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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

Though Eleventh Amendment jurisprudence can appear esoteric and abstruse and the decisions under it inconsistent, the Amendment remains 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] The limit on state accountability in federal courts embodied through the Amendment might seem a discrete, straightforward adjustment of our federal structure precipitated by early case law, but discerning the implications of this embodiment continues to occasion heated dispute.

In accepting a suit against a state by a citizen of another state in 1793,[2] the Supreme Court provoked such anger in Georgia and such anxiety 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 speed." [3] *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

[1] C. Wright, The Law of Federal Courts § 48 at 286 (4th ed. 1983).

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

[3] 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.

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a state was the party plaintiff.[4] 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.[5] *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 of the Act the Supreme Court properly had original jurisdiction.[6]

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.[7] That is, it 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.[8]

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.[9] In *Cohens v. Vir-*

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[4] 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).

[5] 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).

[6] Goebel, *supra*, at 726–34; Fletcher, *supra*, at 1054–58.

[7] Fletcher, *supra*, at 1058–63; Goebel, supra, at 736.

[8] 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.

[9] 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

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ginia,[10] 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.[11] 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,[12] and stated his view that the Eleventh Amendment

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).

[10] 19 U.S. (6 Wheat.) 264 (1821).

[11] 1 Stat. 73, 85.

[12] "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.

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did not bar suits against the states under federal question jurisdiction[13] and did not in any case reach suits against a state by its own citizens.[14]

In *Osborn v. Bank of the United States*,[15] the Court, again through Chief Justice Marshall, held that the Bank of the United States[16] 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.[17] 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 consequently can derive no protection from an unconstitutional statute of a state.[18]

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[13] "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.

[14] "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.

[15] 22 U.S. (9 Wheat.) 738 (1824).

[16] 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).

[17] 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).

[18] 22 U.S. at 858–59, 868. For the flowering of the principle, *see Ex parte* Young, 209 U.S. 123 (1908).

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Expansion of the Immunity of the States.—Until the period following the Civil War, Chief Justice Marshall's understanding of the Amendment generally prevailed. The aftermath of that conflict, however, presented the Court occasion to consider anew the circumstances and import of the Amendment's adoption. Following the war, Congress effectively gave the federal courts general federal question jurisdiction,[19] at a time when a large number of states in the South were defaulting on their revenue bonds in violation of the Contract Clause of the Constitution.[20] As bondholders consequently 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,"[21] 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.[22]

Expansion as a formal holding occurred in *Hans v. Louisiana*,[23] a suit against the state by a resident of that state brought in federal court under federal question jurisdiction, alleging a violation of the Contract 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.[24]

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

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

[20] *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).

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

[22] *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 that soon prevailed.

[23] 134 U.S. 1 (1890).

[24] 134 U.S. at 11.

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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."[25] "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."[26] Thus, although 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,"[27] 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)*,[28] 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."[29] 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 own citizens or

[25] 134 U.S. at 14–15.

[26] 134 U.S. at 15, 16.

[27] 134 U.S. at 18. 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.

[28] 256 U.S. 490 (1921).

[29] 256 U.S. at 497–98.

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not."[30] An *in rem* admiralty action may be brought, however, if the state is not in possession of the *res*.[31]

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 non-consenting 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.' The Federalist, No. 81."[32]

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.[33] But the remaining five Justices adhered to *Hans* and in fact stiffened it with a rule of construction quite severe in its effect.[34] The *Hans* interpretation was further solidified with the Court's ruling in *Seminole Tribe*

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[30] 256 U.S. at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982); Welch v. Texas Dep't of Highways and Transp., 483 U.S. 468 (1987).

[31] 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).

[32] Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) (footnote omitted); 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, relying on *Monaco*, the Court held that the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

[33] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (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).

[34] *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).

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of Florida v. Florida,[35] that Congress lacks the power under Article I to abrogate state immunity under the Eleventh Amendment, and with its ruling in *Alden v. Maine*[36] 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,[37] the Court in *Alden v. Maine*[38] 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"[39] 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.

