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The Eleventh Amendment and Nondiverse Suits Against States

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THE ELEVENTH AMENDMENT AND NONDIVERSE SUITS AGAINST STATES

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INTRODUCTION

Pursuant to its text, the Eleventh Amendment bars federal courts from hearing suits initiated by a plaintiff against a state where the plaintiff is not a citizen.[1] The Supreme Court has also interpreted the Constitution to bar federal courts from hearing suits initiated by a plaintiff against a citizen of that state.[2] This understanding contradicts the text of the Constitution and prevents plaintiffs from recovering against states that have violated their rights. This article argues that the Eleventh Amendment should be interpreted consistent with the text of the Constitution to enable plaintiffs to sue states for violating federal rights.

Scholars disagree with the current doctrine, and their opinions generally split into three different theories:[3] the diversity theory, the originalist theory, and the textualist theory. This article falls under the textualist theory.

The diversity theorists broadly argue that the Eleventh Amendment only removes diversity jurisdiction for out-of-staters wishing to sue another state but leaves federal question jurisdiction as a valid avenue for suit.[4] The originalists vary on several specifics, but they largely argue that the principles of sovereignty that existed at the founding protect states

1. "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.

2. Hans v. Louisiana, 134 U.S. 1 (1890).

3. Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1825-38 (2010) (categorizing the three theories of the Eleventh amendment that he opposes as 1. "immunity theory" (which is current doctrine), 2. diversity theory, and 3. "compromise theory" (which this paper falls under and calls the "textualist theory"). This paper groups Professor Clark's paper with the originalist theorists, a fourth group.)

4. *See, e.g.*, William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 54 U. CHI. L. REV. 443 (1989).

from suits against their own citizens.[5] Originalists agree with the current doctrine that in-staters cannot sue their states, but they instead argue that the common law immunity that existed at the founding, rather than the Eleventh Amendment, provide that immunity.[6] Originalists are also less convinced that the states are necessarily protected against suit in other states' courts.[7]

This article joins a more recent third path paved by a handful of scholars in the sovereign immunity space, which advocates for a textual,[8] rather than originalist or diversity-theory, approach to the Eleventh Amendment. Justifications for the textualist approach range from

5. *See, e.g.*, Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010); William Baude & Stephen Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609 (2021).

6. Clark, *supra* note 5, at 1912 ("If the Supreme Court wishes to continue to shield states from suits brought by their own citizens, then it must rest its decisions on the nature of the Union rather than the Eleventh Amendment."). That said, the Court seemed for a moment to be resting its decisions on background principles of the union, not just the Eleventh Amendment. Alden v. Maine 527 U.S. 706, 713 (1999):

> We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity.' The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the states' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

The Court has since reversed course. Allen v. Cooper, 140 S. Ct. 994, 1000 (stating that although "[t]he text of the Eleventh Amendment . . . applies only if the plaintiff is not a citizen of the defendant State[,] . . . this Court has long understood that Amendment to 'stand not so much for what it says' as for the broader 'presupposition of our constitutional structure which it confirms.'"); Torres v. Texas Department of Public Safety, 142 S. Ct. 2455, 2468.

7. Clark, *supra* note 5, at 1916:

> As discussed, the Founders' original *intent* seems to have been that the Constitution withholds power from Congress both to legislate for states (as opposed to individuals) and to coerce state compliance with federal commands. By contrast, the original public *meaning* of the text may or may not reflect this understanding because the Constitution does not expressly grant or deny congressional power over states. A dynamic approach to interpretation might rely on changed circumstances to conclude that — notwithstanding the original understanding — the Constitution should now be construed to give Congress power to regulate both individuals and states.

8. Andrew B. Coan, *Text As Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2512 (2006):

> This Essay argues that this debate (and the originalist approach of judges and commentators on all sides of it) has had significant costs. It has produced a legal doctrine rife with internal inconsistencies . . . . By adopting a textualist interpretation of the Eleventh Amendment, the Court can achieve a more coherent doctrine and restore the appearance that its decisions are grounded in principle rather than politics;

John F. Manning, *The Eleventh Amendment and the Precise Reading of Constitutional Texts*, 113 YALE L.J. 1663, 1740 (2004); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1347 (1989).

legitimacy and stability in doctrine[9] to the amendment process outlined in Article V.[10] Textualist literature advocates for taking the Eleventh Amendment at its face, distinguishing between in-state and out-of-state plaintiffs. The argument is that in-staters can sue their own states while out-of-staters are barred. Current textualist literature, however, does not explain how its reading would affect Congress' powers under Article I and the Fourteenth Amendment as a whole. Current textualist literature also does not explain whether citizens can sue states in another state's court. This article argues that a distinction between in-state and out-of-state plaintiffs in federal court is not only workable, but sensible. Existing literature has not yet wholly justified this distinction.

This article examines what effect a textualist reading would have on Congress' powers under Article I and the Fourteenth Amendment. Which rights of action Congress can and cannot create under Article I and the Fourteenth Amendment is inextricably linked to the Eleventh Amendment. This article then explains why a textual reading of the Eleventh Amendment, which distinguishes between in-state of and out-of-state suits, grants out-of-staters the ability to vindicate their federal rights. It shows that textualist theory would allow out-of-staters access to a neutral forum in their own state's courts, even if they are barred from federal courts. The article also explains how states can represent their citizens against other states using *parens patriae* standing. Despite out-of-staters being barred in federal court, a textualist approach to the Eleventh Amendment would result in greater protections of federal rights against state violations overall because in-staters would be able to sue states and out-of-staters would have recourse in state court rather than both of those groups being barred in state and federal court under current doctrine.

Section I of this article outlines current Supreme Court doctrine regarding state sovereign immunity and the Eleventh Amendment. Section II discusses why current doctrine is incorrect in holding that the Fourteenth Amendment can allow federal courts to hear cases against a state commenced by an out-of-state citizen and that the diversity theory is an inadequate alternative. Section III then explains why Congress can enable same-state suits under Article I. Section IV illustrates that Congress can enable in-staters to sue under the Fourteenth Amendment without showing congruence and proportionality; only "appropriateness" is necessary. Section V clarifies that state courts may hear cases against states.

9. Andrew B. Coan, *Text As Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2512 (2006)

10. John F. Manning, *The Eleventh Amendment and the Precise Reading of Constitutional Texts*, 113 YALE L.J. 1663, 1721-22 (2004) (arguing that the amendment process necessitates compromise and therefore constitutional text should be construed to reflect that compromise and should be enforced as written).

