THE CAREER OF STATE SOVEREIGN IMMUNITY UNDER THE UNITED STATES CONSTITUTION

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ABSTRACT OF THESIS

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The legal concept of state sovereign immunity has been controversial since the ratification of the Constitution in 1789. In 1793, the Supreme Court ruled that the states had no sovereign immunity. The Eleventh Amendment reversed this ruling about the Constitution. The Eleventh Amendment itself has also been very controversial. We study the history and development of sovereign immunity jurisprudence from the founding of the United States until the present time.

KEYWORDS: SOVEREIGN IMMUNITY, CONSTITUTION, ELEVENTH AMENDMENT, FEDERALISM, ARTICLES OF CONFEDERATION

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THESIS

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Arts in the College of Arts and Sciences at the University of Kentucky

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INTRODUCTION

State sovereign immunity is the legal doctrine that consent is required in order to sue a state. This doctrine is generally considered by the Courts to be a constitutional matter. Many legal commentators and several Supreme Court Justices consider it to be a doctrine of the common law subject to abolition or modification by the Congress at any time. This paper will trace the historical development of the doctrine of state sovereign immunity and its incorporation by the Rehnquist Court in the Tenth and Eleventh Amendments of the Constitution. It is the thesis of this paper that state sovereign immunity is of constitutional dimension and that it stands on its own as a constitutional doctrine whether incorporated in the Tenth and Eleventh Amendments or not.

ON CONSTITUTIONS AND GOVERNMENT

For the purposes of this thesis, a government is a person or a group of persons with an organizational structure which controls a significant portion of the
surface of the Earth generally by military force. We may refer to this land as Blackacre. The powers of government are arbitrary and unlimited. As people do not feel comfortable living in a land with unlimited governmental powers over them, the powers of government are usually harnessed by a Constitution. A Constitution limits governmental power and sets up a structure for government. The people of Blackacre consider the limitations on the power of government to be their constitutional rights. The people benefiting from constitutional rights are generally referred to as citizens. Not all persons located in Blackacre are necessarily citizens. Persons in Blackacre who are not citizens may include visitors, trespassers, invaders, and persons there for a special purpose.

The Constitution is not a source of laws regulating relations between people. Laws regulating behavior, in a government similar to that of the United States, are determined by a Legislature constituted for that purpose. The Legislature passes the laws the people of Blackacre live by. The Legislature enacts tax laws and is solely in charge of spending funds belonging to the government. The laws of Blackacre are in full force and effect only there. Another government, such as Greenacre, may choose to either
accept or reject a law of Blackacre. Acceptance of a law of Blackacre by Greenacre is an act of comity. The laws of Blackacre are generally interpreted by the branch of government referred to as the Judiciary. Members of the Judiciary are Judges.
CHAPTER I. SOVEREIGN IMMUNITY BEFORE THE RATIFICATION OF
THE CONSTITUTION IN 1789

The colonies inherited the doctrine of sovereign immunity from England where it had been the invariable rule ever since the reign of King Edward I (1272-1307), known as “Longshanks.” This doctrine was never a matter of the common law, that is judge made law\(^1\), but was a prerogative of the royal sovereign. The doctrine was inherited by the colonies, but that is not the basis for its continued validity in the United States Constitutional system. Sovereign immunity of the states was included in the Articles of Confederation, the nation’s first constitution, in Article II: “Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.” The Articles of Confederation, ratified in 1781, were never repealed, but were supplanted or constructively amended\(^2\) by the Constitution. The

\(^1\) In the *Oxford Companion to the Supreme Court of the United States* at pp. 170-171 we find the term “common law” defined as follows: Common law is the body of judge-made law that was administered in the royal courts of England (King’s Bench, Common Pleas, Exchequer, and Exchequer Chamber) – in contrast with other bodies of English law administered in different courts, such as equity, admiralty, canon law, and the customary law of the borough and manorial courts. William Blackstone described the common law as the general customary law of the realm as interpreted by the royal judges, the “living oracles” of the law.

Constitution did not mention sovereign immunity. It thus did not modify the sovereign immunity of the states.

THE TREATY OF PARIS

The Treaty of Paris ending the Revolutionary War in 1783 provided in Article I:

His Brittanic Majesty acknowledges the said United States, viz., New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylmania, Maryland, Virginia, North Carolina, South Carolina and Georgia, to be free sovereign and independent states, that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof.3

Sovereignty of the states thus became a constitutional matter due to Article VI, paragraph 2, of the Constitution which provides that treaties shall be the supreme law of the land:

The 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.

The meaning and characteristics of sovereignty in 1783 can be ascertained from Blackstone’s Commentaries on the Laws of England, which was the preeminent authority on

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English law for the founding generation. “[T]he law attributes to the king the attribute of sovereignty or pre-eminence. ... Hence it is, that no suit can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it.”

There was a case in Pennsylvania about sovereign immunity before the ratification of the Articles of Confederation and the Constitution. The case of Nathan v. the Commonwealth of Virginia, 1 U.S. 77, 1 Dallas 77 (1781) concerned an attachment of imported clothing in Philadelphia County, Pennsylvania which belonged to the Commonwealth of Virginia. The Court of Common Pleas of Philadelphia County, Pennsylvania held that Virginia was immune from the processes of Pennsylvania by virtue of its sovereign immunity.

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CHAPTER II. THE HISTORICAL CONTEXT OF THE CHISHOLM CASE

The United States Government under the Articles of Confederation had no taxing power. Instead, it relied on requisitions paid by the states. The requisition of 1786, for example, was supposed to generate $3.0 million Dollars from the states but only $663.00 was paid. This left the United States in an insolvent position. There were proposals in 1781 and 1783 to allow a 5% tax or impost on exports but Rhode Island and then Virginia vetoed these in 1781 followed by New York in 1783. In *Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution*, Calvin H. Johnson states his thesis as follows:

[T]hat the Constitution was a radically nationalizing vector compellingly explained by the righteous anger of the Founders at the misdeeds of the states. The anger explains both key steps in the transformation and also the strength of the drive for change.

The Founders were angry at the states for their defaults on the requisitions and for their vetoes of the federal impost. The Founders believed that the failure of requisitions was due to evil and shameful acts by the states. Rhode Island’s veto of the 1781 impost was the “quintessence of villainy.” Rhode Island was a detestable little corner of the Continent that injured the United States more than the worth of the whole state. Both Rhode Island and New York, it was said at the time, should rest in Hell.5

The Founders expressed their anger at the states in

immoderate, even religious terms. “United, we stand, divided we fall” had been the motto that held together the drive for independence and made victory possible. The states were betraying the sacred cause of the United States. The states had betrayed George Washington’s army at Valley Forge and they were continuing their betrayal of the common cause. The action of the states in their defaults of requisitions and in veto of the impost was sin, disease, wickedness, and vice, not easily forgiven.6

John Jay was one of the Peace Commissioners who negotiated the Treaty of Paris. Article Four of the treaty provided as follows: “It is agreed that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.”7 There were other provisions of the treaty providing relief for Loyalists and persons holding Revolutionary War debts. According to Sandra Frances VanBurkleo, “Jay particularly fulminated against the violations of the Definitive Treaty with Britain and the compacts supporting Revolutionary War debts. His own promises underpinned many such agreements. Of greater moment, however, were national ‘honor, justice, and

6 Ibid.
7 Defining Documents of the United States Web site.
interest.' Time and time again, he advocated broader powers of 'coercion' so that administrators and judges might enforce these 'most salutary and constitutional objects.'”

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CHAPTER III. THE SUPREME COURT RULES THAT THE STATES HAVE NO SOVEREIGN IMMUNITY: CHISHOLM V. GEORGIA (1793)

The states had sovereign immunity at least from 1783 until the present as a constitutional matter and not due to a common law tradition inherited from England. The issue of sovereign immunity came up almost immediately in the first major case decided by the United States Supreme Court, *Chisholm v. Georgia*, 2 U.S. 419, 2 Dallas 419, 1 L.Ed. 440 (1793).

The background facts of the case of *Chisholm v. Georgia* are not given in the report of Alexander J. Dallas at 2 U.S. 419, 2 Dallas 419, 1 L.Ed. 440 (1793). They are found in *Chisholm v. Georgia: Background and Settlement* by Doyle Mathis. In 1777 the Executive Council of Georgia authorized Thomas Stone and Edward Davies of Savannah, as commissioners of the state, to purchase supplies from Robert Farquhar, a merchant of Charleston, South Carolina. They purchased a considerable quantity of merchandise from Farquhar for which he was to receive $169,613.33 in South Carolina currency. The date of delivery of the merchandise was November 3, 1777. On December 2, 1777 Farquhar demanded payment. Georgia paid Stone and Davies for the merchandise, however, they became insolvent and never paid Farquhar who

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died in a maritime accident during January 1784. Alexander Chisholm became executor of Farquhar’s estate. After efforts to collect the debt failed, Chisholm filed suit against the state of Georgia in the United States Circuit Court for the District of Georgia in an unreported case styled *Farquhar’s Executor v. Georgia*. Governor Edward Telfair answered the suit stating that Georgia was:

a free, sovereign and independent State, and that the said State of Georgia cannot be drawn or compelled ...to answer against the will of the said State of Georgia, before any Justices of the federal Circuit Court for the District of Georgia or before any Court of Law or Equity whatsoever.10

The case was decided in the October, 1791 term of the Circuit Court at Augusta, Georgia. James Iredell of the United States Supreme Court on Circuit and Nathaniel Pendleton of the United States District Court for Georgia agreed that Georgia could not be sued by a resident of South Carolina in the Circuit Court. The case was dismissed. Chisholm then brought an original action against Georgia in the Supreme Court of the United States.

In a surprising four to one decision, the Supreme Court ruled against Georgia and decided the states had no sovereign immunity. The Justices in the majority were Chief

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10 Case File, Records of the United States Circuit Court, District of Georgia, Case A, Box 1.

ON SOVEREIGNTY

The Chisholm case concerns the concept of sovereignty. The definition of sovereignty we shall use is the standard one taken from Black’s Law Dictionary:

Sovereignty. The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; ...

The power to do everything in a state without accountability, - to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like. Story, Const. § 207.11

In a very deceptive manner, Justices Jay and Wilson use the concept of “popular sovereignty” in place of sovereignty in their Chisholm opinions. Popular sovereignty is a legal fiction and not a form of governmental or territorial sovereignty at all. Popular sovereignty was adopted by the Federalists to argue for the ratification of the Constitution. The concept arose in England to replace the legal fiction known as the divine right of kings in the

reign of King Charles I during the first half of the Seventeenth Century. Parliament needed a new ideology to justify placing the authority of the King below that of the people and its representatives. It did this through a new fiction that God authorized government through the people and set the people above their governors. According to this new idea of popular sovereignty, the people of the nation, exercising their God-given powers chose a government by kings in hereditary succession. The fiction of popular sovereignty strained credulity as much as the fiction of the divine right of kings. The idea of “the people” is an abstraction and no authorization of government by God ever occurred.  