This now-institutionalized 5–4 split continued with *Federal Maritime Commission v. South Carolina State Ports Authority*,[40] 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.[41] 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 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

[35] 517 U.S. 44 (1996).

[36] 527 U.S. 706 (1999).

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

[38] 527 U.S. 706 (1999).

[39] 527 U.S. at 713.

[40] 535 U.S. 743 (2002). Justice Breyer's dissenting opinion describes a need for "continued dissent" from the majority's sovereign immunity holdings. 535 U.S. at 788.

[41] 46 U.S.C. §§ 40101 *et seq*.

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the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[42]

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.[43] It explains the decision in *Edelman v. Jordan*,[44] 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."[45] But that the bar is not wholly jurisdictional seems established as well.[46]

Moreover, if under Article III there is no jurisdiction of suits against states, the settled principle that states may consent to suit[47] becomes conceptually difficult, as it is not possible to confer jurisdiction where it is lacking through the consent of the parties.[48] And there is jurisdiction under Article III of some suits against states,

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[42] 535 U.S. at 755, 760.

[43] *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).

[44] 415 U.S. 651 (1974).

[45] 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury of Indiana, 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.

[46] *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).

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

[48] *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).

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such as those brought by the United States or by other states.[49] Furthermore, Congress is able in at least some instances to legislate away state immunity,[50] although it may not enlarge Article III jurisdiction.[51] The Court has 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."[52]

Another explanation of the Eleventh Amendment is that it merely recognized the continued vitality of the doctrine of sovereign immunity as established prior to the Constitution: a state was not subject to suit without its consent.[53] This view also has support in modern case law: "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[54] 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.[55] Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[56] The limited effect of the doctrine in this context in federal court arises 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

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[49] *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).

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

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

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

[53] 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).

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

[55] *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).

[56] 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).

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to some undetermined and changing degree to the national government, a sovereign that does not have plenary power over them but that is more than their coequal.[57]

Outside the area of federal court jurisdiction, *Nevada v. Hall*,[58] perfectly illustrates the difficulty. This 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. Although it recognized 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.[59]

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 enactment of 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.[60] 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.[61]

Still another view of the Eleventh Amendment is that it embodies a state sovereignty principle limiting the power of the Federal

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[57] *See* Fletcher, *supra*.

[58] 440 U.S. 410 (1979).

[59] 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).

[60] 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).

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

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Government.[62] 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.[63]

Suits Against States

Despite the apparent limitations of the Eleventh Amendment, individuals may, under certain circumstances, bring constitutional and statutory cases against states. In some of these cases, the state's sovereign immunity has either been waived by the state or abrogated by Congress. In other cases, the Eleventh Amendment does not apply because the procedural posture is such that the Court does not view them as being against a state. As discussed below, this latter doctrine is most often seen in suits to enjoin state officials. However, it has also been invoked in bankruptcy and admiralty cases, where the *res*, or property in dispute, is in fact the legal target of a dispute.[64]

The application of this last exception to the bankruptcy area has become less relevant, because even when a bankruptcy case is not focused on a particular *res*, the Court has held that a state's sovereign immunity is not infringed by being subject to an order of a bankruptcy court. "The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of state sovereign immunity in the bankruptcy arena."[65] Thus, where a federal law authorized a bankruptcy trustee to recover "preferential transfers" made to state

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

[63] *See* Hutto v. Finney, 437 U.S. 678 (1978), in which the various opinions differ among themselves as to the degree of explicitness required. *See also* Quern v. Jordan, 440 U.S. 332, 343–45 (1979). As noted in the previous section, later cases stiffened the rule of construction. 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.

[64] *See* Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446–48 (2004) (exercise of bankruptcy court's *in rem* jurisdiction over a debtor's estate to discharge a debt owed to a state does not infringe the state's sovereignty); California v. Deep Sea Research, Inc., 523 U.S. 491, 507–08 (1998) (despite state claims over shipwrecked vessel, the Eleventh Amendment does not bar federal court *in rem* admiralty jurisdiction where the *res* is not in the possession of the sovereign).

[65] Central Virginia Community College v. Katz, 546 U.S. 356, 362–63 (2006).

