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[3b] Thus, a narrow holding allowing federal jurisdiction over Welch's suit in admiralty under the Jones Act against the State of Texas is consistent with precedent and the will of Congress,⁹ and prevents further erosion of a legal distinction

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which is difficult, if not impossible, to rationalize. It is patently improper to extend the Eleventh Amendment doctrine of sovereign immunity any further.¹⁰

II

The Eleventh Amendment does not bar a suit under the Jones Act by a Texas citizen against the State of Texas. The part of Article III, § 2, that was affected by the Amendment provides: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects" (emphasis added). The Amendment uses language identical to that in Article III to bar the extension of the judicial power to a suit "against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" (emphasis added). The congruence of the language suggests that the Amendment specifically limits only the jurisdiction conferred by the above-referenced part of Article III. Thus, the Amendment bars only federal actions brought against a State by citizens of another State or by foreign aliens.

9. [3c] In *Petty v Tennessee-Missouri Bridge Comm'n*, 359 US 275, 282, 3 L Ed 2d 804, 79 S Ct 785 (1959), the Court considered the substantive applicability of the Jones Act to state employees: "When Congress wished to exclude state employees, it expressly so provided. . . . The Jones Act . . . has no exceptions from the broad sweep of the words 'Any seaman who shall suffer personal injury in the course of his employment may' etc." (citations omitted). The Court today does not

Contrary to the Court's view, ante, at 480-484, 97 L Ed 2d, at 401-403, a proper assessment of the historical record of the Constitutional Convention and the debates surrounding the state ratification conventions confirms this interpretation. See *Atascadero State Hospital v Scanlon*, 473 US, at 263-280, 87 L Ed 2d 171, 105 S Ct 3142 (Brennan, J., Dissenting). The Court exclusively relies on the remarks of Madison, Hamilton, and Marshall at the Virginia Convention to support its contrary position. Ante, at 480-484, 97 L Ed 2d, at 401-403. But these statements must be considered in context.

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At the Virginia Convention, discussion focused on the question of Virginia's liability for debts that arose under state law, and which could be brought into federal court only through diversity suits by citizens of another State. See 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 533 (2d ed 1861) (hereinafter *Elliot's Debates*) (Madison) ("[Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. . . .") (emphasis added); *The Federalist* No. 81, p 548 (J. Cooke ed 1961) (Hamilton) ("It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those

disturb this holding. See ante, at 495, 97 L Ed 2d, at 410-411 (White, J., concurring).

10. Cf. *United States v Johnson*, 481 US 681, 692, 95 L Ed 2d 648, 107 S Ct 2063 (1987) (Scalia, J., dissenting) (arguing against extension of the *Feres* doctrine in order to "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred").

securities. . .") (emphasis added); 3 Elliot's *Debates* 555 (Marshall) ("With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. . . .") (emphasis added).

Thus, the delegates to the Virginia Convention were not objecting to suits initiated by citizens of the same State; what concerned them were suits by citizens of other States. The majority of the delegates who spoke at the Virginia Convention, including Mason, Henry, Pendleton, and Randolph, did not believe that state sovereign immunity provided protection against suits initiated by citizens of other States. See

Atascadero, supra, at 264-280, 87 L Ed 2d 171, 105 S Ct 3142. Moreover, those attending the Virginia Convention evidently were not persuaded by the rhetoric of Madison, Hamilton, and Marshall cited by the Court. The Convention endorsed an amendment that would have explicitly denied the federal judiciary authority over controversies between a State and citizens of other States. 3 Elliot's *Debates* 660-661. The felt need for this amendment shows that the delegates did not believe that state sovereign immunity barred all suits against States.¹¹

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There is little evidence that Madison¹² or Hamilton¹³ believed that Article III failed to authorize diversity

11. Similar proposals submitted in New York, North Carolina, and Rhode Island urged amendments depriving federal courts of jurisdiction over cases instituted against a State by a citizen of another State or by an alien. See C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 64 (1972).

12. Madison's view of this issue is not clear. As legal historian Clyde Jacobs concluded, "[w]hether Madison thought that federal courts should possess any jurisdiction over suits instituted against a state by citizens of another state or by foreigners must remain a matter of some conjecture; indeed there is no direct evidence that he considered the question at all. . . ." *Id.*, at 12. Professor Jacobs also noted:

"Madison and other nationalists believed that the federal judiciary should be armed with powers not only to maintain the supremacy of national law but also to review state judicial decisions that might have interstate or foreign ramifications. Thus one of the principal reasons nationalists advanced for extending the federal judicial power—the maintenance of international peace and domestic harmony—would appear to necessitate national jurisdiction in cases where the good faith of the states vis-à-vis foreigners and citizens of other states had been engaged. If, however, this proposed federal judicial jurisdiction were qualified by the doctrine of state immunity, a broad avenue would have been left open to

defeat every claim made upon them by citizens of other states and by aliens. The exception to the jurisdiction would have made the proposed jurisdiction futile or, at least, negligible." *Id.*, at 13-14.

13. Hamilton's writings in *The Federalist*, No. 80, suggest that he did not believe that Article III barred all suits against States: "It may be esteemed the basis of the union, that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.' And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." *The Federalist* No. 80, pp 537-538 (J. Cooke ed 1961) (first emphasis in original; second emphasis added).

or federal-question suits brought by citizens against States. We know [483 US 507]

Marshall's understanding of Article III from his opinions written for the Court. The Chief Justice, in *Cohens v Virginia*, 6 Wheat 264, 5 L Ed 257 (1821), interpreted the effect of Article III on the Court's jurisdiction to review an appeal involving, as parties, a State and a citizen of the same State. The State of Virginia was sued for a writ of error in the United States Supreme Court. The writ challenged a criminal conviction obtained in a Virginia state court. The Court rejected the State's contention that the Constitution denied federal jurisdiction over the appeal. It concluded that Article III provides federal jurisdiction "to all [federal-question cases] without making in its terms any exception whatever, and without any regard to the condition of party." *Id.*, at 378, 5 L Ed 257. The Chief Justice then considered whether, in the face of Article III's clear language, a general principle of state sovereign immunity could be implied. He concluded:

"From this general grant of jurisdiction [in federal-question cases], no exception is made of those cases in which a State may be a party. When we consider the situa-

tion of the government of the Union and of a State, in relation to each other; the nature of our constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; *are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not.* We think a case arising under the constitution or laws of the United States,

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is cognizable in the Courts of the Union, whoever may be the parties to that case" (emphasis added). *Id.*, at 382-383, 5 L Ed 257.¹⁴

The Court in *Cohens* also clearly revealed its understanding that the Eleventh Amendment was inapplicable to a suit brought by a citizen against his or her own State. After concluding that the petition for a writ of error was not properly understood as a suit commenced or prosecuted against a State, the Chief

Justice stated that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides." *Cohens v Virginia*, 6 Wheat, at 380, 5 L Ed 257.

The Court then found that in agreeing to the Constitution, the States had surrendered a significant measure of their sovereignty. It stated that the Supremacy Clause is evidence of this surrender. *Id.*, at 380-381, 5 L Ed 257. The Court therefore found that Article III extended jurisdiction to all federal-question suits and that "no exception is made of those cases in which a state may be party." *Id.*, at 382-383, 5 L Ed 257.

Justice stated an alternative holding:

"But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial

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power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." *Id.*, at 412, 5 L Ed 257 (emphasis added).

Chief Justice Marshall reaffirmed this view of the Eleventh Amendment when he wrote for the Court in *Osborn v Bank of the United States*, 9 Wheat 738, 857-858, 6 L Ed 204 (1824):

"The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens."

The Court, however, chooses to ignore the clear meaning of the Constitution text based on speculation that the intentions of a few of the Framers and Ratifiers might have been otherwise. The evidence available reveals that the views of Madison and Hamilton on the issue are at best ambiguous, see nn 12 and 13, supra, and that Marshall's understanding runs directly counter to the Court's position. Thus, the Eleventh Amendment only bars a federal suit

initiated by citizens of another State. Moreover, as Part III demonstrates, the Amendment only bars a particular type of federal suit—an action based on diversity jurisdiction.

III

In my view, the Eleventh Amendment applies only to diversity suits and not to federal-question or admiralty suits. The parallel between the language in Article III's grant of diversity jurisdiction ("to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects") and the language in the Eleventh Amendment ("any suit in law or equity . . . by Citizens of another State or by Citizens or Subjects of any Foreign State") supports this view. The Amendment prohibits federal jurisdiction over *all* such suits in law or

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equity which are based on diversity jurisdiction. Since Congress had not granted federal-question jurisdiction to federal courts prior to the Amendment's ratification, the Amendment was not intended to restrict that type of jurisdiction. Furthermore, the controversy among the Ratifiers cited by the Court today, ante, at 480-484, 97 L Ed 2d, at 401-403, involved only diversity suits. Moreover, the Court recognizes that the immediate impetus for adoption of the Eleventh Amendment was *Chisholm v Georgia*, 2 Dall 419, 1 L Ed 440 (1793). Ante, at 484, 97 L Ed 2d, at 403. *Chisholm* was a diversity case brought in federal court upon a state cause of action against the State of Georgia by a citizen of South Carolina. The Court relies on *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), to hold that the

14. In *Cohens*, Chief Justice Marshall explained in detail the effect of the general principle of sovereign immunity on the scope of Article III:

"The Counsel for the [State] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.

"This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear

Eleventh Amendment bars Welch's suit in admiralty.

Hans, however, was a *federal-question* suit brought by a Louisiana citizen against his own State. Ignoring this fact, the Court in Hans relied on materials that primarily addressed the question of state sovereign immunity in diversity cases, and not on federal-question or admiralty cases.¹⁵ It is plain from the face of the Hans opinion that the Court misunderstood those materials.¹⁶ In particular, the Court in

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Hans heavily relied on two sources: a statement by Hamilton in *The Federalist* No. 81 and the views of Justice Iredell, who wrote the dissent in *Chisholm*. 134 US, at 12, 13-14, 18-19, 33 L Ed 842, 10 S Ct 504. A close examination of both these sources indicates that they cannot serve as support for the holding of Hans or of the Court today.

A

The Court today relies on the same quotation of Hamilton in *The Federalist* No. 81 cited by the Court

in Hans. Compare 134 US, at 12-13, 33 L Ed 842, 10 S Ct 504 with ante, at 480-481, n 10, 97 L Ed 2d, at 401. The Court in Hans used this quotation as proof that all suits brought by individuals against States were barred, absent their consent.¹³⁴ US, at 14-15, 33 L Ed 842, 10 S Ct 504. But, in that passage, Hamilton was discussing cases of diversity jurisdiction, not of federal-question jurisdiction:

"It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation." *The Federalist* No. 81, p 548 (J. Cooke ed 1961) (emphasis added).

In the ensuing discussion, Hamilton described the circumstances in which States can claim sovereign immunity. He began with the general principle of sovereign immunity.

"It is inherent in the nature of

the familiar quotations from Madison, Marshall, and Hamilton. With regard to *Chisholm* Bradley declaimed: "In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views. . . . Yet Iredell's dissent was manhandled. . . . Attributing sovereign immunity to the states, Bradley began the confusion that still prevails between federal and state sovereignty."

"Nothing had arisen since the decision of the New Hampshire case to change Bradley's view of the past—except the pressing need for a new rationale to justify a new result. If sovereign immunity had not existed, the Justice would have had to invent it. As it was, all that was required was to rewrite a little history." J. Orth, *The Judicial Power of the United States* 74-75 (1987) (Orth).

sovereignty not to be amenable to the suit of an individual *without its consent*.

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This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union." *Id.*, at 548-549.

Hamilton believed that the States surrendered at least part of their sovereign immunity when they agreed to the Constitution. The States, however, retained their sovereign authority over state-created causes of action. "Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal." *Id.*, at 549. Thus, the States retained their sovereign authority over diversity suits involving the State assignment of public securities to citizens of other States.

"A recurrence to the principles there established will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting state; and to ascribe to

the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *Ibid.*

Hamilton therefore believed that States could not be sued in federal court by citizens to collect debts in diversity actions.

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A careful reading of this passage demonstrates that it does not support the general principle of sovereign immunity against all suits brought by individuals against States, contrary to the Court's views in Hans and in the present case.

B

The Court in Hans also heavily relied on the rationale stated by Justice Iredell in *Chisholm*. The Court in *Chisholm* held that the case was within the jurisdiction of the Federal District Court. The Eleventh Amendment was thereafter enacted with "vehement speed," displacing the *Chisholm* ruling. *Larson v Domestic & Foreign Commerce Corp.* 337 US 682, 708, 93 L Ed 1628, 69 S Ct 1457 (1949). The dissent of Justice Iredell is generally regarded as embodying the rationale of the Eleventh Amendment by those who broadly construe it. See *Hans v Louisiana*, supra, at 12, 14, 18-19, 33 L Ed 842, 10 S Ct 504; see also Fletcher, 35 *Stan L Rev*, at 1077; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 *Pa L Rev* 515, 541 (1978). Nevertheless, 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

15. See generally, Brief of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae 11-23.

16. A legal historian, Professor John Orth, recently described the historical approach taken by the Court in Hans: "In *Hans v Louisiana*, . . . Justice Bradley rewrote the history of the Eleventh Amendment. . . . Only half a dozen years before, in *New Hampshire v Louisiana*, 108 US 76 [27 L Ed 656, 2 S Ct 176] (1883) written by Chief Justice Waite and joined by Justice Bradley, the Court had accepted *Chisholm* as a correct interpretation of the Constitution as it then stood."

"How did Justice Bradley suddenly attain such unhedged certitude about the original understanding and the Eleventh Amendment? No surprising discoveries about the historical record had been made in the decade of the 1880s. The Justice himself merely rehashed

federal court in federal-question or admiralty cases.

Justice Iredell's dissent focused on whether the States delegated part of their sovereignty to the Federal Government upon entering into the Union and agreeing to the Constitution.

"Every State in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered. Each State in the Union is sovereign as to all the powers reserved." 2 Dall, at 435, 1 L Ed 440.

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Justice Iredell defined the powers surrendered by the States in terms of the authority that resides in the Congress and the Executive Branch.

"The powers of the general Government, either of a Legislative or executive nature, or which particularly concern Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States. They require no aid from any State authority. This

is the great leading distinction between the old articles of confederation, and the present constitution." *Ibid.*

He then defined the "judicial power" of Article III. Justice Iredell found that the federal judicial power "is of a peculiar kind" because of its hybrid nature. *Ibid.* His conception of state sovereign immunity centered on the dual sources of federal judicial authority. First, he delineated the portion of federal jurisdiction that "is indeed commensurate with the ordinary Legislature and Executive powers of the general government, and the Power which concerns treaties." *Ibid.* This category encompasses matters wholly within the federal sovereignty. Justice Iredell plainly was describing the federal-question and admiralty jurisdiction where federal courts have jurisdiction based on the federal subject matter of the cases.¹⁷

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Justice Iredell then stated: "But [the judicial power] also goes further." *Ibid.* It was in the further extension of judicial power that the sovereign immunity of the States was implicated. In diversity cases, the federal judiciary was not dealing with subject matter within the

to be vested in courts ordained and established by the United States. . . . The same remarks may be urged as to cases affecting ambassadors, other public ministers, and consuls . . . and as to cases of admiralty and maritime jurisdiction. . . . All these cases, then, enter into the national policy, affect the national rights, and may compromise the national sovereignty. . . .

"A different policy might well be adopted in reference to the second class of cases. . . ." *Martin v Hunter's Lessee*, 1 Wheat 304, 334-335, 4 L Ed 97 (1816). See generally Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B UL Rev 205 (1985).

17. Justice Story later drew the same distinction between federal subject-matter jurisdiction and federal diversity jurisdiction as did Justice Iredell:

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdiction over such cases could not exist in the state courts previous to the adoption of the constitution, and it could not afterwards be directly conferred on them; for the constitution expressly requires the judicial powers

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realm of federal sovereignty, but was instead providing a neutral forum for the resolution of state-law issues over which the States had not given up their sovereignty.

"Where certain parties are concerned, although the subject in controversy does not relate to any of the special objects of authority of the general Government, wherein the separate sovereignties of the States are blended in one common mass of supremacy, yet the general Government has a Judicial Authority in regard to such subjects of controversy, and the Legislature of the United States may pass all laws necessary to give such Judicial Authority its proper effect. So far as States under the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited. But it is limited no farther than the necessary execution of such authority requires." *Id.*, at 435-436, 1 L Ed 440.

Justice Iredell was concerned with "the limit of our authority" in the diversity case before the Court, since "we can exercise no authority in the present instance consistently with the clear intention of the [Judiciary Act], but such as a proper State Court would have been at least competent to exercise at the time the act was passed." *Id.*, at 436-437, 1 L Ed 440.

18. Justice Iredell avoided committing himself on the broader constitutional question concerning whether suits, other than those in diversity, were barred by the Eleventh Amendment. He noted: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circum-

"If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent [state] laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution . . . an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here: If it could not, I think, as the law stands at present, it is not maintainable. . . ." *Id.*, at 437, 1 L Ed 440.

Thus, Justice Iredell's dissenting opinion rested on a conception of state sovereignty that justified the incorporation of the sovereign-immunity doctrine through the state common law, but *only* in diversity suits. His opinion traditionally has been cited as key to the underlying meaning of the Eleventh Amendment. See *Hans v Louisiana*, 134 US, at 12, 33 L Ed 842, 10 S Ct 504. Yet it provides no more support for the result in *Hans* than does the plain language of the Eleventh Amendment.¹⁸

I will not repeat the exhaustive evidence presented in my dissent in *Atascadero* that further buttresses my view of the Eleventh Amendment sovereign immunity. See *Atas-*

stances, a compulsive suit against a State for the recovery of money." *Chisholm v Georgia* 2 Dall 419, 449, 1 L Ed 440 (1793). Nonetheless, he conceded, "[t]his opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial." *Id.*, at 450, 1 L Ed 440.

caderno, 473 US, at 247-304, 87 L Ed 2d 171, 105 S Ct 3142. I adhere to the view that a suit brought under a federal law against a State is not barred.

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IV

The Court today overrules, in part, *Parden v Terminal Railway of Alabama Docks Dept.* 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964). It rejects the holding in *Parden* that Congress evidenced an intention to abrogate Eleventh Amendment immunity by making the FELA applicable to "every common carrier by railroad while engaging in commerce between any of the several States. . . ." § 1, 35 Stat 65, 45 USC § 51 [45 USCS § 51]. The Court instead concludes that Congress did not abrogate the sovereign immunity of States, because it did not express this intent in unmistakably clear language.

The Court's departure from normal rules of statutory construction frustrates the will of Congress. The Court's holding in *Parden* that Congress intended to abrogate the sovereign immunity of States in FELA has not been disturbed by Congress for the past two decades. In FELA, Congress not only indicated that "every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce," but also expressed in unequivocal language that the "action may be brought in a district court of the United States." 45 USC §§ 51, 56 [45 USCS §§ 51, 56]. The Court in *Parden* noted that the legislative history of FELA revealed that Congress meant to extend the scope to apply to "all commerce," without exception for state-owned carriers. 377

US, at 187, n 5, 12 L Ed 2d 233, 84 S Ct 1207.

In *Parden*, the Court also comprehensively reviewed other federal statutes regulating railroads in interstate commerce, which used similar terminology. It found that we had consistently interpreted those statutes to apply to state-owned railroads. *Id.*, at 188-189, 12 L Ed 2d 233, 84 S Ct 1207, quoting *United States v California*, 297 US 175, 185, 80 L Ed 567, 56 S Ct 421 (1936) ("No convincing reason is advanced why interstate commerce and persons and property concerned in it should not receive the protection of the act whenever a state, as well as a privately-owned carrier, brings itself within the sweep of the statute"); *California v Taylor*, 353 US 553, 564, 1 L Ed 2d 1034, 77 S Ct 1037 (1957) ("The fact that Congress

[483 US 518] chose to phrase the coverage of the Act in all-embracing terms indicates that state railroads were included within it"). This conclusion confirmed the Court's determination in *Petty v Tennessee-Missouri Bridge Comm'n*, 359 US 275, 3 L Ed 2d 804, 79 S Ct 785 (1959): "In [*Taylor*] we reviewed at length federal legislation governing employer-employee relationships and said, 'When Congress wished to exclude state employees, it expressly so provided.'" *Id.*, at 282, 3 L Ed 2d 804, 79 S Ct 785 (citation omitted).

The Court today repeatedly relies on a bare assertion that "the constitutional role of the States sets them apart from other employers and defendants." *Ante*, at 477, 97 L Ed 2d, at 399. This may be true in many contexts, but it is not applicable in the sphere of interstate commerce. Congress has plenary authority in regulating this area. In *Gibbons v*

Ogden, 9 Wheat 1, 196-197, 6 L Ed 23 (1824), the Court stated:

"If, as has always been understood, the sovereignty of congress, though limited to specified objects is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States."

Thus, the Court in *Parden* concluded that the decision to regulate employers of interstate workers, be they private individuals or States, was for Congress to make:

"While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty,' . . . the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.

"If Congress made the judgment that, in view of the dangers of railroad work and the difficulty of recovering for personal injuries under existing rules, railroad workers in interstate commerce should be provided with the

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should not presume to say, in the absence of express provision to the contrary, that it intended to exclude a particular group of such workers from the benefits conferred by the Act." 377 US, at 189-190, 12 L Ed 2d 233, 84 S Ct 1207.

Until today, *Parden* has been repeatedly cited by the Court as an established approach "to the test of waiver of the Eleventh Amendment." *County of Oneida v Oneida Indian Nation*, 470 US 226, 252, n 26, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Powell, J.); see, e.g., *Fitzpatrick v Bitzer*, 427 US 445, 452, 49 L Ed 2d 614, 96 S Ct 2666 (1976). I believe that *Parden* was correctly decided. "[B]y engaging in the railroad business a State cannot withdraw the railroad from the power of the federal government to regulate commerce." *New York v United States*, 326 US 572, 582, 90 L Ed 326, 66 S Ct 310 (1946). In my view, Congress abrogated state immunity to suits under the FELA, a statute incorporated by the Jones Act.

