

# IN DEFENSE OF OUR LAW OF SOVEREIGN IMMUNITY

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**Abstract:** Professor Hill maintains that the Constitution was grounded on an understanding that the states would not be suable without their consent, either in the federal or state courts; the Eleventh Amendment, within its purview, is declaratory of this understanding. The Supreme Court has consistently treated sovereign immunity as of constitutional dimension. As such, the immunity has been deemed exempt from congressional modification under the Commerce Clause. However, without overt challenge to the immunity's constitutional status, it has been held subject to congressional modification under Section 5 of the Fourteenth Amendment. The Supreme Court's decision in this regard does not withstand critical analysis. Sovereign immunity is not the malign doctrine it is commonly thought to be. In general, it has not served as a bar to effective relief for lawless conduct by government officers. For the most part, it has operated to defeat claims arising from consensual relations with the government—and here the immunity has been almost completely eliminated by the federal and state legislatures within their respective areas of competence.

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## INTRODUCTION

This Article is not written in defense of the doctrine of sovereign immunity as such, but rather in defense of our law of sovereign im-

munity, which is under continual attack. Academic opinion has been overwhelmingly hostile.<sup>1</sup> In addition, for some fifteen years a substantial number of the justices, usually not less than four, has stood poised to eliminate the doctrine root and branch.<sup>2</sup> The Supreme Court has

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<sup>1</sup> So far as this writer has been able to discover, Professor Currie is the only other academic who believes sovereign immunity, like it or not, to be of constitutional dimension. David P. Currie, *Ex parte Young after Seminole*, 72 N.Y.U. LAW REV. 547, 547-48 (1997).

A partial list of academics who argue that sovereign immunity has no sound basis in law follows. See, e.g., JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987); Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123 (1989); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-25); William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931 (1989-90); Kenneth Culp Davis, *Sovereign Immunity in Suits Against Officers for Relief Other Than Damages*, 40 CORNELL L.Q. 3 (1954-55); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, *Part II*]; Martha A. Field, *The Eleventh Amendment and other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977) [hereinafter Field, *Part I*]; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) [hereinafter Fletcher, *Historical Interpretation*]; William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989) [hereinafter Fletcher, *Reply to Critics*]; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); John V. Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423; James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998) [hereinafter Pfander, *State Suability*]; James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) [hereinafter Pfander, *State-Party Cases*]; James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899 (1997) [hereinafter Pfander, *Right to Petition*]; David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997).

<sup>2</sup> See *Alden v. Maine*, 527 U.S. 706, 760 (1999) (5-4 decision) (Souter, J., dissenting); *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (5-4 decision) (Stevens, J., dissenting); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991) (6-3 decision) (Blackmun, J., dissenting); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (5-4 decision) (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (5-4 decision) (Brennan, J., dissenting); *Pennhurst State Sch. & Hosp. v. Hal-*

created a potentially large hole in the structure of state sovereign immunity by its holding that Congress, under Section 5 of the Fourteenth Amendment, can provide for suits against the states without their consent.<sup>3</sup> It will be argued that the Court erred in construing Section 5 as conferring such power on Congress. To be sure, the Court is not likely to change its course in this regard. Assuming the authority to exist, it will be argued that, in invalidating virtually every congressional attempt to exercise this authority, the Court has unduly narrowed the scope both of the Fourteenth Amendment and of Section 5. Thus, congressional diminution of state sovereign immunity exists largely as a potential.

Currently, sovereign immunity stands as an absolute bar to suit against the federal government, and against state governments as well, subject only to such power as Congress may have to override the immunity of the states under Section 5. There may of course be consent to suit on both levels, but only if consent is given by the legislatures of the respective jurisdictions.

In brief, the opponents of sovereign immunity argue: (1) that there is error in allowing the doctrine to defeat claims founded on the Constitution, especially when it is considered that the Constitution makes no provision for sovereign immunity in the first place; (2) that sovereign immunity came to us from England, where it was founded on the notion that the king can do no wrong, and as such it has no place in a regime of written constitutions that set limits on the powers of government; (3) that in any event sovereign immunity is at most an aspect of the common law and is subject to modification or elimination by judges and legislators, as in the case of common law generally; and (4) that while the Supreme Court does in fact, through the fiction of *Ex parte Young*,<sup>4</sup> override sovereign immunity to vindicate constitutional rights, it has, without meaningful explanation, left large gaps where constitutional rights go unprotected, and its opinions on the point are in utter confusion. It will be argued that all but the last of these objections are without merit. As to the last objection, the opinions of the Court are indeed confusing, but if we look, not to what the Court has said, but to what it has done, it will be seen that a defensible pattern emerges from the confusion.

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derman, 465 U.S. 89, 125 (1984) (5-4 decision) (Brennan, J., dissenting); *id.* at 126 (Stevens, J., dissenting).

<sup>3</sup> See *infra* notes 205-229 and accompanying text.

<sup>4</sup> 209 U.S. 123 (1908).

So far as concerns the provenance of sovereign immunity,<sup>5</sup> our conception of the doctrine is seriously skewed if we conceive of it as deriving from English law.<sup>6</sup> We derived it independently, in the same way as did England—and Italy and Japan. The immunity is an inherent attribute of sovereignty, without regard to the form of government prevailing within the borders of the particular sovereign. There is probably not a country in the world that permits itself to be sued except on terms satisfactory to it. Conversely, if we except countries where there is little if any law to speak of, there is probably not a single one that disallows suit against itself in all circumstances. The question is which governmental organs have authority to consent to such suit. In the United States, on both the federal<sup>7</sup> and state<sup>8</sup> levels, it has been assumed from the start that exclusive competence in this regard is vested in the legislative branch.

It will be argued that, when adopted, the Constitution was understood as embodying an understanding that the federal and state governments were free to invoke the doctrine of sovereign immunity for themselves, even if this meant that rights given by the federal Constitution would go unenforced.<sup>9</sup> It will be further argued that the Eleventh Amendment, in the cases to which it applies, is merely an em-

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<sup>5</sup> In England, suit against the sovereign was possible if certain conditions were met—principally by obtaining permission from the Privy Council, the Chancery or the Exchequer. See Louis L. Jaffe, *Suits Against Government and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 5–9 (1963). With these institutions absent in the United States, consent to suit devolved upon the legislatures, which initially gave consent to suit in special statutes for particular cases, and later, increasingly, by general statutes.

<sup>6</sup> For the contention that it was so derived, see *Nevada v. Hall*, 440 U.S. 410, 414–15 (1979); Engdahl, *supra* note 1, at 2–5; Jackson, *supra* note 1, at 79–80. In *United States v. Lee*, the Court, in the course of an elaborate dictum, assumed that the sovereign immunity of the United States derived from English practice, and gave reasons why, as it said, transplanting that practice to the United States made no sense because of our different political institutions. See 106 U.S. 196, 204–10 (1882). In any event, the Court did not reject the immunity. The holding turned on the Court's conclusion that the suit was permissible as one against federal officers in their personal capacities. See *id.* at 210–16; see also *Employees of Dep't of Pub. Health & Welfare*, 411 U.S. 279, 311, 323 (1973) (Brennan, J., dissenting) (describing sovereign immunity as “a doctrine premised upon kingships” and “born of systems of divine right”).

<sup>7</sup> E.g., *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 443–44 (1834).

<sup>8</sup> See, e.g., *Attorney-General v. Turpin*, 13 Va. (1 Hen. & M.) 548 (1809); *Commonwealth v. Matlack*, 4 Dall. 303, 303 (Pa. 1804). Litigants were often reminded that only the legislature could waive the immunity. Not for over a century was this exclusive legislative role challenged, when a significant number of states modified or eliminated sovereign immunity, in the belief that it was only common-law doctrine. See *infra* notes 186–190 and accompanying text.

<sup>9</sup> See discussion *infra* Part I.A.1.

bodiment of the original understanding underlying the Constitution, adopted only because the decision in *Chisholm v. Georgia*<sup>10</sup> was thought to have ignored the original understanding.<sup>11</sup> Judicial and academic critics dispute both points. They see sovereign immunity as a common-law doctrine. They maintain that if the federal courts are obliged to honor the sovereign immunity of the states, this is only because of the ouster of their jurisdiction in such cases by the Eleventh Amendment. They maintain further that the champions of state sovereign immunity were not concerned with protecting the states from claims founded on federal law, but only from claims founded on state law. They construe the Eleventh Amendment as embodying a similar limitation, contrary to its express language.<sup>12</sup>

Part of the confusion arises from the frequent assertion that sovereign immunity is common law. The confusion is compounded by failure to distinguish the two distinct dimensions in which the problems arise. One of these is the internal law of a particular jurisdiction, such as Georgia or the United States. It will be argued that even in this dimension, sovereign immunity is not common-law doctrine. The other dimension is a vertical one. In this dimension, the question is one of federal power, legislative or judicial, to set aside the immunity of the states. This is part of the larger question of federal power to override state law. Discussing this power as an aspect of common-law doctrine is absurd.<sup>13</sup>

Although academic critics and minority Justices have ignored the distinctions between these two dimensions, the Court as a whole has not. The Court has denied congressional power to set aside state sovereign immunity under Article I and sustained such power under Section 5 of the Fourteenth Amendment. It will be argued that the Article I Supreme Court decisions are correct, and, as earlier observed, that the Section 5 decisions are dubious.

While the federal and state governments have been immune from suits not consented to, their officers in general have not. The doctrine of *Ex parte Young* has been employed to permit suits against government officers acting contrary to law. Such relief is founded on the theory that the suit is not against the government but against the officer personally. The problem is that, in what seem to be the over-

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<sup>10</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>11</sup> See *infra* notes 41-48 and accompanying text.

<sup>12</sup> See *infra* notes 49-107, 127-142 and accompanying text.

<sup>13</sup> See *infra* notes 177-190 and accompanying text.

whelming majority of such cases, the officer is essentially a nominal party, with the government, though not named, the real party in interest. Thus, the doctrine of *Ex parte Young* is an obvious fiction.

Acceptance of the views of the Supreme Court minority and of virtually all scholars would in effect transform the fiction into law. But that is not the only way of dealing with what is thought to be a blatant fiction. It can be argued that *sovereign immunity* should be recognized as constituting the basic rule and that what is wrong is the undermining of this rule by an obvious sham. Not long ago, a majority of the Supreme Court justices inclined to just this view, expressing doubt that there is a "principled basis" for the "fiction of the [*Ex parte*] *Young* opinion," and stating that it should be kept as "a very narrow exception" to the sovereign immunity doctrine.<sup>14</sup> The Court added: "For present purposes, however, we do no more than question the continued vitality of the . . . doctrine in the Eleventh Amendment context."<sup>15</sup> This challenge to the *Ex parte Young* doctrine has not borne fruit so far.

The *Ex parte Young* suit against the officer has presented the Court with a serious dilemma. There must be limits to the redress afforded against the officer, or else nothing would be left of the government's immunity. The Court's attempts to devise a formula for dealing with this dilemma have been unsuccessful. For a long time the Court maintained that a judgment against the officer would be disallowed if it resulted in interference with the government's administration of its laws. Consistent application of such a test would have barred most *Ex parte Young* suits, and this did not happen. This test was succeeded by the one now in force—relief may be granted if it operates prospectively, but not if it operates retroactively. The test is simple but unworkable, and in fact the Court does not follow it.

It is submitted that the problem is solved if we look, not to the rationalizations attempted by the Court, but rather to its actual holdings. These form a pattern. It appears that in the suit against the officer, a plea of sovereign immunity is disallowed when the immunity would operate offensively, but not when it would operate defensively. If the claimant is seeking only to be left alone and charges that past or

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<sup>14</sup> *Pennhurst*, 465 U.S. at 114 n.25.

<sup>15</sup> *Id.* The Court's concern was with "relief [that] would operate against the State." *Id.* Presumably, the Court thought that constitutional rights would be amply protected by relief against the officer that does not have that effect. But the opinion reveals a readiness to go far beyond previous decisions in finding that a decree addressed to the officers would in fact operate against the state. See *infra* notes 312–323 and accompanying text.

prospective conduct of government officers is unlawfully intrusive, judicial inquiry into the validity of such conduct would be precluded if a plea of sovereign immunity would be sustained. This would constitute what is here called offensive use of the immunity, and such use is disallowed. On the other hand, when the claimant is seeking some affirmative advantage from the government, like payment of its debt, a plea of sovereign immunity is sustained, in what is here called defensive use of the immunity.<sup>16</sup>

Apart from recognition of this pattern, our understanding of the law pertaining to officer liability will be enhanced by recognition that not every suit against an officer that also affects the government calls for exercise of the *Ex parte Young* fiction. If the pertinent statute is not under attack, and the claim is based only on the officer's failure to perform a nondiscretionary duty, the officer is routinely held to performance of this duty. Such a suit is not deemed to be one against the government. When this is not recognized, as in the notorious Supreme Court decision in *Pennhurst State School & Hospital v. Halderman*,<sup>17</sup> mischief can result.

There will be some discussion of topics bearing on obtaining money from the government itself, apart from legislation expressly consenting to such suit. One of these involves judicial use of the writ of mandamus for access to funds from the general treasury, with the unexplained assertion that sovereign immunity is no bar to such relief. An explanation will be ventured. Of special interest are recent Supreme Court decisions in a tax refund case and in an inverse condemnation case, which can be read to herald the demise of sovereign immunity in a broad number of contexts. The question is whether such a reading is justified.<sup>18</sup>

One of the concluding points to be discussed will be the question of how far federal jurisdiction may be exercised on the basis of a state's consent to be sued in its own courts—a troublesome area where the Court has been accused of inconsistency in answering this question differently on the appellate and trial levels.<sup>19</sup> In another concluding point, it will be argued that the Court erred when it ruled generally in *Nevada v. Hall*<sup>20</sup> that a state need not recognize the sover-

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<sup>16</sup> See *infra* note 352 and accompanying text.

<sup>17</sup> 465 U.S. at 121.

<sup>18</sup> See *infra* notes 458–488 accompanying text.

<sup>19</sup> See *infra* notes 489–492 and accompanying text.

<sup>20</sup> 440 U.S. 410, 426–27 (1979).



eign immunity of a sister state, although the writer believes the result was proper under the circumstances of that case.<sup>21</sup>

## I. THE SOVEREIGN IMMUNITY OF THE STATES

### A. *The Constitution's Formative Period*

#### 1. The Case for the Original Understanding

When ratification of the proposed Constitution was being considered in New York, Alexander Hamilton made the following much-quoted statement:

It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the State, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debt in their own way, free from every constraint but that which flows from the obligations of good faith. . . . [T]o ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.<sup>22</sup>

Hamilton's contemporaries did not express disagreement concerning the universality of sovereign immunity, apart from possible questions arising from adoption of the Constitution. James Wilson, who had been a delegate to the Philadelphia Convention, was strongly

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<sup>21</sup> See discussion *infra* Part VI.C.

<sup>22</sup> THE FEDERALIST No. 81, at 455-56 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

of the view that the immunity had no place in a polity which lacked a king, and in which a written constitution prescribed the limits of government—from which it followed that the immunity would be denied to the federal as well as the state governments. These views were expounded in his opinion in *Chisholm v. Georgia*, which was decided in 1793 shortly after adoption of the Constitution.<sup>23</sup> Chief Justice John Jay, in his own opinion in *Chisholm*, expressed somewhat similar views, save as to the suability of the United States.<sup>24</sup> No evidence exists, however, that these views were shared to any significant extent. In general, the sovereign immunity of the United States was not questioned. Further, it was assumed that the states were free to bar suits against themselves in their own courts.<sup>25</sup> The debate among the leading statesmen of the time centered almost exclusively on whether the states, without their consent, were suable in the federal courts, in light of the provision in Article III extending the federal judicial power to controversies "between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects."<sup>26</sup>

Some argued that by reason of this grant of jurisdiction a state was suable despite a plea of sovereign immunity. Among those so contending were George Mason,<sup>27</sup> Edmund Randolph<sup>28</sup> and Patrick Henry.<sup>29</sup> Alexander Hamilton, as has been seen, argued differently, as

<sup>23</sup> See 2 U.S. (2 Dall.) 419, 453–66 (1793).

<sup>24</sup> See *id.* at 469–79. His argument concerning the suability of the United States, however, was cramped. He said that when federal judges rendered judgments against states, they could count on the support of the federal executive branch in the matter of enforcement, but could not expect the same support when judgments were rendered against the federal government, and that arguably judicial power under Article III should be construed in the light of "this distinction." *Id.* at 478; see U.S. CONST. art. III, § 2, cl. 1.

<sup>25</sup> Such assumption is evident from the remarks of leading statesmen at various state ratification conventions. See *infra* notes 27, 30–31.

<sup>26</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>27</sup> 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (J. Elliot ed., William S. Hein & Co., Inc. 2d ed. 1996) (1891) [hereinafter ELLIOT'S DEBATES] ("To controversies between a state and the citizens of another state. . . claims respecting . . . every liquidated account, or other claim against this state will be tried before the federal court. Is this not disgraceful? Is this state to be brought to the bar of justice like a delinquent individual?").

<sup>28</sup> *Id.* at 573 ("I think . . . that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*.").

<sup>29</sup> *Id.* at 543 ("[Madison] says that the state may be plaintiff only. If gentlemen pervert the most clear expressions . . . there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant.").

did James Madison<sup>30</sup> and John Marshall.<sup>31</sup> In accordance with their view, the states could be plaintiffs in litigation under the Article III clauses indicated above, but could rely on sovereign immunity if sued.<sup>32</sup> If sovereign immunity could not be interposed, the states faced large claims by reason of their heavy indebtedness and by reason of their violations of the terms of the Peace Treaty of 1783 with Great Britain through confiscations and escheats.<sup>33</sup>

In ratifying the Constitution, several of the states proposed amendments to preserve the sovereign immunity in whole or in part. It has been argued that this shows an understanding that, absent amendment, the states were suable.<sup>34</sup> But two of the amendments, proposed by Rhode Island and New York respectively, cannot be so described. Rhode Island proposed an amendment that would have eliminated any suit by any person against a state in federal court. But the drafters was apparently assumed that the states would not lose

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<sup>30</sup> *Id.* at 533 ("It is not in the power of individuals to call any state into court. The only operation the [Clause] can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.").

<sup>31</sup> *Id.* at 555 ("I hope no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power shall be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states.").

<sup>32</sup> There was no anomaly in this. Absent access to a federal court as plaintiff, state A, suing a citizen of state B, would normally have been obliged to sue in the courts of state B. Allowing state A to bring such a suit in a federal court placed the state on a par with a citizen of state A suing a citizen of state B because in both instances, access to a federal court avoided the need to face a possibly hostile tribunal in state B. This was a reasonable arrangement, regardless of whether state A as defendant could claim sovereign immunity.

<sup>33</sup> See Treaty of Paris, Sept. 3, 1783, 8 Stat. 80 (formally ending the United States War for Independence); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (1922); Gibbons, *supra* note 1, at 1899-1902.

From time to time the Court has adverted to sovereign immunity as serving to protect the "dignity" of the states. It should not be assumed that such rhetoric is the basis of the immunity. If, say, the legislature of a state is considering waiver of the immunity generally, or more likely, in a specified class of cases, opposition to the measure on the ground of affront to the state's dignity is hardly likely to affect the outcome in any degree, assuming that opposition on this basis is even voiced. On the other hand, if a member of the international community rejects a claim of sovereign immunity by another member, such rejection might be characterized as an affront to the "dignity" of the latter because nations still talk in terms of constraint of the person of the sovereign or the latter's ambassador. More realistically, the conduct complained of is a kind that provokes resentment and possible retaliation, on a basis more substantial than loss of "dignity." Sovereign immunity is based upon raw power, which in the case of the United States is distributed by the Constitution; "dignity" has nothing to do with it. The Founding Fathers were not beguiled by such a notion. See *infra* notes 22, 30-33 and accompanying text.

<sup>34</sup> See *Atascadero*, 473 U.S. at 278 n.28 (Brennan, J., dissenting); Gibbons, *supra* note 1, at 1908, 1912-14.

their sovereign immunity under the Constitution, inasmuch as the purpose of the amendment was said to be "to remove all doubts or controversies respecting the [issue]."<sup>35</sup> In New York, the proposed amendment itself announced an understanding that the federal judicial power did not "authorize any suit by any person against a state,"<sup>36</sup> and the ratifying convention declared that the Constitution was being ratified "[u]nder these impressions."<sup>37</sup> Thus, it seems that the amendments proposed by Rhode Island and New York had only a clarifying purpose.

On the other hand, Virginia and North Carolina advanced amendments that were far-reaching.<sup>38</sup> It may be doubted, however, that any of the proposed amendments reflected serious apprehension that state sovereignty would be lost by adoption of the Constitution. The fact is that virtually no attempt was made to protect the immunity of the states when the First Congress was considering what became the first ten Amendments,<sup>39</sup> and also the Judiciary Act of 1789<sup>40</sup>—in sharp contrast to the alacrity with which the Eleventh Amendment was adopted after the decision in *Chisholm v. Georgia*<sup>41</sup> showed that the states were indeed vulnerable to suit.

The general understanding regarding sovereign immunity was manifested by the reaction to *Chisholm*. In this case a citizen of South Carolina invoked the original jurisdiction of the Supreme Court in an assumpsit action against Georgia, for non-payment under a contract to furnish supplies to the state during the Revolutionary War. The

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<sup>35</sup> 1 ELLIOT'S DEBATES, *supra* note 27, at 336.

<sup>36</sup> *Id.* at 329.

<sup>37</sup> *Id.*

<sup>38</sup> The amendments proposed by each of these states would have eliminated the Article III provisions vesting the federal judiciary with jurisdiction over controversies between a state and citizens of another state. See 3 *id.* at 660-61 (Virginia); 4 *id.* at 246 (North Carolina).

<sup>39</sup> When the amendments were under consideration, Thomas Tudor Tucker of South Carolina proposed an amendment that would have stricken from Article III, Section 2, the clause conferring jurisdiction of controversies between a state and a citizen of another state. The amendment was not reported to the full House of Representatives, and thus failed. See 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 438-39 (1971); Fletcher, *Historical Interpretation*, *supra* note 1, at 1052 & n.81.

<sup>40</sup> One commentator related that section 13 of the Judiciary Act, which conferred original jurisdiction on the Supreme Court in controversies between states and noncitizens, went through Congress unchallenged, and indeed that it was not even discussed. Fletcher, *Historical Interpretation*, *supra* note 1, at 1053-54; see also Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

<sup>41</sup> 2 U.S. at 419.

Court, by a vote of four to one, held that under Article III the state could be sued without its consent by a citizen of another state.<sup>42</sup> The reaction was speedy and angry. Georgia's House of Representatives adopted a bill making it a capital offense to attempt to levy a judgment in the case.<sup>43</sup> The Massachusetts and Virginia legislatures called for a constitutional convention to reverse the decision; and such a call was soon under consideration by the legislatures of eight additional states, where it had "strong support."<sup>44</sup> But the Eleventh Amendment quickly went through Congress, and the requisite number of state ratifications was achieved within two years of the *Chisholm* decision.<sup>45</sup>

In sum, at the time of adoption of the Constitution, it was generally assumed that the states were protected by sovereign immunity if sued in their own courts. Hamilton and those of like views insisted that the states would be similarly protected if sued in the federal courts, and that the state-noncitizen clauses of Article III did not contemplate a contrary result. Others said they were unconvinced. But subsequent to ratification there was virtually a total lack of effort to secure such protection for the states, despite ample opportunity to do so—which supports the conclusion that no significant doubt existed that sovereign immunity was expected to survive the Constitution. So too does the speedy adoption of the Eleventh Amendment following *Chisholm*, and the silence on the sovereign immunity issue when provision was briefly made for federal question jurisdiction in the Judiciary Act of 1787. Therefore, the writer is persuaded that the case for an original understanding on state sovereign immunity is a strong one. As will be shown, the Court has given effect to this understanding

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<sup>42</sup> *Id.* at 480. All the Justices wrote opinions. Blair and Cushing wrote narrowly and briefly, relying on the language of Article III, and on indications elsewhere in the Constitution, that in their view showed that the exercise of jurisdiction over the states as defendants was contemplated. *See id.* at 450–53 (Blair, J.); *id.* at 466–69 (Cushing, J.). Justices Wilson and Jay made the same points, but also wrote broadly to the effect that sovereign immunity was incompatible with the American system of constitutional government. *See id.* at 453–66 (Wilson, J.); *id.* at 469–79 (Jay, J.). Concerning Jay's views on the suability of the United States, see *supra* note 24 and accompanying text. Iredell was the sole dissenter. *Id.* at 429–50 (Iredell, J., dissenting). He maintained that, as the law then stood, the controlling principle was sovereign immunity, as an aspect of the common law that, he said, derived from England. *Id.* at 437, 449. He expressed doubt whether the Constitution permitted invasion of the sovereign immunity of the states, but said that this was an open question. *Id.* at 449–50. Congress had made no intervention along this line, and that for him concluded the matter. *Id.* at 449.

<sup>43</sup> This bill was not enacted into law. 1 WARREN, *supra* note 33, at 100–01.

<sup>44</sup> Gibbons, *supra* note 1, at 1931.

<sup>45</sup> Fletcher, *Historical Interpretation*, *supra* note 1, at 1059.

from the start, save in one decision which was soon overruled. The essentials of the argument set forth above were advanced recently in *Alden v. Maine*.<sup>46</sup> Clear holdings along the same line were *Hans v. Louisiana*<sup>47</sup> and *Principality of Monaco v. Mississippi*.<sup>48</sup>

## 2. The Case Against the Original Understanding

### a. *Atascadero State Hospital v. Scanlon*

Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, in 1985, was the first full-scale judicial assault on the doctrine of sovereign immunity.<sup>49</sup> It remains a principal basis for the continuing attack on sovereign immunity by a minority of the justices, usually not less than four in number.<sup>50</sup> Further, in its basic approach it reflects the dominant view of academic writers.<sup>51</sup>

Justice Brennan emphasized the inconclusive character of the discussion of sovereign immunity at the ratification debates.<sup>52</sup> He maintained that the amendments suggested by some of the ratifying states to preserve state immunity in whole or in part were indicative of a "felt need" on this point,<sup>53</sup> yet he failed to explain, or even discuss, the fact that subsequently these states, through their legislative representatives, made virtually no effort to act in accordance with this "felt need," despite ample opportunity to do so.

But in major part, he purported to show that the proponents of sovereign immunity were not concerned with loss of the immunity when claims were founded on federal law but only when founded on state law. He said that "virtually" all the discussion during the ratification debates was centered on suits against the states on their debts.<sup>54</sup> Such suits, he maintained, would be based on state law and

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<sup>46</sup> 527 U.S. 706 (1999).

<sup>47</sup> 134 U.S. 1 (1890).

<sup>48</sup> 292 U.S. 313 (1934); see also *infra* notes 85-100, 143-159, 167-174 and accompanying text (discussing these cases).

<sup>49</sup> 473 U.S. at 274 (Brennan, J., dissenting).

<sup>50</sup> See cases cited, *supra* note 2.

<sup>51</sup> See *infra* notes 108-111 and accompanying text. The views of scholars regarding the Eleventh Amendment also reveal a basic affinity with the account set forth in the *Atascadero* dissent. See *infra* notes 130-134 and accompanying text.

<sup>52</sup> 473 U.S. at 263-64, 278-79.

<sup>53</sup> *Id.* at 278 n.28. Justice Brennan also failed to note that in two of the four states the proposals assumed survival of the immunity of the states and sought only clarification of that point. See *supra* notes 34-35 and accompanying text.

<sup>54</sup> *Atascadero*, 473 U.S. at 264.

would be brought in federal court under one of the diversity clauses.<sup>55</sup> On the other hand, he said, "[t]he debates do not directly address the question of suits against States in . . . federal-question cases, where federal law and not state law would govern."<sup>56</sup> From this he inferred that the debates disclosed a willingness to surrender state sovereign immunity in regard to federal claims.<sup>57</sup>

This conclusion is wildly implausible. Consider Charles Warren's statement of some of the problems facing the newly independent colonies immediately prior to adoption of the Constitution:

In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.<sup>58</sup>

This state of affairs suggested that the states would be beset by claims founded on the Contracts Clause, and on Peace Treaty violations, unless they had the protection of sovereign immunity. It should take weighty arguments to persuade us that the states were content to give up such protection. The arguments advanced by Justice Brennan are singularly unpersuasive.

Thus, Justice Brennan was wrong in insisting that when jurisdiction rested on diversity of citizenship the claimant would necessarily

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Article III provided for two basic heads of jurisdiction—the party-based head of jurisdiction, which included the state-citizen diversity clause, and the subject matter-based head of jurisdiction, which included any claim arising under federal law. U.S. CONST. art. III, § 2, cl. 1; *Atascadero*, 473 U.S. at 263 (Brennan, J., dissenting).

<sup>57</sup> *Atascadero*, 473 U.S. at 264. One commentator drew the opposite inference from the silence during the ratification debates on the federal question and admiralty heads of jurisdiction. He believed that, standing alone, such silence was the "strongest evidence that the Constitution was *not* understood by its adopters to provide for private causes of action against the states" under either of those heads of jurisdiction. Fletcher, *Historical Interpretation*, *supra* note 1, at 1071 (emphasis supplied). He also discussed three factors that "suggest the opposite conclusion." *Id.* at 1072. These were: (1) the fact that Supreme Court jurisdiction was established for controversies between states; (2) the fact that the Constitution contained provisions designed to protect individuals from states; and (3) the potential for statutorily created private causes against states, which the federal courts would then be competent to hear. *Id.* at 1072–74.

<sup>58</sup> 1 WARREN, *supra* note 33, at 99.

be "asserting a cause of action based on state law."<sup>59</sup> More importantly, even if correct in this regard, he was wrong in his assumption that such a case would be "governed," presumably in its entirety, by state law.<sup>60</sup> Take, for example, a suit founded on violation of the Contracts Clause. Justice Brennan remarked that "it was certainly not clear at the time . . . that the Contracts Clause provided a plaintiff with a private right of action for damages."<sup>61</sup> This was indeed true.<sup>62</sup> But if suit could not be brought "on" the Contracts Clause,<sup>63</sup> it did not follow that the Clause was a dead letter. It could always have been invoked (as could the Peace Treaty) to challenge the constitutional adequacy of a state defense.

