Intergovernmental Immunity and the Eleventh Amendment

Wayne McCormack

INTERGOVERNMENTAL IMMUNITY AND THE ELEVENTH AMENDMENT

WAYNE MCCORMACK†

Close at the heart of our federal system is a problem that has plagued both federal and state governments since the beginning of this form of government. The problem is the degree of immunity that one government may enjoy from the taxes and regulations of the other. The Constitution does not deal explicitly with the problem of intergovernmental immunity, and the first debates over the Constitution centered on the separate but related question of the permissible scope of federal power under the "necessary and proper" clause.[1] The immunity problem arose early, however, following the assertion by the federal government of the prerogative to adopt whatever measures were appropriate to accomplish purposes deemed to be within the substantive reach of its powers.[2] The states reacted by adopting counter-measures against what they viewed as incursions into their domains,[3] but the federal government successfully asserted immunity from state control.[4]

The immunity of the federal government from state control and regulation has often been thought to occasion reciprocal immunity for

---

†Assistant Professor of Law, University of Georgia.

[1]*See, e.g.*, THE FEDERALIST No. 44, at 197 (C. Beard ed. 1959) (J. Madison). Madison, one of the defenders of the Constitution, argued that the "necessary and proper" clause was an inherent attribute of government: "Had the Constitution been silent on this head there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication."

[2]The debate over federal powers erupted early in Washington's first term as President when it was proposed by Hamilton that a national bank be created with a system of branches for the purpose of providing ready capital, supporting federal programs, and helping collect taxes. When the incorporation bill was passed by Congress, Washington asked for opinions on its constitutionality from his cabinet members. The two principal responses were from Jefferson, Secretary of State, and Hamilton, Secretary of the Treasury.

Jefferson urged that the incorporation of a bank was beyond the specific powers of the federal government and that the "necessary and proper" clause should be limited to "the *necessary* means, that is to say, to those means without which the grant of power would be nugatory." 3 THE WRITINGS OF THOMAS JEFFERSON 149-50 (Monticello ed. 1904).

Hamilton vigorously defended the constitutionality of the bank on the ground that it would facilitate tax collection and help in interstate trade. The "necessary and proper" clause was interpreted as including programs "needful, requisite, incidental, useful, or conducive" to the express powers, so long as the means were not specifically prohibited. 8 THE PAPERS OF ALEXANDER HAMILTON 102 (H. Syrett ed. 1965).

[3]*See* Virginia Resolutions, in STATE DOCUMENTS ON FEDERAL RELATIONS 54 (H. Ames ed. 1900).

[4]M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

the states from federal control and regulation.[5] In this century, however, it has become increasingly clear that essential federal programs might affect directly some state governmental functions. Despite the supremacy clause,[6] which would seem to belie any state immunity from otherwise valid federal programs, the argument for immunity still is made on behalf of the states.[7]

The problem takes on extreme complexity when the federal government creates a claim on behalf of private persons against the state government. Private remedies that are designed to vindicate these claims have been challenged by states under the eleventh amendment,[8] which has been interpreted as providing a form of state sovereign immunity from suit.[9] If the eleventh amendment continues to be read in this fashion, some surprising and anomalous limitations on the exercise of federal statutory rights are possible. For example, federal rights that are enforcable against state governments by the federal government, might nevertheless be unenforceable by private lawsuit on behalf of the person for whom the right was created.[10] In light of recent federal legis-

[5]*Compare* Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842), *with* Collector v. Day, 78 U.S. (11 Wall.) 113 (1871). "[I]f the means and instrumentalities employed by [the federal] government to carry into operation the powers granted to it are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?" *Id.* at 127.

[6]U.S. CONST. art. VI: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[7]*See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 199 (1968); Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 452 F.2d 820 (8th Cir. 1971), *cert. granted*, 405 U.S. 1016 (1972) (No. 71-1021).

[8]*See, e.g.*, Parden v. Terminal Ry., 377 U.S. 184 (1964) (private suit under FELA); Briggs v. Sagers, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970).

[9]Fitts v. McGhee, 172 U.S. 516 (1899); Hans v. Louisiana, 134 U.S. 1 (1890); *see* Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183 (1908); Note, *The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments*, 40 MINN. L. REV. 234, 236 (1956).

[10]Maryland v. Wirtz, 392 U.S. 183, 200 (1968), held that the wage and hour provisions of the Fair Labor Standards Act might be applied validly to state schools and hospitals but refused to specify what remedies are available for enforcement.

> Percolating through each of these provisions for relief are interests of the United States and problems of immunity, agency, and consent to suit . . . . The constitutionality of applying the substantive requirements of the Act to the States is not, in our view, affected by the possibility that one or more of the remedies the Act provides might not be available when a State is the employer-defendant . . . . Questions of state immunity [from suit] are therefore reserved for appropriate future cases.

lation which has created new rights of individuals against the states,[11] the doctrine of intergovernmental immunities and the eleventh amendment should be reconsidered as they apply to these new rights.

INTERGOVERNMENTAL IMMUNITY DOCTRINE

The history of intergovernmental immunities in this country is largely a history of the taxation power. Taxation was until this century the primary means of governmental regulation,[12] as well as the source of revenue.[13] The potential of the taxation power to generate friction between the state and federal governments is reflected in Justice Mar-

---

The question about available remedies was answered in favor of the federal government when enforcement was sought by the Secretary of Labor. Hodgson v. Board of Educ., 344 F. Supp. 79 (D.N.J. 1972). However, there is a split in the circuits whether suit can be maintained when enforcement has been sought by private employees. Employees of Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 452 F.2d 820 (8th Cir. 1971), *cert. granted*, 405 U.S. 1016 (1972) (No. 71-1021); Briggs v. Sagers, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970); *see* note 165 and accompanying text *infra*.

[11]*See, e.g.*, Fair Labor Standards Act § 16(b), 29 U.S.C. § 216(b) (1970); Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1970).

[12]Through the nineteenth and into the early twentieth century, the Supreme Court reviewed many taxes that clearly had regulatory purposes but held consistently that the taxation power was plenary and that the judiciary could not inquire into the motives of Congress to determine whether a tax was a true revenue-raising measure or a prohibitory enactment. Taxes held valid under this reasoning included prohibitive taxes on narcotics, United States v. Doremus, 249 U.S. 86 (1919); yellow oleomargarine, McCray v. United States, 195 U.S. 27 (1904); and state bank notes, Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

The Court seemed to make an abrupt switch in philosophy when it declared invalid the tax on net profits of businesses employing child labor. Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922):

> Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.

More decisions following *Drexel Furniture* overturned taxes on liquor sales, United States v. Constantine, 296 U.S. 287 (1935), and on commodities futures, Hill v. Wallace, 259 U.S. 44 (1922). The line of reasoning turned back to judicial restraint with the validation of taxes on gambling, United States v. Kahriger, 345 U.S. 22 (1953); marijuana sales, United States v. Sanchez, 340 U.S. 42 (1950); and firearms, Senzinky v. United States, 300 U.S. 506, 514 (1937) ("as it is not attended by an offensive regulation and since it operates as a tax, it is within the national taxing power"). *Kahriger* was eventually overruled on the basis of fifth amendment objections to the reporting and registration requirements. Marchetti v. United States, 390 U.S. 39 (1968); *see* Leary v. United States, 395 U.S. 6 (1969); Haynes v. United States, 390 U.S. 85 (1968).

[13]The taxation power is almost unlimited when it is used expressly for revenue raising purposes. *See* note 70 *infra*.

shall's famous phrase, "[T]he power of taxing . . . may be exercised so as to destroy . . . ."[14] These factors require a treatment of taxation immunities before turning to consideration of modern regulatory provisions that raise the question of intergovernmental immunity in a new context.

Taxation Immunity

The landmark case of *M'Culloch v. Maryland*[15] arose out of an attempt by the State of Maryland to impose a tax on the issuing of bank notes by the Bank of the United States,[16] which was operating a branch in Maryland. The Supreme Court, through Justice Marshall, held that creation of the bank was within the powers of the federal government and that the bank was immune from the state taxation. The discussion of the bank's immunity was set out in one of Marshall's famous three-point syllogisms;[17] at the heart of his opinion was an assertion of the supremacy of the federal government as the representative of *all* the people. From this principle he inferred the nonreciprocal nature of intergovernmental immunity: the federal government could tax the activities of state governments because it would be taxing its own constituents, whereas a state would be able to restrict the activities of a government with broader constituencies if it were allowed to tax the instrumentalities of the federal government.[18]

Notwithstanding Marshall's conception of federal power, the principle of reciprocal immunity from taxation prevailed in the late nineteenth century in the decison in *Collector v. Day*.[19] The Supreme Court held that the federal government could not tax the income of a state judge.[20] Justice Bradley, in a strong dissent, echoed the political con-

[14]M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819).

[15]17 U.S. (4 Wheat.) 316 (1819).

[16]The case arose as a state criminal prosecution against M'Culloch, the chief executive officer of the Baltimore branch for refusing to pay the tax. *See generally* R. CATTERALL, THE SECOND BANK OF THE UNITED STATES (1903); B. HAMMOND, BANKS AND POLITICS IN AMERICA—FROM THE REVOLUTION TO THE CIVIL WAR (1957).

[17]"1st. [T]hat a power to create implies a power to preserve. 2nd. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3rd. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme." 17 U.S. (4 Wheat.) at 426.

