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ELEVENTH AMENDMENT

SUITS AGAINST STATES

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SUITS AGAINST STATES

ELEVENTH AMENDMENT

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.

STATE SOVEREIGN IMMUNITY

Purpose and Early Interpretation

Eleventh Amendment jurisprudence has become over the years esoteric and abstruse and the decisions inconsistent. At the same time, it is a vital element of federal jurisdiction that "go[es] to the very heart of [the] federal system and affect[s] the allocation of power between the United States and the several states." [1] Because of the centrality of the Amendment at the intersection of federal judicial power and the accountability of the States and their officers to federal constitutional standards, it has occasioned considerable dispute within and without the Court. [2]

The action of the Supreme Court in accepting jurisdiction of a suit against a State by a citizen of another State in 1793 [3] provoked such angry reaction in Georgia and such anxieties in other States that at the first meeting of Congress following the decision the Eleventh Amendment was proposed by an overwhelming vote of both Houses and ratified with, what was for that day, "vehement

[1] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 286 (4th ed. 1983).

[2] An extraordinary amount of writing on the Amendment and its interpretation has appeared in recent years. *See, e.g.*, Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978); Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

[3] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

speed."[4] *Chisholm* had been brought under that part of the jurisdictional provision of Article III that authorized cognizance of "controversies ... between a State and Citizens of another State." At the time of the ratification debates, opponents of the proposed Constitution had objected to the subjection of a State to suits in federal courts and had been met with conflicting responses—on the one hand, an admission that the accusation was true and that it was entirely proper so to provide, and, on the other hand, that the accusation was false and the clause applied only when a State was the party plaintiff.[5] So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between States and citizens of other States.[6] *Chisholm v. Georgia* was brought under this jurisdictional provision to recover under a contract for supplies executed with the State during the Revolution. Four of the five Justices agreed that a State could be sued under this Article III jurisdictional provision and that under section 13 the Supreme Court properly had original jurisdiction.[7]

The Amendment proposed by Congress and ratified by the States was directed specifically toward overturning the result in *Chisholm* and preventing suits against States by citizens of other States or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against States in the federal courts.[8] That is, it

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[4] The phrase is Justice Frankfurter's, from Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 708 (1949) (dissenting), a federal sovereign immunity case. The amendment was proposed on March 4, 1794, when it passed the House; ratification occurred on February 7, 1795, when the twelfth State acted, there then being fifteen States in the Union.

[5] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 423–25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making States subject to suit, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied States could be made party defendants, id. at 533, 555–56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that States could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that States would be subject to suit. 2 id. at 491. *See* Hamilton, in THE FEDERALIST No. 81 (Modern Library ed. 1937), also denying state suability. *See* Fletcher, supra at 1045–53 (discussing sources and citing other discussions).

[6] Ch. 20, § 13, 1 Stat. 80 (1789). *See also* Fletcher, supra, at 1053–54. For a thorough consideration of passage of the Act itself, *see* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. 1, ANTECEDENTS AND BEGINNINGS TO 1801 457–508 (1971).

[7] Id. at 723–34; Fletcher, supra, at 1054–58.

[8] Id. at 1058–63; Goebel, supra, at 736.

barred suits against States based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter.[9] The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum.[10] In *Cohens v. Virginia*,[11] Chief Justice Marshall ruled for the Court that the prosecution of a writ of error to review a judgment of a state court alleged to be in violation of the Constitution or laws of the United States did not commence or prosecute a suit against the State but was simply a continuation of one commenced by the State, and thus could be brought under § 25 of the Judiciary Act of 1789.[12] But in the course of the opinion, the Chief Justice attributed adoption of the Eleventh Amendment not to objections to subjecting States to suits *per se* but to well-founded concerns about creditors being able to maintain suits in federal courts for payment,[13] and stated his view that the Eleventh Amendment did not

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[9] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[10] One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D.Pa. 1809) (No. 14,647), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that States were subject to suits in admiralty. This understanding, *see* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 560–61 (1833), did not receive a holding of the Court during this period, *see Georgia v. Madrazo*, supra; United States v. Peters, 9 U.S. (5 Cr.) 115 (1809); Ex parte Madrazo, 32 U.S. (7 Pet.) 627 (1833), and was held to be in error in Ex parte New York (No. 1), 256 U.S. 490 (1921).

[11] 19 U.S. (6 Wheat.) 264 (1821).

[12] 1 Stat. 73, 85.

[13] "It is a 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. There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by states." 19 U.S. at 406-07.

bar suits against the States under federal question jurisdiction[14] and did not in any case reach suits against a State by its own citizens.[15]

In *Osborn v. Bank of the United States*,[16] the Court, again through Chief Justice Marshall, held that the Bank of the United States[17] could sue the Treasurer of Ohio, over Eleventh Amendment objections, because the plaintiff sought relief against a state officer rather than against the State itself. This ruling embodied two principles, one of which has survived and one of which the Marshall Court itself soon abandoned. The latter holding was that a suit is not one against a State unless the State is a named party of record.[18] The former holding, the primary rationale through which the strictures of the Amendment are escaped, is that a state official possesses no official capacity when acting illegally and thus

[14] "The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. 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." 19 U.S. at 382-83.

[15] "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." 19 U.S. at 412.

[16] 22 U.S. (9 Wheat.) 738 (1824).

[17] The Bank of the United States was treated as if it were a private citizen, rather than as the United States itself, and hence a suit by it was a diversity suit by a corporation, as if it were a suit by the individual shareholders. Bank of the United States v. Deveaux, 9 U.S. (5 Cr.) 61 (1809).

