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The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents

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THE SUPREME COURT AND THE ELEVENTH AMENDMENT: MOURNING THE LOST OPPORTUNITY TO SYNTHESIZE CONFLICTING PRECEDENTS

BY ALLEN K. EASLEY*

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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.

—Eleventh Amendment to the United States Constitution

INTRODUCTION

The varied ways in which the Supreme Court has reached beyond the literal language of the eleventh amendment in an effort to articulate its true meaning are familiar to all who study, teach or practice in the field.¹ The eleventh amendment speaks of barring suits prosecuted against a state by "citizens of another State,"² but the Court has not

1. A sampling of recent commentary on the topic might include C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 139-68 (1980); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Part One*]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, *Part Two*]; Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Lichtenstein, *Retroactive Relief in the Federal Courts Since Edelman v. Jordan: A Trip Through the Twilight Zone*, 32 CASE W. RES. 364 (1982); 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 (1975); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

2. U.S. CONST. amend. XI.

hesitated to apply it to suits brought by citizens of the state being sued.³ The eleventh amendment speaks in classic subject matter jurisdiction terms by limiting the “judicial power of the United States,”⁴ but the Court has suggested that states may waive the jurisdictional bar and that Congress may override it by legislative action.⁵ The eleventh amendment speaks of barring suits “in law or equity,” but it has been applied to suits in admiralty as well,⁶ and has been ignored in some suits in equity based on the legal fiction that suits to enjoin state officials from enforcing allegedly unconstitutional state laws are not suits against the state.⁷ As one commentator noted: “One might expect that a look at the language of the eleventh amendment would help resolve most sovereign immunity issues. The problem is that the eleventh amendment is universally taken *not* to mean what it says.”⁸

Perhaps the foremost cause of the Supreme Court’s difficulties with the eleventh amendment is the first impression it typically generates that, however unambiguous it might appear, it makes no sense. What ever could have possessed the drafters of the eleventh amendment to bar suits against a state only by citizens of other states? This question leads inescapably to the answer that the drafters could not have intended such a bizarre result. However, interpreting the eleventh amendment to bar all suits against states in federal court creates other difficulties. Consider, for example, the obstacles to enforcing the fourteenth amendment if states cannot be sued in federal court. Inevitably, exceptions to such an interpretation of the eleventh amendment would have to be recognized to make its application more tolerable. The result was preordained. As one judge recently observed: “Any step through the looking glass of the eleventh amendment leads to a wonderland of judicially created and perpetuated fiction and paradox.”⁹

Several commentators in recent years have advocated alternative interpretations of the eleventh amendment in an effort to avoid this pre-

3. *See, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare* [hereinafter *Employees*], 411 U.S. 279 (1973); *Hans v. Louisiana*, 134 U.S. 1 (1890).

4. U.S. CONST. amend. XI. It could not have been merely coincidental that its drafters chose to begin the eleventh amendment with the same language that introduces article III. That language has been uniformly interpreted to refer to subject matter jurisdiction of the federal courts. *See* C. WRIGHT, *LAW OF FEDERAL COURTS* § 8, at 26 (4th ed. 1983).

5. *See, e.g.*, *Employees*, 411 U.S. 279 (1973). There the Court noted that the eleventh amendment stands as a barrier to federal court suits “against a nonconsenting state.” *Id.* at 284. It also suggested the pertinent inquiry was “whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court.” *Id.* at 283. Though the Court ultimately concluded that Congress had not done so, the obvious implication of its question was that Congress could do so if it wished. *Id.*

6. *Florida Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Ex parte New York*, No. 1, 256 U.S. 490, 497-500 (1921). *Contra* *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647).

7. *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

8. Field, *Part One*, *supra* note 1, at 516 (emphasis in original).

9. *Spicer v. Hilton*, 618 F.2d 232, 235 (3d Cir. 1980).

dicament.¹⁰ Their premise is that the drafters of the eleventh amendment meant what they said. These commentators conclude that the eleventh amendment does not prohibit suits by citizens against their own states.¹¹ This conclusion makes sense. Nonetheless, in *Atascadero State Hospital v. Scanlon*,¹² the Court's most significant recent eleventh amendment decision, a bare majority of the Court rejected this view of the eleventh amendment.¹³

The purpose of this article, however, is only secondarily to urge the adoption of a more literal interpretation of the eleventh amendment as a means of solving the eleventh amendment's conceptual dilemmas. Its primary purpose is to suggest that the body of eleventh amendment case law prior to *Atascadero*, although seemingly in hopeless disarray, can be synthesized into an analytical framework that is both sensible and workable. *Atascadero* misinterprets, neglects or rejects the framework erected by these cases, which explains the title of this article.

Part I will describe four key eleventh amendment cases decided in the last twenty-five years and the problems that have been presented for those attempting to derive from these cases a comprehensible framework for eleventh amendment analysis. Part II will explain how these cases can be reconciled with each other in a workable construct consistent with the proposed literal interpretation of the eleventh amendment. Part III will examine and criticize the Court's holding in *Atascadero*.

I. KEY ELEVENTH AMENDMENT CASES

The eleventh amendment has generated considerable litigation in the past fifteen years, including six major Supreme Court decisions and at least eight minor ones.¹⁴ Its earlier history was more circumspect. Although the eleventh amendment was mentioned in several Supreme Court decisions in the early 1800's,¹⁵ the Court's most significant rulings were not made until after the ratification of the Civil War amend-

10. Redish, *supra* note 1; Field, *Part One*, *supra* note 1; Field, *Part Two*, *supra* note 1; Fletcher, *supra* note 1; Gibbons, *supra* note 1.

11. Redish, *supra* note 1, at 152; Field, *Part One*, *supra* note 1, at 544; Fletcher, *supra* note 1, at 1060.

12. 473 U.S. 234 (1985).

13. In *Atascadero* the majority reaffirmed what it considered to be the holding of *Hans v. Louisiana* "that the Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide." *Atascadero*, 473 U.S. at 238 (1985).

14. The six major cases are *Welch v. State Department of Highways & Public Transportation*, 107 S. Ct. 2941 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974); and *Employees*, 411 U.S. 279 (1973). The minor cases include *Papasan v. Allain*, 106 S.Ct. 2932 (1986); *Green v. Mansour*, 474 U.S. 64 (1985); *Kentucky v. Graham*, 473 U.S. 159 (1985); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985); *Cory v. White*, 457 U.S. 85 (1982); *Florida Dep't of Health & Rehabilitative Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam); *Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978).

15. *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

ments¹⁶ and the general grant by Congress in 1875 of federal question jurisdiction.¹⁷ The earliest key Supreme Court decisions interpreting the eleventh amendment were *Hans v. Louisiana*¹⁸ in 1890, and *Ex parte Young*¹⁹ in 1908. *Hans* held that neither a citizen nor a noncitizen can sue a state in federal court.²⁰ In *Ex parte Young*, a decision that would have major ramifications for future fourteenth amendment litigation,²¹ the Court held that a suit against a state official to enjoin enforcement of an unconstitutional state law was not a suit against the state for eleventh amendment purposes.²²

The major catalyst to the modern influx of eleventh amendment litigation was *Parden v. Terminal Railway Co.*, decided in 1964.²³ *Parden*, and three key cases that followed it, *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare (Employees)*,²⁴ *Edelman v. Jordan*,²⁵ and *Fitzpatrick v. Bitzer*,²⁶ form a quartet which provides the framework of modern eleventh amendment analysis.

A. *Parden v. Terminal Railway Co.*

*Parden*²⁷ was a lawsuit brought under the Federal Employer's Liability Act (FELA)²⁸ by an Alabama railroad employee against his employer. The state of Alabama owned the railroad and raised the affirmative defense of sovereign immunity under the eleventh amendment. Because

16. U.S. CONST. amends. XIII, XIV, & XV.

17. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (1875) (codified as amended at 28 U.S.C. § 1331 (1982)).

18. 134 U.S. 1 (1890).

19. 209 U.S. 123 (1908).

20. 134 U.S. 1, 15 (1890).

21. The Court has more recently noted that *Ex parte Young* is a watershed case which has permitted "the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). A number of landmark cases striking down state statutes on constitutional grounds could not have been heard by the federal courts were it not for *Ex parte Young*. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (meditation or voluntary prayer in the public schools); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Baker v. Carr*, 369 U.S. 186 (1962) (state legislative reapportionment); *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954) (racially segregated public schools).

22. In *Ex Parte Young*, the Court held that a state official acting in conflict with the Constitution "is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. From that premise the Court adopted the fiction that a suit to enjoin a state official from enforcing an allegedly unconstitutional state law is not a suit against a state for eleventh amendment purposes, although the consequences of the injunction are certainly felt by the state, and although, for fourteenth amendment purposes, the actions of the state official would still be considered "state action." *Id.* at 166-68. However, the Court has refused to extend this reasoning to suits seeking lump sum money damages or restitution, even those couched in terms of injunctive relief, when the source of relief would be the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 668-69 (1974).

23. 377 U.S. 184 (1964).

24. 411 U.S. 279 (1973).

25. 415 U.S. 651 (1974).

26. 427 U.S. 445 (1976).

27. 377 U.S. 184 (1964).

28. Federal Employer's Liability Act, ch. 149, 35 Stat. 65, as amended by Act of Aug. 11, 1939, ch. 685, 53 Stat. 1404 (codified at 45 U.S.C. §§ 51-60 (1982)).

the plaintiff sought a damage award to be paid out of the state treasury rather than injunctive relief against state officials,²⁹ *Ex Parte Young* was not applicable. Justice Brennan, who would later become a key figure in modern eleventh amendment jurisprudence,³⁰ wrote a short, ambiguous opinion for a bare majority of five justices.³¹

1. Justice Brennan's Majority Opinion

Justice Brennan noted that although the literal language of the eleventh amendment did not prohibit suits by citizens against their own states, *Hans v. Louisiana* had nevertheless held that unconsenting states were immune from suit in federal court. He distinguished *Hans* by noting that Congress had authorized suits under the FELA against any railroads operating in interstate commerce, whether publicly or privately owned. Congress, he asserted, was empowered to subject Alabama to suits because each state surrendered a portion of its sovereignty to Congress by ratifying the commerce clause.³² Acknowledging that a state still could not be sued in federal court without its consent, he noted that the issue of consent was itself a question of federal law.³³ Despite state law to the contrary,³⁴ Justice Brennan held that Alabama had consented to suit in federal court by entering into the interstate railroad business with full knowledge that such conduct would bring it within the provisions of the FELA. He concluded that Alabama could not claim immunity from suit in federal court.³⁵

The ambiguity in Justice Brennan's majority opinion concerns the interrelationship between his "surrender" and "consent" theories. On one hand, if the states had surrendered their sovereignty to Congress by ratifying the commerce clause in 1789, as Justice Brennan suggested, then why did it matter whether Alabama had subsequently consented to this suit? Was it not enough that Congress had used the commerce power given to it by the states to enact the FELA? On the other hand, if it is true that, as Justice Brennan said, "[i]t remains the law that a State may not be sued by an individual without its consent,"³⁶ then in what sense did the states surrender their sovereignty to Congress in 1789?

29. 377 U.S. at 184 (1964).

30. See Field, *Part Two*, *supra* note 1, at 2010.

31. 377 U.S. at 198. Chief Justice Warren and Justices Black, Goldberg and Clark joined in Justice Brennan's opinion for the Court. Justices White, Douglas, Harlan and Stewart dissented.

32. *Id.* at 191.

33. *Id.* at 196. Justice Brennan observed that Congress could condition state participation in interstate commerce on states waiving their immunity from suits in federal court related to those activities. Such congressional authority would be rendered meaningless if a state, "on the basis of its own law or intention, could conclusively deny the waiver and shake off the condition." *Id.* As Alabama's activity involved interstate commerce, the question of its consent to suit was necessarily a question of federal law.

34. ALA. CONST. art. I, § 14 states that "the State of Alabama shall never be made a defendant in any court of law or equity."

35. 377 U.S. at 192.

36. *Id.*

2. Justice White's Dissent

Justice White wrote a short dissent which three other Justices joined. Justice White started with the proposition that states enjoy constitutional immunity from suits in federal court.³⁷ He then focused on Congress' enactment of the FELA as it related to Alabama's alleged consent to this suit. He argued that, while Congress certainly had the power to condition a state's entry into the interstate transportation business on its consent to suits arising out of that business, the Court should demand a clear manifestation of that congressional intent before recognizing such a result. Justice White pointed to a line of cases holding that a waiver of sovereign immunity could only be based on "the most express language,"³⁸ and noted that the FELA contained no such language. He concluded that Alabama could not be subjected to this suit in the federal courts.³⁹

B. *Employees of the Department of Public Health & Welfare v. Department of Health & Welfare*

*Employees*⁴⁰ was a lawsuit brought by a class of mental hospital employees against its employer, the state of Missouri, for overtime wages owed to them under the 1966 amendments to the Fair Labor Standards Act (FLSA).⁴¹ Here the Court found the suit barred by the eleventh amendment. The majority opinion was written by Justice Douglas, one of the dissenters in *Parden*. Justice Marshall, who joined the Court after *Parden* was decided, concurred in the result.⁴² Justice Brennan, author of the *Parden* opinion, dissented alone.⁴³

1. Justice Douglas' Majority Opinion

Justice Douglas began by explaining that, although the eleventh

37. *Id.* at 198 (White, J., dissenting).

38. *Id.* at 200 (White, J., dissenting) (citing *Ford Motor Co. v. Department of Treasury*, 323 U.S.459, 468-70 (1945); *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). It should be noted that the cases relied on by Justice White were not cases where the alleged "waiver" of state immunity was found in congressional legislation. *Ford Motor Co.* involved an ambiguous state statute which the Court construed as limiting consent to suits in state courts. *Murray* involved state legislation which dissolved the state liquor control board and created a special commission to dispose of the assets held by the board. *Id.* at 160-61. Plaintiffs, who sued the commission in federal court, asserted that the state had relinquished control over these assets so that a suit against the commission was not a suit against the state within the meaning of the eleventh amendment. *Id.* at 170. The Court disagreed, holding that such an interpretation of the state statute would only be adopted if supported "by the most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction." *Id.* at 171.

39. 377 U.S. at 200 (White, J., dissenting).

40. *Employees*, 411 U.S. 279 (1973).

41. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (1938), as amended by Fair Labor Standards Act of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966) (codified at 29 U.S.C. § 201-19 (1982)).

42. 411 U.S. at 287 (Marshall, J., concurring). Justice Marshall was joined by Justice Stewart, a dissenter in *Parden*.

43. None of the four members of the Court who joined in Justice Brennan's majority opinion in *Parden* was on the Court when *Employees* was decided.

amendment did not literally apply to citizen suits, *Hans v. Louisiana* had held that unconsenting states were constitutionally immune from both citizen and noncitizen suits in the federal courts.⁴⁴ Justice Douglas acknowledged that the issue was whether this case was controlled by the holding of *Parden*. He noted that in *Parden*, suit had been allowed against Alabama based on waiver or consent.⁴⁵ He found *Parden* distinguishable from *Employees* by the nature of the state activities and the statutory authority involved in the two cases.⁴⁶

Justice Douglas examined the state activities involved in each case. In *Parden*, Alabama had entered into the proprietary field of running an interstate railroad.⁴⁷ By contrast, in *Employees*, Missouri had done nothing more than engage in the traditionally governmental and nonproprietary function of running state mental hospitals.⁴⁸

With respect to the statutory authority for the respective suits, Justice Douglas acknowledged that in *Employees*, as in *Parden*, Congress had acted pursuant to its commerce clause power. However, because of the nature of Missouri's governmental activities, the harshness of the double damage penalty Congress imposed on FLSA violators, and the availability of other enforcement mechanisms besides private suits, he concluded that it would be inappropriate to assume that Congress intended to bring "the states to heel, in the sense of lifting their immunity from suit in a federal court,"⁴⁹ merely because Congress had included certain state operations within the FLSA definition of "employer."⁵⁰ He was unwilling to permit this suit to proceed without an explicit statement by Congress that the FLSA's grant of jurisdiction to the federal courts included the power to entertain private enforcement suits against states.⁵¹

Justice Douglas' opinion in *Employees*, like Justice Brennan's opinion

44. 411 U.S. at 280.

45. *Id.* at 284. Both Justice Douglas in *Employees* and Justice Brennan in *Parden* appeared to use the terms "consent" and "waiver" interchangeably. While "consent" is sometimes viewed as involving a more conscious choice on the part of the decision maker than is present in the case of "waiver," it does not appear that either Justice Douglas or Justice Brennan intended to draw such a distinction. See, e.g., BLACK'S LAW DICTIONARY 276 (5th ed. 1979) ("Consent is an act of reason, accompanied with deliberation, the mind weighing as in a balance the good or evil on each side."); *id.* at 1416 (Waiver "may be shown by acts and conduct and sometimes by nonaction.").

46. 411 U.S. at 282-84.

47. *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 185 (1964).

48. 411 U.S. at 284.

49. *Id.* at 283.

50. Fair Labor Standards Act of 1938, ch. 676, § 3(d), 52 Stat. 1060 (1938), as amended by Fair Labor Standards Act of 1966, Pub. L. No. 89-601, 80 Stat. 830 (1966). The original FLSA excluded federal, state and local governmental bodies from the definition of "employers." The 1966 amendments added an exceptions clause to § 3(d) which read: "except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in subsection (r) of this section." Subsection (r) further defined hospitals, institutions and schools.

51. See *Employees*, 411 U.S. at 284-85. Section 16(b) of the FLSA authorized suit in federal district court against an "employer" to recover overtime compensation, liquidated damages and attorney's fees. When Congress expanded the definition of employer in § 3(d) in 1966 to include certain state operations, it left the grant of jurisdiction in § 16(b) unchanged.

in *Parden*, was not without its difficulties. As was readily apparent, Congress had been much clearer in the FLSA than it had been in the FELA about its intent to “[bring] the states to heel.”⁵² The FELA was silent about suits against states in federal court, and no one suggested that Congress had even thought about the matter.⁵³ It was really only coincidental that the state of Alabama operated an interstate railroad, and Congress, twenty years earlier, had decided to authorize suits under the FELA against interstate railroads. By contrast, Congress explicitly addressed the question of applicability to state entities in its 1966 amendments to the FLSA, by modifying the definition of “employer” to include specified state institutions, such as state hospitals.⁵⁴ It is therefore difficult to understand how Justice Douglas thought Congress had not made its intent clear enough in the FLSA, when *Parden* had found the FELA to be sufficiently clear without any evidence of congressional intent. Indeed, Justices Marshall and Brennan in concurring and dissenting opinions found Justice Douglas’ argument that Congress had not been clear enough in the FLSA nothing short of incredible.⁵⁵

A second problem with Justice Douglas’ opinion concerned the conclusion implicit in his analysis of congressional intent that Congress, had it been clear enough, could have subjected states to suits under the FLSA even without state consent.⁵⁶ Given his assumption that *Hans*

52. *Employees*, 411 U.S. at 283.

53. The legislative history of the FELA discloses no congressional consideration of the potential liability of states engaged in interstate railroad operations. Rather, the debate focused on whether the legislation would unconstitutionally intrude on states’ exercise of police power over intrastate commerce. See, e.g., 42 CONG. REC. 4438 (1908).

54. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, Title II, § 102(b), 80 Stat. 831 (codified at 29 U.S.C. § 203(d) (1982)).

55. Justice Marshall said: “In the face of such clear language, I find it impossible to believe that Congress did not intend to extend the full benefit of the provisions of the FLSA to these state employees.” *Employees*, 411 U.S. at 289 (Marshall, J. concurring). Justice Brennan found “no support whatever in either the text of the amendments or their legislative history for the arguments made by the Court for its contrary conclusion.” *Id.* at 303 (Brennan, J., dissenting).

It would be possible to attribute untoward motives to Justice Douglas. He was one of the dissenters in *Parden*, arguing that Congress had not made sufficiently clear in the FELA its intent to permit suits against states in federal court. One possibility, therefore, is that he was silently overruling *Parden* in *Employees*. His dissent in *Edelman v. Jordan*, 415 U.S. 651 (1974), however, suggests otherwise.

In *Edelman* Justice Douglas accepted the *Parden* rationale that Alabama had constructively consented to suit by entering the interstate railroad business twenty years after enactment of the FELA. He found constructive consent present in *Edelman* as well, based on Illinois’ decision to enter into a federal-state welfare plan heavily regulated by Congress. While Justice Douglas’ *Edelman* dissent did not refer to his majority opinion in *Employees*, it is fair to assume that he was more concerned about the degree of congressional authorization in *Employees* than he was in *Edelman* because there was no basis for finding state consent in *Employees*. In order to permit suit in *Employees*, Justice Douglas would have been required to assume that Congress intended to subject states to suits in federal court without their consent. He was not willing to make that assumption without more evidence. 411 U.S. at 284-85.

56. Congress was quick to adopt Justice Douglas’ suggestion. It amended the jurisdictional provisions of the FLSA within two years after *Employees*, explicitly authorizing suits against states. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55 (1974) (codified at 29 U.S.C. § 216(b) (1982)). Additionally, the 1974 amendments broadened the definition of employer to include any “public agency.” The 1974

read into the eleventh amendment a constitutional barrier to suits against states in federal court, how could Congress remove that barrier by statute? Justice Marshall's concurring opinion addressed both of these problems with Justice Douglas' opinion, but left other problems unresolved.

2. Justice Marshall's Concurring Opinion

Justice Marshall asserted that there were two distinct questions raised by *Employees*: first, whether Congress, by extending the FLSA to certain state employees, had abrogated the states' affirmative defense of common law sovereign immunity; and second, whether this exercise of federal judicial power was barred by the eleventh amendment.⁵⁷

On the first question, Justice Marshall concluded that Congress had intentionally and effectively abrogated the defense of common law sovereign immunity by using its commerce power to enact the FLSA which, by its terms, authorized suits against states.⁵⁸ He therefore disagreed with the Court's more cautious reading of congressional intent.

Justice Marshall based his concurrence in the judgment of the Court on his answer to the second question. Emphasizing notions of federalism and state sovereignty, Justice Marshall concluded that the eleventh amendment barred suits against states in federal court by citizens as well as noncitizens.⁵⁹ The suit against Alabama in *Parden* had been allowed to proceed, in Justice Marshall's eyes, because Alabama had waived eleventh amendment immunity by entering into the interstate railroad business with full knowledge that it would thereby subject itself to federal regulations like the FELA. He asserted that no waiver had occurred in *Employees*, because Missouri had been running state mental hospitals long before Congress amended the FLSA to bring them under its coverage.⁶⁰ Because he believed the eleventh amendment raised a constitutionally imposed jurisdictional barrier to suit in federal court, he concluded that, regardless of congressional intent to the contrary, the plaintiffs in *Employees* could not bring suit in federal court.⁶¹

Although Justice Marshall's concurring opinion resolved the obvious problems with the Court's opinion, it exposed other difficulties that could not be so easily resolved. For example, if the eleventh amend-

amendments were held unconstitutional in *National League of Cities v. Usery*, 426 U.S. 833 (1976), although on tenth rather than eleventh amendment grounds. *National League of Cities* was itself overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985).

57. *Id.* at 287-88 (Marshall, J., concurring).

58. *Id.* at 288-89 (Marshall, J., concurring).

59. *Id.* at 294 (Marshall, J., concurring).

60. *Id.* at 296 (Marshall, J., concurring).

61. *Id.* at 289 (Marshall, J., concurring). Citing *Testa v. Katt*, 330 U.S. 386 (1947) and *General Oil v. Crain*, 209 U.S. 211 (1908), Justice Marshall concluded that the state courts would be constitutionally obligated under the supremacy clause to enforce FLSA claims, common law sovereign immunity to the contrary notwithstanding. 411 U.S. at 298 (Marshall, J., concurring). Justice Douglas, by contrast, noted that state courts might be available for FLSA suits, but declined to decide whether they were obligated to hear them. *Id.* at 287.

ment imposes a constitutionally dictated jurisdictional barrier to suits against states in federal court which Congress cannot overcome by legislation, how can states confer jurisdiction on the federal courts by mere consent? What of the black letter rule learned by every first year law student that consent of the parties does not confer subject matter jurisdiction?⁶² Justice Marshall's only response to that question was that the ability of a state to waive the jurisdictional bar of the eleventh amendment by consent "is an anomaly that is well established as a part of our constitutional jurisprudence."⁶³ While correct as far as it goes, this statement is hardly a satisfactory basis for constitutional decision making.⁶⁴

3. Justice Brennan's Dissent

Justice Brennan criticized both Justice Douglas and Justice Marshall for what he felt was a misunderstanding of his *Parden* opinion. In explaining what he meant in *Parden*, Justice Brennan also provided answers to key problems raised by the opinions of Justices Douglas and Marshall.

Justice Brennan took the position that *Parden* had held the eleventh amendment inapplicable to citizen suits. As a result, Missouri's immunity defense would have to rest on the common law doctrine of sovereign immunity. However, he reiterated his view that the states had surrendered a portion of their sovereignty to Congress by ratifying the commerce clause. Congress, he felt, had authorized suit against Missouri by enacting the FLSA pursuant to its commerce power. This left no immunity on which Missouri could rely in defense of this lawsuit.⁶⁵

By taking the position that the eleventh amendment does not apply to citizen suits, Justice Brennan accomplished two things. First, he resolved the problem presented by Justice Douglas' opinion of how Congress could by statute override a constitutionally imposed immunity. Second, he avoided the anomaly of permitting subject matter jurisdiction to be conferred on the federal courts by consent of the states.

The biggest problem with Justice Brennan's dissent is his insistence that *Parden* held the eleventh amendment inapplicable to citizen suits. Without the benefit of Justice Brennan's *Employees* dissent, few persons reading the majority opinion in *Parden* would have guessed as much. In

62. See J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 13 (1985); C. WRIGHT, LAW OF FEDERAL COURTS § 7, at 23 (4th ed. 1983).

63. 411 U.S. at 294-95 n.10 (Marshall, J., concurring).

64. Another conceptual problem not resolved by the approaches taken by Justices Douglas and Marshall concerns the Supreme Court's appellate jurisdiction over the state courts. The eleventh amendment does not distinguish between appellate and original jurisdiction. Thus it literally applies not only to suits against states brought originally in the federal district courts but also to suits against states brought in the state courts and appealed to the Supreme Court. However, the power of the Supreme Court to hear such appeals has never been seriously questioned, in spite of the eleventh amendment. See, e.g., *General Oil v. Crain*, 209 U.S. 211 (1908) (exercise of appellate jurisdiction to determine whether state courts were obligated by supremacy clause to hear suits that might be barred in federal court by the eleventh amendment).

65. 411 U.S. at 321 (Brennan, J., dissenting).

Parden, he stated: "Although the Eleventh Amendment is not *in terms* applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is *immune* from federal-court suits by its own citizens as well as by citizens of another State."⁶⁶ In retrospect Justice Brennan probably meant that, although the *eleventh amendment* did not apply to citizen suits, states could nevertheless raise the defense of *common law sovereign immunity* even without state consent or congressional authorization. But no other Justice participating in the *Employees* decision was willing to read *Parden* that way.

C. Edelman v. Jordan

*Edelman v. Jordan*⁶⁷ was a class action on behalf of Illinois disability benefit applicants against the state officials administering federal-state programs of Aid to the Aged, Blind, and Disabled (AABD).⁶⁸ Plaintiffs alleged that the processing of their benefit applications by the defendant officials exceeded the maximum time periods authorized by federal law. They sought a preliminary injunction requiring defendants to comply with federal standards. They also requested a permanent injunction requiring defendants to provide restitution to plaintiffs for benefits withheld by the state as a result of past noncompliance with federal law.⁶⁹ The Court granted the first request but denied the second. Justice Rehnquist wrote the Court's opinion. This time Justices Douglas, Marshall and Brennan each dissented, albeit in three separate opinions. Justice Blackmun joined in Justice Marshall's dissent to round out another five-four split.⁷⁰

1. Justice Rehnquist's Majority Opinion

Insofar as the plaintiffs sought prospective injunctive relief against Illinois state officials to compel their compliance with federal law, Justice Rehnquist saw no difficulty with permitting the suit under *Ex parte Young*. However, Justice Rehnquist rejected plaintiff's argument that *Ex Parte Young* permitted an award of back benefits.⁷¹ He concluded that the award of back benefits, although couched in terms of equitable restitution, nevertheless constituted a monetary award against the state of Illinois barred by the eleventh amendment.⁷²

66. *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 186 (1964) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)) (emphasis added). Justice Rehnquist used virtually identical language in *Edelman*, stating that "[w]hile the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

67. 415 U.S. 651 (1974).

