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THE ELEVENTH AMENDMENT AND OTHER SOVEREIGN IMMUNITY DOCTRINES: CONGRESSIONAL IMPOSITION OF SUIT UPON THE STATES

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This article is the second of a series collectively entitled The Eleventh Amendment and Other Sovereign Immunity Doctrines. The first article surveyed the historical context in which the eleventh amendment was adopted, and took the position that the Constitution does not impose the sovereign immunity doctrine; sovereign immunity is a common law doctrine, and is not constitutionally compelled. The present article addresses congressional power to override state immunity. It first sets out the case law on the subject and then discusses alternate theories supporting congressional power to impose suit upon the states. It also treats the interpretive functions of the federal courts in the sovereign immunity area. The final article will discuss questions respecting the kinds of relief that are available from state defendants.

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To what extent can Congress, through legislation, impose suit in federal court¹ upon the states? The question is easily answered if one accepts the view of sovereign immunity set forth in the first Article in this series—that the Constitution allows but does not impose the sovereign immunity doctrine.² Congress then would have full leeway, in the exercise of its regulatory powers, to subject the states to suit. Since the Supreme Court, however, has accorded constitutional status to the sovereign immunity doctrine,³ the question of congressional power becomes much more complicated. As the following discussion will show, the Court seems to have arrived at much the same solution that a common law sovereign immunity doctrine would suggest, but the path it has taken is tortuous indeed.

I. THE MAJOR CASES

Questions concerning congressional imposition upon the states of suits in federal court did not reach the Supreme Court until 1964, when the Court decided *Parden v. Terminal Railway*.⁴ There, as the Court said, “for the first time . . . , a State’s claim of immunity against suit by an individual [met] . . . a suit brought upon a cause of action expressly created by Congress.”⁵ *Parden* was a suit against an Alabama-owned interstate railway by its employees, seeking damages under the Federal Employer’s Liability Act⁶ [hereinafter FELA] for personal injuries sustained while employed. The lower federal courts upheld Alabama’s plea of sovereign immunity and dismissed the suit.⁷ The Supreme Court reversed.

The Court held that Congress had intended the terms of the FELA, covering “[e]very common carrier by railroad while engaging in commerce between any of the several states,”⁸ to include state-owned railroads. It held that Congress had power thus to make states suable in federal court for two reasons. First, Congress acted within its commerce power in regulating interstate railroads, and “the States surrendered a portion of their sovereignty when they

¹ The different issue that exists for imposition of suit in state court is discussed in Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 546-49 (1978) [hereinafter cited as *Part One*]. Throughout this Article, discussion of congressional imposition of suit upon states refers to suits imposed in federal court.

² *Id.* 522-46.

³ *Id.* 522-24, and authorities cited at 517 n.9.

⁴ 377 U.S. 184 (1964).

⁵ *Id.* 187.

⁶ 45 U.S.C. §§ 51-60 (1970).

⁷ *Parden v. Terminal Ry.*, 311 F.2d 727 (5th Cir. 1963), *rev'd*, 377 U.S. 184 (1964). The district court did not write an opinion, but its order is reproduced in 311 F.2d at 728.

⁸ 45 U.S.C. § 51 (1970).

granted Congress the power to regulate commerce.”⁹ Second, the state consented to suit by beginning to operate an interstate railroad twenty years after enactment of the FELA regulating such railroads.¹⁰

Three Supreme Court cases since *Parden* have involved possible clashes between congressionally-created causes of action and a state claim of sovereign immunity. The earliest of these, *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare* [hereinafter, referred to as *Government Employees*]¹¹ most clearly presents the various positions concerning congressional imposition of suit upon the states. The *Government Employees* suit was brought under the Fair Labor Standards Act¹² [hereinafter, FLSA] by state employees seeking overtime compensation, liquidated damages, and attorneys’ fees. In rejecting the employees’ claims, the Supreme Court distinguished *Parden*. The Court held that although Congress had intended to regulate the wages of state employees like the petitioners, it had *not* intended to subject noncompliant states to suits brought by private citizens in federal court.¹³ The Court held that the Act was not sufficiently express in subjecting the states to suit for the Court to infer congressional abrogation of the states’ immunity. The Court did imply, however, that if Congress so desired, it could subject the states to suits like the one at hand.¹⁴

Both Mr. Justice Brennan in a dissenting opinion,¹⁵ and Mr. Justice Marshall (joined by Mr. Justice Stewart) in an opinion concurring in the result,¹⁶ sharply disputed the Court’s conclusion that Congress had not intended to subject the states to private suit. Justice Brennan found no difficulty in sustaining the FLSA, thus construed, because this suit, like *Parden*, was based upon a regulatory statute founded on the commerce clause, and because the states “surrender[ed] their immunity to that extent when they granted Congress the commerce power.”¹⁷ (His position, here as elsewhere,

⁹ 377 U.S. at 191.

¹⁰ *Id.* 192-93.

¹¹ 411 U.S. 279 (1973). The other two, which will be discussed in the text, *infra*, are *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹² 29 U.S.C. §§ 201-19 (1970) (amended 1972 & 1974).

¹³ For other means of enforcing the Act, see text accompanying notes 190-92 *infra*.

¹⁴ See note 58 *infra*.

¹⁵ 411 U.S. at 298 (Brennan, J., dissenting).

¹⁶ *Id.* 287 (Marshall, J., concurring).

¹⁷ *Id.* 301. See also *id.* 315.

was that sovereign immunity is not a constitutionally-based doctrine in suits, like the present one, brought by a state's own citizens.¹⁸) Unlike the Court and Mr. Justice Brennan, however, Mr. Justice Marshall doubted Congress' power to impose this suit upon the state. Founding a constitutional doctrine of immunity from federal suit on article III of the Constitution,¹⁹ Mr. Justice Marshall took the position that Congress could not abrogate that immunity absent some real consent to suit on the part of the state. He went on to say that no such consent could be found on the facts of *Government Employees*.²⁰

Edelman v. Jordan,²¹ the next major sovereign immunity case, was a class action against Illinois officials administering programs of Aid to the Aged, Blind, and Disabled (AABD programs), which are funded equally by the state and federal governments.²² The plaintiffs in *Edelman* charged that state officials were withholding welfare benefits in violation of federal regulations, and the charge was sustained on the merits. The Supreme Court allowed injunctive relief in *Edelman* but it also held that the wrongfully withheld benefits could not be recovered retroactively from the state. One ground on which the court of appeals had allowed retroactive benefits in *Edelman* was that the state had waived its immunity, within the meaning of *Parden*, by participating in the federal AABD program.²³ Over four dissents, which included the authors of the Court's opinions in both *Parden* and *Government Employees*, the Supreme Court reversed, distinguishing *Parden* on the ground that "in this case [*Edelman*] the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."²⁴ Accordingly, the Court did not explicitly treat congressional power to impose a damage remedy upon the states.

¹⁸ For a fuller description of Justice Brennan's position, see notes 36-39 *infra* & accompanying text.

¹⁹ Justice Marshall relied on article III rather than the eleventh amendment because the case was a citizen suit. See *Part One*, *supra* note 1, at 523-24, 537.

²⁰ 411 U.S. at 295-97, *quoted in* text accompanying note 108 *infra*.

²¹ 415 U.S. 651 (1974).

²² 42 U.S.C. §§ 1381-85 (1970) (replaced by Social Security Amendments of 1972, Pub. L. No. 92-603, § 302, 86 Stat. 1478) (replacement repealed by Social Services Amendments of 1974, Pub. L. No. 93-647 § 3(b), 88 Stat. 2349 (1975)).

²³ *Jordan v. Weaver*, 472 F.2d 985, 994-95 (7th Cir. 1973), *rev'd sub nom. Edelman v. Jordan*, 415 U.S. 651 (1974). The court of appeals' opinion was written prior to the Supreme Court's *Government Employees* holding.

²⁴ 415 U.S. at 672. In dissenting opinions, Justice Douglas, *id.* 678, and Justice Marshall, *id.* 688, agreed with the seventh circuit and disputed the Court's finding that Congress had not intended to authorize suits like *Edelman*. Both thought that 42 U.S.C. § 1983 authorized the suit. *Id.* 685, 690-92, 693-96 (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)). See also notes 209-11 *infra* & accompanying text. Justice Marshall, moreover, found here the "voluntary consent"

*Fitzpatrick v. Bitzer*²⁵ did address congressional power and upheld a congressional authorization to sue states for damages, enacted under section five of the fourteenth amendment. *Fitzpatrick* was a suit against the State of Connecticut brought on behalf of all its male employees, alleging sex-based employment discrimination in violation of Title VII of the 1964 Civil Rights Act,²⁶ and seeking money damages as provided by that Act.²⁷ The United States Court of Appeals for the Second Circuit had held that *Edelman* precluded such an award of money damages,²⁸ but the Supreme Court reversed.

The Court said that Congress had intended to authorize such discrimination suits against state governments²⁹ but that the principal issue concerned congressional power to do so. It found that power because the congressional legislation in question was enacted under section five of the fourteenth amendment, an amendment that was "intended to be . . . [a limitation] of the power of the States and [an enlargement] of the power of Congress";³⁰ and because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."³¹ Two Justices concurred on other grounds.³²

to suit that he had found lacking in *Government Employees*. See text accompanying notes 105-07 *infra*. Justice Blackmun joined in Justice Marshall's opinion. Justice Brennan also dissented, on the same ground as he did in *Government Employees*, that the states had surrendered their immunity "at least insofar as [they] . . . granted Congress specifically enumerated powers." *Id.* 687. Justice Douglas' dissent rested both on his rejection of *Edelman's* retroactive monetary relief rule as an element of the sovereign immunity doctrine, and alternatively, on a finding of consent on the part of the state.

²⁵ 427 U.S. 445 (1976).

²⁶ 42 U.S.C. § 2000e-1 to -15 (1970), as amended by Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2-B, 10, 11, 13, 86 Stat. 103 (amended 1975 & 1976).

²⁷ 42 U.S.C. § 2000e-5(g) (Supp. V 1975).

²⁸ *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *rev'd*, 427 U.S. 445 (1976). A three-judge district court had held that both a damage award (retroactive retirement benefits) and an award of attorney's fees were precluded. *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974). The court of appeals reversed as to attorney's fees. 519 F.2d at 571-72.

²⁹ This factor distinguished the suit from *Edelman*. See text accompanying note 24 *supra*.

³⁰ 427 U.S. at 454 (quoting from *Ex parte Virginia*, 100 U.S. 339, 345 (1880)). The persuasiveness of this reasoning is discussed in text accompanying notes 133-38, 149-52 *infra*.

³¹ 427 U.S. at 456 (citation omitted).

³² Mr. Justice Brennan concurred on his usual ground: In citizen suits, sovereign immunity is not a constitutional doctrine and therefore is fully subject to modification by Congress, acting within its enumerated powers. 427 U.S. at 457-58.

Mr. Justice Stevens, concurring separately, 427 U.S. at 458, was uncertain as to the validity of the Title VII legislation under Congress' fourteenth amendment powers, but thought that in any event the legislation was valid under the commerce

As this survey shows, there are two main categories of issues in the cases—those concerning congressional power to impose the suits in question, and those concerning interpretation of the congressional intent. I will discuss the power and the intent issues in turn.

II. CONGRESSIONAL POWER TO IMPOSE SUIT AND CONCOMITANT QUESTIONS CONCERNING THE NEED FOR STATE CONSENT

One thing to note is that the only opinion in the foregoing cases that denies congressional power is Mr. Justice Marshall's opinion in *Government Employees*.³³ Justice Marshall found power to impose federal suit on the states in the other three cases; and all the other members of the Court have found congressional power every time they have addressed the issue. The indications are, therefore, that there is congressional power to subject the states to private federal suits, requiring payment of damages, or other retroactive benefits, from state funds.

In many ways, the cases are a morass, but one can sort out three basic positions on congressional power. I will refer to these as the Brennan position, the Marshall position, and the Court's position. The first two are much more clearly developed than the last.

One can see in *Parden v. Terminal Railway* the seeds of the three basic positions, and also the source of confusion that persists in the Court's position. The majority opinion in *Parden* was written by Mr. Justice Brennan. The status in which the opinion places congressional regulatory power is ambiguous primarily because of the two lines of reasoning the Court gives for its result.³⁴ The first reason for giving effect to Congress' regulation of state-owned railroads—that the states, by ratifying the Constitution, surrendered their immunity from suits imposed by valid congressional enactments—would seem sufficient. The addition, in the next paragraph of the opinion, of the second reason—that the state consented to suit when it operated the railroad—confuses the holding, for it is simply unnecessary if the Court adheres to the first reason. Indeed, that

power. Assuming the applicability of the eleventh amendment, and expressing his difficulty with the *Edelman* retroactive monetary relief rule, he found that the monetary award in this case was distinguishable because it "will not be paid directly from the state treasury, but rather from two separate and independent pension funds." *Id.* 459-60.

³³ 411 U.S. 279, 287 (1973) (Marshall, J., concurring in result).

³⁴ Another significant ambiguity in *Parden* is its undercutting of the reasoning of *Hans v. Louisiana*, 134 U.S. 1 (1890). See text accompanying notes 233-52 *infra*.

entire paragraph undermines the preceding rationale; it states also that the eleventh amendment (which obviously could not have been waived by ratification of the original Constitution) retains vitality and that "[i]t remains the law that a State may not be sued by an individual without its consent."³⁵ In the cases decided after *Parden*, a key issue has been whether the first reason is valid and sufficient—whether Congress can impose suit on states whenever it acts within its article I or other regulatory powers.

A. The Brennan and Marshall Positions

The position Mr. Justice Brennan has taken consistently since *Parden* is that the first reason is valid, rendering the opinion's second rationale superfluous. There is no place for a sovereign immunity claim in a suit by a state's own citizens when Congress, acting within its regulatory powers, has authorized the suit; by ratifying the Constitution, with its grants of power to Congress, the state consented to such suits.³⁶ Mr. Justice Brennan does concede that the eleventh amendment may pose a barrier to noncitizen suits,³⁷ and he has gone so far as to suggest that this barrier should stand despite a state's consent to suit.³⁸ (For citizen suits the effect of his position is the same as if sovereign immunity were recognized as a common law

³⁵ 377 U.S. at 192.

³⁶ *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. at 300-01, 309-15, 320-22 (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. 651, 687 (1973) (Brennan, J., dissenting).

³⁷ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 687 (1973) (Brennan, J., dissenting) ("the Eleventh Amendment . . . bars only federal court suits against States by citizens of other States"); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 309 (1973) (Brennan, J., dissenting) (inapplicability of eleventh amendment "to suits against a State brought by its own citizens in federal court"). But see *id.* 310 (Brennan, J., dissenting) ("[T]he question whether the Eleventh Amendment constitutionalized sovereign immunity as to noncitizen suits should . . . be regarded as open, or at least ripe for further consideration. . . ."); *id.* 309 (Brennan, J., dissenting) ("I know of no concrete evidence that the framers of the [Eleventh] Amendment thought, let alone intended, that even the Amendment would ensconce the doctrine of sovereign immunity.").

³⁸ *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. at 310 (Brennan, J., dissenting) ("The literal wording [of the eleventh amendment] is . . . a flat prohibition against the federal judiciary's entertainment of suits against even a consenting State brought by citizens of another State or by aliens.").

The Court has not agreed with Justice Brennan's suggestion that where a constitutional requirement of sovereign immunity exists, a state cannot waive its immunity and thus effectively expand the federal "judicial power." See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

doctrine, without constitutional sanction, as Justice Brennan recognizes.³⁹)

Mr. Justice Marshall, on the other hand, has not regarded the first reason of *Parden* as sufficient or persuasive and has taken seriously the requirement that a state must consent to avoid either an article III or an eleventh amendment bar to suit. "Consent" by ratification of the Constitution is not sufficient; instead, Mr. Justice Marshall sees state immunity from federal suit as a constitutionally-required doctrine in both citizen and noncitizen suits.⁴⁰ Nor can the required consent be wholly fictional. Not only did Mr. Justice Marshall find no consent on the facts of *Government Employees*;⁴¹ he also suggested in that opinion that if he had the question to decide afresh, he might not find that Alabama, by operating a railroad after enactment of the FELA, necessarily consented to suit.⁴²

Mr. Justice Marshall did find consent in *Edelman*, however, because the welfare program there involved was "fundamentally different from most federal legislation"; it was not imposed upon the states, but gave states the option to participate.⁴³ If they decided to participate, they would receive federal matching funds; and their undertaking in return to comply with federal requirements could be considered voluntary.⁴⁴ Moreover, "[i]n agreeing to comply," Mr. Justice Marshall reasoned, a state "also agreed to subject itself to suit in the federal courts to enforce these obligations."⁴⁵

My evaluation of the foregoing positions is largely evident from the first Article in this series. Like Mr. Justice Brennan, that Article supports a common law concept of sovereign immunity, although it goes beyond his position by extending that concept to noncitizen

³⁹ E.g., *Edelman v. Jordan*, 415 U.S. 651, 687 (1973) (Brennan, J., dissenting) ("nonconstitutional but ancient doctrine of sovereign immunity"); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 320 (1973) (Brennan, J., dissenting) ("traditional nonconstitutional principles of sovereign immunity"); *id.* 321 ("ancient principles of sovereign immunity").

⁴⁰ According to Mr. Justice Marshall, both article III and the eleventh amendment impose sovereign immunity; article III's provision applies to citizens' suits as well as noncitizens' suits. *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 290-92 (1973) (Marshall, J., joined by Stewart, J., concurring in result).

⁴¹ See text accompanying note 20 *supra* and text accompanying note 108 *infra*.

⁴² "For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver." 411 U.S. at 296 (Marshall, J., concurring in result). The statement is quoted in context in text accompanying note 108 *infra*.

⁴³ 415 U.S. at 688 (Marshall, J., dissenting).

⁴⁴ *Id.* 689.

⁴⁵ *Id.* 690. See also *id.* 695-96.

suits.⁴⁶ Once Mr. Justice Brennan finds that the sovereign immunity doctrine is not constitutionally required, congressional power to impose suit follows. Similarly, Mr. Justice Marshall's position on congressional power flows naturally from his interpretation of sovereign immunity as a constitutionally-imposed limit on the judicial power that can be abrogated only by a state's consent. My quarrel with Mr. Justice Marshall's position is only with this concept of sovereign immunity: Neither constitutional language nor history supports the view that article III imposes a doctrine of state sovereign immunity from federal suit.⁴⁷

B. *The Court's Position on Congressional Power*

1. The Essential Ambiguity in the Court's Position—Its Endorsement of Both Congressional Power and the Need for State Consent

In contrast to the relative clarity of the Brennan and Marshall positions on congressional imposition, the Court's position is difficult to decipher.⁴⁸ The most basic problem is that the Court seems to endorse *both* Congress' power to impose suit *and* the necessity for state consent to suit. The confusion in the Court's position can be seen as the confusion of *Parden*—an ambiguity as to which of the *Parden* lines of reasoning it adopts. Since *Parden*, the Court has not described the states' grant of regulatory power to Congress as a waiver. In that sense, it has not followed the first prong of *Parden's* reasoning.⁴⁹ But in a different way, its position seems equivalent to *Parden's* first rationale, standing alone. The Court's implications that Congress is free to impose suit upon the states as long as it stays within its article I and other regulatory powers suggest that sovereign immunity is only a common law doctrine. If sovereign immunity had constitutional status, how could Congress abrogate it?⁵⁰

⁴⁶ Mr. Justice Brennan also recognizes the possibility that the concept would extend to noncitizen suits. See note 37 *supra*.

⁴⁷ See *Part One*, *supra* note 1, at 527-38. Justice Marshall does not see the eleventh amendment as supporting immunity in these cases because of the amendment's limitation to noncitizen suits.

⁴⁸ One reason, of course, is that the various opinions of "the Court" are authored by different Justices, some of whom have quite individual views on sovereign immunity. Yet the Court's opinions purport to be consistent, and it seems useful to attempt to elucidate the position in which they leave the congressional imposition question, since that position is presently "the law."

⁴⁹ Justice Brennan, the author of *Parden*, has continued to follow that opinion's first rationale. See notes 24 and 32 and text accompanying notes 15-18 *supra*.

⁵⁰ It is no answer to say that both the eleventh amendment and article III are phrased as limitations on the "judicial power" and not on the power of Congress. For Congress is not allowed, in other instances, to confer on the federal courts jurisdiction of cases outside the United States' "judicial power." See note 258 *infra* & accompanying text.

The Court's position, as expressed in *Government Employees and Edelman*, appears to differ from Mr. Justice Brennan's because the Court emphasizes the search for a federal statute authorizing the particular action, while Mr. Justice Brennan stresses the states' consent to suit, given by ratification of the Constitution.⁵¹ But the theories are actually the same in this respect, for even under the Brennan scheme, suit will not be imposed upon the states unless there is a congressional enactment imposing it; and finding a statute under the Court's scheme would not avail unless that statute were constitutional.⁵²

Like Mr. Justice Brennan, the Court sometimes talks in language of consent, rather than in language of congressional imposition. But here its theory does depart from Mr. Justice Brennan's, because the consent on the part of a state that the Court looks to is not a consent accompanying ratification of the Constitution. Indeed, it hardly could be since the primary source of sovereign immunity, according to the Court, is the eleventh amendment⁵³—a post-ratification amendment. Moreover, unlike Mr. Justice Brennan, the Court appears to view sovereign immunity as a constitutionally-required doctrine.⁵⁴ In these respects, then, the Court's position seems to resemble Mr. Justice Marshall's—or the second *Parden* rationale—more than Mr. Justice Brennan's position. But the question remains, if immunity from federal suit is a constitutionally imposed doctrine, where does Congress derive the power to impose suit upon the state?⁵⁵ The key to the Court's position on this issue lies in the interrelationship it creates between consent to suit and congressional imposition of suit.

⁵¹ Thus, in *Government Employees*, Justice Brennan objected to the Court's "inquiry 'whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court,' since *Parden* held that, because of its surrender, *no immunity exists that can be the subject of a congressional declaration or a voluntary waiver.*" 411 U.S. at 300 (Brennan, J., dissenting) (citation omitted) (emphasis added).

⁵² The theories seem the same, that is, with respect to congressional power. They may differ nonetheless concerning presumptions of congressional intent to impose suit. See text accompanying notes 175-232 *infra*.

⁵³ Despite the eleventh amendment's language, this is true even for suits by a state's own citizens. *Edelman v. Jordan*, 415 U.S. 651, 663 (1973); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284 (1973). See *Part One*, *supra* note 1, at 522.

