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THE ELEVENTH AMENDMENT: AN AFFIRMATIVE LIMIT ON THE COMMERCE CLAUSE POWER OF CONGRESS—A DOCTRINAL FOUNDATION

Joseph John Jablonski, Jr.*

I deem [as one of] essential principle[s] of this government and consequently [one of] those which ought to shape its administration . . . [t]he support of the State governments in all their rights, as [th]e most competent administrations for our domestic concerns, and the surest bulwarks against anti[-]republican tendencies. . . .

Today's federalism debate concerns such emotionally charged issues as the extent of the change in federal-state relations wrought by the Civil War Amendments, and whether the Constitution, in any of its provisions or amendments, contains any judicially enforceable affirmative protection for the states from the federal government. It is, in a certain respect, as fundamental as the Framers' debates in the steamy Philadelphia summer of 1787, and the animated ratification debates which followed. Indeed, nothing less than the fate of federalism law, as an effective means of adjusting the problems of "an indestructible Union . . . of indestructible

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1. First Inaugural Address (March, 4 1801), reprinted in, 8 P. Ford, The Writings of Thomas Jefferson 4 (1897).

2. The extent to which U.S. Const. amends. XIII, XIV, and XV have augmented the federal government's power over the states is a fundamental constitutional issue. Do the states at this juncture in American constitutional history have any judicially enforceable rights against the federal government? Did the Framers of the Civil War Amendments intend to preserve a judicially protectable province of state sovereignty on which a balance of power between the states and the federal government could rest? For different approaches, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) and 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, 1469 (1975).

States,"4 and the role of the Supreme Court as the ultimate guardian of that union,5 are at stake.

In the midst of a substantial body of critical commentary,6 the Supreme Court has struggled in recent years to define the nature and effect of two constitutional provisions of state sovereignty: the tenth7 and eleventh8 amendments to the Constitution of the United States. After the 1985 decision of Garcia v. San Antonio Metropolitan Transit Authority,9 the tenth amendment no longer bears much vitality as a limit on the federal government's power over states.10 However, Atascadero State Hospital v.

5. See Garcia, 469 U.S. at 581 (O'Connor, J., dissenting) ("[T]his Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interest of the States.").
6. See Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1466 (1987) ("[T]he Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth"); Baker, Federalism and the Eleventh Amendment, 48 U. COLO. L. REV. 139, 140 (1977) ("[I]flexibility and confusion ... now characterize eleventh amendment analysis."); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. PA. L. REV. 515 (1977) [hereinafter, Field, Part One]; Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon States, 126 U. PA. L. REV. 1203, 1279 (1978) [hereinafter, Field, Part Two] ("The distortions that have been imposed upon ... the eleventh amendment from the outset ... are evidence that an erroneous view of the amendment has prevailed."); Fletcher, A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction, 35 STAN. L. REV. 1033, 1034 (1983) ("As a historical matter [the Court's] view of the [eleventh] amendment is mistaken."); Nowak, supra note 2, at 1414 ("The confusion that surrounds the [eleventh] amendment is, in large part, a result of the failure—by both courts and commentators ... ."); Shapiro, Wrong Turns: The Eleventh Amendment and the Pennhurst Case, 98 HARV. L. REV. 61 (1984); Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 HARV. L. REV. 682, 688 (1976) (Court has "exhibited a schizophrenic approach").
7. U.S. Const. amend. X: 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. See Garcia, 469 U.S. 528 (1985) (5-4 decision); National League of Cities v. Usery, 426 U.S. 833 (1976) (5-4 decision).
9. 469 U.S. 528 (1985) (held that Congress had transgressed no constitutional limit on its power under the commerce clause in extending to employees of municipal mass-transit system the minimum wage and overtime protection of the Fair Labor Standards Act (1938), amended by 29 U.S.C. §§ 201-19 (1974)).
10. In Garcia, the Burger Court overruled National League of Cities v. Usery, 426 U.S.
Scanlon," decided later in the same year, suggests that the Court has summoned the eleventh amendment, which limits federal court jurisdiction over state government, to serve as one of the most effective provisions of state sovereignty in the Constitution.

While Atascadero arguably clarified and strengthened the eleventh amendment in favor of state government, it raised the next major federalism issue; whether, and in what way, the eleventh amendment affirmatively limits Congress's commerce clause power in the wake of Garcia's virtual obliteration of any tenth amendment protection for states; or more specifically

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13. U.S. CONST. amend. XI: The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.


15. See infra notes 412-508 and accompanying text. See Brown, State Sovereignty, supra note 14, at 363. For an article predicting the antithesis of what has in fact happened to the eleventh amendment, see Thornton, The Eleventh Amendment: An Endangered Species, 55 IND. L.J. 293 (1980).

16. See Skover, "Phoenix Rising" and Federalism Analysis, 13 HASTINGS CONST. L.Q. 271, 298-303 (1986) [hereinafter, Skover, Phoenix Rising]. Professor Skover has written a particularly incisive and helpful analysis of the nature and dynamics of federalism doctrine. ("Now that National League of Cities has been overruled by Garcia, it is an open question whether the Eleventh Amendment imposes a second condition to suit against a state in federal court under congressional commerce legislation, namely, that a state must have independently consented, either expressly or constructively, to Congress' policy of immunity waiver."). Id. at 301 (footnote
phrased, whether Congress may "abrogate" a state's eleventh amendment immunity in an exercise of the commerce clause?

In the most recent significant eleventh amendment case after *Atascadero*, *Welch v. Texas Department of Highways and Public Transportation*, the Court explicitly reserved judgment on the issue. The earlier cases of *Parden v. Terminal Railway Company* and *Employees v. Department of Public Health and Welfare* did not clearly address the issue of congressional power under the commerce clause to abrogate eleventh amendment protection for state government, and since then, the Court has not been forced to confront this issue.

17. In this article, the issue of Congress's power to abrogate is "not congressional power to legislate, but the effectiveness of a congressional grant of jurisdiction despite the eleventh amendment's limitation on Article III." United States v. Union Gas Co., 832 F.2d 1343, 1343 n.1 (3rd Cir. 1987). The particular issue in this article is whether Congress, in an exercise of the commerce clause power, may compel a state to defend a private damage suit in federal court, despite the eleventh amendment. In eleventh amendment analysis, the term "abrogation" is indeed confusing. For example, that Congress intends to abrogate the states' eleventh amendment immunity by authorizing private damage suits against them in federal court, does not necessarily mean that their eleventh amendment immunity has been "abrogated." See e.g., Edelman v. Jordan, 415 U.S. 651, 672 (1974). Moreover, that "when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent," *Atascadero*, 473 U.S. at 238, would seem to imply that at least in some circumstances Congress cannot "abrogate the Eleventh Amendment without the States' consent." The nagging question is whether, and in what circumstances, independent state action is a necessary predicate of eleventh amendment analysis for determining whether abrogation has occurred. In other words, is "abrogation" unilateral in some circumstances, but bilateral in others? For purposes of this article, the congressional authorization of private damage suits against states in federal court is assumed to be equivalent to the congressional authorization of federal jurisdiction over private damage suits against states. Either form of authorization is assumed to express Congress's intent to abrogate the eleventh amendment.

18. 107 S. Ct. 2941 (1987) (held that, in an exercise of the commerce clause power, Congress had not spoken clearly enough in the face of the Jones Act, 46 U.S.C. § 688, to effectively authorize federal jurisdiction over private damage suits against states, and thus had not expressed intention to abrogate states' eleventh amendment immunity).

19. *Id.* at 2946.

20. 377 U.S. 184 (1964) (held that by operating railroad in interstate commerce twenty years after Congress enacted the Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51-60, Alabama constructively consented to congressionally authorized federal jurisdiction over private damage suits against it based on FELA, and thereby waived its eleventh amendment immunity).


22. See Skover, *Phoenix Rising*, supra note 16, at 301-03. Professor Skover suggests that it is still an open question whether the cases of *Parden* and *Employees* will give rise to an affirmative limitation on Congress's power to abrogate eleventh amendment immunity after *Garcia*. See 411 U.S. at 298 (Marshall & Stewart, JJ., concurring in result). There, both Justice
Shortly after Welch, the Third Circuit, in United States v. Union Gas Company23 ("Union Gas II"), relying on the Seventh Circuit's decision in Matter of McVey Trucking, Inc.,24 answered the longstanding question in favor of congressional power, and adopted what has been called the "congressional supremacist"25 view of the eleventh amendment. Union Gas II

Thurgood Marshall and Justice Potter Stewart seemed quite satisfied with such a limit, and the practical result of forcing private plaintiffs with damage claims against the state into state court. See also J. Nowak, R. Rotunda & J. Young, Constitutional Law 55 (1986) ("The extent to which the eleventh amendment restricts other Congressional powers has not yet been determined.").

23. 832 F.2d 1343 (3rd Cir. 1987). This litigation began with a suit brought in federal district court by the United States against Union Gas Company under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (1982) ("CERCLA" or "Superfund Act"), which sought recoupment of expenses related to the clean-up of toxic waste seepage into Brodhead Creek in Stroudsburg, Pennsylvania. Id. at 1345. Pennsylvania and the United States performed a joint clean-up under an EPA order, and the United States reimbursed Pennsylvania for all of its expenses. Id. After the United States filed its complaint in federal court, Union Gas Company filed a third-party complaint against Pennsylvania, charging that Pennsylvania's negligence had contributed to the toxic waste seepage. Id. Union Gas Company sought damages payable from the state treasury. Pennsylvania moved to dismiss on eleventh amendment grounds, which the court granted. Id. Thereafter, the United States and Union Gas Company settled the principal action. Id. Union Gas Company then appealed the district court's dismissal of Pennsylvania as a defendant. Id. In United States v. Union Gas Co., 792 F.2d 372 (3rd Cir. 1986) ("Union Gas I"), a divided panel affirmed the district court. In Union Gas I the court held that Congress had not intended to authorize private damage suits against states in federal court in the Superfund Act. Subsequently, Union Gas Company filed, on October 8, 1986, a petition for certiorari which the Supreme Court granted. On October 16, 1986, the President signed certain amendments to the Superfund Act. Thereafter, in Union Gas Co. v. Pennsylvania, 107 S. Ct. 865 (1987) ("Union Gas II"), the Supreme Court vacated the decision, and remanded the case "for further consideration in light of the Superfund Amendments and Reauthorization Act of 1986 [SARA], Pub. L. No. 99-499." Id. at 869.

On remand, the Third Circuit in Union Gas II determined that the SARA Amendments, particularly §§ 9601(20)(D) and 9620(a)(1), evinced unequivocal congressional intent to authorize private damage suits against states in federal court. 832 F.2d at 1349. Convinced that the Superfund Amendments were passed pursuant to the commerce clause, the court then addressed the underlying fundamental constitutional issue of whether Congress possessed the power to remove the eleventh amendment immunity of state government in an exercise of the commerce clause, id. at 1350, and held that Congress possessed such power. Id. at 1356. Pennsylvania then filed a petition for certiorari with the Supreme Court, which the Court granted on March 21, 1988. It should be noted that the Supreme Court would not necessarily have to reach the constitutional power issue if it determines, contrary to the Third Circuit, that §§ 9601(20)(D) and 9620(a)(1), or any other relevant portion of the Superfund Act, do not evince clear congressional intent to authorize private damage suits against states in federal court. Id. at 1348-50. This article, however, discusses only the constitutional power issue raised by Union Gas II.

24. 812 F.2d 311 (7th Cir. 1987) (when Congress acts pursuant to the bankruptcy clause, art. I, sec. 8, cl. 4, it is exercising a plenary power; thus, Congress possessed power to compel a state to defend federal court private damage action based on Bankr. Code, 11 U.S.C.A. § 547(b); court was more broadly convinced that Congress possessed such a power for any of its plenary powers, despite the eleventh amendment).

held that Congress, in an exercise of the commerce clause, possesses the constitutional power to compel a state to defend a private damage suit in federal court, despite the eleventh amendment. If the Court affirms Union Gas II, it will have determined that the Constitution contains little, if any, affirmative limitation on federal power over states, and perhaps no state sovereignty with any "legal substance"; the Court will have significantly impaired its ability to resolve disputes between the federal government and the states. In this author's view, eleventh amendment doctrine provides a basis for reversing Union Gas II, despite the tenth amendment's demise in Garcia.

Highly charged constitutional drama is likely to ensue in resolving the issues presented in Union Gas II because of the deep divisions over federalism issues within the Supreme Court. Confrontation between supreme legislative and supreme judicial power at one level, and federal and state power on another level, will also necessarily be involved. Heightening the drama surrounding these issues is the presence of recent commentary predicting that the Court will "back down" from a challenge to the congressional supremacist position, and "despite Atascadero, . . . abandon the concept of limits generated by the eleventh amendment." In referring to eleventh amendment based limits on congressional power to compel states to defend private damage actions in federal court, and current eleventh amendment doctrine more generally, Professor Amar has passionately pronounced that "[a]ll of this, is, in a word, nonsense."

While Garcia may have removed the possibility of an affirmative limitation on congressional power grounded in the tenth amendment, Justice Blackmun provocatively suggested that there may be other bases for affirmative limitations on "federal action affecting the States under the Commerce Clause." Professor Schwartz has recently stated that "[i]f, as the Garcia opinion recognizes, there are limits on federal action affecting the states, those limits are meaningless if they cannot be enforced by the courts." Atascadero, in this author's view, suggests that the Court intends the eleventh amendment

26. 832 F.2d at 1356.
29. A minority of the Supreme Court consisting of Justices Brennan, Marshall, Blackmun, and Stevens is highly critical of current eleventh amendment law.
31. Amar, supra note 6, at 1473.
32. 469 U.S. at 556. Justice Scalia quoted this language from Garcia with emphasis in his concurrence to the recent tenth amendment case of South Carolina v. Baker, 108 S. Ct. 1355, 1369 (1988) (Scalia, J. concurring), suggesting that Garcia's impact on affirmative limitations on federal power over states might be containable. In his strong dissent in Garcia, Justice Powell also noted this interesting aspect of the Garcia Court's opinion. 469 U.S. at 564 n.7.
33. Schwartz, supra note 10, at 165.
to live a life of its own, quite apart from the tenth amendment. The eleventh amendment may very well be one judicially enforceable affirmative limitation.

Before the recent changes in its composition, the Supreme Court was seriously concerned with developing an eleventh amendment state sovereignty, despite Garcia. Consistent with this author's reading of Atascadero, and eleventh amendment law more generally, Fitzpatrick v. Bitzer suggests the Court's intention to reject the congressional supremacist position. An eleventh amendment affirmative limit on Congress's power may justify the Garcia dissenters' position that the judicial protection of state sovereignty interests is an essential part of the Constitution. Garcia, in that case, might be called into question by eleventh amendment doctrine.

This Article argues that current eleventh amendment doctrine, which has not yet adopted the Wechsler thesis as Garcia has for the tenth amendment, generates a basis for an affirmative limitation on Congress's power under the commerce clause. To be sure, Supreme Court eleventh amendment doctrine governing Congress's power to grant jurisdiction to the federal

34. See infra notes 412-508 and accompanying text.
36. Before the recent changes in the membership of the Supreme Court, the majority supportive of current eleventh amendment law was essentially composed of the Garcia dissenters, Chief Justice Burger, Justices Rehnquist, Powell and O'Connor, with the addition of Justice White. Justice Scalia appears tentatively willing to support eleventh amendment doctrine, see Welch, 107 S. Ct. at 2957-58 (Scalia, J., concurring in part and concurring in the judgment). However, in dissent in Webster v. Doe, 56 U.S.L.W. 4568, 4573 (1988), Justice Scalia stated that "[t]he doctrine of sovereign immunity—not repealed by the Constitution, but to the contrary at least partially reaffirmed as to the States by the Eleventh Amendment—is a monument to the principle that some constitutional claims can go unheard." Whether Justice Kennedy will be inclined to strengthen the formidable eleventh amendment legacy left by Justice Powell is an open question.
37. 427 U.S. 445 (1976) (held that Congress possessed constitutional power under the fourteenth amendment enforcement power, U.S. CONST. amend. XIV, sec. 5, to compel a state to defend private damage action in federal court, and thus to abrogate the eleventh amendment immunity of states; at issue were the 1972 Amendments to Title VII of the Civil Rights Act of 1964).
38. Id. at 456 (while Congress may remove state's eleventh amendment immunity in an exercise of the fourteenth amendment enforcement power, it would be "constitutionally impermissible in other contexts").
41. 469 U.S. at 553-56.
courts over state government has been problematic. Problems stem from the apparent contradiction between language suggesting that Congress's power to create federal court jurisdiction over private damage suits against states is absolute, and other language suggesting that Congress's power in this respect is limited by a state's right to consent independently to that federal jurisdiction. Other problems concern whether, and in what way, Congress's power under the fourteenth amendment enforcement power may be distinguished from its powers under article I. Still other problems derive from the tension between the repeated affirmation that the eleventh amendment confers a "constitutional" immunity, and the suggestion that Congress may nevertheless "lift" that immunity. However, these doctrinal problems are not insurmountable.

There is another debate within the ranks of congressional supremacy that Union Gas II noted but did not enter: whether in-state private suits and federal question private suits are properly within the scope of the eleventh amendment. In support of Justice Brennan, Professor Amar has argued vigorously that neither in-state private suits nor federal question private suits are part of eleventh amendment immunity. If these suits are not within the eleventh amendment's scope, an affirmative limitation on Congress's power to grant federal jurisdiction over state government would be much less important. The debate here stems not so much from confusing language in current cases, as from whether there is historical, textual and structural foundation for the inclusion of those suits within the amendment's scope.

This Article proposes a synthesis of eleventh amendment law not seen anywhere in the academic literature on this amendment. Its goal is to stimulate further thinking and scholarship on the eleventh amendment. It suggests that eleventh amendment law may be profitably viewed as a unity based on the states' constitutionally guaranteed immunity from compulsory private suit in federal court. Instead of distinguishing the amendment's limitations on the federal courts from those on Congress, as Professor Tribe and Union Gas II in reliance on him have clearly done, this Article

43. See, e.g., Parden, 377 U.S. at 191-92.
44. See, e.g., Edelman, 415 U.S. 651, 672 (1974) (Court held that Congress had not authorized private damage suits against states in federal court in the federal-state program called Aid to the Aged, Blind and Disabled, or in any provision of the Social Security Act, and thus Congress had not intended to abrogate a state's eleventh amendment immunity; however, Court suggested that even if Congress had intended to abrogate the states' eleventh amendment immunity, some form of independent state consent would be necessary to abrogate that immunity).
45. See Fitzpatrick, 427 U.S. at 452-53. See also Nowak, supra note 2.
47. See, e.g., Employees, 411 U.S. at 283.
48. 832 F.2d at 1353 n.8.
49. Amar, supra note 6, at 1474.
50. Tribe, supra note 6, at 693.
51. 832 F.2d at 1353.
advances a more unified view of eleventh amendment doctrine. In response to Justice Brennan and Professor Amar, this Article argues that there may be justification for inclusion within the eleventh amendment of suits by in-state private plaintiffs and private suits based on federal questions.

Part I of this Article reviews the essential nature of Union Gas II, and two camps of congressional supremacy. Part II generally discusses the unity of eleventh amendment law. It argues that Hans v. Louisiana establishes the existence of a "broad," "stable," "constitutional" limitation on original federal court jurisdiction over compulsory private damage suits against state government. The derivation of an affirmative limitation on Congress's power to create such jurisdiction would be defensible in terms of: Hans v. Louisiana; the Court's historical view of the amendment and Justice Iredell's dissent in the famous case of Chisholm v. Georgia; the "constitutional" status of eleventh amendment immunity; the complex relationship between article III and the amendment; the trend toward broadening the scope of eleventh amendment immunity to include prospective relief; and in terms of a "bilateral framework."

