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The Eleventh Amendment: An Endangered Species

PETER W. THORNTON*

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

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

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

The case of Chisholm v. Georgia2 was seen as a threat to the sovereign immunity of the states and was the catalytic event which produced the eleventh amendment. It was an action against the state, initiated in the Supreme Court by the executor of a deceased South Carolina merchant who had sold war supplies to Georgia. The state contended that, as a sovereign, it was immune from suit without its consent. The Supreme Court held that article III of the Constitution extended the judicial power to a case against a state by a citizen of another state or by an alien, and that this grant of power to the national government was binding on the states.

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

2 2 U.S. (2 Dall.) 419 (1793).
One reason traditionally assigned for the speed and for the near unanimity in the adoption of the eleventh amendment was the financial position of the states. Largely as a consequence of the war they had accumulated substantial debts to both foreign and domestic creditors, and some had circulated new paper money as a painless way of meeting their obligations. Historians and courts have viewed the amendment as a means of avoiding the states’ obligations to pay those debts, particularly those owing to Tory and British creditors.

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

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

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4 Id. at 8.
5 Chief Justice Marshall said:

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

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

4 For a judicial adoption of this view, see Hans v. Louisiana, 134 U.S. 1 (1890).
The validity of the traditional view that the eleventh amendment reestablished state immunity depends on whether the somewhat ambiguous constitutional language quoted above originally recognized it. Did it extend the judicial power to all controversies between such parties regardless of whether the state is plaintiff or defendant, or only to controversies between such parties where the state is plaintiff? In other words, did article III implicitly recognize the exemption of states, as sovereigns, from unconsented suits by individuals?

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

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

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7 C. Jacobs, supra note 3, at 19, 21-22.
8 Id. at 39.
9 It is inherent in the nature of the sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. . . . there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsory force. They confer no right to action independent of the sovereign will.

The Federalist No. 81 (A. Hamilton) 501, 508 (H. Lodge ed.).
consent.

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

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

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

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

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

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10 *See Hans v. Louisiana,* 134 U.S. 1, 13-14 (1890).
11 19 U.S. (6 Wheat.) 264 (1821).
12 *Id.* at 412.
13 *The Federalist* No. 80 (A. Hamilton) 494, 497 (H. Lodge ed.).
14 C. Jacobs, *supra* note 3, at 40. Professor Nowak indicates that criticism of jurisdiction in suits against states centered on the possibility of enforcement of state debts, and that none of the attacks were directed at congressional power to grant jurisdiction to federal courts. He suggests that *Federalist No. 80* is consistent with *Federalist No. 81* in that Hamilton may have intended that only Congress have the power to grant federal court jurisdiction over cases against states, but that the judiciary lack inherent power to assume such jurisdiction. He states that *Federalist No. 80* emphasized the need for federal court jurisdiction over national laws, and defended jurisdiction in suits against states because of the need for the national government to enforce the privileges and immunities clause of article IV, section 2. This view, Professor Nowak states, is consistent with Federalist philosophy. Nowak, *supra* note 5, at 1429-30.
15 *Hans v. Louisiana,* 134 U.S. 1, 13 (1890) (quoting Hamilton's *Federalist No. 81*). For a more recent discussion, see *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 708 (1949).
overrule the holding of Chisholm and to return to the pre-existing understanding of state immunity.

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

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

THE “ERROR”: Chisholm v. Georgia

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

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

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

16 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430 (1793).
sies in which a state is involved with an individual. However, it was noted, the Judiciary Act, in granting the Supreme Court jurisdiction of all controversies between a state and citizens of another state, granted only concurrent jurisdiction. It was concluded that this could only mean concurrent with the courts of the several states, and therefore the Supreme Court could exercise no authority but that which a state court was competent to exercise. A historical discussion of the concept of governmental immunity from suit supported his statement that at the time of the Constitution and passage of the Judiciary Act no state authorized a compulsory suit for recovery of money against itself in its own courts.

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

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

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

17 C. Wright, supra note 1, at 556 (citing Chisholm and Kentucky v. Dennison, 65 U.S. (24 How.) 66, 96 (1860)).
18 377 U.S. 184, 190 (1964). But see Hans v. Louisiana, 134 U.S. 1, 18-19 (1890) (admitting that the majority in Chisholm did not agree, but that the Court preferred Justice Iredell’s view on this point).
19 2 U.S. (2 Dall.) at 431.
recovery of money. This understanding of the Iredell opinion is implicit in *Hans v. Louisiana*, where the Court equated Justice Iredell’s view with those Hamilton expressed in *The Federalist No. 81*, and stated that the eleventh amendment, on the question of the suability of states by individuals, shows that the highest authority of this country (the people) was in accord with the minority rather than with the majority in the decision of *Chisholm.*

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

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

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

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

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20 134 U.S. 1 (1890).
21 *Id.* at 12-14.
22 *Id.* at 19.
ing to bind the States.

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

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

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

23 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793).
THE "ERROR" CORRECTED: THE ELEVENTH AMENDMENT

The judicial opinion which is famous for holding that the eleventh amendment corrected the error of Chisholm, and which restored the original "general understanding" that the Judiciary Article implicitly recognized state sovereign immunity, is Hans v. Louisiana. The case involved an action on a debt, in the form of interest coupons on bonds, brought against the state. The complaint alleged that a state constitutional provision repudiated the coupons, and that the state by adopting the provision had thereby impaired the validity of contract in violation of article I section 10 of the Constitution. Plaintiff was a citizen of Louisiana. The state excepted on the ground that it could not be sued without its consent. Both the trial court and the Supreme Court agreed.

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

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

134 U.S. 1 (1890).

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

See note 5 & accompanying text supra.

