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ARTICLES

DOES GARCIA PRECLUDE AN ELEVENTH AMENDMENT AFFIRMATIVE LIMITATION ON THE CONGRESS'S COMMERCE CLAUSE POWER?

*Joseph John Jablonski, Jr.**

I do not think it for the interest of the General Government itself, & still less of the Union at large, that the State governments should be so little respected as they have been. However, I dare say that in time all these as well as their central government, like the planets revolving around their common sun, acting & acted upon according to their respective weights & distances, will produce that beautiful equilibrium on which our Constitution is founded, and which I believe it will exhibit to the world in a degree of perfection, unexampled but in the planetary system itself. The enlightened statesman, therefore, will endeavor to preserve the weight and influence of every part, as too much given to any member of it would destroy the general equilibrium.

—Letter from Thomas Jefferson to Peregrine Fitzhugh (Feb. 23, 1798).¹

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1. Letter from Thomas Jefferson to Peregrine Fitzhugh (Feb. 23, 1798), *reprinted in 7 THE WRITINGS OF THOMAS JEFFERSON* 208, 110 (P. Ford ed. 1896).

INTRODUCTION

The recent eleventh amendment decisions of *Welch v. Texas Department of Highways & Public Transportation*² and *Atascadero State Hospital v. Scanlon*³ suggest that the eleventh amendment⁴ can affirmatively limit Congress's commerce clause power.⁵ However, *Garcia v. San Antonio Metropolitan Transit Authority*⁶ broadly overrules the tenth amendment⁷ case of *National League of Cities v. Usery*,⁸ and appears to remove any theoretical foundation for such a limit.⁹ Professor Brown, a recent convert to the "congressional supremacist" view,¹⁰ established by

2. 107 S. Ct. 2941 (1987) (plaintiff barred from suing Texas in federal court because Congress failed to authorize federal jurisdiction over private damage suits against states in the Jones Act, 46 U.S.C. § 688 (Supp. I 1983)). The further question of whether the state of Texas waived its eleventh amendment immunity was not before the Court. *Id.* at 2946.

3. 473 U.S. 234 (1985) (holding that the state of California had neither consented to federal jurisdiction over private damage suits against it arising out of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (1982)), nor had the Congress unilaterally created federal jurisdiction over such suits.

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

5. In *Welch*, the Court stated that it neither decided, nor intimated a view on the question of whether Congress may subject unconsenting states to private damage suit in federal court, as an exercise of its commerce clause power to regulate interstate commerce. See *Welch*, 107 S. Ct. at 2946-47. Professor Skover suggests that *Atascadero* ought not be read as foreclosing an eleventh amendment affirmative limit on Congress's commerce clause power, or, more broadly, as foreclosing a limit on Congress's article I power. See Skover, "Phoenix Rising" and *Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271, 301 n.106 (1986); see also Jablonski, *The Eleventh Amendment: An Affirmative Limitation on the Commerce Clause Power of the Congress—A Doctrinal Foundation*, 37 DE PAUL L. REV. 547 (1988).

6. 469 U.S. 528 (1985) (holding that amendments to the Fair Labor Standards Act (FLSA) requiring a metropolitan transit authority to meet minimum wage and overtime standards, did not violate the tenth amendment). In reaching their conclusion, the Court did away with all substantive restraints on the commerce clause power, and suggested that the national political process constituted the "principal" limit on the federal government's power over the states. See *id.* at 550-56.

7. "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. amend. X.

8. 426 U.S. 833 (1976) (holding that Congress exceeded its substantive power under the commerce clause and thus violated the tenth amendment, by requiring the states to meet federal minimum wage and maximum hours standards under the 1974 amendments to the FLSA). *National League of Cities* was subsequently overruled. *Garcia*, 469 U.S. at 531.

9. See *Garcia*, 469 U.S. at 556-57. By suggesting that the national political process is the "principal" constitutional safeguard of state sovereignty, *Garcia* appears to remove the possibility of any meaningful, judicially enforceable, affirmative limits on federal power over states. See *Atascadero*, 473 U.S. at 302-04 (Blackmun, J., dissenting).

10. See Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985).

Professors Nowak¹¹ and Tribe,¹² argues that in the aftermath of *Garcia* all the states have left is “process with a bite,”¹³ despite any implications of *Atascadero* to the contrary.¹⁴

In the 1987 case of *United States v. Union Gas Co. (Union Gas II)*,¹⁵ the Third Circuit Court of Appeals, relying on the Seventh Circuit’s decision in *In re McVey Trucking, Inc.*,¹⁶ subscribed to the “congressional supremacist” view by characterizing the eleventh amendment as a mere “presumption of immunity.”¹⁷ The court held that Congress, in an exercise of its article I power to regulate interstate commerce,¹⁸ may compel an unconsenting state government to defend a private damage suit in federal court, as long as it speaks clearly to that effect on the face of the statute.¹⁹

11. 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).

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

13. Brown, *supra* note 10, at 365.

14. *Id.* What is particularly intriguing about Professor Brown’s position are his statements, that, on the one hand he views “*Atascadero* as a tacit rejection of the [congressional supremacist] position” and that on the other, that the Court will “back down, despite *Atascadero*, and abandon the concept of limits generated by the eleventh amendment.” *Id.*

15. 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

16. 812 F.2d 311 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 227 (1987).

17. *Union Gas II*, 832 F.2d at 1354; *see also McVey*, 812 F.2d at 318.

18. U.S. CONST. art. I, § 10, cl. 3.

19. *Union Gas II*, 832 F.2d at 1354. This case has a complex procedural history. In *United States v. Union Gas Co. (Union Gas I)*, 792 F.2d 372 (3d Cir. 1986), *vacated and remanded*, 107 S. Ct. 865 (1987), the Third Circuit held that the eleventh amendment barred the defendant-third party plaintiff, Union Gas Company, from suing the state based on the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund Act), 42 U.S.C. §§ 9601-9657 (1982). In *Union Gas I*, the court reasoned that because the Superfund Act did not indicate congressional intent to remove the eleventh amendment immunity of the states, a private plaintiff could not sue the state of Pennsylvania in federal court, under the Act. *See Union Gas II*, 832 F.2d at 1345. After *Union Gas I*, the Union Gas Company filed a petition for certiorari on October 8, 1986, which the Supreme Court granted. 107 S. Ct. 865 (1987). On October 16, 1986, the President signed the Superfund amendments. *Union Gas II*, 832 F.2d at 1346. The Supreme Court then vacated their decision in *Union Gas I*, and remanded the case “for further consideration in light of the Superfund Amendments and Reauthorization Act of 1986 [SARA], Pub. L. No. 99-499.” *Union Gas I*, 107 S. Ct. at 865.

On remand, the Third Circuit determined that the Superfund amendments, particularly §§ 101(b) and 120(a)(1) of SARA, codified at 42 U.S.C.A. §§ 9601(20)(D) and 9620(a)(1) (West Supp. 1987), evinced unequivocal congressional intent to authorize private damage suits against states in federal court. *Union Gas II*, 832 F.2d at 1349. Convinced that the Superfund amendments were passed pursuant to the commerce clause, the court then addressed the underlying fundamental constitutional issue: whether Congress may unilaterally remove eleventh amendment immunity of state government when invoking its commerce

Specifically, the 1987 amendments to the Superfund Act were held to evince Congress's intent that states could be compelled by private plaintiffs to defend damage suits in federal court under the Act.²⁰ In its October 1988 term, the Supreme Court may decide whether *Union Gas II* properly held that *Garcia* necessarily requires a "toothless" eleventh amendment.²¹ Deciding that issue, the Court would revisit the larger, more fundamental issue of whether the Constitution contains any judicially enforceable affirmative protection of state sovereignty.²²

This Article analyzes the major issues raised by *Garcia* concerning an eleventh amendment affirmative limitation on the Congress's commerce clause power.²³ It suggests that, despite *Union Gas II* and the congressional supremacist view, the eleventh amendment is the "'constitutionally guaranteed immunity of the several States'"²⁴ from unconsented private damage suits in federal court, an immunity which Congress is bound to respect. The eleventh amendment is, therefore, an affirmative limit on Congress's commerce clause power to create federal jurisdiction over private damage suits against state governments.²⁵ Following Pro-

clause power, and held that the Congress does possess such power. *Id.* at 1350-51. Pennsylvania filed another petition for certiorari which was granted in March 1988. *Pennsylvania v. Union Gas Co.*, 108 S. Ct. 1219 (1988).

20. The Court in *Union Gas II* held that 42 U.S.C. § 9601(20)(D) and 9620(a)(1) (1987) indicated Congress's intent to authorize private damage suits against states in federal court seeking compensation for liability under the Superfund Act. *Union Gas II*, 832 F.2d at 1348 (construing SARA, Pub. L. No. 99-499, § 101(b)(1), 100 Stat. 1613, 1615 (1986)).

21. See *supra* note 19. Before reaching the issue of *Garcia*'s preclusive effect, the Court would have to find that Congress intended to authorize private damage suits against states in federal court under the SARA amendments to the Superfund Act.

22. See *Garcia*, 469 U.S. at 581 (O'Connor, J., dissenting) ("The issue . . . is whether the federal system has any *legal* substance, any core of constitutional right that courts will enforce.") (quoting C. BLACK, *PERSPECTIVES IN CONSTITUTIONAL LAW* 30 (1963)).

23. Another article has endeavored to respond to some of the historical and linguistic issues presented by *Union Gas II* and the congressional supremacists for an eleventh amendment limit on Congress's commerce clause power. See Jablonski, *supra* note 5, at 556-87.

24. *Pennhurst State School & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 99 (1984) (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)); see *Atascadero*, 473 U.S. at 242 (the eleventh amendment represents "the States' constitutionally secured immunity from suit in federal court").