V

Sound precedent should produce progeny whose subsequent application of principle in light of experience confirms the original wisdom. Tested by this standard, *Hans* has proven to be unsound. The doctrine has been unstable, because it lacks a textual anchor, an established historical foundation, or a clear rationale." We should not forget that the

19. Today only four Members of the Court advocate adherence to *Hans*. Three factors counsel against continued reliance upon *Hans*. First, *Hans* misinterpreted the intent of the Framers and those who ratified the Eleventh Amendment. Cf. *Michelin Tire Corp. v Wages*, 423 US 276, 297-298, 46 L Ed 2d 495, 96 S Ct 535 (1976) (overruling *Low v Austin*, 13 Wall 29, 20 L Ed 517 (1872), because it ignored the language and objectives of the Import-Export Clause and misread ear-

lier Court precedent). Second, the progeny of *Hans* has produced erratic and irrational results. If a general principle of state sovereign immunity is based on the sensitive problems inherent in making one sovereign appear against its will in the courts of other sovereigns, *ante*, at 486-487, 97 L Ed 2d, at 405, then it is inexplicable why States can be sued in some cases (by other States, by the Federal Government, or when prospective relief is sought) and not in other instances (by foreign

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irrationality of the doctrine has its costs. It has led to the development of a complex set of rules to avoid unfair results.²⁰ See, e.g., *Ex parte Young*, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908) (Amendment does not bar suit if plaintiff names state official, rather than State itself, as defendant); *Edelman v Jordan*, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974) (Amendment does not bar prospective, but only retrospective, relief). The doctrine, based on a notion of kingship, intrudes impermissibly on Congress' lawmaking power. I adhere to my belief that:

"[T]he doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, . . . the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the struc-

ture of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the

[483 US 521]

decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority." *Atascadero State Hospital v Scanlon*, 473 US, at 302, 87 L Ed 2d 171, 105 S Ct 3142 (dissenting opinion) (citations omitted).

By clinging to *Hans*, the Court today erases yet another traditional legal distinction and overrules yet another principle that defined the limits of that decision. In my view, we should at minimum confine *Hans* to its current domain. More fundamentally, however, it is time to begin a fresh examination of Eleventh Amendment jurisprudence without the weight of that mistaken precedent. I therefore dissent.

countries, by citizens of the same State, or when retrospective relief is sought). The Court's recital of the rules of sovereign immunity in *Monaco v Mississippi*, 292 US 313, 78 L Ed 1282, 54 S Ct 745 (1934), indicates the crazy-quilt pattern of the *Hans* doctrine. Ante, at 487, 97 L Ed 2d, at 405. Third, the Eleventh Amendment doctrine creates inconsistencies in constitutional interpretation. For example, under the Seventh Amendment, the Court has stated that a right to a jury trial does not extend to admiralty cases because these suits in admiralty are distinguishable from suits in law. See *Parsons v Bedford*, 3 Pet 433, 446-447, 7 L Ed 732 (1830). Yet today

the Court ignores the distinction between suits in admiralty and in law in arriving at its decision.

20. As Professor Orth concludes:

"By the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity. . . . The case law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions. Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges." Orth 11 (citation omitted).

[483 US 522]

SAN FRANCISCO ARTS & ATHLETICS, INC. and THOMAS F. WADDELL, Petitioners

v

UNITED STATES OLYMPIC COMMITTEE and INTERNATIONAL OLYMPIC COMMITTEE

483 US 522, 97 L Ed 2d 427, 107 S Ct 2971

[No. 86-270]

Argued March 24, 1987. Decided June 25, 1987.

Decision: Exclusive rights of U.S. Olympic Committee in word "Olympic" held not to violate freedom of speech; USOC's enforcement of such rights held not to be governmental action for equal protection purposes.

SUMMARY

Section 110 of the Amateur Sports Act of 1978 (36 USCS § 380) provides that, without the consent of the United States Olympic Committee (USOC), certain commercial and promotional uses of the word "Olympic" are subject to a civil action by the USOC for the trademark infringement "remedies" provided in the Lanham Act (15 USCS §§ 1051 et seq.). A nonprofit California corporation—which later claimed that its use of the word "Olympic" was intended to make a political statement about the status of homosexuals in society—began to promote a proposed "Gay Olympic Games." After the USOC requested the corporation to discontinue the word "Olympic" in the corporation's description of the planned games, and the corporation continued to use the word, the USOC brought suit against the corporation and its president in the United States District Court for the Northern District of California, which eventually granted the USOC summary judgment, and a permanent injunction against the corporation's use of the word "Olympic." On appeal, a panel of the United States Court of Appeals for the Ninth Circuit affirmed with respect to the grant of summary judgment and an injunction, expressing the view that (1) § 110 granted the USOC exclusive use of the word "Olympic" (a) without a requirement that the USOC prove that the unauthorized use was confusing, and (b) without regard to the Lanham Act's statutory defenses for unauthorized use of a trademark; (2) the USOC was not a governmental actor bound by the constraints of the

Briefs of Counsel, p 930, infra.

made a crime. See, e. g., *United States v Bass*, supra; *Rewis v United States*, 401 US 808, 812, 28 L Ed 2d 493, 91 S Ct 1056 (1971); *Bell v United States*, 349 US 81, 83, 99 L Ed 905, 75 S Ct 620 (1955). I disagree not with these principles, but with their application to this statute. As I read § 2314, it is not ambiguous, but simply very broad. The statute punishes individuals who transport goods, wares, or merchandise worth \$5,000 or more, knowing "the same to have been stolen converted or taken by fraud." 18 USC § 2314 [18 USCS § 2314]. As noted above, this Court has given the terms "stolen" and "converted" broad meaning in the past. The petitioner could not have had any doubt that he was committing a theft as well as defrauding the copyright owner.²

The Court also emphasizes the fact that the copyright laws contain their own penalties for violation of their terms. But the fact that particular conduct may violate more than one federal law does not foreclose the Government from making a choice as to which of the statutes should be the basis for an indictment. "This Court has long recognized that when an act violates more than one criminal statute, the Government

[473 US 233]

may prosecute under either so long as it does not discriminate against any class of defendants." *United States v Batchelder*, 442 US 114, 123-124, 60 L Ed 2d 755, 90 S Ct 2198 (1979).

² Indeed, there was stipulated testimony by a former employee of petitioner's, himself an unindicted co-conspirator, that petitioner and his partner "were wary of any unusually large record orders, because they could be

Finally, Congress implicitly has approved the Government's use of § 2314 to reach conduct like Dowling's. In adopting the Piracy and Counterfeiting Amendments Act of 1982, Pub L 97-180, 96 Stat 91, Congress provided that the new penalties "shall be in addition to any other provisions of title 17 or any other law." 18 USC § 2319(a) [18 USCS § 2319(a)] (emphasis added). The Senate Judiciary Committee specifically added the italicized language to clarify that the new provision "supplement[s] existing remedies contained in the copyright law or any other law." S Rep No. 97-274, p2 (1981) (emphasis added). Many courts had used § 2314 to reach the shipment of goods containing unauthorized use of copyrighted material prior to the enactment of the Piracy and Counterfeiting Amendments Act. By choosing to make its new felony provisions supplemental, Congress implicitly consented to continued application of § 2314 to these offenses.

Dowling and his partners "could not have doubted the criminal nature of their conduct . . ." *United States v Bottone*, supra, at 394. His claim that § 2314 does not reach his clearly unlawful use of copyrighted performances evinces "the sort of sterile formality" properly rejected by the vast majority of courts that have considered the question. *United States v Belmont*, 715 F2d 459, 462 (CA9 1983), cert denied, 465 US 1022, 79 L Ed 2d 679, 104 S Ct 1275 (1984). Accordingly, I dissent.

charged with an interstate transportation of stolen property if they shipped more than \$5,000 worth of records." App A19-A20 (stipulation regarding testimony of Ace Anderson).

EDITOR'S NOTE

An annotation on "Supreme Court's construction and application of National Stolen Property Act (18 USCS § 2314)," appears p 768, infra.

[473 US 234]
ATASCADERO STATE HOSPITAL and CALIFORNIA DEPARTMENT OF
MENTAL HEALTH, Petitioners

v
DOUGLAS JAMES SCANLON

473 US 234, 87 L Ed 2d 171, 105 S Ct 3142

[No. 84-351]

Argued March 25, 1985. Decided June 28, 1985.

Decision: Federal suit against state by litigant seeking monetary relief under § 504 of Rehabilitation Act of 1973 (29 USCS § 794) held proscribed by Eleventh Amendment.

SUMMARY

A man suffering from certain physical handicaps brought suit against a state hospital and the California Department of Mental Health in the United States District Court for the Central District of California, alleging that the hospital had denied him employment as a graduate student assistant recreational therapist solely because of his physical handicaps, in violation of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794). The District Court granted the defendants' motion to dismiss the complaint on the ground that the action was barred by the Eleventh Amendment to the United States Constitution, and the United States Court of Appeals for the Ninth Circuit affirmed on grounds that the plaintiff had failed to allege an essential element of a claim under § 504, namely, that a primary objective of the federal funds received by the defendants was to provide employment (777 F2d 1271). The United States Supreme Court vacated the judgment and remanded, after which the Court of Appeals reversed, holding that the Eleventh Amendment did not bar the action since a state's consent to suit in federal court could be inferred from its participation in programs funded by the Rehabilitation Act (735 F2d 359).

On certiorari, the United States Supreme Court reversed. In an opinion by POWELL, J., joined by BURGER, Ch. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., it was held that the suit was proscribed by the Eleventh Amendment, since the provisions of the Rehabilitation Act fell short of expressing the requisite unequivocal congressional intent to abrogate the

Briefs of Counsel, p 777, infra.

states' Eleventh Amendment immunity, since the Act likewise fell 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, and since California had not specifically waived its immunity to suit in federal court.

BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissented, expressing disagreement with the court's Eleventh Amendment doctrine and stating that the court should take advantage of the opportunity provided by the instant case to reexamine the doctrine's historical and jurisprudential foundations.

BLACKMUN, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ., dissented, expressing the view (1) that California, as a willing recipient of federal funds under the Rehabilitation Act, consented to suit when it accepted such assistance and (2) that Congress produced the Act in exercise of its enforcement power under § 5 of the Fourteenth Amendment to the United States Constitution and thereby abrogated any claim of immunity the state might otherwise raise.

STEVENS, J., dissented, stating that a fresh examination of the court's Eleventh Amendment jurisprudence will produce benefits that outweigh the consequences of further unraveling the doctrine of stare decisis in this area of the law.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Civil Rights § 7.5; States, Territories, and Possessions § 87 — employment discrimination against handicapped — states' immunity from suit

1a-1f. The Eleventh Amendment to the United States Constitution proscribes a suit in federal court against a California state hospital that allegedly denied the plaintiff employment solely because of his physical handicap, in violation of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794), since the provisions of the Act fall short of expressing the requisite unequivocal congressional intent to abrogate the states' Eleventh Amendment immunity, since the 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, and since the state has not specifically waived its immunity to suit in federal court. (Brennan, Marshall, Blackmun, and Stevens, JJ., dissented from this holding.)

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

2. The Eleventh Amendment to the United States Constitution does not bar a federal action against a state if the state waives its immunity and consents to suit in federal court.

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15 Am Jur 2d, Civil Rights § 248.5 (Supp); 72 Am Jur 2d, States, Territories, and Dependencies §§ 103, 118 et seq.
USCS, Constitution, 11th Amendment; 29 USCS § 794
US L Ed Digest, Civil Rights § 7.5; States, Territories, and Possessions §§ 87, 88, 89
L Ed Index to Annos, Civil Rights; States
ALR Quick Index, Discrimination; States
Federal Quick Index, Disability; States
Auto-Cite®: Any case citation herein can be checked for form, parallel references, later history and annotation references through the Auto-Cite computer research system.

ANNOTATION REFERENCES

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. 50 L Ed 2d 923.
Construction and effect of § 504 of the Rehabilitation Act of 1973 (29 USCS § 794) prohibiting discrimination against otherwise qualified handicapped individuals in specified programs or activities. 44 ALR Fed 148.
Construction and effect of state legislation forbidding job discrimination on account of physical handicap. 90 ALR3d 393.

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

3a, 3b. A state may effectuate a waiver of its Eleventh Amendment immunity to suit in federal court by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program; however, there must be an unequivocal indication that the state intends to consent to federal jurisdiction that otherwise would be constitutionally barred.

States, Territories, and Possessions § 88 — Eleventh Amendment — abrogation by Congress

4. When acting pursuant to the enforcement provisions of § 5 of the Fourteenth Amendment to the United States Constitution, Congress can abrogate the Eleventh Amendment without the states' consent.

States, Territories, and Possessions § 89 — Eleventh Amendment — consent to be sued

5. Although a state's general waiver of sovereign immunity may subject it to suit in state court, it is

not enough to waive the immunity guaranteed by the Eleventh Amendment to the United States Constitution; in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the state's intention to subject itself to suit in federal court.

States, Territories, and Possessions § 88 — Eleventh Amendment — abrogation by Congress

6a-6c. Congress may abrogate the states' Eleventh Amendment immunity from suit in federal court only by making its intention unmistakably clear in the language of a statute; a general authorization for suit in federal court is not sufficient for this purpose.

States, Territories, and Possessions § 89 — Eleventh Amendment — receipt of federal funds

7. The mere receipt of federal funds cannot establish that a state has waived its Eleventh Amendment immunity and consented to suit in federal court.

program receiving federal financial assistance under the Act. Section 505(a) makes available to any person aggrieved by any act of any recipient of federal assistance under the Act the remedies for employment discrimination set forth in Title VI of the Civil Rights Act of 1964. The District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. Ultimately, after initially affirming on other grounds and upon

Respondent, who suffers from diabetes and has no sight in one eye, brought an action in Federal District Court against petitioners, alleging that petitioner California State Hospital denied him employment because of his physical handicap, in violation of § 504 of the Rehabilitation Act of 1973, and seeking compensatory, injunctive, and declaratory relief. Section 504 provides that no handicapped person shall, solely by reason of his handicap, be subjected to discrimination under any

SYLLABUS BY REPORTER OF DECISIONS

remand from this Court, the Court of Appeals reversed, holding that the Eleventh Amendment did not bar the action because the State by receiving funds under the Act had implicitly consented to be sued as a recipient under § 504.

Held: Respondent's action is proscribed by the Eleventh Amendment.

(a) Article III, § 5, of the California Constitution, which provides that "[s]uits may be brought against the State in such manner and in such courts as shall be directed by law" does not constitute a waiver of the State's Eleventh Amendment immunity from suit in federal court. In order for a state statute or constitutional provision to constitute such a waiver, it must specify the State's intent to subject itself to suit in federal court. Article III, § 5, does not specifically indicate the State's willingness to be sued in federal court but appears simply to authorize the legislature to waive the State's sovereign immunity.

(b) The Rehabilitation Act does not abrogate the Eleventh Amend-

ment bar to suits against the States. Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself. Here, the general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.

(c) The State's acceptance of funds and participation in programs funded under the Rehabilitation Act are insufficient to establish that it consented to suit in federal court. The Act falls far short of manifesting a clear intention to condition participation in programs under the Act on a State's consent to waive its constitutional immunity.

735 F2d 359, reversed.

Powell, J., delivered the opinion of the Court, in which Burger, C. J., and White, Rehnquist, and O'Connor, JJ., joined. Brennan, J., filed a dissenting opinion, in which Marshall, Blackmun and Stevens, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, JJ., joined. Stevens, J., filed a dissenting opinion.

APPEARANCES OF COUNSEL

James E. Ryan argued the cause for petitioners.

Marilyn Holle argued the cause for respondent.

Briefs of Counsel, p 777, infra.

OPINION OF THE COURT

Justice Powell delivered the opinion of the Court.

[1a] This case presents the question whether States and state agencies are subject to suit in federal court by litigants seeking retroactive monetary relief under § 504 of the Rehabilitation Act of 1973, 29 USC § 794 [29 USCS § 794], or whether such suits are proscribed by the Eleventh Amendment.

I

Respondent, Douglas James Scanlon, suffers from diabetes mellitus and has no sight in one eye. In November 1979, he filed this action against petitioners, Atascadero State Hospital and the California Department of Mental Health, in the United States District Court for the Central District of California, alleging that in 1978 the hospital denied

him employment as a graduate student assistant recreational therapist solely because of his physical handicaps. Respondent charged that the hospital's discriminatory refusal to hire him violated § 504 of the Rehabilitation Act of 1973, 87 Stat 394, as amended, 29 USC § 794 [29 USCS § 794], and certain state fair employment laws. Respondent sought compensatory, injunctive, and declaratory relief.

Petitioners moved for dismissal of the complaint on the ground that the Eleventh Amendment barred the federal court from entertaining respondent's claims. Alternatively, petitioners argued that in a suit for employment discrimination under § 504 of the Rehabilitation Act, a plaintiff must allege that the primary objective of the federal assistance received by the defendants is to provide employment, and that respondent's case should be dismissed because he did not so allege. In January 1980, the District Court granted petitioners' motion to dismiss the complaint on the ground that respondent's claims were barred by the Eleventh Amendment. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed. *Scanlon v Atascadero State Hospital*, 677 F2d 1271 (1982). It did not reach the question whether the Eleventh Amendment proscribed respondent's suit. Rather it affirmed the District Court on the ground that respondent failed to allege an essential element of a claim under § 504, namely, that a primary objective of the federal funds received by the defendants was to provide employment. *Id.*, at 1272.

Respondent then sought review by this Court. We granted certiorari, 465 US 1095, 83 L Ed 2d 395, 105 S Ct 503 (1984), vacated the judgment

[473 US 237]

of the Court of Appeals, and remanded the case for further consideration in light of *Consolidated Rail Corp. v Darrone*, 465 US 624, 79 L Ed 2d 568, 104 S Ct 1248 (1984), in which we held that § 504's bar on employment discrimination is not limited to programs that receive federal aid for the primary purpose of providing employment. *Id.*, at 632-633, 79 L Ed 2d 568, 104 S Ct 1248. On remand, the Court of Appeals reversed the judgment of the District Court. It held that "the Eleventh Amendment does not bar [respondent's] action because the State, if it has participated in and received funds from programs under the Rehabilitation Act, has implicitly consented to be sued as a recipient under 29 USC § 794 [29 USCS § 794]." 735 F2d 359, 362 (1984). Although noting that the Rehabilitation Act did not expressly abrogate the States' Eleventh Amendment immunity, the court reasoned that a State's consent to suit in federal court could be inferred from its participation in programs funded by the Act. The court based its view on the fact that the Act provided remedies, procedures, and rights against "any recipient of Federal assistance" while implementing regulations expressly defined the class of recipients to include the States. Quoting our decision in *Edelman v Jordan*, 415 US 651, 672, 39 L Ed 2d 662, 94 S Ct 1347 (1974), the court determined that the "threshold fact of congressional authorization to sue a class of defendants which literally includes [the] States" was present in this case. 735 F2d, at 361.

The court's decision in this case is in conflict with those of the Courts of Appeals for the First and Eighth Circuits. See *Ciampa v Massachu-*

setts Rehabilitation Comm'n, 718 F2d 1 (CA1 1983); *Miener v Missouri*, 673 F2d 969 (CA8), cert den, 459 US 909, 74 L Ed 2d 171, 103 S Ct 215 (1982). We granted certiorari to resolve this conflict, 469 US 1032, 83 L Ed 2d 395, 105 S Ct 503 (1984), and we now reverse.

II

The Eleventh Amendment provides: "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

[437 US 238]

or Subjects of any Foreign State." As we have recognized, the significance of this Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III" of the Constitution. *Pennhurst State School and Hospital v Halderman*, 465 US 89, 98, 79 L Ed 2d 67, 104 S Ct 900 (1984) (*Pennhurst II*). Thus, in *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court held that the

Amendment barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide.

[2, 3a, 4] There are, however, certain well-established exceptions to the reach of the Eleventh Amendment. For example, if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action. See, e.g., *Clark v Barnard*, 108 US 436, 447, 27 L Ed 780, 2 S Ct 878 (1883).¹ Moreover, the Eleventh Amendment is "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," that is, by Congress' power "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." *Fitzpatrick v Bitzer*, 427 US 445, 456, 49 L Ed 2d 614, 96 S Ct 2666 (1976). As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent. *Ibid.*

But because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States,²

1. [3b] A State may effectuate a waiver of its constitutional immunity by a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment. As we said in *Edelman v Jordan*, 415 US 651, 673, 39 L Ed 2d 662, 94 S Ct 1347 (1974), "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

2. Justice Brennan's dissent repeatedly asserts that established Eleventh Amendment doctrine is not "grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people . . ." *Post*, at 247-248, 87 L Ed 2d, at 183; see also *post*, at

258-302, 87 L Ed 2d, at 190, 217. We believe, however, that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. See n 3, *infra*. The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a "counterpoise" to the power of the Federal Government. See, e.g., *The Federalist No. 17*, p 107 (J. Cooke ed 1961); *The Federalist No. 46*, p 316 (J. Cooke ed 1961). The "new evidence," discovered by the dissent in *The Federalist* and in the records of the state ratifying conventions, has been available to historians and Justices of this Court for almost two centuries. Viewed in isolation, some of it is subject to varying interpretations. But none of the Framers questioned that the Constitution created a federal system with some authority expressly granted the Federal Government and the re-

this Court consistently has held
[473 US 239]

that these exceptions apply only when certain specific conditions are met. Thus, we have held that a State will be deemed to have waived its immunity "only where stated 'by
[473 US 240]

the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.'" *Edelman v Jordan*, supra, at 673, 39 L Ed 2d 662, 94 S Ct 1347, quoting *Murray v Wilson Distilling Co.* 213 US 151, 171, 53 L Ed 742, 29 S Ct 458 (1909). Likewise, in determining whether Congress in exercising its Fourteenth Amendment powers has abrogated the States' Eleventh Amendment immunity, we have required "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immu-

mainder retained by the several States. See, e. g., *The Federalist* Nos. 39, 45. The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.

The principle that the jurisdiction of the federal courts is limited by the sovereign immunity of the States "is, without question, a reflection of concern for the sovereignty of the States . . ." *Employees v Missouri Dept of Public Health and Welfare*, 411 US 279, 293, 36 L Ed 2d 251, 93 S Ct 1614 (1973) (Marshall, J., concurring in result). As the Court explained almost 65 years ago: "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States 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 the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one

of the several States.'" *Pennhurst II*, 465 US, at 99, 79 L Ed 2d 67, 104 S Ct 900, quoting *Quern v Jordan*, 440 US 332, 342, 59 L Ed 2d 358, 99 S Ct 1139 (1979). Accord, *Employees v Missouri Dept. of Public Health and Welfare*, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973).

In this case, we are asked to decide whether the State of California is subject to suit in federal court for alleged violations of § 504 of the Rehabilitation Act. Respondent makes three arguments in support of his view that the Eleventh Amendment does not bar such a suit: first, that the State has waived its immunity by virtue of Art III, § 5, of the California Constitution; second, that in enacting the Rehabilitation Act, Congress has abrogated the constitutional immunity of the States; third, that by accepting federal funds under the Rehabilitation Act, the State

brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." *Ex parte New York*, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921) (citations omitted). See also cases cited in n 3, *infra*.

Justice Brennan's dissent also argues that in the absence of jurisdiction in the federal courts, the States are "exempt[ed] . . . from compliance with laws that bind every other legal actor in our Nation." *Post*, at 248, 87 L Ed 2d, at 183. This claim wholly misconceives our federal system. As Justice Marshall has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals." *Employees v Missouri Dept. of Public Health and Welfare*, supra, at 293-294, 36 L Ed 2d 251, 93 S Ct 1614 (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land. See *Martin v Hunter's Lessee*, 1 Wheat 304, 341-344, 4 L Ed 97 (1816). See also *Stone v Powell*, 428 US 465, 493, n 35, 49 L Ed 2d 1067, 96 S Ct 3037 (1976), and *post*, at 256, n 8, 87 L Ed 2d, at 188-189.

has consented to suit in federal court. Under the prior decisions of this Court, none of these claims has merit.