⁵⁴ *Part One*, *supra* note 1, at 522. See *id.* 517 n.9, 524 n.38, 548 n.113.

⁵⁵ Neither Mr. Justice Brennan nor Mr. Justice Marshall ultimately has this difficulty: Mr. Justice Brennan, because he finds sovereign immunity is not a constitutional doctrine; Mr. Justice Marshall, because he finds that Congress cannot impose suit.

2. The Court's View of the Interrelationship Between Congressional Power and State Consent

For the moment, I will put to the side the question of congressional power under the Civil War amendments, which may be a distinct source of congressional power, with its own special analysis. Cases prior to *Fitzpatrick v. Bitzer*⁵⁶ did not deal with that power but with article I powers of Congress. Seemingly the Court found that Congress, under its article I powers, had authority to impose upon the states an obligation to defend suits by private individuals in federal court.

As the *Parden* discussion above discloses,⁵⁷ the Court seems both to uphold congressional power to subject states to suit and to maintain the need for states' consent. In *Government Employees*, too, the Court said Congress had power to impose suit,⁵⁸ but also that "a federal court is not competent to render judgment against a non-consenting State."⁵⁹ It can be crucial which of these propositions is in fact determinative. If, for example, Congress enacts a statute allowing individuals a right of action against the states in federal court, is that statute valid regardless of states' consent to suit? It would seem not to be if consent is required; otherwise it would be valid.

These two conflicting themes in the Court's position are reconciled by its practice of consistently imputing to the states a fictional consent whenever it finds that Congress has imposed suit. If consent is always present when Congress regulates a particular area, it matters little whether one calls that consent required or not: in either case, the regulation is valid. For that reason the Court's position becomes the equivalent of Mr. Justice Brennan's in practice. (Indeed, its results bring it even closer to the position I advocate—that sovereign immunity should be deemed solely a common law doctrine—than to Mr. Justice Brennan's position, insofar as he would accord constitutional status to sovereign immunity in noncitizen suits.) In theory, however, it resembles more the position of Mr. Justice Mar-

⁵⁶ 427 U.S. 445 (1976).

⁵⁷ See text accompanying notes 9-10, 34-35 *supra*.

⁵⁸ 411 U.S. at 284 ("Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States."); *id.* 283 ("The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court. . . ."). See also *id.* 287 ("[T]he purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States . . . is not clear.").

⁵⁹ 411 U.S. at 284. See also *id.* 280.

shall, both because it sees sovereign immunity as a constitutional requirement, and because it requires states to consent other than by ratifying the Constitution.

The Court's method of finding consent is evident from *Parden*. Believing that Congress had imposed "a condition of amenability to suit upon the State's right to operate a railroad in interstate commerce,"⁶⁰ the Court there said:

Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. . . . [W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to the regulation as fully as if it were a private person or corporation.⁶¹

In other words, states' consent would be inferred whenever the federal statute in question is interpreted to impose the condition of waiver of immunity, independent of any question of state intent to consent to suit. The theory is that when a state begins or continues to operate in an area that Congress has validly regulated (or conditioned, under the spending power) by imposing suit, it thereby consents to be sued, and this makes the only issue whether the statute does impose suit.

Edelman runs together the issues of state consent and of congressional power in the same way. The Court's opinion contains some language that might be deemed to suggest a change of course, for it disapproves constructive consent,⁶² and says that

[i]n deciding whether a State has waived its constitutional protection under the Eleventh Amendment, [the Court] . . . will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable

⁶⁰ *Parden v. Terminal Ry.*, 377 U.S. at 193 n.11. Later, as well, the Court described the case as one "where the waiver is asserted to arise from the State's commission of an act to which Congress, in the exercise of its constitutional power to regulate commerce, has attached the condition of amenability to suit." *Id.* 195.

⁶¹ *Id.* 196.

⁶² "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." 415 U.S. at 673.

construction.' *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909).⁶³

Nonetheless the Court does not step back from its earlier position, but reaffirms it. It says that *Edelman* is unlike *Parden* and *Government Employees*, because both of those cases "involved a congressional enactment which by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities."⁶⁴ In *Edelman*, by contrast, "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent."⁶⁵ Where Congress has not imposed suit, the Court will require the genuine state consent it describes above,⁶⁶ and the "mere fact" of state participation in the welfare program was insufficient.⁶⁷ But when Congress has imposed suit, the Court does not question the doctrine it finds in earlier cases that "[t]he question of waiver or consent under the Eleventh Amendment . . . turn[s] on whether Congress . . . intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress . . . in effect consented to the abrogation of that immunity."⁶⁸

The Court's practice of imputing consent from states' activities in areas covered by congressional enactments rests, then, essentially on a theory that Congress has conditioned the grant of some privilege or benefit to the state⁶⁹ upon the state's waiver of its sovereign immunity. One might object to this approach generally on the ground that grants of federal benefits or privileges to states should not be conditioned upon states' forfeiture of their constitutional rights.⁷⁰

⁶³ *Id.* The Court added:

We see no reason to retreat from the Court's statement in *Great Northern Life Insurance Co. v. Read*, 322 U.S., at 54 (footnote omitted):

"[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

Id.

⁶⁴ *Id.* 672.

⁶⁵ *Id.*

⁶⁶ See notes 62 & 63 *supra* & accompanying text. See also notes 92-94 *infra* & accompanying text.

⁶⁷ 415 U.S. at 673.

⁶⁸ *Id.* 672.

⁶⁹ For example, *Parden* involved the privilege of operating a railroad; *Edelman*, the benefit of federal money for welfare programs.

⁷⁰ See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 570-71 (1898); *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 336-37 (1893). See generally French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961).

The nexus between the privilege granted and the demanded waiver may, however, be sufficient to save it from invalidation as an unconstitutional condition; it may be legitimate to demand the waiver because it is the grant of the privilege that created the need for the waiver.⁷¹ In *Parden* and *Edelman* the question whether the states had consented to suit could thus become the equivalent of whether Congress had imposed suit on the states.

It is much more difficult to explain in that way the Court's assertions of congressional power to subject states to suit in *Government Employees*. The difficulty is that the statutory scheme involved in *Government Employees* granted no "privilege" to the states. The congressional regulation consisted of imposing specified minimum wages for certain state employees. Perhaps "engaging in interstate commerce" could be deemed the privilege that Congress bestowed, at least insofar as the FLSA applies to employers generally. But this privilege should not support the Act's application to states, for states could not operate at all without being "in interstate commerce" as that term is currently defined by the Court.⁷² Similarly, the state could not operate without having employees—although school and hospital employees may not be an absolute necessity. One would imagine that there are at least some activities that Congress cannot forbid states to engage in; the list might include, for example, running the legislature or courts; maintaining a state house; or engaging in police work or fire prevention.⁷³ If it is true that Congress cannot forbid certain activities to the states, it is difficult to understand how it can condition those activities⁷⁴ upon a

⁷¹ See *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 142-44 (1947). But see *United States v. Butler*, 297 U.S. 1 (1936). But cf. *Lefkowitz v. Cunningham*, 97 S. Ct. 2132 (1977) (State may not condition holding of state political office upon waiver of fifth amendment right to be free from compelled self-incrimination).

⁷² See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁷³ Cf. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (some essential state activities exempt from congressional regulation under the commerce power), discussed in text accompanying notes 78-90 *infra*.

⁷⁴ Justice Marshall made the same point in his dissenting opinion in *Edelman* where he said,

if sovereign immunity is to be at all meaningful, the Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity—i.e. by merely performing "governmental" functions. On the other hand, in launching a profitmaking enterprise, "a State leaves the sphere that is exclusively its own," *Parden v. Terminal R. Co.*, 377 U.S., at 196, and a voluntary waiver of sovereign immunity can more easily be found.

415 U.S. at 695.

Mr. Justice Marshall attributes this point to the Court's opinion in *Government Employees*. The Court there did not, however, suggest that the governmental-

waiver of a constitutional right of immunity.⁷⁵

This analysis would suggest that there may be limits to the Court's ability to impute a fictional consent to the states.⁷⁶ While imputed consent in *Parden* and *Edelman* resolved the conflict between congressional power to subject states to suit and the states' constitutional right to immunity, congressional power to impose suit might not exist when consent cannot be imputed. Perhaps if the *Government Employees* holding had rested upon congressional power, the Court would have developed its argument, discovered the difficulties of inferring state consent on the facts of the case, and decided on another basis whether congressional power, or the need for state consent, would prevail. Nonetheless, *Government Employees* as it stands plainly implies that the Court was ready to impute state consent to suit if Congress had intended to impose suit, and that the only bar to suability was that Congress had not chosen to impose any condition of waiver. The Court quite clearly says that Congress has power to impose the waiver of suit upon the state for the program there at issue.⁷⁷

Government Employees suggests, therefore, that consent will always be imputed to states if Congress, in a valid enactment, has imposed suit upon them. But one cannot be certain that the Court has chosen this course, because its holding in *Government Employees* did not rest upon the finding of congressional power, and because the Court did not thoroughly develop its finding that congressional power existed.

C. *The Significance of National League of Cities v. Usery*

The issue whether the Court will impute consent to suit even from states engaging in activities that are essential to their operation as states has to some extent been mooted. *National League of Cities v. Usery*,⁷⁸ decided three years after *Government Employees*, again involved the congressional regulation of the minimum wages and

proprietary distinction it discussed was relevant to assessing the voluntariness of waiver by states or any issue of congressional power; its discussion of the governmental-proprietary distinction relates instead to the question of congressional intent to subject states to suit. See 411 U.S. at 284-85.

⁷⁵ Sometimes Congress can forbid an activity without being able to condition it. See *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949); *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507 (1926); *Frost & Frost Trucking v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926). The converse does not follow.

⁷⁶ Thus the fourth circuit, in *International Longshoremen's Ass'n v. North Carolina Ports Auth.*, 511 F.2d 1007, 1008 (4th Cir. 1975), apparently limited *Parden's* constructive consent approach to proprietary state activities.

⁷⁷ See note 58 *supra*.

⁷⁸ 426 U.S. 833 (1976).

overtime pay of state employees embodied in the FLSA.⁷⁹ Prior to *Government Employees*, the Court had upheld the constitutionality of these regulations in *Maryland v. Wirtz*.⁸⁰ At the time *Wirtz* was decided, the Court's view of the commerce power permitted Congress to regulate state activities whenever it could regulate similar activities of private persons—that is, whenever regulation might rationally be deemed substantially to affect interstate commerce.⁸¹ *Usery*, however, overruled *Wirtz* and held that the FLSA regulations were an invalid impingement upon the states' sovereignty, which is protected by the tenth amendment to the Constitution.⁸² According

⁷⁹ The 1974 amendments stated expressly that Congress intended to make state employers, along with other employers, subject to private enforcement actions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 61 (amending 29 U.S.C. § 216(b) (1970)).

The 1974 amendments had also further expanded the coverage of the Act. They expressly included "public agencies," 29 U.S.C. § 203(d) (Supp. IV 1974), and they brought almost all public employees within the Act (for the exceptions that remained, see 29 U.S.C. §§ 203(e)(2)(C), 213(a)(1) (Supp. IV 1974)). In *Usery* the Court emphasized that the amended Act covered persons employed by fire, police, and health departments, and sanitation districts, as well as the school and hospital employees involved in *Government Employees*. See 426 U.S. at 851. That the *Usery* Court did not intend to confine its holding to these arguably more essential government activities is apparent, however, from its overruling of *Maryland v. Wirtz*, 392 U.S. 183 (1968), which, like *Government Employees*, concerned school and hospital workers. See 426 U.S. at 853-55.

⁸⁰ 392 U.S. 183 (1968). The regulations were, however, in somewhat different form. See note 79 *supra*.

⁸¹ *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964); *Wickard v. Filburn*, 317 U.S. 111, 128 (1942).

⁸² See 426 U.S. at 842-43. If the holding is deemed to derive directly from the tenth amendment, it is difficult to square with that amendment's wording. The amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. That wording would seem to support the view of the tenth amendment prevailing before *Usery*, that it "states but a truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124 (1941), and that its content can be determined only by examining the Constitution's delegations of power to the federal government. Under this traditional approach, if something is within the commerce power, or any other federal power, the tenth amendment necessarily does not reserve it to the states.

Usery clearly altered this approach, if it is a tenth amendment case, because it considered the FLSA provisions to be *prima facie* within the reach of the commerce power, and valid as applied to private employers, but it nevertheless held that the provisions "encounter a . . . constitutional barrier because they are to be applied directly to the States as employers." 426 U.S. at 841 (footnote omitted).

It is not absolutely clear, from the Court's opinion, whether the *Usery* holding did rest upon the tenth amendment, as distinct from other policies of federalism (not tied to any particular constitutional provision). Some of the Court's statements indicate that it is a tenth amendment case. For example, the Court says, "there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce" and "an express declaration of this limitation is found in the Tenth Amendment." *Id.* 842-43. Moreover, the Court had foreshadowed this apparent approach of finding affirmative limits in the tenth amendment in *Fry v. United States*, 421 U.S. 542 (1975). See also *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

to *Usery*, there are some subjects so central to the state governments that Congress cannot reach them even if they are otherwise within Congress' regulatory powers, and among those subjects are the wages and hours of state employees.

The *Usery* holding goes beyond the suggestion, discussed above,⁸³ that state consent to suit under the FLSA should not be inferred from the state engaging in interstate commerce and employing school and hospital employees. For *Usery* is not limited to protecting the states' immunity from federal suit. Instead it prohibits the congressional regulation altogether.⁸⁴ No Justice in *Government Employees* had questioned the validity of the congressional regulation there, although Justice Douglas, the author of *Government Employees*, was a dissenter in *Wirtz*.⁸⁵

It is not at all clear how broadly *Usery* will apply. The *Usery* opinion contains many formulations describing the area into which Congress may not intrude,⁸⁶ but none furnishes definitive guidance.

⁸³ See text accompanying notes 71-76 *supra*.

⁸⁴ Mr. Justice Marshall dissented in *Usery*. Even if he did stand behind the governmental-proprietary distinction he put forth in *Government Employees*, therefore, see notes 102-03 *infra* & accompanying text, the Court's response in *Usery* to the concern he articulated was more forceful than Mr. Justice Marshall wished. Justice Marshall in *Government Employees* made clear that congressional regulation of states was appropriate in any article I area (or other area within congressional regulatory power, e.g., section 5 of the fourteenth amendment), and that he questioned only the availability of the federal forum to enforce that regulation. 411 U.S. at 297-98. See Part One, *supra* note 1, at 546-49.

In one respect, however, the *Usery* rule might possibly go less far than Mr. Justice Marshall's suggestion. It probably does not extend to all things that could be deemed "governmental" as that phrase has been used in other contexts, see notes 86-89 *infra* & accompanying text, and conceivably it extends to fewer subjects than Mr. Justice Marshall's distinction does. For the various formulations the *Usery* Court used, see note 86 *infra*.

⁸⁵ *Wirtz* was a 6-2 decision. Mr. Justice Stewart joined in Mr. Justice Douglas' opinion. Mr. Justice Marshall did not participate in the decision.

⁸⁶ For example, the *Usery* opinion says "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress," 426 U.S. at 845. It describes those attributes at various places as "essential governmental functions," *id.* 839; "essential governmental decisions," *id.* 850; "the activities of the States as States," *id.* 842. See also *id.* 845; "essentially and peculiarly state powers," *id.* 845 (quoting *Coyle v. Smith*, 221 U.S. 559, 565 (1911)); "functions essential to [the state's] separate and independent existence," *id.* (quoting *Coyle v. Smith*, 221 U.S. at 580); and "attribute[s] of state sovereignty," *id.*

Usery defines the functions on which Congress may not intrude in many different ways, for example: "activities . . . typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," *id.* 851; "functions such as these which governments are created to provide, services such as these which States have traditionally afforded their citizens," *id.*; "those governmental services which the States and their political subdivisions have traditionally afforded their citizens," *id.* 855. It further says that Congress cannot displace "state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require," *id.* 847; "Congress may not exercise power in a fashion that impairs States'

It may be that *Usery* applies only "when Congress seeks to regulate directly the activities of States as public employers."⁸⁷ Indeed the protected area may be narrower still;⁸⁸ it may be limited to federal regulation of state employees' wages and hours, so that the federal government could constitutionally impose a health regulation that would apply in all places of employment, private or public. Moreover, the legislation in *Usery* was enacted under Congress' commerce power and, as *Usery* recognized, the same subjects that are protected from congressional regulation there may be reachable under other congressional powers.⁸⁹

The upshot is that today there exists an area of state activity that, because it is central to the states' functioning as states, is beyond congressional regulation under the commerce clause and perhaps other congressional powers. Although the scope of the area is still uncertain, it at least covers the factual situation in *Government Employees*. That area has been put beyond the reach of congressional regulation altogether. When a challenged regulation impinges upon that area, the Court need not determine whether states constructively consent to suit by engaging in even essential governmental activities; nor need the Court resolve whether a congressional requirement that states consent to suit in order to continue operations is an "unconstitutional condition."

integrity or their ability to function effectively in a federal system," *id.* 843 (quoting *Fry v. United States*, 421 U.S. 542, 547 n.7 (1975)); Congress cannot "interfere with traditional aspects of state sovereignty" or "substantially restructure traditional ways in which local governments have arranged their affairs." 426 U.S. at 849. It cannot "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," *id.* 852; it cannot "force directly upon the States its choices as to how essential decisions regarding the conduct of integral government functions are to be made," *id.* 855.

⁸⁷ 426 U.S. at 841.

⁸⁸ In *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451 (N.D. Fla. 1977), *appeal pending*, No. 77-1846 (5th Cir., oral argument scheduled for June, 1978), the district court held that the Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-2026 (Supp. V 1975), had required the Florida Department of Transportation to grant the plaintiff a military leave of absence, so that upon his return from military duty he was entitled to reemployment with seniority, status, and salary, as if he had never been absent. The state argued that the Veterans' Reemployment Rights Act, thus applied, "impairs states' integrity" within the meaning of *Usery*, because it "effectively disrupts the States' authority to control state employees with respect to conditions of employment," *id.* 458; but the court rejected that contention. Although the state has appealed *Peel's* eleventh amendment holdings, *see* notes 154, 169 & 287 *infra*, it has not appealed this limitation of *Usery*.

For other opinions interpreting *Usery* narrowly, *see Usery v. Allegheny County Institution Dist.*, 544 F.2d 148 (3d Cir. 1976); *National League of Cities v. Marshall*, 429 F. Supp. 703 (D.D.C. 1977) (Supreme Court *Usery* on remand).

⁸⁹ *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976). *See* notes 146-47 *infra* & accompanying text.

Those questions persist, however, insofar as some essential governmental services can still be regulated by Congress, under the commerce power and under other powers. In those governmental areas where congressional regulation is not forbidden, can Congress impose suit upon the states, or must the states first consent to suit? If consent is required, will the Court, as *Government Employees* suggests, find a fictional consent whenever Congress has imposed suit, despite the difficulty of inferring consent from states engaging in essential governmental services? Or will it develop another approach delimiting the circumstances in which consent can be inferred?⁹⁰

D. *Alternative Approaches to Determining Consent*

If the Court does prove unwilling to impute consent from state operation of essential governmental services, what degree of voluntariness will be necessary in those cases for consent to suit to be attributed to states?

Supreme Court cases cover a broad spectrum on the question how genuine a state's consent to suit must be to effectuate a valid waiver. There is a category of cases that requires genuine state waiver of immunity as a precondition to private, federal suits against states.⁹¹ In those cases the Court says that the interpretation of a state statute waiving immunity is a question of state law,⁹² and it even resolves ambiguities in state consent statutes against a waiver of federal court immunity.⁹³ This requirement of genuine consent applies, however, only to suits that no federal enactment purports to authorize.⁹⁴ Those cases stand in sharp contrast to the constructive consent approach the Court follows in cases involving congressional imposition of suit upon the states. *Parden v. Terminal Railway* was one of the first cases following this constructive approach.⁹⁵ There the Court found state consent even though Alabama at no time had

⁹⁰ For discussion of the effect of *Usery* on other sovereign immunity issues, see text accompanying notes 144-52, 159-61, 220-24 *infra*.

⁹¹ See notes 62-63 *supra* & accompanying text. The cases predate *Parden*, and prior to *Edelman*, see text accompanying notes 63-68 *supra*, one might have thought that *Parden* superseded them.

⁹² *Ford Motor Co. v. Department of Treasury*, 323 U.S. 495 (1945); *Southern Ry. v. South Carolina State Highway Dep't*, 246 F. Supp. 435 (E.D.S.C. 1965).

⁹³ *E.g.*, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577 (1946).

⁹⁴ See *Parden v. Terminal Ry.*, 377 U.S. at 195-96. See also text accompanying notes 63-68 *supra*.

⁹⁵ The other was *Petty v. Missouri-Tennessee Bridge Comm'n*, 359 U.S. 275 (1959), in which the Court held that the states involved had waived their immunity when they entered into an interstate compact, approved by Congress on the condition that nothing therein should diminish federal jurisdiction.

intended to waive immunity. Nor did state officials even know, until the Supreme Court so informed them, that a waiver had taken place.⁹⁶ For the Alabama Constitution at all times had provided that the state could "never be made a defendant in any court of law or equity,"⁹⁷ and state case law had denied the power of either the state legislature or any state officer to waive the state's immunity.⁹⁸

Mr. Justice Marshall has attempted to develop an alternative approach, more meaningful than the Court's, to determine states' consent to congressionally imposed suits. The position he develops falls, on the voluntary-constructive spectrum, somewhere in between those cases requiring genuine consent and those suggesting a willingness to impute consent automatically whenever a congressional enactment imposes suit. Justice Marshall did not agree that state consent could be found in *Government Employees*, although the Court there implied that its constructive consent approach would obtain and that Congress had power to impose suit upon the states. On the other hand, he did find state consent in *Parden* and in *Edelman*. One or more of the factors he discusses, in his separate opinions in *Government Employees* and *Edelman*,⁹⁹ might possibly prove useful to the Court if indeed it finds itself unwilling automatically to impute consent in some instances.

In *Edelman*, Mr. Justice Marshall made the point already discussed above: "[T]he Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity—i.e., by merely performing its 'governmental' functions."¹⁰⁰ He did not believe, however, that this necessarily barred a finding of state consent to suit for governmental activities, and it did not in *Edelman*: "While conducting an assistance program for the needy is surely a 'governmental' function, the State here has done far more than operate its own program in its sovereign capacity."¹⁰¹

⁹⁶ This fact substantially weakens any attempted reconciliation of *Parden* with later cases on the ground that the state in *Parden* "had notice that it was entering a regulated industry subject to federally imposed liabilities." Nowak, *The Scope of Congressional Power To Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1450 (1975). In discussing *Edelman*, by contrast, Professor Nowak says that "although Illinois had notice when it entered the program that it would have to follow federal guidelines or lose its funds, it had no notice from Congress that failure to follow these regulations would result in liability to its citizens." *Id.* 1452. The point is as applicable to *Parden* as it is to *Edelman*.

