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STATE IMMUNITY AND FEDERAL JUDICIAL POWER—RETREAT FROM NATIONAL SUPREMACY

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The question of an uncontesting state's amenability to suit has long been troublesome, giving rise to a number of legal doctrines. Suits to restrain unconstitutional action threatened by individuals who are state officers have consistently been allowed in the federal courts upon the fiction that such suits are not actions against the state.[1] This fiction has been repeatedly reexamined and reaffirmed.[2] Equitable relief in the form of restitution[3] and mandatory injunctions[4] has also been approved against state officers, despite a substantial impact upon state treasuries.

Claims that impose treasury liability are especially sensitive because of their potentially disruptive impact upon state fiscal policy. When such claims arise out of federal law or are litigated in the federal courts, they often raise critical questions for ultimate resolution in the United States Supreme Court regarding the distribution of power between federal and state governments. When state officers violate federal law, it is well established that, upon complaint by the United States, federal courts have the power to fashion effective equitable remedies despite the effect upon state treasuries.[5] In such instances the state fiscal interests are subordinated to the paramount interest in the enforcement of federal law.

Traditionally, claims upon the state treasury by bondholders have not been permitted in federal courts of original jurisdiction without the consent of the state.[6] Such claims do not "arise under" federal law within the meaning of article III of the United States Constitution; rather, they arise under state statutes or contract law, and federal review can be exercised only upon the judgment of a state court of last resort.[7] To the extent that private rights against the state are *"not given by contract, but by statute,"* there is no contract to be impaired and, thus, no violation of the Contract Clause of article I, section 10 for state repeal of statutory entitlement.[8] No vital federal interest is

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1. *Ex parte* Young, 209 U.S. 123 (1908).

2. *See* cases cited in Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 nn.14-15 (1952).

3. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 871 (1824).

4. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Griffin v. County School Bd., 377 U.S. 218 (1964).

5. *See* Department of Employment v. United States, 385 U.S. 355 (1966) (refund of state taxes unlawfully imposed upon a federal instrumentality).

6. Hans v. Louisiana, 134 U.S. 1 (1890).

7. *Cf.* Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908).

8. Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 112 (1938) (Black, J., dissenting).

impaired by recognition that those who do business with a state do so at their own risk.

Federal courts have also adopted a policy of noninterference in the enforcement of state laws where there is an express remedial procedure provided in state courts.[9] It has long been established that the state courts are the appropriate tribunals for resolution of questions arising under their local law, whether statutory or otherwise.[10] Since state law questions are likely to predominate in state tax litigation, federal deference to state forums is clearly appropriate in this context. Review by the Supreme Court[11] is sufficient to satisfy any residual federal interest in state tax policy.

Although the sensitivity of treasury liability has also been recognized in damage actions against the state, the trend has been to allow recovery premised upon an implied waiver of state immunity.[12] The state immunity doctrine has been criticized,[13] but judicial recognition of states' common law immunity from liability for damages intrudes upon no legitimate federal interest.

The effect of prior case law has been to make the eleventh amendment[14] or the alleged state immunity postulate of article III[15] irrelevant in most federal question cases brought against officers of a state by the citizens thereof. However, two recent cases, *Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare*[16] and *Edelman v. Jordan*,[17] have cast the state immunity doctrine in constitutional terms and, as a result, the eleventh amendment has assumed renewed vitality. Earlier cases to which the state immunity bar had been extended can be explained by the presence of special state interests and the lack of special federal interests. *Employees* and *Edelman* present important federal claims that arise under acts of Congress and are, thus, distinguishable from earlier cases in which state immunity claims were approved.

The effect of the holdings in *Employees* and *Edelman* is either to deny private enforcement of federal rights or to deny a federal forum of original

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9. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944).

10. Murdock v. City of Memphis, 87 U.S. 1 (20 Wall.) 590, 626-32 (1875).

11. Supreme Court review of decisions by the highest court of a state is permitted where impairment of a federal right is asserted. 28 U.S.C. §1257 (1971).

12. Parden v. Terminal Ry., 377 U.S. 184 (1964); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); *cf.* Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381 (1939) (authority to sue and be sued contained in a federal charter granted a government corporation held broad enough to include suits in torts).

13. *See* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

14. "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." U.S. CONST. amend. XI.

15. U.S. CONST. art. I, §9; *cf.* Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 294 n.9 (1973) (Marshall, J., joined by Stewart, J., concurring).

16. 411 U.S. 279 (1973).

17. Edelman v. Jordan, 94 S. Ct. 1347 (1974).

jurisdiction in federal question cases, a result that could cause substantial dilution of federal rights. One of the most important roles of lower federal courts is the *vindication* of federal rights. The ultimate exposition of federal rights by the Supreme Court, important as it is, does not diminish the need for access to lower federal courts for vindication, which often turns more upon the establishment of an adequate record — a *factual* inquiry — than upon the *legal* content of the asserted right. Review of the record by the Supreme Court can never be an adequate substitute for access to a sympathetic forum of original jurisdiction. Moreover, the burgeoning Supreme Court docket makes it unrealistic to assume that the Court could adequately fulfill its role as the expositor of federal law if its responsibilities for factfinding or review of factfinding were significantly increased.

The denial of the obligatory character of federal rights prior to entry of a court decree enforcing those rights portends even more ominous difficulties for the enforcement of federal law. The vastness of our nation makes it unrealistic to impose exclusive enforcement responsibilities upon the various federal agencies except in situations where the Congress plainly indicates an intent to preclude individual access to the courts. In the welfare area "[r]ecent studies suggest that there may be massive noncompliance by the states with the federal requirements."[18] Any denial of a right to private enforcement undermines the salutary trend toward judicial acceptance of the vital role of "private litigation as a means of securing broad compliance with the law."[19]

Thus, the implications of *Employees* and *Edelman* are far reaching indeed, and deserve careful consideration. The purpose of this article will be to consider both cases in the context of social welfare policy and the asserted state immunity postulates of article III and the eleventh amendment.

STATE IMMUNITY DOCTRINE

Employees of Department of Public Health & Welfare v. Department of Public Health & Welfare

In *Employees* state hospital and school employees sought overtime compensation under section 16(b) of the Fair Labor Standards Act[20] (FLSA) and an equal amount as liquidated damages and attorneys' fees.[21] The district court dismissed the complaint and the court of appeals, sitting en banc, affirmed. The Supreme Court granted certiorari and held that the eleventh amendment barred the federal claim. The Court declined to extend the waiver exception to the state immunity doctrine[22] "to every exercise by Congress of

18. Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 666 (1972).

19. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401 (1968). For an excellent treatment of the right to counsel fees in actions initiated by "private attorneys general," see King & Plater, *The Right to Counsel Fees in Public Interest Environmental Litigation*, 41 TENN. L. REV. 27, 48-56 (1973).

20. 45 U.S.C. §§51 *et seq.* (Supp. II, 1973) [hereinafter cited as FLSA].

21. 29 U.S.C. §216(b) (1970); 411 U.S. at 281.

22. *See* Parden v. Terminal Ry., 377 U.S. 184, 192 (1964) (when the State of Alabama

its commerce power."[23] The Court's conclusions are disturbing for several reasons. First, no reasonably ascertainable standard for establishing when waivers of state immunity will be implied is articulated. The Court appears to have been influenced by "how pervasive such a new federal scheme of regulation would be."[24] The substantial fiscal impact of a decision adverse to the state on *Employees* was contrasted with the "rather isolated state activity" found in *Pardon v. Terminal Railway of Alabama,*[25] where a waiver of immunity was implied from state operation of a railroad in interstate commerce. Certainly, the level of state activity in the operation of railroads nowhere approximates the level of state involvement in the operation of schools and hospitals. The operation of railroads is plainly peripheral to state *governmental* interests; being as *proprietary* as any conceivable state enterprise. By considering the impact of a particular program on state government the Court apparently draws the line between state governmental functions, which are immunized from federal judicial scrutiny, and proprietary functions for which there is no immunity from federal judicial review. But "economic impact" analysis, while conservative of the resources of the Court politically, is utterly lacking in predictive value. Moreover, the immunity doctrine insulates state government from accountability for state administered school and hospital programs whose employees may be objects of special federal concern.

The Court's efforts to distinguish *Employees* from *Parden* on a governmental-proprietary basis[26] were unfortunate because "when acting within a delegated power, [the federal government] may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[27] Several years ago in *Maryland v. Wirtz*[28] the Court upheld FLSA coverage of state and local school and hospital employees as being within the commerce clause grant of power to Congress. If the characterization of the governmental activity as "propietary or governmental" was spurious for determining the extent of the Commerce power in *Wirtz,* why should it be relevant in *Employees* for determining the scope of federal judicial power? *Wirtz* suggests that the Court in *Employees* construed too narrowly the extent of the judicial power under article III. To deny federal jurisdiction on constitutional grounds over subjects admittedly within the regulatory purview of Congress is regret-

began operation of an interstate railroad 20 years after the enactment of the Federal Employees Liability Act, it "necessarily consented to such suit as was authorized by that Act"); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (state waiver of immunity for a maritime tort inferred from congressional consent to an interstate compact).

23. 411 U.S. at 287.

24. *Id.* at 285.

25. 377 U.S. 184 (1964). In *Employees* the Court was concerned because a decision adverse to the state "may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy." 411 U.S. at 285.

26. 411 U.S. at 281-85.

27. Maryland v. Wirtz, 392 U.S. 183, 195 (1968).

28. 392 U.S. 183 (1968). In *Wirtz* the Court upheld the constitutionality of the extension of the FLSA to every employee in an *enterprise* engaged in commerce and the minimum wage amendments extending coverage to service employees of state public schools, hospitals, and related institutions.

table. The right of Congress to provide a federal remedy for impairment of a federal right should not be denied lightly, especially where, as here, the federal court can afford a nonhostile forum for the establishment of complicated questions of fact upon which the vindication of federal law depends. The extension of the judicial power under article III to cases arising under the constitution, laws, and treaties "enables the judicial department to receive jurisdiction to the *full extent* of the Constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it."[29] *Employees* limits the federal judicial power with regard to FLSA claims against state institutions when exercised by courts of original jurisdiction but, presumably, not when exercised by the Supreme Court under United States Code, volume 28, section 1257.[30] There are valid reasons for the Congress to withhold federal jurisdiction over some cases to which the federal judicial power extends, especially where questions of state law are likely to predominate.[31] However, federal rather than state questions dominate both FLSA and welfare litigation. The need for access to a federal factfinding forum free from potential bias or parochialism is especially compelling when the defendant is the state itself.[32]

The Court also established a presumption in *Employees* that contradicts an important right secured by the Judiciary Act of March 3, 1875[33] — a federal

29. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (emphasis added). Chief Justice Marshall's conclusion was derived from the premise commonly accepted by the framers of the Constitution:

"[T]he legislative, executive, and judicial powers, of every well-constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws."