68. Social Security Amendments of 1972, Pub. L. No. 92-603, Title III, 86 Stat. 1465 (codified at 42 U.S.C. §§ 1381-1383c (1982)).

69. 415 U.S. at 656.

70. *Id.* at 678 (Douglas, J., dissenting); *id.* at 687 (Brennan, J., dissenting); *id.* at 688 (Marshall, J., dissenting).

71. *Id.* at 664.

72. *Id.* at 666.

Justice Rehnquist rejected the argument that *Parden* permitted an award of back benefits because Illinois had waived its immunity from suit in federal court by accepting matching federal funds under the provisions of the Social Security Act.⁷³ He noted that “[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights.”⁷⁴ He concluded that a state can only be found to have waived its eleventh amendment immunity from suit in federal court when the waiver is stated in “the most express language.”⁷⁵

Justice Rehnquist found further support for his conclusion in the failure of the Social Security Act to provide for enforcement suits against states in federal court. The only sanction Congress provided in the Social Security Act for the violation by participating states of its fund distribution requirements was termination of future federal funding.⁷⁶ He noted, by contrast, that both *Parden* and *Employees* involved federal legislation “which by its terms authorized suit . . . against a general class of defendants which literally included States or state instrumentalities.”⁷⁷ The state was literally included in a class of defendants against whom suit was authorized in *Parden* by operating interstate railroads, and in *Employees*, by operating mental hospitals.

Justice Rehnquist rejected the argument that the Civil Rights Act of 1871 (section 1983)⁷⁸ authorized this suit to bring Illinois into compliance with the Social Security Act. He noted that section 1983 did nothing more than authorize an action against state officials, such as plaintiffs’ claim for prospective injunctive relief which the Court found was permitted by *Ex parte Young*. In Justice Rehnquist’s view, that hardly constituted congressional authorization to sue the state itself, let alone a general class of defendants that literally included states.⁷⁹

73. *Id.* at 671. The court of appeals had stated this as an alternative basis for its decision.

74. *Id.* at 673.

75. “[W]e will find waiver only where stated ‘by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.’” *Id.* (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)).

76. 42 U.S.C. § 1384 (1970) (omitted by revision, Pub. L. No. 92-603, § 302, 86 Stat 1465 (1982)).

77. 415 U.S. at 672.

78. The Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 (1982)), states in part:

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

79. Justice Rehnquist was probably following the Court’s reasoning in the seminal decision of *Monroe v. Pape*, 365 U.S. 167 (1961). *Monroe* held that the word “person” in § 1983 encompasses natural persons but not municipalities. *Id.* at 187. By the same logic, § 1983 could be viewed as authorizing suits against state officials but not against the state itself.

After *Edelman* was decided, this aspect of *Monroe* was overruled in *Monell v. Department of Social Serv.*, 436 U.S. 658 (1978). In *Quern v. Jordan*, 440 U.S. 332 (1979), a continuation of the *Edelman* litigation under a different name, the Court concluded in dictum that the *Monell* reading of § 1983 to encompass suits against municipalities would not

One problem immediately raised by Justice Rehnquist's opinion in *Edelman* concerns his apparent reinterpretation of the *Parden* decision. In *Employees*, Justice Douglas had stated that the *Parden* decision was based on the doctrine of waiver.⁸⁰ However, Justice Rehnquist seemed to suggest that *Parden* was really based on the doctrine of congressional authorization. Furthermore, Justice Rehnquist said that congressional authorization was present in both *Parden* and *Employees*, once again raising the question of why that authorization was sufficient in *Parden* and not in *Employees*.

A related problem raised by Justice Rehnquist's opinion concerns his statement that constructive consent could not be the basis of an eleventh amendment waiver. The *Parden* Court based its decision, at least in part, on the issue of constructive consent.⁸¹ Justice Douglas' opinion in *Employees* referred to *Parden* as a consent case. While this seeming inconsistency with *Parden* might explain why Justice Rehnquist sought to characterize *Parden* as a congressional authorization case, that recharacterization served only to emphasize the incongruence between *Parden* and *Employees*.

2. Justice Douglas' Dissent

In his majority opinion in *Employees*, Justice Douglas had distinguished *Parden* from *Employees* on the basis of consent. He now asserted that *Edelman* was distinguishable from *Employees* on the same basis. He found consent in Illinois' acceptance of matching federal funds to support its AABD program, coupled with knowledge of Supreme Court precedent authorizing monetary awards against states not complying with federal guidelines for administration of AABD programs.⁸² He was satisfied that section 1983 provided the appropriate vehicle for such awards.

Justice Douglas was not concerned about the lack of explicit congressional authorization, as he had been in *Employees*, because in *Edelman*, unlike *Employees*, he felt that the state had consented to suit.⁸³ This also explains why Justice Douglas required Congress to use more explicit language in *Employees* than had previously been required in *Parden*. *Parden*, like *Edelman*, involved state consent, and therefore explicit congressional authorization was not necessary.

change the outcome of *Edelman*. The *Quern* dictum was reaffirmed without further discussion in *Green v. Mansour*, 474 U.S. 64, 70 (1985).

80. *Employees*, 411 U.S. 279, 282 (1973).

81. *Parden* could not have been based on express consent. Alabama hotly contested whether plaintiff could subject it to suit in federal court, and nothing in Alabama law suggested that Alabama had consented to this suit. Thus the only kind of consent that could have been found in *Parden* was constructive consent. See *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964).

82. *Edelman*, 415 U.S. at 686-87 (Douglas, J., dissenting).

83. *Id.* (Douglas, J., dissenting).

3. Justice Marshall's Dissent

Justice Marshall, joined by Justice Blackmun, agreed that Illinois had waived its immunity from suit by accepting federal funds in support of its AABD program. Justice Marshall argued that, by accepting federal matching funds, Illinois had agreed to abide by the requirements imposed by the Social Security Act and accompanying regulations regarding their administration. Like Justice Douglas, he was untroubled by the lack of authority in the Social Security Act for suits against states to enforce compliance with federal requirements, because he found that authority in section 1983. While conceding Justice Rehnquist's point that section 1983 did not literally authorize suits against states, Justice Marshall noted that the *Edelman* class action was not literally a suit against a state. It was a suit against state officials, and in that sense, had been literally authorized by Congress. In the face of what he viewed as congressional authorization of a suit to which Illinois had constructively consented by its acceptance of federal matching funds, Justice Marshall found no eleventh amendment bar. He further noted that his views were consistent with his position in *Employees* because there had been no basis in *Employees* for inferring that Missouri had consented to the terms of the FLSA.⁸⁴

4. Justice Brennan's Dissent

Justice Brennan again asserted that the eleventh amendment does not apply to citizen suits. He contended that the only immunity from citizen suits which states could claim was the "ancient doctrine of sovereign immunity," which the states had surrendered by the grant of enumerated powers to Congress in the Constitution. In his view, since the states gave up their immunity when the Constitution was ratified in 1789, there was no reason to inquire whether Congress intended to authorize suits against states for retroactive AABD benefits, or whether Illinois had consented to such suits by its acceptance of federal funds in support of its AABD program.⁸⁵

D. Fitzpatrick v. Bitzer

*Fitzpatrick*⁸⁶ was a Title VII sex discrimination suit by a class of current and retired male employees of the state of Connecticut against supervisory state officials. The class sought retroactive retirement benefits.⁸⁷ As it had in the FLSA, Congress specifically excluded state employers from coverage when it initially enacted Title VII, but subsequently amended the definitional provisions to bring states within the purview of the statutory scheme.⁸⁸ This time, acting pursuant to its

84. *Id.* at 694-95 (Marshall, J., dissenting).

85. *Id.* at 688 (Brennan, J., dissenting).

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

87. *Id.* at 449-50.

88. As originally enacted, the term "employer" was defined to exclude "the United States, a corporation wholly owned by the Government of the United States, an Indian

fourteenth amendment enforcement power, Congress included jurisdictional language ever so slightly more explicit than the language which was found to be insufficient in *Employees*.⁸⁹

Fitzpatrick was a unanimous opinion authored by Justice Rehnquist.⁹⁰ It was the first and only modern eleventh amendment case to be decided without dissent.⁹¹ The only hint of disagreement on the Court appeared in brief concurring opinions written by Justices Brennan and Stevens.⁹²

As in *Edelman*, to the extent plaintiffs sought prospective injunctive relief against the individual state officials they had named as defendants, the suit was permitted by *Ex parte Young*. This time, however, Justice Rehnquist found that an award of back benefits from the Connecticut state treasury was also permissible in spite of the eleventh amendment.⁹³

1. Justice Rehnquist's Majority Opinion

In his discussion of the eleventh amendment implications of a retroactive monetary award against the state, Justice Rehnquist observed that, unlike *Edelman*, "in this Title VII case, the 'threshold fact of con-

tribe, or a State or political subdivision thereof . . ." Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e(b) (1982)).

89. The claim in *Employees* was brought under the Fair Labor Standards Act of 1938. Section 3(d) of the FLSA originally defined "employer" to exclude states and political subdivisions. This definition was amended in 1966 to except from the exclusion "employees of a state, or a political subdivision thereof, employed . . . in a hospital, institution, or school." 29 U.S.C. § 203(d) (1982). However, § 16(b) of the act, which granted jurisdiction to the federal courts to enforce the provisions of the FLSA, was not amended to include any specific reference to this expanded definition of "employer." 29 U.S.C. § 216(b) (1982). The court held that it would not infer congressional intent to abrogate immunity from suit in the absence of an amendment to § 16(b).

The claim in *Fitzpatrick* was brought under the Civil Rights Act of 1964. As with the FLSA, the Civil Rights Act originally excluded states, but was later amended to include governments, their agencies and political subdivisions. Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(a) (Supp. IV 1970). The crucial difference was that the enforcement provisions of the Civil Rights Act were also amended to make clear that the right of private enforcement was being extended to individuals aggrieved by public employers. See 42 U.S.C. §§ 2000e-5(a) to (g) (Supp. IV 1970). Subsection (f)(1) states in part:

In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall . . . refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.

90. 427 U.S. 445 (1976).

91. Other eleventh amendment cases decided by a split vote include *Green v. Mansour*, 474 U.S. 64 (1985) (five-four); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (six-three); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984) (five-four); *Cory v. White*, 457 U.S. 85 (1982) (six-three); *Hutto v. Finney*, 437 U.S. 678 (1978) (six-three); *Edelman v. Jordan*, 415 U.S. 651 (1974) (five-four); *Employees*, 411 U.S. 279 (1973) (six joining in Court's opinion, two concurring in the judgment only, and one dissent); *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (five-four).

92. 427 U.S. at 457 (Brennan, J., concurring); *id.* at 458-60 (Stevens, J., concurring).

93. *Id.* at 457.

gressional authorization' . . . to sue the State as employer is clearly present."⁹⁴ He added that "[t]his is, of course, the prerequisite found present in *Parden* and wanting in *Employees*."⁹⁵ Justice Rehnquist noted that *Parden* involved authorization based on Congress's commerce power, while *Fitzpatrick* was based on Congress's fourteenth amendment enforcement power. However, he found such a distinction unavailing.⁹⁶ After all, the fourteenth amendment was aimed specifically at states and their treatment of private citizens, and section five of the fourteenth amendment gave Congress express authority to enforce the provisions of the fourteenth amendment "by appropriate legislation."⁹⁷ Justice Rehnquist concluded that the eleventh amendment, and the principles of state sovereignty embodied therein, were "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."⁹⁸ Congress had acted pursuant to the fourteenth amendment, and was therefore capable of authorizing this suit.

The primary difficulty with Justice Rehnquist's opinion in *Fitzpatrick* concerns its starting point. First of all, Justice Rehnquist had unequivocally stated in *Edelman* that "[b]oth *Parden* and *Employees* involved a congressional enactment which by its terms authorized suit . . . against a general class of defendants which literally included States."⁹⁹ Yet here he contended that congressional authorization was "found present in *Parden* and wanting in *Employees*."¹⁰⁰

Second, Justice Rehnquist's *Fitzpatrick* opinion renewed the confusion created in *Employees* about the degree of specificity required by Congress in order to overcome the eleventh amendment. On whatever scale of sufficiency the Court used to measure congressional authorization, why was authorization insufficient in *Employees* but sufficient in *Fitzpatrick* and *Parden*? Regarding the legislation at issue, Congress had been fairly specific about regulating state activities in *Employees*, slightly more specific in *Fitzpatrick*, and utterly silent in *Parden*.

2. The Concurring Opinions

Neither Justice Brennan's nor Justice Stevens' concurring opinion addressed these difficulties. Justice Brennan merely reiterated his view that the eleventh amendment did not apply to suits brought by citizens against their own state.¹⁰¹ Justice Stevens acknowledged the plausibility of Justice Brennan's position and agreed with his result.¹⁰²

94. *Id.* at 452 (quoting *Edelman v. Jordan*, 415 U.S. 651, 672 (1974)).

95. *Id.*

96. *Id.* at 452-53.

97. U.S. CONST. amend. XIV, § 5.

98. *Fitzpatrick*, 427 U.S. at 456.

99. *Edelman v. Jordan*, 415 U.S. 652, 672 (1974).

100. 427 U.S. at 452.

101. *Id.* at 457 (Brennan, J., concurring).

102. *Id.* at 458 (Stevens, J., concurring). Justice Stevens commented that "[e]ven if the Eleventh Amendment does cover a citizen's suit against his own State, it does not bar an action against state officers enforcing an invalid statute." *Id.* at 458-59 (Stevens, J., concurring) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) and *Employees*, 411 U.S.

E. *The Problems Summarized*

The problems created by the Supreme Court's view of the eleventh amendment in *Parden* through *Fitzpatrick* can be divided into two categories. The first relates to the Court's conception of the eleventh amendment as a constitutional barrier to both citizen and noncitizen suits against states in federal court. The second relates to the analytical bases for the distinctions drawn in its eleventh amendment decisions.