The system of common-law pleading then universally in force provided ample opportunity for vindication of federal rights. The plaintiff had to choose the particular form of action appropriate under the circumstances, and the permissible contents of the several pleadings under that form of action were rigidly prescribed. If, say, a plaintiff wanted to recover land seized by a state in violation of the Peace Treaty and now in the possession of a third person under deed from the state, an appropriate form would be the one for ejectment. The declaration, as the initial pleading was called, would allege only

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<sup>59</sup> In *Atascadero*, Brennan stated:

A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question or admiralty claim would provide an independent basis for jurisdiction that did not depend on the identity of the parties.

473 U.S. at 262. That availability of the federal question and admiralty jurisdictions provided a basis for bringing a federal claim did not preclude resort to the diversity jurisdiction to pursue that claim. The availability of one head of jurisdiction does not bar resort to others. That choice is for the plaintiff, not the court.

<sup>60</sup> *Id.* at 268 ("Of course, where the cause of action is based on state law, as it would be in a suit under the state-citizen diversity clause, the 'sovereign power' whose law governed would be the state.").

<sup>61</sup> *Id.* at 282 n.33.

<sup>62</sup> It was the *Bivens* decision, discussed *infra* notes 280-284 and accompanying text, that introduced the notion of a cause of action deriving directly from the Constitution itself. Justice Brennan remarked that prior to *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "it was not at all clear that the Contracts Clause applied to contracts to which the state was a party." *Atascadero*, 473 U.S. at 283 n.33. But the possibility that the Contracts Clause would be applied to such contracts was not so remote that it would have been dismissed out of hand. Further, at the relevant time some key figures thought it would apply. Thus, Edmund Randolph was pleased that the states, as he saw it, would be obliged to pay their debts; and Patrick Henry expressed apprehension that this would indeed be the effect of ratification. See Fletcher, *Historical Interpretation*, *supra* note 1, at 1050 n.70.

<sup>63</sup> U.S. CONST. art. I, § 10, cl. 1.



that the plaintiff was entitled to possession and that the defendant was wrongfully in possession; possible federal issues determinative of the outcome could not be anticipated.<sup>64</sup> In the answer, under the rules applicable to that plea, the defendant would claim entitlement under a deed from the state. In the replication, which was the plaintiff's responsive plea, the claim would be made that the deed was void because the state's seizure of the land was in violation of the Peace Treaty.<sup>65</sup> In form, the suit was instituted as one for vindication of a state-created right. In substance, the suit was "on" the Peace Treaty.<sup>66</sup>

This, essentially, is what happened in *Martin v. Hunter's Lessee*, where an action in ejectment ended with a holding that Virginia's escheat of British-owned property was in violation of the Peace Treaty.<sup>67</sup> The suit was instituted in a Virginia state court. In *Sturgis v. Crowninshield*, an action in assumpsit brought in a federal circuit court, resulted in a decision vindicating the plaintiff's claim that the State had impaired a contractual right under the Contract Clause.<sup>68</sup> There was a similar holding in *Fletcher v. Peck*.<sup>69</sup> There the action was in covenant

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<sup>64</sup> Cf. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 903 (1824) (Johnson, J., dissenting) ("But how the act of Congress is to be introduced into an action of trespass, ejectment, or slander, before the defendant is called to plead, I cannot imagine.").

<sup>65</sup> These pleading conventions are discussed in Alfred Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1128-29 (1969) [hereinafter Hill, *Constitutional Remedies*]. For fuller treatment, see 1 JOSEPH CHITTY, TREATISE ON PLEADING AND PARTIES TO ACTIONS \*235-60; \*390-414, \*486-90, \*518-42, \*603-06, \*617-24 (16th Am. ed. 1876); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON LAW PLEADING 208-13, 298-301, 366-81 (Henry W. Balantine ed., West Publishing Co. 3d ed. 1923) (1894). In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, in reversing the Second Circuit Court of Appeals, the Supreme Court held for the first time that a suit for damages occasioned by a violation of constitutional rights could be brought "on" the constitutional provisions allegedly violated. See 403 U.S. 388, 397 (1971); see also *infra* notes 280-281 and accompanying text (discussing *Bivens* in more detail). In *Bivens*, the defendants were federal law-enforcement officers charged with such violations. *Id.* at 389. Prior to *Bivens* it was thought that such an action could be brought only for trespassory conduct violative of state law, although it was acknowledged that federal law would ordinarily control the outcome. For instance, see the opinion of the Second Circuit in *Bivens*, 409 F.2d 718, 721-22 (2d Cir. 1969); see also *infra* note 71 (discussing the well-pleaded complaint rule in the federal courts).

<sup>66</sup> Issues of state law might be also be present in such a case. Whether the plaintiff had a right to possession in the first place might turn on the validity of the instrument under which the entitlement was claimed. Such a case would be governed by both federal and state law. The case was not primarily one under state law except in the sense that whether the plaintiff had any right at all was an antecedent question—and then only if that issue was raised.

<sup>67</sup> 14 U.S. (1 Wheat.) 304, 306-07, 360-62 (1816).

<sup>68</sup> 17 U.S. (4 Wheat.) 122, 197-200 (1819).

<sup>69</sup> 10 U.S. (6 Cranch) 87, 137-39 (1810).

and was also instituted in a federal circuit court. So too, the *Dartmouth College Case*, enforcing a claim under the Contract Clause, was commenced in a New Hampshire state court as an action in trover.<sup>70</sup> These were all suits against private persons. The system of common-law pleading prevailed in actions at law in the federal courts irrespective of the source of jurisdiction. Even after the advent of general federal question jurisdiction in 1875, with the passage of the Judiciary Act of 1875, that jurisdiction could not properly be invoked if a declaration in an action at common law would not have disclosed the federal character of the claim.<sup>71</sup> The states themselves were protected against such suits only by their sovereign immunity.

Furthermore, underlying Justice Brennan's analysis was a fundamental error concerning the nature of jurisdiction. The source of a court's jurisdiction is immaterial to the legal issues that come before it. Having jurisdiction, a court administers justice in accordance with the law applicable to the particular controversy, whether it be federal law, state law or "the laws of the most distant part of the globe."<sup>72</sup> This, Hamilton said, is "the nature of judiciary power . . . the general genius of the system."<sup>73</sup> The point is obvious. A court's jurisdiction may be solidly founded, but it would be the grossest injustice if, in the exercise of that jurisdiction, judgment were rendered on a basis other than the applicable law. There can be no doubt that the Founding Fathers, or the lawyers among them, were aware that in any litigation, whether in federal or state court, federal law would be considered if presented to the court. Whether preservation of sovereign immunity was contemplated by the Framers was a separate question; and, indeed, the history recounted above affords solid basis for the understanding that the sovereign immunity of the states would be preserved.<sup>74</sup>

Justice Brennan was aware that claims might be made for vindication of rights claimed under federal law, but he thought this could be done only by invoking the federal question jurisdiction. Since the First Congress did not provide for such jurisdiction, he thought it evi-

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<sup>70</sup> *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat) 518, 654 (1819).

<sup>71</sup> *E.g.*, *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152-54 (1908). This practice persists to the present day, under the doctrine of the well-pleaded complaint rule, even though common-law pleading has long been superseded by code pleading. *See* RICHARD H. FALLON, JR., ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 909-13 (4th ed. 1996) [hereinafter *HART & WECHSLER*].

<sup>72</sup> *THE FEDERALIST*, No. 82, *supra* note 22, at 467 (Alexander Hamilton).

<sup>73</sup> *Id.*

<sup>74</sup> *See supra* notes 22-48 and accompanying text.

dent that "Congress had decided that [such] cases, even those arising under the Treaty of Paris, should be heard in the first instance only in state courts."<sup>75</sup> He did not recognize that such cases could "in the first instance" be heard in general courts on the basis of diversity of citizenship.

In sum, Justice Brennan's basic position in his *Atascadero* dissent was that the stated fears of the Framers concerning the loss of state sovereign immunity related only to cases arising under the diversity clauses, which were the only clauses they talked about, and which he thought were governed in their entirety by state law. On the other hand, he argued that the absence of similar stated apprehensions regarding the federal question clause shows that the Framers acquiesced in the overriding of state immunity in regard to federal claims. He did not consider the possibility that issues of controlling federal law might arise in cases brought under the diversity jurisdiction.

Why was there relative silence on the issue of federal question jurisdiction during the ratification debates? Justice Brennan's answer was convoluted and unpersuasive. It is submitted that there is a more plausible explanation—namely, that Article III's provision for federal question jurisdiction was not perceived to be a threat to state sovereign immunity, in contrast to the diversity clauses, which expressly spoke of the state as a party. Madison and Marshall argued that, despite the generality of the diversity clauses, the state could be a party only as plaintiff.<sup>76</sup> Their opponents argued that the language of Article III did not warrant such a limitation.<sup>77</sup> That was the *only* issue debated. It is impossible to find in the ratification debates or elsewhere any suggestion, direct or indirect, that the states would lose their sovereign immunity by virtue of the constitutional provision for federal question jurisdiction.

#### b. *Seminole Tribe v. Florida*

In *Seminole Tribe v. Florida*, the Court, in reliance upon what it took to be the original understanding, invalidated a federal statute overriding state sovereign immunity.<sup>78</sup> Justice Souter's dissenting opinion—joined by Justices Ginsburg and Breyer—rested primarily on Justice Brennan's dissenting views in *Atascadero*. But Justice Souter

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<sup>75</sup> *Atascadero*, 473 U.S. at 287 n.40.

<sup>76</sup> See *supra* note 30 and accompanying text.

<sup>77</sup> See *supra* notes 27–29 and accompanying text.

<sup>78</sup> 517 U.S. 44, 72–73, 76 (1996).

made some additional points. Declaring that sovereign immunity is a common-law rule, "derived from the laws and practices of our English ancestors,"<sup>79</sup> he emphasized that the reception of the English common law by the states did not have a counterpart on the federal level.<sup>80</sup> He noted that the Framers had "an aversion to a *general* federal reception of the common law."<sup>81</sup> Justice Souter concluded that, given these circumstances, "the Court today cannot reasonably argue that something like the old immunity doctrine somehow slipped in as a tacit but unenforceable background principle."<sup>82</sup>

But a strong policy against a general reception of the common law did not preclude use of aspects of the common law compatible with the basic federal scheme. Justice Souter noted that the Constitution itself in effect incorporated aspects of the common law, including its provision for habeas corpus and its distinction between law and equity.<sup>83</sup> To state that the rule of sovereign immunity is not comparable and that it was "slipped in" is to ignore the fact that the issue was extensively debated in the state ratification conventions. This of course assumes that sovereign immunity is a common-law doctrine. If, as is argued below, it is not, Justice Souter's argument becomes irrelevant.<sup>84</sup>

### c. *Alden v. Maine*

In *Alden v. Maine*, in 1999, the Court held that Congress could not, under its Article I powers, subject a state to suit in a state court without state consent.<sup>85</sup> Justice Souter's dissenting opinion incorporated by reference the arguments advanced in the dissenting opinions in *Atascadero* and *Seminole Tribe*, and then presented at great length an argument never advanced in any prior opinion, nor, so far as the writer is aware, in any academic commentary. Justice Souter argued that the holding in *Alden*, and the Court's prior holdings to the same effect, are supportable only if sovereign immunity is a natural law doc-

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<sup>79</sup> *Id.* at 130 (Souter, J., dissenting) (quoting *United States v. Lee*, 106 U.S. 196, 205 (1882)).

<sup>80</sup> *Id.* at 137-38.

<sup>81</sup> *Id.* at 140 (emphasis supplied). This aversion is understandable, since, as Madison explained, such a reception would largely have obliterated such powers as were left to the states by the Constitution. *See id.* at 141.

<sup>82</sup> *Id.* at 142.

<sup>83</sup> 517 U.S. at 137-38.

<sup>84</sup> *See* discussion *infra* Part I.F.1.

<sup>85</sup> 527 U.S. 706, 748 (1999).

trine.<sup>86</sup> Justice Souter saw only two possibilities: either sovereign immunity is a common-law principle, in which case it is defeasible by legislative action,<sup>87</sup> or it is an aspect of "natural law, a universally applicable proposition discoverable by reason."<sup>88</sup> Conceived as natural law, sovereign immunity is "unalterable,"<sup>89</sup> "indefeasible,"<sup>90</sup> "untouchable and untouched by the Constitution."<sup>91</sup> Justice Souter declared that the majority in *Alden* relied on sovereign immunity as a natural law doctrine in rejecting congressional power to override state sovereign immunity.<sup>92</sup>

The dissent understood Justice Holmes's opinion in *Kawananakoa v. Polyblank*<sup>93</sup> as "embodying . . . [the] natural law theory of sovereign immunity."<sup>94</sup> The relevant passage in Holmes's opinion was as follows: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but 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."<sup>95</sup> This passage was not a statement that the immunity is immutable.<sup>96</sup> If the legislature, which is

<sup>86</sup> *Id.* at 763.

<sup>87</sup> *Id.* at 761.

<sup>88</sup> *Id.* at 763.

<sup>89</sup> *Id.* at 764.

<sup>90</sup> *Alden*, 527 U.S. at 770 n.9.

<sup>91</sup> *Id.* at 791.

<sup>92</sup> *Id.* at 795, 799. The dissent said that one of the problems with the Court's "absolutist" natural law doctrine was that the history discussed by the Court showed that only Hamilton had subscribed to this doctrine. *Id.* at 773. This was said to be evidenced by Hamilton's statement that the immunity is "inherent in the nature of sovereignty." *Id.* at 773 (quoting *THE FEDERALIST*, No. 81, *supra* note 22, at 455 (Alexander Hamilton)). Hamilton, according to the dissenting opinion, "chose his words carefully." *Id.* at 2275. On the other hand, Madison and Marshall were thought not to be adherents of the natural law view, *id.* at 778, although Madison had said, "It is not in the power of individuals to call any state into court," and Marshall had said, "It is not rational to suppose that the sovereign power should be dragged before a court." See notes 30–31 and accompanying text. This characterization of the views of Madison and Marshall was necessary to support the dissent's conclusion that, at the ratification debates, in which both men participated, "[n]o one was espousing an indefeasible, natural law view of sovereign immunity." *Id.* at 778. Hamilton's statement, on the other hand, was made not at a ratification convention, but had appeared in the pages of *The Federalist*. See *supra* note 22.

<sup>93</sup> 205 U.S. 349 (1907).

<sup>94</sup> *Alden*, 527 U.S. at 797.

<sup>95</sup> *Kawananakoa*, 205 U.S. at 353.

<sup>96</sup> In *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, Justice Breyer's dissenting opinion spoke of the Court's view of sovereign immunity as "an immutable constitutional principle more akin to the thought of James I than of James Madison." 527 U.S. 666, 704 (1999). This comparison is inapt because James Madison was a strong proponent of sovereign immunity. See *supra* note 30. In this connection, it may be observed that the

the "authority that makes the law," abolishes the immunity, a suit thereafter instituted is not the assertion of a right against this "authority." What is more to our purpose is that, as emphasized by the dissent, under the above formulation, "sovereign immunity may be invoked only by the sovereign that is the source of the right upon which suit is brought."<sup>97</sup> The dissent did not understand that it was undermining its own position. Since the right in issue in *Alden* was federally created, only the federal government—and not the states—could make a claim of sovereign immunity under the natural law formulation of Justice Holmes. Hence, in upholding a *state* claim of sovereign immunity, the Court was *not* applying natural law doctrine. On the other hand, it was the dissenting opinion that comported with natural law doctrine, in its insistence that the state could not interpose sovereign immunity in regard to a federal claim.<sup>98</sup>

In the course of their discussion, the dissenters said that ultimately their position rested on their conception of sovereign immunity as a common-law rule, defeasible by statute.<sup>99</sup> But here, we find the minority laboring under another misconception. Whether or not the sovereign immunity of the federal government is common-law doctrine, it is defeasible by Congress. Similarly, the sovereign immunity of, say, the state of Illinois, whether or not resting on common law, is defeasible by the Illinois legislature. However it does not follow that Congress can override the sovereign immunity of Illinois. The question of federal power in this regard is subsumed in a larger question—federal power to override state law. The answer must be found in the Constitution.<sup>100</sup>

d. *Kimel v. Florida Board of Regents*

In *Kimel v. Florida Board of Regents*, in 2000, the Supreme Court invalidated the Age Discrimination in Employment Act of 1967

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*Alden* dissenters relied on Blackstone's comment that the "general and indisputable rule [is], that where there is a legal right, there is also a legal remedy . . . ." See 527 U.S. at 812 (Souter, J., dissenting) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23). The dissenters also cited Chief Justice Marshall to the same effect; Marshall asked the rhetorical question: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" See *id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). But both Blackstone and Marshall were proponents of sovereign immunity. See 3 BLACKSTONE, *supra*, at \*244–45; *supra* note 31.

<sup>97</sup> *Alden*, 527 U.S. at 796.

<sup>98</sup> See *id.* at 761.

<sup>99</sup> *Id.* at 762.

<sup>100</sup> See *infra* notes 192–248 and accompanying text.

("ADEA") insofar as it abrogated state Eleventh Amendment immunity from suit by private individuals.<sup>101</sup> The dissenting opinion of Justice Stevens advanced yet another argument against the constitutional status of sovereign immunity as it pertains to the states.<sup>102</sup> His view was that the subject was entirely within the province of Congress. Drawing on a well-known article by Herbert Wechsler,<sup>103</sup> Justice Stevens declared that "the normal operation of the legislative process itself would adequately defend state interests from undue infringement."<sup>104</sup>

Wechsler had concluded that the Supreme Court should move slowly in invalidating congressional legislation affecting the states.<sup>105</sup> Wechsler wrote broadly, without mention of sovereign immunity. In any event, his insistence that the states could be counted upon to protect themselves overlooked the reality that state interests often clash, and often on a regional basis. These clashes have occurred throughout our history as a nation. One need only recount the pre-Civil War disputes over tariffs; federal spending on internal improvements; the Bank of the United States; and the struggles between North and South over the status of African-Americans that culminated in the Civil War, and continued after that war. There have been continual regional clashes over water rights. Moreover, it has long been evident that state interests vary widely in such matters as labor and regulatory legislation generally. The list is endless. Indeed, the recent federal statutes adopted under Section 5 of the Fourteenth Amendment, which provided for suit against states in a variety of situations, were presumably the work of pressure groups not equally potent in all states.<sup>106</sup> Accordingly, Justice Stevens was unpersuasive in his *Kimel* dis-

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<sup>101</sup> 528 U.S. 62, 92 (2000).

<sup>102</sup> See *id.* at 92 (Stevens, J., dissenting).

<sup>103</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

<sup>104</sup> *Kimel*, 528 U.S. at 93 (citing Wechsler, *supra* note 103, at 543).

<sup>105</sup> Wechsler said:

This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation. . . . It is rather to say that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress.

Wechsler, *supra* note 103, at 559.

<sup>106</sup> It is not difficult to discern in these statutes a response to the demands of government employees' unions, women's groups and lobbies for senior citizens. See *infra* notes 227-233 and accompanying text (discussing these statutes).

sent when he said that "once Congress has made its policy choice, the sovereignty concerns of the several States are satisfied."<sup>107</sup>

### 3. Academic Commentators

Academic critics are for the most part in agreement regarding the basic point made by Justice Brennan in his *Atascadero* dissent—the Framers contemplated that claims founded on federal law would not be barred by sovereign immunity.<sup>108</sup> They commonly argue that delegates to the state ratification conventions who feared loss of the immunity were actually in the majority of those who spoke on the subject. Often, however, these critics do not go beyond the debates, ignoring the subsequent events that tended to show that such fears were not entertained seriously.<sup>109</sup> Others do not discuss the question of an original understanding at all, in reliance on the work of earlier critics, or on the apparent assumption that parts of the problem can be analyzed adequately without regard to what this writer believes to be the overarching principle of an original understanding.<sup>110</sup> The commentators who have examined the problem in depth are relatively few in number, and they are predominantly hostile to the conception of an original understanding protective of state sovereign immunity.<sup>111</sup>

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<sup>107</sup> 528 U.S. at 96.

<sup>108</sup> See commentators listed *infra* note 111; see also Engdahl, *supra* note 1, at 8–9.

<sup>109</sup> See, e.g., Engdahl *supra* note 1, at 7; Field, *Part I*, *supra* note 1, at 527–38.

<sup>110</sup> See generally, e.g., Meltzer, *supra* note 1; Shapiro, *supra* note 1; Sherry, *supra* note 1.

<sup>111</sup> Judge Gibbons asserted that sovereign immunity was a foreign notion not native to American shores in the colonial period. See Gibbons, *supra* note 1, at 1895–97. He relied for the most part on the absence at that time of express references to the immunity, but failed to consider the absence of litigation against the Crown because the English doctrine of sovereign immunity shielded only the King, not his officers, nor the government as such. See *id.* The break with England changed the fundamental basis of sovereign immunity in the new sovereign territories, with the state replacing the King. Gibbons found it noteworthy that few of the early state constitutions expressly provided for sovereign immunity. *Id.* at 1897–99. But federal and state courts, without regard to provision therefor in the constitutions of their respective jurisdictions, have from the start assumed sovereign immunity to be in force as governing law, unless abolished or modified by the legislature. See *supra* note 8 and accompanying text.

Gibbons also maintained that state-noncitizen jurisdiction in the federal courts was understood and generally accepted as an important device for redress against state violations of the Peace Treaty of 1783. He argued that with the states suable for their violations, the United States would have been in a position to deal more effectively with the British in the ongoing controversy over the Peace Treaty. Gibbons, *supra* note 1, at 1899–1902, 1916–20. In this connection, he referred to a memorandum from Jefferson as Secretary of State to the British Minister Plenipotentiary, George Hammond, declaring that the Peace Treaty could be in enforced in the federal courts. *Id.* at 1919–20. Gibbons conceded that the



memo did not expressly refer to suits against the states themselves, as distinguished from suits against private citizens. *Id.* at 1920. On the other hand, in regard to the trio of major statesmen who had declared their understanding that the Constitution preserved the immunity of the states, he accused Madison of "dissembling," *id.* at 1906; Hamilton of writing "political propaganda," *id.* at 1912 n.112; and stated that Marshall, "contrary to his statement during the Virginia ratification convention . . . did not believe that an original understanding on sovereign immunity existed." *Id.* at 1948 n.319.

Professor Orth stated: "The search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire." ORTH, *supra* note 1, at 28. He was of a different view in commenting on *Hans v. Louisiana*, 134 U.S. 1 (1890), which he maintained was egregiously wrong in rejecting *Chisholm*. In his view *Chisholm* was correct in its disregard of the original understanding. See ORTH, *supra* note 1, at 74-76.

Professor Pfander has written extensively on sovereign immunity, but this writer has found his arguments unpersuasive. See Pfander's articles listed *supra* note 1. For example, he stated that a "close reading" of *The Federalist No. 81*, where Hamilton declared that the immunity of a state from being sued without its consent "is inherent in the nature of sovereignty," THE FEDERALIST No. 81, *supra* note 22, at 455, showed that Hamilton was really "affirm[ing] the surrender of state sovereign immunity." Pfander, *State-Party Cases*, *supra* note 1, at 629 (emphasis added). The basis of Pfander's reading is essentially no more than that Hamilton was writing in the context of a suit against a state on its indebtedness. Pfander, *State-Party Cases*, *supra* note 1, at 629-32. Madison's statement that "[i]t is not in the power of individuals to call any state into court" is discounted on similar grounds. *Id.* at 634. Moreover, says Pfander, Madison did not "deny that states were subject to suit in actions that arose under federal law." *Id.* (emphasis supplied). In a later article, he declared that suits against states on federal claims were "regarded as regrettably necessary" by the Framers. Pfander, *State Suitability*, *supra* note 1, at 1368. But this sense of regrettable necessity is not established, in the opinion of this writer.

In another article, Pfander contended that the Petition Clause of the First Amendment should be understood as supporting *judicial* override of federal sovereign immunity. See Pfander, *Right to Petition*, *supra* note 1, at 953-55; 980-89. He noted that, in adaptation of English practice, a substantial number of states, from an early time, had essentially a petition procedure for suits against states in their courts. *Id.* at 934-37; 991-1014. He conceded, however, that in all instances this was the product of legislative action. *Id.* at 937, 1013-14. Such legislative action has never abated; today, as a result of such action, the immunity of the government from suit is very much the exception rather than the rule. The question is whether the judiciary may initiate such a practice by itself.

Professor Amar declared that sovereign immunity can "conflict[]" with the Constitution's structural principle of full remedies for violations of legal rights against government." Amar, *supra* note 1, at 1489. He derived this principle from: (1) the system of separation of powers, and the related system of checks and balances, *id.* at 1492-1506; (2) his view that sovereign immunity resides in the people rather than in governments, *id.* at 1429-41, 1485; (3) his view that "[t]he legal rights against government enshrined in the Constitution strongly imply corresponding governmental obligations to ensure full redress whenever these rights are violated;" and (4) his view that full remedies for constitutional wrongs committed by governments will often require government liability. *Id.* at 1485. He rejected the notion that the "structural principle of full remedies is somehow . . . limited by an equally valid structural postulate [of sovereign immunity]." *Id.* at 1489-90. "The latter principle," he says, "is simply not part of our Constitution's structure. Its sole basis is the British idea [of sovereign immunity]." *Id.* at 1490. He made these points while maintaining silence concerning the history that supports the argument for an original misun-

Some of the critics who reject the notion of an original understanding<sup>112</sup> rely on general language employed by Chief Justice Marshall in *Cohens v. Virginia*.<sup>113</sup> In this case, the state of Virginia imposed

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derstanding. Thus, he does not even mention the pro-immunity positions of Madison, Hamilton and Marshall.

Professor (as he then was) Fletcher stated his belief that federal legislative and judicial power exist to override state sovereign immunity, but failed to consider whether this may be precluded by an understanding underlying adoption of the Constitution. See Fletcher, *Historical Interpretation*, *supra* note 1, at 1127-30. To be sure, he observed that if there was serious apprehension that the state-citizen diversity clauses would result in loss of state sovereign immunity, the discussion of that issue would have occupied a more "prominent place . . . in the debates over the Constitution or the deliberations on the [first] Judiciary Act." *Id.* at 1054. But he doubted that there was any sentiment for protection of states against federal claims. In common with other commentators, he assumed that the basis of a court's jurisdiction is determinative of the issues that the court will be called upon to decide. *Id.* at 1070-71. Hence, he believed that claims under federal law could be pressed only under the federal question or admiralty jurisdictions. *Id.* at 1071. Apparently, these considerations accounted for his conclusion that the suability of states on federal claims "was probably an open question, in part, because it was not fully visible when the Constitution was adopted and probably also in part because, to the extent that it was visible, it presented too many difficult political and theoretical issues to permit explicit resolution." *Id.* at 1078. In a subsequent article, he conceded error on this point, stating the bringing of federal-question suits was foreseeable. See Fletcher, *Reply to Critics*, *supra* note 1, at 1271-74; 1291-92. But he related this only to construction of the Eleventh Amendment, and not to the existence of an original understanding pertinent to the question of immunity.

Unlike Fletcher, Jacobs was aware of the extensive private litigation in which claims founded on federal law were redressed by the federal courts at an early time in litigation between private parties. See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 72-73 (1972). As to whether states would be suable on such claims, he stated that no general understanding existed either way, but in context it is clear that he was speaking only of the ratification debates. *Id.* at 39-40, 68. His account of the near-contemporaneous reaction to *Chisholm* is more illuminating. He contended that there was no great concern with the problem of suits against states on their debts, since by the time of *Chisholm* the extent of such debt had been greatly reduced, owing, *inter alia*, to assumption of much of that debt by the federal government. *Id.* at 69-70. On the other hand, claims founded on Peace Treaty violations constituted a pressing problem. He stated:

[I]n Congress, as well as in the state legislatures, there was strong opposition to recognition of any liability to reimburse British creditors or to make restitution of seizures of Loyalist property. In fact, this was the transcendent political issue of 1794 and 1795, when the Eleventh Amendment was under active consideration, as provisions of the Jay Treaty clarifying the rights of Loyalists came under attack in Congress and throughout the country.

*Id.* at 70-71. But the threat posed by the Peace Treaty was no less a problem when the Constitution was adopted and ratified by the states, and is thus pertinent to the general understanding at the time. See also *infra* notes 179-180 (discussing the views of Professor Field).

<sup>112</sup> See, e.g., Engdahl, *supra* note 1, at 5-7, 10, 22, 28; Fletcher, *Historical Interpretation*, *supra* note 1, at 1054, 1084-87; Hovenkamp, *supra* note 1, at 2238, 2241.

<sup>113</sup> 19 U.S. (6 Wheat.) 264 (1821). The Court considered the issue of state sovereign immunity in two principal parts. The first, discussed here, dealt with whether sovereign

a criminal sentence on two of its residents for violation of a state statute forbidding the sale of lottery tickets, in the face of a defense that federal law permitted such sale.<sup>114</sup> When the defendants sought review in the Supreme Court, the State contended that the judgments of its courts were not federally reviewable on the ground of sovereign immunity.<sup>115</sup> The Supreme Court said flatly: "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.*"<sup>116</sup> But the opinion as a whole belied the generality of the quoted language, a point commonly ignored by critics.<sup>117</sup> In the first place, the opinion makes plain that this remark concerned the Constitution as it "originally stood," prior to adoption of the Eleventh Amendment.<sup>118</sup> What is more important, the Court limited the scope of the quoted language by suggesting that judicial disregard of state sovereign immunity was not contemplated.<sup>119</sup>

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immunity barred Supreme Court review of state judgments, apart from the Eleventh Amendment. *See id.* at 378–405. Having found no bar, the Supreme Court, in the second part, reached the same conclusion in regard to the Eleventh Amendment. *See id.* at 405–12. This part of the opinion is considered *infra* notes 493–497 and accompanying text.

<sup>114</sup> *Cohens*, 19 U.S. at 289.

<sup>115</sup> *Id.* at 302, 380.

<sup>116</sup> *Id.* at 383 (emphasis supplied).

<sup>117</sup> *See, e.g.,* Engdahl, *supra* note 1, at 10, 22, 28, 63–64; Fletcher, *Historical Interpretation*, *supra* note 1, at 1084–85; Gibbons, *supra* note 1, at 1953; Shapiro, *supra* note 1, at 69 & n.48. To like effect, see *Seminole Tribe*, 517 U.S. at 112–13 (Souter, J., dissenting). *But see* ORTH, *supra* note 1, at 39–40 (recognizing that the Court dealt more narrowly with the issues than the quoted language would suggest).

<sup>118</sup> *Cohens*, 19 U.S. at 405.

<sup>119</sup> Thus the Court stated:

Were a state to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it . . . maintain a suit in this Court against such State, to recover back the money?