52. Amar, supra note 6, at 1473.
53. See infra notes 141-47 and accompanying text.
54. See infra notes 148-215 and accompanying text.
55. See infra notes 73-121 and accompanying text.
56. 134 U.S. 1 (1890) (held that despite absence of any explicit mention of suits by in-state plaintiffs, the eleventh amendment nevertheless barred in-state plaintiff from suing Louisiana against its consent for damages in federal court for alleged violation of the contract clause of the Constitution).
57. 107 S. Ct. at 2952.
58. Id. But see Nowak, supra note 2, at 1431.
59. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98-99 (1984) ("[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.") (emphasis in original) (Pennhurst II broadened scope of eleventh amendment immunity beyond damage suits in holding that the eleventh amendment barred a federal court from issuing state law based injunctive or prospective relief on behalf of private plaintiffs against unconsenting state government).
60. See infra notes 122-233 and accompanying text.
61. 134 U.S. 1 (1890). See infra notes 122-40 and accompanying text.
62. 2 U.S. (2 Dall.) 419 (1793) (case which provoked the eleventh amendment). See infra notes 148-215 and accompanying text. But see Tribe, supra note 6, at 693 ("Nothing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power under the commerce clause or under any other head of affirmative legislative authority.").
63. See infra notes 216-33 and accompanying text.
64. See infra notes 234-61 and accompanying text.
65. See infra notes 263-319 and accompanying text. While Edelman, 415 U.S. at 665, suggests that private damage suits against states in federal court have been one major focal point of the eleventh amendment, Pennhurst II, 465 U.S. at 106, suggests the Court's willingness to extend the eleventh amendment to cover purely prospective relief (injunctive relief ordering state officials to conform future behavior to legal standards).
66. As is extensively argued in this article, the "bilateral framework" is essentially a test for determining whether federal court jurisdiction over private damage suits against states
inherent in the recent eleventh amendment cases dealing with specific congressional grants of federal jurisdiction over state government. For article I enactments, the bilateral framework would essentially protect a state’s right to consent independently, or to withhold consent from, to federal jurisdiction over private damage suits against it, despite congressional authorization of such jurisdiction.

Part III and Part IV discuss in depth how the more recent eleventh amendment cases may be read coherently in terms of a bilateral framework for article I power. Part III argues that the eleventh amendment—commerce clause cases of Welch (post-Garcia), and Parden and Employees (both pre-Garcia) support the bilateral framework. Part IV argues that Atascadero has not necessarily foreclosed a state’s right to consent independently under the bilateral framework; and, in affirming Fitzpatrick, supports an effective constitutional distinction between Congress’s power under the fourteenth amendment and its power under article I, despite Garcia. Finally, Part V suggests that justification exists for adopting an express state consent approach to determine a state’s independent consent in bilateral framework analysis.

I. **Union Gas II AND CONGRESSIONAL SUPREMACY**

After finding that the SARA Amendments to the Superfund Act authorized federal jurisdiction over private damage suits against states, Union Gas II turned to the underlying constitutional issue of whether Congress possessed the power to compel a state government to submit to such jurisdiction. In answering the question in the affirmative, Union Gas II adopted the leading academic view of the eleventh amendment held by Professors Brown, Nowak, and Tribe. Under that view, the eleventh

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67. See infra notes 320-65 and accompanying text.
68. See infra notes 366-411 and accompanying text.
69. See infra notes 413-62 and accompanying text.
70. See Atascadero, 473 U.S. at 242-43 (affirming and quoting Fitzpatrick, 427 U.S. at 456).
71. See infra notes 463-508 and accompanying text.
72. See infra notes 509-26 and accompanying text.
73. 832 F.2d at 1346-50.
74. Id. at 1350-56.
75. Id. at 1356.
76. In his first article, however, Professor Brown criticized the congressional supremacists, and believed in the possibility of eleventh amendment based affirmative limits on Congress’s power deriving from the eleventh amendment itself. See Brown, Beyond Pennhurst, supra note 16, at 392 (“Because the eleventh amendment is a separate and distinct constitutional provision it may contain (and retain) its own state sovereignty-based limits on congressional power, whatever the status of the tenth amendment.”) (emphasis added). However, in his second article
amendment is nothing more than a "process" limit requiring Congress to speak clearly in a statute's face in order to create federal jurisdiction over private damage suits against state government. Accordingly, when Congress speaks clearly in the face of a statute, the state's actions are of token importance, if not altogether irrelevant. In this camp of congressional supremacy, the eleventh amendment is "process with a bite" or a "presumption of immunity," which the federal judiciary must respect in exercising general federal question jurisdiction. Nonetheless Congress may rebut that presumption with a clear, specific grant of jurisdiction providing for private damage suits against states in federal court, irrespective of the source of constitutional power used to enact that grant. Hence, the eleventh amendment is fundamentally a dichotomy; it limits the federal judiciary, but not Congress.

For Union Gas II, the dichotomy of eleventh amendment law essentially rested on a view similar to McVey, that Supreme Court precedent had not made a distinction between the various sources of constitutional power beyond standards for determining congressional intent. Union Gas II, in agreement with McVey, also rested the dichotomy of eleventh amendment law on Garcia's perceived impact on federalism.

he clearly appears to have moved to the supremacist camp. See Brown, State Sovereignty, supra note 14, at 365 ("What is left of the eleventh amendment then is a form of process federalism.") (emphasis added).

77. See Nowak, supra note 2, at 1469. "[T]he Congress should be free to determine the extent of federal court jurisdiction over state governments . . . ." Id. "[T]he Court should take . . . a limited role in reviewing congressional grants of jurisdiction allowing suits against states." Id. at 1442. See also M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 165 (1980) (accepts idea of absolute congressional power to create federal jurisdiction over private damage suits against states, but congressional authorization must be clear).

78. See Tribe, supra note 6, at 693-99. Cf. Baker, supra note 6, at 184 ("Final power to balance state and federal interests [in eleventh amendment analysis] ought not to reside in Congress. But the failure of the structural argument does not discredit the idea that Congress can normally waive the eleventh amendment so long as it speaks clearly.").

80. 832 F.2d at 1354.
81. Id. ("[O]nly Congress' clearly articulated decision to subject the states to suits by private individuals in federal court operates to rebut this presumption.").
82. Id.
83. See 812 F.2d at 317-19.
84. 832 F.2d at 1353.
85. 812 F.2d at 321.
86. 832 F.2d at 1352-53.
87. 812 F.2d at 320.
88. 832 F.2d at 1354-56.
Union Gas II and McVey assumed that the history of the eleventh amendment necessarily indicates nothing more than a presumption of immunity. However, current eleventh amendment cases containing the Supreme Court's historical view of the amendment suggest otherwise. Moreover, the amendment's language read in light of its relationship to article III suggests it was intended to bind both the federal judiciary and Congress.

Contrary to the position of Union Gas II and McVey, Hans v. Louisiana may be read with the recent cases concerning specific congressional grants of federal jurisdiction, to require that a state government, through its independent actions, must consent to the exercise of federal jurisdiction over a private damage suit against it, before federal jurisdiction over it exists. Union Gas II and McVey recognized that Fitzpatrick v. Bitzer held that Congress may subject state governments to private damage suit in federal court, regardless of any state consent. However, both Circuits avoided addressing head on Fitzpatrick's explicit confinement of such power to section five of the fourteenth amendment, and thus its implication that independent state consent would still be relevant for article I power analysis. Excluding section five of the fourteenth amendment, eleventh amendment law may be reconcilable around a state's right to consent independently to federal jurisdiction over private damage suits against it. Notwithstanding Union Gas II and McVey, there exists fundamental unity in eleventh amendment doctrine.

89. Id. at 1353. See also Nowak, supra note 2, at 1469 ("the history and purpose of [the eleventh] amendment establish the principle Congress should be free to determine the extent of federal court jurisdiction over state governments . . . ").
90. 812 F.2d at 318 ("a state is presumptively immune").
91. See infra notes 148-59 and accompanying text.
92. See infra notes 234-50 and accompanying text. But see Tribe, supra note 6, at 693 ("Nothing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power under the commerce clause or under any other head of affirmative legislative authority. ") (emphases added).
93. 832 F.2d at 1354.
94. 812 F.2d at 318.
95. 134 U.S. 1 (1890).
96. See infra notes 122-40, 321-65 and accompanying text.
97. 832 F.2d at 1351.
98. 812 F.2d at 320.
100. Id. at 452-53, 455-56.
101. See Union Gas II, 832 F.2d at 1351. See also McVey, 812 F.2d at 323 ("[t]he fact that, when Congress acts under the Fourteenth Amendment, it may require the federal courts to impose monetary damages on a state . . . further convinces us that there is no constitutional limit on the ability of a federal court to impose money damages on a state.") (citation omitted). But see infra notes 463-508 and accompanying text (arguing that effective constitutional distinction between the fourteenth amendment and article I makes sense).
Union Gas II and congressional supremacists (Professors Brown, Nowak, and Tribe) rely to some extent on Professor Wechsler's thesis that the national political process is the sole significant safeguard of state sovereignty interests. This reliance leads to the view that the state's actions have no meaningful or independent importance in eleventh amendment analysis. However, eleventh amendment law has never adopted the Wechsler thesis, nor even hinted at its adoption. The eleventh amendment's concern with protecting the states' constitutional right to consent to federal jurisdiction may explain why the post-Garcia cases of Atascadero and Welch never mentioned the Wechsler thesis. Indeed, eleventh amendment law may cast doubt on the Wechslerian vision of federalism that the national political process is the sole significant safeguard of state sovereignty. The principle of independent state consent may also suggest that state interests under the tenth amendment are constitutionally different from state interests under the eleventh amendment. Interestingly, some tendency exists in congressional supremacy to confuse the eleventh amendment's concern with federal jurisdiction with Congress's ability to create federal causes of action against states. As a distinct constitutional provision from the tenth amendment, the eleventh amendment may, however, generate its own limits, and indeed its own unity.

Less charitable than Union Gas II is the view that the eleventh amendment is less than a presumption of immunity, since neither the federal judiciary, nor Congress, is generally limited by it. Under this view, the requirement that Congress clearly authorize federal jurisdiction over private damage suits against state governments is unnecessary. While Professors Field, Fink, and Tushnet define the eleventh amendment in terms of a feeble form of "common law sovereign immunity," Justice Brennan and Professor

102. See 832 F.2d at 1356.
103. See Brown, State Sovereignty, supra note 14, at 393-94.
104. Nowak, supra note 2, at 695.
105. See Tribe, supra note 6, at 695.
106. Wechsler, supra note 40.
108. See generally Jablonski, supra note 42.
109. E.g., Nowak, supra note 2, at 1441 ("A state asserting an eleventh amendment defense is, in essence, challenging the right of the federal government to impose a monetary burden on it.").
110. See Brown, Beyond Pennhurst, supra note 16, at 392.
111. E.g., Field, Part Two, supra note 6, at 1278 ("I prefer the view that the Eleventh Amendment was not intended to limit either the Congress or the judiciary.").
112. E.g., Atascadero, 473 U.S. at 253-54 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun, & Stevens, J.J.) (no need that clear congressional intention be expressed in statute's face to authorize private damage suits against states in federal court). See also Field, Part One, supra note 6, at 540-46.
113. See Field, Part Two, supra note 6, at 1280 ("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
Amar define the amendment in terms of a specific response to a narrow technical problem of federal diversity jurisdiction. In contrast to the scope of eleventh amendment immunity grudgingly accepted by *Union Gas II,* neither federal question suits, nor in-state private suits are properly within it. For this camp, the Court’s current position on these two problems is a grave error which demonstrates the incoherence of eleventh amendment doctrine. On the contrary, there may be justification for the Court’s current view.

II. Eleventh Amendment Law: A Unity?

A. Hans v. Louisiana: *The Basis of Modern Eleventh Amendment Doctrine?*

Bearing late nineteenth century vintage, the unanimous decision of *Hans v. Louisiana* lies at the core of modern eleventh amendment doctrine, defining some of the principal contours of eleventh amendment immunity. Indeed, certain major aspects of current eleventh amendment doctrine may be understood as an affirmation, limitation, and expansion of that early seminal case.

In *Hans,* a citizen of Louisiana sued Louisiana in federal court for damages arising out of the state’s refusal to pay interest due on certain previously issued bonds. As in *Louisiana v. Jumel,* decided earlier in 1882, a federal question was involved because the plaintiff argued that the state’s refusal to pay that interest constituted a violation of the self-enforcing contract clause of the Constitution. Subject matter jurisdiction was therefore argued to

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*See also H. Fink & M. Tushnet, Federal Jurisdiction: Policy and Practice 152 (1984).*


115. See *Amar,* supra note 6, at 1466-75.

116. See *infra* notes 197-215 and accompanying text (discussing view that the eleventh amendment simply removed the state-citizen diversity of article III as independent basis for federal jurisdiction over out-of-state private damage suits against state government in federal court).

117. 832 F.2d 1343, 1353-54.

118. *Amar,* supra note 6, at 1473.

119. *Id.*

120. *Id.* at 1475-81.

121. *See infra* notes 141-215 and accompanying text.

122. 134 U.S. 1 (1890).

123. *Id.*

124. 107 U.S. 711 (1882) (held that eleventh amendment barred out-of-state private mandamus suit in federal court against Louisiana, charging that Louisiana violated the contract clause of the Constitution when it refused to honor exchange of “old” state bonds for “new” state bonds to financial detriment of private plaintiffs).

be based on general federal question jurisdiction as implemented by the Judiciary Act of 1875.\textsuperscript{126} The state raised the eleventh amendment defense that it had not consented to be sued by private plaintiffs in federal court.\textsuperscript{128} Despite the in-state plaintiff's literal arguments concerning the scope of the eleventh amendment,\textsuperscript{129} the Court held, for the first time, that in-state as well as out-of-state private plaintiffs were within it.\textsuperscript{130} \textit{Hans} justified this holding on the basis the eleventh amendment represents, not a "presumption of immunity" as \textit{Union Gas II}\textsuperscript{131} and \textit{McVey} stated,\textsuperscript{132} but the broad constitutional principle of federalism that unconsenting state governments may not be sued by private plaintiffs for damages in federal court.\textsuperscript{133}

To be sure, \textit{Hans} involved only a "congressional enactment conferring general federal question jurisdiction."\textsuperscript{134} However, the unanimous \textit{Hans} Court made no distinction between general and specific grants of jurisdiction to the federal courts. Indeed, it unqualifiedly stated that "[a]ny such power as that of authorizing the federal judiciary to entertain suits by individuals against the [consent of the] States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people."\textsuperscript{135} Further, the federalism importance attributed to the eleventh amendment by the \textit{Hans} Court\textsuperscript{136} would suggest that had there been a congressional grant specifically conferring federal jurisdiction over private damage suits against state government, the same result

\begin{itemize}
\item \textsuperscript{126} 134 U.S. at 9.
\item \textsuperscript{127} At the time, the Judiciary Act of 1875 invested the federal courts with general federal question jurisdiction. Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (1982)).
\item \textsuperscript{128} 134 U.S. at 3. (state argued that the private plaintiff could not sue it in federal court "without its permission").
\item \textsuperscript{129} \textit{Id.} at 10.
\item \textsuperscript{130} \textit{Id.} at 15.
\item \textsuperscript{131} 832 F.2d at 1354.
\item \textsuperscript{132} 812 F.2d at 318.
\item \textsuperscript{133} 134 U.S. at 15 ("Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States; can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.").
\item \textsuperscript{134} \textit{Union Gas II}, 832 F.2d at 1354.
\item \textsuperscript{135} 134 U.S. at 12 (emphasis added).
\item \textsuperscript{136} At the end of its opinion, the \textit{Hans} Court justified its holding with a federalism theory concerning the relationship of the federal courts to the state legislatures. 134 U.S. at 21. The Court felt no need to provide an extensive articulation of this theory, since it had been "fully discussed by writers on public law." \textit{Id}. However, the Court stated that "to deprive the [state] legislature of the power of judging what the honor and safety of the State may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause." \textit{Id}."
\end{itemize}
would have obtained. In *Ex parte New York*,137 cited with some frequency in recent years,138 the Court affirmed *Hans* by stating that "it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given . . . because of the fundamental rule of which the Amendment is but an exemplification."139 Thus, it could be argued that the essential jurisdictional deficiency in *Hans* was the lack of Louisiana's consent, not the absence of any specific congressional grant of federal jurisdiction over private damage suits against states.140

1. In-state private suits?

Justice Brennan has, however, vigorously criticized the extension of the amendment's scope to include suits by in-state plaintiffs.141 Professor Amar has recently maintained that this extension demonstrates the clear error of modern eleventh amendment jurisprudence.142 On the contrary, if the amendment represents a broad, important state sovereignty limitation on the federal judicial power,143 then it would seem unlikely that its framers intended to permit in-state plaintiffs to sue an unconsenting state government for damages in federal court, while prohibiting out-of-state plaintiffs from doing that very thing. Professor Brown has recently argued, moreover, that "[the] narrowness [of the text of the eleventh amendment] need not be a fatal obstacle to the *Hans* construction . . . ."144 He explains that suits by out-of-state plaintiffs, and foreign plaintiffs, received the most attention during the ratification period.145 *Chisholm v. Georgia*,146 the case that provoked the eleventh amendment, was in his view, an example of the phenomenon. Since suits of this kind were most familiar to the framers, we should not be

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137. 256 U.S. 490 (1921).
138. See, e.g., Welch, 107 S. Ct. at 2954 (explaining that *in personam* admiralty suits against states in federal court were correctly held to be within scope of the eleventh amendment); *Atascadero*, 473 U.S. at 238-40 n.2.
139. 256 U.S. at 497 (emphasis added).
140. Lack of state consent may also be one important aspect of Justice Iredell's dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793). See infra notes 191-96 and accompanying text.
141. See Welch, 107 S. Ct. at 2958, 2962, 2969-70 (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 247 (Brennan, J., dissenting); *Edelman*, 415 U.S. at 687 (Brennan, J., dissenting).
142. Amar, supra note 6, at 1476.
143. See Employees, 411 U.S. 279, 292 (Marshall & Stewart, JJ., concurring in result) ("despite the narrowness of the language of the Amendment, *its spirit* has consistently guided this Court in interpreting the reach of the federal judicial power generally . . . .") (emphasis added); ("[the eleventh amendment] limitation upon the judicial power is, without question, a reflection of concern for the sovereignty of the States . . . .") Id. at 293 (emphasis added).
145. Id.
146. 2 U.S. (2 Dall.) 419 (1793).
surprised that the eleventh amendment explicitly identifies only these suits. As Professor Field has argued, furthermore, the amendment's framers also may have failed to include in-state citizen suits, or even purposefully omitted them, because at the time they may not have existed.\textsuperscript{147}

2. Chisholm v. Georgia, the eleventh amendment and federal question private suits?

The eleventh amendment passed both houses of Congress by large majorities, and within two years of the Chisholm holding was ratified by the necessary 12 states on February 7, 1795.\textsuperscript{148} The Court has recently maintained, and perhaps not unjustifiably, that "the speed and vigor of the Nation's response to Chisholm suggests that the Eleventh Amendment should be construed broadly so as to further the federal interests that the court misapprehended in Chisholm."\textsuperscript{149} Professor Jacobs has noted that Chisholm raised an alarm because the seriatim opinions of the majority Justices "all but denied the sovereignty of the states."\textsuperscript{150} After Chisholm, the states became deeply suspicious of the federal courts as institutions of the national government which threatened their financial integrity, and their continued existence as separate sovereigns in the federal system.\textsuperscript{151} Thus, the principle that "[b]ehind the words of the constitutional provisions are postulates which limit and control"\textsuperscript{152} would seem particularly applicable to interpreting the eleventh amendment. As Justice Powell has emphasized: "principles of federalism . . . underlie the Eleventh Amendment."\textsuperscript{153} While the history behind the eleventh amendment is unclear and controversial,\textsuperscript{154} the Court's view of that history has become clarified over time. Essentially, the Court has adhered to the view expressed in Hans that the eleventh amendment was adopted not only to overturn the famous case of

\textsuperscript{147} Field, Part One, supra note 6, at 540 n.88. If in-state suits were not within the amendment's scope, how would this affect the argument that the amendment limits Congress's power to grant jurisdiction to the federal courts over compulsory out-of-state private damage suits against states? It is possible that the argument for an eleventh amendment limitation on Congress's power would remain unaffected.