Id. at 818-19; *accord,* 3 J. ELLIOT, DEBATES 469 (1836) (remarks of Mr. Wilson of Pennsylvania).

30. There have been other instances in which cases outside the original federal question jurisdiction have been subject to review in the Supreme Court upon the final state decision. For example, *compare* Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908), *with* Louisville & N.R.R. v. Mottley, 219 U.S. 467 (1911).

31. Consider, for example, the avalanche of western land litigation that threatened to overwhelm the federal courts at the turn of the century and the congressional response. *See* Union Pac. Ry. v. Myers, 115 U.S. 1 (1885); 28 U.S.C. §349 (Supp. II, 1973). *Cf.* Gully v. First Nat'l Bank, 299 U.S. 109, 116 (1936); Shoshone Mining Co. v. Rutter, 177 U.S. 505, 507 (1900).

32. Congressional authority to establish "inferior tribunals . . . dispersed throughout the Republic" was based in part upon the fear of "biased directions of . . . dependent [state] Judge[s] . . . or the local prejudices of an undirected jury." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (M. Farrand ed. 1911) (Mr. Madison of Virginia) [hereinafter cited as RECORDS].

33. 18 Stat. 470, pt. 3 (1875). Federal jurisdiction of question arising under the laws, constitution, and treaties is vested in the federal courts, among other places, by 28 U.S.C. §1331 (1970) ($10,000 jurisdictional amount) and 28 U.S.C. §1343 (1970) (without regard to jurisdictional amount). *See, e.g.,* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 65 (1928); M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM

forum of original jurisdiction for cases arising under the Constitution, laws, or treaties of the United States.[34] Access to a federal forum of original jurisdiction enhances important constitutional values: vindication of federal claims by judges who are *institutionally* free from the parochial restraints of state courts, many of whose members are subject to popular election;[35] adjudication of federal claims by judges with specialized knowledge in federal law because of the relative frequency with which they are called upon to hear federal claims; consideration of federal claims by judges of superior competence who are attracted to federal rather than state judgeships because of the generally greater prestige, emoluments, and perquisites of the federal bench. Ironically, the majority in *Employees* would bar the door of the federal courts to FLSA claims against state hospitals and schools despite its acknowledgement that "[s]ection 16(b) . . . authorizes employee suits in 'any court of competent jurisdiction.' "[36] The awkward effect of the Court's decision is to shuttle citizens with federal statutory claims to the state courts to seek relief. Despite the obligation of state courts to enforce federal law[37] and the possibility of ultimate federal review of federal claims adjudicated in the state courts,[38] denial of a

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844-50 (Bator, Mishkin, Shapiro & Wechsler eds. 1973); Note, *Federal Jurisdiction Over Challenges to State Welfare Programs,* 72 COLUM. L. REV. 1404 (1972).

34. *See, e.g.,* Zwickler v. Koota, 389 U.S. 241 (1967); Harman v. Forssenius, 380 U.S. 528 (1965). *But cf.* Railroad Comm'r v. Pullman, 312 U.S. 496 (1941) and its progeny, *discussed in* C. WRIGHT, LAW OF FEDERAL COURTS §52, at 196 (2d ed. 1970).

35. *See* R. BURKE, THE PATH TO THE COURT: A STUDY OF FEDERAL JUDICIAL APPOINTMENTS (1959). The institutional independence of the federal judge from parochial pressure is exemplified by district judges such as Frank Johnson of Alabama and Robert Merhige of Virginia. J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961). The supervisory power of federal appellate courts along with the distaste of judges for being reversed combine to make federal district courts preferred forums for the assertion of federal claims. State trial judges, at least psychologically, are insulated from federal accountability by intermediate appellate state courts. Unfortunately, some federal judges are also heavily influenced by parochial values and local social pressures despite their greater institutional independence. Parochialism among federal judges is probably attributable largely to two factors: the political selectivity implicit in accession to the federal judiciary, and conformity relating to the personal aspirations of individual federal judges for social acceptability and approbation.

36. 411 U.S. at 287. The Court admits that "[a]rguably . . . [§16(b)] *permits suit in the Missouri courts* but that is a question we need not reach." (emphasis added). *Id.*

37. Testa v. Katt, 330 U.S. 386 (1947); *cf.* Brown v. Gerdes, 321 U.S. 178, 188 (1944) (Frankfurter, J., concurring).

38. 28 U.S.C. §1257 (Supp. II, 1973) provides: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: (1) by appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; (2) by appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity; (3) by writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

federal forum of original jurisdiction to secure rights conferred by federal statute appreciably dilutes the rights of national citizenship.

Actually, the Court does not establish an eleventh amendment limitation on the power of Congress to confer jurisdiction of FLSA claims against the states upon the federal courts. Rather, the Court presumes that Congress did not intend to confer federal jurisdiction of FLSA claims against state institutions,[39] thus rejecting the rule Chief Justice Marshall attributed to the founding fathers — that legislative creation of rights presumes coextensive judicial authority to expound and protect those rights.[40] The basis for this conclusion that congressional imposition of "new or even enormous fiscal burdens on the States" may not be presumed from congressional silence,[41] appears contrary to fact. It is obvious that the extension of coverage to state employees could not be presumed absent clear evidence of legislative intent.[42] Nevertheless, if Congress in fact intended "to put the States 'on the same footing as other employers,' "[43] the creation of federal rights should, absent clear and convincing evidence to the contrary, presume access to a federal forum for their assertion.[44] The Court should not presume, as it did in *Employees,* that the Congress creates substantive federal rights without authorizing an effective federal remedy for their enforcement.

There is little basis for the Court's conclusion that congressional authorization of suits for unpaid wages or overtime by the Secretary of Labor establishes that "private enforcement of the Act was not a paramount objective."[45] In fact, administrative enforcement of federal statutes geared to patterns of

39. 411 U.S. at 285. The Court "found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal Courts." *Id.* There is also *not the slightest indication* in *Employees* that Congress intended to bar access to federal courts to enforce compliance with federal standards. *Compare* 411 U.S. 299, *with* Rosado v. Wyman, 397 U.S. 397, 422-23 (1970).

Mr. Justice Brennan's analysis of congressional intent is more convincing than the Court's. He emphasizes that §16(b) was expressly extended to " '[a]*ny* employer' covered by the Act" and that the Senate explicitly declared its intent to extend coverage to institutions " 'whether *public* or *private* or operated for profit or not for profit.' " 411 U.S. at 302 n.1 (emphasis added). *See* S. REP. No. 1487, 89th Cong., 2d Sess. 8 (1966).

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

41. 411 U.S. at 284-85.

42. There was ample evidence of such intent. *See id.* at 801-08 (Brennan, J., dissenting). By §3(d) of the Act "employer" was first defined to exclude the United States or any state or political subdivision. In 1966 an "except" clause was added to §3(d), which extended the Act to state hospitals and schools. The Court admitted that "[b]y reason of the literal language of the present Act, Missouri and the departments joined as defendants are constitutionally covered by the Act." *Id.* at 283.

43. *Id.* at 301.

44. *See* Rosado v. Wyman, 397 U.S. 397, 420 (1970): "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program."

45. 411 U.S. at 286. *But cf.* Botany Worsted Mills v. United States, 278 U.S. 282, 288 (1929). *Botany Mills* was cited with approval in National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 94 S. Ct. 690 (1974), wherein the Court found that Congress' specification of a remedy impliedly negatived the availability of other remedies. See text accompanying note 78 *infra.*

noncompliance generally either complements or supplements individual enforcement.[46] Authorization of individual remedies often enhances administrative enforcement by disclosing patterns of nonconformity that deserve administrative attention. Moreover, it is highly questionable for the Court to imply that if the Congress finds a need for administrative enforcement of a statute, it is obliged to create a bureaucracy so vast that individual remedies are unnecessary.[47] For these reasons, the Court's presumption that administrative enforcement precludes individual remedies does not ring true.

The most plausible explanation of *Employees* derives from the Court's "pursuit of harmonious federalism,"[48] through which it infuses its ethical and political values into the decision. Political and ethical values, of course, elude rational criticism. One can only identify such values, explore their social implications, and characterize the "style" of the Court by its ethical postulates. The Court's value perspective in *Employees* emerges not as one of restraint, a popular characterization, but rather as one of deference to *state fiscal interests* over both *national enforcement interests* and the *individual interests of the working poor*. The irony is that Mr. Justice Douglas is sounding the call[49] and Mr. Justice Marshall is willing, with some reservations, to agree. Mr. Justice Brennan alone was willing to accord the *national enforcement interests* and *individual interests of the working poor* the respect that Congress intended they have.

In *Employees* the Court subordinated enforcement of minimum wage legislation affecting state employees to the assumed value of federal restraint in the "delicate federal-state relationship,"[50] at least to the extent that state compliance with the FLSA cannot be effected either voluntarily or through the intervention of the Secretary of Labor. But the Department of Labor is

46. Consider, for example, the complementary character of individual action for relief against employment discrimination under title VII of the Civil Rights Act of 1964 with commissioner complaints directed at whole industries (such as textiles) or patterns of discrimination in particular companies. Consider, also, that the right of HEW in administration of the categorical assistance programs to secure state conformity with federal statutes, regulations, and the United States Constitution through the "drastic" device of state conformity hearings does not preclude individual remedies in the federal courts. 397 U.S. at 422.

47. The Court protested that judicial deference to the alleged state immunity does "not make the extension of coverage to state employees meaningless." 411 U.S. at 285-86. Suits by the Department of Labor against nonconforming states would not present state immunity obstacles. *See* United States v. Texas, 143 U.S. 621 (1892) (original jurisdiction in the Supreme Court for suits by the United States against a state); United States v. California, 328 F.2d 729 (9th Cir. 1964) (original jurisdiction in the district courts of civil action by the United States against a state). But the Solicitor General, as amicus curiae advised the court that "less than 4% of . . . establishments [covered by FLSA] can be investigated by the Secretary of Labor each year." 411 U.S. at 287. Because 45.4 million workers were covered by FLSA in 1971 a state-immunity bar to individual relief severely frustrates the remedial purposes of the statute.