⁹⁷ ALA. CONST. of 1901, art. I, § 14.

⁹⁸ *Parden v. Terminal Ry.*, 377 U.S. at 194 & n.12 (citing Alabama cases).

⁹⁹ *Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. at 287 (concurring in result); *Edelman v. Jordan*, 415 U.S. at 688 (dissenting).

¹⁰⁰ 415 U.S. at 695. See text accompanying notes 71-76 *supra*.

¹⁰¹ 415 U.S. at 695.

It is not clear whether Mr. Justice Marshall himself intended to espouse the "governmental-proprietary" distinction that he describes in *Edelman*, or whether he simply (erroneously)¹⁰² attributes it to the Court.¹⁰³ In any event, it does make sense, as discussed above,¹⁰⁴ to refuse to impute state consent simply from states engaging in activities that Congress could not forbid to them.

A second relevant factor appears in *Edelman*, where Mr. Justice Marshall stressed that the state truly had an option whether to join in the federal program.¹⁰⁵ A related way to sustain the voluntariness of the consent in *Edelman* is to stress that the state benefited from subjecting itself to federal regulation because, as a result, it received federal matching funds. There should be more willingness to view the state's consent as voluntary when it is given as part of a bargain¹⁰⁶—when the state derives some benefit in return for its waiver.¹⁰⁷

¹⁰² See note 74 *supra*. The Court seemingly employed the governmental-proprietary distinction in relation to how clearly congressional imposition of suit must be expressed. 411 U.S. at 284-85. See text accompanying notes 200-02 *infra*. Justice Brennan read the Court's distinction thus, although he questioned its relevance to the issue. 411 U.S. at 303 (Brennan, J., dissenting).

¹⁰³ In *Government Employees* Mr. Justice Marshall roundly repudiated any governmental-proprietary distinction in this area:

Certainly, I do not accept the Court's efforts to distinguish this case from *Parden* on the basis that there we dealt with a "proprietary" function, whereas here we deal with a "governmental" function. . . . I had thought we had escaped such unenlightening characterizations of States' activities. Cf. *Maryland v. Wirtz*, 392 U.S. 183, 195 (1968); *United States v. California*, 297 U.S. 175, 183-84 (1936).

411 U.S. at 297 n.11. In *Edelman*, however, he picks up the distinction, which he attributes to the Court, and gives it a rationale that makes it applicable to assessing voluntariness of waiver, an issue to which the Court had not suggested its distinction was relevant. See note 74 *supra*. And even in *Government Employees*, in arguing that consent should not be imputed, he made mention of the fact that the state activities at issue were "vital public services." See text accompanying note 108 *infra*.

¹⁰⁴ See text accompanying notes 71-77 *supra*.

¹⁰⁵ 415 U.S. at 688-90, 693, 695-96 (Marshall, J., dissenting). One might question whether states today could realistically opt to renounce federal welfare funds. Nonetheless since formally states have the option, and since they benefit from the funds, it is reasonable to hold them to conditions imposed upon the funds.

¹⁰⁶ That the waiving party has benefited from the waiver might profitably be given some weight in the troublesome confessions area, as well. Perhaps one reason the voluntariness of guilty pleas has been made so much more difficult to challenge than that of confessions, see *Tollett v. Henderson*, 411 U.S. 258 (1973); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970), is because the defendant in a guilty plea situation usually has benefited to some degree from his plea.

¹⁰⁷ See *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947). This rationale for upholding states' consent would be particularly helpful in sustaining exercises of Congress' spending power.

The main factor Justice Marshall stressed in refusing to find state consent in *Government Employees* was timing:

In *Parden v. Terminal R. Co.*, supra, this Court found that Alabama which had undertaken the operation of an interstate railroad had consented to suits brought in federal court by its railroad employees under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60. As to the State's suability in federal court, the Court reasoned that "Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act." 377 U.S., at 192. For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver. Cf. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-186 (1972); *Fay v. Noia*, 372 U.S. 391, 439 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Certainly, the concept cannot be stretched sufficiently further to encompass this case. Here the State was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State had the choice of either ceasing operation of these vital public services or "consenting" to federal suit suffices, I believe, to demonstrate that the State had no true choice at all and thereby that the State did not voluntarily consent to the exercise of federal jurisdiction in this case. Cf. *Marchetti v. United States*, 390 U.S. 39, 51-52 (1968). In *Parden*, Alabama entered the interstate railroad business with at least legal notice of an operator's responsibilities and liability under the FELA to suit in federal court, and it could have chosen not to enter at all if it considered that liability too onerous or offensive. It obviously is a far different thing to say that a State must give up established facilities, services, and programs or else consent to federal suit. Thus, I conclude that the State has not voluntarily consented to the exercise of federal judicial power over it in the context of this case.¹⁰⁸

Justice Marshall's distinction between *Parden* and *Government Employees* suggests that for consent to be genuine, the state may have to commence the regulated activity after Congress has imposed

¹⁰⁸ 411 U.S. at 295-97.

the regulation.¹⁰⁹ If this distinction were adopted,¹¹⁰ one can imagine problems of application. For example, how would Mr. Justice Marshall resolve the question if, subsequent to the state's "consent," Congress imposed a distinctly more stringent regulation of the same subject matter?¹¹¹ Would he say that consent to regulation of the particular subject matter necessarily encompasses every valid congressional regulation for all time; or would Congress, in altering the regulatory scheme, risk losing the state's consent? A converse problem would arise if the state's entry into the field—for example, railroads—preceded the congressional regulation, but subsequent to the regulation the state expanded its enterprise.

Another issue is how this suggestion that the date of regulation is dispositive would fit in with the "governmental-proprietary" distinction for determining voluntariness of consent. One possibility would be a rule that consent can always be found when a state engages in proprietary activities,¹¹² but that for governmental activities it can be inferred only if the regulation preceded commencement of the activity. Otherwise the rule could be that consent can never be inferred for governmental activities (though of course genuine state consent would be honored here as elsewhere), and that

¹⁰⁹ The extent to which Mr. Justice Marshall would adhere to this distinction is unclear. Not only does Justice Marshall's opinion in *Government Employees* throw his *Parden* position into some doubt, see text accompanying note 42 *supra*; but, in a footnote appearing at the end of the above-quoted *Government Employees* language on consent, Justice Marshall also declines to commit himself as to whether he would find consent in *Government Employees* if the state had begun to operate the relevant facilities after the congressional regulations were in effect. 411 U.S. at 279 n.11.

¹¹⁰ The Court apparently does not espouse the distinction, but instead believes that consent could be imputed on the facts of *Government Employees* even if state participation in the activity predated congressional regulation. See note 58 *supra* and text accompanying note 77 *supra*.

¹¹¹ The problem would not arise, of course, in spending power cases like *Edelman*, involving conditions attached to receipt of federal funds; in those cases, when the conditions changed, a state could simply cease to participate and cease to receive federal benefits. In other contexts, however, the problem is a real one. In commerce clause cases like *Parden*, for example, the state would be put to a choice similar to the one Justice Marshall describes above, see text accompanying note 108 *supra*,—a choice between ceasing operation of its railroad or "consenting" to the new regulation.

¹¹² This is the equivalent of a rule that the eleventh amendment protects states *only* in their governmental activities. The *Government Employees* Court can be read, at one point, to say the amendment has no application to proprietary activities. 411 U.S. at 284 (saying the eleventh amendment bars suit against non-consenting states but distinguishing *Parden* because it involved an activity "operated for profit" and "in an area where private persons and corporations normally ran the enterprise.").

it would be inferred for proprietary activities only if entry was subsequent to regulation.¹¹³

E. *Summary of Pre-Fitzpatrick v. Bitzer Law on Congressional Power To Abrogate States' Immunity*

In short, "the law" concerning congressional power to abrogate states' immunity, as it stood after *Parden*, *Government Employees*, *Edelman*, and *Usery*, is that Congress does have power to impose suit upon the states, despite the eleventh amendment and other sovereign immunity doctrines, in any area in which it has regulatory power. (Its regulatory power, however, is subject to some limits when it regulates states as states, as found in *Usery*.) It appears that whenever a valid congressional enactment imposes suit, the Court will infer the states' consent to suit. But since the Court's holding has never actually rested upon congressional power to impose suit in a situation, like *Government Employees*, where it is particularly difficult to find state consent, one cannot be certain that a fictional consent to support congressional power will always be found.

It is also noteworthy that while the cases do not discuss the issue as such, they set no apparent limit on the type of relief Congress can impose against the states. *Edelman* held that in the absence of congressional authorization the judiciary should not award money judgments to be paid from state funds, even though injunctive relief may be proper.¹¹⁴ It did not, however, throw into question congressional power to authorize money judgments against the states.

Prior opinions had made quite clear that Congress could impose this form of relief against the states. Indeed, the question of congressional power to authorize private, federal suits against the states has always been posed in the context of congressional imposition of damage remedies against states. *Parden* held that a statute making railroads "liable in damages" to injured employees¹¹⁵ applied to state-owned railroads along with others. The *Government Employees* Court was "reluctant to believe" that Congress would choose to grant individuals *double* recovery against the states,¹¹⁶ but

¹¹³ It is not clear from Mr. Justice Marshall's discussions which of these alternatives he would espouse, if indeed he would follow the governmental-proprietary distinction at all.

¹¹⁴ This question of appropriate forms of relief is the subject of the final article in this series.

¹¹⁵ 45 U.S.C. § 51 (1970).

¹¹⁶ The double damages provision in the FLSA was not as great a problem as the Court suggested. Under the statute, good faith on the part of the defendant

it cast no doubt upon Congress' power to do so.¹¹⁷ It implied that it saw no problem arising from congressional authorization of a damage remedy against states when it said that Congress could "place new or even enormous fiscal burdens on the States" even in connection with governmental activities.¹¹⁸ (*Usery* now undercuts some applications of this principle to governmental activities.)

This is the law as it stood prior to *Fitzpatrick*. A substantial issue concerning *Fitzpatrick* is whether it altered any of these propositions.

F. *Fitzpatrick v. Bitzer* and the Special Problem of the Civil War Amendments

In *Fitzpatrick v. Bitzer*,¹¹⁹ the Title VII case upholding a congressional authorization of private damage suits against the states, the Supreme Court held that Congress' power under section five of the fourteenth amendment is not subject to the eleventh amendment. It had long been argued that the fourteenth and the other Civil War amendments¹²⁰ modify the eleventh amendment. As early as *Ex parte Young*, the Court had noted the issue and avoided resolving it.¹²¹ The issue had also arisen in *Edelman v. Jordan*,¹²² where the NAACP Legal Defense Fund argued to the Supreme Court, in its amicus curiae brief, that the eleventh amendment was inapplicable to actions under the Civil War amendments.¹²³ The Court did not explicitly address this contention, and Justice Marshall, writing separately, claimed that it was left an open question.¹²⁴ The Court's reasoning in *Edelman* did suggest, however, that actions based on the fourteenth amendment were not to be given special

obviated double recovery; and even if there were bad faith, double recovery was discretionary with the judge. 29 U.S.C. § 260 (Supp. V 1975).

¹¹⁷ 411 U.S. at 286.

¹¹⁸ *Id.* 284.

¹¹⁹ 427 U.S. 445 (1976).

¹²⁰ In *Fitzpatrick v. Bitzer*, 427 U.S. at 454 & n.10, the Court discusses the thirteenth amendment. Later in the opinion the Court speaks of "the Civil War Amendments," saying that they allow "intrusions by Congress" into areas previously reserved to the states. *Id.* 455. Reason would suggest that the same rule should apply to the enforcement provisions of the thirteenth and fifteenth amendments as applies to section five of the fourteenth amendment. Other amendments with similar enforcement provisions might be similarly treated. See U.S. CONST. amends. XIX, para. 2 and XXIV, § 2.

¹²¹ 209 U.S. 123, 149-50 (1908).

¹²² 415 U.S. 651 (1974).

¹²³ Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., at 8-18 [hereinafter cited as Brief].

¹²⁴ 415 U.S. at 694 n.2 (Marshall, J., dissenting) (speaking in terms of fourteenth amendment only).

treatment. It overruled earlier cases allowing retroactive monetary relief that were based on the fourteenth amendment,¹²⁵ and it discussed fourteenth amendment cases as though they were not distinguishable on that ground.¹²⁶ It should be noted that the issue raised in *Edelman* was whether the fourteenth amendment generally modifies the eleventh; the issue was not limited to section five of the fourteenth amendment. The Court in *Fitzpatrick* held only that Congress' power under section five of the fourteenth amendment is not subject to the eleventh amendment.¹²⁷

In concluding that section five of the fourteenth amendment is independent of any sovereign immunity restrictions, the *Fitzpatrick* Court emphasized:

[The Fourteenth] Amendment quite clearly contemplates limitations on [the states'] authority. In relevant part, it provides:

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress' power to "enforce" them "by appropriate legislation."¹²⁸

Furthermore, the Court quoted approvingly from *Ex parte Virginia*¹²⁹ that the thirteenth and fourteenth amendments "'were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress'";¹³⁰ and that congressional enforcement of those limitations "'is no invasion of

¹²⁵ *Id.* 670-71 & n.13. The most important of these cases was *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹²⁶ 415 U.S. at 664, 666-67, 670-71, 677 n.13.

¹²⁷ See note 139 *infra* & accompanying text.

¹²⁸ 427 U.S. at 453.

¹²⁹ 100 U.S. 339 (1879).

¹³⁰ 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 345 (1879)).

State sovereignty,' " ¹³¹ even when it touches areas like jury selection and administration of state laws,¹³² "spheres of autonomy previously reserved to the States." ¹³³

In some ways the argument tells us little. As the Court recognized elsewhere in *Ex parte Virginia*, every constitutional grant of power to Congress diminishes the powers of states.¹³⁴ The Court also recognizes elsewhere in *Fitzpatrick* that its argument does not address the question why the eleventh amendment does not nonetheless protect the states from private federal suit,¹³⁵ leaving Congress free to regulate the states through other means. The eleventh and fourteenth amendments could then both be applicable in the same area, instead of the fourteenth amendment modifying the eleventh. In *Government Employees* the Court made the point that Congress can effectively regulate states through means other than private federal suit; the Court held such suits barred, yet claimed nonetheless that Congress' regulation was applicable and enforceable.¹³⁶

The *Fitzpatrick* Court's conclusion that the fourteenth amendment allowed Congress in Title VII to subject states to private damage actions in federal court amounts, in the last analysis, to little more than an *ipse dixit*:

It is true that none of [the] previous cases [sanctioning congressional intrusions, under the Civil War amendments, into areas previously reserved to the states] presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans v. Louisiana*, 134 U.S. 1 (1890), are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody

¹³¹ 427 U.S. at 454 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

¹³² 427 U.S. at 454.

¹³³ *Id.* 455.

¹³⁴ "Indeed every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." *Id.* 455 (quoting *Ex parte Virginia*, 100 U.S. 339, 347 (1879)).

¹³⁵ 427 U.S. at 456 ("It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment.").

¹³⁶ See text accompanying notes 12-14 *supra* and text accompanying notes 181-82, 190-92 *infra*.

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. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan*, *supra*; *Ford Motor Co. v. Department of Treasury*, *supra*.¹³⁷

Nonetheless it does represent a clear holding that the eleventh amendment does not constrain Congress when it acts "to enforce, by appropriate legislation, the provisions of [the fourteenth amendment]." ¹³⁸

Unquestionably the *Fitzpatrick* holding is limited to actions authorized by Congress pursuant to section five of the fourteenth amendment.¹³⁹ While the Court does not separate the issues, there are three different subholdings in the *Fitzpatrick* opinion: (1) Under the fourteenth amendment, Congress can regulate, through the imposition of private suits, even activities most central to states' governmental processes; (2) Congress can impose suit without the necessity of even a fictional consent by the states; and (3) Congress can impose even suits for retroactive monetary relief upon the states. While *Fitzpatrick* limits the first of these subholdings to fourteenth amendment cases, I believe that it does not so limit the last two.

¹³⁷ 427 U.S. at 456.

¹³⁸ U.S. CONST. amend. XIV, § 5.

¹³⁹ The limitation is apparent in the first two sentences of the *Fitzpatrick* opinion:

In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin." The principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, *Edelman v. Jordan*, 415 U.S. 651 (1974), Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment.

427 U.S. at 447-48 (footnote omitted). See also language quoted in text accompanying note 137 *supra* and note 143 *infra*.

1. Imposition of Suit upon States "In Their Capacities as Sovereign Governments"¹⁴⁰

The Court's implication, in the statements quoted above,¹⁴¹ that the Civil War amendments show a cession of state power to Congress in a special way makes more sense if one bears in mind that the Court is discussing federal regulation of activities central to the states' governmental function. It should be noted that the Court avoided the terms "governmental" and "proprietary" in its opinion. Indeed its references to this issue are sufficiently oblique that one unfamiliar with the preceding case law could miss this thrust of the *Fitzpatrick* opinion.¹⁴² Instead of using the "governmental-proprietary" terminology, the Court said it was "aware of the factual differences between the type of state activity involved in *Parden* and that involved in [*Fitzpatrick*]. . . ." It is concerning this distinction that the *Fitzpatrick* Court considered it significant that the statutory provisions in question were enacted under Congress' fourteenth amendment enforcement power.¹⁴³ Without being willing to adopt the governmental-proprietary terminology, *Fitzpatrick*, then, suggests an intention to limit this part of its holding—that Congress can impose private suits on states even in connection with state activities most central to state sovereignty—to actions Congress has authorized pursuant to the Civil War amendments.

Prior eleventh amendment case law had not suggested that such a distinction, according to the type of state activity at stake, would be significant to the scope of congressional power under either the

¹⁴⁰ National League of Cities v. Usery, 426 U.S. 833, 852 (1976), uses this formulation to describe what is more readily called the "governmental-proprietary" distinction. I hesitate to rely exclusively upon the usual "governmental-proprietary" terminology, because the *Fitzpatrick* Court went to such lengths to avoid using those terms. See text accompanying notes 141-43 *infra*.

¹⁴¹ See text accompanying notes 128-33 & 137 *supra*.

¹⁴² In contrast to the failure to adopt any descriptive formulation in *Fitzpatrick*, the Court's opinion in *Usery*, also authored by Mr. Justice Rehnquist, uses many different formulations to describe the area immune from congressional control. See note 86 *supra*.

¹⁴³ We are aware of the factual differences between the type of state activity involved in *Parden* and that involved in the present case, but we do not think that difference is material for our purposes. The congressional authorization involved in *Parden* was based on the power of Congress under the Commerce Clause; here, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment.

427 U.S. at 452 (footnote omitted). Similarly, the long discussion of *Ex parte Virginia* which follows, *id.* 453-55, concerns congressional power to regulate state activities central to states' governmental functions: jury selection for state courts and administration of state laws.

fourteenth amendment or any other grant of power to Congress.¹⁴⁴ But *Usery*, decided after *Edelman* and before *Fitzpatrick*, had told us that at least some congressional regulations enacted under the commerce power cannot "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."¹⁴⁵ It not only prevented subjecting states to suit; it forbade the regulations altogether. *Fitzpatrick* complements *Usery* when it implies that acting pursuant to most of its powers other than the fourteenth amendment, Congress may not impose suit as a means of regulating central governmental activities. *Fitzpatrick* thereby gives an eleventh amendment basis as well for *Usery*'s prohibition. *Usery* also had indicated the possibility that fourteenth amendment cases would receive different treatment—that under its fourteenth amendment powers Congress could regulate even the activities at issue there.¹⁴⁶ Thus, *Fitzpatrick*'s ruling that Congress can do so by imposing private federal damage actions fits in with the *Usery* opinion.

If *Usery* had removed altogether congressional power to regulate "states as states," except under the fourteenth amendment or the spending power, *Fitzpatrick* then would add little. Insofar as *Usery* is applied more narrowly,¹⁴⁷ however, there is greater practical importance to *Fitzpatrick*'s implication that under powers other than the fourteenth amendment, Congress cannot impose suit on states for essential governmental activities. Insofar as that implication would apply to activities outside of *Usery*'s exemption from congressional regulation, there would be a category of cases in which regulation is valid but imposition of suit is not. *Fitzpatrick* may also thereby suggest, contrary to the suggestion of *Government Employees*, that fictional consent to suit would not be imputed

¹⁴⁴ See text accompanying note 77 *supra*. The distinction had, however, moved the Court in *Government Employees* to impose a heavy presumption against congressional intent to subject the states to suit. See note 74 *supra*.

¹⁴⁵ 426 U.S. at 852. For other formulations of the limits on Congress' power, see note 86 *supra*.

¹⁴⁶ "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." 426 U.S. at 852 n.17.

¹⁴⁷ See note 88 and text accompanying notes 87-90 *supra*. In *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451 (N.D. Fla. 1977), *appeal pending*, No. 77-1846 (5th Cir., oral argument scheduled for June, 1978) the court held that *Usery* had no application to congressional enactments pursuant to the war powers, and it intimated that *Usery* was limited to congressional enactments pursuant to the commerce power. *Id.* 458-59. Although the state has appealed the court's eleventh amendment holdings in that case, see notes 154, 169 & 287 *infra*, it has not appealed this limitation on *Usery*.

merely from states' operations in their essential governmental capacities.¹⁴⁸

The *Fitzpatrick* holding that Congress may regulate essential governmental functions of the states under the fourteenth amendment is sensible. The fourteenth amendment envisions federal regulation of the substance of state action more clearly than other grants of power to Congress do. If one compares it with the commerce clause, involved in *Usery*, for example, the difference is apparent. The grant of power to Congress to regulate commerce is interpreted today to allow congressional regulation of states, at least when they engage in proprietary activities in commerce.¹⁴⁹ Conceivably, however, the commerce power could have been interpreted not to contemplate regulation of state activity at all. That grant of power to Congress would still diminish state power by itself preempting, and allowing Congress further to preempt, matters that the states could otherwise regulate. But since most commerce to be regulated is not carried on by states, an interpretation that Congress was not allowed to regulate states at all under that provision would not displace the commerce power. A large area for regulation would remain. The same is true of the position the Court has adopted—that Congress cannot regulate states under the commerce power in some of their governmental capacities.¹⁵⁰

The main thrust of the fourteenth amendment, by contrast, is to allow federal supervision and regulation of state action and of the state machinery as such. It is to regulate state action at the core of states' governmental processes—e.g., to outlaw the enactment and administration of discriminatory state laws—as well as in areas less central to states' governmental functions. To accomplish this purpose, Congress must be able to regulate the states under the fourteenth amendment; furthermore, it would make no sense to hold that under the fourteenth amendment it could not reach states acting in their governmental capacity.