The notion of popular sovereignty explained the novel American system of sovereignty split between the federal government and the states. According to this theory, all sovereignty was in the people who allotted some to the federal government, some to the states, and retained some for themselves. This is the argument developed by James Wilson and used by the Federalists to explain the Constitution.

In a debate at the Pennsylvania Ratification

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Convention November 24, 1787, James Wilson said "[t]hat the supreme power, therefore, should be vested in the people, is in my judgment the great panacea of human politics. It is a power paramount to every constitution, inalienable in its nature, and indefinite in its extent." On the tombstones for Wilson at Edenton, North Carolina and Christ Church in Philadelphia is the quote: "That the Supreme Power, therefore, should be vested in the People, is, in my judgment, the great panacea of human politics." Popular sovereignty is not a legal doctrine and is not a part of the law of the United States. It is just political philosophy.

THE PRIMARY EVIDENCE USUALLY CITED AS INDICATING THE INTENTIONS OF THE FOUNDERS CONCERNING SOVEREIGN IMMUNITY

Several important statements concerning sovereign immunity were made at the times of the Constitutional Convention and the subsequent ratifying conventions. These statements are well known and cited by almost all writers on the subject.

Alexander Hamilton said in Federalist 81, "It is inherent in the nature of sovereignty not to be amenable to

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the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states."\(^{15}\)

James Madison in the Virginia Ratifying Convention June 20, 1788 debated the Supreme Court’s jurisdiction of suits between a state and citizens of another State as follows: “Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts.”\(^{16}\)

John Marshall, in the Virginia Ratifying Convention,


on June 20, 1788 argued similarly about citizen-state diversity jurisdiction:

> With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant -- if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?17

The Rhode Island Ratifying Convention proclaimed that

> “It is declared by the Convention, that the judicial power of the United States, in cases where the state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state.”18 The Convention sought an amendment “to remove all doubts and controversies respecting the same.”19

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17 Ibid, 555-556.
18 1 Elliot’s Debates, 336.
19 Ibid.
The New York Ratifying Convention also made known its understanding “[t]hat the judicial power of the United States, in cases in which a state may be a party, does not extend to Criminal prosecutions, or to authorize any suit against a state.”\(^2\) The convention proceeded to ratify the Constitution “[u]nder these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration.”\(^1\)

The clause concerning citizens-state diversity jurisdiction was proposed by a Committee of Detail of the Constitutional Convention consisting of John Rutledge, Edmund Randolph, Oliver Ellsworth, Nathaniel Gorham, and James Wilson. Its inclusion in the Constitution occurred without debate or discussion among the delegates at large so far as surviving records indicate.

**THE JAY OPINION**

John Jay was born December 14, 1745 in New York City to a wealthy merchant family. He graduated from King’s

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\(^2\) Ibid, 329.

\(^1\) Ibid.
College (now Columbia University) in 1764. He was an attorney and served in the Continental Congress. In 1782 he served as one of the commissioners to draft the peace treaty with England. He was a nationalist thinker. His nationalist views led to his rejection as a New York delegate to the Constitutional Convention of 1787. President Washington appointed Jay the first Chief Justice of the United States Supreme Court in 1789.

Chief Justice Jay in his Opinion first considered the sense in which Georgia is a sovereign state. He ignored the Articles of Confederation and the Treaty of Paris which both established governmental sovereignty for Georgia. He did admit "thirteen sovereignties were considered as emerged from the principles of the Revolution." He declared "at the Revolution the sovereignty devolved on the people, and they are truly the sovereigns of the country, but they are sovereigns without subjects (unless the African slaves among us may be so called) and have none to govern but themselves." He said sovereign immunity was based on feudalism which never existed in the United States and had no application here. He defined sovereignty as "the right to govern" which was not the definition in general

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23 Chisholm v. Georgia, 470-472.
use. He cleverly substituted the fiction of popular sovereignty for the legal concept of sovereignty so his opinion would read as if it made some sense.

Jay was of the opinion that Georgia, by being a party to the Constitution, consented to be suable by individual citizens of another state. This argument is based on Article III, Section 2 of the Constitution setting forth the jurisdiction of the federal courts as follows:

The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to controversies between two or more States; - between a State and Citizens of another State - between Citizens of different states, - between Citizens of the same State claiming Lands under Grants of different states, and between a State or the citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and fact, with such Exceptions and under such Regulations as the Congress shall make.

Jay argued for a non-existent principle of judicial symmetry that if a state can sue an individual then an individual can sue a state. This is, in fact, a correct interpretation of Article III, Section 2 of the
Constitution cited above as far as jurisdiction is concerned. The problem with Jay’s argument is that a suit of an individual against a state for ordinary debt does not state a claim upon which relief may be granted due to sovereign immunity. Article III, Section 2 is just a jurisdictional provision for the federal courts. The Constitution established the federal Courts as Courts of limited jurisdiction. This is very confusing to non-lawyers. To get a suit into a federal court one must establish and prove jurisdiction. Once having established jurisdiction, one must also have a claim upon which relief may be granted in order to have a case which will survive dismissal. Article III, Section 2 does not establish substantive law making states liable to suit in federal court for debt. No such substantive law existed. Commenting on the *Chisholm* case, Akhil Reed Amar said: “This was a bold leap. Under the common law of Georgia and South Carolina – and indeed, of every other state in 1792, it would appear – no damages lay for a breach of contract by a state itself. At common law, such a contract, though morally binding upon a state, was not legally enforceable against it in a damage suit unless the state itself
consented to the suit."\textsuperscript{24}

Edmund Randolph, Attorney-General of the United States and attorney for Chisholm, writing to James Madison, expressed his not very flattering opinion of Jay's judicial abilities as follows: "An opinion which has long been entertained by others is riveted in my breast concerning the C.J. He has a nervous and imposing elocution, and striking lineaments of face, well adapted to his real character. He is clear, too, in the expression of his ideas, but that they do not abound on legal subjects has been proved to my conviction. In two judgments which he gave last week, one of which was written, there was no method, no legal principle, no system of reasoning!"\textsuperscript{25}

Walter Stahr, a biographer of Jay, analyzed Jay's Chisholm Opinion as follows:

Its main deficiency, from a modern perspective, is that it assumed that, if there was jurisdiction, if the Supreme Court had authority to hear a case against a state, there was a cause of action, a right to recover on a private contract with a state. But before the Constitution it was universally agreed that a private party could not recover on a contract with a state. As Hamilton put it in the Federalist, "contracts between a nation and individuals are only binding on the conscience of the sovereign, and have

\textsuperscript{24} Akhil Reed Amar, America's Constitution: A Biography, New York (2005), 333.
Jay did not discuss the source of the right to sue a state in contract, but it seems he assumed the right was found in a kind of federal common law, that there was now a federal cause of action on contracts made by states, even though there had been none before the Constitution.\textsuperscript{26}

VanBurkleo characterized Jay’s \textit{Chisholm} Opinion as “curiously wistful” and “nonlegalistic”.\textsuperscript{27} She further discussed his judicial career as follows: “The chief justice, moreover, has been dismissed as a ‘trifling’ student of domestic law whose court escaped mediocrity (when it did) largely because James Wilson and other imaginative associates shared the bench. Again, when measured against modern standards, such charges seem plausible. Jay produced no scholarship more extensive than grand jury charges and brief \textit{Federalist} essays. His apprenticeship and private practice were relatively insubstantial, and his judicial experience in New York before 1789 was fleeting.”\textsuperscript{28} She concluded that scholars may rightly decide that Jay “was a poor excuse for an appellate judge.”\textsuperscript{29} “Gustavus Myers in his \textit{History of the Supreme Court in the United States} (1911), found Jay to be a key figure in a land-owning combine of colonial aristocrats who protected the interests of their own class against the

\textsuperscript{26} Stahr, 296.
\textsuperscript{27} VanBurkleo, 48.
\textsuperscript{28} Ibid, 28-29.
\textsuperscript{29} Ibid, 56.
popular rank and file.”

Jay “was scarcely disposed to take a narrow or circumscribed view of the judicial power of the Federal Government, or an enlarged view of the sovereign claims and immunities of the States. With Jay, no less than with Wilson, his opinion in Chisholm v. Georgia simply marked the culmination of, and the opportunity to give public, judicial, and authoritative expression to, views which had matured during years of public service and of private thought on the nature of the Union, and of government and sovereignty in America.” In Federalist No. 3 he said: “When once a national government is established, the best men in the country will not only consent to serve, but also will generally be appointed to manage it. ... Hence it will result that the administration, the political counsels, and the judicial decisions of the national government will be more wise, systematical, and judicious than those of the individual States, and consequently more satisfactory with respect to other nations, as well as more safe with respect to us.” Jay’s profoundly nationalist views explain the
judicial activism he exhibited in Chisholm.

THE BLAIR OPINION

John Blair was born in November 1732 to a wealthy and politically important family. He graduated from the College of William and Mary in 1754 and studied law in the Middle Temple in London. He was a Judge of Virginia’s General Court, High Court of Chancery, and Court of Appeals. He was a Virginia delegate to the Constitutional Convention along with George Washington, Edmund Randolph, James Madison, George Mason, George Wythe, and James McClurg. Madison recorded him as making no speeches during the Convention. He was an original appointee to the United States Supreme Court in 1789. In his Chisholm opinion he said he would consider the wording of the Constitution and nothing else. As the Constitution said nothing about sovereign immunity, this was not a proper way to reach a correct decision. Noting that Article III, Section 2 conferred the federal Courts jurisdiction over states, he reasoned in his brief opinion that once a state “has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.” 33 No mention was made of popular sovereignty.

33 Chisholm v. Georgia, 2 U.S. 419, 2 Dallas 419, 1 L.Ed. 440 (1793), 452.
Earl Gregg Swem said of Blair: “John Blair ... while not a man of the first order of ability, was a safe and conscientious judge. He acted an important part in the history of the country both before and after the American revolution.”

Senator William Plumer of New Hampshire remarked on Blair’s retirement in 1795: “I consider him as a man of good abilities, not indeed a Jay, but far superior to Cushing, a man of firmness, strict integrity and of great candour.” Wythe Holt remarked about Blair: “Though not a strong thinker as a jurist, John Blair did have an ability to get to the heart of the matter, was an able and competent judge, and was, first and foremost, sturdily devoted to his own interests and to the cause of mercantile and planter republican independence, as later embodied in the Federalist Party.”

It would seem that perhaps Blair went along with the majority in ruling against Georgia in order to be a good Federalist.

THE CUSHING OPINION

William Cushing was born March 1, 1732 in Scituate,

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34 Earl Gregg Swem, Review of an address of Henry T. Wickham, Esq. on the subject of Hon. John Blair, Jr., William and Mary Quarterly (1st Ser.), Vol. 22 (1913), 142.
35 Friedman and Israel, 115.
Massachusetts. He was the son and grandson of justices of the Royal superior Court of Judicature of Massachusetts. He received an A.B. degree from Harvard in 1751, an M.A. from Yale in 1753 and an M.A. degree from Harvard in 1754. He was admitted to the Bar in 1755 and practiced law thereafter. He served as Chief Justice of the Supreme Judicial Court of Massachusetts and was appointed as one of the original justices of the United States Supreme Court in 1789.