[18] 22 U.S. at 850-58. For a reassertion of the Chief Justice's view of the limited effect of the Amendment, *see* id. at 857–58. *But compare* id. at 849. The holding was repudiated in Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), in which it was conceded that the suit had been brought against the governor solely in his official capacity and with the design of forcing him to exercise his official powers. It is now well settled that in determining whether a suit is prosecuted against a State "the Court will look behind and through the nominal parties on the record to ascertain who are the real parties to the suit." In re Ayers, 123 U.S. 443, 487 (1887).

can derive no protection from an unconstitutional statute of a State.[19]

Expansion of the Immunity of the States.—Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. But in the aftermath of that conflict, Congress for the first time effectively gave the federal courts general federal question jurisdiction,[20] and a large number of States in the South defaulted upon their revenue bonds in violation of the Contracts Clause of the Constitution.[21] As bondholders sought relief in federal courts, the Supreme Court gradually worked itself into the position of holding that the Eleventh Amendment, or more properly speaking the principles "of which the Amendment is but an exemplification,"[22] is a bar not only of suits against a State by citizens of other States, but also of suits brought by citizens of that State itself.[23]

Expansion as a formal holding occurred in *Hans v. Louisiana*,[24] a suit against the State by a resident of that State brought in federal court under federal question jurisdiction, alleging a violation of the Contracts Clause in the State's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only the entertaining of a suit against a State by citizens of another State, or citizens or subjects of a foreign state, the Court nonetheless thought the literal language was an insufficient basis for decision. Rather, wrote Justice Bradley for the Court, the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision and reflected the determination that the decision was wrong and that federal jurisdiction did not extend to making defendants of unwilling States.[25]

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[19] 22 U.S. at 858-59, 868. For the flowering of the principle, *see* Ex parte Young, 209 U.S. 123 (1908).

[20] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See* discussion under "Development of Federal Question Jurisdiction" supra.

[21] *See, e.g.*, Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C. L. REV. 747 (1981); Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980); Orth, *The Virginia State Debt and the Judicial Power of the United States*, in AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 106 (D. Bodenhamer & J. Ely eds., 1983).

[22] Ex parte New York (No. 1), 256 U.S. 490, 497 (1921).

[23] *E.g.*, In re Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); The Virginia Coupon Cases, 114 U.S. 269 (1885); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Louisiana v. Jumel, 107 U.S. 711 (1882). In Antoni v. Greenhow, 107 U.S. 769, 783 (1883), three concurring Justices propounded the broader reading of the Amendment which soon prevailed.

[24] 134 U.S. 1 (1890).

[25] 134 U.S. at 11.

Under this view, the amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. The views of the opponents of subjecting States to suit "were most sensible and just" and those views "apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."[26] "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. . . . The suability of a State without its consent was a thing unknown to the law."[27] Thus, while the literal terms of the Amendment did not so provide, "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing,"[28] led the Court unanimously to hold that States could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

Then, in *Ex parte New York (No. 1)*,[29] the Court held that, absent consent to suit, a State was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification. . . . It is true the Amendment speaks only of suits in law or equity; but this is because . . . the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* . . . from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case."[30] Just as *Hans v. Louisiana* had demonstrated the "impropriety of construing the Amendment" so as to permit federal question suits against a State, so "it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its

[26] 134 U.S. at 14-15.

[27] 134 U.S. at 15-16.

[28] 134 U.S. at 18-19. The Court acknowledged that Chief Justice Marshall's opinion in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 382–83, 406–07, 410–12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." 134 U.S. at 20.

[29] 256 U.S. 490 (1921).

[30] 256 U.S. at 497-98.

citizens or not."[31] An *in rem* admiralty action may be brought, however, if the State is not in possession of the *res*.[32]

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that 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.'"[33]

In the 1980s four Justices, led by Justice Brennan, argued that *Hans* was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the States in diversity cases, and that *Hans* and its progeny should be overruled.[34] But the remaining five Justices adhered to *Hans* and in fact stiffened it with a rule of construction quite severe in its effect.[35] The *Hans* interpretation was further solidified with the Court's ruling in *Seminole*

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[31] 256 U.S. at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982). *And see* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987).

[32] California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (application of the Abandoned Shipwreck Act) (distinguishing Ex parte New York and Treasure Salvors as involving in rem actions against property actually in possession of the State).

[33] Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) (quoting THE FEDERALIST, No. 81); Breard v. Greene, 523 U.S. 371, 377 (1998) (foreign nation may not contest validity of criminal conviction after State's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations). Similarly, the Court has recently held, relying on *Monaco*, the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

[34] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice Brennan were Justices Marshall, Blackmun, and Stevens. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[35] *E.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227–32 (opinion of the Court by Justice Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice White); id. at 105 (concurring opinions of Justices O'Connor and Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice O'Connor).

Tribe of Florida v. Florida,[36] that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in *Alden v. Maine*[37] that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in *state* courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in *state* courts,[38] the Court in *Alden v. Maine*[39] held that states could also assert Eleventh Amendment "sovereign immunity" in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a "misnomer"[40] as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent "compelling evidence" that the States had surrendered such by the ratification of the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court's decision effectively limited the application of significant portions of federal law to state governments. Both *Seminole Tribe* and *Alden* were also 5–4 decisions with the four dissenting Justices maintaining that *Hans* was wrongly decided.[41]

This now institutionalized 5-4 split continued with the Court's ruling in *Federal Maritime Commission v. South Carolina State Ports Authority*,[42] which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. The operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.[43] Justice Breyer, writing for the four dissenting justices, emphasized the executive (as opposed to judicial nature) of such agency adjudications, and pointed out that the ultimate enforcement of such proceedings in federal court was exercised by a

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[36] 517 U.S. 44 (1996).

[37] 527 U.S. 706 (1999).

[38] Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 287 (1973).

[39] Alden v. Maine, 527 U.S. 706 (1999).

[40] 527 U.S. at 713.

[41] Chief Justice Rehnquist wrote the opinion of the Court in *Seminole Tribe*, joined by Justices O'Connor, Scalia, Kennedy, and Thomas. Justice Stevens dissented, as did Justice Souter, whose opinion was joined by Justices Ginsburg and Breyer. In Alden, Justice Kennedy wrote the opinion of the Court, joined by the Chief Justice, and by Justices O'Connor, Scalia, and Thomas. Justice Souter's dissenting opinion was joined by Justices Stevens, Ginsburg, and Breyer.

[42] 122 S. Ct. 1864 (2002). Justice Breyer's dissenting opinion describes a need for "continued dissent" of the majority's sovereign immunity holdings. 122 S. Ct. at 1889.