[473 US 241]
III

Respondent argues that the State of California has waived its immunity to suit in federal court, and thus the Eleventh Amendment does not bar this suit. See *Clark v Barnard*, 108 US 436, 27 L Ed 780, 2 S Ct 878 (1883) Respondent relies on Art III, § 5, of the California Constitution, which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." In respondent's view, unless the California Legislature affirmatively imposes sovereign immunity, the State is potentially subject to suit in any court, federal as well as state.

[1b, 5] The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. *Florida Dept. of Health v Florida Nursing Home Assn.*, 450 US 147, 150, 67 L Ed 2d 132, 101 S Ct 1032 (1981) (per curiam). As we explained just last Term, "a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst II*, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*. See *Smith v Reeves*, 178 US 436, 441, 44

L Ed 1140, 20 S Ct 919 (1900); *Great Northern Life Insurance Co. v Read*, 322 US 47, 54, 88 L Ed 1121, 64 S Ct 873 (1944). In view of these principles, we do not believe that Art III, § 5, of the California Constitution constitutes a waiver of the State's constitutional immunity. This provision does not specifically indicate the State's willingness to be sued in federal court. Indeed, the provision appears simply to authorize the legislature to waive the State's sovereign immunity. In the absence of an unequivocal waiver specifically applicable to federal-court jurisdiction, we decline to find that California has waived its constitutional immunity.

[473 US 242]
IV

[1c, 6a] Respondent also contends that in enacting the Rehabilitation Act, Congress abrogated the States' constitutional immunity. In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. *Pennhurst II*, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900; *Quern v Jordan*, supra, at 342-345, 59 L Ed 2d 358, 99 S Ct 1139. We decline to do so, and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion.

Only recently the Court reiterated that "the States occupy a special and specific position in our constitutional system . . ." *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 547, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." *Id.*, at 572, 83 L Ed 2d 1016, 105 S Ct 1005 (Powell, J., dissenting). By guaranteeing the sovereign immunity of the States against suit in federal court, the Eleventh Amendment serves to maintain this balance. "Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system." *Pennhurst II*, supra, at 99, 79 L Ed 2d 67, 104 S Ct 900.

Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain. "Congress may, in determining what is 'appropriate

[473 US 243]

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." *Fitzpatrick*, 427 US, at 456, 49 L Ed 2d 614, 96 S Ct 2666. In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

It is also significant that in determining whether Congress has abrogated the States' Eleventh Amendment immunity, the courts themselves must decide whether their own jurisdiction has been expanded. Although it is of course the duty of this Court "to say what the law is," *Marbury v Madison*, 1 Cranch 137, 177, 2 L Ed 60 (1803), it is appropriate that we rely only on the clearest indications in holding that Congress has enhanced our power. See *American Fire & Cas. Co. v Finn*, 341 US 6, 17, 95 L Ed 702, 71 S Ct 534, 19 ALR2d 738 (1951) ("The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation . . .").

[6b] For these reasons, we hold—consistent with *Quern*, *Edelman*, and *Pennhurst II*—that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself.³

3. In a remarkable view of *stare decisis*, Justice Brennan's dissent states that our decision today evinces "lack of respect for precedent." *Post*, at 258, 87 L Ed 2d, at 190. Not a single authority is cited for this claim. In fact, adoption of the dissent's position would require us to overrule numerous decisions of this Court. However one may view the merits of the dissent's historical argument, the principle of *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III," *Penn-*

hurst II, 465 US, at 98, 79 L Ed 2d 67, 104 S Ct 900, has been affirmed time and time again, up to the present day. E.g., *North Carolina v Temple*, 134 US 22, 30, 33 L Ed 849, 10 S Ct 509 (1890); *Fitts v McGhee*, 172 US 516, 524, 43 L Ed 535, 19 S Ct 269 (1899); *Bell v Mississippi*, 177 US 693, 44 L Ed 945, 20 S Ct 1031 (1900); *Smith v Reeves*, 178 US 436, 446, 44 L Ed 1140, 20 S Ct 919 (1900); *Palmer v Ohio*, 248 US 32, 34, 63 L Ed 108, 39 S Ct 16 (1918); *Duhne v New Jersey*, 251 US 311, 313, 64 L Ed 280, 40 S Ct 154 (1920); *Ex parte New York*, 256 US, at 497, 65 L Ed

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In light of this principle, we must determine whether Congress, in adopting the Rehabilitation Act, has chosen to override the Eleventh Amendment.⁴ Section 504 of the Rehabilitation Act provides in pertinent part:

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"No otherwise qualified handicapped individual in the United States as defined in section 706(7)

of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service." 87 Stat 394, as amended and as set forth in 29 USC § 794 [29 USCS § 794].

1057, 41 S Ct 588; *Missouri v Fiske*, 290 US 18, 26, 78 L Ed 145, 54 S Ct 18 (1933); *Great Northern Life Insurance Co. v Read*, 322 US 47, 51, 88 L Ed 1121, 64 S Ct 873 (1944); *Ford Motor Co. v Department of Treasury of Indiana*, 323 US 459, 464, 89 L Ed 389, 65 S Ct 347 (1945); *Georgia Railroad & Banking Co. v Redwine*, 342 US 299, 304, n 13, 96 L Ed 335, 72 S Ct 321 (1952); *Parden v Terminal Railway of Ala. Docks Dept.*, 377 US 184, 186, 12 L Ed 2d 233, 84 S Ct 1207 (1964); *United States v Mississippi*, 380 US 128, 140, 13 L Ed 2d 717, 85 S Ct 808 (1965); *Employees v Missouri Public Health and Welfare Dept.* 411 US, at 280, 36 L Ed 2d 251, 93 S Ct 1614; *Edelman v Jordan*, 415 US, at 662-663, 39 L Ed 2d 662, 94 S Ct 1347; *Pennhurst II*, supra. Justice Brennan long has maintained that the settled view of *Hans v Louisiana*, as established in the holdings and reasoning of the above cited cases, is wrong. See, e.g., *County of Oneida v Oneida Indian Nation*, 470 US 226, 254, 84 L Ed 2d 169, 105 S Ct 1245 (1985) (Brennan, J., dissenting in part); *Pennhurst II*, supra, at 125, 79 L Ed 2d 67, 104 S Ct 900 (Brennan, J., dissenting); *Employees v Missouri Dept. of Public Health and Welfare*, supra, at 298, 36 L Ed 2d 251, 93 S Ct 1614 (Brennan, J., dissenting); *Edelman v Jordan*, 415 US, at 687, 39 L Ed 2d 662, 94 S Ct 1347 (Brennan, J., dissenting). It is a view, of course, that he is entitled to hold. But the Court has never accepted it, and we see no reason to make a further response to the scholarly, 55-page elaboration of it today.

In a dissent expressing his willingness to overrule *Edelman v Jordan*, supra, as well as at least 16 other Supreme Court decisions that have followed *Hans v Louisiana*, see

supra, Justice Stevens would "further unravel[] the doctrine of *stare decisis*," *Florida Dept. of Health v Florida Nursing Home Assn.* 450 US 147, 155, 67 L Ed 2d 132, 101 S Ct 1032 (1981), because he views the Court's decision in *Pennhurst II* as "repudiat[ing] at least 28 cases." *Post*, at 304, 87 L Ed 2d, at 219, citing *Pennhurst II*, supra, at 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900 (Stevens, J., dissenting). We previously have addressed at length his allegation that the decision in *Pennhurst II* overruled precedents of this Court and decline to do so again here. See *Pennhurst II*, supra, at 109-111, nn 19, 20, and 21, 79 L Ed 2d 67, 104 S Ct 900 (1984). Justice Stevens would ignore *stare decisis* in this case because in the view of a minority of the Court two prior decisions of the Court ignored it. This reasoning would indeed "unravel" a doctrine upon which the rule of law depends.

4. Petitioners assert that the Rehabilitation Act of 1973 does not represent an exercise of Congress' Fourteenth Amendment authority, but was enacted pursuant to the Spending Clause, Art I, § 8, cl 1. Petitioners conceded below, however, that the Rehabilitation Act was passed pursuant to § 5 of the Fourteenth Amendment. Thus, we first analyze § 504 in light of Congress' power under the Fourteenth Amendment to subject unconsenting States to federal court jurisdiction. See *Fitzpatrick v Bitzer*, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976). In Part V, infra, at 246, 87 L Ed 2d, at 182, we address the reasoning of the Court of Appeals and conclude that by accepting funds under the Act, the State did not "implicitly consent[] to be sued . . ." 735 F2d 359, 382 (1984).

Section 505, which was added to the Act in 1978, as set forth in 29 USC § 794a [29 USCS § 794a], describes the available remedies under the Act, including the provisions pertinent to this case:

"(a)(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC 2000d et seq.] [42 USCS §§ 2000d et seq.], shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

"(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[1d, 6c] The statute thus provides remedies for violations of § 504 by "any recipient of Federal assistance." There is no claim here that the State of California is not a recipient of federal

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aid under the statute.

But given their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically. *Pennhurst II*, 435 US, at 99, 79 L Ed 2d 67, 104 S Ct 900, citing *Quern v Jordan*, 440 US 332, 59 L Ed 2d 358, 99 S Ct

1139 (1979). Accordingly, we hold that the Rehabilitation Act does not abrogate the Eleventh Amendment bar to suits against the States.

V

Finally, we consider the position adopted by the Court of Appeals that the State consented to suit in federal court by accepting funds under the Rehabilitation Act.⁵ 735 F2d, at 361-362. In reaching this conclusion, the Court of Appeals relied on "the extensive provisions [of the Act] under which the states are the express intended recipients of federal assistance." *Id.*, at 360. It reasoned that "this is a case in which a 'congressional enactment . . . by its terms authorized suit by designated plaintiffs against a general class of defendants which literally included States or state instrumentalities,' and 'the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity,'" *id.*, at 361, citing *Edelman v Jordan*, 415 US, at 672, 39 L Ed 2d 662, 94 S Ct 1347. The Court of Appeals thus concluded that if the State "has participated in and received funds from programs under the Rehabilitation Act, [it] has implicitly consented to be sued as a recipient under 29 USC § 794 [29 USCS § 794]." 735 F2d, at 332.

[1e, 7] The court properly recognized that the mere receipt of federal funds cannot establish that a State has consented to suit

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in federal court. *Ibid.*, citing *Florida Dept. of Health v Florida Nursing Home Assn.*, 450 US, at 150, 67 L Ed 2d

sent to federal jurisdiction it engaged in analysis relevant to Spending Clause enactments.

132, 101 S Ct 1032; *Edelman v Jordan*, supra, at 673, 39 L Ed 2d 662, 94 S Ct 1347. The court erred, however, in concluding that because various provisions of the Rehabilitation Act are addressed to the States, a State necessarily consents to suit in federal court by participating in programs funded under the statute. We have decided today that the Rehabilitation Act does not evince an unmistakable congressional purpose, pursuant to § 5 of the Fourteenth Amendment, to subject unconsenting States to the jurisdiction of the federal courts. The Act likewise falls far 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. Thus, were we to

view this statute as an enactment pursuant to the Spending Clause, Art I, § 8, see n 4, supra, we would hold that there was no indication that the State of California consented to federal jurisdiction.

VI

[1f] The provisions of the Rehabilitation Act fall far short of expressing an unequivocal congressional intent to abrogate the States' Eleventh Amendment immunity. Nor has the State of California specifically waived its immunity to suit in federal court. In view of these determinations, the judgment of the Court of Appeals must be reversed.

It is so ordered.

SEPARATE OPINIONS

Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, dissenting.

If the Court's Eleventh Amendment doctrine were grounded on principles essential to the structure of our federal system or necessary to protect the cherished constitutional liberties of our people, the doctrine might be unobjectionable; the interpretation of the text of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text—has always been the unique role of this Court. But the Court's

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Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the fed-

eral judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation. Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations. Such an inquiry would reveal that the Court, in Professor Shapiro's words, has taken a wrong turn.¹ Because the Court today follows this mistaken path, I respectfully dissent.

I

I first address the Court's holding that Congress did not succeed in abrogating the States' sovereign im-

1. See Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv L Rev 61 (1984).

5. Although the Court of Appeals seemed to state that the Rehabilitation Act was adopted pursuant to § 5 of the Fourteenth Amendment, by focusing on whether the State con-

munity when it enacted § 504 of the Rehabilitation Act, 29 USC § 794 [29 USCS § 794]. If this holding resulted from the Court's examination of the statute and its legislative history to determine whether Congress intended in § 504 to impose an obligation on the States enforceable in federal court, I would confine my dissent to the indisputable evidence to the contrary in the language and history of § 504.

Section 504 imposes an obligation not to discriminate against the handicapped in "any program or activity receiving Federal financial assistance." This language is general and unqualified, and contains no indication whatsoever that an exemption for the States was intended. Moreover, state governmental programs and activities are undoubtedly the recipients of a large percentage of federal funds.² Given this

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widespread state dependence on federal funds, it is quite incredible to assume that Congress did not intend that the States should be fully subject to the strictures of § 504.

The legislative history confirms that the States were among the primary targets of § 504. In introducing the predecessor of § 504 as an amendment to Title VI of the Civil Rights Act of 1964, 42 USC § 2000d [29 USCS § 2000d], Representative Vanik clearly indicated that governments would be among the primary targets of the legislation: "Our Governments tax [handicapped] people, their parents and relatives, but fail to provide services for them. . . . The opportunities provided by the Government almost always exclude

2. For instance, in 1972-1973, the year in which Congress was considering § 504, state governments received over \$31 billion in revenue from the Federal Government. By 1981-

the handicapped." 117 Cong Rec 45974 (1971). He further referred approvingly to a federal-court suit against the State of Pennsylvania raising the issue of educational opportunities for the handicapped. See *id.*, at 45974-45975 (citing Pennsylvania Assn. for Retarded Children v Pennsylvania, 343 F Supp 279 (ED Pa 1972), and characterizing it as a "suit against the State"). Two months later, Representative Vanik noted the range of state actions that could disadvantage the handicapped. He said that state governments "lack funds and facilities" for medical care for handicapped children and "favor the higher income families" in tuition funding. 118 Cong Rec 4341 (1972). He pointed out that "the States are unable to define and deal with" the illnesses of the handicapped child, and that "[e]xclusion of handicapped children [from public schools] is illegal in some States, but the States plead lack of funds." *Ibid.* Similarly, Senator Humphrey, the bill's sponsor in the Senate, focused particularly on a suit against a state-operated institution for the mentally retarded as demonstrating the need for the bill. See *id.*, at 9495, 9502.

The language used in the statute ("any program or activity receiving Federal financial assistance") has long been used

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to impose obligations on the States under other statutory schemes. For example, Title VI, enacted in 1964, bans discrimination on the basis of race, color, or national origin by "any program or activity receiving Federal financial

1982, this had grown to \$66 billion. Bureau of the Census, Historical Statistics on Governmental Finances and Employment 34 (1982).

assistance." 42 USC § 2000d [42 USCS § 2000d]. Soon after its enactment, seven agencies promulgated regulations that defined a recipient of federal financial assistance to include "any State, political subdivision of any State or instrumentality of any State or political subdivision." See, e.g., 29 Fed Reg 16274, § 15.2(e) (1964). See generally *Guardians Assn. v Civil Service Comm'n*, 463 US 582, 618, 77 L Ed 2d 866, 103 S Ct 3221 (1983) (Marshall, J., dissenting). Over 40 federal agencies and every Cabinet Department adopted similar regulations. *Id.*, at 619, 77 L Ed 2d 866, 103 S Ct 3221. As Senator Javits remarked in the debate on Title VI, "[w]e are primarily trying to reach units of government, not individuals." 110 Cong Rec 13700 (1964).

Similarly Title IX of the Education Amendments of 1972, 20 USC § 1681(a) [20 USCS § 1681(a)], prohibits discrimination on the basis of sex by "any education program or activity receiving Federal financial assistance." The regulations governing Title IX use the same definition of "recipient"—which explicitly includes the States—as do the Title VI regulations. See 34 CFR § 106.2(h) (1985). The Congress that enacted § 504 had the examples of Titles VI and IX before it, and plainly knew that the language of the statute would include the States.³

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3. The Rehabilitation Act was amended in 1974, a year after its original enactment. Pub L 93-516, 88 Stat 1617. The Senate Report that accompanied the amendment acknowledged that "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1974 [sic]." S Rep No. 93-1297, pp 39-40 (1974). These amendments and their history "clarified the scope of § 504" and "shed significant light on the in-

Implementing regulations promulgated for § 504 included the same definition of "recipient" that had previously been used to implement Title VI and Title IX. See 45 CFR § 84.3(f) (1984). In 1977, Congress held hearings on the implementation of § 504, and subsequently produced amendments to the statute enacted in 1978. Pub L 95-602, 92 Stat 2982, § 505(a)(2), 29 USC § 794a [29 USCS § 794a]. The Senate Report accompanying the amendments explicitly approved the implementing regulations. S Rep No. 95-890, p 19 (1981). No Member of Congress questioned the reach of the regulations. In describing another section of the 1978 amendments which brought the Federal Government within the reach of § 504, Representative Jeffords noted that the section "applies 504 to the Federal Government as well as State and local recipients of Federal dollars." 124 Cong Rec 13901 (1978). Representative Sarasin emphasized that "[n]o one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, and most certainly, not the Federal Government." *Id.*, at 38552.

The 1978 amendments also addressed the remedies for violations of § 504:

"The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC

1964] with which § 504 was enacted." *Alexander v Chate*, 469 US 237, 306-307, n 27, 83 L Ed 2d 661, 105 S Ct 712 (1985).

4. Representative Jeffords also noted that "it did not seem right to me that the Federal Government should require States and localities to eliminate discrimination against the handicapped wherever it exists and remain exempt themselves." 124 Cong Rec 38551 (1978).

2000d et seq.] [42 USCS 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title." 29 USC § 794(a)(2) [29 USCS § 794(a)(2)].

Again, the amendment referred in general and unqualified terms to "any recipient of Federal assistance." An additional [473 US 252]

provision of the 1978 amendments made available attorney's fees to prevailing parties in actions brought to enforce § 504. Discussing these two provisions, Senator Cranston presupposed that States would be subject to suit under this section:

"[W]ith respect to State and local bodies or State and local officials, attorney's fees, similar to other items of cost, would be collected from the official, in his official capacity from funds of his or her agency or under his or her control; or from the State or local government—regardless of whether such agency or Government is a named party." 124 Cong Rec 30347 (1978)

Given the unequivocal legislative history, the Court's conclusion that Congress did not abrogate the States' sovereign immunity when it enacted § 504 obviously cannot rest on an analysis of what Congress in-

tended to do or on what Congress thought it was doing. Congress intended to impose a legal obligation on the States not to discriminate against the handicapped. In addition, Congress fully intended that whatever remedies were available against other entities—including the Federal Government itself after the 1978 amendments—be equally available against the States. There is simply not a shred of evidence to the contrary.

II

Rather than an interpretation of the intent of Congress, the Court's decision rests on the Court's current doctrine of Eleventh Amendment sovereign immunity, which holds that "the fundamental principle of sovereign immunity limits the grant of judicial authority in Art III" of the Constitution. *Pennhurst State School and Hospital v Halderman*, 465 US 89, 98, 79 L Ed 2d 67, 104 S Ct 900 (1984). Despite the presence of the most clearly lawless behavior by the state government, the Court's doctrine holds that the judicial authority of the United States

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does not extend to suits by an individual against a State in federal court.

The Court acknowledges that the supposed lack of judicial power may be remedied, either by the State's consent,⁶ or by express congressional

Court's words, "[a]lthough a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment." *Ibid.* Ordinarily, a federal court is expected faithfully to decide state-law questions before it as the courts of a State would. I would think that a federal court deciding the scope of a state waiver of sovereign immunity should attempt to construe the state law of sovereign immunity as a state court would, making use of relevant legisla-

abrogation pursuant to the Civil War Amendments, see *Fitzpatrick v Bitzer*, 427 US 445, 49 L Ed 2d 614, 96 S Ct 2666 (1976); *City of Rome v United States*, 446 US 156, 64 L Ed 2d 119, 100 S Ct 1548 (1980), or perhaps pursuant to other congressional powers. But the Court has raised formidable obstacles to congressional efforts to abrogate the States' immunity; the Court has put in place a series of special rules of statutory draftsmanship that Congress

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must obey before the Court will accord recognition to its act. *Employees v Missouri Dept. of Public Health and Welfare*, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973), hold that Congress must make its intention "clear" if it sought to lift the States' sovereign immunity conditional on their participation in a federal program. *Id.*, at 285, 36 L Ed 2d 251, 93 S Ct 1614. *Edelman v Jordan*, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), made it still more difficult for Congress to act, stating that "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Id.*, at 673, 39 L Ed 2d 662, 94 S Ct 1347. *Pennhurst State School and Hospital v Halderman*, *supra*, required "an un-

equivocal expression of congressional intent." *Id.*, at 99, 79 L Ed 2d 67, 104 S Ct 900. Finally, the Court today tightens the noose by requiring "that Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." *Ante*, at 243, 87 L Ed 2d, at 180 (emphasis added).

These special rules of statutory drafting are not justified (nor are they justifiable) as efforts to determine the genuine intent of Congress; no reason has been advanced why ordinary canons of statutory construction would be inadequate to ascertain the intent of Congress. Rather, the special rules are designed as hurdles to keep the disfavored suits out of the federal court. In the Court's words, the test flows from need to maintain "the usual constitutional balance between the States and the Federal Government." *Ante*, at 242, 87 L Ed 2d, at 180. The doctrine is thus based on a fundamental policy decision, vaguely attributed to the Framers of Article III or the Eleventh Amendment, that the federal courts ought not to hear suits brought by individuals against States. This Court executes the policy by making it difficult, but not impossible,

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for Congress to create

Congress, special rules of statutory draftsmanship if they would make a waiver of state sovereign immunity in federal court successful. Apparently, even States that want to make a federal forum available for the fair adjudication of grievances arising under federal law ought to be deterred from doing so.

6. See also *Pennhurst State School and Hospital v Halderman*, 465 US 89, 99, 79 L Ed 2d 67, 104 S Ct 900 (1984) ("Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system").