This is not to suggest that the holding that the fourteenth amendment permits Congress to authorize private federal suits against states was absolutely compelled. The fourteenth amendment could still have had some effect if Congress were limited to other

¹⁴⁸ Thus the court of appeals held in *Fitzpatrick* that although Congress had intended to create a cause of action against states, it had not effectively done so because there had been no waiver; the state could not realistically abandon its employee pension program. *Fitzpatrick v. Bitzer*, 519 F.2d 559 (2d Cir. 1975), *rev'd*, 427 U.S. 445 (1976). See text accompanying notes 159 & 160 *infra*.

¹⁴⁹ E.g., *Parden v. Terminal Ry.*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *United States v. California*, 297 U.S. 175 (1936).

¹⁵⁰ *National League of Cities v. Usery*, 426 U.S. 833 (1976).

means of enforcement, although the amendment's explicit creation of rights in private individuals cuts against this interpretation.¹⁵¹ But the rule that *Usery* created for the commerce clause simply could not have been carried over to the fourteenth amendment; state governmental processes could have been exempt from congressional regulation generally under the commerce clause, and not only from imposition of suit, but they could not have been exempt from congressional regulation generally under the fourteenth amendment.¹⁵²

In addition to its holding that under the fourteenth amendment Congress may impose suit against states for actions done even in performance of strictly governmental functions, there are two other interesting implications of the *Fitzpatrick* opinion. One of these is relevant to the issue of state consent; the other, to imposition of a retroactive monetary remedy against the states.

2. Consent

Fitzpatrick appears to reflect a change in theory on the issue whether a state must consent to suit in order for Congress to impose suit. It suggests that not even a fictional consent by the states is requisite to congressional imposition of suit. It suggests this by distinguishing *Fitzpatrick* from *Edelman* and *Government Employees* on the ground that Congress had not authorized suit in those cases, saying *Fitzpatrick* is like *Parden* in this respect.¹⁵³

In so doing the Court makes no mention of any need for state consent. It does not discuss consent at all, and it does not limit to fourteenth amendment cases its implication that even a fictional state consent is unnecessary as long as Congress has imposed suit upon the states.¹⁵⁴ It is concerning the governmental-proprietary

¹⁵¹ The fifteenth amendment is similar to the fourteenth in this respect. Thirteenth amendment rights, by contrast, are implicit.

¹⁵² Of course, we now know that individuals can obtain injunctive relief against unconstitutional state action without encountering any eleventh amendment problem; such suits are deemed to be suits against individual state officers and not against the sovereign. *Ex parte Young*, 209 U.S. 123 (1908). While some cases already foreshadowed this rule when the fourteenth amendment was adopted, it is unlikely that the amendment's framers had any firm sense that the states would be subject to suits for injunctions even if no fourteenth amendment provisions modified the eleventh amendment.

¹⁵³ "Our analysis begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization,' [415 U.S.] at 672, to sue the State as employer is clearly present. This is, of course, the prerequisite found present in *Parden* and wanting in *Employees*. . . ." 427 U.S. at 452.

¹⁵⁴ A subsequent district court case seemingly follows through with this implication that even constructive consent is no longer required. *Peel v. Florida*

distinction that the Court found it significant that the legislation in *Fitzpatrick* was based upon Congress' fourteenth amendment powers,¹⁵⁵ not concerning state consent.¹⁵⁶ If sovereign immunity is a constitutional requirement, however, it is difficult to justify the abolition of a state consent requirement when Congress has acted under a power (such as the commerce power involved in *Parden*) that existed before the eleventh amendment.¹⁵⁷ That difficulty, together with the obliqueness of any discussion of the consent requirement in *Fitzpatrick*,¹⁵⁸ suggests that courts may continue to require at least a fictional consent in actions Congress has imposed in the exercise of powers other than those granted by the fourteenth amendment.

If the Court in *Fitzpatrick* would in any event have inferred a fictional state consent to suit, the Court's abandonment of the consent requirement does not affect the result. In *Fitzpatrick* the Court does not confirm whether it would follow through with the willingness it had shown in *Government Employees* to infer consent even from states engaging in essential sovereign functions. Instead its holding that no consent was necessary to uphold congressional imposition of suit avoided once again a definitive pronouncement on whether state consent could be inferred from the state engaging in an activity central to its functioning as a state.¹⁵⁹ Just as it was difficult to infer consent in *Government Employees*, it would have been difficult to do so in *Fitzpatrick*; one cannot say that a state has consented to federal court suit by passing a law, which is alleged to be discriminatory, as easily as one might if the state operated an allegedly discriminatory railroad system. A fictional consent might be implied from the states' ratification of the Civil War amend-

Dep't of Transp., 443 F. Supp. 451 (N.D. Fla. 1977), *appeal pending*, No. 77-1846 (5th Cir., oral argument scheduled for June, 1978), involved a congressional enactment pursuant to the article I war powers, not the fourteenth amendment, and the court, upholding the enactment, discussed only congressional power; it did not mention any need for state consent.

¹⁵⁵ See text accompanying notes 143-46 *supra*.

¹⁵⁶ Of course, there is an interrelationship between governmental-proprietary distinctions in this area and difficulties of imputing consent to states. See text accompanying notes 71-76, 100-04 *supra*.

¹⁵⁷ But see text accompanying notes 233-63 *infra*.

¹⁵⁸ The full discussion of consent is the language quoted in note 153 *supra*. That language is followed immediately by the language quoted in note 143 *supra*, discussing the governmental-proprietary distinction and how it is irrelevant to cases based on section five of the fourteenth amendment.

¹⁵⁹ The *Government Employees* Court had, however, indicated a willingness to make the inference. See note 58 and text accompanying notes 71-77 *supra*.

ments,¹⁶⁰ but that position is equivalent to saying that the fourteenth amendment modifies the eleventh. The question whether state consent will be implied from states' engaging in essential sovereign functions may still arise when Congress has acted under powers other than those granted by the Civil War amendments, but only if the particular regulation of essential state functions is deemed not to transgress *Usery's* protection of state sovereignty.¹⁶¹

3. Retroactive Monetary Relief

The most significant issue that *Fitzpatrick* touches is the propriety of actions for retroactive monetary relief. *Fitzpatrick's* holding is consistent with prior case law on this subject:¹⁶² It upholds Congress' authorization, in Title VII, of private damage actions against the states. But *Fitzpatrick* breeds confusion because its language carries a possible implication that damage awards may be authorized only under Congress' fourteenth amendment powers. If this were true, it would upset prior case law upholding damage awards against states in actions authorized under Congress' article I powers.¹⁶³

A single sentence in the *Fitzpatrick* opinion causes the confusion. At the conclusion of its fourteenth amendment discussion,¹⁶⁴ the Court says:

We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or State officials which are constitutionally impermissible in other contexts. See *Edelman v. Jordan*, *supra*; *Ford Motor Co. v. Department of Treasury*, *supra*.¹⁶⁵

¹⁶⁰ The NAACP made this argument in its *Edelman* amicus curiae brief. Brief, *supra* note 123, at 34-39.

¹⁶¹ For example, if Congress enacts a health regulation to apply in both public and private places of employment, and allows private individuals to bring federal damage suits against state employers along with others, will that provision for private damage actions be respected (with state consent to suit either imputed or deemed unnecessary), or will the federal government be limited to authorizing other kinds of actions against state officials?

¹⁶² See text accompanying notes 114-18 *supra*.

¹⁶³ *Parden* is the only holding that damage awards are authorized, but language in both *Government Employees* and *Edelman* upholds the rule. See text accompanying notes 114-18 *supra*.

¹⁶⁴ The full passage is quoted in text accompanying note 137 *supra*.

¹⁶⁵ 427 U.S. at 456.

It is the citation to *Edelman*, noted for its holding that retroactive monetary relief is impermissible in the absence of congressional authorization,¹⁶⁶ that imparts the suggestion that retroactive monetary awards are "constitutionally impermissible" in contexts other than fourteenth amendment actions.¹⁶⁷

This *Fitzpatrick* sentence alone should not be taken to establish that Congress cannot authorize retroactive monetary relief against the states pursuant to its powers under provisions other than the Civil War amendments.¹⁶⁸ While the implication is there, it is extremely unlikely that such a significant change in doctrine would be announced so lightly, or so obliquely. As noted above, *Parden* had sustained damage awards against states. The case law generally had suggested that damages could be awarded against states when Congress authorized them, although a federal court could not order that remedy under a jurisdictional statute that did not expressly authorize suit against the state. Moreover *Fitzpatrick* itself, in its earlier discussion, recognized that *Edelman's* striking down of retroactive monetary awards against states is limited to situations in which there was no "congressional intent to abrogate the immunity conferred by the Eleventh Amendment."¹⁶⁹

Another reason for concluding that Congress can authorize awards of damages, when it has power to impose suits on states at all, is that congressional authorizations of suit are meaningful only

¹⁶⁶ See text accompanying note 114 *supra* and text accompanying notes 290-97 *infra*. Of course, any remedy is impermissible in the absence of congressional (or constitutional) authorization. The *Edelman* holding in effect is that the judiciary is not free to find an implied cause of action for damages in these circumstances, unless Congress (or the Constitution) allows it more clearly than here. See text accompanying notes 290-97 *infra*. Another significant aspect of *Edelman's* holding is that the suit will be deemed one against the state if the state will pay the award sought.

¹⁶⁷ Similarly, the citation to *Ford Motor Co. v. Department of Treas.*, 323 U.S. 459 (1945), a case noted for its strict view of state consent to suit, might be taken to imply that genuine state consent is required in all but fourteenth amendment cases.

¹⁶⁸ Professor Nowak also takes the position that Congress may authorize damage actions against the states, either under its fourteenth amendment powers or under any of its other powers. He comes to the same conclusion concerning congressional power under the Civil War amendments and other congressional powers, although he puts forth independent historical arguments for these interpretations of the fourteenth and eleventh amendments. See Nowak, *supra* note 96, at 1453-55.

¹⁶⁹ 427 U.S. at 451-52. See *id.* 452 ("Our analysis begins where *Edelman* ended, for in this Title VII case the 'threshold fact of congressional authorization' . . . to sue the State as employer is clearly present."); *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451, 461-62 (N.D. Fla. 1977), *appeal pending*, No. 77-1846 (5th Cir., oral argument scheduled for June, 1978) (interpreting *Edelman* to hold simply that without congressional authorization it is improper to award retroactive monetary relief against states).

if they make available some such remedy. Suits for injunctions against unconstitutional conduct are available even without specific authorization, because the Court has found implied rights of action in the Constitution and has avoided any sovereign immunity bar by conceiving of the suits as actions against individual officers, not against the state.¹⁷⁰ The reason the congressional authorization issue has generated substantial Supreme Court interest is that it has had the effect of providing a damage remedy, an additional remedy which otherwise would be unavailable.

G. Summary

Fitzpatrick has seemed significant only because phraseology that it occasionally employs throws into question some propositions that were established before *Fitzpatrick*. In the last analysis, the case tells us little that we did not know before.¹⁷¹

In *Fitzpatrick* congressional regulation covered state employees in strictly governmental capacities. Imposition of the damage remedy may therefore have been justifiable only because Congress acted pursuant to the fourteenth amendment.¹⁷² In proprietary areas, however, Congress, acting under *any* of its powers, may impose damage suits upon the states. If Congress has imposed suit in connection with proprietary activities, consent by the state is either unnecessary or will automatically be imputed to the states.

Although Congress may impose damage actions, courts may not find damages an implied remedy in the absence of congressional authorization. It is this last point that reconciles *Fitzpatrick* with *Edelman*; the self-executing provisions of section one of the fourteenth amendment do not modify the eleventh amendment, although

¹⁷⁰ *Ex parte Young*, 209 U.S. 123 (1908).

¹⁷¹ After *Fitzpatrick*, we know that Congress can regulate states, even in their governmental activities, when it acts under the fourteenth amendment; we know that when Congress exercises its powers to regulate states by abrogating their immunity, state consent is not required (at least when Congress acts under the fourteenth amendment); and we know that Congress may impose suits for retroactive monetary relief (at least when Congress acts under the fourteenth amendment). The items in parentheses are possibilities but are not clearly parts of the holding.

The only significant change in law the above statements would represent is the possible limitation, to the fourteenth amendment, of the last proposition. The second proposition reflects some change in theory, substituting a pure congressional power rationale for a constructive consent one. (It is less significant if it is indeed limited to the fourteenth amendment than if it is not.)

¹⁷² For a different view, see the position of Mr. Justice Stevens, writing separately, set out in note 32 *supra*. And even under the Court's approach, such imposition would be impermissible only if the activity were deemed to fall within the *Usery* ban. See text accompanying note 77 *supra*.

section five gives Congress power to modify it.¹⁷³ Both section one and section five, however, apply even to those state activities at the core of states' governmental function.

In other words, the following proposition accurately summarizes "the law" concerning congressional power: In the exercise of its regulatory powers, Congress may impose even damage suits on states acting in their more "proprietary" capacities, and under the Civil War amendments it can impose such suits on states acting even in strictly governmental capacities.¹⁷⁴

It should be noted that one situation is not covered by the above statement: congressional regulation of states' governmental functions on the basis of provisions other than the Civil War amendments (or the spending power). The question of congressional power remains open in this limited area, with *Government Employees* and *Fitzpatrick* perhaps implying different answers. The scope of the area in which this uncertainty persists will depend upon whether *Usery* is broadly or narrowly applied. Insofar as regulations of governmental activity are permissible after *Usery*, will state consent to suit be prerequisite to suit? If so, will it be fictionally imputed, or will the absence of consent sometimes prevent congressional imposition of suit?

III. CONGRESSIONAL INTENT

The Court which has taken such a broad view of congressional power has shown some disposition to create restrictive rules for interpreting whether Congress has intended to exercise its power. In every case it has heard, the Supreme Court has upheld congressional power to impose suit upon the states; yet some of the cases have allowed suit against states and some have not. The results have turned, not on the Court's power holdings, but on its view of congressional intent.¹⁷⁵

¹⁷³ For a discussion of the difficulties in maintaining this distinction, see text accompanying notes 290-302 *infra*. Professor Nowak, however, agrees with the distinction and supports it with an historical argument. See Nowak, *supra* note 96, at 1455, 1460-64. I do not find the historical argument compelling, but it does show that, even if history does not mandate the result, it is consistent with it.

¹⁷⁴ Besides the Civil War amendments, another likely exception, noted in *Usery*, is the spending power. See 426 U.S. at 852 n.17 (*quoted in* note 146 *supra*). See also note 154 *supra* (war powers).

¹⁷⁵ All the congressional enactment cases contain both a congressional power and a congressional intent issue. *Government Employees* is the only one of the series in which the Court discusses congressional intent as the principal issue. *Edelman*, the other case denying congressional intent, focuses chiefly on judicial power to impose a damage remedy against states. See text accompanying notes 290-97 *infra*.

It is likely that there is an interrelationship between the broad view the Court has taken of congressional power and the narrow view it has sometimes taken of congressional intent. The Court's holdings that Congress did not intend to allow individuals to sue states in federal court¹⁷⁶ may have been a bit disingenuous, and a reluctance to confront the power issue may have contributed to the intent findings. As we shall see, the later history of the legislation involved in *Government Employees* provides support for the suggestion that unarticulated doubts concerning congressional power contribute to holdings grounded upon an absence of congressional intent; for when Congress later unambiguously expressed its intent to impose suit in the legislation in question,¹⁷⁷ the Court held that Congress lacked power to impose the legislation at all.

The case law concerning the rules for interpreting congressional intent is as complex as it is concerning congressional power.

A. *Two Approaches To Determining Intent: Parden and Government Employees*

Both *Parden* and *Government Employees* involved the question of congressional intent. They took different approaches to the question and reached different results. In *Parden* the Court held that Congress had intended the Federal Employers Liability Act to apply to state-owned railroads, as well as to others, and that states thus were subject to enforcement and damage actions. The Court relied principally upon the language of the FELA—making it applicable to “every” interstate railroad¹⁷⁸—and the Act’s general grant of jurisdiction to federal district courts.¹⁷⁹ It held these provisions sufficient to show congressional intent to impose suit upon states, despite the dissenters’ argument that “[o]nly when Congress has clearly considered the problem and expressly declared that any State which undertakes given regulable conduct will be deemed thereby

¹⁷⁶ *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973).

¹⁷⁷ See note 79 *supra*.

¹⁷⁸ 45 U.S.C. § 51 (1970). It added, in a footnote:

Although the language of the Act itself is clear enough, further indication of the congressional desire to cover all rail carriers that constitutionally could be covered is found in the legislative history, where the House Report states that “This bill relates to common carriers by railroad engaged in interstate . . . commerce. . . . It is intended in its scope to cover all commerce to which the regulative power of Congress extends.” H.R. Rep. No. 1386, To Accompany H.R. 20310, 60th Cong., 1st Sess. (1908),

377 U.S. at 187 n.5.

¹⁷⁹ 45 U.S.C. § 56 (1970).

to have waived its immunity should courts disallow the invocation of [a sovereign immunity] defense.”¹⁸⁰

Nine years later, in *Government Employees*, the Court adopted an approach similar to that of the dissenters in *Parden*. Conceding congressional power,¹⁸¹ the *Government Employees* Court focused its inquiry on congressional intent to subject states to suit; it found that intent lacking. In so holding, it drew a dichotomy between Congress regulating states and Congress taking from states their immunity from private suits in federal court: even when it was clear that Congress had regulated states, their sovereign immunity from suit would be deemed to survive in the absence of “clear language” removing the immunity.¹⁸²

The evidence that Congress “intended” to impose liability on the state as employer was as strong in *Government Employees* as it was in *Parden*. The Fair Labor Standards Act, involved in *Government Employees*, regulates work conditions of “employers.” The definition of “employer,” contained in section 3(d) of the Act, originally had excluded federal, state, and local governments; but that definition was amended in 1966 to make states (and local governments) subject to the Act with respect to state (and local) hospital and school employees.¹⁸³ The Supreme Court conceded in *Government Employees* that the congressional amendments were intended to regulate working conditions of state hospital and school employees, and that they had effectively done so.¹⁸⁴ On this point, the Court followed its holding in *Maryland v. Wirtz*, which had also upheld the constitutionality of the Act so regulating the states.¹⁸⁵ But in *Government Employees* the Court said that *Wirtz* was not dispositive of whether Congress had thereby intended to subject states to federal suits brought by aggrieved individuals.¹⁸⁶

The Act seemingly subjected states to suit along with other employers, for section 16(b) provided:

¹⁸⁰ 377 U.S. at 198-99 (White, J., dissenting).

¹⁸¹ See note 58 *supra* & accompanying text.

¹⁸² 411 U.S. at 285.

¹⁸³ 29 U.S.C. § 203(d) (1964) (*amended by* Pub. L. No. 89-601 § 102(b), 80 Stat. 831 (1966)). The Act's definitions of “enterprise,” 29 U.S.C. § 203(r) (*amended by* Pub. L. No. 89-601 § 102(a), 80 Stat. 831 (1966)); and of “enterprise engaged in commerce,” 29 U.S.C. § 203(r) (*amended by* Pub. L. No. 89-601 § 102(c), 80 Stat. 831 (1966)) were also amended to cover employees of hospitals and schools. See 411 U.S. at 282-83.

¹⁸⁴ 411 U.S. at 282-83.

¹⁸⁵ 392 U.S. 183 (1968).

¹⁸⁶ 411 U.S. at 283. Similarly, in *Wirtz*, the Court reserved the question whether the Act violated the eleventh amendment in providing a private damage remedy against states. 392 U.S. at 200.

*Any employer who violates the provisions of [section 6 or section 7 of this Act] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction. . . .*¹⁸⁷

But the Court pointed out that the language in *this* section had not been changed in 1966; and that before that date, because of the definition of employer then prevalent, the language had not removed states' immunity. It concluded that it should not infer that Congress had removed states' immunity from suit without amending *that* section "or indicating in some way by clear language that the constitutional immunity was swept away."¹⁸⁸ (The argument *contra*, of course, is that since the amended FLSA clearly and in terms does regulate the state as employer in its schools and hospitals, section 16(b) clearly and literally does make the state, with other employers, liable in individuals' federal suits. Section 16(b) was not amended in 1966 because no amendment of it was necessary to impose liability on the states; with the amendments of sections 3(d), (r), and (s),¹⁸⁹ the Act already clearly imposed that liability.)

The Court went on to say that its holding that Congress did not intend to lift states' immunity did not render meaningless Congress' undoubted attempt to regulate state hospitals and schools in its 1966 FLSA amendments, because the Act gave the Secretary of Labor power to sue for unpaid minimum wages or unpaid overtime compensation.¹⁹⁰ The Court reached this conclusion even though it noted that the Solicitor General had reported that the remedy was ineffective, because the Secretary, with his limited resources, could investigate less than four percent of the establishments subject to the FLSA.¹⁹¹ The Court also noted the possibility that suits against state employers for damages for FLSA violations could be heard in

¹⁸⁷ 29 U.S.C. § 216(b) (1970) (emphasis added).

¹⁸⁸ 411 U.S. at 285.

¹⁸⁹ See note 183 *supra*.

¹⁹⁰ 411 U.S. at 285-86. The Act also gives the district courts power to grant injunctive relief. 29 U.S.C. § 217 (1970).

The Court did not explain why it deemed the statutory language clear enough to support actions by the Secretary against even state employers, but not a private damage remedy. Probably the explanation is that no clear language was necessary because the eleventh amendment does not apply to suits by the Secretary against the state. Cf. text accompanying notes 229-32 *infra* (clear language rule limited to enactments of doubtful constitutionality).

