There is nothing in the Eleventh Amendment to suggest a difference between suits at law and suits in equity, for it treats the two without distinction. If common sense has any role to play in constitutional adjudication, once there is a waiver of immunity it must be true that it is complete so far as effective operation of the state-federal joint welfare program is concerned.[190]

Douglas did not find it necessary for Congress to specifically create state suability when the state's consent could be implied from its participation in, and obligation to administer, the program.

Justice Brennan, consistent with his views in *Parden* and *Employees*, found complete surrender of immunity because Congress was authorized by the commerce clause to create and regulate a joint federal-state welfare program.[191] Justice Marshall, joined by Justice Blackmun, also dissented.[192] Unlike *Employees*, he found the state's knowing waiver could be implied from its voluntary participation in the program. Although Marshall believed Congress could not justify federal court suits against the state solely on the basis of ratification, he contended that Congress could condition participation in a joint program on state waiver of immunity and had done so in the Social Security Act.[193]

The Court's opinion is disappointing because it is unclear whether Congress simply failed to create a cause of action that included state liability for past due payments or whether the creation of state liability was constitutionally impermissible. Justice Rehnquist conceded that a right of action was created for the plaintiffs by 42 U.S.C. § 1983,[194] but then stated:

> But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment is necessarily limited to prospective injunctive relief and may not include

190. 415 U.S. at 684-85.

191. *Id.* at 687-88. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (allowing recovery of retroactive benefits where the state participated in the same program).

192. 415 U.S. at 688.

193. *Id.* at 692, 696.

194. *Id.* at 675.

a retroactive award which requires the payment of funds from the state treasury.[195]

Edelman has generated litigation, in which lower courts are attempting to determine whether, under varied circumstances, monetary awards can be made against state officials. Thus far, courts have broadly construed the decision to mean that no judgment against a state official is payable from state treasury funds.[196]

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195. *Id.* at 675-77 (citations omitted).

196. In particular, the lower courts have seized upon this language in *Edelman*:

> While the Court of Appeals described this retroactive award of monetary relief as a form of "equitable restitution," it is in practical effect indistinguishable in many aspects from an award of damages against the State. It will to a virtual certainty be paid from state funds, and not from the pocket of the individual state official who was the defendant in the action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

Id. at 668.

See Long v. Richardson, 525 F.2d 74 (6th Cir. 1975) (denying recovery of tuition allegedly illegally collected by state university from out-of-state students); McAuliffe v. Carlson, 520 F.2d 1305 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (denying recovery of Social Security benefits paid to state as representative payee of inmates in mental hospital under invalid state statutes); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975) (denying attorney's fees in successful suit to overcome illegal regulation prohibiting abortion clinic); Thonen v. Jenkins, 517 F.2d 3 (4th Cir. 1975) (allowing possible recovery of damages from state university officials in individual capacities only and recovery of attorney's fees from them in both individual and official capacities for violation of first amendment by disciplining students for expression of opinion in a letter published in the school newspaper); Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1975) (denying recovery of sales and use taxes collected under state statute later held unconstitutional); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds*, 421 U.S. 983 (1975) (award of back pay and attorney's fees to unlawfully dismissed teacher dependent upon whether college is agent of state or a subsidiary government unit under state law); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (denying recovery of attorney's fees in successful § 1983 reapportionment suit); Named Individual Members of San Antonio Conservation Soc'y v. Texas Highway Dep't, 496 F.2d 1017 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (denying attorney's fees in suit to stop construction of highway because of its adverse effect on the environment); Meyers v. Pennsylvania, 483 F.2d 294 (3d Cir. 1974), *cert. denied*, 416 U.S. 946 (1974) (denying damages to person injured through faulty highway construction that was undertaken by state with funding by federal highway program). *But see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (allowing award of back payments and attorney's fees under Title VII of Civil Rights Act of 1964); Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 479 (1977) (allowing recovery of attorney's fees in § 1983 action against state officials found guilty of bad faith because they failed to institute required program for Medicaid-eligible children).