[18]*Id.* at 428-29.

[19]78 U.S. (11 Wall.) 113 (1871).

[20]The Court had previously held that a state could not tax the salary of a federal official. Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842). *Dobbins* was implicitly

cepts of Marshall by referring to the interests of other states and of the people in the activities of the federal government.[21] Bradley urged a nonreciprocal immunity that would leave the federal government free to tax most state activities while it remained immune from state taxation.

Later decisions expanded reciprocal immunity to protect private taxpayers whose relationship with a government demonstrated that any tax liability imposed on them would ultimately fall on a state or the federal government. The relationships that carried immunity included the leasing of public lands,[22] selling to governments,[23] and, temporarily, even the holding of a patent.[24] Although the scope of immunity had been broadened to include private persons dealing with governments, it was limited by a distinction between governmental and proprietary activities.[25] Under this distinction, the federal government could tax any state-conducted activities that had been traditionally conducted by private business.[26]

About the same time that New Deal legislation was beginning to win approval in the Supreme Court,[27] the wholesale granting of constitu-

---

overruled by Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939), upon the realization that *M'Culloch* did not require immunity for the employee or special treatment for the government. *See* notes 32-38 and accompanying text *infra*.

[21] [[T]he general government has the same power of taxing the income of the officers of the State governments as it has of taxing that of its own officers. . . . The taxation by the State governments of the instruments employed by the general government in the exercise of its powers, is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation.

78 U.S. (11 Wall.) at 128-29.

[22] *Compare* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932) (lessee of state lands immune from federal income tax) *with* Gillespie v. Oklahoma, 257 U.S. 501 (1922) (lessee of Indian lands immune from state income tax).

[23] *Compare* Panhandle Oil Co. v. Mississippi, 277 U.S. 218 (1928) (sales to federal government immune from state sales tax) *with* Indian Motorcycle Co. v. United States, 283 U.S. 570 (1931) (sales to state immune from federal tax).

[24] Long v. Rockwood, 277 U.S. 142 (1928), overruled by Fox Film Corp. v. Doyal, 286 U.S. 123 (1932).

[25] *See, e.g.*, Helvering v. Powers, 293 U.S. 214 (1934) (operation by Massachusetts of Boston street railway); South Carolina v. United States, 199 U.S. 437 (1905) (operation of state liquor store).

[26] Ohio v. Helvering, 292 U.S. 360, 368 (1934), reaffirmed that "the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises nongovernmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress." The governmental-proprietary distinction was never applied for the purpose of taxing federal activities. *See* notes 37-38 and accompanying text *infra*.

[27] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v.

tional tax immunity began to end.[28] The significant turnaround came with Mr. Justice Stone's opinion in *Helvering v. Gerhardt*,[29] which held that federal income tax could be levied on the salaries of employees of the New York Port Authority, which was a joint operation of the states of New York and New Jersey. Justice Stone asserted three separate bases for the denial of immunity to state employees. First was the Marshallian doctrine of greater taxing power in the federal government.[30] Secondly, Stone relied on the proposition that the Port Authority was not performing an essential governmental function.[31] A third proposition seemed to call into question much of the prior doctrine of immunity and its economic justification with respect to private persons having some relationship with a government. Stone maintained that immunity for salaries was not essential to governmental integrity and that it should not be used "to confer on the state a competitive advantage over private persons" engaged in the same conduct,[32] in this case the hiring of employees.

Gerhardt did not result in complete rejection of the ideal of reciprocity, for the Court later followed Justice Stone's economic rationales to deny immunity to federal employees from state income taxes.[33] Having limited state immunity, the Court limited federal immunity in symmetrical fashion. Governmental or proprietary distinctions were not deemed controlling; instead the nature of the transaction being taxed was said to be determinative.[34] The receipt of compensation for contracted services could be taxed because the burden on state and federal governments was indirect and slight. No government had need of a "competitive advantage" over private employers or contractors when the transaction was one not distinctly governmental, but in transactions characteristically governmental, such as the issuing of bank notes for

---

Parrish, 300 U.S. 379 (1937). *See generally* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

[28]*See* James v. Dravo Contracting Co., 302 U.S. 134 (1937) (proceeds of construction contract with United States subject to state gross receipts tax); Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938) (lessees of public lands subject to income taxes); *cf.* notes 21-22 *supra*.

[29]304 U.S. 405 (1938).

[30]*Id.* at 416.

[31]*Id.* at 421.

[32]*Id.* The conduct to which reference was made was apparently the acts of employing personnel and paying salaries.

[33]Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[34]*See id.* at 483-85.

national economic stabilization, the immunity was preserved.[35] Even when the burden was directly on the state rather than on persons with some relationship to the state, the Court ceased inquiring into the governmental or proprietary character of the agency being taxed and inquired into the nature of the particular transaction involved. For example, revenues collected by state schools from the sale of tickets to football games could be taxed.[36] This inquiry into the nature of the transaction rather than the nature of the institution comported with the idea of taxing salaries or sales as if those activities were carried on for private employers or buyers.[37] The opinions reflected dissatisfaction with the governmental-proprietary distinction, which could not comfortably be reconciled with the reciprocity ideal, for it did not admit of symmetrical application.[38] The Court adhered to the notion that the federal government was one of such limited powers that its activities if legitimate, could only be deemed governmental and not proprietary.[39]

Thus by the mid-1940's, reciprocal immunity had become an ideal of questionable validity, because all immunity was limited to governmental transactions[40] and the limitation was not precisely symmetrical. In federal operations it gave broad immunity to any government-created entity, whereas in state operations it was based on the governmental character of the particular transaction involved rather than the nature of the institution making the transaction. In *New York v. United*

[35]The continued vitality of *M'Culloch* has been seriously challenged on the ground that the modern banking system is in no significant way a function of government. The Supreme Court refused to overrule *M'Culloch*, with heavy reliance on statutory rather than constitutional provisions. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339 (1968).

[36]Allen v. Regents of Univ. of Georgia, 304 U.S. 439 (1938). It was conceded that the proceeds of football games were used for educational purposes, a governmental function. For an interesting analysis of the *Allen* case *see* Powell, *The Waning of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 663, 649 (1945).

[37]*See generally* Brown, *Intergovernmental Tax Immunity*, 25 WASH. U. L.Q. 153 (1940); Graham & Stinson, *Two Centuries of Tax Immunity*, 18 N.C.L. REV. 16 (1939); Snedeker, *Intergovernmental Tax Immunity*, 15 ROCKY MT. L. REV. 8 (1942).

[38]*See* Van Brocklin v. Tennessee, 117 U.S. 151, 158 (1886): "The United States do not and cannot hold property, as a monarch may, for private or personal purposes."

[39]*See* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 467 (1939) (emphasis added):

> As that government [federal] derives its authority wholly from powers delegated to it by the Constitution, *its every action within its constitutional power is governmental action*, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation.

[40]*See* Powell, *The Remnant of Intergovernmental Tax Immunities*, 58 HARV. L. REV. 757 (1945).

States[41] the Supreme Court had a case clearly governed by established principles. The State of New York was operating a mineral water bottling plant and selling the waters of its natural springs, and the federal government sought to tax it as it would have taxed any other mineral water bottling plant.[42] Justice Frankfurter, announcing the judgment of the Court, took the opportunity to advocate rejection of the concept of reciprocity and to promulgate a new test of tax immunity, stating that a tax on a state entity should be valid if it is nondiscriminatory, falling equally on any state and on any private persons who came within the same subject matter of taxation.[43] Frankfurter expressly rejected any distinction between "governmental" and "proprietary" activities but maintained that the state could not be taxed on those activities that were "uniquely" characteristic only of a government.[44]

Frankfurter's mental gymnastics proved too much for the rest of the majority,[45] who, in an opinion by Justice Stone, also found the "governmental-proprietary" distinction untenable but believed that there might be nondiscriminatory taxes that "would nevertheless impair

---

[41]326 U.S. 572 (1946).

[42]Internal Revenue Act of 1932, ch. 209, § 615(a)(5), 47 Stat. 265.

[43]Justice Frankfurter also added some remarks about the claim of intergovernmental immunity, implying that the whole subject should be treated as a "political question."

> [Recent cases] indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now before us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges.

326 U.S. at 583-84. It is surprising to find an eminent jurist urging an abdication of the judicial function when confronted with a controversy between two parties over this question of law. The judicial function could be used to decide that Congress had absolute unfettered discretion to impose taxes, but that would be a decision against immunity. The judicial philosophy of Frankfurter that called for non-decision over many questions of constitutional law is reflected in cases such as Dennis v. United States, 341 U.S. 494, 550 (1951) (concurring opinion) (Communist Party prosecution: "it is not for us to decide how we would adjust the clash of interests which this case presents were the primary responsibility for reconciling it ours"); Colegrove v. Green, 328 U.S. 549, 553-54 (1946) (reapportionment: "it is hostile to a democratic system to involve the judiciary in the politics of the people"); Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941).

These views conflict sharply with those of Justice Marshall and others. It was Marshall who early espoused a doctrine of judicial responsibility or accountability: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 19 U.S. (6 Wheat.) 120, 181 (1821).

[44]*See* note 72 *infra*.