7. *Id.*, at 216, 359 P2d, at 460. Instead, the Court seems to believe that the Eleventh Amendment justifies the Court in imposing on the state legislatures, as well as

6. The "stringent" see *ante*, at 241, 87 L Ed 2d, at 179, test that the Court applies to purported state waivers of sovereign immunity is a mirror image of the test it applies to congressional abrogation of state sovereign immunity. Just as the Court today decides that Congress, if it desires effectively to abrogate a State's sovereign immunity, must do so expressly in the statutory language, so the Court similarly decides that a State's waiver, to be effective, must be "specifically applicable to federal-court jurisdiction." *Ibid.* In the

private rights of action against the States.⁷

Reliance on this supposed constitutional policy reverses the ordinary role of the federal courts in federal-question cases. Federal courts are instruments of the National Government, seeing to it that constitutional limitations are obeyed while interpreting the will of Congress in enforcing the federal laws. In the Eleventh Amendment context, however, the Court instead relies on a supposed constitutional policy disfavoring suits against States as justification for ignoring the will of Congress; the goal seems to be to obstruct the ability of Congress to achieve ends that are otherwise constitutionally unexceptionable and well within the reach of its Article I powers.

The Court's sovereign immunity doctrine has other unfortunate re-

sults. Because the doctrine is inconsistent with the

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essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land—it has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur. Under the rule of *Ex parte Young*, 209 US 123, 52 L Ed 714, 28 S Ct 441 (1908), a State may be required to obey federal law, so long as the plaintiff remembers to name a state official rather than the State itself as defendant, see *Alabama v Pugh*, 438 US 781, 57 L Ed 2d 1114, 98 S Ct 3057 (1978), and so long as the relief sought is prospective rather than retrospective. *Edelman v Jordan*, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974).⁸ These

this chronology, for the Court now to hold that Congress did not abrogate the States' immunity because it did not "unequivocally express this intention in the statutory language" is to change the rules for lawmaking after Congress has already acted. Congress, like other officials, "cannot be expected to predict the future course of constitutional law." *Procurier v Navarette*, 434 US 555, 662, 55 L Ed 2d 24, 98 S Ct 855 (1978).

8. There are other rules created specifically to permit suits that would appear to be barred by any thoroughgoing interpretation of the Eleventh Amendment as a bar to exercise of the federal judicial power in suits against States. For instance, *Lincoln County v Luning*, 133 US 529, 530, 33 L Ed 766, 10 S Ct 363 (1890), established that the Eleventh Amendment is not a bar to suits against local governmental units. In addition, it seems to have been a longstanding, though unarticulated, rule that the Eleventh Amendment does not limit exercise of otherwise proper federal appellate jurisdiction over suits from state courts. For instance, in *Bacchus Imports, Ltd. v Dias*, 468 US 263, 82 L Ed 2d 200, 104 S Ct 3049 (1984), we adjudicated a taxpayer's appeal from an unfavorable judgment in a suit against state officials for re-

intricate rules often create manifest injustices, while failing to respond to any legitimate needs of the States. A damages award may often be the only practical remedy available to the plaintiff,⁹ and the threat of a damages award may be the only effective

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deterrent to a defendant's willful violation of federal law. Cf. *Edelman v Jordan*, supra, at 691-692, 39 L Ed 2d 662, 94 S Ct 1347 (Marshall, J., dissenting). While the prohibition of damages awards thus imposes substantial costs on plaintiffs and on members of a class Congress sought to protect, the injunctive relief that is permitted can often be more intrusive—and more expensive—than a simple damages award would be.¹⁰

The Court's doctrine itself has been unstable. As I shall discuss below, the doctrine lacks a textual anchor, a firm historical foundation, or a clear rationale. As a result, it has been impossible to determine to

what extent the principle of state accountability to the rule of law can or should be accommodated within the competing framework of state nonaccountability put into place by the Court's sovereign immunity doctrine. For this reason, we have been unable to agree on the content of the special "rules" we have applied to Acts of Congress to determine whether they abrogate state sovereign immunity. Compare *Parden v Terminal Railway of Ala. Docks Dept.*, 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964), with *Employees v Missouri Dept. of Public Health and Welfare*, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973). Whatever rule is decided upon at a given time is then applied *retroactively* to actions taken by Congress. See n 7, supra. Finally, in the absence of any plausible

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limiting principles, the Court has overruled and ignored past cases that seemed to stand in the way of vindication of the doubtful States' right the Court has created. See

fund of taxes. Cf. *Edelman v Jordan*. Compare *Martinez v California*, 444 US 277, 62 L Ed 2d 481, 100 S Ct 553 (1980) (adjudicating appeal of § 1983 action brought against State in state court) with *Quern v Jordan*, 440 US 332, 59 L Ed 2d 358, 99 S Ct 1139 (1979) (holding that § 1983 does not abrogate state sovereign immunity in federal court). See also *Williams v Vermont*, 472 US 14, 86 L Ed 2d 11, 105 S Ct 2465 (1985); *Summa Corp. v California ex rel. State Lands Comm'n*, 466 US 198, 80 L Ed 2d 237, 104 S Ct 1751 (1984); *Aloha Airlines, Inc. v Director of Taxation of Hawaii*, 464 US 7, 78 L Ed 2d 10, 104 S Ct 291 (1983); *Thomas v Review Board of Ind. Employment Security Div.*, 450 US 707, 67 L Ed 2d 624, 101 S Ct 1425 (1981); *Bonelli Cattle Co. v Arizona*, 414 US 313, 38 L Ed 2d 526, 94 S Ct 517 (1973).

9. In this case, for instance, damages may well be the only practical relief available for the respondent. He originally brought suit in 1979 alleging that the State had improperly denied him employment as a graduate student assistant recreational therapist. Even if

he had brought suit against state officials as well as the State itself, it is reasonable to suppose that now—six years later—he has attained his degree and would obtain no benefit from an injunction ordering the end of discrimination against the handicapped in hiring graduate student assistants. "For people in [Scanlon's] shoes, it is damages or nothing." *Bivens v Six Unknown Federal Narcotics Agents*, 403 US 388, 410, 29 L Ed 2d 619, 91 S Ct 1999 (1971).

10. Congress, of course, may decide in a given case that a remedial scheme should be limited to either damages or injunctive relief. Cf. 42 USC § 2000a-3(a) [42 USCS § 2000a-3(a)] (statute limiting remedy to "preventive" relief against all defendants). Our role in such a case is to interpret the will of Congress with respect to the scope of the permissible relief. In the Eleventh Amendment context, however, the Court seems to have decided that the supposed constitutional policy disfavoring suits against States justifies limiting the scope of relief regardless of the apparent will of Congress.

7. In this case, the Court's decision relentlessly to apply its "clear-statement rule" demonstrates how that rule serves no purpose other than obstructing the will of Congress. When Congress enacted § 504, it could have had no idea that it must obey the extreme clear-statement rule adopted by the Court for the first time today. The roots of that rule are found in *Employees v Missouri Dept. of Public Health and Welfare*, 411 US 279, 36 L Ed 2d 251, 93 S Ct 1614 (1973), which was decided on April 18, 1973. Cf. *Parden v Terminal Railway of Ala. Docks Dept.*, 377 US 184, 12 L Ed 2d 233, 84 S Ct 1207 (1964). The *Employees* case, of course, did not itself lay down the extreme rule adopted today. In any event, the bill which became § 504 had been first enacted six months previously. See 118 Cong Rec 35841 (Oct. 13, 1972) (enactment of bill by Senate); id., at 36109 (Oct. 14, 1972) (enactment of bill by House). It was then vetoed by the President and reenacted in February 1973. See 119 Cong Rec 5901 (Feb. 28, 1973) (Senate); id., at 7139 (Mar. 8, 1973) (House). Another veto followed, and the legislation was finally signed into law on September 26, 1973. See id., at 29633 (Sept. 13, 1973) (Senate enactment of final bill); id., at 30151 (Sept. 18, 1973) (House enactment of final bill). Given

Pennhurst State School and Hospital v Halderman, 465 US, at 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900.

I might tolerate all of these results—the unprecedented intrusion on Congress' lawmaking power and consequent increase in the power of the courts, the development of a complex set of rules to circumvent the obviously untenable results that would otherwise ensue, the lack of respect for precedent and the lessons of the past evident in *Pennhurst*—if the Court's sovereign immunity doctrine derived from essential constitutional values protecting the freedom of our people or the structure of our federal system. But that is sadly not the case. Instead, the paradoxical effect of the Court's doctrine is to require the federal courts to protect States that violate federal law from the legal consequences of their conduct.

III

Since the Court began over a decade ago aggressively to expand its doctrine of Eleventh Amendment sovereign immunity, see *Employees v Missouri Dept. of Public Health and Welfare*, *supra*, modern scholars and legal historians have taken a critical look at the historical record that is said to support the Court's result.¹¹ Recent research has discovered

11. See, e. g., Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan L Rev* 1033 (1983) (hereinafter Fletcher); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum L Rev* 1889 (1983) (hereinafter Gibbons); C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972) (hereinafter Jacobs); Field, *The Eleventh Amendment and Other Immunity Doctrines*, 126 *U Pa L Rev* 515,

[473 US 259] and collated substantial evidence that the Court's constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise. The flawed underpinning is the premise that either the Constitution or the Eleventh Amendment embodied a principle of state sovereign immunity as a limit on the federal judicial power. New evidence concerning the drafting and ratification of the original Constitution indicates that the Framers never intended to constitutionalize the doctrine of state sovereign immunity. Consequently, the Eleventh Amendment could not have been, as the Court has occasionally suggested, an effort to reestablish a limitation on the federal judicial power granted in Article III. Nor, given the limited terms in which it was written, could the Amendment's narrow and technical language be understood to have instituted a sweeping new limitation on the federal judicial power whenever an individual attempts to sue a State. A close examination of the historical records reveals a rather different status for the doctrine of state sovereign immunity in federal court. There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of exclud-

1203 (1978) (hereinafter Field); 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 (1975); Orth, *The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power*, 1983 *U Ill L Rev* 423; Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 *Harv L Rev* 61 (1984); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 *U Colo L Rev* 1 (1972).

ing suits against States from federal court.

A

In *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), the Court stated that to permit a citizen to bring a suit against a State in federal court would be "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*, at 15, 33 L Ed 842, 10 S Ct 504. The text of the Constitution, of course, contains no explicit adoption of a principle of state sovereign immunity. The passage from *Hans* thus implies that everyone involved in the framing or ratification of the Constitution believed

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that Article III included a tacit prohibition on the exercise of the judicial power when a State was being sued in federal court. The early history of the Constitution reveals, however, that the Court in *Hans* was mistaken. The unamended Article III was often read to the contrary to prohibit not the exercise of the judicial power, but the assertion of state sovereign immunity as a defense, even in cases arising solely under state law.

It is useful to begin with the text of Article III. Section 2 provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citi-

zens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The judicial power of the federal courts thus extends only to certain types of cases, identified either by subject matter or parties. The subject-matter heads of jurisdiction include federal questions ("all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made") and admiralty ("all Cases of admiralty and maritime Jurisdiction"). The party-based heads of jurisdiction include what might be called ordinary diversity ("Controversies . . . between Citizens of different States"), state-citizen diversity ("between a State and Citizens of another State"), and state-alien diversity ("between a State . . . and foreign . . . Citizens"). It is the latter two clauses, providing for state-citizen and state-alien diversity, that were

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at the focus of the Court's decision in *Chisholm v Georgia*, 2 Dall. 419, 1 L Ed 440 (1793), and the subsequent ratification of the Eleventh Amendment.

To understand the dispute concerning the state-citizen and state-alien diversity clauses, it is crucial to understand the relationship between the party-based and subject-matter heads of jurisdiction. The grants of jurisdiction in Article III are to be read disjunctively. The federal judicial power may extend to a case if it falls within *any* of the enumerated jurisdictional heads. Thus, a federal court can hear a federal-question case even if the

parties are citizens of the same state; it can exercise jurisdiction over cases between citizens of different states even where the case does not arise under federal law. Most important for present purposes, the language of the unamended Article III alone would permit the federal courts to exercise jurisdiction over suits in which a noncitizen or alien is suing a State on a claim of a violation of state law.

This standard interpretation of Article III gave a special importance to the interpretation of the state-citizen and state-alien diversity clauses. The clauses by their terms permitted federal jurisdiction over any suit between a State and a noncitizen or a State and an alien, and in particular over suits in which the plaintiff was the noncitizen or alien and the defendant was the State. Yet in most of the States in 1789, the doctrine of sovereign immunity formally forbade the maintenance of suits against States in state courts, although the actual effect of this bar in frustrating legal claims against the State was unclear.¹² Thus, the question left open by the terms of the two clauses was whether the State law of

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sovereign immunity barred the exercise of the federal judicial power.

A plaintiff seeking federal jurisdiction against a State under the state-citizen or state-alien diversity clauses would be asserting a cause of action based on state law, since a federal question or admiralty claim

12. Professor Jaffe has explained that the doctrine of sovereign immunity in English practice prior to 1789 rarely was a bar to effective relief for those who had legitimate claims against the government. See Jaffe, *Suits Against Governments and Officers: Sov-*

would provide an independent basis for jurisdiction that did not depend on the identity of the parties. To read the two clauses to abrogate the state-law sovereign immunity defense would be to find in Article III a substantive federal limitation on state law. Although a State previously could create a cause of action to which it would not itself be liable, this same cause of action now could be used (at least by citizens of other States or aliens) in federal courts to sue the State itself. This was a particularly troublesome prospect to the States that had incurred debts, some of which dated back to the Revolutionary War. The debts would naturally find their way into the hands of noncitizens and aliens, who at the first sign of default could be expected promptly to sue the State in federal court. The State's effort to retain its sovereign immunity in its own courts would turn out to be futile. Moreover, the resulting abrogation of sovereign immunity would operate retroactively; even debts incurred years before the Constitution was adopted—and before either of the contracting parties expected that a judicial remedy against the State would be available—would become the basis for causes of action brought under the two clauses in federal court.

In short, the danger of the state-citizen and state-alien diversity clauses was that, if read to permit suits against States, they would have the effect of limiting state law in a way not otherwise provided for in the Constitution. The original Con-

stitution, 77 *Harv L Rev* 1 (1963). Judge Gibbons' recent essay similarly points out that the doctrine of sovereign immunity in the Colonies may also have had a very limited scope. See Gibbons, at 1895-1899.

stitution prior to the Bill of Rights contained only a few express limitations on state power. Yet the States would now find in Article III itself a further limit on state action: Despite the fact that the State as sovereign had created a given cause of action, Article III would have made it impossible

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for the State effectively to assert a sovereign immunity defense to that action.

The records of the Constitutional Convention do not reveal any substantial controversy concerning the state-citizen and state-alien diversity clauses.¹³ The language of Article III,¹⁴ which provides one guide to its meaning, is undoubtedly consistent with suits against States under both subject-matter heads of jurisdiction (for example, a suit arising out of federal law brought by a citizen against a State) and party-based heads of jurisdiction (for example, a suit brought under the state-citizen diversity clause itself). However, a federal-question suit against a State does not threaten to displace a prior state-law defense of sovereign immunity, because state-law defenses would not of their own force be applicable to federal causes of action. On the other hand, a state-citizen suit against a State does, as suggested above, threaten to displace

any extant state-law sovereign immunity defense.

An examination of the debates surrounding the state ratification conventions proves more productive. The various

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references to state sovereign immunity all appear in discussions of the state-citizen diversity clause. Virtually all of the comments were addressed to the problem created by state debts that predated the Constitution, when the State's creditors may often have had meager judicial remedies in the case of default. Yet, even in this sensitive context, a number of participants in the debates welcomed the abrogation of sovereign immunity that they thought followed from the state-citizen and state-alien clauses. The debates do not directly address the question of suits against States in admiralty or federal-question cases, where federal law and not state law would govern. Nonetheless, the apparent willingness of many delegates to read the state-citizen clause as abrogating sovereign immunity in state-law causes of action suggests that they would have been even more willing to permit suits against States in federal-question cases, where Congress had authorized such suits in the exercise of its Article I or other powers.

13. See Fletcher, at 1045-1046; Jacobs, at 14-20.

14. As reported by the Committee on Detail, the original draft provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to such other cases, as the national legislature may assign, as involving the national peace and harmony, in the collection of the revenue[,] in disputes between citizens of different states[,] in disputes between a State a Citizen or Citizens of another State[,] in disputes between different states; and in disputes, in which subjects or citizens of other countries are concerned[,] & in Cases of Admiralty Jur-

isdn." (angle brackets in source omitted). M. Farrand, *Records of the Federal Convention of 1787*, pp. 146-147 (rev ed 1937) (hereinafter Farrand). This jurisdiction was to be appellate only, "except in . . . those instances, in which the legislature shall make it original." *Ibid.* Interestingly, the Committee's draft of Article III was in James Wilson's handwriting, but the state-citizen diversity clause was written in the margin by another Committee member, John Rutledge of South Carolina. See Putnam, *How the Federal Courts were Given Admiralty Jurisdiction*, 10 *Cornell LQ* 460, 467 (1925) (facsimile of original document).

The Virginia debates included the most detailed discussion of the state-citizen diversity clause.¹⁵ The first to mention the clause explicitly was George Mason, an opponent of the new Constitution. After quoting the clause, he referred to a

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disputer about Virginia's confiscation of property belonging to Lord Fairfax.¹⁶ He asserted:

"Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject farther. What is to be done if a judgment be obtained against a state? Will you issue a fieri facias? It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted." 3 Elliot's Debates, at 526-527.

Mason thus believed that the state-citizen diversity clause provided federal jurisdiction for suits against the

States and would have the effect of abrogating the State's sovereign immunity defense in state-law causes of action for debt that would be brought in federal court.

Madison responded the next day:

"[Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts." Id., at 533.

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Madison seems to have believed that the Article III judicial power, at least under the state-citizen diversity clause, was limited to cases in which the States were plaintiffs. Although he does deny that "[i]t is in the power of individuals to call any State into court," this remark could be understood as an explication of current State law which he believed would not be displaced by the state-citizen diversity clause. His remarks certainly do not suggest that Congress, acting under its enumerated

of debts owed to British creditors or the discharge of such debts by payment into the state treasury. See Gibbons, at 1903. The Treaty thus potentially subjected Virginia to substantial liability to British creditors trying to collect these debts, although enforcement of the Treaty's provisions was largely impossible under the Articles of Confederation. See generally id., at 1899-1902, 1903-1908.

16. See also 3 J. Elliot, Debates on the Federal Constitution 529 (1891) (hereinafter Elliot's Debates) (further discussion of problem of land confiscation).

powers elsewhere in the Constitution, could not "call a state into court," or, again acting within its own granted powers, provide a citizen with the power to sue a State in federal court.

At any rate, the delegates were not wholly satisfied with Madison's explanation. Patrick Henry, an opponent of ratification, was the next speaker. Referring to Mason, he said: "My honorable friend's remarks were right, with respect to incarcerating a state. It would ease my mind, if the honorable gentleman would tell me the manner in which money should be paid, if, in a suit between a state and individuals, the state were cast." Id., at 542. Returning to the attack on Madison, Henry had no doubt concerning the meaning of the state-citizen diversity clause:

"As to controversies between a state and the citizens of another state, his construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has such demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construc-

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tion they please on it. What! is justice to be done to one party, and not to the other?" Id., at 543.

Edmund Pendleton, the President of the Virginia Convention and the next speaker, supported ratification but seems to have agreed with Henry that the state-citizen diversity clause would subject the States to suit in federal court. He said that "[t]he impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party." Id., at 549.

John Marshall next took up the debate:

"With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be a partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system

on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another

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state, without the establishment of these tribunals?" *Id.*, at 555-556.

Marshall's remarks, like Madison's, appear to suggest that the state-citizen diversity clause could not be used to make an unwilling State a defendant in federal court. The reason seems to be that "it is not rational to suppose that the sovereign power should be dragged before a court." Of course, where the cause of action is based on state law, as it would be in a suit under the state-citizen diversity clause, the "sovereign power" whose law governed would be the State, and Marshall is consequently correct that it would be "irrational" to suppose that the sovereign could be forced to abrogate the sovereign immunity defense that its own law had created. However, where the cause of action is based on a federal law enacted pursuant to Congress' Article I powers, it would be far less clear that Marshall would have concluded that the State still retained the relevant "sovereignty"; in such a case, there is nothing "irrational" about supposing that the relevant sovereign—in this case, Congress—had subjected the State to suit.¹⁷

Marshall's observations did not go

17. To interpret Marshall's remarks to endorse a principle of wholesale state immunity from suit on any cause of action—state or federal—in federal court would render them inconsistent with the views he later expressed as Chief Justice. See *infra*, at 292-299, 87 L Ed 2d, at 211-215.

unanswered. Edmund Randolph, a member of the Committee of Detail at the Constitutional Convention and a proponent of the Constitution, referred back to Mason's remarks:

"An honorable gentleman has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred. . . . I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not

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defendant, is taken away by the words *where a state shall be a party.*" *Id.*, at 573.

Randolph was convinced that a State could be made a party defendant. Discussing some disputed land claims, he remarked: "One thing is certain—that . . . the remedy will not be sought against the settlers, but the state of Virginia. The court of equity will direct a compensation to be made by the state." *Id.*, at 574. Finally, he concluded his discussion: "I ask the Convention of the free people of Virginia if there can be honesty in rejecting the government because justice is to be done by it? . . . Are we to say that we shall discard this government because it would make us all honest?" *Id.*, at 575.¹⁸ One of the purposes of Article III was to vest in the federal courts the power to settle disputes that might

18. Before the discussion of the state-citizen clause initiated by Mason, Randolph had earlier made much the same point while summarizing his views of the Constitution: "I admire that part which forces Virginia to pay her debts." 3 Elliot's Debates, at 207.

threaten the peace and unity of the Nation." Randolph saw the danger of just this kind of internecine strife when a State reneges on debts owed to citizens of another State, and consequently applauded the extension of federal jurisdiction to avoid these consequences.

The Virginia Convention ratified the Constitution. The Madison and Marshall remarks have been cited as evidence of an inherent limitation on Article III jurisdiction. See, e.g., *Edelman v Jordan*, 415 US, at 660, n 9, 39 L Ed 2d 662, 94 S Ct 1347; *Monaco v Mississippi*, 292 US 313, 323-325, 78 L Ed 2d 1282, 54 S Ct 745 (1934); *Hans v Louisiana*, 134 US, at 14, 33 L Ed 842, 10 S Ct 504. Even if this adequately characterized the substance of their views, they were a minority of those given

at the Convention. Mason, Henry, Pendleton, and Randolph
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all took an opposing position.²⁰ Equally important, the entire discussion focused on the question of Virginia's liability for debts and land claims that predated the Constitution and clearly arose under Virginia law. The question that excited such interest was whether the state-citizen diversity clause itself abrogated the sovereign immunity defense that would be available to the State in a suit concerning these issues in state court.²¹ The same issue arose in a few other state conventions, but did not receive the detailed attention that it did in Virginia.²²

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The debate in the press sheds further light on the effect of the Consti-

19. For example the draft of the Constitution referred to the Committee on Detail at the Convention had provided "[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony." 2 Farrand, at 39.

20. It has been suggested that the remarks of the opponents of the Constitution should be given less weight. However, the same argument could be made concerning the remarks of Madison and Marshall, especially in light of Marshall's later interpretation of Article III as Chief Justice. See *infra*, at 295, 87 L Ed 2d, at 212-213. Their fervent desire for ratification could have led them to downplay the features of the new document that were arousing controversy. See Field, at 534.