Cushing reasoned that Article III, Section 2 of the Constitution was supposed to provide a necessary dispute resolution method for disputes between states and citizens of other states. He asserted “As controversies between State and State, and between a state and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies and preserve peace and friendship. Further, if a State is entitled to justice in a Federal court against a citizen of another State, why not such citizens against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed the latter are founded upon the former, and the great end and object of them must
be to secure and support the rights of individuals, or else vain is government." Cushing relied on the same nonexistent law of judicial symmetry as Jay. He said, “no argument of force can be taken from the sovereignty of states.” He made no argument based on popular sovereignty. Apparently anticipating some difficulty with the decision of the case, he commented that, “If the Constitution is found inconvenient in this or any other particular, it is well that a regular mode is pointed out for amendment.” He apparently expected some discontent and controversy about the Court’s decision.

Cushing’s biographer, John D. Cushing, concluded that: “As a federal jurist, he did little to distinguish himself. That he brought long and valuable experience to the new judiciary is incontestable, but that he played a significant role in shaping the constitution or legal customs of the nation is doubtful.”

THE WILSON OPINION

James Wilson was born into humble circumstances September 14, 1742 in Carskerdo, Fifeshire, Scotland. He attended St. Andrews University and then immigrated to

37 Chisholm, 468.
38 Ibid.
America in 1765 settling in Pennsylvania. He read law under John Dickinson and began practicing law at Reading, Pennsylvania in 1767. He was a delegate to the Constitutional Convention and a Signer of both the Declaration of Independence and the Constitution. In 1789 President Washington appointed him one of the original justices of the United States Supreme Court. As a delegate to the Constitutional Convention he was a nationalist. In a debate at the Convention, according to James Madison’s Notes, John Dickinson said that “[t]he preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other. To attempt to abolish the States altogether, would be ruinous. He compared the proposed National System to the Solar System, in which the States were the planets, and ought to be left to move freely in their proper orbits. The Gentleman from Pa. [Mr. Wilson] wished he said to extinguish these planets.”  


41 Ibid, 42.
sovereign and asserted that “in this country the supreme, absolute, and uncontrollable power resides in the people at large.” He considered the people of the United States to be the group in which sovereignty resided and not the separate peoples organized as states. “Wilson believed the United States was one people and not a collection of divergent interests. He believed the federal government and the states had distinct powers and the states were mainly to control local matters. He felt the main danger in the system was that the states might encroach on federal powers.

In his Chisholm opinion, Wilson was true to his strongly held earlier beliefs: “As a citizen, I know the Government of that state [Georgia] to be republican; and my short definition of such a Government is, one constructed on this principle, that the Supreme Power resides in the body of the people. As a Judge of this Court, I know, and can decide upon the knowledge, that the citizens of Georgia, when they acted upon the large scale of the Union, as a part of the ‘People of the United States,’ did not surrender the Supreme or Sovereign Power to that State;

42 McMaster and Stone, 318.
but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.” 44 Wilson’s definition of a republican government differs somewhat from the standard one. A republican government is “a government of the people; a government by representatives chosen by the people.” 45 According to Gordon Wood, “By definition it [a republican government] had no other end than the welfare of the people: res publica, the public affairs, or the public good.” 46 Wilson argues that a republican government is one with popular sovereignty rather than one controlled by representatives elected by the people.

Wilson, like Jay, believed that sovereignty derived from feudal principles having no application in the United States. According to Wilson, “Sovereignty is derived from a feudal source, and, like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause by which that influence was produced never extended to the American states.” 47 Wilson did admit that sovereign immunity was the law in England at least since the reign of King Edward I

44 Chisholm, 457.
47 Ibid.
Wilson thought the rights of states were inferior to the rights of people: “Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator. A state, useful and valuable as the contrivance is, is the inferior contrivance of man, and from his native dignity derives all its acquired importance.” This can only be charitably characterized as a religious view and is in no sense legal reasoning or an interpretation of the meaning of the United States Constitution.

At the beginning of his opinion, Wilson stated that the Chisholm case was one of “uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this 'do the people of the United States form a Nation?'” He answers his question about the United States forming a Nation as follows: “Whoever considers, in

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48 Chisholm, 460.
49 Chisholm, 455.
50 Chisholm, 453.
a combined and comprehensive view, the general texture of the Constitution, will be satisfied, that the people of the United States intended to form themselves into a nation for national purposes. They instituted, for such purposes, a national Government, complete in all its parts, with powers Legislative, Executive and Judiciary; and, in all those powers, extending over the whole nation. Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation?"51

Colonel William R. Davie, a member of the Constitutional Convention and later a Governor of North Carolina, wrote James Iredell on June 12, 1793 stating his views concerning Justice Wilson’s opinion in Chisholm: "I confess I read some of these arguments and particularly that by Mr. Wilson with astonishment: however, the scope and propriety of this elaborate production called an argument, were expressly reserved for the contemplation of ‘a few, a very few comprehensive minds;’ and, perhaps,

51 Chisholm, 465.
notwithstanding the tawdry ornament and poetical imagery with which it is loaded and bedizened, it may still be very 'profound.' On this I shall give no opinion; but as a law argument it certainly has the merit of being truly 'original.' His definition of the American States as sovereignties is more like an epic poem than a Judge's argument, and we look in vain for legal principles or logical conclusions. The illustration he has drawn from the relation of the word subject to the word sovereign, as contradistinguished from the appellation of citizen as the correlative of the American Government, is no better than a contemptible play upon words, like his 'collection of original sovereigns:' indeed, speaking professionally, or as he says 'politically and classically,' this whole argument of his seems to be the rhapsody of some visionary theorist and entirely unworthy of my former idea of that man."

52 Prof. Clyde E. Jacobs of the University of California, Davis opined that "because Wilson seized upon Chisholm v. Georgia as a medium for expounding a strongly nationalist constitutional philosophy, his opinion is rather weak in certain technical particulars. Moreover, as

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a state paper, it was at least impolitic; many contemporary statesmen and politicians read it as an exercise in judicial usurpation, which called for repudiation.”

Jean-Marc Pascal, in his study of Wilson’s ideas, concluded that “Wilson was not an original thinker” although he was “an outstanding exponent of the American system of government and an exemplary spokesman of the American Enlightenment.”

THE IREDELL DISSENTING OPINION

James Iredell was born in Lewes, England October 5, 1751, the oldest of five children of a Bristol merchant. At the age of 17, he emigrated from England to North Carolina where he entered the customs service at Edenton. He read law under Samuel Johnston, later a governor of North Carolina, and was admitted to the bar in 1770. After the outbreak of the American Revolution he helped to organize the North Carolina court system. In 1777, he became a judge and in 1779 attorney general of North Carolina. His strong support of the proposed U.S. Constitution helped procure its adoption by North Carolina. North Carolina was the next to last of the original thirteen states to ratify the

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Constitution and ratification was accomplished there with some difficulty. President George Washington nominated Iredell to the Supreme Court in early 1790, and the Senate confirmed him two days later.

Judge Iredell observed, in accordance with Section 13 of the judiciary Act of 1789, that the Supreme Court had concurrent jurisdiction of cases such as *Chisholm* with the appropriate state court.\(^{55}\) Section 34 of the Judiciary Act, the so-called Rules of Decision Act, provided, “That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”\(^{56}\) This meant the *Chisholm* case had to be decided using state law. Georgia followed the rule of sovereign immunity. Justice Iredell thus found no law in support of a cause of action by a citizen of South Carolina against the state of Georgia for debt in federal court:

\(^{55}\) Section 13 of the Judiciary Act of 1789 provides in part “That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.”, The Constitution Society Web site, http://www.constitution.org/uslaw/judiciary_1789.htm.

\(^{56}\) Ibid.
[I]t is observable that in instances like this before the Court, this Court hath a concurrent jurisdiction only; the present being one of those cases where by the judicial act this Court hath original but not exclusive jurisdiction. This Court, therefore, under that act, can exercise no authority in such instances, but such authority as from the subject matter of it may be exercised in some other Court. There are no Courts with which such a concurrence can be suggested but the Circuit Courts, or Courts of the different States. With the former it cannot be, for admitting that the Constitution is not to have a restrictive operation, so as to confine all cases in which a State is a party exclusively to the Supreme Court (an opinion to which I am strongly inclined), yet there are no words in the definition of the powers of the Circuit Court which give a colour to an opinion, that where a suit is brought against a State by a citizen of another State, the Circuit Court could exercise any jurisdiction at all. If they could, however, such a jurisdiction, by the very terms of their authority, could be only concurrent with the Courts of the several States. It follows, therefore, unquestionably, I think, that looking at the act of Congress, which I consider is on this occasion the limit of our authority (whatever further might be constitutionally, enacted) we can exercise no authority in the present instance consistently with the clear intention of the act, but such as a proper State Court would have been at least competent to exercise at the time the act was passed.

If therefore, no new remedy be provided (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law, which I have shown to be alone applicable. If it could, I think it is now maintainable here; If it could not, I think, as the law stands at present, it is not maintainable; whatever opinion may be entertained;
upon the construction of the Constitution, as to the power of Congress to authorize such a one. Now I presume it will not be denied, that in every State in the Union, previous to the adoption of the Constitution, the only common law principles in regard to suits that were in any manner admissible in respect to claims against the State, were those which in England apply to claims against the crown; there being certainly no other principles of the common law which, previous to the adoption of this Constitution could, in any manner, or upon any colour apply to the case of a claim against a State in its own Courts, where it was solely and completely sovereign in respect to such cases at least. Whether that remedy was strictly applicable or not, still I apprehend there was no other. ... It is stated, indeed, in Com. Dig. 105. That 'until the time of Edward I. the King might have been sued in all actions as a common person.' And some authorities are cited for that position, though it is even there stated as a doubt.57

Like Justice Wilson, Justice Iredell found sovereign immunity of the English crown to have been uniformly the law at least since the reign of King Edward I (1272-1307). There being no law authorizing citizens to sue states for debt, Justice Iredell, was of the opinion that dismissal of the case was required. He analyzed the nature of the states in our federal system as follows:

A State does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: The voluntary and deliberate choice of the people. ... A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless, in the special instances where the general Government has power derived from the Constitution itself. ... A

57 Chisholm, 436-437.
State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The people of the State created, the people of the State can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States; that it must be of the Republican form.\textsuperscript{58}

He summarizes the conclusions of his opinion as follows:

I have now, I think, established the following particulars. 1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2nd. That Congress has provided no new law in regard to this case, but expressly referred us to the old. 3rd. That there are no principles of the old law, to which, we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained.\textsuperscript{59}

He adds in dicta (a view not required in deciding the case):

So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorize the deduction of so high a power.\textsuperscript{60}

Judge Iredell thus came down on the side of the states

\textsuperscript{58} Chisholm, 448.
\textsuperscript{59} Chisholm, 449.
\textsuperscript{60} Chisholm, 449-450.
having sovereign immunity rather than all sovereignty being only in the people. He did not use the fictitious popular sovereignty argument. While the opinion of Justice Iredell may seem like just another dissenting opinion without legal force, it is very important. The holding in *Chisholm v. Georgia* was reversed by the Eleventh Amendment to the United States Constitution. This development made Justice Iredell’s opinion that of the Court although not in a strict legal sense. Ordinarily, when a higher court reverses a case there is a written opinion detailing the manner in which the lower court was wrong. As *Chisholm* was reversed by constitutional amendment, there is no document revealing just how the court went wrong. This has led to problems of understanding and interpretation that persist to this day. In particular, there is an argument about whether *Chisholm* was reversed by the Eleventh Amendment because it was an incorrect interpretation of the Constitution or whether *Chisholm* was correct but the people didn’t want such cases in the federal courts. The speed and near unanimity with which the Eleventh Amendment was adopted make it “plain that just about everybody in Congress agreed the Supreme Court had misread the
Constitution.” Justice Joseph P. Bradley in his opinion of the court in the very important case of Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 832 (1890) made significant use of Judge Iredell’s arguments. Hans concerned the issue of federal question jurisdiction in suits against states.