The Federalist No. 81 (A. Hamilton) 501, 508 (H. Lodge ed.).
Had plaintiff's cause of action been one directly created by federal statute or the Constitution, his argument would have been stronger, and he clearly would have been supported by the reasoning of Chief Justice Marshall in *Cohens v. Virginia*.\(^2\) In fact, the suit was an action on debt, a breach of contract. Nevertheless, the Court spoke of the case as one “arising under” the Constitution. It then cited *Louisiana v. Jumel*,\(^3\) *Hagood v. Southern*,\(^3\) and *In re Ayers*,\(^3\) which like *Hans* all involved actions on debt, for the proposition that a state cannot be sued by a citizen of another state or of a foreign state on the mere ground that the case is one “arising under” the Federal Constitution or federal laws.\(^3\) Following those authorities, the Court held that the action was precluded by the eleventh amendment.

Plaintiff contended that because he was a citizen of Louisiana the action was not precluded by the eleventh amendment.\(^4\) The Court admitted that the language of the amendment did not cover the plaintiff, but concluded that it would be anomalous if a citizen could sue his own state and a non-citizen could not. The mere thought of this anomaly shocked the Court, which stated that such a result would be no less startling than was the decision of *Chisholm v. Georgia*.\(^5\) The Court then discussed the *Chisholm* case.

*Chisholm*, it said, created such a shock that it produced the eleventh amendment, the effect of which was to overrule the *Chisholm* opinion. The amendment showed that the people of the United States were in accord with Justice Iredell's dissent in *Chisholm*, which held that the Constitution did not intend to create new and unheard of remedies by subjecting sovereign states to actions by individuals. The Constitution only authorized Congress to invest the federal courts with jurisdiction to hear controversies between specified parties, and properly susceptible to litigation in courts.\(^6\)

In his concurring opinion, Justice Harlan disagreed with the Court’s comments about the *Chisholm* case. He said that they were not necessary to the opinion and stated that *Chisholm* was based on a sound interpretation of the Constitution at that time.\(^7\) His

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\(^2\) 19 U.S. (6 Wheat.) 264, 383 (1821).
\(^3\) 107 U.S. 711 (1882).
\(^4\) 117 U.S. 52 (1886).
\(^5\) 123 U.S. 443 (1887).
\(^6\) 134 U.S. at 10.
\(^7\) Id. at 11.
\(^8\) Id. at 12.
\(^9\) Id. at 21 (Harlan, J., concurring).
view, contrary to the majority holding that article III implicitly recognized the state’s sovereign immunity from suit in the federal courts, leaves article III as interpreted in *Chisholm*, except to the extent that the eleventh amendment limited the judicial power therein defined. This view leaves open the question as to what limits were imposed by the amendment.

**ELEVENTH AMENDMENT ELASTICITY AND SOME QUALMS ABOUT SOVEREIGN IMMUNITY**

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

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

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

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

""*The Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court . . . .” Id. at 678.*

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

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*411 U.S. 279, 310 (1972) (Brennan, J., dissenting).*
has yet offered, however, a persuasively principled explanation for that conclusion in the face of the wording of the Amendment.

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

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

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

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

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41 143 U.S. 621, 643-46 (1892).
42 206 U.S. 46, 83 (1907).
43 292 U.S. 313 (1934)."The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates." Id. at 330.
44 134 U.S. 1 (1890).
45 178 U.S. 436 (1900).
46 292 U.S. 313 (1934).
the States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81.59

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

The Hans and Monaco cases are permeated with the concept of sovereign immunity. Both indicate that article III and the eleventh amendment implicitly embrace the immunity doctrine and they merge the amendment with the doctrine of sovereign immunity, save where there has been a "surrender in the plan of the convention." It appears that this merger of the eleventh amendment and the doctrine of sovereign immunity56 explains why, though ordinarily jurisdiction cannot be waived, a state may waive the eleventh amendment. This concept was borrowed from the doctrine of sovereign immunity.52

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

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

50 Id. at 322 (footnotes omitted).
52 See Baker, supra note 40, at 154, 158.
53 C. Jacob, supra note 3, at 150-53.
54 The tension was stated in Prout v. Starr, 188 U.S. 537 (1903).

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provi-
federal courts for injury caused by breach of federal rights, and the view that states are sovereign and should be immune from suit, continues as strong as ever.

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

Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, see Kawananakoa v. Polyblank, 205 U.S. 349, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland’s belief, expressed nearly fifty years ago, that "it is a wholesome sight to see ‘the Crown’ sued and answering for its torts." 3 Maitland, Collected Papers, 263.11

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

In a nation whose ultimate sovereign is the people and not government, a doctrine premised upon kingship—or, as has been suggested, "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends," Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907)—is indefensible. . . .58

56 Id. at 723 (Frankfurter, J., dissenting).
57 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting).
Professor Jacobs states that the doctrine of sovereign immunity is "by practically any standard, morally indefensible in a modern society," and suggests that it is, "as the Court has more than once intimated, an unfortunate excrescence of a political and legal order which no longer enlists support."

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

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

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

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

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

Nevada further argued that the Constitution implicitly established a union which reciprocally obligated each state to respect the sovereignty of the others. The Court listed specific constitutional limitations on state sovereignty as demonstrating that we do not have a union of wholly independent states, but found nothing that implied that a state's immunity from suit in another state is anything but a matter of comity. The Court observed that the tenth amendment, which reserves to the states those powers not delegated to the federal government, suggests caution in concluding that un-
stated limitations on state power were intended. California has adopted a policy of full compensation for injuries on its highways, and nothing in the Constitution, said the Court, authorizes or obligates frustration of that policy out of enforced respect for the sovereignty of Nevada. It said that a holding so limiting California would intrude on the sovereignty of the states, and the power of the people, in our union.