[45]Only Justice Rutledge joined the opinion of Justice Frankfurter. Rutledge, however, also filed a separate concurring opinion. 326 U.S. at 584.

the sovereign status of the State."[46] Justice Stone reverted to the language of reciprocal immunity that he had earlier rejected and pointed to *M'Culloch* as an impairment of sovereign status by nondiscriminatory taxation.[47]

The taxation cases thus lead to the conclusion that the federal government's activities cannot be taxed, although persons dealing with the federal government may be taxed on the basis of the transactions they carry out. Conversely, state governments, as well as persons dealing with them, may be taxed according to the nature of the particular transaction. Not since *New York v. United States* has any significant litigation in this area found its way to the Supreme Court. Apparently, no state has felt its sovereign status sufficiently impaired by federal taxation to warrant raising the Stone distinction. A hesitant conclusion might be offered that perfect reciprocity is no longer a hotly pursued ideal and that any challenge to federal taxation of a state activity would require a showing of actual impairment of state functions.

Regulatory Immunity

The taxation cases have resulted in highly unsatisfactory logical distinctions, although they are probably in accord with popular conceptions of federalism. Most persons probably have a feeling that it would be wrong for the federal government to impose a tax on the attributes of state sovereignty that are uniquely governmental. For example, a federal tax based on the number of policemen or firemen hired by a state would certainly raise an outcry and would likely be declared unconstitutional if it were not part of a general program of taxation that affected all employers equally. Perhaps the major reason for this feeling about the taxing power is that it has been historically a major source of regulatory power for the federal government.[48] Before the New Deal brought widespread regulatory programs enacted under the commerce power,[49] taxation of an often prohibitory degree was enacted to regulate prob-

[46]*Id.* at 586-87.

[47]Some of the problems inherent in this position are reflected in the fact that the Maryland tax invalidated in *M'Culloch* was a discriminatory tax that applied only to banks chartered by the federal government. 17 U.S. (4 Wheat.) at 320.

[48]The federal statutes still contain many prohibitory and regulatory taxes. *See* INT. REV. CODE of 1954, §§ 5001-862.

[49]For a discussion of the problems confronted by reformers in the early part of this century, *see* Cushman, *The National Police Power Under the Commerce Clause of the Constitution* (pts. I-IV), 3 MINN. L. REV. 289, 381, 400, 452 (1919).

lems relating to child labor,[50] foods,[51] and drugs.[52] More sophisticated uses of the commerce power[53] and more open and direct regulatory programs have followed the New Deal legislation. The states, unhampered by limited power, have also developed extensive regulatory schemes, often in advance of the federal government. The development of concepts of immunity from regulatory programs has paralleled the development of taxation immunities.

Federal immunity from state regulatory programs has been invoked to protect federal employees from penalty under state regulations licensing drivers[54] and to relieve federal contractors[55] from state licensing requirements even in situations in which they would be subject to state taxation.[56] The reasons given for regulatory immunity reflect the fear of the Court in *M'Culloch v. Maryland* that a single state might impede the activities of the federal government. Federal immunity from state regulatory provisions is broader than the immunity from taxation, apparently because regulation is a more direct form of control than taxation.[57] For example, regulation of prices by the states was held inapplicable to federal purchasing which operated on a policy of competitive bidding.[58]

When federal regulatory programs began to affect state activities, the states argued for reciprocal immunity of the type that had been in effect for taxation. The Supreme Court was quick to point out a significant difference between the taxing power and the regulatory power under the specific powers granted to the federal government by the

[50]Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922), invalidated a tax on businesses selling products made with child labor after an earlier attempt to exclude the same items from interstate commerce had been invalidated in Hammer v. Dagenhart, 247 U.S. 251 (1918). *See* note 12 *supra*.

[51]*See* McCray v. United States, 195 U.S. 27 (1904).

[52]*See* United States v. Doremus, 249 U.S. 86 (1919).

[53]*See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[54]Johnson v. Maryland, 254 U.S. 51 (1920). Johnson was fined for driving a mail truck in the course of employment by the United States without a valid state driver's license.

[55]Leslie Miller Inc. v. Arkansas, 352 U.S. 187 (1956) (per curiam).

[56]James v. Dravo Contracting Corp., 302 U.S. 134 (1937).

[57]Johnson v. Maryland, 254 U.S. 51, 57 (1920) (driver's license): "Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient."

[58]Paul v. United States, 371 U.S. 245 (1963). *See also* Public Util. Comm'n v. United States, 355 U.S. 534 (1958), in which the Court invalidated California statutory and regulatory provisions that purported to regulate rates charged the federal government by common carriers.

Constitution. In applying the Federal Safety Appliances Act[59] to a state-owned and -operated railroad within interstate commerce,[60] the Court held that taxation immunity principles were wholly inapplicable and that it was irrelevant whether the state was operating in its "sovereign" or "private" capacity. The Court said that the commerce power is a delegation of sovereignty to the federal government over anything that comes within the scope of that grant of power and that, consequently, there is no limitation upon the plenary power of Congress to regulate commerce. Of course, the operation of a railroad in interstate commerce is not an activity that raises the subliminal fears for state sovereignty that have given rise to the "uniquely governmental" test of taxation power.

A case that came closer to raising those fears was *Maryland v. Wirtz*,[61] which upheld application of the minimum wage and hour provisions of the federal Fair Labor Standards Act (FLSA) to state-operated schools and hospitals.[62] The Court explicitly declared that federal regulatory power under the commerce clause "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."[63] Justice Douglas in dissent decried the "invasion of state sovereignty" because the FLSA would disrupt the fiscal policy of the states and threaten their ability to perform services for the public.[64] Justice Douglas thereby expressed the fears described above and touched on the underlying policies of federalism, which have seldom found expression in the reported cases.

A Unified Theory of Taxation and Regulatory Immunity

If state sovereignty is to remain a viable proposition, it must find justification in the ability of states to experiment with new programs, to tailor government services to local needs, and to provide legislation designed to deal with local problems. The increasing dominance of the

---

[59]45 U.S.C. §§ 2, 6 (1970).

[60]United States v. California, 297 U.S. 175 (1936).

[61]392 U.S. 183 (1968).

[62]Fair Labor Standards Act § 3(r), 29 U.S.C. § 203(r) (1970).

[63]392 U.S. at 195.

[64]"It is one thing to force a State to purchase safety equipment for its railroad and another to force it either to spend several million more dollars on hospitals and schools or substantially reduce services in these areas." *Id.* at 203. The language in this quote seems to indicate that Douglas would distinguish the two situations simply on the basis of the greater cost involved in the latter. Any distinction to be drawn between the cases probably should depend more on the nature of schools and hospitals as being more akin to traditional governmental services than operating a railroad.

federal government forebodes a centralization of government that could result in programs that are inadequately designed to meet the diverse needs of all the states. For example, welfare programs such as Aid to Families with Depedent Children,[65] if operated solely under national control, might meet the minimum needs of residents in a majority of states but fall well short of the realities of life in urban centers.[66] Professor Wechsler cites as an example of this phenomenon[67] the rent controls of the federal government following World War II, which tended to be less and less effective because most of the country was experiencing a building boom that held rent prices down. Increasing dissatisfaction by New Yorkers[68] ultimately lead to adoption of a state program that was much more aggressive and effective in dealing with the crisis faced by New York residents.[69]

The Supreme Court is on solid ground in finding a distinction between the taxing power and other delegated powers, such as the commerce power. The taxing power is all-encompassing in subject matter and is limited explicitly only by specific exclusions and qualifications.[70]

---

[65]42 U.S.C. §§ 601-10 (1970).

[66]This is a major reason for the present structure of welfare programs that operate under national policy guidelines with federal funds matching state funds. The state controls implementation of the programs through its own bureaucracy subject to checks of federal regulations. *See, e.g.*, Arizona State Dep't of Pub. Welfare v. HEW, 449 F.2d 456, 470 (9th Cir. 1971).

[67]H. WECHSLER, *Political Safeguards of Federalism*, in PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 53 (1961).

[68]Professor Wechsler was personally involved in this and seems to believe that aggressive local action would have been taken much earlier had it not been for the existence of the federal program.

[69]The same point could be made with respect to the minimum wage and hour provisions validated in *Maryland v. Wirtz*, 392 U.S. 183 (1968). The federal controls might tend to homogenize salary levels throughout the country by stifling attempts to move beyond the federal level. Should this happen, the results might be somewhat anomalous. For example, the $1.60 hourly minimum wage will be much more beneficial in Alabama or Mississippi than in Hawaii or Alaska. On the other hand, it will take considerably more effort for the less wealthy states to raise the money for these wages. If the result were to curtail activities in the poorer states, then Justice Douglas' fears would be realized. But if the result were to raise the salary levels and lower the purchasing price of a dollar in these states, then the resulting uniformity of money prices throughout the states would be beneficial in encouraging more interstate travel and residence mobility. Thus, it is not at all clear that every policy decision uniformly applied to all states would be detrimental to the welfare of the federal system.

[70]So long as the taxing power is used for revenue purposes, it is subject to only slight limitations. "It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion." License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866). The formal requisites on direct taxes caused problems with an income tax, Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), and led to enactment of the sixteenth amendment.