48. 411 U.S. at 286.

49. The position of Justice Douglas in *Employees* may be explained by his belief that the "political processes rather than equal protection litigation . . . [must be] the ultimate solvent of [the 'enormous' problems of medical care]. Memorial Hosp. v. Maricopa County, 94 S. Ct. 1076, 1090 (1974) (Douglas, J., in separate opinion) (footnote omitted).

50. 411 U.S. at 286.

already very busy, and its officers serve at the pleasure of the administration and are subject to powerful political constraints. Administrative enforcement of federally secured rights against state institutions would understandably be a "delicate" political matter for the Secretary of Labor, as evidenced by the protracted negotiations required to obtain state compliance with the Department of Health, Education and Welfare (HEW) categorical assistance programs. One probable effect of the Court's decision in *Employees* is to denigrate the entitlement of state employees from "now" to a time frame holding out the hope of future compliance, since FLSA claims for *back* wages presumably would be precluded by *Edelman*. The interest of state hospital and school employees in securing the wages to which they are entitled by federal law, although not "fundamental" in a constitutional sense,[51] is both *immediate* and *compelling*. One wonders whether the Court's "pursuit of harmonious federalism" is worth the price it exacts from the 2.7 million anonymous employees of state hospitals and schools.

Striking a proper balance among conflicting national, state, and individual interests is admittedly one of the most difficult and important of the Court's functions. The supremacy clause of article VI,[52] however, establishes important limitations upon the Court's deference to state interests, at least when the Congress is acting within the proper scope of its delegated powers.[53] The supremacy clause and the respect the Court owes Congress as a coordinate branch of government should function as important restraints upon the Court's subordination of national to state interests. The Court' federalism postulate has left a judicial gloss on the FLSA inconsistent with the Supremacy Clause.

It may often be appropriate for the Court to construe congressional grants of judicial power more narrowly than the scope of power available under article III,[54] even though the congressional grant uses the language of article III. The same language used in different contexts may take on quite different meanings.[55] Whenever substantial federal interests are not involved, the *Gold-Washing/Gully* line of authority is appropriate. But the doctrine of *Gold-Washing* and *Gully* is not appropriate to cases such as *Employees* or *Edelman*, precisely because the two latter cases implicate vital questions of policy under remedial federal legislation. In searching for an answer to whether federal jurisdiction should prevail over eleventh amendment objections, the Court might look for analogies to the *Erie doctrine*[56] and approach the problem from

51. *Compare* Richardson v. Belcher, 404 U.S. 78 (1971) *and* Dandridge v. Williams, 397 U.S. 471 (1970), *with* Shapiro v. Thompson, 394 U.S. 618 (1969).

52. U.S. CONST. art. VI, ¶2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

53. *See* Townsend v. Swank, 404 U.S. 282 (1971); note 116 *infra*.

54. *See, e.g.*, Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877) and cases cited note 31 *supra*.

55. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 678 (1950). *But cf.* Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943).

56. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

a perspective similar to that of the Court in *Hanna v. Plumer*.[57] The aptness of the *Erie* analogy arises from the pervasive concern with federalism common to cases involving the eleventh amendment and *Erie* doctrine. In *Hanna,* the Court held that the Rules of Enabling Act of 1934[58] rather than the Rules of Decision Act of 1789[59] controls the validity of the Federal Rules of Civil Procedure. As a result, conflicts between specific Federal Rules and state law in the future are likely to be resolved in favor of the Federal Rules.[60] Yet there remain substantial areas of primary activity in which state law will prevail, consistent with the Rules of Decision Act of 1789 and the *Erie* doctrine. Similarly, states need not be amenable to process in the federal courts for actions sounding in tort, contract, or otherwise arising under the laws of the states. If the claim arises under an Act of Congress, however, the federal law rather than the eleventh amendment should define the scope of federal judicial power. Federal judicial power, in the absence of an expression of congressional intent to the contrary should be coextensive with federal legislative power.

Employees and *Edelman* are disturbing also because they frustrate the development of federal common law by the lower federal courts in substantive areas in which it is particularly appropriate for the interstitial law to be federal rather than local.[61] The need for a uniform, federal common law consistent with the purposes of the FLSA and categorical assistance laws would appear equally compelling with the recognized need for a uniform federal common law governing labor contracts.[62]

Edelman v. Jordan

In *Edelman v. Jordan*[63] the Court held that state immunity barred an action under the assistance program for the aged, blind, and disabled (AABD) for benefits that had been withheld in violation of federal regulations[64] *prior* to the date of a judicial decree ordering state officers to comply with the applicable federal regulations.[65] The Court, therefore, set aside the *retroactive*

57. See 380 U.S. 460 (1965).

58. 28 U.S.C. §2072 (1970).

59. 28 U.S.C. §1652 (1970).

60. *See* Ely, *The Irrepessible Myth of* Erie, 87 HARV. L. REV. 693 (1974).

61. *See, e.g.,* D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447, 471-72 (1942) (Jackson, J., concurring).

62. *See* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 456-57 (1957). *Cf.* Cousins v. Wigoda, 95 S. Ct. 541, 548-49 (1975); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

63. 94 S. Ct. 1347 (1974).

64. Applicable federal regulations required eligibility determination and payment within 30 days of application for the blind and aged and within 45 days for the disabled. *Id.* at 1351. For subsequent changes in the federal regulations, see 45 C.F.R. §§206.10(a)(1)-(6) (1973).

65. *Edelman* thus leaves undisturbed any *prospective* relief based upon state noncompliance with federal regulations subsequent to the district court's "permanent injunction requiring compliance with federal time limits." Jordan v. Weaver, 472 F.2d 985, 988 (7th Cir. 1973). HEW had sought passage of a bill in the 91st Congress that would have given it authority to require retroactive payments to eligible persons denied such benefits, but the bill failed to pass the House of Representatives. 94 S. Ct. at 1351 n.16. *Accord,* Rodriguez v. Swank, 496 F.2d 1110 (7th Cir.), *cert. denied,* 95 S. Ct. 151 (1974).

portion of the district court's order that directed state officials "to 'release and remit AABD benefits wrongfully withheld to all [eligible] applicants . . . who applied between July 1, 1968 [the date of federal regulations] and April 16, 197[1] [the date of the preliminary injunction issued by the District Court] . . . .' "[66] *Edelman* limited cases permitting equitable relief against state officers, such as *Ex parte Young*.[67] Equitable restitution against state officers does not appear possible under *Edelman* and claimants have been limited to "prospective injunctive relief,"[68] despite the Court's admissions that time limitations established by federal regulations were an " 'appropriate interpretation of the Congressional mandate of reasonable promptness' "[69] and that state officers had patently violated the federal regulations.

The cases granting equitable relief against state officials do not readily admit to the shackle imposed by *Edelman*. *Ex parte Young* on its facts afforded redress for *past* wrongs. There, a federal circuit court had issued a preliminary injunction, upon the suit of railroad stockholders, to restrain compliance with a Minnesota statute reducing railroad rates, allegedly in violation of the Federal Constitution. Although the federal circuit court enjoined Young from instituting any proceeding to enforce the Minnesota rate law he filed a petition for mandamus in state court directing the railroads to comply with the state statute. The federal circuit court then adjudged Young to be in contempt, whereupon he filed an original application in the Supreme Court for leave to file a petition for writs of habeas corpus and certiorari. The Court recognized that the central question was whether the suit was, in effect, one against the State of Minnesota and thus not cognizable in the federal court. The Court held that Young was amenable to federal process under the fiction that state officers are stripped of their official or representative character, and thus their immunity when they act in violation of the Federal Constitution. Likewise, it would appear that the state officers in *Edelman* who violated a lawful act of Congress and lawful regulations promulgated thereunder would, under the Supremacy Clause, be stripped of their representative character and immunity.

In *Rosado v. Wyman*[70] the Court compelled compliance with a cost of living adjustment for welfare recipients required of the states as a condition for continued participation in the federally supported Aid to Families with Dependent Children (AFDC) program. To deny redress in *Rosado*-type actions for *past* wrongful deprivations by state officers undermines the *obligatory* character of federal law, subverts the intention of Congress, and encourages state nonconformity with federal norms. The states are legally free to par-

66. 94 S. Ct. at 1352. It is misleading to describe the disapproved portion of the district court's order as retroactive. The federal *obligation* upon the states emanates from valid federal regulations, which the courts are called upon to enforce, *not* from the enforcement decree itself. This case is clearly distinguishable from cases in which judicial decisions declaratory of asserted, but theretofore nonrecognized, rights are given prospective application only.

67. 209 U.S. 123 (1908).

68. 94 S. Ct. at 1362.

69. *Id.* at 1354 n.8.

70. 397 U.S. 397 (1970).

ticipate or decline to participate in the AFDC program; if they elect to accept the benefits they should not be permitted to withhold funds to which recipients are entitled by federal law.

Unfortunately, *Edelman* dilutes the most effective sanction reinforcing the obligatory character of an entire class of federally secured rights. It establishes fiscal incentives for states to abrogate or delay the implementation of important federal rights, limited only by the possible personal accountability of state officers for their past wrongful acts.[71] In his dissent, Mr. Justice Douglas suggests that the retroactive-prospective gloss that *Edelman* placed on *Ex parte Young* "is not relevant or material because the result in every welfare case coming here is to increase or reduce the financial responsibility of the participating state."[72] Indeed, the Court admitted that there was no "day and night" difference between the fiscal impact upon state treasuries of *prospective*

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71. Personal liability of public officers for deprivations of federal rights is beyond the scope of this article. However, neither the eleventh amendment nor the doctrine of "executive immunity" establish an *absolute* immunity for public officers. *See* Scheuer v. Rhodes, 94 S. Ct. 1683, 1687 (1974). Moore v. County of Alameda, 411 U.S. 693 (1973); Monroe v. Pape, 365 U.S. 167 (1961); *cf.* Bivins v. Six Unknown Named Agents, 403 U.S. 388 (1971).