**REACTION TO CHISHOLM IN THE NEWSPAPERS**

Writing of the Chisholm decision, American lawyer and historian, Charles Warren, concludes that “Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court; and their surprise was warranted, when they recalled that the vesting of any such jurisdiction over sovereign States had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption.”

The clause in the Constitution providing for original jurisdiction in the Supreme Court of cases between states and citizens of other States as well as between states and foreign states, citizens, or subjects could possibly be referred to as the “Trojan horse clause” as it was definitively construed by leading Federalists before

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62 Warren, 96.
ratification not to provide a forum for suits in federal court against States by citizens of other States and then after ratification received, in Chisholm, the opposite interpretation. There was some sentiment that the Federalists planned this strategy in advance as a way of abolishing the sovereignty of the States which had not been possible in the Convention. An unnamed “correspondent” to the Independent Chronicle, a Boston newspaper, wrote “[the] novelty of an independent and sovereign state being obliged to respond in a Court of Justice, consisting, perhaps, of its own citizens, is not less striking, than the importance of the consequences which may result from an acquiescence in this stride of authority. ... When the persons in opposition to the acceptance of the new Constitution hinged on the article respecting the Judiciary Department being so very extensive and alarming as to comprehend even the State itself, as a party to an action for debt; this was denied peremptorily by the Federalists, as an absurdity in terms. But it is now said, that the eloquent and profound reasoning of the Chief Justice has made that to be right, which was at first doubtful or improper.” 63

On July 9, 1793, Governor John Hancock issued a

63 Independent Chronicle, April 4, 1793.
proclamation calling the Massachusetts legislature, the General Court, into Special Session to consider the problems caused by the suit of William Vassal against the Commonwealth of Massachusetts in the United States Supreme Court. On that date Governor Hancock had been served with a subpoena ordering him to appear before the Supreme Court on August 5, 1793 to offer a defense to the suit. Governor Hancock thought the matter was one for the legislature to consider and make decisions about. Governor Hancock was seeking a resolution calling for a constitutional amendment making suits against states by citizens of other states, foreign states and citizens or subjects thereof, illegal. According to the Boston Gazette: "The Proclamation of Governor Hancock, inserted in this Gazette, must excite serious ideas in those who have from the beginning been inclined to suspect that the absorption of the State Governments has long been a matter determined on by certain influential characters in this country, who are aiming gradually at monarchy."64

The Columbian Centinel, a Boston newspaper, had a Federalist writer who published a series of articles using the name "Crito." Crito identified himself as a lawyer. A person using the name "Anti-Wizard" responded to an article

64 Boston Gazette, August 5, 1793.
by “Crito” in the *Columbian Centinel* arguing that the Federalists were trying to “ram down the throats of Freemen” a King, Lords, Commons, and a standing army. He claimed lawyers had used craft and subtlety to introduce the Trojan horse clause into the Constitution with a view to reduce the States to corporations.⁶⁵

In the *Salem Gazette* of Salem, Massachusetts, a person writing under the name “Uncle Toby” and also responding to Crito had a somewhat similar anti-lawyer view. He claimed the Norman Conquest was not complete until Norman lawyers introduced laws reducing slavery to a “system.” He warned readers not to let American lawyers profit from similar behavior.⁶⁶

Gordon Wood believes the arguments advanced by the Federalists were contrived for the purpose of causing the ratification of the Constitution: “Considering the Federalist desire for a high-toned government filled with the better sorts of people, there is something decidedly disingenuous about the democratic radicalism of their arguments, their continual emphasis on the popular character of the Constitution, their manipulation of Whig maxims, their stressing of the representational nature of

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⁶⁵ *Columbian Centinel*, August 10, 1793.
⁶⁶ *Salem Gazette*, August 6, 1793.
all parts of government, including the greatly strengthened executive and Senate. In effect, they appropriated and exploited the language that more rightly belonged to their opponents. The result was a beginning of a hiatus in American politics between ideology and motives that was never again closed. By using the most popular and democratic rhetoric available to explain and justify their aristocratic system, the Federalists helped to foreclose the development of an American intellectual tradition in which differing ideas of politics would be intimately and genuinely related to differing social interests.”

67 Ibid, 562.
CHAPTER IV. THE ELEVENTH AMENDMENT AND POST-CHISHOLM DEVELOPMENTS

New York elected John Jay Governor in May 1795 and he resigned from the United States Supreme Court to take that position. President John Adams nominated Jay as Chief Justice of the United States Supreme Court in 1800 but Jay declined the nomination due to weak health and the “fatigues incident to the office.” John Blair resigned from the Supreme Court October 25, 1795 due to failing health. William Cushing was a candidate for Governor of Massachusetts in 1794 and 1795 but was soundly defeated both times by Samuel Adams. His Chisholm opinion was unpopular in Massachusetts. President Washington nominated Cushing to be Chief Justice in 1796 after Alexander Hamilton, John Rutledge, and Patrick Henry had all declined the position. Cushing was unanimously confirmed by the Senate but resigned after serving for only a week due to ill health. He retained his position as Associate Justice and served until his death September 13, 1810. James Wilson aspired to be Chief Justice but was passed over many times. He died of malaria in Edenton, North Carolina on August 21, 1798 in a state of financial embarrassment due to unsuccessful land speculation. James Iredell served on the

68 Stahr, 364.
Court until his death October 20, 1799. Apparently the opinions of Jay and Cushing in Chisholm did not harm their standing with the Federalists as they both received nominations afterwards to be Chief Justice. One can surmise that their opinions in Chisholm were consistent with Federalist ideology.

Two days after the Chisholm decision was announced a resolution of uncertain authorship was introduced in the Senate proposing a constitutional amendment abolishing citizen-state diversity jurisdiction worded as follows: “The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.”69 However, the Second Congress adjourned without taking any action on the matter.

On November 4, 1793, Georgia Governor Edward Telfair presented to a joint session of the Georgia legislature his annual message and referred to the recent Chisholm decision of the United States Supreme Court as follows:

A process from the Supreme Court of the United States at the instance of Chisolm, executor of Farquhar, has been served upon me and the attorney-general. I declined entering any appearance, as this would have

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introduced a precedent replete with danger to the Republic, and would have involved this State in complicated difficulties, abstracted from the infractions which it would have made in her retained sovereignty. The singular predicament to which she has been reduced by savage inroads has caused an emission of paper upwards of £150,000 since the close of the late war, a considerable part of which is still outstanding, and which in good faith and upon constitutional principles is the debt of the United States. I say were action admissible under such grievous circumstances, an annihilation of her political existence must follow. To guard against civil discord as well as the impending danger, permit me most ardently to request your most serious attention to the measure of recommending to the legislatures of the several states that they effect a remedy in the premises by amendment to the Constitution; and that to give further weight to this matter, the delegation of this State in Congress be requested to urge that body to propose an amendment to the several legislatures.\footnote{Ulrich B. Phillips, \textit{Georgia and State Rights}, Yellow Springs, Ohio: Antioch Press (1902), 26-27.; Augusta Chronicle and Gazette of the State, Dec. 22, 1792; H. V. Ames, \textit{State Documents on Federal Relations: the States and the United States}, New York: Da Capo Press, 8.}

The Georgia House of Representatives passed a bill providing the death penalty for any U.S. Marshal attempting to enforce the \textit{Chisholm} decision:

That any Federal Marshal, or any other person or persons levying or attempting to levy on the territory of this state or any part thereof, or on the treasury or any other property of the Governor or Attorney General, or any of the people thereof, under or by virtue of any execution or other compulsory process issuing out of, or by authority of the supreme court of the United States, as it now stands, be constituted; for, or in behalf of the before-mentioned Alexander Chisholm, executor of Robert Farquhar, or for, or in behalf of any other person or persons whatsoever, for the payment or recovery of any debt or pretended debt, or claim against the state of Georgia; shall be, and or they attempting to levy as aforesaid,
are hereby declared to be guilty of felony, and shall suffer death, without benefit of the clergy, by being hanged.\footnote{Augusta Chronicle and Gazette of the State, Nov. 23, 1793.}

This bill did not pass in the Georgia Senate probably due to favorable prospects for a constitutional amendment nullifying the Chisholm decision.

On January 2, 1794 a Senator, now unknown, introduced a resolution proposing the exact text of the Eleventh Amendment in the United States Senate reading as follows:

\begin{quote}
The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens of subjects of a foreign State.\footnote{Annals of Congress (3d Cong., January 2, 1794), IV, 25.}
\end{quote}

This proposed amendment eliminated citizen-state diversity jurisdiction in cases involving suits against states by citizens of other states and citizens and subjects of foreign states as well as prohibiting the Courts from construing the judicial power of the United States in such a way as to permit a Chisholm type suit. The wording of the proposed amendment clearly conveyed a lack of confidence in the ability and/or willingness of judges to correctly interpret the Constitution. Such an amendment eliminated problems like Chisholm in the future but failed to specifically resolve or clarify the underlying question of
state sovereign immunity. This left an unfortunate ambiguity in constitutional law.

A two-thirds majority of both Houses of Congress proposed the Eleventh Amendment, which was one of the methods for proposing an amendment. Ratification of the proposed Eleventh Amendment required the approval of the legislatures of three-fourths of the states. By February 7, 1795 the required number of states had ratified the Eleventh Amendment.73 However, the Presidential proclamation of ratification did not occur until January 8, 1798.74 On February 14, 1798 the Supreme Court decided unanimously that “there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state,” Hollingsworth v. Virginia, 3 U.S. 378, 1 L.Ed. 644, 3 Dallas 378 (1798).75

While the language of the Eleventh Amendment seems at first blush to be simple and clear enough, the amendment has been subjected to many different and contradictory interpretations by commentators and the Courts.