The commerce power is not all-encompassing but rather is limited to a certain segment of human activity. Any activity that comes within the commerce power may legitimately be referred to as falling outside the exclusive sphere of the states. If a state activity falls within the delegated commerce power, then the state is operating in an area in which sovereignty has been transferred to the federal government. The two governments may exercise dual sovereignty over activities within the commerce power,[71] but federal policies within their proper scope are supreme. State policy must yield when federal policy has been affirmatively stated.

Because there are differing concepts of immunity in the exercise of the taxation and commerce powers, one might imagine that the fears expressed in taxation cases simply are not warranted when the federal government is regulating activity within one of its expressly delegated powers. The fear might be greater in face of the unspecified, comprehensive power of taxation and the need to impose limitations on that power in the interests of greater state sovereignty. The other powers of the federal government are limited to those which have been specifically relinquished by the states, who seemingly would have no room for complaint so long as the federal government was acting within its delegated powers. However, this theoretical distinction ignores some rather important realities. It is the fear of direct regulation of state activities that is voiced in the taxation cases. The comprehensive nature of the taxation power has a potential of being used for the purpose of regulating state governmental activity over which the states have not delegated sovereignty. Thus, the need for limiting the federal commerce power is the same as the need for limiting the taxation power. In addition, whatever benefits may be derived from the principles of federalism in the form

[71]Chief Justice Marshall established very early the proposition that the states could not enforce regulations within their own borders that conflicted with existing federal regulations over interstate commerce. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). In Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829), he rejected an argument that laws of Delaware authorizing dams across navigable creeks were "repugnant to the power to regulate commerce in its dormant state. . . ." For some years, the Court toyed with the notion that a state regulation might be void as conflicting with the commerce clause despite congressional silence. *See* License Cases, 46 U.S. (5 How.) 504 (1847); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

Modern doctrine, stemming from Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), can be summarized by recognizing dual power of the state and federal governments over subjects that are local in character but affect interstate commerce. The emphasis in most recent cases has been on the capacity of state regulations to impede interstate commerce. *See* Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

of experimentation and decentralization are threatened directly by assertion of any form of federal regulatory power over state governmental activities. The Supreme Court's wholly conceptual distinction between taxation and regulation could be said to ignore these goals of the federal system.

In facing the problems of a federal system directly, one has great difficulty in specifying the areas of state activity that should be left open to state autonomy. It would be counter-productive to freeze into constitutional principle a categorization of the particular activities that should be autonomous and those that should be federally regulated. Many of the problems that face state and local governments today are occasioned by historical accident. The territorial boundaries between states bear no logical relationship to topography or demographic distributions and probably will remain despite the changes that have taken place over the last two centuries.[72] A similar mistake should not be made by irrevocably allocating areas of responsibility between the state and federal governments.[73] Refusing to make a permanent allocation would be equivalent to recognizing federal power similar to the Supreme Court's determination in *Maryland v. Wirtz* that the grant of commerce power to the federal government was plenary and that the states had relinquished their sovereignty in that area.[74]

Another objection to placing constitutional limitations on federal power to regulate state activities stems from a realization that some states will not meet even minimum standards of governmental action toward goals that national policy dictates should be pursued. For example, some states might not require a decent living wage, pass equal

[72]For a thorough analysis of this and related problems, *see* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM (1969).

[73]In addition to a need for flexibility over a period of time, there is an additional factor. Whether control of highways or police forces or health services should be regulated by the federal government involves an assessment of priorities that has been left traditionally to the interplay of the political system. Justice Frankfurter's allusion to this problem was strongly criticized at note 43 *supra*. Yet the question of what areas the federal government should control may well be the most classic example of a true political question, having been vested by the Constitution exclusively in the legislative and executive branches of government. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959). The objection made in note 43 to Justice Frankfurter's formulation is that it implies an abdication of judicial responsibility that may be carried over into other fields. *See* Bickel, *The Supreme Court, 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961). A better approach would be explicit recognition of unfettered power in the other branches, which is actually the result of applying the political question doctrine.

[74]*See* note 62 and accompanying text *supra*.

employment laws, or attempt to deal with housing problems of the poor. In these fields, the federal government might yield to whatever state measures have been adopted[75] but might initiate a federal program if a state had failed to act. Imposition of minimum standards by the federal government would not affront state sovereignty in any meaningful sense worthy of protection.[76] The dangers of over-centralization of government always exist in imposing programs on the states but, in situations requiring the setting of minimum standards, the dangers would be attributable to the unwillingness of the states to set their own houses in order. It would be ludicrous to suggest that diversity in substandard or degrading conditions is an ideal to be pursued as a matter of national constitutional policy.

The foregoing considerations point to a need for diversity and restraint in congressional ordering of programs, but they also demonstrate the necessity for freedom on the part of Congress in situations in which the states have shown an unwillingness to provide minimum regulatory measures. Thus the conceptual result of the Supreme Court's political rationale also proves to be the better view as a matter of constitutional principle, in that it leaves Congress free to impose controls on the state governments[77] within any area of competency that the states have delegated to the federal government.[78] The caveat that Congress should be

[75]*See, e.g.*, Civil Rights Act of 1964, §§ 706(b)-(c), 42 U.S.C. §§ 2000e-5(b) to -5(c) (1970), *as amended*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4 (U.S. CODE CONG. & AD. NEWS 816-17 (Apr. 20, 1972)), providing for EEOC deferral to state equal employment agencies for 180 days after a claim of employment discrimination has been made. *See* Love v. Pullman Co., 404 U.S. 522 (1972).

[76]The power of the federal government to control direct state governmental activities should come as no surprise to persons who have had recourse to federal assistance in securing fair elections. Congressional power to protect the right to vote has been explicitly delegated by the states, and the power may be used to supplant state election agencies with federal examiners when necessary. South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding the Voting Rights Act of 1965). The power of protecting the right to vote does not extend to altering the definition of an eligible voter in local elections. Oregon v. Mitchell, 400 U.S. 112 (1970). The disparate opinions in the latter case make it impossible to synthesize a wide-reaching rule, but the opinions do reflect a possible increasing sensitivity to local control of local problems.

[77]The need for flexibility was strongly urged by Hamilton in his defense of the Bank of the United States, *supra* note 2: "The *expedience* of exercising a particular power, at a particular time, must, indeed, depend on circumstances; but the constitutional right of exercising it must be uniform and invariable, the same today as tomorrow." 8 THE PAPERS OF ALEXANDER HAMILTON 102 (H. Syrett ed. 1965).

[78]Hamilton also touched upon this concept: "The only question must be in this, as in every other case, whether the means to be employed, or, in this instance, the corporation to be erected, has a natural relation to any of the acknowledged or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the city of Philadel-

sensitive to back off when the states have made a commitment to provide these services need hardly be made with any vigor, since Congress is not likely to continue for long any imposition on the states that is not essential.[79]

ELEVENTH AMENDMENT STANDARDS OF SOVEREIGN IMMUNITY

The Court in *Maryland v. Wirtz*, in rejecting the intergovernmental immunity argument, expressly reserved for later decision[80] the related question of the enforcement power of the federal government in light of the eleventh amendment.[81] The question arises when the federal government has created, in admitted exercise of its delegated powers, a right in individuals and has provided that the right may be enforced by suit in federal court.[82] The eleventh amendment might be asserted by the states as an additional form of intergovernmental immunity that stands as a shield against federal court action.[83]

History of the eleventh amendment and sovereign immunity

The eleventh amendment was adopted in 1798 in response to the immensely unpopular decision in *Chisholm v. Georgia*,[84] which held

---

phia, because they are not authorized to *regulate* the *police* of that city." *Id.* at 100 (emphasis in original). Congress may not be authorized explicitly to regulate the police of Philadelphia, but it is authorized to regulate commerce and to provide protection for civil rights. If the activities of the Philadelphia Police Department extend into either of these fields of subject matter, then Congress might use the means of police regulation for the end of achieving its authorized goals. Under Maryland v. Wirtz, 392 U.S. 183 (1968), this would raise not a problem of intergovernmental immunity but rather the familiar one of whether the means chosen were rationally related to legitimate ends. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[79]*See* Wechsler, *supra* note 66, at 52-53.

[80]*See* note 10 *supra*.

[81]*See, e.g.*, Fitts v. McGhee, 172 U.S. 516 (1899); Hans v. Louisiana, 134 U.S. 1 (1890).

[82]Congress can and often does provide that federal rights may be enforced in state courts. The state courts are required by the supremacy clause of the Constitution to take jurisdiction over suits to enforce federal rights so long as the particular court generally has jurisdiction over claims of this character. *See* Testa v. Katt, 330 U.S. 386 (1947); Mondou v. New York, N.Y. & H.R.R., 223 U.S. 1 (1912). An interesting question not dealt with at length in the present article is whether the state could successfully assert sovereign immunity in its own courts in response to a suit to enforce a federal right. *See* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 46, at 175 (2d ed. 1970).

[83]Another facet of intergovernmental immunity beyond the scope of the present article is the effect of the federal anti-injunction statute, 28 U.S.C. § 2283 (1970), and the related doctrines of comity and abstention. *See* Younger v. Harris, 401 U.S. 37 (1971).