Section VI rationalizes the distinction between in-staters and out-of-staters and how a textualist reading of the Eleventh Amendment advances individual rights overall.

I. CURRENT ABROGATION DOCTRINE

The Eleventh Amendment, which was ratified in 1795 in reaction to *Chisholm v. Georgia*,[11] reads: "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."[12]

Despite the Eleventh Amendment specifying "Citizens of another State," the Court currently holds that the Constitution also protects against suits from citizens of the same state.[13] The grouping of same-state and out-of-state suits began in 1890 with *Hans v. Louisiana*, which held that the Eleventh Amendment protected same-state suits despite the Eleventh Amendment's language.[14] In *Hans*, a citizen of Louisiana sued Louisiana for a violation of the federal Constitution. The Court held that the Constitution barred this suit, citing Hamilton in Federalist No. 81 as well as Madison and Marshall at the Virginia ratifying convention.[15] The Court also noted that the Eleventh Amendment and Article III did not by their text bar nondiverse suits against states because people being able to sue nonconsenting states was inconceivable to the ratifiers.[16]

In 1976, *Fitzpatrick v. Bitzer* established that Congress could abrogate "Eleventh Amendment Immunity," which included both same-state and out-of-state suits, under the Fourteenth Amendment so long as the statute clearly states it does so.[17] In *Fitzpatrick*, the plaintiffs were a group of male retirees suing Connecticut under Title VII of the Civil Rights Act of 1964 for alleged sex discrimination in retirement policies.[18] Title VII

11. 2 U.S. 419 (1793) (holding that Article III §2 allows federal courts to hear cases in which an individual sues a state).

12. U.S. CONST. amend. XI.

13. Allen v. Cooper, 140 S. Ct. 994, 1000

14. Hans v. Louisiana, 134 U.S. 1 (1890).

15. *Id.* at 12-14.

16. *Id.* at 15:

> It is an attempt to strain the constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? . . . The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the constitution when establishing the judicial power of the United States.

17. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

18. *Id.* at 451.

created an explicit right of action for individuals to sue states.[19] In an opinion authored by Justice Rehnquist, the Supreme Court held that because the Fourteenth Amendment was enacted specifically to enforce civil rights against states, Congress can abrogate state sovereign immunity if it acts pursuant to the Fourteenth Amendment.[20]

Subsequently, in *Pennsylvania v. Union Gas Co.*, a plurality of the Court led by Justice Brennan held that Congress could abrogate states' sovereign immunity under the Interstate Commerce Clause.[21] Union Gas sued Pennsylvania under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 which granted a right of action to sue states for monetary damages under the Commerce Clause.[22] The Court reasoned that the Act was valid because creating such rights of action was necessary and proper and because the states had surrendered their sovereign immunity at the founding.[23] Even though Article I was ratified before the Eleventh Amendment, the Court reasoned that state sovereign immunity preceded the founding, meaning the Commerce Clause was created in light of that immunity and could therefore abrogate that immunity.[24]

Later, in *Seminole Tribe of Florida v. Florida*, the Court overruled *Union Gas* and held that Congress could not abrogate immunity under its Article I powers.[25] Pursuant to the Indian Commerce Clause, Congress passed the Indian Gaming Regulatory Act which gave Indian tribes a right of action to sue states if states refused to negotiate with tribes about Indian gaming.[26] The Seminole Tribe of Florida sued Florida for failing to negotiate.[27] The Court, again led by Chief Justice Rehnquist, held that the right of action in the Act was invalid because Article I powers, unlike Fourteenth Amendment powers, could not be used to abrogate state sovereign immunity since they were ratified prior to the Eleventh Amendment.[28]

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19. *Id.* at 448-49.

20. *Id.* at 456. ("We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.").

21. 491 U.S. 1 (1989).

22. *Id.* at 1-2.

23. *Id.* at 19.

24. *Id.* at 17-18. ("Justice SCALIA, therefore, has things backwards: it is not the Commerce Clause that came first, but 'the principle embodied in the Eleventh Amendment' that did so. Antecedence takes this case closer to, not further from, *Fitzpatrick*.").

25. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

26. *Id.* at 47.

27. *Id.* at 51-52.

28. *Id.* at 65-66 ("*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment. As the dissent in *Union*

In *City of Boerne v. Flores*, the Court held that to validly abrogate immunity under the Fourteenth Amendment, the statute must be "congruent and proportional" to the Fourteenth Amendment violation.[29] The case involved a Catholic archbishop who sued Boerne, a city in Texas, under the Religious Freedom Restoration Act.[30] The Court held that the Act was unconstitutional as applied to states and local governments.[31] Going forward, this meant that there had to be significant evidence of states violating the Fourteenth Amendment, and that the Court had ultimate authority in deciding what rights were protected by the Fourteenth Amendment.[32]

The Court would then elaborate on the congruence and proportionality standard in several subsequent cases. Evidence of violations doesn't have to stem from the state currently being sued; it can come from conduct of other states.[33] Evidence of local government violations, however, is irrelevant[34] unless the violation occurs in an area where local governments are treated as "arms of the state" under the Eleventh Amendment, such as judicial services.[35]

If the alleged violation is an equal protection violation, then the amount of evidence needed is proportionate to the level of scrutiny allotted for that suspect classification. In other words, more evidence is needed to find a violation of the Equal Protection Clause stemming from discrimination on the basis of disability compared to discrimination on the basis of gender. In practice, plaintiffs bringing disability discrimination suits under the Equal Protection Clause are unlikely to meet this standard of proof. But violations of other constitutional rights, such as Due Process Clause and Eighth Amendment rights, can be justified if there is sufficient evidence.[36]

In *Alden v. Maine*, the Court mostly reaffirmed its holding in *Hans* that federal courts are prohibited from hearing both in-state and out-of-state

Gas made clear, *Fitzpatrick* cannot be read to justify 'limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'").

29. City of Boerne v. Flores, 521 U.S. 507 (1997).

30. *Id.* at 512.

31. *Id.*

32. *Id.* at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").

33. Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

34. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

35. Tennessee v. Lane, 541 U.S. 509 (2004).

36. Lane, *supra* note 35; U.S. v. Georgia, 546 U.S. 151 (2006).

suits under the Eleventh Amendment.[37] Further, it held that Congress could not compel state courts to hear these suits against their own states. This was extended in *Franchise Tax Board v. Hyatt*, where the Court held that the Constitution bars private suits against one state in the courts of another.[38]

These cases have made it exceedingly difficult for Congress to enable suits against states, whether the plaintiff is in-state or out-of-state, despite in the text of the Eleventh Amendment specifying out-of-state. While the Eleventh Amendment specifies the judicial power of the United States, current doctrine does not differentiate between an action is brought in federal court, in the court of the defendant's state, or in a court of any other state. They are all barred.

Allen v. Cooper then reaffirmed these prior decisions.[39] The unanimous Court held that the Copyright Remedy Clarification Act, which attempted to abrogate sovereign immunity in copyright infringement cases under Congress's intellectual property power, was unconstitutional.[40]

The Court in *Allen* reasoned that *Florida Prepaid Postsecondary Expense Board v. College Savings Bank*,[41] which held that the Intellectual Property Clause could not justify abrogation, squarely controlled.[42] Additionally, the Due Process Clause could not serve as basis for this suit because there was no congruence and proportionality, meaning there wasn't sufficient evidence for widespread state violations of copyrights that rose to the level of a violation of Fourteenth Amendment rights.[43]

Ideally, the Court would have taken the opportunity to note that the plaintiff, Allen, was a citizen of North Carolina, and therefore the Eleventh Amendment does not bar jurisdiction. This case differed from *Florida Prepaid*, as the plaintiff in that case was a New Jersey chartered savings bank, not a citizen of Florida.[44] Thus, the Court could have distinguished *Allen* from previous cases but it did not do so. The Court should have read the Copyright Remedy Clarification Act ("CRCA"), which allows for suits against states, as allowing for suits against states from in-state citizens but not for out-of-state citizens. Since Allen was a citizen of North Carolina, his suit should have proceeded because the

37. 527 U.S. 706 (1999).

38. 139 S. Ct. 1485, 1499 (2019).

39. Allen v. Cooper, 140 S. Ct. 994 (2020).

40. *Id.* at 1000.

41. 527 U.S. 627 (1999).

42. *Allen*, 140 S. Ct. at 1003.

43. *Id.* at 1006.

44. *Florida Prepaid*, 523 U.S. at 630. For the purposes of Article III, corporations are considered "citizens." Danjaq, S.A. v. Pathe Commc'ns Corp., 979 F.2d 772, 773 (9th Cir. 1992). Therefore, under current law, they would be considered citizens under the Eleventh Amendment because it uses the term "citizen" in the same way.

CRCA was a valid exercise of Congress' power over copyright. States have no ability to simply ignore copyright laws or any other valid laws.

II. WHY ENABLING DIVERSE SUITS AGAINST STATES IN FEDERAL COURT IS IMPOSSIBLE

There are two main theories that improperly curtail the Eleventh Amendment. These are the diversity theory and current Supreme Court doctrine, which holds that the Fourteenth Amendment may be used to abrogate the Eleventh Amendment.

The diversity theory of the Eleventh Amendment postulates that it removes only diversity jurisdiction for suits against states, not federal question jurisdiction. Stemming from Justice Joseph Story's *Commentaries*, diversity theory has long been proposed in academia and Supreme Court dissents as an alternative to current doctrine.[45] The theory holds that any case brought under federal law would be valid even if it were a suit against a state by a citizen of another state.[46]

A. The Diversity Theory Does Not Hold

Much of the focus in Eleventh Amendment scholarship, at least since *Seminole Tribe*, focuses on why the diversity reading of the Eleventh Amendment is correct,[47] arguing that courts may hear suits against states when dealing with federal question cases. Others, such as William P. Marshall, Baude, and Sachs, argue that the Constitution's text does not support distinguishing between diversity and federal question jurisdiction.[48] As Baude and Sachs note, the text of the Eleventh Amendment specifies "any" suit "in law or equity." The Eleventh Amendment does not simply reflect the language of the head of diversity jurisdiction which is "the judicial Power shall extend . . . to Controversies between two or more States [and] between a State and Citizens of another

45. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 293-302 (Brennan, J., dissenting) (citing 3 JOSEPH L. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 560-61 (1833)); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 54 U. CHI. L. REV. 443 (1989).

46. *See generally* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment; A Reply to Critics*, 56 CHI. L. REV. 1261 (1989).

47. *See, e.g.*, John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1 (1996); James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

48. Baude & Sachs, *supra* note 5, at 643; Marshall, *supra* note 8, at 1347.

State . . . ."[49] It instead has similar language to the head of federal question jurisdiction, "to all Cases, in Law and Equity."[50] "[T]o any suit in law or equity" is more similar to the head of federal question jurisdiction and is broader than the head of diversity jurisdiction.

Had the Eleventh Amendment read "[t]he Judicial power of the United States shall not be construed to extend to *every* suit in law or equity," or "to *all suits*," it would have precisely carved out diversity jurisdiction but left federal question jurisdiction intact. But the word used is "any." In some cases, "any" could be used like all. For example, "I won't eat just any fruit" means I will eat some fruits, just not others. But when "any" is not coupled with a word like "just," it's quite a different meaning from "all."

Application of *lex specialis*, or the idea that the specific provision governs the general, could be levied against the diversity theory. The general pronouncement that "the judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made…" is overcome by the specific language of the Eleventh Amendment, which only speaks of suits between specific groups.[51] But the *lex specialis* principle is probably not what cautions against the diversity theory. The principle that constitutional limitations on government power should supersede constitutional grants of government powers is a more solid ground on which to reject the diversity theory.

That principal is that limitations on government must be read to supersede grants of power, at least when the grant of power does not specifically address the content of the limitation. Without a constitution, the presumption is that there is no default government power. Government power is only effective to the extent granted in a constitution. A limitation on government, however, can only be read as an exception to government power because the assumption is already that the government is limited when the Constitution is silent. If the powers of government were read to limit the limitations on government, the limiting provisions would be wholly redundant.

B. The Fourteenth Amendment Does Not Abrogate the Eleventh Amendment

Though abrogation is essentially dead in practice, it is still alive in theory. This Part argues that practice should match theory.

49. U.S. CONST. art. III, § 2, cl. 1.

50. *Id.*

51. U.S. CONST. amend. XI.

1. The Fourteenth Amendment and the Eleventh Amendment Address Different Branches of Government.

The Eleventh Amendment specifically limits the judicial power while the Fourteenth Amendment expands the power of Congress. An amendment that grants power to Congress doesn't remove the limitation on the judiciary; Congress cannot generally use its powers to expand the judicial power beyond constitutional limits. Because the Fourteenth Amendment expands the legislative power and the Eleventh Amendment curtails the judicial power, they do not speak to the same issue.[52] Therefore, the Fourteenth Amendment should not be read to abrogate the Eleventh Amendment.