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

In Mills Music, Inc. v. Arizona, the Court of Appeals for the 9th Circuit found that the eleventh amendment did not protect a state from suit for copyright infringement by use of plaintiff's song for the promotion of its state fair. The court found that the Copyright Act of 1909 did, by the use of the phrase "any person", authorize suit against a class of defendants which includes states. This intent was based on the sweeping language of the statute; on the fact that the statute is a comprehensive regulation; and on the additional fact that, by statute, the United States is liable for infringement. It was then determined that the copyright and patent clause, was a specific grant of constitutional power to legislate to effectuate the clause. The clause, it held, contains inherent limitations on state sovereignty, abrogating a state's eleventh amendment immunity, preventing a state from nullifying rights created by a statute enacted pursuant to the clause.

591 F.2d 1278 (9th Cir. 1979).
8 U.S. Const. art. I, § 8, cl. 8.
9 In respect to the modern trend against-sovereign immunity in other areas, see the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (providing that immunity of foreign states shall be decided by the United States courts rather than the executive branch, and dispensing with immunity in actions based on commercial activity or on tort). See also Comment, Avoiding the Eleventh Amendment: A Survey of Escape Devices, 1977 Ariz. St. L.J. 625, 644 (stating that in regard to suits against a state in its own courts, the trend in the recent years has been for state courts and legislatures to abolish or severely
Similar to the Mills case is Peel v. Florida Department of Transportation. There the Court of Appeals for the 5th Circuit held that the eleventh amendment did not preclude an action against a state for reinstatement as an employee and compensation for lost wages and benefits for dismissal contrary to the Veteran’s Reemployment Rights Act. The statute was interpreted to show congressional intent to abrogate eleventh amendment immunity of the states and to authorize an action for both types of relief. The Act was within the legitimate scope of the war power. When Congress acts under an article I, section 8 delegated power, it has the authority to provide for federal court enforcement of private damage actions against states.

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

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

LIMITATIONS ON THE SCOPE OF THE ELEVENTH AMENDMENT

The Fiction of the Individual Defendant

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

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

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

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

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

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

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14 Id. at 150.
17 117 U.S. 52, 67 (1886).
into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.\(^7\)

Justice Harlan dissented. It would be difficult to dispute the force of his argument that the suit was in reality one against the state and deprived the state of the right to enforce its own statutes in its own courts.\(^7\) A more sovereign function would be difficult to imagine than enforcement of state statutes in state courts.

Professor Wright made the observation that the fiction has its own illogic because the enforcement of the statute by the Attorney General is treated as state action for purposes of the fourteenth amendment and individual wrongdoing for purposes of the eleventh amendment. He further disclosed the irony that when the case was decided on the merits, the statute was sustained. Therefore, the Attorney General was not enforcing an unconstitutional statute; he was not stripped of state authority; and the federal suit was in actuality one against the state, though the ultimate outcome did not defeat the jurisdiction invoked by the complaint.\(^8\)

The majority obviously knew what it was doing. Like all legal fictions, this one was adopted with a particular end in view. The purpose was to provide federal court protection for constitutional rights against state invasion at the trial court level, rather than relegate the injured party to the state courts, with possible review in the Supreme Court. The result permits greater speed and efficiency in enforcing federal rights, and provides the benefit of a federal court's role in fact findings.\(^9\)

\(^7\) *Ex parte Young*, 209 U.S. 123, 159-60 (1886).

\(^8\) Id. at 174 (Harlan, J., dissenting).

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

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

\(^9\) *C. Wright*, supra note 1, at 208.

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

It is true that, after . . . rejection of his federal claims by the state courts, a litigant could seek direct review in this Court . . . . But such review, even when
Ex parte Young greatly altered the relations between the nation and the states. Federal power to restrain state officers from enforcing unconstitutional state statutes subjected states to restrictions of the Constitution that they might otherwise safely ignore. The fiction of the individual defendant permitted the use of injunctive relief to compel states to honor their constitutional obligations.\footnote{2}
The Court has stated\footnote{3} that "[a] 'storm of controversy' raged in the wake of Ex parte Young." Professor Jacobs stated: "[T]he antagonism engendered by suits against officers was intense, verging, in one instance, it was said, upon open rebellion. The outcry was reminiscent of that following the decision of Chisholm v. Georgia."\footnote{8}
The outcry was muted by legislation requiring the convening of a three judge court to decide an action seeking injunctive relief against the enforcement of a state statute on the ground of unconstitutionality.\footnote{5}
A later statute softening the blow was the Johnson Act of 1934,\footnote{6} which deprived district courts of the power to enjoin enforcement of state administrative orders affecting rates chargeable by public utilities unless, among other things, there is no plain, speedy and efficient remedy in the state courts.
A similar statute, The Tax Injunction Act of 1937,\footnote{11} deprived

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

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

\footnote{28 U.S.C. § 1342 (1976). Note that this covers the facts of Ex parte Young.}

\footnote{28 U.S.C. § 1341 (1976).}
district courts of the power to enjoin the assessment, levy or collection of state taxes where a plain, speedy and efficient remedy is available in the state courts.

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

Later attempts to limit federal court injunctions restraining the enforcement of state statutes were judicial not legislative, and did not involve jurisdiction. They are court made rules of self restraint, based on the avoidance of needless friction with state courts, and concepts of "Our Federalism." One such judicial limitation is the *Younger v. Harris* abstention doctrine, which developed in response to a case in which federal injunctive relief was sought to prevent state officials from further prosecution of pending state criminal proceedings under an unconstitutional state statute. The doctrine has the vital consideration of "Our Federalism" as its basis. If the federal plaintiff can raise his constitutional ground in the pending state litigation, federal injunctive and declaratory relief will be withheld absent a showing of great and immediate irreparable injury. The defense of a single state prosecution brought in good faith is not sufficient. It must appear that the defendants are acting in bad faith and for the purpose of harassment, or that the statute is flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, or that other unusual circumstances are present.