No further reported cases against states invoking the sovereign immunity defense appeared in the Supreme Court until 1890 when a very important case involving Louisiana bonds came before it.
CHAPTER V. HANS V. LOUISIANA AND THE ELEVENTH AMENDMENT

In 1890, the Supreme Court revisited the issue of state sovereign immunity. Bernard Hans, a citizen of Louisiana, sued the state to pay the coupons on some defaulted state bonds he was holding. He also alleged that Louisiana had violated the Constitution by impairing the obligation of a contract. This created a federal issue. The Eleventh Amendment did not apply in this case as there was no citizen-state diversity jurisdiction. The Circuit Court dismissed the case due to lack of jurisdiction, *Hans v. State of Louisiana*, 24 F. 55 (E.D., Louisiana, 1885).

The Supreme Court, in a unanimous decision in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 832 (1890), decided Louisiana had no liability due to sovereign immunity. Justice Bradley, writing the opinion of the Court said:

> The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States. Some things, undoubtedly, were made justiciable which were not known as such at the common law; such, for example, as controversies between states as to boundary lines, and other questions admitting of judicial solution. ... The suability of a state, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that

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*The Contract Clause, Article I, Section 10, of the Constitution provides: “No State shall ... pass any ... Law impairing the Obligation of Contracts.”*
it is hardly necessary to be formally asserted. It was
fully shown by an exhaustive examination of the old
law by Mr. Justice Iredell in his opinion in Chisholm
v. Georgia; and it has been conceded in every case
since, where the question has, in any way, been
presented. ...

But besides the presumption that no anomalous and
unheard-of proceedings or suits were intended to be
raised up by the Constitution -- anomalous and unheard
of when the Constitution was adopted -- an additional
reason why the jurisdiction claimed for the Circuit
Court does not exist, is the language of the act of
Congress by which its jurisdiction is conferred. The
words are these: "The circuit courts of the United
States shall have original cognizance, concurrent with
the courts of the several States, of all suits of a
civil nature at common law or in equity, . . . arising
under the Constitution or laws of the United States,
or treaties," etc. -- "Concurrent with the courts of
the several States." Does not this qualification show
that Congress, in legislating to carry the
Constitution into effect, did not intend to invest its
courts with any new and strange jurisdictions? The
state courts have no power to entertain suits by
individuals against a State without its consent. Then
how does the Circuit Court, having only concurrent
jurisdiction, acquire any such power? It is true that
the same qualification existed in the judiciary act of
1789, which was before the court in Chisholm v.
Georgia, and the majority of the court did not think
that it was sufficient to limit the jurisdiction of
the Circuit Court. Justice Iredell thought
differently. In view of the manner in which that
decision was received by the country, the adoption of
the Eleventh Amendment, the light of history and the
reason of the thing, we think we are at liberty to
prefer Justice Iredell's views in this regard.77

Justice Bradley's opinion was very similar to that of
Justice Iredell in Chisholm. He observed that a cause of
action by an individual against a state for debt was
unknown before Chisholm. The state and federal courts

77 Hans, 15-19.
exercised concurrent jurisdiction over such actions which meant that the law would be the same in both courts. No state allowed such suits. As pointed out by Justice Bradley, the Eleventh Amendment “expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the supreme court [in Chisholm].” Justice Bradley was rated in The First One Hundred Justices as one of the “near great” justices of the Supreme Court.

The Hans case has encountered much criticism due to its use in barring federal question suits against states. Although the Eleventh Amendment had no application in Hans, the case law later interpreted it as an Eleventh Amendment case. In fact, Professor Melvyn R. Durchslag, asserts that Hans is “the seminal Eleventh Amendment case, the case from which all significant Eleventh Amendment doctrine now flows, and to which both supporters and critics of Eleventh Amendment jurisprudence look to begin their discussion.”

One recent book criticizing Hans is Narrowing the Nation’s Power: The Supreme Court Sides with the States by

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78 Ibid, 11.
John T. Noonan, Jr. The author is a former law professor and judge of the United States Court of Appeals. He has his character Clio say: “As a matter of fact, there is a constitution that Joseph Bradley and his companions in Hans might have been expounding. It’s called the Constitution of the Confederate States of America, adopted March 11, 1861.” More seriously, Noonan argues that sovereign immunity is a common law doctrine that Marshall, Madison, and Hamilton probably believed to be in force. He argues that Chief Justice John Marshall held that the states waived sovereign immunity as to federal questions when they ratified the constitution, citing as his authority Justice Marshall’s opinion in *Cohen v. Virginia*, 19 U.S. 264, 5 L.Ed. 257, 6 Wheat. 264 (1821). *Cohen* was an appeal of Virginia criminal convictions to the United States Supreme Court. The brothers Cohen were convicted of unlawfully selling lottery tickets for the National Lottery in the state of Virginia. It was argued without success that appellate jurisdiction in such a case was barred by the Eleventh Amendment or was otherwise outside the judicial power of the United States. The Eleventh Amendment refers to “any suit in law or equity, commenced or

prosecuted against one of the United States.” An appeal is the continuation of an already existing case and not a new suit being commenced or prosecuted. Justice Marshall ruled that the appeal in Cohens was not a suit in law or equity commenced or prosecuted against Virginia within the meaning of the Eleventh Amendment. He compared the case to appeals against the United States: “The point of view in which this writ of error, with its citation, has been considered uniformly in the Courts of the Union, has been well illustrated by a reference to the course of this Court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favour of the United States into a superior Court, where they have, like those in favour of an individual, been re-examined, and affirmed or reversed. It has never been suggested, that such writ of error was a suit against the United States, and, therefore, not within the jurisdiction of the appellate Court.” The Cohens appeal was not a suit against Virginia to which the

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82 Cohens v. Virginia, 19 U.S. 264, 5 L.Ed. 257, 6 Wheat. 264 (1821), 411-412.
Eleventh Amendment might have some arguable application. The constitutional basis for the Cohens appeal was not original jurisdiction under Article III, Section 2 of the Constitution but Supreme Court appellate jurisdiction. Justice Marshall made no ruling in Cohens that the states waived objection to federal question jurisdiction by ratifying the Constitution or joining the Union.

Likewise, Alexander Hamilton never opined that the states waived objection to federal question jurisdiction by ratifying the constitution. Noonan refers to Federalist No. 80 where Hamilton writes about restrictions on state power in the constitution such as imposing duties on imported articles and emission of paper money. He states that some enforcement power is implied and that this “power must either be a direct negative on the State laws, or an

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83 Article III, Section 2 of the Constitution reads in relevant part as follows: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
authority in the federal courts to overrule such as might be in manifest contravention of the articles of Union. ... The latter appears to have been thought by the convention preferable to the former." Hamilton made his opinion about sovereign immunity clear in Federalist No. 81: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states." The general remarks of Federalist 80 are sharpened by the more specific remarks in Federalist 81 and make clear Hamilton’s unambiguous opinion.

Noonan admits that James Madison never made an argument that the states waived objection to federal question jurisdiction. His argument that Hans was wrongly decided will not hold water.

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84 The Federalist Papers, No. 80, 476.
85 The Federalist Papers, No. 81, 487-488.
CHAPTER VI. POST-HANS CASES INVOLVING SOVEREIGN IMMUNITY AND ABROGATION OF SOVEREIGN IMMUNITY

In 1900, the Supreme Court decided another case involving the issue of sovereign immunity. In this case, a corporation chartered by an Act of Congress sued the Treasurer of California in his official capacity.

SMITH V. REEVES

In Smith v. Reeves, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900), the Receivers of the Atlantic and Pacific Railroad Company, a corporation created by an 1866 Act of Congress, brought suit against the Treasurer of California in his official capacity for a recovery of taxes paid. The Court regarded this suit as one against the state of California. Such a suit did not fall within the ambit of the Eleventh Amendment as the railroad company was not a citizen of a state or a citizen or subject of a foreign state. Justice John Marshall Harlan, writing for a unanimous Court, declared that, “[t]he present plaintiffs, as did the plaintiffs in Hans v. Louisiana, base the argument in support of their right to sue the State in the Circuit Court upon the mere letter of the Constitution. We deem it unnecessary to repeat or enlarge upon the reasons given in Hans v. Louisiana why a suit brought against a State by one of its citizens was excluded from the judicial
power of the United States, even it is one arising under
the Constitution and Laws of the United States. They apply
equally to a suit of that character brought against the
State by a corporation created by Congress." \(^{86}\) The case was
dismissed for lack of jurisdiction. Justice Harlan had
written a concurring opinion in *Hans* stating that *Chisholm*,
in his view, was decided correctly in 1793 based on the law
in effect at that time. Justice Harlan was one of the
twelve justices receiving a rating of “great” in *The First
One Hundred Justices*. \(^{87}\)

The Supreme Court also ruled that sovereign immunity
applied to suits in admiralty against states whether in
personum or in rem. In 1921 two such suits came before the
Court for decision.

*EX PARTE NEW YORK, NO. 1*

The case of *Ex Parte New York, No. 1*, 256 U.S. 490; 41
S.Ct. 588; 65 L.Ed. 1057 (1921) was an admiralty suit
against the state of New York. An admiralty case is a case,
civil or criminal, resulting from maritime contracts,
torts, injuries, and offenses done upon or relating to the
sea, navigable streams running into the sea, and the Great

\(^{86}\) *Smith v. Reeves*, 178 U.S. 436, 20 S.Ct. 919, 44 L.Ed. 1140 (1900), 448.

\(^{87}\) Blaustein and Mirsky, 37.
Lakes. The Eleventh Amendment did not apply as it only applies to suits “in law and equity.” This case involved damages to vessels on the Erie canal caused by tugboats and sought in personum relief. In personum relief is money damages. Justice Mahlon Pitney delivered the opinion for a unanimous Court saying, “That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.”

EX PARTE NEW YORK, NO. 2

The case of Ex Parte New York, No. 2, 256 U.S. 503; 41 S.Ct. 592; 65 L.Ed. 1063 (1921) was an action against the steam tug Queen City involving a drowning on the Erie canal allegedly caused by the negligent operation of the tug. The suit sought in rem relief. That is, the suit sought the seizure and sale of the Queen City. An in rem suit is one against property in contradistinction to personal actions for money damages. The Queen City was the property of the

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state of New York. Justice Pitney ruled in favor of New
York noting that permitting a creditor to seize and sell
government property “to collect his debt would be to
permit him in some degree to destroy the government
itself.”89 The Court ruled the Queen City exempt from
seizure by admiralty process in rem due to its ownership by
the state of New York.

In 1934 a suit was brought against Mississippi by the
Principality of Monaco on some old defaulted state bonds.
The Eleventh Amendment did not prohibit this suit.