In practice, the Eleventh Amendment serves to enhance state power and the Fourteenth Amendment curtails it. In that sense, the amendments do speak to the same subject. But affecting state power is only the practical result of limiting judicial power and expanding legislative power. Of course, both amendments mention the states. But they speak of entirely different modes of affecting the states. Those modes, judicial and legislative power, though not always separate, are distinct enough to suggest the Fourteenth Amendment does not abrogate the Eleventh Amendment.

The Fourteenth Amendment expands Congress' power by giving it the ability to "enforce" its provisions.[53] It indirectly curtails the states by directly empowering Congress. By its language, the Eleventh Amendment specifically limits "[t]he Judicial power of the United States."[54] Therefore, the Eleventh Amendment indirectly protects the states by limiting the judicial power. Though the two amendments indirectly serve contrary aims, curtailing and protecting states respect-ively, their direct means of serving those aims operate through completely different channels.

An amendment expanding legislative power has no bearing on a provision limiting judicial power, at least no bearing as direct as complete abrogation. Since the legislative branch and the judicial branch are separate government branches, enhancing the power of the former does not suddenly remove a limitation on the latter, even if the two provisions

52. *See* Baude & Sachs, *supra* note 5, at 646-47 ("Even if Section Five of the Fourteenth Amendment had special force against common-law principles of sovereignty, that section makes no particular mention of the judicial power of the United States. . . . More to the point, the Fourteenth Amendment can't plausibly be read to authorize Congress to dispense with other jurisdictional rules, letting plaintiffs file federal suits that fall outside the judicial power.").

53. U.S. CONST. amend. XIV.

54. U.S. CONST. amend. XI.

indirectly affect the states.[55] Notably, the establishment of Congress and the presidency under the Constitution both indirectly limit the states. The commerce power limits the states' ability to affect interstate commerce via negative implication. The presidential treaty power binds states to the effect of treaties. The creation of both federal branches was enacted to enhance federal power at the expense of states. Yet, Congress's expansion does not remove limitations on the president simply because the powers of both diminish the states.[56]

Congress does have some control over the judicial branch in its jurisdictional powers. But such power does not expand its own power by removing limitations on the judicial branch, at least not in a system with a separation of powers. Removing limitations would only occur only when the amendment specifically deals with the nexus between the two branches, such as altering Congress' jurisdiction stripping power. And such an amendment would likely enhance one while limiting the other, not simultaneously expand both branches like the Fourteenth Amendment is purported to do.

Another reason the Fourteenth Amendment should not be read to abrogate the Eleventh Amendment is that there is much more intuitive language that could have been added to do so. For example, the Fourteenth Amendment could have expanded the judicial power to hear cases when due process or equal protection rights are violated. Even a simple, "notwithstanding other provisions in the Constitution" would have sufficed.

2. The "Passed After" Theory Fails Because the Fourteenth Amendment Does Not Speak to the Issue of Sovereign Immunity.

One common explanation for why the Fourteenth Amendment could enable out-of-state litigants' suits against states, particularly as opposed to Article I, is that it was passed after the Eleventh Amendment,[57] with

55. The plurality in *Pennsylvania v. Union Gas* notes this fact but in the opposite direction – that the Eleventh Amendment did not wipe out Article I power. 491 U.S. 1, 18 (1989) ("The language of the Eleventh Amendment gives us no hint that it limits *congressional* authority; it refers only to 'the *judicial* power' and forbids '*constru[ing]*' that power to extend to the enumerated suits—language plainly intended to rein in the Judiciary, not Congress. It would be a fragile Constitution indeed if subsequent amendments could, without express reference, be interpreted to wipe out the original understanding of congressional power.").

56. One might argue that the commerce clause and the Article II treaty power do not directly mention states, while the Fourteenth and Eleventh amendments do. Therefore, the purpose of limiting states is more central to those two amendments, allowing for abrogation. But this is not the case. The limitation on states is made explicit through the Article VI Supremacy Clause.

57. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65-66 (1996) (citing *Union Gas*, 491 U.S. at 42 (Scalia, J., dissenting)) ("*Fitzpatrick* cannot be read to justify 'limitation of the principle embodied in the Eleventh Amendment through appeal to antecedent provisions of the Constitution.'").

the intent to supersede any conflict with the Eleventh Amendment.

Many arguments have been made against this explanation. For example, could Congress abrogate other constitutional limitations on its power to advance the enforcement provisions of the Reconstruction Amendments?[58] Likely not.[59] Theoretically, abrogating other amendments could be helpful to Congress' enforcement of the Fourteenth Amendment. For example, creating expedited civil and criminal proceedings against police for violating certain federal rights in abrogation of the Sixth and Seventh Amendments may advance enforcement of the Due Process Clause or Equal Protection Clause. But the fact that abrogating the Bill of Rights could be useful in enforcing the Fourteenth Amendment does not mean that the enforcement power allows Congress to override other provisions as provisions should generally be read to be consistent with each other. Furthermore, what is considered "appropriate" under the Fourteenth Amendment may be limited to what is not forbidden by other provisions of the Constitution.

Another reason for the rejection of the "passed after" principle is that for an amendment to not abrogate prior provisions, the new amendment would have to say "this provision is not to be construed to supersede prior enactments" or something along those lines. The presumption should be that amendments should be read consistent with prior enactments. Perhaps that rule, however, is also too rigid.

Justice Rehnquist notes in *Fitzpatrick* that the Fourteenth Amendment was passed after the Eleventh Amendment, meaning that the Fourteenth Amendment rebalanced power between states and the federal government despite the Eleventh Amendment.[60] If anything, the fact that the Fourteenth Amendment was passed in light of the Eleventh Amendment creates a higher level of specificity necessary for a provision to do away with it. That is because a writer would know of a specific impediment and would have greater ability to clarify than a writer who did not know of a particular obstacle and instead had to anticipate.

One question that could shed light on how much an amendment can implicitly abrogate prior enactments is whether the Flag Desecration Amendment would have had any operative effect in light of the First Amendment. The amendment that passed the House several times read: "The Congress shall have power to prohibit the physical desecration of

58. *See* RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 958 (7th ed. 2019) (citing Meltzer, *supra* note 47, at 20-24).