Personal liability does not afford an adequate alternative remedy to the eleventh amendment barriers raised by *Employees* and *Edelman* for several reasons: (1) The "necessity of permitting officials to perform their official functions free from the threat of suits for personal liability," Scheuer v. Rhodes, *supra* at 1688, assures that the immunity of public officers from personal liability, although not absolute, will be extensive. *See* Pierson v. Ray, 386 U.S. 547, 554 (1967). Since the options that executive officers consider are broad and subtle, their "range of discretion must be comparably broad." Scheuer v. Rhodes, *supra* at 1692. (2) Public officers are not generally persons of sufficient means to make personal liability a viable remedy, especially where entitlement may extend to thousands of citizens as is true with FLSA, AABD, and other federal programs. Moore v. County of Alameda, *supra* at 700 n.10. (3) Federal funds available to states for retroactive, corrective payments to satisfy a hearing decision or court order in the categorical assistance programs, see note 96 *infra,* could not be used to satisfy a personal judgment against a state officer. (4) It is uncertain whether suits against public officers on their bonds would reach the civil deprivations in *Employees* or *Edelman,* or that all of the responsible officers are bonded.

72. 94 S. Ct. at 1365 (Douglas, J., dissenting). *See, e.g.,* Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (district court given authority to require supervisors of Prince Edward County "to levy taxes . . . adequate to reopen . . . public school system"). Federal courts must be able to give "complete rather than truncated justice." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). Distinctions between *prospective* and *retrospective* relief are untenable because retrospective relief is often "necessary to redress past wrong." Brief for Respondents at 26, n.16, Edelman v. Jordan, 94 S. Ct. 1347 (1974). Vlandis v. Kline, 412 U.S. 441 (1973) (refund of excess tuition wrongfully withheld by state officers). Equitable relief against mental health and jail officials has also been approved despite the fact that affirmative remedial action to redress the deprivation of federal rights often amounts to claims upon the state treasury. *See* Holt v. Sarver, 442 F.2d 304, 306-07 (8th Cir. 1971); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Equitable restitution against state officers may often provide the only satisfactory relief. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (a federal court of equity has the power to decree restitution against a state treasurer who wrongfully levied taxes upon a federally chartered bank; *cf.* Perez v. Ledesma, 401 U.S. 82, 105-06 (1971) (Brennan, J., concurring).

relief[73] and the so-called *retroactive* relief sought in *Edelman*.[74] The Court's retroactive-prospective distinction is traceable to equitable discretion rather than to a distinction between suits at law and in equity under either the eleventh amendment or article III. The basis for the distinction is doubtless that prospective relief would afford the state the option of electing not to receive federal funds rather than complying with federal regulations. But this distinction ignores the fact that the state agreed to comply with federal law and regulations when it initially elected to participate in the federally assisted program.

The effect of *Edelman* upon continuing access to the federal courts by welfare recipients and applicants is uncertain. After stating that *Rosado* "did not purport to decide the eleventh amendment issue we resolve today,"[75] the Court declared:

> The only language in the Social Security Act which purports to provide a federal sanction against a State which does not comply with federal requirements for the distribution of federal monies is found in 42 U.S.C. §1384. . . . This provision by its terms does not authorize suit against anyone, and standing alone, falls far short of a waiver by a patricipating State of its Eleventh Amendment immunity.[76]

The Court's recent unanimous decision in *Shea v. Vialpando*,[77] which reaffirmed the right of individual access to the federal courts to secure conformity with federal law is reassuring. In *National Railroad Passenger Corp. v. National Association of Railroad Passengers (Amtrak)*,[78] however, the Court applied strict principles of statutory construction, stating that when a statute

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73. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (welfare officials prohibited from denying welfare benefits to otherwise qualified aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (recipients entitled to hearing prior to termination).

74. The Court asserted that *Goldberg* and *Graham* have only an "ancillary effect on the state treasury [which] is a permissible and often inevitable consequence" of *Ex parte* Young, 94 S. Ct. at 1358.

75. *Id.* at 1362 n.18. The Court did not regard *Rosado* as controlling, "since the Court was not faced with a district court judgment ordering retroactive payments nor with a challenge based on the Eleventh Amendment." *Id.*

76. *Id.* at 1361. Compare the Court's unequivocal language in *Edelman*, with the *Rosado* Court's "reluctance to *assume* Congress has closed the avenue of effective judicial review." 397 U.S. at 420 (emphasis added). *Rosado* adhered to the premise that the state had "alternative *choices* of assuming the additional cost [of compliance with federal requirements] or not using federal funds to pay welfare benefits." *Id.* at 420-21 (emphasis added). Compliance of *participating* states with federal law and regulations can be ordered but, ultimately, the review power of the federal court is limited to prohibition of the use of federal funds by a nonconforming state. *See* Mr. Justice Harlan's statement that a state is "in no way prohibited from using only *state* funds according to whatever plan it chooses, providing it violates no provision of the Constitution. . . . [But] petitioners are entitled to declaratory relief and an appropriate injunction . . . against the payment of *federal* monies . . . would the state not develop a conforming plan within a reasonable period of time." *Id.* at 420 (emphasis in original).

77. 94 S. Ct. 1746 (1974) (Colorado standard $30 allowance for work expenses for AFDC recipients invalidated because of inconsistence with 42 U.S.C. §602(a)(7) (1970)).

78. 94 S. Ct. 690 (1974).

expressly provides a particular remedy courts should not imply the availability of other remedies.[79] The standing rationale of *Rosado* can be distinguished from *Amtrak* upon two grounds: (1) the asserted interests in welfare cases, although not "fundamental" in a constitutional sense, are deserving of greater judicial solicitude than the less compelling interests of railroad passengers,[80] (2) the legislative history of the Amtrak Act bears substantial evidence of congressional intent that the Attorney General assume *exclusive* responsibility for enforcement.[81] Recognition of the continuing vitality of *Rosado* is essential because of its immense value in assuring compliance with federal law and regulations.

The dissenters in *Rosado* asserted that "all judicial examinations of alleged conflicts between state and federal . . . programs prior to a final HEW decision approving or disapproving the state plan are fundamentally inconsistent with the enforcement scheme created by Congress and hence such suits should be completely precluded."[82] The state immunity doctrine of *Edelman* provides a way for the Court to rid itself of the "countless lawsuits by welfare recipients"[83] without overruling *Ex parte Young*—a step that, as Mr. Justice Douglas observed, none is eager to take.[84] Were the Court to adopt the position of the dissenters in *Rosado,* the precise questions of when and under what circumstances welfare recipients could properly seek judicial review would remain to be settled.[85]

Aggrieved welfare recipients are the most obvious complainants against state noncompliance with federal regulations. Certainly AFDS recipients suffer injury in fact and are within the zone of statutorily protected interests;[86] thus, they satisfy two of the three standing requirements of *Data Processing Service*

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79. *Id.* at 693. The Court observed: "[W]hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' Botany Worsted Mills v. United States, 279 U.S. 282, 289 (1929)." The Court held, over the lone dissent of Mr. Justice Douglas, that Amtrak passengers lacked standing under §307(a) of the Amtrak Act, 45 U.S.C. §5477 (1970), to sue to enjoin alleged discontinuance of a passenger train in violation of §404(a)(1) of the Act.

80. *See, e.g.,* 397 U.S. 254 (1970); *cf.* United States Dep't of Agriculture v. Murry, 413 U.S. 508, 517 (1973) (Marshall, J., concurring).

81. 94 S. Ct. at 695 n.9.

82. 397 U.S. at 453 (Black, J., joined by Burger, C.J., dissenting).

83. *Id.* at 433.

84. Edelman v. Jordan, 94 S. Ct. 1347, 1367 (1974) (Douglas, J., dissenting).

85. The statutory provisions for review by HEW of state AFDC plans "do not permit private individuals, namely, present or potential welfare recipients, to initiate or participate in . . . compliance hearings." Rosado v. Wyman, 397 U.S. at 426 (Douglas, J., concurring). Under the rationale of the dissenters in *Rosado* would private suits by present or potential welfare recipients be appropriate only when refusal of the Secretary of HEW to act under 42 U.S.C. §1384—even though within the letter of his authority—went "beyond any rational exercise of discretion?" *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 94 S. Ct. 690, 696-97 (Brennan, J., concurring). *Compare* Davis v. Romney, 490 F.2d 1360 (3d Cir. 1974) (plaintiffs have standing and a right to declaratory judgment that National Housing Act requires federal officers to make efforts to ascertain that insured mortgages under §235 meet municipal housing code standards), *with National R.R., supra.*

86. *See* 42 U.S.C. §§601 *et seq.*

Organizations, Inc. v. Camp.[87] As to the third – that judicial review has not been precluded – the test, where there is no express denial of judicial review, is whether "nonreviewability can fairly be inferred."[88] The authorization of administrative enforcement under section 1384 should not preclude individual standing to sue.[89] Did Mr. Justice Douglas put his finger on the pulse of the Court in *Amtrak* when he observed:

> The Court is in the mood to close all possible doors to judicial review so as to let the existing bureaucracies roll on to their goal of administrative absolutism. When the victims of administrative venality or administrative caprice are not allowed even to be heard, the abuses of the monsters we have created will become intolerable.[90]

State participation in federal welfare programs is not required.[91] That a state may elect "to refuse to comply with the federal requirement at the cost of losing federal funds is, of course, a risk that any welfare plaintiff takes."[92] However:

> As long as a State is receiving federal funds . . . it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds; and individuals who are adversely affected by the failure of the State to comply with the federal requirements in distributing those federal funds are entitled to a judicial determination of such a claim.[93]

Political rather than legal constraints generally guarantee that states will continue to participate in the categorical assistance programs. Continued state participation in a program should provide an adequate basis for implying a waiver of immunity.

Under *Edelman* the adversely affected individual is denied the right to a judicial determination of his claim for wrongfully withheld benefits. State compliance with federal law and regulations is subverted. The individuals injured by state noncompliance are forced to rely upon the good will of state bureaucracy or protracted negotiation between federal and state bureaucracies.

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87. 397 U.S. 150 (1970).

88. Barlow v. Collins, 397 U.S. 159, 166 (1970).

89. As the Court observed in Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969): "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the *subdivisions thereof.* The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the §5 approval requirements." (emphasis in original). To permit individual suits against cities and counties but not against states is a metaphysical distinction that exalts form over substance.

90. 94 S. Ct. at 700 (Douglas, J., dissenting).

91. King v. Smith, 392 U.S. 309 (1968).

92. 397 U.S. at 427 (Douglas, J., concurring).

93. *Id.*

The door is also opened for political considerations to dilute individual rights secured by law. Without private enforcement, the size and cost of the federal bureaucracy inevitably increase. Yet it is doubtful in the context of the political constraints upon HEW that state compliance with federal law and regulations could ever be achieved as effectively as by private lawsuit. The Court's implicit "pursuit of harmonious federalism" in *Edelman* threatens to undermine drastically the accountability of state welfare agencies to the intended beneficiaries of federal monies. Denial of access to the federal courts will only increase disparity in powers between the state welfare agencies and the recipient population. *Edelman* also places a premium on expeditious initiation of litigation and dilatory state tactics in the courts. Plaintiffs who can claim only from the date of a decree have every reason to file early, while any state inclination toward diligent litigation is abrogated.

