



3-1-2000

Eleventh Amendment: Unfinished Business

William A. Fletcher

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

Recommended Citation

William A. Fletcher, *Eleventh Amendment: Unfinished Business*, 75 Notre Dame L. Rev. 843 (2000).

Available at: <http://scholarship.law.nd.edu/ndlr/vol75/iss3/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

ARTICLES

THE ELEVENTH AMENDMENT: UNFINISHED BUSINESS

*William A. Fletcher**

I graduated from law school in 1975. While in law school, I took federal courts and as much constitutional law as I could, and I wrote a student note on a federal courts topic. But when I graduated, I had never heard of the Eleventh Amendment. I knew the Amendment must exist because I had studied the Fourteenth Amendment, and even the Thirteenth. But I knew as little about the Eleventh Amendment as about the Twelfth. (I still know nothing about the Twelfth.)

There was very little academic writing on the Eleventh Amendment in the mid-1970s. Professor Jacobs published a historical study in 1972;¹ Professor Nowak published an article in 1975;² and Professor Tribe published an article in 1976.³ Professor Field did not publish her prescient articles on the Amendment until 1978.⁴ When I was a

* Judge, United States Court of Appeals for the Ninth Circuit; Richard W. Jennings, Jr., Professor of Law Emeritus, University of California, Berkeley, School of Law (Boalt Hall).

This Article is a slightly expanded version of a talk delivered to the Federal Courts Section of the Annual Meeting of the American Association of Law Schools in January of 2000. I would like to thank my law clerks, Matti Fromson, Freya McCamant, Kim Sayers-Fay, and Sherri Sokeland, for their very helpful comments and editing suggestions.

1 See CLYDE EDWARD JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972).

2 See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

3 See Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

4 See Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Part One*]; Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition*

law clerk during October Term of 1976, I learned for the first time that Justice Brennan had a "position" on the Eleventh Amendment.⁵ The position seemed sensible (if a little odd) to me at the time, but I was not sure how much practical importance it had. *Edelman v. Jordan*⁶ had been decided in the spring of 1974, and *Fitzpatrick v. Bitzer*⁷ in the spring of 1976, but their import was not apparent, at least not to me.

That time is scarcely imaginable now. There has been an avalanche of excellent academic writing on the Eleventh Amendment since then, much of it by the contributors to this Symposium. Further, although the Amendment was ratified over two hundred years ago, the Supreme Court has decided more Eleventh Amendment cases in the last twenty-five years than in the entire period before that. Some, but by no means all, of the judicial landmarks since 1976 have been *Pennhurst State School & Hospital v. Halderman*⁸ in 1984, holding that the *Ex parte Young*⁹ fiction did not permit injunctions to enforce state law;¹⁰ Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*¹¹ in 1985, advancing for the first time in a judicial opinion what has come to be known as the "diversity explanation";¹² *Welch v. Texas Department of Highways & Public Transportation*¹³ in 1987, holding that the Jones Act did not clearly indicate a congressional intent to subject the states to provisions of the Federal Employers' Liability Act;¹⁴ *Pennsylvania v. Union Gas Co.*¹⁵ in 1989, holding that Congress has the power under the Commerce Clause to abrogate the protection of the Eleventh Amendment; *Hilton v. South Carolina Public Railways Commission*¹⁶ in 1991, holding that the Federal Employers' Liability Act creates a cause of action against a state in state court but not in federal court; *Blatchford v. Native Village of Noatak*¹⁷ in 1991, holding that the

of Suit upon the States, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, *Congressional Imposition*].

5 See *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (Brennan, J., dissenting).

6 415 U.S. 651 (1974).

7 427 U.S. 445 (1976).

8 465 U.S. 89 (1984).

9 209 U.S. 123 (1908).

10 See *Pennhurst State Sch.*, 465 U.S. at 106.

11 473 U.S. 234 (1985).

12 See *id.* at 247 (Brennan, J., dissenting).

13 483 U.S. 468 (1987).

14 45 U.S.C. §§ 51-60 (1994).

15 491 U.S. 1 (1989).

16 502 U.S. 197 (1991).

17 501 U.S. 775 (1991).