59. Baude & Sachs, *supra* note 5, at 646 ("So Section Five can't plausibly be read as implicitly repealing the jurisdictional restrictions in the Eleventh Amendment, just as it can't plausibly be read as implicitly repealing the Fifth Amendment requirement of due process, the Sixth Amendment right to jury trial, or the Eighth Amendment ban on cruel and unusual punishments.").

60. Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

the flag of the United States."[61]

Setting aside arguments that such an amendment would violate provisions other than the First Amendment, such as the Due Process Clause, there are three possible interpretations of the amendment:

1. The First Amendment bars the Flag Desecration Amendment from having any effect and therefore it has no effect.[62]
2. The Flag Desecration Amendment carves a single exception from the First Amendment but does not allow Congress to pass similar bans on physical speech demonstrations, even if pursuant to enumerated powers.
3. The Flag Desecration Amendment narrows the meaning of "abridging the freedom of speech" such that Congress can not only pass legislation that bans flag burning, but also can ban other physical speech demonstrations if pursuant to enumerated powers of Congress.

The issue with option one is that it makes the First Amendment toothless. It would be similar to the presumption against redundancy; the Constitution should not be interpreted to render a provision entirely meaningless and inoperable.[63]

Between options two and three, the question is: Do we read the amendment as an explanation of the meaning of the First Amendment, or as an exception?

It makes more sense to read the amendment as option three because under option three, there would be no inconsistency or redundancy in the Constitution.[64] Option two creates an inconsistency between the Flag Desecration Amendment and the First Amendment.

Under option three, whether the Flag Desecration Amendment was passed after the First Amendment or concurrently would not change its effect. Likewise, whether the Desecration Amendment was passed before or after the First Amendment also would not affect which of the three options is best.

If instead of the Flag Desecration Amendment, an amendment was passed reading "Congress shall have power to make laws abridging the freedom of speech," what would that mean? Would the principal of

61. S.J. Res. 103-334, 108th Cong. (2004).

62. *See, e.g.*, Jeff Rosen, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

63. One could argue that it wouldn't be entirely meaningless because the First Amendment could be repealed. Therefore, the Flag Desecration Amendment would exist just in case that occurs as probably the other powers given to Congress do not allow for flag burning bans. However, the presumption against inoperability works to make readings of the current Constitution not have meaningless provisions.

64. Option 3 does not make the Flag Burning Amendment redundant because without the amendment, Congress could only restrict physical speech if it were pursuant to an enumerated power. With the amendment, preventing flag burning is itself an enumerated power.

"passed after" be able to overcome the broad limitations/narrow powers principal in a case where the subsequent provision speaks directly to an earlier provision? The "passed after" reasoning is only sensical in the case where a subsequent text actually mirrors the language of the earlier text.[65] But when the language is not the same, as is the case with the Fourteenth and Eleventh Amendments, the "passed after" theory doesn't hold.

3. The Purpose of the Fourteenth Amendment Theory Fails Because it Does Not Distinguish the Fourteenth Amendment From Article I.

One argument that could be made in favor of current doctrine is that the Fourteenth Amendment abrogates the Eleventh Amendment but not other provisions of the Constitution because the Fourteenth Amendment specifically curtails the power of states.[66] Second, the Fourteenth Amendment abrogates the Eleventh Amendment because the Eleventh Amendment enlarges state power. Third, the enforcement power cannot be exercised without allowing suits against states from out-of-state litigants.

But even combination of these arguments probably doesn't allow the Fourteenth Amendment to abrogate the Eleventh Amendment. Although the Fourteenth Amendment is about curtailing states, it still doesn't speak specifically enough to the precise issue of out-of-state litigants suing states. Furthermore, there are several ways Congress can enforce the Fourteenth Amendment without allowing individuals to sue states.

It's only because of *Hans* that "Eleventh Amendment immunity" came to encompass suits of citizens against their own states. Under that broader reading of the Eleventh Amendment, the Eleventh Amendment is more about enhancing states' rights rather than creating a specific limitation on the judicial power. If the Eleventh Amendment is now read to increase the power of states, rather than just placing a specific limitation on the federal judicial power, it becomes more plausible that the Fourteenth Amendment, which is about curtailing the states, could actually abrogate the Eleventh Amendment.[67] But that level of fit just does not hold between

65. One could still argue that a speech-regulating power would have no effect in light of the Twenty-First Amendment's language: "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." It states than an earlier article is repealed rather than mirroring the language of the Eighteenth Amendment. That would suggest that when there is a direct repeal, the amendment would say so. It's unclear how persuasive this is.

There is also the question of whether the date of ratification is actually part of the text of the Constitution. Even without the date being part of the Constitution, the fact that amendments are sequentially listed as amendments gives context to the fact that later ones are passed in light of earlier ones. That would suggest there is some contextual reasons that it's valid for things "passed after" to abrogate earlier provisions.

66. Fitzpatrick v. Bitzer, 427 U.S. 445, 453-56 (1976) (explaining that abrogation is viable because the Fourteenth Amendment is about limiting state power).

67. Even if the Eleventh Amendment read "by citizens of *any* state," it could be argued that the

the Eleventh and Fourteenth Amendments.

Another problem with the Fourteenth Amendment argument is that Article I, in conjunction with the Supremacy Clause, curtails state power as much as, if not more than, the Fourteenth Amendment. Article I and the Supremacy Clause allow Congress to fully preempt state legislative action. For example, they give rise to the Dormant Commerce Clause.[68] Indeed, establishing a federal Congress curtails state power. Historical context supports this as well. The Constitution was created in response to the failure of the Articles of Confederation, resulting in weaker states and a more powerful federal government.[69] That context is at least as persuasive as the context in which the Fourteenth Amendment was passed, which is relied on in *Fitzpatrick*.[70] Consequently, if the Fourteenth Amendment can be used to abrogate the Eleventh Amendment because it was passed to curtail state power, so too can Article I since it was similarly passed to diminish state power in favor of federal power.[71] If the Fourteenth Amendment spoke specifically to the question of Eleventh Amendment immunity, that would be a different story. However, it doesn't, at least not enough to distinguish it from Article I.