[43] 46 U.S.C. App. §1701 *et. seq.* (1994 ed. And Supp V).

federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a "relatively barren historical record," presumed that when a proceeding was "unheard of" at the time of the founding of the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[44]

The Nature of the States' Immunity

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of *Hans v. Louisiana*, *Ex parte New York*, and *Principality of Monaco*, is that *Chisholm* was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the States. That view finds present day expression.[45] It explains the decision in *Edelman v. Jordan*,[46] in which the Court held that a State could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[47] But that the bar is not wholly jurisdictional seems established as well.[48]

Moreover, if under Article III there is no jurisdiction of suits against States, the settled principle that States may consent to suit[49] becomes conceptually difficult, inasmuch as it is not possible

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[44] 122 S. Ct. at 1872, 1874.

[45] *E.g.*, Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291–92 (1973) (Justice Marshall concurring); Nevada v. Hall, 440 U.S. 410, 420–21 (1979); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (Justice Powell dissenting); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).

[46] 415 U.S. 651 (1974).

[47] 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the State's immunity. Edelman has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.

[48] *See* Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. *See* id. at 520 (Justice Powell dissenting).

[49] Clark v. Barnard, 108 U.S. 436 (1883).

to confer jurisdiction where it is lacking through the consent of the parties.[50] And there is jurisdiction under Article III of some suits against States, such as those brought by the United States or by other States.[51] And, furthermore, Congress is able in at least some instances to legislate away state immunity,[52] although it may not enlarge Article III jurisdiction.[53] The Court has recently declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived."[54]

Another explanation of the Eleventh Amendment is that it recognizes the doctrine of sovereign immunity, which was clearly established at the time: a state was not subject to suit without its consent.[55] This view also has support in modern case law: "the State's immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . ."[56] The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with federal governmental immunity.[57] Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[58] The limited effect of the doctrine in this context in federal court arises

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[50] *E.g.*, People's Band v. Calhoun, 102 U.S. 256, 260–61 (1880). *See* Justice Powell's explanation in Patsy v. Florida Board of Regents, 457 U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* States).

[51] *See, e.g.*, the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[52] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[53] The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[54] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[55] As Justice Holmes explained, the doctrine is based "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). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, *see* supra pp. 746–48. For the history and jurisprudence, *see* Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[56] Alden v. Maine, 527 U.S. 706, 713 (1999).

[57] *See, e.g.*, United States v. Lee, 106 U.S. 196, 210–14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642–43, 645 (1911).

[58] A sovereign may consent to suit. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).

from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the States surrendered their sovereignty to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but which is more than their coequal.[59]

Thus, outside the area of federal court jurisdiction, there is the case of *Nevada v. Hall*,[60] which perfectly illustrates the difficulty. The case arose when a California resident sued a Nevada state agency in a California court because one of the agency's employees negligently injured him in an automobile accident in California. While recognizing that the rule during the framing of the Constitution was that a State could not be sued without its consent in the courts of another sovereign, the Court discerned no evidence in the federal constitutional structure, in the specific language, or in the intention of the Framers that would impose a general, federal constitutional constraint upon the action of a State in authorizing suit in its own courts against another State. The Court did imply that in some cases a "substantial threat to our constitutional system of cooperative federalism" might arise and occasion a different result, but this was not such a case.[61]

Within the area of federal court jurisdiction, the issue becomes the extent to which the States upon entering the Union gave up their immunity to suit in federal court. *Chisholm* held, and the Eleventh Amendment reversed the holding, that the States had given up their immunity to suit in diversity cases based on common law or state law causes of action; *Hans v. Louisiana* and subsequent cases held that the Amendment in effect codified an understanding of broader immunity to suits based on federal causes of action.[62] Other cases have held that the States did give up their immunity to suits by the United States or by other States and that subjection to suit continues.[63]

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[59] *See* Fletcher, supra.

[60] 440 U.S. 410 (1979).

[61] 440 U.S. at 424 n.24. The Court looked to the full faith and credit clause as a possible constitutional limitation. The dissent would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id. at 427 (Justice Blackmun), 432 (Justice Rehnquist).

[62] For a while only Justice Brennan advocated this view, Parden v. Terminal Ry., 377 U.S. 184 (1964); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 298 (1973) (dissenting), but in time he was joined by three others. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissenting).

[63] *E.g.*, United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904). *See* Kansas v. Colorado, 533 U.S. 1 (2001) (state may

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal Government.[64] In this respect, the federal courts may not act without congressional guidance in subjecting States to suit, and Congress, which can act to the extent of its granted powers, is constrained by judicially-created doctrines requiring it to be explicit when it legislates against state immunity.[65]

Suits Against States

Aside from suits against States by the United States and by other States, there are permissible suits by individuals against States upon federal constitutional and statutory grounds and indeed upon grounds expressly covered by the Eleventh Amendment in somewhat fewer circumstances.

Consent to Suit and Waiver.—The immunity of a State from suit is a privilege which it may waive at its pleasure. It may do so by a law specifically consenting to suit in the federal courts.[66] But the conclusion that there has been consent or a waiver is not lightly inferred; the Court strictly construes statutes alleged to consent to suit. Thus, a State may waive its immunity in its own courts without consenting to suit in federal court,[67] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[68] "The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.' . . .

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seek damages from another state, including damages to its citizens, provided it shows that the state has an independent interest in the proceeding).

[64] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Quern v. Jordan, 440 U.S. 332, 337 (1979).

[65] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves on the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). Later cases stiffened the rule of construction. *See* n.56, infra, and text at nn. 79–84. The parallelism of congressional power to regulate and to legislate away immunity is not exact. Thus, in Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279 (1973), the Court strictly construed congressional provision of suits as not reaching States, while in Maryland v. Wirtz, 392 U.S. 183 (1968), it had sustained the constitutionality of the substantive law.

[66] Gunter v. Atlantic Coast Line R.R., 200 U.S. 273, 284 (1906).

[67] Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151, 172 (1909); Graves v. Texas Co., 298 U.S. 393, 403–04 (1936); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944).

[68] Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1947); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). *Compare* Patsy v. Florida Bd. of Regents, 457 U.S. 496, 519 n.* (1982) (Justice White concurring), *with* id. at 522 and n.5 (Justice Powell dissenting).