MONACO v. MISSISSIPPI

Another unsuccessful attempt was made to pierce the
sovereign immunity of the states in the case of Monaco v.
Mississippi, 292 U.S. 313; 54 S.Ct. 745; 78 L.Ed. 1282
(1934). Several holders of seventy year old unpaid
Mississippi bonds donated them to the Principality of
Monaco, which was to use them for charitable purposes.
Monaco then attempted to sue Mississippi to force payment
on the bonds in the Supreme Court of the United States
pursuant to the clause in Section 2 of Article III of the
Constitution providing for jurisdiction in the case of
suits “between a State, or the Citizens thereof, and

89 Ex Parte New York, No. 2, 256 U.S. 503, 41 S.Ct. 592, 65 L.Ed. 1063
(1921), 511.
foreign States, Citizens or Subjects”. The Eleventh Amendment did not apply in this case as Monaco was a foreign state rather than a citizen or subject of a foreign state. A unanimous Court in an opinion by Chief Justice Charles Evans Hughes ruled that an action such as that of Monaco was impossible without the consent of the parties and denied leave to file the suit. Chief Justice Hughes was one of the twelve justices rated as “great” in The First One Hundred Justices.\(^{90}\)

This case was somewhat like Chisholm in that there was a jurisdictional statute permitting the suit, but no justiciable cause of action. Chief Justice Hughes ruled that “States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention.’ The Federalist, No. 81.”\(^{91}\) This language of Chief Justice Hughes occurs in later cases about sovereign immunity. In considering the plan of the convention, the Court cited remarks of James Madison in the Virginia Ratifying Convention in which he stated: “The next case provides for disputes between a foreign state and one of our states, should such a case

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\(^{90}\) Blaustein and Mersky, 37.

\(^{91}\) Monaco v. Mississippi, 292 U.S. 313; 54 S.Ct. 745; 78 L.Ed. 1282 (1934) 322-323
ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made.”\textsuperscript{92} John Marshall expressed similar views in the Virginia Ratifying Convention.\textsuperscript{93}

Another issue concerning the Eleventh Amendment was whether Congress had authority to abrogate the Eleventh Amendment immunity of the states by statute. At first it was thought by many that Congress could do this. The first successful abrogation of Eleventh Amendment immunity was against the state of Alabama.

\textit{PARDEN V. TERMINAL RAILWAY OF ALABAMA}

Citizens of Alabama sued a railway owned by Alabama in the United States District Court to recover damages under the Federal Employers’ Liability Act for injuries sustained while working for the railway. The federal statute abrogated the Eleventh Amendment immunity of Alabama. At issue was whether this statute was constitutional. The Supreme Court ruled it was in a five to four decision in an opinion by Justice William Joseph Brennan, Jr. joined by

\begin{footnotes}
\item[92] 3 Elliot’s Debates, 533.
\item[93] 3 Elliot’s Debates, 557.
\end{footnotes}
Justices Warren, Black, Clark, and Goldberg. Justice White dissented joined by Justices Douglas, Harlan, and Stewart. Justice Brennan was the leader of the liberals on the Court during his tenure from 1956 until 1990. He stated:

“Recognition of the congressional power to render a state sueable under the FELA does not mean the immunity doctrine, as embodied in the Eleventh Amendment with respect to citizens of other States and as extended to the State’s own citizens by the Hans case, is here being overridden. It remains the law that a state may not be sued by an individual without its consent. Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as is authorized by that Act.”

The dissent argued that abrogation was a matter for the Congress instead of the Court. If Congress decided to condition privileges within its control on the forfeiture of constitutional rights “its intention to do so should appear with unmistakable clarity.”

The rationale of the Parden dissenters came to be the majority view in our next case.

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95 Ibid, 199.
96 In 1999, Parden was overruled in College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666; 119 S. Ct. 2219; 144 L. Ed. 2d 605 (1999).
This was a suit by employees of Missouri state agencies to recover overtime compensation due under the Fair Labor Standards Act. Justice Douglas wrote the opinion of the Court joined by Justices Burger, White, Blackmun, Powell and Rehnquist. He ruled that Missouri could not be sued under the FELA unless Congress indicated “in some way by clear language that the constitutional immunity was swept away.” The Court dismissed the case.

Justice Marshall concurred in a separate opinion joined by Justice Stewart. He opined that “common law” sovereign immunity was not a bar and the FLSA did effectively lift the state’s immunity from private suit. He interpreted the Eleventh Amendment as barring the suit: “On its face the Amendment, of course, makes no mention of a citizen's attempt to sue his own State in federal court, the situation with which we deal here. Nevertheless, I believe it clear that the judicial power of the United States does not extend to suits such as this, absent consent by the State to the exercise of such power.”

98 Ibid, 290-291.
Justice Marshall suggested that the employees might seek relief in the state courts of Missouri: “This is not to say, however, that petitioners are without a forum in which personally to seek redress against the State. n12 Section 16 (b)‘s authorization for employee suits to be brought ‘in any court of competent jurisdiction’ includes state as well as federal courts. ... [S]ince federal law stands as the supreme law of the land, the State’s courts are obliged to enforce it, even if it conflicts with state policy.”99

Justice Brennan dissented. He viewed the Eleventh Amendment differently from the other members of the Court. He said any “statement that we may infer from the Eleventh Amendment a ‘constitutional immunity,’ ante, at 285, protecting States from § 16 (b) suits brought in federal court by its own citizens, must be rejected. I emphatically question, as I develop later, that sovereign immunity is a constitutional limitation upon the federal judicial power to entertain suits against States. Indeed, despite some assumptions in opinions of this Court, I know of no concrete evidence that the framers of the Amendment thought, let alone intended, that even the Amendment would ensconce the doctrine of sovereign immunity. On its face, the Amendment says nothing about sovereign immunity but

enacts an express limitation upon federal judicial power.” His view was that Congress validly exercised its authority under the Commerce Clause and a “common-law shield of sovereign immunity” was no defense.\(^{100}\) He said the trend since *Hans* was against enforcement of governmental immunity “except when clearly required by explicit textual prohibitions, as in the Eleventh Amendment”\(^{101}\)

In 1985 the validity of the *Hans* doctrine was questioned in the Supreme Court for the first time after being the law in numerous cases for ninety-five years.

**ATASCADERO STATE HOSPITAL v. SCANLON**

In *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985), a disappointed job applicant alleging handicap discrimination sued a state hospital and the California Department of Mental Health in United States District Court. The District Court dismissed the case on sovereign immunity grounds. The Court of Appeals reversed the District Court. The Supreme Court reversed the Court of Appeals. The majority opinion by Justice Powell joined by Justices Burger, White, Rehnquist, and O’Connor held that the suit was proscribed by the

\(^{100}\) Ibid., 323.
\(^{101}\) Ibid, 290-291.
Eleventh Amendment as the Rehabilitation Act fell short of expressing unequivocal intent to abrogate California’s Eleventh Amendment immunity. In his dissenting opinion joined by Justices Marshall, Blackmun, and Stevens, Justice Brennan attacked the precedent of *Hans v. Louisiana* arguing that the case rested on “misconceived history and misguided logic.” He viewed sovereign immunity as “an anachronistic and unnecessary remnant of a feudal legal system.” He argued that the federal question jurisdiction in the federal courts under Article III is as broad as the lawmaking authority of Congress. The Brennan dissent initiated a major controversy between liberals and conservatives which continues still. Judge Brennan’s views reflected those of most academicians.

In the next case, the Supreme Court split four to four over whether to overrule *Hans*.

**WELCH v. TEXAS DEPT. OF HIGHWAYS AND PUBLIC TRANSPORTATION**

*Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) was a case in which an employee of the Texas state highway and public transportation department was injured while working on a state-operated ferry dock. She

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filed suit in the United States District Court for the Southern District of Texas against the department and the state under a federal statute that applied the remedial provisions of the Federal Employers' Liability Act (FELA) (45 USCS 51 et seq.) to seamen and provided that any seaman who suffered personal injury in the course of his or her employment could maintain an action for damages at law in federal court. The District Court dismissed the action as barred by the Eleventh Amendment. The Court of Appeals affirmed and the Supreme Court affirmed the Court of Appeals ruling that the Eleventh Amendment barred in personum suits in admiralty against unconsenting states brought by private citizens and the general language of the federal statute was insufficient to abrogate the Eleventh Amendment immunity of Texas. To the extent that Parden was inconsistent with the requirement that an abrogation of Eleventh Amendment immunity must be in unmistakably clear language, it was overruled. Interestingly, the Court stated in note 14 that “the principle that States cannot be sued without their consent is broadly consistent with the Tenth Amendment.” This foreshadowed the Court’s later ruling in Alden that sovereign immunity was embedded in the Tenth Amendment.
The Court split four to four on whether to overrule *Hans* with Justices Brennan, Marshall, Blackmun, and Stevens being in favor of overruling the case. They quote Professor John V. Orth of the University of North Carolina School of Law as follows: "By the late twentieth century the law of the Eleventh Amendment exhibited a baffling complexity. ... 'The case law of the eleventh amendment is replete with historical anomalies, internal inconsistencies, and senseless distinctions.' Marked by its history as were few other branches of constitutional law, interpretation of the Amendment has become an arcane specialty of lawyers and federal judges."103

The next case is the last Supreme Court case before *Seminole Tribe* in which an abrogation of Eleventh Amendment immunity received judicial approval.

**PENNSYLVANIA V. UNION GAS CO.**

*Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) was an environmental “superfund” case against Union Gas Co. to recover the cleanup costs of coal tar pollution of a creek in Pennsylvania. Union Gas Co. filed a third party complaint against the Commonwealth of Pennsylvania which it alleged

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was responsible for some of the cleanup cost. In a complicated decision, Justices Brennan, Marshall, Blackmun, Stevens and Scalia decided the statutory scheme allowed a suit for money damages in federal court against Pennsylvania. This raised the issue as to whether Congress had the authority to abrogate the sovereign immunity of Pennsylvania. Justices Brennan, Marshall, Blackmun, Stevens and White ruled that Congress did have such authority when legislating pursuant to the Commerce Clause. Justice White did not favor overruling *Hans*, however. In 1996, *Seminole Tribe* overruled *Union Gas*.

The next case concerns a suit by an Alaskan native village against the state of Alaska. This type of suit is not prohibited by the language of the Eleventh Amendment due to no diversity of citizenship.

*BLATCHFORD V. NATIVE VILLAGE OF NOATAK*

In *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), an Alaskan native village sued the state of Alaska in a dispute over annual revenue-sharing payments. The Supreme Court in an Opinion by Justice Scalia joined by Justices Rehnquist, White, O’Connor, Kennedy, and Souter held the suit barred by the sovereign immunity of the state of Alaska. Justice
Blackman filed a dissenting opinion joined by Justices Marshall and Stevens.

Justice Scalia expounds the judicial views which are the very heart of the so-called federalism revolution of the Rehnquist Court in the following lengthy quote:

“Despite the narrowness of its terms, since Hans v. Louisiana, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468, 472, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987) (plurality opinion); Employees of Dept. of Public Health and Welfare of Mo. v. Department of Public Health and Welfare of Mo., 411 U.S. 279, 290-294, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973) (MARSHALL, J., concurring in result); and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the ‘plan of the convention.’ See Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304, 109 L. Ed. 2d 264, 110 S. Ct. 1868 (1990); Welch, supra, at 474 (plurality opinion); Atascadero State Hospital v. Scanlon, 473 U.S. 234, 238, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985); Penhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984).”