The most recent Supreme Court case that allows relief against state officials in the form of state funds for remedial educational programs to alleviate the effect of past de jure segregation of schools, Milliken v. Bradley, 97 S. Ct. 2749 (1977) does little

In *Employees*, the Solicitor General's amicus brief focused on waiver by ratification.[197] He distinguished *Hans* as a suit supported only by the state's alleged contract clause violation, necessarily prohibited by the eleventh amendment and state sovereign immunity,[198] and therefore inapposite in a case based on a federal statutory right.[199]

Although Justice Douglas, writing for the majority, did not warmly embrace the argument of the United States,[200] he did not reject it:

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to eliminate the confusion. The Court chose not to reach the arguments of waiver by state statutes or repeal of eleventh amendment immunity by the fourteenth amendment, and instead held the relief was allowable because it was "prospective" rather than compensatory. The Court emphasized that no plaintiff would receive any compensatory award. *Id.* at 2761-62.

197. *See* 411 U.S. at 286.

198. Brief for United States as Amicus Curiae at 9, 15.

199. *Id.* Justice Brennan accepted the arguments of the United States in his dissent, 411 U.S. at 298. He argued that *Hans*, a suit against the state by its own citizen, had its basis in the common law sovereign immunity and was no constitutional bar to suit. He limited *Hans* to its facts—an alleged contract impairment suit, "a prohibition self imposed by the States upon themselves" and granting "Congress no powers of enforcement by means of subjecting the States to suit or otherwise." *Id.* at 320 n.7. Moreover, Brennan stated that even if *Hans* were read as a constitutional decision, it did not apply. The states, he reasoned, surrendered their immunity with respect to the enumerated powers that the Constitution granted Congress. The commerce power was among those granted and was exercised in sanctioning state employees' rights under the FLSA. The contract clause, however, was not among the enumerated or "supreme federal powers" given to the national government and, therefore, did not carry with it any such waiver or immunity. *Id.* Concurring in *Employees*, Justice Marshall attempted to rebut Justice Brennan's argument that the contract clause did not create a cause of action by citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). The *Sturges* case, however, involved the aspect of the contract clause that forbade the states to pass laws that would impair the obligations of private citizens, not the aspect that deals with the state's own contracts. Although the contract clause may be self-executory between private citizens, there is no indication that it is self-executory in a suit between a citizen and the state.

200. At one point, he stated:

> The dissent argues that "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.". . . But, the plain language of the Court's opinion in Parden belies this assertion. For example, the Court stated:
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> "Recognition of the congressional power to render a State suable under the FELA does not mean that the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State's own citizens by the Hans case, is here being overridden. It remains the law that a State may not be sued by an individual without its consent.". . . The Court then repeated that "[a] State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court.". . . As we read these passages, and clearly as the dissent in Parden read them, [0] this [2/1] . . they dealt with constitutional

> The Solicitor General, as *amicus curiae*, argues that *Hans v. Louisiana* should not be construed to apply to the present case, his theory being that in *Hans* the suit was one to collect on coupons attaching to state bonds, while in the instant case the suit is a cause of action created by Congress and contained in § 16(b) of the Act. It is true that, as the Court said in *Parden*, "the States surrendered a portion of sovereignty when they granted Congress the power to regulate commerce." But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the State and putting the States on the same footing as other employers is not clear.[201]

It may thus be concluded that all the Justices except Marshall and Stewart (who concurred with the majority, alleging a lack of congressional power to overcome the "constitutional immunity" without some true waiver by the state) recognized that Congress had the power to authorize suits against the states.

Unfortunately, the Court paid considerable attention to the Solicitor General's commerce power discussion and did not devote as much thought to the argument that *Hans* was applicable only in the contract clause situation. As a result, subsequent commentary has focused on the commerce power rather than on the meaning of the eleventh amendment and sovereign immunity. Although the two concepts overlap, the loss of sovereign immunity due to adoption and ratification of the Constitution is broader than the commerce power alone, and potentially encompasses all federal question suits against states except ordinary suits on debts.

This interpretation of the legislative prerogative would logically apply in suits against states both by citizens and non-citizens, although the former application is simplified by the absence of prohibitive eleventh amendment language. The state sovereign immunity obstacle is removed in cases arising under the Constitution or federal statutes,

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constraints on the exercise of the federal judicial power. Moreover, if Parden was concerned merely with the surrender of common-law sovereign immunity when the States granted Congress the power to regulate commerce, it would seem unnecessary to reach the question of waiver or consent, for Congress could subject the States to suit by their own citizens whenever it was deemed necessary or appropriate to the regulation of commerce. No more would be required. But, there can be no doubt that the Court's holding in Parden was premised on the conclusion that Alabama, by operating the railroad, had consented to suit in the federal courts under FELA.