The Court's conception of the eleventh amendment poses three principal dilemmas for the Court. First, it requires the Court to ignore the literal language of the eleventh amendment. Second, it creates serious problems for the Court in explaining how the eleventh amendment's jurisdictional barrier may be waived by the decision of individual states to consent to suits against them in federal court. Third, it leaves unanswered the question of how Congress can abrogate the eleventh amendment merely by enacting a statute authorizing suits against states.

The analytical difficulties with the Court's precedent concern the degree of state consent or congressional authorization needed to avoid eleventh amendment problems, and the relationship between state consent and congressional authorization. Are both consent and authorization necessary, or will one suffice? If the authorization in *Parden* was sufficient, why was the authorization in *Employees* insufficient, and what made the authorization in *Fitzpatrick* sufficient? If constructive consent supported the suit in *Parden*, why did Justice Rehnquist say in *Edelman* that eleventh amendment immunity could not be waived by constructive consent?

II. THE CASES RECONCILED WITH EACH OTHER AND WITH A MORE LITERAL VIEW OF THE ELEVENTH AMENDMENT

The Court's conception of the eleventh amendment is rooted firmly in its decision in *Hans v. Louisiana* that the drafters of the eleventh amendment could not have intended to bar federal suits against states by noncitizens while simultaneously permitting citizen suits. However, a narrower and more literal reading of the eleventh has been suggested by two commentators, Professors Field and Fletcher.¹⁰³ The interpretation of the eleventh amendment that follows is based largely on their ideas.

A. *Did the Drafters of the Eleventh Amendment Mean What They Said?*

In order to understand why the eleventh amendment was drafted as

279, 298 (1973) (Brennan, J., dissenting) for the proposition that the eleventh amendment does not apply to citizen suits). Justice Stevens based his conclusion on the *Ex Parte Young* fiction that suits to enjoin state officials from enforcing unconstitutional state statutes are not suits against the state for eleventh amendment purposes. He acknowledged that *Edelman* forbids the application of *Ex Parte Young* to cases where funds are sought directly from the state treasury. He asserted, however, that *Edelman* did not apply where the award would be paid directly out of trust assets which would only later be replenished from state treasury funds. *Id.* at 459-60.

103. Field, *Part One*, *supra* note 1; Field, *Part Two*, *supra* note 1; Fletcher, *supra* note 1.

it was, it is necessary to examine the problem the eleventh amendment was designed to address, which is universally agreed to be the Supreme Court's decision in *Chisolm v. Georgia*.¹⁰⁴ Understanding the full significance of the problem *Chisolm* posed requires analysis of the various grants of judicial power found in article III, section 2, of the Constitution.

1. The Constitution's Grant of Power to the Third Branch

Article III, section 2, of the Constitution lists a number of different bases for the exercise of federal judicial power, but they can all be categorized under one of two headings: party-based or subject-based jurisdiction.¹⁰⁵ For purposes of eleventh amendment analysis two clauses are of paramount importance: the "arising under" clause, and the "state-noncitizen" clause. The arising under clause, the principal subject-based jurisdictional grant, extends the judicial power of the United States to cases "arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."¹⁰⁶ The state-noncitizen clause, one of several party-based jurisdictional grants, extends federal judicial power to controversies "between a State and Citizens of another State."¹⁰⁷

The potential ramifications of the state-noncitizen clause were not debated during the Constitutional Convention. However, there was considerable debate during state ratifying conventions over the question of whether the state-noncitizen clause would partially abrogate state sovereign immunity by permitting states to be sued in federal court by citizens of other states.¹⁰⁸ While it is not possible to draw from these debates firm conclusions about the intent of the framers, there is support for the view that neither the state-noncitizen clause nor any other clause in article III, section 2, was intended to have such an effect.¹⁰⁹

2. The Court's First Mistake: The Problem Presented by *Chisolm v. Georgia*

Whatever the intent of the framers of the Constitution, the Supreme Court in *Chisolm v. Georgia* decided that the state-noncitizen clause did abrogate state sovereign immunity.¹¹⁰ This sent the nation, in the words of one commentator, into "profound shock," and was the

104. 2 U.S. (2 Dall.) 419 (1793). See Field, *Part One, supra* note 1, at 515; Fletcher, *supra* note 1, at 1034; Jacobs, *supra* note 1, at 64-67; Redish, *supra* note 1, at 140.

105. Party-based jurisdiction refers to those clauses in article III, section two, which base jurisdiction on the status of the parties. Examples include the diversity of citizenship clause and the clause granting jurisdiction in suits involving ambassadors, public ministers and consuls. By contrast, subject-based jurisdiction refers to those clauses which base jurisdiction on the subject matter of the litigation. This includes the clause granting jurisdiction in admiralty and maritime cases.

106. U.S. CONST. art. III, § 2, cl. 1.

107. *Id.*

108. Fletcher, *supra* note 1, at 1046-53; Field, *Part One, supra* note 1, at 527-31.

109. Fletcher, *supra* note 1, at 1049, 1054; Field, *Part One, supra* note 1, at 527-29.

110. 2 U.S. (2 Dall.) 419 (1793).

catalyst for the proposal and ratification of the eleventh amendment.¹¹¹

Chisolm was a common law action for breach of contract.¹¹² Since it did not meet any of the requirements for subject-based jurisdiction, it would normally have been brought in state court. And, of course, in state court, *Chisolm* would have faced the common law defense of sovereign immunity. But since *Chisolm* was not a citizen of the state he sued, he brought his suit in the original jurisdiction of the Supreme Court, asserting that his claim could be heard there by reason of the state-noncitizen clause.¹¹³ The "mistake" made in *Chisolm* was in the Court's conclusion, based on ambiguous evidence in the ratification debates, that this conferral of federal subject matter jurisdiction partially abrogated the common law doctrine of sovereign immunity.¹¹⁴

3. The Cure: The Eleventh Amendment

The response to *Chisolm v. Georgia* was immediate. One day after *Chisolm* was announced the following amendment to the Constitution was proposed:

That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.¹¹⁵

One day later, a different amendment was proposed:

The Judicial power of the United States shall not extend to any suits 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.¹¹⁶

111. C. WARREN, 1 *THE SUPREME COURT IN UNITED STATES HISTORY* 96 (rev. ed. 1932). Professor Warren reports that there was considerable fear that *Chisolm* would encourage raids on meager state treasuries through suits against states in federal court brought "by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States." The Georgia House of Representatives immediately enacted a statute making any attempt to execute process in the *Chisolm* case a capital felony, punishable by "death, without benefit of clergy, by being hanged." *Id.* at 100.

The "profound shock" theory of the eleventh amendment does not stand undisputed. Judge Gibbons has suggested the eleventh amendment was more a reaction to "foreign policy concerns and political compromises of the Federalist era" than outrage at the Court's attempt to undermine sovereign immunity. Gibbons, *supra* note 1, at 1894.

112. 2 U.S. (2 Dall.) at 419.

113. *Id.* at 420-21.

114. Justice Iredell, dissenting in *Chisolm*, asserted that the state-noncitizen clause did not abrogate common law sovereign immunity. He argued that jurisdiction under article III could be exercised only to the extent legislatively authorized, and that, by permitting the issuance of writs "agreeable to the principles and usages of law," Congress had not intended to alter the common law principle that the sovereign could not be sued without consent. 2 U.S. (2 Dall.) at 433-34 (Iredell, J., dissenting) (quoting Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81).

115. Fletcher, *supra* note 1, at 1058-59 (quoting Pa. J. & Weekly Advertiser, Feb. 27, 1793, at 1, col. 2).

116. Fletcher, *supra* note 1, at 1059 (quoting 3 ANNALS OF CONG. 651-52 (1793)).

This proposal, with three words added to it, and one word changed from plural to singular, became the eventual text of the eleventh amendment:

The Judicial power of the United States shall not *be construed to* extend to any suit[s] 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.¹¹⁷

Whatever else might be said about the intent of the drafters of the eleventh amendment, it should be clear by comparing the first proposed amendment to the one eventually adopted that the decision to focus the eleventh amendment on noncitizen suits was not inadvertent. However, when the Supreme Court decided *Hans v. Louisiana*¹¹⁸ approximately one century later, it seemed to take a different view of the matter.

4. The Court's Second Mistake: What Was Wrong with *Hans v. Louisiana*

Hans, like *Chisolm*, was a suit for breach of contract brought against a state in federal court. The major difference was that *Hans* was a citizen of the state he sued. Consequently he could not rely on the state-noncitizen clause as a basis for subject matter jurisdiction.¹¹⁹ Instead, *Hans* asserted a claim against Louisiana under the contract clause of the United States Constitution,¹²⁰ relying on the arising under clause of article III as the basis for federal subject matter jurisdiction.¹²¹

The *Hans* Court asked whether the drafters of the eleventh amendment meant to forbid suits against a state by citizens of other states while permitting such suits by its own citizens.¹²² The Court concluded that the drafters could not have intended such an odd result,¹²³ and the eleventh amendment has been in trouble ever since. Whether the Court in *Hans* meant to constitutionalize state immunity from citizen suits or simply to recognize a common law analogue to the eleventh amendment

117. Fletcher, *supra* note 1, at 1059 (quoting 4 ANNALS OF CONG. 25 (1794)). Emphasis indicates words added to the previous version, while brackets indicate that the letter "s" was deleted from the previous version.

118. 134 U.S. 1 (1890).

119. *Id.* at 9-10.

120. U.S. CONST. art. I, § 10, cl. 1 states: "No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

121. The arising under jurisdiction of the lower federal courts was implemented by Congress in the Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1982)).

122. 134 U.S. at 15.

123. The Court in *Hans* said:

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

Id.

bar against noncitizen suits,¹²⁴ the Court in subsequent cases has interpreted *Hans* as recognizing in the eleventh amendment a constitutional immunity of states from citizen and noncitizen suits in federal court.¹²⁵ A major portion of subsequent eleventh amendment jurisprudence has been devoted to identifying and justifying exceptions to this immunity, so that limitations on state power imposed by the Constitution or Congress could be enforced by private parties through litigation in the federal courts.¹²⁶

The Court might have laid a better foundation for future eleventh amendment analysis had its focus in *Hans* been on why the drafters of the eleventh amendment were *unconcerned* about citizen suits against states, rather than on whether they intended to *permit* citizen suits. Answering this question is a crucial first step to unraveling the eleventh amendment.

B. *The True Meaning of the Eleventh Amendment*

Starting with the premise that the principal concern of the drafters of the eleventh amendment was to correct the Supreme Court's misconstruction of article III in *Chisolm*,¹²⁷ and viewing that premise against a

124. Justice Brennan has for some time contended that the conclusion of *Hans v. Louisiana* was based on nothing more than the common law doctrine of sovereign immunity. *Employees*, 411 U.S. 279, 320-21 (1973). Professors Field and Fletcher both agree. Fletcher, *supra* note 1, at 1039; Field, *Part One*, *supra* note 1, at 539 n.86. Until *Atascadero*, the rest of the Court disagreed with Justice Brennan's interpretation. For example, in *Employees*, Justice Marshall engaged in a vigorous footnote battle with Justice Brennan, contending that *Hans* found in the spirit of the eleventh amendment a constitutional barrier to suits against states in federal court whether brought by citizens or noncitizens of the state sued. 411 U.S. at 292 n.7 (Marshall, J., concurring); *id.* at 292-93 n.8 (Brennan, J., dissenting). In *Atascadero*, Justices Marshall, Stevens and Blackmun for the first time agreed with Justice Brennan's reading of *Hans*. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

125. See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Employees*, 411 U.S. 279, 280 (1973).

126. This article chronicles the Supreme Court's struggle with the eleventh amendment since *Hans*. One can imagine how much more difficult has been the task of the lower federal courts of interpreting and applying the Supreme Court's post-*Hans* decisions. Compare *United States v. Union Gas Co.*, 792 F.2d 372 (3d Cir. 1986) (private suit against state under Comprehensive Environmental Response, Compensation and Liability Act barred despite inclusion of states among "persons" liable under the Act) and *Richard Anderson Photography v. Radford Univ.*, 633 F. Supp. 1154 (W.D. Va. 1986) (copyright infringement suit against state institution barred) with *Clark v. Cohen*, 794 F.2d 79 (3d Cir. 1986) (order directing expenditure of state funds to finance living arrangements for mental health patient unconstitutionally confined in state institution not barred) and *Grotta v. Rhode Island*, 781 F.2d 343 (1st Cir. 1986) (as consequence of state court interpretation of state statute as waiving eleventh amendment immunity, state is a "person" subject to suit in federal court under 42 U.S.C. § 1983) and *David D. v. Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985) (suit against state entities under Education of the Handicapped Act not barred) and *Johnson v. University of Va.*, 606 F. Supp. 321 (W.D. Va. 1985) (copyright infringement suit against state institution not barred).

For a list of current federal statutes authorizing in some fashion citizen suits against state entities, and therefore raising potential future eleventh amendment problems, see McClintock, Downey, Karau & Kirkpatrick, *The Atascadero Rule: New Hurdle for Plaintiffs Suing States in Federal Court*, 21 GONZ. L. REV. 47, 86-101 (1986).

127. In support of the point that it was primarily a matter of misconstruction the draft-

backdrop of the other grants of judicial power found in article III, it is readily apparent why the drafters focused solely on noncitizen suits. The only clause in article III that had been misconstrued was the state-noncitizen clause. Furthermore, the only suits that threatened state sovereignty in federal court were noncitizen suits. Citizen suits posed no similar danger.¹²⁸ If Chisolm had been a citizen of Georgia, then, regardless of sovereign immunity, his contract claim against Georgia would not have been within the subject matter jurisdiction of the federal courts. The drafters of the eleventh amendment addressed their only immediate concern by providing that suits like Chisolm's could not be heard by federal courts.¹²⁹

This reading of the drafters' intent, while further justifying the conclusion that the otherwise odd wording of the eleventh amendment was not inadvertent, raises two key questions. First, can a citizen sue her own state in federal court when jurisdiction is based on the federal question clause of article III? Second, if the answer to the first question is yes, can a noncitizen also sue the state in federal court on a federal question claim, thus avoiding reliance on the now maligned state-noncitizen clause for jurisdiction?