25. The eleventh amendment, in my view, provides constitutionally guaranteed protection to the states, from private damage suits in federal court. Congress may not unilaterally remove this protection, regardless of how loudly and clearly it speaks on the face of a commerce clause statute.

essor Wechsler,²⁶ *Garcia* suggested that the national political process is the principal, if not the sole, safeguard of state sovereignty.²⁷ However, *Garcia* also stated that “[t]hese cases do not require us to identify or define what affirmative limits *the constitutional structure* might impose on federal action affecting the States under the Commerce Clause.”²⁸ Justice Scalia, in a separate concurrence to the recent tenth amendment taxation case of *South Carolina v. Baker*,²⁹ has quoted this very language with similar emphasis,³⁰ perhaps to underscore a belief that *Garcia*’s preclusive effect on affirmative limits may not be as broad as commentary initially suggested.³¹ While *Garcia* left open the question of whether those limits would be judicially enforceable, commentary suggests that such limits “are meaningless if they cannot be enforced by the courts.”³²

If eleventh amendment doctrine is justified by “the structure and requirements of the federal system,”³³ as the Court repeatedly emphasized in the post-*Garcia* case of *Welch*,³⁴ the eleventh amendment may be one of those other “affirmative limits . . . on federal action affecting the States under the Commerce Clause.”³⁵ *Welch* suggests that some constitutionally significant residuum of state sovereignty survived *Garcia*, and that a portion of that residuum is embodied in the eleventh amendment.³⁶ *Atascadero* only reinforces this view of *Welch*.

Atascadero, another major post-*Garcia* case, maintained that the eleventh amendment contributes to a balance of power between the federal and the state governments³⁷ which is a necessary

26. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

27. *Garcia*, 469 U.S. at 552-56.

28. *Id.* at 556 (emphasis added).

29. 108 S. Ct. 1355 (1988).

30. *Id.* at 1369 (Scalia, J., concurring).

31. Professor Schwartz believes that *Garcia* may have left open the possibility of affirmative state sovereignty restraints on federal power over states. Schwartz, *National League of Cities Again—R.I.P. or a Ghost That Still Walks*, 54 FORDHAM L. REV. 141, 165 (1985). *But see* Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 346-49, 380-419 (after *Garcia* there is no basis for affirmative state sovereignty restraints on federal power).

32. Schwartz, *supra* note 31, at 165.

33. *Welch*, 107 S. Ct. at 2953.

34. *See id.*

35. *Garcia*, 469 U.S. at 556.

36. *Welch*, 107 S. Ct. at 2949-51, 2951 n.14.

37. *Atascadero*, 473 U.S. at 238 n.2.

foundation of individual rights and freedoms.³⁸ Were it merely a "presumption of immunity" as *Union Gas II* and *McVey* have held,³⁹ the eleventh amendment's salutary effect on the "constitutional equilibrium between the General and the State Governments"⁴⁰ could be nullified by the Congress. The residuum of state sovereignty embodied in the eleventh amendment must thus yield more than simply a processual limit on federal power over states.⁴¹

This Article argues first, that the Court's "original understanding" view of the eleventh amendment⁴² may be harmonized with *Garcia*, eleventh amendment case law, and with the logic of the federal union.⁴³ Part I challenges the *Union Gas II* assumption that the states, by accepting the Constitution and Congress's power to regulate interstate commerce therein,⁴⁴ necessarily surrendered their right to be free from federal jurisdiction over compulsory private damage suits against them.

Second, the Article suggests that, despite recent commentary,⁴⁵ the governmental-proprietary distinction⁴⁶ is not necessary to an eleventh amendment affirmative limit on Congress's commerce clause power. Part II argues that the determination of independent state consent,⁴⁷ the basis of any eleventh amendment affirmative limit on the commerce clause, does not necessarily require the governmental-proprietary distinction.⁴⁸ Because it failed to identify the principle of state consent as a foundation of eleventh amendment law, *Union Gas II* never discussed the governmental-proprietary distinction.

Third, my thesis questions a major assumption of the "congressional supremacist" view—that the Wechsler thesis requires that

38. *Id.*

39. See *Union Gas II*, 832 F.2d at 1354; *McVey*, 812 F.2d at 318.

40. THE FEDERALIST No. 31, at 198 (A. Hamilton) (J. Cooke ed. 1961).

41. That is, some limit beyond the procedural limit provided by what Professor Tribe has called "the clear statement rule." Tribe, *supra* note 12, at 695.

42. The "original understanding" view implies that the states never surrendered their immunity from unconsented private suit in federal court when they assented to Congress's power to regulate interstate commerce. See, e.g., *Welch*, 107 S. Ct. at 2949 (quoting *Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 291-92 (1973) (Marshall, J., and Stewart, J., concurring)).

43. See *infra* notes 57-149 and accompanying text.

44. *Union Gas II*, 832 F.2d at 1355.

45. See Brown, *supra* note 10, at 393-94.

46. That distinction was invalidated in *Garcia*. See *Garcia*, 469 U.S. at 538-47.

47. See Skover, *supra* note 5, at 301.

48. See *infra* notes 150-86 and accompanying text.

the states' eleventh amendment protection from compulsory private damage suits in federal court evaporates when Congress clearly authorizes such suits.⁴⁹ In *Garcia*, the Court adopted the Wechsler thesis for state interests under the tenth amendment.⁵⁰ Part III assumes that the Wechsler thesis is valid for state interests under the tenth amendment,⁵¹ but suggests that the structural relationship between the states and the federal courts provides a constitutional basis for an eleventh amendment affirmative limit on Congress's power to create federal jurisdiction over private suits against state government.⁵²

Finally, Part IV builds on Part III and argues that eleventh amendment law results from jurisdictional problems inherent in the federal union.⁵³ Eleventh amendment principles have validity independent of *Garcia* because they address the structural concerns inherent in the assertion of jurisdiction in a "system of dual sovereignties,"⁵⁴ in which the states have no representation in the federal judiciary.⁵⁵ Thus, there is some basis for the view that eleventh amendment state sovereignty is on the rise.⁵⁶

49. See *Union Gas II*, 832 F.2d at 1350-56 ("where Congress has clearly articulated its desire to abrogate the eleventh amendment, any further expansion of the eleventh amendment is unwarranted."). *Id.* at 1354. Professors Brown, Nowak, and Tribe adhere to the "congressional supremacist" view. See Brown, *supra* note 10, at 393-94 (feels bound by the Wechsler thesis); Nowak, *supra* note 11, at 1441-42 (stating that "the court should take a limited role in reviewing congressional grants of jurisdiction allowing suits against states," implying that review should be limited to determining whether Congress has met a statutory construction standard in authorizing private suits against states in federal court); Tribe, *supra* note 12, at 695 (concluding that the "clear statement rule" is the sum and substance of the states' eleventh amendment protection from congressional power to grant federal jurisdiction over them).

50. See *Garcia*, 469 U.S. at 552-56.

51. In making this assumption I do not imply any endorsement of the Wechsler thesis for tenth amendment interests.

52. See *infra* notes 187-225 and accompanying text.

53. See *infra* notes 226-57 and accompanying text.

54. *Welch*, 107 S.Ct. at 2953.

55. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.9 (1981); see *infra* notes 168-204 and accompanying text.

56. See Skover, *supra* note 5, at 298-304.

I. SURRENDER OF 11TH AMENDMENT IMMUNITY?

A. *Eleventh Amendment Immunity and Tenth Amendment Analysis*

1. Jurisdictional Versus Substantive Limits on Federal Power

While *Garcia v. San Antonio Metropolitan Transit Authority* may remove all, or nearly all, substantive restraints on the Congress's commerce clause power over states,⁵⁷ an eleventh amendment-based affirmative limit would not be substantive, but jurisdictional.⁵⁸ An eleventh amendment jurisdictional limitation would be a judicially enforceable limitation on congressional power over the states. *Garcia* did not necessarily foreclose the possibility of judicially enforceable affirmative limits on federal action impacting states.⁵⁹

In contrast to the tenth amendment limit based on *National League of Cities v. Usery*,⁶⁰ an eleventh amendment affirmative limit would not invalidate commerce clause legislation providing for federal jurisdiction over private damage suits against state governments. Rather, in the absence of a state's waiver of its eleventh amendment immunity, such a limit would circumscribe the jurisdictional reach of such legislation to state court.⁶¹ Such a limit would be a jurisdictional shield that states might use when called to defend private damage suits in federal courts based on com-

57. 469 U.S. 528, 554 (1985). "Any *substantive* restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation" *Id.* (emphasis added).

58. See, e.g., *Employees of the Dep't of Pub. Health & Welfare v. Missouri Department of Pub. Health & Welfare*, 411 U.S. 279, 293-94 (1973) (Marshall, J., and Stewart, J., concurring) (discussing the operation of such a jurisdictional limit on the Congress commerce clause power).

59. *Garcia*, 469 U.S. at 556 "These cases do not require us to identify or define what *affirmative* limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *Id.* (emphasis added). In discussing the implications of Wechsler's thesis Justice Blackmun stated that the "[F]ramers chose to rely on a federal system in which the restraints on federal power over the States inhered *principally* in the workings of the National Government itself." *Id.* at 552 (emphasis added). Justice Blackmun clearly does not mean exclusively. See *Brown*, *supra* note 10, at 390 (Justice Blackmun "left open the question of whether such limits would be judicially enforceable.").

60. 426 U.S. 833, 852 (1976) (holding that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.") (footnote omitted).

61. See, e.g., *Employees*, 411 U.S. at 298 (1973) (Marshall, J., and Stewart, J., concurring).

merce clause legislation. "The issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before federal tribunals."⁶²

In some tenth amendment-commerce clause cases prior to *Garcia*, the Court reserved judgment on the eleventh amendment issue, implying that the constitutional issues raised by the eleventh amendment were different from those raised by the tenth amendment.⁶³ In tenth amendment-commerce clause cases of the *National League of Cities* era, tenth and eleventh amendment issues overlapped. If congressional regulations were struck down on tenth amendment grounds,⁶⁴ eleventh amendment issues were not required to be addressed because the substantive basis of the suit was invalidated. In this sense, the tenth amendment "eclipsed" the eleventh amendment, leading commentators to suggest that the eleventh amendment rested on the tenth amendment. However, in the major eleventh amendment decisions of *Edelman v. Jordan*⁶⁵ (pre-*Garcia*) and *Atascadero State Hospital v. Scanlon*⁶⁶ (post-*Garcia*), the Court has clearly held that protection of states from unconsented federal jurisdiction is but one important federalism principle, whose constitutional source is the eleventh amendment.⁶⁷ In those decisions, Justice Rehnquist and Justice Powell stated that eleventh amendment federalism concerns are deserving of consideration in their own right.⁶⁸

2. The Eleventh Amendment and *Garcia*

In the *National League of Cities* era, Professor Fletcher argued that eleventh amendment principles could not be separated from tenth amendment principles⁶⁹ and suggested that the eleventh

62. *Id.* at 293-94.