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educational institutions,[66] the court held that the sovereign immunity of the state was not infringed despite the fact that the issue was "ancillary" to a bankruptcy court's *in rem* jurisdiction.[67]

Because Eleventh Amendment sovereign immunity inheres in states and not their subdivision or establishments, a state agency that wishes to claim state sovereign immunity must establish that it is acting as an arm of the state: "agencies exercising state power have been permitted to invoke the [Eleventh] 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."[68] In evaluating such a claim, the Court will examine state law to determine the nature of the entity, and whether to treat it as an arm of the state.[69] The Court has consistently refused to extend Eleventh Amendment sovereign immunity to counties, cities, or towns,[70] even though such political subdivisions exercise a "slice of state power."[71] Even when such entities enjoy immunity from suit under state law, they do not have Eleventh Amendment immunity in federal court and the states may not confer it.[72] Similarly, entities created pursuant to interstate compacts (and subject to congressional approval) are not immune from suit, absent a show-

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[66] A "preferential transfer" was defined as the transfer of a property interest from an insolvent debtor to a creditor, which occurred on or within 90 days before the filing of a bankruptcy petition, and which exceeds what the creditor would have been entitled to receive under such bankruptcy filing. 11 U.S.C. § 547(b).

[67] 546 U.S. at 373.

[68] 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).

[69] *See*, *e.g.*, Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (local school district not an arm of the state based on (1) its designation in state law as a political subdivision, (2) the degree of supervision by the state board of education, (3) the level of funding received from the state, and (4) the districts' empowerment to generate their own revenue through the issuance of bonds or levying taxes.

[70] Northern Insurance Company of New York v. Chatham County, 547 U.S. 189, 193 (2006) (counties have neither Eleventh Amendment immunity nor residual common law immunity). *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Moor v. County of Alameda, 411 U.S. 693 (1973); Workman v. City of New York, 179 U.S. 552 (1900); Lincoln County v. Luning, 133 U.S. 529 (1890). In contrast to their treatment under the Eleventh Amendment, the Court has found that state immunity from federal regulation under the Tenth Amendment extends to political subdivisions as well. *See* Printz v. United States, 521 U.S. 898 (1997).

[71] Lake County Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 400–01 (1979) (quoting earlier cases).

[72] Chicot County v. Sherwood, 148 U.S. 529 (1893).

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ing that the entity was structured so as to take advantage of the state's constitutional protections.[73]

Consent to Suit and Waiver.—The immunity of a state from suit is a privilege which it may waive at its pleasure. A state may expressly consent to being sued in federal court by statute.[74] 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,[75] and a general authorization "to sue and be sued" is ordinarily insufficient to constitute consent.[76] "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.' 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*.'"[77]

Thus, in *Port Authority Trans-Hudson Corp. v. Feeney*,[78] 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, because 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.[79]

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[73] 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).

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

[75] 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).

[76] 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).

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

[78] 495 U.S. 299 (1990).

[79] 495 U.S. at 306–07. *But see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985).

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In a few cases, the Court has found a waiver by implication, but the vitality of these cases is questionable. In *Parden v. Terminal Railway*,[80] 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.[81] Distinguishing *Parden* as involving a proprietary activity,[82] the Court later 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.[83]. Further, even if a state becomes amenable to suit under a statutory condition on accepting federal funds, remedies, especially monetary damages, may be limited, absent express language to the contrary.[84]

A state may waive its immunity by initiating or participating in litigation. In *Clark v. Barnard*,[85] 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

[80] 377 U.S. 184 (1964). The alternative but interwoven ground had to do with Congress's power to withdraw immunity. *See also* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959).

[81] The implied waiver issue aside, *Parden* subsequently was overruled, a plurality of the Court emphasizing that Congress had failed to abrogate state immunity unmistakably. 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.

[82] 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).

[83] 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.

[84] Sossamon v. Texas, 563 U.S. ___, No. 08–1438, slip op. (2011).

[85] 108 U.S. 436 (1883).