\textsuperscript{149} \textit{Welch}, 107 S. Ct. at 2952 n.17.

\textsuperscript{150} C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 71 (1972).

\textsuperscript{151} \textit{Id.} States were also fearful of suits related to the confiscation of Loyalist property. \textit{Id.} at 57-62, 178 n.72. The states were fearful of debilitating suits seeking satisfaction of Revolutionary War debts. See Cullison, Interpretation of the Eleventh Amendment, 5 Houston L. Rev. 1, 7, 9 (1967).

\textsuperscript{152} Monaco v. Mississippi, 292 U.S. 313, 322 (1934).

\textsuperscript{153} \textit{Penhurst II}, 465 U.S. at 106.

Chisholm v. Georgia, but to restore the “original understanding” of the scope of article III regarding federal jurisdiction over compulsory private suits against states.155 As Justices Marshall and Stewart explained, “[i]t had been widely understood prior to ratification of the Constitution that the provision in Article III, section 2, concerning ‘Controversies . . . between a State and Citizens of another State’ would not provide a mechanism for making States unwilling defendants in federal court.”156 Relying on historian Charles Warren,157 the Court has maintained that the “original understanding” may have been necessary to ratification of the Constitution.158 While scholars and members of the Court all agree that the eleventh amendment was adopted in reaction to the famous case of Chisholm, they vehemently disagree, however, over the nature and scope of the immunity arising out of the reaction to Chisholm, culminating in the eleventh amendment. Apart from the controversy over in-state plaintiffs, a debate rages over whether the amendment properly extends to federal question suits.159 Since Congress has the sole responsibility for enacting federal law, the federal question suit issue bears fundamental importance to whether the amendment affirmatively limits the Congress in any way. Thus it is important to understand Chisholm, and the broader federalism concerns raised by its facts and the various seriatim opinions of the majority and dissenting Justices.

In 1792, a private plaintiff, the executor of a South Carolina merchant, sued Georgia in federal court160 for breach of a war supplies contract, seeking damages from the state treasury.161 Declining to argue the case orally in the federal forum,162 the state maintained that the state-citizen diversity clause of article III, section 2, on which jurisdiction was argued to be constitutionally based, must be read narrowly to permit states to prosecute out-of-state defendants in a federal forum, but not vice-versa.163 Article III, in the state’s view, did not authorize private suits against unwilling state defendants in federal court, and thus section 13 of the Judiciary Act of 1789 could not,

155. Welch, 107 S. Ct. at 2949 (quoting Employees, 411 U.S. at 292 (Marshall & Stewart, JJ., concurring in result)).
156. Employees, 411 U.S. at 291-92 (emphasis added).
158. Welch, 107 S. Ct. at 2951; Edelman, 415 U.S. at 660.
159. See, e.g., Atascadero, 473 U.S. at 286-87 (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.).
160. The case was originally brought before the Supreme Court. Under the Judiciary Act of 1789, the Supreme Court had been granted original but not exclusive jurisdiction of civil controversies “between a state and citizens of other states”—the clause which raised the constitutional issue of whether article III authorized private plaintiffs to sue unconsenting states in federal court. In today’s context, the eleventh amendment regulates the original jurisdiction of the federal courts, including the Supreme Court, but clearly not the appellate jurisdiction of the Supreme Court.
161. 2 U.S. (2 Dall.) at 419-20.
162. Id. at 469. See also C. Jacobs, supra note 150, at 48.
163. See 2 U.S. (2 Dall.) at 473, 476 (opinion of Jay, C.J.).
whatever it stated or implied. Rejecting the state’s jurisdictional defense, the Court held that state defendants could be constitutionally compelled against their will into federal court to defend a private suit seeking damages from the state treasury.

In reaching this conclusion, the seriatim opinions of the Justices in the majority generally maintained that the states enjoyed a very limited sovereignty under the new Constitution, and thus were not sovereign in the same sense as were European governments. In their view, the limitations on state sovereignty in the Constitution meant that states must be suable in federal court by private plaintiffs seeking damages. Otherwise they suggested, those limitations could not be enforced. The majority Justices maintained, moreover, that ample evidence existed that the Constitution approved of federal jurisdiction over unconsenting state defendants. As an example, three Justices in the *Chisholm* majority pointed to article III’s conferral of jurisdiction to the federal courts to decide controversies between two or more states. Since states must be able to sue other states in federal court, these Justices reasoned (in logic now ostensibly rejected by the current Court) that private plaintiffs must also be able to sue unconsenting state defendants in federal court. At least two of the Justices in the *Chisholm* majority also suggested, however, that effective vindication of individual rights against states would require private damage suits against unconsenting states in federal court under article III’s general federal question jurisdiction. The *Chisholm* Court thus felt compelled to reject the “original understanding” that the states retained any constitutional immunity from compulsory private damage suit in federal court under article III, despite the absence of any federal question in the suit.

Assuming that the state-citizen diversity clause of article III, section 2 conferred jurisdiction, the majority Justices recognized the existence of a general federal corporate law of state assumpsit liability, despite the absence of any such liability in any state’s common law or federal law at the time. Committing what would appear similar to an *Erie* error, and antici-

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164. Section 13 of the Judiciary Act of 1789 stated as follows: “[T]he 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 own 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.”


166. E.g., id. at 472, 479 (opinion of Jay, C.J.).

167. E.g., id. at 467-68 (opinion of Cushing, J.).

168. Id. at 468.

169. Id. at 450-51, 465 (opinion of Blair, J.); id. at 466-67 (opinion of Cushing, J.); id. at 472, 473 (opinion of Jay, C.J.).

170. See *Welch*, 107 S. Ct. at 2953.

171. 2 U.S. (2 Dall.) at 465 (opinion of Wilson, J.); id. at 468 (opinion of Cushing, J.). See also id. at 421-22 (oral argument of Randolph).

172. See Amar, *supra* note 6, at 1469.

173. E.g., 2 U.S. (2 Dall.) at 464 (opinion of Blair, J.).
panying *Swift v. Tyson* in some sense, the Court created principles of federal common law, without any authorization for doing so, except "general principles of right and equality." On this federal common law basis, it predicated Georgia's liability to the out-of-state private plaintiff. In reaching this conclusion, the majority Justices analogized a state to a corporation, insofar as each were equally capable of entering into, and equally responsible for breaches of, contractual obligation.

Justice Iredell in dissent, however, rejected the view that any federal common law of state assumpsit liability existed. Consistent with current eleventh amendment jurisprudence, he expressed the view that states were special actors in the federal system, whose vital role and fundamental importance in that system contradicted *Chisholm*'s implication that states became merely corporations after ratifying the Constitution. The importance of Justice Iredell's dissent, however, goes beyond his rejection of the majority's *Erie*-like error. There is justification for the *Hans* Court's view that Justice Iredell's dissent significantly influenced the framers of the eleventh amendment. Indeed, Justice Iredell's dissent suggests that the *Chisholm* majority faltered on constitutional shores much more fundamental than *Erie*.

While Justice Iredell discussed the state-citizen diversity clause of article III, and section 13 of the Judiciary Act, it is by no means clear that his jurisdictional analysis can be limited to the narrow question of whether the parties' statuses conferred federal jurisdiction. His analysis seems to be focussed, rather, on a larger question of whether there was a "subject matter" basis for federal jurisdiction over a compulsory private damage suit against a state government; or a more fundamental jurisdictional predicate than simply the state-citizen diversity clause. He noted that both article III and the Judiciary Act limited federal jurisdiction to "controversies," though the Judiciary Act qualified controversies with the word "civil." The judicial power of the United States only could be exercised, from his standpoint, over "such controversies in which a state can be a party."
Since neither the Constitution, nor the Act, provided any guidance as to the meaning of "controversies," he looked to the common law for assistance.187 "[A]s the law stands at present, [a private contract action against the consent of a state] . . . is not maintainable" he argued, "whatever opinion may be entertained, upon the construction of the constitution as to the power of Congress to authorize such a one."188 "[E]ven if the constitution would admit of the exercise of such a power [to invest the federal courts with power to hear a compulsory private damage suit against a state]," he maintained, "a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case."189 Toward the end of his dissent, Justice Iredell, consistent with the above statement, stated that there was no "new law" or "old law" that "in any manner authorize[d] the present suit, either by precedent or analogy."190 Since no subject matter basis for federal jurisdiction existed, the compulsory private damage suit against the state, from his standpoint, therefore had to be dismissed, despite the state-citizen diversity clause of article III and the Judiciary Act which attempted to implement it.

However, Justice Iredell's dissent could be understood as a broader statement of the reach of the federal judicial power under the Constitution, and as a reaction to the majority's sweeping rejection of any notion of a state's constitutional immunity from private damage suit in federal court.191 While concurring with the majority that the Constitution imposed certain limitations on the states,192 he indicated in unambiguous language that he was "strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."193 Thus, a compulsory private damage suit in federal court would not have been a "controversy," and would not have been necessary, in his view, to vindicate federal rights, congressionally-created or constitutional.194 The more fundamental jurisdictional predicate for which Justice Iredell was searching would thus seem to have been a state's independent consent. In this respect,

187. Id. at 434.
188. Id. at 436.
189. Id. at 449.
190. Id. at 448.
191. See Nowak, supra note 2, at 1432 ("There is language in the Iredell opinion which indicates that he believed that Congress was without authority to add [compulsory private damage suits against states] to the jurisdiction of the federal courts.") (emphasis added).
192. 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting).
193. Id. at 449 (emphasis added).
194. But see Welch, 107 S. Ct. at 2966 (Brennan, J., dissenting) ("I think it plain that Justice Iredell's conception of state sovereign immunity supports the notion that States should not be immune from suit in federal court in federal question or admiralty cases.") Professor Amar has acknowledged that "[Justice] Iredell did write that he was inclined to believe that full vindication of congressionally-created and constitutional rights would never require 'a compulsive suit against a State for the recovery of money.'" Amar, supra note 6, at 1473 (quoting 2 U.S. (2 Dall.) at 499). However, he takes the spin off this by characterizing Justice Iredell's view as "pure dicta." Id.
Justice Iredell's analysis would be congruent with the current Court's "original understanding" view of article III and the eleventh amendment: that states could not be sued against their consent by private plaintiffs in federal court. Had he been forced to address the question of whether a state could be compelled to defend a private damage action in federal court based on federal law, or whether a federal question would have conferred "subject matter" jurisdiction in the federal courts for such a suit, Justice Iredell would have answered the question in the negative. While Justice Iredell indicated that the case before him did not contain either congressionally-created or constitutional rights, the emphasis and clarity with which he stated his views on the matter cannot be ignored.

Professor Amar has recently argued, however, that in *Chisholm* both the majority Justices and Justice Iredell concurred that jurisdiction in the federal court was solely predicated on the state-citizen diversity clause of article III, section 2—"between a State and Citizens of another State." The eleventh amendment, as a reaction to *Chisholm*, he thus argues, must have simply removed the state-citizen diversity clause in article III, section 2 as an independent jurisdictional basis for private suits against states in federal court. Professor Amar also has limited the "defect of *Chisholm* [to] its displacement of the prevailing state common law of government immunity with a 'general' common law of state assumpsit liability in a case presenting no question of substantive federal law." The eleventh amendment, in his view, was never intended to disturb general federal question jurisdiction as a basis for federal jurisdiction over compulsory private suits against states. As he phrases it, the eleventh amendment was not "designed as a barrier cutting across" the general federal question jurisdiction provisions in article III.

However, contrary to Professor Amar's argument, Justice Iredell was arguably concerned not only with party status, but with more general questions of federal court jurisdiction over state government. At the beginning of his dissent, Justice Iredell indicated that "every thing [he had] to say upon [the question of whether a state could be sued in assumpsit] will effect every kind of suit, the object of which is to compel the payment of money by a state."

195. In this author's view, Justice Iredell's "substantive" analysis would have merged with his "jurisdictional" analysis to prevent federal jurisdiction. But see Amar, supra note 6, at 1472.
196. 2 U.S. (2 Dall.) at 449-50.
197. See Amar, supra note 6, at 1470 "Jurisdiction rested exclusively on diverse party status [for the majority Justices];" and "[Justice] Iredell carefully limited his discussion to pure diverse party cases against states . . . ." Id. at 1472.
198. Id. at 1474.
199. Id. (emphasis in original).
200. Id. at 1474-75.
201. Id. at 1475.
202. 2 U.S. (2 Dall.) at 430.
In his neo-Federalist interpretation, Professor Amar limits the eleventh amendment to the narrow facts in *Chisholm*, despite the majority Justices' sweeping rejection of any state immunity from suit in federal court, and Justice Iredell's articulated concerns about the federalism implication of that rejection. While the narrow facts of *Chisholm* involved no substantive federal law, both the majority Justices and the dissenting Justice felt the need to comment on the question of general federal question jurisdiction in the context of a compulsory private damage suit against a state in federal court.

Moreover, the text of the amendment—"*any* suit in law or equity"—may directly belie the neo-Federalist view. Broad enough to include federal question cases, the amendment's text directly suggests that the framers intended to rebut any suggestion by the majority Justices in *Chisholm* that a federal question would confer jurisdiction in a federal court over a compulsory private damage suit against a state. Although *Chisholm* involved no federal question, Professor Jacobs suggests, moreover, that the eleventh amendment should be viewed as a response to three other cases before the Supreme Court which involved federal questions under the Constitution or United States treaties. The breadth of the amendment's text suggests that the framers may have had these cases in mind when drafting the eleventh amendment. Rather than giving the words "*any* suit in law or equity" their natural import, the neo-Federalist restricts the meaning of "*any*" to exclude from the amendment's scope those suits having a jurisdictional basis other than, or in addition to, the diversity of citizenship between private plaintiff and defendant state. The framers may have thought the breadth inherent in the words "*shall not* be construed to extend to *any* suit in law or equity" sufficient to countermand any inclination by contemporaries to use the words—"*all Cases, in Law and Equity*" of article III as an argument that a federal question would constitute a jurisdictional basis for a compulsory private damage suit against a state in federal court.

Furthermore, as framers of an amendment to the Constitution, the framers of the eleventh amendment clearly would not have been bound to limit the

203. Id. at 448.
204. Professor Amar recognizes that the majority justices felt the need to comment on the article III grant of federal question jurisdiction. See Amar, supra note 6, at 1469.
205. Professor Amar also recognizes that Justice Iredell commented on article III's grant of general federal question jurisdiction. Amar, supra note 6, at 1473.
207. See Welch, 107 S. Ct. at 2952. In Missouri v. Fiske, 290 U.S. 18 (1933), the Court indicated that the words "in law or equity" in the eleventh amendment's text were meant to cover suits based on federal questions as well as state law. Id. at 26-27.
208. E.g., 2 U.S. (2 Dall.) at 465 (opinion of Wilson, J.); id. at 468 (opinion of Cushing, J.).
209. Professor Jacobs indicates that they were Moultrie v. Georgia and Vassal v. Massachusetts, both unreported and dismissed, and Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796). C. Jacobs, supra note 150, at 94.
scope of eleventh amendment immunity to the facts of the *Chisholm* case. Thus, they could have adopted Justice Iredell's view of compulsory private damage suits against states in federal court as *Hans* suggested,\(^1\) even if it were "pure dicta."\(^2\) Since the framers were apparently quite concerned with protecting state treasuries from private debt suits, it is indeed difficult to believe that they would have made a distinction between federal question damage suits and state law damage suits against state government. Damage suits, irrespective of their basis in federal or state law, impact on state treasuries. Professor Tribe has well noted that "[t]he Georgia House of Representatives was so exercised by the [*Chisholm*] decision that it made any attempt to carry out the Supreme Court's mandate a felony punishable by hanging without the benefit of clergy."\(^3\) Finally, "the delicate problems of enforcing judgments against the States, ... raised by both Federalists and Anti-Federalists ..."\(^4\) apply without preference to federal question cases. Enforcement of damage judgments against states by federal courts requires their intrusion into state fiscal policy, irrespective of the federal or state law basis of the suit.\(^5\)

3. *The constitutional status of eleventh amendment immunity?*

Apart from its scope, the constitutional status of eleventh amendment immunity spawns great controversy among both scholars and Supreme Court justices.\(^6\) Professor Field has argued that *Hans* can be read consistently with the view that the eleventh amendment is merely common law sovereign immunity.\(^7\) If that were true, however, then it would seem that the combination of the grant of general federal question jurisdiction and a self-enforcing constitutional provision\(^8\) would have been sufficient for the *Hans* Court to allow the federal court to assert jurisdiction over a private damage suit against Louisiana, regardless of its consent; the Constitution is clearly superior to any principle of common law. Yet, the *Hans* Court held that the eleventh amendment barred federal court jurisdiction over such a suit against Louisiana. Thus, an immunity principle of constitutional status was necessary for the *Hans* Court to limit federal jurisdiction over the state in

\(^1\) Amar, *supra* note 6, at 1473 (describing portion of Justice Iredell's opinion as "pure dicta").
\(^2\) Am. *supra* note 6, at 1473 (footnote omitted).
\(^3\) Tribe, *supra* note 6, at 683 (footnote omitted).
\(^4\) Welch, 107 S. Ct. at 2950.
\(^6\) See, e.g., *Welch*, 107 S. Ct. at 2962-64 (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.); *Atascadero*, 473 U.S. at 268, 276-78 (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.).
\(^7\) Field, *Part One, supra* note 6, at 537.
\(^8\) Justices Marshall and Stewart explained that "the Contract Clause is self-enforcing ...; it requires no congressional act to make its guarantee enforceable in a judicial suit." *Employees*, 411 U.S. at 292-93 n.8 (Marshall & Stewart, JJs., concurring in result).
a compulsory private damage suit based on a self-enforcing provision of the Constitution.

Moreover, the *Hans* Court understood the states' immunity from compulsory private damage suit in federal court to be an important form of protection for states from federal power, with secure constitutional mooring in the eleventh amendment.219 Indeed, the *Hans* Court indicated that the eleventh amendment was "superior to all legislatures and all courts . . . ."220 The question of whether, and why, the states would have protected themselves from the federal government with an amendment subject to override by the federal government, must have crossed the minds of the members of the unanimous *Hans* Court.

For the *Hans* Court and the *Jumel* Court, important policy concerns underpinned the constitutional status of eleventh amendment immunity. The danger of substituting rule by the state legislature with rule by the federal court was one basis of their concerns.221 If the eleventh amendment represents a "broad," "stable," constitutional principle of state immunity from unconsented federal jurisdiction over private suits rooted in these policy concerns, not only a federal court, but even Congress's clear will should have to respect such a principle. Indeed, in the most recent case of *Welch*, the Court stated that "[t]he Court's unanimous decision in *Hans v. Louisiana* . . . firmly established that the Eleventh Amendment embodies a broad constitutional principle of sovereign immunity."224 Before his views changed, Justice Marshall had indicated, along with Justice Potter Stewart, that there was "little basis for doubting that *Hans* rested upon considerations as to constitutional limitations on the reach of federal judicial power, a view confirmed by the decision's lengthy analysis of the constitutional debates surrounding Art. III . . . ."225

There can be no doubt but that the eleventh amendment was ratified in 1795, and officially announced as part of the Constitution in 1798; and indeed properly added to the Constitution through the amendment process pursuant to article V.226 In providing the amendment process in article V,
we must not forget that the Framers intended to enable the people of the United States, after the Constitution's ratification, to put beyond the reach of temporary majorities in the federal legislature certain principles of fundamental law. Thus, there must be some "core" of eleventh amendment protection impregnable to attack from both Congress and the federal judiciary.