He thus announces the new approach of the conservatives on the Rehnquist Court to sovereign immunity and the Eleventh Amendment. The later cases are not much of a surprise after reading this one carefully. Although Justice Scalia is the

great literalist of the Court, he abandoned the plain
meaning of the text approach to interpreting Eleventh
Amendment in Blatchford and instead he gave it a meaning
completely outside its text but within the context of its
historical meaning as overruling Chisholm. The Eleventh
Amendment now means the states entered the Union with their
sovereignty intact, that they now have sovereign immunity,
and no abrogation of that immunity of a state by Congress
will be sustained unless the state expressly waived
sovereign immunity or a waiver by the states was made
within the “plan of the Convention.” This approach to the
Eleventh Amendment is now the law of the United States.

The Indians argued that the traditional principles of
immunity set forth in Hans did not apply to suits by
sovereigns like Indian tribes and even if they did, the
states consented to suits by tribes in the "plan of the
convention." The Court found these arguments to be without
merit. The dissent found the Indians to have a valid
federal cause of action.

The following case is a suit by the Seminole Tribe
against the state of Florida. The Eleventh Amendment does
not apply as there is no diversity of citizenship.
SEMINOLE TRIBE V. FLORIDA

The sovereign immunity of states was revisited by the Rehnquist Court in *Seminole Tribe v. Florida*, 517 U.S. 44; 116 S.Ct. 1114; 134 L.Ed.2d 252 (1996) in which the Seminole Tribe of Florida sued Florida and its Governor pursuant to 25 U.S.C. 2710(d)(1)(C) (part of the Indian Gaming Regulatory Act enacted pursuant to the Indian Commerce Clause) to compel good faith negotiations to form a Tribal-State compact concerning gaming. Such a suit was provided for by the Act. Florida defended based on sovereign immunity. At issue was whether the Congress could abrogate Florida’s immunity from suit. The Court sharply divided on this issue and in a five to four decision upheld the sovereign immunity (referred to as Eleventh Amendment immunity) of the State. Chief Justice Rehnquist delivered the opinion of the Court joined by Justices O’Connor, Scalia, Kennedy, and Thomas. Justice Stevens filed a dissenting opinion. Justice Souter filed a lengthy dissenting opinion with historical commentary joined by Justices Ginsburg and Breyer. The Court held that abrogation of Eleventh Amendment immunity was impossible in enforcing any clause in the Constitution earlier than the
Fourteenth Amendment.\textsuperscript{105} The Court interpreted the Eleventh Amendment as including state sovereign immunity following \textit{Blatchford}: “Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, ‘we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.’ \textit{Blatchford v. Native Village of Noatak}, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991).”\textsuperscript{106} The Court overruled \textit{Union Gas}: “both the result in Union Gas and the plurality rationale depart from our established understanding of the Eleventh Amendment and undermine the accepted function of Article III. We feel bound to conclude that Union Gas was wrongly decided and that it should be, and now is, overruled.”\textsuperscript{107} The majority comments on the dissent as follows: “The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since \textit{Hans} (other than \textit{Union Gas}) that supports its view of state sovereign immunity, instead relying upon the now-discredited decision in \textit{Chisholm v. Georgia}, 2 U.S. 419, 2

\textsuperscript{106} Ibid, 54.
\textsuperscript{107} Ibid.
Dall. 419, 1 L. Ed. 440 (1793). See, e.g., post, at 53, n. 47. Its undocumented and highly speculative extralegal explanation of the decision in Hans is a disservice to the Court’s traditional method of adjudication.”

The dissent of Justice Stevens characterized state sovereign immunity as a matter of federal common law modifiable by Congress at its pleasure. In an eighty-five page dissent joined by Justices Breyer and Ginsburg, Justice Souter asserted that the majority decision suffered from three critical errors: a misreading of the Eleventh Amendment, a misunderstanding of how common law doctrines were received at the Founding, and a misunderstanding of the “nature of sovereignty in the young Republic.” Justice Souter argued that the Eleventh Amendment did not apply to federal question cases, that the states at the founding only had a common law sovereign immunity, and the founders were reluctant to constitutionalize common law doctrines. Justice Souter’s dissent displays a very different legal philosophy from his concurrence in Blatchford five years earlier.

Following Seminole Tribe was the famous case of Alden v. Maine in which Justice Marshall’s recommendation in

\[\text{footnote}{108} \text{Ibid, 68-69.} \]
\[\text{footnote}{109} \text{Ibid, 84.} \]
\[\text{footnote}{110} \text{Ibid, 77.} \]
Employees to file federal question cases against states in state court was tested.

**ALDEN V. MAINE**

In *Alden v. Maine*, 527 U.S. 706; 119 S.Ct. 2240; 144 L.Ed.2d 636(1999), the plaintiff sued his employer, the State of Maine, under the Fair Labor Standards Act of 1938 in a state court in Maine as authorized by the federal Act. This suit was not prohibited under the literal terms of the Eleventh Amendment. The State of Maine asserted its sovereign immunity as a defense. The Supreme Court in a five to four decision ruled in favor of Maine in an opinion by Justice Anthony McLeod Kennedy joined by Justices Rehnquist, O’Connor, Scalia and Thomas. Justice Souter filed a dissenting opinion joined by Justices Stevens, Ginsburg, and Breyer. The Court held that Congress could not abrogate the sovereign immunity of a state by Article I legislation. Justice Kennedy explained state immunity from suit in the following words: "The Eleventh Amendment makes explicit reference to the States' immunity from suits 'commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' U.S. Const., Amdt. 11. We have, as a result, sometimes referred to the States' immunity from
suit as ‘Eleventh Amendment immunity.’ The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution’s structure, and its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.111 He argued that the framers chose a Constitution giving Congress the power to regulate individuals but not states. The states under the Constitution had a “residual and inviolable sovereignty.”112 The Eleventh Amendment did not change the Constitution, but merely overruled the erroneous decision of the Supreme Court in Chisholm and restored the original constitutional design. “By its terms, then, the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court.”113 The Article I powers of Congress did not

111 *Alden v. Maine*, 527 U.S. 706; 119 S.Ct. 2240; 144 L.Ed.2d 636(1999), 712-713.
112 Ibid, 715.
include the authority to subject the states to private
suits as an enforcement method in either state or federal
court. Although Parden and Union Gas held state immunity
could be abrogated by Congress, those cases were wrongly
decided and were previously overruled.

The Alden majority ruled for the first time that the
sovereign immunity of the states was encompassed by the
Tenth Amendment. "Any doubt regarding the constitutional
role of the States as sovereign entities is removed by the
Tenth Amendment, which, like the other provisions of the
Bill of Rights, was enacted to allay lingering concerns
about the extent of the national power. The Amendment
confirms the promise implicit in the original document:
'The powers not delegated to the United States by the
Constitution, nor prohibited by it to the States, are
reserved to the States respectively, or to the people.'
U.S. Const., Amdt. 10."\textsuperscript{114}

Justice Souter dissented joined by Justices Stevens,
Ginsburg and Breyer. Justice Souter asserted that "There
is no evidence that the Tenth Amendment constitutionalized
a concept of sovereign immunity as inherent in the notion
of statehood, and no evidence that any concept of inherent

\textsuperscript{113} Ibid, 723.
\textsuperscript{114} Ibid, 713.-714.
sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law.” He argued that natural law was the basis of the Court’s acceptance of state sovereign immunity¹¹⁵: “The Court’s principal rationale for today’s result, then, turns on history: was the natural law conception of sovereign immunity as inherent in any notion of an independent State widely held in the United States in the period preceding the ratification of 1788 (or the adoption of the Tenth Amendment in 1791? The answer is certainly no.”¹¹⁶

Justice Kennedy responded to the argument that he was making use of natural law in the following manner: “Despite the dissent’s assertion to the contrary, the fact that a right is not defeasible by statute means only that it is protected by the Constitution, not that it derives from natural law. Whether the dissent’s attribution of our

¹¹⁵ Black’s Law Dictionary defines natural law as follows: This expression, “natural law,” or jus naturale, was largely used in the philosophical speculations of the Roman jurists of the Antonine age, And was intended to denote a system of rules and principles for the guidance of human conduct which, independently of enacted law or of the systems peculiar to any one people, might be discovered by the rational intelligence of man, and would be found to grow out of and conform to his nature, meaning by that word his whole mental, moral and physical constitution. The point of departure for this conception was the Stoic doctrine of a life ordered “according to nature,” which in its turn rested upon the supposititious existence, in primitive times, of a “state of nature;” that is a condition of society in which men universally were governed solely by a rational and consistent obedience to the needs, impulses, and promptings of their true nature, such nature be as yet undefaced by dishonest, falsehood, or indulgence of the baser passions. Maine, Anc.Law, 50 et seq.; Jus Naturale.

¹¹⁶ Ibid, 763-764.
reasoning and conclusions to natural law results from analytical confusion or rhetorical device, it is simply inaccurate. We do not contend the founders could not have stripped the States of sovereign immunity and granted Congress power to subject them to private suit but only that they did not do so. By the same token, the contours of sovereign immunity are determined by the founders' understanding, not by the principles or limitations derived from natural law."

The next case is one concerning the applicability of the Eleventh Amendment in the context of administrative law.

**FEDERAL MARITIME COMMISSION V. SOUTH CAROLINA STATE PORTS AUTHORITY**

In *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) the Rehnquist Court considered a controversy concerning South Carolina’s port authority which had denied a cruise ship permission to berth in Charleston, South Carolina because its primary business was gambling. This was a case of first impression as to whether state sovereign immunity applied in administrative proceedings.

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117 Ibid, 734.
The Supreme Court in a five to four decision held that it did in an opinion by Justice Clarence Thomas joined by Justices Rehnquist, O’Connor, Scalia, and Kennedy.

The founders did not contemplate the huge federal bureaucracy that later developed. There are no provisions in the Constitution relating to the issue of sovereign immunity in administrative proceedings. Administrative cases are not judicial proceedings but can be termed quasi-judicial proceedings. Justice Thomas quoted *Hans* as ruling that the Constitution was not intended to "raise up" cases against states that were "anomalous and unheard of when the Constitution was adopted." He believed there was great significance in the fact that there were no private suits in administrative proceedings at the time of the founding or for many years thereafter. The earliest such case found in the briefs filed with the Court did not occur until 1918. The Federal Maritime Commission (FMC) had authority to order payment to an injured private party. If its order was not obeyed it could assess a civil penalty against South Carolina of up to $25,000.00 per day. The orders of the FMC were enforceable in United States District Court in proceedings in which state sovereign immunity was not a

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defense. The Supreme Court dismissed the case stating:

“Although the Framers likely did not envision the intrusion on state sovereignty at issue in today’s case, we are nonetheless confident that it is contrary to the constitutional design.”