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whether that official has the authority under state law to make a valid waiver.[86] 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.[87]

Congressional Withdrawal of Immunity.—The Constitution grants Congress power to regulate state action by legislation. At least in some instances when Congress does so, it may subject the states themselves to suit by individuals to implement the legislation. The clearest example arises from the Civil War Amendments, which directly restrict state powers and expressly authorize Congress to enforce these restrictions through appropriate legislation.[88] 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."[89] 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's judgment will promote compliance.[90] The principal judicial brake on this power to abrogate state immunity in legislation enforcing the Civil War Amendments is the rule requiring that congressional intent to subject states to suit be clearly stated.[91]

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

[87] Lapides v. Board of Regents, 535 U.S. 613 (2002).

[88] 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's § 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); and Dellmuth v. Muth, 491 U.S. 223, 227 (1989).

[89] Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (under the Fourteenth Amendment, Congress may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

[90] 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). *See also* Frew v. Hawkins, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

[91] Even prior to the tightening of the clear statement rule over the past several decades to require express legislative language (*see* note 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

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In the 1989 case of *Pennsylvania v. Union Gas Co.*,[92] the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers (as opposed to its Fourteenth Amendment 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,[93] but only as an alternative holding, and a later case had set forth a more restrictive rule.[94] 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's powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the states to enforce congressional enactments. The dissenters disputed each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, would have held that no such power existed under Article I.

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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.

[92] 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.

[93] 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).

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

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Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.[95] Chief Justice Rehnquist, writing for a 5–4 majority, concluded *Union Gas* had deviated from a line of cases, tracing back to *Hans v. Louisiana*,[96] that viewed the Eleventh Amendment as implementing the "fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III."[97] 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."[98] Subsequent cases have upheld this interpretation.[99]

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,[100] which was "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 achieved by Article III and the Eleventh Amendment," remains good law.[101] This ruling has led to a significant number of cases that examined whether a statute that might be applied against non-state actors under an Article I power, could also, under section 5 of the Fourteenth Amendment, be applied against the states.[102]

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[95] 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).

[96] 134 U.S. 1 (1890).

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

[98] 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.

[99] 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).

[100] 427 U.S. 445 (1976).

[101] *Seminole Tribe*, 517 U.S. at 65–66.

[102] *See* Fourteenth Amendment, Congressional Definition of Fourteenth Amendment Rights, *infra*.

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In another line of case, a different majority of the Court focused not so much on the authority Congress used to subject states to suit as on the language Congress used to overcome immunity. Henceforth, the Court held in a 1985 decision, and even with respect to statutes that were enacted prior to promulgation of this 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.[103] This means that no legislative history will suffice at all.[104]

Indeed, at one time a plurality of the Court apparently believed that only if Congress refers specifically to state sovereign immunity and the Eleventh Amendment will its language be unmistakably clear.[105] 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."[106] As a result of these rulings, Congress began to use the "magic words" the Court appeared to insist on.[107] Later, however, the Court has accepted less precise

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

[104] 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).

[105] 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.

[106] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985). *See also* Dellmuth v. Muth, 491 U.S. 223 (1989).

[107] In 1986, following *Atascadero*, 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. 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. 101–476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. 101–553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making states and state officials liable in damages for copyright violations).

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language,[108] and in at least one context, has eliminated the requirement of specific abrogation language altogether.[109]

Even before the decision in *Alden v. Maine*,[110] when the Court believed that Eleventh Amendment sovereign immunity did not apply to suits in state courts, the Court applied its rule of strict construction to require "unmistakable clarity" by Congress in order to subject states to suit.[111] Although the Court was willing to recognize exceptions to the clear statement rule when the issue involved subjection of states to suit in state courts, the Court also suggested the need for "symmetry" so that states' liability or immunity would be the same in both state and federal courts.[112]

Suits Against State Officials

Courts may open their doors for relief against government wrongs under the doctrine that sovereign immunity does not prevent a suit to restrain individual officials, thereby restraining the government as well.[113] The doctrine is built upon a double fiction: that for purposes of the sovereign's immunity, a suit against an 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.[114] The doctrine preceded but is most noteworthily associated with the decision in *Ex parte Young*,[115] a case that deserves the overworked adjective, seminal.