The difficulties posed by these questions may be what prompted the Supreme Court to approach *Hans* as it did. When Hans sued his home state of Louisiana in federal court, basing jurisdiction on a federal question, the Supreme Court had to answer the first question. Furthermore, the Court had to at least consider the implications an affirmative answer would have for the second question. If a citizen could sue her state on a federal question in federal court then perhaps a noncitizen could also bring such a suit, even in the face of the eleventh amendment. *Hans* avoided the implications posed by the second question by answering the first question in the negative, concluding that, regardless of the basis for subject matter jurisdiction, neither a citizen nor a noncitizen could sue a state in federal court.¹³⁰

There is, however, another way of approaching these questions that both addresses the implications of the second question and permits a

ers were worried about, Professor Fletcher notes that the earliest draft of what ultimately became the eleventh amendment provided that "[t]he Judicial power of the United States shall not extend to any suits in law or equity. . . ." Only later was the phrase "be construed to" added, so that eleventh amendment opened with the command that "[t]he Judicial power of the United States shall not *be construed to extend*" Fletcher, *supra* note 1, at 1059-62 (emphasis added).

128. Citizen suits could not be brought under party-based jurisdiction. Therefore, the only likely basis for jurisdiction in a citizen suit would have been federal question jurisdiction. Congress, however, did not authorize the exercise of federal question jurisdiction by federal trial courts until 1875, Act of Mar. 3, 1875, ch. 137, 18 Stat. 470, save for a brief period in 1801. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, *repealed by* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

129. As Professor Fletcher notes, "[u]nder this interpretation, the adopters of the amendment were following the traditions of common law lawyers in solving only the problem in front of them by requiring a limiting construction of the state-diversity clause." Fletcher, *supra* note 1, at 1063.

130. 134 U.S. 1, 20 (1890).

more literal interpretation of the eleventh amendment. This approach rests on a premise first articulated several years ago by Professor Field that the intent behind article III was to remain neutral on the question of continued viability of the doctrine of common law sovereign immunity.¹³¹ When the Constitution was written, debate on the sovereign immunity question was limited to the state-noncitizen clause.¹³² Although the views expressed about whether the clause abrogated sovereign immunity were mixed, no one suggested that the clause created a new constitutional immunity.¹³³ Furthermore, if the state-noncitizen clause was intended to be neutral on the question of sovereign immunity, as the reaction to *Chisolm v. Georgia* would suggest, then certainly the same would have to be said for the rest of article III.

The conclusion that can be drawn from this premise is that the eleventh amendment was simply designed to restore the original intent of article III by forbidding a construction of the state-noncitizen clause hostile to common law sovereign immunity.¹³⁴ In other words, the eleventh amendment does not impose a jurisdictional bar to noncitizen suits in federal court. Rather, it forbids an interpretation of the article III state-noncitizen clause that would permit such suits. The difference, although subtle, can be seen most vividly by inserting six words into the text of the eleventh amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, *on the basis that it is commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*¹³⁵

131. Field, *Part One*, *supra* note 1, at 538.

132. Field, *Part One*, *supra* note 1, at 527-36; Fletcher, *supra* note 1, at 1046-52.

133. Field, *Part One*, *supra* note 1, at 527-29; Fletcher, *supra* note 1, at 1049, 1054.

134. Field, *Part One*, *supra* note 1, at 538-39; Fletcher, *supra* note 1, at 1063.

135. The italicized words are those of the author, not Professor Field's. But the conclusions Professor Field reaches are consistent with the added language. She asserts that [t]he provision that the "[j]udicial power of the United States shall not be construed to extend to" certain classes of cases may mean simply that the language should not be deemed *affirmatively to allow* the prosecution of those cases, as it had been deemed to do in *Chisolm*. The eleventh amendment then would simply overturn *Chisolm's* abrogation of sovereign immunity.

Field, *Part One*, *supra* note 1, at 543 (emphasis in original); Fletcher, *supra* note 1, at 1060-61.

Professor Field's conclusions have not received unanimous acceptance. Professor Fletcher points to the writings of several scholars critical of these conclusions, although he accepts her central thesis. Fletcher, *supra* note 1, at 1036 n.9. The most serious criticism of Professor Field's views comes from Professor Redish, who contends that neither historical evidence nor the language of the eleventh amendment supports her conclusions. Redish, *supra* note 1, at 148-49.

Regarding Professor Redish's view of the historical evidence, it should be noted that there is no direct historical evidence supporting anyone's view of the drafters' intent in proposing the eleventh amendment. As Professor Field notes, the amendment "passed without debate, and contemporary indications of the intended scope of the amendment are not available." Field, *Part One*, *supra* note 1, at 541. However, the alternative amendments proposed in response to *Chisolm*, as well as historical information concerning other reactions to the *Chisolm* decision, permit some inferences to be made about the drafters' intent. Fletcher, *supra* note 1, at 1058-59. That information, coupled with considerable historical data concerning the intended scope of the state-noncitizen clause, provide ample

Under this view of the eleventh amendment, the answers to the questions faced by the Court in *Hans* are quite simple. Whether a state may be sued by its citizens in federal court on a federal question claim will depend on the nature of the claim and whether a common law sovereign immunity defense is available. This is so because article III permits the assertion of federal question jurisdiction but does not eradicate the defense of common law sovereign immunity.¹³⁶ If a citizen can sue his state in federal court on a particular federal question claim because for whatever reason a sovereign immunity defense is not available, then a noncitizen should also be accorded that right because the eleventh amendment does not impose a jurisdictional bar to noncitizen suits. It merely forbids an interpretation of the state-noncitizen clause that would permit such suits. Thus, any federal suit against a state must be brought under some jurisdictional heading other than the state-noncitizen clause.¹³⁷ Such a suit will also be subject to any common law sover-

support for the proposed reading of the eleventh amendment. See Fletcher, *supra* note 1, at 1045-63.

As for Professor Redish's view of the language of the amendment, it is ironic that Professor Field, who is critical of the Court for ignoring the language of the eleventh amendment, is in turn criticized for failing to follow her own advice in interpreting the eleventh amendment. Professor Redish is correct in his assertion that Professor Field's justification for her reading of the eleventh amendment strains the language of the amendment. But the conclusion advocated by Professor Field can be reached with less strain by reading the eleventh amendment in the fashion suggested in the text.

The point of Professor Field's analysis is that, because the language of the eleventh amendment does not bar citizen suits, it should not be read to do so absent firm historical evidence supporting such an interpretation. On this point Professor Redish agrees wholeheartedly. Redish, *supra* note 1, at 152. Once this point is established, the question then becomes why the drafters circumscribed the eleventh amendment in such a fashion. Professor Field's answer to that question is certainly more faithful to the language of the eleventh amendment than the response of the Court. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

136. Thus, Professors Field and Fletcher maintain that the result in *Hans* would not change under their analysis. Common law sovereign immunity would be available as an affirmative defense to Louisiana, even if the eleventh amendment is not viewed as barring *Hans*' claim. In fact, they both agree with Justice Brennan's assertion that this is exactly what *Hans* held. See *Employees*, 411 U.S. at 320-21 (Brennan, J., dissenting); Field, *Part One*, *supra* note 1, at 539 n.86; Fletcher, *supra* note 1, at 1039.

Today the same result could be reached by finding that there was no federal question jurisdiction in *Hans*. The Court assumed there was, but under the "well-pleaded complaint" rule first enunciated in *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908), eighteen years after *Hans*, that assumption could easily be overcome. Plaintiff's claim in *Hans* was essentially for breach of contract. The defense to the merits would have been that the breach was justified by state statute. Plaintiff's counterargument was that the statute was unconstitutional because it violated the contract clause. On a virtually identical fact pattern, *Mottley* held federal question jurisdiction lacking because the federal issues were relevant only to the validity of defendant's defense and not a part of plaintiff's well-pleaded complaint. 211 U.S. at 153.

137. Fletcher, *supra* note 1, at 1060. Professor Field appears to take an even narrower view of the eleventh amendment. She does not read the eleventh amendment as forbidding reliance on the state-noncitizen clause as a basis for jurisdiction. Rather, she reads it as simply overturning *Chisolm*'s interpretation of the state-noncitizen clause, thus forbidding a construction of the clause that abrogates sovereign immunity. Field, *Part One*, *supra* note 1, at 543.

The difference can be seen most clearly by imagining the *Chisolm* suit brought today as "*Chisolm II*," but this time against a state which has explicitly waived immunity from suit in federal court. Professor Fletcher reads the eleventh amendment as "modify[ing] article III

eign immunity defenses available to the state.

This interpretation of the eleventh amendment makes more sense than reading into the eleventh amendment what is plainly not there — a prohibition against suits by citizens as well as noncitizens. It also makes more sense than interpreting the eleventh amendment as permitting federal question claims brought by citizens against their own state while barring the same claims by noncitizens.¹³⁸

Under this view of the eleventh amendment, the question of amenability of states to suit in federal court requires a two step process of analysis. The first step involves an inquiry into the subject matter jurisdiction of the court. When a state is named as a defendant, the question is whether there is some basis for subject matter jurisdiction other than the state-noncitizen clause of article III.

Assuming some proper basis for subject matter jurisdiction is found, the second step requires an examination of whether the state has available to it the defense of common law sovereign immunity.¹³⁹ This

directly by repealing one of its affirmative grants." Fletcher, *supra* note 1, at 1060. Thus, he would presumably find *Chisolm II* barred for lack of an article III grant of jurisdiction. Under Professor Field's approach, however, the state-noncitizen clause is still a viable basis for jurisdiction, subject to the defense of common law sovereign immunity. Since that defense is waived in *Chisolm II*, the suit would be allowed in federal court.

The interpretation of the eleventh amendment proposed in this article comes closer on this point to Professor Fletcher's views. It is also conforms more easily to the language of the eleventh amendment. This difference in approach seems minor, however, in comparison to the primary point of agreement that citizens and noncitizens can sue states in federal court in cases where jurisdiction is otherwise proper, subject to the defense of common law sovereign immunity.

138. Justice Brennan once took such a position. *Edelman v. Jordan*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting). But in *Employees*, he referred to the question as open for debate. *Employees*, 411 U.S. at 310 (Brennan, J., dissenting).

Professor Redish also has asserted that the eleventh amendment permits citizen suits on federal question claims while barring similarly based noncitizen suits. Redish, *supra* note 1, at 152. He has argued, in criticism of the views of Professor Field, that while "[i]t might be preferable to have no constitutional bar to a suit against a state, even by out-of-state citizens[,] . . . the only appropriate means to achieve this goal is by constitutional amendment, not by a simple rejection of constitutional language." *Id.*

On a practical level, however, the position taken by Professor Redish will not lead to results very different from those advocated by Professor Field. First, most modern suits against states are citizen suits. For example, all of the major cases, and most of the minor ones, listed in note 14, *supra*, were citizen suits. Professor Redish readily agrees that the eleventh amendment does not bar these suits, though he may disagree with Professor Field on the availability of a common law sovereign immunity defense. Compare Redish, *supra* note 1, at 162 with Field, *Part Two, supra* note 1, at 1227. Second, even Professor Redish concedes that noncitizen suits, in his view barred by the eleventh amendment, can be authorized by Congress pursuant to its fourteenth amendment enforcement power. Redish, *supra* note 1, at 152. Thus, the only suits Professor Redish finds barred by the eleventh amendment are noncitizen suits authorized by Congress under some provision other than the fourteenth amendment.

139. Field, *Part Two, supra* note 1, at 1261-62. Professor Fletcher asserts that his principal disagreement with Professor Field concerns whether sovereign immunity remains as nothing more than a common law defense. He argues that there may be other constitutional sources of sovereign immunity, such as the tenth amendment. Fletcher, *supra* note 1, at 1111-12 & n.303. This disagreement seems largely semantic. Professor Field does not view the tenth amendment as a source of sovereign immunity, but she does point to it as a limitation on Congress's power to abrogate the common law sovereign immunity of unconsenting states. Field, *Part Two, supra* note 1, at 1218-21. In any event, the Court's

inquiry in turn prompts two others: first, whether the state consented to being sued; and second, whether Congress authorized the suit by a valid congressional enactment, thus abrogating the state's immunity.¹⁴⁰

C. *Conceptual Difficulties: Impact of the Court's Failure to Adopt a More Literal View of the Eleventh Amendment*

The Supreme Court's decisions from *Parden* through *Fitzpatrick* have been largely consistent with this proposed interpretation of the eleventh amendment. In each case there was subject matter jurisdiction in the federal courts based on the arising under clause,¹⁴¹ save for whatever jurisdictional implications the Court found in a state's claim of eleventh amendment immunity. In each case the availability of an immunity defense to the federal claim rested in some fashion on the questions of state consent or congressional authorization. The Court has been asking all the right questions. Only the reasons for asking them have been wrong.

Thus, the question of whether to adopt the proposed interpretation of the eleventh amendment could be viewed as a simple matter of semantics, since its adoption need not disturb the outcome of the Court's decisions.¹⁴² But it is important that the Court ask the right questions for the right reasons because the Court's purpose in asking a question cannot help but influence its answer.

At a minimum, a decision by the Court to adopt the proposed interpretation of the eleventh amendment would eliminate the three earlier described conceptual dilemmas caused by the Court's current position: first, how the eleventh amendment can be read to bar citizen suits when it says nothing about them; second, how states can confer subject matter jurisdiction on the federal courts by consent; and finally, how Congress can statutorily authorize suits barred by the eleventh amendment.

More significantly, however, in terms of its effect on the outcome of eleventh amendment cases, the elimination of these conceptual dilemmas would reduce analytical confusion about how these cases should be decided.¹⁴³

subsequent overruling of *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), makes the tenth amendment unavailable as a source of, or limitation on, congressional power to abrogate sovereign immunity.

140. Field, *Part One*, *supra* note 1, at 543-45; Fletcher, *supra* note 1, at 1130.

141. In each case, plaintiff's cause of action was created by federal legislation—the FELA in *Parden*, the FLSA in *Employees*, § 1983 in *Edelman*, and Title VII in *Fitzpatrick*—thereby bringing each case within the arising under jurisdiction of the federal courts.

142. Professor Field suggests that the results in the Court's modern eleventh amendment cases would not have to change in order to accommodate her theories. Field, *Part One*, *supra* note 1, at 545; Field, *Part Two*, *supra* note 1, at 1279-80; *see also* Fletcher, *supra* note 1, at 1131.