A State does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts . . . and '[t]hus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.'"[69]

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney,*[70] an expansive consent "to suits, actions, or proceedings of any form or nature at law, in equity or otherwise . . ." was deemed too "ambiguous and general" to waive immunity in federal court, since it might be interpreted to reflect only a State's consent to suit in its own courts. But when combined with language specifying that consent was conditioned on venue being laid "within a county or judicial district, established by one of said States or by the United States, and situated wholly or partially within the Port of New York District," waiver was effective.[71]

While the Court in a few cases has found a waiver by implication, the current vitality of these cases is questionable. Thus, in *Parden v. Terminal Railway*,[72] the Court ruled that employees of a state-owned railroad could sue the State for damages under the Federal Employers' Liability Act. One of the two primary grounds for finding lack of immunity was that by taking control of a railroad which was subject to the FELA, enacted some 20 years previously, the State had effectively accepted the imposition of the Act and consented to suit.[73] Distinguishing *Parden* as involving a proprietary activity, the Court subsequently refused to find any implied consent to suit by States participating in federal spending programs; participation was insufficient, and only when waiver has been "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," will it be found.[74] This aspect of

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[69] Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305–06 (1990) (internal citations omitted; emphasis in original).

[70] 495 U.S. 299 (1990).

[71] 495 U.S. at 306-07. *See*, on the other hand, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

[72] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress' power to withdraw immunity. *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[73] Edelman v. Jordan, 415 U.S. 651, 671–72 (1974). For the same distinction in the Tenth Amendment context, *see* National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).

[74] Edelman v. Jordan, 415 U.S. 651 (1974) (quoting id. at 673, Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981). Of the four *Edelman* dissenters, Justices Marshall and Blackmun found waiver through knowing participation, 415 U.S. at 688. In *Florida Dep't*, Justice Stevens noted he would have agreed with them had he been on the Court at the time but that he would now adhere to *Edelman*. Id. at 151.

Parden has now been overruled, a plurality of the Court emphasizing that congressional abrogation of immunity must be express and unmistakable.[75]

Similarly, a State may waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[76] the State had filed a claim for disputed money deposited in a federal court, and the Court held that the State could not thereafter complain when the court awarded the money to another claimant. However, the Court is loath to find a waiver simply because of the decision of an official or an attorney representing the State to litigate the merits of a suit, so that a State may at any point in litigation raise a claim of immunity based on whether that official has the authority under state law to make a valid waiver.[77] However, this argument is only available when the State is brought into federal court involuntarily. If a State voluntarily agrees to removal of a state action to federal court, the Court has held it may not then invoke a defense of sovereign immunity and thereby gain an unfair tactical advantage.[78]

With respect to governmental entities that derive their authority from the State, but are not the State, the Court closely examines state law to determine what the nature of the entity is, whether it is an arm of the State or whether it is to be treated like a municipal corporation or other political subdivision. An arm of the State has immunity: "agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."[79] Municipal corporations, though they partake under state law of the State's immunity, do not have immunity in federal court and the

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[75] Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987). Justice Powell's plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that *Hans v. Louisiana* shielded states from immunity. Id. at 495.

[76] 108 U.S. 436 (1883).

[77] Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 466–467 (1945); Edelman v. Jordan, 415 U.S. 651, 677–678 (1974).

[78] Lapides v. Board of Regents of University System of Georgia, 122 S. Ct. 1640 (2002).

[79] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979), citing Edelman v. Jordan, 415 U.S. 651 (1974); and Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945). The fact that a state agency can be indemnified for the costs of litigation does not divest the agency of its Eleventh Amendment immunity. Regents of the University of California v. Doe, 519 U.S. 425 (1997).

States may not confer it.[80] Entities created through interstate compacts (subject to congressional approval) generally also are subject to suit.[81]

Congressional Withdrawal of Immunity.—The Constitution grants to Congress power to legislate in ways that affect the States. At least in some instances when Congress does so, it may subject the States themselves to suit at the initiation of individuals to implement the legislation. The clearest example arises from the Reconstruction Amendments, which are direct restrictions upon state powers and which expressly provide for congressional implementing legislation.[82] Thus, "the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[83] Dwelling on the fact that the Fourteenth Amendment was ratified after the Eleventh became part of the Constitution, the Court implied that earlier grants of legislative power to Congress in the body of the Constitution might not contain a similar power to authorize suits against the States.[84] The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress' judgment will promote compliance.[85] The principal judicial brake on this power to abrogate state immunity has been application of a

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[80] Lincoln County v. Luning, 133 U.S. 529 (1890); Chicot County v. Sherwood, 148 U.S. 529 (1893); Workman v. City of New York, 179 U.S. 552 (1900); Moor v. County of Alameda, 411 U.S. 693 (1973); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). Notice that in National League of Cities v. Usery, 426 U.S. 833 (1976), the Court extended the state immunity from regulation in that case to political subdivisions as well.

[81] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[82] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Hutto v. Finney, 437 U.S. 678 (1978); City of Rome v. United States, 446 U.S. 156 (1980). More recent cases affirming Congress' § 5 powers include: Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[83] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[84] 427 U.S. at 456 (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.")

[85] In Maher v. Gagne, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys' fees on the State following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. Maine v. Thiboutot, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys' fees were awarded against States are Hutto v. Finney, 437 U.S. 678 (1978); and New York Gaslight Club v. Carey, 447 U.S. 54 (1980).

clear statement rule requiring that congressional intent to subject States to suit must be clearly expressed.[86]

In the 1989 case of *Pennsylvania v. Union Gas Co.*,[87] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty five years earlier the Court had stated that same principle,[88] but only as an alternative holding, and a later case had set forth a more restrictive rule.[89] The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that the exercises of Congress' powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the

[86] Even prior to the recent tightening of the rule to require clear expression in the statutory language itself (*see* n. and accompanying text, infra), application of the rule curbed congressional enforcement. Fitzpatrick v. Bitzer, 427 U.S. 445 451–53 (1976); Hutto v. Finney, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in Quern v. Jordan, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include States within the term "person" for the purpose of subjecting them to suit. The question arose after Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978), reinterpreted "person" to include municipal corporations. *Cf.* Alabama v. Pugh, 438 U.S. 781 (1978). The Court has reserved the question whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against States, Milliken v. Bradley, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in Scheuer v. Rhodes, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. *But see* Mauclet v. Nyquist, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing money damages under the Fourteenth Amendment), appeal dismissed sub nom. Rabinovitch v. Nyquist, 433 U.S. 901 (1977). The Court declined in Ex parte Young, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

[87] 491 U.S. 1 (1989). The plurality opinion of the Court was by Justice Brennan and was joined by the three other Justices who believed *Hans* was incorrectly decided. *See* id. at 23 (Justice Stevens concurring). The fifth vote was provided by Justice White, id. at 45, 55–56 (Justice White concurring), although he believed *Hans* was correctly decided and ought to be maintained and although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Scalia thought the statutes were express enough but that Congress simply lacked the power. Id. at 29. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

[88] Parden v. Terminal Railway, 377 U.S. 184, 190–92 (1964). *See also* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283, 284, 285–86 (1973).