Eleventh Amendment bars an Indian tribe from suing a state; *Seminole Tribe v. Florida*¹⁸ in 1996, overruling *Union Gas* and holding that Congress does not, after all, have the power under the Commerce Clause to abrogate the Eleventh Amendment; and *Idaho v. Coeur d'Alene Tribe*¹⁹ in 1997, holding that an Indian tribe is barred by the Eleventh Amendment from seeking injunctive relief in federal court in a suit to establish title to land.

Last Term, the Supreme Court decided three more Eleventh Amendment cases: *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁰ holding that the federal Patent and Plant Variety Protection Remedy Clarification Act²¹ was passed under the Commerce and Patent Clauses rather than the Fourteenth Amendment, and that it does not abrogate the protection of the Eleventh Amendment; *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,²² holding that the federal Trademark Remedy Clarification Act²³ was not "appropriate legislation" under Section 5 of the Fourteenth Amendment and does not abrogate the protection of the Eleventh Amendment; and *Alden v. Maine*,²⁴ following Professor Vázquez's recommendation²⁵ and holding that Congress does not have any greater power to subject a state to suit under federal law in state court than in federal court, and that the Eleventh Amendment bars suit in state court under the Fair Labor Standards Act.²⁶ This Term, the Court has already decided *Kimel v. Florida Board of Regents*,²⁷ holding that the federal Age Discrimination in Employment Act of 1967²⁸ is not "appropriate legislation" under Section 5 of the Fourteenth Amendment. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,²⁹ in which the Court is asked to decide whether the Eleventh Amendment protects a state against a suit brought by a private individ-

18 517 U.S. 44 (1996).

19 521 U.S. 261 (1997).

20 119 S. Ct. 2199 (1999).

21 35 U.S.C. §§ 271(h), 296 (1994).

22 119 S. Ct. 2219 (1999).

23 Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified as amended in scattered sections of 15 U.S.C.).

24 119 S. Ct. 2240 (1999).

25 Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1283 (1997).

26 29 U.S.C. §§ 201-19 (1994 & Supp. III 1997).

27 120 S. Ct. 631 (2000).

28 29 U.S.C. §§ 621-34 (1994 & Supp. III 1997).

29 119 S. Ct. 2391 (1999) (granting cert. from *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998)).

ual on behalf of the United States under the federal *qui tam* statute, still awaits decision.

I will try to answer three questions today: First, why now? What has changed to bring the Amendment, for the first time in its history, to center stage of American constitutional development? Second, what is the current state of the law? Third, what is the Court's unfinished business?

I. WHY NOW?

The three developments most responsible for the recent emergence of Eleventh Amendment jurisprudence are, first, the adoption of the Fourteenth Amendment after the Civil War; second, the Warren Court revolution, most clearly exemplified by *Brown v. Board of Education*;³⁰ and third, the expansion of federal statutory obligations imposed on the states, both in cooperative and not-so-cooperative federalism.

First, the Fourteenth Amendment imposed substantial federal constitutional obligations directly on the states. As we know, those obligations were largely ignored for several decades, and when first enforced at the end of the nineteenth century, they took the form of substantive due process restrictions on the ability of the states to pass economic legislation. Judge Friendly has reminded us that because of this earlier meaning of the Fourteenth Amendment, *Ex parte Young*, the primary mechanism of enforcing the obligations of the Fourteenth Amendment's Due Process Clause, was the "bête noir of the liberals" in the 1920s.³¹ But whether used to curb Progressive economic legislation of the states in the early years of the century or to protect individual rights against abuses by the states in the second half of the century, the Fourteenth Amendment laid the foundation for the exercise of federal judicial power against the states.

Second, *Brown* marked the beginning of the Warren Court's vigorous expansion of equal protection and due process protections for individuals against the states under the Fourteenth Amendment. Further, and probably more important for our purposes, *Brown* set the stage for remedial law to come—for the routine enforcement of affirmative injunctions against state actors under *Ex parte Young*. In their earlier incarnation, *Ex parte Young* injunctions were classic negative injunctions, merely ordering state officers to cease illegal activity. In their late twentieth-century incarnation—in school busing, prison reform, and other cases—*Ex parte Young* injunctions have typically

30 347 U.S. 483 (1954).