Perhaps not. Without, however, deciding such supposed case, we may say, that it is entirely unlike that under consideration. . . .

But let us vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the constitution of the United States in bar of the action, notwithstanding which the Court gives judgment against him. That would be a case arising under the constitution, and would be the very case before the Court.

. . . .

The case of a State which pays off its own debts with paper money, no more resembles this than do those to which we have already adverted. *The courts have no jurisdiction over the contract.* . . . But . . . suppose a State to prosecute one of its citizens for refusing paper money, who should plead the constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this . . . .

Some commentators, who assume that there is legislative power to abolish sovereign immunity, claim the same power for the judiciary, in reliance on the maxim that the judicial power is coextensive with the legislative.<sup>120</sup> The problem, as with maxims generally, is that the law refuses to conform with what the maxim prescribes. Under the American constitutional system, the legislature of each component—the nation and the states—has authority to waive sovereign immunity for that component. It does not follow that Congress (let alone the federal judiciary) has power to override the immunity of the states. The writer has found no indication that this distinction is recognized by the critics. Apart from that, judicial power is not necessarily coterminous with legislative power even within a particular jurisdiction. For example, in the case of the federal government, Congress has power, under the Commerce Clause, to establish a regulatory regime for railroads and other utilities, or a law of labor relations—in both instances with a scope unknown to the common law. There is no basis in the Supreme Court's jurisprudence for the view that the federal courts are free to make like rules, on the theory that they are acting in areas within the potential reach of Congress.<sup>121</sup>

It has been argued in effect that even if sovereign immunity had been contemplated by the Founders, the subsequent expansion of federal power and the corresponding contraction of state competence—most notably in consequence of the Civil War Amendments—warrant elimination of the doctrine.<sup>122</sup> In an earlier article, the writer advanced the following thesis: (1) that the Constitution should always be construed in accordance with the intent of the Framers, or at least their probable intent, as best that can be ascertained; (2) that when the provisions of the Constitution permit of only one interpretation, like those establishing the two houses of Congress, the intent is sufficiently clear, and such provisions should be modifiable only through the amendment route; (3) that when the language of a provision is open-ended in that it is fairly susceptible to more than a single interpretation, the provision should be construed as the Framers most probably would have wanted it construed at the time of decision, assuming foreknowledge on their part of conditions existing at that

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*Id.* at 402–03 (emphasis added).

<sup>120</sup> Amar, *supra* note 1, at 1477–78; Fletcher, *Historical Interpretation*, *supra* note 1, at 1074, 1108, 1127–30; Vazquez, *supra* note 1, at 1689.

<sup>121</sup> *E.g.*, Alden v. Maine, 527 U.S. 706, 715, 738 (1999); *Seminole Tribe*, 517 U.S. at 58.

<sup>122</sup> See, *e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 974 (2000).

time; and (4) that the greater the public consensus on a particular issue at such time, the greater the likelihood that the Framers would have wanted the provision to be construed in accordance with that consensus.<sup>123</sup>

Where the structural provisions of the Constitution are concerned, modification in light of later developments is singularly inappropriate, for the structural provisions are not open-ended. A statement in the Constitution that the states are not suable, as in the case of the Eleventh Amendment, does not lend itself to more than one construction. So too, whether deemed structural or not, is the general understanding on state sovereign immunity, which the Court later referred to as a controlling "postulate"<sup>124</sup>—as part of "the understood background against which the Constitution was adopted."<sup>125</sup> At least so much seems clear when the construction is one that in effect eliminates sovereign immunity altogether. It is arguable, however, that the immunity is accorded its intended scope when implemented in accordance with a current consensus on its meaning. On this basis, governmental liabilities arising out of their commercial activities could be deemed unprotected by sovereign immunity.<sup>126</sup>

### B. *The Eleventh Amendment*

The Eleventh Amendment provides as follows: "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

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<sup>123</sup> Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1245, 1302 (1990). The thesis was the outcome of an attempt to find a principled rationalization for the Court's persistence in developing what its critics called a "current" Constitution, in the face of argument by many of the same critics that the Court's duty is to construe the Constitution in accordance with the original intent of the Framers. See *id.* at 1239–40. The principal focus of the Article was on the problem of women's rights under the Equal Protection Clause. It was clear that the purpose of the Clause was to benefit the newly-emancipated slaves, and not at all to end the subordination of women. A decision that applied the clause to give equal rights to women, a year or two after the Clause became law, would have been greeted as an outrage, if not an act of lunacy. When, in *Reed v. Reed*, 4 U.S. 71 (1971), the Court first applied the Clause in that manner, the public reaction was muted, for equal rights for women was a concept that was then largely taken for granted. The decision was at odds with the original intent of the framers, but to insist that the framers, assuming foreknowledge of conditions in 1971, would have wanted the case decided on the basis of their intent in 1868 would be essentially arbitrary.

<sup>124</sup> *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934); see also *supra* note 168–174 and accompanying text.

<sup>125</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part, dissenting in part).

<sup>126</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW 451 & cmt. a (1986).

United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>127</sup> By its terms, the Eleventh Amendment applies to "any" suit brought against a state by a noncitizen, regardless of the source of jurisdiction. Further, read literally, it would embrace a suit founded on federal law as well as state law. It is submitted that the literal reading should prevail, and others have also taken this view.<sup>128</sup> The overwhelming majority of academic commentators, however, claim that the Eleventh Amendment should not be deemed to apply in cases founded on federal question jurisdiction.<sup>129</sup> Rather, they construe the Amendment as if it read: "Any suit in which jurisdiction is founded on diversity of citizenship."

For this construction, the commentators observed that the Framers of the Eleventh Amendment took no action on an earlier version of the Amendment under which the states would have been protected from suit by "any person or persons, citizens or foreigners."<sup>130</sup> Virtually without exception, they maintain that a suit against a state by one of its own citizens could have been brought only under the federal question jurisdiction.<sup>131</sup> In the circumstances they stress what seems to

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<sup>127</sup> U.S. CONST. amend. XI.

<sup>128</sup> See, e.g., Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1371 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1395-96 (1989); Calvin R. Massey, *State Sovereign Immunity and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65-66 (1989); Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 608-12 (1989). But see Fletcher, *Reply to Critics*, *supra* note 1, at 1276-79 (contending that the meaning of the Amendment's language to contemporaries was otherwise); see also Lawrence C. Marshall, Correspondence, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 127, 128-31 (1996) (rebutting Fletcher's contention).

<sup>129</sup> This is now known as the diversity theory of the Eleventh Amendment. Its proponents include Amar, *supra* note 1, at 1473-76, 1481; Fletcher, *Historical Interpretation*, *supra* note 1, at 1060-63; Meltzer, *supra* note 1, at 10-13; Pfander, *State Suability*, *supra* note 1, at 1351; Shapiro, *supra* note 1, at 67-69; Sherry, *supra* note 128, at 1265-72. Professor Shreve, however, has referred to the diversity theory as a "fiction." Shreve, *supra* note 1, at 610. The diversity theory has also been adopted by the minority justices. See *Seminole Tribe*, 517 U.S. at 82 (Stevens, J., dissenting); *id.* at 114 (Souter, J., dissenting); *Atascadero*, 473 U.S. at 289-91, 294 (Brennan, J., dissenting).

<sup>130</sup> This version provided in pertinent part "that no State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners . . ." 1 WARREN, *supra* note 33, at 101. It is not clear that a resolution to this effect was formally introduced. Gibbons, *supra* note 1, at 1926 n.186; but see Fletcher, *Reply to Critics*, *supra* note 1, at 1269-70 n.45 ("I have little doubt that Sedgwick introduced the proposed amendment.").

<sup>131</sup> At least this writer has experienced great difficulty in finding any recognition in their writings that federal claims were cognizable under the diversity jurisdiction. Here too we see the fallacy that the source of a court's jurisdiction determines the nature of the

them to be the pointed omission of any reference to federal question jurisdiction in the final form of the Eleventh Amendment, which they say simply tracks the diversity language of Article III.<sup>132</sup> Finally, they contend that if the drafters wanted to protect the states from federal claims, the Eleventh Amendment was poorly drafted to that end because it applied only to suits by noncitizens. Since the drafters could easily have protected the states from suits by their own citizens as well, but failed to do so, the argument goes, it is reasonable to read the Amendment as not protecting against federal claims at all.<sup>133</sup>

Even if the critics are correct in contending that the Eleventh Amendment should be read otherwise than in accordance with its express language—that it should be taken to apply only when jurisdiction was founded on diversity of citizenship—the Eleventh Amendment has an effect opposite to the one for which they contend. Critics assume that the source of jurisdiction is determinative of the issues, federal or state, that the court is called upon to determine. Justice Brennan made this assumption in his dissenting opinion in *Atascadero*, and this was no accident, for he credited his views to academic commentators.<sup>134</sup>

Whatever the source of jurisdiction, as has been seen, the system of common-law pleading universally in effect at the time, allowed ample scope for the injection of issues of controlling federal law into the case.<sup>135</sup> As it happened, the only relevant head of jurisdiction at the time was the diversity jurisdiction.<sup>136</sup> If, as the critics contend, the only jurisdiction to which the Eleventh Amendment applies is the diversity jurisdiction, the federal courts were stripped of power to hear *any* claims that might be presented by those invoking that jurisdiction, including claims founded on federal law.

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issues the court will be called to decide. This fallacy is discussed *supra* notes 53–77 and accompanying text.

<sup>132</sup> E.g., *Seminole Tribe*, 517 U.S. at 114 (Souter, J., dissenting); see also U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State.”).

<sup>133</sup> E.g. Amar, *supra* note 1, at 1475; Fletcher, *Historical Interpretation*, *supra* note 1, at 1060–61, Meltzer, *supra* note 1, at 10–11.

<sup>134</sup> He credited eight academic critics for their “critical look at the historic record.” 473 U.S. at 258–59 n.11 (citing critics). His dissenting opinion is interlarded with references to these and other critics.

<sup>135</sup> See *supra* notes 53–77 and accompanying text.

<sup>136</sup> Except for a very brief period after adoption of the Constitution, the federal circuit courts were not granted original federal-question jurisdiction until 1875. See HART & WECHSLER, *supra* note 71, at 879–82.

Moreover, it is evident that the Amendment's drafters understood this problem. Thus, when the Eleventh Amendment was under consideration by Congress, Senator Albert Gallatin of Pennsylvania proposed that the Amendment should not apply "in cases arising under treaties made under authority of the United States."<sup>137</sup> The proposal was not adopted.<sup>138</sup> The reason should be apparent. As has been observed, the "states . . . most ardent in advocating the amendment—Massachusetts, Virginia, and Georgia—all faced pending claims in the Supreme Court that posed issues turning upon interpretation of the Constitution or federal treaties."<sup>139</sup> It is plain that the Amendment as drafted was expected to protect the states from treaty claims.

The absence in the Eleventh Amendment of any protection for the states against suits by their own citizens should not be taken to indicate acquiescence in such suits. It had been the general understanding that, absent consent, the states were immune from suit by citizens and noncitizens alike.<sup>140</sup> *Chisholm* disputed this understanding, and the Eleventh Amendment should be read as no more than a repudiation of *Chisholm*.<sup>141</sup> As has already been remarked, during the Constitution's formative period, those who expressed apprehension of possible overriding of state sovereign immunity by virtue of Article III made the point that the Article's diversity clauses expressly spoke of states as parties.<sup>142</sup> Since they did not express similar apprehension of the federal question jurisdiction, and indeed scarcely mentioned it at all, this bespeaks confidence on their part that the states would not be suable under that jurisdiction, and sufficiently explains why there was no mention of the jurisdiction in the text of the Eleventh Amendment. Finally, even if it is assumed that the Eleventh Amendment is not applicable to federal claims, it is submitted that the states are protected against such claims by virtue of the original understand-

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<sup>137</sup> 4 ANNALS OF CONG. 30 (1794).

<sup>138</sup> Justice Brennan argued that "Congress may well have rejected Gallatin's proposal precisely because to adopt that proposal would have implied some limitation on the ability of the federal courts to hear nontreaty based federal-question claims." *Atascadero*, 473 U.S. at 286 n.40 (Brennan, J., dissenting). Fletcher's explanation, as he puts it, "parallels" that of Justice Brennan. William C. Fletcher, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 118, 131, 135 (1990). The subject is more fully discussed in Fletcher, *Reply to Critics*, *supra* note 1, at 1185-87.

<sup>139</sup> Massey, *supra* note 128, at 114.

<sup>140</sup> See *supra* Part I.A.

<sup>141</sup> 2 U.S. at 480; see also *supra* notes 41-45 and accompanying text (discussing *Chisholm*).

<sup>142</sup> See *supra* text accompanying note 76.



ing that their sovereign immunity survived adoption of the Constitution.

### C. *Hans v. Louisiana*

In *Hans v. Louisiana*, the State of Louisiana defaulted on state-issued bonds, and one of its own citizens sued the state in a federal circuit court on coupons attached to the bonds, claiming that the State's default violated the Contracts Clause of the Constitution.<sup>143</sup> The claimant maintained that, under Article III of the Constitution and the implementing jurisdictional legislation, a state was suable by its own citizens on cases arising under the Constitution, laws and treaties of the United States. The Court acknowledged that the Eleventh Amendment was inapplicable by its terms because no diversity of citizenship existed,<sup>144</sup> but sustained the defense of sovereign immunity.<sup>145</sup> The Court observed that in earlier cases, where the claimant was a non-citizen and the Eleventh Amendment was therefore applicable, the holding had been that a non-consenting state is not suable on such a claim.<sup>146</sup> The Court added that it would be "anomalous"<sup>147</sup> to allow such a claim when brought against a non-consenting state by one of its own citizens.

The academic verdict on *Hans* has been overwhelmingly negative.<sup>148</sup> It has been contended: (1) that, despite the Court's disclaimer, the Court did indeed rely on the Eleventh Amendment;<sup>149</sup> and (2) that the Amendment did not apply when a federal claim was asserted against a state.<sup>150</sup> Regarding the first point, critics have relied heavily on the Court's statement that it would be "anomalous"<sup>151</sup> to allow a claim against a state by one of its own citizens, in light of the Amendment's bar of suit by a noncitizen. But the Court also wrote more broadly, declaring in effect that the broad consensus at the time of adoption of the Constitution was that a state could not be sued by any

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<sup>143</sup> 134 U.S. 1, 1-3 (1890).

<sup>144</sup> *Id.* at 10.

<sup>145</sup> *Id.* at 21.

<sup>146</sup> *Id.* at 10.

<sup>147</sup> *Id.*

<sup>148</sup> But see Currie, *supra* note 1, at 547 ("I am that rara avis, a law professor who thinks that *Hans v. Louisiana* was rightly decided.")

<sup>149</sup> Amar, *supra* note 1, at 1476; Gibbons, *supra* note 1, at 1893-94, 2001; Massey, *supra* note 128, at 66; Pfander, *State Suability*, *supra* note 1, at 1368; Sherry, *supra* note 1, at 1260.

<sup>150</sup> Burnham, *supra* note 1, at 995; Fletcher, *Reply to Critics*, *supra* note 1, at 1299; Jackson, *supra* note 1, at 49-50.

<sup>151</sup> 134 U.S. at 10.

person on *any* cause of action. Thus, the Court said: "[T]he 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."<sup>152</sup>

The Court also said that the "shock of surprise"<sup>153</sup> occasioned by the *Chisholm* holding, leading as it did to prompt adoption of the Eleventh Amendment, represented a repudiation of the notion of federal judicial power "to entertain suits by individuals against the states . . . [a power that] had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people."<sup>154</sup> Adoption of the Amendment, said the Court, showed that "the highest authority of the country was in accord rather with the minority than with the majority of the court in . . . *Chisholm*."<sup>155</sup>

With particular reference to a federal-question claim the Court declared:

Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states,

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<sup>152</sup> *Id.* at 15-16.

<sup>153</sup> *Id.* at 11. The Court's "shock of surprise" thesis has been attacked. Thus, Gibbons remarked that the Federalists agreed to the Amendment reluctantly, in response to "republican clamor," Gibbons, *supra* note 1, at 1926, which had won strong support in at least eight states for a constitutional convention to undo *Chisholm*. *Id.* at 1926-39. Whatever the politics of the time, the fact that the Amendment cleared Congress in six months, with overwhelming majorities in both houses, and was ratified by the states within two years of the decision, speaks volumes for the surprise and outrage that greeted *Chisholm*. See Fletcher, *Historical Interpretation*, *supra* note 1, at 1058-59 & n.121.

Orth saw no significance in speedy adoption of the Amendment. ORTH, *supra* note 1, at 27. He stated, surprisingly in light of the times, that "action by twelve seaboard states need not be time-consuming." *Id.* Perhaps more surprisingly, he stated that the "near impossibility of amending the Constitution today" is owing to fact that there are now fifty states and that their legislatures are busier than they used to be. *Id.*

Justice Souter, dissenting in *Seminole Tribe* contended that the "shock of surprise" thesis was "contradicted" by the fact that it took two full years to get the Amendment ratified. 517 U.S. at 107-08 n.5 (citing Gibbons, *supra* note 1, at 1926-27). Subsequently, dissenting in *Alden*, Justice Souter advanced a different argument for the same conclusion: namely, that evidence existed of some contemporaneous public support for *Chisholm*. 527 U.S. at 794. But see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1143, 1191 (1988) (contending that the reaction to the *Chisholm* decision "clearly establishes *Chisholm*'s incompatibility with prevailing political assumptions.").

<sup>154</sup> *Hans*, 134 U.S. at 12.

<sup>155</sup> *Id.*

was indignantly repelled? Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.<sup>156</sup>

As for the argument of critics that the Eleventh Amendment does not cover the case of a claim against a state based on federal law, this argument is based on both their narrow reading of the Amendment and on their rejection of the idea that there was an original understanding that the sovereign immunity of the states would be preserved.<sup>157</sup> The writer has already attempted to show that such criticism is without merit.<sup>158</sup> *Hans* has commonly been regarded as a major and surprising turning point in American law—as the first case to suggest, let alone hold, that state sovereign immunity could be sustained as matter of constitutional right, independent of the Eleventh Amendment.<sup>159</sup> However, *Hans* was foreshadowed in *Cohens v. Virginia*<sup>160</sup> and in *Osborne v. Bank of the United States*.<sup>161</sup>

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<sup>156</sup> *Id.* at 15.

<sup>157</sup> Concerning the original understanding, the critics stated that the Court set forth passages representing the views of Hamilton, Madison and Marshall, while ignoring the views of their opponents. *E.g.*, Field, *Part I, supra* note 1, at 527–29 & n.54. Actually, the Court noted that George Mason and Patrick Henry espoused these views, but without quotation from their remarks at the Virginia convention on ratification. *See Hans*, 134 U.S. at 14. In any event, the Court declared that the outlook of the opponents was reflected in the decision in *Chisholm*, and that this outlook, and *Chisholm* with it, had been resoundingly rejected by speedy adoption of the Eleventh Amendment, with resulting vindication of the original understanding. *See id.* at 11–12. The speed with which the Amendment became law lends strong support to this conclusion.

<sup>158</sup> *See* discussion *supra* Part I.A.1.

<sup>159</sup> *E.g.*, Engdahl, *supra* note 1, at 30–31, 60–61 (calling the Court's opinion a "naked judicial fiat").

<sup>160</sup> 19 U.S. at 264. *See also supra* note 119 and accompanying text.

<sup>161</sup> 22 U.S. at 738.

The holding was that the Eleventh Amendment is not applicable unless the state is a party of record—a position later modified by the Court in *In re Ayers*, 123 U.S. 443, 487 (1887). *Osborne*, 22 U.S. at 738.

Marshall recognized, however, that even though the state was not a party of record, it might have an "interest" in the litigation. He said in that situation a court would be obliged to determine "what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual." *Id.* at 853. Presumably, a sufficient "degree of interest" is one that shows the suit to be in effect against the state. *Cf.* *United States v. Peters*, 9 U.S. (5 Cranch) 115, 139 (1809).

#### D. Cases Following *Hans*, Culminating in Monaco

The Supreme Court has followed *Hans* many times in suits by persons against their own states on constitutional claims.<sup>162</sup> The Court has also extended the *Hans* holding to other types of cases that involved federal claims and which were outside the express terms of the Eleventh Amendment. In *Smith v. Reeves*, the Court sustained a plea of sovereign immunity where a state was sued by a federal corporation, which was not a citizen by the terms of the Eleventh Amendment.<sup>163</sup> Also, in *Ex parte New York*, the Court held that the Eleventh Amendment was inapplicable because the suit originated as an admiralty proceeding in a federal district court.<sup>164</sup> Although the Eleventh Amendment spoke only of suits in "law or equity," not admiralty,<sup>165</sup> the state's plea of sovereign immunity was sustained "because of the fundamental rule of which the amendment is but an exemplification."<sup>166</sup>

In *Principality of Monaco v. Mississippi*,<sup>167</sup> in 1934, the Supreme Court gave the issue of sovereign immunity further explication. The Principality of Monaco had invoked the original jurisdiction of the Supreme Court in a suit against the state of Mississippi on defaulted state bonds.<sup>168</sup> The Eleventh Amendment does not apply to suits by a foreign state. Monaco argued that the Supreme Court's jurisdiction under Article III was clear and that the Article made no reference to the need for consent by a defending state in the case of a suit by a foreign state.<sup>169</sup> The Court, however, observed that the Article similarly conferred jurisdiction in cases to which the United States is a

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There is additional discussion in the *Osborne* opinion bearing on this point. The suit was against Ohio officers for funds of the Bank that had been seized in the collection of a state tax that was invalid under *McCulloch v. Maryland*, 17 U.S. at 316. The sum involved, consisting of coin and notes in the amount of \$98,000, had been "retained . . . carefully in a trunk separate from the other funds in the state treasury." 22 U.S. at 822. The continuous segregation of the funds from the time of seizure was mentioned no fewer than eight times. *Id.* at 833-36, 845, 849, 852, 858. The obvious implication was that there could have been no recovery in the event of commingling, on the ground of the state's sovereign immunity.

<sup>162</sup> See the collection of cases listed in *Seminole Tribe*, 517 U.S. at 54 n.7.

<sup>163</sup> 178 U.S. 436, 448-49 (1900).

<sup>164</sup> 256 U.S. 490, 497-98, 500 (1921).

<sup>165</sup> See *id.* at 497-98.

<sup>166</sup> *Id.* at 497.

<sup>167</sup> 292 U.S. 313 (1934).

<sup>168</sup> *Id.* at 317-18.

<sup>169</sup> *Id.* at 320-21.

party, and that the consent of the United States to suit against it had always been required.<sup>170</sup> The crux of the opinion was as follows:

Manifestly, we cannot rest with a mere literal application of the words of section 2 of article 3, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suit against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also 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 question is whether the plan of the Constitution involves the surrender of immunity when the suit is brought against a State, without her consent, by a foreign State.<sup>171</sup>

The Court went on to show why, under the "plan of the convention," a state should not enjoy sovereign immunity when sued by the United States,<sup>172</sup> or when sued by a sister state in the Supreme Court.<sup>173</sup> On the other hand, the Court gave reasons why the constitutional scheme should not be deemed to subject a non-consenting state to suit by a foreign state.<sup>174</sup>

#### E. Alden Revisited

Although *Hans* and the cases just discussed made clear that state sovereign immunity exists independently of the Eleventh Amendment, in recent decades the Court, in what seems to have been careless usage, often spoke of the Eleventh Amendment as the source of the immunity in cases where the Amendment clearly did not apply.<sup>175</sup> This point was clarified by the Court in *Alden*:

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<sup>170</sup> *Id.* at 321.

<sup>171</sup> *Id.* at 322-23 (citations omitted).

<sup>172</sup> *Principality of Monaco*, 292 U.S. at 329. The Court noted that while jurisdiction in such a case "is not conferred by the Constitution in express words, it is inherent in the constitutional plan." *Id.* (citations omitted).

<sup>173</sup> *Id.* at 328-29.

<sup>174</sup> *Id.* at 330-32.

<sup>175</sup> E.g., *Seminole Tribe*, 517 U.S. at 54, 68-73; *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683-700 (1982). *Blatchford* was a suit by several Alaskan Native villages against an Alaskan state officer seeking an order requiring payment to them of money allegedly owed under a state revenue-sharing statute. See 501 U.S. at 775. The suit was deemed one

[W]e have . . . sometimes referred to the States' immunity as "Eleventh Amendment Immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. . . . Rather . . . the States' immunity is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Constitution or certain constitutional Amendments.<sup>176</sup>

#### F. Sovereign Immunity Conceived as Common Law

Sovereign immunity is widely understood by judges<sup>177</sup> and academic critics<sup>178</sup> to be a branch of the common law, and subject to ju-

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against the State. The Eleventh Amendment was not applicable by its terms, but the Court sustained a plea of sovereign immunity, stating as follows:

Despite the narrowness of its terms, since *Hans v. Louisiana* . . . we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

*Id.* at 779 (citations omitted & emphasis supplied). This seems to be an unexceptionable formulation of the law of sovereign immunity as it affects the states. Certainly, it does not look like a statement that the Amendment, as such, governs in contexts where by its terms it does not apply. Yet shortly following the quoted language, the Court declared that it was the Amendment that had been the basis for sustaining the finding of sovereign immunity in *Principality of Monaco*. See *id.* at 780-81; *supra* notes 167-174 and accompanying text. Further, the holding in *Blatchford* itself seems to have rested on the Eleventh Amendment. See 501 U.S. at 779-82. It was so understood by the dissenters. *Id.* at 788-89 (Blackmun, J., dissenting). This is incomprehensible, for if the states entered the Union with their "sovereignty intact," and are subject to suit (absent waiver) only if they gave their consent in the "plan of the convention," then their immunity does not derive from the subsequently-adopted Eleventh Amendment. It obviously follows that, as the Court said, the Amendment, within its stated compass, merely "confirms" a prior state of the law.

<sup>176</sup> *Alden*, 527 U.S. at 713. John Nowak has recently stated that the disavowal in *Alden* of reliance on the Eleventh Amendment was dishonest. See John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1094 (2000). He bases this argument mainly on his view that the *Alden* Court placed substantial reliance on *Hans*, which he still regards as an Eleventh Amendment decision. See *id.*

<sup>177</sup> The point has been vigorously maintained in some recent dissenting opinions by Supreme Court Justices. See *Alden*, 527 U.S. at 762-98 (Souter, J., dissenting); *Seminole Tribe*, 517 U.S. at 100-09 (Souter, J., dissenting).

dicial or legislative modification, like any other branch of the common law. Professor Martha Field has made the clearest exposition of this viewpoint.<sup>179</sup> Her reasoning is as follows: (1) Sovereign immunity was in existence as common-law doctrine immediately prior to adoption of the Constitution, and the Constitution left it untouched; (2) there was no consensus on the subject at the one time when the historical record shows it to have been considered—namely, during the debates on ratification; (3) the only constitutional provisions having any possible bearing on the subject are the jurisdictional clauses of Article III; and (4) it has been accepted that Article III by itself affords no basis for overruling sovereign immunity. For these reasons, she argued, the common-law doctrine of sovereign immunity has survived adoption of the Constitution.<sup>180</sup>

Concerning this argument, it may be helpful to distinguish two questions: (1) whether the sovereign may be sued without its consent as an aspect of the internal law of the particular jurisdiction, federal or state; and (2) whether the federal government has authority to override the sovereign immunity of the states. These questions are governed by different considerations (a point not noted by the critics). As will now be argued, the concept of sovereign immunity as common-law doctrine has little if any pertinence to the first, and no pertinence at all to the second.

### 1. Sovereign Immunity as Internal Law

The sovereign immunity law traditionally applied has none of the significant incidents of common-law doctrine. First, it is doubtful that even the English law of sovereign immunity at the time of the American Revolution can be meaningfully described as an aspect of the English common law. The term, common law, is stretched beyond its generally recognized meaning if it is said to embrace judicial acquiescence in Royal prerogatives. It would be much like saying that the acquiescence of the federal judiciary in the exclusive power of the President and the Senate in the making of treaties is an aspect of the federal common law.

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<sup>178</sup> E.g., Burnham, *supra* note 1, at 933–34; Field, *supra* note 1, at 522–38; Hovenkamp, *supra* note 1, at 2244–45; Jackson, *supra* note 1, at 75–84; Shapiro, *supra* note 1, at 69. See also Gibbons, *supra* note 1, at 1973 (“a narrow and malleable common law doctrine”).

<sup>179</sup> See Field, *Part I*, *supra* note 1, at 522–38.

<sup>180</sup> *Id.*

Second, if sovereign immunity is nevertheless regarded as common law, it is a unique kind of common law. The proposition that the sovereign may not be sued without its consent means that the consent must be that of the *sovereign*. In the American constitutional systems it is the legislative rather than the judicial branch that speaks for the sovereign, and it has never seriously been suggested otherwise. Certainly, it has never been thought that the judiciary can consent for the sovereign in the particular case. Yet if sovereign immunity is merely common-law doctrine, the judiciary can in effect consent in all cases, simply by abolishing the doctrine.<sup>181</sup>

Third, the notion of sovereign immunity as common law is ill-suited to a constitutional system that limits the power of government and confers rights upon people. In such a system, either the assertion of the immunity should prevail or it should not. The idea that courts should have power to decide this fundamental question one way or the other would be surprising to an intelligent person not versed in the law. For such judicial power to exist, it should be inferable from the constitution of the particular jurisdiction and success in finding such a constitution is most unlikely.

Fourth, traditionally, courts have decided the basic immunity issue in only one way—the government, as distinct from its officers, was never suable. This tends to show that the law they were applying was not common law at all, even if they called it that. Fifth, in response, presumably, to a changed public consensus on the propriety of suit against the government, American legislatures for the most part have consented to such suit in all but narrow circumstances.<sup>182</sup> If sovereign immunity were no more than common law, one would have expected courts to respond to the same public concerns. But, except as noted below,<sup>183</sup> they did not. Thus, on the federal level, where legislative consent to suit has proceeded in stages for over a century, the judiciary has never asserted authority to restrict the immunity along similar lines.

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<sup>181</sup> See *supra* note 120 (listing commentators who have argued for the use of judicial power to abolish sovereign immunity because judicial power is co-extensive with legislative power).

<sup>182</sup> See, e.g., HART & WECHSLER, *supra* note 71, at 1027–39 (legislation on the federal level).

<sup>183</sup> See *infra* notes 187–190 and accompanying text.