Union Gas II to the contrary notwithstanding, the "clear statement rule" could not be the constitutional "core" of the eleventh amendment, since such a rule merely dictates how clearly Congress must speak to the states in statutes affecting them; such a rule could not thus effectively limit federal court jurisdiction over compulsory private damage suits against states; precisely one problem the amendment was adopted to address. Such a rule might operate as a limitation in the short term, but once Congress learns how to speak with "clear statement," the eleventh amendment could be eroded from the Constitution. Moreover, the Garcia dissenters' position that Congress has been made structurally insensitive to the needs and interests of state government only buttresses the view that the eleventh amendment should be viewed as something more than the clear statement rule. If Congress has been made to some extent structurally insensitive to state interests, as the Garcia dissenters generally maintained, then the assumption that Congress must have considered the interests of the states simply because it spoke clearly to them would indeed be questionable. In assessing whether the "clear statement rule" is the constitutional core of the eleventh amendment, one should also bear in mind that Congress's structural insensitivity to state interests is only compounded by the fact that the states are neither directly nor indirectly represented in the federal courts.

Furthermore, in the congressional supremacist's argument, an uncomfortable fundamental tension certainly exists between the objectives of article V's amendment process, and the inherent nature of a presumption always subject to Congress's will. Because that argument assumes a major departure from article V's goals, this argument carries a heavy burden indeed. Perhaps it is a burden which the ambiguous historical support available is inherently unable to bear.

In the absence of clear contrary evidence, an amendment to the Constitution must be presumed to bear principles of constitutional status binding

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227. Tribe, supra note 6, at 687 (describing core as consisting of protection for states from private damage suits in federal court).
228. 832 F.2d at 1354 ("The presumption of immunity and the high threshold for its rebuttal animate the notion of sovereignty that underlies the eleventh amendment."). Professor Tribe argues that the clear statement rule is the sum and substance of the eleventh amendment immunity of the states. See Tribe, supra note 6, at 695.
229. Tribe, supra note 6, at 695.
on the federal legislature and the federal judiciary. This would be even truer for an amendment intended to restrict the reach of article III judicial power, which is generally not self-executing. Interestingly, the view that the eleventh amendment is merely a presumption of immunity, or common law sovereign immunity, may derive as much from a particular view of the amendment's history as from an analysis of eleventh amendment doctrine, which might support the possibility of an affirmative limit on Congress's power to create federal jurisdiction over state government, were it not for the "confusing, convoluted, and essentially disingenuous reasoning . . . [of eleventh amendment law]." 233

B. Article III, the Eleventh Amendment, and Congressional Power

If "the Eleventh Amendment was introduced to clarify the intent of the framers [of the Constitution] concerning the reach of federal judicial power," 234 even specific congressional grants of jurisdiction, in the absence of clear evidence to the contrary, would be included in the scope of the eleventh amendment, since article III was generally understood not to be self-executing. Moreover, the functional and close linguistic parallel between article III and the eleventh amendment also may provide for the application of the eleventh amendment's limiting force to congressional grants of federal jurisdiction over state government.

As does article III in some circumstances, the eleventh amendment essentially operates to prevent federal jurisdiction. 235 The eleventh amendment, however, does not constitute an absolute bar to federal jurisdiction, unlike article III. 236 Rather, it constitutionally prohibits federal jurisdiction over private damage suits 237 against a state government 238 which has not consented

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233. Field, Part Two, supra note 6, at 1279.
234. 411 U.S. at 291 (Marshall & Stewart, JJ., concurring in result).
236. Under article III principles of jurisdiction, parties may not mutually consent to create federal jurisdiction where their controversy does not meet article III requirements, i.e., "diversity of citizenship" or "case or controversy." However, under eleventh amendment principles of jurisdiction, the parties' consent may create federal jurisdiction.
237. For reasons intrinsic to the "constitutional plan," and in the interest of the permanency within the union, the United States may sue an unconsenting state in federal court. United States v. Mississippi, 380 U.S. 128, 140-41 (1965); Monaco v. Mississippi, 292 U.S. 313, 329 (1934). In the interest of peace between states, a state may sue an unconsenting sister state in federal court. Monaco, 292 U.S. at 328. See also North Dakota v. Minnesota, 263 U.S. 365, 372-73 (1923); South Dakota v. North Carolina, 192 U.S. 286, 315-21 (1904). Cf. New Hampshire v. Louisiana, 108 U.S. 76, 91 (1883) (state may not bring suit against unconsenting state in federal court to vindicate rights of a group of citizens for purpose of circumventing the eleventh amendment). While the structure of the federal union implies that the federal interest in a federal forum outweighs any state interest in freedom from federal jurisdiction for suits brought by the United States or other states, eleventh amendment law suggests that, for different structural reasons relating to the vitality and integrity of state government, this balance tilts in
to that federal jurisdiction. By consenting to federal jurisdiction, the state government waives its eleventh amendment immunity, and removes what otherwise would be a constitutional bar to federal jurisdiction. Without reference to the tenth amendment, Justice Powell has succinctly described the eleventh amendment's focus on unconsented-to federal court jurisdiction as the "constitutionally guaranteed immunity of the several States."  

The Court has attributed "Article III status" to the eleventh amendment insofar as it has maintained that the amendment directly circumscribes the grant of judicial power in article III, despite the fact that the eleventh amendment is not an absolute bar to federal jurisdiction. Striking linguistic similarity between the eleventh amendment and article III may justify this attribution. One should compare the following language: "The judicial Power of the United States, shall be . . . " with "The Judicial power of the United States shall not be . . . "; and "The judicial Power shall extend to all Cases, in Law or Equity . . . " with "The Judicial power . . . shall not be construed to extend to any suit in law or equity . . . " Justice Powell

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238. The eleventh amendment has been held to apply to state agencies, but not to political subdivisions of the state. See, e.g., Lake Country Estates, Inc., v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). See also Lincoln County v. Luning, 133 U.S. 529 (1890) (counties do not enjoy eleventh amendment protection); Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (school boards do not enjoy eleventh amendment protection). However, in Pennhurst II, 465 U.S. at 123 n.34, Justice Powell stated the following: "At the same time [referring to the cases of Mt. Healthy and Luning], we have applied the [eleventh] Amendment to bar relief against county officials 'in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself'" (citing Lake Country Estates, Inc. 440 U.S. at 401). See also Comment, The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism, 1979 DUKE L.J. 1042, 1042-49 (refusal to apply eleventh amendment immunity to political subdivisions is an exception). The same structural reasons relating to the vitality and integrity of state government would seem to apply with equal force to municipal, county and town governments, but the Court has so far refused to extend eleventh amendment protection to them.

239. Welch, 107 S. Ct. at 2945 ("[i]f a State waives its immunity and consents to suit in federal court, the suit is not barred by the Eleventh Amendment"). Accord Atascadero, 473 U.S. at 238; Pennhurst II, 465 U.S. at 99 (1984); Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981); Edelman, 415 U.S. at 673-74; Employees, 411 U.S. at 280 n.2; Parden, 377 U.S. at 192; Hans, 134 U.S. at 13-17; Clark v. Barnard, 108 U.S. 436 (1883).


243. U.S. Const. amend. XI.

244. U.S. Const. art. III, sec. 2.

245. U.S. Const. amend. XI.
has stated that "[i]n language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Art. III, suits 'commenced or prosecuted against one of the United States.'" 246

It is well settled constitutional law that Congress may not expand the jurisdiction of the federal courts beyond the confines of article III.247 As yet, the Court has not been forced to determine definitively whether the eleventh amendment affirmatively limits Congress's power to expand federal jurisdiction over state government in an exercise of the article I commerce clause power. However, the clear implication of the recent attribution of "Article III status" to the eleventh amendment is that just as article III limits Congress's constitutional power to expand federal court jurisdiction affirmatively, so would the eleventh amendment. Indeed, the Court has stated that "the history of the adoption and development of the [eleventh] Amendment . . . confirms that it is an independent limitation on all exercises of Art. III power: 'the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given.'" 248 If "[t]he root of the constitutional impediment to the exercise of the federal judicial power is . . . Art. III of our Constitution,"249 the eleventh amendment thus could be viewed as a general limit on congressional power to create federal jurisdiction over private damage suits against unconsenting state governments.250

In analyzing the relationship between article III and the eleventh amendment, the McVey court found in the words "the Judicial power shall not be construed to extend"251 clear evidence that the amendment was intended to apply to only the federal courts, and not Congress.252 However, the McVey court, and Union Gas II in reliance,253 failed to recognize that since Marbury v. Madison254 a limitation on the judicial power established in article III must be a limitation on Congress's power to execute that judicial power in conferring jurisdiction to the federal courts.255 Since the eleventh amendment is, as the Court maintains, a limitation on the judicial power established in

247. The grant of judicial power in article III may not be expanded by legislation. Marbury v. Madison, 5 U.S. (1 Cranch) 60 (1803). In Muskrat v United States, 219 U.S. 346 (1911), the Court held that Congress may not vest the federal courts with authority to render advisory opinions in derogation of the case or controversy requirement. Nor may it be expanded by consent of the parties. Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884).
249. Employees, 411 U.S. at 291 (Marshall & Stewart, JJ., concurring in result).
250. But see Union Gas II, 832 F.2d at 1353.
251. U.S. CONST. amend. XI.
252. 812 F.2d at 318.
253. 832 F.2d at 1353.
254. 5 U.S. (1 Cranch) 137 (1803).
255. See Brown, State Sovereignty, supra note 14, at 369.
article III, it follows that the amendment also must limit Congress's power to confer jurisdiction to the federal courts.

Based on comparisons between article III principles of jurisdiction and eleventh amendment principles, commentators have implied, however, that the eleventh amendment should have no affirmative limiting effect on congressional power to expand federal jurisdiction over state government.\textsuperscript{256} Since the eleventh amendment is distinctly unlike article III inasmuch as mutual consent may create federal jurisdiction, eleventh amendment law, commentary suggests, ought to be disqualified from binding Congress.\textsuperscript{257} However, the wrong question may have been asked. The proper question might be not whether there are divergences between article III and eleventh amendment principles of jurisdiction; but, rather, whether these divergences from the traditional article III model necessarily preclude the eleventh amendment from being construed as a limit, binding on both Congress and federal courts alike, as is article III.

Professor Redish has maintained that "[a]lso from pointing to this one difference,\textsuperscript{258} commentators have failed to justify so drastic a distinction in construction between the limits on the judicial power imposed by Article III and those imposed by the eleventh amendment."\textsuperscript{259} In this author's view, this difference between article III and the eleventh amendment does not necessarily lead to distinctions between congressional and judicial power. Indeed, as Professor Redish has stated, the framers of the eleventh amendment generally were concerned with subjecting states that had not consented to suits for damages in federal court.\textsuperscript{260} In the circumstances where a state has not consented, a principal concern of the eleventh amendment would be salient, justifying a limitation not only on the federal courts, but on Congress as well. If this may be considered anomalous, it "is an anomaly that is well established as a part of our constitutional jurisprudence."\textsuperscript{261}

C. The Eleventh Amendment: "An Admittedly Arbitrary Distinction"\textsuperscript{262}Between Permissible and Impermissible Relief?

\textit{Edelman v. Jordan,}\textsuperscript{263} based on its analysis of \textit{Ex parte Young,}\textsuperscript{264} limited the scope of eleventh amendment immunity to private suits seeking "retro-

\begin{itemize}
\item \textsuperscript{256}See id. at 368. See also Baker, supra note 6, at 150.
\item \textsuperscript{257}See, e.g., Nowak, supra note 2, at 1442 ("the Court . . . should not interpret [the eleventh amendment] as a limitation on congressional power").
\item \textsuperscript{258}Professor Redish is referring to the fact that under eleventh amendment principles a state may consent to federal jurisdiction as opposed to article III principles where parties may not create jurisdiction through consent.
\item \textsuperscript{259}M. Redish, supra note 77, at 152 n.94.
\item \textsuperscript{260}Id.
\item \textsuperscript{261}Employees, 411 U.S. at 294 n.10 (Marshall & Stewart, JJ., concurring in result).
\item \textsuperscript{262}McVey, 812 F.2d at 322.
\item \textsuperscript{263}415 U.S. 651 (1974).
\item \textsuperscript{264}209 U.S. 123 (1908). Edelman, 415 U.S. at 663-71 (discussing Young).
\end{itemize}
active relief’\textsuperscript{265} (essentially compensatory damages from the state treasury).\textsuperscript{266} Edelman distinguished between federal court ‘‘prospective relief’’\textsuperscript{267} (essentially injunctive relief requiring state officials to conform future conduct to legal standards)\textsuperscript{268} and retroactive relief. Notwithstanding the amendment’s text: ‘‘any suit in . . . equity,’’\textsuperscript{269} Edelman suggested that a federal court must be able to issue federal law prospective relief against state government in order to vindicate the supremacy of federal law.\textsuperscript{270} It recognized, however, that certain forms of prospective relief would be more onerous to state government than retroactive relief.\textsuperscript{271}

Sensing a doctrinal weakness, McVey argued that eleventh amendment law had ‘‘imposed an admittedly arbitrary distinction’’\textsuperscript{272} between permissible and impermissible private suits against states in federal court. It thus maintained that the amendment ought not to be viewed as a constitutional limitation on the article III powers of the federal courts.\textsuperscript{273} A fortiori, it reasoned that the eleventh amendment could not be an affirmative limitation on Congress’s power to invest the federal courts with jurisdiction over state government.\textsuperscript{274} Neither McVey, nor Union Gas II recognized, however, that recent eleventh amendment developments already may have weakened Edelman’s distinction between prospective and retroactive relief as a doctrinal barrier to further expansion of eleventh amendment protection for states.

In Young,\textsuperscript{275} private plaintiffs suing state officials in federal court sought to enjoin the enforcement of state statute allegedly violating the fourteenth amendment. The Young Court permitted a federal court to enjoin Minnesota’s Attorney General from enforcing the state statute at issue, regardless of any state or state officials’ consent to federal jurisdiction.\textsuperscript{276} In so holding, it adopted the fictional theory that such a suit is not one ‘‘against the state,’’ but rather against the state officials who, by allegedly violating the Constitution, are no longer representatives of the state.\textsuperscript{277} It maintained that the federal court’s issuance of an injunction based on the fourteenth amendment ordering state officials to refrain from the challenged conduct would not

\textsuperscript{265} 415 U.S. at 664 (“the award of an accrued monetary liability which must be met from the general revenues of a State”).
\textsuperscript{266} Id. at 663-68 (1974).
\textsuperscript{267} Edelman defined one form of prospective relief as an injunction “to conform . . . future conduct of [a state official or state officials] to the requirement of the Fourteenth Amendment.” 415 U.S. at 664.
\textsuperscript{268} Id. at 664-68.
\textsuperscript{269} U.S. Const. amend. XI.
\textsuperscript{270} 415 U.S. at 668. See also Pennhurst II, 465 U.S. at 105 (explaining Edelman).
\textsuperscript{271} Id. at 667.
\textsuperscript{272} 812 F.2d at 322.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} 209 U.S. 123 (1908).
\textsuperscript{276} Id.
\textsuperscript{277} Id. at 159-60.
violate the eleventh amendment, regardless of either the state's consent, or its officials' consent. While the *Young* Court distinguished equitable relief from legal relief, its "fictional theory" left many questions unanswered as to the nature and range of prospective relief a federal court could issue against an unconsenting state government.

*Edelman* narrowed *Young* insofar as it held that any equitable or legal relief issued by a federal court which requires direct payment from the state treasury against an unconsenting state government violates the eleventh amendment. At the same time, however, *Edelman* maintained a rather rigid distinction between prospective relief and retroactive relief, despite recognition that purely prospective relief may have as potentially devastating fiscal and structural effects on state governments as retroactive relief. *Edelman* tried to distinguish between the "ancillary effect that state compliance with federal law would necessarily have on the state treasury," from the direct effect monetary payment to private plaintiffs would have on the same.

Whether *Edelman*'s line between prospective and retroactive relief should be redrawn, is unclear. In distinguishing *In re Ayers*, *Young* itself may have provided a basis for distinguishing prospective relief which simply enjoins unconstitutional state government conduct, from other forms of prospective relief compelling state officials to conform to an articulated plan devised by the federal court. Moreover, Justice Harlan's strong dissent in

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278. *Id.* at 162-63.
279. *Id.* at 159-60.
280. 415 U.S. at 664-66 (eleventh amendment focuses on damages in favor of private plaintiffs which must be paid from "general revenues" of a state treasury, regardless of whether suit is brought in law or equity). *See also* Tribe, *supra* note 6, at 687 ("the operational concept of a sovereign immunity that is secure against judicial inroads has been retained in at least the core area of damage suits").
281. *Id.* at 665-67.
282. *Id.* at 667.
283. *Id.* at 668. In *Quern* v. *Jordan*, 440 U.S. 332, 338 (1979), the Court reaffirmed the distinction *Edelman* made between permissible and impermissible forms of relief under the eleventh amendment. In *Quern*, the plaintiff class argued that they were entitled to notice that they had been possibly deprived of welfare benefits in violation of applicable law. *Id.* at 339-40. On the basis of the distinction between retroactive and prospective relief, the Court affirmed a lower court which ordered state officials to mail notices of the availability of state administrative procedures by which the injured members of the plaintiff class could get redress. *Id.* at 344-45. *Quern* held that 42 U.S.C. § 1983 permitted a private plaintiff to seek only prospective relief against a state in federal court. *Id.* at 345.
285. 123 U.S. 443 (1887). *See 209 U.S.* at 159 (distinguishing between injunctions in which "affirmative action of any nature is directed" and injunctions which prevent the "doing of an act which [the state officer] had no legal right to do").
286. The precise contours of this self-limitation are unclear. In *In re Ayers*, Virginia passed legislation in 1882 prohibiting state tax collectors from accepting certain coupons, issued under statutes previously passed in 1871, to discharge state tax obligations. *Id.* at 446-47. Private
Young concerning the structural consequences of prospective relief for states as separate sovereigns may provide a basis for limiting federal court prospective relief based on federal law.\textsuperscript{287} Federal court prospective relief may indeed be substantially more intrusive into and burdensome on state government than any form of retroactive relief. For example, in \textit{Milliken v Bradley}\textsuperscript{288} the Court held that state officers may be ordered by a federal court to spend funds from the state treasury to institute educational programs to desegregate public schools according to a remedy devised by a federal court. For structural reasons relating to the integrity of state government, more onerous forms of federal court prospective relief might be limited to the furtherance of the civil rights concerns of the Civil War Amendments. While it might be argued that \textit{Milliken sub silentio} invalidated \textit{Louisiana v. Jumel},\textsuperscript{289} the Court has recently cited \textit{Jumel} with approval in \textit{Pennhurst II},\textsuperscript{290} suggesting that \textit{Milliken} may indeed be containable.

In \textit{Louisiana v. Jumel},\textsuperscript{291} out-of-state bondholders brought a private mandamus suit in federal court against the state auditor, treasurer, and other

\begin{itemize}
  \item Plaintiffs brought suit in federal court against the state auditor, attorney general, and state prosecutors, seeking to enjoin them from prosecuting taxpayers who had been reported delinquent because they tendered the 1871 coupons in payment of state taxes. \textit{Id.} at 446. After the lower court issued the requested injunctive relief, the Supreme Court reversed on the ground that the equitable action was in essence against the state. \textit{Id.} at 504. The \textit{Ayers} Court held that "any action founded upon it against defendants who are officers of the State, the object of which is to enforce [the state's] specific performance by compelling those things to be done by the defendants [state officials] which, when done, would constitute a performance by the State, . . . is in substance against the State itself . . . ." \textit{Id.} What is interesting for our purposes is that \textit{Young} did not distinguish \textit{Ayers} on the basis of the absence of allegations of unconstitutional conduct by state officials in \textit{Ayers}. See \textit{209 U.S.} at 151-53. Indeed, even \textit{Hans} cited \textit{Ayers} in a way which suggested that \textit{Ayers} involved a federal question. See \textit{134 U.S.} at 10. \textit{Young} explained that the prospective relief demanded by the private plaintiff in \textit{Ayers} was constitutionally impermissible because it would have been a federal court injunction in which "affirmative action of any nature is directed" against state officials and state government. \textit{209 U.S.} at 159. Furthermore, the injunctive relief in \textit{Ayers} would have had a substantial financial impact on the state because it arguably would have meant payment on a large number of publicly held obligations.