31 HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 3 n.7 (1973).

been affirmative injunctions, ordering state officers to perform specific acts.³² Affirmative injunctions are, if understood in terms of common law and equitable doctrines, the most intrusive form of relief. There is an obvious irony in the fact that such injunctions are permitted under current Eleventh Amendment doctrine while damages are forbidden, for affirmative injunctions were traditionally seen as more intrusive than damages at law and negative injunctions in equity. Indeed, because of the intrusiveness of affirmative injunctions, there may be some danger to the continuation of an unqualified *Ex parte Young* principle under the current Supreme Court's jurisprudence.

Third, the federal government during the twentieth century has increasingly sought to regulate the states under federal statutes. Some, such as the Federal Employers' Liability Act³³ and the federal Fair Labor Standards Act,³⁴ have been on the books for many years. Others, such as the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)³⁵ and the federal program of Supplemental Security Income for Aged, Blind, and Disabled,³⁶ have either been recently enacted or recently amended. As I will argue in a moment, the most important part of the Court's unfinished business is to arrive at a proper understanding of the place of such statutes in the federal structure.

The combination of these three factors has produced an enormous number of decisions as the Supreme Court has tried to sort out the proper relationships between the federal and state governments, between state and local governments, between federal and state courts, between federal and state law, between federal constitutional and federal statutory law, between Article-I-based and Fourteenth-

32 Sometimes the affirmative injunctions are straightforward orders to do specific things in accordance with federal law in the future. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). Many lower court prison reform cases also support this proposition. Occasionally, they are orders to act affirmatively in the future to cure constitutional violations that occurred in the past. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977).

33 45 U.S.C. §§ 51-60 (1994). For cases involving this statute, see *Hilton v. South Carolina Public Railway Commission*, 502 U.S. 197 (1991), *Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 469 (1987), *Parden v. Terminal Railway*, 377 U.S. 184 (1964), and *United States v. Darby*, 312 U.S. 100 (1941).

34 29 U.S.C. §§ 201-19 (1994). For cases involving this statute, see *Alden v. Maine*, 119 S. Ct. 2240 (1999), *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and *National League of Cities v. Usery*, 426 U.S. 833 (1976).

35 42 U.S.C. §§ 9601-75 (1994 & Supp. III 1997). See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), for a case involving this statute.

36 42 U.S.C. §§ 1381-85 (1994 & Supp. III 1997). See *Edelman v. Jordan*, 415 U.S. 651 (1974), for a case involving this statute.

Amendment-based law, between governmental and private sectors, and among various kinds of judicial remedies. As is clear from the three decisions last Term, from the cases on the calendar this Term, and from the cases now being decided in the lower courts, the Supreme Court is still sorting out these relationships.

II. WHERE ARE WE?

The actual text of the Eleventh Amendment, of course, says very little. Those who subscribe to the "diversity explanation" believe that the Amendment does no more than require a narrow construction of the state-citizen diversity clause of Article III, Section 2; under this reading, the Amendment bars nothing, and state sovereign immunity must be found elsewhere in the Constitution.³⁷ Those who, on the other hand, subscribe to a "prohibition theory" believe that the text of the Amendment prohibits the exercise of jurisdiction; under this reading, the Amendment bars federal court jurisdiction, but only when an out-of-state or foreign citizen sues a state in law or equity.³⁸ Under either reading of the Amendment, the text does not bar a suit by any plaintiff except an out-of-state or foreign citizen, does not bar a suit not brought in law or equity, and does not bar any suit brought in state court.

Under current law, however, the bar is extremely broad. The Amendment (or the sovereign immunity principle for which it stands) bars suit against states brought not only by out-of-state and foreign individuals, but also by in-state individuals,³⁹ by Indian tribes,⁴⁰ and by

37 For an adumbration of the diversity explanation, see Field, *Part One*, *supra* note 4, and Field, *Congressional Imposition*, *supra* note 4. For the first two fully argued versions of the diversity explanation, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) [hereinafter Fletcher, *Historical Interpretation*], and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983), and see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987), William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989), Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988), James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998), and Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling Hans v. Louisiana*, 57 U. CHI. L. REV. 1260 (1990).