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[108] 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 sufficiently 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, 534 U.S. 533 (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 Eleventh Amendment immunity).

[109] Central Virginia Community College v. Katz, 546 U.S. 356, 363 (2006) (abrogation of state sovereign immunity under the Bankruptcy Clause was effectuated by the Constitution, so it need not additionally be done by statute); id. at 383 (Justice Thomas dissenting).

[110] 527 U.S. 706 (1999).

[111] Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (holding that states and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts).

[112] 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.).

[113] *See, e.g.*, Larson v. Domestic and Foreign Corp., 337 U.S. 682 (1949), where the majority and dissenting opinions cite 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).

[114] C. Wright, The Law of Federal Courts § 48 (4th ed. 1983).

[115] 209 U.S. 123 (1908).

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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 a federal action to enjoin Young, the state attorney general, from enforcing the law, alleging that it was unconstitutional and that 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 permissible, 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 as a defense in enforcement proceedings, but if they were wrong about the statute's validity the penalties would have been devastating.[116] On the other hand, effectuating constitutional rights through an injunction would not have been possible had the injunction been deemed to be a suit against the state.

In deciding *Young*, the Court faced 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.[117] He presently was required to modify that decision and preclude suit when an official, the governor of a state, was sued in his official capacity,[118] but relying on *Osborn* and reading *Madrazo* narrowly, the Court later 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 did not make the suit one against the state.[119] Another line of cases began developing a more functional, less formalistic concept of the Eleventh Amendment and sovereign immunity, one that evidenced an increasing wariness toward affirmatively ordering states to relin-

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

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

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

[119] 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).

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quish state-controlled property[120] and culminated in the broad reading of Eleventh Amendment immunity in *Hans v. Louisiana*.[121]

Two of the leading cases, as were many cases of this period, were suits attempting to prevent Southern states from defaulting on bonds.[122] In *Louisiana v. Jumel*,[123] 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.[124] Then, *In re Ayers*[125] purported to supply a rationale for cases on the issuance of mandamus or injunctive relief against state officers 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.[126] That is, the unconstitutional nature of the state statute under which the officer acted 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.[127]

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[120] Judicial reluctance to confront government officials over government-held property did not extend in like manner in a federal context, as was evident in United States v. Lee, the first case in which the sovereign immunity of the United States was claimed and rejected. United States v. Lee, 106 U.S. 196 (1882). *See* Article III, "Suits Against United States Officials." However, the Court sustained the suit against the federal officers by only a 5-to-4 vote, and the dissent presented the arguments that were soon to inform Eleventh Amendment cases.

[121] 134 U.S. 1 (1890).

[122] *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.

[123] 107 U.S. 711 (1882).

[124] "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).

[125] 123 U.S. 443 (1887).

[126] 123 U.S. at 500–01, 502.

[127] *Ayers* sought 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 con-

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Although *Ayers* was in all relevant points on all fours with *Young*,[128] 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." [129] 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." [130]

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tract; but, in any event, because 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 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).

[128] *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).

[129] *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, in that 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).

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

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The "fiction" remains a mainstay of our jurisprudence.[131] It accounts for a great deal of the litigation brought by individuals to challenge the carrying out of state policies. 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.[132] Similarly, suits to restrain state officials from taking certain actions in contravention of federal statutes[133] or to compel the undertaking of affirmative obligations imposed by the Constitution or federal laws[134] 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[135] or that they are not doing something required by state law[136] are not precluded by the Eleventh Amendment or its emanations of sovereign immunity,

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[131] *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).

[132] *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.

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

[134] *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).

[135] *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 who agreed that the Eleventh Amendment applied divided 4-to-4 over the proper interpretation.

[136] *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).

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provided only that there are grounds to obtain federal jurisdiction.[137] However, in *Pennhurst State School & Hospital v. Halderman*,[138] 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*,[139] that some suits against officers are "really" against the state[140] 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.[141]

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 foundered 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.[142] 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

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[137] 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., 535 U.S. 635 (2002). In the last instance, federal courts are obligated first to consider 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).

[138] 465 U.S. 89 (1984).