287. \textit{See 209 U.S.} at 168-204 (Harlan, J., dissenting) ("[The \textit{Young}] principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the National and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the States as if they were 'dependencies' or provinces. It would place the States of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the Supreme Law of the Land.").


289. \textit{For example, in Kelley v. Metropolitan County Bd. of Educ., 836 F.2d 986} (6th Cir. 1987), Judge Nelson stated that "[a]lthough it has been afforded many opportunities to do so, the Supreme Court has never repudiated \textit{Louisiana v. Jumel}; in literally dozens of subsequent decisions, on the contrary, the Supreme Court has cited that seminal case or its progeny with every indication of approval." \textit{Id.} at 991. Later, Judge Nelson indicated that "\textit{Louisiana v. Jumel} is still sound." \textit{Id.}


state officials of Louisiana. The plaintiff bondholders charged that the state’s refusal to pay on certain bonds constituted “an impairment of obligations” under the contract clause. As for relief, the plaintiffs sought to enjoin the defendant state officials from recognizing the validity of a state constitutional amendment forbidding an exchange of their “old” state bonds for “new” state bonds. In holding that the eleventh amendment barred the suit, the Court disapproved “[federal] jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State.” In discussing the constitutional implications of a private mandamus suit against the state in federal court, it indicated that “[t]he remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, . . . and to supervise the conduct of all persons charged with any official duty in respect to . . . the tax in question until the bonds, principal and interest, were paid in full . . . .” The Court went on to say that “the political power [of the state government] cannot thus be ousted of its jurisdiction and the judiciary set in its place.” To the extent that prospective relief requires a state government and its officials to meet federal obligations according to an articulated remedy devised by the federal court, such relief “intrudes” into and effectively operates against the state government. Garcia’s severe curtailment of any effective tenth amendment based protection for states may lead to the revitalization of Jumel; or at the very least prompt the Court to examine what forms of federal law based prospective relief the supremacy clause necessarily requires.

The complex litigation in Pennhurst State School & Hospital v. Halderman (Pennhurst II) began in 1974 when a resident of Pennsylvania’s Pennhurst State School & Hospital brought a class action in federal court against state officials in the state’s Department of Public Welfare. The plaintiff class charged that conditions at Pennhurst violated federal constitutional and statutory rights, as well as state statutory rights, and sought broad injunctive relief from the federal court. After the first round of appeal reversing the Third Circuit’s affirmance of a broad federal court remedial order, the Court remanded the case for a determination as to whether that order could be

292. U.S. Const. art. 1, sec. 10, cl. 1. Id. at 716.
293. Id. at 720-21.
294. Id. at 728.
295. Id. at 727.
296. Id. at 727-28.
297. U.S. Const. art. VI, sec. 2.
298. Federal rights are arguably not all alike. For example, federal statutory rights would seem to present less justification for intrusive federal court prospective relief than federal constitutional rights.
300. Id. at 92.
301. Id.
supported by federal constitutional or statutory law, or state law.\footnote{302} Affirming
the remedial order in its entirety, the Third Circuit determined that it was
sufficiently undergirded by the "least restrictive environment" standard
adopted by the Pennsylvania Supreme Court, and did not analyze other
possible bases in federal law.\footnote{303} The Third Circuit rejected an eleventh
amendment defense, reasoning that since \textit{Ex parte Young} permitted pro-
spective relief on the basis of federal law, it would also permit prospective
relief respecting a pendent state-law claim.\footnote{304}

Writing for the majority, Justice Powell in \textit{Pennhurst II} rejected this logic,
and held the eleventh amendment forbade the federal courts from issuing
purely prospective relief based on state law against unconsenting state gov-
ernments,\footnote{305} despite any possible implications of \textit{Edelman} or \textit{Young} in this
regard. What the implications of \textit{Pennhurst II} are for federal law based
prospective relief is unclear. To be sure, \textit{Pennhurst II} distinguished \textit{Edelman}
on the basis that it involved the supremacy clause concerns of federal law.\footnote{306}
However, \textit{Pennhurst II} also suggested that more intrusive forms of purely
prospective relief based on federal law issued by a federal court against a
state might violate the eleventh amendment, if that relief had too great an
adverse effect on the state.\footnote{307} Moreover, in suggesting that crucial structural
considerations should guide eleventh amendment analysis respecting federal
court prospective relief against state government,\footnote{308} \textit{Pennhurst II} implied
that even federal law based prospective relief having significant structural
consequences for state government would be barred by the eleventh amend-
ment.

Justice Powell apparently established in \textit{Pennhurst II} a test which measures
the "effect"\footnote{309} federal court prospective relief may have on a state govern-
ment. Indeed, he seems to have returned to the logic of \textit{Jumel} insofar as
whether a suit is against the state does not necessarily pivot on the allegation
of unconstitutional state action, but the structural "effect" that the relief

\footnotesize

304. 465 U.S. at 96.
305. \textit{Id.} at 104-06.
306. \textit{Id.} at 106.
307. \textit{Id.} at 104 n.13 ("We do not decide whether the District Court would have jurisdiction
under this reasoning to grant prospective relief on the basis of federal law, but we note that
the scope of any such relief would be constrained by principles of comity and federalism.
\text{"Where, 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.'"} (citation omitted). \textit{See also id.} at
105 ("the need to promote the supremacy of federal law must be accommodated to the
constitutional immunity of the States").
308. \textit{Id.} at 100 ("principles of federalism . . . inform Eleventh Amendment doctrine.""
(citation omitted). \textit{See also id.} at 116-17 ("the Eleventh Amendment's restriction on the federal
judicial power is based in large part on 'the problems of federalism inherent in making one
sovereign appear against its will in the courts of the other.'" (citation omitted).
309. \textit{Id.} at 101 n.11, 101-02, 107, 117 ("impact directly on the State itself").}
asked for would have on the state government. Though developed in the context of state law based prospective relief, the "effect" test would seem to have implications for purely prospective relief based on federal law as well. Indeed, by severely limiting the Young fiction as the general criterion for determining whether a private suit is "against the state," and potentially barred by the eleventh amendment, Pennhurst II may bring coherence and strength to eleventh amendment law. Justice Powell made it very clear that the eleventh amendment is not, as McVey phrased it, "a pragmatic effort at line-drawing," but instead, a principled constitutional doctrine.

By disfavoring the Young fiction, Pennhurst II has made eleventh amendment law more amenable to other federalism doctrines regulating the federal courts' power to issue purely prospective relief based on federal law against state government. In according legitimacy and respect to state courts as an essential judicial system in our federal union, "Our Federalism" parallels eleventh amendment jurisprudence. Under Our Federalism and current eleventh amendment law, the assumption that a private plaintiff raising federal claims against a state in state court will not receive a full and fair opportunity to litigate those claims is questionable. The extent to which Pennhurst II's implications, and the various parallels between Our Federalism and eleventh amendment law, will result in greater protection for states from federal court prospective relief remains to be seen. Indeed, if "constitutional" principles of federalism . . . underlie the Eleventh

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310. Id. at 113 ("at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it." (citing Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690, 695 (1949)).
311. 812 F.2d at 322.
312. 465 U.S. at 114 n.25 ("[the Young fiction] is a very narrow exception").
313. 812 F.2d at 322.
314. 465 U.S. at 114 n.25 ("[the Young fiction] is a very narrow exception").
315. 465 U.S. at 114 n.25 ("[the Young fiction] is a very narrow exception").
316. 465 U.S. at 114 n.25 ("[the Young fiction] is a very narrow exception").
318. Outside the eleventh amendment context, under the rubric of "Our Federalism," the Court has issued forth a body of decisions, which indicates that the federal interest in enforcing the supremacy clause by means of "prospective relief" (declaratory or injunctive) against a state must, under certain circumstances, yield to the state interest in enforcing its own criminal and civil laws. E.g., Younger v. Harris, 401 U.S. 37 (1971) (Court held that a federal court should abstain from interference in already begun, or ongoing, state criminal proceedings); Huffman v. Pursue, Ltd. 420 U.S. 592, 604 (1975) ("Our Federalism" governs state civil proceedings where "[t]he State is a party to the . . . proceedings, and the proceeding is both in aid of and closely related to criminal statutes"); the civil action here was the abatement of obscene movie theatre as a nuisance). See also Baker, supra note 6, at 173-75.
319. See Younger, 401 U.S. at 47-49. Recently, in Pennzoil Oil Co. v. Texaco, Inc., 107 S. Ct. 1519 (1987), the Court held that federal courts should not interfere with the execution of state court judgments when the plaintiff cannot meet its burden of demonstrating that the state courts will not hear its federal constitutional claims. In the major eleventh amendment case of Atascadero, Justice Powell indicated that it denigrated state judges to imply that they would not enforce the supreme law of the land. 473 U.S. at 238 n.2. Dissenting in Young, Justice Harlan stated forcefully that "[w]e must assume—a decent respect for the States requires us to assume—that the state courts will enforce every right secured by the Constitution." 209 U.S. at 176.
320. 465 U.S. at 105.
Amendment,"317 rather than principles of "comity" as in Our Federalism,318 further limitation on federal court prospective relief in eleventh amendment doctrine may have firmer justification.319

D. The Enigma of Congressional Power and Eleventh Amendment

Immunity: The Bilateral Framework as the Solution?

Insofar as the eleventh amendment has been applied to specific congressional attempts at expanding federal court jurisdiction to include compulsory private damage suits against states, the Court has expanded Hans. Indeed, some of the most interesting federalism issues have revolved around this expansion of Hans. Hans did not involve a specific grant of federal jurisdiction over private damage suits against states.320 However, if the jurisdictional deficiency was the lack of any independent state consent, then the absence of a specific congressional grant of jurisdiction would not have changed the result in Hans.321 Though current eleventh amendment doctrine governing congressional power is not free from logical problems, the Court, in this author's view, has striven to remain true to the essence of Hans: that an unconsenting state may not be sued by a private plaintiff for damages in federal court.322

Over the last three decades, the Court has struggled, it would seem, to develop a coherent framework for the analysis of the eleventh amendment issues raised when Congress specifically authorizes federal jurisdiction over private damage suits against state governments. This has occurred in the context where states have neither explicitly waived their eleventh amendment immunity in their respective state constitutions or state statutes,323 nor intend to expressly waive their eleventh amendment immunity by making an individual appearance for that purpose in federal court.324 Since requiring Congress to clearly specify its authorization of federal jurisdiction over private damage suits against states,325 the Court has resorted to statutory construction

317. Id. at 106.
318. See Younger, 401 U.S. at 44.
319. But see McVey, 812 F.2d at 322 ("principles of comity, rather than strict constitutional restraints, underlie the decisions of the Supreme Court... ").
320. See supra notes 134-40 and accompanying text.
321. See id.
322. 134 U.S. 1, 9-21.
323. In Atascadero, Justice Powell devoted a portion of the decision to the issue of whether the State of California had consented to be sued in federal court through a provision in its own constitution. 473 U.S. at 241. The Court held that a state must express such a waiver in "unequivocal" language in state law. See id. at 238 n.1.
324. E.g., Toll v. Moreno, 458 U.S. 1 (1982) (state may waive its eleventh amendment immunity by appearing in federal court, and clearly stating through its counsel that it intends to waive its eleventh amendment immunity). Id. at 17-19.
325. 107 S. Ct. at 2948; 473 U.S. at 243.
for resolution of eleventh amendment federalism problems. The Court has thus far been able to avoid squarely confronting the issue of congressional power to remove a state's eleventh amendment immunity in the commerce clause context, and in the article I context more generally.

Nonetheless, modern eleventh amendment doctrine has emphasized the importance of the source of congressional power used to authorize federal jurisdiction over private damage suits against states; and has suggested that independent state consent, when relevant, is an essential element in determining whether federal court jurisdiction exists over private damage suits against state governments. In the article I context, a bilateral framework consisting of clear congressional authorization of private suits against states in federal court and independent state consent has been developing. Union Gas IP and McVey failed to acknowledge even the outlines of this development. In the fourteenth amendment context, a unilateral framework of clear congressional authorization has been established.

Parden v. Terminal Railway Company, decided in 1964, was the first case to deal with issues of congressional power under the commerce clause and the eleventh amendment. In the context of the Federal Employers' Liability Act (FELA), the Court seemed to suggest that Congress's power to create federal jurisdiction over private damage suits against states was absolute. However, it also suggested the necessity of independent state consent. Hence, it implied that Congress alone could not create federal

326. In the most recent case of Welch, Justice Powell was not compelled to rule on whether Congress possessed the power, under the commerce clause, to force an unconsenting state into federal court to answer to private damage suits based on the Jones Act, since Congress had not spoken clearly enough in that statute to authorize federal jurisdiction over private damage suits. 107 S. Ct. at 2947.

327. See, e.g., Atascadero, 473 U.S. at 238; Fitpatrick, 427 U.S. at 452-53.

328. See, e.g., Edelman, 415 U.S. at 672; Parden, 377 U.S. at 192.


330. 832 F.2d at 1346-53.

331. 812 F.2d at 323-26.

332. U.S. Const. amend. XIV, sec. 5: Fitzpatrick, 427 U.S. 445 (1976) (1972 Amendments to Title VII); Quern v. Jordan, 440 U.S. 332 (1979) (§ 1983); Atascadero, 373 U.S. 234, 242-46 (1985) (Rehabilitation Act). Professor Brown criticized commentators of the congressional supremacist school for their inability to recognize that the distinction among the various sources of congressional powers used to authorize federal jurisdictions over private damage suits against states existed within eleventh amendment law. See Brown, Beyond Pennhurst, supra note 16, at 392-93 n.290. In a subsequent article, however, Professor Brown adheres to that criticism, but feels that after Atascadero the distinction is "no longer tenable." Brown, State Sovereignty, supra note 14, at 393 n.244.


335. Id. at 191.

336. Id. at 192.
jurisdiction over private damage suits against states. While the 1973 eleventh amendment—commerce clause case of *Employees v. Department of Public Health and Welfare*337 acknowledged the bilateral framework nascent in *Parden*,338 it suggested that Congress could bring “the States to heel”339 by alone creating private damage suits against them in federal court under the 1966 Amendments to the Fair Labor Standards Act (FLSA).340 *Edelman v. Jordan,*341 involving a spending clause program called the Aid to the Aged, Blind or Disabled (AABD) funded by the Social Security Act,342 appeared to cast doubt on this ambiguous language in *Employees* by reaffirming the bilateral framework.343 The *Edelman* Court suggested, moreover, that the eleventh amendment had not only constitutional dimension, but conferred “constitutional rights” on state government which Congress is bound to respect.344 Both post-*Garcia* cases of *Welch*345 and *Atascadero*346 have quoted this language from *Edelman* with approval.

*Fitzpatrick v. Bitzer,*347 decided in 1976, is the only eleventh amendment decision to address directly the issue of congressional power to create federal jurisdiction over private damage suits against states. In the context of the 1972 Amendments to the Civil Rights Act of 1964,348 the Court held that Congress may create federal jurisdiction over private damage suits against state government, regardless of state consent.349 However the *Fitzpatrick* Court confined this special ability to the fourteenth amendment enforcement power.350 In 1981, *Florida Department of Health v. Florida Nursing Home Association,*351 a spending clause case involving the Medicaid program, appeared to affirm the *Edelman* Court’s suggestion that both clear congressional authorization and independent state consent were required to create

338. 411 U.S. at 280 n.1.
339. Id. at 283.
342. The *Edelman* Court described the program as follows: “AABD is one of the categorical aid programs administered by the Illinois Department of Public Aid pursuant to the Illinois Public Aid Code, Ill. Rev. Stat., c. 23 §§ 3-1 through 3-12 (1973). Under the Social Security Act, the program is funded by the State and Federal Governments. 42 U.S.C. §§ 1381-1385.” 415 U.S. at 653.
343. Id. at 672. See Brown, *Beyond Pennhurst*, supra note 16, at 386 (“the *Edelman* Court suggested that both congressional intent and some form of state consent to the removal of [eleventh amendment] immunity were necessary”). In addition, the *Edelman* Court referred to the case of *Parden* when suggesting that both congressional intent and independent state consent were necessary to remove eleventh amendment immunity. See 415 U.S. at 672.
344. 415 U.S. at 673.
345. 107 S. Ct. at 2945-46.
346. 473 U.S. at 238 n.1.
349. Id. at 456.
350. Id.
federal jurisdiction over private damage suits against state government in the article I context.\textsuperscript{352}

Shortly after \textit{Garcia}'s virtual obliteration of any effective tenth amendment based protection for states,\textsuperscript{353} and in the same Supreme Court Term, \textit{Atascadero State Hospital v. Scanlon}\textsuperscript{354} was decided. It held that Congress had not authorized private damage suits in federal court in the Rehabilitation Act of 1973,\textsuperscript{355} whether the Act represented an exercise of the spending clause\textsuperscript{356} or the enforcement clause of the fourteenth amendment.\textsuperscript{357} It thus kept alive the possibility that the Court would clearly and unambiguously find that Congress could not do in an exercise of article I power what it could do in an exercise of section five of the fourteenth amendment; that is, unilaterally create federal court jurisdiction over private damage suits against state government. In 1987, \textit{Welch v. Texas Dept. of Highways and Public Transportation},\textsuperscript{358} a commerce clause case, only heightened the anticipation by continuing to keep alive the possibility of an eleventh amendment based affirmative limit on the commerce clause. There, the Court held that Congress had not authorized private damage suits against states in federal court under the Jones Act,\textsuperscript{359} and explicitly reserved judgment on the relationship between state consent and congressional power.\textsuperscript{360}

Though not without ambiguity,\textsuperscript{361} eleventh amendment law may be read to establish the independence of the element of state consent in a bilateral framework for article I power.\textsuperscript{362} This bilateral framework would recognize

\textsuperscript{352} Id. at 149-50.
\textsuperscript{353} 469 U.S. 528 (1985).
\textsuperscript{354} 473 U.S. 234 (1985).
\textsuperscript{356} Id. at 246-47.
\textsuperscript{357} Id. at 242-46.
\textsuperscript{358} 107 S. Ct. 2941 (1987).
\textsuperscript{359} 46 U.S.C. § 688 (as amended 1982). Id. at 2947.
\textsuperscript{360} Id. at 2946.

\textsuperscript{361} See, e.g., Field, \textit{Part Two, supra} note 6, at 1212 ("The most basic problem is that the Court seems to endorse both Congress's power to impose suit and the necessity for state consent to suit.") (emphasis in original)). Professor Field has also said that "[i]t 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 \textit{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.") \textit{Id.} at 1227. External problems relate to the preclusive effect of \textit{Garcia}. \textit{See Brown, State Sovereignty, supra} note 14, at 393 (suggesting that were the Court to find independent power of state to withhold consent, eleventh amendment law and \textit{Garcia} would indeed be in conflict). \textit{See also Skover, Phoenix Rising, supra} note 16, at 303 (suggesting that "implied waiver" approach—which recognizes independent state consent—to issues regarding congressional power to create federal jurisdiction over private damage suits against states may undermine presumption in \textit{Garcia} that the national political process is sole safeguard of state sovereignty).