Currently courts, especially state courts, have continued to speak of sovereign immunity as an aspect of common-law doctrine.<sup>184</sup> For the reasons given above, the law traditionally applied has none of the significant incidents of common-law doctrine. On the other hand, it is evidence of a limitation on judicial authority that can have only a constitutional source.<sup>185</sup>

In the mid-twentieth century, there was a break, on the state level, with what had previously been universal judicial practice in this regard. Convinced that sovereign immunity was an aspect of the common law, a number of courts abolished it in whole or in part. Some of the cases involved states or their instrumentalities.<sup>186</sup> Others involved political subdivisions, whose claims to sovereign immunity seemingly did derive from the common law,<sup>187</sup> but the judicial language was usually broad enough to encompass states as well.<sup>188</sup> It is worth noting that in many cases the immunity was abolished only as to tort.<sup>189</sup> There is irony in this, for the most common ground for a tort claim is negligence, which, at least on the federal level, furnishes no basis for a constitutional claim.<sup>190</sup> Those states that have gone no further have left intact the immunity regarding constitutional violations, which is the problem of special concern to the academic critics.

## 2. Federal Judicial Power to Override State Sovereign Immunity

In the case of sovereign immunity as an aspect of the internal law of a particular jurisdiction, the governing law rests ultimately on the

<sup>184</sup> See, e.g., *Ballard v. Ypsilanti Township*, 577 N.W.2d 890, 895 (Mich. 1998); *Brown v. State*, 674 N.E.2d 1129, 1133 (N.Y. 1996).

<sup>185</sup> Cf. *Seminole Tribe*, 517 U.S. at 69 ("It . . . is noteworthy that the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment.").

<sup>186</sup> E.g., *Stone v. Ariz. Highway Comm'n*, 381 P.2d 107, 113 (Ariz. 1963) (concluding doctrine of sovereign immunity was judicially created and can be changed or abrogated by same judicial process (this means common-law doctrine)); *Colo. Racing Comm'n v. Brush Racing Assoc'n*, 316 P.2d 582, 585-86 (Colo. 1957) (citing *Boxberger v. State Highway Dep't*, 250 P.2d 1007, 1008 (Colo. 1952) (stating that "[the] doctrine of sovereign immunity originates through the course of unwritten common law"))).

<sup>187</sup> *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 463 (Cal. 1961); *Molitor v. Kaneland Cmty. Unit Dist. No. 302*, 163 N.E.2d 89, 96 (Ill. 1959). The immunity of political subdivisions from suit was not originally based on the theory that they were sovereign. See *Muskopf*, 359 P.2d at 459; see also *supra* note 186.

<sup>188</sup> Cf. *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 625 (Wis. 1962) (declaring, in this case against a city, that the abrogation ruling applied to all bodies within the state, including the state, counties, cities, etc.).

<sup>189</sup> E.g., *Muskopf*, 359 P.2d at 458; *Molitor*, 163 N.E.2d at 96; *Holytz*, 115 N.W.2d at 625.

<sup>190</sup> *Daniel v. Williams*, 474 U.S. 327, 332-33 (1986).

constitution of that jurisdiction. The question of federal judicial power to override state sovereign immunity is governed exclusively by the federal Constitution. On this point, the English experience is irrelevant, because pertinent only to the problem of English internal law. The extent of the federal judicial power, if any, to override state sovereign immunity is subsumed in the more basic issue of a federal power—legislative or judicial—to set aside state law. To the extent that provisions of the Constitution are self-executing, their implementation by the federal judiciary has never been thought to constitute an application of common law. When the Constitution is not self-executing and its implementation depends on legislative action, the action may be taken only pursuant to one or more of the enumerated powers of Congress. It would be anomalous in the extreme if the federal judiciary, in the administration of what it deems to be federal common law, should have a power to override state law comparable to that of Congress but exercisable in the absence of the type of constitutional limitations that circumscribe congressional action.<sup>191</sup>

### G. Congressional Power to Abolish State Sovereign Immunity

The question now to be considered is whether the original understanding is pertinent to the issue of federal *legislative* power. The Court has analyzed the congressional power to abolish state sovereign immunity under Article I and Section 5 of the Fourteenth Amendment. We now turn to an analysis of such powers.

#### 1. Under Article I

In *Parden v. Terminal Railway*,<sup>192</sup> the statute involved, adopted under the Commerce Clause, provided that suit could be brought against interstate railroads by employees claiming injury by reason of violation of the statute. The Court held that the state had impliedly consented to be sued in that it had undertaken operation of the railroad subsequent to enactment of the statute. The question of suit

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<sup>191</sup> The writer has contended elsewhere that the federal common law is best understood as the law applied in areas where state competence has been ousted by the Constitution or congressional action—areas in which neither the Constitution nor statutes happen to provide guidelines for the judiciary, with the result that federal courts must make up the law as best they can as controversies arise. Otherwise, in applying federal law, the federal courts can be seen as simply *implementing* the federal Constitution and statutes. See Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1080–81 (1967) [hereinafter Hill, *Law-Making Power*].

<sup>192</sup> 377 U.S. 184 (1964).

based on a theory of implied consent is an important one, and will be discussed in a separate section below.<sup>193</sup>

Subsequently, in *Pennsylvania v. Union Gas Co.*, also involving a statute based on the Commerce Clause, the Court ruled in effect that there was no need to find consent on a case-by-case basis. The Court reasoned that congressional power under that Clause "would be incomplete without authority to render States liable in damages,"<sup>194</sup> and, further, that the States "gave their consent *all at once*, in ratifying the Constitution containing the Commerce Clause rather than on a case-by-case basis."<sup>195</sup> This facile approach to the problem has been abandoned, presumably in light of the repeated declarations by the Court that consent to suit must be shown by unequivocal language.<sup>196</sup>

*Union Gas* was subsequently overruled in 1996 by *Seminole Tribe*.<sup>197</sup> This case invalidated a federal statute providing for suits against states that had been adopted under the Indian Commerce Clause. The holding was that Congress lacked such power under Article I. In *Alden v. Maine*,<sup>198</sup> where the Court again invalidated an Article I statute providing for suit against a state, the Court spoke more generally, emphasizing the incompatibility of such a statute with the original understanding on the place of state sovereign immunity in the constitutional scheme. It is submitted that the Court had ample basis for this disposition of the cases. While the ratification debates were focused on the federal judicial power, the original understanding embodied a conception of the role of the states in our federal system that, in the view of this writer, limits the power of Congress (putting aside for the moment Section 5 of the Fourteenth Amendment) in the same degree that it limits that of the federal judiciary.

Some additional remarks may be ventured here concerning the Commerce Clause. First, congressional power under that Clause has expanded enormously, in step with the enormous changes in the economy. Starting about fifty years ago, successive legislative measures under the Clause were judicially validated almost as a matter of course, under the rational basis mode of review.<sup>199</sup> The recent deci-

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<sup>193</sup> See *infra* text accompanying notes 252–261.

<sup>194</sup> *Union Gas*, 491 U.S. at 19.

<sup>195</sup> *Id.* at 20 (emphasis supplied).

<sup>196</sup> See *infra* note 252 and accompanying text (discussing state consent to suit).

<sup>197</sup> 517 U.S. at 72–73.

<sup>198</sup> 527 U.S. at 754, 759–60.

<sup>199</sup> This began with decisions validating legislation of the New Deal. *E.g.*, *NLRB v. Johns & Laughlin Steel Co.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).

sions in *United States v. Lopez*,<sup>200</sup> and *United States v. Morrison*,<sup>201</sup> marked an abrupt halt, but the full implications of these decisions remain to be seen. Challenges to legislation as exceeding the bounds of the Commerce Clause have been treated by the Court very much like challenges based on denial of economic due process. In effect, the rational basis test has been applied in both contexts, and that is understandable. But that test is ill-suited to resolving the question of congressional competence under the Commerce Clause when a competing constitutional principle is invoked to challenge such competence. The minority Justices do not expressly rely on the rational basis test to support breach of state sovereign immunity under the Commerce Clause, but it seems to this writer that the arguments they employ are essentially rational basis arguments.<sup>202</sup>

Second, it is anomalous to require more extensive enforcement of legislatively-created rights than of rights created by the Constitution itself. Given the constitutional status of state sovereign immunity, it would be odd if the Constitution sanctioned judicial enforcement against non-consenting states of a sub-constitutional right created by Congress, such as the right to overtime pay involved in *Alden*.<sup>203</sup> Suppose, however, that Congress tries to assure enforcement of a constitu-

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<sup>200</sup> 514 U.S. 549 (1995).

<sup>201</sup> 529 U.S. 598 (2000).

<sup>202</sup> *Union Gas* (since overruled) involved the federal superfund legislation (CERCLA), under which the federal government was authorized to clean up toxic sites and recover its costs from those responsible, including states. In that case, the United States sued Union Gas as a responsible party, and Union Gas in turn filed a third-party complaint against Pennsylvania, contending that the state was partially responsible. See 491 U.S. at 6. To show why Congress could override state sovereign immunity pursuant to its "plenary" power under the Commerce Clause, the Court made an argument based on what it conceived to be the practicalities of the situation. *Id.* at 15-16. It reasoned that for the United States to incur all cleanup costs in the first instance would impose upon it an undue financial burden. This burden would be relieved if private parties would engage in voluntary cleanups, and they would be encouraged to do so if they were free to sue states for partial reimbursement. *Id.* at 20-22. The writer believes this to be a "rational basis" argument.

*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* involved a federal statute authorizing suit against states for trademark violations. See 527 U.S. 666, 667-68 (1999). The dissenting opinion of Justice Breyer, foregoing reliance on Section 5 of the Fourteenth Amendment, argued that Article I supported the legislation. Justice Breyer emphasized the desirability of "legislative flexibility," *id.* at 701, to allow "the creation of incentive-based or decentralized regimes . . . assigning roles . . . not just to federal administrators, but to citizens . . ." *Id.* at 702. To withhold such power from Congress, he said, "threatens the Nation's ability to enact economic legislation needed for the future in much the way [as did] *Lochner v. New York* [198 U.S. 45 (1905)]." *Id.* at 701.

<sup>203</sup> See *Alden*, 527 U.S. at 711 (involving Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 (1994); alleging state probation officers violated the overtime provisions of FLSA and sued for compensation and liquidated damages).

tional right. Consider a possible statute in which Congress purports to find that non-payment of state bonds has harmful consequences for the national economy, and vests the federal courts with jurisdiction to make states pay. It is submitted that the Commerce Clause is an unlikely source of such authority, in view of the constitutional basis for state sovereign immunity.

More fundamentally, it is submitted that, whatever the scope of congressional power under Article I, it cannot be employed to set aside other provisions of the Constitution. In the section immediately below, it is contended that Congress lacks such power even under Section 5 of the Fourteenth Amendment.<sup>204</sup> If that contention is correct, the lack of such power under Article I follows a fortiori.

## 2. Under Section 5 of the Fourteenth Amendment

The first case to find congressional authority to abolish state sovereign immunity under Section 5 of the Fourteenth Amendment was *Fitzpatrick v. Bitzer*.<sup>205</sup> The suit had been instituted in a federal district court, and the state had relied on the Eleventh Amendment.<sup>206</sup> The

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<sup>204</sup> See discussion *infra* Part I.G.2.

<sup>205</sup> 427 U.S. 445, 456 (1976). In *Fitzpatrick*, the federal statute involved was Title VII of the Civil Rights Act of 1964, which forbids discrimination on the basis of "race, color; religion, sex, or national origin" and, by its express terms, applies to the states as employers. *Id.* at 447-48. Further, Congress had made clear its reliance on Section 5 of the Fourteenth Amendment. See *id.* at 458 (Stevens, J., concurring); see also *id.* at 453 n.9 (Rehnquist, J., majority opinion) (concluding that Congress exercised its powers under Section 5 in adopting the 1972 Amendments to Title VII, which extended coverage of Title VII to the states as employers). Section 5 legislation authorizing suits against states is of recent origin. For over one hundred years, Congress has exercised its implementation powers under the Civil War Amendments without breaching state sovereign immunity. See *Katzenbach v. Morgan*, 384 U.S. 641, 643, 658 (1966) (upholding a Section 5 statute that struck down a New York State literacy test that in effect disenfranchised large numbers of persons literate only in Spanish; the enforcement mechanism was embodied in a provision stating that "no person should be denied the right to vote" by reason of failure to meet the literacy requirement); *South Carolina v. Katzenbach*, 383 U.S. 301, 315-16, 337 (1966) (concluding that disputed portions of the Voting Rights Act of 1965, which provided for extensive federal interference with state election machinery with a view to ending practices that disenfranchised African Americans, were a valid means for carrying out the commands of the Fifteenth Amendment; the statute did not provide for suits against states and the question of sovereign immunity was not raised); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (involving a statute that provided for removal to federal court of certain cases involving civil rights where the problem was exclusion of African Americans from grand juries); *Civil Rights Cases*, 109 U.S. 3, 8 (1883) (involving a statute that provided for criminal and civil penalties against private persons guilty of racial discrimination in denial of access to places of public accommodation).

<sup>206</sup> See *Fitzpatrick*, 427 U.S. at 448-51.

Court held that, under Section 5, Congress could override state sovereign immunity despite the Eleventh Amendment.<sup>207</sup> Actually the Eleventh Amendment was not applicable in *Fitzpatrick*, where the state was not being sued by a citizen of another state.<sup>208</sup> The Court, however, said: "[W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana* . . . are necessarily limited by the enforcement provisions of section 5 of the Fourteenth Amendment."<sup>209</sup> The Court's reasoning in *Fitzpatrick* did not support its holding. The Court relied, as it said, on a "line of cases [that] sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States."<sup>210</sup> In the same vein, the Court added:

In [section 5] Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is *plenary* within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.<sup>211</sup>

A federal statute that provides for unconsented suit against a state obviously embodies a limitation on state authority. The state, however, argued that the Eleventh Amendment was a bar to adoption of the statute. The issue before the Court, which it failed to recognize, was whether Congress can supersede a constitutional provision (and "the principle that it embodies") that imposes a limitation on *federal* authority. After all, the Eleventh Amendment and its underlying principle forbid federal courts to exercise jurisdiction in specified circumstances.<sup>212</sup> The line of cases that the Court thought controlling is rep-

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<sup>207</sup> See *id.* at 456. Accordingly, retroactive benefits and attorneys fees were held to be recoverable from the state. *Id.* at 456-57.

<sup>208</sup> 427 U.S. at 457 (Brennan, J., concurring). Subsequently, the Court rendered a similar ruling in a case where the Eleventh Amendment did apply because the parties were from different states. See *Florida Prepaid*, 527 U.S. at 630-31.

<sup>209</sup> *Id.* at 456 (emphasis supplied).

<sup>210</sup> *Id.* at 455.

<sup>211</sup> *Id.* at 456 (emphasis supplied).

<sup>212</sup> The question of sovereign immunity in general, or the Eleventh Amendment in particular, was not raised in *Boerne*. The plaintiff had brought suit against the City of

resented by *Ex parte Virginia*,<sup>213</sup> where the Court upheld a federal statute prohibiting exclusion from state juries on the basis of race, and *Katzenbach v. Morgan*,<sup>214</sup> upholding a federal statute forbidding use of state literacy tests for voter qualification. These cases involved limitations on state authority.

In *Seminole*, the Court, with reference to *Fitzpatrick*, observed that "the Fourteenth Amendment was adopted well after adoption of the Eleventh."<sup>215</sup> In the same vein, a distinguished federal judge spoke of "the familiar premise that the Fourteenth Amendment trumps the Eleventh Amendment because the Fourteenth Amendment was adopted later in time."<sup>216</sup> As a later amendment, the Fourteenth undoubtedly supersedes the Eleventh insofar as inconsistent with it. A finding of inconsistency, however, should not be made lightly. If Congress, under section 5, is free to set aside the Eleventh Amendment, it is also free—in an indeterminate degree—to set aside other provisions of the Constitution, or at least those previously adopted. Any assumption that this follows because the Fourteenth was adopted later in time is unpersuasive, to put it mildly.

After the *Fitzpatrick* decision, the Court, in *City of Boerne v. Flores*, made clear, on the basis of numerous precedents, that congressional power "to enforce" Section 5 of the Fourteenth Amendment extends to measures of remedy but not of substance.<sup>217</sup> Further, the Court concluded that that legislation which "alters the meaning of [a constitutional clause] cannot be said to be enforcing the . . . Clause."<sup>218</sup> If Congress may not alter the meaning of a constitutional clause with a view to effectuating the rights afforded by that clause,<sup>219</sup> it decidedly lacks power to achieve this objective by superseding other provisions of the Constitution. In *Fitzpatrick*, the Court was oblivious to limita-

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Boerne in a federal district court for denial of a permit. A municipality is not a state instrumentality and may not invoke sovereign immunity as a bar to a federal claim. *See infra* Part I.I.

<sup>213</sup> 100 U.S. 339 (1880).

<sup>214</sup> 383 U.S. 301 (1966).

<sup>215</sup> 517 U.S. 44, 65 (1996).

<sup>216</sup> *Chaves v. Arte Publico Press*, 157 F.3d 282, 296 (5th Cir. 1998) (Judge John Minor Wisdom, dissenting).

<sup>217</sup> 521 U.S. 507, 519 (1997); *see also* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

<sup>218</sup> *Boerne*, 521 U.S. at 519. Justice O'Connor, joined in dissent by Justice Breyer, agreed that the "Court's careful and historical analysis" did indeed establish this principle. *Id.* at 545. The remaining dissenter, Justice Souter, did not dispute the point in his own dissenting opinion. *Id.* at 566.

<sup>219</sup> It was on this ground that relief was denied in *Boerne*. *See id.* at 536.

tions. The power of Congress under Section 5 was said to be "plenary,"<sup>220</sup> and the overriding of the Eleventh Amendment seemed to follow from that.<sup>221</sup>

Two years after *Fitzpatrick*, the Court followed that decision in upholding an award of costs against a state.<sup>222</sup> But statutes authorizing suits against states have been struck down in five subsequent cases.<sup>223</sup> These invalidations have followed in part from inattention to the implications of the Due Process Clause and in part from misapplication of the "congruence and proportionality" test of *Boerne*.<sup>224</sup>

In *Boerne*, the Court observed that Congress may adopt remedial measures under Section 5 "even if in the process it prohibits conduct

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<sup>220</sup> 427 U.S. at 456. Only Justice Stevens was troubled by this aspect of the opinion. In his concurring opinion, however, he said no more than this: "I question whether § 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense. I believe the defense should be rejected for a different reason." *Fitzpatrick*, 427 U.S. at 458 (Stevens, J., concurring). He then advanced several reasons, among them his conviction that Congress possessed ample power to adopt such a statute under Article I. *Id.* In his separate concurring opinion, Justice Brennan said nothing about the Court's reasoning, relying on his own understanding, advanced in his earlier dissenting opinions and then for the Court in *Union Gas*, that the states had surrendered their immunity with adoption of the Constitution. *Id.* at 457-58 (Brennan, J., concurring). Under his views the subsequent adoption of the Eleventh Amendment was irrelevant.

<sup>221</sup> See Fallon, *supra* note 153, at 1199-1200 (contending that the *Fitzpatrick* Court's "conclusion that section five . . . authorizes Congress to abrogate the states' constitutional immunity reflects a judgment about historical intent that is by no means obvious and is probably mistaken").

<sup>222</sup> *Hutto v. Finney*, 437 U.S. 678 (1978). In *Hutto*, the Court said that "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity." 437 U.S. 678, 695 (1978). But the authorities cited for this point all involved suits by one state against another under the Supreme Court's original jurisdiction. See *id.* (citing *Missouri v. Iowa*, 48 U.S. (7 How.) 660, 681 (1849); *North Dakota v. Minnesota*, 263 U.S. 583 (1924) (collecting cases)). Sovereign immunity has never been recognized in such cases, for otherwise the constitutional creation of this important head of jurisdiction would be meaningless.

The *Hutto* Court, however, cited one decision that was relevant: namely, *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927). In this case, a criminal conviction was reversed, with costs against the state. See *Fairmont*, 275 U.S. at 71-72. Minnesota contended that costs could not be imposed upon a state unless consented to by its legislature. But the Court declared that it had been taxing costs against states routinely using various court rules and statutes as authority. *Id.* at 74-77. Further, the Court said that "[t]hough a state is sovereign in many respects, the state when a party to litigation in this court loses some of its character as such." *Id.* at 74. The states seem never to have lost this "character" except as regards imposition of costs.

<sup>223</sup> *Board of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (Feb. 21, 2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

<sup>224</sup> 521 U.S. 507, 520 (1997).



which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'<sup>225</sup> On the other hand, if a Section 5 statute is to be sustained as remedial, the Court concluded that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation in effect."<sup>226</sup> As an example of valid remedial legislation that has intruded on state constitutional prerogative, the Court noted the problem of state literacy tests.<sup>227</sup> While the Constitution vests states with control over voter qualifications, the Court has upheld Section 5 legislation striking down such tests.<sup>228</sup> Thus, the Court upheld a statute setting aside New York's requirement of literacy in English because its effect was to deny the right to vote to "large segments" of the State's Puerto Rican population.<sup>229</sup> Had the number of persons adversely affected by the literacy requirement been insubstantial, the congressional intrusion on New York's constitutional prerogative would presumably have failed *Boerne's* proportionality test.

Now consider the *Boerne* test as it was applied in *Kimel v. Florida Board of Regents*.<sup>230</sup> This case involved the Age Discrimination in Employment Act of 1967 ("ADEA"), which prohibits an employer, including a state, from failing to or refusing to hire or to discharge any individual because of such individual's age.<sup>231</sup> The constitutionality of this statute under Article I had been already been decided.<sup>232</sup> The question in *Kimel* was whether Congress, acting under Section 5, could validly subject the states, as employers, to the liability created by the ADEA.<sup>233</sup> The Court noted that age is not a suspect classification, so that discrimination on the basis of age does not violate the Equal Protection Clause of the Fourteenth Amendment so long as the classification is reasonably related to a state's legitimate interest (i.e.,

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<sup>225</sup> *Id.* at 518 (quoting *Fitzpatrick*, 427 U.S. at 455).

<sup>226</sup> *Id.* at 520.

<sup>227</sup> *Id.* at 518.

<sup>228</sup> *See id.* (listing cases where congressional voting rights provisions were upheld under Congress' power to enforce the Fourteenth and Fifteenth Amendments).

<sup>229</sup> *See Katzenbach*, 384 U.S. at 641.

<sup>230</sup> 528 U.S. 62 (2000).

<sup>231</sup> 29 U.S.C. § 623(a) (1) (1994).

<sup>232</sup> *EEOC v. Wyoming*, 460 U.S. 226, 243-44 (1983) (concluding that the extension of the ADEA to cover state and local government employers was a valid exercise of Congress' powers under the Commerce Clause).

<sup>233</sup> *Kimel*, 528 U.S. at 66-67.

if it meets the rational basis test).<sup>234</sup> Further, the Court found that the ADEA "prohibits substantially more state employment decisions and practices than would likely be held to be unconstitutional under the applicable equal protection, rational basis standard."<sup>235</sup> That being so, the Court concluded that the statutory remedy was excessive under the proportionality rule of *Boerne*.<sup>236</sup>

Unaccountably, the question whether the state had violated the Due Process Clause in rejecting a claim under the statute was not an issue in the case. The ADEA had created a cause of action against violators. This cause of action was property, protected against state impairment under the Due Process Clause.<sup>237</sup> The Court's determination of lack of proportionality rested on its conclusion that only a small number of the rights created by the statute were protected by the Fourteenth Amendment. In fact, however, all the rights created by the statute were protected by the Amendment's Due Process Clause.

A case in all fours with *Kimel* is *Board of Trustees of University of Alabama v. Garrett*, where the Court invalidated the Americans with Disabilities Act of 1990 ("ADA") insofar as the Act authorized suit against the states.<sup>238</sup> And a comparable case is *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, which involved a suit against Florida for patent infringement.<sup>239</sup>

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<sup>234</sup> *Id.* at 83-84.

<sup>235</sup> *Id.* at 86.

<sup>236</sup> *Id.* at 82-83, 86.

<sup>237</sup> For a statutory entitlement that was deemed a cause of action, see *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-32 (1982) (holding that employee's right to use the State's Fair Employment Practices Act's adjudicatory procedures was property protected by the Due Process Clause). Cf. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950) (invalidating state procedural law that impaired a non-statutory cause of action). For a collection of cases that have held diverse interests to constitute property, see *Logan*, 455 U.S. at 430-31.

<sup>238</sup> 121 S. Ct. at 955.

<sup>239</sup> In *Florida Prepaid*, the Section 5 statute abrogating state sovereign immunity in patent cases was also invalidated as excessive under the proportionality test. 527 U.S. at 645-47. The opinion is tortuous, but the Court seems to have had two reasons for this holding. One was that most cases of state patent infringement are not intentional, and as such do not rise to the level of unconstitutionality. *Id.* at 645. To subject the state to liability for all cases of patent infringement was therefore deemed to be disproportionate. *Id.* at 645-46. But the plaintiff had relied on the Due Process Clause. *Id.* at 641-42. And the Court had said that patents were property rights protected by the Clause. Further, the Court stated that "we know of no reason why Congress might not legislate against their deprivation . . . under § 5 of the Fourteenth Amendment." *Id.* at 642. If all patent violations are redressable by virtue of the Due Process Clause, there is seemingly no basis for invoking the proportionality test.

The foregoing decisions are questionable if *Fitzpatrick*, which declared that Congress has "plenary" authority under Section 5, represents the governing law. It does not necessarily follow that they are wrong in the result.

The Court has decided that Congress cannot abrogate state sovereign immunity under Article I, but that it can do so under Section 5. There is a resulting anomaly in that property rights created under the Commerce Clause seemingly become enforceable against the

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But the Court did invoke it, on an additional ground that was more persuasive. The legislative record showed that in virtually all instances the states did afford remedies for their own patent infringements, and that the remedies were almost invariably adequate. *Florida Prepaid*, 527 U.S. at 640-41. The Court determined that congressional concern was not so much with the adequacy of these remedies but their nonuniformity. *Id.* at 644. But this problem, the Court ruled, could be addressed by Congress only under its Article I power, which did not extend to abrogation of state sovereign immunity. *Id.* at 645, 647-648. Construing the statute as having no purpose other than to ensure adequate remedies, the Court concluded that in the circumstances resort to Section 5 to work such abrogation was excessive under the proportionality principle. *Id.* at 645-47.

In *College Savings*, the Court did not deal with *Boerne's* proportionality test, but took, it is submitted, a confused view of the scope of the Due Process Clause. See 527 U.S. at 675. The case involved a Section 5 statute authorizing suit against a state for violation of Section 43(a) of the Lanham Act, which outlaws false advertisements by a maker concerning its own products. The Court said that a competitor could not assert a property interest that was "impinged upon" by such advertising. *Id.* While this was true before adoption of the Act, it was not true afterward, for the Act gives competitors a cause of action for damages arising out of a violation. See 15 U.S.C. § 1122(c) (1994). Further, the Court narrowed the conception of property, and thereby narrowed the scope of substantive due process. Thus, the Court said that the claim under the Lanham Act was not property because a "hallmark of a protected property interest is the right to exclude others." *College Savings*, 527 U.S. at 673. For this proposition the Court relied on a statement in *Kaiser Aetna v. United States* to the effect that "one of the most essential" attributes of property is the right to exclude others. *Id.* (citing *Kaiser*, 444 U.S. 164, 176 (1979)). This language in *Kaiser* was taken out of context. In *Kaiser*, the Court was insisting that a right of exclusion could not be destroyed by the government without compensation. 444 U.S. at 180. If the right to exclude is an indispensable attribute of property rights generally, then not only choses in action, but also contractual interests generally do not constitute property. Yet the Court had previously made clear that a chose in action is "a protected property interest in its own right." *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996). And it had previously declared that "contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid." *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977).

Professor Woolhandler read *College Savings* and *Florida Prepaid* as precluding action under Section 5 to compel states to compensate for interference with "new property," by which she means a "statutorily created cause of action or expectation of compliance with the law by the state." Ann Woolhandler, *Old Property, New Property*, 75 NOTRE DAME L. REV. 919, 935 (2000). But in *College Savings* the Court said that a chose in action is not property at all because it carries no right of "exclusion." Whether this announced legal principle will stand may be doubted. And it may be questioned whether the defeat of an expectation is actionable unless the expectation constitutes a property interest.

States under Section 5. The Supreme Court has never come to grips with this anomaly. The Fifth Circuit Court of Appeals, however, has.

In *Chavez v. Arte Publico Press*, the plaintiff, invoking several Section 5 statutes,<sup>240</sup> sued a state university for copyright infringement and violation of the Lanham Act.<sup>241</sup> The plaintiff's claim that her rights were protected by the Due Process Clause was clearly presented. The court confronted the question whether Section 5 legislation may be relied on to enforce rights created Article I.<sup>242</sup> Judge John Minor Wisdom, in dissent, answered this question in the affirmative: "Congress can combine its authority under Article I and section 5 of the Fourteenth Amendment to achieve a result that would not be possible in the absence of that combination."<sup>243</sup> The majority of the judges disagreed. They argued that rights created Article I can easily be dressed up in due process clothes if that is all it takes to render them enforceable under Section 5.<sup>244</sup> They said that even the statute involved in *Seminole Tribe* itself was amenable to "this style of constitutionalization."<sup>245</sup> To allow Article I rights to be enforced against states under Section 5, concluded the court, "would require us to ignore the result in *Seminole [Tribe]*."<sup>246</sup>

This view of the matter would severely limit the scope of *Fitzpatrick*.<sup>247</sup> But that decision, as previously argued, was a dubious

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<sup>240</sup> 15 U.S.C. § 1122, 17 U.S.C. §§ 501, 511 (1994).

<sup>241</sup> 157 F.3d 282, 284-85 (5th Cir. 1998).

<sup>242</sup> *Id.* at 287.

<sup>243</sup> *Id.* at 297 n.53 (Wisdom, J., dissenting).

<sup>244</sup> *See id.* at 289-90.

<sup>245</sup> *Id.* at 290; *see supra* Part I.A.2.b (discussing *Seminole Tribe*).

<sup>246</sup> *Chavez*, 157 F.3d at 290.