¹⁹¹ 411 U.S. at 287. Brief for the United States as Amicus Curiae at 22-23.

state court, and that the FLSA precluded states from claiming immunity there.¹⁹²

Government Employees and *Parden* appear to conflict in their approaches to divining congressional intent. Both the FELA and the FLSA literally imposed liability upon states as employers: the former applied to "every" railroad; the latter, to "any" employer. Moreover, in *Government Employees* the state as employer was clearly—and expressly—within the regulatory reach of the statute after its 1966 amendments, while the statutory scheme in *Parden* made no explicit mention of state-owned railroads. *Parden* held, however, that explicit mention was not required. In deciding that state immunity had been lifted, the *Parden* Court reasoned that federal statutes had been held to regulate state-owned railroads along with other ones.¹⁹³ But in *Government Employees*, where congressional regulation was explicit, the Court held that states' sovereign immunity may remain even after their facilities have been subjected to congressional regulation. The *Parden* Court had rejected this possibility partly because "[t]o read a 'sovereign immunity exception' into the Act would result . . . in a right without a remedy; it would mean that Congress made 'every' interstate railroad liable in damages to injured employees but left one class of such employees—those whose employers happen to be state owned—without any effective means of enforcing that liability."¹⁹⁴ But the relief remaining for state employees after the *Government Employees* decision was equally ineffective.¹⁹⁵ Furthermore, in *Parden*

¹⁹² 411 U.S. at 287. See *Part One*, *supra* note 1, at 546-49.

While the *Government Employees* Court stressed the existence of *alternative remedies* as a fact supporting the absence of congressional intent to allow private suits, the Court in *Edelman* supported its conclusion there that no implicit private right of action existed by stressing that the Social Security Act expressly provided *few remedies*. 415 U.S. at 674.

¹⁹³ 377 U.S. at 188-89. What the *Parden* Court failed to mention was that none of the cases so holding was an eleventh amendment case. The cases the Court discussed were *United States v. California*, 297 U.S. 175 (1936), (construing the Federal Safety Appliance Act, 45 U.S.C. §§ 2, 6 (1970)); *California v. Taylor*, 353 U.S. 553 (1957) (construing the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970)), and three state court cases construing the FELA. (*United States v. California* was not an eleventh amendment case because the United States was the plaintiff; *California v. Taylor* was not a suit against the state, 353 U.S. at 555-56; the other cases were not eleventh amendment cases because they were state court decisions.)

¹⁹⁴ 377 U.S. at 190.

¹⁹⁵ One of the judges who heard the case in the court of appeals had pointed out that since the Secretary's enforcement powers are discretionary, "[a] suit by a state employee under § 216(b) represents the only remedial provisions of the Act which assures [a state employee] the opportunity of hearing his claim presented to a court." 452 F.2d at 833 (Bright, J., dissenting). But cf. *Part One*, *supra* note 1, at 546-49 (possibility of suit in state court).

there were some means other than employees' damage actions by which the duties imposed upon railroads in general might be enforced against state-owned railroads.¹⁹⁶ Moreover, it apparently did not occur to the Court in *Parden* that the suits might be heard only in state court.¹⁹⁷

Finally, instead of requiring that Congress clearly express its intention to deprive states of their immunity, the *Parden* Court used language suggesting the opposite presumption:

If Congress made the judgment that . . . railroad workers in interstate commerce should be provided with the right of action created by the FELA, *we should not presume to say, in the absence of express provision to the contrary, that it intended to exclude* a particular group of such workers [those whose employers are state-owned] from the benefits conferred by the Act.¹⁹⁸

It is the *Parden* dissenters who argued "that if Congress decides to exercise its power to condition privileges within its control on the forfeiture of constitutional rights [specifically the states' constitutional immunity] its intention to do so should appear with unmistakable clarity."¹⁹⁹

Despite the apparent conflict, the *Government Employees* Court purported not to disturb the *Parden* holding.²⁰⁰ It limited its clear language requirement to regulations of state activities that are "not proprietary,"²⁰¹ or possibly to nonprofit state activities.²⁰² Presumably when proprietary or profit-making activities are at issue the

¹⁹⁶ For example, monetary penalties were provided for violation of the Federal Safety Appliance Act, see 45 U.S.C. § 34 (1970), which the individual damage actions permitted in the FELA also enforce.

¹⁹⁷ See 377 U.S. at 190 n.8; *Part One*, *supra* note 1, at 547.

¹⁹⁸ 377 U.S. at 189-90 (emphasis added). The Supreme Court had previously said, in a non-eleventh amendment case, that "[w]hen Congress wished to exclude state employees, it expressly so provided." *California v. Taylor*, 353 U.S. 553, 564-65 (1957).

¹⁹⁹ 377 U.S. at 199 (White, J., dissenting). See also text accompanying note 180 *supra*.

²⁰⁰ At the end of its *Government Employees* opinion the Court says, "We decline to extend *Parden*" to cover *Government Employees*. 411 U.S. at 286-87. At the outset it says "the central issue" is whether *Parden* is distinguishable. *Id.* 281.

²⁰¹ 411 U.S. at 284-85.

²⁰² *Id.* 285. Some opinions exhibit a tendency to regard the terms "governmental" and "proprietary" as equivalents of "profit-making" and "not-for-profit." See *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. at 284 (opinion of Court); *id.* 303 (Brennan, J., dissenting); *Edelman v. Jordan*, 415 U.S. at 695 (Marshall, J., dissenting). See also language quoted in text at note 220 *infra*. For other formulations of a government-proprietary distinction, see note 86 *supra*.

"normal" rules of ascertaining intent still obtain: Intent is judged from all the circumstances concerning an enactment, without a requirement that the evidence of legislative purpose be in any particular form. The Court's limitation of its clear language rule to nonproprietary state activities is sufficiently oblique, however, that it is possible the clear language test could be carried over to proprietary activities. It may have been only a reluctance directly to overturn the most recent Supreme Court pronouncement on the subject when it was not absolutely necessary that led the *Government Employees* Court to devise this distinction between *Government Employees* and *Parden*.²⁰³

Another uncertainty after *Government Employees* is how strictly the "clear language" requirement is to be defined and applied. Is an explicit statement lifting immunity necessary, as the *Government Employees* holding might suggest, or will other clear indications of intent suffice? If an explicit statement is necessary, must it be in the enactment itself, as distinct from the legislative history, for example? *Government Employees* itself does not answer these questions; indeed, it leaves considerable ambiguity. One of the Court's statements might be read to imply that express language in the enactment itself is necessary: "It would also be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the old § 16(b) under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away."²⁰⁴ Yet the Court also emphasized that "not a word in the history of the 1966 amend-

²⁰³ Prior to *Government Employees* the Court did not follow any governmental-proprietary distinction in determining federal sovereign immunity issues, see, e.g., *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704-05 (1949), although the distinction has traditionally been employed in determining municipal liability, see 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 459-66 (1958). There is some language in *Parden* that might suggest a governmental-proprietary test, but in context it is clear that when the *Parden* Court speaks of "a State leav[ing] the sphere that is exclusively its own," 377 U.S. at 196, it does not refer to a state engaging in an enterprise operated for profit, or a proprietary enterprise otherwise defined; it is speaking of a state operating in an area to which congressional regulatory power extends. See language quoted in text accompanying note 61 *supra*.

In those contexts in which it has been used, a governmental-proprietary distinction has proved difficult. See, e.g., 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 459-66 (1958). It was long an issue whether such a distinction should be read into the Federal Tort Claims Act, 28 U.S.C. § 2674 (1970), but in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Court rejected the "'non-governmental'-governmental" distinction as "inherently unsound." *Id.* 66. See *Rayonier Inc. v. United States*, 352 U.S. 315 (1957). See also *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (state immunity from federal taxation).

²⁰⁴ 411 U.S. at 285.

ments”²⁰⁵ showed a congressional purpose to impose suit upon states, and more generally that “the purpose of Congress” to lift states’ immunity was “not clear.”²⁰⁶ Another formulation the Court uses is to say that in the face of congressional silence, a court should not presume that suit is imposed.²⁰⁷ An important question left open in *Government Employees* is therefore how rigidly the “clear language” test is to be applied.

B. Edelman and Fitzpatrick

The cases since *Government Employees* are inconclusive concerning the future vitality of a “clear language” requirement. *Edelman v. Jordan* is consistent with a clear language rule but does not enhance it. Nor does *Edelman* show whether a clear language rule will be applied in its stricter implications. The court of appeals in *Edelman* had held that the state had waived any objection to suit when it participated in the AABD program—the equivalent of a holding that Congress required a waiver as a condition of participating and receiving federal funds.²⁰⁸ The Supreme Court overturned that ruling because no language in the Social Security Act purports to allow suit against the states.

As in *Government Employees*, what was missing in *Edelman* was congressional authorization to maintain the suit. As the Court recognized, however, the issue was unlike the *Government Employees* and *Parden* authorization issues. In both of those cases there was a congressional authorization literally allowing suit against states as such. In *Edelman*, however, all agreed that the only arguably relevant congressional authorization was section 1983, allowing suit against state officers acting under color of state law,²⁰⁹ not against the state as such. The dispositive issue, therefore, was whether a suit maintained in that form may reach state funds. When the Supreme Court held that it could not, without becoming a suit against the state as such, which no congressional enactment purported to allow,²¹⁰ it effectively decided the case; the suit could not

²⁰⁵ *Id.*

²⁰⁶ *Id.* 287.

²⁰⁷ *Id.* 284-85.

²⁰⁸ *Jordan v. Weaver*, 472 F.2d 985, 993-95 (7th Cir. 1973), *rev'd sub nom. Edelman v. Jordan*, 415 U.S. 651 (1974).

²⁰⁹ 42 U.S.C. § 1983 (1970).

²¹⁰ Unlike the statutes involved in *Parden* and *Government Employees*, the provisions of the Social Security Act involved in *Edelman* contained no language even arguably allowing individual suit against states. The only remedy that the Act expressly provided for a state's failure to comply with federal requirements was a

stand although section 1983 allows relief against the state officer which in form is what the *Edelman* suit requested.²¹¹

Edelman thus requires some language—some enactment imposing suit upon the states as such—before monetary relief can be obtained from the state treasury. It does not tell us whether or not a clear language rule would have been used to construe such an enactment had there been one.²¹²

A simple reading of the Supreme Court's opinion in *Fitzpatrick v. Bitzer* gives the impression that the clear language requirement has been abandoned. The Court's full discussion of the intent issue is contained in the first sentence of its opinion:

In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin."²¹³

The Court subscribed unanimously to this effortless discovery of congressional intent to subject states to private suit.²¹⁴ Yet the data the Court cites in support of its finding does not serve to distinguish

cut-off of federal funds by the Secretary of HEW. 42 U.S.C. § 804 (1964). Prior to *Edelman*, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court had held that Congress had not intended the cut-off of federal funds as the exclusive sanction but had intended § 1983 remedies to supplement it. The Court in *Edelman* did not overturn *Rosado* but simply held the § 1983 route unavailable *when the suit is one against the state*. 415 U.S. at 675-77.

²¹¹ The court of appeals, *Jordan v. Weaver*, 472 F.2d at 985, and Justices Douglas, *Edelman v. Jordan*, 415 U.S. at 678 (Douglas, J., dissenting), and Marshall, *id.* 688 (Marshall, J., dissenting, joined by Blackmun, J.), thought that Congress had intended individual recipients to have a cause of action under § 1983 for wrongfully withheld benefits, even though the benefits would be paid from the state treasury. That position was supported by HEW regulations requiring states to make corrective payments retroactively when a recipient challenges denial of assistance in a statutorily required "fair hearing." 45 C.F.R. § 205.10(a)(18). See also 45 C.F.R. §§ 205.10(b)(2), (b)(3). The Court, however, was unwilling to find congressional intent to impose these suits upon the states in the absence of statutory language to that effect. See text accompanying notes 295-97 *infra*. Justice Brennan also dissented, but on his view of the case he had no occasion to reach this issue.

The complex of distinctions between suits against officers and suits against the state will be explored in the final article in this series.

²¹² This last question was the issue in both *Parden* and *Government Employees*. For further discussion of the relationship between the *Edelman* rule requiring literal congressional authorization and the clear language rule, see text accompanying notes 290-98 *infra*.

²¹³ 427 U.S. at 447-48.

²¹⁴ Justice Brennan and Justice Stevens concurred separately, but neither questioned the Court's finding of congressional intent to impose suit.

the case from *Government Employees*. Title VII, like the Fair Labor Standards Act involved in *Government Employees*, had originally excluded states from its reach by not including them among the affected employers.²¹⁵ Like the FLSA, Title VII had since been amended—by the Equal Employment Opportunity Act of 1972—to include state governments in its definition of employer,²¹⁶ and to include government employees among the covered employees.²¹⁷ While this might reasonably be deemed to show a congressional intent to extend to state employees the benefits of the Act, precisely the same argument was available as proved dispositive in *Government Employees*: Congress could have regulated states as employers without requiring them to give up their immunity from individuals' suits. Moreover, no language specifically stated that states' immunity was abrogated.²¹⁸

Fitzpatrick is, however, consistent with *Government Employees* because of another section of Title VII. Section 2000e-5(f)(1), setting forth the procedure for civil actions,²¹⁹ makes explicit mention of the procedure to be followed when the respondent is a government, government agency, or political subdivision. While it does not expressly refer to federal suits, that section of the Act contains references to ongoing state proceedings that certainly suggest that a federal forum for these individual suits against states was contemplated.

Although section 2000e-5(f)(1) does make *Fitzpatrick* consistent with *Government Employees*, the *Fitzpatrick* Court did not feature that section as the distinguishing factor; nor did its opinion disclose enough about the section to show why *Fitzpatrick* and *Government Employees* are consistent. This failure to focus upon the distinguishing variable may show a disposition not to take seriously *Government Employees*' requirements for a clear language test.

In any event, *Fitzpatrick* shows that the Court will not read a clear language test as strictly as might have been possible. Although the statutory language involved in *Fitzpatrick* did clearly indicate

²¹⁵ 42 U.S.C. §§ 2000e(a), (b) (1970) (*as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §§ 2(1), (2), 86 Stat. 103).

²¹⁶ 42 U.S.C. §§ 2000e(a), (b) (Supp. V 1975) (*as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §§ 2(1), (2), 86 Stat. 103).

²¹⁷ 42 U.S.C. §§ 2000e(a), (b), (f) (Supp. V 1975) (*as amended by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 §§ 2(1), (2), (5), 86 Stat. 103).

²¹⁸ As in *Government Employees*, the section giving a cause of action to aggrieved employees was retained unamended. 42 U.S.C. §§ 2000e-5(f)-5(j) (Supp. V 1975).

²¹⁹ 42 U.S.C. § 2000e-5(f)(1) (Supp. V 1975).

that Congress contemplated state liability in individuals' federal suits, neither the statute nor the legislative history contained a statement in terms removing the states' immunity, and no such statement was deemed necessary. *Fitzpatrick* may, therefore, show that any "clear language" requirement can be fulfilled by statutory language that in any way provides clear evidence of congressional intent; no clear statement specifically addressing states' amenability to suit is necessary.

C. *The Clear Language Rule Today*

The importance of correctly applying the clear language requirement diminishes if one accepts at face value the *Government Employees* Court's distinction of *Parden* as involving a state activity "in the area where private persons and corporations normally ran the enterprise."²²⁰ For with this restriction, the clear language requirement operates in a limited area today. Like other rules,²²¹ the clear language requirement may have been largely displaced by *National League of Cities v. Usery*, depending upon how broadly that case is applied. If *Usery* were read so broadly that the only activities remaining within Congress' reach under the commerce clause were "nongovernmental" activities (where *Parden* and *Government Employees* together suggest that the usual rules concerning implication of congressional intent apply), *Usery* would displace the clear language test by removing altogether from congressional regulatory power the area in which the test was to apply. But to the extent that *Usery* is read narrowly, permitting Congress still to regulate areas central to states' governmental functions under the commerce clause,²²² the clear language requirement could remain relevant. Moreover, the rule might apply to those congressional regulations of states' governmental functions that are still permissible after *Usery* under powers other than the commerce power.²²³ (The fact that "the Commerce Clause . . . has grown to vast proportions in its applications"²²⁴ was part of the impetus for creation of a clear language test, but the test could have application to other exercises of congressional power as well.) One area where we know (from *Fitzpatrick*) that regulation of governmental activi-

²²⁰ 411 U.S. at 284.

²²¹ See text accompanying notes 89-90, 144-48 *supra*.

²²² See notes 86-88 *supra* & accompanying text.

²²³ See notes 146-47 and text accompanying note 89 *supra*.

²²⁴ 411 U.S. at 285. See also *id.* 286-87 ("[W]e decline to extend *Parden* to cover every exercise by Congress of its commerce power. . . .").

ties is still contemplated is in Congress' exercise of power under section five of the fourteenth amendment. Another possibility suggested in *Usery* is the spending power, which was involved in *Edelman*. As we have seen, it is not clear whether *Edelman* and *Fitzpatrick* followed *Government Employees'* approach in determining congressional intent. Neither case spoke in terms of a clear language rule, though neither is flatly inconsistent with it. Possibly, however, exercises of congressional power under these provisions would be deemed exempt from a clear language requirement for the same reasons that they are exempt from *Usery's* ban on regulation of state governmental activities.

In areas in which Congress does retain power to regulate states in their governmental capacities, no clear language rule should apply. The merits of a clear language rule will be addressed later in this Article,²²⁵ but from what we have seen already, it is apparent that *Government Employees'* clear language rule was the product of a situation peculiar to that case. The Court was faced with congressional regulations of state employees' hours and wages—regulations whose constitutionality the Court had upheld eight years before²²⁶ over the dissent of Justice Douglas, the author of the Court's *Government Employees* opinion. In *Wirtz* Justice Douglas had expressed his discomfort with allowing Congress to extend to state hospitals and schools its maximum hour and minimum wage legislation, and thereby to "overwhelm state fiscal policy"²²⁷ and "devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."²²⁸

It seems reasonable to conclude that *Government Employees'* clear language rule was the product of uneasiness concerning the constitutionality of those regulations of state employees' wages and

²²⁵ See text accompanying notes 290-309 *infra*.

²²⁶ *Maryland v. Wirtz*, 392 U.S. 183 (1968). Without overturning *Wirtz*, the Court could have resolved *Government Employees* by making a decision respecting congressional power. In *Wirtz*, the appellant states had argued that the Act's remedial provisions would violate the eleventh amendment, in addition to their contention that Congress could not impose upon them these regulations. Upholding regulation, the Court reserved the remedial issue "for appropriate future cases." 392 U.S. at 200. In *Government Employees* the Court could have held that Congress lacked power to impose private suit against states in this governmental area, even though it had power otherwise to regulate them. Instead it drew the same dichotomy in interpreting congressional intent to impose suit.

²²⁷ 392 U.S. at 203 (Douglas, J., dissenting).

²²⁸ *Id.* 205. He also said that sustaining the legislation was "such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism." *Id.* 201.

hours.²²⁹ It is not uncommon for the Supreme Court to impose a requirement that congressional intent be clearly stated if that intent is found to support a statutory construction that is constitutionally doubtful.²³⁰ The Court's later holding, that the regulations were indeed unconstitutional, reinforces the impression that uneasiness with *Wirtz* was responsible for *Government Employees'* strong presumption of state immunity. But when there are not constitutional doubts concerning a regulation, the need to construe it very narrowly disappears.²³¹ Therefore the special rule that *Government Employees* adopts for determining congressional intent should not carry over to congressional regulations that do not transgress constitutional limitations.²³²

IV. DOES SOVEREIGN IMMUNITY RETAIN ANY FORCE AS A CONSTITUTIONAL DOCTRINE?—THE POSSIBILITY OF A DICHOTOMY BETWEEN CONGRESSIONAL AND JUDICIAL POWER

Because the Court has left Congress free to impose suit upon states whenever it acts within its regulatory powers, the Court's position seems to produce the same results as would obtain if the sovereign immunity doctrine had no constitutional status. There is, however, a fundamental ambiguity in the Court's position in this

²²⁹ Mr. Justice Brennan, dissenting in *Government Employees*, 411 U.S. at 304, 306, suggested that the Court's opinion there resulted from its unhappiness with the result in *Wirtz*.

²³⁰ See generally *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-36 (1974). Cf. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 264 (1973) (advocating "a clear statement rule: to depart from an established principle, the legislature must speak plainly") (emphasis in original).

See also H. HART & A. SACKS, *THE LEGAL PROCESS* 1411-13 (tent. ed. 1958): In discussing the clear statement rule (which the authors conceive as a rule against attributing to words an unusual though linguistically possible meaning, *id.* 1411) the authors say the rule "forbids a court to understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly. This policy has special force when the departure is so great as to raise a serious question of constitutional power. . . ." *Id.* 1413.

²³¹ See, e.g., *Algonquin SNG Inc. v. Federal Energy Administration*, 518 F.2d 1051 (D.C. Cir. 1975), *rev'd*, 426 U.S. 548 (1976), wherein the court of appeals construed very narrowly a seemingly broad congressional authorization to the President to adjust imports because of apparent doubts concerning the constitutionality of such a broad delegation of trade policy to the executive. The Supreme Court had no such doubts concerning the constitutionality of the delegation, and as a result did not require clear and specific congressional authorization. Instead it approached the statutory construction issues in a more ordinary fashion. Cf. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976) (without ruling on its constitutionality, Court applies strict construction to find real purpose behind federal legislation, applicable to aliens, which creates a classification that a state could not constitutionally apply).

²³² See also text accompanying notes 303-09 *infra*.

respect—an ambiguity that appears as early as *Parden* and which has not yet been resolved. In upholding Congress' imposition of suit upon states in the FELA, the *Parden* Court said that the case was "distinctly unlike *Hans v. Louisiana*"²³³ and that the *Hans* result was undisturbed. In *Hans v. Louisiana*²³⁴ the Court had held that sovereign immunity barred a contract clause action to recover on state bond coupons that the state had refused to honor. The reasoning of *Parden* (and of the subsequent cases suggesting that Congress can impose suit upon the states) would seem to throw *Hans*' holding into question, for consent to suit could be attributed to the state in *Hans* in the same ways it was in *Parden*. The *Parden* Court upheld imposition of the FELA upon the states because "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce,"²³⁵ and because the State of Alabama had consented to suit when it began operating an interstate railroad after enactment of the FELA.²³⁶ In *Hans*, one could say as readily that the states surrendered their immunity when they ratified the contract clause; or, if one prefers the second *Parden* rationale, that the state consented to suit when it issued bonds subsequent to the Constitution's ratification. Thus consent in *Hans* would seem as genuine as it was in *Parden*.²³⁷

Given the Court's conception of sovereign immunity as a constitutionally imposed doctrine, there is a problem with allowing *Parden*'s reasoning to carry over to *Hans*: If *Parden* were deemed to disturb the *Hans* result, sovereign immunity would truly be denied any effect as a constitutional doctrine.²³⁸ In the exercise of its regulatory powers, Congress could impose suit upon the states, and courts may find implied causes of action against the states in self-executing constitutional provisions; the situation would seem exactly the same as if sovereign immunity had no constitutional force be-

²³³ 377 U.S. at 186.