\textsuperscript{362} \textit{See Skover, Phoenix Rising, supra} note 16, at 301 n.106; \textit{id.} at 303 ("[eleventh amendment] doctrine recognizes an independent power of the states to withhold consent to suit").
the independent right of a state to withhold consent from federal court jurisdiction over a private damage suit against it, despite congressional authorization of that jurisdiction. It might seem anomalous that Congress is even permitted to authorize private damage suits against states in federal court at all under this eleventh amendment analysis. However, the bilateral framework would affirmatively prevent both Congress and federal courts from creating federal court jurisdiction over compulsory private damage suits against states because the framework honors the state's right to independently consent to federal jurisdiction. To the extent that it would guarantee to the states immunity from compulsory private damage suits in federal court, the bilateral framework is an outgrowth of *Hans*; and indeed may also be understood as a modern response to the majority Justices in *Chisholm* and as a vindication of Justice Iredell's dissent which arguably recognized independent state consent as a necessary constitutional jurisdictional predicate.363

To the extent that the bilateral framework would affirmatively limit Congress's power to grant jurisdiction to the federal courts, it would find mooring in the principle that the eleventh amendment “limits the grant of judicial authority in Art. III.”364 In this author's view, the bilateral framework bears the potential for bringing a measure of unity to eleventh amendment doctrine. As explained below, Congress's “unilateral” power to create federal jurisdiction over private damage suits against states in an exercise of the fourteenth amendment is special, and limitable to the furtherance of the civil rights concerns of the fourteenth amendment.365

III. *Welch, Parden, and Employees: A Bilateral Framework For Eleventh Amendment—Commerce Clause Analysis?*

*Union Gas* IP66 and *McVey*367 refused to acknowledge those aspects of the eleventh amendment—commerce clause cases of *Welch, Parden* and *Employees*, which support a state's independent right to consent, or to withhold consent, to federal jurisdiction over private damage suits against it. *Welch, Parden* and *Employees* may, however, be read coherently to support a bilateral framework for eleventh amendment analysis under the article I power to regulate interstate commerce.

In the most recent eleventh amendment case of *Welch*, a private plaintiff sued a state for damages in federal court under the Jones Act,368 a federal statute passed pursuant to the commerce power. The state raised the eleventh amendment defense, and the district court dismissed the suit369 which, on

363. See supra notes 191-96 and accompanying text.
365. See infra notes 470-500 and accompanying text.
366. See 832 F.2d at 1346-47, 1350-51.
367. See 812 F.2d at 325.
appeal, the federal circuit affirmed. Justice Powell, writing for the majority, affirmed the circuit, and held that Congress had not spoken clearly enough on the face of the statute to authorize federal jurisdiction over private damage suits against a state. As did Employees in considering the 1966 Amendments to the Fair Labor Standards Act, Welch focused exclusively on whether clear congressional authorization of federal jurisdiction over private damage suits against states existed in the Jones Act. Welch ventured no answer as to what independent state consent might mean in the circumstances of the case. In terms of the bilateral framework, it could be argued that since Congress had not authorized federal jurisdiction over private damage suits against the states in the Jones Act, the issue of whether the state independently consented to federal jurisdiction, or waived its eleventh amendment immunity was not before the Court.

While Welch expressed reluctance to decide whether Congress could, in an exercise of the commerce clause, compel a state to defend a private damage suit in federal court, neither Parden nor Employees satisfactorily clarified this major unanswered issue. While Welch overruled the part of Parden which implied that Congress could authorize private damage suits against states in federal court with less than clear language on the face of the statute, it arguably left the state consent aspect of Parden intact.

In Parden, Congress enacted the Federal Employers' Liability Act (FELA) in an exercise of the commerce clause twenty years before Alabama entered the railroad industry. An employee of the state-owned railroad sued Alabama for damages in federal court under FELA. The state raised the eleventh amendment defense. However, Justice Brennan, writing for the majority, held that the state’s subsequent entry into an area already subject to federal regulation providing for private damage suits in federal court, constituted a constructive waiver of its eleventh amendment immunity.

370. 780 F.2d 1268 (5th Cir. 1986) (rehearing en banc led to a reversal of previous decision on same issue in 739 F.2d 1034 (5th Cir. 1984)).
371. 107 S. Ct. at 2947.
372. See infra notes 395-401 and accompanying text.
374. Id. at 2947.
375. Id. at 2946. Justice Powell stated that “the question of whether the State of Texas has waived its Eleventh Amendment immunity is not before us.”
376. Id.
377. Id. at 2948.
379. Id. at 192-93. Parden introduced the concept of “constructive consent” into eleventh amendment analysis respecting congressional enactments. However, in Petty v. Tennessee-Missouri Bridge Comm’n, 359 U.S. 275 (1959), the Court first adopted the notion that states may impliedly consent to be sued for damages by private plaintiffs in federal court. There, the Court held that the states of Tennessee and Missouri waived their eleventh amendment immunity by joining in an interstate compact subject to Congress’s approval. Id. at 281-82. The sue-and-be-sued clause in the compact was sufficiently clear for the Petty Court to imply that the states, in accepting the interstate compact, consented to be sued for damages by private plaintiffs in
Parden's holding may be understood as an application of a nascent bilateral framework: (1) the determination that Congress authorized private damage suits against states in federal court under FELA; and (2) the determination that the state, through its independent actions, consented to those suits in federal court. Read this way, Parden arguably supports the principle that Congress's power to create federal jurisdiction over private damage actions against states in an exercise of the commerce clause power is limited by a state's independent right to consent, or to withhold consent, to such jurisdiction.

However, the Parden rationale underlying the holding contains a certain logical problem, or a "schizophrenic approach," as Professor Tribe has called it. On the one hand, Justice Brennan maintains that the power of Congress under the commerce clause is absolute, and on the other, that the eleventh amendment both applies to and limits this power. Thus, the holding would seem to be in tension with its supporting rationale.

Perhaps the key to understanding Parden is the recognition of two very different kinds of state sovereignty. The difference between "common law sovereign immunity," and the constitutional immunity of the eleventh amendment has been offered as one solution. When Justice Brennan writes that the "States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," he seems to be referring to the common law sovereign immunity that the states surrendered to the federal government in the ratification of the Constitution. The surrender of this fundamental attribute of sovereignty permitted Congress to regulate the states, and, within certain constitutional limits, to create substantive rights in private plaintiffs against the states.

However, what the states surrendered in the ratification of the Constitution would not necessarily have included the jurisdictional protection for states expressed in the eleventh amendment: immunity from compulsory private

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federal court. Id. at 280. Hence, the introduction of constructive consent into eleventh amendment jurisprudence. The Supreme Court has recently expressed a strong disfavor for the notion of constructive consent in eleventh amendment law. See Welch, 107 S. Ct. at 2945; Atascadero, 473 U.S. at 238 n.1. 380. 377 U.S. at 190. 381. Id. at 192. 382. Tribe, supra note 6, at 688. 383. 377 U.S. at 191-92 (quoting United States v. California, 297 U.S. 175, 184-85 (1936)). 384. Id. at 192. 385. See Employees, 411 U.S. at 280-81 n.1 ("common law sovereign immunity" is distinguished from eleventh amendment immunity); id. at 287-88 (Marshall & Stewart, J.J., concurring in the result) (concurrence based on distinction between common law sovereign immunity and eleventh amendment immunity). See also Brown, Beyond Pennhurst, supra note 16, at 364; Comment, Implied Waiver of a State's Eleventh Amendment Immunity, 1974 Duke L.J. 925, 942-50. 386. 377 U.S. at 191.
damage suits in federal court.\textsuperscript{387} Alternatively, if such protection were included in that set of powers initially surrendered, it was arguably taken back by the states in the ratification of the eleventh amendment in 1795.\textsuperscript{388} \textit{Parden} certainly suggests the former, if not the latter historical theory.\textsuperscript{389} Without at least the distinction between what was surrendered at the Constitution's ratification and what the eleventh amendment represents, logically it is impossible to explain why something which has been surrendered could have any effect on the commerce power of Congress. Yet, \textit{Parden} explicitly stated that the eleventh amendment is "not here being overridden."\textsuperscript{390} Moreover, insofar as \textit{Parden} implicitly measured whether the state's independent actions constituted the state's consent,\textsuperscript{391} it implied that the state had an immunity to be consented away in relation to a congressional enactment under the commerce clause. Such an interpretation of \textit{Parden} is specifically reinforced by the statement in the text of the opinion that "it remains the law that a State may not be sued by an individual without its consent."\textsuperscript{392} In addition, the above language appears after the discussion of the "plenary" commerce power,\textsuperscript{393} which suggests that while the commerce power is, within certain limits, plenary regarding the creation of substantive rights in private plaintiffs against states, it is not necessarily plenary regarding the creation of federal jurisdiction over the enforcement of those rights against states.

Nothing in the \textit{Parden} decision would necessarily preclude a limit of the kind contemplated by this Article in circumstances where a state has already entered an area which subsequently becomes federally regulated with provision for federal jurisdiction over private damage suits against states. Indeed, it can reasonably be argued that had the state already entered the railroad industry at the time Congress enacted FELA, no independent state consent could be found. The state could not be said to have had any prior knowledge of the possibility of private damage suits in federal court, because the statute authorizing such suits would not yet have been in existence; but neither could the state be said to have voluntarily consented to clear congressional authorization of such suits by its continuance in the regulated activity, where

\textsuperscript{387} See \textit{Employees}, 411 U.S. at 288 (Marshall & Stewart, JJ., concurring in the result) (constitutional protection represented by the eleventh amendment was not among those things surrendered to federal government in ratifying the Constitution).

\textsuperscript{388} On the theory that if the constitutional protection represented by the eleventh amendment was surrendered by the states to the federal government in the ratification of the Constitution, it was certainly taken back by them in the adoption of the eleventh amendment.

\textsuperscript{389} 377 U.S. at 192. Justice Brennan also said later in the opinion that "[a] State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh Amendment and by subsequent decisions of this Court." \textit{Id.} at 196. However, Justice Brennan has dramatically changed his views about the eleventh amendment. \textit{See}, \textit{e.g.}, \textit{Welch}, 107 S. Ct. at 2958 (Brennan, J., dissenting).

\textsuperscript{390} \textit{Id.} at 192.

\textsuperscript{391} \textit{Id.}

\textsuperscript{392} \textit{Id.} (emphasis added).

\textsuperscript{393} \textit{Id.}
the state had already committed personnel and resources to the activity.\textsuperscript{394}

Nine years after \textit{Parden}, the Court decided \textit{Employees},\textsuperscript{395} another difficult and enigmatic decision. The \textit{Employees} Court held that Congress had not spoken with sufficient clarity in amending § 16(b) of the Fair Labor Standards Act of 1938\textsuperscript{396} to authorize federal jurisdiction over private damage suits against state governments.\textsuperscript{397} Language in \textit{Employees} seemed to suggest that Congress could "lift"\textsuperscript{398} the eleventh amendment immunity of a state and force that state to defend a private damage suit in federal court. In a footnote, however, \textit{Employees} recognized the bilateral framework of congressional authorization and independent state consent predicated in \textit{Parden}.\textsuperscript{399}

While \textit{Employees} explicitly specified that Congress must speak clearly to authorize federal jurisdiction over private damages suits against state governments,\textsuperscript{400} it was reticent on the state consent side of the bilateral framework. The absence of any discussion of state consent does not, however, necessarily imply that \textit{Employees} had abandoned the bilateral framework of \textit{Parden}. On the contrary, this silence is explicable in terms of the bilateral framework: since no congressional authorization of private damage suits in federal court in the 1966 FLSA Amendments had occurred, no need existed for the \textit{Employees} Court to address the issue of independent state consent.\textsuperscript{401} That Congress had not even authorized federal jurisdiction over private damage suits against states in the FLSA is thus the only interpretation of \textit{Employees} which confines itself to the holding.

In contrast to the position of this Article, Professor Field has advanced an interpretation of \textit{Employees} which assumes that the Court eschewed any notion that state consent was a meaningful, independent predicate of eleventh amendment analysis.\textsuperscript{402} She assumed that the only satisfying interpretation of \textit{Employees} was one which "imput[ed] to the states a fictional consent when [the Court] finds that Congress has imposed [private] suit" against states in federal court.\textsuperscript{403} There are problems with Professor Field's interpretation, not the least of which is its assumption that the issue of state consent had been reached by the \textit{Employees} Court. Under her analysis, the concept of "fictional consent" is assumed to be consistent with \textit{Parden}'s notion of state consent; such fictional consent would be satisfied simply by the state's continuance in the activity subsequently made subject to federal

\begin{itemize}
  \item \textsuperscript{394} See \textit{Employees}, 411 U.S. at 296-97 (Marshall & Stewart, JJ., concurring in result).
  \item \textsuperscript{395} 411 U.S. 279 (1973).
  \item \textsuperscript{396} 29 U.S.C. §§ 203(d), (s)(4) (1964 ed., Supp. II).
  \item \textsuperscript{397} 411 U.S. at 285.
  \item \textsuperscript{398} \textit{Id.} at 285-86.
  \item \textsuperscript{399} \textit{Id.} at 280-81 n.1.
  \item \textsuperscript{400} \textit{Id.} at 285.
  \item \textsuperscript{401} See \textit{Skover, Phoenix Rising}, supra note 16, at 300.
  \item \textsuperscript{402} Field, \textit{Part Two}, supra note 6, at 1218.
  \item \textsuperscript{403} \textit{Id.}
\end{itemize}
regulation providing for private damage suits against states in federal court.404

Parden’s notion of state consent, however, may be interpreted to require that the state’s entry into an area already subject to federal regulation be both knowing and voluntary.405 In Employees on the other hand, Missouri was already engaged in the activity of running hospitals and schools when Congress regulated that activity in an exercise of the commerce clause power;406 the state had already committed personnel and resources to the activity before Congress legislated the 1966 FLSA Amendments. By implying that the predicate of state consent could be satisfied under such circumstances, Professor Field’s reading of Employees is not only inconsistent with Parden, but would effectively emasculate the eleventh amendment in its relationship to the commerce power.

Professor Tribe suggests that Employees necessarily “reaffirmed Congress’ power to bring ‘the States to heel, in the sense of lifting their immunity from suit in a federal court’ . . . ”407 However, this view rests on questionable assumptions about the Parden decision. Indeed, in acknowledging its “schizophrenic approach,”408 Professor Tribe implicitly admits that Parden may be read for the proposition that independent state consent is a necessary predicate in eleventh amendment analysis. Interpreted in terms of the holding, Employees therefore stands only for the proposition that Congress had not authorized federal jurisdiction over private damage suits against states in the FLSA;409 the first prong of the bilateral framework had not been satisfied. The language about bringing the states “to heel” on which Professor Tribe’s view of Employees fundamentally rests410 therefore is dicta. If Congress may “lift” a state’s eleventh amendment immunity in an exercise of its commerce clause power, as Professor Tribe has maintained, not only would Employees arguably contradict Parden, but Fitzpatrick too.411

IV. Atascadero’s Implications For A Bilateral Framework

The discussion of Atascadero State Hospital v. Scanlon412 in Union Gas IP413 and McVey414 assumes that Congress, so long as it speaks clearly, may compel a state to defend a private damage suit in federal court, regardless of any consent by the state, and irrespective of the source of constitutional power used by Congress. Far from necessarily invalidating the concept of

404. Id. at 1214-18.
405. See supra notes 391-94 and accompanying text.
407. Tribe, supra note 6, at 689.
408. Id. at 688.
409. See supra note 401 and accompanying text.
410. Id. at 689.
411. See 427 U.S. at 456. See infra notes 505-08 and accompanying text.
413. See 832 F.2d at 1345-46.
414. See 812 F.2d at 324-26.
independent state consent, *Atascadero*, however, both directly and indirectly supports it.\(^{415}\) Directly confirming *Fitzpatrick'*s constitutional distinction between article I and fourteenth amendment power,\(^{416}\) *Atascadero* suggests that while the states' eleventh amendment protection may have been diminished regarding the fourteenth amendment, that protection has not been diminished regarding article I power. *Atascadero*, in the final analysis, thus supports the bilateral framework for the commerce clause inherent in *Welch, Parden* and *Employees*,\(^{117}\) and more generally contains the outlines of a general framework for analyzing eleventh amendment issues concerning congressional power.

**A. Independent State Consent and Congressional Power**

In *Atascadero*, a private plaintiff sought damages, among other relief, against a state in federal court under section 504 of the Rehabilitation Act of 1973.\(^ {418}\) The state raised the defense that the eleventh amendment barred the federal court from entertaining the plaintiff's claims.\(^ {419}\) The district court agreed with the eleventh amendment argument, and granted the state defendant's motion to dismiss for lack of federal jurisdiction.\(^ {420}\) After the federal court of appeals reversed the district court,\(^ {421}\) the state appealed to the Supreme Court. The Court, led by Justice Powell, reversed the federal appellate court, and held that the eleventh amendment, which embodied fundamental constitutional interests of states,\(^ {422}\) barred the federal court from hearing private damage suits under the above federal statute, regardless of whether that statute was passed in an exercise of the article I power to spend for the general welfare,\(^ {423}\) or the enforcement power of the fourteenth amendment.\(^ {424}\) The *Atascadero* Court was not compelled to address the issue

\(^{415}\) Id. at 246-47. Id. at 247 ("clear [congressional] intent" and "State's consent to waive its [eleventh amendment] immunity") (emphasis added).

\(^{416}\) Id. at 242-43.

\(^{417}\) See *supra* notes 366-411 and accompanying text.


\(^{419}\) 473 U.S. at 236.

\(^{420}\) Id.

\(^{421}\) Scanlon v. Atascadero State Hosp., 735 F.2d 359 (9th Cir. 1984), rev'd, 473 U.S. 234 (1985). It should be noted that the Ninth Circuit previously held in the state defendant's favor, on the ground that § 504 of the Rehabilitation Act, 29 U.S.C. § 794, was inapplicable unless the provision of employment was the primary objective of the federal financial assistance at issue. See Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982). In *Atascadero State Hosp. v. Scanlon*, 465 U.S. 1095 (1984), the Supreme Court vacated this judgment, and remanded in light of *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984).

\(^{422}\) 473 U.S. at 238. In the text of the opinion, Justice Powell stated that the eleventh amendment "implicates the fundamental constitutional balance between the Federal Government and the States." In a considerable footnote, Justice Powell explained eleventh amendment doctrine as "necessary to support the view of the federal system held by the Framers of the Constitution." Id. at 238-40 n.2.

\(^{423}\) Id. at 247.

\(^{424}\) Id. at 246.
of whether the federal statute was passed pursuant to the spending clause or the fourteenth amendment enforcement power, since Congress, by not speaking clearly, failed to authorize federal jurisdiction over private damage suits against state government in any case.425

That the Atascadero Court did not explicitly discuss the concept of independent state consent does not necessarily suggest that it had abandoned it. If the Rehabilitation Act of 1973 represented an exercise of the article I spending clause power, any discussion of independent state consent may have been unnecessary under the bilateral framework. Since the Act failed to authorize federal jurisdiction over private damage suits against state government,426 Congress had not intended to "abrogate" the state's eleventh amendment immunity.427 Since no abrogation was intended, the Court was thus not required to address whether the state had voluntarily "consented to the abrogation of [its eleventh amendment] immunity"428 by accepting funds under the statute.