<sup>247</sup> Illustrating a possible application is *United States v. Morrison*, 529 U.S. at 589. This case involved a Section 5 statute, Violence Against Women Act, based on congressional findings that battered women suing for damages had suffered "gender-based disparate treatment by state authorities," *id.* at 624, through complicity in the use of "erroneous stereotypes and assumptions" permeating state proceedings in such cases. *Id.* at 620. The remedy that Congress had provided was creation of a federal cause of action against the persons doing the battering, with concurrent jurisdiction in the federal and state courts. *See id.* at 605-08. As a practical matter, it is difficult to see how this would have improved the situation, but Congress evidently thought it would, and the Court did not dispute Congress in this regard. The Court invalidated the statute for two reasons. First, the Court concluded that the statute was beyond the power of Congress under the Commerce Clause. *Id.* at 617-18. Second, in regard to congressional power under Section 5 of the Fourteenth Amendment, the Court concluded that the statute was incompatible with the *Boerne* proportionality rule for the reason that the statute was "not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe . . ." *Id.* at 626. For this point, the Court relied on the *Civil Rights Cases*, where the opinion stated that proper federal legislation to enforce constitutional rights against delinquent

one.<sup>248</sup> If the *Fitzpatrick* result is constitutionally sustainable, it is not on any ground advanced by the Court.

### H. Legislative Consent to Suit

#### 1. Congressional Consent

The Court has shown increasing reluctance to read a federal statute as a consent to sue the United States. Thus, it recently stated that such consent must be "unequivocally expressed in statutory text . . . and will not be implied."<sup>249</sup> It is submitted that the Court's resistance to a finding of consent (arguably excessive in any event) is inappropriate in the case of federal statutes. While sovereign immunity is an aspect of the constitutional scheme, so too is the plenary power of Congress to waive it for the United States. Construing the exercise of this power with excessive strictness is to thwart effectuation of the congressional will without advancing any constitutional purpose.<sup>250</sup>

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states is "corrective in its character, adapted to counteract and redress the operation of . . . prohibited [s]tate laws or proceedings or proceedings of [s]tate officers." *Id.* at 635 (quoting *Civil Rights Cases*, 109 U.S. at 18). But this language was a general description of Section 5 legislation, and did not purport to be a specification of the remedies that Congress could properly prescribe in such legislation. The statute involved in the *Civil Rights Cases* did no more than outlaw discriminatory conduct by private persons, and prescribe civil and criminal penalties for violators. The statute was not invalidated because of the nature of the remedies it provided; it was invalidated because it made no reference to state violations of the Fourteenth Amendment and was not "predicated on any such view." 109 U.S. at 14. Nothing was said of lack of proportionality. The statute simply did not have a constitutional purpose, inasmuch as it was not addressed to state action.

In *Morrison*, where there was a claim of state official involvement in the discriminatory practices complained of, the Section 5 statute had provided a federal forum as a refuge from such practices. As just noted, the Court held the statute to be fatally defective because this remedy did not in any way act upon state officers. *See Morrison*, 529 U.S. at 618-26. In effect, this was a holding that the Section 5 remedy did not go far enough. The writer can find no rational basis for a requirement that, to pass constitutional muster, a Section 5 statute must substantially discombobulate a state or its officers. A clear precedent for upholding the statute in *Morrison* was *Strauder v. West Virginia*, where the Court sustained a Section 5 statute that did no more than authorize removal from a state court to a federal court when it was claimed that certain civil rights were unenforceable in the state court. *See* 100 U.S. 303, 312 (1879). In *Morrison*, however, it is not clear that the plaintiff's grievance related to unconstitutional conduct.

<sup>248</sup> *See supra* notes 205-221 and accompanying text.

<sup>249</sup> *Lane v. Pena*, 518 U.S. 187, 192 (1996) (internal citations omitted) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34, 37 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

<sup>250</sup> *Cf. HART & WECHSLER, supra* note 71, at 1041 (questioning whether waivers of immunity in federal statutes should "be construed, if not liberally, at least sensibly—with a

On another footing is the Court's reluctance to find a congressional purpose to overrule state sovereign immunity. The Court, as it has said, adopted a "stringent test" in determining whether Congress intended to abrogate state immunity, because "that abrogation of sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,' . . . placing a considerable strain on '[t]he principles of federalism that inform Eleventh Amendment doctrine.'"<sup>251</sup> This same consideration does not apply in the case of congressional waiver of federal sovereign immunity.

## 2. State Legislative Consent

While constitutional considerations counsel greater reluctance to find state legislative consent, the Supreme Court is unduly rigid in its insistence that a state consents to suit only if its legislature has made that purpose clear "by the most express language or by such overwhelming implications from the text as (will) leave no room for any other reasonable construction."<sup>252</sup> If, though such a statement is lacking, the available state materials suggest that the state courts would probably construe the statute as a waiver, it would be perverse for the federal courts to conclude otherwise. In *Edelman v. Jordan*, involving a joint federal-state welfare program, the Court held that the State's assertion of sovereign immunity under the Eleventh Amendment barred a suit against it in a federal court by a recipient for back benefits withheld in violation of federal law.<sup>253</sup> Applying its clear-statement rule, the Court rejected an argument that the State had impliedly consented to suit in federal court by participation in the program through which the federal government provided assistance for the operation by the State of a public aid system.<sup>254</sup> Furthermore,

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sympathetic assumption of congressional intent to introduce a regime of law infused with a spirit of equity?").

<sup>251</sup> *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (internal citations omitted); see also Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1963, 1969-71 (1994) [hereinafter *Clear Statement*].

<sup>252</sup> *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). Similarly, the Court has required that federal statutes overriding state sovereign immunity manifest that purpose by a "clear statement." See Note, *Clear Statement*, *supra* note 251, at 1962-63.

<sup>253</sup> 415 U.S. at 678.

<sup>254</sup> See *id.* at 673-74. In partial response to this problem, in 1986, Congress provided by statute that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . any . . . Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a) (1) (1994). The Supreme Court, in dictum, and speaking evidently of accep-

the Court did so without inquiry into what the state's law on the subject might be.

In partial response to this problem, Congress in 1986 provided by statute that "[a] State shall not be immune under the Eleventh Amendment . . . from suit for a violation of . . . any . . . Federal statute prohibiting discrimination by recipients of Federal financial assistance."<sup>255</sup> The Supreme Court, in dictum, and speaking evidently of acceptance of a conditional federal grant, has called this "an unambiguous waiver of the . . . immunity."<sup>256</sup> The lower federal courts have imposed liability on states accordingly.<sup>257</sup>

It should be noted that congressional power to impose conditions on grants of assistance is not unlimited.<sup>258</sup> One need not accept the result in *New York v. United States*, to acknowledge the justice of the Court's observation that without limits "the spending power could render academic the Constitution's other grants and limits of federal authority."<sup>259</sup> So far as is here pertinent, conditions must be "reasonably related to the federal interest" in the grant.<sup>260</sup> The Supreme Court has also recognized that although a state can avoid onerous conditions by declining the federal grant, the circumstances may be such as

tance of a conditional federal grant, has called this "an unambiguous waiver of the . . . immunity." *Lane*, 518 U.S. at 200. The lower federal courts have imposed liability on states accordingly. *E.g.*, *Sandoval v. Hegan*, 197 F.3d 484 (11th Cir. 1999), *cert. granted sub nom. Alexander v. Sandoval*, 530 U.S. 1305 (2000), and *rev'd on other grounds* No. 99-1908, 2001 WL 408983 (U.S. Apr. 24, 2001).

The authority of Congress to spend for the general welfare is not confined to such objects as are within the purview of congressional authority under the specifics of Article I, Section 8. *See United States v. Butler*, 297 U.S. 1, 65-66 (1936); *see also* Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1111-13 (1987) (demonstrating that it is exceedingly difficult to find actual instances of spending to achieve objects beyond the reach of Congress under its specific powers). One need not accept the result in *New York v. United States*, to acknowledge the justice of the Court's observation that without limits "the spending power could render academic the Constitution's other grants and limits of federal authority." 505 U.S. 144, 167 (1992); *see also Butler*, 297 U.S. at 66-67 (discussing the need for limits). So far as is here pertinent, conditions imposed on state instrumentalities must be "reasonably related to the federal interest" in the grant. *Massachusetts v. United States*, 435 U.S. 444, 461 (1978). The Supreme Court has also recognized that although a state can avoid onerous conditions by declining the federal grant, the circumstances may be such as to place undue pressure on the state in making that choice. *See South Dakota v. Dole*, 483 U.S. 203, 211 (1987). So far as the writer is aware, the Supreme Court has never found the conditions attached to a grant excessive.

<sup>255</sup> 42 U.S.C. § 2000d-7(a) (1994).

<sup>256</sup> *Lane*, 518 U.S. at 200.

<sup>257</sup> *E.g.*, *Sandoval*, 197 F.3d at 500.

<sup>258</sup> *See supra* note 254.

<sup>259</sup> 505 U.S. 144, 167 (1992). *Butler* also spoke of the need for limits. 297 U.S. at 66-67.

<sup>260</sup> *Massachusetts v. United States*, 435 U.S. at 461.

to place undue pressure on the state in making that choice. In *South Dakota v. Dole*, the Court said:

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." . . . Here, however, . . . all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs.<sup>261</sup>

### I. Local Subdivisions

From our beginnings as a nation, it has been understood that cities, counties, and other subdivisions or agencies have no entitlement to a claim of sovereign immunity because they do not have the attributes of sovereignty.<sup>262</sup> This at least is the rule when the suit is based on asserted violations of federal law. In many states, local subdivisions are not suable for violations of local law, usually but not always on the theory that sovereign immunity applies as a matter of state law.<sup>263</sup>

## II. THE SOVEREIGN IMMUNITY OF THE UNITED STATES

The first holding that sustained the sovereign immunity of the United States came in *United States v. McLemore*,<sup>264</sup> and this position is one from which the Court has never swerved.<sup>265</sup>

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<sup>261</sup> 483 U.S. 203, at 211 (1987). So far as the writer is aware, the Supreme Court has never found the conditions attached to a grant excessive.

<sup>262</sup> JACOBS, *supra* note 111, at 108-09. Fletcher has observed that this was the common understanding in the 1790s. Fletcher, *Historical Interpretation*, *supra* note 1, at 1100-01.

<sup>263</sup> E.g., *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); PETER H. SCHUCK, *SUING GOVERNMENT* 206-07 (1983).

<sup>264</sup> 45 U.S. (4 How.) 286 (1846). For earlier recognition of the immunity, see *United States v. Clarke*, 33 U.S. (8 Pet.) 436, 444 (1934).

The word "all" appears in Article III's provision for jurisdiction in certain types of cases (for example, "all cases of Admiralty and Maritime jurisdiction"), but does not appear in the clause, "controversies to which the United States shall be a party." On this basis, argument was made in *Glidden v. Zdanok*, 370 U.S. 530 (1962), that the United States can be a party only as plaintiff, and that jurisdiction is lacking in any case in a federal court where it is named as a defendant, even if it consents to suit. The Court rejected the argument, declaring that what protects the United States from suit is the general principle of sovereign immunity and that accordingly it is suable with its consent.

<sup>265</sup> A recent holding on the point is *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 555 (1999).



The immunity of the federal government seems not to have drawn attention in the ratification debates nor generally during the Constitution's formative period. The constitutional and statutory provisions endowing the federal judiciary with jurisdiction in cases to which the United States was a party did not lead to discussion regarding the suability of the United States. Nor was there litigation raising that issue, though it is possible that such litigation was headed off by early adoption of the Eleventh Amendment, which reflected a strong bias in favor of sovereign immunity generally.

The critics of sovereign immunity have focused almost exclusively on the doctrine in its application to the states. Some of their basic arguments have equal pertinence on the federal level, namely (1) that the doctrine was not meant to protect from claims founded on federal law, and (2) that sovereign immunity is at most an aspect of the common law. In the foregoing pages the writer has attempted to refute these arguments.<sup>266</sup>

### III. THE WRONGDOING OFFICER

#### A. *Ex parte Young*

##### 1. Trespassory Conduct

Traditionally, the officer acting without valid authority was personally liable for acts that, if committed by a private person, would have been deemed trespassory at common law. When damages were assessed against the officer, it was for the commission of a common-law tort. When an injunction was granted, it was to restrain the commission of a common-law tort. This was the law in England, and it was the law on both the federal and state levels before the decision in *Ex parte Young*.<sup>267</sup>

It has been contended that *Ex parte Young* represented a departure from this basic pattern.<sup>268</sup> In that case, the Court concluded that the Attorney General of Minnesota could be enjoined from instituting a proceeding in the state courts to enforce the terms of a regulatory

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<sup>266</sup> See discussion *supra* Parts I.A.2-3, I.F.

<sup>267</sup> 209 U.S. 123 (1908); *Pennoy v. McConaughy*, 140 U.S. 1, 9-18 (1891); *In re Ayers*, 123 U.S. 443, 500-02, 507 (1887); *Poindexter v. Greenhow*, 114 U.S. 270, 288-91 (1885); see also *Young*, 209 U.S. at 198-99 (Harlan, J., dissenting); Jaffe, *supra* note 5, at 9-29 (discussing in detail suits against officers in England and United States).

<sup>268</sup> HART & WECHSLER, *supra* note 71, at 1065; JACOBS, *supra* note 111, at 130-42.

statute alleged to be unconstitutional.<sup>269</sup> Argument has been made that the Attorney General's readiness "to prosecute for conduct in violation of state law was probably not tortious under traditional common law concepts."<sup>270</sup> But if the state law was unconstitutional, enforcement of that law would have been trespassory. Institution of the enforcement proceeding was an integral part of a process that, uninterrupted, could have culminated in confiscatory rates or statutory penalties of imprisonment and fine.<sup>271</sup> Officers are always subject to personal liability for such conduct. But the Court dealt with a larger concern in *Ex parte Young*. As the Court put it, whether the conduct was trespassory turned on whether the statute was "void because unconstitutional."<sup>272</sup> Authority under state law is of no avail, the Court said, when the "officer in proceeding [pursuant to such authority] comes into conflict with the superior authority of the Constitution."<sup>273</sup> If valid authority is lacking, the officer is liable for the trespass as any private person would be for the same conduct.<sup>274</sup> But is liability in tort an essential feature of the *Ex parte Young* doctrine as it has evolved? Seemingly not, as will be shown below.

## 2. Non-Trespassory Conduct

Participation of state officers in maintenance of a segregated school system is not readily characterized as trespassory. By way of contrast, consider the government officers who operate a prison under inhumane conditions. Ordinarily, involuntary confinement is justified under the valid judgment of the sentencing court. But the justification fails when prison conditions do not meet minimal constitutional standards, and at that point continued confinement can arguably be viewed as trespassory. Educational segregation does not lend itself to such characterization. Yet the Court has relied on *Ex parte Young* in desegregation suits against state officers.<sup>275</sup>

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<sup>269</sup> See *Young*, 209 U.S. at 148, 159-61, 168.

<sup>270</sup> HART & WECHSLER, *supra* note 71, at 1065.

<sup>271</sup> See *Young*, 209 U.S. at 127-28. A similar point is made in Jaffe, *supra* note 5, at 28.

<sup>272</sup> *Young*, 209 U.S. at 159.

<sup>273</sup> *Id.* at 159-60. If the governing law is valid, suit against the officer who acted without authority (as when the officer misread the statute) presents a different problem. See discussion *infra* Part II.B; see also *infra* text accompanying note 436 (concerning suits founded on an officer's misreading of a contract).

<sup>274</sup> *Young*, 209 U.S. at 160.

<sup>275</sup> See *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 228 (1964).

Other cases of this type are not readily found in the Supreme Court Reports, but comparable situations exist, though seemingly uncommon. Thus, impairment of voting rights through unconstitutionally constituted legislative districts does not necessarily call for trespassory conduct on the part of election officials. Yet these officials—not the federal and state governments—are the named defendants in such cases.<sup>276</sup> In such cases (and in the desegregation cases) claimants do not ask to be let alone—as when trespassory conduct takes place or is threatened—but what they seek is somewhat similar—not to be singled out for denial of constitutional rights.

*Ex parte Young* has also been invoked to secure statutory benefits unlawfully denied by government officers, as in the case of the future benefits involved in *Edelman v. Jordan*.<sup>277</sup> In this instance, too, the official conduct is not trespassory.<sup>278</sup> Whether or not the official con-

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<sup>276</sup> E.g., *Reynolds v. Sims*, 377 U.S. 533, 537 & n.2 (1964). Sometimes officers are seemingly sued in their official capacities. Cf. *Wesberry v. Sanders*, 376 U.S. 1, 3 (1964) (bringing action asking that a Georgia voting statute be declared invalid and that the Governor and Secretary of State of Georgia be enjoined from conducting elections under it). This practice goes unchallenged. In any event, suit never seems to be brought against the states themselves or their executive departments.

<sup>277</sup> See *Edelman*, 415 U.S. at 663–72.

<sup>278</sup> In *Seminole Tribe*, the Court invalidated a federal statute, adopted under the Indian Commerce Clause, that authorized suit against a state. 517 U.S. at 47. But in that case, the tribe had sued not only the state but also its governor, and one of the issues was whether the suit against the latter could be maintained under the *Ex parte Young* doctrine. *Id.* at 73. With regard to that aspect of the case, it is necessary to consider provisions of the statute that were not mentioned in the earlier discussion. Under the statute, a state permitting gaming activity by others was obliged to permit gaming activity to be conducted by Indian tribes upon Indian lands, in accordance with the conditions established in a compact entered into by the tribe and the state. *Id.* at 49 (citing 25 U.S.C. § 2710(d) (3) (A) (1994)). The statute provided that, upon application by a tribe, “the State shall negotiate with the Indian tribe in good faith to enter into such a compact.” *Id.* The statute further provided that if a state failed in this obligation, the federal district court in which an enforcement action was brought should try to get the parties to agree. *Id.* at 49–50 (citing 25 U.S.C. § 2710(d) (7) (B) (ii)–(vii)). That failing, the parties were to negotiate further with the aid of a court-appointed mediator, in accordance with a detailed procedure set out in the statute. *Seminole Tribe*, 517 U.S. at 50. If that also failed, the Secretary of the Interior was to establish the conditions under which gaming was to be conducted. *Id.*

A divided Court decided that the *Ex parte Young* action against the governor could not be maintained, but neither side suggested that the *Ex parte Young* remedy was unavailable to secure a benefit conferred by a federal statute. See *id.* at 73–76 & n.17; *id.* at 169–82 (Souter, J., dissenting). The Court held the remedy to be unavailable in this case because of its view that the special statutory remedy was meant by Congress to be the exclusive one. See *id.* at 73–76 & n.17. Preliminarily, it may be observed that, when a constitutional violation is charged, the power of Congress to narrow the scope of the judicial remedy is limited, because the remedy must afford adequate implementation of the particular constitutional provision involved, and as to that the Supreme Court has the last word. See

generally Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). In the case of a federal statute, Congress may limit judicial remedies as it pleases, barring of course limitations on constitutional rights such as procedural fairness and equal protection of the law. The *Seminole Tribe* dissenters did not dispute this notion. They insisted, however, that the special statutory procedure could be followed as readily in an action against the governor as in an action against the state. 517 U.S. at 180-81 (Souter, J., dissenting). Further, they argued that it was implausible to attribute to Congress an intent that the *Ex parte Young* route should be unavailable, since Congress was so intent on effectuating the statutory scheme as to have authorized an action against the state itself. *Id.* at 180.

These were weighty arguments, but not, in the view of this writer, dispositive. A question not considered by the majority or the dissent was whether *Seminole Tribe* was a case where the suit against the officer should be deemed one essentially against the state itself. If, in a suit against an officer, a court may not enter a decree that in effect requires specific performance of a repudiated state contract, see *infra* notes 368-377 and accompanying text, one may wonder whether a decree against the officer may in effect require the state to enter into a contract in the first place, or to bargain in good faith with a view to entering into a contract. Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 510-41 (1997), sees in the decision grave danger to the *Young* doctrine generally, as her title suggests. *Seminole Tribe* does not warrant such apprehension. In the first place, Jackson takes little if any account of Congress' plenary power, subject only to such constitutional limitations as have been noted, to limit the remedies for violation of a federal statute. Second, Jackson's fears concerning the future of the doctrine in relation to constitutional violations stem in part from her blurring of the distinction between constitutional and statutory violations, and in part from the *Seminole Tribe*'s reliance on *Schweiker v. Chilicky*. See *Seminole Tribe*, 517 U.S. at 74 (citing *Schweiker*, 487 U.S. 412, 423 (1988)); see also Jackson, *supra*, 527-30 (discussing *Schweiker*).

In *Schweiker*, the claimant had been improperly denied social security benefits. 487 U.S. at 414. The statute provided for full restoration of benefits through administrative and judicial proceedings. But the claimant, contending that the statutory violation also constituted a violation of due process, instituted an *Ex parte Young* action to recover damages for "emotional distress [and] other hardships" occasioned by the denial of benefits but not available under the remedies provided by the statute. *Id.* at 418-19, 425. The Court, as it remarked in its opinion, was being asked to create a remedy, originally created in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, for the alleged due process violation. *Id.* at 421-23; *Bivens*, 403 U.S. 388 (1971); see also *infra* notes 280-281 and accompanying text (discussing *Bivens*). Thus, the issue in *Schweiker* was not whether a statutory remedy provided adequate implementation of a constitutional right, but concerned rather the scope of the claimed constitutional right, which is necessarily a preliminary question. In deciding against creation of a *Bivens* remedy, the Court declared that Congress had provided "meaningful safeguards or remedies" in the Social Security Act, *Schweiker*, 487 U.S. at 425; and, further, that "Congress is in a better position to decide whether or not the public interest would be served" by providing the additional damages sought by the claimant. *Id.* at 427. The holding might have been the same without reference to the superior position of Congress to determine what was in the public interest. Whether or not the deference to Congress was appropriate, the Court was not allowing Congress to limit implementation of a constitutional right that was clearly defined. Thus, the favorable reference to *Schweiker* in *Seminole Tribe* should not be taken to threaten "evisceration" of *Ex parte Young* in its application to constitutional violations. See Jackson, *supra*, at 495. It is submitted that *Seminole Tribe* does not undermine *Ex parte Young*. Other writers of this view, include Daniel Meltzer and David Currie. See David P. Currie, *Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547, 550 (1997); Meltzer, *supra* note 1, at 41-46.

duct at issue in any of these cases is otherwise tortious under the common law need not detain us. For after *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,<sup>279</sup> it is clear that the cause of action derives directly from the Constitution or governing statute, to the extent that the Supreme Court is willing to imply a cause of action from the particular provision.

### 3. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*

Prior to *Bivens*,<sup>280</sup> persons suing federal or state officers in the federal courts to restrain threatened violations of federal law were granted *injunctive* relief as a matter of course. In some of these cases there was no diversity of citizenship, from which it seemed to follow that federal law created the basic cause of action. If the federal or state officers were sued for *damages* arising from their conduct, it was generally assumed that the cause of action if any arose under state tort law and could not be litigated in federal district court in the absence of diversity of citizenship.<sup>281</sup> The writer has attempted elsewhere to account for this anomaly.<sup>282</sup>

In *Bivens*, the Supreme Court confronted the issue for the first time. The claimant had sued federal narcotics agents for violations under the Fourth Amendment and had sought damages for this trespassory conduct. The suit had been instituted in a federal district court, and, there being no diversity of citizenship, it was understood that federal jurisdiction could be sustained only upon a showing that the claim arose under the Constitution, laws or treaties of the United States.<sup>283</sup> The Court held that the right to damages could be implied directly from the Fourth Amendment itself.<sup>284</sup>

Earlier holdings in cases involving trespassory conduct can be rationalized in the same manner, insofar as they have rested on violations of the Constitution or other federal law. And this is true a fortiori in the non-trespassory cases, in which the existence of a common-law tort of any kind is usually dubious. Therefore, *Bivens* has been effectively incorporated into the *Ex parte Young* doctrine.

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<sup>279</sup> See discussion *infra* Part III.A.3.

<sup>280</sup> 403 U.S. at 388.

<sup>281</sup> This practice is describe in Hill, *Constitutional Remedies*, *supra* note 65, at 1122-31.

<sup>282</sup> *Id.*

<sup>283</sup> See *Bivens*, 403 U.S. at 390; *id.* at 398 (Harlan, J., concurring).

<sup>284</sup> *Id.* at 396-97.

#### 4. *Larson v. Domestic and Foreign Commerce Corp.*: A Preview

In *Larson v. Domestic and Foreign Commerce Corp.*,<sup>285</sup> the Court modified the *Ex parte Young* doctrine by rejecting tort and substituting unauthorized conduct as the basis of the officer's liability. Although this looks like a revolutionary modification of the doctrine, it is submitted that *Larson* has worked no substantial change. *Larson* is best understood after detailed analysis of a number of the cases decided under *Ex parte Young*.<sup>286</sup>

##### B. Breach of Duty

In the case of a statute not under attack for invalidity, courts routinely hold officers to performance of ministerial duties by mandamus,<sup>287</sup> mandatory injunction,<sup>288</sup> or negative injunction,<sup>289</sup> as circumstances warrant. Such cases are legion. Sovereign immunity is not a bar to such relief because the suit is not deemed to be one against the government.<sup>290</sup> As the Court said in a suit of this kind involving a federal statute, "[t]he suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the

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<sup>285</sup> 337 U.S. 682 (1949).

<sup>286</sup> See *infra* notes 406-436 and accompanying text (discussing *Larson* in more detail).

<sup>287</sup> E.g., *Houston v. Ormes*, 252 U.S. 469, 473 (1920).

<sup>288</sup> E.g., *Ickes v. Fox*, 300 U.S. 82, 96-97 (1934); *Miguel v. McCarl*, 291 U.S. 442, 469 (1934). In the latter case the Court said: "[t]he mandatory injunction here prayed for is in effect equivalent to a writ of mandamus, and governed by like considerations." *Miguel*, 291 U.S. at 452.

<sup>289</sup> E.g., *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110-11 (1902).

<sup>290</sup> The suit against the officer can plausibly be seen as one against the government if the officer's duty under a valid statute is discretionary. Professor Woolhandler, in a valuable study, remarked on the similarity in some cases of discretionary immunity and sovereign immunity. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396, 424-25 n.148 (1987). The Taney Court took a particularly broad view of discretionary duties—indeed so broad that the Court refused to hear claims of abuse of what today would be deemed clear abuse of discretion. *Id.* at 422-30. This may help to explain the paucity of Supreme Court decisions on sovereign immunity during the Taney period. In any event, it is unthinkable that the defense of discretionary duty should prevail against a claim that the governing statute is unconstitutional. The unthinkable nevertheless happened in *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866) (rejecting an attack on a Reconstruction statute; the result was perhaps explainable in part by the fact that the defendant was the President). Immediately thereafter the Court invoked the political action doctrine to justify its refusal to entertain such an attack. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

United States.<sup>291</sup> The officers being sued in such cases are named in their *official capacities*.<sup>292</sup>

Does this mean that in such a case on the federal level the Court will (1) order payment from the public treasury, or (2) order conveyance of title to government land, or (3) hold the government to performance of its contracts? The answer to the first two questions is clearly yes. Regarding the third question there is considerable confusion.

The Supreme Court has repeatedly sustained mandamus to require payment of funds from the public treasury,<sup>293</sup> sometimes declaring that a suit to require an officer to perform a ministerial duty is not one against the government.<sup>294</sup> When the pertinent statute imposes the duty of making the payment sought, the mandamus can fairly be regarded as in aid of the government rather than against it.<sup>295</sup> The outcome is the same as if the officer had executed the duty in the first place.<sup>296</sup>

<sup>291</sup> *Phila. Co. v. Stimson*, 223 U.S. 605, 620 (1912). To like effect, see, for example, *Payne v. Central Pac. Ry.*, 255 U.S. 228, 238 (1921). *Cf. Rolston v. Crittenden*, 120 U.S. 390, 411 (1887) ("There the effort was to compel a state officer to do what a statute prohibited him from doing. Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state.").

<sup>292</sup> In *In re Ayers*, the Court distinguished between: (1) "suits against individual defendants, who, under color of the authority of unconstitutional legislation by the state are guilty of personal trespasses and wrongs;" and (2) "suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus where such suits are authorized by law . . ." 123 U.S. 443, 506 (1887) (emphasis supplied).

<sup>293</sup> *E.g., Ormes*, 252 U.S. at 473; *United States ex rel. Parish v. MacVeagh*, 214 U.S. 124, 138 (1909); *Roberts v. United States ex rel. Valentine*, 176 U.S. 221, 230-31 (1900). This has also been done by mandatory injunction. See *Miguel*, 291 U.S. at 452, 456.

<sup>294</sup> *Ormes*, 252 U.S. at 472-74; *Minnesota v. Hitchcock*, 185 U.S. 373, 386 (1902).

<sup>295</sup> The discussion in the text is not pertinent to all cases of mandamus. Thus, if a statute is held to be unconstitutional and a writ of mandamus is issued for corrective action on the theory that only a ministerial act is involved, sovereign immunity should not be overridden. It is the existence of a duty created by a valid statute that makes an enforcement action one in aid of the enacting jurisdiction rather than one against it.

<sup>296</sup> In *Kendall v. United States ex rel. Stokes*, the claimants had a contractual claim against the United States Post Office, which had been disallowed in part; the claim was based on contracts made between the claimants and the postmaster general of the United States. 37 U.S. (12 Pet.) 524, 608 (1838). An act of Congress was then adopted, which provided that the controversy over the claim should be determined by the solicitor of the treasury, and that the amount determined by that officer to be due should be entered in the books of the Post Office department as a credit in the claimant's account. *Id.* at 608-09. The solicitor made the requisite determination, but the postmaster general refused to credit the complainant with the amount found. *Id.* at 609. The Supreme Court sustained issuance of mandamus ordering entry of the credit. *Id.* at 618, 626. The claim in question, said the Court, was "of course, upon the United States, through the postmaster general." *Id.* at 611. As such, it could not be "enforced against the United States, without their consent ob-

This explains why the Court has sustained the use of mandamus, not only to require payment of money from the treasury, but also to require transfer of title to government lands.<sup>297</sup> Professor (as he then was) Scalia, in a study of litigation involving public lands, concluded that the cases constituted a special category, without an articulated general principle, in which the Court routinely addressed on the merits claims to public lands—except in a number of cases, that he thought aberrational, in which the Court sustained a plea of sovereign immunity.<sup>298</sup> It is submitted that there is a unifying principle underlying the cases, namely, the principle that the judiciary holds officers to performance of their statutory duties. Few of Scalia's sovereign immunity cases contravene this principle. Where, in result, some do, this stems from a summary declaration that overlooks the principle.<sup>299</sup>

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tained through an act of congress." *Kendall*, 37 U.S. at 611. But Congress had "consented" that the solicitor should determine the amount due. *Id.* The Court added that no money could be drawn from the treasury without an appropriation by Congress, but left no doubt that refusal to make such payment after an appropriation could also have been countered by mandamus. *Id.* at 614-15.