²³⁴ 134 U.S. 1 (1890)

²³⁵ 377 U.S. at 191.

²³⁶ *Id.* 192.

²³⁷ In *Government Employees*, Justice Marshall recognizes and describes well the seeming conflict between *Hans* and *Parden*. 411 U.S. at 292 n.8 (concurring opinion). He reconciles the cases, however, on the ground that there was consent to suit in *Parden* and not in *Hans*. Justice Marshall does not explain why *Parden*'s reasoning would not support consent in *Hans* as well.

²³⁸ *Louisiana v. Jumel*, 107 U.S. 711 (1883), the case most noted for the holding that federal question cases are not excepted from the operation of the eleventh amendment, would be overturned along with *Hans*; *Jumel* like *Hans* was a contract clause case. It alone did not dictate the *Hans* result only because *Jumel* was a "true" eleventh amendment case, a noncitizen suit, whereas *Hans* was a suit by the state's own citizens.

hind it.²³⁹ Not only would other constitutional and congressional rules predominate over states' immunity in the federal question area, but outside the federal question area—in controversies in which state law controls—state rules of sovereign immunity apply, not rules derived from the eleventh amendment.²⁴⁰ There would therefore be no private suits against states in which a constitutional rule of sovereign immunity deriving from the eleventh amendment could apply.

The Court in *Parden* suggested several reasons why its holding left *Hans* unaffected:

This case is distinctly unlike *Hans v. Louisiana*, . . . where the action was a contractual one based on state bond coupons, and the plaintiff sought to invoke the federal-question jurisdiction by alleging an impairment of the obligation of contract.³ Such a suit on state debt obligations without the State's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed. Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. . . .

3. Of the other cases cited in which federal-question jurisdiction was asserted, *Smith v. Reeves*, 178 U.S. 436, and *Ex parte New York*, 256 U.S. 490, were also commonplace suits in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background. The former case was a tax-refund suit brought by receivers of a corporation created by Congress, and the latter was an admiralty suit for property damage due to negligence. *Duhne v. New Jersey*, 251 U.S. 311, was a suit against the State to restrain it from enforcing the Eighteenth Amendment to the Federal Constitution, on the ground that the Amendment was invalid.²⁴¹

²³⁹ I assume that, as is the case today, state consent is either deemed unnecessary or is invariably inferred. *But cf.* text accompanying notes 71-79 *supra*.

²⁴⁰ See, e.g., *Scott v. Board of Supervisors*, 336 F.2d 557 (5th Cir. 1964); *Gerr v. Emrick*, 283 F.2d 293 (3d Cir. 1960); *Burnham v. Department of Public Health*, 349 F. Supp. 1335, 1341 (N.D. Ga. 1972); *Zeidner v. Wulforst*, 197 F. Supp. 23, 25 (E.D.N.Y. 1961). See also notes 92-94 *supra* & accompanying text. The rule that state law governs sovereign immunity in these cases has, however, prevailed only since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Prior to that decision, there would have been some scope for operation of a constitutional immunity doctrine, even if it did not apply in federal question cases; it could have applied to common law causes of action, prohibiting the federal judiciary from altering sovereign immunity. If this had been the intended scope of a constitutional doctrine of immunity, the doctrine would be obsolete today, but would have had some purpose prior to *Erie R.R. v. Tompkins*. For further discussion of this possibility, see note 272 *infra* & accompanying text.

²⁴¹ 377 U.S. at 186-87.

The first reconciliation the Court suggests (in both the text and the accompanying footnote)—that *Hans* was not a federal question case at all—is erroneous. While one might deem suits based upon the contract clause of the Constitution to “arise under” state contract law rather than under the Federal Constitution,²⁴² the Supreme Court has not adopted this position. Instead the suits have been considered within the federal question jurisdiction as suits to enjoin state officers from impairing the obligation of contracts,²⁴³ or as suits “necessarily involv[ing] a question under [the] Federal Constitution or laws”;²⁴⁴ they have been barred from federal court only on a view that sovereign immunity prohibited them.²⁴⁵

Moreover, to distinguish *Parden* from *Hans* on the ground that *Hans* was not a “true” federal question case implies that “true” federal question cases are not subject to sovereign immunity restrictions. This is the position that would leave sovereign immunity meaningless as a constitutional doctrine today,²⁴⁶ and it is also a position that the Court has long rejected.²⁴⁷ The Court disavowed it again in *Parden*, in the paragraph immediately preceding the one

²⁴² See *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). When, because of lack of diversity or other federal jurisdictional basis, plaintiffs were left to litigation in state courts, and state courts invoked state sovereign immunity to bar them, then the United States Supreme Court could review whether the state could constitutionally invoke immunity, in view of the Federal Constitution’s contract clause.

²⁴³ See, e.g., *Louisiana v. Jumel*, 107 U.S. 711 (1883).

²⁴⁴ *Hans v. Louisiana*, 134 U.S. 1, 4, 10 (1890).

²⁴⁵ See *Hans v. Louisiana*, 134 U.S. at 10:

That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana v. Jumel*, 107 U.S. 711; *Hagood v. Southern*, 117 U.S. 52; *In re Ayers*, 123 U.S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the amendment referred to.

Similarly, at least two of the cases the Court discusses in the *Parden* footnote quoted above, text accompanying note 241, were “true” federal question cases. *Ex parte New York* was a maritime case in which federal law clearly governed; the Court’s description of *Duhne* itself reveals that the federal cause of action there was at the forefront of that case.

²⁴⁶ See text accompanying notes 238-40 *supra*.

²⁴⁷ *Louisiana v. Jumel*, 107 U.S. 711 (1882). But see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.) (eleventh amendment does not bar federal question cases).

in which it distinguished *Hans*: "Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" ²⁴⁸ In short, the first suggested distinction between *Hans* and *Parden*, turning upon whether *Hans* was a "true" federal question case, is difficult to understand and does not make sense.

Another of the Court's distinctions,²⁴⁹ emphasizing that *Parden* is the first Supreme Court case involving a clash between state immunity and "a cause of action expressly created by Congress," ²⁵⁰ is often seen as the reconciling factor between the cases. Justice Brennan has defended this distinction,²⁵¹ and two leading articles on sovereign immunity adopt it as a cornerstone of eleventh amendment interpretation.²⁵² The distinction would suggest that somehow Congress is peculiarly empowered to create causes of action against states, and that federal statutory enactments accordingly can accomplish more in this respect than constitutional provisions (such as the contract clause, involved in *Hans*).

At first blush, the distinction would seem difficult to defend. There is, of course, the difference that Congress has acted in the instance of enactments and has not in the instance of self-executing constitutional provisions. But that fact would generally not seem to warrant different treatment. As a general matter, if a statute can accomplish something, a self-executing constitutional provision could as well. As Justice Marshall says in *Government Employees*:

²⁴⁸ 377 U.S. at 186 (quoting *Hans v. Louisiana*, 134 U.S. at 10). The cases the Court cites for this proposition are *Hans* and the three others which, in its footnote 3, it describes as not "true" federal question cases! See note 245 and text accompanying note 241 *supra*. *Louisiana v. Jumel*, 107 U.S. 711 (1882), the case typically cited for the proposition that federal question cases are not excepted from sovereign immunity, in fact supports that proposition only to the same extent that *Hans* does: both cases are contract clause actions.

²⁴⁹ The third reason the Court gives—that contract clause actions were "precisely the evil" at which the sovereign immunity doctrines were aimed—is similar to the one I suggest is appropriate. It is discussed in text accompanying notes 276-89 *infra*.

²⁵⁰ See text accompanying note 241 *supra*.

²⁵¹ Justice Brennan describes the distinction as one between "enumerated powers granted by the States to the National Government, such as the commerce power" and "self-imposed prohibitions, as in the case of the Contract Clause." *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. at 319 n.7 (Brennan, J., dissenting). He does not explain, however, why enforcement powers cannot be inferred directly from constitutional provisions. See note 253 *infra* & accompanying text. See also text accompanying notes 276-89 *infra*.

²⁵² Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); Nowak, *supra* note 96.

[T]he only difference between the Contract Clause and congressionally created causes of action is that the Contract Clause is self-enforcing, see, *e.g.* *Sturges v. Crowninshield*, 4 Wheat. 122, 197-200 (1819); it requires no congressional act to make its guarantee enforceable in a judicial suit. It seems to me a strange hierarchy that would provide a greater opportunity to enforce congressionally created rights than constitutionally guaranteed rights in federal court. . . .²⁵³

One would expect, then, that a theory of unfettered congressional power would lead into a theory that federal question cases generally are excepted from sovereign immunity restrictions.

Although it is strange to our constitutional system for a constitutional provision to be unable to accomplish what a statute can, that result would be plausible if the policy of the eleventh amendment were to limit the judiciary while imposing no limitations upon Congress.²⁵⁴ To distinguish thus between federal statutory and constitutional enactments is in effect to distinguish between congressional and judicial power. A rule that Congress can impose suit upon the states but that constitutional provisions cannot be interpreted to do the same thing, in the absence of congressional implementation, is a rule limiting the possibilities for judicial discovery of federal causes of action. The clear language rule, governing judicial interpretation of congressional enactments, was to the same effect: Congress can impose suit upon the states, but the judiciary is not free to find congressional imposition except when Congress speaks in the clearest terms. Moreover, *Edelman's* holding that the eleventh amendment precludes the judiciary from ordering retroactive monetary relief payable by the states in the absence of con-

²⁵³ *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. at 292 n.8 (Marshall, J., concurring). See also Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1158 (1969) ("[T]he federal and state courts, insofar as their ordinary jurisdiction and remedial authority are adequate to the occasion, are obliged to afford such remedies as are determined, ultimately by the Supreme Court, to be appropriate in the implementation of the Constitution. Legislation specifically directing or authorizing such implementation is no more necessary in the case of the Constitution than in the case of statutes."). *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (anomalous to give federal courts greater freedom to develop remedies for statutory violations than for constitutional violations).

²⁵⁴ Proponents of this view of the eleventh amendment might profitably analogize their position to the view the Court has taken of the commerce clause. There the Court has struck down state enactments as unconstitutional burdens upon interstate commerce, saying that nonetheless congressional legislation can allow the states to impose the burdens. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). But see *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851).

gressional authorization is similar in this respect. All three rules give some effect to sovereign immunity as a constitutional doctrine by having the eleventh amendment curtail judicial discovery of causes of action against states,²⁵⁵ even though the amendment does not limit Congress' powers.

The dichotomy between congressional and judicial power does serve to reconcile the cases: the older cases, upholding immunity, were suits brought under federal constitutional provisions, while the more recent ones are statutory and recognize *congressional* power to impose suit on states. It is not clear, however, from the holdings to date, whether the Court's eleventh amendment position ultimately rests upon such a dichotomy or not. If it did, state consent would no longer be an issue in congressional enactment cases; sovereign immunity would *never* prevent Congress from imposing suit on states; and not even a fictional consent would be required. Espousal of that dichotomy would be a means of giving some force to the eleventh amendment, while at the same time giving full play to congressional power to impose suit upon states.

There is a weakness in the argument, however:²⁵⁶ Nothing in the eleventh amendment supports the view that it was intended only to affect the powers of the judiciary and not those of Congress. Although the language of the amendment refers only to "the judicial power" ("The *Judicial power* of the United States shall not be construed to extend to" ²⁵⁷), such language is generally deemed to limit Congress along with the courts; if a given controversy is outside of the federal judicial power, accepted doctrine is that Congress cannot confer jurisdiction of that controversy upon the judiciary, any more than the judiciary can hear it on its own motion.²⁵⁸

Two strong advocates of differentiating between congressional and judicial power to hold states accountable in private suits are Professor John Nowak and Professor Laurence Tribe.²⁵⁹ Both

²⁵⁵ For a fuller formulation of the Court's limitations upon the judiciary, see note 319 *infra* & accompanying text.

²⁵⁶ Another weakness in the argument is that the dichotomy is very difficult to apply in practice. See text accompanying notes 290-99 *infra*.

²⁵⁷ U.S. CONST. amend. XI (emphasis added).

²⁵⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Cf. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591-92 (1949) (plurality opinion states that "[i]t is too late to hold that judicial functions incidental to Art. I powers of Congress cannot be conferred on courts existing under Art. III" but a majority of the Court, in two separate opinions, rejects that position).

²⁵⁹ Nowak, *supra* note 96; Tribe, *supra* note 252. The way Professor Nowak frequently states his theory is to emphasize that, under the eleventh amendment, Congress has power to create federal causes of action against the states while the judiciary does not. Nowak, *supra* note 96, at 1422. The position that Congress

ground their argument primarily upon considerations of federalism. They believe that Congress is better suited than the judiciary to adjust the federal-state balance involved in decisions whether states

has the power is not self-evident, and is not universally espoused (although the Supreme Court has adopted it), and the case Professor Nowak makes for congressional power is therefore an interesting and valuable one. I question, however, the basis for his negation of judicial power, because I believe that immunity is a common law issue. Professor Tribe at one point seems to agree with the common law view of immunity, rather than with Professor Nowak, for he says that all the eleventh amendment did was "scutt[le] the notion that article III had the self-executing effect of abrogating state sovereign immunity in federal tribunals." Tribe, *supra* note 252, at 694. That position would not have the Constitution confer on the states any "rights" of sovereign immunity; under a common law view, sovereign immunity would limit neither congressional nor judicial power (except, of course, for the limitation that the judiciary should not interpret article III to abrogate sovereign immunity). Elsewhere, however, Professor Tribe adopts the Congress-judiciary dichotomy and speaks of "distinguish[ing] rights conferred against the federal judiciary from rights conferred against Congress." *Id.* 693. See also *id.* 694 (the amendment "literally limits only the judicial power"). He also advocates a "clear statement" approach, which limits judicial powers without limiting congressional ones (except congressional power to impose suits upon states by other than explicit language).

Professor Nowak, by contrast, clearly and consistently states that the eleventh amendment does limit judicial but not congressional power. But some of the examples that he provides of the ways in which the eleventh amendment limits judicial power in fact do not show any limitations on the judiciary that would not exist even without the eleventh amendment. For example, Professor Nowak states, in the course of developing his thesis, that "the Federalists believed that Congress could grant jurisdiction to federal courts in suits against states, although they disclaimed any inherent power of the judiciary to assume such jurisdiction." Nowak, *supra* note 96, at 1430. The situation he thus describes is the situation generally with respect to federal courts' jurisdiction; the jurisdiction is only as broad as congressional grants and includes no "inherent power" in the judiciary "to assume . . . jurisdiction." See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). The statement adds something only if it means simply that article III did not, of its own force, make it unconstitutional for a state immunity doctrine to persist (which is the interpretation of the Constitution's sovereign immunity provisions that a common law view of immunity makes). Elsewhere, as well, when Professor Nowak speaks of the eleventh amendment limiting judicial power to create causes of action against the states, or to assume jurisdiction on its own of suits against the states, Nowak, *supra* note 96, at 1422, he seems to describe limitations on the federal judiciary that exist independent of eleventh amendment policy. He may, however, be referring to the special rules the Court has found limiting usual judicial interpretive functions in this area. See text accompanying notes 254-55 *supra*; text accompanying notes 317-18 *infra*. For a discussion of the difficulties inherent in delineating special limits on the judiciary but not Congress, see text accompanying notes 290-316 *infra*.

Professor Tribe does, in advocating a "clear statement approach," put forth a special limitation on the federal judiciary that might be deemed to stem from the eleventh amendment. Tribe, *supra* note 252, at 695. Tribe does not, however, carry over to interpretation of constitutional provisions his unwillingness to impart discretion to the judiciary. He finds that "one situation in which judicial abrogation of sovereign immunity, subject to congressional veto, might be justified" is "[w]hen a court implies a remedy under a constitutional rule that limits both national and state power." Tribe, *supra* note 252, at 696 n.73. Query why the "clear statement approach" need not be followed in constitutional as well as statutory provisions. See note 309 *infra*. (Tribe does have a functional explanation for excepting this class of cases: The federal judiciary would be more sensitive to the interests of states as states in those cases, because the state interests would be shared by the federal government. Tribe, *supra* note 252, at 696 n.73.)

should be accountable to individuals for violations of federal law. In Professor Nowak's words, "Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels."²⁶⁰ In contrast, the federal judiciary is politically isolated and enjoys life tenure.²⁶¹

The difficulty with the argument is that it derives from nothing peculiar to the eleventh amendment. It is an argument for a *general* limitation upon judicial power in relation to legislative power, at least in areas involving federal-state relations. In discussing the applicability of their argument in the eleventh amendment context, both authors make the point that nothing in the amendment is inconsistent with such a dichotomy between judicial and legislative power.²⁶² But they show nothing in either the language or the history of the amendment that affirmatively supports or even suggests it.²⁶³ In the absence of any affirmative historical support, it would

²⁶⁰ Nowak, *supra* note 96, at 1441. Professor Tribe makes the same point in support of congressional power: "[I]t has generally been recognized that the states are represented in Congress and that Congress will be attentive to concerns of state governments as separate sovereigns." Tribe, *supra* note 252, at 695. See generally 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).

²⁶¹ See Nowak, *supra* note 96, at 1441.

²⁶² Tribe, *supra* note 252, at 694; Nowak, *supra* note 96, at 1429-30, 1431-33, 1440-41.

²⁶³ Professor Nowak does extensively discuss historical materials—from article III of the Constitution through passage of the eleventh amendment. He suggests that the chief concern was judicial, not congressional, imposition of suit against states, because it was the judiciary that had so ruled in *Chisholm*. Basically, however, Nowak's argument turns on his view that greater congressional than judicial policy in the area would be desirable. Nowak, *supra* note 96, at 1429-42.

In other contexts, as well, Professor Nowak is free in reading constitutional provisions and constitutional history to accord with his views of policy. Later in the article Nowak says, "one of the [eleventh] amendment's underlying purposes was to prohibit the courts from imposing monetary burdens on the states for past actions." *Id.* 1444. He goes on to say that "[t]his prohibition against retroactive relief is so basic to the eleventh amendment that it should be construed as applying to congressional enactments, even though the amendment is framed only in terms of the judicial power." *Id.* This suggestion is in derogation of his own general position that the amendment does not limit congressional power. Nowak offers no explanation for why "this prohibition against retroactive relief" is more "basic" than any other, although he does express his own distaste for "hold[ing] the states liable for actions taken before any branch of the federal government had given them notice that they would be subject to federal suit for such actions." *Id.* (Indeed the language of the amendment does not suggest any prohibition in terms of the type of relief sought at all.)

Professor Nowak ultimately exposes his own argument when he concludes that "[t]he drafters of the amendment probably did not limit congressional power in this area simply because they did not foresee the creation of retroactive causes of action by Congress." *Id.* 1444-45. This seems to concede that the intent of the constitutional prohibition did not encompass these congressional actions, and that Professor Nowak's suggestion that the Constitution be interpreted to outlaw them rests simply on his own view that they are unsound. Cf. *Part One*, *supra* note 1, at

seem strange to create a rule that is applicable only to this one constitutional amendment, and that permits congressional enactments but not other constitutional provisions to override it.

V. THE SUGGESTED APPROACH: SOVEREIGN IMMUNITY AS A NON-CONSTITUTIONAL DOCTRINE

In the first article in this series, I suggested that historical sources show that neither the eleventh amendment nor article III had the effect of constitutionalizing the established common law doctrine of sovereign immunity. The debate surrounding article III concerned whether the grant of jurisdiction "to controversies . . . between a State and Citizens of another State" took away states' immunity or left it unaffected; there was no suggestion at that time that the jurisdictional grant conferred a constitutional right of sovereign immunity upon states. In *Chisholm v. Georgia*,²⁸⁴ the Supreme Court held that article III took away states' historical immunity. The effect of the eleventh amendment was to overturn *Chisholm's* holding in favor of the other interpretation that had been suggested for article III, that it left states' immunity unaffected.

What consequences would flow from accepting this view of immunity, and how do they differ from the results the Court has reached?

A. Consequences for Congressional Power

If sovereign immunity survives article III but is not required by it (or by the eleventh amendment), plainly Congress has power to override states' immunity in the exercise of its regulatory powers. In respect to congressional power, the results do not differ between this approach and the theory discussed above that the purpose of the eleventh amendment does not extend to curtailing congressional (as opposed to judicial) power; under either view, Congress retains full freedom of action. Insofar as the Court's holdings do not expressly rely upon a Congress-judiciary dichotomy, but uphold congressional power through imputing to states a fictional consent to suit, the results generally accord with the Court's. The one difference is that under a non-constitutional view of immunity, it is clear that congressional legislation that is otherwise valid could always impose

522 & nn.32-34 (describing the process by which the eleventh amendment came to be applied to citizen suits). That being so, Professor Nowak's argument as to the propriety of actions for retroactive monetary relief should be addressed to Congress; the eleventh amendment does not remove Congress' power to impose the suits.

²⁸⁴ 2 U.S. (2 Dall.) 419 (1793).

suit upon states;²⁶⁵ under the Court's holdings, it is not clear whether congressional power will be upheld in situations (most notably regulation of activities central to state's sovereign functions)²⁶⁶ where it is most difficult to impute a fictional consent to states and where the congressional regulations are based on powers other than the spending power or the Civil War amendments.

B. *Consequences for Federal Judicial Power*

It is more difficult to ascertain what power the suggested approach leaves to the federal courts to affect sovereign immunity. Generally one would expect that if immunity survives only as a common law doctrine, it would be fully subject to judicial as well as legislative development. As the following discussion will show, however, some restraints on judicial development, or at least abrogation, of immunity are necessarily implicit, and others are at least possible, even if article III and the eleventh amendment do not impose immunity as a constitutional requirement.

1. Is the Federal Judiciary Free to Abrogate States' Immunity, on the Basis of its Own Notions of Policy?—The Possibility of a General "Freeze" on Judicial Development of Sovereign Immunity Doctrine

Is the federal judiciary free itself to abrogate immunity in the first instance? Today it is not unusual for state judiciaries, acting as common law courts, to reject established sovereign immunity doctrine as "an anachronism without rational basis."²⁶⁷ Did the

²⁶⁵ The same is true under a Congress-judiciary dichotomy.

²⁶⁶ It may also be unclear when state undertaking of the activity has preceded congressional regulation. See text accompanying notes 108 & 109 *supra*.