[89] Edelman v. Jordan, 415 U.S. 651, 672 (1974).

states to enforce congressional enactments. The dissenters denied each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that none existed under Article I.

Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[90] Chief Justice Rehnquist, writing for a 5–4 majority, concluded that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause [at issue in *Seminole Tribe*] and the Interstate Commerce Clause [relied upon in *Union Gas*]."[91] In the majority's view, *Union Gas* had deviated from a line of cases tracing back to *Hans v. Louisiana*[92] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[93] Because "the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[94] Subsequent cases have confirmed this interpretation.[95]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[96] "based upon a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power

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[90] 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

[91] 517 U.S. at 63.

[92] 134 U.S. 1 (1890).

[93] 517 U.S. at 64 (quoting Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–98 (1984).

[94] 517 U.S. at 72-73. Justice Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in Hans v. Louisiana was a common law concept that "had no constitutional status and was subject to congressional abrogation." 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This "imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty." Id. at 160.

[95] College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid).

[96] 427 U.S. 445 (1976).

achieved by Article III and the Eleventh Amendment," remains good law.[97]

At the same time as these developments, however, a different majority secured a victory in circumscribing the manner in which Congress could express its decision to abrogate state immunity. Henceforth, and even with respect to statutes that were enacted prior to promulgation of the judicial rule of construction, "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute*" itself.[98] This means that no legislative history will suffice at all.[99] Indeed, at one time a plurality of the Court was of the apparent view that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.[100] Thus, the Court held in *Atascadero* that general language subjecting to suit in federal court "any recipient of Federal assistance" under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether States are "recipients" within the meaning of the provision but because "given their constitutional role, the States are not like any other class of recipients of federal aid."[101] As a result of these rulings, Congress began to utilize the "magic words" the Court appeared to insist on.[102] More recently, however, the Court has accepted less precise language.[103]

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[97] 517 U.S. at 65-66.

[98] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (emphasis supplied).

[99] See, particularly, Dellmuth v. Muth, 491 U.S. 223, 230 (1989) ("legislative history generally will be irrelevant"), and Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 103-04 (1989).

[100] Justice Kennedy for the Court in *Dellmuth*, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakably clarity because, inter alia, it "makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity." Justice Scalia, one of four concurring Justices, expressed an "understanding" that the Court's reasoning would allow for clearly expressed abrogation of immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." Id. at 233.

[101] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). And see Dellmuth v. Muth, 491 U.S. 223 (1989).

[102] Following *Atascadero*, in 1986 Congress provided that States were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (1986), 42 U.S.C. § 2000d-7. Following *Dellmuth*, Congress amended the statute to insert the explicit language. Pub. L. No. 101-476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. No. 101-553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making States and state officials liable in damages for copyright violations).

[103] Kimel v. Florida Board of Regents, 528 U.S. 62, 74-78 (2000). In *Kimel*, statutory language authorized age discrimination suits "against any employer (including a public agency)," and a "public agency" was defined to include "the government of a State or political subdivision thereof." The Court found this language to be suffi-

Although acknowledging that the Eleventh Amendment was not an issue because the § 1983 suit had been pursued in state court, nonetheless the Court applied its strict rule of construction, requiring "unmistakable clarity" by Congress in order to subject States to suit, in holding that States and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts.[104] While the Court is willing to recognize exceptions to the clear statement rule when the issue involves subjection of states to suit in state courts, the Court will normally opt for "symmetry" that treats the states' liability or immunity the same in both state and federal courts.[105]

Suits Against State Officials

Mitigation of the wrongs possible when the State is immune from suit has been achieved under the doctrine that sovereign immunity, either of the States or of the Federal Government, does not ordinarily prevent a suit against an official to restrain him from commission of a wrong, even though the government is thereby restrained.[106] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against the official is not a suit against the government, but for the purpose of finding state action to which the Constitution applies, the official's conduct is that of the State.[107] The doctrine preceded but is most noteworthily associated with the decision in *Ex parte Young*,[108] a case truly deserving the overworked adjective, seminal.

Young arose when a state legislature passed a law reducing railroad rates and providing severe penalties for any railroad that failed to comply with the law. Plaintiff railroad stockholders brought an action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that

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ciently clear evidence of intent to abrogate state sovereign immunity. The relevant portion of the opinion was written by Justice O'Connor, and joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsberg, Breyer and Stevens. *But see* Raygor v. Regents of the University of Minnesota, 122 S. Ct. 999 (2002) (federal supplemental jurisdiction statute which tolls limitations period for state claims during pendency of federal case not applicable to claim dismissed on the basis of 11th Amendment immunity) .

[104] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

[105] Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 206 (1991) (interest in "symmetry" is outweighed by stare decisis, the FELA action being controlled by *Parden v. Terminal Ry.*

[106] *See, e.g.*, Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), where the majority and dissenting opinions utilize both federal and Eleventh Amendment cases in a suit against a federal official. *See also* Tindal v. Wesley, 167 U.S. 204, 213 (1897), applying to the States the federal rule of United States v. Lee, 106 U.S. 196 (1882).

[107] C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 (4th ed. 1983).

[108] 209 U.S. 123 (1908).

they would suffer irreparable harm if he were not prevented from acting. An injunction was granted forbidding Young from acting on the law, an injunction he violated by bringing an action in state court against noncomplying railroads; for this action he was adjudged in contempt. If the Supreme Court had held that the injunction was not impermissible, because the suit was one against the State, there would have been no practicable way for the railroads to attack the statute without placing themselves in great danger. They could have disobeyed it and alleged its unconstitutionality in the enforcement proceedings, but if they were wrong about the statute's validity the penalties would have been devastating.[109] In the modern context, the effectuation of federal constitutional rights against state action often depends upon the imposition of affirmative obligations through injunctions, and this relief would be impossible if such an injunction were in effect a suit against a State.