In *Edelman* the Court overruled previous cases that had approved "retroactive" payments "to the extent that they are inconsistent with our holding today."[94] But not all retroactive relief is necessarily inconsistent with *Edelman*. For example, in *Shapiro v. Thompson*[95] where the Court affirmed an award of retroactive welfare payments, the claim was based on the right to travel, a constitutional liberty secured by the fourteenth amendment, not a federal statutory claim as in *Edelman*. *Edelman* does not resolve the degree to which the state's eleventh amendment immunity "may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment . . . ."[96]

Three of the four dissenters in *Edelman* argued for allowing the claim upon the ground of "implied waiver,"[97] and the fourth, Justice Brennan, would have disallowed state immunity because it was waived " 'in the plan of the Convention' that formed the Union, at least insofar as the States granted Congress specifically enumerated powers."[98] The Brennan position has the superior virtue of avoiding the state immunity doctrine when Congress acts within its delegated powers. Even if one admits the viability of state immunity under our "scheme of cooperative federalism,"[99] however, there is persuasive evidence that the states, by accepting matching federal funds, voluntarily assumed the Act's requirements.[100] Implied waiver is fully consistent with the "essentially contractual agreement [states have] with the Federal government."[101] Implied

94. 94 S. Ct. at 1360. These cases included Shapiro v. Thompson, 394 U.S. 168 (1969), and several cases summarily affirming district court orders awarding retroactive payments. *Id.* at 1359 n.13.

95. 394 U.S. 168 (1967).

96. 94 S. Ct. at 1371 n.2 (Marshall, J., joined by Blackmun, J., dissenting). The claim that the Reconstruction Amendments limit state immunity allegedly conferred by the eleventh amendment was presented in an amicus brief by the NAACP Legal Defense and Educational Fund, Inc.

97. *Id.* at 1366-67 (Douglas, J., dissenting); *id.* at 1370 (Marshall, J., joined by Blackmun, J., dissenting).

98. *Id.* at 1368 (Brennan, J., dissenting).

99. King v. Smith, 392 U.S. 309, 316 (1968).

100. 94 S. Ct. at 1366-67 (Douglas, J., dissenting).

101. *Id.* at 1770 (Marshall, J., joined by Blackmun, J., concurring). "While conducting an assistance program for the needy . . . the State . . . has voluntarily subordinated its

waiver is assuredly closer to the concept of national supremacy of article VI than the "league-of-sovereign-states" brand of federalism implicit in the *Edelman* majority opinion.

The federal regulations promulgated by HEW likewise point to the amenability of the states to suit. The regulations authorize federal financial participation in "retroactive . . . corrective payments" made "to carry out hearing decisions . . . or to extend the benefit of a hearing decision or court order to others in the same situation as those directly affected by the decision or order."[102] But deference to asserted state fiscal interests by the *Edelman* Court prevailed over the substantial respect generally accorded rulemaking by the administrative agency charged with enforcement of a federal statute.[103] The *Edelman* majority declared that "this retroactive award of monetary relief [described by the Court of Appeals] as a form of 'equitable restitution' is in practical effect . . . an award of damages against the State."[104] A substantial portion of any award would, of course, be satisfied through matching federal funds for wrongfully withheld past payments.[105] Also, the award sought in *Edelman* was *compensatory* and would have been limited to wrongfully withheld assistance payments that are a "matter of statutory entitlement for persons qualified to receive them."[106]

Edelman substantially lessens the accountability of state agencies to welfare applicants and recipients. State hearing officers are generally restricted to awarding relief for wrongful denial of benefits *under* applicable state policies; they lack authority to hold state policies inconsistent with federal regulations and to afford appropriate individual or class relief. When state policies are attacked for alleged inconsistency with federal law or regulations, the customary practice for legal services attorneys — and it is they who have been responsible for virtually all of the litigation under the categorical assistance programs — is to file a claim for relief in the federal court.[107] If judicial relief is barred prior to entry of a decree, the principle of accountability[108] is substantially eroded, and the most effective sanction for state nonconformity with federal law and regulations is undermined.

The state immunity postulate of *Employees* and *Edelman* and the national supremacy premise of Mr. Justice Brennan's dissent in *Employees* embody sentiments as old as the nation itself.[109] The Court in *Employees* and *Edelman,*

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sovereignty in this matter to that of the Federal Government, and agreed to comply with the conditions imposed by Congress upon the expenditure of federal funds." *Id.* at 1871-72.

102. *See* 45 C.F.R. §§205.10(b)(2), (3) (1973). The Court did not regard the adoption of regulations by HEW as determinative of the constitutional issues presented in *Edelman*. 94 S. Ct. at 1261-62 n.17.

103. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

104. 94 S. Ct. at 1358. In Scheuer v. Rhodes, 94 S. Ct. 1683, 1687 (1974), the Chief Justice cited *Edelman* as authority for the proposition that the "doctrine of *Ex parte* Young is of no aid to a plaintiff seeking damages from the public treasury."

105. See text accompanying note 103 *supra*.

106. Goldberg v. Kelly, 397 U.S. 251, 262 (1970).

107. Exhaustion of administrative remedies is not necessary. *See* Damico v. California, 389 U.S. 416, 417 (1967). *Cf.* McNeese v. Board of Educ., 373 U.S. 668 (1963).

108. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Damico v. California, 389 U.S. 416 (1967).

109. The political rhetoric and historical scholarship on this theme are probably as

in effect, subordinates the supremacy of federal law to nineteenth century doctrines of state sovereignty. What is most important is that the Court's decisions be understood by all to reflect a concept of federalism that defers national supremacy and individual rights to asserted state fiscal interests.

In both *Employees* and *Edelman* the Court held an unconsenting state immune from suit by one of its citizens. Although such action is not prohibited by the language of the eleventh amendment,[110] the judicial gloss to that effect, stemming from *Hans v. Louisiana*[111] was found persuasive.[112] However, in his *Employees* dissent Mr. Justice Brennan pointed the way for the Court to avoid the state immunity bar while leaving *Hans* and its progeny[113] undisturbed. Suppose, as he contends, that these cases accord "to nonconsenting states only a *nonconstitutional* immunity from suit by its own citizens."[114] State fiscal

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voluminous as any in the pre-Civil War period. Curiously, the eleventh amendment has received relatively little attention from legal scholars. *See, e.g.*, Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946); Cullison, *Interpretation of the Eleventh Amendment*, 5 HOUSTON L. REV. 1 (1967); Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183 (1908); Hyneman, *Judicial Interpretation of the Eleventh Amendment*, 2 IND. L.J. 371 (1927); Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

110. The text of the eleventh amendment is set out in note 14 *supra*.

111. 134 U.S. 1 (1890).

112. In reaching its result, the Court appears to have interpreted history to suit a preconceived state immunity posture. A comprehensive study addressed specifically to the validity of the historical premise for the Court's state immunity postulate in *Employees* and *Edelman* would be of interest. The important constitutional questions raised in the concurring opinion of Justice Marshall and the dissenting opinion of Justice Brennan in *Employees* deserve thorough attention by legal historians. As Justice Brennan observed: "None has yet offered, however, a persuasively principled explanation for . . . [the *Hans*] conclusion in the face of the wording of the [eleventh] Amendment. . . . [T]he question whether the Eleventh Amendment constitutionalized sovereign immunity . . . should, therefore, be regarded as open, or at least ripe for further consideration." Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 310 (1973) (Brennan, J., dissenting). Some recent inquiries tend to negate the Court's historical premise in *Employees* and *Edelman*. *See, e.g.*, C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (1970); R. MORRIS, JOHN JAY; THE NATION AND THE COURT (1967). The question comes very close to being a *normative* one incapable of dispositive historical or other rational proof. Since both nationalist and state-rights philosophies of citizenship and politics can be found in the Constitution, the members of the Court, regardless of their predilections on the national supremacy-state sovereignty issue, can derive substantial historical support consistent with their respective federalism postulates.

113. Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Great N. Life Ins. Co. v. Read, 320 U.S. 47 (1940). These cases [a]t most . . . reflect the unique considerations that surround federal judicial interference with enforcement of state tax law and the underlying policy of the federal courts not to decide these cases where an adequate remedy is otherwise available." Brief for Respondents at 28, Edelman v. Jordan, 44 S. Ct. 1347 (1974); *cf.* Burford v. Sun Oil Co., 319 U.S. 315 (1943). *Employees* and *Edelman*, in contrast to *Kennecott*, *Ford*, and *Read*, present important questions of federal policy in which state law is largely irrelevant.

114. Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. at 313 (Brennan, J., dissenting). Mr. Justice Marshall, with whom Mr. Justice Stewart joined, concurring in *Employees*, asserts that the "constitutional impediment to the

interests would be protected unless they conflicted with national interests, which should be preferred under the supremacy clause. Moreover, such construction would enable the Court to reconcile the "retroactive portion" of the district court's decree in *Edelman* with the *Hans* line of cases. Since those cases involved federal judicial interference with enforcement of state tax laws, *Edelman,* which arises under the commerce power,[115] could be distinguished because it does not involve a claim based upon special state interests. Alternatively, it could be argued that lower federal courts lack jurisdiction under the United States Code, volume 28, section 1331, of challenges to state tax legislation (or state laws impairing the obligation of contract) because such claims "arise under" state law rather than the Constitution or laws of the United States. The "well pleaded complaint" rule[116] would thus defeat original fed-

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exercise of the federal judicial power in a case such as this is not the Eleventh Amendment but Article III of our Constitution." *Id.* at 291. The language of article III does not support Mr. Justice Marshall's construction. When one considers article III in the context of the fastidiousness of the framers in their use of language, the many proposed drafts of a judicial article and the substantial discussion and debate concerning the judicial article, it is obvious that inferences construing article III contrary to its express terms should be strongly disfavored. Moreover, the predominance of creditor interests among the leading proponents of the judicial article at the Constitutional Convention and their equally strong commitment to the sanctity of contract weigh against the Marshall position. *See* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). *See also* HISTORY OF THE SUPREME COURT OF THE UNITED STATES 196-412 (J. Goebel ed. 1971).