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

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*See supra* note 85.

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

*401 U.S. 37 (1971).*

*See generally id. at 47-54.*
in the civil rights area. Following the Civil War, a pervasive sense of nationalism led to the Civil Rights Act of 1871, and Mitchum v. Foster held that the Civil Rights Act is an "expressly authorized" exception to the anti-injunction statute, and authorizes, in appropriate cases, injunctive relief against ongoing state litigation. However, the limitation of the Younger doctrine only applies to state criminal prosecutions and to civil proceedings by the state brought to vindicate important state policies. The Younger doctrine is a doctrine of comity and discretion. It recognizes that the judicial power, as determined in Ex parte Young, authorizes injunctions against state officers enforcing unconstitutional state statutes, despite the eleventh amendment.

The Waiver Cases

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

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

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8 Id. at 243. "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1976).
15 45 U.S.C. § 51 (1976), provides: "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," and 45 U.S.C. § 56 (1972), provides: "Under this chapter an action may be brought in a district court of the United States."
state moved to dismiss on the ground that it had not waived its sovereign immunity from suit. The Supreme Court held that the motion must be denied.

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

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

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

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

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102 134 U.S. 1 (1890).
103 377 U.S. at 187.
104 Id. at 188. The Court cites United States v. California, 297 U.S. 175 (1936) and California v. Taylor, 353 U.S. 553 (1957). But see the dissent in *Parden* which states: "It should not be easily inferred that Congress, in legislating pursuant to one article of the Constitution, intended to effect an automatic and compulsory waiver of rights arising under another." 377 U.S. at 198 (White, J., dissenting). It was stated that an express declaration that a state would be deemed to waive by undertaking regulable conduct was necessary.
106 "This power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . . the sovereignty of Congress, though limited to specific objects, is plenary as to those objects. . . ." 22 U.S. (9 Wheat.) 1, 196-97 (1824).
107 A state's operation of a railroad in interstate commerce "must be in subordination to the power to regulate interstate commerce . . . . The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." 297 U.S. at 183-84.
that would stand in the way of such regulation. Since imposition
of the FELA right of action upon interstate railroads is within
the congressional regulatory power, it must follow that applica-
tion of the Act to such a railroad cannot be precluded by sover-
eign immunity.108

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

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

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

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108 377 U.S. at 192.
109 See Employees v. Missouri Public Health Dep’t, 411 U.S. 279, 299 (1973) (Brennan, J.,
dissenting). Justice Brennan had previously authored the Parden decision. “Parden held that
a federal court determination of such suits cannot be precluded by the doctrine of sovereign
immunity because the States surrendered their sovereignty to that extent when they granted
Congress the power to regulate commerce.” Id. at 299.
110 377 U.S. 184, 200 (White, J., dissenting). See Field, The Eleventh Amendment and other
Sovereign Immunity Doctrines, Congressional Imposition of Suit upon the States, 126 U. Pa.
L. Rev. 1203, 1209-10, 1214-15 (1978). See Peel v. Florida Dep’t of Transp., 600 F.2d 1070,
1081 (5th Cir. 1979), where the court viewed the requirement of consent as unnecessary and
viewed compelled consent as fiction.
whose creation required congressional consent pursuant to the compact clause of the Constitution. In approving it, Congress attached a proviso which was construed as a condition of amenability to suit in the federal courts. It took some ingenuity to transfer the condition concept from that contractual context to the FELA. It may be that the consent theory was used in Parden as a convenient way to avoid a direct answer to the premise of Alabama that Congress lacks power to directly strip a state of its sovereign immunity. The closing portion of the opinion is interesting, the last sentence being, "Where, as here, Congress by the terms and purposes of its enactment has given no indication that it desires to be . . . hindered in the exercise of its constitutional power, we see nothing in the Constitution to obstruct its will." Employees v. Missouri Public Health Department, the second of the waiver cases, refused to read Parden as holding that sovereign immunity cannot preclude a federally created cause of action because the states surrendered their sovereignty when they granted Congress the power to regulate commerce. Instead, it deemed that state consent, based on operating the railroad, was an essential part of the Parden holding.

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

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


377 U.S. at 198.


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


Discussion at 411 U.S. 286-87 could be taken to mean that if Congress had clearly
Justice Marshall, in his concurring opinion, found that Congress did intend to subject states to suit by individuals. He also found, however, that the state did not consent. He believed that the choice of either ceasing operation of vital public service or "consenting" to federal suit showed that there was no true choice. Therefore, he agreed that the eleventh amendment precluded suit in federal court. He noted however that the FLSA authorized suit to be brought in any court of competent jurisdiction. He then stated, citing Testa v. Katt, that while individuals could not enforce their FLSA action against a state in federal court, they could do so in a state court because of the constitutional obligation of state courts, under the supremacy clause, to enforce federally created causes of action, even if they conflict with state policy.

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

Justice Brennan's dissent in the Employees case was the most interesting of the opinions. He also believed that the intent to allow individual suits against states was clear both from the text of the statute and its legislative history; he then discussed his view of the eleventh amendment. He stated that there was an ancient doctrine authorized individual suits against states it would have lifted sovereign immunity (no discussion of consent here). Additionally, the Court stated: "The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court."

*Id.* at 283.