63. *E.g.*, *Maryland v. Wirtz*, 392 U.S. 183, 200 (1968).

64. *See National League of Cities*, 426 U.S. at 833.

65. 415 U.S. 651 (1974).

66. 473 U.S. 234 (1985).

67. *Id.* at 242-43; 415 U.S. at 660-78.

68. *Id.* at 242-46; 415 U.S. at 677-78.

69. *See 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. 1003, 1112-1114 (1983). Professor Fletcher identifies the power to create state obligation under federal law with the power to create jurisdiction in the federal courts to enforce those obligations, and in my opinion, confuses two constitutionally distinct analyses, one tenth, the other, eleventh amendment. *Cf. Baker, Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 179-80 (1977) (suggesting that tenth and eleventh amendments generate distinct analyses).

amendment had no life apart from the tenth. *Union Gas II* confirmed his view by maintaining that eleventh amendment principles must be merely a subset of the tenth amendment principles established in *Garcia*.⁷⁰ At first glance this seems plausible. However, one must accept either the argument that Congress's virtually absolute power under the commerce clause to create substantive rights in private plaintiffs against states includes an equivalent power to create in private plaintiffs the right to use federal courts to enforce those rights,⁷¹ or one must adopt the argument of *Union Gas II*, that *Garcia* must mean that the states necessarily surrendered any immunity from private damage suit in federal court by ratifying the Constitution.⁷² However, the implications of *Garcia* may not be so far reaching.

General statements in *Garcia* outline what the states surrendered by assenting to federal authority over interstate commerce.⁷³ These statements should not be interpreted to include their "constitutionally guaranteed immunity" from unconsented federal jurisdiction over private damage suits against them.⁷⁴ While implying that the states surrendered a portion of their sovereignty by ratifying a Constitution which permits Congress to create substantive rights in private plaintiffs against them in exercising its com-

70. See *United States v. Union Gas Co. (Union Gas II)*, 832 F.2d 1343, 1355-56 (3rd Cir. 1987).

71. Fletcher, *supra* note 69, at 1109, 1114-15; see also Brown, *supra* note 10, at 389 ("[The] general power [to regulate] ought reasonably to include the lesser power of determining how and where the regulation is to be enforced.").

72. See *Union Gas II*, 832 F.2d at 1355 (holding that for states to maintain their eleventh amendment immunity in the face of national control is inconsistent with the constitutional plan); see also Edelman v. Jordan, 415 U.S. 651, 687 (1974) (Brennan, J., dissenting) (stating that the states surrendered any immunity from suit in federal court in their acceptance of the Constitutional plan); cf. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2950-51 "Opponents of ratification, including Patrick Henry, George Mason, and Richard Henry Lee, feared that the Constitution would make unconsenting States subject to suit in federal court . . . [T]he representations of Madison, Marshall, and Hamilton that the Constitution did *not* abrogate the States' sovereign immunity may have been essential to ratification." (footnote omitted). *Id.*

73. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548. "Section 8 [of Article I] works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." *Id.* (citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-92 (1981)).

74. This is apparently the interpretation made in *Union Gas II*. "Congress' authority over interstate commerce stems from the plenary powers that have been granted to our national legislature and represents a displacement of state sovereignty. *Union Gas II*, 832 F.2d at 1356 (citing *Garcia*, 469 U.S. at 548-49 (stating both Art. I, § 8 and the fourteenth amendment are "sharp contraction[s] of state sovereignty.")).

merce clause power, *Garcia* also states that “[t]he States unquestionably do retain a significant measure of sovereign authority.”⁷⁵ “They do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”⁷⁶ Had the states surrendered their right to be free from unconsented federal jurisdiction over private damage suits against them by ratifying the Constitution, or by “accept[ing] . . . the Constitutional plan,”⁷⁷ congressional power to compel a state government to defend a private suit in federal court in an exercise of the commerce clause would “brook[] no restraint.”⁷⁸

However, the Court’s current historical view of the eleventh amendment is that it restores the “original understanding” of article III that states could not be compelled to defend a private suit in federal court.⁷⁹ This view implies that the states did not necessarily consent to private suits in federal court by assenting to federal authority to regulate interstate commerce. Under this view, Congress would, therefore, be bound to respect that constitutional fact in granting jurisdiction to the federal courts over state government. Justice Powell, writing for the majority in *Atascadero*, maintained that “[t]he Constitution never would have been ratified if the States . . . were to be stripped of their sovereign authority . . . except as expressly provided by the Constitution itself.”⁸⁰ As Alexander Hamilton suggested, part of that sovereign authority or immunity was the right to be free from compulsory private damage suits in federal and foreign courts.⁸¹ Even if it could be argued that

75. *Garcia*, 469 U.S. at 549 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)).

76. *Id.*

77. *Union Gas II*, 832 F.2d at 1355.

78. *Tribe*, *supra* note 12, at 689.

79. *Welch*, 107 S. Ct. at 2949 (quoting *Employees* 411 U.S. at 291-92 (Marshall, J., and Stewart, J., concurring)).

80. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985).

81. *THE FEDERALIST* No. 81, at 549 (A. Hamilton) (J. Cooke ed. 1961).

It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in *the federal courts* for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and 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*, and the danger intimated must be merely ideal.

Id. at 548-49 (emphasis added).

the states had surrendered that immunity by assenting to federal authority to regulate interstate commerce, the very existence of the eleventh amendment indicates that the states rescinded their assent⁸² and placed that immunity in a constitutional amendment, beyond the reach of Congress.

B. *The Eleventh Amendment Commerce Clause Cases*

The eleventh amendment-commerce clause cases of *Parden v. Terminal Railway Co.*,⁸³ *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*,⁸⁴ and *Welch v. Texas Department of Highways & Public Transportation*,⁸⁵ may be harmonized with the Court's "original understanding" theory of the eleventh amendment. By requiring the principle of independent state consent in eleventh amendment analysis,⁸⁶ *Parden* implied that the states have not surrendered their immunity from unconsented federal jurisdiction over private damage suits by the ratification of the Constitution, in spite of language suggesting the contrary.⁸⁷ This "schizophrenia"⁸⁸ may be based on a confusion of common law sovereign immunity with constitutional immunity under the eleventh amendment.⁸⁹ Language in *Parden* suggests that any immunity from unconsented federal jurisdiction was surrendered by the states in their assent to federal authority to regulate interstate commerce.⁹⁰ However, *Parden* cannot be properly understood without distinguishing between what the states surrendered at the ratification of the Constitution, and what they retained after ratification of the eleventh amendment.

If the states had surrendered all their sovereign authority relating to immunity from compulsory private damage suit in federal court, it would have been logically unnecessary for the Court in *Parden* to examine whether the actions of the state of Alabama constituted an implied waiver of that immunity. The Court's analysis would have focused strictly on the question of whether Con-

82. U.S. CONST. amend. XI.

83. 377 U.S. 184 (1964).

84. 411 U.S. 279 (1973).

85. 107 S. Ct. 2941 (1987).

86. *Parden*, 377 U.S. at 192.

87. *Id.* at 191-92.

88. Tribe, *supra* note 12, at 688-89.

89. See Jablonski, *supra* note 5, at 589-90.

90. *Parden*, 377 U.S. at 191-93.

gress authorized federal jurisdiction over private damage suits against the state. Yet, the *Parden* holding focuses, instead, on what was done by the state, not what was done by Congress. The Court emphasized that Alabama necessarily consented to federal jurisdiction over private suits against the state by entering the railroad industry twenty years after the enactment of the Federal Employers' Liability Act (FELA).⁹¹ *Parden* thus may be interpreted harmoniously with the "original understanding theory," to hold that Congress must respect, even in an exercise of the plenary power to regulate interstate commerce, the states' constitutionally guaranteed immunity from unconsented federal jurisdiction over private damage suits against them.

Employees,⁹² decided in 1973, confirms this view. It acknowledged that, had the states actually surrendered their immunity from unconsented federal jurisdiction over private damage suits, by ratifying the Constitution, the *Parden* Court would not have needed to examine the actions of the state in relation to the FELA.⁹³ Moreover, because the Congressional actions at issue in *Employees* did not authorize federal jurisdiction over such suits, the Court was not required to consider the issue of whether the state had, through its independent action, consented to private suit in federal court.⁹⁴

Concurring in *Employees*, Justices Marshall and Stewart clearly indicated that the states had not surrendered their immunity from compulsory private damage suit in federal court by the ratification of the Constitution, and explicitly used the "original understanding" theory of the eleventh amendment to support this view.⁹⁵ They understood *Parden* to turn on the question of whether a state, by its independent actions, made a knowing and voluntary waiver of its eleventh amendment immunity.⁹⁶ Their reasoning was that if the eleventh amendment bars federal jurisdiction over an

91. *Id.* at 192.

92. 411 U.S. 279 (1973).

93. *Id.* at 280-81 n.1.

94. See Skover, *supra* note 5, at 300. The suggestion in *Employees* that the Congress could bring "the States to heel" or lift their eleventh amendment immunity is merely dicta, and therefore does not undermine the above view of *Parden*. *Employees*, 411 U.S. at 283, 287.

95. *Id.* at 291-92 (Marshall, J., and Stewart, J., concurring).

96. *Id.* at 295-96. "For me at least, the concept of implied consent or waiver relied upon in *Parden* approaches, on the facts of that case, the outer limit of the sort of voluntary choice which we generally associate with the concept of constitutional waiver." *Id.*

unwilling state government in a private damage suit based on the "self-enforcing" contract clause of the Constitution, the eleventh amendment ought not to be any less of a bar where the private damage suit is based on congressionally created private rights.⁹⁷

In *Edelman v. Jordan*,⁹⁸ Justice Rehnquist made explicit what was implicit in the *Employees* concurrence, and suggested that the eleventh amendment conferred "constitutional rights" on state governments which the federal government is bound to respect. In *Edelman*, a private plaintiff brought a class action against the state of Illinois under the Aid to the Aged, Blind or Disabled (AABD).⁹⁹ The suit was brought in federal court, seeking restitution of all AABD monetary benefits wrongfully withheld for certain persons who had applied for those benefits over a particular period of time.¹⁰⁰ The Court held that the Social Security Act and the categorical aid program of the AABD, enacted pursuant to the article I power to spend for the general welfare, did not authorize private suits against anyone, let alone a state government.¹⁰¹ Although Justice Douglas dissented on the ground that the remedial statute 42 U.S.C. § 1983 gave the plaintiff class the right to sue the state for past AABD benefits on an equal protection theory,¹⁰² the Court held that the eleventh amendment nevertheless barred any relief "which requires the payment of funds from the state treasury."¹⁰³

Writing that the eleventh amendment barred the suit, Justice Rehnquist explicitly articulated what underlay the *Parden* decision: a bilateral framework for eleventh amendment analysis requiring congressional authorization of private damage suits against state government in federal court, and some form of independent consent by the state to that congressionally authorized jurisdiction.¹⁰⁴

97. *Id.* at 292-93 n.8 (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)).