Justice Stevens dissented arguing that the Eleventh Amendment restricted the courts’ diversity jurisdiction but left intact the holding in *Chisholm* that the Court had personal jurisdiction over Georgia. Justice Breyer dissented joined by Justices Stevens, Souter, and Ginsburg stating, “The Court holds that a private person cannot bring a complaint against a State to a federal administrative agency where the agency (1) will use an internal adjudicative process to decide if the complaint is well founded, and (2) if so, proceed to court to enforce the law. Where does the Constitution contain the principle of law that the Court enunciates? I cannot find the answer to this question in any text, in any tradition, or in any relevant purpose.”

Justice Breyer felt the federalism decisions of the Rehnquist Court unduly restricted relationships between citizens and states and said: “Today's decision reaffirms the need for continued

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119 Ibid, 769.
120 Ibid, 772.
dissent."\textsuperscript{121}

In the next case, the Court again found an instance in which the sovereign immunity of the states could be abrogated by Article I legislation.

\textit{CENTRAL VA. COMMUNITY COLLEGE V. KATZ}

Central Va. Community College v. Katz, 546 U.S. 356, 126 S.Ct. 990, 163 L.Ed.2d 945 (2006) concerned a preferential transfer claim by the Bankruptcy Trustee for Wallace’s Bookstores, Inc. against Central Virginia Community College. A preferential transfer is a transfer by a debtor to a creditor occurring within sixty days of bankruptcy while the debtor is insolvent and which enables the creditor to receive more than it would have through a Chapter 7 liquidation. Although the Court in \textit{Seminole Tribe} had held that Congress could not abrogate the sovereign immunity of a State by Article I legislation, it carved out an exception in the case of preferential transfers in bankruptcy. In 1787, various states had bankruptcy laws generally providing that a debtor could receive a discharge upon turning over all his property to the bankruptcy trustee. A problem arose in that some debtors who had surrendered all their property and received a discharge of

\textsuperscript{121} Ibid, 788.
their debts then suffered imprisonment by other states for
debt. Some states refused to extend comity (legal
recognition) to bankruptcy discharges of other states. The
Constitution provided for the establishment of a federal
bankruptcy system that would be uniform throughout the
United States and avoid the problem of one state not
extending comity to the bankruptcy laws of another.
Congress implemented the first permanent federal bankruptcy
law in 1898. However the majority, in an Opinion written by
Justice John Paul Stevens, joined by Justices O’Connor,
Souter, Ginsburg, and Breyer believed that history taught
an intent on the part of the founders to waive state
sovereign immunity in this circumstance. The states waived
immunity by ratifying the Constitution or joining the
Union. The argument made was almost the same as the
prevailing one in Union Gas, but involved the bankruptcy
laws rather than the Commerce Clause. Justice O’Connor, in
one of her last cases before retirement, switched sides and
joined the liberal wing of the Court in this instance.

Justice Thomas dissented joined by Justices Roberts,
Scalia and Kennedy. Justice Thomas was not impressed by
the argument that the framer’s intended to abrogate state
sovereign immunity in bankruptcy cases stating: “The
majority's action today ... is difficult to comprehend.
Nothing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, in contrast to all of the other provisions of Article I, manifests the States' consent to be sued by private citizens."\textsuperscript{122}
CHAPTER VII. STATES SUED IN ANOTHER STATE’S COURT

In *Paulus v. South Dakota*, 52 N.D. 84, 201 N.W. 867 (1924) the plaintiff suffered an injury in a coal mine in North Dakota operated by South Dakota. He sued South Dakota in a North Dakota state court. The North Dakota Supreme Court ruled that South Dakota was immune from suit without its consent.

The United States Supreme Court declined to follow the precedent of *Nathan* and *Paulus* in *Nevada v. Hall*, 440 U.S. 410; 99 S.Ct. 1182; 59 L.Ed.2d (1979) in which Nevada was sued in a California state court for a motor vehicle accident in California involving a Nevada-owned vehicle on official business. Nevada lost the case and was ordered to pay $1,150,000.00. The Court would not extend comity to a Nevada statute limiting damages to $25,000. In a six to three decision the United States Supreme Court ruled that sovereign immunity did not protect Nevada and that California was not required to extend Full Faith and Credit to the Nevada statute limiting damages. Justice John Paul Stevens wrote the majority Opinion joined by Justices Brennan, Stewart, White, Marshall, and Powell. Justice Blackmun wrote a dissenting opinion joined by Chief Justice Burger and Justice Rehnquist. Justice Rehnquist wrote a dissenting opinion joined by Chief Justice Burger. This
case at first seems anomalous and inconsistent with the sovereign immunity rulings of the Rehnquist Court. The main problem is there is little in the Constitution regulating the behavior of states towards each other. As the law stands now, for a state to recognize the sovereign immunity of another state there must be an agreement, either express or implied, between them or a voluntary decision by the forum state to extend comity to the sovereign immunity of the other state. Prof. Ann Woolhandler has published a study of the law in this area in which she argues that *Hall* was wrongly decided.\(^\text{123}\)

Chief Justice John Marshall, for a unanimous Court, decided Indian nations are sovereignties within the United States in *Cherokee Nation v. Georgia*, 30 U.S. 1, 8 L. Ed. 25 (1831). Issues of sovereign immunity have arisen with respect to Indian nations and political subdivisions of states.

CHAPTER VIII. INDIAN NATIONS HAVE SOVEREIGN IMMUNITY BUT POLITICAL SUBDIVISIONS OF STATES DO NOT

In *United States v. United States Fidelity Co.*, 309 US 506, 60 S. Ct. 653; 84 L. Ed. 894 (1940) the United States Supreme Court in an Opinion by Justice Stanley Reed ruled that Indian nations had sovereign immunity and could not be sued except as provided by an act of Congress. With respect to political subdivisions of states such as counties and municipalities, the rule of sovereign immunity does not apply.

*Lincoln County v. Luning*, 133 U.S. 529, 10 S. Ct. 363, 33 L. Ed. 766 (1890) was an action against Lincoln County to pay bonds and coupons. A unanimous Court in an Opinion by Justice David Josiah Brewer ruled that Eleventh Amendment immunity applies only to states themselves and not their political subdivisions. This was a weak case for a sovereign immunity defense as Lincoln County did not have immunity under Nevada state law.

The issue of county immunity was revisited by the Court in *Northern Ins. Co. of N. Y. v. Chatham County*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367, (2006). In this case a drawbridge operated by the County fell and collided with a boat. The Court held, in a unanimous Opinion by Justice Clarence Thomas, that the County was not
acting as an arm of the state in operating the drawbridge
and was not clothed with immunity from suit.

There is one way in which state sovereign immunity can
be penetrated. This is in an action filed by the United
States.
CHAPTER IX. THE UNITED STATES CAN SUE A STATE

The United States can sue a state and the state’s sovereign immunity is not a defense. The first such case was *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920; 34 L.Ed. 336 (1890) although the immunity issue was not raised. In *United States v. Texas*, 143 U.S. 621; 12 S.Ct. 488; 36 L.Ed. 285 (1892), Texas asserted the sovereign immunity defense. The Supreme Court ruled that it had original jurisdiction of the case. It is settled law that the United States can sue a state in either state or federal court and state sovereign immunity is no bar.

The sovereign immunity of the United States has not been seriously questioned other that by Justice James Wilson.
CHAPTER X. THE SOVEREIGN IMMUNITY OF THE UNITED STATES

Chief Justice Jay and Justice Cushing indicated in dicta in *Chisholm* that the United States had sovereign immunity. Justice Wilson made it clear that no republican government, in his opinion, had sovereign immunity. Chief Justice Marshall in dicta in *Cohens v. Virginia* said, “the universally received opinion is that no suit can be commenced or prosecuted against the United States.”124 In *United States v. McLemore*, 45 U.S. 286; 11 L.Ed. 977 (1846) the Supreme Court, in a unanimous decision, ruled that the United States had sovereign immunity. The United States could not be sued or ordered to pay court costs without its consent. This has been the invariable rule ever since. Sovereign immunity for the federal government is undoubtedly correct and of a constitutional nature as Article I, Section 9 of the Constitution states in relevant part: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Justice Scalia dissenting in *Union Gas* stated

Undoubtedly the Constitution envisions the necessary judicial means to assure compliance with the Constitution and laws. But since the Constitution does not deem this to require that private individuals are able to bring claims against the Federal Government for violation of the Constitution or laws, see *United States v. Testan*, 424 U.S. 392, 399-402 (1976); U.S.

124 *Cohens*, 411-412.
Const., Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), it is difficult to see why it must be interpreted to require that private individuals be able to bring such claims against the States. If private initiation of suit against the offending sovereign as such is essential to preservation of the structure, it is difficult to see why it would not be essential at both levels. Indeed if anything it would seem more important at the federal level, since suits against the States for violation of the Constitution or laws can at least be brought by the Federal Government itself, see United States v. Mississippi, supra, at 140-141. In providing federal immunity from private suit, therefore, the Constitution strongly suggests that state immunity exists as well.\(^\text{125}\)

CONCLUSIONS

It is indeed hard to fathom why the States and the Federal government should have different rules with respect to sovereign immunity. They are equal participants in the Federal system. The Supreme Court, except in Chisholm, has consistently ruled that the states have sovereign immunity although many of the decisions have been by sharply divided courts. Our history shows that state sovereign immunity was of constitutional stature from the ratification of the Articles of Confederation until the present time. The Court has fashioned an Eleventh Amendment jurisprudence including state sovereign immunity. The Eleventh Amendment has been interpreted in many ways over the years and has a very complex and confusing case law. Prof. Jesse H. Choper commented about the Eleventh Amendment case law as follows: “The Court's Eleventh Amendment jurisprudence has come in for heavy scholarly criticism. It has been called unconstitutional, anachronistic, based on discredited legal principles, and inconsistent with constitutional text, structure, and history. It is fair to say that, in general, scholarship in the federal courts area has been critical of the justifications for the doctrine of state sovereign
immunity, even in its pre-Rehnquist Court incarnations."126

The history of sovereign immunity given early in this thesis should help to clarify the understanding of this concept. The future for sovereign immunity and the Eleventh Amendment could be rocky. Justice David Hackett Souter joined by Justices Stevens, Ginsburg, and Breyer in Alden says as much,

The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking. The Court began this century by imputing immutable constitutional status to a conception of economic self-reliance that was never true to industrial life and grew insistently fictional with the years, and the Court has chosen to close the century by conferring like status on a conception of state sovereign immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting."127

Justice Stevens joined by Justices Stevens, Ginsburg, and Breyer was of the opinion that some recent federalism decisions of the Court were not entitled to respect, deference, or *stare decisis*:

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that

127 *Alden*, 814.
opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. 

*Stare decisis*, furthermore, has less force in the area of constitutional law. ... The kind of judicial activism manifested in cases like *Seminole Tribe, Alden v. Maine, Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999), represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.”

One should hope that the law in this area would stabilize and be determined by legal rather than political considerations.

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