38 See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989).

39 See *Hans v. Louisiana*, 134 U.S. 1 (1890).

foreign countries.⁴¹ The Amendment bars a suit not only in law and equity, but also in admiralty.⁴² And the Amendment bars a suit not only in federal court, but also in state court.⁴³ Further, although an Eleventh Amendment defense can be waived by a state, the Amendment "sufficiently partakes" of subject matter jurisdiction that a state may assert an Eleventh Amendment defense for the first time on appeal.⁴⁴

Despite the breadth of the Amendment's bar, certain fictions permit suits as a practical matter by defining "state" more narrowly for purposes of the Eleventh Amendment than for purposes of the Fourteenth Amendment. As a result of the modern Court's continuing adherence to its 1890 decision in *Lincoln County v. Luning*,⁴⁵ local governments, including cities and counties, are not part of a state for purposes of the Eleventh Amendment, even though the action of a local government is state action for purposes of the Fourteenth Amendment. Further, under *Ex parte Young*, as interpreted by *Edelman*, a state officer sued for prospective (i.e., injunctive) relief under federal law is not part of the state for purposes of the Eleventh Amendment, even though the rationale for the suit is that the officer's behavior was state action under the Fourteenth Amendment.⁴⁶ Finally, a state officer may be sued individually for damages, at least when the officer has committed a so-called "constitutional tort," even though the rationale for the suit, as above, is that the officer's behavior was state action under the Fourteenth Amendment.⁴⁷

Under *Fitzpatrick v. Bitzer*,⁴⁸ Congress may abrogate the protection of the Eleventh Amendment altogether by clearly stating its intent to do so and by passing a statute that is "appropriate legislation" under Section 5 of the Fourteenth Amendment.⁴⁹ If Congress has abrogated the Eleventh Amendment under Section 5, judicial remedies are not limited to the prospective relief available under *Ex parte Young* and

40 See *Blatchford v. Native Village*, 501 U.S. 775 (1991).

41 See *Monaco v. Mississippi*, 292 U.S. 313 (1934).

42 See *Ex parte New York*, 256 U.S. 490 (1921). But see *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

43 See *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

44 *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974).

45 133 U.S. 529 (1890).

46 See *Edelman*, 415 U.S. at 664.

47 *Monroe v. Pape*, 365 U.S. 167, 172 (1961); see also *Kentucky v. Graham*, 473 U.S. 159, 165-176 (1985); *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974).

48 427 U.S. 445, 456 (1976).

49 It appears that Congress may also abrogate the 11th Amendment when legislating under Section 2 of the 15th Amendment. See *City of Rome v. United States*, 446 U.S. 156 (1980).

Edelman or to damage relief against officers sued individually for constitutional torts. Under *Seminole Tribe*, however, Congress may not abrogate the protection of the Eleventh Amendment by passing a statute under the Commerce Clause or other provisions of Article I of the Constitution.

III. UNFINISHED BUSINESS

Despite its prodigious work over the past quarter century, the Court still has unfinished business. Some of it amounts to little more than tidying up, filling in the spaces between already-decided cases. But some of it is unfinished in a more fundamental sense, for some important cases have yet to be decided, and others may have been decided incorrectly. I will start with the small and work toward the large.

First, the Court needs to clarify what it meant in *Edelman* in holding that an Eleventh Amendment defense may be raised for the first time on appeal. *Edelman* is now commonly read (or misread) to mean that the Amendment may be raised late in the proceedings before the trial court or for the first time on appeal, without regard to whether it could have been raised earlier and without regard to whether the state's attorney had the power under state law to waive it. But under *Edelman*, we should probably ask not only *when* the defense was first asserted, but also *by whom* it was asserted. *Edelman* relied on *Ford Motor Co. v. Department of Transportation*⁵⁰ to support its holding that the defense may be raised for the first time on appeal. *Ford Motor Co.* did hold that the defense could be asserted for the first time on appeal, but only because the state Attorney General, who had litigated the case in the trial court, did not have the power to waive it. Indeed, *Ford Motor Co.* stated explicitly that, if the Attorney General had had the power under state law to waive the Eleventh Amendment, he would have done so by failing to assert it in a timely fashion.⁵¹

Second, the Court may wish to decide whether the states and their local governments should be treated equally for purposes of the

50 323 U.S. 459 (1945).

51 See *id.* at 467. Justice Kennedy has recently raised this issue, arguing in a concurrence in *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 393 (1998), that a state may waive the 11th Amendment by removing a suit from state to federal court. Indeed, Justice Kennedy would actually go further than *Ford Motor Co.* and would hold that an attorney can waive the 11th Amendment by removing to federal court (or, by extension, by failing to assert the 11th Amendment in a suit already in federal court), irrespective of whether the attorney was specifically authorized under state law to waive the Amendment. See *id.* at 397 (Kennedy, J., concurring); see also *Hill v. Blind Indus.*, 179 F.3d 754 (9th Cir. 1999) (adopting Justice Kennedy's approach).