In deciding *Young*, the Court was confronted with inconsistent lines of cases, including numerous precedents for permitting suits against state officers. Chief Justice Marshall had begun the process in *Osborn* by holding that suit was barred only when the State was formally named a party,[110] although he was presently required to modify that decision and preclude suit when an official, the governor of a State, was sued in his official capacity.[111] Relying on *Osborn* and reading *Madrazo* narrowly, the Court, seeming to treat the barrier to suit as common-law sovereign immunity, held in a series of cases that an official of a State could be sued to prevent him from executing a state law in conflict with the Constitution or a law of the United States, and the fact that the officer may be acting on behalf of the State or in response to a statutory obligation of the State does not make the suit one against the State.[112] Soon, however, the Court began developing a more expansive concept of the Eleventh Amendment and sovereign immunity, beginning with the first case in which the sovereign immunity of the United States was claimed and rejected[113] and the *Hans v. Louisiana* decision

[109] In fact, the statute was eventually held to be constitutional. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352 (1913).

[110] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[111] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[112] Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Board of Liquidation v. McComb, 92 U.S. 531 (1875); Allen v. Baltimore & Ohio R.R., 114 U.S. 311 (1885); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894); Smyth v. Ames, 169 U.S. 466 (1898); Scranton v. Wheeler, 179 U.S. 141 (1900).

[113] United States v. Lee, 106 U.S. 196 (1882). *See* "Suits Against United States Officials" under Article III. The Court sustained the suit against the federal officers by only a 5-to-4 vote, the dissent presenting the arguments that were soon to inform Eleventh Amendment cases.

reading broadly the effect of the adoption of the Eleventh Amendment.[114]

The two leading cases, as were many cases of this period, were suits attempting to prevent Southern States from defaulting on bonds.[115] In *Louisiana v. Jumel*,[116] a Louisiana citizen sought to compel the state treasurer to apply a sinking fund that had been created under the earlier constitution for the payment of the bonds after a subsequent constitution had abolished this provision for retiring the bonds. The proceeding was held to be a suit against the State.[117] Then, *In re Ayers*[118] purported to supply a rationale for the cases permitting the issuance of mandamus or injunctive relief against state officers in a way that would have severely curtailed federal judicial power. Suit against a state officer was not barred when his action, aside from any official authority claimed as its justification, was a wrong simply as an individual act, such as a trespass, but if the act of the officer did not constitute an individual wrong and was something that only a State, through its officers, could do, the suit was in actuality a suit against the State and was barred.[119] That is, the unconstitutional nature of the state statute under which the officer acted stripped him of the State's shield against suit, but it did not itself constitute a private cause of action. For that, one must be able to point to an independent violation of a common law right.[120]

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[114] 134 U.S. 1 (1890).

[115] *See* Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1968–2003 (1983); Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423.

[116] 107 U.S. 711 (1882).

[117] "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury and under their official control in one way, when the supreme power has directed them to use it in another, and they must raise more money by taxation when the same power has declared that it shall not be done." 107 U.S. at 721. *See also* Christian v. Atlantic & N.C. R.R., 133 U.S. 233 (1890).

[118] 123 U.S. 443 (1887).

[119] 123 U.S. at 500-01, 502.

[120] *Ayers* was a suit by plaintiffs seeking to enjoin state officials from bringing suit under an allegedly unconstitutional statute purporting to overturn a contract between the State and the bondholders to receive the bond coupons for tax payments. The Court asserted that the State's contracts impliedly contained the State's immunity from suit, so that express withdrawal of a supposed consent to be sued was not a violation of the contract; but, in any event, inasmuch as any violation of the assumed contract was an act of the State, to which the officials were not parties, their actions as individuals in bringing suit did not breach the contract. 123 U.S. at 503, 505-06. The rationale had been asserted by a four-Justice concurrence in Antoni v. Greenhow, 107 U.S. 769, 783 (1882). *See also* Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883); Hagood v. Southern, 117 U.S. 52 (1886); North

Although *Ayers* was in all relevant points on all fours with *Young*,[121] the *Young* Court held that the injunction had properly issued against the state attorney general, even though the State was in effect restrained as well. "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 the 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 into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subject in his person to the consequences of his individual conduct."[122] Justice Harlan was the only dissenter, arguing that in law and fact the suit was one only against the State and that the suit against the individual was a mere "fiction."[123]

The "fiction" remains a mainstay of our jurisprudence.[124] It accounts for a great deal of the litigation brought by individuals to

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Carolina v. Temple, 134 U.S. 22 (1890); In re Tyler, 149 U.S. 164 (1893); Baltzer v. North Carolina, 161 U.S. 240 (1896); Fitts v. McGhee, 172 U.S. 516 (1899); Smith v. Reeves, 178 U.S. 436 (1900).

[121] *Ayers* "would seem to be decisive of the *Young* litigation." C. WRIGHT, THE LAW OF FEDERAL COURTS § 48 at 288 (4th ed. 1983). The *Young* Court purported to distinguish and to preserve Ayers but on grounds that either were irrelevant to *Ayers* or that had been rejected in the earlier case. Ex parte Young, 209 U.S. 123, 151, 167 (1908). Similarly, in a later case, the Court continued to distinguish *Ayers* but on grounds that did not in fact distinguish it from the case before the Court, in which it permitted a suit against a state revenue commissioner to enjoin him from collecting allegedly unconstitutional taxes. Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952).

[122] Ex parte Young, 209 U.S. 123, 159–60 (1908). The opinion did not address the issue of how an officer "stripped of his official . . . character" could violate the Constitution, inasmuch as the Constitution restricts only "state action," but the double fiction has been expounded numerous times since. Thus, for example, it is well settled that an action unauthorized by state law is state action for purposes of the Fourteenth Amendment. Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). The contrary premise of Barney v. City of New York, 193 U.S. 430 (1904), though eviscerated by *Home Tel. & Tel.* was not expressly disavowed until United States v. Raines, 362 U.S. 17, 25–26 (1960).

[123] Ex parte Young, 209 U.S. 123, 173–74 (1908). In the process of limiting application of *Young*, a Court majority has recently referred to "the *Young* fiction." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 281 (1997).