18 330 U.S. 386 (1947). But see Drake v. Smith, 390 A.2d 541, 546 (Me. 1978), where the Maine Supreme Court held that an action in the state court for money due under a federal-state aid program under the Social Security Act was not justified by a statute waiving state immunity from tort liability, stating:

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

19 411 U.S. at 316.
of sovereign immunity that existed before the Constitution. He further stated that there was a surrender of that immunity to the extent that enumerated powers were granted to the national government, because effective exercise of such enumerated powers required state surrender of immunity to empower Congress, where necessary, to subject states to suit. There was no surrender in regard to prohibitions imposed by the states on themselves, such as the contract clause, which is not an enumerated power, and as to which the states granted Congress no power of enforcement by means of subjecting the states to suit or otherwise. He rejected the view that Hans extended the coverage of the eleventh amendment to suits against a state brought by its own citizen. He believed that in Hans the state was protected by the non-constitutional ancient doctrine of sovereign immunity, which was not waived in respect to the contract clause action. This approach is based on that of Chief Justice Marshall in Cohens v. Virginia, who said that the eleventh amendment did not bar a federal-question suit brought against a state by its own citizen. Marshall’s view was that article III extended judicial power to all federal question controversies regardless of the litigants, and that the eleventh amendment expressly withdrew such power only as to suits against states by citizens of other states or by aliens.

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

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

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

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

Note that even though Congress does act under an enumerated power, its regulation will be ineffective if it impairs the states' integrity, or their ability to function effectively in a
This approach bears close watching. It has a kind of inexorable logic despite the apparently incongruous result that in *Employees* the state would have been suable by its own citizen but not by a citizen of another state. However, the probabilities are great that the vast majority of state employees desiring to sue the state under the FLSA would be state citizens.

Justice Brennan's interpretation certainly would be a major step in restricting the scope of eleventh amendment immunity. *Edelman v. Jordan,* the last of the trilogy of consent cases, like the majority opinion in *Employees,* never really had to discuss the concept of consent.

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

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

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

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

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

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

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

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

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126 *See* note 18 & accompanying text *supra*.
127 Among others he cited Shapiro v. Thompson, 394 U.S. 618 (1969). Note that in the majority opinion the Court stated that the *Shapiro* case was of precedential value on this
Justice Brennan’s dissent reiterated his views in Employees to the effect that the eleventh amendment had no application to a suit against a state by its own citizen, and that as the Social Security Act was enacted pursuant to article I, an enumerated power, the states surrendered their ancient sovereign immunity.

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

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

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

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128 411 U.S. 279, 310 (1972) (Brennan, J., dissenting).
130 See note 73 & accompanying text supra.
Statutory Implementation of the Fourteenth Amendment

Fitzpatrick v. Bitzer\(^1\) was a class action on behalf of present and retired employees of the state of Connecticut against state officials of Connecticut. The plaintiffs alleged that provisions in the state statutory retirement plan discriminated against them because of sex, in contravention of Title VII of the Civil Rights Act of 1964. Title VII was amended in 1972 to include state governments as employers within the statutory coverage. The district court held that the state statute violated Title VII and granted prospective injunctive relief. Petitioners also sought an award of retroactive retirement benefits for losses caused by the discrimination. It is clear from the language of the 1972 Amendments to Title VII that Congress intended to authorize a private suit for backpay by state employees against the state. Nevertheless, the district court and the court of appeals both held that under the eleventh amendment and the decision in Edelman v. Jordan the federal action for retroactive damages was not constitutionally permissible.\(^2\)

The Supreme Court, finding the retroactive award constitutional, distinguished Edelman. It reasoned as follows: Edelman held that an award of monetary relief to welfare plaintiffs for earlier wrongfully denied benefits violated the eleventh amendment; Edelman further held that the doctrine of waiver expounded in Parden\(^3\) was inapplicable because the necessary predicate for that doctrine was congressional intent to abrogate state immunity and no such intent was found in the statutes relied on by plaintiffs.

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

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

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\(^1\) 427 U.S. 445 (1976).
\(^3\) 377 U.S. 184 (1964).
the fourteenth amendment.\footnote{134}{Section 1 ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
Section 5 ... The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
U.S. CONS. amend. XIV.}

Relying on the much earlier case of \textit{Ex parte Virginia},\footnote{135}{100 U.S. 339 (1879).} the Court reasoned that the fourteenth amendment, ratified by the states after the Civil War, clearly contemplates limitations on state sovereignty. The substantive provisions are expressly directed at the states; the provisions imposed duties on the states in respect to private individuals; and Congress is given power to enforce the imperatives by appropriate legislation. All this expanded Congress' powers, with the corresponding diminution of state sovereignty. The eleventh amendment, and the principle of state sovereignty it embodies, are necessarily limited by the enforcement provisions of section 5 of the fourteenth amendment. Under section 5, the Court stated, Congress can provide for private suits against states which are constitutionally impermissible in other contexts. The latter would seem to be dictum, despite the strong and clear language of the Court.

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

It is interesting to compare Justice Brennan's opinion. He reasserted his view from \textit{Employees}\footnote{136}{411 U.S. 279 (1972).} that the eleventh amendment does not bar this action, and that the ancient doctrine of sovereign immunity does not either because immunity was surrendered insofar as the states granted Congress specifically enumerated powers. Title VII, he said, is based on congressional authority in the commerce clause, \textit{and} in section 5 of the fourteenth amendment, which are \textit{two} of the enumerated powers granted to Congress.

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

\textbf{Attorney's Fees}

In \textit{Hutto v. Finney},\footnote{137}{437 U.S. 678 (1978).} the Court dealt with the question of whether
the award of attorney's fees against a state is prohibited by the eleventh amendment.

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

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

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

128 Id. at 685.
129 See notes 73-78 & accompanying text supra.
130 See notes 123-28 & accompanying text supra.
As to the court of appeals award, it was not based on any finding of bad faith, but on the Civil Rights Attorney's Fees Awards Act of 1976. The Court, cited Fitzpatrick for the proposition that Congress has plenary power to set aside the state's immunity from retroactive relief in order to enforce the fourteenth amendment. It then found that when the Fees Awards Act was passed, Congress undoubtedly intended to use that power and to authorize fee awards payable by the state when their officials are sued in their official capacities. Intent was found from the broad language "in any action" to enforce certain laws; from the fact that the covered laws were specifically passed to restrain state action; and from the clear legislative history which contemplated state liability for attorney fees.