One distinction between the Fourteenth Amendment and Article I is that the Fourteenth Amendment serves to curtail states to specifically protect civil rights, whereas Article I curtails states to enhance federal power. But there's nothing specific to protecting rights that lends itself to enabling individuals to sue states. As will be discussed in Section III, federal programs enacted pursuant to Article I can also be protected via suing states, conceivably to the point at which doing so would be

Fourteenth Amendment does not abrogate it. That is because enforcing the Fourteenth Amendment can involve means other than enabling citizens to sue states. It could involve Congress directly invalidating the actions state legislatures and executive branches, for example.

68. *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) (holding that a Massachusetts tax on milk products unconstitutionally impeded interstate commerce).

69. Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532 (1908).

70. In *Fitzpatrick*, the Court relied on the fact that the Fourteenth Amendment was passed specifically to curtail state power, and therefore should be read to abrogate the Eleventh Amendment. Fitzpatrick, 427 U.S. 445 at 455. But that doesn't distinguish the Fourteenth Amendment from Article I, which was also passed to curtail state power while expanding federal power. Therefore, under this rationale, acts pursuant to Article I should also be able to abrogate the Eleventh Amendment.

71. Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989) ("Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.").

"necessary and proper."[72] Protecting constitutional rights may be a more intuitive fit for individual suits, but that does not mean individuals suing for state intrusions on federal law could not be necessary and proper. Federal programs under Article I may also create individual rights, but even in their absence, individual suits may be a proper vehicle to prevent the generalized harm associated with frustrating federal law.

C. Eleventh Amendment Immunity Cannot Be Waived.

The Supreme Court has recently reiterated that it has "understood the Eleventh Amendment to confer 'a personal privilege which [a State] may waive at pleasure.'"[73] But the Eleventh Amendment speaks in the same terms as Article III's grants of subject-matter jurisdiction as it limits the judicial power. This is why, for example, a motion to dismiss brought under the Eleventh Amendment must be brought under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. Therefore, Eleventh Amendment immunity must be treated like subject-matter jurisdiction all the way down as opposed to a personal privilege or a hybrid between subject-matter jurisdiction and personal jurisdiction. The Eleventh Amendment does not grant any privilege to the states – it solely limits the federal courts' subject-matter jurisdiction.

Unlike with personal jurisdiction, lack of subject-matter jurisdiction cannot be waived.[74] Like other subject-matter jurisdiction issues, federal courts do have an obligation to raise Eleventh Amendment problems on their own, contrary to what the Supreme Court held in *Wisconsin Department of Corrections v. Schacht*.[75] A court cannot ignore the Eleventh Amendment because it takes away that which grants the court power.

III. CONGRESS CAN ENABLE SAME-STATE SUITS UNDER ARTICLE I.

Article I, in addition to the Fourteenth Amendment, can be used to abrogate common law state sovereign immunity that is not codified by the

72. *Union Gas*, 491 U.S. at 20-21 ("[I]n many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause. . . . Hence, the Commerce Clause as interpreted in *Philadelphia v. New Jersey* ensures that we often must look to the Federal Government for environmental solutions. And often those solutions, to be satisfactory, must include a cause of action for money damages.").

73. *PennEast Pipeline Company, LLC v. New Jersey*, 141 S.Ct. 2244, 2262 (citing Clark v. Barnard, 108 U.S. 436, 447, 2 S.Ct. 878, 27 L.Ed. 780 (1883)).

74. Joyce v. United States, 474 U.S. 215.

75. 524 U.S. 381, 389. ("The Eleventh Amendment, however, does not automatically destroy original jurisdiction….Nor need a court raise the defect on its own. Unless the State raises the matter, a court can ignore it.").

Eleventh Amendment, so long as such an action is necessary and proper.[76] As explained in *Union Gas*, states surrendered their plenary common law immunity by ratifying the Constitution.[77] More importantly, nothing in the Constitution suggests that there is immunity other than the Eleventh Amendment that can oppose a legitimate exercise of Congressional power – the Tenth Amendment only protects states in the absence of valid federal power. The Eleventh Amendment combined with Article III suggests that there is no constitutionalized immunity outside of the Eleventh Amendment.[78]

This article argues that contrary to current Supreme Court doctrine, there is nothing in the Constitution that forbids Congress from creating a right of action against states under its Article I powers. The distinction between Congress' acts under Article I and acts under the Fourteenth Amendment is important because the Court currently examines Congress' acts pursuant to the Fourteenth Amendment with much greater scrutiny (though it arguably shouldn't).

Congress can abrogate common law state sovereign immunity when it directly effectuates an enumerated power or is "necessary and proper" to an enumerated power. The Necessary and Proper Clause is not a bar that must be satisfied by any legislation. It states that Congress may make "all laws," not "only laws," showing that the Necessary and Proper Clause is only an additional power, not a limitation on previous powers.[79] If the Necessary and Proper Clause were not present, what legislative powers would Congress have? Congress would still be able to legislate pursuant to Section 8. Therefore, to not be superfluous, the Necessary and Proper clause must extend past legislation that Congress would be able to create without it. So, the only question to ask is whether legislation is necessary and proper if the legislation doesn't directly effectuate any other power. Only then does necessary and proper become a bar. Whether Congress must meet this bar in any given act of abrogation will be case-by-case. That said, if legislation directly effectuates an enumerated power, it would likely pass any independent necessary and proper test.[80]

76. *Union Gas*, 491 U.S. at 19-20.

77. *Id.*

78. Manning, *supra* note 8, at 1740 (explaining that the Eleventh Amendment was written with precision and consideration because it doesn't include other heads of jurisdiction, while at the same time not just being a response to *Chisholm* because it goes beyond *Chisholm*, creating a negative inference).

79. U.S. CONST. art. I sec. 8.

80. McCulloch v. Maryland, 17 U.S. 316, 420 (1819) (noting that the Necessary and Proper Clause is in Section 8, not Section 9, and that the Clause would be phrased differently if it were a restriction rather than an expansion).

A. Sovereign Immunity Versus State Immunity

As an initial matter, it is worth noting that the Court generally doesn't seem to distinguish between a state's immunity in its own courts, which is typically referred to as "sovereign immunity" versus immunity in another sovereign's courts, commonly called "state immunity." The Court bafflingly treated these immunities the same in *Alden v. Maine* when they have been different since the before the founding. Both have been lumped into the category of "state sovereign immunity."

This article argues for a distinction between sovereign immunity and state immunity, so long as federal courts remain an option for in-state litigants. Many of the rationales that exist for immunity in a sovereign's own courts simply do not apply when referring to immunity in another court, such as the appropriations power justification[81] or the idea that the sovereign created the courts, so it is by default immune from suit.