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

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

[141] In Frew v. Hawkins, 540 U.S. 431 (2004), Texas, which was under a consent decree regarding its state Medicaid program, attempted to extend the reasoning of *Pennhurst*, arguing that unless an actual violation of federal law had been found by a court, then such court would be without jurisdiction to enforce such decree. The Court, in a unanimous opinion, declined to so extend the Eleventh Amendment, noting, among other things, that the principles of federalism were served by giving state officials the latitude and discretion to enter into enforceable consent decrees. Id. at 442.

[142] Worcester County Trust 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).

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treasury,[143] it also held that a suit would lie against a revenue officer to recover tax moneys illegally collected and still in his possession.[144] Beginning, however, with *Great Northern Life Ins. Co. v. Read*,[145] 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 against state tax collection officials for the recovery of taxes illegally collected, which revenues were required to be kept segregated.[146]

In *Edelman v. Jordan*,[147] 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." [148] 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.[149] 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

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

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

[145] 322 U.S. 47 (1944).

[146] *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).

[147] 415 U.S. 651 (1974).

[148] 415 U.S. at 663.

[149] 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., 535 U.S. 635 (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 648. 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 649 (Souter, J., concurring).

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those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[150]

That *Edelman* in many instances will be a formal restriction rather than an actual one is illustrated by *Milliken v. Bradley*,[151] 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*."[152] 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.[153] The Court also applied *Edelman* in *Papasan v. Allain*,[154] 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*,[155] the Court further narrowed *Ex parte Young*. The implications of the case are difficult to predict, because of 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

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[150] 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 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.

[151] 433 U.S. 267 (1977).

[152] 433 U.S. at 289.

[153] 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 state's bad faith).

[154] 478 U.S. 265 (1986).

[155] 521 U.S. 261 (1997).

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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."[156] The case was "unusual" because state ownership of submerged lands traces to the Constitution through the "equal footing doctrine," and because navigable waters "uniquely implicate sovereign interests."[157] 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."[158]

A separate part of Justice Kennedy's opinion, joined only by Chief Justice Rehnquist, advocated more broad scale 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."[159]

Addressing a suit by an independent state agency against state health officials, the Court, quoting *Pennhurst*, reiterated "that the general criterion for determining when a suit is in fact against the sovereign is the effect of the relief sought."[160]

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[156] 521 U.S. at 281.
[157] 521 U.S. at 284.
[158] 521 U.S. at 282.
[159] 521 U.S. at 296.
[160] Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. ___, No. 09–529, slip op. at 8 (2011) (quoting Pennhurst State School & Hospital v. Halderman, 465 U.S. at 107). Federal law offered states funding to improve services for the developmentally disabled and mentally ill on condition that, *inter alia*, the states designate a private or independent state entity to seek remedies for incidents of neglect and abuse. Virginia was one of eight states to establish a state entity to exercise this authority.

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The agency sought access to records of state-run hospitals in federal court. Six Justices upheld the effort: The relief sought was straightforward and prospective, and not a burdensome encroachment on state sovereignty.[161]

Thus, as with the cases dealing with suits facially against the states themselves, the Court's 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 increasingly resorted to the Eleventh Amendment as a means to reduce federal-state judicial conflict.[162] One may, therefore, expect this to be a continuingly contentious area.

Tort Actions Against State Officials.—In *Tindal v. Wesley*,[163] the Court adopted the rule of *United States v. Lee*,[164] 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.[165] The reach of the rule is evident in *Scheuer v. Rhodes*,[166] in which the Court held that plaintiffs 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.[167]

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[161] In a concurring opinion, Justice Kennedy, joined by Justice Thomas, continued to support a case-by-case balancing analysis. Virginia Office for Protection and Advocacy v. Stewart, 563 U.S. ___, No. 09–529, slip op. (2011) (Kennedy, J., concurring).

[162] *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). *See also* Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

[163] 167 U.S. 204 (1897).

[164] 106 U.S. 196 (1883).

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

[166] 416 U.S. 233 (1974).

[167] 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* Article III, "Suits Against United States Officials," *supra*.

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