[84]2 U.S. (2 Dall.) 419 (1793).

that the diversity jurisdiction of the federal courts extended to suits by a citizen of one state to collect a debt owed by another state. *Chisholm* had been brought under that part of the judicial power that extends to "Controversies . . . between a State and Citizens of another State."[85] It was a diversity case, with no federal question involved, in which plaintiff sought recovery from the state of Georgia on a note. The states were heavily in debt after the founding of the United States and it was feared that opening the federal courts to suits such as *Chisholm* would result in collection of these debts.[86] Therefore, the eleventh amendment was enacted to provide that "[t]he 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."[87]

The amendment itself purports to go no further than overruling *Chisholm*. On its face it merely indicates that the diversity jurisdiction over suits between citizens of one state and another state shall be available only when the state is the plaintiff. Debate over its meaning has centered on whether the amendment restored a common law definition of judicial power that should have been "construed" to be the meaning of the Constitution in *Chisholm*[88] or whether the amendment adds a qualification to what would otherwise have been the proper reading of the Constitution.[89] The use of the phrase "shall not be construed to extend" indicates that the drafters of the amendment wanted to emphasize that the amendment did not change the law but merely restored the law as it had been prior to the "incorrect" decision in *Chisholm*. This debate is important because it involves the central question whether the amendment was to provide sovereign immunity for states in the federal courts or whether it was a mere limitation on the diversity jurisdiction of the federal courts.

Many writers have traced the history of the concept of sovereign immunity and have found that the doctrine as applied in this country

---

[85]U.S. CONST. art. III, § 2. The constitutional definition of the federal judicial power over diversity cases was implemented immediately in the Judiciary Act of 1789, 28 U.S.C. § 1332 (1970). There was no grant to the federal courts by Congress of federal question jurisdiction until 1875. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470 (now 28 U.S.C. § 1331 (1970)).

[86]The background of *Chisholm* and the eleventh amendment is described in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821). *See also* Guthrie, *supra* note 9.

[87]U.S. CONST. amend. XI.

[88]*See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 18-19 (1890) (praising the opinion of Justice Iredell, who dissented in *Chisholm*).

[89]*See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring).

did not exist in the common law of England.[90] The courts of England apparently had always considered the crown to be subject to the law[91] because the lawgiver has an obligation not to set differing standards of conduct for himself and others.[92] As legal philosophers recognize, a legal obligation cannot exist with respect to any rule that is not applied with uniformity.[93] Sovereign immunity is primarily a procedural concept designed to avoid the anomaly that would arise should the king be required to call himself before his own courts to answer for his wrongs without his consent.[94] The doctrine also avoided the practical problems which stemmed from the dependence of the courts upon the king for enforcement of their decrees.[95] The use of "petitions of right" arose as the form in which suits were brought against the crown. The petition of right was originally a request for the consent of the king to suit in his courts over a particular matter, but the consent was so readily given that it came to be expected as a matter of right in which the king had no prerogative to refuse consent.[96]

Unfortunately, the petition of right was surrounded by a cumbersome and time-consuming procedure[97] that limited its effectiveness.[98]

---

[90]*E.g.*, 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 1-31 (3d ed. 1944); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 198-213 (1965); Carrow, *Sovereign Immunity in Administrative Law—A New Diagnosis*, 9 J. PUB. L. 1, 20 (1960).

[91]The maxim that "the king can do no wrong" did not mean that the king was always right but that "[t]he king must not, was not allowed, not entitled, to do wrong." Ehrlich, *Proceedings Against the Crown (1216-1377)*, at 42, in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (P. Vinogradoff ed. 1921).

[92]9 W. HOLDSWORTH, *supra* note 90, at 9. A different reason for the same proposition can also be offered. "The law makes the king, therefore, the king must make a return present to the law by subjecting himself to its rules." Schulz, *Bracton on Kingship*, 60 ENG. HIST. REV. 136, 168 (1945).

[93]L. FULLER, THE MORALITY OF LAW 46-48 (rev. ed. 1969).

[94]1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 518 (2d ed. 1898).

[95]This practical difficulty may be a problem in modern times when a court system litigates suits involving the coordinate executive branch. It should not be a problem, however, when federal courts litigate claims against the states, because the federal executive can enforce decrees against state officials. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958).

[96]The petition of right had become so firmly established by the middle of the eighteenth century that Blackstone was able to describe it in these terms:

> Whenever . . . it happens, that, by misinformation, or inadvertance, the crown hath been induced to invade the private rights of any of its subjects, though no action will lie against the sovereign (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute: and, as it presumes that to *know of* any injury and to *redress* it are inseparable in the royal breast, it then issues as of course in the king's own name, his orders to his judges to do justice to the party aggrieved.

3 W. BLACKSTONE, COMMENTARIES *255 (emphasis in original).

[97]The procedure originally called for the chancellor to determine whether a "right" could be

Ameliorating these limitations, however, was a coordinate practice that had developed with respect to suits against public officials.[99] The prerogative writs of mandamus[100] and certiorari[101] could be used to remedy derelictions of duty on the part of officials, even when the duty to be performed was payment of funds out of the crown treasury.[102] That a suit of this nature actually amounted to obtaining damages against the crown did not deter the courts, who viewed the problem as one merely of forcing a functionary to perform his legal duties.[103]

Perhaps one reason why the courts were not overly concerned with the nature of these suits was that a protective rule existed with respect to torts of public servants. *Respondeat superior* never applied to the king, and the crown treasury could not be invaded for payment of damages resulting from the tortious activities of public servants.[104] Only for disbursement of funds under a legal duty would the writs lie against crown officers in their official capacity. For torts committed under authority and in the line of duty, officials would be liable personally without recourse against the crown.[105] Under these circumstances, the suit to reach public monies involved nothing more than enforcement of the law as it presumably had been promulgated by the king; the courts were in this sense only assisting the crown in making its officers perform its commands.

---

found in the petition, 9 W. HOLDSWORTH, *supra* note 90, at 8, and in modern times calls for sending the petition through the office of the Home Secretary. Petition of Right Act, 23 & 24 Vict., c. 34 (1860).

[98]Another slight limitation on this procedure lay in the scope of its subject matter, which did not include torts committed by the king personally. Feather v. The Queen, 6 B. & S. 257, 122 Eng. Rep. 1191 (Q.B. 1865).

[99]The notion of private suits against public officers to enforce the king's will was established very early. *See* Statute of Westminster I, 3 Edw. 1, c. 24 (1275) (writ of novel disseisin); Statute of Westminster II, 13 Edw. 1, c. 13 (1285) (false imprisonment remedy against sheriffs). A common law action in case based on denial of the right to vote was approved by the House of Lords in Ashby v. White, 1 Brown 62, 1 Eng. Rep. 417 (H.L. 1703).

[100]James Bagg's Case, 11 Co. Rep. 936, 77 Eng. Rep. 1271 (K.B. 1615); *see* Jaffe & Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345, 359 (1956).

[101]Commins v. Massam, March, N.R. 196, 82 Eng. Rep. 473 (K.B. 1643).

[102]The Queen v. Commissioners for Special Purposes of the Income Tax, 21 Q.B.D. 313 (C.A. 1888). Equity had earlier recognized the remedy of enjoining payments from the treasury to persons other than the plaintiff. Ellis v. Grey, 6 Sim. 214, 58 Eng. Rep. 574 (Ch. 1833). These cases were decided after the Constitution was enacted in this country, but various writers have insisted that the practice was known to English common law at the time of the American Revolution. 2 F. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW 200 (1893); Guthrie, *supra* note 9, at 194.

[103]The Queen v. Commissioners for Special Purposes of the Income Tax, 21 Q.B.D. 313, 322 (C.A. 1888).

[104]Feather v. The Queen, 6 B. & S. 257, 122 Eng. Rep. 1191 (Q.B. 1865).

[105]Entick v. Carrington, 2 Wils. K.B. 275, 95 Eng. Rep. 807 (1765).

Thus, at the time of the Constitution the common law had established that the sovereign could be called into court only with his consent, which was expected to be given as a matter of right. On the other hand, officers of the crown could freely be sued. If the obligation to be enforced were one arising from his official capacity, then the courts were aiding the sovereign. If the obligation to be enforced were his own tort then the sovereign had no interest in the proceedings. Part of this learning was incorporated into American law in the form of sovereign immunity, but the American system had no sovereign akin to the king to grant consent to suit in the form of the petition of right.[106] The concept of suits against officers is an important one in American constitutional litigation, but a discussion of it must follow[107] a consideration of the question whether sovereign immunity ever should have been a part of federal law at all.

It is arguable that at the time *Chisholm v. Georgia* was decided, common law as contained in the Constitution could be interpreted to provide sovereign immunity for the states. For two reasons, this position is unlikely. First, the petitions of right had become so firmly established in English common law that they reflected a judgment that the government should be answerable for its wrongs. In American institutions no single entity was accepted as the sovereign; instead governments were created to serve the sovereign people. Under these circumstances sovereign immunity should have no application to suits against the state governments because they are not truly the sovereign.[108] Secondly, even if the states were considered as the sovereign in this sense, then they had relinquished their sovereignty in the powers delegated to the federal government in the Constitution. One of these grants was the grant of the judicial power, which included power over suits of any subject matter between a state and a citizen of another state. These factors point to the conclusion that *Chisholm* was rightly decided, that citizens of

[106]*See* United States v. Lee, 106 U.S. 196, 238-39 (1882) (Gray, J., dissenting). It has been assumed generally that the legislature is empowered to waive sovereign immunity in American law, but it could just as easily have been argued that the people and not the legislature were sovereign, which would lead to the conclusion that state officers could neither claim nor waive sovereign immunity. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (Jay, C.J., dissenting): "[T]he people are the sovereign of this country . . . ." Justice Wilson made the point even more strongly. *Id.* at 456.