[124] *E.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 156 n.6 (1978) (rejecting request of state officials being sued to restrain enforcement of state statute as preempted by federal law that *Young* be overruled); Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 685 (1982).

challenge the carrying out of state policies. Thus, suits against state officers alleging that they are acting pursuant to an unconstitutional statute are the standard device by which to test the validity of state legislation in federal courts prior to enforcement and thus interpretation in the state courts.[125] Similarly, suits to restrain state officials from taking certain actions in contravention of federal statutes[126] or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws[127] are common. For years, moreover, the accepted rule was that suits prosecuted against state officers in federal courts upon grounds that they are acting in excess of state statutory authority[128] or that they are not doing something required by state law[129] are not precluded by the Eleventh Amendment or its emanations of sovereign immunity, provided only that there are grounds to obtain federal jurisdiction.[130]

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[125] *See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Truax v. Raich, 239 U.S. 33 (1915); Cavanaugh v. Looney, 248 U.S. 453 (1919); Terrace v. Thompson, 263 U.S. 197 (1923); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Massachusetts State Grange v. Benton, 272 U.S. 525 (1926); Hawks v. Hamill, 288 U.S. 52 (1933). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (enjoining state welfare officials from denying welfare benefits to otherwise qualified recipients because they were aliens); Goldberg v. Kelly, 397 U.S. 254 (1970) (enjoining city welfare officials from following state procedures for termination of benefits); Milliken v. Bradley, 433 U.S. 267 (1977) (imposing half the costs of mandated compensatory education programs upon State through order directed to governor and other officials). On injunctions against governors, *see* Continental Baking Co. v. Woodring, 286 U.S. 352 (1932); Sterling v. Constantin, 287 U.S. 378 (1932). Applicable to suits under this doctrine are principles of judicial restraint, constitutional, statutory, and prudential, discussed under Article III.

[126] *E.g.*, Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

[127] *E.g.*, Milliken v. Bradley, 433 U.S. 267 (1977); Edelman v. Jordan, 415 U.S. 651, 664–68 (1974); Quern v. Jordan, 440 U.S. 332, 346–49 (1979).

[128] *E.g.*, Pennoyer v. McConnaughy, 140 U.S. 1 (1891); Scully v. Bird, 209 U.S. 481 (1908); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Greene v. Louisville & Interurban R.R., 244 U.S. 499 (1977); Louisville & Nashville R.R. v. Greene, 244 U.S. 522 (1917). Property held by state officials on behalf of the State under claimed state authority may be recovered in suits against the officials, although the court may not conclusively resolve the State's claims against it in such a suit. South Carolina v. Wesley, 155 U.S. 542 (1895); Tindal v. Wesley, 167 U.S. 204 (1897); Hopkins v. Clemson College, 221 U.S. 636 (1911). *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), in which the eight Justices agreeing the Eleventh Amendment applied divided 4-to-4 over the proper interpretation.

[129] *E.g.*, Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887); Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912); Johnson v. Lankford, 245 U.S. 541, 545 (1918); Lankford v. Platte Iron Works Co., 235 U.S. 461, 471 (1915); Davis v. Wallace, 257 U.S. 478, 482–85 (1922); Glenn v. Field Packing Co., 290 U.S. 177, 178 (1933); Lee v. Bickell, 292 U.S. 415, 425 (1934).

[130] Typically, the plaintiff would be in federal court under diversity jurisdiction, *cf.* Martin v. Lankford, 245 U.S. 547, 551 (1918), perhaps under admiralty jurisdiction, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982), or under federal question jurisdiction. Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002). In the last instance, federal courts are obligated first to consider

However, in *Pennhurst State School & Hosp. v. Halderman*,[131] the Court, five-to-four, held that *Young* did not permit suits in federal courts against state officers alleging violations of *state* law. In the Court's view, *Young* was necessary to promote the supremacy of federal law, a basis that disappears if the violation alleged is of state law. The Court also still adheres to the doctrine, first pronounced in *Madrazo*,[132] that some suits against officers are "really" against the State[133] and are barred by the State's immunity, such as when the suit involves state property or asks for relief which clearly calls for the exercise of official authority, such as paying money out of the treasury to remedy past harms.

For example, a suit to prevent tax officials from collecting death taxes arising from the competing claims of two States as being the last domicile of the decedent floundered upon the conclusion that there could be no credible claim of violation of the Constitution or federal law; state law imposed the obligation upon the officials and "in reality" the action was against the State.[134] Suits against state officials to recover taxes have also been made increasingly difficult to maintain. Although the Court long ago held that the sovereign immunity of the State prevented a suit to recover money in the state treasury,[135] it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[136] Beginning, however, with *Great Northern Life Ins. Co. v. Read*,[137] the Court has held that this kind of suit cannot be maintained unless the State expressly consents to suits in the federal courts. In this case, the state statute provided for the payment of taxes under protest and for suits afterward

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whether the issues presented may be decided on state law grounds before reaching federal constitutional grounds, and thus relief may be afforded on state law grounds solely. *Cf.* Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193 (1909); Hagans v. Lavine, 415 U.S. 528, 546–47 & n.12 (1974). In a case removed from state court, presence of a claim barred by the Eleventh Amendment does not destroy jurisdiction over non-barred claims. Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998).

[131] 465 U.S. 89 (1984).

[132] Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828).

[133] *E.g.*, Ford Motor Co. v. Department of the Treasury, 323 U.S. 459, 464 (1945).

[134] Worcester County Co. v. Riley, 302 U.S. 292 (1937). *See also* Old Colony Trust Co. v. Seattle, 271 U.S. 426 (1926). *Worcester County* remains viable. Cory v. White, 457 U.S. 85 (1982). The actions were under the Federal Interpleader Act, 49 Stat. 1096 (1936), 28 U.S.C. § 1335, under which other actions against officials have been allowed. *E.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939) (joinder of state court judge and receiver in interpleader proceeding in which State had no interest and neither judge nor receiver was enjoined by final decree). *See also* Missouri v. Fiske, 290 U.S. 18 (1933).

[135] Smith v. Reeves, 178 U.S. 436 (1900).

[136] Atchison, T. & S. F. Ry. v. O'Connor, 223 U.S. 280 (1912).