Eleventh Amendment. *Lincoln County v. Luning*⁵² was based on an early conception of a city (and, by extension, a local government) as a corporation independent of the state,⁵³ a conception that has survived anachronistically in current Eleventh Amendment law. But assuming equal treatment, we have to ask what form the equality would take. Would the states' sovereign immunity come to look like that of local governments—or vice versa? Though it is not clear that the current Court would agree, there are plausible arguments for treating the states the way local governments are now treated. Probably most important, it does not appear that local governments have been unreasonably burdened under the current regime. Moreover, in those instances where the distinction between state and local governments has made a difference, it is hard to argue on grounds of policy that those harmed by lawless state action under federal law should go without remedy merely because they had the bad fortune to be harmed by a state rather than a county.

It may be, however, that this question will prove to be of greater theoretical than practical importance. As Professor Jeffries has pointed out⁵⁴ and as Professor Woolhandler has more recently agreed,⁵⁵ at least for so-called "constitutional torts," the different theoretical treatment of states and local governments often is of little consequence in the real world. Individual state and local officers both may be enjoined to obey federal law, and both may be sued in their individual capacities for damages for violations of federal law. Further, state and local officers both may shield themselves from damage suits based on a defense of qualified official immunity. Finally, it appears that both state and local governments, in all but the most extreme cases, routinely defend and reimburse officers from whom damages are recovered.⁵⁶ It is true that a local government may be held directly liable for damages where the constitutional tort resulted from official policy or from a systemic failure of the local government to train its officers, and that a state government may not be held directly liable on the same basis.⁵⁷ However, the barriers to direct recovery of damages from a local government are fairly high, and the set of

52 133 U.S. 529 (1890).

53 See Fletcher, *Historical Interpretation*, *supra* note 37, at 1101–07.

54 See John C. Jeffries, *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998).

55 See Ann Woolhandler, *Old Property, New Property and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000).

56 See Jeffries, *supra* note 54, at 50 n.16.

57 See *City of Canton v. Harris*, 489 U.S. 378 (1989); *Owen v. City of Independence*, 445 U.S. 622 (1980).

cases in which no damages are recoverable against an individual officer because of official immunity, but in which there is, at the same time, damage liability against the local government employing that officer, is very small.⁵⁸ In other words, even if this business remains unfinished, it may not be critical that the Court finish it any time soon.

Third, the Court has begun to suggest that the power to enjoin state officials under *Ex Parte Young* is not uniform for violation of all federal laws. In *Seminole Tribe*, the Court refused to allow an injunction that would have required state officers to follow the federal Indian Gaming Regulatory Act, and in *Coeur d'Alene* the Court refused to allow a federal court to hear a suit contesting title to real property that would have resulted, if the tribe had prevailed on the merits, in an injunction against state officers. The open question is whether the Court will make further inroads into *Ex parte Young*. Until the Court's decisions in *Seminole Tribe* and *Coeur d'Alene*, most observers would have said that the *Ex parte Young* principle did not differentiate among federal laws; indeed, *Edelman*, the central modern case affirming the availability of injunctive remedies under *Ex parte Young*, hinted at no such differentiation. In fact, however, *Seminole Tribe* and *Coeur d'Alene* should not have come as a great surprise, for nineteenth-century litigation under the Contracts Clause indicates fairly clearly that there is a difference among federal laws. *In re Ayers*⁵⁹ and related cases consistently held that the Contracts Clause cannot be enforced by injunction. I believe that these cases are still good law, based on the traditional principle of sovereign immunity that an unconsenting sovereign cannot be judicially compelled to pay its contractual obligations. Professor Jaffe described this principle as lying at the heart of sovereign immunity, and I see no sign that the Court is likely to disagree.⁶⁰ How much farther the Court will go, I do not know; but it does not seem to me analytically wrong to conclude that remedies, even injunctive remedies, may be different depending on the underlying substantive legal obligation. In most instances, an injunction—even an affirmative injunction—is likely to be an appropriate, perhaps indispensable, remedy, but this does not mean that this must be so in all instances.