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

1 42 U.S.C. § 1988 (1976), provides that in suits under the Civil Rights Act, 42 U.S.C. § 1983 (1976), and certain other statutes, federal courts may award prevailing parties reasonable attorney's fees "as part of the costs."

Municipal Liability

In Monell v. Department of Social Services, the Supreme Court expressly overruled the decision of Monroe v. Pape, which held that local governments were wholly immune from suit under The Civil Rights Act of 1871. The Court in Monell expressly disavowed that it was addressing the question of state liability under section 1983. Therefore, Monell does not directly affect the eleventh amendment. Nevertheless, the holding is closely related to the thrust of this article.

The Monroe Court concluded that on the basis of legislative history Congress did not intend municipal corporations to be within the definition of “persons” subject to liability under section 1983. In Monell, the Court made a fresh and detailed analysis of the debates on the proposed statute, and of the case law which each side mustered in its support. It reached the conclusion that Congress did intend municipalities and other local government units to be within the coverage of section 1983.

This interpretation permits suits directly against local governmental bodies for monetary, declaratory or injunctive relief where the alleged unconstitutional activity implements or executes a policy statement, an ordinance, a regulation, or a decision officially adopted and promulgated by that body’s officers. Moreover, though the touchstone of action against a government body is that official policy be responsible for a deprivation of constitutional
rights, like every other "person" local governments may be sued for constitutional deprivations pursuant to governmental "custom," even though such custom has not received formal approval through the body's official decision making channels. \(^{150}\)

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

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

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

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

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\(^{150}\) Id. at 690-91.

\(^{151}\) Id. at 691.

\(^{152}\) Id. at 692.

\(^{153}\) 403 U.S. 388 (1971).

\(^{154}\) Id. at 396.

\(^{155}\) Kostka v. Hogg, 560 F.2d 37, 42 (1st Cir. 1977).

\(^{156}\) Patzig v. O'Neill, 577 F.2d 841 (3d Cir. 1978).
teenth amendment on the basis of *Bivens.* These latter circuits justified an action against a municipality under the general federal question statute, 28 U.S.C. 1331, rather than section 1983. They, however, drew the line by holding that such direct cause cannot be based on the doctrine of respondeat superior. They required that the municipality itself be culpable. *Turpin v. Mailet,* decided one day before *Monell,* relied on the *Bivens* holding, stating that its intention was that only those directly responsible for unconstitutional behavior may be called to task for their wrongful course of conduct.

*Jones v. City of Memphis,* was decided after *Monell,* and in its holding on respondeat superior relied directly on *Monell,* believing that it would be incongruous to hold that the doctrine of respondeat superior can be invoked against a municipal corporation under section 1331, when it clearly has no application in an action under section 1983. This holding, which appears eminently logical, for-closes the possibility that an implied direct cause of action based on the fourteenth amendment can give broader possibilities of recovery against a municipality than those provided by section 1983.

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

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158 *Davis v. Passman,* 99 S. Ct. 2264 (1979), the Supreme Court inferred a cause of action directly from the due process clause of the fifth amendment based on sex discrimination in termination of employment, in favor of an employee of a federal congressman who, not being in the competitive service, was not within the coverage of Title VII of the Civil Rights Act of 1964. Whether the same result would be reached in regard to the fourteenth amendment is uncertain. The fact that it is state power sought to be restrained, that a remedy exists under 1983 against the officer, and now against the local governmental body might suggest otherwise. See Smith & Singer, *supra* note 148, at 718-19.

159 579 F.2d at 164.


161 See Case Comment, *Judicial Refusal to Imply a Cause of Action Against Municipality Under Fourteenth Amendment After Monell,* 13 SUFFOLK U. L. REV. 1150 (1979), which suggests legislation amending 1983 to include actions against municipalities based on respon-deat superior.
it must itself have caused the injury.

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

State Liability

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

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165 Id. at 16-17.
166 Id.; see also Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (pendent party concept).
His conclusion was founded on the Fitzpatrick holding that Congress can, by legislation enacted under section 5, the enforcement provision of the fourteenth amendment, provide for private suits against states, and the enactment of section 1983 under section 5. He then found that a state was intended to be included within the words “every person” used to describe the class of prospective defendants in section 1983. The conclusion followed that state immunity under the eleventh amendment was abrogated by section 1983.

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

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

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

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170 Id. at 1154.
171 Id. at 1150.
172 Id.
174 See note 146 supra.
175 For judicial discussion of this act, see Quern v. Jordan, 99 S. Ct. 1139, 1145 (1979).
176 Id. at 1152-58 (Brennan, J., concurring).
units . . . not considered part of the State for Eleventh Amendment purposes."\(^8\) Further, after Monell, the Court decided Alabama v. Pugh,\(^9\) which was said to dispel any doubt on the question by holding that, in an action based on section 1983, the eleventh amendment precluded joining a state as defendant.\(^10\) The Court was not convinced by Justice Brennan's opinion, and believed that neither the language of the statute nor its legislative history showed congressional intent to abrogate state immunity.\(^11\)

The Quern case is a most unusual one, and is actually a sequel to Edelman.\(^12\) Following remand to the district court in Edelman, defendant state officials were ordered to send a notice to members of the plaintiff class explaining that the federal suit was at an end, and advising that there were state administrative procedures available to obtain a state determination of their eligibility for past benefits. The Court rejected the argument that such notice would lead inexorably to payment of state funds for retroactive benefits and therefore was, in effect, a monetary award. The notice was held to be merely informational and the matter one for resolution by the state.\(^13\) The notice, the Court held, was properly viewed as "ancillary to the prospective relief already ordered by the Court."\(^14\) The propriety of the notice was the only issue in the case, nevertheless, during the opinion, the Court answered respondent's suggestion that Edelman had been undercut by Monell and that section 1983 should be held to include states.\(^15\)