98. 415 U.S. 651 (1974).

99. AABD was a categorical aid program administered by the Illinois Department of Public Aid pursuant to the Illinois Public Code. ILL. REV. STAT., ch. 23, para. 3-1 to 3-12 (1973). The program was funded by the state and federal governments under 42 U.S.C. §§ 1381-85 (1982).

100. *Edelman*, 415 U.S. at 656.

101. *Id.* at 674.

102. *Id.* at 678-79 (Douglas, J., dissenting).

103. *Id.* at 677.

104. *Id.* at 672.

In *Fitzpatrick v. Bitzer*,¹⁰⁵ the Court held that Congress may create federal jurisdiction over private damage suits against states in the absence of state consent.¹⁰⁶ At issue were the 1972 amendments to Title VII of the Civil Rights Act of 1964.¹⁰⁷ One might argue that, notwithstanding any contrary implications of *Parden* or *Employees*, the states must have surrendered their immunity from private damage suit in federal court binding on congressional power, since independent state consent was no longer relevant. However, the Court in *Fitzpatrick* based its holding on the distinction between congressional power to create federal jurisdiction under article I, and power to create jurisdiction under section 5 of the fourteenth amendment.¹⁰⁸ The 1972 amendments were passed pursuant to the fourteenth amendment enforcement power.¹⁰⁹ The Court therefore suggested that while eleventh amendment state sovereignty had been diminished by the Civil War amendments,¹¹⁰ it was not diminished with respect to article I. *Fitzpatrick* strongly implied that while state consent was irrelevant to fourteenth amendment analysis, it was still germane to an analysis of Congress's article I power.¹¹¹

*Atascadero State Hospital v. Scanlon*¹¹² affirmed the *Fitzpatrick* distinction between fourteenth amendment enforcement power and article I power, both structurally¹¹³ and explicitly,¹¹⁴ even though the Court never reached the issue of whether California consented to private suits in federal court under the Rehabilitation Act.¹¹⁵ In so doing, *Atascadero* implicitly confirms the view that the states have never surrendered their eleventh amendment immunity with respect to article I. As in *Employees* and *Edelman*, the *Atascadero* Court held that the federal statute at issue (the

105. 427 U.S. 445 (1976).

106. *Id.* at 456; see also *Welch v. Texas Dep't. of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2946 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985).

107. 42 U.S.C. § 2000e-2 (1982). The amendments made Title VII effective against state governments.

108. *Fitzpatrick*, 427 U.S. at 452-53.

109. *Id.* at 447.

110. *Id.* at 455-56; see *Jablonski*, *supra* note 5, at 598-603.

111. *Fitzpatrick*, 427 U.S. at 452-53.

112. 473 U.S. 234 (1985).

113. *Atascadero* can be said to structurally affirm *Fitzpatrick* by separating article I spending power analysis from fourteenth amendment analysis and paralleling the distinction *Fitzpatrick* made between the article I power to regulate interstate commerce and the fourteenth amendment powers. *Id.* at 242-47.

114. *Id.* at 242-43 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

115. *Atascadero*, 473 U.S. at 246-47; 29 U.S.C. § 794 (1982).

Rehabilitation Act) did not authorize private damage suits against states in federal court.¹¹⁶

*Welch v. Texas Department of Highways & Public Transportation*¹¹⁷ explicitly reaffirmed the state consent basis of *Parden* by quoting from *Employees*: “*Parden* was premised on the conclusion that [the State] . . . had consented to suit in the federal courts.”¹¹⁸ On its own facts, *Welch* confirms this reading of *Parden* as well. Because the Jones Act¹¹⁹ did not evince clear congressional intent to authorize private damage suits against states in federal court,¹²⁰ *Welch* did not require the Court to comment on independent state consent. In this respect, *Welch* parallels *Employees*.¹²¹ *Welch* only invalidated any suggestion in *Parden* that Congress could authorize private damage suits against states in federal court with anything less than clear language to that effect, appearing on the statute’s face.¹²²

C. *The Theory Created by the Cases—An Analysis*

1. Entry into Interstate Commerce Is Insufficient

One might be tempted to interpret *Parden v. Terminal Railway Co.*¹²³ as holding that a state surrenders its eleventh amendment immunity simply by entering interstate commerce, since the opinion contains language suggesting that when a state leaves the sphere that is exclusively its own, it subjects itself to regulation as fully as would a private person.¹²⁴ In *Welch v. Texas Department of Highways & Public Transportation*,¹²⁵ however, the Court explicitly refused to consider the validity of this proposition.¹²⁶ It is not clear whether *Parden* was referring to substantive or jurisdictional aspects of “regulation.”¹²⁷ The *Parden* Court clearly stressed that the state’s entry into the railroad industry was *subsequent* to

116. *Atascadero*, 473 U.S. at 247.

117. 107 S. Ct. 2941 (1987).

118. *Id.* at 2948. (quoting *Employees*, 411 U.S. at 281 n.1).

119. 46 U.S.C. § 688 (1982).

120. “We note that the question whether the State of Texas has waived its Eleventh Amendment immunity is not before us.” *Welch*, 107 S. Ct. at 2946.

121. *Id.* at 2947-48 (failure of the Jones Act to evince clear intent).

122. *Id.*

123. 377 U.S. 184 (1964).

124. *Id.* at 196.

125. 107 S. Ct. 2941 (1987).

126. *Id.* at 2948.

127. See, e.g., *Parden*, 377 U.S. at 192 (“such regulation”); *id.* at 196 (“that regulation”).

the FELA's enactment.¹²⁸ That implies that a state's mere entry into interstate commerce is insufficient to constitute consent in eleventh amendment-commerce clause analysis. Professor Field has recognized, as the *Parden* Court must have, that "states could not operate at all without being 'in interstate commerce,' as that term is currently defined by the Court."¹²⁹

2. The Logic of the Federal Union

There are logical arguments in support of the view that any immunity limiting congressional power to create federal jurisdiction over state government must have been surrendered to the federal government by ratification of the Constitution. It is argued that such state immunity would be incompatible with the existence of the federal union. In *United States v. Union Gas Co. (Union Gas II)*,¹³⁰ the Third Circuit phrased the issue of state immunity limiting federal power in terms of the states' acceptance of the Constitutional plan.¹³¹ Professor Tribe states that "[t]o the extent that sovereign immunity would free a state from such national controls, that immunity is inconsistent with the constitutional plan."¹³² Professors Shapiro and Amar make charges of "lawlessness,"¹³³ as have Justices Brennan and Stevens.¹³⁴ Despite the alarm of these commentators, neither would the existence of the union be jeopardized, nor division among the states created, nor the enforcement of federal norms against states prevented, if the eleventh amendment were to be interpreted to limit Congress's power to grant federal jurisdiction over state governments.

Not only do these critics appear to misunderstand the nature and scope of eleventh amendment immunity, they also harbor an unjustified mistrust of the state judiciary in enforcing federal rights against states. Eleventh amendment law has never prohibited the United States from suing a state directly in the federal

128. *Id.* at 192.

129. See Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1217 (1978).

130. 832 F.2d 1343 (3d. Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

131. *Id.* at 1354 (relying heavily on the analysis of Professor Tribe).

132. See Tribe, *supra* note 12, at 694-95.

133. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987); see Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 71-76 (1984).

134. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 252-58 (1985) (Brennan, J., dissenting); *Pennhurst II*, 465 U.S. 89, 126-67 (Stevens, J., dissenting).

courts. Thus, Congress would not be barred from compelling a state government into federal court where the United States is a plaintiff.¹³⁵ Nor has the eleventh amendment ever prevented states from suing other states in a federal forum.¹³⁶ A federal forum for such suits is "essential to the peace of the Union."¹³⁷ Further, state courts are as constitutionally obligated to enforce federal norms as are federal courts.¹³⁸ Finally, the eleventh amendment has never prevented a private plaintiff from suing a state official personally.¹³⁹ An eleventh amendment affirmative limit on the commerce clause thus would not relieve the state of its obligation to obey and enforce federal law.

Compulsory private suits against state governments in federal courts generally generate greater federalism tension than suits brought by the United States, or the states, because they involve a private plaintiff calling a sovereign state into the courts of another sovereign. The Court has recognized that compulsory private suits against state government do "violence to the inherent nature of sovereignty."¹⁴⁰ The Supreme Court has stated that "[t]he very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."¹⁴¹ After the eleventh amendment was adopted, Chief Justice Marshall, in *Cohens v. Virginia*,¹⁴² demonstrated "that making a State a defendant in error was entirely different from suing a State in an original action in prosecution of a demand against it, and was not within the meaning of the Eleventh Amendment."¹⁴³ Alexander Hamilton, in essential concurrence with Chief Justice Marshall, argued in *The Federalist* that compulsory private damage suits against states in federal court would be contrary to the "general sense and practice of mankind."¹⁴⁴

135. *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965).

136. *See North Dakota v. Minnesota*, 263 U.S. 365, 372-74 (1923).

137. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2953 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934)).

138. *See Testa v. Katt*, 330 U.S. 386, 389-94 (1947).

139. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

140. *See United States v. Texas*, 143 U.S. 621, 646 (1892).

141. *In re Ayers*, 123 U.S. 443, 505 (1887).

142. 19 U.S. (6 Wheat.) 264 (1821).

143. *Hans v. Louisiana*, 134 U.S. 1, 19 (1890) (interpreting *Cohens*, 19 U.S. (6 Wheat.) at 410).

144. *THE FEDERALIST* No. 81, at 549 (A. Hamilton) (J. Cooke ed. 1961).