[107]*See* notes 123-32 and accompanying text *infra*.

[108]This argument is fraught with difficulties and should not be relied upon with enthusiasm. First, the history may not be as clear as various students of the time would have us believe. Second, the conceptualization of sovereignty as resting with the people rather than the states is open to serious question. Therefore, the argument of delegated sovereignty seems eminently more reliable to this author.

another state did have a right to sue a state, and that the eleventh amendment was a derogation of prior law as it was understood at the time.

The significance of the conclusion that *Chisholm* was correct is that a reading of the eleventh amendment should be confined to its own language and its apparent purpose of overruling *Chisholm*. Chief Justice Marshall developed this proposition at some length in *Cohens v. Virginia*,[109] which held that the amendment did not prevent appeals by an individual from state courts to the Supreme Court. Marshall noted that the amendment still left the state subject to suit by other states:

> That its motive was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. . . . We must ascribe the amendment, then, to some other cause than the dignity of a state.[110]

Marshall found its cause in the debts owed by the states and reasoned that the amendment was designed to prevent collection of these debts by the most numerous creditors, namely, citizens of other states.[111] He could have gone on to point out that there was no reason for the amendment to forbid suits by citizens of the state itself because there was no jurisdictional basis in the Constitution for citizens of a state to sue the state for claims arising out of state law, such as claims on debts owed by the state.[112]

The question whether the amendment prevented suit by citizens against their own state finally came before the Court in *Hans v. Louisiana*.[113] The suit involved bonds issued by the state. Citizens of Louisiana claimed that their suit to collect interest was cognizable in federal court on the basis of a federal question. The plaintiffs stated that the state's disavowal of the debt amounted to an impairment of contract in violation of the United States Constitution. The Court held that the eleventh amendment barred suits against the state by citizens of the same state when the jurisdiction was based on a federal question. The Court relied on earlier cases which had barred similar suits to collect

---

[109]19 U.S. (6 Wheat.) 264 (1821).

[110]*Id.* at 406.

[111]"There was not much reason to fear that foreign or sister states would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace." *Id.* at 406-07.

[112]*See* notes 115-16 and accompanying text *infra*.

[113]134 U.S. 1 (1890).

debts in which the same impairment of contract claim had been made by citizens of other states.[114]

In all of these debt collection cases, the Court held that the suits were barred by the eleventh amendment, which had been enacted to restore the prior law of sovereign immunity that had existed before the "incorrect" decision in *Chisholm*. The astounding point about all of these cases is that their rationale of an eleventh amendment bar to federal question cases was wholly unnecessary to the result. In none of these suits was a federal question presented. They all proceeded on the theory that the state had entered into a contract with the bondholders and that the state was impairing the obligation of contract by refusing to pay. The suits were simply efforts to collect debts and the pleadings of the plaintiffs anticipated the defenses to be raised by the state (statutory provisions cancelling the debts) and asserted that these defenses were unconstitutional. The federal courts have always refused to allow the plaintiff to anticipate a defense and base his statement of a federal claim on that defense.[115] The claim to debts owed by the state "arises" as a matter of state law and in no way "arises" under federal law.[116]

Hans was no different from the earlier debt collection cases in that it presented no federal question basis of jurisdiction, regardless of the eleventh amendment. In the cases relied on in *Hans*, subject matter jurisdiction would have existed in diversity of the parties as an original matter had not the eleventh amendment withdrawn this small portion of diversity jurisdiction from the judicial power of the federal courts. Thus in these earlier cases the Court was correct in saying that the eleventh amendment acted as a bar to the suit, but its remarks about

[114]The cases relied on by the Court were *In re* Ayers, 123 U.S. 443 (1887); Hagood v. Southern, 117 U.S. 52 (1886); Louisiana v. Jumel, 107 U.S. 711 (1882).

[115]Louisville & N.R.R. v. Mottley, 211 U.S. 149 (1908); Gold-Washing & Water Co. v. Keyes, 96 U.S. 199 (1877). Various tests have been stated for determining the presence of a federal question, beginning with one set forth by Chief Justice Marshall in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). Referring to the question of the bank's right to sue as a legal entity, Marshall said, "The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on." *Id.* at 824. Justice Holmes stated that "[a] suit arises under the law that creates the cause of action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916). Justice Cardozo sought to limit the jurisdiction by a "distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible." Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936). For criticism of the various tests and the difficulty of applying them, see C. WRIGHT, *supra* note 82, § 17; Chadbourn & Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639 (1942).

[116]The Supreme Court has recognized that these cases did not present proper federal question jurisdiction. Parden v. Terminal Ry., 377 U.S. 184, 187 n.3 (1964).

the application of the amendment even when a federal question was stated were pure dicta, for no federal question was properly presented in the plaintiffs' complaints. Similarly, *Hans* presented no basis of jurisdiction at all because of the lack of diversity, and all the eleventh amendment rationale was dictum. Not only were these dicta unnecessary to the case, they were incorrect as a matter of constitutional law.[117] There was no sovereign immunity at the time of the Constitution for the eleventh amendment to reenact. Moreover, the states had relinquished some sovereignty by delegation of the judicial power to the federal government. The eleventh amendment was intended to do no more than to withdraw from the federal judiciary one aspect of the previously delegated power of diversity jurisdiction, namely, power over suits based on the character of the parties when the plaintiff was a private person and the defendant was a state. If the question is still open,[118] then the eleventh amendment should no longer be read as a limitation on the federal question jurisdiction of the federal courts.

Suits by individuals to redress constitutional rights

The states have relinquished their sovereignty by delegating power to the federal government in two different ways. First, the Constitution itself creates federally protected individual rights to be shielded from state infringement. Secondly, Congress is given power to create individual rights as a matter of federal statutory law. Sovereign immunity of the states has been considered more often in suits to enforce constitu-

[117] *See* text accompanying note 108 *supra*.

[118] No case has come to light in which the Supreme Court has applied an eleventh amendment bar to a suit clearly arising within the federal question jurisdiction. *See* note 157 *infra*. Two ambiguous tax cases should be noted here. In Great N. Life Co. v. Read, 322 U.S. 47 (1944), suit was brought against the Insurance Commissioner of Oklahoma to recover taxes paid by a foreign insurance company. The suit was brought specifically under diversity jurisdiction and relied on the state statutory provisions for recovery procedures. Nevertheless, the grounds for claiming a refund were that the tax discriminated against foreign companies, a colorable federal question. The Supreme Court did not consider the case to be one under the federal question jurisdiction but simply decided that it was a suit against the state to which the state had not consented.

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945), was a substantially identical suit for recovery of taxes, but the constitutional validity of the state tax had already been settled in J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938). The Court of Appeals divided on the applicability of a prior state court decision, and the Supreme Court granted certiorari on the issue of whether the lower court had "decided an important question of local law probably in conflict with an applicable decision of the Supreme Court of Indiana." 323 U.S. at 462. After argument, the Court decided that the suit was barred by the eleventh amendment without stating whether the case was one of diversity or federal question jurisdiction.

tional rights so we may explore these cases before turning to a discussion of the enforcement of federal statutory rights against the states.

In *Cohens v. Virginia*[119] Justice Marshall attempted to limit the eleventh amendment to the withdrawal of a small piece of diversity jurisdiction from the federal judicial power.

> A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, and so strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.[120]

Thus, Marshall seemed to assert that the state could be sued when the subject matter of the suit fell within the federal question jurisdiction of the federal courts. He did not rely on this proposition, however, when presented with the opportunity to do so in *Osborn v. Bank of the United States*.[121] *Osborn* involved a suit under federal question jurisdiction by a federal agency against a state official who had acted pursuant to the charge of the state. Marshall assumed that the state could not have been made a party to the litigation but avoided the impact of this statement by refusing to inquire whether the state were not the real party in interest.[122] Marshall stated that so long as full relief could be granted in the form of an injunction against the agent of the state,[123] then jurisdiction over his principal need not be obtained.

The principle of allowing suits against officers of the state harkens back to English law, which allowed suits against officers to compel their performance of official duty or to establish personal liability for tortious wrongs.[124] This was followed by the Court in *Hans*[125] and later in *Ex parte Young*,[126] which established the proposition that a state officer is

---

[119]19 U.S. (6 Wheat.) 264 (1821). For a description of the holding in *Cohens*, *see* text accompanying note 109 *supra*.

[120]19 U.S. (6 Wheat.) at 407.

[121]22 U.S. (9 Wheat.) 738 (1824).

[122]*Id.* at 846-59.

[123]The relief granted in *Osborn* was an injunction against continuing to withhold money wrongfully taken from the bank. Marshall delved deeply into common law learning surrounding the forms of action to determine that the taking was a personal trespass for which the defendant could be required to respond in damages. On the other hand, equity could duplicate the writ of replevin, which would have required return of the specific money taken by requiring return of the fungible notes. *Id.* at 847-55.

[124]*See* text accompanying notes 100-05 *supra*.

[125]134 U.S. at 16.