143. A comparison of *Employees* and *Fitzpatrick* reveals some of the confusion flowing from the Court's unwillingness to confront the conceptual dilemmas inherent in its vision of the eleventh amendment. In *Employees*, the Court required what seemed to be an inordinate degree of congressional explicitness to sustain a finding of legislative abrogation of the eleventh amendment. By contrast, the Court was noticeably less concerned about congressional explicitness in *Fitzpatrick*. Both opinions were devoid of analysis of the differ-

D. *Analytical Difficulties: Explaining Parden through Fitzpatrick*

As has been suggested earlier, the Court's analytical difficulties with the eleventh amendment occur in two related ways: first, in failing to explain the relationship between consent and congressional authorization; and second, in failing to delineate the kinds of consent and authorization required to overcome the eleventh amendment.

1. The Subtleties of Consent and Congressional Authorization

To take the latter point first, the cases seem to contradict themselves on the question of consent. *Parden* accepts constructive consent as a basis for overcoming the eleventh amendment while *Edelman* appears to reject it. However, the Court's holding in *Edelman* was more limited. *Edelman* held that consent must normally be stated expressly.¹⁴⁴ But the *Edelman* Court did not overrule *Parden*, which was based at least partially on constructive consent. How then was *Parden* abnormal? The answer rests on the relationship between consent and congressional authorization, as will be discussed in the next section.

The cases also seem contradictory on the question of congressional authorization. The Court in *Employees* said Congress was not explicit enough about authorizing suits against states in federal court, even though authorization was more explicit in *Employees* than in *Parden*. Then the *Edelman* Court found authorization in both *Parden* and *Employees*, but again without explaining why it was nevertheless insufficient in *Employees*. Finally, the *Fitzpatrick* Court said there was authorization in *Parden* but not in *Employees*.

However, the cases can be viewed as consistent on the issue of con-

ence. One explanation, however, might relate to the Court's unspoken conceptual difficulty with the notion that Congress could legislatively abrogate what the Court conceived of as a constitutional immunity. In *Fitzpatrick* Congress acted pursuant to the fourteenth amendment. Justice Rehnquist noted that the fourteenth amendment was aimed at limiting state power. It also gave Congress specific authority to pass legislation enforcing its provisions. Because this specific fourteenth amendment power postdated the eleventh amendment, he concluded that Congress could use this power to subject the states to law suits otherwise barred by the eleventh amendment. 427 U.S. at 456.

By contrast, in *Employees* Congress acted pursuant to its commerce power. That the Court had some concern with Congress's power to abrogate the eleventh amendment through the use of its commerce power is evidenced by the fact that the Court held such an effort unconstitutional three years later in *National League of Cities v. Usery*, 426 U.S. 833 (1976). However, the *Employees* Court did not hold, or even suggest, that Congress could not abrogate the eleventh amendment with its commerce power. If anything, the Court implied the contrary by refused to assume Congress intended such a result absent extraordinarily explicit language. 411 U.S. at 287. When Congress provided the requisite language by amending the FLSA the Court was again able to avoid coming to grips with the conceptual difficulties underlying its interpretation of the eleventh amendment by declaring Congress's actions unconstitutional on tenth amendment grounds. *National League of Cities*, 426 U.S. at 852.

Because the Court chose to resolve *Employees* and *Fitzpatrick* without confronting the difficulties with its concept of the eleventh amendment, the result was confusion about the analytical basis for distinguishing the two cases.

144. The Court stated that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Edelman v. Jordan*, 411 U.S. 651, 673 (1974) (emphasis added).

gressional authorization as well. When *Edelman* says there was authorization in *Employees* and *Fitzpatrick* says there was not, the Court is referring to two different kinds of authorization. *Edelman* was referring to *implicit* authorization, which the Court described as authorization to sue “a general class of defendants which literally includes States.”¹⁴⁵ By contrast, *Fitzpatrick* was referring to *explicit* authorization, which the Court in *Employees* thought was lacking, as evidenced by its unwillingness “to infer that Congress . . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution.”¹⁴⁶ Viewed in this light, there was implicit authorization in *Employees*, as the Court noted in *Edelman*.¹⁴⁷ Nevertheless, there was no explicit authorization in *Employees*, as the Court later noted in *Fitzpatrick*.¹⁴⁸

The cases still seem contradictory insofar as *Parden* permits suits based on implicit authorization, while *Employees* requires explicit authorization. But even this contradiction can be explained by examining the relationship between consent and congressional authorization.

2. The Link Between Consent and Congressional Authorization

Consent and congressional authorization, in the cases from *Parden* through *Fitzpatrick*, exist on two levels: independent and dependent. Express consent by a state will defeat state immunity independent of the question of congressional authorization.¹⁴⁹ By the same token, explicit congressional authorization will defeat state immunity, regardless of the question of state consent.¹⁵⁰ So long as either one is sufficiently clear, state immunity will be overcome. In this sense, the questions of consent and congressional authorization are independent of each other.

When neither consent nor congressional authorization is expressed with sufficient clarity to decide the issue independently, the availability of state immunity must be determined by considering the questions of consent and congressional authorization together. In this sense, they become dependent variables.

This dependency occurs when a state *constructively* consents to being sued in federal court, as Alabama did in *Parden* by entering into the interstate railroad business. Whenever constructive consent is alleged,

145. 415 U.S. at 672.

146. *Employees*, 411 U.S. 279, 285 (1973).

147. Justice Rehnquist stated that Congress had authorized suits “against a general class of defendants,” in this case employers, which literally included states. 415 U.S. at 674.

148. 427 U.S. at 452. Congress, in the statutory scheme involved in *Employees*, had not explicitly stated that private enforcement suits could be brought against states in federal court. These suits were nevertheless implicitly authorized when Congress provided for private enforcement suits against “employers” in federal court and amended the definition of employers to include certain state entities.

149. *Edelman*, 415 U.S. at 673; *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). Of course, in order to sue a state some law must create a cause of action on plaintiff’s behalf. However, that law need not be created by Congress.

150. *Fitzpatrick*, 427 U.S. at 456; *Employees*, 411 U.S. at 283. For this reason, it is sometimes referred to as “congressional abrogation.” See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 253 (1985) (Brennan, J., dissenting).

the surrounding circumstances must be examined to determine both whether there is consent, and to what consent was given. In other words, unlike express consent, which by definition identifies the terms of the consent within itself, constructive consent must be viewed in the context of external circumstances. Relevant circumstances in *Parden* included what Congress said would happen to those choosing to enter the interstate railroad business. When a state engages in activities having the effect of bringing it within a general class of defendants which Congress has chosen to regulate, and against whom Congress has authorized suits in federal court, then the state can be said to have constructively consented to a suit implicitly authorized by Congress.¹⁵¹

3. The Theory Applied to the Cases

The *Parden* Court found that Alabama's entrance into the railroad business, coupled with Congress's prior authorization of suits against railroad employers, justified a finding of constructive consent.¹⁵² Because constructive consent was present, the Court was not concerned about whether Congress had explicitly stated its intent to abrogate state immunity.¹⁵³ By the same token, express consent was not necessary in light of Alabama's actions taken in the face of Congress's enactment of the FELA. But neither Congress's enactment of the FELA nor Alabama's entry into the railroad business, by itself, would have been sufficient to overcome Alabama's sovereign immunity defense.¹⁵⁴

Viewing *Parden* this way, both *Employees* and *Edelman* become easily distinguishable from *Parden*, although each for different reasons. In *Employees*, there was no basis for constructive consent, because Missouri merely continued to perform its traditional governmental functions in the face of new congressional regulation of that activity. Furthermore, the Court refused to assume that Congress intended to abrogate state immunity unilaterally, absent explicit statutory language to that effect.¹⁵⁵

151. *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 192-93 (1964).

152. The *Parden* Court did not make it clear that congressional authorization and consent were linked together in the manner suggested. *Parden* was an ambiguous hodgepodge, as even its author later conceded. *Employees*, 411 U.S. 279, 301 (1973) (Brennan, J., dissenting).

In light of later decisions, however, it is apparent that what justified the result in *Parden* was the coupling of Alabama's actions in acquiring a railroad with prior congressional authorization of suits against railroad employers. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Employees*, 411 U.S. 279, 282 (1973) (majority opinion); *id.* at 288 (Marshall, J., concurring).

153. This distinction became clearer in Justice Douglas' majority opinion in *Employees*, and became the focus of Justice Douglas' dissent in *Edelman*.

154. Had Congress not enacted the FELA, there would have been no basis for constructive consent. To what, after all, would Alabama have been consenting? By the same token, congressional authorization of suits against railroads would have had no impact on the eleventh amendment, absent Alabama's entry into the railroad business.

155. Unfortunately, Justice Douglas' opinion in *Employees* obscured the relationship between consent and congressional authorization. He could simply have held that in the absence of express or constructive consent the Court would require Congress to manifest clearly its intent to impose FLSA suits on unwilling states. Instead, he appeared to distin-

In *Edelman*, by comparison, constructive consent could have been based on Illinois' acceptance of matching federal money. However, Congress had not authorized suits against states under the Social Security Act. The only enforcement mechanism Congress provided in the Social Security Act against noncomplying states was termination of funding.¹⁵⁶ This justified the Court's conclusion that Illinois had not been put on notice that, in exchange for receiving federal money, it would be deemed to have consented to suit in federal court.¹⁵⁷

Finally, in *Fitzpatrick*, although there was no basis for finding any form of consent by Connecticut, the Court held that Title VII had been sufficiently explicit about authorizing suits against states to demonstrate congressional authorization independent of state consent.¹⁵⁸

There is a pattern to these four cases that perhaps can be seen more clearly in the following chart:¹⁵⁹

STATE CONSENT		CONGRESSIONAL AUTHORIZATION	
express	_____	explicit	<i>Fitzpatrick</i>
constructive	<i>Parden</i>	implicit	<i>Parden</i>
	<i>Edelman</i>		<i>Employees</i>
none	<i>Employees</i>	none	<i>Edelman</i>
	<i>Fitzpatrick</i>		

Parden represents what might be viewed as the minimum standard for waiver of state immunity: constructive consent by a state to a suit implicitly authorized by Congress. Since there was no consent of any

guish *Parden* from *Employees* on the basis of lack of congressional authorization. This holding made no sense because Congress had been more explicit in *Employees* than it had in *Parden*. Justice Douglas eventually provided some clarification of his position in his *Edelman* dissent. See *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (Douglas, J., dissenting).

156. 415 U.S. at 674.

157. The question was a close one. As Justices Douglas and Marshall pointed out in their dissenting opinions, prior cases had held that the provisions of the Social Security Act could be enforced against participating states by § 1983 actions in the federal courts. However, it had not been settled whether retroactive monetary awards damages payable out of state treasuries were available.

158. 427 U.S. at 456.

159. What is depicted on this chart as three distinct levels of consent and authorization could more realistically be viewed as a sliding scale or spectrum with explicit consent or authorization at one end and no consent or authorization at the other end. Other factors should also be balanced on the scale. These include the burden such suits impose on states and the source of congressional power to regulate state activity.

For example, in comparing *Parden* and *Employees*, it is obvious that the burden imposed on states by the FLSA was considerably greater than that imposed by the FELA. This difference was a significant factor in distinguishing *Parden* from *Employees*. 411 U.S. at 285. Equally revealing is a comparison between *Fitzpatrick* and *Employees*. The burdens imposed on states by Title VII were certainly no less than those imposed by the FLSA. However, Title VII was enacted pursuant to Congress's specific fourteenth amendment enforcement powers, which explicitly authorizes congressional regulation of state activities, rather than the more general provisions of the commerce clause. This fact, coupled with slightly more explicit congressional authorization in Title VII, caused the Court to distinguish *Fitzpatrick* from *Employees*. *Fitzpatrick*, 427 U.S. at 456.

Nevertheless, the consent/authorization chart serves a useful purpose in clarifying the relationship between state consent and congressional authorization in the Supreme Court's eleventh amendment precedent.

kind in *Employees*, only explicit congressional authorization could overcome state immunity. The Court was not satisfied that the existing evidence of Congress's intent to regulate state activities through the FLSA was enough to meet this heavy burden. In *Edelman*, Congress could have conditioned state acceptance of federal money on consent to suit but did not. Absent an indication by Congress that states accepting federal money would be subject to suit in federal court, there could be no constructive consent based on the mere receipt of federal money, and barring the suit was appropriate. Finally, in *Fitzpatrick*, congressional authorization was sufficiently explicit to overcome state immunity, independent of the issue of state consent.

When viewed in this fashion, the cases from *Parden* through *Fitzpatrick* are consistent. Perhaps even more significantly, they make sense.

For example, Justice Douglas's suggestion in *Employees* that Congress had not made sufficiently clear its intention to subject states to private enforcement suits in federal court has caused endless confusion.¹⁶⁰ Indeed, it is difficult to imagine how Congress could have rewritten the 1966 FLSA amendments to make clearer its desire to authorize state suits in federal court.¹⁶¹

Under the proposed analysis of these cases, the reason for the decision in *Employees* becomes clear. However carefully Congress amended the FLSA to include state and local governments in the definition of "employers" covered by the FLSA, and therefore subject to suit in federal court, the statute does not on its face declare that states can be sued in federal court. As such, in the absence of some basis for imposing constructive consent, the level of congressional authorization found in *Employees* was insufficient to overcome state immunity.

It makes sense to require that Congress state its intentions explicitly on the face of the statute when considering that this requirement applies only where the obligations imposed on states by Congress are not just substantial, but wholly involuntary. Requiring that Congress declare in express statutory language that states can be sued in federal court, serves two salutary purposes. It forces Congress to consider more directly the issues and problems of subjecting states to suit in federal court without their consent and lessens the chances that some members of Congress will vote in favor of the legislation without understanding its full implications.¹⁶²

160. See, e.g., Field, *Part Two*, *supra* note 1, at 1244-46 (noting apparent conflict between *Parden* and *Employees* "in their approaches to divining congressional intent," describing the *Employees* opinion as "oblique," and concluding that *Employees* created "uncertainty" and "considerable ambiguity").

161. Justices Brennan and Marshall, despite their disagreement on the proper result, lambasted the majority for concluding that the FLSA failed to demonstrate congressional authorization. *Employees*, 411 U.S. at 289-90 (Marshall, J., concurring); *id.* at 301-08 (Brennan, J., dissenting).