B. Immunity in Foreign Courts Has Always Been Abrogable

The immunity that states had in the courts of other sovereigns that Hamilton, Madison, Marshall, and others spoke of around the time of ratification was the immunity from suit arising from common law causes of action. They were not referring to some immunity that persisted even when a sovereign decided to abrogate another state's immunity in a particular circumstance through affirmative legislation. This is evidenced by Chief Justice Marshall's treatment of state immunity in *The Schooner Exchange*, which stated that a sovereign can abrogate the implied state immunity of another sovereign in the international context.[82] Chief Justice Marshall's vision was later confirmed when Congress passed the Foreign Sovereign Immunities Act that abrogates foreign sovereign immunity in certain contexts.[83]

A sovereign has control of what happens under its own courts, but not of what happens in the courts of other sovereigns. Under the Articles of Confederation and the law of nations at the time, states could theoretically abrogate the immunity of other states in their own courts through affirmative legislation.[84] It stands to reason that if states had this ability prior to ratification as equal sovereigns, the superior sovereign in the

81. *Id.*

82. Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party at 16-17, Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485 (2019) (citing The Schooner Exch. v. McFaddon, 11 U.S. 116, 143 (1812)).

83. 28 U.S.C. § § 1605(a)(6), 1605(a)(2).

84. Baude & Sachs, *supra* note 5, at 622 n.70; *McFaddon*, 11 U.S. at 146 ("Without doubt, the sovereign of the place is capable of destroying this implication.").

United States has that same ability today.[85] Furthermore, if Congress can abrogate its own sovereign immunity, as well as the immunity of foreign nations pursuant to Article I powers, why would it not be able to abrogate the states'? Nothing in the Tenth Amendment prevents this outcome because the Tenth Amendment does not apply when Congress is acting pursuant to its powers.[86] To the extent the states are wholly sovereign, their immunity is abrogable like those of foreign nations. Any daylight between the states and foreign nations only cuts in favor of the ability to abrogate because of the degree of sovereignty the states surrendered to the United States.

In *Chisholm v. Georgia*, the plaintiff sued Georgia in federal court under a common law right of action for failing to pay him for goods but there was no authorizing statute.[87] The Court held that Article III Section 2 abrogated immunity even under common law rights of action.[88] The Eleventh Amendment specifies out-of-staters because those individuals could have sued in federal court under state common law through diversity jurisdiction. In-staters are not diverse and have no ability to utilize diversity jurisdiction. The Eleventh Amendment entrenched the principle that states could not be sued without consent under common law, though the wording is so broad that it also bars suit in federal court even when there is affirmative legislation allowing it. This broad language may be due to abrogation not being commonplace and therefore not drafted around.

Thus, at most, the immunity the states did not surrender at the time of ratification was immunity from being sued absent any affirmative legislation to the contrary. What current doctrine gets wrong is that common law immunity doesn't mean that affirmative legislation cannot be passed.

C. The Eleventh Amendment and Article III

By its text, Article III affirms states are generally subject to federal question jurisdiction.[89] In its grant of federal question jurisdiction, Article III does not distinguish between suits against states and suits against

85. Though Baude and Sachs note that the states under the Articles may not have been able to enforce judgments against other states, *supra* note 5, at 622, the Supremacy Clause would prevent that with respect to judgments made in federal court. U.S. CONST. art. VI.

86. U.S. CONST. amend. X.

87. 2 U.S. 419 (1793).

88. There still is an open question of whether *Chisholm* was correct and that Article III Sec. 2 does in fact get rid of any sort of common law immunity in federal court, which would contradict the idea that states retained their common law immunity. But the question is moot because of the Eleventh Amendment and the fact that in-staters cannot sue in federal court under state common law.

89. U.S. CONST. art. III.

individuals. The grant of federal question jurisdiction states, "[t]he judicial Power shall extend to all cases," which would seem to include suits against states unless a suit against a state were not considered a "case."[90] For example, there is no question that the United States can sue states under federal question jurisdiction. If the United States can sue states under federal question jurisdiction, then so can individuals since there is no text that contradicts "all cases."

Combined with the negative inference that the Eleventh Amendment gives rise to by specifying that out-of-state citizens cannot sue states,[91] the "all cases" language in Article III indicates that federal courts have jurisdiction over cases by citizens against their states. The only remaining question in each case is whether there is a valid right of action created by Congress, treaties, or the Constitution.

If the federal judicial power extends to suits against states by in-state litigants, that suggests there is some federal cause of action that can exist between an in-stater and their state. In that case there is some cause of action that could be "arising under this Constitution, the Laws of the United States, and Treaties made." Since there is no general federal common law, and individuals cannot sue a state directly under the Constitution except for just compensation claims, Article III implies that Congress can create individual rights of action against states. Otherwise, what would be the point of the federal judicial power extending to in-state suits if no right of action could exist?

D. Creating Rights of Action Against States Under Article I Need at Most Be Necessary and Proper.

As discussed in Section IV, there is no difference between enabling same-state suits under Article I powers and the Fourteenth Amendment. The combined facts that the Fourteenth Amendment was ratified after the Eleventh Amendment and was intended to curtail state power do not differentiate the Fourteenth Amendment from Article I. The Fourteenth Amendment does not speak specifically to state immunity to damages suits, and Article I is also intended to curtail state power given the Supremacy Clause.

In *Alden*, the Court refused to employ the Supremacy Clause to allow Congress to create a right of action against states because such statutes that did so were not enacted pursuant to the Constitution.[92] In Justice Kennedy's view, writing for the majority, if the acts violated implicit sovereign immunity principles, while not being enacted pursuant to the

90. U.S. CONST. art. III. sec. 2.
91. U.S. CONST. amend. XI.
92. Alden v. Maine, 527 U.S. 706, 731 (1999).

Fourteenth Amendment, they were not enacted pursuant to the Constitution and therefore the Supremacy Clause did not apply.[93]

The issue with Justice Kennedy's argument is that he did not consider the different constitutional status of in-state and out-of-state suits. If the statute creating a right of action against states generally were read just to enable in-state suits, it would be enacted pursuant to the Constitution, and would not violate the Eleventh Amendment. The statute would just be abrogating common-law sovereign immunity.