Fourth, and finally, the Court has more work to do in defining the scope of congressional power to abrogate the protection of the

58 See *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (finding no basis for damages liability against the employing municipality where there has been no constitutional violation by an individual officer).

59 123 U.S. 443 (1887).

60 See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 29 (1963).

Eleventh Amendment. One way to understand this last piece of business is to view it merely as tidying up after *Seminole Tribe*. This is how the current Court appears to view it, and the Court is now working its way through a laundry list of federal statutes, deciding whether they are passed as "appropriate legislation" under Section 5 of the Fourteenth Amendment, or whether they are passed under Article I. Even on this view of the matter, however, there is a needed clarification of the Court's opinion in *Seminole Tribe*. I believe that the Court should probably not be taken literally when it says in *Seminole Tribe* that Congress entirely lacks power under Article I to abrogate the protection of the Eleventh Amendment.⁶¹ If Congress acts under the Spending Clause of Article I, specifically and clearly giving a state money in exchange for a waiver of the state's sovereign immunity, the state's waiver should have binding consequence. Perhaps the current Court will get around its apparent meaning in *Seminole Tribe* by saying it in exactly this way—that is, by saying that such action under the Spending Clause is not an example of abrogation under Article I, which is forbidden, but of waiver, which is permitted.

Another way to understand this last piece of business, however, is to say that the task is more than merely tidying up after *Seminole Tribe*. As a number of commentators, including Professor Jackson,⁶² have argued, the task instead is to overrule *Seminole Tribe*. I believe that the decision is a mistake not only from the viewpoint of the four consistent dissenters on Eleventh Amendment issues. It is also at least a partial mistake from the viewpoint of the five Justices in the majority, and I hope that they will eventually recognize the implications of their own previously expressed views of federalism and state sovereignty.

I believe that there is at least as strong an argument in favor of some version of *Union Gas*, the case overruled by *Seminole Tribe*, as in favor of *Fitzpatrick v. Bitzer*. That is, there is as strong an argument in favor of allowing Congress to provide for damage judgments against the states under at least some statutes passed under the Commerce Clause (and under the Patent and Copyright Clauses) as under statutes passed under the Fourteenth Amendment. I do not mean to say that *Fitzpatrick* was wrongly decided; quite the opposite, for the arguments in favor of *Fitzpatrick* are quite compelling. The most familiar (though somewhat simplistic) argument in favor of *Fitzpatrick* is chron-

61 See *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996) ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

62 See Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997); see also Daniel J. Meltzer, *The Seminole Decision and Sovereign Immunity*, 1996 SUP. CT. REV. 1.

ological: the Fourteenth Amendment was adopted after the Eleventh, and therefore the later must overrule the earlier (even though the adopters of the Fourteenth Amendment had no way of knowing the modern meaning attached to the Eleventh Amendment and even though the post-incorporation Fourteenth Amendment embodies law of which its adopters had no notion). But more fundamentally, the Fourteenth Amendment embodies legal rights that, for reasons embedded in our history, have turned out to be particularly well-suited to federal protection and particularly ill-suited to state protection. The text of the Fourteenth Amendment tells us this on its face, specifically forbidding the states *eo nomine* from depriving persons of equal protection or due process. This understanding of the Fourteenth Amendment provides an overwhelming justification for *Fitzpatrick*. Why, then, do I believe that the argument in favor of *Union Gas*—in favor of some congressional abrogation under the Commerce Clause—is just as strong?

First, an argument in favor of state sovereign immunity is powerful when a state performs its sovereign functions, especially its policing and other criminal justice functions. But this argument has little or no force when a state engages in commercial activities. Unlike regulation under the Fourteenth Amendment, regulation under the Commerce, Patent, and Copyright Clauses generally does not regulate a state in the performance of its sovereign functions. The Fourteenth Amendment names the states, as states, and specifically directs them to behave in certain ways. By contrast, the Commerce, Patent, and Copyright Clauses do not name the states, and legislation passed under these clauses is virtually always directed at private actors, and brings a state within its scope only because the state engages in the same behavior as the private actors.