Justice Iredell, in his dissent in *Chisholm v. Georgia*,¹⁴⁵ the case which provoked the eleventh amendment, clearly stated that he was “strongly against any construction [of the Constitution], which will admit, under any circumstances, a compulsive private suit against a state for the recovery of money,”¹⁴⁶ and “every word in the Constitution may have its full effect.”¹⁴⁷ Thus, the federal interest in a federal forum for private damage suits against states should not necessarily be judged to outweigh the strong state interest in being free from compelled federal jurisdiction. Given that strong state interest in freedom from unconsented federal jurisdiction, the Court should view the tension generated by private damage suits against unconsenting states in federal court as tension the federal system should not have to bear.

Indeed, Justice Marshall, in his concurrence in *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*,¹⁴⁸ which is cited frequently with approval by the Court, recognized that

[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case [where the state itself has not consented to congressionally authorized federal jurisdiction over private suits].¹⁴⁹

II. THE GOVERNMENTAL-PROPRIETARY DISTINCTION AND STATE CONSENT

A. *The Issue Raised by Garcia*

In *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁵⁰ the Court found the governmental-proprietary distinction espoused by *National League of Cities v. Usery*¹⁵¹ “unworkable.”¹⁵² The Court thereby invalidated any notion of state immunity from fed-

145. 2 U.S. (2 Dall.) 419 (1793).

146. *Id.* at 449.

147. *Id.* at 450.

148. 411 U.S. 279 (1973).

149. *Id.* at 294 (Marshall, J., and Stewart, J., concurring).

150. 469 U.S. 528 (1985).

151. 426 U.S. 833 (1976).

152. *Garcia*, 469 U.S. at 545.

eral power which was based on that distinction.¹⁵³ Commentary has suggested that "mere difficulty in applying legal principles has never been considered an adequate reason for abandoning those principles."¹⁵⁴ Other commentary has suggested that the Court could have reformulated the governmental-proprietary distinction in terms of a "constitutive" principle of state sovereignty.¹⁵⁵ Such reformulation, it is argued, would have met Justice Blackmun's legitimate definitional and consistency concerns and, at the same time, preserved a greater province of state sovereignty against invasion by the federal government in the name of interstate commerce.¹⁵⁶ The question arises, however, whether an eleventh amendment affirmative limit on Congress's commerce clause power necessarily requires a governmental-proprietary distinction. If such a limit is based on the concept of independent state consent the question then becomes whether the determination of such state consent would necessarily require a governmental-proprietary distinction. Professor Nowak has maintained that the determination of whether state consent is voluntary, and thus independent from congressional action, necessarily requires application of the governmental-proprietary distinction.¹⁵⁷ Professor Brown accepts Professor Nowak's analysis, and maintains that because *Garcia* has rendered the governmental-proprietary distinction invalid, any determination of whether a state has voluntarily consented to congressionally authorized federal jurisdiction is rendered impossible, and as a result, any eleventh amendment affirmative limit on the Congress's commerce clause power would also be impossible.¹⁵⁸ However, close analysis of the cases reveals that the Court has not yet applied the governmental-proprietary distinction to reach that conclusion and it is not clear that it would. Moreover, the views of Professors Nowak and Brown assume an implied waiver approach, rather than an express waiver approach, to eleventh amendment analysis of article I power.

153. *Id.* at 546-47.

154. Schwartz, *supra* note 31, at 151.

155. Baird, *State Empowerment After Garcia*, 18 URB. L. 491, 509-11 (1986).

156. *See id.* at 511.

157. Nowak, *supra* note 11, at 1442-43.

158. Brown, *supra* note 10, at 393-94.

B. *The Governmental-Proprietary Distinction Prior to Garcia*

While *Parden v. Terminal Railway Co.*¹⁵⁹ established the outlines of a bilateral framework in which both congressional authorization of private damage suits against states in federal court and state consent to that congressional authorization must be satisfied before federal jurisdiction constitutionally exists over a private damage suit against a state, it also adopted an implied waiver approach to the determination of state consent.¹⁶⁰ Insofar as the governmental-proprietary distinction has *actually* been used in eleventh amendment law, however, one may argue that it has been exclusively applied to the congressional authorization analysis and not necessarily to the state consent analysis. Thus, the fact that *Garcia* discredited the governmental-proprietary distinction does not necessarily eliminate state consent as an independent predicate to Congress's creation of federal jurisdiction over private suits against states, under the commerce clause.

Though *Parden* mentions that the state of Alabama was involved in what has been termed "proprietary activity,"¹⁶¹ the Supreme Court's holding that the state had constructively consented away its eleventh amendment immunity in running a railroad twenty years after the enactment of the FELA¹⁶² may be justified without reliance on the governmental-proprietary distinction. Essentially, the *Parden* holding can be analyzed in terms of time. The state's actions were voluntary, because it had *not yet* entered the activity at the time FELA was enacted. The FELA was enacted well before the state bought and operated a common carrier in interstate commerce. Specifically, Justice Brennan stated: "[o]ur conclusion is simply that [the state], when it began operation of an interstate railroad approximately [twenty] years *after* enactment of the FELA, necessarily consented to such suit as was authorized by that Act."¹⁶³ He also stated with respect to the state's consent: "by *thereafter* operating a railroad in interstate commerce, [the state] must be taken to have accepted that condition [congressional authorization of private damage suits in federal court] and thus to have consented to suit."¹⁶⁴ *Parden* thus implies that had

159. 377 U.S. 184 (1964).

160. *Id.* at 192-93 ("constructive consent").

161. *Id.* at 185.

162. *Id.* at 192.

163. *Id.* (emphasis added).

164. *Id.* (emphasis added).

the state bought and operated a common carrier in interstate commerce *prior* to the enactment of the FELA, voluntary consent by the state would not have been found.

In his concurrence to *Employees of the Department of Public Health & Welfare v. Missouri Department of Public Health & Welfare*,¹⁶⁵ Justice Marshall recognized that "time,"¹⁶⁶ and not the governmental-proprietary distinction was the basis of the state consent found in *Parden*. *Parden* neither used the governmental-proprietary distinction to determine the voluntariness of state consent, nor implied that this distinction would ever be used to make that determination.

In contrast to *Parden*, *Employees* focused almost exclusively on the issue of whether Congress intended to authorize federal jurisdiction over private damage suits against states by the FLSA.¹⁶⁷ Although the *Employees* Court attempted to distinguish *Parden* on the ground that the latter involved a proprietary activity,¹⁶⁸ it never discussed the state consent aspect of *Parden* in terms of the governmental-proprietary distinction.¹⁶⁹ *Parden* implied, on the other hand, that in a proprietary context, Congress could effectively authorize federal jurisdiction over private suits against state governments with a less clear statute.¹⁷⁰

Conversely, *Employees* suggested that where a "governmental activity" is involved, Congress must speak more clearly in the statute, in order to effectively authorize private suits against states in federal court.¹⁷¹ In *Employees*, the operation of hospitals and schools was "governmental" activity.¹⁷² The Court in *Employees* neither indicated different treatment for a proprietary activity on the state consent issue, nor suggested that Congress could not constitutionally authorize federal jurisdiction regarding governmental activity. It bears mention that the *Employees* Court did not use the governmental-proprietary distinction to carve out an area of immunity in which Congress could not regulate as it did in tenth

165. 411 U.S. 279 (1973).

166. *Id.* at 296; see Field, *supra* note 129, at 1225.

167. *Employees*, 411 U.S. at 282-87.

168. *Id.* at 282; see *id.* at 297 n.11 (Justice Marshall rejects the *Employees* Court's attempts to distinguish *Parden* on the basis of governmental-proprietary distinction).

169. *Id.* at 282. "The *Parden* case in final analysis turned on the question of waiver. . . ." *Id.*

170. *Parden*, 377 U.S. at 190-92 (1964).

171. See *Employees*, 411 U.S. at 285-87.

172. *Id.* at 284.

amendment analysis. In fact, Justice Marshall suggested in his concurrence, that had the Court reached the issue of state consent, the issue could have been analyzed without resort to the governmental-proprietary distinction. The focus would have appropriately been on *when* the Congress regulated the schools and hospitals by providing for private damage suits against states in federal court.¹⁷³ He suggested that since the 1966 amendments were enacted after the state became engaged in running hospitals and schools, state consent could not be considered voluntary in such circumstances.¹⁷⁴

Professors Brown and Nowak have argued, however, that under an implied waiver approach, voluntary state consent could not be found in circumstances analogous to *Parden*, where Congress's attempt was to regulate a governmental, instead of a proprietary activity.¹⁷⁵ The theory that a state has no choice as to whether to begin, continue, or cease a governmental activity is the foundation of their argument.¹⁷⁶ That theory rests on the premise that the states are, by definition, obligated to provide "governmental" services, and therefore never voluntarily begin or cease those services.

C. *Resolution of the Issue Raised by Garcia*

As Justice Marshall suggested, so long as the state has notice of the possibility of being sued by private plaintiffs in federal court before it engages in the activity which subjects it to that possibility, voluntary state consent can be argued to exist, irrespective of the governmental or proprietary character of the activity.¹⁷⁷ Indeed, nothing in *Parden* or *Employees* necessarily suggests that the "governmental" character of the activity would so seriously inhibit a state from restructuring its services (so as to avoid suit in federal court) that it would not be viewed as voluntary restructuring. On the other hand, if the regulated activity is "governmental," it is more likely than not that the state, would already be engaged in that activity when federal regulation occurred. So, in practice, implied consent is not likely to be found in the context of a governmental activity. Federal jurisdiction over private damage suits

173. *Id.* at 296 (Marshall, J., and Stewart, J., concurring).

174. *Id.*

175. Nowak, *supra* note 11, at 1448-50.

176. *See Id.* at 1443.

177. *Employees of the Dep't of Health & Welfare v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 297 n.11 (1973) (Marshall, J., and Stewart, J., concurring).

against states can only be based on some form of express state consent.¹⁷⁸ Under an implied waiver approach, state consent may be, in most cases, determined by focusing on when Congress attempted to regulate the state government by providing for federal jurisdiction over private suits against it, without regard for the nature of the state activity. Reserving judgment on the question of congressional power to compel states to defend private suits in federal court, the *Welch v. Texas Department of Highways & Public Transportation*¹⁷⁹ Court never mentioned the governmental-proprietary distinction.