115. See Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 319-20 n.7 (1973) (Brennan, J., dissenting); *cf.* Indiana *ex rel.* Anderson v. Brank, 303 U.S. 95 (1938) (Black, J., dissenting). This distinction was urged by Justice Brennan who contended that state immunity was waived by the plan of the Constitutional Convention "in respect to enumerated powers granted by the States to the National Government, such as the commerce power . . . [but that] there was no surrender in respect to self-imposed prohibitions, as in the case of the Contract Clause." 411 U.S. at 319-20 n.7 (Brennan, J., dissenting). In Mr. Justice Brennan's view, the Contract Clause is not among the "supreme federal powers" but is "simply a prohibition self-imposed by the States upon themselves and it granted Congress no powers of enforcement by means of subjecting the States to suit . . . ." *Id.* Thus, judicial recognition of states' immunity claims is appropriate under the Contract Clause but not under the Commerce Clause or any other enumerated power of Congress.

Mr. Justice Marshall, conversely, believes that state waiver of common law immunity for the purposes of the enumerated powers of article I, §8 "would seem to compel the conclusion that the States had also *pro tanto* surrendered their common law immunity with respect to any claim under the Contract Clause." *Id.* at 293 n.8 (Marshall, J., joined by Stewart, J., concurring). Mr. Justice Marshall attacked the Brennan position by observing that it is "a strange hierarchy that would provide a greater opportunity to enforce congressionally created rights than constitutionally guaranteed rights in federal court." *Id.* Mr. Justice Marshall's argument has impressive historical credentials. *See, e.g.,* 2 J. ELLIOT, DEBATES 486 (2d ed. 1836) where James Wilson advised the Pennsylvania ratification convention: "If only the following lines were inserted in this Constitution, I think it would be worth our adoption: 'No state shall hereafter *emit bills of credit;* make anything but gold and silver coin a *tender* in payment of debts; pass any bills of attainder ex post facto law or law *impairing the obligation of contracts.*'" (emphasis in original). The Brennan position, however, has the virtue of leaving state immunity largely intact *without* undermining national supremacy.

116. *See, e.g.,* Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908). *Compare* Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) (Holmes, J., dissenting), *with* Louisville & N.R.R., *supra.* To defeat jurisdiction under 28 U.S.C. §1343(3) (1970), however, would re-

eral jurisdiction. Either distinction would permit enforcement of preemptive federal legislation without unnecessarily jeopardizing state fiscal interests. When a state participates in an activity subject to federal regulation or in a cooperative program funded in large part by federal monies, its common law immunity should be subordinated to supreme federal law.

CONCEPTUAL FRAMEWORK

A conceptual framework for determining the extent of the judicial power of the United States was offered by the Court in *Cohens v. Virginia*.[117] Chief Justice Marshall reasoned that article III had extended the judicial power of the United States to two classes of cases. In the first category "jurisdiction depends on the *character of the cause, whoever may be the parties*."[118] Federal jurisdiction of cases according to the *character of the cause* "comprehends *'all* cases in law or equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority.' "[119] Thus, the jurisdiction is coextensive with the federal judicial power and any exception must be "implied against the express words of the article."[120]

The second class of cases described by Chief Justice Marshall "depends entirely on the *character of the parties*." Federal jurisdiction based upon the *character of the parties* under article III comprehends " 'controversies between two or more states, between a state and citizens of another state' 'and between a state and foreign citizens or subjects.' "[121] As to the second class of cases, it is "entirely unimportant what may be the subject of controversy."[122]

A corollary of Chief Justice Marshall's classification is that "a case arising under the constitution or laws of the United States is cognizable in the courts of the Union whoever may be the parties to that case."[123] The judicial department is "authorized" to decide *all* cases of every description, arising under the Constitution or laws of the United States.[124] From "this general grant of jurisdiction" in which jurisdiction depends on the *character of the cause,* no exception is made of those cases in which a state may be a party.[125] The constitutional policies supporting jurisdiction in *Cohens* are applicable as well in *Employees* and *Edelman.* They are:

> [T]he situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of

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quire a construction that a claim under the Contract Clause is not a "right, privilege or immunity secured by the Constitution" within the meaning of §1343(3).

117. 19 U.S. (6 Wheat.) 264 (1821). The Supreme Court "gives particular weight to pronouncements of Chief Justice Marshall upon the meaning of his contemporaries in framing the Constitution." 411 U.S. at 313-14 (Brennan, J., dissenting).

118. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 378 (1821) (emphasis added).

119. *Id.* (emphasis added).

120. *Id.* (emphasis added).

121. *Id.*

122. *Id.*

123. *Id.* at 383.

124. *Id.* at 382 (emphasis added).

125. *Id.*

> the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department . . . .[126]

The purpose for extending federal jurisdiction under article III to all cases based upon the *character of the cause* was, of course, to uphold the supremacy of federal law. A contrary construction would "prostrate . . . the government and its laws at the feet of every state in the Union."[127] Do not *Employees* and *Edelman,* in fact, prostrate federal law?

In *Employees* and *Edelman* the Court declined to consider Chief Justice Marshall's commentary on the *dual* nature of federal jurisdiction. Even Mr. Justice Brennan appears to have been misled by a recent historical study of the eleventh amendment,[128] which argued that Chief Justice Marshall's statements in *Cohens* led to a "paradox." The alleged inconsistency is that a state citizen, who has a voice in the state legislature, could enforce a federally protected right, while a noncitizen would enjoy neither a legislative nor a judicial remedy for the same right.

Upon close scrutiny, however, the alleged paradox disappears. The eleventh amendment must be understood as limiting the judicial power of article III only with respect to those cases to which jurisdiction is extended by the *character of the parties;* the eleventh amendment has absolutely no effect upon federal judicial power as it relates to jurisdiction based upon the *character of the cause.* This construction is the only plausible one for several reasons. First, the eleventh amendment by its express terms extends only to cases that come under federal judicial power because of the *character of the parties. Cohens* is explicit authority for the proposition that the eleventh amendment did not affect cases to which the judicial power of article III was extended because of the *character of the cause.* Restrictions upon the extent of the federal judicial power should not be favored. The principle of strict construction is especially appropriate, where, as here, the restriction upon federal jurisdiction would frustrate "the great purpose" that federal question jurisdiction was intended to serve— the supremacy of federal law.[129]

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126. *Id.*

127. *Id.* at 385.

128. Mr. Justice Brennan accepted as true the assertion that "Chief Justice Marshall's statement of the principle in *Cohens v. Virginia,* created a paradox: 'a citizen with a claim under the Constitution or federal law against his own state might sue in federal courts, while a citizen of another state or an alien, parties exercising much less, if any influence upon the government of the state for its beneficence would be denied a federal remedy.'" C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 91 (1972); 411 U.S. at 313.

129. The rule of construction in *Employees* and *Edelman* should have been as it was in *Cohens:* "[T]o construe the constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must . . . construe them as to preserve the true intent and meaning of the instrument." 19 U.S. (6 Wheat.) at 393. Applying such a rule of construction, it is plain that the eleventh amendment limitation upon federal judicial power relating to the *character of the parties* would not affect jurisdiction based upon cases relating to the *character of the cause.* In cases in which jurisdiction is "founded entirely on the character of the parties. . . . [t]he character of the parties is everything, the nature of the case nothing. . . . [Where] jurisdic-

Cohens is almost as old as the Union itself and is the lynchpin upon which the supremacy clause depends. Overruling *Cohens* would, of course, be unthinkable. What the Court did in *Hans* and has done again in *Employees* and *Edelman* is to undermine the logic of *Cohens* without full consideration of the implications of its action.

The fact that federal question jurisdiction was not vested in federal courts of original jurisdiction by the Judiciary Act of 1789[130] suggests that concern over federal question jurisdiction could not possibly have been the object of the remedial intent of the eleventh amendment. Moreover, since the eleventh amendment does not preclude actions between two or more states, its purpose was "not to maintain the sovereignty of the state from the degradation supposed to attend a compulsory appearance before the tribunal of the Nation."[131] Its purpose was, rather, to protect a state from "persons who might probably be its creditors."[132] The interest of states in protecting their fiscs from suits by citizens of other states and foreign states is distinct from the equally compelling policies that support federal judicial power in federal question cases.

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tion is founded entirely on the character of the case . . . . the nature of the case is everything, the character of the parties nothing." *Id.*

130. For the legislative history of the Judiciary Act of 1789, see Warren, *New Light in the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923).

131. 19 U.S. (6 Wheat.) at 406. Since the eleventh amendment "does not comprehend controversies between two or more states, or between a state and a foreign state . . . . [w]e must ascribe the amendment then to some other cause than the dignity of a state." *But see* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (eleventh amendment construed to bar suits against states by foreign states). *Monaco* is inconsistent with the views prevailing at the Constitutional Convention and among Federalists generally on the sanctity of contract and upon the necessity of state respect for contract rights as the only means of securing state credit. It is not necessary, however, to reject state immunity as asserted in *Monaco* for the Court to decline to extend the eleventh amendment to cases such as *Employees* and *Edelman*. *See* notes 115-116 *supra* and accompanying text.

132. 19 U.S. (6 Wheat.) at 406. "There was not much reason to fear that foreign or sister states would be creditors to any considerable amount." *Id.*

A preliminary search by the writer into the early reported cases of several states confirms Chief Justice Marshall's hypothesis. The early state reports are filled with actions by creditors upon public debts. *See, e.g.,* Stanley's Ex'r v. Hawkins, 1 N.C. (1 Martin) 36 (1791); Executors of Fowl v. Todd, 1 S.C. (1 Bay) 176 (1791). The states were equally concerned with avoiding review of state confiscation acts during the war with Britain. *See* Bayard v. Singleton, 1 N.C. (1 Martin) 5 (1787), where it was held that an act of the Assembly confiscating property of alien enemies by name was effective to vest valid title to the property in the state and subsequent purchasers from the state. On the decision in *Bayard,* twenty-seven other similar cases were all swept off the docket. *See also* Porter v. Dunn, 1 S.C. (1 Bay) 53 (1787), where the court upheld "Sumter's law" under which the Assembly in 1784 granted General Sumter and his officers authority to seize "loyalist" property, real or personal, and vest title to same in his men in lieu of pay.

Under article III of the Constitution and under the Judiciary Act of 1789, the Supreme Court was vested with original jurisdiction over an array of potential claims against states by citizens of other states, foreign creditors, aliens, or loyalists.