The Supreme Court's cases dealing with statutes passed under the Commerce, Patent, and Copyright Clauses form a revealing pattern. In *Parden v. Terminal Railway*⁶³ and *Hilton v. South Carolina Public Railways Commission*,⁶⁴ decided under the Federal Employers' Liability Act,⁶⁵ the state owned and operated railroads; in *Alden*,⁶⁶ decided under the Fair Labor Standards Act,⁶⁷ the state employed workers; in *Union Gas*,⁶⁸ decided under CERCLA,⁶⁹ the state owned polluted

63 377 U.S. 184 (1964).

64 502 U.S. 197 (1991).

65 45 U.S.C. §§ 51–60 (1994).

66 119 S. Ct. 2240, 2246 (1999).

67 29 U.S.C. §§ 201–19 (1994 & Supp. III 1997).

68 491 U.S. 1, 5 (1989).

69 42 U.S.C. §§ 9601–75 (1994 & Supp. III 1997).

land; in *Florida Prepaid*,⁷⁰ decided under the Patent and Plant Variety Protection Remedy Clarification Act,⁷¹ the state allegedly infringed a patent; and in *College Savings Bank*,⁷² decided under the Trade-Mark Act of 1946 (the Lanham Act),⁷³ the state allegedly engaged in false and misleading advertising. In a case that has not yet made it to the Supreme Court and whose name we do not yet know, but that will be decided under the federal Copyright Act, the state may have violated a copyright.

With the possible exception of a state deciding how much to pay its employees, the actions of a state in these cases are not the actions of a sovereign. Rather, they are actions of a state engaging in behavior indistinguishable from that of a private commercial actor. The distinction between sovereign actions and commercial actions ought to be critical to Eleventh Amendment jurisprudence, but, at the moment, it is not. If the Court really believes that the distinction is unimportant, we need to rethink a number of important legal ideas. Perhaps most obvious, those Justices in the current majority who voted for *National League of Cities v. Usery*⁷⁴ need to rethink their rationale in that case. Those Justices cannot simultaneously subscribe to the rationale in *National League of Cities* and the results in the recent Eleventh Amendment cases, for the holding in *National League of Cities* depends on the distinction between activities of a state that involve its sovereignty and activities that do not. Further, if the commercial activities of the states are protected as activities of sovereigns, we need to rethink the Foreign Sovereign Immunities Act⁷⁵ which, as Professor Jackson points out,⁷⁶ does not give sovereign immunity protection to commercial activities of foreign states. Still further, if the commercial activities of the states are the activities of sovereigns, the Court needs to rethink the market participant doctrine under the dormant Commerce Clause, under which a state is allowed to favor its own residents only when it is engaged in commercial activities.⁷⁷ Finally, the Court needs to rethink its decision this Term in *Reno v. Condon*,⁷⁸ sustaining

70 119 S. Ct. 2199, 2202-03 (1999).

71 35 U.S.C. § 271, 296 (1994 & Supp. III 1997).

72 119 S. Ct. 2219, 2222 (1999).

73 15 U.S.C. § 1051-1127 (1994 & Supp. IV 1998).

74 426 U.S. 833

75 28 U.S.C. § 1605(a)(2) (1994).

76 See Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and Constitutional Compromise*, 31 RUTGERS. L.J. (forthcoming 2000).

77 See, e.g., *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82 (1984); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

78 120 S. Ct. 666, 672 (2000) ("[T]he DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as

a federal law forbidding a state from selling information obtained from drivers' licenses on the ground that it was commercial activity.

This is not to say that all statutes passed under the Commerce, Patent, and Copyright Clauses should necessarily abrogate the Eleventh Amendment. In particular, the reach of the Commerce Clause is so great that some state activity reached by some statutes passed under the Commerce Clause would have a plausible claim to be protected sovereign activity. For the current Court, the federal Age Discrimination in Employment Act is a statute that reaches such activity,⁷⁹ as is the Fair Labor Standards Act. But even this Court cannot claim seriously that negligent operation of a state-owned railroad, or a patent violation by a revenue-generating arm of a state university, is an activity traditionally protected by sovereign immunity.