411 U.S. at 280 n.1 (citations omitted).

201. *Id.* at 286-87 (citations omitted).

except to the extent that federal law purportedly legitimizes an otherwise barred suit against a state on its ordinary contractual debt. If the decisions were to turn only on the extent of commerce power, moreover, the Court could go too far and validate legislation that creates federal causes of action against states on ordinary state law debt.

3. *The Fourteenth Amendment*

In *Fitzpatrick v. Bitzer*,[202] the Court allowed suit by state citizens against their own state under Title VII of the Civil Rights Act of 1964.[203] The Act authorized a cause of action based on employment discrimination because of race or sex.[204] The Court had little trouble finding that under the fourteenth amendment, particularly section 5 which sanctions appropriate enforcement legislation, Congress could create causes of action that allowed monetary recovery from a state, including back payments and attorney's fees.[205] The case ruled that any eleventh amendment bar was necessarily eliminated by the fourteenth amendment.

The decision in *Fitzpatrick* is in apparent conflict with *Edelman* because section 1983, alleged by plaintiffs to authorize suit in the latter case, is also fourteenth amendment legislation. In *Edelman*, the Court held that section 1983, even though supported by the Social Security Act provisions, did not create a cause of action for back payments. That the Court reached a different result in *Fitzpatrick* indicates *Edelman* was the result of statutory construction and not constitutionally required.

It is difficult to believe the Court will continue to find implied consent by Congress more readily under the fourteenth amendment than under the other legitimate constitutional powers. In deference to Congress, the Court should uphold a congressional act found to be valid under any constitutional provision. Moreover, the Court in *Employees* recognized Congress' ability to override the eleventh amendment and state sovereign immunity through its commerce power.

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202. 427 U.S. 445 (1976).

203. 42 U.S.C. § 2000 2(a) (1970), *as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103.

204. 42 U.S.C. § 2000e-2(a) (Supp. V 1975).

205. 427 U.S. at 456.

4. *Statutory Interpretation*

The unusual kind of statutory interpretation in *Employees* and *Edelman* was abandoned by the Court in *Fitzpatrick*. In *Employees*, the Court found that Congress had the power to create causes of action against the state, but, despite evidence to the contrary, held Congress had not done so. According to normal rules of legislative construction, where the pre-existing FLSA specifically authorized federal or state court suit for minimum wages and penalties and Congress specifically extended the same rights to certain state employees, the state employees were intended to have the same right to file such a cause of action.[206]

Conceivably, Justice Douglas based his contrary statutory construction on his belief that Congress did not have the constitutional power to require the states to pay minimum wages to these state employees;[207] he conceded that under "the literal language of the present Act," suit would lie.[208] The result is unfortunate because it imposes a rule of statutory construction on the federal courts which, in effect, approves super-legislative decisions to veto or amend congressional enactments on a non-constitutional basis. Furthermore, there are no guidelines; the rule may be arbitrarily applied in any case where Congress purports to make a state liable.

The ultimate determination of the issues illustrates the futility and danger of the Court's statutory construction in *Employees*. Congress not only revised the law that covered state hospital employees to insure liability to suit, but also broadened it to cover almost all state and local employees.[209] The new legislation ultimately reached the Supreme Court in *National League of Cities v. Usery*[210] on the real issue: Was such legislation a valid exercise of the commerce power in the face of the tenth amendment. The Court held that it was not.

Regardless of whether one agrees with the decision in *National League of Cities*, the Court will clearly hand down better opinions where state governmental prerogatives and congressional power conflict if it analyzes

206. *See* Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 289 (1973) (Marshall, J., dissenting).

207. *See* Maryland v. Wirtz, 392 U.S. 183, 202-05 (1968) (Douglas, J., dissenting).

208. 411 U.S. at 283.

209. *See* 29 U.S.C. §§ 203(d) & 216(b) (1970), *as amended by* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55.

210. 426 U.S. 833 (1976).

the specific clauses of the Constitution that allegedly granted the powers at issue. *National League of Cities* presented a very difficult issue which was decided by weighing the purposes of the commerce power against the purposes of the tenth amendment. By using this analysis in the future, in cases potentially involving a wide spectrum of constitutional provisions, the Court is more likely to strike an appropriate balance between the need of the people for enforcement of federal rights and the need for viable state governments within the constitutional framework.[211]

The eleventh amendment furnishes no guidelines for such balancing. Certainly, rigid statutory interpretation and judicial limitation on the express acts of Congress does not help the process. Although the Court in *Employees* succeeded in delaying the resolution of the issue on the merits, it did so only at the expense of inviting litigation in every case where Congress has created state liability.