Atascadero's requirement of clear congressional authorization for spending power analysis does not necessarily suggest that Congress may "condition participation in the programs funded [in a spending power package] on a State's consent to waive its constitutional immunity,"429 just so long as its speaks clearly. If Congress possessed such power, one might argue that Atascadero rendered any notion of independent state consent in the prior cases of Parden and Employees, if not theoretically invalid, practically meaningless. However, Atascadero may provide no basis for making any inferences on the issue, since no need existed to address the issue of Con-

425. The Atascadero Court did not have to decide the issue of what specific enumerated power the Congress used in passing the Rehabilitation Act of 1973. One might suspect that such an analysis will have implications for the controversy over the so-called Katzenbach power of the Congress. Katzenbach v. Morgan, 384 U.S. 641 (1966). Were the Court forced to decide what power the Congress used in enacting federal legislation, the Court would have to develop a set of criteria respecting what constitutes a reasonable use of that particular power. Inherent within such criteria will be judgments as to the boundaries of the source of the power, i.e., U.S. Const. amend. XIV, sec. 5. The Court could then begin to establish the parameters of what Justice Powell has called "the usual constitutional balance between the States and the Federal Government." 473 U.S. at 242. It might then be possible to begin to reconcile the vision of Jefferson with the Civil War Amendments born in the era of Lincoln.

426. Id. at 247.

427. In Edelman, 415 U.S. at 672, Justice Rehnquist used the terminology of "abrogation" to refer to the Congress's intention to authorize private damage suits against states in federal court.

428. 415 U.S. at 672.

429. 473 U.S. at 247. Indeed, this language in Atascadero appears to suggest that the Congress possesses such a power: "[t]he Act likewise falls short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." Professor Brown has argued that Atascadero necessarily suggests that the Court would "find a waiver by the state of its eleventh amendment protection" from clear congressional authorization of private damage suits in federal court in the statute's face, regardless of whether the state's acceptance of the monies was truly voluntary. See Brown, State Sovereignty, supra note 14, at 385.
gress's power under the spending clause in relation to the eleventh amendment. One would suspect, moreover, that the doctrine of unconstitutional conditions would provide a strong argument against any inference of Congress's absolute power to condition a state's receipt of benefits on the relinquishment of its constitutional rights under the eleventh amendment.\footnote{430}

On the other hand, if \textit{Atascadero} implies that Congress possesses such power to condition for spending clause enactments, this would not necessarily imply a similar power for enactments under the commerce clause. While the spending clause power is inherently bilateral, the commerce clause is inherently coercive. While a state arguably makes a knowing and voluntary decision to give up its rights under the eleventh amendment in accepting "money and benefits" in a spending power package, nothing analogous can be said about the situation in the commerce clause context. On this basis, a different nature and degree of state action could reasonably be required to constitute independent state consent in commerce clause analysis. Thus, eleventh amendment analysis for spending clause enactments and commerce clause enactments might significantly differ, yet still be logically accommodated within the notion of independent state consent. Thus, \textit{Atascadero} does not necessarily mean that Congress could "condition, in an exercise of the commerce clause, a state's continuation in a regulated area on the state's waiver of its eleventh amendment immunity, if that state had already committed personnel and resources to that activity as in \textit{Employees}.\footnote{431}

Moreover, \textit{Atascadero}'s clear congressional authorization requirement might be justified in terms of an aspect of independent state consent: a state's knowledge. Clarity in the spending power statute's face, as opposed to clarity in legislative history, could function in the bilateral framework to put the state on notice of the possibility of federal jurisdiction over private damage suits, should it decide to accept funds under the statute.\footnote{432} California could not have had knowledge of any possible federal jurisdiction over private damage suits against it arising out of the Rehabilitation Act,\footnote{433} since the facial terms of the Act were unclear in this respect. Far from implying the absolute power of Congress to create federal jurisdiction over private damage suits against states, the "clear statement rule" may represent the subordination of Congress's clear will to a state's independent right to consent to federal jurisdiction for article I enactments. In this sense, \textit{Atascadero} confirmed one essential aspect of the earlier case of \textit{Edelman}.\footnote{434}

Furthermore, the \textit{Atascadero} Court may have implicitly acknowledged the principle of independent state consent in eleventh amendment analysis when

\footnotesize{\begin{itemize}
\item \footnote{430} See generally Hale, \textit{Unconstitutional Conditions and Constitutional Rights}, 35 \textit{COLUM. L. REV.} 321 (1935).
\item \footnote{431} See supra notes 402-06 and accompanying text.
\item \footnote{432} Brown, \textit{State Sovereignty}, supra note 14, at 388 (clarity in the face of the spending power statute "provides the . . . assurance that the state knows what it is getting into").
\item \footnote{433} 473 U.S. at 246.
\item \footnote{434} 415 U.S. 651 (1974). See infra notes 452-58 and accompanying text.
\end{itemize}}
it stated: "we consider the position . . . that the State consented to suit in
federal court by accepting funds under the Rehabilitation Act." Subsequ-
ently, Atascadero stated: (1) "the mere receipt of federal funds cannot
establish that a State has consented to suit in federal court;" (2) "there
was no indication that the State . . . consented to federal jurisdiction." In
characterizing the analysis of the lower court, the Court stated, moreover,
that "by focusing on whether the State consented to federal jurisdiction it
engaged in analysis relevant to Spending Clause enactments." Atascadero's
direct citations to Edelman also suggest that a state's actions in accepting
funds under a spending statute must be both knowing and voluntary to
constitute independent consent in the bilateral framework. Thus, it may be
hazardous to conclude that Atascadero necessarily inferred state consent as
an independent element of a bilateral framework.

In Edelman v. Jordan, decided in 1974, a private plaintiff filed a class
action against Illinois in federal court, based on alleged federal constitutional
and statutory violations by state officials in implementing the federal-state
program of the Aid to the Aged, Blind or Disabled (AABD), funded under
the Social Security Act, enacted pursuant to the article I spending clause
power. The plaintiff class sought equitable relief for all "AABD benefits
wrongfully withheld," relief which would run directly against the state
treasury. The state had not raised the eleventh amendment defense in the
district court. The district court issued an injunction which required the
payment of damages from the state treasury. The Seventh Circuit affirmed
this injunction over the eleventh amendment based objections of the state
defendants raised on appeal.

Justice Rehnquist, for a majority of the Court, reversed that portion of
the Seventh Circuit's order requiring payment of damages from the state
treasury. To create federal jurisdiction over what was essentially a private

435. 473 U.S. at 246.
436. Id. at 246-47 (emphasis added).
437. Id. at 247 (emphasis added).
438. Id. at 246 n.5 (emphasis added).
439. 473 U.S. at 247 (citing 415 U.S. 651 (1974)).
440. See infra notes 452-58 and accompanying text.
441. See infra notes 459-62 and accompanying text.
442. See Skover, Phoenix Rising, supra note 16, at 301 n.106. Professor Skover has stated
in this connection that the cases of Atascadero and Edelman "should not be understood to
take any affirmative stance against a second element in a two-pronged Eleventh Amendment
test that would require evidence of a state's independent waiver of immunity by explicit or
constructive consent."
446. 415 U.S. at 656.
447. Id. at 677.
448. Id. at 656.
damage suit against the state, he suggested that there must be both clear congressional authorization of federal jurisdiction over those suits against states and a state's independent consent to such jurisdiction.\textsuperscript{450} Thus, he explicitly confirmed the existence of a bilateral framework for the article I spending clause power.\textsuperscript{451}

Justice Rehnquist went on to say that the "mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts."\textsuperscript{452} Neither the AABD program, nor any provision of the Social Security Act which funded it,\textsuperscript{453} authorized federal jurisdiction over states for private damage suits arising out of the package.\textsuperscript{454} \textit{Edelman} thus implied, as \textit{Atascadero} did,\textsuperscript{455} that what the state knows from the relevant statute or statutes concerning the possibility of private damage suits in federal court is vitally important. Justices Marshall and Stewart in separate concurrence to \textit{Employees} directly confirmed this connection between the two elements of the bilateral framework in the context of the commerce clause power.\textsuperscript{456} Where Congress had not clearly authorized federal jurisdiction over private damage suits against state governments, they explained, the state government

\begin{itemize}
\item \textsuperscript{450} 415 U.S. at 672. Justice Rehnquist used different terminology, yet in this author's opinion meant the very same thing. He specifically stated that "[t]he question of waiver or consent under the Eleventh Amendment was found in \textit{Parden and Employees} to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of the immunity." (emphasis added).
\item \textsuperscript{451} Justice Douglas's dissent in \textit{Edelman} argued that the \textit{Edelman} plaintiffs were suing under 42 U.S.C. § 1983 on an equal protection theory to vindicate their rights guaranteed by the AABD statute, and implied that the eleventh amendment for that reason ought not to operate as a jurisdictional bar, 415 U.S. at 678-79. Because § 1983 makes no specific mention of private damage suits against states in federal court, it could not operate, in any case, to remove a state's eleventh amendment immunity. Indeed, the Court subsequently held that § 1983 does not operate to negate the states' eleventh amendment protection from compulsory private damage suits in federal court. \textit{Quern}, 440 U.S. at 345. Since the \textit{Edelman} plaintiffs sought relief payable directly from the state treasury, § 1983 was of no help to them. Justice Douglas did not, moreover, address the argument that § 1983 is a general remedial statute. Without the constitutional power to remove unilaterally the states' eleventh amendment immunity in an exercise of article I power, the Congress could not, it would seem, by means of a general remedial statute such as § 1983, allegedly passed pursuant to the fourteenth amendment, circumvent the eleventh amendment to compel states to defend private damage suits in federal court based on substantive rights derivative from article I statutes and outside the scope of the civil rights concerns of the fourteenth amendment. Indeed, Justice Rehnquist noted in \textit{Quern} that "extending § 1983 liability to States obviously \textit{would} place 'enormous fiscal burdens on the States.'" 440 U.S. at 344-45 n.16 (emphasis in original).
\item \textsuperscript{452} 415 U.S. at 673.
\item \textsuperscript{453} 42 U.S.C. §§ 1381-85.
\item \textsuperscript{454} 415 U.S. at 674.
\item \textsuperscript{455} See supra notes 432-33 and accompanying text.
\item \textsuperscript{456} 411 U.S. at 287-88.
\end{itemize}
could not be held to have "legal notice" of the possibility of such federal jurisdiction. Dissenting in *Parden*, Justice White essentially made this same point in arguing that waiver of constitutional rights must be both knowing and intelligent.\(^4\)\(^5\)\(^6\)

In analogizing state consent under the eleventh amendment to a "surrender of constitutional rights,"\(^4\)\(^5\)\(^7\) Justice Rehnquist in *Edelman* implied that state consent must be *voluntary*, as well as knowing, to waive eleventh amendment protection. In their concurrence to *Employees*, Justices Marshall and Stewart recognized that *Parden*'s concept of implied state consent approximated "the sort of voluntary choice which we generally associate with the concept of constitutional waiver."\(^4\)\(^6\)\(^8\) One commentator has suggested that "[b]y implying that the eleventh amendment guarantees a constitutional right that must be waived voluntarily, the Court hints at an analysis that would make [eleventh amendment immunity] almost impregnable to congressional attack."\(^4\)\(^6\)\(^9\) By suggesting that state consent must be voluntary, as well as knowing, Justice Rehnquist in *Edelman*, and Justices Marshall and Stewart in their concurrence to *Employees*, have necessarily established the independence of the state consent requirement of the bilateral framework from the clear congressional authorization requirement. For the reasons stated above, *Atascadero* supports this conclusion.\(^4\)\(^6\)\(^2\)

**B. Differentiation of Congressional Power**

One marked deficiency of *Union Gas II*,\(^4\)\(^6\)\(^3\) *McVey*,\(^4\)\(^6\)\(^4\) and the congressional supremacist view more generally, has been the inability to recognize the constitutional distinction in sources of congressional power, and assess its significance for an affirmative limit on congressional power to create federal jurisdiction over state government.\(^4\)\(^6\)\(^5\) *Atascadero* clearly separated its eleventh amendment analysis under the spending clause power, an article I power,\(^4\)\(^6\)\(^6\) from that under the fourteenth amendment enforcement power.\(^4\)\(^6\)\(^7\) It thus suggested that the two broad sources of congressional power, article I and the fourteenth amendment, are fundamentally different: in the former, the bilateral framework of clear congressional authorization and independent

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457. *Id.* at 296.
458. 377 U.S. at 200 (footnote omitted).
459. 415 U.S. at 673.
460. 411 U.S. at 296 (emphasis added).
462. *See supra* notes 427-42 and accompanying text.
463. *See* 832 F.2d at 1351-53.
464. *See* 812 F.2d at 319-21.
465. *But see* Brown, *State Sovereignty*, *supra* note 14, at 393 n.244. Professor Brown has said that while he once believed that the distinction in the source of congressional power to create federal jurisdiction over private damage suits against states "made sense," "it is no longer tenable after *Atascadero*.
466. 473 U.S. at 246-47 (spending clause analysis).
467. *Id.* at 242-46. *See also id.* at 244-45 n.4, 246 n.5.
state consent applies; and in the latter, the unilateral framework of clear congressional authorization applies.

If "Congress can abrogate the Eleventh Amendment without the States' consent" in an exercise of section five of the fourteenth amendment, Atascadero implied that Congress's power in the exercise of other sources of power would be limited by "the States' consent." Where the "usual constitutional balance between States and the Federal Government," i.e. article I power, Atascadero suggested that congressional power would be subject to the full force of the eleventh amendment. Atascadero thus may be viewed as a tacit rejection of the "congressional supremacist" position; and further, as a decision after Garcia, a tacit rejection of the recently expressed view that Garcia renders the source of constitutional power issue unimportant. Atascadero quoted language from Fitzpatrick v. Bitzer which more directly suggests that Congress may not subject unconsenting states to private damage suit in federal court in an exercise of article I power. Atascadero thus could be said to guard the territory of the other affirmative limits on federal power over states to which the Garcia Court referred.

In Fitzpatrick, private plaintiffs brought a damage suit against a state in federal court under the 1972 amendments to Title VII of the Civil Rights Act of 1964. One of the major issues was whether Congress possessed the power under the enforcement clause of the fourteenth amendment to subject states to private damage suits in federal court, irrespective of independent state consent. The Court held that Congress possessed such power, but did not explicitly state how clearly Congress must speak in order to remove a state's eleventh amendment immunity. Later, Quern v. Jordan indicated

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468. Id. at 246 n.5 ("by focusing on whether the State consented to federal jurisdiction it engaged in analysis relevant to Spending Clause enactments.").
469. Id. at 238 ("when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent.").
470. Id.
471. Id.
472. Id. at 242.
473. While McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) implied that Congress's power under the "necessary and proper" clause was unlimited, that clause is located in article I, and like the commerce clause and other founts of power in article I, would therefore be subject to the constitutional restraints of the eleventh amendment.
474. See Brown, State Sovereignty, supra note 14, at 393.
476. 473 U.S. at 243 (quoting 427 U.S. at 556).
477. 469 U.S. at 556. But see Brown, State Sovereignty, supra note 14, at 393 (eleventh amendment affirmative limitation on the commerce clause consistent with Fitzpatrick means that "Atascadero and Garcia will indeed be in conflict").
479. 427 U.S. at 448.
480. Id. at 456.
that, in an exercise of the fourteenth amendment enforcement power, Congress must express its intention to remove the states' eleventh amendment protection clearly in the face of the statute.482

In the opinion, Justice Rehnquist was careful to distinguish Congress's power under the commerce clause from its power under the fourteenth amendment enforcement provision.483 He made it absolutely clear that the 1972 amendments to Title VII of the Civil Rights Act of 1964 were passed pursuant to the fourteenth amendment enforcement clause, and not the commerce clause power.484 His insistence on distinguishing the power of Congress under the commerce clause from that under the fourteenth amendment enforcement clause,485 combined with some strong language at the end of the opinion,486 suggests that the result of the eleventh amendment analysis conducted for the fourteenth amendment would not have been the same for the commerce clause. In this respect, it might be argued that Fitzpatrick prefigured Justice Powell's conception of the "usual constitutional balance"487 in Atascadero.

Clearly implicit in this developing area of eleventh amendment law is the suggestion that the particular source of congressional power used to authorize suit raises different issues, depending on that source's relationship to the eleventh amendment. In Fitzpatrick, Justice Rehnquist wrote the following: "[w]e 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."488 In essence, Justice Rehnquist confined congressional power to subject unconsenting states to private damage suit in federal court to the fourteenth amendment.489 Thus, he suggested that a commerce clause statute is not in pari materia with a fourteenth amendment enforcement power statute for purposes of the eleventh amendment.

The distinction in the source of congressional power appears to rest on a diminution of eleventh amendment state sovereignty, effected in the states'
ratification of the fourteenth amendment.\textsuperscript{490} The relevant language in the opinion is the following: "The [Title VII] legislation... was grounded on the expansion of Congress’ powers—with the corresponding diminution of state sovereignty [eleventh amendment based]—found to be intended by the Framers and made part of the Constitution upon the States’ ratification of the Civil War Amendments..."\textsuperscript{491}

The Seventh Circuit in \textit{McVey} argued that plenary grants of power to Congress are equal limitations on state sovereignty.\textsuperscript{492} Thus, it argued that there was no difference between the plenary powers of the commerce clause in article I, and section five of the fourteenth amendment.\textsuperscript{493} This is not necessarily so. In regard to the plenary powers in article I of the Constitution, the chronologically subsequent eleventh amendment could reasonably be interpreted as a constitutional limitation on those plenary powers.\textsuperscript{494} The eleventh amendment may thus be interpreted as an effort by the states either to take back a particular attribute of state sovereignty, or to articulate and ensconce in a constitutional amendment an attribute of state sovereignty, respecting exercises of article I power. Moreover, that state governments could cede certain elements of their sovereignty respecting one plenary power but not the other is not an unreasonable proposition. That the states ceded some or all of their eleventh amendment protection respecting the fourteenth amendment is supported by not only the chronological fact that the fourteenth amendment was adopted after the eleventh amendment, but also by the fact that it was intended as a curtailment of existing state sovereignty to protect certain categories of constitutionally guaranteed individual rights. Far from representing an exercise in arbitrarily "read[ing] the Constitution on a timeline,"\textsuperscript{495} reading \textit{Fitzpatrick} to distinguish Congress’s power under the fourteenth amendment from its power under article I is reasonable, defensible constitutional interpretation.

\textsuperscript{490} 427 U.S. at 456 (citations omitted). See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, \textsc{Hart & Wechsler’s The Federal Courts and the Federal System} 231 (1981 Supp.) (suggesting that \textit{Fitzpatrick} was rightly decided because, as a predicate to congressional power to abrogate the eleventh amendment, the state legislatures have generally surrendered their eleventh amendment immunity in a ratification process, article V.). See Note, \textit{The Eleventh Amendment and State Damage Liability Under the Rehabilitation Act of 1973}, 71 VA. L. REV. 655, 668 (1985) ("The \textit{[Fitzpatrick]} Court implied that state consent to suit is unnecessary because the states had already waived a portion of their eleventh amendment immunity by ratifying the fourteenth amendment."). \textit{See also} Baker, \textit{supra} note 6, at 171.

\textsuperscript{491} \textit{Id.} at 455-56.

\textsuperscript{492} 812 F.2d at 321.

\textsuperscript{493} \textit{Id.}

\textsuperscript{494} In the \textit{Employees} litigation, the Eighth Circuit stated that "[t]o the extent that any inconsistency exists between the powers granted by the Commerce Clause and the Eleventh Amendment, the Eleventh Amendment as the more recent expression of the will of the people should prevail." 452 F.2d 820, 825 (8th Cir. 1971). Supporting this kind of constitutional interpretation, see Casto, \textit{The Doctrinal Development of the Tenth Amendment}, 51 W. VA. L. Q. 227, 228-29 (1949).