²⁶⁷ *Stone v. Arizona Highway Comm'n*, 93 Ariz. 384, 388, 381 P.2d 107, 109 (1963) (abolishing government immunity in tort). For other judicial rejections of sovereign immunity, see *Spencer v. General Hosp.*, 425 F.2d 479 (D.C. Cir. 1969); *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89, *modified sub nom. Corning Hosp. Dist. v. Superior Ct.*, 57 Cal. 2d 482, 370 P.2d 325, 20 Cal. Rptr. 620 (1961); *Hargrove v. Cocoa Beach*, 96 So. 2d 130 (Fla. 1957); *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970); *Molitor v. Kaneland Community Unit Dist.*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (commented upon in 9 DEPAUL L. REV. 39 (1959)); *Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972); *Klepinger v. Board of Comm.*, 143 Ind. App. 155, 239 N.E.2d 160 (1968); *Brinkman v. City of Indianapolis*, 141 Ind. App. 622, 231 N.E.2d 169 (1967); *Carroll v. Kittle*, 203 Kan. 841, 457 P.2d 21 (1969) (immunity reinstated in part, KANS. STAT. ANN. §§ 46-901-902 (1973), held unconstitutional in *Brown v. Wichita State Univ.*, 217 Kan. 279, 540 P.2d 66 (1975), *rev'd on rehearing*, 219 Kan. 2, 547 P.2d 1015 (1976)); *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961) (immunity reinstated in MICH. STAT. ANN. § 3.996(101)-(115) (1977); *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); *Willis v. Department of Conservation & Economic Dev.*, 55 N.J. 534, 264 A.2d 34

Constitution, by leaving sovereign immunity in common law status, allow the federal judiciary as well to repudiate the rule? (Since the 1938 decision in *Erie R.R. v. Tompkins*,²⁶⁸ such a federal judicial power would in any event be limited to areas in which federal law controls, but during some pre-*Erie* periods the federal judiciary participated along with state judiciaries in the development or discovery of the common law in instances where state law now controls.)²⁶⁹ It would seem anomalous to maintain staunchly that the Constitution did not abrogate immunity of its own force while at the same time entertaining a view that the federal judiciary could accomplish the same result, not by constitutional interpretation but in service of its own notions of policy.

Such a problem with preserving immunity only as a common law doctrine would not have been apparent when the Constitution—or the eleventh amendment—was adopted. For it was not then anticipated that the judiciary—state or federal—would freely develop common law in a way familiar to us today. At that time the prevalent concept of the common law was of one unitary system, which courts were to discover, not to create.²⁷⁰ A more realistic view of judicial functions might have led one to expect that judges would inevitably develop sovereign immunity doctrine—and that they would do so in some ways that did not preserve every possible means of state immunity from suit.²⁷¹ But while fine distinctions might have been expected, bold changes of course were not.

Arguably the view of the judicial function contemporary with the ratification of article III and the adoption of the eleventh amendment, together with the purposes of those provisions, supports a position “freezing” common law development in federal courts.

(1970) (reinstated for two years in N.J. STAT. ANN. 52:4A-1 (Supp. 1977); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1976); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618 (1962); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976). Compare *Liber v. Flor*, 143 Colo. 205, 353 P.2d 590 (1960) with *Colorado Racing Comm'n v. Brush Racing Ass'n, Inc.*, 136 Colo. 279, 316 P.2d 582 (1957).

It is sometimes said, however, that only state legislatures should waive immunity, and that courts should not. *E.g.*, *Kleban v. Morris*, 363 Mo. 7, 247 S.W.2d 832, 836 (1952).

²⁶⁸ 304 U.S. 64 (1938).

²⁶⁹ *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

²⁷⁰ See, e.g., *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-34 (1928) (Holmes, J., dissenting); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842); W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* ch. XVIII (1953); I D. HOFFMAN, *COURSE OF LEGAL STUDY* 415-16 (2d ed. 1836).

²⁷¹ See note 273 *infra*.

The result would be that sovereign immunity doctrine even today could be developed or abrogated only by Congress or by state legislatures and judiciaries, but not by the federal judiciary. In effect, then, the position would be the same as the Congress-judiciary dichotomy discussed above, unless the freeze were not deemed to extend to federal question cases.²⁷²

Such a freeze on federal judicial development of the sovereign immunity doctrine would be extremely difficult to apply, for pre-Constitution sovereign immunity doctrine did not offer dispositive solutions to many problems that would arise. Federal courts did in fact substantially develop the contours of sovereign immunity doctrine during the nineteenth century, laying down not only rules regarding immunity that were more expansive than might have been expected but also some that were more narrow.²⁷³

Moreover, it is unnecessary to impose a freeze on federal judicial interpretation of sovereign immunity in order to avoid federal

²⁷² Even if the Constitution were deemed to freeze federal judicial development of common law sovereign immunity, it is not clear whether that would affect the disposition of sovereign immunity problems today. Any such freeze might well have been deemed to apply only in cases involving common law causes of action, which constituted a substantial amount of the federal judicial business during the nineteenth century, and not in the federal question area. If so, the sovereign immunity doctrine would in that respect be obsolete today, since the federal judiciary now follows state decisional and statutory law in those cases. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). In any event, that exemption of federal question litigation from sovereign immunity doctrine would be possible only if contract clause actions were not deemed federal question cases, because it is clear that a chief concern of proponents of state immunity was actions against states to enforce debts. See note 281 *infra* & accompanying text. Although contract clause actions became firmly established during the nineteenth century as suits arising under the Constitution (though barred by sovereign immunity), it was not self-evident that they would have been deemed federal question cases; they could equally have been conceived of as suits upon the contract. See notes 242-45 *supra* & accompanying text. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), would not compel that contract clause actions be treated as federal question cases. It was not treated as a contract clause action, or as a federal question case in any other respect. The jurisdictional basis there was that the suit was between a state and a citizen of another state. See note 311 *infra*. The eleventh amendment's overturning of *Chisholm* is therefore consistent with a view of the amendment as limiting judicial creative functions in areas we now see as controlled by state law and as not carrying over to federal question cases, as long as actions alleging state impairment of contracts are not seen as federal question cases. See notes 242-45 *supra* & accompanying text.

If the Constitution were deemed to freeze federal judicial development of the common law relating to sovereign immunity, and if the freeze were deemed to cover federal question cases as well as common law causes of action, the result would be the same as the Congress-judiciary dichotomy discussed above. If, on the other hand, the concern was with common law causes of action and not federal question cases (except suits to enforce state debts), that freeze on the common law would be without effect today.

²⁷³ For example, cases allowing suit against individual officers and allowing people to recover their own property. *E.g.*, *United States v. Lee*, 106 U.S. 196 (1882); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

judicial abrogation of the immunity doctrine. Federal judicial abrogation is not a realistic possibility because of the view the Supreme Court has taken of the federal judicial role in formulating federal common law generally. The Court has not claimed for the federal judiciary a role in evolving federal common law equal to the common law making powers of state judiciaries; the federal judiciary does not assume full rule-making power simply because an area is one in which Congress could have acted but has not. Only in a few areas, none of which is relevant here,²⁷⁴ does the federal judiciary exercise full rule-making power. Otherwise it has limited itself to "interstitial federal lawmaking"—to filling in gaps in constitutional schemes or in statutory schemes largely formulated by Congress.²⁷⁵ Absent a freeze, then, judicial interpretation and development of the common law immunity doctrine is to be expected, but judicial abrogation is not.

In any event, it would seem erroneous to impose a freeze on federal judicial development of the common law of immunity simply because the Framers entertained a different view of the judicial function (as it relates to immunity and to all other common law questions as well) than we do today. A sounder approach would stress that the attitudes reflected in the eleventh amendment, and in the interpretation of article III thereby adopted, counsel restraint on the part of the federal judiciary in imposing new and different remedies against the states. Moreover, they are not alone in counseling restraint. Even if the Constitution as such does not stand behind the sovereign immunity doctrine—so that article III and the eleventh amendment limit neither congressional *nor* judicial functions in relation to suits against states—the special rules constraining the federal judiciary that the Court has derived from the eleventh amendment could stand, though with a different theoretical basis.

2. Will the Suggested Approach Impose on the Federal Judiciary the Same Restraints That the Court's Approach Has?

a. *Hans v. Louisiana and Other Contract Clause Cases—Finding Private Causes of Action Against States Implied in Constitutional Provisions*

If the Court were to view sovereign immunity as solely a common law requirement, it could nevertheless allow *Hans v. Louisiana*

²⁷⁴ See note 291 *infra*.

²⁷⁵ See generally *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-93 (1973); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

to stand, although not because of any dichotomy between constitutional provisions and congressionally-created causes of action. A common law approach to immunity permits the judiciary to find a private cause of action flowing from federal constitutional provisions or statutes, when the cause of action accords with the purposes of the particular provision. The holding in *Hans v. Louisiana* can, and probably should, be maintained; but the holding flows from the contract clause, not from the eleventh amendment.²⁷⁶

There is an argument suggesting that the contract clause does contemplate private enforcement suits against states: such suits are essential for the provision to have effect. The contract clause, which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts,"²⁷⁷ was undoubtedly intended to limit states. The Court in *Chisholm v. Georgia*²⁷⁸ and Mr. Justice Harlan, dissenting in *Louisiana v. Jumel*²⁷⁹ (the case first holding that sovereign immunity bars private actions under the contract clause) thought that contract clause actions against the state must necessarily be permissible; otherwise, the clause would be ineffective.²⁸⁰

Nonetheless, the position the Court has consistently taken—that contract clause claims can be raised only defensively—best accords with the Framers' intent. In the ratification debates on the original Constitution, state suability was much discussed. Objections to it focused principally upon the undesirability of holding states to their debts, as contract clause actions would do.²⁸¹ The provision some

²⁷⁶ This approach makes it irrelevant whether the suit is a citizen suit or a non-citizen suit. Therefore, *Louisiana v. Jumel*, 107 U.S. 711 (1884), stands on the same footing as *Hans*.

²⁷⁷ U.S. CONST. art. I, § 10.

²⁷⁸ 2 U.S. (2 Dall.) 419 (1793).

²⁷⁹ 107 U.S. 711, 748 (1884) (Harlan, J., dissenting).

²⁸⁰ The clause still could and can be raised defensively, however, and the line between a defensive and an affirmative use is not a clear one. See, e.g., *Pennoyer v. McConaughy*, 140 U.S. 1 (1891); *Virginia Coupon Cases*, 114 U.S. 269 (1885).

The other prohibitions upon the states contained in article I, section ten do not raise the same problem. As to most, one would not imagine that the plaintiff would be a private individual. Other prohibitions might be adequately enforced if raised defensively by private individuals.

²⁸¹ See, e.g., *THE FEDERALIST* No. 81 (A. Hamilton) 511-12 (B. Wright ed. 1961) (1st ed. 1788) (quoted in *Part One*, *supra* note 1, at 529); 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 318-19, 471, 473-76 (J. Elliot ed. 1836) (remarks of Patrick Henry, quoted in *part in Part One*, *supra* note 1, at 532). Cf. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 99 (1922) (speaking of the reaction to *Chisholm*). But see C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 22 (1972) ("[T]he framers of the Constitution attached utmost importance to the fidelity of financial obligations, both public and private. . . ."). But cf. *id.* 69-70, 74 (discussing the eleventh amendment).

looked to as accomplishing this result was the judicial power language in article III; some thought it abrogated states' sovereign immunity generally in suits in federal court. This is the interpretation of article III that *Chisholm* upheld and that the eleventh amendment rejected.²⁸² No one intimated, however, either in the debates on the original Constitution, or at any time prior to passage of the eleventh amendment, that the contract clause of its own force might have the effect of removing states' immunity. Given this history, it would be strange indeed to find an implied right of action in the contract clause that would accomplish precisely what the eleventh amendment repudiated for article III, and that would remove states' immunity in suits to enforce debts—an area of central concern in 1789 when the Constitution was ratified, and again when the eleventh amendment was adopted. It would mean that the ratification debates, *Chisholm*, and the eleventh amendment had simply focused on the wrong constitutional provision, and that the contract clause all along had by itself accomplished what was most feared.

Since the question whether the contract clause of its own force entails a private cause of action against states is a question of the intent behind the contract clause, this history supports an interpretation that no such cause of action exists. Instead, the contract clause leaves states' immunity unaffected; the immunity persists, in suits on state obligations, as a common law doctrine. But the fact that the history and deliberations support this interpretation of the contract clause does not mean, of course, that every other constitutional provision must similarly be interpreted to maintain states' immunity from suit. Each constitutional provision poses a separate interpretive question. The commerce clause, for example, has been interpreted to contemplate congressional imposition of suit upon states, though not to impose suit of its own force.²⁸³ One constitutional provision that might be held, of its own force, to modify common law immunity is section one of the fourteenth amendment,²⁸⁴ although the Court suggested in *Edelman v. Jordan* that it

²⁸² See Part One, *supra* note 1, at 527-46.

²⁸³ *Parden v. Terminal Ry.*, 377 U.S. 184, 192 (1964).

²⁸⁴ Indeed, that result could obtain even if the eleventh amendment were deemed to impose immunity as a constitutional requirement; as a subsequent amendment, the fourteenth could modify the eleventh. Professor Nowak, in fact, has taken the position that section one of the fourteenth amendment has that effect. See Nowak, *supra* note 96, at 1455-60. The Court has viewed section five of the fourteenth amendment as modifying the eleventh, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), but it does not view section one as modifying the eleventh, *Edelman v. Jordan*, 415 U.S. 651 (1974).

would not follow that interpretation.²⁸⁵ It may be that no constitutional provision, or at least none existing prior to the adoption of the eleventh amendment,²⁸⁶ will be interpreted to alter common law immunity and impose suit on states of its own force. The same history that supports *Hans*' interpretation of the contract clause could support a theory that plaintiffs could not use other pre-eleventh amendment provisions to enforce debts against the states. Possibly the theory could even be extended beyond debts, to any monetary liability against the states.²⁸⁷ To the extent, however, that a given provision is more specific in contemplating monetary liability, or less far-reaching in allowing it,²⁸⁸ the Court might reach a result different from the contract clause cases. In any event, the results reached would obtain as a matter of interpretation of each constitutional provision,²⁸⁹ and not because the eleventh amendment creates a bar to federal judicial recognition of private actions against states that are implicit in constitutional guarantees.

b. *The Prohibition Against Implication of Retroactive Monetary Relief Against States and the Clear Language Rule*

In contrast to the rule of *Hans v. Louisiana*, it is not clear to me that the *Edelman v. Jordan* rule and the clear language rule

²⁸⁵ See text accompanying notes 125-26, 169 & 173 *supra*. The result of *Edelman* is that a federal court cannot recognize a damage remedy against states in actions brought under the fourteenth amendment, except where Congress has authorized damages. In that case, the suit is under section five, which does modify the eleventh amendment.

²⁸⁶ This is relevant because later ones could be modifiers. Moreover, the history contemporary with ratification, suggesting concern with suits to enforce debts against the states, is some evidence that constitutional provisions then in existence other than article III were also not deemed of their own force to subject states to monetary liability. The argument made in text with respect to the contract clause could thereby be applied to all pre-eleventh amendment constitutional provisions.

²⁸⁷ But cf. *Jacobs v. United States*, 290 U.S. 13 (1933) (holding fifth amendment gives private party a right of action against the United States for just compensation for the taking of his or her property). Moreover, in *Peel v. Florida Dep't of Transp.*, 443 F. Supp. 451 (N.D. Fla. 1977), *appeal pending*, No. 77-1846 (5th Cir., oral argument scheduled for June, 1978), the court held that Congress can use its article I war powers, U.S. Const. art. I, § 8, cl. 12, to abrogate states' immunity and to make states amenable to private damage actions without the need for any enforcement clause.

²⁸⁸ See, e.g., *Jacobs v. United States*, 290 U.S. 13 (1933) (fifth amendment just compensation clause). See also *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute.").

²⁸⁹ Justice Brennan's *Government Employees* opinion, 411 U.S. at 319 n.7, may similarly reflect a view that the Court, in deciding whether enforcement powers were granted to Congress, should look to the purpose of each particular constitutional provision. Justice Brennan does not, however, mention the possibility of implied remedies against states found directly in constitutional provisions.

should obtain, at least if they are interpreted strictly. If those rules are deemed desirable, however, there are bases other than a constitutional sovereign immunity doctrine on which they can rest; the results need not necessarily change if immunity is deemed only a common law doctrine.

The *Edelman* rule that the judiciary should not imply retroactive monetary relief against states may not be the same as the clear language rule,²⁹⁰ but at least it is closely related to it. Both are essentially rules of strict construction, to be applied to enactments arguably conferring federal jurisdiction of suits against states. The *Edelman* rule is a rule of construction because any rule limiting judicial recognition of implied remedies is. The federal judiciary claims a power to make true "federal common law" only in a few classes of cases, none of which is relevant here.²⁹¹ When the judiciary finds an implied remedy of damages against a state in other classes of cases, it is not acting fully as a common law court; it is interpreting a constitutional provision or a statute. The line between judicial interpretation and judicial lawmaking is not an easy or clearcut one. The Court's announcement of the exclusionary rule in *Mapp v. Ohio*,²⁹² for example, resembles federal common law in some ways. It represents judicial implementation of the fourth and fifth amendments in a way that was not directly suggested by the amendments' language. But in another way *Mapp* represents an interpretation of the fourth amendment (and the fifth amendment). If one had a system prohibiting common law making by the federal judiciary but retaining judicial construction of constitutional provisions and statutes, it is not clear that there would not still be decisions like *Mapp*.²⁹³ Questions would arise concerning statutory enactments or constitutional provisions that give no apparent guid-

²⁹⁰ See text accompanying notes 208, 209 & 212 *supra*.

²⁹¹ E.g., controversies to which the United States is a party (*Miree v. DeKalb County*, 433 U.S. 25 (1977); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973); *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411 (1947); *United States v. Standard Oil Co.*, 332 U.S. 301 (1947); *United States v. County of Allegheny*, 322 U.S. 174, 181-83 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942)); international law (*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)); controversies between states (*Texas v. New Jersey*, 379 U.S. 671 (1965); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)); admiralty (*Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-11 (1953); *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 214-15 (1917)); suits brought under section 301 of the National Labor Relations Act (*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

²⁹² 367 U.S. 643 (1961).

²⁹³ Another example of creative constitutional interpretation not directly suggested by constitutional language but not fully federal common law is *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), in

ance on the point at issue.²⁹⁴ The point is simply that it is difficult to separate those instances in which courts are acting in furtherance of congressional (or constitutional) policy from those in which they are acting as policy-makers themselves.

The court of appeals in *Edelman* did not hold that it had power to grant the requested relief despite contrary legislative intent. Instead it thought the relief consistent with the Social Security Act.²⁹⁵

which the Supreme Court found a damage remedy, deriving from the fourth amendment, in suits against federal officers.

J.I. Case v. Borak, 377 U.S. 426 (1964) is a statutory case in which an implied damage remedy was found (under § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970)).

For authorities on the propriety of finding implied remedies in the Constitution, see note 253 *supra*. Another case finding a remedy implicit in a constitutional guarantee is *Ex parte Young*, allowing injunctive relief against state officials charged with violating the Constitution. See text accompanying note 170 *supra*.

²⁹⁴ Normally in deciding a question concerning a congressional enactment (such as the issue whether a particular remedy is available for a statutory violation), the judiciary, finding congressional intent uncertain, would follow "the better rule" in all the circumstances. It does this by itself deciding what purposes ought to be attributed to the statute and what resolution those purposes call for. H. HART & A. SACKS, *THE LEGAL PROCESS* 1410-11, 1414-15 (tent. ed. 1958). The rule thus formulated will stand until Congress acts to modify it. The judiciary does not, however, act without restraints. Even without definitive indications of "congressional intent," a court should reason from the statutory purposes and not from its own notions of preferable policy when it makes its decisions; it must, in other words, "respect the position of the legislature as the chief policy-determining agency of the society." *Id.* 1410. See generally *id.* 1414-15; Hill, *The Erie Doctrine and The Constitution*, 53 Nw. U.L. Rev. 427, 440-44 (1958); Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1026-28 (1967). See also Wellington, *supra* note 230, at 262-64. Nonetheless, the absence of clear indications in a congressional enactment, or accompanying legislative history, does give the judiciary considerable freedom in interpreting "congressional intent."

²⁹⁵ It is inferable from the purpose of Congressional enactment of the AABD program that effective judicial review might include the remedy of restoration of benefits withheld in violation of federal law.¹⁵ Otherwise a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them "at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence." *Alexander v. Weaver*, 345 F. Supp. 666, 673 (N.D. Ill.1973); see also *Alvarado v. Schmidt*, 317 F. Supp. 1027, 1042 (W.D. Wis.1970). Certainly we are not to be understood as meaning that retrospective relief is always [*sic*] or even generally an appropriate remedy. However, the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them convinces us that Congress fully meant to condition the grant of federal funds on the states' being susceptible to a federal court suit to obtain retrospective relief. Simply put, we think it unreasonable to presume that Congress would have intended assistance to be given to welfare recipients in conformity with federal law and at the same time deny them the possibility of gaining an effective remedy. See *Employees of Dept. of Public Health & Welfare v. Department of Public Health & Welfare*, 452 F.2d 820, 831

In reversing and in holding that the judiciary should not find implied damage remedies against states, the Supreme Court essentially held that there must at least be language literally imposing suit upon the states²⁹⁶ for states to be found liable under federal enactments for retroactive monetary relief. Generally it might be possible for the federal judiciary to find a damage remedy in an enactment that did not explicitly provide or deny the remedy; if the judiciary thought that the purposes of the enactment required the remedy, and that nothing in the enactment or the legislative history suggested that the remedy was not consistent with the legislative intent, the judiciary would have power to grant that relief.²⁹⁷ *Edelman* precludes such judicial interpretation of an enactment, when the result is to hold states to retroactive monetary relief, unless language in the enactment literally imposes suit upon states. The *Government Employees* clear statement rule goes one step further, maintaining (in the cases to which it applies)²⁹⁸ that language literally imposing suit upon the states is not enough but that there must as well be clear language affirming that the intent is to lift states' immunity.

An essential problem with approaches restricting the federal judiciary but not restricting Congress is that they are dependent upon delineating some clear division between judicial interpretation and judicial lawmaking. They must place special limits upon the federal judiciary without unduly interfering with federal courts' interpretive role in enforcing statutory (or constitutional) provisions. Rules of strict construction, like the *Edelman* rule and the clear language rule, are one solution to this problem.