In *Edelman,* the Court recognized Congress' ability to authorize relief for eligible welfare applicants, but denied the applicants the right to recover benefits owed, but not paid, prior to their obtaining a federal court order for relief. Although the opinions of both the majority and dissent were phrased almost entirely in terms of waiver and statutorily created federal rights (which implies the state was suable to the extent the action lay), the opinion turned on the officer's liability for injunctive relief but not for the payment of money. Although it is probably unimportant whether officer and state liability are distinguished where the result is the same, Justice Rehnquist's opinion is confusing because he applied different standards to the same legislation.

The Court used a two-tier theory of implied waiver: the states' waiver of the eleventh amendment and sovereign immunity by ratification and adoption of the Constitution allows Congress to create causes of action against the state or its officers even where the payment of money is required. In causes seeking money awards, however, Congress must indicate its desire to hold the states liable for everything owed; otherwise, the state will be held liable only for those benefits

211. *See* Baker, *Federalism and the Eleventh Amendment,* 48 U. COLO. L. REV. 139, 179-80 (1977), suggesting that the tenth amendment is the logical guardian of "substantive federalism" while the eleventh amendment is more related to "formal federalism." Although the term "substantive" may carry some connotations regarding the use of state law which are not appropriate in this area, Mr. Baker makes a point similar to that expressed in the text. One problem with focusing too much on the tenth amendment, however, is that the tenth may also be overruled by Congress when it acts under the fourteenth amendment.

that accrue after the court order is issued.[212] This is an unusual, if not unique, form of non-retroactivity because it creates future non-retroactivity: every plaintiff must obtain an injunction before the state's responsibility for wrongfully withheld payments begins. In effect, it is within the state official's discretion whether to observe federal legislation legitimately enacted by Congress. The result is undesirable because it encourages lawlessness in state officials and immunizes them until a court order is granted.[213]

Although *Edelman* is not technically an eleventh amendment suit, having been brought by a citizen of the same state, Justice Rehnquist had no difficulty in finding that a possible Illinois waiver of immunity in its own courts had no bearing on the question of whether the state had also waived its immunity from suit in federal court.[214] Consequently, although the entire defense rests on common law sovereign immunity, the state's waiver of that immunity became a practical impossibility. It is difficult to imagine a state enacting legislation specifically making itself suable in federal as well as in state courts. On the other hand, Congress must specifically provide that the state meet the obligations it incurs before a court can order it to comply.

The statutory interpretation in *Edelman* is subject to the same criticism as that in *Employees*. Justice Rehnquist is unquestionably correct that there is less specific statutory authorization for suit under the Social Security Act than there was under the FLSA in *Employees* because the former provided, at best, an implied cause of action. The suit, however, rested squarely on section 1983.[215]

212. At least two Justices had difficulty with the two-tier theory. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Stevens, J., concurring); Edelman v. Jordan, 415 U.S. 651, 678 (1974) (Douglas, J., dissenting).

213. Application of the two-tier theory to questions of federal sovereign immunity has been defended. *See* Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Cases*, 10 HARV. C.R.-C.L. L. REV. 322 (1975). Federal sovereign immunity involves different considerations than state sovereign immunity, however. Professor Abernathy proposes that the relief aspect be governed by considerations of separation of powers, principles which can be found in the language of the Constitution that delegates those powers to the different branches and the decisions defining the extension thereof by implication. *Id.* at 361. He shows respect for the constitutional language and the powers of the other branches of government, rather than condoning a second tier governed only by court discretion.

214. 415 U.S. at 677 n.19. *See* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Chandler v. Dix, 194 U.S. 590 (1904). Both suits were filed by citizens of another state.

215. *See* Rosado v. Wyman, 397 U.S. 397 (1970) (allowing suit to determine validity of state's action that allegedly violated Social Security Act).