In light of the recently affirmed disfavor of "constructive consent" in *Welch*,¹⁸⁰ the Court would be justified in rejecting an implied waiver approach in favor of *express* state consent. If an express state consent approach is adopted, the governmental-proprietary distinction becomes irrelevant. State consent would not be measured according to whether the state undertook or refrained from certain federally regulated activity and thereby impliedly consented, but by a state's express consent.

Parden may be viewed as an unjustified reliance on *Petty v. Tennessee-Missouri Bridge Commission*,¹⁸¹ and as an unjustified departure from previous eleventh amendment law that required express state consent.¹⁸² That *Parden* made state consent a federal question does not render state consent meaningless or impossible in the commerce clause context. Express state consent could be made a matter of federal constitutional law and be consistent with recent precedent which characterizes the eleventh amendment as the "'constitutionally guaranteed immunity of the several States.'"¹⁸³

178. See *Atascadero*, 473 U.S. at 241.

179. 107 S. Ct. 2941 (1987).

180. See *Welch*, 107 S. Ct. at 2945 (quoting *Edelman*, 415 U.S. at 673); *Atascadero v. State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (quoting *Edelman*, 415 U.S. at 673).

181. 359 U.S. 275 (1959) (held that a state constructively waived its eleventh amendment immunity for actions connected to an agency created by an interstate compact). The Court based its holding on a rather vague "sue and be sued" clause in the compact entered into by Tennessee and Missouri. Because there was no federal statute at issue, the questions of Congress's constitutional power to abrogate the eleventh amendment, and whether the Congress authorized private suits against states in federal court were not part of the analysis. This is the major difference between *Petty* and *Parden*.

182. See, e.g., *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944); *Smith v. Reeves*, 178 U.S. 436, 441 (1900).

183. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (quoting *Quern v. Jordan*, 440 U.S. 332, 342 (1979)).

Finally, the complex theoretical problems revolving around the issue of whether Congress can "induce" a state to waive its eleventh amendment immunity could be avoided by the adoption of an express state consent approach. Professor Tribe has expressed some justifiable concern over whether the application of implied consent doctrine to eleventh amendment problems would permit Congress to condition a state's entry into a regulated area or the receipt of federal benefits on a state's waiver of its constitutionally guaranteed immunity.¹⁸⁴ Could a state be said to have voluntarily consented away its eleventh amendment immunity if Congress essentially indicates that unless a state agrees to be sued by private plaintiffs in federal court, it will not receive any federal money or benefits from a federal program?

Professor Tribe solves the problem of "unconstitutional conditions" by denying that a state has any constitutional rights under the eleventh amendment.¹⁸⁵ However, such a solution flies in the face of *Edelman's* suggestion that states do have rights under the eleventh amendment.¹⁸⁶ An express state consent approach would not only be an alternative to the practically difficult implied consent approach, but it would offer a solution to the unconstitutional conditions problem, and would be more consistent with current eleventh amendment law.

III. THE WECHSLER THESIS AND AN ELEVENTH AMENDMENT AFFIRMATIVE LIMIT BASED ON STATE CONSENT

Theoretically one might argue, as *Union Gas II*¹⁸⁷ clearly suggests, that since *Garcia*¹⁸⁸ adopted the federalism theory of the Wechsler thesis for tenth amendment analysis, the Court would be logically required to adopt it for eleventh amendment analysis as well.¹⁸⁹ The Wechsler thesis maintains that state sovereignty inter-

184. Tribe, *supra* note 12, at 692-93.

185. *Id.* at 693.

186. 415 U.S. at 673 ("surrender of constitutional rights").

187. *United States v. Union Gas Co. (Union Gas II)*, 832 F.2d 1343, 1354-56 (3rd Cir. 1987), *cert. granted subnom.* *Pennsylvania v. Union Gas Co.*, 108 S. Ct. 1219 (1988).

188. *Garcia v. San Antonio Metro. Authority*, 469 U.S. 528, 550-51 (1985).

189. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302-04 (1985) (Blackmun, J., dissenting); *see also* *Brown*, *supra* note 10, at 393-94 (Professor Brown suggests that an eleventh amendment affirmative limit on the commerce clause power would contradict *Garcia's* federalism theory that the national political process is the sole safeguard of state interests); *Skover*, *supra* note 5, at 299 (Professor Skover has suggested that an eleventh amendment affirmative limit on Congress's commerce clause power would seem to "un-

ests are adequately protected by the legislators in Congress and that there is no need for judicially enforcing affirmative protection for states.¹⁹⁰ The Wechsler thesis, as the *Garcia* Court understood it,¹⁹¹ assumes that because the states are represented in the Congress, the votes of the state's representatives are votes of the states themselves. *Union Gas II*, Professors Nowak and Tribe, and now Professor Brown,¹⁹² have relied heavily on the Wechsler thesis to support their conclusion that Congress may abrogate a state's eleventh amendment immunity in the exercise of its article I power to regulate interstate commerce.

Professor Nowak believes that the eleventh amendment should not affirmatively limit Congress's power to grant jurisdiction to the federal courts over state government. He has stated that "the pragmatic problems of federalism posed by the eleventh amendment should be resolved by Congress, not by the judiciary. Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels."¹⁹³ Professor Tribe was quoted in *Union Gas II* as saying¹⁹⁴ that "it has generally been recognized that the states are represented in Congress and that Congress will be attentive to concerns of state governments as separate sovereigns."¹⁹⁵ Professor Brown appears to accept the Tribe/Nowak view and predicts that the Court will "abandon the concept of limits generated by the eleventh amendment."¹⁹⁶

determine the presumption in *Garcia* that national political processes safeguard federalism concerns.").

190. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558-59 (1954); see also La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L. Q. 779 (1982); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980).

191. 469 U.S. at 552-54.

192. *Union Gas II*, 832 F.2d at 1354-56; Nowak, *supra* note 11, at 1441 nn.151-52. Interestingly, despite the historical support Professor Nowak musters in support of his thesis, in the final analysis he relies on "pragmatic" concerns to resolve the congressional power issue. See Brown, *supra* note 10, at 393-94; Nowak, *supra* note 11, at 1441; Tribe, *supra* note 12, at 695.

193. Nowak, *supra* note 11, at 1441.

194. 832 F.2d at 1355 (quoting Tribe, *supra* note 12, at 695).

195. Tribe, *supra* note 12, at 695.

196. Brown, *supra* note 10, at 365.

The Wechsler thesis is, however, under increasing attack by scholars¹⁹⁷ and certain members of the Supreme Court.¹⁹⁸ Professor Shwartz recently said: " 'Trust the Congress!' is hardly enough to protect the states from federal legislators who look on them with a more hostile eye than the *Garcia* opinion anticipated."¹⁹⁹ Professor Kaden suggests that fundamental changes in the conduct of politics and the increasing emphasis on national programs decreases the sensitivity of Congress to state interests. He further asserts that, as a result, Congress "may no longer be as well suited [as it once may have been] to the task of safeguarding the role of the states in the federal system and protecting the fundamental values of federalism."²⁰⁰

Justice Powell, the principal architect of modern eleventh amendment jurisprudence, has vehemently attacked the relevance of the Wechsler thesis to contemporary political realities. In his dissent in *Garcia*, he argued that "[n]ot only is the premise of [the Wechsler thesis] clearly at odds with the proliferation of national legislation over the past [thirty] years, but 'a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values.'"²⁰¹ In Justice Powell's view,

[t]he adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies.²⁰²

197. See, e.g., Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979); Comment, *Garcia v. San Antonio Metropolitan Transit Authority and the Manifest Destiny of Congressional Power*, 8 HARV. J.L. & PUB. POL'Y 745 (1985); Comment, *State Autonomy After Garcia: Will the Political Process Protect States' Interests?*, 71 IOWA L. REV. 1527 (1986).

198. See, e.g., *Garcia*, 469 U.S. at 557 (Powell, J., with whom Burger, C.J., Rehnquist, J., and O'Connor, J., join, dissenting); *id.* at 579 (Rehnquist, J., dissenting); *id.* at 580 (O'Connor, J., with whom Burger, C.J., Powell, J., and Rehnquist, J., join, dissenting). The *Garcia* dissenters sharply rebuked the majority's heavy reliance on the Wechsler thesis and indicated that such reliance was nothing less than an abdication of the Supreme Court's constitutional responsibility.

199. Schwartz, *supra* note 31, at 164.

200. Kaden, *supra* note 197, at 849.

201. *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting) (relying on ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50 (1984) [hereinafter ACIR]).

202. *Id.* (citing ACIR at 50-51).

Justice O'Connor was in essential agreement with Justice Powell and Justice Rehnquist in her dissent in *Garcia* and stated firmly: "[t]he political process has not protected against [federal] encroachment on state activities."²⁰³

If the Court were going to adopt the Wechsler thesis for eleventh amendment law, one could reasonably have expected a hint in *Atascadero State Hospital v. Scanlon*,²⁰⁴ (decided shortly after *Garcia*) or in *Welch v. Texas Department of Highways & Public Transportation*,²⁰⁵ (an eleventh amendment-commerce clause case). *Atascadero* did not even mention the Wechsler thesis, but recognized that *Garcia* continued to acknowledge "that 'the States occupy a special and specific position in our constitutional system.'"²⁰⁶

Moreover, eleventh amendment immunity indeed belongs to the states themselves. It cannot be said that the states relinquished even a portion of that immunity at any point in our constitutional history, except perhaps in the limited area of fourteenth amendment enforcement power.²⁰⁷ The Court has suggested that constitutional rights under the eleventh amendment belong to state governments themselves,²⁰⁸ at least in the article I power context, and may not be waived simply by a majority vote of their representatives in Congress.

Furthermore, the eleventh amendment itself suggests that the Framers desired to codify and protect that immunity with a constitutional provision, placing it beyond the reach of the state's representatives in Congress.²⁰⁹ The line of law developed in *Parden*²¹⁰ and in *Edelman*,²¹¹ and implicitly supported in *Atascadero*²¹² and *Welch*,²¹³ suggests that the eleventh amendment requires more than the Wechsler thesis would allow in the way of independent state consent. One must question, therefore, whether "prag-

203. *Id.* at 587-88 (O'Connor, J., dissenting).

204. 473 U.S. 234 (1985).

205. 107 S. Ct. 2941 (1987).

206. *Atascadero*, 473 U.S. at 242 (citing *Garcia*, 469 U.S. at 547).

207. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976); see *Jablonski*, *supra* note 5, at 600-03.

208. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

209. U.S. CONST. amend. XI.

210. *Parden v. Terminal Ry. Co.*, 377 U.S. 184, 192 (1964).

211. *Edelman*, 415 U.S. at 672.

212. *Atascadero*, 473 U.S. at 246-47.

213. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2951 (1987).

matic"²¹⁴ considerations justify conclusions contrary to constitutional mandate. To this extent, eleventh amendment law may contradict Professor Wechsler's thesis that the Constitution envisions no more protection for states than that deriving from their representation in the federal legislature.

The broadest theoretical question of eleventh amendment law raised by *Garcia* is: if state tenth amendment interests are sufficiently protected by the national political process, why do state eleventh amendment interests require a principle independent from the national political process? Stated another way, why, after *Garcia*, should a majority vote of the representatives of the states in Congress not be, in the eleventh amendment context, constitutionally tantamount to the consent of those states? One commentator has argued that "[a] Wechslerian critique of state sovereignty as articulated in *National League of Cities* would seem equally applicable to eleventh amendment doctrine."²¹⁵ However, in a footnote to *Welch*, Justice Powell provocatively suggested that "the principle that [s]tates cannot be sued *without their consent* is broadly consistent with the Tenth Amendment."²¹⁶ Even in the era before *Garcia*, when states had substantive protection under *National League of Cities*, commentary attacked the sufficiency of the Wechsler thesis to protect state eleventh amendment interests, and stated that "[f]inal power to balance state and federal interests ought not to reside in Congress."²¹⁷

Under the tenth amendment, state interests in sovereignty revolve around freedom from unduly burdensome federal regulation. According to the Wechsler thesis, because the states are directly represented in Congress, there is no need for judicially enforceable limitations of federal power over states other than perhaps certain procedural requirements.²¹⁸ Since state interests in federal regulation are adequately represented in Congress, unduly onerous substantive obligations will not, in theory, be enacted. However, when Congress authorizes federal jurisdiction over private damage suits against state governments it necessarily involves the federal courts,

214. Nowak, *supra* note 11, at 1441.

215. Brown, *supra* note 10, at 375.

216. *Welch*, 107 S. Ct. at 2951 n.14 (emphasis added).

217. Baker, *supra* note 69, at 184.

218. That is that Congress speak clearly in the face of the statute, ensuring that these state sovereign interests are recognized and considered in enacting burdensome legislation. See Comment, *The Tenth Amendment After Garcia: Process-Based Procedural Protections*, 135 U. PA. L. REV. 1657 (1987).

a branch of the federal government in which state governments have no representation and that is independent from the branch which includes the representatives of the states. The Supreme Court has recognized that "the [s]tates are represented in Congress but not in the federal courts."²¹⁹

It is never Congress which ultimately exercises federal jurisdiction over a state government in the context of disputes based on federal law. It only authorizes that jurisdiction. It is a federal court which ultimately resolves the dispute.

Neither the state governments, nor their representatives in Congress, choose the federal judiciary. Indeed, state governments exert no influence over the federal judiciary and have no control over a federal court exercising jurisdiction over them in a private suit. A commentator acknowledged this fact in support of a contrary thesis by stating that "[t]he federal judiciary . . . is insulated from the influence of the states."²²⁰ It is precisely this structure which necessitates the principle of state consent in order to provide a measure of protection for a state government from an *exercise* of jurisdiction by a branch of the federal government over which it exerts no influence, and in which it has neither direct nor indirect representation.

Federal jurisdiction, in the case of private damage suits, bears the distinct potential for intrusive federal court supervision of state fiscal and policy matters. That potential is only strengthened by the loss of perhaps all substantive protection under the tenth amendment. While some commentary has suggested that the eleventh amendment ought not to limit specific congressional grants of jurisdiction,²²¹ it should be recognized that important federalism concerns exist whether a federal court assumes jurisdiction pursuant to congressional grant, or pursuant to federal question jurisdiction.

Justice Powell may have implicitly sanctioned this reasoning in *Welch* when he stated that "[t]he contours of [eleventh amendment] immunity are determined by the structure and requirements of the federal system."²²² Additionally, Justice Powell stated that

219. *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.9 (1981).

220. Nowak, *supra* note 11, at 1441.

221. Field, *supra* note 129, at 1278; Nowak, *supra* note 11, at 1441; Tribe, *supra* note 12, at 693.

222. *Welch*, 107 S. Ct. at 2953.

"[a]lthough the dissent [in *Welch*] denies that [eleventh amendment] immunity is 'required by the structure of the federal system' . . . the principle has been deeply embedded in our federal system from its inception."²²³ In *Garcia*, Justice Blackmun suggested that the structure of the Constitution may require certain affirmative limits on federal power over states.²²⁴ The requirement of independent state consent in eleventh amendment law may be one of them.

Under the eleventh amendment, then, state interests are broader than they are under the tenth amendment. Tenth amendment interests implicate only the federal legislature; eleventh amendment interests, however, implicate both the federal legislature and the federal judiciary.²²⁵ Eleventh amendment-based rights accruing to state government must reflect the breadth of these constitutional interests.

IV. THE RISE OF ELEVENTH AMENDMENT STATE SOVEREIGNTY?

To the extent that the eleventh amendment operates as an effective instrument of intergovernmental federalism, it must be something more than Professor Field's characterization as "common law sovereign immunity." Moreover, if the amendment were merely a "presumption of immunity," a view held by *Union Gas II*,²²⁶ and long held by Professors Nowak and Tribe,²²⁷ it could not function as an effective instrument of intergovernmental federalism, since that view would allow Congress to nullify its efficacy by simply speaking clearly on a statute's face. Even after *Garcia*,²²⁸ the Court has made it clear that the eleventh amendment's importance rests in the "structure of the federal system,"²²⁹ and the eleventh amendment "limitation upon the judicial power is, without question, a reflection of concern for the sovereignty of the States."²³⁰

223. *Id.*

224. *Garcia*, 469 U.S. at 556.

225. In *Union Gas II*, the court altogether misses this important structural point. 832 F.2d at 1356. The court suggests that the "constitutional scheme" is a sufficient "structural" principle to protect state interests under the eleventh amendment.

226. See *United States v. Union Gas Co. (Union Gas II)*, 832 F.2d 1343, 1354 (3rd Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988).

227. See Nowak, *supra* note 11, at 1441; Tribe, *supra* note 12, at 695-96.

228. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).

229. *Welch v. Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2953 (1987) (citing *id.* at 2970 (Brennan, J., dissenting)).

230. *Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 293 (1973) (Marshall, J., and Stewart, J., concurring in result).

A. *The Failure of the Wechsler Thesis to Protect Eleventh Amendment State Sovereignty?*

Despite commentary trivializing the eleventh amendment as "formalities of federalism,"²³¹ and deprecating the eleventh amendment to the level of common law sovereign immunity doctrine,²³² or merely a presumption of immunity,²³³ the *Atascadero* Court, without reference to either *Garcia* or the Wechsler thesis, boldly summarized its justification of an eleventh amendment-based state sovereignty:

We believe . . . that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution. The Framers believed that the States played a vital role in our system and that strong state governments were essential to serve as a "counterpoise" to the power of the Federal Government . . . [N]one of the Framers questioned that the Constitution created a federal system with some authority expressly granted the Federal Government and the remainder retained by the several States.²³⁴

The *Atascadero* Court further maintained that "[t]he Eleventh Amendment serves to maintain [a] balance"²³⁵ of power between the federal and state governments "[b]y guaranteeing the sover-

231. Baker, *supra* note 69, at 181.

232. *Welch Texas Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2958 (1987), (Brennan, J., dissenting, joined by Stevens, J., Marshall, J., and Blackmun, J.); H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 152 (1984); see Field, *supra* note 129, at 538-46; see Tribe, *supra* note 12, at 694-95; see also Thornton, *The Eleventh Amendment: An Endangered Species*, 55 *IND. L.J.* 293, 305-10 (1980). To the extent that Professor Tribe suggests that the eleventh amendment would free states from national control, he implies that the eleventh amendment operates as traditional common law sovereign immunity in shielding the sovereign from private suit altogether. However, the eleventh amendment is specifically directed at the issue of shielding the states from federal jurisdiction not from private suits based on federal law. "A state asserting an eleventh amendment defense is, in essence, challenging the right of the federal government to impose a monetary burden on it." See Nowak, *supra* note 11, at 1441. Professor Nowak and Professor Tribe confuse the concepts of common law sovereign immunity and eleventh amendment immunity. The eleventh amendment regulates jurisdiction in a system of dual sovereignties, not imposition of monetary burdens.

233. *United States v. Union Gas Co. (Union Gas II)*, 832 F.2d 1343, 1354 (3d Cir. 1987), *cert. granted* 108 S. Ct. 1219 (1988); *In re McVey Trucking, Inc.*, 812 F.2d 311, 318 (7th Cir.), *cert. denied*, 108 S. Ct. 227 (1987).

234. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 n.2 (1985) (citations omitted).

235. *Id.* at 242.

eign immunity of the States against [unconsented] suit in federal court."²³⁶

1. State Interest in Freedom from Retroactive Relief: Federal Intrusion into State Fiscal Matters

One fundamental liberty, cherished by both Federalists and Anti-Federalists, is participation in effective local government.²³⁷ Indeed, the Court has expressed deep concern over the possible depletion of a state treasury effected through federal court order.²³⁸ In *Edelman*, the Court indicated that the eleventh amendment protected "state funds,"²³⁹ though differently. Justice Rehnquist, for the majority of the Court in *Edelman*, stated that "a suit by private parties [in federal court] seeking to impose a liability which must be paid from the public funds [of a] state treasury"²⁴⁰ or a suit seeking retroactive relief is a major focus of eleventh amendment state sovereignty. By limiting the federal judiciary's power to issue various forms of fiscally burdensome and institutionally intrusive relief on behalf of private plaintiffs against state government,²⁴¹ the eleventh amendment contributes to the balance of power between the federal and state governments.

236. *Id.*

237. See *Garcia*, 469 U.S. at 575-76 (Powell, J., dissenting).

238. *Edelman v. Jordan*, 415 U.S. 651, 665-69 (1974).

239. *Id.* at 668.

240. *Id.* at 663.