(8th Cir. 1971) (dissenting opinion), certiorari granted, 405 U.S. 1016, 92 S.Ct. 1294, 31 L.Ed.2d 478.

15. The federal regulations governing the federal welfare programs contemplate court-ordered, retroactive welfare payments by expressly providing for federal financial participation in such corrective payments. 45 C.F.R. § 205.10(b)(2)(3).

Jordan v. Weaver, 472 F.2d 985, 994-95 (7th Cir. 1973) (footnote omitted), *rev'd sub nom.* Edelman v. Jordan, 415 U.S. 651 (1974).

²⁹⁶ Edelman v. Jordan, 415 U.S. at 672, 674.

²⁹⁷ See notes 253, 287 & 293 *supra*. See generally *Santa Clara Pueblo v Martinez*, 46 U.S.L.W. 4412 (Sup. Ct. May 15, 1978); *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-40 (1969).

Moreover, the existence of literal language may not make the strongest case for congressional intent. In *Parden*, for example, the literal language included suits against states, because the statute was phrased in terms of "every railroad," and the case concerned a state-owned railroad. But since there were no state-owned railroads serving as common carriers when the FELA was adopted, the judicial interpretation that state railroads were covered was not altogether compelled.

²⁹⁸ See text accompanying notes 220-32 *supra*.

Should these rules of strict construction be retained?

In cases in which congressional intent is truly unclear, it is unobjectionable to have a rule that the judiciary should not find a private cause of action for damages against states. The Court's rules cutting back on the usual judicial interpretive function are objectionable only to the extent that they go further and attempt to prevent the judiciary from finding causes of action against the states in situations where all the circumstances suggest that such causes of action are within the statutory purpose.²⁹⁹ They have this effect because they prohibit findings of congressional intent except where that intent has manifested itself in particular forms and is expressed in particular formulations: They require absolutely that a congressional enactment literally impose suit against the states and, further they require, in some circumstances, "clear language" showing that states' immunity from suit was to be lifted. While the Court has not made clear how strictly this last requirement is to be applied, if indeed any scope remains for its operation, some advocates of the requirement have turned it into "a clear statement rule" and have read it for all it is worth: "[T]he amenability of states to suit must be specifically addressed by federal legislation, and Congress must make its intention to treat states like private parties unmistakably clear."³⁰⁰ Because it is unrealistic to expect Congress always to have expressed directly its intent to impose suit on states,³⁰¹ especially in statutes enacted prior to *Government Employees*, courts following such a clear statement rule would not find private causes of action

²⁹⁹ In the recent argument in the United States Supreme Court of *Hutto v. Finney*, 548 F.2d 740 (1977), cert. granted, 46 U.S.L.W. 3261 (No. 76-1660), argument, 46 U.S.L.W. 3535 (Feb. 28, 1978), counsel for the state took the position that the congressional enactment involved there (the 1976 Civil Rights Attorney's Fees Awards Act, Pub. L. No. 94-559, § 2, 90 Stat. 2641 (amending 42 U.S.C. § 1988 (1970))) did not abrogate states' immunity from attorney's fees awards, even though, as counsel conceded, the legislative history made clear that Congress did intend to abrogate states' immunity. The state argued that regardless of congressional intent, Congress had simply "botched the job"; if Congress did not use explicit language, no abrogation of immunity could be found. 46 U.S.L.W. 3535.

³⁰⁰ Tribe, *supra* note 252, at 691. Professor Tribe also says, "By making a law unenforceable against the states unless a contrary intent were apparent in the language of the statute, the clear statement rule would . . . ensure that attempts to limit state power were unmistakable. . . ." *Id.* 695. See also *id.*

³⁰¹ "[T]he low motive power of abstract sovereign immunity concerns" means that Congress often will not explicitly discuss whether to impose suit, let alone include in the legislation a direct statement on the subject, even when its statute rather clearly has that effect. The quoted language is Professor Tribe's. *Id.* 696 n.73. He recognizes the point, though in another context, but he is content to have the presumption play a substantive role "thereby structuring the legislative process to allow the centrifugal forces in Congress the greatest opportunity to protect the states' interests." *Id.* 695. See generally *id.* 695-96.

even in instances in which "all the circumstances" made clear that state suability was intended.³⁰²

A clear statement rule, strictly applied, thus leads courts to deny causes of action that were intended by Congress. Professor Harry Wellington has recognized that a function of a clear statement rule is to allow courts, under the guise of statutory interpretation, to contravene congressional intent: "The exercise of judicial power entailed in the application of such a rule is, of course, the exercise of quasi-constitutional, judicial review. The court, in a mild way, is resisting legislative purpose. It is interposing itself, in a non-cooperative fashion, between the legislature and the people."³⁰³ While the rule appears to be one of judicial restraint, it effectively gives courts a veto over congressional causes of action,³⁰⁴ a veto courts can exercise when congressional intent is clear but the legislation is not absolutely explicit.³⁰⁵ The veto can be overridden only if Congress again considers the issue and states its position with the necessary specificity.³⁰⁶ But such a presumption against a particular result should arise only when the Court believes that result is in some way improper—when congressional legislation contravenes fundamental principles.³⁰⁷ In those instances the Court forces Congress to deliberate upon the specific problem,³⁰⁸ and to address it as

³⁰² E.g., *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). See also note 299 *supra*.

³⁰³ Wellington, *supra* note 230, at 264. See also note 301 *supra*.

³⁰⁴ Wellington also conceives of a clear statement approach as one that "shifts, or hides, responsibility as between court and legislature." Wellington, *supra* note 230, at 264.

³⁰⁵ It is hard to believe that the *Government Employees* Court was not displacing congressional legislation with its own conclusion of policy that "[t]he policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." 411 U.S. at 286.

³⁰⁶ Unless Congress makes benefits retroactive to previous legislation, and that is upheld, many persons will lose benefits irretrievably. For factors reducing the likelihood that Congress will do so, see Tribe, *supra* note 252, at 696 n.73. But when Congress amended the Fair Labor Standards Act to provide explicitly that employees could maintain actions against state employers, see note 79 *supra*, it did extend the statute of limitations to allow refiling by the state employees who had been denied relief under *Government Employees*. If the Court were to proceed on a waiver rationale, in upholding congressional imposition of suits, it might have difficulty sustaining such retroactive causes of action. See text accompanying notes 108-11 *supra*. See also Nowak, *supra* note 96, at 1444.

³⁰⁷ Professor Wellington recognizes this as the function of a clear statement rule: "The court should assume responsibility by imposing on the legislature a clear statement rule: to depart from an established *principle*, the legislature must speak plainly. . . . Legislative power to disregard principles exists in our form of government, but it must be exercised without doubt." Wellington, *supra* note 230, at 264 (emphasis in original). See also notes 229-32 *supra* & accompanying text.

³⁰⁸ Professor Tribe believes that a primary purpose of the clear statement rule is to force Congress directly to have focussed on the issue of states' immunity in

such, if it is to impose the disfavored approach. Thus the clear statement rule made sense in *Government Employees* because the Court had doubts concerning the constitutionality of the relevant enactments. But if one accepts congressional power in other circumstances to impose suits on states, it would not be proper to retain for those enactments rules of strict construction that effectively require departure from congressional intent.³⁰⁹

As stated above, the disagreement with the Court's results is limited to those instances in which the Court's rules of construction would depart from congressional intent. A rule that in unclear cases the judiciary should rule against state suability is unobjectionable. Such a rule, which is equivalent to a "clear evidence" requirement, is sufficient to protect against an overenthusiastic judiciary in this area. By telling courts that in ambiguous cases they should reject state suability, a clear evidence rule would counsel courts against finding states suable absent congressional (or constitutional) intent, just as the Court's rules of strict construction do; but unlike the Court's rules, it would not require congressional intent to manifest itself in any particular form.³¹⁰ Instead, a requirement that evidence of congressional intent to impose suit be clear would direct the judiciary to consider all evidence reflecting upon statutory purpose, in whatever form. It would tell the judiciary that if congressional intent was unclear the judiciary should not make its own best guess, or its own best policy judgment, but should instead rule against suability. But while a clear evidence requirement would

order for immunity to be waived. Tribe, *supra* note 252, at 695 ("[C]ourts should not abrogate state immunity unless they are sure that Congress has considered the federalism interests compromised by suits against states."). See also Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936).

³⁰⁹ The *Hans* rule as well can be viewed as one of construction: The Court's retention of *Hans* and the accompanying distinction between constitutional and congressionally created causes of action could simply represent a belief that no constitutional provision is explicit enough to support an implication of damages against states. That rule at least has some specific support: the argument that contemporary history shows the original Constitution should not be interpreted to allow private suits to collect on state debts. There is no similar, specific support for rules of strict construction of congressional enactments imposing suit on states, unless one doubts congressional power to act in the area.

Although carrying the clear statement rule over to constitutional provisions could explain *Hans*, Professor Tribe, an advocate of a clear statement rule for congressional enactments, does not apply the approach to constitutional provisions. See note 259 *supra*.

³¹⁰ A clear evidence approach would thus differ from the Court's approach because, first, there would be no absolute requirement of language literally imposing suit upon states as a prerequisite to finding that evidence of congressional intent to impose suit is clear; second, there would be no clear language rule. (This latter may not show any significant variation from the Court's holdings because it is unclear how strictly the Court ever applied its clear language rule and because the rule operates only in a limited class of cases today.)

affect the weight of evidence of congressional imposition that the judiciary should require to find states suable, it would not adopt the Court's specific rules about how congressional intent must be ascertained.³¹¹

³¹¹ There is, however, one specific rule that the historical understanding of article III and the eleventh amendment does suggest: a rule that a congressional enactment giving federal courts jurisdiction of suits "between a State and citizens of another State" (i.e. utilizing the article III language) should not be deemed, without more, to abrogate states' immunity from suit.

The reasons for this limitation are somewhat complex. It flows from the historical debate concerning whether or not article III abrogated states' immunity and from the suggestion, developed in the prior Article in this series, that the effect of the eleventh amendment was to ensconce the position that article III did not of its own force abrogate immunity. Arguably, there is a fallacy in that thesis because article III, standing alone, has been interpreted not to confer jurisdiction on the inferior federal courts, but instead simply to allow jurisdiction of certain categories of cases when Congress chooses to confer it. *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). One might think, therefore, that it is meaningless to suggest, as I do, that article III itself does not remove immunity but that it allows Congress to do so. It might seem meaningless, because the results of the two positions—article III abrogation and article III nonabrogation—appear to be precisely the same: either requires a congressional grant of jurisdiction over suits against states as a prerequisite to jurisdiction, and either upholds jurisdiction when that grant is made.

Nonetheless, there are ways in which the abrogation and the nonabrogation positions remain distinct. First, the two positions are clearly different as they relate to the Supreme Court's original jurisdiction, which extends to suits to which a state is party, and which derives directly from the Constitution independent of any congressional grant of jurisdiction, *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 86 (1861), (although Congress may make it concurrent with the jurisdiction of lower federal courts or of state courts, *Ames v. Kansas*, 111 U.S. 449 (1884); *Börs v. Preston*, 111 U.S. 252 (1884)). The original jurisdiction would therefore *prima facie* differ in scope depending upon whether article III was deemed to abrogate immunity or simply to leave it, as a common law doctrine, subject to abrogation by Congress.

More significantly, the seeming identity in results for the lower federal courts of the abrogation and nonabrogation positions suggests that the nonabrogation position must require one very limited clear language rule for congressional enactments to abrogate states' immunity: Since the nonabrogation position holds that article III's extension of the judicial power to "Controversies . . . between a State and Citizens of another State" does not in itself remove states' immunity, congressional grants of jurisdiction in the same terms should similarly not be construed to confer jurisdiction of suits against nonconsenting states. When Congress uses the constitutional language, or a close approximation thereof, to confer jurisdiction, it simply allows federal courts to hear suits in which states are properly parties (i.e. those in which the state is plaintiff, or in which the state has consented to suit). Federal courts should not rule that Congress has opted to lift states' immunity when the only evidence of that congressional purpose is Congress' use of the constitutional language. (*Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), not only was in the original jurisdiction. It also was brought under a grant of jurisdiction that would be considered a "close approximation" of the constitutional language and therefore insufficient to show a grant of jurisdiction in private suits against states today. It was brought under § 13 of the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80, which provided: "The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.")

Perhaps the limited rule proposed should not be conceived of as a clear language requirement at all, for it is not an absolute. See text accompanying note 322 *infra*. In any event, that limited rule preserves the distinction between the abroga-

Such a clear evidence requirement is consistent with a common law approach to immunity; courts impose clear evidence requirements with some frequency.³¹² In this context it could readily be justified because important interests of federalism are at stake. Indeed, even if one opts for the more rigid rules of strict construction that the Court and some commentators have advanced, instead of a simple clear evidence requirement, it is not essential, in order to support the rules, that sovereign immunity be regarded as a constitutionally imposed doctrine. Even apart from any sovereign immunity provisions in the Constitution, many policies counsel against the judiciary readily finding implied causes of action against states. The *Edelman* Court grounded upon the eleventh amendment its rule that the judiciary should not, in the absence of somewhat explicit congressional authorization, find implied damage remedies against the states, but traditional limits upon the judicial function in conjunction with policies of federalism could support the rule as well. Although it is not unheard of for federal courts to find implied damage remedies, the instances in which they have done so³¹³ are much more limited than for other forms of relief (principally injunctive relief).³¹⁴ In fact, some Justices have even questioned judicial power to find an implied damage remedy.³¹⁵ And "Our Federalism" has led to a much greater reluctance to grant relief against states than against other defendants, even when no sovereign

tion and nonabrogation positions in the lower federal courts, and independently, it makes sense in terms of the historical understanding of the phrase "Controversies . . . between a State and citizens of another State."

³¹² For discussions of instances in which courts have imposed a requirement of "clear and convincing evidence" (or some variant formulation), see C.T. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* 796-98 (2d ed. 1972); J.H. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* 329-34 (1940).

³¹³ See notes 287 & 293 *supra*.

³¹⁴ See Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1158 (1969) (It has been generally recognized that courts can find implied equitable remedies for constitutional violations but the principle that they can do so "has been obscured in regard to legal remedies, particularly the judgment for damages.").

³¹⁵ See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (Burger, C.J., dissenting); *id.* 427 (Black, J., dissenting); *id.* 430 (Blackmun, J., dissenting). But see *id.* 398 (Harlan, J., concurring in judgment); notes 287 & 293 *supra*. Moreover, at common law, courts created damage remedies, along with others, as a matter of course. See generally T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (5th ed. 1956); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts* in *Bell v. Hood*, 117 U. PA. L. REV. 1, 18-20 (1968).

Moreover, even when a damage remedy is explicitly provided, there are bases other than sovereign immunity that sometimes make it inappropriate for monetary relief to be retroactive as well. See *City of Los Angeles v. Manhart*, 46 U.S.L.W. 4347, 4351-53 (U.S. S. Ct., April 25, 1978).

immunity policy is at stake.³¹⁶ The same policies could be invoked in support of the Court's somewhat amorphous "clear language" approach. And while I have indicated I do not think a strictly-defined "clear statement" requirement should be imposed absent doubts concerning the propriety or constitutional validity of a congressional enactment, a deep sense of hostility to suits against states could lead one to use these doctrines to devise such a rule, even if the Constitution as such does not stand behind the sovereign immunity doctrine.

C. Summary

In the final analysis, there are to date only three discernible rules flowing from the Court's constitutionalization of sovereign immunity: Federal courts should not rule that constitutional provisions—at least the contract clause³¹⁷—remove states' immunity of their own force; courts may not find an implied damage remedy against states absent statutory language that literally includes states as potential defendants; and in some cases³¹⁸ there must as well be "clear language" specifically reflecting a purpose to lift states' immunity from suit. I would suggest that the first of these rules be viewed as resulting not from the eleventh amendment but from an interpretation of the contract clause, and perhaps all or most other pre-eleventh amendment constitutional provisions—an interpretation that is supported by the general understanding of the scope of those provisions when they were adopted. I would also suggest that a clear

³¹⁶ *E.g.*, *Younger v. Harris*, 401 U.S. 37 (1971), holding that federal courts should not interfere in pending state criminal proceedings. This policy of non-interference has been followed despite the fact that such cases are outside the Anti-Injunction Act, 28 U.S.C. § 2283 (1970). *Mitchum v. Foster*, 407 U.S. 225 (1972). Furthermore, the policy has recently been extended to prohibit federal interference with civil enforcement proceedings instituted by states. *E.g.*, *Juidice v. Vail*, 97 S. Ct. 1211 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977); *Huffman v. Pursue, Ltd.*, 95 S. Ct. 1200 (1975).

Similarly, *National League of Cities v. Usery*, 426 U.S. 833 (1976), may not be tied to any specific constitutional provision, *see* note 82 *supra*, and illustrates federal reluctance to impose upon states. *See also* *O'Shea v. Littleton*, 414 U.S. 488, 499-503 (1974) (dictum); *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("[W]here as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"); *Oregon v. Mitchell*, 400 U.S. 112, 124-26 (1970) (opinion of Black, J., announcing the judgment of the Court).

³¹⁷ Or perhaps the category is all constitutional provisions predating the eleventh amendment. *See* notes 286-88 *supra* & accompanying text.

³¹⁸ *E.g.*, *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). *See* text accompanying notes 220-32 *supra*.

evidence rule supplant the Court's rules generally limiting judicial discovery of causes of action against states. But even if the Court's more specific limitations on the judiciary are deemed preferable, they can be maintained under the interpretation of the eleventh amendment that the historical materials suggest to be correct—that sovereign immunity is an established common law doctrine, but is not constitutionally required.

The three rules that the Court has derived from its constitutional immunity doctrine can be explained on a theory that the eleventh amendment was not intended to limit the Congress, but only the judiciary. Indeed, the three rules can be stated as one: The judiciary may not find implied causes of action against states.³¹⁹ I prefer the view that the eleventh amendment was not intended to limit either Congress or the judiciary. There is, however, one specific rule of limitation that unquestionably does flow from the eleventh amendment: This is the rule that article III should not be interpreted to abrogate immunity of its own force.³²⁰ That rule, in my view, states the full effect of the eleventh amendment. It can, however, be given a broad or a narrow scope. It can be understood, for example, to support the position that no provision in the original Constitution should be deemed to abrogate immunity of its own force.³²¹ Moreover, as a corollary to the rule that article III does not abrogate immunity, congressional grants of jurisdiction expressed simply in the words of article III should not be interpreted to abrogate sovereign immunity; other clear evidence that Congress had intended, in those grants of jurisdiction, to confer jurisdiction of private suits against states would be necessary for jurisdiction to be found.³²²

³¹⁹ Injunctive relief, and some other specific relief, is still allowed, on a rationale that such suits are against individual officers, not against the state. *Ex parte Young*, 209 U.S. 123 (1908); *United States v. Lee*, 106 U.S. 196 (1882).

The proposition in text accurately states the Court's approach, if *Hans v. Louisiana* is deemed to stand for the broad proposition that the judiciary may not find causes of action against states implied in constitutional provisions. The other two rules are counterparts to the *Hans* rule, applicable to statutory provisions: (1) The judiciary should not find implied causes of action for retroactive monetary benefits against states (the *Edelman* rule); (2) A possible rule that the judiciary may not find that Congress has authorized suit against states in the absence of clear language abrogating states' immunity. This last rule, attempting to separate "implied" causes of action from those that Congress has granted, is only a possibility because it may apply only to enactments that have in any event been invalidated by *National League of Cities v. Usery*, 426 U.S. 833 (1976); or it may apply only to enactments whose constitutionality the Court doubts.

³²⁰ See *Part One*, *supra* note 1, at 536-39.

³²¹ See note 286 *supra* and text accompanying notes 283-89 *supra*.

³²² For a full discussion of this point, see note 311 *supra*.

VI. CONCLUSION

The Court's position on sovereign immunity is essentially that Congress is free to impose suit upon the states but that the judiciary should show restraint in finding implied remedies against state. The Court has derived its complex of sovereign immunity rules from the eleventh amendment, which it views as creating a constitutional requirement of sovereign immunity. The distortions that have been imposed upon the language of the eleventh amendment from the outset in order for it to support a workable and appropriate sovereign immunity doctrine are evidence that an erroneous view of the amendment has prevailed. In some respects states' immunity has been interpreted more broadly than the constitutional language would suggest. Two examples are the rule that sovereign immunity exists in citizen and noncitizen suits alike, although the amendment in terms covers only noncitizen suits; and the rule that jurisdiction exists once a state consents to suit, although the amendment purports to state a limit upon the federal judicial power. In other respects it has been interpreted more narrowly—for example the exclusion from immunity of suits seeking injunctions against unconstitutional conduct.

The Court's failure to follow constitutional language suggests that sovereign immunity has lost its constitutional moorings. Moreover, it requires confusing, convoluted, and essentially disingenuous reasoning to support the Court's position that Congress is free to override the constitutional doctrine of sovereign immunity (in most situations at least and perhaps invariably). That reasoning might be dangerous as well, if it were deemed to carry over to true constitutional guarantees.

Historical materials suggest that the correct interpretation is that the established doctrine of sovereign immunity survived the adoption of the Constitution and of the eleventh amendment, but that the doctrine is not constitutionally required. This approach leads to results very similar to those the Court has adopted, but they flow much more readily and directly from a common law view of immunity: Because states' sovereign immunity is not a constitutionally required principle, of course Congress can modify it (acting within the scope of its affirmative powers)³²³ and the federal judiciary can develop it generally in accordance with its usual principles

³²³ The difficulties with the application of the same principles for both citizen and noncitizen suits, as well as with jurisdiction attaching upon consent to suit, are also removed.

for common law development ³²⁴ (principles which themselves often counsel restraint, especially in areas important to the viability of state sovereignties and to the federal-state balance of power).

This approach accords with the history. It continues the results the Court has labored so hard to reach under a constitutional view of the immunity, and it fits with the eleventh amendment's language.³²⁵ Surely it is preferable to arrive directly at these results by following the theory of the eleventh amendment allowing modification of sovereign immunity by usual common law processes, than to overread and underread the eleventh amendment's language as the Court's own approach has forced it to do. The Court should take another look at the underpinnings of the eleventh amendment and discover the clear evidence that exists in history that article III and the eleventh amendment leave sovereign immunity in the status of an established common law doctrine.

³²⁴ Subject, perhaps, to a clear evidence rule together with a special rule that congressional grants of jurisdiction phrased in article III language, or a close approximation thereof, should not be deemed sufficient to abrogate states' immunity. See note 311 *supra*.

³²⁵ See *Part One*, *supra* note 1, at 543-44.