There is simply nothing in the language or history of section 1983 to suggest that Congress intended a distinction between prospective relief and back payments.[216] The Court acted outside its judicial role in limiting Congress' intent to provide for all forms of actions against state officials by denying those actions that awarded monetary relief. Again, there was no constitutional basis for the decision unless one considers common law sovereign immunity to be of constitutional stature. In addition, there are no constitutional guidelines for determining when the two-tier rule comes into effect.[217]

In *Fitzpatrick v. Bitzer*,[218] the Court took a step to correct the unusual statutory construction in *Employees* and *Edelman*. The Court, almost effortlessly, acknowledged Congress' power under the fourteenth amendment to provide a remedy, including back payments from a state employees' retirement fund, where employees had been discriminated against on the basis of sex. The facts with regard to the statutory interpretation were remarkably similar to those in *Employees*. Congress, in 1964, enacted a statute that prohibited various discriminatory practices by private employers but excluded employees of a state or its political subdivisions from the Act's coverage. In 1972, Congress amended the law to repeal the exclusion and thus include state employees. Nothing specific was found in the legislative history to indicate that Congress intended to allow a suit against a state in federal court. The newly covered employees were only given the same remedies as the previously included employees enjoyed. Justice Rehnquist, again writing for the majority, made a significant departure from *Employees* in terms of legislative interpretation.

Justice Rehnquist had difficulty, however, with his own discussion of section 1983 in *Edelman* because 1983 is also fourteenth amendment legislation. He attempted to reconcile the differences in the causes of action by stating that because section 1983 did not authorize actions against cities,[219] it would not authorize actions against states.[220] Of course, neither *Edelman* nor *Fitzpatrick* involved a suit against the state in name. Both suits were against officers and the issue in both was

216. *See* Edelman v. Jordan, 415 U.S. 651, 691 (Marshall, J., dissenting); Monroe v. Pape, 365 U.S. 167 (1961) (Section 1983 creates a private cause of action for damages caused by a deprivation of civil rights.).

217. *See* cases cited note 196 *supra*.

218. 427 U.S. 445 (1976).

219. *See* Monroe v. Pape, 365 U.S. 167, 187-91 (1961).

220. 427 U.S. at 452.

whether damages could be awarded against the officer and be payable by the state. Justice Stevens, concurring, identified this problem and distinguished *Fitzpatrick* as allowing the recovery of damages only from the separate state employees' retirement fund and not from the state treasury.[221] It is unlikely that the Court will rule differently in a Title VII case involving payments direct from the state treasury. None of the other Justices felt the need to join Justice Stevens on this point; the case thus silently repudiates *Edelman* with respect to section 1983.[222]

Whether the Court will continue to distinguish fourteenth amendment legislation and require different degrees of clarity from Congress with regard to state liability remains an open question. If *Employees* is regarded as an aberration, however, necessitated by underlying doubts as to the statute's validity, one can expect future cases to avoid the kind of statutory interpretation found in *Employees* and *Edelman.*

5. *Abstention*

Commentators have had trouble reconciling the extension of immunity to state tax officials sued in federal court in cases in which the state has admittedly authorized such suits against the officers in their own courts.[223] Read closely, these cases merely hold that the collection of state taxes should not be interfered with when there is an

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221. *Id.* at 459-60.

222. Different standards may nevertheless continue to be applied to § 1983 actions. Alternatively, the next § 1983 suit may distinguish *Edelman's* weak statutory basis for suit under the Social Security Act, even to the extent of reversing Rosado v. Wyman, 397 U.S. 397 (1970).

The Court postponed a further reconciliation of *Edelman* and *Fitzpatrick* in Bond v. Stanton, 528 F.2d 688 (7th Cir. 1976), *vacated and remanded*, 97 S. Ct. 479 (1977), by vacating its grant of certiorari and remanding a case, involving the allowability of attorney's fees in a § 1983 action against state officials, for further consideration in light of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C.A. § 1988 (Supp. 1977). The Seventh Circuit had an opportunity to consider this problem in Jordan v. Trainor, 551 F.2d 152 (7th Cir. 1977), a sequel to *Edelman*, holding that the district court could not issue an order to the Illinois Department of Welfare that required it to send notice to persons wrongfully denied benefits informing them of their right to appeal and of the amount wrongfully withheld, because it would result in the claims having to be paid out of state funds after appeals were filed. The Seventh Circuit has granted a petition for rehearing en banc, — F.2d — (7th Cir. 1977). Although the case could be decided on alternate grounds (for instance, that the order simply does not require any payment of state funds, or that there is no duty to send such notice), it may well provide a chance to reconsider the meaning of § 1983 and redefine the limits set forth in *Edelman.*

223. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946), Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), and Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944), are the most recent of these. *See* note 156 *supra.*

adequate remedy at state law.[224] It is unfortunate that these cases are relied on in a case like *Edelman*, involving entirely different issues, without discussion of the available state relief.[225] Although it would be more consistent with the purposes of the eleventh amendment to reverse this line of cases, because of ultimate reviewability in the Supreme Court, there is no harm done to the federal balance by continuing to apply them according to their intended meaning.