A somewhat comparable view is apparent in *In re Ayers*. In this case, a state statute authorizing the issuance of bonds had been followed by another statute substantially impairing the value of those bonds. 123 U.S. at 446-47. The Court said: "Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent, and resume its original immunity, without any violation of the obligation of its contract in the constitutional sense." *Id.* at 505. It is submitted that mandamus cases generally lend themselves to the same rationalization. See David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 159 n.58.

<sup>297</sup> *Work v. United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208-09 (1923); *Lane v. Hoglund*, 244 U.S. 174, 182 (1917); *Ballinger v. United States ex rel. Frost*, 216 U.S. 240, 250-51 (1910); *United States v. Schurz*, 102 U.S. 378, 405 (1880).

<sup>298</sup> Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 907-09 (1970). He mentioned seven such cases. *Id.* at 894-907, 910 & n.209. They are discussed *infra* note 299.

<sup>299</sup> In *Naganab v. Hitchcock*, the statute that was the source of the asserted duty had been superseded in pertinent part by a later statute. 202 U.S. 473, 474 (1906). In the circumstances, the suit was held to be one against the United States. *Id.* at 476. The situation was similar in *Morrison v. Work*, as to the first of two sets of claims there involved. 266 U.S. 481, 485-86 (1925). The second set was dismissed because, according to the Court, the lack of a focus on the asserted entitlement made the claimed right comparable to "the general right of every citizen to have the Government administered according to law . . ." *Id.* at 488. In *Oregon v. Hitchcock*, the Court observed that official action by the Land Department regarding the land in issue was incomplete and "in process of administration." 202 U.S. 60, 70 (1906). The implication was that a suit would lie when the official action regarding the land was complete. See *id.* In *Kansas v. United States*, the suit was against the United States itself, which had not consented to be sued. 204 U.S. 331, 341 (1907). The opinion noted that "others" had also been named as defendants. *Id.* at 337. These "others"



Some precedent exists for holding officers to their statutory duties even though the effect is to compel the government to perform its obligation under a contract.<sup>300</sup> In a later case there was a dictum to the effect that such relief would be denied if the contract was executory.<sup>301</sup> In this dictum, the Court did not account for earlier cases where the contracts were in fact executory, and the officers were subjected to liability for violating their statutory duties in respect to the contracts.<sup>302</sup> It is not immediately apparent why mandamus should be

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were not identified; and whether, if officers, the suit might have proceeded against them, was not considered.

In *Louisiana v. Garfield*, the Court rejected the state's claim of entitlement to certain federal lands, except for an unresolved question on whether the state might still prevail on the basis of a statute of limitations that operated against the United States. 211 U.S. 70, 77 (1908). The applicability of this statute turned on certain questions of law and fact, as to which the United States was said to be a "necessary party," which left the Court with "no jurisdiction of this suit." *Id.* at 78. This holding was unexplained, but it is arguable that the applicability of the statute of limitations was unrelated to or remote from the question of the statutory duties of the defendant Garfield in regard to the land. The case of *New Mexico v. Lane*, rested on a misunderstanding of *Garfield*, and is in other respects an egregiously wrong decision. 243 U.S. 52 (1917). Here too the state's claim to public lands raised questions of law and fact and the Court read *Garfield* as requiring the presence of the United States. *Lane*, 243 U.S. at 58. But in *Garfield* these questions arose on a collateral issue. The Court there decided the principal issue on the merits with no mention of sovereign immunity. Disputed questions of law or fact, or both, are almost invariably present in suits to hold officers to performance of their statutory duties—it is only because of disagreement with the officers on such points that suits are typically brought.

The case of *Hawaii v. Gordon* was also an egregiously wrong decision. 373 U.S. 57 (1963). A statute provided that the President should transfer to Hawaii certain federal lands in that state determined by him to be no longer needed by the United States. *Id.* at 57–58. The President delegated this function to the Director of the Bureau of the Budget. The latter construed the statute as not embracing certain lands and Hawaii sued him for relief based on its contention that the statute did embrace these lands. *Id.* at 58. In a *per curiam* decision, the suit was held to be one against the United States, for the following reasons: (1) "[R]elief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Id.* at 58. (2) "[T]he order requested would require the Director's official affirmative action." *Id.* (3) The order would "affect public administration of government agencies . . ." *Gordon*, 373 U.S. at 58. (4) The order would "cause as well the disposition of property admittedly belonging to the United States." *Id.* The first and third points would virtually abolish the *Ex parte Young* doctrine. Besides that doctrine was not pertinent. Hawaii was seeking to hold a federal officer to the duties set forth in a statute not attacked as invalid. The second and fourth points overlook earlier decisions in which the Court ordered transfer of title to government lands in such cases. See *supra* note 297.

<sup>300</sup> See *Santa Fe Pac. R.R. v. Payne*, 259 U.S. 197, 199 (1922) (restraining the Secretary of the Interior from interfering with claimant's acquisition of federal lands under a contract with the United States); *Rolston*, 120 U.S. at 411 (granting relief similar to that in *Santa Fe* to restrain state officers from violating a state contract).

<sup>301</sup> *Ickes v. Fox*, 300 U.S. 82, 95–97 (1934).

<sup>302</sup> See *Santa Fe*, 259 U.S. at 198–99; *Rolston*, 120 U.S. at 402–03.

unavailable in such cases. Yet in *Missouri v. Jenkins*, the Court, in dictum, denounced employment of "the writ of mandamus as a ruse to avoid the Eleventh Amendment's bar against exercising federal jurisdiction over the State."<sup>303</sup> For this proposition, the Court cited *Louisiana v. Jumel*,<sup>304</sup> but in fact *Jumel* sanctioned use of mandamus (though not in the circumstances before it).<sup>305</sup> The subject is mired in confusion.<sup>306</sup>

Of course, far more common than the statutory contracts heretofore discussed are contracts whose terms are set by officers having general statutory authority to do so. A statute creating this general authority is not likely to yield a construction that such contracts, made

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<sup>303</sup> 495 U.S. 33, 56 n.20 (1990).

<sup>304</sup> 107 U.S. 711 (1882).

<sup>305</sup> See *infra* note 306.

<sup>306</sup> Before considering the pertinent cases, it should be remarked that when a statute, whether or not it imposes a duty upon an officer, is superseded by a later statute, the question arises whether invalidation of the later statute leaves the earlier one in force. This should depend on the law of the enacting jurisdiction. Unfortunately, this question was not considered in the cases now to be discussed. In *Board of Liquidation v. McComb*, the Court invalidated a statute impairing a statutory obligation and enforced the obligation. The state's officers were said to be under a "plain official duty" and subject to mandamus to compel discharge of the duty, or injunction to prevent conduct incompatible with the duty; in this instance an injunction was granted. *Id.* at 541. *Board of Liquidation* was discussed approvingly in *Jumel*, where the state had impaired its contract with respect to a bond issue by lowering the interest rate and modifying an accompanying obligation to levy certain taxes to service the bonds. *Jumel*, 107 U.S. at 725-26. Mandamus was denied for an insufficient showing of a ministerial act that would benefit the claimant. 107 U.S. at 727. The remedy sought, declared the opinion, "would require the Court to . . . supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full." *Id.* In *In re Ayers*, the Court approved the mandamus remedy generally, endorsing what was said on that subject in *Board of Liquidation*, but denying relief on the ground that the plaintiffs were seeking specific performance of a contract. *In re Ayers*, 123 U.S. at 504, 506. In both *Jumel* and *In re Ayers*, the Court assumed sub silentio that duties created by the first statute were revived when the second statute was invalidated.

*Board of Liquidation* has not borne fruit in later years, and *Jumel* and *In re Ayers* have been misunderstood. Thus, in *Belknap v. Schild*, the Court declared that an injunction will not be issued "to compel the state to perform its obligations," citing, *inter alia*, *Jumel* and *In re Ayers*. *Belknap*, 161 U.S. 10, 18 (1896). As mentioned in the text, *Jenkins* cited *Jumel* to the same effect. Neither *Belknap* nor *Jenkins* involved a government contract. In some cases where the Court sustained mandamus to enforce a statutory obligation after invalidating a statute abrogating the obligation, the governmental debtors were not states but political subdivisions, which do not enjoy sovereign immunity under federal law. See discussion *supra* Part I.I. Among these cases are *Wolff v. New Orleans*, 103 U.S. 358 (1880); *Hoffman v. Quincy*, 71 U.S. 535 (1866).

by the officer on behalf of the government, are judicially enforceable. In any event, relief is invariably denied in such cases.<sup>307</sup>

If the foregoing analysis is correct, some earlier decisions bear reconsideration. Thus, the denial of relief in *Pennhurst State School and Hospital v. Halderman*,<sup>308</sup> with pernicious consequences for the administration of justice,<sup>309</sup> rested on the Court's assumption that a suit to compel state officers to comply with a concededly valid statute of their state was a suit against the state.<sup>310</sup> Another such case is *Hawaii v. Gordon*.<sup>311</sup>

### C. The Government as the Real Party in Interest

#### 1. In General

If the object of the suit is injunctive relief, the officer typically has no personal interest in the outcome and the government, though not named, is the *only* real party in interest.<sup>312</sup> Even when the relief sought against the officer is a judgment in damages, frequently the only issue is the constitutionality of the statute under which the officer acted. Further, the officer is often indemnified by the government.<sup>313</sup> Indeed, a decree that requires the officer to pay large amounts of money may be essentially pro forma in its application to the officer, the expectation of the court being that the money will be paid by the government. A conspicuous example is *Milliken v. Bradley*,<sup>314</sup> where state officers<sup>315</sup> were ordered to end unconstitutional school segregation and to pay \$5,800,000<sup>316</sup> "to wipe out continuing conditions of inequality produced by the inherently unequal dual school system

<sup>307</sup> *E.g., Larson*, 337 U.S. at 685-86; *United States ex rel. Goldberg v. Daniels*, 231 U.S. 218, 221 (1913). These cases are discussed *infra* Part IV.B.

<sup>308</sup> 465 U.S. 89 (1984).

<sup>309</sup> See discussion *infra* Part VI.B.

<sup>310</sup> See discussion *infra* Part IV.E.

<sup>311</sup> For a discussion of *Gordon*, 373 U.S. 57 (1963), see *supra* note 299.

<sup>312</sup> Even when a court holds an officer to the performance of a duty under a valid statute, the state may be the real party in interest, as where the case turns on construction of the statute.

<sup>313</sup> John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 49-50 (1998).

<sup>314</sup> 433 U.S. 267 (1977).

<sup>315</sup> While the Court spoke of its ruling as directed against the state, in an earlier phase of the same proceeding the Court said that "references to the State must be read as references to the public officials . . . through whom the State is alleged to have acted." *Milliken v. Bradley*, 418 U.S. 717, 722 (1974).

<sup>316</sup> 433 U.S. at 293 (Powell, J., concurring).

long maintained by Detroit."<sup>317</sup> Indeed, the Court said in *Milliken* that "state officials [may be ordered] to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury."<sup>318</sup>

Such impact is not diminished by calling it, as the Court sometimes does, "ancillary."<sup>319</sup> Particularly striking are the numerous cases where, on the basis of an assertion of personal liability on the part of the officer, the claimant recovers property in which ownership is asserted by the government.<sup>320</sup> Indeed, in suits against state officers the Court has sometimes given a remedy tantamount to specific enforcement of a contract.<sup>321</sup> How then is it to be determined whether the suit against the officer is or is not barred by sovereign immunity? The Court's several attempts to answer this question have been notoriously unhelpful.

## 2. The Effect-on-the-Government Test

The first test traditionally employed to determine whether an *Ex parte Young* suit was against the sovereign focused on the effect a judgment would have on governmental operations. A typical formulation of this test was as follows:

[A] suit is against the sovereign if the judgment sought would . . . interfere with the public administration . . . or if the effect of the judgment would be to restrain the government from acting, or to compel it to act.<sup>322</sup>

Under this formulation, virtually every *Ex parte Young* suit would be one against the government, including, conspicuously, *Young* itself.<sup>323</sup>

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<sup>317</sup> *Id.* at 290.

<sup>318</sup> *Id.* at 289.

<sup>319</sup> *E.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 89 (1989); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

<sup>320</sup> See *United States v. Lee*, 106 U.S. 196 (1882) (involving situation where the property was in use as a military cemetery and fort); see also *infra* notes 380-387 and accompanying text (discussing *Lee*).

<sup>321</sup> See *infra* notes 359-379 and accompanying text.

<sup>322</sup> *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotations and citations omitted). For a similar statement, see *Larson*, 337 U.S. at 688. See also *Gordon*, 373 U.S. at 58 ("the order requested would . . . affect the public administration of government agencies").

<sup>323</sup> The suit in *Ex parte Young* would be one against the government because the effect of the injunction was to restrain a state official and therefore the state from enforcing a state regulatory statute. Concerning the facts in *Ex parte Young*, see *supra* Part III.A.

### 3. The Prospective-Retrospective Test

In recent years another test has emerged—the prospective-retrospective test. It is now invoked whenever the question arises whether the suit against the officer should be deemed one against the state.<sup>324</sup> This test originated in *Edelman v. Jordan*.<sup>325</sup> In that case Illinois officers administering a joint federal-state welfare program had followed state regulations that were incompatible with the corresponding federal regulations, with resulting underpayment to the beneficiaries.<sup>326</sup> Invoking *Ex parte Young*, the claimants sued the officers to compel future compliance with the federal requirements, and to recover past benefits wrongfully withheld.<sup>327</sup> Both demands were granted by the lower courts. Review was sought in the Supreme Court only with respect to the decree ordering payment of the arrears. In this regard, the decree, though directed only against the officers, was held to operate essentially against the state.<sup>328</sup> Thus, the Court said:

[T]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment . . . . The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely [a] monetary award against the State itself . . . than it does the prospective injunctive relief awarded in *Ex parte Young*. . . . [This award] is in practical effect indistinguishable in many aspects from an award of damages against the State.<sup>329</sup>

The Court recognized that compliance by the officers with the “prospective” features of the decree would also take state money, but said

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<sup>324</sup> E.g., *Papasan v. Allain*, 478 U.S. 265, 267, 279 (1986); *Green v. Mansour*, 474 U.S. 64, 68 (1985).

<sup>325</sup> 415 U.S. 651 (1974).

<sup>326</sup> *Edelman*, 415 U.S. at 653–55.

<sup>327</sup> *Id.* at 655–56.

<sup>328</sup> *Id.* at 665.

<sup>329</sup> *Id.* at 664, 665, 668. The government cannot be sued directly for damages, and, in the absence of statute, this is what has prevented recourse against the government for the torts of its officers. In this and like situations the immunity cannot be avoided by some stratagem that involves suit against the officer but compels access to the general treasury. Thus, mandamus to this end is unavailable unless the government in effect consents to be sued. See *supra* 287–296.

that "[s]uch an *ancillary* effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*."<sup>330</sup> Apparently, the Court thought that the distinguishing feature of the arrears ordered to be paid was that they were "compensatory."<sup>331</sup> The result in *Edelman* was defensible.<sup>332</sup>

Furthermore, discussion of the issue as turning on the difference between prospective and retrospective relief was understandable in the circumstances of the case. But introduction of this mode of analysis was unnecessary, and has proved troublesome. This problem is illustrated by the several opinions in *Idaho v. Coeur d'Alene Tribe*.<sup>333</sup> In this case, the Tribe sued Idaho officers for interfering with their asserted rights in regard to certain submerged lands.<sup>334</sup> Five of the Justices voted to deny relief, describing the requested remedy as "the functional equivalent of a quiet title action."<sup>335</sup> The Tribe apparently conceded that this was a fair characterization of its claim.<sup>336</sup> In her concurring opinion, Justice O'Connor stated as follows:

[T]he Tribe seeks to eliminate altogether the State's regulatory power over the submerged lands at issue—to establish not only that the State has no right to possess the property, but also that the property is not within Idaho's sovereign jurisdiction at all.<sup>337</sup>

In effect, Idaho was asserting its sovereign immunity to bar inquiry into whether the property it claimed to own was not state property at all, but rather, federally-owned property in which the state had no regulatory competence. There was no need to discuss the retroactive-prospective distinction, yet it was discussed in the three opinions. Yet, relief was denied even though it was to operate *prospectively*. None of

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<sup>330</sup> *Edelman*, 415 U.S. at 668 (emphasis supplied).

<sup>331</sup> *Id.* at 666 n.11. Cf. *Green v. Mansour*, 474 U.S. 64, 68 (1985) (denial of remedies serving only "compensatory and deterrence interests"). It is not clear that the reference to "deterrence interests" adds anything to the analysis.

<sup>332</sup> Again, the constitutional principle that the state may not be sued without its consent would be rendered meaningless if the courts could award remedies against the officer without regard for this basic principle. This is because of the likelihood that the state would provide funds to relieve the officer of liability in cases where the officer is essentially a pawn who stands in for the state.

<sup>333</sup> 521 U.S. 261 (1997).

<sup>334</sup> *Id.* at 264.

<sup>335</sup> *Id.* at 281 (plurality opinion); see also *id.* at 289 (O'Connor, J., concurring) ("functional equivalent of an action to quiet its title").

<sup>336</sup> Concerning property claims against an officer, see *infra* Part IV.B.

<sup>337</sup> *Idaho*, 521 U.S. at 289.

the majority Justices contended otherwise. In short, the case was one in which the retroactive-prospective distinction was ignored, presumably because it would have produced the wrong answer.

After *Edelman*, the Court declared that the essence of prospective relief is that it is addressed to a "continuing violation."<sup>338</sup> Consider in this connection the decision in *Milliken v. Bradley*.<sup>339</sup> That case involved the Detroit school system, which had long been segregated de jure as a result of state and local action. This was no longer the situation, and the issue in the Supreme Court concerned only that aspect of the district court's decree that ordered institution of remedial programs, these being thought necessary by reason of *past* practices.<sup>340</sup> As the Supreme Court said, the conditions to be remedied resulted from the "unequal dual school system"<sup>341</sup> formerly maintained by Detroit. However, the Court stated that the decree was "wholly prospective"<sup>342</sup> because the decree was designed to eliminate "vestiges of state-imposed segregation" and thus "to wipe out continuing conditions of inequality."<sup>343</sup>

*Milliken* should not and indeed cannot be confined to desegregation cases. Relief should be available generally not only for a continuing violation, but also for continuing consequences of a past violation. It would be an absurdity in contravention of settled law to refrain from granting such relief. Thus, in *Osborne v. Bank of the United States*, the Court held that the Bank of the United States was not barred from recovering specie unlawfully seized in the past by the state of Ohio.<sup>344</sup> That has been the universal rule governing past seizures.<sup>345</sup> The Court has never deviated from the principle that the continuing consequences of a past violation may be the subject of a recovery.<sup>346</sup>

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<sup>338</sup> *Green*, 474 U.S. at 68.

<sup>339</sup> 433 U.S. 267 (1977).

<sup>340</sup> *Id.* at 279.

<sup>341</sup> *Id.* at 290.

<sup>342</sup> *Id.* at 290 n.22.

<sup>343</sup> *Id.* at 290 (internal quotation marks omitted).

<sup>344</sup> 22 U.S. (9 Wheat.) 738, 870-71 (1824).

<sup>345</sup> See discussion *infra* Part IV.A-B.

<sup>346</sup> In *Papasan v. Allain*, which was an *Ex parte Young* suit, relief was denied. 478 U.S. 265 (1986). It was for past misconduct; and the Court stated at the outset that "Young has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past." *Id.* at 277-78. But the denial of relief was on grounds unrelated to the past character of the asserted misconduct (if we exclude one item that was essentially for arrears, which were not recoverable under *Edelman*). In 1836, the federal government had ceded certain lands to Mississippi for the use of schools within a designated area. *Id.* at 271-72. Subse-

quently, the State sold the lands with the permission of Congress, and invested the proceeds in railroads. *Id.* at 272. The value of this investment was destroyed by the Civil War. *Id.* The Papasan claimants contended that the lands had been conveyed to the state in trust, and that the state, as trustee, had a continuing duty to execute the terms of the trust. *Id.* at 274. They sought: (1) reconstitution of the corpus of the trust, either by a transfer of land or its monetary equivalent; (2) the "award of past income not received," *id.* at 281 n.13; and (3) the award of future income. *See id.* at 274-81. The first two demands were understandably rejected. But the third demand was one for prospective relief based on the continuing effect of a past violation (assuming the validity of the claim). *Id.* at 279. In denying the third demand, the Court relied entirely on its understanding of the arcana of trust law. *Id.* at 279-81. The details do not warrant discussion in this space. (See the excellent analysis in Carlos Manuel Vazquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1, 38-40 (1998)). It may be ventured, however, that the claimants might have fared better by not introducing trust law but rather by simply alleging that the state had not used the grant for its stated purpose, and that this was a continuing harm for which the claimants were entitled to future payments.

The most recent Supreme Court decision on the subject is *Breard v. Greene*, 523 U.S. 371 (1998). A citizen of Paraguay was under sentence of death in Virginia for murder. In violation of a multilateral treaty, the prisoner had not been advised of his right to consult a consul of his country. Paraguay instituted a suit to set aside the death sentence, but relief was denied on the ground that it would be "quintessentially retrospective." *Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998). The court observed that the treaty was not being violated at the time the action was filed. *Id.* at 629.

On review, the Supreme Court considered not only Paraguay's claim, but also the prisoner's petition (in reliance on the treaty violation) for an original writ of habeas corpus and an application for a stay. In the Court's *per curiam* opinion, handed down on the afternoon of the day for which the execution was scheduled, the Court rejected the prisoner's demands: first, on the ground of procedural default, resulting from failure to make timely assertion of his claim; and second, because, even if the claim had been timely raised, no showing that the violation had affected the trial could "even arguably be made." *Breard*, 523 U.S. at 377. In this connection, that the Court stated that the prisoner's attorneys "were likely far better able to explain the United States legal system to him than any consular official would have been." *Id.* As to Paraguay, the Court said: "Though Paraguay claims that its suit is [based upon] continuing consequences of past violations of federal rights . . . we do not agree. The failure to notify the Paraguay Consul occurred long ago and has no continuing effect. The causal link present in *Milliken* is absent in this case." *Id.* at 377-78. It has been argued that the above language, considered in light of the decision below in the Fourth Circuit and a similar decision in the Ninth Circuit (*United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997)), casts a cloud on the traditional practice in habeas corpus cases, and indeed on postconviction review generally. Vazquez, *supra*, at 51-77. For in virtually all criminal cases, the asserted violations occurred at the trial or earlier.

To say that one under sentence of death is seeking a retroactive remedy when complaining of past violations, and hence barred from relief, is, to put it mildly, disorienting. But the Fourth and Ninth Circuits did not say that. To the contrary, they declared in effect that the violation was an ongoing one as regards the prisoner, though not as regards the foreign government. Thus, in the Fourth Circuit case, though the prisoner was not a party, the state itself conceded that "the violation is 'ongoing' or 'continuing' in the sense that its 'consequences' persist in [the prisoner's] continuation in custody under death sentence." *Paraguay*, 134 F.3d at 627. The violation was not deemed to be ongoing as to Paraguay because the treaty was not being violated at the time the action was filed. Similarly, in the Ninth Circuit case, it was only Mexico that was denied relief (again the prisoner was not a



But it should be apparent that absent a continuing violation, or the continuing consequences of a past violation, there is no entitlement to relief of any kind. Thus the prospectivity fork of the test is no more than the statement of a truism. As for the retrospectivity fork, this loses much of its utility when it is considered that, as in *Milliken*, recovery may be had for past misconduct. The question that remains is when relief should be *denied*. What seems to emerge from the decisions is that the forbidden remedy is one that is "compensatory."<sup>347</sup> But this formulation is too loose. For one thing, it is broad enough to encompass possessory relief against officers for unlawful seizures, which is granted as a matter of course.<sup>348</sup> Further, bearing in mind that the suit is not one against the government but against the officer, there should be hesitation in abolishing outright the officer's historic personal liability.<sup>349</sup> If the foregoing analysis is valid, the prospective-retrospective test is unhelpful, to say the least. It is noteworthy that all the cases discussed in this subsection could have been decided as they were without mention of the prospective-retrospective test, which, indeed, was deemed irrelevant by all the Justices in *Coeur d'Alene Tribe*.<sup>350</sup>

#### 4. Offensive and Defensive Uses of Sovereign Immunity

It is submitted that the problem of a suitable test is solved if we look, not to the rationalizations attempted by the Court, but rather to their actual holdings. Indeed, the Court's holdings in this area form a pattern. In a suit against an officer, a plea of sovereign immunity is

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party) on the basis of what the court characterized as past violations. In the case of prisoners, said the court, such violations are "examined post hoc in state postconviction proceedings and federal habeas." *United Mexican States*, 126 F.3d at 1223.

As to the language quoted earlier from the Supreme Court's opinion, what the Court said as to Paraguay is best understood in light of what the Court said as to the prisoner. There was no mention of past violations in the rejection of the prisoner's claim. Instead, the rejection was based on procedural default and lack of causality. In regard to Paraguay, the Court seemed to say that the past violation had no "continuing effect" because of lack of the "causal link present in *Milliken*." *Beard*, 523 U.S. at 378. And the causal link in the latter case was the continuing effect of past de jure segregation.

<sup>347</sup> See *supra* note 331 and accompanying text.

<sup>348</sup> See *infra* notes 353, 380-387, 420 and accompanying text.

<sup>349</sup> Conduct to which one of the modern privileges does not attach is the type of conduct that, *prima facie*, should continue to be the basis for such liability. In cases subsequent to *Edelman* the Court has condemned "compensatory" decrees unqualifiedly. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993); *Papasan*, 478 U.S. at 278.

<sup>350</sup> This was largely true as well of *Papasan*. See *supra* note 346 (discussing *Papasan*). For other views on the prospective-retrospective dichotomy, see Althouse, *supra* note 1, at 1140-52, and Vazquez, *supra* note 346, at 1.

disallowed when the immunity would operate offensively, but not when it would operate defensively. If the claimant is seeking only to be left alone and charges that past or prospective conduct of government officers is unlawfully intrusive, judicial inquiry into the validity of such conduct would be precluded if a plea of sovereign immunity is sustained.<sup>351</sup> This would constitute what is here called offensive use of the immunity, and such use is disallowed. On the other hand, when the claimant is seeking some affirmative advantage from the government, like payment of outstanding indebtedness, a plea of sovereign immunity is sustained, in what is here called defensive use of the immunity.<sup>352</sup> The two lines of cases are not distinct if we look to the language the Court uses, but they are distinct in the result, with relatively few exceptions. We now turn to an analysis of the cases.

#### IV. THE PATTERN IN THE DECISIONS

##### A. Government Contracts

*Poindexter v. Greenhow* involved an issue of state bonds backed by a guarantee that the interest coupons would be accepted in payment of taxes.<sup>353</sup> This guarantee was repudiated by subsequent legislation. Accordingly, a tax officer had rejected a proffer of interest coupons, and had seized a desk belonging to the claimant, for nonpayment of taxes.<sup>354</sup> In an action in detinue against the officer, the Court sustained recovery of the desk. The Court held that since repudiation of the State's obligation violated the Constitution, the tax collector was a wrongdoer who had been "stripped of his official character," and li-

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<sup>351</sup> The category is not stretched unduly if we place in it the desegregation cases. While plaintiffs in such cases are not asking to be left alone, for our purposes they may be seen as asking for a reasonably close equivalent—not to be singled out invidiously for denial of rights enjoyed by others.

<sup>352</sup> In *Edelman v. Jordan*, it can plausibly be argued that, in resisting payment of arrears unlawfully withheld, the state was acting defensively. Even assuming that the welfare beneficiary had a vested interest in arrears, it should be considered that the owner of a government bond also has a vested interest. It should be of no avail that the state through its officers violated federal law; the owner of the bond fails to recover though the state through its officers has violated the Contract Clause. In such cases the invocation of sovereign immunity is defensive. On the other hand, when a person receives something of value from the government, even as bounty, an unlawful seizure of such property constitutes a taking, and in a suit against the officer an invocation of sovereign immunity should be rejected as offensive in effect.

<sup>353</sup> 114 U.S. 270 (1885).

<sup>354</sup> *Id.* at 273-74.

able as such for seizing the claimant's property.<sup>355</sup> The obvious effect was to hold the State to its contract; for if tax coupons were proffered in payment of taxes, the taxes were not collectible by other means. It was understandable, therefore, that four dissenters contended that the suit was "virtually" one against the State for "specific performance."<sup>356</sup> As a matter of fact, the *Poindexter* majority made it explicit that it was the *contract* that was being enforced. Thus, one of the arguments advanced by the State was that the case presented no more than a question of remedy, since the State contended that under state law a taxpayer claiming a tax to be invalid could pay under protest and then sue to recover the amount paid.<sup>357</sup> The Supreme Court did not challenge the reasonableness of such a remedy.<sup>358</sup> But, said the Court, the State under its "contract" had "bound herself that it shall be otherwise,"<sup>359</sup> and the contractual obligation was enforced.

The Court also emphasized that the taxpayer, though nominally a plaintiff, was essentially a "defendant, passively resting on his rights,"<sup>360</sup> and said in the same vein: "[The taxpayer's] object is merely to resist an attempted wrong and to restore the status in quo as it was when the right to be vindicated was invaded. In this respect, it is upon the same footing with the preventive remedy of injunction in equity."<sup>361</sup> This position was elaborated soon afterwards in *McGahey v. Virginia*,<sup>362</sup> where the Court declared that one tendering tax-receivable coupons in the circumstances of *Poindexter* is:

entitled to be free from molestation in person or goods . . . and may vindicate such right in all lawful modes of redress—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking . . . or by a defense to a suit brought against him.<sup>363</sup>

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<sup>355</sup> *Id.* at 288.

<sup>356</sup> *Id.* at 330 (Bradley, J., dissenting).

<sup>357</sup> *Id.* at 298–99.

<sup>358</sup> Such a remedy, if adequate, is to this day the only remedy a state need furnish when taxes are under constitutional attack. See *infra* note 460 and accompanying text.

<sup>359</sup> 114 U.S. at 300.

<sup>360</sup> *Id.* at 281.

<sup>361</sup> *Id.* at 295.

<sup>362</sup> 135 U.S. 662 (1890).

<sup>363</sup> *Id.* at 684.