Some of the rights asserted against the states had been secured by the treaties of 1783 and 1795 with Great Britain. *See* S. BEMIS, A DIPLOMATIC HISTORY OF THE UNITED STATES 101-10 (1955). For an account of the property-oriented Federalist perspective, which underlay article III, the Judiciary Act of 1789, and the dreadfully unpopular treaty of 1795, "Jay's Treaty," see R. MORRIS, JOHN JAY, THE NATION AND THE COURT (1967).

A proper regard for the different policies that article III and the eleventh amendment were intended to serve would allow the Court to reconcile and honor both. Neither *Employees* nor *Edelman* can be justified by a policy-oriented construction of the eleventh amendment in relationship to article III.

The opinion of Justice Marshall in *Employees*[133] presents more problems than it solves. Mr. Justice Marshall admits the right of individuals to enforce FLSA claims against the states in state courts, but wishes to avoid the tension "inherent in making one sovereign appear against its will in the courts of the other."[134] Denial of original federal jurisdiction, however, should give rise to even more acute federal-state tension. Forcing state courts to bear the additional cost of hearing federal claims does not appear likely to reduce federal-state tension. Moreover, friction frequently develops when state judges are forced to hear federal statutory claims over which they lack special competence or interest. That the denial of a federal forum is not *inherent* in our system is obvious from a careful reading of *Cohens*. It has not been shown that the federal-state tension resulting from Supreme Court review under the United States Code, volume 28, section 1257, is any less than the tension generated by federal review in courts of original jurisdiction. In addition, there are important practical reasons for permitting original federal jurisdiction of FLSA claims against the states. Original federal jurisdiction secures federal claims against possible bias in the state factfinding process and substantially lessens the pressure upon the appellate docket of the Supreme Court. Failure to give original cognizance of federal claims to federal courts would impose a "correspondent necessity for leaving the door of appeal as wide as possible" and "an unrestrained course to appeals . . . [is] a source of public and private inconvenience."[135] Thus, it is questionable whether the assumed diminution of tension outweighs the increased burden upon the Court's appellate docket and possible bias in state factfinding.

The construction of article III and the eleventh amendment urged here could have been reconciled with *Hans* and its progeny until the Court's decisions in *Employees* and *Edelman*. A constitutional immunity of states from suit by their own citizens, according to the Brennan construction, is not necessary to the holding in *Hans*.[136] To the extent that *Hans* elevated state immunity in federal question cases to a constitutional status, it is inconsistent with the legislative history of article III and the eleventh amendment and deserves to be overruled.

Hans v. Louisiana RECONSIDERED

Hans was an action brought against Louisiana by a citizen of that state to recover the amount of certain interest coupons annexed to state bonds. An

133. 411 U.S. at 287 (Marshall, J., joined by Stewart, J., concurring).

134. *Id.* at 294.

135. *See* THE FEDERALIST No. 31, at 486 (W. Kendall & G. Carey ed. 1966). *See also* 1 RECORDS, *supra* note 32, at 124.

136. Mr. Justice Brennan rejects "the premise that *Hans* may be read as a constitutional decision." 411 U.S. at 319 n.7.

amendment to the Louisiana constitution had repudiated the state's obligation to pay this claim. Jurisdiction was asserted under the Act of 1875 upon an alleged state impairment of the obligation of contract. The Court in *Hans* thought it "anomalous" and "startling" if "in cases arising under the Constitution or laws of the United States, a state may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other states or of a foreign state."[137] The *Hans* Court, thus, misconstrued the eleventh amendment by assuming that it applies to cases in which jurisdiction is vested by the *character of the cause* as well as the *character of the parties.* If the eleventh amendment restricts only cases in which jurisdiction is founded upon the *character of the parties,* the "anomaly" vanishes; citizens of other states and foreign states would not be prevented from bringing suit against a state when jurisdiction is founded upon the *character of the cause.* Allowing suit against a state "in the federal courts . . . [when the state does not allow itself] to be sued in its own courts,"[138] is another result the *Hans* Court thought "anomalous" and "startling." But when a supremacy question is raised, the result is no more "anomalous" or "startling" than the concept of national supremacy itself. Nor does *Hollingsworth v. Virginia*[139] support the Court's construction of the eleventh amendment in *Hans,* a claim made by the *Hans* Court.[140] In *Hollingsworth* the Court held that the eleventh amendment prevented "any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state."[141] The phrase "any case" in *Hollingsworth* was obviously intended to comprehend "any case in which jurisdiction is based upon the *character of the parties.*" To contend otherwise strains credulity, since there was no original federal question jurisdiction under the Judiciary Act of 1789 then in force.

The Court suggested in *Hans* that the enactment of the eleventh amendment cast doubt upon whether *Chisolm v. Georgia,*[142] which permitted a suit against a state by a noncitizen, was based upon a sound interpretation of the Constitution at the time it was decided.[143] To support its view that *Chisolm* was improperly decided the *Hans* Court made reference only to the following data: the opinion of Mr. Justice Iredell in *Chisolm,* quotations from Hamilton's *Federalist,* Number 81, and statements made by James Madison and John Marshall at the Virginia ratification convention.

The references to Hamilton's *Federalist,* Number 81, in *Hans* do not support the Court's decision in either *Employees* or *Edelman.* Rather, Hamilton's

137. Hans v. Louisiana, 134 U.S. 1, 10 (1890).
138. *Id.*
139. 3 U.S. (3 Dall.) 378 (1798).
140. 134 U.S. at 11-12.
141. 3 U.S. (3 Dall.) at 378.
142. 2 U.S. (2 Dall.) 419 (1793).
143. 3 U.S. (3 Dall.) at 12. In his brief concurring opinion, Mr. Justice Harlan declared that he thought *Chisolm* was a "sound interpretation of the constitution as that instrument then was" and chided the Court because its comments on *Chisolm* "are not necessary to the determination of the present case." *Id.* at 21.

remarks[144] provide support for the application of the nonconstitutional doctrine of state immunity, which Mr. Justice Brennan urged in explanation of *Hans*.

The statements by Madison and Marshall that article III only conferred federal jurisdiction over cases brought *by* a state are not conclusive. The main opponents to the Constitution at the Virginia Convention apparently put little faith in the assurances of Madison and Marshall.[145] From the perspective of the debates at the Philadelphia Convention and in the context of remarks made in other state ratifying conventions, one is hard put not to question the intellectual honesty of the concessions made by Madison and Marshall at the Virginia Convention and siezed upon by the Court in *Hans*. There can be no doubt that many others at Philadelphia and in the state conventions interpreted article III literally. For example, James Wilson of Pennsylvania, one of the most prominent legal scholars at the Philadelphia Convention and one who had an important role in drafting article III, discussed the federal judicial power at length in the Pennsylvania ratification convention.[146] It is readily apparent that Wilson comprehended the judicial power of article III to include cases against states brought by citizens of other states and foreign states, citizens, or subjects. Wilson contended that "impartiality" was the leading feature of a federal forum: "[W]hen a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."[147] Wilson recognized that the clause vesting diversity jurisdiction and making states amenable to suits by foreign states, citizens, or subjects "will occasion more doubt than any other part."[148] The purpose of extending the judicial power of courts of the United States to diversity cases, including controversies to which a state is a party, was to restore public and private credit, to promote manufacturing, and to enhance interstate commercial transactions.[149]

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144. In THE FEDERALIST No. 81, *supra* note 131, Hamilton wrote that it is "inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*" (emphasis in original). He continued: "*Unless, therefore, there is a surrender of this immunity in the plan of the convention,* it [immunity] will remain with the states." *Id.* at 548 (emphasis added). The delegation of power to Congress under article I, §8, under the "plan of the convention," necessitates a surrender of state immunity. *See* note 115 *supra*.

145. One of the leading opponents of the Constitution, Patrick Henry, argued that the Madison-Marshall argument is: "[P]erfectly incomprehensible . . . . [H]e says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant." 3 J. ELLIOT, DEBATES 543 (1836). *Cf. id.* at 527 (Mr. Mason of Virginia).

146. 2 J. ELLIOT, DEBATES 489-94 (1836).

147. *Id.* at 491.

148. *Id.*

149. *Id.* Wilson observed that the nation needed: "[T]o restore . . . public . . . [and] private credit, [so] that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort[.] I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island . . . . How will a creditor feel who has his debts at the mercy of tender laws in other states?

The views expressed by Wilson at the Pennsylvania Convention plainly expressed his intent at the Philadelphia Convention with regard to the extent of federal jurisdiction according to the *character of the parties,* and his statements deserve special respect because of the preeminent role he played in drafting article III.[150] In contrast, the impetus in favor of federal question jurisdiction lay in the perceived need for a national government strong enough to "defend itself against the encroachments from the states. . . . [and to be] paramount to the state constitutions."[151] Lack of federal supremacy was among the chief defects that the Constitution was intended to remedy.

In *Chisolm v. Georgia*[152] the majority of the Justices construed article III consistently with its language and legislative intent. Mr. Justice Blair observed correctly that the policy supporting the amenability of states to suit lay in the idea that "no state in the union should by withholding justice have

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"[We cannot] extend our manufactures and our commerce . . . unless a proper security is provided for the regular discharge of contracts [and] . . . . unless we give power deciding upon those contracts to the general government.

"I will mention, further, an object that I take to be of particular magnitude . . . . *the improvement of our domestic navigation,* the instrument of trade between the several states. Private credit, which fell to decay from the destruction of public credit, by a too inefficient general government will be restored; and this valuable intercourse among ourselves must give an increase to those useful improvements that will astonish the world." *Id.* at 491-92 (emphasis in original).