Second, federal judicial remedies against state actors under the Fourteenth Amendment—even in the absence of *Fitzpatrick* and congressional abrogation of the Amendment—are substantial and in most cases sufficient. As Professor Jeffries has recently argued, the *Ex parte Young/Edelman* limitation of remedies may, paradoxically, make the Fourteenth Amendment a more, rather than less, effective tool against abuses of individual rights by the states. Under the current regime, the Supreme Court is encouraged to adopt new Fourteenth Amendment rules because, at least initially, they impose prospective obligations through injunctions rather than retroactive obligations through damages.⁸⁰ Only after the rule is well-established are damages available; that is, damages are available against officers sued in their individual capacities who commit constitutional torts only to the extent that the rules have become clear and well-known and to the extent that official immunity is therefore not available as a defense.⁸¹

But Professor Jeffries's argument concerning the sufficiency of remedies for constitutional torts does not apply to a state's commercial activity. Under the *Ex parte Young/Edelman* remedial scheme, no damages are available against a state officer who, even though sued individually, has not committed a constitutional tort but has merely violated the commands of a statute like CERCLA or the Lanham Act.

the owners of databases. . . . The DPPA regulates the universe of entities that participate as suppliers to the market for motor vehicle information—the States as initial suppliers of the information in interstate commerce and private resellers or redisclosers of that information in commerce.”).

79 See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000).

80 See John C. Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

81 See *Wilson v. Layne*, 119 S. Ct. 1692, 1699 (1999); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In such a case, when a federal statute regulates commercial behavior of private parties along with the identical behavior of state parties, there is nothing unfair or economically perverse in requiring a state to behave in as law-abiding a fashion as a private party, and in requiring a state to compensate those harmed by its illegal behavior just as a private party is required to do.

I confess, however, that there is a silver lining (so to speak). As the law now stands, of the participants in this Symposium, Professor Pfander, Professor Jeffries, and I can sell xeroxed course readers to our students without paying royalties to the authors and without fear of damage judgments because we teach at state law schools. Professors Jackson, Vázquez, and Woolhandler cannot, because they teach at private law schools. This is an argument in favor of teaching at state schools. It is also, in a nutshell, the argument against *Seminole Tribe*.

In sum, federal statutes regulating commercial behavior under the Commerce, Patent, and Copyright Clauses affect the states where they are acting least like states and where they consequently have the weakest claim to sovereign immunity under the Eleventh Amendment. In other words, in overruling *Union Gas*, the Court forbade Congress to impose damage judgments on the states in precisely those areas where Congress has the strongest claim to impose such damage judgments without impinging on state sovereignty.

CONCLUSION

As a result of the Supreme Court's decision in *Alden* last spring, the diversity explanation of the Eleventh Amendment has finally ceased to matter. When the Court decided in that case that the Amendment is not just a forum-choice provision and that state sovereign immunity has the same force in both state and federal court, it cut the last tie between its Eleventh Amendment case law and the text of the Amendment. As a result, while Professor Pfander's elegant work on the diversity explanation continues to be important intellectually,⁸² it no longer makes a difference to the outcome of the cases.

All the Justices now accept the diversity explanation or its consequences. Only the four dissenting Justices actually accept the explanation, but the five Justices in the majority might as well have. That is, all nine Justices have abandoned any thought, or any pretense, that the text of the Eleventh Amendment matters. For the four Justices in the minority, the text has a meaning they are willing to follow; but because of the way they understand it, the text has no bearing on the

82 See Pfander, *supra* note 37.

questions of federalism with which the Court is now struggling. For the five Justices in the majority, the text has a different meaning; but they regard the questions of federalism with which the text deals as too important to be governed by the text.

For both groups of Justices, the fundamental question is the meaning of state sovereign immunity in the federal structure, without regard to the text of the Amendment. As Justice Kennedy wrote last spring in *Alden*, Eleventh Amendment immunity is a "convenient shorthand but something of a misnomer."⁸³ Or, as Chief Justice Hughes wrote sixty-six years ago in *Principality of Monaco v. Mississippi*, "Behind the words of the constitutional provisions are postulates which limit and control."⁸⁴ Or, as Justice Bradley wrote one hundred ten years ago in *Hans v. Louisiana*, "The letter [of the Amendment] is appealed to now . . . as a ground for sustaining a suit brought by an individual against a state. . . . It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."⁸⁵ In its fashion, the present Court has finally cleared away the text of the Eleventh Amendment, as in their fashions the Courts before them have done the same. But the Court's unfinished business, the hard work of translating the Constitution into a workable federal structure, remains.

83 *Alden v. Maine*, 119 S.Ct. 2240, 2246 (1999).

84 292 U.S. 313, 322 (1934).

85 *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).