162. When one section of a complex statutory scheme authorizes private enforcement suits against "employers," and another provision defines employers to include specified state entities, legislators unfamiliar with the legislation may not realize the significance of voting to authorize such suits. When in addition, the legislation extends the right to sue to

These concerns are not as pressing when states choose to participate in federally regulated activities. It follows that in such cases the Court will be less concerned about congressional authorization. The Court's primary concern should then be whether states were fairly put on notice of the consequences of their participation in these activities. This concern is satisfied when Congress makes it clear on the face of the regulatory legislation that enforcement suits in federal court are authorized against a general class of defendants which states may join by participating in the regulated activities.

It was against this backdrop that the Supreme Court decided *Atascadero State Hospital v. Scanlon*,¹⁶³ and either departed from or seriously distorted the analytical framework established by its precedent. As a result of *Atascadero*, the burden on a plaintiff seeking to enforce federally created rights against states in the federal courts has been significantly increased. If the Court misconstrued prior case law, it did so at least partially as a result of its failure to articulate adequately in those earlier cases an intelligible framework for resolving eleventh amendment problems.

III. *ATASCADERO STATE HOSPITAL V. SCANLON*

Atascadero was a suit under section 504 of the Rehabilitation Act of 1973.¹⁶⁴ The plaintiff sought injunctive and retroactive monetary relief against a California state hospital which allegedly denied him employment due to his physical handicaps.¹⁶⁵ Section 504 of the Rehabilitation Act provides that "otherwise qualified handicapped individual[s]" shall not "be subjected to discrimination under any program . . . receiving Federal financial assistance."¹⁶⁶ Section 505 of the same act states that the remedies provided in Title VI of the Civil Rights Act of 1964, which include compensatory and injunctive relief in the federal courts, will be available to anyone aggrieved by "any recipient of Federal assistance" under section 504.¹⁶⁷ The state hospital, a recipient of federal financial assistance under the provisions of section 504, defended in part on eleventh amendment grounds.¹⁶⁸

The district court dismissed plaintiff's claims based on the eleventh amendment.¹⁶⁹ The Ninth Circuit Court of Appeals affirmed on different grounds. It took the position that the plaintiff's complaint was deficient because it failed to allege that the federal funds received by defendant had a primary objective of providing employment opportuni-

a large class of state employees engaged in traditionally state governmental activities, and the remedies include double damages and attorneys' fees, it seems reasonable to insist that the authorizing language be sufficiently explicit to apprise individual legislators of the full significance of the proposed legislation. *Employees*, 411 U.S. at 285-86.

163. 473 U.S. 234 (1985).

164. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982).

165. 473 U.S. at 236.

166. Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1982).

167. Rehabilitation Act of 1978, § 505, 29 U.S.C. § 794a (1982).

168. 473 U.S. at 236.

169. *Id.*

ties.¹⁷⁰ The Supreme Court vacated the judgment and remanded the case to the court of appeals for reconsideration in light of its recent decision in *Consolidated Rail Corporation v. Darrone*,¹⁷¹ which had held that section 504's prohibition of handicap discrimination in employment was not limited to programs that received federal funds for purposes of employment.¹⁷² The court of appeals found *Darrone* controlling and thus had to face the eleventh amendment basis for the district court's dismissal. This time the court of appeals reversed the judgment of the district court, concluding that the eleventh amendment was not a bar to the suit because California had constructively consented to the suit by accepting federal financial assistance. The court of appeals noted that, unlike *Edelman*, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States," was present in *Atascadero*.¹⁷³

The Supreme Court granted certiorari again,¹⁷⁴ this time to resolve a conflict between the Ninth Circuit and the First and Eight Circuits on the eleventh amendment question.¹⁷⁵ The Supreme Court reversed, holding by a five to four vote that the plaintiff's monetary claims were barred by the eleventh amendment. Justice Powell wrote the opinion for the Court with Justices Brennan, Marshall, Blackmun, and Stevens dissenting.

A. Justice Powell's Majority Opinion

In holding that the plaintiff's monetary claims against California were barred by the eleventh amendment, Justice Powell addressed three principal arguments: first, that California had waived its immunity by express provision in its own constitution; second, that Congress had abrogated California's sovereign immunity by enacting the Rehabilitation Act; and third, that California constructively consented to being sued in federal court by accepting federal financial assistance under the terms of the Rehabilitation Act.¹⁷⁶

Justice Powell found no merit in the express waiver argument. In *Edelman*, the Court had held that in order to waive its eleventh amendment immunity expressly, a state must specify that it is consenting to suit against it *in federal court*; a general waiver of immunity, however express it might be, would not suffice.¹⁷⁷ Justice Powell adopted that reasoning, concluding that the provision in the California constitution permitting suits "against the State in such manner and in such courts as shall be

170. *Scanlon v. Atascadero State Hosp.*, 677 F.2d 1271, 1272 (9th Cir. 1982), *vacated*, 465 U.S. 1095 (1984).

171. 465 U.S. 624 (1984).

172. *Atascadero State Hosp. v. Scanlon*, 465 U.S. 1095 (1984).

173. *Scanlon v. Atascadero State Hosp.*, 735 F.2d 359, 361 (9th Cir. 1984), *rev'd*, 473 U.S. 234 (1985).

174. 469 U.S. 1032 (1984).

175. 473 U.S. at 237.

176. *Id.* at 240.

177. 415 U.S. 651, 673 (1974).

directed by law”¹⁷⁸ was insufficient to constitute an express waiver of immunity from suit in federal court.¹⁷⁹

Justice Powell next addressed plaintiff’s second argument, that Congress had abrogated state immunity by enacting the Rehabilitation Act. He refused to consider legislative history which plaintiff offered in support of the conclusion that Congress intended to abrogate state immunity. He justified this refusal by noting the well established requirement that Congress’ intent to abrogate immunity must be “unmistakably clear in the language of the statute” before the Court will assume that Congress truly desired such a result.¹⁸⁰ Justice Powell determined that the language of section 505, authorizing relief against “any recipient of Federal assistance,” failed to demonstrate the “unequivocal statutory language” needed to abrogate the eleventh amendment.¹⁸¹

The final argument addressed by Justice Powell was that made by the court of appeals, that California had constructively consented to suit by voluntarily accepting federal funding under the Rehabilitation Act. Justice Powell agreed with the observation of the court of appeals that mere receipt of federal funds will not support a finding of constructive consent.¹⁸² The court of appeals, however, had concluded that *Atascadero* involved more than the mere receipt of federal funds because California had accepted federal funding under a legislative scheme that, by its terms, authorized suit against “any recipient of Federal assistance” provided by that legislation.¹⁸³ Justice Powell held that this additional factor was not enough to support a finding of state consent. Referring to plaintiff’s congressional authorization argument, he reiterated that Congress had failed to make unmistakably clear in the Rehabilitation Act its intent to subject unconsenting states to suit in federal court. He concluded on the same basis that the Act failed to demonstrate “a clear intent by Congress” to make state consent to suit in federal court a condition of receiving federal money.¹⁸⁴ As a result, he found that the case was barred by the eleventh amendment.

178. CAL. CONST. art. III, § 5.

179. 473 U.S. at 241.

180. *Id.* at 242. Justice Powell did not cite the *Employees* case. Instead, he cited two more recent decisions that trace their support directly back to *Employees*. *Id.* (citing *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) and *Quern v. Jordan*, 440 U.S. 332, 343-44 (1979)). *Pennhurst* cited *Quern*, which in turn cited *Employees* for the proposition that Congress must state its intent to abrogate state immunity explicitly.

Justice Powell may have been trying to insulate himself from the implication in *Employees* that Congress can use its commerce clause power to abrogate state immunity. The Court, in cases subsequent to *Employees*, has made a concerted effort to tie Congress’s power of abrogation to the fourteenth amendment. *See, e.g.*, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). That objective was furthered in *Atascadero* by the reference to *Pennhurst* and *Quern*, and the Court’s refusal to acknowledge the historical roots of this power in *Employees* and the commerce clause.

181. 473 U.S. at 245-46.

182. *Id.* at 246-47.

183. 735 F.2d at 362.

184. 473 U.S. at 247.

B. *The Dissenting Opinions*

Justices Brennan, Marshall, Blackmun and Stevens joined together in a dissenting opinion written by Justice Brennan. Justice Blackmun also wrote a separate dissent.¹⁸⁵ Justice Brennan's opinion began by examining the legislative history of the Rehabilitation Act. Pointing to numerous references in the legislative debates suggesting that states were among the primary targets of section 504, Justice Brennan concluded that Congress without question had intended to abrogate state immunity and subject the states to suits in federal court under the Rehabilitation Act.¹⁸⁶

The major portion of Justice Brennan's fifty-five page opinion consisted of historical analysis of sovereign immunity and the eleventh amendment, and a critique of *Hans v. Louisiana* and its progeny.¹⁸⁷ As a way of correcting the deficiencies in the Court's eleventh amendment doctrine, Justice Brennan advocated adoption of a more literal interpretation of the eleventh amendment, similar to the one proposed by Professors Field and Fletcher.¹⁸⁸

Justice Blackmun's opinion was much shorter. He began by agreeing with all of Justice Brennan's historical arguments and urged the Court to reconsider *Hans* and its progeny, just as it had recently reconsidered its position on the tenth amendment¹⁸⁹ by overruling *National League of Cities v. Usery*¹⁹⁰ in *Garcia v. San Antonio Metropolitan Transit Authority*.¹⁹¹ He expressed continuing support for the views expressed in

185. Justice Stevens added a one paragraph explanation of why he was taking a position inconsistent with the one he took in *Florida Dep't of Health & Rehabilitative Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 151 (1981). In *Florida Nursing Homes*, Justice Stevens concurred in a judgment he believed to be incorrect because he felt bound by the Court's prior decision in *Edelman v. Jordan*, 415 U.S. 651 (1974). By the time *Atascadero* was decided, Justice Stevens had become persuaded that *Edelman* was "egregiously incorrect." He therefore decided to cast *stare decisis* aside and join Justices Brennan, Marshall and Blackmun in dissent. 473 U.S. at 304 (Stevens, J., dissenting).

186. 473 U.S. at 248-52 (Brennan, J., dissenting).

187. *Id.* at 258-302 (Brennan, J., dissenting).

188. Although Justice Brennan did not state that he was advocating adoption of the views of Professors Field or Fletcher, his opinion cited their works in several places. *See, e.g., Atascadero*, 473 U.S. at 258 n.11, 263 n.13, 270 n.20, 277 n.26, 279 n.29, 298 n.52 (Brennan, J., dissenting). When comparing Justice Brennan's *Atascadero* dissent to his earlier opinions, it becomes clear that his current position is based on their views. For example, Justice Brennan, as early as his *Employees* dissent, urged a literal interpretation of the eleventh amendment that would not bar citizen suits in federal court. *Employees*, 411 U.S. 279, 309-10 (1973). At that time, however, his view assumed that noncitizen suits would be barred by the eleventh amendment. *Id.* at 310 (Brennan, J., dissenting); *Edelman*, 415 U.S. at 687 (Brennan, J., dissenting). Not until his dissent in *Atascadero* did Justice Brennan adopt the position that the eleventh amendment does not bar any suit in federal court in which subject matter jurisdiction is based on some provision other than the state-noncitizen clause of article III, section two. 473 U.S. at 301 (Brennan, J., dissenting).

One interesting sidelight is that Professor Fletcher served as Justice Brennan's law clerk in 1976-77. Professor Fletcher wrote his article in 1983, and *Atascadero* was the next significant eleventh amendment case decided by the Court.

189. 473 U.S. at 302-03 (Blackmun, J., dissenting).

190. 426 U.S. 833 (1976).

191. 469 U.S. 528 (1985).

Justice Marshall's dissenting opinion in *Edelman*.¹⁹² He concluded that the judgment of the court of appeals should have been affirmed because California, by voluntarily accepting federal funding under the Rehabilitation Act, had constructively consented to suit in federal court. He also concluded that Congress had abrogated California's immunity from suit by enacting the Rehabilitation Act in the exercise of its fourteenth amendment power.¹⁹³

C. *How Atascadero Should Have Been Decided*

Obviously the Supreme Court could not decide *Atascadero* on the grounds it did and remain consistent with its analysis in *Parden* through *Fitzpatrick*. The problem with *Atascadero* lies in the Court's failure to grasp the distinction between the congressional authorization argument made by the plaintiff and the constructive consent argument of the court of appeals.

The Court was correct in rejecting plaintiff's congressional authorization argument because Congress had not made itself "unmistakably clear in the language of the statute" on that point. It was also correct in perceiving that a finding of constructive consent by California would depend on a finding that Congress intended to exact from states their consent to suit in federal court in exchange for Rehabilitation Act funding. However, the Court erred in viewing these two inquiries into congressional intent as identical.

The principle reason for the "unmistakably clear" requirement in the cases prior to *Atascadero* was that, without any kind of state consent, the Court was unwilling to assume Congress intended unilaterally to subject states to suits in federal court unless the language of the statute documented in unmistakable terms Congress's intent to do so.¹⁹⁴ Such precautions are not necessary when there is a basis for finding that a state has constructively consented to suit. When a state engages in activities that subject it to federal regulation, the concern shifts to whether Congress has made it sufficiently clear to the state being regulated precisely which activities will be subject to what sort of control.¹⁹⁵

192. 415 U.S. at 688.

193. 473 U.S. at 304 (Blackmun, J., dissenting).

194. Noting that subjecting states to federal suits might place enormous fiscal burdens on the states, Justice Douglas wrote that "Congress, acting responsibly, would not be presumed to take such action silently." *Employees*, 411 U.S. 279, 284-85 (1973). In his *Edelman* dissent, however, he later argued that "[w]here a State has consented to join a federal-state cooperative project, it is realistic to conclude that the State has agreed to assume its obligations under that legislation." 415 U.S. at 685 (Douglas, J., dissenting).

195. This was the primary basis for disagreement between the majority and dissenters in *Edelman*. Justice Rehnquist, for the majority, noted that the Social Security Act provisions did not authorize enforcement suits and therefore provided no basis for finding "a waiver by a participating State of its Eleventh Amendment immunity." 415 U.S. at 674. Justices Douglas and Marshall in dissent would have found that § 1983, and the case law applying it in the context of enforcement of the Social Security Act, had made sufficiently clear to states that their participation in federal-state Social Security Act programs would subject them to § 1983 suits to enforce the Act. 415 U.S. at 679-80 (Douglas, J., dissenting); *id.* at 690 (Marshall, J., dissenting).