21. The only element of the debate that suggests a broader concern is the repeated reference to the problem of enforcing a judgment against the State. Of course, even these statements were made in the context of the discussion of the state-citizen diversity clause, and the participants in the debate may well not have had their attention directed to the need, ultimately vindicated by the Civil War, to enforce federal law against the States, regardless of the means necessary for enforcement. In any event, the Court has categorically rejected the difficulty of enforcing judg-

ments against the States as ground for permitting States to avoid their obligations. It has long been established that a State may not claim sovereign immunity when it is sued by another State under the Article III State-State clause, see *South Dakota v North Carolina*, 192 US 286, 48 L Ed 448, 24 S Ct 269 (1904), or when it is sued by the United States. See *United States v Texas*, 143 US 621, 642-646, 36 L Ed 285, 12 S Ct 488 (1892). Moreover, the prospective and injunctive relief that is permitted in actions pleaded against a state official, see *Edelman v Jordan*, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), may raise enforcement problems as difficult as those raised by a judgment for damages in a suit against a State. Cf. *Cooper v Aaron*, 358 US 1, 3 L Ed 2d 5, 78 S Ct 1401, 79 Ohio L. Abs 452 (1958).

22. For discussion of the state-citizen clause in other conventions, see Gibbons, at 1902-1903 (Pennsylvania), 1912-1914 (North Carolina); Fletcher, at 1050-1051; Jacobs, at 27-40 (Pennsylvania). In the Pennsylvania Convention, for instance, James Wilson approved of the state-citizen clause that had been drafted in his own Committee on Detail: "When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing." 2 Elliot's Debates, at 491.

tution on state sovereign immunity. A number of influential anti-Federalist publications sounded the alarm at what they saw as the unwarranted extension of the federal judicial power worked by the state-citizen diversity clause. The "Federal Farmer," commonly identified as Richard Henry Lee of Virginia, was one influential and widely published anti-Federalist. He objected:

"There are some powers proposed to be lodged in the general government in the judicial department, I think very unnecessarily, *I mean powers respecting questions arising upon the internal laws of the respective states.* It is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union. By Art 3 Sect 2 the powers of the federal judiciary are extended (among other things) to all cases between a state and citizens of another state—between citizens of different states—between a state or the citizens thereof, and foreign states, citizens of subjects. Actions in all these cases, except against a state government, are now brought and finally determined in the law courts of the states respectively; and as there are no words to exclude these courts of their jurisdiction in these cases, they will have concurrent jurisdiction with the inferior federal courts in them." 14 The Documentary History of the Ratification of the Constitution 40 (Kaminski & Saladino, eds, 1983) (hereinafter Documentary History) (emphasis added).²³

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23. The essay cited here can also be found at 2 The Complete Anti-Federalist 245 (H. Storing ed 1981). Professor Storing has ques-

Later in the same essay, which was published and circulated in 1787 and 1788, see *id.*, at 14-17, the author becomes even more explicit:

"How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law is worthy of consideration; the states are now subject to no such actions; and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between citizens of different states, citizens and foreigners, states and foreigners; and states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states—and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever." *Id.*, at 41-42.

This discussion undoubtedly presupposes that States would be parties defendant in suits on state-law causes of action under the state-citizen diversity clause; the author objects to barring sovereign immunity defenses in cases "arising upon the internal laws of the respective states." However, the anti-Federalist author plainly also believes that the powers of the federal courts are to be coextensive with the powers of

tioned its attribution to Richard Henry Lee. *Id.*, at 214-216.

Congress. Thus, the deficiency of state-citizen diversity jurisdiction is not that it permits the federal courts to hear suits against States based on federal causes of action, but that it permits the federal courts to exercise jurisdiction beyond the lawmaking powers of Congress: it provides new remedies for state creditors "which were not in the contemplation of the parties, when the contract was made."

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Another noted anti-Federalist writer who published under the pseudonym "Brutus" also attacked what he saw as the untoward implications of the state-citizen diversity clause:

"I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, improper in itself, and will, in its exercise, prove most pernicious and destructive.

"It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to.

"Every state in the union is largely indebted to individuals.

24. See, e.g., J. Main, *The Antifederalists* 157 (1961) (quoting 1788 letter raising question whether state-citizen diversity clause would not "expose every State to be sued in the New Court, on their public securities held by Citizens of other States"); 13 Documentary History, at 434 (widely reprinted essay by Federalist Tench Coxe) ("[W]hen a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court constituted by the state, with which, or with the citizens of which, his dispute is. He can appeal to a

disinterested federal court"); 14 Documentary History, at 72 (pro-Federalist pamphlet published in Philadelphia and reprinted elsewhere) ("[States] will indeed have the privilege of oppressing *their own citizens* by bad laws or bad administration; but the moment the mischief extends beyond their own State, and begins to affect the citizens of other States strangers, or the national welfare,—the salutary control of the supreme power will check the evil, and restore *strength and security*, as well as *honesty and right*, to the offending state").

For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering.

"If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress, will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning." 2 The Complete Anti-Federalist 429-431 (H. Storing ed 1981).

Other materials, from proponents and opponents of ratification, similarly view Article III jurisdiction as extending to suits against States.²⁴ Timothy Pickering, a Pennsylvania landowner who supported ratification and attended the Pennsylvania Convention, wrote:

"The federal farmer, and other objectors, say the causes between

a state and citizens of another state—between citizens of different states—and between a state, or the citizens thereof, and the citizens of foreign states, should be left, as they now are, to the decision of the particular state courts. The other cases enumerated in the constitution, seem to be admitted as properly cognizable in the federal courts. With respect to all the former, it may be said generally, that as the local laws of the several states may differ from each other—as particular states may pass laws unjust in their nature, or partially unjust as they regard foreigners and the citizens of other states, it seems to be a wise provision, which puts it in the power of such foreigners & citizens to resort to a court where they may reasonably expect to obtain impartial justice. . . . But there is a particular & very cogent reason for securing to foreigners a trial, either in the first instance, or by appeal, in a federal court. With respect to foreigners, all the states form but one nation. This nation is responsible for the conduct of all its members towards foreign nations, their citizens & subjects; and therefore ought to possess the

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power of doing justice to the latter. Without this power, a single state, or one of its citizens, might embroil the whole union in a foreign war." 14 Documentary History, at 204.

Pickering's comments are particularly revealing because, unlike the previous comments, they do not focus on the problem caused by the abrogation of sovereign immunity in state-law causes of action. In fact, his views seem to be consistent with the view that a federal court adjudicating a state-law claim should apply an applicable state-law sovereign immunity defense. Pickering justifies the existence of state-citizen diversity jurisdiction in part as a remedy for state laws that are unjust or unfair to noncitizens. Such laws would, of course, implicate the interests protected by the Privileges and Immunities Clause of Article IV. His comments, like those of the "Federal Farmer," thus suggest the recognized need for a federal forum to adjudicate cases implicating the guarantees of the Federal Constitution—even those cases in which a State is the defendant.

The Federalist Papers were written to influence the ratification debate in New York. In No. 81, Hamilton discussed the issue of state sovereign immunity in plain terms:

"I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken grounds: It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender

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of this immunity in the plan of the convention, it will re-

main with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." The Federalist

No. 81, pp 548-549 (J. Cooke ed 1961) (emphasis in original).

Hamilton believed that the States could not be held to their debts in federal court under the state-citizen diversity clause. The Court has often cited the passage as support for its view that the Constitution, even before the Eleventh Amendment, gave the federal courts no authority to hear any case, under any head of jurisdiction, in which a State was an unconsenting defendant. See, e.g., *Edelman v Jordan*, 415 US, at 660-662, n 9, 39 L Ed 2d 662, 94 S Ct 1347; *Hans v Louisiana*, 134 US, at 12-13, 33 L Ed 842, 10 S Ct 504. A careful reading of this passage, however, in the context of Hamilton's views elsewhere in *The Federalist*, demonstrates precisely the opposite. In the cases arising under state law that would find their way into federal court under the state-citizen

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diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. The States retained their full sovereign authority over state-created causes of action, as they did over their traditional sources of revenue. See *The Federalist* No. 32 (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention,"²⁵ had

25. Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. See *The Federalist Concordance* 403-404 (Engeman, Eler, & Hofeller, eds 1980). In No. 32, the discussion of taxation to which Hamilton adverted in No. 81, Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." *The Federalist* No. 32, p 200 (J. Cooke ed 1961) (emphasis in original). The Constitution had not delegated to the National Government the

general power to define defenses to state-law causes of action; consequently, nothing in Article III abrogated state sovereign immunity in state-law causes of action in federal or state courts. On the other hand, the Constitution had delegated to the National Government a series of enumerated powers, and had made federal laws enacted pursuant thereto the supreme law of the land. Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified.

In No. 80, Hamilton discussed the need for the federal-question jurisdiction:

"What for instance would avail restrictions on

substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court.²⁶ In these areas, in which the Federal Government

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had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress; as Hamilton had said in discussing the judicial power, "every government ought to possess the means of executing its own provisions by its own authority," *The Federalist* No. 80, p 537 (J. Cooke ed 1961) (emphasis in original).²⁷ To interpret Article III to impose an independent limit on the lawmaking power of Congress would be to turn the "plan of the convention" on its head.²⁸

A sober assessment of the ratifica-

tion debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States. Certain opponents of ratification, like

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Mason, Henry, and the "Federal Farmer," believed that the state-citizen diversity clause abrogated state sovereign immunity on state causes of action and predicted dire consequences as a result. On the other hand, certain proponents of the Constitution, like Pendleton, Randolph, and Pickering, agreed concerning the interpretation of Article III but believed that this constituted an argument in favor of the new Constitution. Finally, Madison, Marshall, and Hamilton believed that a State could not be made a defendant in federal court in a state-citizen diversity suit. The ma-

political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number"; 3 *Elliot's Debates*, at 532 (remarks of Madison) ("With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to").

28. One final piece of evidence concerning the meaning of the original Article III comes from the amendments proposed by the various state ratification conventions. The New York Convention submitted an amendment to the First Congress that "nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." 2 *Elliot's Debates*, at 409. This suggests at least that the New York delegates did not agree with Hamilton's reading of the state-citizen diversity clause. Virginia, North Carolina, Rhode Island, Massachusetts, and New Hampshire also proposed amendments that would have modified or eliminated the state-citizen diversity clause. See Fletcher, at 1051-1052. The felt need for such amendments suggests that the delegates to these conventions did not find such a limitation in Article III itself.

majority of the recorded comments on the question contravene the Court's statement in *Hans*, see *supra*, at 259, 87 L Ed 2d, at 191, that suits against States in federal court were inconceivable.²⁹

Granted that most of the comments thus expressed a belief that state sovereign immunity would not be a defense to suit in federal court in state-citizen diversity cases, the question remains whether the debates evince a contemporary understanding concerning the amenability of States to suit under federal-question or other subject-matter grants of jurisdiction. Although this question received little direct attention, the debates permit some conclusions to be drawn. First, the belief that the state-citizen diversity clause abrogated state sovereign immunity in federal court implies that the federal question and admiralty clauses would have the same effect. It would be curious indeed if Article III abrogated a State's immunity on causes of action that arose under the State's own laws and over which the Federal Government had no legislative authority, but gave a State an absolute right to a sovereign immunity defense when it was charged with a violation of federal law. Second, even Hamilton, who believed that the state-citizen clause did not abrogate state sovereign immunity in federal court, also left substantial room for suits

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against States when "the plan of the convention" required this result. Given the Supremacy Clause and the enumera-

tion of congressional powers in Article I, "the plan of the convention" requires States to answer in federal courts for violations of duties lawfully imposed on them by Congress in the exercise of its Article I powers. Third, the repeated references by Hamilton and others to the need for the federal courts to be able to exercise jurisdiction that is as extensive as Congress' powers to legislate suggests that, if Congress had the substantive power under Article I to enact legislation providing rights of action against the States, the federal courts under Article III could be given jurisdiction to hear such cases.

B

After the ratification of the Constitution, Congress provided in § 13 of the First Judiciary Act, 1 Stat 73, 80, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." The Act did not provide the federal courts with original federal-question jurisdiction, although it did in § 25 provide the Supreme Court with considerable jurisdiction over appeals in federal-question cases from state courts. Despite the controversy over the suability of the States, the provision of the Act giving the Supreme Court original jurisdiction under the state-citizen and state-alien diversity clauses surprisingly aroused little or no de-

29. Indeed, recent scholarship seems unanimously to agree that the weight of the evidence is against the Court's statement in

Hans. See Jacobs, at 40; Field, at 531; Gibbons, at 1913-1914; Fletcher, at 1054.

bate in Congress. See Fletcher, at 1053-1054.³⁰

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Those with disputes against States had no doubt that state-citizen diversity jurisdiction gave them a remedy in federal court. The first case docketed in this Court was *Vanstophorst v Maryland*, 2 Dall 401, 1 L Ed 433 (1791), a suit by Dutch creditors who sought judgments to recover principal and interest on Revolutionary War loans to the State of Maryland. Although a number of other cases were brought against States prior to the passage of the Eleventh Amendment,³¹ the most significant of course was *Chisholm v Georgia*, 2 Dall 419, 1 L Ed 440 (1793). *Chisholm* was an action in assumpsit by a citizen of South Carolina for the price of military goods sold to Georgia in 1777.³² The case squarely presented the question whether a State could be sued in federal court.

The Court held that federal jurisdiction extended to suits against

States under the state-citizen diversity clause. Each of the five sitting Justices delivered an opinion; only Justice Iredell was in dissent. Several features of *Chisholm* are
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crucial to an understanding of the meaning of the Eleventh Amendment. First, two members of the Committee on Detail that had drafted Article III at the Convention were involved in the *Chisholm* case. Both believed that a State could be sued in federal court. Edmund Randolph, Washington's Attorney General who had previously represented the plaintiff in *Vanstophorst v Maryland*, supra, represented the *Chisholm* plaintiff and argued strongly that a State must be amenable to suit in federal court as a result of the plain words of Article III, 2 Dall, at 421, 1 L Ed 440, the necessity for enforcing the constitutional prohibitions on the States, id., at 422, 1 L Ed 440, and the implicit consent to suit that occurred on ratification of the Consti-

30. The First Judiciary Act itself may well suggest Congress' understanding that States would be suable in federal court under the state-citizen diversity clause. Although § 13 of the Act did not differentiate between States as plaintiffs and States as defendants, the same section provided that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors . . . as a court of law can have or exercise consistently with the law of nations." If Congress had thought that States could not, or ought not, be suable in federal court under the state-citizen diversity clause, it easily could have provided that the Supreme Court shall exercise such jurisdiction against a State "as a court can have or exercise consistently with that state's law." In addition, elsewhere in the Act, Congress assigned jurisdiction over cases in which the United States was the plaintiff. See § 9, 1 Stat 77 (district court jurisdiction of "all suits at common law where the United States sue" subject to jurisdictional amount); § 11, 1 Stat 78 (circuit court jurisdiction of all civil suits where \$500 or

more is in dispute "and the United States are plaintiffs, or petitioners"). Congress exercised no such discrimination in assigning jurisdiction in cases "between a state and citizens of another state."

31. See Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 Ga L Rev 207, 215-230 (1968) (discussing cases); Jacobs, at 41-47, 57-64 (same).

32. The precise facts of *Chisholm* have been the subject of some scholarly dispute. Compare 1 C. Warren, *The Supreme Court in United States History* 93, n 1 (1922) (plaintiff in *Chisholm* was executor asserting claim on behalf of estate of British citizen), with Mathis, 2 Ga L Rev, at 217-218 (plaintiff in *Chisholm* was executor of estate of South Carolina citizen). The traditional account, in which the plaintiff was identified as acting on behalf of a British citizen, may explain why the Eleventh Amendment modified the state-alien diversity clause as well as the state-citizen diversity clause.

tution, id., at 423, 1 L Ed 440. Justice James Wilson, another of the drafters of Article III, delivered a lengthy opinion in which he urged that sovereign immunity had no proper application within the new Republic. Id., at 453-466, 1 L Ed 440.

Second, *Chisholm* was not a federal-question case. Although the case involved a contract, it was brought pursuant to the state-citizen diversity clause and not directly under the Contracts Clause of the Constitution. See id., at 420, 1 L Ed 440 (argument of counsel).³³ The case thus squarely raised the issue whether a suit against a State based on a state-law cause of action that was not maintainable in state court could be brought in federal court pursuant to the state-citizen diversity clause. The case did not present the question whether a

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State could be sued in federal court where the cause of action arose under federal law.

Third, even Justice Iredell's dissent did not go so far as to argue that a State could never be sued in federal court. He sketched his argument as follows:

33. Most likely, *Chisholm* could not have been brought directly under the Contracts Clause of the Constitution. Prior to *Fletcher v Peck*, 6 Cranch 87, 3 L Ed 162 (1810), it was not at all clear that the Contracts Clause applied to contracts to which a State was a party. Moreover, the case involved a simple breach of contract, not a "law impairing the obligation of the contract" to which the Clause would have applied. See *Shawnee Sewerage & Drainage Co. v Stearns*, 220 US 462, 471, 55 L Ed 544, 31 S Ct 452 (1911); *Brown v Colorado*, 106 US 95, 98, 27 L Ed 132, 1 S Ct 175 (1882). Finally, it was certainly not clear at the time of *Chisholm* that the Contracts Clause provided a plaintiff with a private right of action for damages. *Chisholm* was

"I have now, I think, established the following particulars.—1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorize the present suit, either by precedent or by analogy." Id., at 449, 1 L Ed 440.

He thus accurately perceived that the question presented was whether Article III itself created a cause of action in federal court to displace state law where a State was being sued. Because he believed that it did not, and because he found no other source of law on which the State could be held liable in the case, he believed that the suit could not be maintained.³⁴

The decision in *Chisholm* was handed down on February 18, 1793. On February 19, a resolution was introduced in the House of Representatives stating:

thus a suit on a state-law cause of action in assumpsit against the State of Georgia pursuant to the state-citizen diversity clause.

34. Justice Iredell added, in what he conceded to be dicta: "So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 Dall, at 449, 1 L Ed 440. He emphasized, however, that he need not decide this broader question: "This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extrajudicial." Id., at 450, 1 L Ed 440.

"[No] State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the

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suit of any person or persons, citizens or foreigners, or of any body politic or corporate whether within or without the United States." 1 C. Warren, *The Supreme Court in United States History* 101 (rev ed 1937).³⁵

Another resolution was introduced in the Senate on February 20. That resolution provided:

"The Judicial power of the United States shall not extend to any suits 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." 3 *Annals of Cong* 651-652 (1793).

Congress then recessed on March 4, 1793, without taking any action on the proposed Amendment.

By the time Congress reconvened in December 1793, a suit had been brought against Massachusetts in the Supreme Court by a British Loyalist whose properties had been confiscated. *Vassal v Massachusetts*.³⁶ Georgia had responded angrily to the decision in *Chisholm*, and the Massachusetts Legislature reacted to the suit against it by enacting a resolution calling for "the most speedy and effectual measures" to

obtain a constitutional amendment, including a constitutional convention. Resolves of Massachusetts 28 (1793) (No. 45). Virginia followed with a similar resolution. Acts of Virginia 52 (1793). The issue had thus come to a head, and the Federalists who controlled Congress no doubt felt considerable pressure to act to avoid an open-ended constitutional convention.³⁷

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On January 2, 1794, a resolution, was introduced, by a Senator whose identity is not now known, with the text of the Eleventh Amendment as it was ultimately enacted:

"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." 4 *Annals of Cong* 25 (1794) (emphasis added).

This differed from the original February 20 resolution only in the addition of the three italicized words. Senator Gallatin moved to amend the resolution to add the words "except in cases arising under treaties made under the authority of the United States" after "The Judicial power of the United States." *Id.*, at 30. After rejecting Gallatin's proposal, the Senate then rejected an amendment offered by an unknown Senator that would have forbidden suits against States only "where the

35. The resolution was not reported in the *Annals of Congress*, but was reported in contemporary newspaper accounts. See Gibbons, at 1926, n 186.

36. The case is unreported, but is discussed

in 1 J. Goebel, *History of the Supreme Court of the United States* 734-735 (1971).

37. For a more detailed explanation of the political situation facing the Washington administration and the Congress at the time, see Gibbons, at 1927-1932.

cause of action shall have arisen before the ratification of this amendment." *Ibid.*³⁸ The Senate ultimately voted 23-2 in favor of the Amendment. *Ibid.*

In the House of Representatives, there was only one attempt to amend the resolution. The amendment would have added at the end of the Senate version the following language: "[w]here such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect." 2d, at 476. This resolution, of course, would have ratified the *Chisholm* result that States could be sued under the state-citizen diversity clause, but would have given the States an opportunity to shift the litigation into

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their own courts. It was rejected, 77-8, and the House proceeded to ratify the Amendment by a vote of 81-9 on March 4, 1794. 2d, at 476-478. Although the chronology of ratification is somewhat unclear,³⁹ President Adams certified that it had been ratified four years later on January 8, 1798.

Those who have argued that the Eleventh Amendment was intended to constitutionalize a broad principle of state sovereign immunity have always elided the question of why Congress would have chosen the language of the Amendment as enacted to state such a broad principle. As shown above, there was—to say the least—no consensus at the time of the Constitution's ratification as to

whether the doctrine of state sovereign immunity would have any application in federal court. Even if there had been such a consensus, however, the Eleventh Amendment would represent a particularly cryptic way to embody that consensus in the Constitution. Had Congress desired to enshrine state sovereign immunity in federal courts for all cases, for instance, it could easily have adopted the first resolution introduced on February 19, 1793, in the House. Alternatively, a strong sovereign immunity principle could have been derived from an amendment that merely omitted the last 14 words of the enacted resolution. See Gibbons, at 1927. However, it does not take a particularly close reading of the Eleventh Amendment to see that it stops far short of that. Article III had provided: "The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens or Subjects." The Eleventh Amendment used the identical language in stating that the judicial power did not extend to "any suit in law or equity . . . against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." The congruence of language suggests that the Amendment was

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intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where

38. The Amendment read in full:

"The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the

United States by citizens of another State, or by citizens of subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment."