In *McGahey*, the Court sustained a defense under this principle. In other cases, the Court has approved injunctive relief against state officers seeking to collect taxes in violation of the contract.<sup>364</sup>

As the foregoing cases show, sovereign immunity, as such, does not render contracts with the state unenforceable, and does not exempt such contracts from the operation of the Contracts Clause; the doctrine does no more than give the state an immunity from suit without its consent.<sup>365</sup> The Court's use of the term "defensive" to describe the taxpayer's posture in *Poindexter* was another way of saying that the redress sought was essentially to be left alone.<sup>366</sup> The holding in *Poindexter* and like cases shows that sovereign immunity may not be offensively interposed to defeat such redress.

There is another class of cases in which government contracts are in effect enforced even in the absence of unconstitutional statutes. In these cases, the claimant has a vested property interest, the property having been obtained from the government or from a private source. A government officer, having statutory authority, enters into a contract relating to such property. Thereafter, the officer (or another officer) seizes the property, or threatens to do so, contending that the contract has been breached and that it provides for such seizure in event of breach. When the claimant sues the officer for an injunction against the seizure, or for return of the property if it has been taken, the defense of sovereign immunity is denied. The court makes an independent determination whether there has been a breach or whether the contract authorizes a seizure. In this general category, a crucial issue is whether a seizure of property is lawful.<sup>367</sup>

There are several contract cases where sovereign immunity has been sustained. In *Hagood v. Southern*,<sup>368</sup> the State had repudiated a statutory obligation to accept certain scrip in payment of taxes. The

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<sup>364</sup> Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); Allen v. B. & O. R.R., 114 U.S. 311 (1885); see also Davis v. Gray, 83 U.S. 203 (1872).

<sup>365</sup> See South Dakota v. North Carolina, 192 U.S. 286 (1904) (sustaining a recovery). North Carolina had defaulted on certain of its bonds, but South Dakota, which had become the bona fide owner of some of these bonds, was entitled to a full recovery thereon when it invoked the original jurisdiction in its suit against North Carolina. Sovereign immunity cannot be interposed in such a suit.

<sup>366</sup> The same point had been made by Henry Clay, arguing for the bank in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 799 (1824). See also *supra* text accompanying note 119 for Chief Justice Marshall's pertinent remarks in *Cohens v. Virginia*.

<sup>367</sup> See, e.g., Land v. Dollar, 330 U.S. 731 (1947); Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U.S. 549 (1922); see also discussion *infra* Part IV.C.

<sup>368</sup> 117 U.S. 52 (1886).

Court held that state officers could not be judicially compelled to receive the scrip, on the ground that this would be tantamount to coerced "performance of the alleged contract by the state."<sup>369</sup> But the only damage claimed by the plaintiffs, most of whom had not proffered the scrip in payment of taxes, was that their holdings of scrip had been rendered worthless by the State's repudiation.

In *In re Ayers*,<sup>370</sup> there was a similar statutory obligation involving, not use of scrip, but use of interest coupons attached to state bonds. A subsequent statute had directed state officers to recover taxes from persons who had used tax-receivable coupons in payment.<sup>371</sup> A suit to enjoin the officers from enforcing this statute failed as essentially an attempt "to compel the specific performance of the contract."<sup>372</sup> Under the *Poindexter* line of cases, persons who had actually paid their taxes with the coupons would presumably have been entitled to injunctive relief.<sup>373</sup> But the claimants in *In re Ayers* were British owners of coupons who had purchased them with a view to resale to Virginia property owners; the claimants did not contend that they themselves had paid taxes with such coupons.<sup>374</sup> Both in *Hagood* and *In re Ayers*, the claimants were seeking only to protect their investments; their position was comparable to that of owners of state bonds suing for payment.

*Wells v. Roper*<sup>375</sup> was a case in which the plaintiff had a contract with the Post Office to supply vehicles for use in the District of Columbia. The plaintiff asserted that, after adoption of a statute enabling the Post Office to purchase its own vehicles, the Post Office had repudiated the contract. The plaintiff sought an injunction against certain named postal officers to restrain them from proceeding in violation of the contract. The Court held that the injunction was properly denied since its "effect . . . would have been to oblige the United States to accept continued performance of plaintiff's contract."<sup>376</sup> To be sure, the plaintiff had invested funds in reliance on the

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<sup>369</sup> *Id.* at 67.

<sup>370</sup> 123 U.S. at 443.

<sup>371</sup> *Id.* at 493-94.

<sup>372</sup> *Id.* at 502.

<sup>373</sup> The Court distinguished *Poindexter* and like cases as in effect involving seizures. *Id.* at 500-01.

<sup>374</sup> *Id.* at 492.

<sup>375</sup> 246 U.S. 335 (1918).

<sup>376</sup> *Id.* at 337; *cf.* *Mine Safety Appliances Co. v. Forrester*, 326 U.S. 371 (1945). In this case the claimant, attacking as unconstitutional a federal statute requiring elimination of excess profits on government war contracts, sought to restrain a federal officer from block-

government's performance; but, again, the purchaser of a government bond is in the same position.<sup>377</sup>

Thus, in the first group of cases the Court in effect enforced state contracts, and in the second group the Court denied enforcement. Critics have castigated the Court for such disparate treatment, for which, they have said, there was no principled basis.<sup>378</sup> But what distinguishes the cases is that in the first group sovereign immunity, if allowed, would have operated offensively, while in the second group its operation was defensive only. In the first group claim was made of seizures or threatened seizures, and sovereign immunity would have barred judicial consideration of whether the officers had acted with legal justification. In the second group the plea of sovereign immunity spoiled an investment entered into voluntarily in anticipation of the state's performance of its contracts.<sup>379</sup>

### B. *Recovery of Property*

A similar pattern is revealed in suits against officers for recovery of property said by the officers to belong to the government. Thus, in *United States v. Lee*,<sup>380</sup> the Court upheld an ejectment judgment against Army officers in charge of property that was used in part as a military cemetery and in part as a fort.<sup>381</sup> The United States had purchased the property at a tax sale that was defective by reason of the government's own misconduct.<sup>382</sup> In the ejectment action, the government

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ing payments to the claimant on other government contracts until it settled its dispute with the government. The Court observed that the allegations "do not make out a threatened trespass against any property in the possession of or belonging to the appellant," *id.* at 374, and held that the suit was "an indirect effort to collect a debt allegedly owed by the government in a proceeding to which the government has not consented." *Id.* at 375.

<sup>377</sup> With regard to attempted use of mandamus to compel performance of state contracts, see *supra* notes 300-306 and accompanying text.

<sup>378</sup> Fletcher, *Historical Interpretation*, *supra* note 1, at 1123 ("virtually impossible to explain"); Gibbons, *supra* note 1, at 1989-91 (same; also asserting that Court's fear of nonenforceability of judgments against states after the Civil War as a reason for such disparate treatment); Orth, *supra* note 1, at 447-50 (asserting Court's fear of nonenforceability).

<sup>379</sup> It has been argued above that in some circumstances the contract might be enforceable. See *supra* note 364-366.

<sup>380</sup> 106 U.S. 196 (1882).

<sup>381</sup> *Id.* at 198, 223.

<sup>382</sup> *Id.* at 200-04. The estate of General Robert E. Lee's wife in Arlington, Virginia, had passed into the possession of the federal government after non-payment of a tax levied during the Civil War. Under a governing regulation, the tax had to be paid by the owner in person or a party in interest. The government refused a proffer of the payment on behalf of the owner, and subsequently acquired the property at a tax sale. The Court held that the United States did not acquire a valid title. *Id.*

conceded that the plaintiff had legal title as heir of the original owner but resisted the ejectment claim as an unconsented suit against the United States.<sup>383</sup> Disallowing this defense, the Court declared in effect that occupation of the land by the officers was tortious.<sup>384</sup> The Court likened the case to one where "the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation."<sup>385</sup> The Court declared that the United States, not being a party, was not bound by the judgment,<sup>386</sup> and the claimant's relief was possessory only. But it is unrealistic to infer from this that the claimant was getting only half a loaf. In view of the uses to which the land was being put, the government was subject to an overriding necessity of quickly purchasing the property or acquiring it by condemnation.<sup>387</sup>

In *Davis v. Gray*, the Court sustained a decree prohibiting the Governor of Texas from alienating land to which the State had title.<sup>388</sup> The claim was founded upon a contract the State had made with a railroad company whereby certain lands were to be transferred to the company as it made progress with its construction program. The State countered that the requirements of the contractual timetable had not been met. But construction had been frustrated by the onset of the Civil War and the Court held that the State itself had made performance within the time limits impossible.<sup>389</sup> In a later case, the Court spoke of *Davis* as "rest[ing] on the same principle it would if patents had been actually issued to the company, and the State, through its officers, was attempting to place a cloud on the title by granting subsequent patents to others."<sup>390</sup> *Davis* also illustrates the point that a court will enforce a contract against the state when necessary to afford redress against trespassory conduct.

Similarly, in *Pennoyer v. McConnaughy*,<sup>391</sup> the Court sustained an injunction against state officers to restrain them from selling lands in which the claimant asserted ownership under a contract with the

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<sup>383</sup> *Id.* at 204.

<sup>384</sup> *Lee*, 106 U.S. at 219-20.

<sup>385</sup> *Id.* at 221.

<sup>386</sup> *Id.* at 222.

<sup>387</sup> In theory, the United States could have tried to relitigate its title, but that course probably would have been futile.

<sup>388</sup> 83 U.S. 203, 233 (1872).

<sup>389</sup> *Id.* at 230.

<sup>390</sup> *Louisiana v. Jumel*, 107 U.S. 711, 725 (1882).

<sup>391</sup> 140 U.S. 1 (1891).

State. A statute that in effect terminated the rights of the claimant to the land was held to violate the Contracts Clause.<sup>392</sup> Cases other than those previously mentioned in which the Court, rejecting pleas of sovereign immunity, upheld recovery of specific property, have involved not only land,<sup>393</sup> but also stock certificates,<sup>394</sup> barges,<sup>395</sup> a shipyard,<sup>396</sup> specie,<sup>397</sup> and (as earlier seen) a desk.<sup>398</sup>

On the other hand, an interesting and suggestive case where the defensive use of sovereign immunity was upheld is *Malone v. Bowdoin*.<sup>399</sup> In *Malone*, an ejectment action against a federal officer was successfully resisted. The plaintiff asserted title to land under an 1857 will of the then-owner of the land. Specifically, the plaintiff claimed that under the will a life estate in the land was left to one Martha A. Sanders, with the remainder to her children, and that in 1873 she had "devised" the land "in fee" to another.<sup>400</sup> The United States acquired title in 1936.<sup>401</sup> The Court observed that there had been no allegation that government officers had acted in violation of the Constitution or of any federal statute.<sup>402</sup> Relief was denied by reason of the absence of any showing that the officers had acted without authority.<sup>403</sup> The Court emphasized that there was no claim of a taking.<sup>404</sup> The claimant had been wronged, it seemed, not by the government, but by Mrs. Sanders who, having only a life estate, had disposed of the land "in fee" to strangers. To the claimant's assertion of superior title, the government invoked sovereign immunity defensively.<sup>405</sup>

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<sup>392</sup> *Id.* at 25.

<sup>393</sup> *Tindal v. Wesley*, 167 U.S. 204 (1897).

<sup>394</sup> *Land v. Dollar*, 330 U.S. 731 (1947).

<sup>395</sup> *Goltra v. Weeks*, 271 U.S. 536 (1926).

<sup>396</sup> *Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922).

<sup>397</sup> *Osborn*, 22 U.S. at 738.

<sup>398</sup> *Poindexter*, 114 U.S. at 270; see also *supra* notes 353-366 and accompanying text (discussing *Poindexter*).

<sup>399</sup> 369 U.S. 643 (1962). An earlier case comparable to *Malone* on its facts, but with a different outcome, is *Stanley v. Schwalby*, 147 U.S. 508 (1893), where the action was allowed to proceed against government officers.

<sup>400</sup> *Malone*, 369 U.S. at 644 & n.2.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 647-48.

<sup>403</sup> *Id.* at 648. The Court was applying a formula announced in *Larson*, 337 U.S. at 682 (discussed *infra* Part IV.C).

<sup>404</sup> *Malone*, 369 U.S. at 648.

<sup>405</sup> In light of a case decided one year after *Malone*, namely *Armstrong v. United States*, 364 U.S. 40 (1960), there is room for argument that the government too had "wronged" the claimant. *Armstrong* held that when the United States acquires property subject to an existing lien, the bare act of acquisition constitutes a taking of the lien. Since liens on gov-



In sum, the property cases resemble the contract cases. Sovereign immunity is allowed when employed defensively but not when employed offensively. To the extent that the dispute over property turns on the contract from which the right derives, the law pertaining to contracts is followed, and the contract is enforced when appropriate. The courts will not award the claimant title, but will award possessory or monetary relief against the officer if there has been a taking.

### C. Larson: *Old Wine in a New Bottle*

*Larson v. Domestic & Foreign Commerce Corp.* is notable for advancing a new formulation of the law governing specific relief against government officers.<sup>406</sup> The dissenters in the case decried this formulation and viewed the result in the case as a regressive step, expanding the scope of sovereign immunity.<sup>407</sup> Commentators have also taken this view.<sup>408</sup> It is submitted, however, that *Larson* has made no meaningful change in the law.

The case involved a contract for the purchase of coal from the War Assets Administration, a federal agency.<sup>409</sup> The Administrator, contending that the terms of the contract had not been fulfilled, was arranging to sell the coal to others.<sup>410</sup> The buyer, on the other hand, claimed title to the coal, and maintained that the Administrator's action constituted a conversion.<sup>411</sup> The relief sought was an injunction

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ernment property are unenforceable by reason of sovereign immunity, the Court declared that, in acquiring title, "the Government for its own advantage destroyed the value of the liens." *Id.* at 48. By the same token, it would seem that if the government, in its acquisition of title to the property involved in *Malone*, was subject to notice of the adverse claim of another, it effected a taking in destroying the value of the adverse claim. That does not end the matter because, traditionally, there was no remedy against the government, even for a taking, unless the government consented to be sued. See *infra* note 473 and accompanying text. But the absence of such a remedy against the government left open a common law possessory action against the officer in possession of the property, which was precisely the situation in *Lee*. In addition, possessory relief was all that the plaintiff sought in *Malone*. Today, consideration would also have to be given to the decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (discussed *infra* Part V.C). Further, under a statute now in effect the United States consents to be sued in such a case. See HART & WECHSLER, *supra* note 71, at 1036-37.

<sup>406</sup> 337 U.S. 682 (1949).

<sup>407</sup> *Id.* at 705, 723-24 (Frankfurter, J., dissenting).

<sup>408</sup> E.g., Roger C. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 404 (1970); Currie, *supra* note 296, at 156-59.

<sup>409</sup> See *Larson*, 337 U.S. at 684.

<sup>410</sup> *Id.* at 685.

<sup>411</sup> *Id.* at 692.

restraining sale or delivery of the coal to other persons.<sup>412</sup> The Administration's defense of sovereign immunity was sustained.<sup>413</sup>

The Court's new formulation of the law was this: When specific relief is sought against government officers, the crucial issue is not whether they acted tortiously but whether they acted in the exercise of valid authority. When official action is validly authorized, such "action is the sovereign's,"<sup>414</sup> and if a claimant's demand is that such action "be prevented or compelled," then "the demand . . . must fail as a demand against the sovereign."<sup>415</sup> Officers, however, remain liable for their torts whether the commission of these torts is authorized or not.<sup>416</sup> The holding was that the Administrator's action fell within the range of his authority and that the suit was therefore one against the United States.<sup>417</sup>

In dissent, Justice Frankfurter observed that in previous cases upholding specific relief, the predicate for such relief was tortious conduct on the part of the officers. He argued that the claimant, having charged a conversion, should therefore not be barred by a plea of sovereign immunity.<sup>418</sup> The Court, however, declared in effect that every previous case involving "specific relief" in connection with property "held or injured" by governmental officers had involved a "taking."<sup>419</sup> It seems to the writer that they did indeed involve takings, consummated or threatened.<sup>420</sup> It is notable that Justice Frankfurter,

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<sup>412</sup> *Id.* at 684.

<sup>413</sup> *Id.* at 703.

<sup>414</sup> *Larson*, 337 U.S. at 693.

<sup>415</sup> *Id.* at 693-94.

<sup>416</sup> The Court rejected the argument that officers cannot be authorized to commit torts. *Id.* at 694-95.

<sup>417</sup> *Id.* at 703.

<sup>418</sup> *Id.* at 718.

<sup>419</sup> *Larson*, 337 U.S. at 698. The Court said that, as distinct from "damages" "specific relief" encompasses "the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions." *Id.* at 688.

<sup>420</sup> The cases on which Justice Frankfurter relied are set forth in two paragraphs of the opinion. See *id.* at 732 (Frankfurter, J., dissenting). The second of these paragraphs listed cases in which the opinions were said to have "made reference to a situation involving an unconstitutional taking." *Id.* The question, therefore, is whether the six cases listed in the first paragraph are precedents for liability without a taking. These cases follow: *Land v. Dollar*, 330 U.S. 731, 736 (1947) (describing plaintiff's claim as one "to recover possession of specific property wrongfully withheld" and directing district court to proceed to a decision on the merits); *Iches v. Fox*, 300 U.S. 82, 96 (1937) (involving a suit "to enjoin [an officer] from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights" and denying relief on the merits); *Goltra v. Weeks*, 271 U.S. 536 (1926) (discussed *infra* notes 422-435 and accompanying text); *Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp.*, 258 U.S. 549 (1922) (in all material respects,

despite the seeming thoroughness of his dissenting opinion, made no attempt to show otherwise.

The nature of the holding in *Larson* is illuminated if we consider the Court's treatment of *United States ex rel. Goldberg v. Daniels*,<sup>421</sup> and *Goltra v. Weeks*.<sup>422</sup> In *Daniels*, the plaintiff had contended that he had submitted the highest bid for a surplus naval vessel; that ownership of the vessel had vested in him when the bids were opened; and that the Secretary of the Navy had refused to deliver the vessel.<sup>423</sup> The relief sought was mandamus against the Secretary to compel delivery.<sup>424</sup> The Court held that such relief should be denied, on the ground that even if title had passed and the Secretary was acting tortiously, the suit was essentially against the United States.<sup>425</sup> In this case, it should be noted, the plaintiff was not asking to be left alone. The contract was executory on the government's part, and what the plaintiff was demanding was specific performance. The government was using sovereign immunity as a shield. The *Larson* Court saw *Daniels* as on all fours with the case before it.

But consider now a case in which the government sells and delivers a chattel, and government officers subsequently repossess it or threaten to do so, claiming a right of repossession by the terms of the contract. If the buyer resists or attempts to prevent repossession, the *buyer* is acting defensively. The government may not justify its trespassory conduct under the contract and at the same time interpose sovereign immunity to bar judicial inquiry into the adequacy of the justification. That would be attempted use of sovereign immunity not as a shield but as a sword; and that, under the precedents, the government may not do.

The facts just posited correspond to those alleged in *Goltra* upon which Justice Frankfurter relied in his dissent in *Larson*. The govern-

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similar to *Goltra*); *Scranton v. Wheeler*, 179 U.S. 141, 152-53, 165 (1900) (declaring that the suit against the officer would lie if there had been a taking and denying relief on the ground that there had not been a taking); *Stanley*, 147 U.S. at 519-20 (rejecting plaintiff's assertion of title; had the plaintiff prevailed on this point, the claim against the officers in possession would have been essentially one for a taking, as in *United States v. Lee*, 106 U.S. 196 (1882)). The fact that the Court did not use the word "taking" in these six cases is immaterial. Any purposeful interference with a property right constitutes a taking. See *infra* notes 482-483 and accompanying text.

<sup>421</sup> 231 U.S. 218 (1913).

<sup>422</sup> 271 U.S. 536 (1926).

<sup>423</sup> *Daniels*, 231 U.S. at 221.

<sup>424</sup> *Id.*

<sup>425</sup> The plaintiff did not contend that the Administrator was under a statutory duty to deliver the vessel. *Id.* at 221-22.

ment had delivered possession of a number of barges to the plaintiff, under a lease whose validity was not in question.<sup>426</sup> Thereafter, complaining of non-compliance with the lease terms, government officers had seized some of the barges and were threatening to seize others.<sup>427</sup> The plaintiff contended that there had been compliance and sought return of the barges seized and an injunction against seizure of the others. The Court held that, inasmuch as the officers were charged with trespassory conduct, sovereign immunity was not a bar to the action.<sup>428</sup>

Justice Frankfurter argued that *Goltra* was being overruled in *Larson*.<sup>429</sup> But there was no overruling. The *Larson* majority made clear that its only quarrel was with "the theory of the *Goltra* opinion,"<sup>430</sup> not with the result in that case. The Court added:

Whether the actual decision in the *Goltra* Case, on the basis of the facts there presented, was correct or not is not relevant to the disposition of the present case, and we express no opinion on that question. *Goltra*, unlike *Goldberg*, does not present a parallel to the facts in the case at bar. The action complained of there was a seizure with a strong hand which was claimed to be unconstitutional, as an arbitrary taking of property without due process of law. . . . *There is no such claim in the present case.*<sup>431</sup>

Thus, *pace* Justice Frankfurter, *Larson* did not repudiate *Goltra*;<sup>432</sup> nor did it "overrule" *United States v. Lee* "and the cases which have applied it."<sup>433</sup> There is simply no basis for reading *Larson* as changing the law in this regard.

On the other hand, the Court was unhelpful in stating that the exclusive basis for specific relief against government officers is lack of valid authority. In this regard, it is instructive to compare *Larson* with

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<sup>426</sup> *Goltra*, 271 U.S. at 539.

<sup>427</sup> *Id.* at 541.

<sup>428</sup> *Id.* at 544.

<sup>429</sup> *Larson*, 337 U.S. at 720 (Frankfurter, J., dissenting).

<sup>430</sup> *Id.* at 701.

<sup>431</sup> *Id.* at 701 n.25 (emphasis added). Actually, the *Larson* Court misconceived the decision in *Goltra*. The opinion in that case characterized the seizure as tortious if not supported by the terms of the lease. The Court's conclusion was that the lease did justify the seizure.

<sup>432</sup> *Id.* at 726.

<sup>433</sup> *Id.* at 724. *United States v. Lee*, 106 U.S. 196 (1882), is the ejectment case involving what is now Arlington Cemetery. See *supra* notes 380-387 and accompanying text.

*Goltra*. In *Larson*, there was no challenge to the constitutionality of the statute under which the Administrator acted, and there was no challenge to his authority. As the Court observed, the Administrator had power to make contracts, to determine whether their terms were met, and to act accordingly.<sup>434</sup> But in these regards, the situation in *Goltra* was identical. There was no challenge to the underlying statute or to the authority of the officers to lease the barges in question and protect the government's interest in accordance with the terms of the lease. Absent a holding that the governing statute was unconstitutional, the decision has turned on the interpretation of a contract or statute without challenge to the authority of the officers to act as they did if their interpretations were proper.<sup>435</sup>

The appeal of the rationalization founded on lack of valid authority is that it bolsters the view that the suit is *only* against the officer and not in any respect one against the government. Lack of valid authority can plausibly be found when the officer acted under an unconstitutional statute, or when the claim of authority under a valid statute is based on what the court finds to be an unfounded reading of that statute. But it cannot be said, without a good deal of strain, that the officer's lack of authority stems from the unfounded reading of a contract.<sup>436</sup> If the officer is subject to liability on that account, it is not for action without authority, but for action without legal justification. The same rationalization—lack of legal justification—could also be employed in all cases where the courts now talk of lack of authority. But there is no need to employ a single rationalization in the entire area.

#### D. Other Parts of the Pattern

As has been seen, in cases where officers are enjoined from unlawfully withholding statutory benefits from the intended beneficiaries, their conduct is not trespassory in the common law

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<sup>434</sup> 337 U.S. at 692.

<sup>435</sup> See, e.g., *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 111 (1902). In *Sloan Shipyards Corp.*, it was not clear whether the authority allegedly misconstrued by the federal agent derived from statute or contract; either way, official action not authorized is "unlawful" and redress may be had against the agent. See 258 U.S. at 566–68.

<sup>436</sup> The reference is to a contract made by an officer made under general statutory authority, as distinct from a contract embodied in the terms of a statute. In the latter situation, it is arguable that the officer should be ordered to execute the duty laid out in the statute, with consequent enforcement of the contract. See *supra* notes 300–306 and accompanying text.

sense.<sup>437</sup> However, their conduct can be analogized to a taking insofar as it prevents the benefits from reaching the intended beneficiaries. Cases that do not lend themselves to rationalization along this line are those in which the officers are ordered to desist from denying the claimant the equal protection of the laws, as in the desegregation decisions.<sup>438</sup> Here, the claimant is asking to be left alone in the sense of not being singled out invidiously for denial of rights enjoyed by the general public. In both classes of cases, recognition of a claim of sovereign immunity would mean denial of opportunity to show the illegal character of the official action. In short, it would constitute the use of sovereign immunity offensively, and this is not permitted.<sup>439</sup>

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<sup>437</sup> See discussion *supra* Part III.A.2. .

<sup>438</sup> See *supra* note 275 and accompanying text.

<sup>439</sup> Some cases do not fit this pattern, but they are plainly outside the mainstream. Thus, in *Belknap v. Schild*, 161 U.S. 10 (1896), suit had been brought against federal officers in a federal district court, alleging infringement of a patent, and seeking damages, and an injunction against further infringement. Upon a finding that the plaintiff's patent had indeed been infringed, the Court sustained the award of damages against the officers, but held that the injunction against them impinged upon the sovereign immunity of the United States. On this point, the Court, relying on a single English case, held that where the United States had "both the title and the possession of the property" the United States was an indispensable party. *Belknap*, 161 U.S. at 25. An attempted interference with transfer of possession was what was involved in the English case. *Id.* at 24. But, in light of the Court's earlier holdings, it is difficult to see why sovereign immunity should have stood in the way of a decree against the officer enjoining continued infringement and affecting neither title nor possession.

In *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911), the college, which occupied state-owned land bordering a river, had built a protective dike, with resulting flooding to plaintiff's land on the other side. The college was held amenable to a decree for damages, but not to one requiring it to remove the dike. As to the latter point, the state was held to be an indispensable party. *Hopkins*, 221 U.S. at 649. But it was not suggested that the college, which had put up the dike for its own convenience, had been acting in that regard as an instrumentality of the state. If the state was nevertheless an indispensable party under the niceties of the law of property and jurisdiction, it is arguable that these bodies of law, which deal with different universes of societal and legal concern, should not be assumed to be incorporated wholesale into the law of sovereign immunity.

In other cases the claimant might have succeeded had a different remedy been sought. In *Cunningham v. Macon & Brunswick R.R.*, 109 U.S. 446 (1883), the state had held a first mortgage on a railroad. The claimants were the owners of a second mortgage. Upon default under the first mortgage, the governor conducted a sale, by the terms of which, according to the claimants, they were effectively precluded from bidding. Thereupon the claimants sued to set aside the sale and to foreclose on their own mortgage. The holding was that the state, as title owner, was an indispensable party; the claimants "would get no title in the absence of the State." *Id.* at 457. But if the allegations were true, this was a case of essentially confiscatory behavior by the state, acting through its governor. Since what was in issue was not money in the state treasury but specific property, a possessory decree running against the officers occupying the property should have been feasible. In *Chandler v. Dix*, 194 U.S. 590 (1904), the plaintiff failed to get relief from the consequences of a tax

## E. Pennhurst State School &amp; Hospital v. Halderman: A Nadir

In *Pennhurst State School & Hospital v. Halderman*,<sup>440</sup> the confusion regarding the *Ex parte Young* doctrine reached a nadir. The Court expressed doubt as to whether the doctrine, in its most important applications, was compatible with the principle of sovereign immunity, which it called a "constitutional limitation" on the authority of the federal judiciary.<sup>441</sup> The suit was instituted in a federal district court against Pennhurst—a state institution for the mentally retarded—and certain of its officers,<sup>442</sup> based on allegations of mistreatment of the patients.<sup>443</sup> While relief was sought on federal and state grounds, it was granted in the lower courts solely on the state ground.<sup>444</sup> Reversing, the Supreme Court declared that the "fiction" of *Ex parte Young* "rests on the need to promote the vindication of federal rights."<sup>445</sup> It follows, said the Court, that "Young . . . [is] inapplicable in a suit against state officials on the basis of state law."<sup>446</sup> This statement was true, but the Court erred regarding its implications.

First, it may be noted that the Court doubted the validity of the *Ex parte Young* doctrine even in its application to rights claimed under federal law.<sup>447</sup> Calling the doctrine "a narrow and questionable exception" to sovereign immunity,<sup>448</sup> the Court had no trouble with it insofar as it was used to impose on the officer personal liability in damages. But the Court was apparently dubious about any relief against the officer that as a practical matter placed a financial burden on the

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sale. There was no assertion of irregularity in the conduct of the sale itself. The claim, rather, was that the statute that levied the tax was unconstitutional. More importantly, the Court understood the plaintiff to be seeking "primarily . . . to remove a cloud upon the plaintiff's title." *Id.* at 590. The state was therefore deemed to be an indispensable party. *Id.* at 591. Conceivably, a demand for possessory relief, not impugning the state's title, would have fared better.

<sup>440</sup> 465 U.S. 89 (1984).

<sup>441</sup> *Id.* at 98.

<sup>442</sup> Pennhurst itself was a state instrumentality, and some other state instrumentalities were also named, but it is clear from the opinion that the result would have been the same if only the officers had been named. *See id.* at 108 n.16

<sup>443</sup> *Id.* at 92.

<sup>444</sup> *Id.* at 95–96.

<sup>445</sup> *Pennhurst*, 465 U.S. at 105.

<sup>446</sup> *Id.* at 106.

<sup>447</sup> *Id.* at 112 n.25.

<sup>448</sup> *Id.* at 116.

government.<sup>449</sup> Observing that injunctive relief against the officer might impose such a burden,<sup>450</sup> the Court said:

In this light, it may well be wondered what principled basis there is to the [Young] doctrine as it was set forth in *Larson*. . . . For present purposes, however, we do no more than question the continued vitality of the . . . doctrine in the Eleventh Amendment context.<sup>451</sup>

The Court relied in part on the *Larson* decision, in the belief that *Larson* represented an earlier restriction on the scope of the *Ex parte Young* doctrine. Thus the Court said that the numerous cases involving takings, upon which Justice Frankfurter had relied in his dissent in *Larson*, were now "moribund."<sup>452</sup> As has been seen, however, the *Larson* majority had disapproved of those cases only insofar as they rested on a theory of tort.