[126]209 U.S. 123 (1908).

stripped of his official capacity when acting unconstitutionally, so that his action is not state action for purposes of the eleventh amendment. The obvious distinction between the *Osborn* rule and the English rule is that the latter is founded on the notion that the court is simply enforcing the will of the sovereign against this officer while the *Osborn* rule results in a denial of the validity of the commands of the state.[127] So long as the state is deemed to have sovereign immunity, it is difficult to rationalize this interference with the commands of the state by saying that the suit is not against the state.[128] The reasons for not openly recognizing that states may be sued to enforce constitutional rights are inadequate,[129] and the fiction results in unnecessary confusion.[130]

---

[127]This point was recognized and applied in *In re* Ayers, 123 U.S. 443, 489 (1887), one of the debt collection suits referred to earlier. The Court had earlier held that Virginia must honor its promise to accept interest coupons on its bonds as payment for taxes. Poindexter v. Greenhow, 114 U.S. 270, 292-93 (1885). *Ayers* was then brought as a bill in equity against state officials to enjoin them from bringing suits to collect taxes against persons who had offered coupons in payment. The Court held that Justice Marshall's rule in *Osborn* must be interpreted as being inapplicable in any case in which the state would be considered an indispensable party. "The inference is, that where it is manifest, upon the face of the record, that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction." 123 U.S. at 489. *Osborn* was distinguished on the ground that the officers in that case would have been liable personally in damages for the wrongs committed and would not have been able to defend on the basis of the unconstitutional state statute. *Id.* at 488. *Ayers*, on the other hand, involved actions on the part of the defendants that could not have rendered them liable personally in damages. This distinction seems to have been preserved in *Ex parte* Young, 209 U.S. 123 (1908), although it is difficult to see how Attorney General Young could have been liable in damages for prosecuting the railroads since malicious prosecution requires a showing of no probable cause for believing that the defendant had committed the offense. *See* Pierson v. Ray, 386 U.S. 547 (1967). *Ayers* could better be explained on the basis of a general lack of equity jurisdiction because of a lack of threatened irreparable harm. Guthrie, *supra* note 9, at 201.

[128]Professor Wright characterizes this dilemma in the following terms:

> The Fourteenth Amendment runs only to the states; in order to have a right to relief under the amendment the plaintiff must be able to show that state action is involved in the denial of his rights. It would have been possible to hold that the Fourteenth Amendment qualified the immunity from suit granted states by the Eleventh Amendment, but the Court did not so hold. Instead it created the anomaly that enforcement of the Minnesota statute is state action for purposes of the Fourteenth Amendment but merely the individual wrong of Edward T. Young for purposes of the Eleventh Amendment.

C. WRIGHT, *supra* note 82, § 48, at 185; *see* Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435 (1962).

[129]*See* L. JAFFE, *supra* note 90, at 221.

[130]For example, a change in persons occupying an official position usually requires substitution of the new defendant with an allegation that the successor in office intends to pursue the policies of his predecessor. *Ex parte* La Prade, 289 U.S. 444 (1933). In revising FED. R. CIV. P. 25(d) to provide for automatic substitution of public officers when sued in their official capacity,

The question whether suit is barred against certain individuals or political entities for redress of constitutional rights has often been subsumed under the problem whether the defendant is a "person" within the meaning of section 1983 of the Civil Rights Act of 1871.[131] This section creates a cause of action for deprivation of rights guaranteed by the federal constitution or laws when the defendant acts "under color" of law, custom or usage. The Supreme Court has held that a municipality is not a "person" within the meaning of the statute,[132] although a school board is.[133] These interpretations were based on legislative history[134] rather than constitutional necessity in the form of sovereign immunity,[135] but possible problems of sovereign immunity have strongly influenced the lower courts to interpret the statute to avoid these problems.

The ability to sue public entities and officials under section 1983 seems to have been influenced in the lower federal courts by the nature of the suit as well as the nature of the particular entity. Injunctive or declaratory relief has rarely been denied on the basis of sovereign im-

---

the Advisory Committee sought to avoid "mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment." *Id.*, Advisory Committee Notes on 1961 Amendment. Whether this goal will be realized remains to be seen. *Cf.* Four Star Publications, Inc. v. Erbe, 304 F.2d 872 (8th Cir. 1962).

Further problems are generated by the question whether particular individuals or entities are subject to certain types of suits. *See* notes 135-144 and accompanying text *infra*.

[131]42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[132]Monroe v. Pape, 365 U.S. 167 (1961).

[133]Griffin v. County School Bd., 377 U.S. 218 (1964).

[134]The legislative history of the 1871 Civil Rights Act contained a provision for strict liability against a municipality in which a deprivation of civil rights occurred. The purpose of the provision was to provide a readily available and solvent defendant against whom the *in terrorem* effect of liability could be wielded to force municipal officers to protect the rights of their residents. The provision was finally deleted as being too powerful a club, but no indication was given that municipalities should not be liable for the authorized acts of their agents. The Monroe v. Pape, 365 U.S. 167 (1961), reading of the legislative history has been vigorously and convincingly criticized in Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. Cal. L. Rev. 131 (1972).

[135]It has long been established that the eleventh amendment does not stand as a bar to suits in federal court against counties and cities whether under diversity or federal question jurisdiction. Chicot County v. Sherwood, 148 U.S. 529 (1893); Cowles v. Mercer County, 74 U.S. (7 Wall.) 118 (1868); *see* Douglas v. City of Jeannette, 319 U.S. 157 (1943).

munity,[136] while damages have been difficult to obtain against a public entity.[137] Some courts have read section 1983 as precluding suit against a municipality or public entity only when damages are sought and not when equitable relief is possible.[138] This choice obviously reflects an unwillingness to invade state treasuries even under circumstances that would have allowed an invasion at common law when the court was simply enforcing the will of the sovereign against an official.[139] Other courts have pursued the inquiry whether a suit is "actually against the state" to determine whether the entity is a person within the meaning of section 1983.[140] This inquiry also touches on the sovereign immunity problem[141] created by the dicta of *Hans* and *In re Ayers* that the state is immune from federal question suits and that a suit should be dismissed if the state is an indispensable party.[142]

---

[136]*See* Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967); Holt v. Richmond Redevelopment & Housing Authority, 266 F. Supp. 397 (E.D. Va. 1966); Willie v. Harris County, 202 F. Supp. 549 (S.D. Tex. 1962).

[137]*See* McArthur v. Pennington, 253 F. Supp. 420 (E.D. Tenn. 1963); Kates & Kouba, *supra* note 136, at 140-44; Note, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEXAS L. REV. 1015 (1968).

[138]*See* Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961): "None of the reasons which support a city's immunity from an action for damages for tortious injuries already inflicted by its officers, agents or servants applies to this case. No reason is apparent why a city and its officials should not be restrained from prospectively violating plaintiffs' constitutional rights pursuant to its own legislative enactment, and an injunction not be granted as provided in § 1983." The Supreme Court could be seen as having approved this distinction. *Compare* Griffin v. County School Bd., 377 U.S. 218 (1964), *and* Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam), *with* Monroe v. Pape, 365 U.S. 167 (1961).

[139]The Supreme Court, however, has not been deterred from granting relief against an individual officer even when doing so would result in payment of large sums of money out of the state treasury. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding unconstitutional a one-year residency requirement for welfare recipients). Although no eleventh amendment argument was made to the Court, it might be questioned whether *Shapiro* does not effectively overrule *Ayers sub silentio*. The result in *Shapiro* is equivalent to a money judgment in damages against the state because the defendant officer is directed to pay over state funds, not his own. In *Ayers* a similar result was condemned by distinguishing *Osborn* on the ground that the state officials in *Ayers* would not have been liable in damages for individual trespass actions. The same can be said of the welfare administrators in *Shapiro*. Thus it is open to question whether the Supreme Court still follows the rule of looking beyond the pleadings to determine whether a suit is actually against the state. *See* note 121 *supra*.

[140]*See, e.g.*, Allison v. California Adult Authority, 419 F.2d 822 (9th Cir. 1969); Taylor v. Pennsylvania Bd. of Parole, 263 F. Supp. 450 (M.D. Pa. 1967).

[141]Some courts make the inquiry explicitly in terms of the eleventh amendment despite the admonitions of the Supreme Court. For a sampling of these cases, *see* C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS 64 (1971); Note, *Civil Rights—Immunity of Municipalities and Municipal Officials—Action of Municipal Housing Authority and Its Director Held Not Enjoinable Under 42 U.S.C. § 1983*, 3 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 225 (1968).

[142]*See* note 129 *supra*.