39. See Jacobs, at 67, nn 95-99.

the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien.⁴⁰

It may be argued that the true intentions of the Second Congress were revealed by its use of the words "shall not be

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construed" in the text of the Amendment. According to this argument, Congress intended not merely to qualify the state-citizen and state-alien diversity clauses, but also to establish a rule of construction barring exercise of the federal jurisdiction in any case—even one otherwise maintainable under the subject-matter heads of jurisdiction—in which a noncitizen or alien was suing a State. This view at least is consistent with the language of the Amendment, and would lead to the conclusion that suits by noncitizens

or aliens against State are never permitted, while suits by a citizen are permissible.⁴¹ Recent scholarship, however, suggests strongly that this view is incorrect. In particular, two other explanations for the use of these terms have been advanced. Some have argued that the words were a natural means for Congress to rebuke the Supreme Court for its construction of the words "between a State and citizens of another State" in *Chisholm*; no longer should those words be construed to extend federal jurisdiction to suits brought under that clause in which the State was defendant. See, e.g., *Fletcher*, at 1061-1062. Others have argued that the words were added to assure the retrospective application of the Eleventh Amendment. See, e.g., *Jacobs*, at 68-69. Of course, if the latter meaning were intended, the words

40. It might be argued that, because Congress rejected Senator Gallatin's proposal, which would have exempted treaty-based causes of action from the operation of the Amendment, Congress intended to leave intact no part of the federal-question jurisdiction that would potentially have left the States open to suit. This argument, however, is untenable. First, it ignores the language of the Amendment. If Congress were generally concerned with suits against States under *all* Article III heads of jurisdiction, it would have had no rational reason to direct the Eleventh Amendment only against suits by noncitizens or foreigners. Second, Congress may well have rejected Gallatin's proposal precisely because to adopt that proposal would have implied some limitation on the ability of the federal courts to hear nontreaty based federal-question claims. Thus, Congress' rejection of the proposal may well have been based on its desire to preserve the full contours of Article III federal-question jurisdiction, rather than on a desire to limit it. Third, the federal courts had no general original federal-question jurisdiction under the First Judiciary Act, although the Supreme Court did have substantial appellate federal question jurisdiction over cases originating in state courts. In refusing in the First Judiciary Act to grant original federal-question jurisdiction to the

federal courts, Congress had evidently decided that federal-question cases, even those arising out of the Treaty of Paris, should be heard in the first instance in state court. In deciding to enact the Eleventh Amendment to overrule *Chisholm*, Congress had decided that the state-citizen and state-alien clauses ought not permit suits against States in federal court. Given these two decisions, Congress had little reason to make an exception to both decisions for suits that arose out of the Treaty. Finally, the case of *Vassal v Massachusetts*, in which a British Loyalist had brought a challenge under the state-alien clause to the State's confiscation of his property, had triggered a movement for a constitutional convention. See *supra*, at 284, 87 L Ed 2d, at 206. By rejecting the Gallatin proposal, which would have authorized the *Vassal* suit, Congress no doubt acted in part to squelch the movement for an open-ended constitutional convention.

41. When the Court is prepared to embark on a defensible interpretation of the Eleventh Amendment consistent with its history and purposes, the question whether the Amendment bars federal-question or admiralty suits by a noncitizen or alien against a State would be open. At the current time, as the text states, the commentators' arguments against this interpretation seem to me quite plausible.

had their intended effect, for the Court dismissed cases pending on its docket under the state-citizen diversity clause when the Amendment was ratified. E.g., *Hollingsworth v Virginia*, 3 Dall 378, 1 L Ed 644 (1798).⁴²

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The language of the Eleventh Amendment, its legislative history, and the attendant historical circumstances all strongly suggest that the Amendment was intended to remedy an interpretation of the Constitution that would have had the state-citizen and state-alien diversity clauses of Article III abrogating the state law of sovereign immunity on state-law causes of action brought in federal courts. The economy of this explanation, which accounts for the rather legalistic terms in which the Amendment and Article III were written, does not require extravagant assumptions about the unexpressed intent of Congress and the state legislatures, and is itself a strong point in its favor. The original Constitution did not embody a principle of sovereign immunity as a limit on the federal judicial power. There is simply no reason to believe that the Eleventh Amendment established such a broad principle for the first time.

The historical record in fact confirms that, far from correcting the error made in *Chisholm*, the Court's interpretation of the Eleventh Amendment makes a similar mistake. The *Chisholm* Court had interpreted the state-citizen clause of Article III to work a major substantive change in state law, or at least in those cases arising under state law that found their way to federal

court. The Eleventh Amendment corrected that error, and henceforth required that the party-based heads of jurisdiction in Article III be construed not to work this kind of drastic modification of state law. The Court's current interpretation of the Eleventh Amendment makes the opposite mistake, construing the Eleventh Amendment to work a major substantive change in federal law. According to the Court, the Eleventh Amendment imposes a substantive limit on the Necessary and Proper Clause of Article I, limiting the remedies that Congress may authorize for state violations of federal law. This construction suffers from the same defect as that of *Chisholm*: both construe the enumeration of heads of jurisdiction to impose substantive limits on lawmaking authority.

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Article III grants a federal-question jurisdiction to the federal courts that is as broad as is the lawmaking authority of Congress. If Congress acting within its Article I or other powers creates a legal right and remedy, and if neither the right nor the remedy violates any provision of the Constitution outside Article III, then Congress may entrust adjudication of claims based on the newly created right to the federal courts—even if the defendant is a State. Neither Article III nor the Eleventh Amendment imposes an independent limit on the lawmaking authority of Congress. This view makes sense of the language, history, and purposes of Article III and of the Eleventh Amendment. It is also the view that was adopted in the earliest interpre-

42. In any event, I find it much more plausible to leave the construction of these words somewhat unclear than to leave the construc-

tion of much of the Amendment a superfluity, as the Court's construction would do.

tations of the Amendment by the Marshall Court.

C

After the enactment of the Eleventh Amendment, the number of suits against States in the federal courts was largely curtailed. The Amendment itself had eliminated the constitutional basis for the provisions of the First Judiciary Act granting the Supreme Court original jurisdiction over suits against States by an alien or noncitizen. Because there was no general statutory grant of original federal-question jurisdiction to the federal courts,⁴³ suits against States would not arise under that head of jurisdiction.⁴⁴ Nonetheless, the Marshall Court did have a number of opportunities to confront the issue of state sovereign immunity. The Court's decisions reflect a consistent understanding of the limited effect of the Amendment on the structure of federal jurisdiction outside the state-citizen and state-alien diversity clauses. Because the Justices on the Marshall Court lived through the

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ratification of the Constitution, the decision in *Chisholm v Georgia*, and the subsequent enactment of the Eleventh Amendment, the Marshall Court's views on the meaning of the Amendment should take on particular importance.

(1)

Admiralty was perhaps the most significant head of federal jurisdiction in the early 19th century. As

43. The Judiciary Act of 1801, 2 Stat 89, did grant general federal-question jurisdiction to the federal circuit courts, but that grant was repealed one year later. 2 Stat 132, 156 (1802).

44. Nor could a suit against a State be

Hamilton noted in a much-quoted passage from the *Federalist Papers*: "The most bigoted idolizers of State authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes." The *Federalist* No. 80, p 538 (Hamilton) (J. Cooke ed 1961). Although few admiralty cases could be expected to arise in which the States were defendants, the Marshall Court in the few instances in which it confronted the issue showed a strong reluctance to construe the Eleventh Amendment to interfere with the admiralty jurisdiction of the federal courts.

In *United States v Peters*, 5 Cranch 115, 3 L Ed 53 (1809), the Court adjudicated a controversy over whether certain funds, proceeds of an admiralty prize sale dating from the 1770's, belonged to the Commonwealth of Pennsylvania or to a private claimant. *Id.*, at 136-139, 3 L Ed 53. The Commonwealth claimed the money as the result of a state-court judgment in its favor, while the private claimant's claim was based on a judgment received from a national prize court established under the Articles of Confederation. The money claimed by the Commonwealth had been held by the State Treasurer, who had since died. Chief Justice Marshall writing for the Court, held that the Eleventh Amendment did not interfere with the traditional common-law suit against a state official for recovery of funds held with notice of an adverse claim. According to Marshall, the suit could be maintained against the state official, even though the relief

brought under diversity jurisdiction, because a State is not a citizen of itself for such purposes. See *Postal Telegraph Cable Co. v Alabama*, 155 US 482, 39 L Ed 231, 15 S Ct 192 (1894).

sought was a recovery of funds. Marshall carefully avoided deciding whether the Eleventh Amendment would have barred the action if it had been necessary
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to bring it against the State itself: "If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion." *Id.*, at 139, 3 L Ed 53. Nonetheless, Marshall's construction of the Eleventh Amendment by preserving the essential remedy of a money judgment that, in effect, ran against the state, left federal admiralty jurisdiction intact.

Later that same year, Justice Bushrod Washington, who had sat on the *Peters* Court, heard a sequel to *Peters* that arose when the State resisted the execution of the *Peters* judgment. *United States v Bright*, 24 F Cas 1232 (No. 14,647). (CC Pa 1809). After agreeing with the *Peters* Court that the State Treasurer could be sued for the funds in his private capacity, he went on to note that the Eleventh Amendment in terms applies only to suits "in law or equity." Because the Framers of the Amendment did *not* add the words "or to cases of admiralty and maritime jurisdiction," *id.*, at 1236, the Amendment should not be construed to extend to admiralty cases.⁴⁵

45. Justice Washington explained the exclusion of admiralty jurisdiction in part on the ground that admiralty proceedings are often in rem and that a judgment could thus be enforced without implicating the "delicate" question of how to execute a judgment against a State. *United States v Bright*, 24 F Cas, at 1236. Although this concern echoed some of the difficulties raised in the debate over ratification of the Constitution, the difficulty of executing a judgment against a State was ultimately rejected by the Court as a ground to expand state sovereign immunity in federal court. See *supra*, at 270, n 21, 87 L Ed 2d, at 197.

Washington thus did not read the Amendment to require a broad constitutional prohibition of suits against States in federal court. Moreover, given the importance of admiralty jurisdiction at the time, Congress' failure to include admiralty suits in the express terms of the statute was unlikely to have been an oversight.

The Marshall Court again refused to hold that the Eleventh Amendment barred suits in admiralty against States in *Governor of Georgia v Madrazo*, 1 Pet 110, 7 L Ed 73 (1828). On appeal
[473 US 293]

from a Federal Circuit Court decision, a claimant alleged that he, and not the State of Georgia, was entitled to the proceeds of a prize sale. Chief Justice Marshall, writing for the Court, held that the suit was in reality a suit against the State. Although the Governor was named as defendant, there was no allegation that he had violated any federal or state law, and thus "no case is made which justifies a decree against him personally." *Id.*, at 123, 7 L Ed 73. The Court then dismissed the case because the Circuit Court had no jurisdiction over it: "if the 11th amendment to the Constitution, does not extend to proceedings in admiralty; it was a case for the original jurisdiction of the Supreme Court." *Ibid.*⁴⁶

46. In 1833, the Court dismissed an original action brought by Madrazo based on the same claim. *Ex parte Madrazo*, 7 Pet 627, 8 L Ed 808 (1833). The Court's one-paragraph opinion apparently dismissed the case on Eleventh Amendment grounds because it "is a mere personal suit against a state to recover proceeds in its possession." *Id.*, at 632, 8 L Ed 808. This was the only case dismissed by the Supreme Court on Eleventh Amendment grounds between *Hollingsworth v Virginia*, 3 Dall 378, 1 L Ed 644 (1798), and the *Civil War*.

Writing in 1833, Justice Joseph Story noted:

"It has been doubted, whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is in rem and not in personam. There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides the language of the amendment is, that 'the judicial power of the United States shall not be construed to extend to any suit *in law or equity*.' But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both." 3 J. Story, Commentaries on the Constitution of the United States 560-561 (1833).⁴⁷

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As Justice Story pointed out, the result of the early admiralty cases was that the Eleventh Amendment was not seen as an obstacle to the exercise of otherwise legitimate federal admiralty jurisdiction.

(2)

Until 1875, Congress did not endow the federal courts with general federal-question jurisdiction. Nonetheless, the Supreme Court had sev-

47. Justice Story cited *Peters, Bright, and Madrazo* in support of his statement.

48. See *Doremus v Board of Education*, 342 US 429, 96 L Ed 475, 72 S Ct 394 (1952) (Article III limits on federal jurisdiction apply to appeal of case from New Jersey state courts).

49. Cf. *Smith v Reeves*, 178 US 436, 445, 44 L Ed 1140, 20 S Ct 919 (1900) (State may consent to suit in its own courts "subject

eral opportunities to decide federal-question cases against States. In some of these, suit was brought against a State in state court and an appeal was taken to the Supreme Court. If the Eleventh Amendment had constitutionalized state sovereign immunity as a limit to the Article III federal judicial power, it would have operated as a limit on both original and appellate federal-question jurisdiction, for nothing in the text or subsequent interpretations of Article III suggests that the federal judicial power extends more broadly to hear appeals than to decide original cases.⁴⁸ Although the Court has largely ignored this consequence of its constitutional sovereign immunity doctrine,⁴⁹ it was a consequence that the Marshall Court squarely faced.

In *Cohens v Virginia*, 6 Wheat 264, 5 L Ed 257 (1821), Chief Justice Marshall addressed the question of the effect of the Eleventh Amendment on the Supreme Court's appellate jurisdiction to review a criminal conviction obtained in a Virginia state court. Counsel for the State argued that either the original

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Constitution or the Eleventh Amendment denied the federal courts the power to hear such an appeal, in which a State was being "sued" for a writ of error in the Supreme Court. Marshall noted at the outset of his opinion for the Court that Article III

always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or re-examined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States⁵⁰).

provides federal jurisdiction "to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party." *Id.*, at 378, 5 L Ed 257. After repeating this principle several times,⁵⁰ the Chief Justice stated: "We think, then, that as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party." *Id.*, at 405, 5 L Ed 257.

Marshall then went on to consider the applicability of the Eleventh Amendment. After holding that a criminal defendant's petition for a writ of error is not properly understood to be a suit "commenced" or "prosecuted" by an individual against a State, Marshall stated an alternative holding:

50. The repetitions of this principle make the point unmistakably. He states that the judicial department "is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be party." 6 Wheat, at 382, 5 L Ed 257. "We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." *Id.*, at 383, 5 L Ed 257. "[W]e think that the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the parties." *Id.*, at 392, 5 L Ed 257. It is worth noting that the Court has often given a broad reading to Marshall's statements in the Virginia Ratification Convention, interpreting those statements to express Marshall's view that a constitutional doctrine of state sovereign immunity in federal courts was an element of the original understanding of Article III. See, e.g., *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890); *Monaco v Mississippi*, 292 US 313, 324, 78 L Ed 1282, 54 S Ct 745 (1934). The Chief Justice's discussion in *Cohens*, however, demonstrates that it may be prudent to give his earlier statements the less expansive

"But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of

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error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State.' It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties." *Id.*, at 412, 5 L Ed 257.⁵¹

Thus, the Marshall Court in *Cohens* squarely confronted the issue of the extent to which the Eleventh

interpretation suggested supra, at 267-268, 87 L Ed 2d 195-196.

51. Marshall's statement is of course consistent with the view that the Eleventh Amendment bars federal-question jurisdiction over suits that are prosecuted against States by noncitizens or aliens, but does not bar federal jurisdiction over suits by citizens of the State being sued. But it is flatly inconsistent with the Court's current position that the Amendment, despite its language and history, should be interpreted as constitutionalizing a broad sovereign immunity principle. Like the discussion earlier in *Cohens*, it evinces the Marshall Court's understanding that the Eleventh Amendment was to be construed narrowly to accomplish the purpose for which it was adopted. It is worth noting that, when the troublesome case hypothesized in *Cohens*—in which a writ of error was taken by a noncitizen of a State—arose 10 years later, the Marshall Court reached the merits of the claim without even discussing any possible Eleventh Amendment bar. See *Worcester v Georgia*, 6 Pet 515, 8 L Ed 483 (1832). Although the Court in *Worcester* did not discuss the Eleventh Amendment issue, the issue was raised by the plaintiff in error. See *id.*, at 533-534, 8 L Ed 483.

Amendment encroached on federal-question jurisdiction, and concluded that it made no encroachment at all. This result is not distinguishable on the ground that it concerned only the exercise of appellate, and not original, federal-question jurisdiction. As was made clear three years later in *Osborn v Bank of the United States*, 9 Wheat 738, 6 L Ed 204 (1824):

"In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original

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or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases in which original jurisdiction is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find in the constitution no prohibition to its exercise, in every case in which the judicial power can be exercised." *Id.*, at 820-821, 6 L Ed 204.

The Court continued, speaking of federal-question jurisdiction: "It would be a very bold construction to say that [the judicial] power could be applied in its appellate form only, to the most important class of cases to which it is applicable." *Ibid.*

Osborn itself involved several important Eleventh Amendment is-

52. This conclusion is in some tension with the Court's holding in *Governor of Georgia v Madrazo*, 1 Pet 110, 7 L Ed 73 (1828), discussed *supra*, at 292-293, 87 L Ed 2d, at 211. But see 1 Pet, at 122-123, 7 L Ed 73. It has been suggested that the distinction between

sues. The State of Ohio had seized bank notes and specie of the Bank of the United States pursuant to a statute imposing a tax on the Bank. The statute was evidently unconstitutional under the Court's holding in *McCulloch v Maryland*, 4 Wheat 316, 4 L Ed 579 (1819). The Bank, which was treated as a private corporation and not a division of the Federal Government for purposes of the suit, obtained an injunction in federal court prohibiting the State from enforcing the tax and requiring the return of the seized funds. The State of Ohio appealed to the Supreme Court, relying in part on the Eleventh Amendment as a bar to the proceedings.

Chief Justice Marshall's opinion for the Court carefully explains that the sovereign immunity principles of the Eleventh Amendment have no application where the State is not a party of record:

"It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains

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the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record." 9 Wheat, at 857, 6 L Ed 204.

Technically, this principle does not address the question whether a suit may be brought against a State, but rather the question whether a suit is indeed to be understood as a suit against a State.⁵³ Nonetheless, it rep-

resents a narrow, technical construction of the Eleventh Amendment, and is thus of a piece with the immediately following language:

"The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens." *Id.*, at 857-858, 6 L Ed 204.

The restatement of the principle of *Cohens* demonstrates Marshall's understanding that neither Article III nor the Eleventh Amendment limits the ability of the federal courts to hear the full range of cases arising under federal law.

The lack of original federal-question jurisdiction, combined with the paucity of admiralty actions against the States, deprived the Marshall Court of the opportunity to rule often on the effect of the Eleventh Amendment on state sovereign immunity in federal court. Moreover, the Court's rulings demonstrate a certain reluctance squarely to decide the extent to which the States were suable in federal court. This was perhaps a result of the Court's sensitivity to the unpopular decision in *Chisholm v Georgia*, the lack of effective governmental power to enforce its decisions, and the centrifugal forces that were driving the Nation toward civil war. Nonetheless,

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a careful reading of the Marshall Court's precedents indicates that the Marshall Court consistently adopted

53. For example, the Court today states that in *Hans*, "the Court held that the [Eleventh] Amendment barred a citizen from bringing a suit against his own State in fed-

narrow and technical readings of the Amendment's import and thus carefully retained the full measure of federal-question and admiralty jurisdiction.

IV

The Marshall Court's precedents, and the original understanding of the Eleventh Amendment, survived until near the end of the 19th century. In 1875, Congress gave the federal courts general original federal-question jurisdiction. 18 Stat 470. For the first time, suits could now be brought against States in federal court based on the existence of a federal cause of action. In *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), a citizen of Louisiana sued his State for payment on some bonds that the state government had repudiated. The plaintiff claimed a violation of the Contracts Clause. The Court held in favor of the State and ordered the suit dismissed.

Hans has been taken to stand for the proposition that the Eleventh Amendment, despite its terms, bars the federal courts from hearing federal-question suits by citizens against their own State.⁵⁴ As I have argued before, the Court's ambiguous opinion need not be interpreted in this way. See *Employees v Missouri Dept. of Public Health and Welfare*, 411 US, at 313-315, 36 L Ed 2d 251, 93 S Ct 1614 (Brennan, J., dissenting). The *Hans* Court relied on Justice Iredell's dissent in *Chis-*

eral court, even though the express terms of the Amendment do not so provide." *Ante*, at 238, 87 L Ed 2d, at 177.

holm, which as noted above, supra, at 283, 87 L Ed 2d, at 205, rested on the absence of a statutory cause of action for Mr. Chisholm against the State of Georgia and reserved the question of the constitutional status of state sovereign immunity. See *Hans*, 134 US, at 18-19, 33 L Ed 842, 10 S Ct 504. The Court further noted the "presumption that

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no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—*anomalous and unheard of when the Constitution was adopted.*" *Id.*, at 18, 33 L Ed 842, 10 S Ct 504. The opinion can thus sensibly be read to have dismissed the suit before it on the ground that no federal cause of action supported the plaintiff's suit and that state-law causes of action would of course be subject to the ancient common-law doctrine of sovereign immunity.

Whether the Court's departure from a sound interpretation of the Eleventh Amendment occurred in *Hans* or only in later cases that misread *Hans*, however, is relatively unimportant. If *Hans* is a constitutional holding, it rests by its own terms on two premises.

First, the opinion cites the comments by Madison, Marshall, and Hamilton in the ratification debates. *Id.*, at 12-14, 33 L Ed 842, 10 S Ct 504. The Court concludes that permitting suits against States would be "startling and unexpected," *id.*, at 11, 33 L Ed 842, 10 S Ct 504, and would "strain the Constitution and the law to a construction never imagined or dreamed of." *Id.*, at 15, 33 L Ed 842, 10 S Ct 504. The historical record outlined above demonstrates that the Court's history was plainly mistaken. Numerous individuals at the time of the Constitution's ratifi-

cation believed that it would have exactly the effect the *Hans* Court found unimaginable. Moreover, even the comments of Madison, Marshall, and Hamilton need not be taken to advocate a constitutional doctrine of state sovereign immunity. Read literally and in context, all three were explicitly addressed to the particular problem of the state-citizen diversity clause. All three were vitally concerned with the constitutionally unauthorized displacement of the state law of creditors' rights and remedies that would be worked by an incorrect reading of the state-citizen diversity clause. All three are fully consistent with a recognition that the Constitution neither abrogated nor instituted state sovereign immunity, but rather left the ancient doctrine as it found it: a state-law defense available in state-law causes of action prosecuted in federal court.

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Second, the opinion relies heavily on the supposedly "anomalous" result that, if the Eleventh Amendment were read literally,

"in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state." *Id.*, at 10, 33 L Ed 842, 10 S Ct 504.

Even if such an "anomaly" existed, it would not justify judicial rewriting of the Eleventh Amendment and Article III and the wholesale disregard of precedents. But in any event a close look at the historical record reveals that the "anomaly" can easily be avoided without a general expansion of a constitutionalized sovereign immunity doctrine. The Eleventh Amendment can and

should be interpreted in accordance with its original purpose to reestablish the ancient doctrine of sovereign immunity in state-law causes of action based on the state-citizen and state-alien diversity clauses; in such a state-law action, the identity of the parties is not alone sufficient to permit federal jurisdiction. If federal jurisdiction is based on the existence of a federal question or some other clause of Article III, however, the Eleventh Amendment has no relevance. There is thus no Article III limitation on otherwise proper suits against States by citizens, non-citizens, or aliens, and no "anomaly" that requires such drastic "correction."