[137] 322 U.S. 47 (1944).

against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.[138]

In *Edelman v. Jordan*,[139] the Court appeared to begin to lay down new restrictive interpretations of what the Eleventh Amendment proscribed. The Court announced that a suit "seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[140] What the Court actually held, however, was that it was permissible for federal courts to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, but that they were not permitted to hear claims seeking, or issue orders directing, payment of funds found to be wrongfully withheld.[141] Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the treasury, and that this was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[142]

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[138] *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945); Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573 (1946). States may confine to their own courts suits to recover taxes. Smith v. Reeves, 178 U.S. 436 (1900); Murray v. Wilson Distilling Co., 213 U.S. 151 (1909); Chandler v. Dix, 194 U.S. 590 (1904).

[139] 415 U.S. 651 (1974).

[140] 415 U.S. at 663.

[141] 415 U.S. at 667-68. Where the money at issue is not a State's, but a private party's, then the distinction between retroactive and prospective obligations is not important . In Verizon Md. Inc. v. Public Serv. Comm'n of Md., 122 S. Ct. 1753 (2002), the Court held that a challenge to a State agency decision regarding a private party's past and future contractual liabilities does not violate the Eleventh Amendment. Id. at 1760. In fact, three judges questioned whether the Eleventh Amendment is even implicated where there is a challenge to a state's determination of liability between private parties. Id. at 1762-63 (Souter, J., concurring).

[142] 415 U.S. at 668. *See also* Quern v. Jordan, 440 U.S. 332 (1979) (reaffirming *Edelman*, but holding that state officials could be ordered to notify members of the class that had been denied retroactive relief in that case that they might seek back benefits by invoking state administrative procedures; the order did not direct the payment but left it to state discretion to award retroactive relief). *But cf.* Green v. Mansour, 474 U.S. 64 (1985). "Notice relief" permitted under *Quern v. Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where

That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken v. Bradley*,[143] in which state officers were ordered to spend money from the state treasury in order to finance remedial educational programs to counteract the effects of past school segregation; the decree, the Court said, "fits squarely within the prospective-compliance exception reaffirmed by *Edelman*."[144] Although the payments were a result of past wrongs, of past constitutional violations, the Court did not view them as "compensation," inasmuch as they were not to be paid to victims of past discrimination but rather used to better conditions either for them or their successors.[145] The Court also applied *Edelman* in *Papasan v. Allain*,[146] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment as indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

In *Idaho v. Coeur d'Alene Tribe*,[147] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, due to the narrowness of the Court's holding, the closeness of the vote (5–4), and the inability of the majority to agree on a rationale. The holding was that the Tribe's suit against state officials for a declaratory judgment and injunction to establish the Tribe's ownership and control of the submerged lands of Lake Coeur d'Alene is barred by the Eleventh Amendment. The Tribe's claim was based on federal law—Executive Orders issued in the 1870s, prior to Idaho Statehood. The portion of Justice Kennedy's opinion that represented the opinion of the Court concluded that the Tribe's "unusual" suit was "the functional equivalent of a quiet title action which implicates special sovereignty interests."[148] The case was "unusual" because state ownership of submerged lands traces to the Constitution through the "equal footing doctrine," and because

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Congress has changed the AFDC law and the State is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[143] 433 U.S. 267 (1977).

[144] 433 U.S. at 289.

[145] 433 U.S. at 290 n.22. *See also* Hutto v. Finney, 437 U.S. 678, 690–91 (1978) (affirming order to pay attorney's fees out of state treasury as an "ancillary" order because of bad faith of State).

[146] 478 U.S. 265 (1986).

[147] 521 U.S. 261 (1997).

[148] 521 U.S. at 281.

navigable waters "uniquely implicate sovereign interests."[149] This was therefore no ordinary property dispute in which the State would retain regulatory control over land regardless of title. Rather, grant of the "far-reaching and invasive relief" sought by the Tribe "would diminish, even extinguish, the State's control over a vast reach of lands and waters long . . . deemed to be an integral part of its territory."[150]

A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more broadscale diminishment of *Young*. The two would apply case-by-case balancing, taking into account the availability of a state court forum to resolve the dispute and the importance of the federal right at issue. Concurring Justice O'Connor, joined by Justices Scalia and Thomas, rejected such balancing. *Young* was inapplicable, Justice O'Connor explained, because "it simply cannot be said" that a suit to divest the State of all regulatory power over submerged lands "is not a suit against the State."[151]

Thus, as with the cases dealing with suits facially against the States themselves, the Court's recent greater attention to state immunity in the context of suits against state officials has resulted in a mixed picture, of some new restrictions, of the lessening of others. But a number of Justices have resorted to the Eleventh Amendment increasingly, as one means of reducing federal-state judicial conflict.[152] One may, therefore, expect this to be a continuingly contentious area.

Tort Actions Against State Officials.—In *Tindal v. Wesley*,[153] the Court adopted the rule of *United States v. Lee*,[154] a tort suit against federal officials, to permit a tort action against state officials to recover real property held by them and claimed by the State and to obtain damages for the period of withholding. The immunity of a State from suit has long been held not to extend to actions against state officials for damages arising out of willful and negligent disregard of state laws.[155] The reach of the rule is evident in *Scheuer v. Rhodes*,[156] in which the Court held that plain-

[149] 521 U.S. at 284.

[150] 521 U.S. at 282.

[151] 521 U.S. at 296.

[152] *See, e.g.*, Florida Dep't of State v. Treasure Salvors, 458 U.S. 670, 702 (1982) (dissenting opinion); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (dissenting opinion). *And see* Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

[153] 167 U.S. 204 (1897).

[154] 106 U.S. 196 (1883).

[155] Johnson v. Lankford, 245 U.S. 541 (1918); Martin v. Lankford, 245 U.S. 547 (1918).

[156] 416 U.S. 233 (1974).

tiffs were not barred by the Eleventh Amendment or other immunity doctrines from suing the governor and other officials of a State alleging that they deprived plaintiffs of federal rights under color of state law and seeking damages, when it was clear that plaintiffs were seeking to impose individual and personal liability on the officials. There was no "executive immunity" from suit, the Court held; rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.[157]

[157] These suits, like suits against local officials and municipal corporations, are typically brought pursuant to 42 U.S.C. § 1983 and typically involve all the decisions respecting liability and immunities thereunder. On the scope of immunity of federal officials, *see* "Suits Against United States Officials," supra.