241. While federal court retroactive relief is clearly within the scope of the eleventh amendment, questions remain as to what prospective relief is covered by the amendment. Prospective relief may generally be defined as an injunction "to conform . . . future conduct of" state officials to legal standards. *Id.* at 664.

While *Edelman* acknowledged that a state government's compliance with prospective relief may place a greater burden on the state in some cases than the payment of damages from the state treasury, *id.* at 667, the Court felt bound by *Ex parte Young*, 209 U.S. 123 (1908), to permit federal courts to issue a broad range of prospective relief based on federal law. *Edelman*, 415 U.S. at 664-65. *Young* permitted a federal court to enjoin state officials acting in their official capacity from enforcing a state statute violative of the fourteenth amendment, on the theory that state officials who enforce unconstitutional statutes are stripped of their representative authority. *Young*, 209 U.S. at 160. Under *Young*, any federal court injunctive relief directed against state officials who are allegedly enforcing unconstitutional statutes, no matter how financially onerous or intrusive such relief may be, was in theory permissible.

Pennhurst State School & Hosp. v. Halderman (Pennhurst II), 465 U.S. 89 (1984), however, indicates the Court's willingness to use the eleventh amendment to limit the federal courts' ability to issue prospective relief against state governments. *Pennhurst II* held that the eleventh amendment barred a federal court from issuing purely prospective relief, where that prospective relief is based on state law and issued against state officials. *Id.* at 106. Justice Powell distinguished *Edelman* on the basis that it involved federally based prospective relief, not state law based prospective relief. *Id.* at 105-06. He explained that the

Without the fiscal ability to meet the needs of its citizenry, the states' role in the federal union could be eliminated along with any chance for a balance of power between the federal and state governments. Even Alexander Hamilton, a forceful advocate for a strong central government, argued that the Constitution contained no "article or clause" permitting the federal government to diminish the fiscal reservoirs of the states.²⁴² Without some assurance of financial independence for state government, the specter of a tyrannizing, absolutely powerful, central government grows more threatening. To avoid that specter, the eleventh amendment guards against diminution of a state treasury through *federal court order*.²⁴³ The tenth amendment limit of *National League of Cities v. Usery*²⁴⁴ protected the state treasury by invalidating burdensome federal legislation. In contrast, an eleventh amendment affirmative limit would guard state treasuries by limiting federal court jurisdiction over the states and consequent federal court orders against them.

2. The Inevitable Tension Created by Federal Jurisdiction over State Governments

*Welch v. Texas Department of Highway's & Public Transportation*²⁴⁵ recently indicated that the eleventh amendment concerns "the delicate problems of enforcing judgments against the States, that [were] raised by both Federalists and anti-Federalists."²⁴⁶ These federalism concerns apply *pari passu* to federal question cases, despite the view of Justice Brennan.²⁴⁷ Federalism tension

supremacy clause concerns of *Edelman* are relevant only for the enforcement of federal law. *Id.* However, Justice Powell referred to *Young* as a "very narrow" exception to general eleventh amendment principles. *Id.* at 114 n.25. Moreover, by citing *Louisiana v. Jumel*, 107 U.S. 711 (1883), with approval, Justice Powell implied that not all forms of federal law based prospective relief would be permissible under the eleventh amendment. *Pennhurst II*, 465 U.S. at 101. Indeed, whether a federal court could, under the eleventh amendment, issue federal law prospective relief where "the prospective financial burden was substantial and ongoing," *id.* at 104, was intriguingly left open. *Id.* at 104 n.13. The Court was convinced, however, that burdensome federal law based prospective relief "would be constrained by principles of comity and federalism." *Id.*

242. THE FEDERALIST No. 32, at 199 (A. Hamilton) (J. Cooke ed. 1961).

243. *Edelman v. Jordan*, 415 U.S. 651, 665-69 (1974).

244. 426 U.S. 833 (1976).

245. 107 S. Ct. 2941 (1987).

246. *Id.* at 2950.

247. *Id.*

develops even for federal questions because in issuing relief an unelected federal judiciary necessarily dictates to an unconsenting state legislature or state executive what it must pay, and how it must pay it.

The *Edelman* Court recognized that federal court intrusion into state fiscal policy and state government more generally, is a matter of no small concern for federalism. The Court in *Edelman* quoted from Judge McGowan's opinion in *Rothstein v. Wyman*: "[i]t is quite another thing to order the Commissioner to use state funds to make reparation for the past. [This] would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force."²⁴⁸ Even Professor Nowak, an opponent of the view of the eleventh amendment articulated by this article, has stated that "judicial interference with state finances poses no small danger to the workings of a harmonious federalism."²⁴⁹

Because the tensions in federal jurisdiction over state government are structurally based, and exist whether the Congress specifically grants federal jurisdiction over state government, or a federal court assumes that jurisdiction, the eleventh amendment should be an affirmative limit on Congress's power to create federal jurisdiction. Permitting the Congress unlimited power to create federal jurisdiction over state government would result in frequent tension with and destructive intrusions into state fiscal policy by federal courts.

B. *A Solution: State Courts as the Preferred Fora*

In the absence of state consent to federal jurisdiction over private damage suits, state courts should become the primary fora for those suits against states based on article I power statutes, even where Congress has clearly granted it.²⁵⁰ The Court has approved of federally-based private suits against states being brought in state court. Justice Marshall stated that "[w]hile constitutional

248. *Edelman v. Jordan*, 415 U.S. 651, 664-65 (1974) (quoting *Rothstein v. Wyman*, 467 F.2d 226, 237 (2d Cir. 1972), *cert. denied*, 411 U.S. 921 (1973)).

249. Nowak, *supra* note 11, at 1469. Professor Nowak continued and noted that the Court will be faced with a more difficult and important question then judicial interference with state finances. This will happen when the Court "determines the scope of congressional power to create federal damage actions against state governments." *Id.*

250. *Employees of the Dep't of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., and Stewart, J., concurring).

limitations upon the federal judicial power bar a federal court action by these [private plaintiffs] to enforce their rights, the courts of the State nevertheless have an independent constitutional obligation to entertain [private] actions to enforce those rights."²⁵¹ Justice Powell recently stated that "[i]t denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land."²⁵² State courts are the basic adjudicators in our federal system.²⁵³ They are generally not insensitive, unsophisticated judicial institutions,²⁵⁴ and they may not constitutionally refuse to hear federal claims against states. In addition, State court interpretations of federal law are always subject to Supreme Court review.²⁵⁵

Relying on Professor Bator, Professor Brown has suggested that it may be politically healthy for state courts to interpret, in the first instance, commerce clause restrictions on state power under which private plaintiffs sue states.²⁵⁶ State courts would be more inclined to respect the sovereign interest of the state against damage claims of private plaintiffs. Professor Nowak has suggested that states would erect procedural impediments to private plaintiffs and foreclose their opportunity to sue state governments in state court.²⁵⁷ However, the doctrine of due process, available in both federal and state constitutions, would serve private plaintiffs if states impeded access to state courts.

V. CONCLUSION

An affirmative limit on Congress's commerce clause power to create federal jurisdiction over state governments is supported by eleventh amendment doctrine, and is not necessarily precluded by

251. *Id.* at 298. "[The state] has courts of general jurisdiction competent to hear [private suits against states], and the judges of those courts are co-equal partners with the members of the federal judiciary in the enforcement of federal law and the Federal Constitution." *Id.*

252. *Atascadero State Hosp. v. Scanlan*, 473 U.S. 234, 240 n.2 (1985) (citations omitted).

253. See generally Douglas, *The Clash Over Constitutions: The Reassertion of State Authority*, 26 *JUDGES' J.* 38 (Summer 1987).

254. *Id.*; Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An empirical Analysis of Judicial Parity*, 10 *HASTINGS CONST. L.Q.* 213, 225-31 (1983); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 *CALIF. L. REV.* 189, 235-44 (1981).

255. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264 (1821).

256. Brown, *supra* note 10, at 391 (citing Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 *VILL. L. REV.* 1030, 1037 (1982)).

257. Nowak, *supra* note 11, at 1447.

Garcia.²⁵⁸ Neither *Garcia's* invalidation of the governmentalproprietary distinction, nor its adoption of the Wechsler thesis presents insuperable problems for such a limit. Despite the tenth amendment's demise, the eleventh amendment still has a role to play in the relationship of the federal government to state governments, and in mitigating the various sources of tension inherent in that relationship. An affirmative limit on Congress's commerce clause power would mediate *Garcia's* effect on the federal union. It would require private plaintiffs to sue states, under commerce clause statutes, in state courts. State courts would inherently be more sensitive to the interests of a sovereign state. An eleventh amendment state sovereignty would also bolster respect for the state judiciary, the basic adjudicator for our system of government.

James Madison, the principal architect of the Constitution, maintained that effective state governments would become bulwarks against a central government bent on encroaching on the liberties of the people.²⁵⁹ Alexander Hamilton understood that just as there exists a tendency in the state governments to invade the sphere of the federal government, there exists in the central government a tendency to interfere with and intrude into, if not altogether annihilate, the spheres of state and local governments.²⁶⁰ Since *Garcia*, Congress may interfere virtually *carte blanche* with what have hitherto been known as integral state functions.

The need for eleventh amendment protection for the states has, therefore, never been greater. Even before *Garcia*, commentary argued for more eleventh amendment protection for the states.²⁶¹ Were the Court to affirm *Union Gas II*²⁶² and hold that the Congress may remove a state's eleventh amendment immunity in an exercise of commerce clause power, there would, in theory, be no limit to intrusive federal court supervision of state policy. Limiting federal intrusions on state sovereignty is necessary to the success of the American experiment in government and the ultimate objective of that experiment, individual liberty. There is considerable reason supporting a reversal of *Union Gas II*. Far from "be-

258. *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985).

259. THE FEDERALIST No. 46, at 322 (J. Madison) (J. Cooke ed. 1961).

260. THE FEDERALIST No. 31, at 198 (A. Hamilton) (J. Cooke ed. 1961).

261. Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 245 (1968).

262. *United States v. Union Gas Co. (Union Gas II)*, 832 F.2d 1343 (3d Cir. 1987), cert. granted, 108 S. Ct. 1219 (1988).

tray[ing] the intellectual history of the American Revolution,"²⁶³ an eleventh amendment state sovereignty would work to secure its basic promise.

263. Amar, *supra* note 133, at 1466.