Justice Brennan, though concurring in the judgment, treated the majority discussion of section 1983 as dictum, despite the author's protestations to the contrary. The Court's holding that the notice was ancillary to prospective relief was sufficient to support the decision that it was not barred by the eleventh amendment, therefore the discussion of the section 1983 issue was unnecessary to the holding. He also denied that Alabama v. Pugh held "that a State is not a 'person' for purposes of section 1983."\(^16\) Pugh was an extremely brief per curiam opinion involving a mandatory injunction to eradicate cruel and unusual punishment in the Alabama prison system. The state was a party in addition to a state board and state officers.

\(^8\) Id. at 1144 (quoting Monell v. Department of Social Serv., 436 U.S. 658, 690 n.54 (1978)).
\(^10\) Id. at 782.
\(^11\) 99 S. Ct. at 1145.
\(^12\) Id. at 1141.
\(^13\) Id. at 1142, 1148-49 (discussing Edelman).
\(^14\) Id. at 1149.
\(^15\) Id. at 1144-47.
\(^16\) Id. at 1151 (Brennan, J., concurring).
The question was, "[w]hether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. §1983." As Justice Brennan noted, the Pugh opinion did not discuss section 1983. It addressed only the question whether Alabama had consented to being sued; found that it had not; and held that the state was not properly made a defendant. Justice Brennan contended that the Court decided the first half of the question, but not the second half in respect of section 1983. This seems to accord with the view of Justice Stevens. The latter, in his dissent in Alabama v. Pugh, stated that nothing was accomplished by the case except the correction of harmless error. Though the state is stricken as defendant, if state officers disobey the injunction, financial penalties may be imposed on the state agencies.

He also stated: "Surely the Court does not intend to resolve summarily the issue [are States ‘persons’ within 1983] debated by my Brothers [Brennan and Powell] in their separate opinions in Hutto v. Finney . . . ." Though there may be merit in Justice Brennan’s contention that the question of the scope of section 1983 was not necessary to the opinion in Quern, the case did say in clear language that states are not “persons” within section 1983. It would seem unlikely that in the near future the majority of the Court will accept the contrary view.

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

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

Suggested Interpretations

Though the divergent political philosophies of nationalism and states-rights which existed at the time of the adoption of the Consti-
tution still exist, by whatever name, the economic and political emotions that propagated the eleventh amendment have long since dissipated. To the extent that the amendment supports the doctrine of sovereign immunity it seems inconsistent with the fundamental policies underlying the later Civil War amendments which "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress;" and equally inconsistent with the "pervasive sense of nationalism" underlying the Civil Rights Act of 1871 which extended protection to individuals against violation, under color of state law, of rights guaranteed by federal Constitution and law, and with the Judiciary Act of March 3, 1875 which conferred on lower federal courts general federal question jurisdiction empowering them to vindicate federal rights.

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

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

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

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

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192 Ex parte Virginia, 100 U.S. 339, 345 (1879).
196 See notes 16-23 & accompanying text supra.
198 See notes 73-97 & accompanying text supra.
Citizen Suits not Precluded by the Eleventh Amendment

Justice Brennan’s dissent in Employees took the position that Hans199 did not extend the eleventh amendment to suits against a state by its own citizens.200 He believed that the Court protected the state against its own citizen’s suit, which was based on contract, by invoking the ancient common law doctrine of sovereign immunity from suit without consent.201 A careful reading of the case indicates this to be plausible and logical analysis.

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

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

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

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

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199 134 U.S. 1 (1890).
201 Id.
202 19 U.S. (6 Wheat.) 264 (1821).
203 See notes 120-22 & accompanying text supra.
204 This view has been briefly stated in Ex parte New York, 256 U.S. 490 (1921), citing Hans among other cases, as follows:

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

Id. at 497 (emphasis added). See also Fitzpatrick v. Bitzer, 427 U.S. 445, 458 (1976) (Stevens, J., concurring) (“Even if the Eleventh Amendment does cover a citizen’s suit against his own state”—expressing doubt as to the Hans holding) (emphasis added). Stevens cited the holding in Cohens v. Virginia and Brennan’s dissent from Employees.
merated power, this theory would permit a citizen of the state to sue while a non-citizen or alien could not. Though such result might offend one's sense of balance, it would probably avoid the bar of the eleventh amendment in most federal question cases; the probability is that citizens are most likely the persons injured by state conduct. Further, the theory does apply the eleventh amendment as clearly written. The uneven result would not appear to be produced by illogic in the theory, but by the drafters of the eleventh amendment, who, though they did not so state, seemed to have had in mind only article III jurisdiction based on the character of the parties and not that based on the nature of the cause.

Federal Question Cases not Precluded by the Eleventh Amendment

Chief Justice Marshall wrote a stirring opinion in Cohens v. Virginia\textsuperscript{25} clearly detailing the purpose and spirit of the Constitution as he saw it. The Constitution, definitely nationalist in concept and origin, created a central government that had the power to directly affect the people and to bind the states, and was designed to cure the weaknesses of the Articles of Confederation. The supremacy clause made the Constitution, the law and the treaties of the United States the supreme law of the land, binding on the judges in every state. The powers ceded by the people and the states to the federal government are limited in number, but in regard to those powers the federal government is supreme; the sovereignty of the states was surrendered to that extent.

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

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

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

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

\textsuperscript{25} 19 U.S. (6 Wheat.) 264 (1821).
That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable.206

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

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

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

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206 Id. at 377.