The extension of the abstention-comity doctrine involves just as great an act of court legislation as the statutory interpretation in *Employees* and *Edelman*, criticized above.[226] In addition, the motivation for such

224. *See* Smith v. Reeves, 178 U.S. 436 (1900); *In re* Ayers, 123 U.S. 443 (1887) (barring a federal action to enjoin a tax collector from filing suits for collection of taxes, where the taxpayer had the right to defend the suit in state court on the basis of his tender of coupons in accordance with prior state law).

225. The *Edelman* majority relied heavily on one of these cases, Ford Motor Co. v. Department of Treasury, as the basis for its decision that past due benefits could not be recovered. 415 U.S. at 655, 677. It is doubtful whether any state court action would be available in *Edelman*. Although an argument of state statutory waiver was made, *id.* at 677, it is unlikely that the Illinois courts would give a liberal interpretation to the state constitution and statute, which partially waive immunity by allowing certain actions in a state court of claims, and permit a suit for past due welfare benefits, particularly where the relief has already been denied in federal suit. In Williamson Towing Co. v. Illinois, 534 F.2d 758, 760 (7th Cir. 1976), a federal court found no waiver of immunity under such provisions in a federal question case. Even if state court relief were available, it is absurd to require plaintiffs to split their claims in a case like *Edelman*.

Edelman in turn has contributed to a rash of eleventh amendment defenses in cases where the eleventh amendment would not have been thought of prior to *Edelman* and its predecessor, Rothstein v. Wyman, 467 F.2d 226 (2d Cir. 1972). None of these cases fall within the traditional exception to officer liability. Almost all relate to the enforcement of federal statutory rights. Only one, Standing Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135 (8th Cir. 1975), a suit for refund of state taxes, was a proper case for abstention under the *Read* doctrine.

226. The classical requirement of a state statute that might be construed to eliminate the federal question is missing. In addition, exhaustion of state judicial remedies is not ordinarily a prerequisite to § 1983 actions, *see* McNeese v. Board of Educ. for Community Unit School Dist., 373 U.S. 668, 671 (1963), *and* Monroe v. Pape, 365 U.S. 167, 183 (1961), and exhaustion will not be required unless a federal statute so mandates. *See* Preiser v. Rodriguez, 411 U.S. 475, 480-90 (1973). The Court has begun, however, to exhibit more flexibility with the doctrine of abstention. *See* Schlesinger v. Councilman, 420 U.S. 738, 756 (1975) (applying comity considerations in federal suit to block court martial proceedings); Huffman v. Pursue, Ltd., 420 U.S. 592, 610-11 (1975) (applying abstention doctrine to order lower court to reconsider whether it should enjoin state civil nuisance proceeding where federal plaintiff had not exhausted state appeal process and state supreme court had already issued a ruling severely limiting the statute under which plaintiff was sued); O'Shea v. Littleton, 414 U.S. 488, 500-02 (1974) (federal injunction against future arrests, prosecutions, and sentencing by

abstention is questionable. It appears that past abstention and comity holdings are as much a response to overcrowding of federal court dockets as a weighing of constitutional or even non-constitutional issues regarding the division of powers between federal and state governments. The rationale for limiting the federal docket is perhaps best expressed by Judge Friendly, who feels that in order to maintain the dignity of federal courts and to attract jurists of high quality to federal judgeships, the prestige of federal courts must be maintained by limiting the number of federal courts and federal judges. This, of course, requires that the caseload be kept within manageable limits so that quality judicial craftsmanship will be present at all levels of the federal judicial system.[227] The difficulty with the argument, assuming that it is true, is that it contains a very disturbing judgment which goes to the root of federalism itself: dignity and quality of federal courts must be maintained at the expense of the dignity and quality of state courts. Unfortunately, state courts do not enjoy as much quality and respect on the whole as federal courts and many of them are already far more overcrowded. Nevertheless, if a viable federal system is to be maintained, we must simultaneously attend to the overcrowding problem in state courts. Certainly when it comes to cases containing federal questions, there will be some overall savings in court time and expense by having them litigated, where possible, through the federal judicial circuits and the Supreme Court rather than through the fifty state judicial systems and the Supreme Court.[228]

In spite of the misuse of abstention and comity in cases arising under federal law, however, it still seems preferable that the *Read* line

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state officials is a violation of comity principles) (dictum). The Court seems to base this largely on the traditional need for a showing of lack of adequate remedy at law in order for a federal plaintiff to show the irreparable injury necessary for equitable relief. *See also* Allee v. Medrano, 416 U.S. 802 (1974). Although some of these cases may go too far, one can at least argue that the availability of relief through state court suit for tax refund is an adequate remedy.