Viewed in this light, the error in the majority's analysis in *Atascadero* becomes obvious. Given California's voluntary decision to accept federal funding under the terms of the Rehabilitation Act, *Atascadero* should have been analyzed as a constructive consent/implicit authorization case. Thus, the relevant inquiry should not have been whether Congress made its intent to subject states to suit unmistakably clear on the face of the Rehabilitation Act. Rather, the Court should have asked whether California was fairly put on notice that recipients of federal funding under the Rehabilitation Act could be subjected to enforcement suits in federal court for violating the terms of the Act.

Ironically, a careful analysis of this question might have justified the same result eventually reached by the Court. Prior to the Supreme Court's decision in *Consolidated Rail Corporation v. Darrone*,¹⁹⁶ which was not handed down until after the first decision of the court of appeals in *Atascadero*,¹⁹⁷ it was unclear whether the nondiscrimination provisions of the Rehabilitation Act applied to all recipients of Rehabilitation Act funds, or only those receiving funds for the primary objective of providing employment.¹⁹⁸ Thus, an argument could have been made that California was not fairly put on notice of the consequences that would flow from its acceptance of Rehabilitation Act funding. Nevertheless, the answer to this question was far less clear than the answer to the question the Court did address.

CONCLUSION

Prior to *Atascadero*, the eleventh amendment could be overcome in three ways: express consent of the state, explicit congressional authorization, or constructive consent to a suit implicitly authorized by Congress. *Atascadero* apparently has narrowed the possibilities down to two: express consent or explicit authorization.

For future plaintiffs suing state employers under the Rehabilitation Act, *Atascadero* will not matter. On October 21, 1986, Congress amended the Act to abrogate explicitly the eleventh amendment immunity of states violating section 504.¹⁹⁹ Nevertheless, *Atascadero* remains

196. 465 U.S. 624 (1984).

197. The first decision by the court of appeals in *Atascadero* was handed down in 1982. *Darrone* was not decided until 1984.

198. The result in *Darrone* was prefigured in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). *North Haven* held that the prohibition of employment discrimination in Title IX did not incorporate a "primary objective" requirement even though it, like the Rehabilitation Act of 1973, borrowed language from Title VI, which did contain a "primary objective" limitation. *Id.* at 527-30; *Darrone*, 465 U.S. at 632 n.13. The *North Haven* decision, however, was handed down only one week before the first court of appeals decision in *Atascadero*.

199. Congress provided that:

- (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
- (2) In a suit against a State for violation of a statute referred to in paragraph (1),

the most recent statement by the Court of the standards for determining when a plaintiff can enforce federally protected rights against a state in the federal courts.

In that regard, *Atascadero* could be viewed as simply another example of the Supreme Court expounding on the eleventh amendment in a manner bewildering to all concerned. On the other hand, it could be interpreted as a conscious effort to stake out higher ground, setting up new and more difficult hurdles for plaintiffs to clear in order to enforce claims against states in federal court. Whatever else might be said about *Atascadero*, the Court, by its refusal or failure to acknowledge its departure from precedent, has added one more layer to the wealth of confusion that has permeated the eleventh amendment for more than a century.

Perhaps the most curious thing about *Atascadero* is the nearly total neglect of *Parden* by both the majority and dissenting opinions.²⁰⁰ The majority's disinclination to discuss *Parden* is almost understandable. The Court may have felt that it had run out of ways of distinguishing *Parden* from its progeny. *Employees* could be distinguished from *Parden* on the basis of consent which was found lacking in *Employees*. *Edelman* could be distinguished for lack of congressional authorization. However, congressional authorization was much more apparent in *Atascadero* than it had been in *Edelman* or *Parden*. Furthermore, it was possible to conclude that by accepting federal funds under the Rehabilitation Act, California had consented as a condition of that funding to federal enforcement by suits against it, just as Alabama had consented to suits under the FELA in *Parden* by entering the interstate railroad business. Thus, for the ma-

remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than the State.

Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (1986). Presumably this provision will satisfy the standard of explicitness required in *Atascadero* to abrogate the eleventh amendment.

Interestingly, the Senate Report accompanying the legislation states that section 1003 "clarifies the intent of Congress" and that "[t]he Supreme Court's decision [in *Atascadero*] misinterpreted congressional intent." S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). Perhaps as a result of this legislative history, a case was brought before the Court asserting that, in light of this amendment, *Atascadero* should be overturned. *Dunlap v. University of Ky.*, 815 F.2d 702 (6th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3354 (U.S. November 16, 1987) (No. 86-2029). Of course, evidence of what the 99th Congress desires does not by itself establish what the 93rd and 95th Congress intended in enacting sections 504 and 505 of the Rehabilitation Act. However, there was considerable support in the legislative history of the Act of Congress's intent to permit suits against participating states. See *Atascadero*, 473 U.S. at 248-252 (Brennan, J., dissenting). Nevertheless, *Atascadero*'s application of the congressional authorization standard of prior cases was correct. The 95th Congress, unlike the 99th Congress, did not make unmistakably clear on the face of the Rehabilitation Act its intent to abrogate the eleventh amendment. The error in *Atascadero* lay in importing this explicitness requirement from the context of congressional authorization to the context of constructive consent.

200. The only reference to *Parden* appears as a string citation in a footnote in the majority opinion. *Atascadero*, 473 U.S. at 243 n.3. The footnote documents the assertion that the Court has consistently held that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) and citing fifteen other cases, including *Parden*).

jority, it may have seemed that *Parden* either had to be overruled or ignored.

But why did the dissenters neglect *Parden*? Either they misunderstood *Parden*, or they disagreed with what they thought it had come to mean. There is support for the latter possibility. It was Justice Brennan who wrote *Parden*, and who, ever since *Employees*, has been trying to convince the rest of the Court that *Parden* did not mean what everyone else thought it did.²⁰¹ The ultimate irony of *Atascadero* may be that when four members of the Court finally agreed upon a workable conception of the eleventh amendment that could support the analytical framework created by *Parden*, they chose to ignore that framework, while the rest of the Court took its most significant step away from *Parden*, once again defying the language and intent of the drafters of the eleventh amendment.

ADDENDUM

On June 25, 1987, the Supreme Court announced its latest contribution to the eleventh amendment fray.²⁰² In *Welch v. State Department of Highways & Public Transportation*,²⁰³ a plurality of four, in an opinion written by Justice Powell, invoked the eleventh amendment to bar a Jones Act suit by a ferry dock employee against his employer, the Texas Department of Highways.²⁰⁴ A majority was attained with Justice Scalia's concurrence in the judgment.²⁰⁵ Justice White, though part of the plurality, also contributed a separate concurring opinion.²⁰⁶ Justice Brennan wrote a lengthy dissent reiterating the historical arguments he made in his *Atascadero* dissent. Predictably for eleventh amendment cases, he was joined by Justices Marshall, Blackmun and Stevens.²⁰⁷

In *Welch* the Court finally reached a point where it could neither ignore *Parden v. Terminal Railway*, as it did in *Atascadero*, nor distinguish it, as it did in *Employees* and *Edelman*. *Welch* presented a fact pattern identical to *Parden* except that the plaintiff brought his suit under the Jones Act instead of the FELA. But even that distinction was transparent, as the Court recognized, since the Jones Act simply "applied the remedial provisions of the FELA to seamen."²⁰⁸ Thus, the Court had either to

201. *Employees*, 411 U.S. 279, 299 (1973) (Brennan, J., dissenting); *Edelman*, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 457 (1976) (Brennan, J. dissenting).

202. This addendum was written after work on the main body of this article was completed.

203. 107 S. Ct. 2941 (1987).

204. *Id.* at 2944. Section 33 of the Jones Act, 46 U.S.C. § 688 (1982), provides a cause of action to any seaman suffering personal injury in the course of employment.

205. 107 S. Ct. at 2957 (Scalia, J., concurring). Justice Scalia's concurrence in the judgment was based on his reluctance to entertain a question not addressed in the parties' briefs about the correctness of *Hans v. Louisiana*, 134 U.S. 1 (1890). He did, however, agree with the plurality's decision to overrule *Parden*. 107 S. Ct. at 2958.

206. 107 S. Ct. at 2957 (White, J., concurring).

207. *Id.* at 2958 (Brennan, J., dissenting).

208. 107 S. Ct. at 2944.

abide by *Parden* or to overrule it. It chose the latter.²⁰⁹

Two brief points should be made about *Welch*. First, it is clear from Justice Powell's opinion in *Welch* that he intended no shift in doctrine from that which he articulated in *Atascadero*. As this article suggests, *Atascadero* established an analytical framework inconsistent with *Parden*. *Welch*, in overturning *Parden*, simply did explicitly what *Atascadero* had already done implicitly. Justice Powell's reasoning, in both cases, is plainly that whenever a private enforcement suit based on federal legislation is brought against a state which has not expressly consented to the suit, the eleventh amendment bars the suit unless congress makes "unmistakably clear in the language of the statute" its intention to allow the suit.²¹⁰

Consequently, *Welch* has no additional impact on the views expressed in this article about either the eleventh amendment or the Court's analysis of the eleventh amendment, save for the significant fact that *Welch* expressly overturns *Parden*, the progenitor of the analytical framework on which this article is based. But of course, this article has already criticized *Atascadero* for implicitly overturning *Parden*. The *Welch* Court's decision to make the demise of *Parden* explicit simply adds another wrongly reasoned case to the stack.

The second point to be made about *Welch* concerns an argument the Court failed to address as it discarded *Parden*. One question on which the Court granted certiorari in *Welch* was the continued viability of the "doctrine of implied waiver as set forth in *Parden*,"²¹¹ a question going to the heart of whether *Parden* ought to be formally overruled. Remarkably, the Court never discussed this implied waiver strand of analysis.²¹² Save for one quote pulled from the dissent in *Parden*, the focus of the Court's discussion of *Parden* was on whether congressional authorization could be found in the absence of "unmistakably clear" statutory language.²¹³ Thus, the Court once again missed or ignored the crucial dis-

209. *Id.* at 2948.

210. *Atascadero*, 473 U.S. at 242; *Welch*, 107 S. Ct. at 2948. Justice Powell assumed in *Welch*, without deciding, that the fourteenth amendment was not the sole source of congressional authority to subject unconsenting states to suits in federal court. *Parden* had concluded that Congress had such power under the commerce clause. *Employees* assumed as much without discussion. Since *Fitzpatrick*, however, cases have assumed that this power might be limited to the fourteenth amendment.

211. 107 S. Ct. at 2946.

212. The Court cannot entirely be blamed for this omission. Of the briefs filed with the Court, only one *amicus* brief discussed *Parden*'s constructive consent doctrine. Brief of the Council of State Governments, International City Management Association, National Association of Counties, National Governors' Association, National League of Cities, and U.S. Conference of Mayors as *Amici Curiae* in Support of Respondents at 25-28, *Welch v. State Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941 (1987) (No. 85-1716).

213. Justice White's dissent in *Parden* stated that "[o]nly when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby to have waived its immunity should courts disallow the invocation of this defense." 377 U.S. at 198-99 (White, J., dissenting) (quoted in *Welch*, 107 S. Ct. at 2948). After quoting this language, the *Welch* Court discussed the requirement imposed by *Employees* and *Atascadero* that Congress state its intent to override the eleventh amendment in express language. The Court concluded that *Parden*, being inconsistent with this requirement, should be overruled. In reaching this conclusion, the

inction between the explicit congressional authorization analysis and the constructive consent/implicit congressional authorization analysis called for by *Parden* and its progeny.

Justice White's concurring opinion brings home the same point from a different perspective. In the first sentence of Justice White's one paragraph concurrence he notes approvingly the Court's refusal to address the question of "whether the Jones Act affords a remedy to seamen employed by the States."²¹⁴ At first glance, this point seems irreconcilable with the Court's holding. It would seem that in holding that Congress did not make sufficiently clear its intent to subject states to suits under the Jones Act, the Court necessarily resolves the very question Justice White says is left open.²¹⁵

The only way Justice White's concurring opinion can be reconciled with the Court's holding is by recognizing, as this article suggests, that there are two distinct levels of congressional intent that need to be analyzed. The first level focuses on whether Congress intended to abrogate the immunity of unconsenting states. The Court correctly concluded, based on the "unmistakably clear" rule, that such intent could not be found in the Jones Act.²¹⁶ The second level focuses on whether Congress intended that the Jones Act provisions give a remedy to seamen against consenting states. The Court noted the concession by the parties that Texas had not expressly consented to this suit.²¹⁷ However, the Court failed to address the question of whether, much less what kind of, implied consent might suffice, other than by bare implication from its decision to overrule *Parden*.

In the end, what makes *Welch* most paradoxical is the juxtaposition of the Court's response to Justice Brennan's dissent and its discussion of *Parden*. The Court's discussion of *Parden* disregards the fact that a whole line of cases that could have overruled *Parden* did not; overlooks the implied consent strand of analysis which emerged from *Parden* and that same line of cases; relies heavily on the one significant case (*Atascadero*) that ignored *Parden*; and finally overrules *Parden*. Then the Court complains that the dissent urges that *Hans v. Louisiana* be overruled in violation of the long-standing doctrine of *stare decisis*, "any departure from [which] demands special justification."²¹⁸ The Court would do a better service to those who struggle to comprehend what has often been viewed as the "Twilight Zone" of federal jurisdiction²¹⁹ if it would be more mindful of its own pronouncements of the importance of *stare decisis* "by whose circumspect observance the wisdom of this Court as an

Court glossed over the fact that *Employees* had not found it necessary to overrule *Parden* on grounds of inconsistency, and ignored the fact that the *Employees* express language requirement had been imposed only because no basis for state consent was found.

214. 107 S. Ct. at 2957 (White, J., concurring).

215. However, the Court confirms in a footnote that it is not resolving this question. *Id.* at 2947 n.6.

216. *Id.* at 2947.

217. *Id.* at 2946.

218. *Id.* at 2948 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

219. See Lichtenstein, *supra* note 1, at 381.

institution transcending the moment can alone be brought to bear on the difficult problems that confront us.”²²⁰

220. 107 S. Ct. at 2948-49 (quoting *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting)).