207 U.S. CONST. art. III, § 2, cl. 1.

208 "[C]ases between a State and one of its own citizens, do not come within the general scope of the constitution, and were obviously never intended to be made cognizable in the federal courts. The State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case, could not exist in the last, and therefore the judicial power is not extended to the last." 19 U.S. (6 Wheat.) at 390.

209 This view continues to the present in regard to Supreme Court review of state decisions, but as to the original jurisdiction of the district courts, the view is that a case "arises under" when plaintiff seeks to vindicate federal rights but not when the defense is based on federal law. See Gully v. First Nat'l Bank, 299 U.S. 109 (1936); Louisville & N. R.R. v. Mottley, 211 U.S. 149 (1908).
tution and laws so that the delegated powers cannot be set at naught by variant applications or lack of enforcement in state courts. He said, "We think a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."210

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

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

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

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

211 Id. at 406.

212 Id. at 412.

213 It is interesting to note that following the strong decision supporting the jurisdiction of the Supreme Court, after argument on the merits the Court found for Virginia, interpreting
Chief Justice Marshall's opinion in *Cohens* is the basis of the second theory suggested in this article, viz. that states are subject to suit in federal courts on cases "arising under" the Federal Constitution and laws, regardless of the eleventh amendment.

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

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

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

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

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

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

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

*See note 5 supra.*

*19 U.S. (6 Wheat.) at 383, 391.*

*Id. at 412-13.*
The basic justification for Supreme Court jurisdiction to review state court decisions was that without such power the Court could not perform the important task enjoined on it by the Constitution, that is to determine all controversies “arising under” federal law. It would seem that the same motivation, proper performance of that duty, should be strong enough to justify entertaining all federal question suits at the federal trial court level rather than merely having Supreme Court review of state court judgments, though a state be defendant, and regardless of who is plaintiff.218

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

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

An apparent major hurdle to the above suggestion is the Hans221 case, where the specific argument made by the plaintiff was that a state has no immunity from suit if the case arises under the Constitution, laws or treaties of the United States. The Court, in clear language held to the contrary, “That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases.”222

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

218 According to the Court, review of state court decisions is an inadequate substitute for federal trial court determination of federal issues. See note 81 supra.
220 Id. at 857-58.
221 134 U.S. 1 (1890).
222 Id. at 10.
223 107 U.S. 711 (1882).
as cases "arising under" the Constitution, upon laws complained of as impairing the obligation of contracts, and stating that it was not denied that they presented cases arising under the Constitution.

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

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

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

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

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

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117 U.S. 52 (1886).
123 U.S. 443 (1887).
Id. at 503-05.
107 U.S. 711 (1882).
The Hans "holding" that cases "arising under" federal law are precluded by the eleventh amendment can be viewed as unnecessary to the case, as the cause involved did not arise under federal law; the case only involved a suit to enforce a state's debt obligation.

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

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

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

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


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


234 See notes 105-13 & accompanying text supra.
actions under regulatory statutes founded on the commerce clause, clearly stated Parden's rationale: "Parden held that a federal court determination of such suits cannot be precluded by the doctrine of sovereign immunity because the States surrendered their sovereignty to that extent when they granted Congress the power to regulate commerce." That statement does not include the concept of waiver by current state activity, but waiver of immunity by adoption of the Constitution.

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

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

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

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417 Id. at 285.
240 The question whether the eleventh amendment may have been limited by the later
The Court stated that under the enforcement provision of the fourteenth amendment Congress may provide for private suits against states which would be constitutionally impermissible in other contexts. This statement, though contrary to the view being discussed in this article, that is, that all cases "arising under" should be outside the eleventh amendment, was unnecessary to the opinion. Further it seems inconsistent with the statement in Ex parte Virginia, which the Court relied on and cited at length. There it was said,

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

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

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

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

\textsuperscript{246} "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, §8, cl. 18.

\textsuperscript{247} Fitzpatrick v. Bitzer, 427 U.S. at 455.

\textsuperscript{248} 384 U.S. 641 (1966). "By including § 5 the draftsmen sought to grant to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. 1, §8, cl. 18." Id. at 650. The Court pointed out in footnote 9 that earlier drafts of the proposed amendment employed the "necessary and proper" terminology to describe the scope of congressional power, and that the substitution of the "appropriate legislation" formula was not thought to diminish the scope of the power.

\textsuperscript{249} 427 U.S. at 458 (Brennan, J., concurring).

\textsuperscript{250} See notes 137-40 & accompanying text supra.

\textsuperscript{251} See note 222 & accompanying text supra.

\textsuperscript{252} See Pee v. Florida Dep't of Transp., 600 F.2d 1070, 1080 (5th Cir. 1979).

\textsuperscript{253} See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).
limited the judicial power only in respect to that portion based solely on the character of the parties; thus it does not preclude jurisdiction of actions "arising under" federal law even though a state is the defendant.

CONCLUSION

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

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

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

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

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

Also, the Supreme Court has held that Congress may impose money damages on states in the federal courts in accordance with a statute enacted under the enforcement provision, section 5, of the fourteenth amendment.
This article has suggested that even greater incursions be made by adopting the two following interpretations of the eleventh amendment, each dealing with cases "arising under" the Constitution, laws or treaties of the United States. First, interpret the eleventh amendment, in accordance with its terms, to preclude suits against states by citizens of another state and by citizens of a foreign state, but not to preclude those suits by citizens of the same state which are within the judicial power because they arise under a federal statute implementing an enumerated power. Second, interpret the eleventh amendment as a limitation of the judicial power set forth in article III, only with respect to the headland based upon the character of the parties, viz., controversies "between a State and Citizens of another State" and "between a State . . . and foreign States, Citizens or Subjects," but not as a limitation of the judicial power to determine cases arising under federal law, regardless of who the parties are.

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

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

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