227. H. FRIENDLY, FEDERAL JURISDICTION, A GENERAL VIEW 28-31 (1973). Judge Friendly does not argue that the caseload should be reduced by improper abstention in federal questions. In fact, he suggests many other more practical ways to reduce the caseload. *Id.* at 102-04. His argument is adopted only because it is as good a rationale as any for the position that the caseload needs to be reduced, which is a factor in recent decisions extending comity abstention.

228. *See* Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976), which suggests the Supreme Court is already lacking in capacity to review federal questions litigated in state courts.

of cases be treated as a form of abstention for several reasons. First, the Court treated them as such. Secondly, federal court suits to enjoin or restrain the collection of state taxes have been forbidden by statute since 1937 where there is an adequate remedy at state law.[229] The policy of this statute should also apply to suits for tax refunds where state remedies are sufficient. Thirdly, if the Court abstained without any congressional authority to do so, it is relatively easy for Congress to draft corrective legislation. Finally, it is possible to develop helpful lines of precedent, on the basis of abstention from cases involving state functions, where the state has clearly waived immunity in its own court by providing that appropriate actions be filed and federal issues be raised and ultimately reviewed by the Supreme Court. The factors are easily identified, and the Court is not required to do any delicate balancing.

In the *Read* line of cases, moreover, abstention allowed state courts to first interpret the state tax laws, which could possibly result in a favorable ruling for the plaintiff-taxpayers. The policy of leaving the state tax collection process undisturbed until the state statute was construed by the state court is at least analogous to classical abstention in cases where a state court construction might well obviate the need for the Supreme Court to consider the validity of the statute. In *Edelman* and *Employees*, there were no state statutes at issue and the basic questions involved federal statutory construction. Nothing in the federal statutes required or suggested a policy of abstention. A redefinition of the *Read* line of cases, as abstention cases, would prevent misapplication in federal statutory cases, where almost no considerations supporting abstention exist.

V. CONCLUSION

There have always been theoretical problems with traditional lines of analysis in state immunity cases that premise liability of the state official upon classification of the lawsuit's subject matter. There is nothing in the language of the eleventh amendment, whether it be considered a jurisdictional limit on federal courts or an invocation of common law sovereign immunity, that prohibits a suit for specific per-

229. 28 U.S.C. § 1341 (1970) provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

formance of a contract but permits a suit that alleges the tortious seizure of property. The analysis was useful, despite this theoretical gap, in an age where Congress made no complicated demands on the state governments. A workable rule was fashioned by holding the officer liable, individually, for the state's failure. The rules, as applied, were consistent with the purpose of the eleventh amendment: to prevent states from being subjected to ordinary state common law suits on debt. In cases that did not interfere with the basic functioning of state government, compliance with the law was achieved by permitting suits against state officers, whether filed by citizens or non-citizens of the state.

Prior to the increase in federal legislation creating rights for individuals, the Court was able to avoid conflicts between federal law and state immunity by refusing to consider the contract clause self-executing. This approach coincided with the purposes of the eleventh amendment because the contract clause was the only constitutional provision that could be used to transform ordinary debt suits into federal causes of action. The Court used this device to prevent ordinary state debt actions even after statutory jurisdiction was created in the 1870s for causes arising under the Constitution or federal laws. Nevertheless, even state debt issues could sometimes be resolved, either by suit against an officer or by the right of appeal to the Supreme Court from state court rulings alleged to be in conflict with federal law.

With the rise of federal legislation formulating new individual rights and particularly federal schemes that create direct state obligations, the old officer liability categories no longer seemed adequate. The categories were based on traditional common law and required arbitrary determinations as to whether the state officer had individual responsibility for the act or omission alleged.[230] The new federal rights and duties do not fit, even roughly, into these common law molds.