As to where this leaves us, consideration must be given to some of the *Pennhurst* Court's additional remarks. The Court said: "[A]n injunction based on federal law stands on very different footing, particularly in light of the Civil War Amendments. . . . [I]n such cases this Court is vested with the constitutional duty to vindicate 'the supreme authority of the United States.'"<sup>453</sup> Since the Court had earlier said that a decree against a state officer was in effect one against the state if it could not be satisfied without funding by the state, it may be that the Court's conception of a proper injunction was one that cast no financial burden on the government, as was seemingly the case in *Ex parte Young* itself. But the Court also suggested that if, upon remand, consideration was given to the Fourteenth Amendment claims of the *Pennhurst* plaintiffs, account should be taken of the then recent decision in *Youngberg v. Romeo*.<sup>454</sup> This was a case in which the Court declared a state to be under a duty to meet certain standards in the institutional care of mentally retarded persons.<sup>455</sup> But this is precisely the kind of case in which additional state funding may be necessary.

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<sup>449</sup> *Pennhurst*, 465 U.S. at 114 n.25.

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* at 115.

<sup>453</sup> *Pennhurst*, 465 U.S. at 109 n.17. The quoted phrase is from *Ex parte Young*, 209 U.S. at 160. The Court was responding to an argument of the *Pennhurst* dissenters in favor of federal injunctive relief for both federal and state claims.

<sup>454</sup> 457 U.S. 307 (1982).

<sup>455</sup> *Id.* at 324. As it happened, the only relief sought in *Youngberg* by the time the case reached the Supreme Court was a damage award against certain officers. See *id.* at 311. It is



The most plausible view of *Pennhurst* is that the Court did not contemplate an actual change in the law applicable to federal claims. It opposed what it considered to be any extension of *Ex parte Young* and believed that federal enforcement of claims founded on state law would be such an extension. Its views of *Ex parte Young*, however, if taken up by the Court, would severely limit the application of that doctrine to claims founded on federal law.<sup>456</sup>

## V. GETTING MONEY FROM THE GOVERNMENT

### A. *Mandamus and Mandatory Injunction*

This subject is discussed in the earlier section on breach of duty.<sup>457</sup>

### B. *Reich v. Collins: Suing the State in Tax Cases*

*Reich v. Collins* is notable for a dictum to the effect that a state may not interpose sovereign immunity to bar a suit in its courts for recovery of illegally-exacted taxes.<sup>458</sup> Some preliminary comments may help place *Reich* in perspective. When sovereign immunity is not in issue, it is established doctrine that state courts, when called upon to implement federal rights, must provide a remedy that is adequate by federal standards.<sup>459</sup> The typical case has involved state taxation. When state taxes are attacked on federal grounds, the Supreme Court has held that the states must provide either an adequate pre-deprivation remedy or an adequate post-deprivation remedy.<sup>460</sup> The states typically prefer the latter, which amounts to consent to suit.

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difficult to believe, however, that the Court would have disapproved of injunctive relief to require that the standards be met.

<sup>456</sup> *Pennhurst's* treatment of pendant jurisdiction is discussed *infra* Part VI.B.

<sup>457</sup> See *supra* note 272 and accompanying text.

<sup>458</sup> 513 U.S. 106, 109–10 (1994).

<sup>459</sup> HART & WECHSLER, *supra* note 71, at 850–53; Hill, *Constitutional Remedies*, *supra* note 65, at 1113–16.

<sup>460</sup> *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Professors Fallon and Meltzer read *McKesson* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), as constituting exceptions to the rule that the states are not required to pay damages for unconstitutional takings. Richard H. Fallon, Jr., & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1825–26 (1991); see also *infra* Part V.C (discussing *First English*). The cases they cite as exemplifying the general rule all involved unconsented suits. *Id.* at 1781 n.253, 1784–85 n.283. But in both *McKesson* and *First English* the states had consented to be

In *Reich*, the state had provided a postdeprivation remedy in the state courts for illegally-exacted taxes, and the Court concluded that plaintiff's reliance on this remedy was justified.<sup>461</sup> However, relief had been denied in the state courts on the ground that the plaintiff should have resorted to a *pre*-deprivation remedy. The Supreme Court held this to be error, because the plaintiff, under then state law, was not on adequate notice that the *pre*-deprivation remedy was the exclusive one.<sup>462</sup> That was all the Court needed to say.

But the Court remarked, summarily, that there was an obligation to grant "recovery of taxes [illegally] exacted . . . the sovereign immunity States traditionally enjoy in their own courts notwithstanding."<sup>463</sup> The remark was doubly gratuitous, in that (1) the issue of sovereign immunity had not been raised and (2) the state had waived its immunity in allowing itself to be sued. The Supreme Court's only holding was that a limitation on the remedy that prevented recovery in the particular case was violative of due process; its requirement that any remedies provided must be constitutionally adequate had of course been amply set forth in earlier cases.<sup>464</sup> The Court cautioned that a state waiver allowing suit in a state court could not be the basis for overriding a defense of sovereign immunity in a federal district court; this too accorded with settled doctrine.<sup>465</sup> But in *Reich* the Court was reviewing the judgment of a *state* court, in a suit consented to by the state. There was no need to discuss sovereign immunity at all.

#### C. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles: *Compensation for Takings*

However, *Reich*'s dictum regarding sovereign immunity may now be controlling law by virtue of the decision now to be discussed. In *First English*, the Court ruled in effect that the constitutional requirement of compensation for takings cannot be avoided by the defense of sovereign immunity.<sup>466</sup> Of course, the immunity is not a problem in formal condemnation proceedings, which are instituted by the gov-

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sued. The issue of sovereign immunity is irrelevant to the question whether the Supreme Court may consider the adequacy of the remedy in a consented suit.

<sup>461</sup> See 513 U.S. at 111.

<sup>462</sup> *Id.*

<sup>463</sup> *Id.* at 109-10.

<sup>464</sup> See *supra* note 459 and accompanying text.

<sup>465</sup> See *infra* note 489 and accompanying text.

<sup>466</sup> 482 U.S. 304 (1987).

ernment, not against it. *First English* is pertinent in cases of inverse condemnation, where the owner of property, alleging intrusion amounting to a taking, sues the government for compensation, typically under a consent-to-suit statute.<sup>467</sup> But the decision has broader ramifications as well.

*First English* arose as an inverse condemnation proceeding in a California state court, as permitted by statute.<sup>468</sup> The Supreme Court understood California law to deny compensation for temporary takings in a particular class of such cases.<sup>469</sup> That, apparently, was the basis for denial of redress below. The validity of such denial was the only issue on review.

Sovereign immunity was injected into the case by the United States, which in an amicus brief took the position that the Takings Clause, standing alone, was no ground for invalidating the California law.<sup>470</sup> The argument was that the Clause operates only as a limitation on government power: a taking without compensation could be prevented, or, if consummated, could be invalidated, but the compensation feature of the Clause did not operate of its own force.<sup>471</sup> The argument was based in part on the language of the Clause. But it was also based in part on the contention that, as a practical matter, the Clause could have no other meaning, inasmuch as sovereign immunity barred an unconsented suit for compensation.<sup>472</sup> A number of decisions were cited that supported this contention.<sup>473</sup>

This view of the Takings Clause was rejected in *First English*. The Court did not challenge the cases cited in the amicus brief. Instead, it relied on cases that contained language indicating that the compensation requirement was an integral aspect of the Takings Clause.<sup>474</sup> Sovereign immunity, however, was not mentioned, and was not remotely in issue, in any of those cases. Most of them involved suits against the

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<sup>467</sup> Prior to the advent of such statutes, the claimant's only recourse was to pursue a common-law remedy against the officer.

<sup>468</sup> *Id.* at 308.

<sup>469</sup> *Id.*

<sup>470</sup> Brief for the United States as Amicus Curiae Supporting Appellee, *First English*, 482 U.S. 304 (1987) (No. 85-1199).

<sup>471</sup> See *id.*; *First English*, 482 U.S. at 316 n.9.

<sup>472</sup> See Brief for the United States, *First English* (No. 85-1199).

<sup>473</sup> See *id.*; *United States v. Varig Airlines*, 467 U.S. 797, 809-10, 814 (1984); *United States v. Lynch*, 292 U.S. 571, 582 (1934); *Schillinger v. United States*, 155 U.S. 163, 168 (1894); *United States v. Jones*, 109 U.S. 513, 518 (1883).

<sup>474</sup> *First English*, 482 U.S. at 314-15.

United States under statutes consenting to suit.<sup>475</sup> Others involved formal condemnation proceedings instituted by the United States.<sup>476</sup> Another involved construction of a federal statute.<sup>477</sup> The cases relied on by the Court were simply unresponsive to the argument made in the amicus brief. But the Court insisted that these cases "refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'"<sup>478</sup>

The approach that the Court took to sovereign immunity was an oblique one. To repeat, the immunity was not directly in issue because the suit was consented to and because the suit was against local subdivisions not enjoying the immunity in any event. The United States interjected the immunity issue into the case in support of its argument that the Takings Clause was not self-executing. The Court's response was that the Clause itself is a command for compensation. But that should not have been deemed conclusive. After all, the Court has repeatedly held that the assertion of a constitutional right is not itself sufficient basis for overriding sovereign immunity.<sup>479</sup> Still, it should always be appropriate to inquire whether the Constitution itself, in one of its particulars, requires that the federal and state governments be amenable to suit whether they consent or not. The analysis in *Principality of Monaco v. Mississippi*<sup>480</sup> is illustrative. There the Court said that the question should be considered in light of "the plan of the Convention"; and observed that, under the "plan," a state may be sued without its consent when another state or the United States makes a claim against it under the Supreme Court's original jurisdiction, and also when sued by the United States.<sup>481</sup> The tenor of the opinion in *First English* suggests that the Court, faced with the precise

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<sup>475</sup> *United States v. Dickerson*, 331 U.S. 745 (1947) (Tucker Act); *United States v. Causby*, 328 U.S. 256 (1946) (Tucker Act); *Jacobs v. United States*, 290 U.S. 13 (1933) (Tucker Act); *Seaboard Air Line R.R. v. United States*, 261 U.S. 299 (Lever Act). The Court also cited *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), an inverse condemnation proceeding that was consented to, presumably under the same California statute that was involved in *First English*.

<sup>476</sup> *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984). *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

<sup>477</sup> *United States v. Clarke*, 445 U.S. 253 (1980).

<sup>478</sup> 482 U.S. at 316 n.9.

<sup>479</sup> An illustration would be state breaches of the Contract Clause. See *supra* text accompanying notes 365-366.

<sup>480</sup> 292 U.S. 313 (1934); see also *supra* notes 167-174 and accompanying text (discussing *Principality of Monaco*).

<sup>481</sup> *Principality of Monaco*, 292 U.S. at 327-29.

question, might well have deemed the Takings Clause to be a provision contemplating suit irrespective of state consent. Again, however, the case was one in which the state had in fact consented.

*First English* is of particular interest for what it may portend. As the Court said in *Logan v. Zimmerman Brush Co.*, a leading case under the Takings Clause, "[t]he hallmark of property is an individual entitlement grounded in . . . law, which cannot be removed except 'for cause.'"<sup>482</sup> Seemingly, any purposeful impairment of the value of property can amount to a taking; the property interest need not be one in land.<sup>483</sup>

With the immunity of the government to unconsented suit hitherto taken as axiomatic, the only remedy available has been the *Ex parte Young* suit against the officer. For a variety of reasons that remedy may be inadequate. Property repossessed may have been damaged, or there may have been substantial pecuniary harm from deprivation of its use. In theory, the officer remains liable for such losses, especially for conduct that can be classified as tortious; but the officer may be protected by a privilege, or may lack sufficient resources to satisfy a judgment. The implication of *First English* is that the government itself must make good such losses, and indeed that it may be sued in the first instance.

It is of course doubtful that the Court had in mind these ramifications of its position in *First English*. Against such a sweeping change in the law, it can be argued that *First English*, like *Reich* before it, involved suits against consenting states, and that these two cases should be taken as controlling only in that context. But, having said time and again, in regard to challenged taxes, that the state must afford an adequate pre-deprivation remedy or an adequate post-deprivation remedy, is the Court likely to say that this obligation applies only if the state consents to be sued? And having held in *First English* that the Constitution requires compensation to be made for a taking, is the Court likely to say that compensation can be avoided by a plea of sovereign immunity?

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<sup>482</sup> 455 U.S. 422, 430 (1982).

<sup>483</sup> *E.g.*, *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid"); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of public school student without opportunity to be heard is deprivation of property interest in education); *United States v. Causby*, 328 U.S. 256 (1946) (repeated low flights by military planes with disruptive effects on operation of chicken farm constituted a taking of beneficial use of the property); *Mullan v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950) (chase in action).

An affirmative answer to both questions is possible. The constitutional basis for the doctrine of sovereign immunity has been sustained for two centuries. The anomalies that would be presented by confining *First English* and *Reich* to their own facts would be more theoretical than real. After all, consent-to-suit statutes are now relatively universal. Thus, so far as the writer is aware, no state shuts the doors of its courts to a suit for inverse condemnation. The Court could take the position that Congress and the state legislatures, in the exercise of their exclusive constitutional roles in regard to waivers of sovereign immunity, have reflected popular sentiment on holding governments financially responsible for their wrongs; that it is not to be supposed that this process has been completed; and that there is no pressing reason for the courts to usurp the role of the legislatures in this regard.

Yet another possibility remains. The Court could take the position that the near-universality of consent-to-suit statutes is warrant for abrogating the sovereign immunity of the nation and the states. This would present problems already discussed.<sup>484</sup>

It is submitted that the problem of enforcing a money judgment against the government, if it comes to that, should not be one of practical concern. In general, the Court does not allow uncertainties relative to enforceability of judgments to interfere with its disposition of controversies—as shown when it ordered President Richard Nixon to surrender the Watergate tapes,<sup>485</sup> and when it in effect ordered the House of Representatives to reinstate Representative Adam Clayton Powell.<sup>486</sup> It may be added that collecting money in a suit directly against the government should not encounter greater obstacles than achieving the identical result indirectly in a suit against the officer.

Indeed, the Court has routinely authorized judgments against states as such, including judgments for the payment of money, when its original jurisdiction is invoked in controversies between states.<sup>487</sup> Further, in the *Ex parte Young* line of cases, the Court has recognized, as has been shown, that a judgment casting a heavy financial burden on an officer will in many cases almost certainly be borne by the gov-

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<sup>484</sup> See *supra* notes 124–126 and accompanying text.

<sup>485</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

<sup>486</sup> *Powell v. McCormack*, 395 U.S. 486 (1969).

<sup>487</sup> *E.g.*, *Virginia v. West Virginia*, 206 U.S. 290 (1907); see also PAUL M. BATOL ET AL., HART & WECSHLER'S *THE FEDERAL COURTS & THE FEDERAL SYSTEM* 322–33 (3d ed. 1988) (providing a subsequent history of the *Virginia* case).

ernment.<sup>488</sup> In all these cases, the expectation, justified in the result, is that, at least eventually, the political branches of the government will implement the decisions of the judicial branch.

## VI. THE PROPER FORUM

### A. Federal Jurisdiction Founded on State's Consent to Suit in Its Own Courts

In *Smith v. Reeves*, the Court held that a state's consent to be sued in its own courts cannot be deemed a consent to be sued in a federal trial court.<sup>489</sup> The Court added that this was "subject always to the condition . . . that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed . . . as prescribed by the Act of Congress, if it denies to the plaintiff any [federal] right."<sup>490</sup> Professor Jackson interprets the quoted passage from *Smith v. Reeves* as making the state's consent to suit in its own courts suffice as consent to suit in the Supreme Court.<sup>491</sup> She therefore sees a discrepancy in the effect accorded to state consent on the appellate and trial levels of the federal courts.<sup>492</sup>

It is submitted that there is a sound constitutional basis for the discrepancy, if that is what it is. Apart from the Eleventh Amendment, it should be clear that the constitutional scheme contemplates that the Supreme Court, as ultimate arbiter of federal law, can review state decisions of federal questions. Chief Justice Marshall made this point strongly in *Cohens v. Virginia*.<sup>493</sup> The question is whether the Amendment makes a difference.

The Amendment covers the Supreme Court, since it is a limitation on the "judicial power of the United States."<sup>494</sup> In *Cohens v. Virginia* the Court held that the Amendment does not apply when the

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<sup>488</sup> See *supra* notes 312-318 and accompanying text.

<sup>489</sup> 178 U.S. 436, 445 (1900).

<sup>490</sup> *Id.* at 445.

<sup>491</sup> See Jackson, *supra* note 1, at 29. It is submitted that the Court's language is susceptible to another interpretation—a recognition that if the state does not consent to suit in the first place there is nothing for the Supreme Court to review. If the state court bars the suit on the basis of sovereign immunity, its judgment rests on an independent state ground, thereby depriving the Supreme Court, as it has said, of jurisdiction to consider any federal questions in the case. *E.g.*, *Herb v. Pictain*, 324 U.S. 117, 126 (1945). The subject is discussed in Alfred Hill, *The Inadequate State Ground*, 65 COLUM. L. REV. 943 (1965).

<sup>492</sup> Jackson, *supra* note 1, at 35-39.

<sup>493</sup> 19 U.S. (6 Wheat) 264 (1821).

<sup>494</sup> U.S. CONST. art. III, § 1.

state is plaintiff.<sup>495</sup> The apparent implication was that the Amendment would bar review in the case where an individual sues the state. However, as the Court declared more recently, "it is inherent in the constitutional plan that when a state takes cognizance of a case, the state assents to appellate review of federal issues raised by the case."<sup>496</sup> It could hardly be otherwise, for absent such review, the states would have the last word on question of federal law. As for the Eleventh Amendment, assuming it to be other than declaratory of the original understanding, it is waivable,<sup>497</sup> as of course is the immunity inherent in the states under the original understanding. Considering the Amendment in light of the constitutional plan, it can strongly be argued that there has been a waiver, for purposes of Supreme Court review, when the state "takes cognizance" of a case presenting a federal question.

On the other hand, such an argument is unavailable to support federal district court jurisdiction on the basis of a state's consent to suit in its own courts. Imputing consent to the Supreme Court's jurisdiction on that basis rests in the final analysis on the constitutional role of that Court as having the final say on federal law. The federal district courts have no such role.

### B. *Pennhurst*: Pendent Jurisdiction

In *Pennhurst*, the Court rejected a claim of pendent jurisdiction.<sup>498</sup> Such rejection was based on the bewildering assumption that the "principles established in our Eleventh Amendment decisions" would not apply in cases adjudicated on the basis of pendent jurisdiction.<sup>499</sup> The Court remarked that the Eleventh Amendment barred even federally-based suits aimed at securing "damages against the state

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<sup>495</sup> *Cohens* was such a case, having been instituted as a criminal proceeding in a state court. Virginia contended that the defendant's application to the Supreme Court for a writ of error constituted a suit against the state. The Court rejected this contention, declaring that, the proceeding, having commenced as a suit by the state against an individual, "it retained this character '[w]hatever the state of its progress.'" 19 U.S. at 409.

<sup>496</sup> *McKesson Corp. v. Division of ABT*, 469 U.S. 18, 28 (1990).

<sup>497</sup> *E.g.*, *Clark v. Bernard*, 108 U.S. 436, 437 (1883).

<sup>498</sup> *Pennhurst*, 465 U.S. at 117-19. The rule of pendent jurisdiction, now codified at 28 U.S.C. § 1367, is generally to the effect that a federal court having jurisdiction over one claim may adjudicate a second claim so closely related as to form part of the same case or controversy, even though the court does not have independent jurisdiction with respect to the latter claim. Other aspects of *Pennhurst* are discussed *supra* Part IV.E.

<sup>499</sup> *Pennhurst*, 465 U.S. at 119.



treasury,"<sup>500</sup> or "brought directly against a state."<sup>501</sup> It added that the "Amendment should not be construed to apply with less force"<sup>502</sup> to suits founded on state law, through invocation of pendent jurisdiction. Otherwise, said the Court, "a federal court could award damages against a state on the basis of a pendent claim."<sup>503</sup> No one argued for such a view of pendent jurisdiction, and there was no basis for it. Since the claim was founded on state law, and in the absence of any questions of federal substantive law, state law, whatever it might be, would have governed in all respects.

More fundamentally, the Court was also in error in assuming that the suit was against the state. To repeat, it was one against state officers to compel them to perform their duties under a concededly valid statute. For reasons developed earlier in this Article, such a suit is not one against the state but rather one in aid of the state.<sup>504</sup> Such a case is governed entirely by state law; the Eleventh Amendment and the *Ex parte Young* doctrine are irrelevant.<sup>505</sup>

Giving stare decisis effect to this holding would be most unfortunate. Litigants claiming, as they commonly do, that the conduct of state officers violates both federal and state law, are confronted with two unpalatable choices: (1) to bring the federal claims in a federal court and the state claims in a state court, with the resulting inconvenience, expense, and uncertainty;<sup>506</sup> or (2) to bring both claims in a state court, with only the remotest prospect of federal consideration of the federal claim, considering the unlikelihood of Supreme Court review. It is difficult to perceive any public reliance on the pendent jurisdiction ruling that would mitigate in favor of stare decisis.

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<sup>500</sup> *Id.* at 120.

<sup>501</sup> *Id.*

<sup>502</sup> *Id.*

<sup>503</sup> *Id.*

<sup>504</sup> See *supra* notes 287–296 and accompanying text; see also Currie, *supra* note 296, at 165 (asserting that the majority's conclusion in *Pennhurst* was "unconvincing" given the Court's prior precedent).

<sup>505</sup> It does not follow that the exercise of federal jurisdiction in such a case is desirable. As the Court emphasized, the state officers were doing the best they could with the inadequate funds provided by the state legislature. Absent a federal issue, it is arguable that such a case is a proper one for abstention. See HART & WECHSLER, *supra* note 71, at 1246–56; Shapiro, *supra* note 1, at 79 & n.109. But federal issues are commonly present in such lawsuits, and the advantages of pendent jurisdiction should not be foregone without good reason. The problem is with the traditional rule that prevents decision on federal constitutional questions if the case can be decided on any other basis. Perhaps it is time to consider whether this rule should be followed without exception.

<sup>506</sup> Shapiro, *supra* note 1, at 81.

C. Nevada v. Hall: *Suit in a Sister State*

The case of *Nevada v. Hall* involved an accident in California resulting from the negligent operation of a Nevada-owned vehicle on official Nevada business.<sup>507</sup> An injured person sued the State of Nevada in a California state court, with service based on California's long-arm statute.<sup>508</sup> Nevada's plea of sovereign immunity was rejected.

The Supreme Court held that California was under no constitutional obligation to respect Nevada's claim of immunity.<sup>509</sup> The Court explained that, on the international level, the question whether one sovereign is bound to respect the immunity of another is governed entirely by considerations of comity.<sup>510</sup> The Court explained that when the Constitution was being drafted and ratified, the states, "heavily indebted"<sup>511</sup> as they were, "presumably" assumed that they had "adequate protection" against suit in the courts of sister states by virtue of "prevailing notions of comity," but that they neglected to write this into the Constitution, which accordingly gave them no protection on this point.<sup>512</sup> A dissenting opinion argued that there were arguments for implying such protection from the Constitution that were more persuasive than the Court's "literalism."<sup>513</sup>

It is submitted that the Court was beguiled by "notions of comity," and inattentive to the implications of our constitutional arrangements. On the international level, if nation A has suffered injury in consequence of action by nation B that constitutes a violation of international law, nation A's opportunity for redress is sharply limited. An international tribunal could not exercise jurisdiction over the case absent consent by nation B, unless nation B has in effect given a general consent under the terms of a treaty. Absent nation B's consent on either basis, nation A might resort to retaliation, or even to war if it deemed itself sufficiently aggrieved.

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<sup>507</sup> 440 U.S. 410 (1979).

<sup>508</sup> *Id.* at 411-12.

<sup>509</sup> *Id.* at 426.

<sup>510</sup> *Id.* at 416-17. On this point the Court quoted from Chief Justice Marshall's opinion in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812).

<sup>511</sup> *Hall*, 440 U.S. at 418.

<sup>512</sup> *Id.* at 419.

<sup>513</sup> *Id.* at 439 (Rehnquist, J., dissenting). The dissenters relied, inter alia, on the right-to-travel precedents. *Id.* at 430 (Blackmun, J., dissenting).

Avoidance of such confrontations between the states was of course a major reason for creation of the Supreme Court.<sup>514</sup> The Supreme Court is a tribunal to which one state can summon another without the latter's consent. Absent any indication in the Constitution of the law to be applied in these controversies between states, the Supreme Court applies rules that it deems appropriate to the occasion, drawing heavily on rules of customary international law.<sup>515</sup> Clearly, Nevada, if wronged, would have had a sound basis for redress against California in an original proceeding in the Supreme Court.

To return to the situation in *Hall*, suppose that Nevada had argued in the California courts for an outcome the same as that which could be achieved if Nevada sued California in the Supreme Court. Our jurisprudence would be wasteful and formalistic if Nevada could have this claim recognized *only* by such a suit in the Supreme Court. In fact, there is precedent indicating that the California courts were bound to apply the law that the Supreme Court would apply if adjudicating the controversy itself; that law is binding on all courts as federal common law.<sup>516</sup> It is not suggested that one state should be allowed to

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<sup>514</sup> See THE FEDERALIST NO. 39, *supra* note 22, at 214 (James Madison) ("Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact . . .").

<sup>515</sup> Hill, *Law-Making Power*, *supra* note 191, at 1030-32.

<sup>516</sup> In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), Illinois petitioned the Supreme Court for leave to sue a number of Wisconsin political subdivisions under the Court's original jurisdiction. The claim was founded on the alleged pollution of Lake Michigan by the defendants. The case was held to be governed by federal common law, and one that could be adjudicated by the Supreme Court. Noting, however, that its jurisdiction in a controversy between a state and non-state parties was not exclusive, the Court remitted the parties to "an appropriate district court." *Id.* at 108.

In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the Court, on review of a judgment rendered by a state court, in a suit between a private corporation and a state officer, held that the federal common law governing the use of interstate waters was binding where appropriate to the issues. 304 U.S. 92, 110 (1938). This rule was developed by the Court in controversies between states. *Id.* at 102-03.

In an earlier article, this writer expressed the view that federal common law applicable in controversies between states does not come into existence until established by authoritative decisions. Hill, *Law-Making Power*, *supra* note 191, at 1032 n.47 (1965). It now seems to the writer that this conclusion was unsupportable in principle. Thus, after the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), a number of inferior federal courts, mindful of *Erie's* command to apply state law, rejected the proffer of what was claimed to be state law unless such law had been authoritatively established by the highest state courts. It should have been obvious that the inferior state courts themselves could not have functioned under such a rule and that in adhering to this rule the federal courts were not really applying state law. This development was arrested in *Bernhardt v. Polygraph Co. of America*, 350 U.S. 198 (1956). This lesson applies to the federal common law as well. When law of a

sue another state in a federal district court, but only that, in a suit to which a state is a party or in which it has a substantial interest, account should be taken of the law that the Supreme Court would apply in a comparable case between the two interested states.

However, it does not follow that the wrong result was reached in *Nevada v. Hall*. Since Nevada had, in effect, entered California and affected that state's interests adversely, Nevada should not be able to avoid such consequences by a plea of sovereign immunity. To a substantial extent the original jurisdiction of the Supreme Court is exercised in suits by one state against another for relief from harmful consequences caused by the second state within the borders of the first, as in cases of pollution of water and air, or impairment of water rights.<sup>517</sup> The Supreme Court touched upon this point in an ambiguous footnote in *Nevada v. Hall*.<sup>518</sup> The problem is that the thrust of the opinion would allow one state to override the sovereign immunity of another even when the latter's conduct has not produced harmful consequences within the borders of the first.

### CONCLUSION

It has been argued in this Article that there was an understanding at the time of adoption of the Constitution that the nation and the states were not suable without their consent, except in special particulars like a suit by a state against a sister state. Modern critics and a minority of the Justices have challenged the existence of such an understanding. They have maintained that the historical record shows that the proponents of sovereign immunity were concerned with protecting the states only from claims founded on state law, as distinct from federal law. This is implausible, and incompatible with the historical record. The same fallacy has engendered confusion about the meaning of the Eleventh Amendment. Read in light of the original understanding the Amendment loses its mystery. The original understanding also illuminates the problem of congressional power to set aside the sovereign immunity of the states.

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particular jurisdiction is controlling, decision should be made in light of the probable outcome in the highest court of that jurisdiction.

<sup>517</sup> See the discussion of representative cases in *Illinois v. City of Milwaukee*, 406 U.S. at 104-08.

<sup>518</sup> The Supreme Court seemed to recognize this in an ambiguous footnote in *Hall*, 440 U.S. at 424 n.24.

The Supreme Court's seeming zigzagging in decisions under the *Ex parte Young* doctrine assumes a rational and defensible pattern when it is recognized that the Court has permitted the use of sovereign immunity for defensive but not offensive purposes. In these decisions, the Court has gone far in recognition of constitutional and statutory claims. The result can be seen as a defensible accommodation of the requirements of sovereign immunity to the requirements of the rule of law.

Consent-to-suit statutes aside, the relief that can be afforded through the suit against the officer is imperfect. Property may be restored, but damages assessed against an officer may not be collectible. Hardship may be incurred by reason of inability to compel a transfer of title by the government. It has been suggested, however, that, as the law is tending, governmental interference with a property right may in all cases be tantamount to a taking, with relief allowable on that basis. Contracts with the government are not enforceable when sovereign immunity is asserted defensively, although this rule may not be applicable where the government's obligation is spelled out in a statute which also specifies clearly the duties of the officer in regard to the obligation. If an inability to hold the government to its executory contracts, as in the case of defaulted bonds, presents a rule-of-law problem, it is one a good deal less serious than government intrusion on persons who ask only to be left alone, or to be free from governmental denial of rights enjoyed by others. The government's ability to escape liability in tort, at least when the tort consists of negligence, as is usually the case, arguably presents even less of a rule-of-law problem.

These are the principal costs of sovereign immunity, absent consent-to-suit statutes. But these statutes are now so widespread, on the federal and state levels, that these costs have in greater part been eliminated. Paradoxically, the prevalence of such statutes offers a possible basis for a principled judicial modification or elimination of sovereign immunity, at least as applied to governmental commercial activity, if there is merit in a thesis advanced by this writer eleven years ago.<sup>519</sup>

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<sup>519</sup> This point is developed *supra* notes 122-126 and accompanying text.