150. *See* 2 RECORDS, *supra* note 32, at 129-75. Much of the work on the Constitution was done by the Committee of Detail. The first draft of the Committee proposed federal jurisdiction for two separate classes of cases. Jurisdiction was conferred upon "[c]ases arising under the Laws passed by the general Legislature." *Id.* at 132-33. This was the progenitor of the clause conferring jurisdiction according to the *character of the cause.* Jurisdiction was also extended "to such other Questions as involve national Peace and Harmony." *Id.* at 133. This clause was the ancestor of jurisdiction according to the *character of the parties.* The fourth draft of the Committee of Detail had begun to define cases "involving the national peace and harmony" to include diversity jurisdiction; "disputes between a State and a Citizen or Citizens of another State" (a marginal note in the handwriting of John Rutledge) and to "disputes . . . in which subjects or citizens of other countries are concerned." *Id.* at 147. The ninth draft, found among the Wilson papers, was in Wilson's handwriting with emendations in Rutledge's hand. The phrase "national peace and harmony" had given way to a specific enumeration of cases in language very close to that of the Constitution itself. In the ninth draft, jurisdiction of cases according to the *character of the parties,* in addition to cases affecting ambassadors, was extended "to Controversies between <States, — except those wh. regard Jurisdn or Territory, — betwn> a State and a Citizen or Citizens of another State, between Citizens of different States and between <a State or the Citizens> (of any of the States) <thereof> and foreign States, Citizens or Subjects. (Parts in parenthesis were crossed out in original; emendations by Rutledge are in angle brackets.) *Id.* at 173. John Rutledge delivered the ninth draft of the Committee of Detail to the Convention on August 7, 1787, a printed copy being at the same time furnished to each member. *Id.* at 177, 186. Mr. Sherman subsequently moved successfully to extend the jurisdiction to include suits between Citizens of the same state claiming land grant from different states. *Id.* at 431-32. No other substantive changes were made with regard to jurisdiction according to the *character of the parties.* Jurisdiction according to the *character of the cause* was subsequently extended to cases arising under the Constitution and treaties as well as under laws of the United States. *See id.* at 432 (document in Mason papers); 600 (reports of the Committee of Style); 660 (article III of the Constitution).

151. *See* 1 RECORDS, *supra* note 32, at 19.

152. 2 U.S. (2 Dall.) 419 (1793).

it in its power to embroil the whole confederacy in disputes."[153] By adopting the Constitution, each state "agreed to be amenable to the judicial power of the United States . . . [and] in that respect, [has] given up her right of sovereignty."[154] Mr. Justice Wilson's opinion in *Chisolm* reiterated the concern for commercial stability that he had pursued at the Philadelphia Convention in drafting article III.[155] Chief Justice Jay's opinion was predicated upon the responsibility of the United States to foreign nations for the conduct of each state, the performance of treaties, and the inexpediency of referring such questions to the courts of delinquent states.[156] The opinions of Justices Blair, Cushing, Wilson, and Jay in *Chisolm* mirror the concern of the Philadelphia Convention and of the Federalists over the security of commercial transactions and private property.[157]

The enactment of the eleventh amendment negated a portion of the judicial power of article III. Suits between states and citizens of other states or of foreign countries — cases based on the *character of the parties* — were no longer cognizable by federal courts. The sentiment in the country at large, as the Court observed in *Hans,* did not coincide with the overriding concerns of the Federalists for the sanctity of private property and the obligation of contract. The people were obviously unwilling to sanction respect for private property or contracts to the extent of authorizing suits by loyalists whose property had been confiscated during the Revolution, the treaties of 1783 and 1795 to the contrary notwithstanding. Nor were the states willing to submit to suit on claims arising from vast debts incurred during the Revolutionary and post-Revolutionary period (most of which under Hamilton's plan were assumed by the federal government). In short, the eleventh amendment applies only to two classes of cases — suits against states by citizens of other states and suits against states by citizens of foreign states[158] — and in both cases jurisdiction is conferred according to the *character of the parties.* But the eleventh amendment could not have been intended to affect the federal judicial power as it relates to a federal question jurisdiction — jurisdiction founded upon the *character of the cause.* The present Court by accepting the constitutional dicta of *Hans* is exalting a late nineteenth century revisionist construction over an interpretation that emerges from the Philadelphia Convention and a consideration of contemporaneous Federalist policies.

The Court can honor not only the letter but the spirit of the eleventh amendment — its alleged unwritten postulates — by recognizing a nonconstitutional state immunity in federal courts whenever the supreme federal powers

153. *Id.* at 451.

154. *Id.* at 432 (opinion of Wilson, J.).

155. *Id.* at 456.

156. *Id.* at 474 (opinion of Jay, C.J.).

157. Chief Justice Jay was not prepared to extend the rule of *Chisolm* to "bills of credit issued before the Constitution was established, and which were issued and received on the faith of the state . . . ." *Id.* at 479.

158. This is consistent with the understanding of article III during the 1790's. Thus, Chief Justice Jay in *Chisolm* observed that the judicial power of the United States extended to "ten descriptions of cases." *Id.* at 475. The eleventh amendment did no more than negate federal jurisdiction for cases comprising the eighth and tenth of Jay's categories.

of article I, section 8, are not at stake. States would thus continue to enjoy federal immunity relating to matters of state taxation, bonds, and contracts. But where matters of national supremacy are at stake, as in *Employees* and *Edelman,* a proper respect for the legislative history of article III and the supremacy clause demand that the Court subordinate conflicting states fiscal interests to the overriding national interest in the supremacy of federal law.

CONCLUSION

The revisionist posture of the Court in *Employees* and *Edelman* misconceives the nature of the judicial power conferred by article III. The Court's holdings extend and distort the eleventh amendment to serve policies for which it was never intended. The decisions are all the more unfortunate because they retreat from the earlier position taken by the Court in *Parden.* The Court's reference in *Edelman* to the statement of Mr. Justice Brandeis on the limited applicability of stare decisis in constitutional matters[159] suggests that additional revisions of previous decisions in the social welfare area may be forthcoming. The Court's expressed "pursuit of harmonious federalism" in *Employees* and its implicit search for the same goal in *Edelman* threaten to strike a new balance in American federalism more deferential to asserted doctrines of state sovereignty. Such deference inevitably would take a heavy toll of values enhanced by the supremacy clause. When the Court denies individual enforcement of federally secured rights in the federal courts, the value of the asserted rights diminishes considerably. Nor does the American experience provide a basis for the hypothesis that a policy of unbridled voluntarism will generally result in anything short of persistent deprivation or dilution of federally secured individual rights. In an age in which individual rights are most in need of judicial protection against degradation by large bureaucracies, be they state, federal, or private – the trend of *Employees* and *Edelman* should be viewed with concern. The Court acknowledges the propriety of " 'the process of trial and error . . . in the judicial function.' "[160] One can only hope that the Court will not extend the errors of *Employees* and *Edelman* to undermine further the principle of federal supremacy and the equally important principle of administrative accountability to the individual. The nonconstitutional state immunity doctrine urged by Mr. Justice Brennan in *Employees,* has obvious advantages over the opinions rendered by the Court and Justices Marshall and Stewart. The Brennan construction is consistent with the language and legislative intent of the eleventh amendment and article III. Most importantly, it would preserve national supremacy with respect to the paramount federal powers of Congress under article I, section 8, and the Reconstruction Amendments while shielding against federal intrusion upon state interests outside the scope of the federal powers.

Although *Edelman* precludes monetary relief retrospective to the wrongful denial of benefits by state officers, the eleventh amendment apparently provides no protection to state officers who disobey valid decrees of federal courts.[161]

159. Edelman v. Jordan, 94 S. Ct. 1347, 1359 n.14 (1974).
160. *Id.*
161. Rodriguez v. Swank, 496 F.2d 1110 (7th Cir. 1974).

Thus, in *Swank,* the Supreme Court declined to review a Seventh Circuit order upholding a federal district court's civil contempt order, effective February 1, 1973, and designed to bring about compliance with a 1970 injunction. The district court order awarded 100 dollars in compensatory damages in addition to regular benefits to Illinois AFDC applicants whose applications were pending more than thirty days through no fault of their own. *Swank* places a premium on early filing and suggests that the race to the courthouse may be the surest way for attorneys to avoid the deleterious impact of *Edelman.*

Eleventh amendment claims have been asserted in several petitions for certiorari presently pending in the Supreme Court.[162] The most significant eleventh amendment claims presently pending disposition on the certiorari docket involve the validity of awards of attorneys' fees[163] and costs[164] against the state — a matter of substantial practical importance both to the practicing bar and to special interest groups acting as "private attorneys general." Although the appropriateness of an award of attorneys' fees or costs in the face of an eleventh amendment challenge is beyond the scope of this article, it is apparent that the construction of eleventh amendment urged here would *not* preclude an award of attorneys fees[165] or costs under Federal Rule of Appellate Procedure 39 in federal question cases.[166] Whatever merit an eleventh amendment defense may have as a bar to federal jurisdiction based upon the character of the parties, it is submitted that the eleventh amendment is not relevant to cases arising under the federal question jurisdiction. As to federal question cases, state fiscal interests are adequately protected by the proper exercise of equitable discretion in the federal courts. A constitutional barrier is not needed to insure respect for comity or the common sense of our nation's federalism.

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162. *See, e.g.,* Department of Human Resources v. Burnham, F.2d (5th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3459 (U.S. Jan. 22, 1975) (whether federal district court, consistent with the eleventh amendment, can entertain suit by private individuals that would require state to reorder priorities and increase the level of fiscal support for therapeutic or curative psychiatric treatment it provides in its mental institutions); Vargas v. Trainor, 508 F.2d 486 (7th Cir. 1974), *cert. denied,* 95 S. Ct. 1454 (1975) (applicability of eleventh amendment to order allegedly requiring retroactive payment of state funds under Supplemental Security Income Program).

163. Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3319 (U.S. Oct. 30, 1974); Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974) *petition for cert. filed,* 43 U.S.L.W. 3299 (U.S. Oct. 9, 1974); Skehan v. Board of Trustees, 501 F.2d 31 (3d Cir. 1974), *petition for cert. filed,* 43 U.S.L.W. 3366 (U.S. Nov. 8, 1974); Citizens To Preserve Overton Park, Inc v. Brinegar, 494 F.2d 1212 (6th Cir. 1974), *petition for cert. filed sub nom.* Citizens To Preserve Overton Park, Inc. v. Smith, 43 U.S.L.W. 3418 (U.S. Dec. 17, 1974). *Compare* Sims v. Amos, 336 F. Supp. 924 (M.D. Ala.), 340 F. Supp. 691 (judgment on bill for costs and attorney's fees), *aff'd,* 409 U.S. 942 (1972); Jordan v. Fusari, 496 F.2d 646 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974); Cates v. Collier, 489 F.2d 298 (5th Cir. 1973); La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd,* 488 F.2d 559 (9th Cir. 1973).

164. Boston Chapter NAACP, Inc. v. Beecher, 504 F.2d 1017, 1028-29 (1st Cir. 1974), *petition for cert. filed sub nom.* Commissioners & Directors of Civil Serv. v. Boston Chapter NAACP, Inc., 43 U.S.L.W. 3429 (U.S. Dec. 16, 1974).

165. Hall v. Cole, 412 U.S. 1 (1973). *See also* King & Plater, *supra* note 19.

166. *See* Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927).