The Court has not been able to solve the problem by development of a useful doctrine of waiver in fact. As with officer liability analysis, there are serious theoretical problems with using waiver as a tool. If state immunity is based on the absence of federal jurisdictional power, it cannot be waived;[231] if it is based on common law sovereign immunity, its waiver is dependent on state law. Neither alternative is

230. *See* Engdahl, *supra* note 44.

231. Minnesota v. Hitchcock, 185 U.S. 373 (1902) (federal court jurisdiction cannot be supplied by consent).

useful in dealing with the clash between federal law and state immunity.[232]

The *Employees* case suggests a useful approach with a solid basis in existing precedent. The states have lost their immunity to the extent that the Constitution imposes federal duties and obligations upon states, either by its direct terms or by empowering Congress to enact legislation subject only to tenth amendment limitations. Using the fourteenth amendment, the *Fitzpatrick* case takes the same approach.

The suggested approach is broad enough to include all federal question suits against a state or a state officer. The Court has not yet recognized its application in suits filed against a state by a citizen of another state, however.[233] Even if limited to suits by a state's own citizens, the rule would resolve most of the important questions con-

232. Edelman v. Jordan, 415 U.S. 651 (1974), all but obliterated the doctrine of waiver by act. It is unlikely that the state can show more actual consent by participation than was demonstrated in *Edelman*. Justice Marshall, who by his concurrence in *Employees* demonstrated an unwillingness to find consent absent actual affirmative conduct by the state in a situation involving real choice, found consent in *Edelman* on the basis of the state's open-eyed participation in the program. 415 U.S. at 695-96 (dissenting opinion). Douglas, who wrote for the majority in *Employees*, found state consent to be sued in *Edelman* both for future and past due benefits. 415 U.S. at 625. Implied waiver due to constitutional powers of Congress, however, avoids the pitfalls contained in the officer liability case just as well. In addition, it eliminates the search for actual acts of waiver by the state and avoids the complications that result from reliance on state law.

233. *Employees, Edelman,* and *Fitzpatrick*, the recent cases recognizing congressional power to create state liability, have been suits by a citizen against his own state. Allowing suit in such cases has been said to be anomalous, however, because the need for federal court jurisdiction is greatest in cases between a state and a citizen of another state who might be prejudiced in a foreign state court. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890) (criticizing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821)). This argument takes into account the article III provision for jurisdiction in suits between a state and a citizen of another state, but ignores the federal question provision. Ordinarily, a citizen of one state deals with another state only by choice, but all citizens necessarily deal with the government of their own state and for them it is essential to have some recourse for protection of their federal rights. In cases involving solely questions of state law, it would be anomalous to allow federal suit only by citizens of the same state. Under the Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), interpretation of the Federal Rules of Decision Act it would have been worse than anomalous, giving the citizen the right to a choice of law (by choosing a federal or state forum) that was denied the non-citizen. The use of state law in federal courts to determine state law questions since Erie R.R. v. Tompkins, 304 U.S. 64 (1938), has largely erased this effect. These considerations, however, do not apply in federal question cases. It is hard to see anything anomalous in allowing a citizen to assert his federal rights against his own state in federal court rather than in state court where the judge is likely to be a political appointee of the state administration.

cerning enforcement of federal rights. Moreover, it is likely that *Fitzpatrick* will extend federal jurisdiction to suits filed by non-citizens under fourteenth amendment legislation. State immunity would continue, under existing law, if no federal question is involved, regardless of whether suit is filed by a citizen or non-citizen. The rules allowing suits against state officers, with the traditional exceptions, are sufficient to avoid any problem in the nonfederal area.

It may be suggested that this approach is invalid, because the Court seemed to move in a different direction in *Employees* and *Edelman*. In both cases, however, the Court recognized Congress' power to create state liability in federal question suits. In these cases, the denial of relief was imposed by unusually restrictive legislative construction incorrectly based on one line of cases, including *Hans*, which denied relief on ordinary state debts by holding that the contract clause did not create a federal question, and another line of cases which required abstention where adequate review through state court procedures was available. In *Fitzpatrick* this limiting statutory construction was not applied. It is reasonable to believe that in future cases the Court will not limit the power of Congress under the eleventh amendment except to the extent that general federal question jurisdiction will not be construed to authorize suit merely because a state has impaired its contract; federal court suits to prohibit state tax collection may still be denied where state relief is clearly available. In other situations, Congress should be free to create state liability, provided its action is otherwise within its constitutional authority.