The Court has repeatedly relied on *Hans* as establishing a broad principle of state immunity from suit in federal court.⁵⁴ The historical record demonstrates that, if *Hans* was a constitutional

[473 US 302]

holding, it rested on misconceived history and misguided logic.⁵⁵

The doctrine that has thus been created is pernicious. In an era when sovereign immunity has been generally recognized by courts and legislatures as an anachronistic and unnecessary remnant of a feudal legal system, see, e.g., *Great Northern Life Ins. Co. v Read*, 322 US 47, 57, 88 L Ed 1121, 64 S Ct 873 (1944) (Frankfurter, J., dissenting); *Muskopf v Corning Hospital Dist.*, 55 Cal 2d 211, 359 P2d 457 (1961); *W. Pros-*

er, *The Law of Torts* 984-987 (4th ed 1971), the Court has aggressively expanded its scope. If this doctrine were required to enhance the liberty of our people in accordance with the Constitution's protections, I could accept it. If the doctrine were required by the structure of the federal system created by the Framers, I could accept it. Yet the current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

I respectfully dissent.

Justice Blackmun, with whom Justice Brennan, Justice Marshall, and Justice Stevens join, dissenting.

I, too, dissent and join Justice Brennan's opinion. Its exhaustive historical review and analysis demonstrate the Eleventh Amendment error in which the Court today persists. As Justice Brennan shows, if *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), is a constitutional holding, it then reads into the Amendment words that are not there and that cannot

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be reconciled with any principled view of congressional power; Justice Brennan is surely correct when he says, ante, at

54. In *Ex parte New York*, 256 US 490, 65 L Ed 1057, 41 S Ct 588 (1921), the Court even extended *Hans* (or its view of *Hans*) to admiralty jurisdiction, thus overruling Justice Washington's 110-year-old holding that the Eleventh Amendment did not apply to admiralty actions. See *United States v Bright*, 24 F Cas 1232 (No. 14,647) (CC Pa 1809), discussed supra, at 292, 87 L Ed 2d, at 211.

55. If *Hans* was not a constitutional holding, however, its use of the Madison, Marshall, and Hamilton comments would be substantially more justifiable; the relevance of this material was simply to show that the common law did not recognize a cause of action on a debt against a sovereign. Since Congress had not created any such action, the Court justifiably refused to do so itself.

302, 87 L Ed 2d, at 217, that the case rests on "misconceived history and misguided logic." Thus, the Court today compounds a longstanding constitutional mistake. The shield against just legal obligations afforded the States by the Court's prevailing construction of the Eleventh Amendment as an "exemplification" of the rule of sovereign immunity, ante, at 239, n 2, 87 L Ed 2d, at 178, quoting *Ex parte New York*, 256 US 490, 497, 65 L Ed 1057, 41 S Ct 588 (1921), simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments.

Indeed, though of more mature vintage, the Court's Eleventh Amendment cases spring from the same soil as the Tenth Amendment jurisprudence recently abandoned in *Garcia v San Antonio Metropolitan Transit Authority*, 469 US 528, 83 L Ed 2d 1016, 105 S Ct 1005 (1985). Both in its modern reading of *Hans*, supra, and in *National League of Cities v Usery*, 426 US 833, 49 L Ed 2d 245, 96 S Ct 2465 (1976), the Court, in derogation of otherwise unquestioned congressional power, gave broad scope to circumscribed language by reference to principles of federalism said to inform that language.* The intuition underlying *Hans* and its contemporary progeny is no truer to the federal structure or to a proper view of congressional power than was that underlying *National League of Cities*.

But I would dissent from the

* See *Fry v United States*, 421 US 542, 557, 44 L Ed 2d 363, 95 S Ct 1792 (1975) (dissenting opinion) ("As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understand-

Court's spare opinion and predictable result on other grounds as well. There is no

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need to expatiate on them here, where so much already has been written. It suffices to say that I adhere to the views expressed in the dissenting opinion in *Edelman v Jordan*, 415 US 651, 688, 39 L Ed 2d 662, 94 S Ct 1347 (1974). See also *Florida Dept. of Health v Florida Nursing Home Assn.*, 450 US 147, 151, 67 L Ed 2d 132, 101 S Ct 1032 (1981) (dissenting statement). Thus, I would affirm the judgment here on the ground that California, as a willing recipient of federal funds under the Rehabilitation Act, consented to suit when it accepted such assistance. And a fair reading of the statute and its legislative history indicates for me that Congress produced the Act in exercise of its power under § 5 of the Fourteenth Amendment and thereby abrogated any claim of immunity the State otherwise might raise.

Justice Stevens, dissenting.

Because my decision to join Justice Brennan's dissent is a departure from the opinion I expressed in *Florida Dept. of Health v Florida Nursing Home Assn.*, 450 US 147, 151, 67 L Ed 2d 132, 101 S Ct 1032 (1981), a word of explanation is in order. As I then explained, notwithstanding my belief that *Edelman v Jordan*, 415 US 651, 39 L Ed 2d 662, 94 S Ct 1347 (1974), was incorrectly

ing of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation").

decided, see 450 US, at 151, n 2, 67 L Ed 2d 132, 101 S Ct 1032, I then concluded that the doctrine of stare decisis required that *Edelman* be followed. Since then, however, the Court has not felt constrained by stare decisis in its expansion of the protective mantle of sovereign immunity—having repudiated at least 28 cases in its decision in *Pennhurst State School and Hospital v Halderman*, 465 US 89, 165-166, n 50, 79 L Ed 2d 67, 104 S Ct 900 (1984) (Stevens, J., dissenting)—and additional study has made it abundantly clear

that not only *Edelman*, but *Hans v Louisiana*, 134 US 1, 33 L Ed 842, 10 S Ct 504 (1890), as well, can properly be characterized as "egregiously incorrect." 450 US, at 153, 67 L Ed 2d 132, 101 S Ct 1032. I am now persuaded that a fresh examination of the Court's Eleventh Amendment jurisprudence will produce benefits that far outweigh "the consequences of further unraveling the doctrine of stare decisis" in this area of the law. *Id.*, at 155, 67 L Ed 2d 132, 101 S Ct 1032.

HB

122

FISCAL NOTE

NO. _____
 Bill Version: HB 122
 (H) Publish Date: 2/10/97

**STATE OF ALASKA
1997 LEGISLATIVE SESSION**

Revision Date: _____ Dept. Affected: Department of Law
 Title: ... relating to prisoner litigation, post-conviction BRU: Criminal Division/Civil Division
relief, and sentence appeals ... amending Alaska Rule of ... Component: Criminal Division/General Legal Services
 Sponsor: Rules Committee
 Requester: Governor COMPONENT SERIAL NO. 2085/2087

Expenditures/Revenues

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

POSITIONS	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

In 1995, the legislature passed far-reaching legislation aimed at reducing the burgeoning amount of frivolous litigation brought by state prisoners. This bill makes additional changes that are relatively minor, but that will contribute significantly to the further reduction of frivolous prisoner litigation. These refinements include clarifying that filing fees, or exemptions from them, are required in all types of litigation brought by prisoners, and that time limits for filing litigation by prisoners related to conviction or sentence appeals may not be extended by the courts beyond the periods provided in court rules. Additionally, the bill adds a provision to make it easier to collect money owed by a prisoner for attorney fees and costs of litigation.

This bill will have no fiscal impact on the Department of Law. However, it will continue the trend began with ch. 79, SLA 1995, of containing current costs and avoiding continued increases in the state's prisoners' rights and appeals litigation costs. The bill should also increase the amount of fines collected by the Collections and Support Unit of the Civil Division for deposit in the state general fund by an unknown amount.

Prepared by: Joan M. Kasson *Joan M. Kasson* Phone: 465-5370
 Division: Administrative Services Division Date: 1/24/97
 Approved by Commissioner: Bruce M. Bortelno, Attorney General *Bruce Bortelno for* Date: 1/24/97
 Agency: Department of Law

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NO. _____
 Bill Version: HB 122
 (H) Publish Date: 2/10/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

E

Revision Date: _____	Dept. Affected: <u>Corrections</u>	_____
Title: <u>Frivolous Litigation</u>	BRU: <u>ALL</u>	_____
_____	Component: <u>ALL</u>	_____
Sponsor: <u>Rules Committee</u>	_____	
Requester: <u>Governor</u>	COMPONENT SERIAL NO. <u>#0694</u>	_____

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY97) cost: \$ 0.0

POSITIONS

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Section 4 of this bill allows for a lien to be placed on a prisoner's account by the state for costs and attorney's fees. This provision will have a minimal fiscal impact on the Department and will be absorbed.

Prepared by: <u>Bruce Richards</u>	Phone: <u>465-3307</u>
Division: <u>Commissioner's Office</u>	Date: <u>1/25/97</u>
Approved by Commissioner: <u>Margaret M. Pugh</u>	Date: <u>1/27/97</u>
Agency: <u>Department of Corrections</u>	

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FISCAL NOTE

Bill Version: HB 122
(H) Publish Date: 2/10/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: _____
Title: "An Act relating to prisoner litigation..."
Sponsor: Rules Committee
Requestor: Governor

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency
COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
-----------------------------	------------	------------	------------	------------	------------	------------

CHANGE IN REVENUES ()	0.0	0.0	0.0	0.0	0.0	0.0
-------------------------------	------------	------------	------------	------------	------------	------------

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: \$ 0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

This bill, which changes many of the rules of court when the litigant is a prisoner, is unrelated to the question of whether a case is frivolous. Eliminating a prisoner's ability to obtain discovery, entering arbitrary time deadlines, and making collection of judgments easier, has nothing to do with the merits of the case. These rules simply are punitive and designed to eliminate a class of persons from having the same access to the courts as everyone else. As such, it violates the equal protection of the laws.

There is no fiscal impact on the Public Defender Agency.

Prepared by: Barbara K. Brink, Director
Division: Public Defender Agency

Phone: (907) 264-4414
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Department of Administration

Date: 1/21/97

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FISCAL NOTE

Bill Version: HB 122
(H) Publish Date: 2/10/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date: _____
Title: "An Act relating to Frivolous Litigation..."
Sponsor: Rules Committee
Requestor: Governor

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 97) cost: \$ 0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Department of Administration.

Prepared by: Brant McGee, Director
Division: Office of Public Advocacy

Phone: 274-1684
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Department of Administration

Date: 1/24/97

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CS for HOUSE BILL 122 (JUD)

Sectional Analysis

CSHB 122 was submitted to make additions and improvements to the comprehensive legislation adopted in 1995 to reduce the volume of frivolous litigation filed by prisoners against the state. That enactment has been very successful in reducing unnecessary lawsuits, while at the same time allowing prisoners to raise legitimate issues and enabling state attorneys to focus attention on those issues.

The 1995 legislation requires a prisoner to pay a filing fee to the court for pursuing a lawsuit, as other litigants are required to do, or to request an exemption from the fee based on need. The law currently requires a prisoner to supply certain information in support of a request for an exemption. Section 1 of the bill adds the requirement that the prisoner include information about money held in bank accounts outside the prison in the request for a filing fee exemption.

Section 2 makes a technical correction to the statutes and repairs an omission in the 1995 legislation. Current law provides that the automatic disclosure requirements of Civil Rule 16.1 do not apply to prisoner litigation; however, that rule has been deleted from the Civil Rules. The bill amends the law to reflect the deletion. Additionally, the bill provides that the automatic disclosure requirements of Civil Rule 26 do not apply to prisoner litigation. The rationale for automatic disclosure - reducing the cost and duration of litigation by cooperative discovery - does not readily apply in most cases filed by prisoners.

Section 3 expands the definition of "litigation against the state" to include all proceedings in the appellate courts. This clarifies that the laws regulating prisoner litigation apply to all litigation, not only to cases filed in the trial courts.

Sections 4 - 7 and 11 also concern a law enacted in 1995. The legislature enacted a provision that expands the use of DNA profile evidence in criminal prosecutions. In addition, the law requires the Department of Public Safety to establish a DNA identification system to help in the investigation of crimes in Alaska. It requires the department to obtain blood samples, oral samples, or both, from adults convicted of a crime against the person (except custodial interference) and arson, and minors 16 years of age or older adjudicated delinquents based on

similar conduct. Unfortunately, enforcement of the sample requirement is inadequate if a person refuses to cooperate. The bill provides several enforcement options, including making it a class A misdemeanor if a person is required to provide a sample and refuses a lawful request from a health care provider.

Section 8 clarifies that the Parole Board may revoke mandatory parole before the actual release of a prisoner if the prisoner has violated a court order to participate in the treatment plan of a rehabilitation program.

Section 9 is a technical amendment to the parole statutes.

Section 10 limits the time an appellate court may allow extensions of time to file an appeal or request for review of a criminal conviction or sentence to 60 days after the last deadline for filing the appeal or request. This does not limit requests for an extension of time filed before a deadline; rather, it disallows requests filed two months after a deadline has passed, when no request for an extension has been filed.

Section 12 limits the time a court may relax the deadline for filing a motion to reduce or modify a sentence under Criminal Rule 35(b) in the trial court to 10 days beyond the 180 days in which a defendant may file the motion under the terms of the rule. Criminal Rule 35(b) motions allow a court to reconsider a sentence in the six months following imposition. It is not intended to allow a court to change a sentence after that period. The Parole Board is in a better position to make decisions about the release of a person at this time.

4/15/98

HOUSE JUDICIARY STANDING COMMITTEE

friendly amendment to Amend. 7

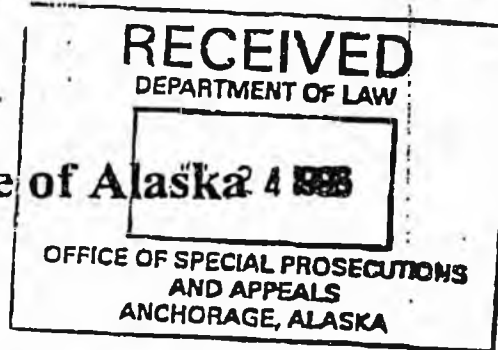
DATE: 4/15/98

ISSUE: HB 122
Admendment #2

	YEA	NAY	PRESENT
Vice Chair Bunde		✓	
Representative Berkowitz	✓		
Representative Croft		✓	
Representative James			
Representative Porter		✓	
Representative Rokeberg		✓	
Chairman Green		✓	
TOTALS:			

PASSED _____

FAILED ✓



In the Court of Appeals of the State of Alaska

Jack A. Ozenna,)
)
 Appellant,)
)
 v.)
)
 State of Alaska,)
)
 Appellee.)

Court of Appeals No. A-06265

Order¹

Date of Order: 7/23/96

Trial Court Case # 3AN-94-11188CI

Before: Bryner, Chief Judge, Coats, and Mannheimer, Judges.
Mannheimer, Judge, concurring.

The state has moved for full-court reconsideration of the single-judge order entered on June 28, 1996, granting Ozenna's motion to accept his late-filed notice of appeal. We grant the state's motion for full-court reconsideration and conclude that the motion to accept Ozenna's late notice of appeal should be granted for the reasons stated in the June 28 single-judge order.

In its motion for reconsideration, the state argues that Appellate Rule 502(b) should be narrowly construed to authorize appellate courts to extend a time period "only within the limits permitted by Appellate Rule 521." The state argues that this narrow interpretation is necessary to reconcile the two rules and give effect to chapter 79, section 21, SLA 1995 -- the statute enacting the current form of Appellate Rule 521.

When Appellate Rule 502(b) was adopted, however, Appellate Rule 521

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Order 5/2/96

Court of Appeals Order (cont.)

2

Ozenna v. State, A-06265

Date of Order: 7/23/96

specified no time limits governing an appellate court's authority to extend the time for filing a notice of appeal. Accordingly, in originally promulgating Rule 502(b), the Alaska Supreme Court could not have intended to subject the powers granted therein to any time limitation stated in Rule 521.

The state's request for a narrowing interpretation of Rule 502(b) thus seems directed at implementing legislative intent in enacting chapter 79, section 21, SLA 1995, rather than at reflecting the supreme court's intent in adopting Rule 502(b). For this reason, the request is in effect an argument that chapter 79, section 21, SLA 1995 should be construed to have impliedly amended Rule 502(b).

But the Alaska Supreme Court has made it clear that the doctrine of implied repeal or amendment does not apply to legislation affecting procedural rules adopted by the court. Because article IV, section 15 of the Alaska Constitution expressly gives rule-making power to the supreme court rather than the legislature, the supreme court has held that a statute dealing with a procedural matter will not alter a conflicting rule of court unless the statute is enacted with the stated purpose of changing that rule. Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1047 (Alaska 1981); Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963). As the court said in Nolan, "we need not look to the legislature's intentions to discern whether it has attempted to prescribe a different procedure than that contained in a court rule, unless the legislature has acted in the requisite manner[.]" 627 P.2d at 1046.

In enacting chapter 79, section 21, SLA 1995, the legislature specifically stated its intent to amend Appellate Rule 521. It did not specifically state a similar intent to amend

Order/wpt

Court of Appeals Order (cont.)

3

Ozenna v. State, A-06265

Date of Order: 7/23/96

or limit Appellate Rule 502. We assume that the legislature's failure to address Rule 502 was an oversight and that it would have intended the provisions of Rule 521 to govern over those of Rule 502.² However, Nolan and Leege preclude this court from relying on our perception of probable legislative intent as a basis for construing Rule 502 to have been amended.

For the reasons stated in this court's order of June 28, 1996, we grant the motion to accept Ozenna's late notice of appeal.

Entered by direction of the court.

Clerk of the Appellate Courts



Jan Hansen

MANNHEIMER, Judge, concurring.

The state has moved for full-court reconsideration of the single-judge order entered on June 28, 1996, granting Ozenna's motion to accept his late-filed notice of appeal. I join my colleagues in concluding that Ozenna's motion to accept a late-filed appeal should be granted under the authority of Appellate Rule 502(b).

In chapter 79, section 21, SLA 1995, the legislature amended Appellate Rule

² For this reason, in ruling on a request to accept a late notice of appeal, we think it highly relevant to consider the restrictions stated in the amended version of Rule 521 and to exercise restraint in light of those restrictions. In the present case, we do not exercise our authority under Rule 502(b) lightly. It appears highly likely to us that Ozenna is entitled to restoration of his appellate rights as a constitutional matter. Because the state has not challenged, or even alleged any desire to challenge, Ozenna's factual assertions on their merits, we see little purpose to be served in requiring him to pursue a costly and time consuming post-conviction relief action to assert his right to appeal.

Court of Appeals Order (cont.)

4

Ozenna v. State, A-06265

Date of Order: 7/23/96

521 -- the rule allowing any other appellate rule to be relaxed "where a strict adherence to [the rule] will work surprise or injustice". As amended by the legislature, in litigation involving the validity of a criminal judgement or sentence, Rule 521 "does not authorize an appellate court ... to allow [a] notice of appeal [or] a petition for review or petition for hearing to be filed more than 60 days late".

The State contends that the legislature, by enacting this amendment to Rule 521, clearly expressed its intention that no criminal appeal should be filed more than 60 days late. I disagree.

Appellate Rule 502(b) is the provision of the appellate rules that expressly governs extensions of time. Rule 502(b) declares that an appellate court can extend any time limit fixed by the appellate rules, and can validate any act performed outside the established time limits, upon a showing of good cause.

Because Appellate Rule 502(b) and Appellate Rule 521 were enacted simultaneously (by Supreme Court Order 439, effective November 15, 1980), they presumedly are not redundant. Examination of the two rules bears this out; they address different concerns. Rule 502(b) allows time limits to be relaxed when good cause is shown. In cases where there is no good cause (for example, cases of unexcused attorney neglect), Rule 521 nevertheless allows time limits to be relaxed to prevent injustice.

The legislative amendment to Rule 521 does not forbid all extensions of time exceeding 60 days in criminal cases. Rather, chapter 79, section 21 expressly states that "this rule" -- that is, Rule 521 -- does not authorize extensions of more than 60 days in

Court of Appeals Order (cont.)

5

Ozenna v. State, A-06265

Date of Order: 7/23/96

criminal cases. The legislature was silent regarding Rule 502(b). From this, one can reasonably conclude that the legislature did not intend to forbid all extensions of time exceeding 60 days, but rather intended to forbid an extension of time exceeding 60 days if the moving party failed to demonstrate good cause -- because it is only when there is no good cause for the extension that Rule 521 must be invoked.

Moreover, even assuming that the legislature had clearly expressed its intention to forbid any and all extensions of time exceeding 60 days, the fact remains that the legislature did not alter Appellate Rule 502(b). Rule 502(b) continues to authorize extensions of time without the 60-day limitation.

The State argues that, where legislative intention is clearly expressed, court rules must be harmonized with the legislature's desire. This argument was squarely rejected in Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981).

The litigation in Nolan involved a recent legislative revision of the law governing class actions. A new statute, AS 23.10.130(b), clearly provided that the filing of a class action tolled the statute of limitations only with respect to the named plaintiffs, not the entire class. Civil Rule 23, on the other hand, incorporated the rule that the filing of a class action tolled the statute of limitations with respect to all class members, whether or not they were specifically named in the lawsuit. Nolan, 627 P.2d at 1040-42.

When the legislature enacted AS 23.10.130(b), they did not comply with the procedural requirements established in Leege v. Martin, 379 P.2d 447 (Alaska 1963), for altering a court rule. Because the statute failed to meet those procedural requirements, the

Court of Appeals Order (cont.)

6

Ozenna v. State, A-06265

Date of Order: 7/23/96

supreme court held that the statute had no effect on the rule. Even though the legislature had clearly expressed its intention to adopt a contrary rule regarding the statute of limitations, the supreme court held that the legislature's intention was irrelevant:

In Alaska, [the supreme court] is given exclusive, initial power to make rules governing practice and procedure[,] and we need not look to the legislature's intentions to discern whether it has attempted to prescribe a different procedure than that contained in a court rule, unless the legislature has acted in the requisite manner to change a rule. Here the legislature plainly intended not to allow the tolling, but [that statute, because it is procedural,] need not be given effect.

Nolan, 627 P.2d at 1046.

Thus, I join the court's decision to allow Ozenna to file a late appeal for two reasons. First, because Appellate Rule 502(b) and Appellate Rule 521 address different concerns, the legislature's decision to restrict the courts' authority under Rule 521 does not indicate a concurrent intention to restrict the courts' authority under Rule 502(b). Second, even if the legislature had plainly expressed its intention to forbid any criminal appeal or petition from being filed more than 60 days late, the legislature took no action to amend Appellate Rule 502(b). Under Leege and Nolan, Rule 502(b) remains unaffected by chapter 79, section 21, SLA 1995.

Distribution:

James A. Wendt
Office of Public Advocacy
900 W. 5th Ave., Ste. 525
Anchorage AK 99501

Cynthia M Hora
OSPA
310 K Street #308
Anchorage AK 99501

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA

STATE OF ALASKA,

Plaintiff,

vs.

HAROLD L. STELLY,

Defendant.

SEP 15 1997

FOURTH JUDICIAL DISTRICT
DISTRICT ATTORNEY

FILED in the Trial Court
State of Alaska, Fourth District

SEP 12 1997

By _____ Deputy

4FA-S96-2189 Cr.