Section 1983 is a hybrid action authorizing enforcement of both constitutional rights and rights created by Congress. It has never been necessary to determine whether specific provisions of the Constitution itself create implied private rights of action against the states or state officers, although it is likely that the fourteenth amendment would be so read should the question ever arise.[143] If the Constitution creates individual rights with an implied private action to enforce those rights, then it is difficult to see how the states or state officers could claim to have retained sovereign immunity against suits of this nature. It has been unnecessary to decide this question because the fourteenth amendment explicitly gave Congress the power to enforce its provisions by legislation[144] and Congress immediately did so by enacting section 1983.[145]

Under section 1983 it is even more difficult for the states to claim sovereign immunity. The grant of power to Congress in the fourteenth amendment is a direct relinquishment of sovereignty in the field of constitutional rights. Under *Maryland v. Wirtz*[146] the states would be subject to regulation of Congress at least so long as that regulation did not reach conduct that could not validly be regulated when engaged in by private persons.[147] This raises some slight conceptual difficulty with section 1983 actions because it is only under color of state law, custom, or usage that a person can violate constitutional restrictions, and it might be thought that section 1983 actions do reach conduct that could not be reached if engaged in by private persons. The degree of state action required to establish liability against a private person, however, is slight and a private person might be held liable because of acting under the color of state law even though his action were illegal under state law.[148] The state need not put its stamp of approval on the actions of a defendant before he may be held to answer for the constitutional wrong.[149] If the state does approve and authorize the actions of a private

[143]The question could not have arisen prior to 1875 because there was no general federal question jurisdiction grant to the federal trial courts such as now appears in 28 U.S.C. § 1331 (1970). After years of doubt under Bell v. Hood, 327 U.S. 678 (1946), the Supreme Court has finally decided that there is an implied private right of action against federal officers arising from the Constitution itself. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

[144]U.S. CONST. amend. XIV, § 5.

[145]Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (now 42 U.S.C. § 1983 (1970)).

[146]392 U.S. 183 (1968).

[147]*Id.* at 196.

[148]Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).

[149]Monroe v. Pape, 365 U.S. 167 (1961).

person or public official, then liability imposed on the state would not discriminate against the state and should be held to be within the delegated enforcement power of Congress under the fourteenth amendment.[150]

Suits to enforce federal statutory rights

The Supreme Court apparently has recognized a difference between cases brought to vindicate constitutional liberties and cases brought to enforce claims created by Congress. In *Parden v. Terminal Railway*,[151] suit was brought against a state-owned and -operated railroad for damages for personal injuries sustained by employees covered by the Federal Employers' Liability Act.[152] The Court referred to *Hans* and the other debt collection cases[153] and stated that "for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress."[154] The Court might have been expected to hold that the state had no immunity when Congress was acting within its delegated power to regulate commerce.[155] Certain language in *Parden* shows that the Court considered this theory:

> By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.[156]

---

[150]Congress, of course, has not chosen to exercise its power so broadly in section 1983, which is limited to suits against "persons." It is argued here that Congress could have sanctioned suits against the states, that these suits may be implicitly authorized by the eleventh amendment (*see* note 143 *supra*), and that considerations of sovereign immunity should play no part in determining who or what is a "person" within the meaning of section 1983.

[151]377 U.S. 184 (1964).

[152]45 U.S.C. §§ 51-60 (1970).

[153]The Court quoted *Hans* for the proposition that "Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" 377 U.S. at 186. The Court also cited for the same proposition *Ex parte* New York, 256 U.S. 490 (1921); Duhne v. New Jersey, 251 U.S. 311 (1920); Smith v. Reeves, 178 U.S. 436 (1900). *See* note 157 *infra*.

[154]377 U.S. at 187.

[155]Of the debt collection cases and the others cited note 153 *supra*, the Court said that they "were also commonplace suits in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background." 377 U.S. at 187 n.3. *See* notes 115-121 and accompanying text *supra*.

[156]377 U.S. at 192.

The Court, however, failed to reach so broadly in *Parden*. Rather than relying solely on an *abandonment* of state sovereignty in the field of interstate commerce, the Court also found a *waiver* of sovereign immunity from suit based on the state's operation of a railroad in interstate commerce following enactment of federal statutes regulating railroads in interstate commerce. The Court reasoned that Congress had "conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit."[157]

The waiver rationale of *Parden* is particularly disturbing because of the Court's reliance on what appears to be a governmental-proprietary distinction.

> [W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. . . . States have entered and are entering numerous forms of activity which, if carried on by a private person or corporation, would be subject to federal regulation.[158]

This language leaves open the possibility that the state could argue for immunity from private suit when it has done nothing affirmative to step outside its traditional role as a government. Just as the taxation cases seem to recognize an immunity for those functions that are "uniquely governmental," *Parden* seems to leave an umbrella of immunity for those state activities that would not be subject to a finding of waiver. It has been argued above[159] and is submitted here that the taxation cases present a situation completely different from the abandonment of sovereignty in fields within congressional power, and that the sovereign immunity doctrine should have no application to rights arising under federal laws that are validly enacted within congressional spheres of power.

The waiver rationale of *Parden* can also be attacked on another basis. If the eleventh amendment is read as having adopted a doctrine of sovereign immunity rather than as having withdrawn a portion of diversity jurisdiction, then its limitation of the judicial power of the United States would not be subject to waiver. The subject matter jurisdiction of the federal courts is strictly limited by the Constitution[160]

---

[157] *Id.*

[158] *Id.* at 196-97.

[159] Notes 70-72 and accompanying text *supra*.

[160] Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

and cannot be waived,[161] asserted by estoppel,[162] or created by consent of the parties.[163] If the judicial power does not extend to private suits against the states, then nothing that the states do could create subject matter jurisdiction. Although the Supreme Court has often recognized waivers of sovereign immunity,[164] the eleventh amendment should be considered a jurisdictional provision, not an enactment of the principles of sovereign immunity.

If the waiver rationale of *Parden* were disavowed, then the Court would be free to base its reading of all previous cases upon a reinvestigation of the doctrine of sovereign immunity. The erroneous dicta of the debt collection cases could be disregarded and the states held to have relinquished their sovereignty within those areas delegated to the federal government. State immunity from suit could be seen as never having existed, and the eleventh amendment could be read as it was probably intended, as a limitation upon the diversity jurisdiction of the federal courts. One limitation that might need to be implied from the nature of the federal system would be the type of limitation mentioned in both the taxation and regulatory cases—a limitation on congressional power rather than upon the jurisdiction of the courts. This is the limitation that Congress cannot discriminate against the states with an intent to put them at a disadvantage. Thus a regulation that operated only on states because of their state function would be viewed in a different light as a matter of federal power, but this would have no impact on the federal question jurisdiction of the courts.

The Supreme Court has an opportunity to make this reinvestigation of the immunity doctrines this term when it decides a question that has split the circuits.[165] This is the question that was expressly reserved in *Maryland v. Wirtz*—whether the eleventh amendment prohibits suits for private enforcement of the rights created by the Fair Labor Stan-

[161]Mitchell v. Maurer, 293 U.S. 237 (1934); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[162]*E.g.*, Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379 (1884); Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804).

[163]*E.g.*, People's Bank v. Calhoun, 102 U.S. 256, 260 (1880); Jackson v. Ashton, 33 U.S. (8 Pet.) 148 (1834).

[164]In *Parden*, the Court cited numerous cases for the proposition that the state may consent to suit. Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); Clark v. Barnard, 108 U.S. 436 (1883).

[165]*See* Employees of Dep't of Pub. Health & Welfare, 452 F.2d 820 (8th Cir. 1971), *cert. granted*, 405 U.S. 1016 (1972) (No. 71-1021) (no waiver); Briggs v. Sagers, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970) (waiver found).

dards Act.[166] The Act provides for coverage of state-operated schools and hospitals, activities that are less susceptible of being construed as a waiver than operation of a railroad. The proper mode of decision as outlined here would be that the states have no sovereign immunity in federal question jurisdiction and that *Maryland v. Wirtz* has settled that their abandonment of sovereignty has made them subject to congressional regulation of these activities within the commerce power.

This decision will have great impact on recent and proposed legislation. For example, when Title VII of the Civil Rights Act of 1964,[167] which provides for fair employment opportunities, was extended to cover state employment, suits both by the Attorney General of the United States and private individuals were authorized against private employers.[168] There is little question but that the enforcement powers of the Attorney General will be upheld[169] under *Maryland v. Wirtz,* but it will be more difficult to uphold private enforcement.[170] Under *Parden*'s waiver rationale, it would be difficult to find a waiver of sovereign immunity by a state in the act of employing public agents. A better result would be reached by allowing private suits under federal question jurisdiction in those areas in which the states have abandoned their sovereignty to Congress.[171] Hopefully, the Court will so rule.

---

[166]392 U.S. at 200.

[167]42 U.S.C. § 2000e (1970).

[168]Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(f)(1) (U.S. CODE CONG. & AD. NEWS 817-18 (Apr. 20, 1972)). The Attorney General is given original opportunity to sue but a private person may bring suit if no action is filed by the Attorney General.

[169]Some argument will presumably be made on the basis of the relief sought, which will inure to the benefit of individual employees. It could be argued that the suit is actually brought by the Attorney General to enforce a right belonging to an individual, who would be barred from suing the state by the eleventh amendment. Reliance could be placed on Hawaii v. Standard Oil Co., 405 U.S. 251, 258 n.12 (1972); "In order to properly invoke [original Supreme Court] jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens . . . . An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals."

An argument similar to this has been rejected when the Secretary of Labor has sued to enjoin violations of the wage and hour provisions considered in *Maryland v. Wirtz.* Hodgson v. Board of Educ., 344 F. Supp. 79 (D.N.J. 1972).

[170]The 1972 amendments do allow the private complainant to intervene if an action is brought by the Attorney General against a governmental employer. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4 (U.S. CODE CONG. & AD. NEWS 818 (Apr. 20, 1972)). This provision could raise an eleventh amendment problem when intervention is sought.

[171]*See also* Clean Air Act of 1970, 42 U.S.C. § 1857h-2(a) (1970), which authorizes suits against government instrumentalities "to the extent permitted by the Eleventh Amendment to the Constitution."