\textsuperscript{495} \textit{Union Gas II}, 832 F.2d at 1351.
Union Gas II argued, relying on McVey, that article I power and the fourteenth amendment were not distinguishable on the basis of the latter’s explicit reference to states. However, the explicit reference to states in the fourteenth amendment only buttresses the theory, implicit in Fitzpatrick, that the states surrendered a portion of their eleventh amendment protection in ratifying the fourteenth amendment. "[S]tates of the union still possess[] attributes of sovereignty . . . save where there has been 'a surrender of the immunity' . . . ." Moreover, that the states would have surrendered a portion of the eleventh amendment protection in ratifying the fourteenth amendment makes structural sense. If the fourteenth amendment were confinable to civil rights concerns, the states' surrender of their eleventh amendment immunity in the fourteenth amendment context would have a limited effect on eleventh amendment protection for states more generally, and consequently, a limited effect on the distribution of power in the federal union. If the enforcement power of the fourteenth amendment is properly limited to civil rights concerns, the area in which federal courts could assert jurisdiction over compulsory private damage suits against state government would become well defined, and over time familiar to state government. In Atascadero, Justice Powell explicitly indicated that the eleventh amendment, by limiting the federal judicial power over state government, contributed to a balance of power between the states and the federal government.

Fitzpatrick did not indicate the extent to which eleventh amendment state sovereignty had been diminished in the ratification of the Civil War Amendments. Recent cases have, however, indicated that it has been diminished to the extent that state consent is irrelevant in the fourteenth amendment power context. The fact that the fourteenth amendment does not ex proprio vigore abrogate eleventh amendment protection for states might suggest that there is still some eleventh amendment protection to be respected in the fourteenth amendment context. Because the states do not have the right to consent independently to federal jurisdiction under the fourteenth amendment enforcement power, the protection they retain might be the right to clear congressional authorization, on the statute's face, of federal jurisdiction over private damage suits against them. If eleventh amendment protection were entirely surrendered by the states in the ratification of the fourteenth amendment, clear congressional authorization must be justified on principles

496. Id. at 1352.
497. 812 F.2d at 321.
498. E.g., "No State" and "nor shall any State." U.S. Const. amend. XIV.
500. Atascadero, 473 U.S. at 238 n.2.
501. 473 U.S. at 238.
502. Congress must express a clear intention to remove the states' eleventh amendment immunity even when acting pursuant to the fourteenth amendment. Quern, 440 U.S. at 345. Thus, the fourteenth amendment does not by itself operate to remove the states' eleventh amendment immunity.
independent from the eleventh amendment. Thus, this requirement in the fourteenth amendment context may not be justified in terms of independent state consent as in the article I context. Nevertheless, it may be underpinned by the principle that federal courts must guard against expansion in their own jurisdiction.

Conversely, the rationale of Fitzpatrick suggests that, because there is no diminution of eleventh amendment state sovereignty in respect to article I of the Constitution, the locus of the spending and commerce clause powers, those powers are fully subject to it. Because no diminution of eleventh amendment based state sovereignty has occurred in respect to article I, as it has in respect to the Civil War Amendments, Congress could not, in an exercise of either commerce or the spending clause powers, constitutionally subject states to private damage suit in federal court irrespective of independent state consent. Where the "usual constitutional balance" between the states and federal government obtains, as Justice Powell phrased it in Atascadero, Congress may not unilaterally strip them of their constitutionally guaranteed eleventh amendment protection. Indeed, Parden would support this interpretation of Atascadero and Fitzpatrick, insofar as it suggested that Congress must respect the principle of independent state consent in the commerce clause context. If the reading advanced by this Article is valid, Fitzpatrick has clearly invalidated those interpretations of Employees which assume that Congress, in an exercise of the commerce clause power, may either "impose a waiver" of eleventh amendment immunity, or may unilaterally "lift" eleventh amendment protection.

V. Express State Consent?

If it reverses Union Gas II, the Court will be faced with the problem of choosing an approach to determining state consent. An implied waiver approach to eleventh amendment issues governing congressional power may be one reconciliation of existing eleventh amendment cases, as it preserves what seems essential to the eleventh amendment: a state's independent right to consent, or to withhold consent. I agree with Professor Skover that an
express waiver approach may offer another approach to reconciling the eleventh amendment case.\footnote{511} Under an implied waiver approach, independent state consent is a necessary condition to the creation of federal jurisdiction over private damage suits against state government arising out of the commerce clause regulations.\footnote{512} Assuming no other basis for state consent exists, as in state constitutional or statutory waiver, or individual appearance by the state in federal court for that purpose, state consent must be derived from independent state action: a state government’s voluntary entry into an area of activity already subject to federal regulation,\footnote{513} where the state government knows from the terms of the relevant commerce clause statute that the statute provides for federal jurisdiction over private damage suits against states.\footnote{514}

Similarly, in the spending power context, independent state consent would be a necessary condition to the creation of federal jurisdiction over private damage suits in federal court.\footnote{515} Where there is no basis for state consent in either statutory waiver, individual appearance, or in the state's constitution, state consent must be implied from independent state action: voluntary acceptance of federal funds provided in that spending package where the state knows from the terms of the statute that Congress has authorized federal jurisdiction over it in private damage suits arising out of that spending package.\footnote{516} As suggested above, the difference in the modes of consent is

\footnote{511} Skover, Phoenix Rising, supra note 16, at 301.

\footnote{512} See supra notes 366-411 and accompanying text. One of the logical problems in an implied waiver approach is the tension between the requirement of “express waiver” of eleventh amendment immunity through state constitutional provision, and individual appearance in federal court on the one hand, and the doctrine of “implied waiver” in the area of congressional power to create federal jurisdiction over states on the other hand. However, “implied waiver” doctrine for congressional power, and “express waiver” doctrine for state statutory, state constitutional waiver, and individual appearance, are consistent inasmuch as both recognize the independent power of a state to withhold consent.

\footnote{513} See supra notes 366-411 and accompanying text (discussing how Parden, Employees and Welch may be read to require state consent as independent predicate in eleventh amendment analysis).

\footnote{514} See supra notes 452-62 and accompanying text. Under implied waiver analysis, Pennsylvania in Union Gas II could not be held to have impliedly waived its eleventh amendment immunity. Pennsylvania had been engaged in the clean-up of toxic waste long before the Congress enacted the SARA Amendments (42 U.S.C. §§ 9601(20)(D) and 9620(a)(1)) to the Superfund Act. As Pennsylvania argued in its Supreme Court brief, the events on which liability would be predicated occurred between 1960 and 1980. Main Brief of Pennsylvania, at 45. The SARA Amendments were enacted in 1986. Pennsylvania could not thus have had any notice of the possibility of private damage suit in federal court based on the Superfund Act, assuming those amendments authorized private damage suits against states in federal court. Thus, Pennsylvania could not have impliedly waived its eleventh amendment immunity on the facts of Union Gas II.

\footnote{515} See supra notes 412-62 and accompanying text (discussing how Atascadero and Edelman suggest bilateral framework of clear congressional authorization and independent state consent).

\footnote{516} See supra notes 459-62 and accompanying text (discussing Edelman’s requirement that state consent to congressionally authorized federal jurisdiction must be voluntary, and thus independent of any congressional action).
explicable in terms of the essential difference between the spending clause power and the commerce clause power.\textsuperscript{517}

Alternatively, the Court might go further and adopt an approach which requires some form of express consent. Under an express waiver approach to article I (either spending or commerce clause powers), a state must expressly consent to be sued for damages by private plaintiffs in federal court, before that federal court could exercise jurisdiction.

Perhaps an express state consent approach would solve Professor Tribe's concerns over the implications of an implied waiver approach for eleventh amendment issues of congressional power.\textsuperscript{518} He has argued that an implied waiver approach, as outlined by Justices Marshall and Stewart in the \textit{Employees} concurrence,\textsuperscript{519} would seem to "prove too much,"\textsuperscript{520} inasmuch as it implicitly condoned the power of Congress to condition a state's entry into an area subject to federal regulation on the state's waiver of eleventh amendment immunity. Though this interpretation of the \textit{Employees} concurrence is not the only one,\textsuperscript{521} there is that danger that implied waiver analysis could slowly erode the voluntariness aspect of a state's independent consent. Generally, the waiver of constitutional rights requires voluntariness. An express state consent approach would mean that a state could \textit{never} be forced, theoretically or practically, to relinquish its eleventh amendment immunity. This is true even if the state entered an area after Congress authorized federal jurisdiction over private damage suits against states. An express state consent approach could also be justified in terms of the present requirement that an express waiver of eleventh amendment immunity exist in state statute or state constitution,\textsuperscript{522} or occur by the state's individual appearance in federal court.\textsuperscript{523} In referring to waiver through state constitution or state statute, \textit{Atascadero} stated that "we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment."\textsuperscript{524} Further, that \textit{Parden} made state consent a matter of federal law\textsuperscript{525} does not necessarily change the analysis, as independent state consent arguably has always been

\textsuperscript{517} See \textit{supra} note 431 and accompanying text.

\textsuperscript{518} See Tribe, \textit{supra} note 6, at 692-93.

\textsuperscript{519} 411 U.S. 279, 287-98 (Marshall & Stewart, J.J., concurring in result).

\textsuperscript{520} Tribe, \textit{supra} note 6, at 692.

\textsuperscript{521} The \textit{Employees} concurrence would seem open to another interpretation, however. Indeed, if the concept of independent state consent in the \textit{Employees} concurrence implied that state action must be a "voluntary choice," then that concept would prevent Congress's attempt "to condition" state action on the surrender of eleventh amendment rights, to the extent that the state action in the circumstances was not voluntary. See \textit{Employees}, 411 U.S. at 296 (Marshall & Stewart, J.J., concurring in result).

\textsuperscript{522} See \textit{Atascadero}, 473 U.S. at 241.

\textsuperscript{523} Toll v. Moreno, 458 U.S. 1 (1982).

\textsuperscript{524} 473 U.S. at 238 n.1. Pennsylvania has not expressly consented away its eleventh amendment immunity in \textit{Union Gas II}.

\textsuperscript{525} 377 U.S. at 196.
a matter of federal constitutional law. Moreover, the Edelman Court’s recent clear language disfavoring “constructive consent”\(^\text{526}\) in the eleventh amendment context supports express state consent.

VI. CONCLUSION

The “bilateral framework,” an affirmative limitation on Congress’s power to grant jurisdiction to the federal courts over state government, has a firm doctrinal foundation. It offers one approach for resolving eleventh amendment issues raised in the context of specific congressional grants of federal jurisdiction over private damage suits against state government. In securing for state government protection from compulsory private damage suit in federal court (including those based on federal questions\(^\text{527}\) and brought by in-state plaintiffs),\(^\text{528}\) the framework would satisfy a major constitutional concern traceable to Justice Iredell’s dissent in Chisholm v. Georgia\(^\text{529}\) and the unanimous Hans v. Louisiana\(^\text{530}\) decision. Growing out of the principle that the eleventh amendment is a constitutional limitation on the grant of judicial power in article III,\(^\text{531}\) the bilateral framework would protect the states’ immunity under the eleventh amendment from invasion by both Congress and the federal judiciary. Thus, the bilateral framework would bring a measure of logical strength and unity to eleventh amendment law.

The bilateral framework would not invalidate Congress’s authorization of private damage suits against states in federal court. Rather, in the absence of independent state consent, it would deprive a federal court of original jurisdiction over a state for private damage suits defined by the federal statute at issue. Thus, by making independent state consent an essential predicate of the analysis—congruent with the unanimous Hans Court,\(^\text{532}\) and Justice Iredell’s dissent in Chisholm before the eleventh amendment was adopted\(^\text{533}\)—the framework operates as a jurisdictional limitation. However, if state exposure to federal court jurisdiction presents significant federalism

\(^{526}\) Edelman, 415 U.S. at 673. See also Welch, 107 S. Ct. at 2945 (quoting Edelman, 415 U.S. at 673); Atascadero, 473 U.S. at 238 n.1 (quoting Edelman, 415 U.S. at 673).

\(^{527}\) See supra notes 148-215 and accompanying text (arguing that federal question damage suits present same threat to integrity of state government as do state law based damage suits).

\(^{528}\) See supra notes 141-47 and accompanying text (arguing that if the eleventh amendment is viewed as state sovereignty principle bearing structural importance relating to integrity of state government, distinction between out-of-state suits and in-state suits collapses).

\(^{529}\) 2 U.S. (2 Dall.) 419 (1793). See supra notes 183-96 and accompanying text.

\(^{530}\) 134 U.S. 1 (1890). See supra notes 122-40 and accompanying text.

\(^{531}\) See supra notes 234-61 and accompanying text.

\(^{532}\) See supra notes 122-40 and accompanying text.

\(^{533}\) See supra notes 234-61 and accompanying text (arguing that, despite the state-citizen diversity clause of article III, sec. 2, independent state consent was the more fundamental jurisdictional predicate that Justice Iredell was searching for in his dissent in Chisholm, 2 U.S. (2 Dall.) at 429-50).
problems, the bilateral framework may significantly reduce that exposure.

In the absence of independent state consent, state courts would become the primary fora for private damage suits against states under article I statutes. Some may argue that the uniformity and consistency of federal law would be jeopardized, since federal courts would be deprived of jurisdiction over a certain class of federal cases. However, it should be said that all state court decisions based on federal law are ultimately reviewable by the Supreme Court. Some may argue that the state judiciary is not up to the task of hearing federally based private damage suits against states. However, state courts are not generally the ineffective, insensitive institutions that some critics have portrayed them to be. Moreover, an eleventh amendment based affirmative limit on the commerce clause power would not promote "lawlessness" in any sense of the word, as the eleventh amendment probably does not prevent Congress from compelling state courts to hear certain federal causes of action against state government. Further, state courts are bound under the Constitution to uphold federal law, even against their own state governments. As Justice Powell has recently noted, "[i]t

534. See Employees, 411 U.S. 279, 295 (Marshall & Stewart, JJ., concurring in result) ("Because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate . . . .") (footnote omitted). In Welch, Justice Powell emphasized this principle by adding the word "sensitive" and quoting directly from the Employees concurrence. 107 S. Ct. at 2952-53.


537. Justice Brennan has emphasized that current eleventh amendment doctrine will lead to lawlessness. See, e.g., Atascadero, 473 U.S. at 247-48 (Brennan, J., dissenting). Professor Shapiro has made similar charges, see Shapiro, supra note 6, at 76.

538. Cf. Brown, State Sovereignty, supra note 14, at 391 ("Whether state courts must entertain all federally based suits remains an open question."). Though the eleventh amendment does not apply to state courts, it is questionable whether Congress could, in an effort to circumvent the eleventh amendment, create the possibility of substantial damage judgments against state government, which the state courts would be bound to apply to the great detriment of their own governments.

539. Testa v. Katt, 330 U.S. 386 (1947) (since federal law is supreme law of the land, state courts are constitutionally obligated to enforce it, even if it contradicts or conflicts with state policy). See also Employees, 411 U.S. at 298 (Marshall & Stewart, JJ., concurring in result) ("Missouri has courts of general jurisdiction competent to hear suits of this character, and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution . . . .") (footnote and citation omitted) (emphasis added)
denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.\textsuperscript{540}

Congress's power to create federal jurisdiction over state government under the fourteenth amendment enforcement provision is distinguishable from Congress's power under article I.\textsuperscript{541} For structural reasons, it is unlikely that the framers intended the fourteenth amendment to negate a state's right to consent to federal court jurisdiction over private damage suits against it, where those civil rights concerns were not present; or as Justice Powell has phrased it, where the "usual constitutional balance"\textsuperscript{542} obtains. The bilateral framework may present an opportunity for the Court to begin to fill out Justice Powell's vision of the "usual constitutional balance."

While the Civil War amendments long have been held to have increased the federal government's power over states, they should not be interpreted as a basis on which to justify any expansion of federal power over states, as Justice Rehnquist in \textit{Fitzpatrick} so clearly implied.\textsuperscript{543} The power that these amendments confer on the federal legislature to create federal jurisdiction over private damage suits against state government therefore should be used wisely. It should be limited to the furtherance of those civil rights concerns properly within the scope of those amendments. If those amendments become the basis for any expansion of federal power over state government, the framers' worst fears about the concentration of political power may be realized; the federal government may no longer be a government of specific, enumerated powers. If Congress can negate rights constitutionally guaranteed to the states by the eleventh amendment, what other rights constitutionally guaranteed to the states may Congress negate?

There can be no doubt that the framers of our Constitution were deeply concerned about the concentration of power in governmental bodies, as their fear of parliamentary tyranny is well documented. Likewise, there can be no doubt that both Federalists and Anti-Federalists would be concerned by the vastly expanded power of the federal government over the state governments in America today. Indeed, the structure of the federal union engaged the passion and intellect of the framers of the Constitution\textsuperscript{544} and the participants in the stormy ratification debates as perhaps no other issue.

\begin{footnotes}
\item[540] \textit{Atascadero}, 473 U.S. at 238 n.2. \textit{See also} \textit{Ex parte Young}, 209 U.S. 123, 176 (Harlan, J., dissenting).
\item[541] \textit{See supra} notes 492-500 and accompanying text.
\item[542] 473 U.S. at 242.
\item[543] \textit{See supra} notes 488-91 and accompanying text (discussing \textit{Fitzpatrick}'s holding that Congress is on special ground when acting pursuant to the fourteenth amendment enforcement power, and may create federal jurisdiction over private damage suits against states without state's consent).
\end{footnotes}
Our forebears recognized that the federal union's structure was not only important as the basic framework for government, but also as the ultimate foundation of individual liberty. Can it be supposed, therefore, that the framers of the Civil War Amendments intended to remove all possibility for a balance of power between the federal and state governments?

The relationship between the federal judiciary and the state governments, and Congress's attempts to employ the federal judicial power against state government, are important aspects of this balance of power. As the Court has recently maintained in *Atascadero*, "our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution." In the Supreme Court's view, the eleventh amendment contributes to a balance of power between the federal and state governments, and to a harmony of federal-state relations. In this author's view, the bilateral framework would strengthen the eleventh amendment's ability to contribute to a balance of power in the federal union, for the fundamental reason that Congress could not then legislate the eleventh amendment out of the Constitution.

More than an arcane provision in the Constitution, the eleventh amendment has an important place in the broader scheme of federalism, despite the tenth amendment's demise in *Garcia*. Precisely because of the states' loss of substantive protection under the tenth amendment, it may be argued that nowhere in our history has the need for eleventh amendment protection been greater. In an era where the power of the federal government has been vastly expanded at the expense of that of the states, the bilateral framework would modulate, through the concept of independent state con-


546. See *Atascadero*, 473 U.S. at 238-40 n.2. For an excellent discussion of why attention to the structure of the federal union is vitally important, see Nagel, Federalism as Fundamental Value: National League of Cities in Perspective, 1981 SUP. CT. REV. 81.

547. 473 U.S. at 238 n.2.

548. *Id.*

549. The Supreme Court has recognized that compulsory private damage suits against state government do "violence to the inherent nature of sovereignty." United States v. Texas, 143 U.S. 621, 646 (1892).

550. It should be noted that the conclusions Professor Tribe reached about the eleventh amendment were in a different context in which the states had some significant substantive protection under the tenth amendment. He argued that "any congressional attempt to confer jurisdiction and abrogate immunity must be reasonably ancillary to an otherwise valid substantive exercise of federal lawmaking power." Tribe, supra note 6, at 697 (emphasis added). He also argued that "a sufficiently 'drastic invasion of state sovereignty' could be invalidated notwithstanding even the clearest possible expression of congressional purpose, but any such invalidation would rest ultimately on tenth rather than eleventh amendment grounds." *Id.* (footnotes omitted) (emphasis added).
sent, the "sensitive" and important federalism tensions which inevitably arise when a federal court assumes jurisdiction over state government. By limiting the states' exposure to federal court retroactive relief, the bilateral framework would give the state treasuries—the heart of state governments—a measure of fiscal security. A constitutional principle with such importance to the American experiment in government ought to be secure against congressional, as well as "judicial inroads." Under the Constitution, therefore, Congress may not "abrogate" a state's or the states' eleventh amendment immunity from compulsory private damage suits in federal courts in an exercise of the commerce clause, as *Union Gas II*, *McVey*, and congressional supremacy more generally, have maintained.

552. 832 F.2d at 1356.
553. 812 F.2d at 323.