OPINION AND ORDER DENYING DRAWING OF BLOOD SAMPLE

I. INTRODUCTION

Plaintiff seeks an order from the Court compelling Defendant to comply with a State statute requiring all persons convicted of a felony against another person to submit to the drawing of samples of their body fluids for submission to a statewide DNA database. Defendant protests, arguing that the Court is not vested with the authority to enter such an order, that the relief sought by the State is not a proper component of the Court's general sentencing powers, and that mandatory submission of a blood specimen for the purposes of DNA identification would violate Defendant's constitutional rights to be free from unreasonable searches and seizures, to due process of law, and to privacy.

II. STATEMENT OF FACTS

On October 23, 1996, Defendant Harold L. Stelly pled no contest to Assault in the Third Degree and Assault in the Fourth Degree after attempting to stab S.N. with a knife and pushing his wife to the ground. At sentencing, the prosecution made an oral

ORDER DENYING DRAWING OF BLOOD SAMPLE - 1
4FA-S96-2189 Cr.

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request for a court order compelling Stelly to voluntarily submit to the drawing of his blood in order that it be submitted to the State's deoxyribonucleic acid (DNA) database, pursuant to AS 44.41.035. The State requested that the Court make its order a condition of probation and a separate order of the Court; the violation of which would result in revocation of probation, or a finding of contempt of court, or both.

III. DISCUSSION

A. The Statute

Chapter 41 effectively creates the Department of Public Safety and lays out its respective authority, which includes gathering data for a statewide criminal justice information system. Among the data authorized to be gathered are crime statistics¹ and an automated fingerprint system.² In 1995, the State Legislature amended Chapter 41 of Title 44, adding AS 44.41.035, which allows the Department of Public Safety to collect for inclusion into the DNA registration system a blood sample, oral sample, or both, from

¹ Alaska Statute 44.41.020(c) provides that:

[t]he department shall establish, and may require state and local law enforcement agencies to use, standardized methods of collecting and recording law enforcement and crime statistics. See also AS 44.41.050, Uniform Homicide Reporting, which requires the Department of Public Safety to participate in the Federal Bureau of Investigation, Violent Criminals Apprehension Program. Participation includes submitting Violent Criminals Apprehension Program report which will aid in discovering similarities of crimes and suspects.

² Alaska Statute 44.41.025(a) provides that "[t]he Department of Public Safety may maintain an automated fingerprint system."

(1) a person convicted of a crime against a person, and (2) a minor 16 years of age or older, adjudicated as a delinquent for an act that would be a crime against a person if committed by an adult. AS 44.41.035(b) "Crime against a person" means a felony offense, or a felony attempt to commit an offense. AS 44.41.035(j)(1). Throughout the entire statute, the language specifically targets the Department of Public Safety as the governmental agency responsible for the establishment of the DNA identification registration system [AS 44.41.035(a)], the collection of blood and oral samples [AS 44.41.035(b) & (h)(1)], and the dissemination of information derived from those samples whether needed by other law enforcement agencies or for presentation in court [AS 44.41.035(c)(1)-(2)]. The statute further instructs the Department that the DNA registration system is confidential to be used in a limited and tightly controlled fashion. AS 44.41.035(f)(1)-(4). Lastly, the statute mandates that the Department adopt reasonable procedures for the collection, analysis, storage, expungement, and use of the DNA registration system, and to protect the system from unauthorized access and the natural elements. AS 44.41.035(h)(1)-(2).

- B. The responsibility for the collection of deoxyribonucleic acid (DNA) is borne by the Department of Public Safety, not with the Court.

This is a matter of statutory construction: Does the statute which creates the DNA registration system vest responsibility of sample collection on the court? Of course, by examining the plain meaning of the statutory language, it would

appear that the only agency responsible for implementing the substantive portions of the statute lies directly upon the Department of Public Safety. However, Alaska has rejected the strict "plain meaning" approach to statutory construction. Indeed, the fact that a statute's wording is apparently clear and unambiguous does not end the search for the legislature's intent. Municipality of Anchorage v. Ray, 854 P.2d 740, 745 (Alaska App. 1993), citing Stephan v. State, 810 P.2d 564, 566 (Alaska App. 1991). Yet, the more clear and unambiguous the wording of the disputed statute, the correspondingly greater burden of persuasion borne by a litigant who contends that the statute does not mean what it appears to say. Ray, 854 P.2d at 745, citing University of Alaska v. Geistauts, 666 P.2d 424, 428 n.5 (Alaska 1983).

In this case the State has not offered any argument against the Defendant's assertion that the Court cannot act as an independent authority in conjunction with the Department imposing an order compelling Defendant to participate in the DNA registration system. Nowhere in the statutory language which creates the DNA registration system is there mention of judicial involvement, nor is there any indication of an implied contemplation of such involvement. It is clear and unambiguous that the statute directs the Department to adopt reasonable procedures for the collection of DNA. The Defendant has clearly laid that argument out.

The State, by virtue of the fact that it asserts a different meaning, now bears a "correspondingly heavy burden of

demonstrating contrary legislative intent. University of Alaska v. Geistauts, 666 P.2d at 428 n.5 (Alaska 1983). The State has not met its burden and, after reviewing the legislative history, it cannot.

Legislative history, reflected in the House Judiciary Committee's hearings, indicates that judicial involvement was not considered when considering how to persuade convicted felons to submit to DNA registration. Persuasion would clearly come from the Department of Corrections which could promulgate regulations, including administrative segregation, loss of good time, and other methods to make this statute effective. See generally DNA Testing of Convicted Sex Offenders: Hearings on H.B. 27 Before the House Judiciary Standing Committee, 19th Legis., 1st Sess. (January 25, 1995). The Court therefore concludes that the clear and unambiguous language of AS 44.41.035 involves only the Department of Public Safety and the State's arguments otherwise are unpersuasive.

C. The Court may not exceed the scope of its sentencing powers elaborated in AS 12.55.015 and therefore may not enter a direct order requiring Defendant to participate in the DNA registration system.

The provisions set out in AS 12.55.015 definitively establish the scope of the Court's sentencing powers.³ Nothing in

³ Sec. 12.55.015. Authorized sentences; forfeiture. (a) Except as limited by AS 12.55.125 — 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a

(continued...)

³(...continued)

(A) fine when authorized by law and as provided in AS 12.55.035; or

(B) day fine when authorized by law and as provided in AS 12.55.036, if the court does not impose a term of periodic or continuous imprisonment or place the defendant on probation;

(2) order the defendant to be placed on probation under conditions specified by the court that may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution under AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work under AS 12.55.055;

(7) suspend execution of all or a portion of the sentences imposed under AS 12.55.080;

(8) suspend imposition of sentence under AS 12.55.085;

(9) order the forfeiture to the commissioner of public safety or a municipal law enforcement agency of a deadly weapon that was in the actual possession or used by the defendant during the commission of an offense described in AS 11.41, AS 11.46, AS 11.56, or AS 11.61;

(10) order the defendant, while incarcerated, to participate in or comply with the treatment plan of a rehabilitation program that is related to the defendant's offense or to the defendant's rehabilitation if the program is made available to the defendant by the Department of Corrections;

(11) order the forfeiture to the state of a motor vehicle, weapon, electronic communication device, or money or other valuables, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang.

(b) The court, in exercising sentencing discretion as provided in this chapter, shall impose a sentence involving imprisonment when

(1) the defendant deserves to be imprisoned, considering the seriousness of the present offense and the defendant's prior criminal history, and imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances;

(2) imprisonment is necessary to protect the public from further harm by the defendant; or

(3) sentences of lesser severity have been repeatedly imposed for substantially similar offenses in the past and have proven ineffective in deterring the defendant from further criminal conduct.

(c) In addition to the penalties authorized by this section, the court may invoke any authority conferred by law to order a
(continued...)

that statute expressly or impliedly confers authority on the sentencing court to require the Defendant to participate in the DNA registration system, except as a condition of probation.

In Benboe v. State, 738 P.2d 356 (Alaska App. 1987), the Court of Appeals concluded that the sentencing court exceeded the scope of its sentencing powers when it separately ordered Benboe, not as a condition of probation but as separate provisions of its oral and written judgments, to participate, while incarcerated, in sexual offender treatment programs offered by the Department of Corrections. (AS 12.55.015 was subsequently amended to provide the authority.) Carefully delineating between a "condition of

³(...continued)

forfeiture of property, suspend or revoke a license, remove a person from office, or impose any other civil penalty. When forfeiting property under this subsection, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of the defendant, the seizure of property, or the identification of property for seizure, (1) the property if the property is worth \$5,000 or less and is not money or some other thing that is divisible, or (2) up to 75 percent of the property or the value of the property if the property is worth more than \$5,000 or is money or some other thing that is divisible. In determining the percentage a municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency's total involvement in the case relative to the involvement of the state.

(d) [Repealed, § 1 ch 188 SLA 1990.]

(e) If the defendant is ordered to serve a definite term of imprisonment, the court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(f) Notwithstanding (a) of this section, the court shall order the forfeiture to the commissioner of public safety or a municipal law enforcement agency of a deadly weapon that was in the actual possession of or used by the defendant during the commission of a crime involving domestic violence.

(g) In this section "deadly weapon" has the meaning given in AS 11.81.900.

probation" and a "direct order" that becomes a component of the sentence, the Court wrote that it found:

nothing empowering the court, as a part of a sentence of imprisonment, to enter a direct order requiring the accused to participate in treatment. Nor [were they] aware of any authority for the proposition that the court has inherent power to enter such orders in the absence of legislative authorization.

Benboe, 738 P.2d at 361; see also Skrepich v. State, 740 P.2d 950 (Alaska App.1987) (Superior Court had no authority, statutory or inherent, to order defendant to refrain from engaging in any direct or indirect contact with victim of his offense of sexual abuse of a minor in second degree).

Therefore, the Court concludes that it does not have the authority to impose a direct order mandating that Defendant participate in the DNA registration program, nor may it make such an order a component of Defendant's sentence, absent specific statutory authority.

D. The Court has broad discretionary powers to establish conditions of probation when suspending all or a portion of a sentence and as long as the conditions of probation serves a three-fold purpose, specifically the conditions of probation must be reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty.

The State Legislature has conferred broad discretionary powers on the sentencing court to establish conditions of probation when all or a portion of a sentence is to be suspended.⁴ Roman v.

⁴ AS 12.55.080 provides:

Suspension of sentence and probation. Upon entering a judgment of conviction of a crime, or at any time within 60
(continued...)

State, 570 P.2d 1235, 1240 (Alaska 1977); see also Benboe v. State, 738 P.2d 356, 360 (Alaska App. 1987); Jones v. State, 727 P.2d 6, 7 (Alaska App. 1986) (condition prohibiting individual from being in a 45 block, high crime area of city for a year was not reasonably related to rehabilitation, not clearly related to his misconduct and was unnecessarily severe and restrictive); Edison v. State, 709 P.2d 510, 511 (Alaska App. 1985) (obtaining court permission before entering town is an improper condition of probation). But see Oyoqhok v. Municipality of Anchorage, 641 P.2d 1267 (Alaska App. 1982) (restricting defendant arrested for prostitution from entering four block area where prostitution occurred is a permissible condition of probation); Allain v. State, 810 P.2d 1019 (Alaska App. 1991) (special condition of probation requiring defendant to abstain from consumption of alcohol was reasonably related to goal of rehabilitation despite fact that record disclosed no direct link between defendant's drinking and current offense of sexual abuse of a minor).

Compelling the Defendant to provide a sample of his body fluids does not appear to comport to at least one factor of the test. Placing the Defendant's DNA in a data bank could arguably provide protection of the community by means of deterrence.

⁴(...continued)

days from the date of entry of that judgment of conviction, a court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best.

However, this condition does not reasonably relate to the rehabilitation of this Defendant. Since it fails to satisfy this factor, it cannot be a special condition of probation.

IV. CONCLUSION

Given the reasons set forth above, the Court lacks the authority to order Defendant to submit to the drawing of samples of his body fluid for the statewide DNA database. Thus, the Court need not address whether or not the DNA identification would violate the Defendant's constitutional rights to be free from unreasonable searches and seizures, to due process, and privacy.

The State's motion is therefore DENIED.

ENTERED at Fairbanks, Alaska, this 12 day of September, 1997.



RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

TONY KNOWLES
GOVERNOR



HB 100
P.O. Box 110001
Juneau, Alaska 99811 0001
(907) 465-3500
Fax (907) 465-3532

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1997

The Honorable Gail Phillips
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Phillips:

I am transmitting this bill to further enhance the positive effects of a 1995 law aimed at reducing frivolous litigation filed by state prisoners.

The bill clarifies a prisoner must pay filing fees in all types of legal actions against the state, including discretionary appellate review. It also ensures the court will consider all prisoner financial accounts in determining whether an exemption from the filing fee is warranted. This is an extension of the 1995 law (ch. 79, SLA 1995) which requires a prisoner to pay the usual filing fees for bringing a legal action against the state, unless the court finds the prisoner qualifies for an exemption based on financial information. This bill requires the prisoner to submit information about money in accounts outside the prison as well as in-prison accounts.

The law enacted in 1995 provides that automatic disclosure provisions of Alaska Rule of Civil Procedure 16.1 do not apply to litigation filed by prisoners. But a corresponding exemption from a similar provision in a separate court rule (Alaska Rule of Civil Procedure 26) was inadvertently not included in the earlier bill. This bill repairs that omission.

The rationale for automatic disclosure--reducing the cost and duration of litigation by cooperative discovery--does not readily apply in most litigation brought by prisoners. Prisoners are generally not willing or able to participate in discovery and, as a result, the state is obliged to furnish full information while prisoners furnish no information to the state. This is expensive and unnecessary, especially in litigation that is often without merit.

4/15/98

A M E N D M E N T

OFFERED IN THE HOUSE

BY REPRESENTATIVE

TO: CSHB 122 ()

Version 0-GH0055\B

Page 5, lines 22 - 26:

Following "court." delete all material and insert:

"In a matter requesting review of or appealing a criminal conviction or sentence, this rule does not authorize an appellate court, or a superior court acting as an intermediate appellate court, to validate the filing of a notice of appeal, petition for review, or petition for hearing more than 60 days after the expiration of the time specified in the rule or statute, or in the last extension of time previously granted."

HB

124

(7)

Date Referred to Committee: March 12, 1997

FURTHER REFERRALS:

Date of Committee Action: 4/21/97

The JUDICIARY Committee considered:

HB 124

HOUSE BILL NO. 124

PERA: LOCAL EXEMPTION/NONNEGOTIABLE ITEMS

"An Act relating to items not subject to collective bargaining and to application of the Public Employment Relations Act to municipalities and other political subdivisions."

recommends it be replaced with the following committee substitute

CSHB 124 (JUD)

the same title
 a new title

additional referral to _____ Committee
 attached amendment(s)

ADOPTS: _____ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) _____

fiscal note(s) _____

zero fiscal note(s) _____

zero fiscal note(s) Admin & Labor

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>[Signature]</i> CROFT		✓		
<i>[Signature]</i> JAMES			✓	
<i>[Signature]</i> PORTER			✓	
<i>[Signature]</i> GREEN			✓	
<i>[Signature]</i> BERKOWITZ		✓		
<i>[Signature]</i> FUNDE				✓

CHAIR'S SIGNATURE

[Signature]

CS FOR HOUSE BILL NO. 124(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to items not subject to collective bargaining and to application
2 of the Public Employment Relations Act to municipalities and other political
3 subdivisions."

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

5 * Section 1. AS 23.40.075 is amended to read:

6 Sec. 23.40.075. Items not subject to bargaining. The parties may not
7 negotiate terms contrary to the

8 (1) reemployment rights for injured state employees under
9 AS 39.25.158;

10 (2) reemployment rights of the organized militia under AS 26.05.075;

11 (3) authority of the Department of Health and Social Services under
12 AS 47.27.035 to assign Alaska temporary assistance program participants to a work
13 activity considered appropriate by the Department of Health and Social Services; [OR]

14 (4) authority for agencies to create temporary positions under

1 AS 47.27.055(c); or

2 (5) right of the employer to contract out or privatize services or
3 functions previously performed by employees or that could be performed by
4 employees except to ensure cost savings to the public employer.

5 * Sec. 2. AS 23.40 is amended by adding a new section to read:

6 Sec. 23.40.085. Application to political subdivisions. (a) Except as provided
7 in (b) of this section, the provisions of AS 23.40.070 - 23.40.260 do not apply to
8 municipalities and other political subdivisions of the state.

9 (b) A municipality may, by ordinance, and a political subdivision other than
10 a municipality may, by resolution, choose to accept or reject application of the
11 provisions of AS 23.40.070 - 23.40.260 at any time.

12 * Sec. 3. AS 29.35.685(c) is amended to read:

13 (c) AS 23.40.070 - 23.40.260 apply to employees of an authority established
14 under AS 29.35.600 - 29.35.730 unless all municipalities participating in the authority
15 are exempt under AS 23.40.085 [SEC. 4, CH. 113, SLA 1972].

16 * Sec. 4. Section 4, ch. 113, SLA 1972, and sec. 11, ch. 1, SLA 1992, are repealed.

17 * Sec. 5. This Act does not terminate or modify the terms of a collective bargaining
18 agreement in effect on the effective date of this Act.

Alaska State Legislature



House of Representatives
House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

MEMORANDUM

Date: April 21, 1997
To: Terry Cramer, Legislative Legal Services
Fax: 465-2029
From: Lisa Kirsch, House Judiciary Committee
Fax: 465-4316
Re: HB 124 with amendment

We passed HB 124 out of committee today with one amendment:
We adopted draft 0-LS0540\B as our working document.
Amendment number 2 (attached). We need a final version, please.

Thanks for your help.

04/21/97

AMENDMENT # 1

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 124

Page 1, line 1

Following "relating",

delete "to items not subject to collective bargaining and"

Page 1, line 5 through page 2, line 4

delete all material

renumber following sections accordingly

04/21/97

AMENDMENT #2

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 124

Page 2, line 4:

following "employees",

insert "except to insure cost savings to the public employer"

*Passed
4/21/97*

0-LS0540B
Cramer
4/21/97

CS FOR HOUSE BILL NO. 124()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL

FOR AN ACT ENTITLED

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11 (3) authority of the Department of Health and Social Services under
12 AS 47.27.035 to assign Alaska temporary assistance program participants to a work
13 activity considered appropriate by the Department of Health and Social Services; [OR]

14 (4) authority for agencies to create temporary positions under

1 AS 47.27.055(c); or

2 (5) right of the employer to contract out or privatize services or
3 functions previously performed by employees or that could be performed by
4 employees.

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7 in (b) of this section, the provisions of AS 23.40.070 - 23.40.260 do not apply to
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15 are exempt under AS 23.40.085 [SEC. 4, CH. 113, SLA 1972].

16 * Sec. 4. Section 4, ch. 113, SLA 1972, and sec. 11, ch. 1, SLA 1992, are repealed.

17 * Sec. 5. This Act does not terminate or modify the terms of a collective bargaining
18 agreement in effect on the effective date of this Act.

04/21/97

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OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 124

Page 2, line 4:

following "employees",

insert "except to insure cost savings to the public employer"

04/21/97

AMENDMENT

OFFERED IN THE HOUSE

BY: Representative Berkowitz

TO: House Bill 124

Page 1, line 1

Following "relating",

delete "to items not subject to collective bargaining and"

Page 1, line 5 through page 2, line 4

delete all material

renumber following sections accordingly

CS FOR HOUSE BILL NO. 124()

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTIETH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE VEZEY

A BILL

FOR AN ACT ENTITLED

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* Sec. 4. Section 4, ch. 113, SLA 1972, and sec. 11, ch. 1, SLA 1992, are repealed.

* Sec. 5. This Act does not terminate or modify the terms of a collective bargaining agreement in effect on the effective date of this Act.

3/21/97 ~~K/10/97~~

Pub EEs Rela Act

Bargained under Title 14

Schbd & NEA

1990 decision made

Put teachers under PERA - got right to strike
agree 3-4 days off - no raise
- add training then more
but no raise for exp or

Wants right to binding arb.

Kenda: both dist & teachers

agree to submit to binding arb

2 tiers - current employees

- new on lesser value sched

No raise better than 2 systems

- 1990 agree teach under PERA

2 yr. trial exp - sunset in 1992

Teachers thought working

- 1992 PERA sunset removed

gov. Hickle vetoed bill - leg over rode

Since 92 developing a process

it is working even though right to

strike teach work ~~for~~ @ school

94 Strike - More years under procedures

"in great shape"

Also deals @ Municipalities

- HB 124 Will allow School Dist to present

to voters Q does dist stay under PERA

or opt out.

In effect create 2 systems

Green Q losing members?

Ⓐ Leads to diff struggle - unintended outcome - if so opts out - Teachers still want to bargain - in effect created importance of union.

Alaska State Legislature

House of Representatives

Interim Address:
119 N. Cushman, Suite 211
Fairbanks, AK 99701
(907)-456-5081
Fax# (907)-456-8245



Session Address:
Room 13

(907)-465-3719

State Capitol
Juneau, AK. 99801-1182

Official Business

Representative Al Vezey

HB 124 SPONSOR STATEMENT

HB 124 makes two modifications to the Public Employment Relations Act (PERA).

Section 1 of HB 124 exempts from collective bargaining state services that are contracted out or privatized.

Section 2 of HB 124 will provide a democratic means for the municipalities of Alaska to vote to be covered by the Public Employment Relations Act (PERA) or if covered by PERA, a democratic means to opt out of PERA.

Existing legislation as interpreted by the courts has put local governing bodies in a position where one governing body can obligate all future governing bodies. HB 124 would place the decision making process back into the hands of local governing officials and the people.

HB 124 will strengthen the ability of municipalities to represent the citizens of their communities.

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM

February 10, 1997

SUBJECT: Sectional Summary of HB 124. (Application of PERA to municipalities and other political subdivisions; right to privatize government services)

TO: Representative Al Vezey
Attn: Rynnieva Moss

FROM: Teresa B. Cramer 
Legislative Counsel

You have requested a sectional summary of the above-described bill. Please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents.

Section 1 amends AS 23.40.075 to provide that the right of the employer to contract out services or functions is not subject to the requirement of collective bargaining under the Public Employment Relations Act (PERA).

Sec. 2 adds AS 23.40.085 to PERA to set out a mechanism for municipalities and other political subdivisions to use in deciding whether or not PERA should apply to employment relations in the municipality or political subdivision. The voters in the municipality or political subdivision can decide to accept or reject coverage under PERA.

Sec. 3 repeals two temporary law sections.

Section 4, ch. 113, SLA 1972 provides that PERA applies to "organized boroughs and political subdivisions of the state, home rule or otherwise, unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply."

Section 11, ch. 1, SLA 1992 provides that a municipal school district or regional educational attendance area cannot reject coverage under PERA.

Sec. 4 provides that the Act does not terminate or modify the terms of a collective bargaining agreement in effect on the effective date of the Act.

TC:glc
97-085.glc