This article, unlike Justice Kennedy, assumes that the Constitution is its text, not common law doctrines existing at the time of the founding like sovereign immunity.[94] Therefore, if an enactment is pursuant to the text of the Constitution contradicts a common law tradition, it would still be enacted pursuant to the Constitution for the purpose of the Supremacy Clause. This is supported by the fact that the Supremacy Clause states "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the Supreme Law of the Land" and repeated references to "this Constitution" in Article, V, Article VI, Article VII, and the Preamble.[95] "This Constitution" refers to the text of the Constitution because it refers to the document, which consists of text. The Preamble is the introduction to a document and refers to the establishment of "this Constitution," meaning the document. Article V and Article VII detail ratification and amendment and refer to "this Constitution" to mean the text of the document. Amendments occur in the form of text. If the phrase used was "the Constitution" that could potentially refer to a metaphorical, broad Constitution that includes common law. But "this" is particularly self-referential. "This" refers to the document that those provisions are written on and being presently ratified rather than common law doctrines that had already existed.[96]

Even if the Fourteenth Amendment is not explicitly invoked or obviously implicated by a statute that is passed, say, under the Commerce Clause, states still cannot deprive their citizens of "privileges or immunities of citizens of the United States," "equal protection of the laws," or "due process of law." If Congress creates a right of action against states under Article I powers, that right of action may still be considered a

93. *Id.*

94. Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1202 (2003) ("The doctrine is inconsistent with the United States Constitution. Nowhere does the document mention or even imply that governments have complete immunity to suit. Sovereign immunity is a doctrine based on a *common law* principle borrowed from the English common law. However, Article VI of the Constitution states that the Constitution and laws made pursuant to them are the supreme law, and, as such, it should prevail over government claims of sovereign immunity.").

95. U.S. CONST. art. V-VII.

96. It's conceivable that "this Constitution" could refer to a metaphorical Constitution that includes common law, but that reading is highly unintuitive and unlikely.

privilege or immunity or due process of law, giving federal courts the ability to hear the case. Under this theory, even if a right of action were explicitly enacted pursuant to an Article I power, doing so would automatically fall within the Fourteenth Amendment enforcement power if a state were to act in defiance of the federal statute.

Even the weakest form of constitutional avoidance doctrine would dictate that general grants of rights of action against states be read to mean in-state suits only. In fact, it would take an abnormally aggressive court to read a general grant as enabling out-of-state suits because out-of-state suits cannot be brought in federal court under the Eleventh Amendment, a fact that Congress likely knows. Therefore, the presumption that Congress does not enact unconstitutional statutes is strengthened. The problems facing constitutional avoidance don't necessarily apply here. The risk that Congress would just try to keep pushing the constitutional envelope and trying to enlarge its powers is not significant; the Eleventh Amendment is a bright line rule that clearly limits general grants.

E. Creating a Right of Action Against States May Sometimes Be Necessary And Proper To Congress' Article I Powers.

Assuming an act of abrogation does not directly effectuate another power, the question of whether Congress can create a right of action against states under Article I without needing to show "congruence and proportionality" rests on whether doing so could be considered "Necessary and Proper" to its other powers or if this is what Chief Justice Marshall would call a "great substantive and independent power" that would be listed on its own if it existed.[97]

8 U.S.C. § 1605(a)(2) abrogates foreign sovereign immunity in certain situations when foreign nations engage in commercial activity. The fact that Congress has validly abrogated the immunity of foreign nations pursuant to the Commerce Clause indicates that abrogating state sovereign immunity is something Congress can do pursuant to its Article I powers.[98] And Congress has many of the same powers with respect to the states that it does with respect to foreign nations. Just as Congress has plenary authority over commerce with foreign nations, so too does it have plenary authority to regulate interstate commerce.[99] Abrogating immunity may be no less "necessary and proper" in the state context than in the foreign nation context. Furthermore, there are many more contexts in which Congress may validly regulate activities of the states than there are with foreign nations.

97. McCulloch v. Maryland, 17 U.S. 316, 411 (1819)

98. 8 U.S.C. § 1605(a)(2).

99. U.S. Const. art. I sec. 8.

In *McCulloch v. Maryland*, Chief Justice Marshall wrote that creating a national bank was not a great substantive and independent power because "[i]t is never the end for which other powers are exercised, but a means by which other objects are accomplished."[100] Chief Justice Marshall's test was whether a power is exercised for its own sake or to effectuate an enumerated power.

Under this test, creating a right of action against states squarely qualifies as an incidental power, not a great substantive and independent one. This is because, for example, creating a right of action to sue states that infringe on someone's copyright would not be done for its own sake, but to effectuate Congress' copyright granting powers. Under Chief Justice Marshall's test, there is no distinction between creating rights of action under Article I against individuals and creating those same rights of action against states. Both equally effectuate enumerated powers and are not done for their own sakes. If the former is not a substantive and independent power, then neither is the latter.[101]

But whether something is "necessary and proper" doesn't just turn on whether that power is independent, it also turns on whether the power actually effectuates the end; that is, whether the ends and means are rationally related. Chief Justice Marshall wrote that since the phrase "absolutely necessary" appears in Article I Section 10, the Necessary and Proper Clause does not require the incidental power to be absolutely necessary.[102] It merely must be "convenient."[103] Under Chief Justice Marshall's test, creating a right of action against states would certainly further Congress' establishment of, for example, intellectual property rights, and would be considered "necessary." It would seem to be at least as necessary or helpful as creating a private right of action against individuals is, since Congress has many more tools to regulate individuals than it does to regulate states.

Even under more stringent tests, such as what is in between "convenient" and "indispensably necessary" under some original readings,[104] enabling private rights of action against states for violations of intellectual property rights seems to be permitted. James Madison, who took a much more limited view of the Necessary and Proper Clause compared to Alexander Hamilton, even conceded that the clause would "permit the

100. *Id.*

101. *But see* Baude & Sachs, *supra* note 5, at 621 (suggesting that the ability to abrogate the states' common law sovereign immunity could be a "great substantive and independent power," seemingly through a test that is not Chief Justice Marshall's but more because of how significant such a power would be rather than asking whether the legislation is done for its own sake).

102. *McCulloch*, 17 U.S. at 413-14.

103. *Id.*

104. Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 206 (2003).

adoption of measures the best calculated to attain the ends of government and produce the greatest quantum of public utility." Otherwise, "very few acts of the legislature could be proved essentially necessary to the absolute existence of government."[105]

What other tools does Congress have to ensure compliance with intellectual property law? Professors Berman, Reese, and Young describe some alternatives such as conditional waiver and the United States bringing suit itself.[106] Waiver is not possible under the Eleventh Amendment because it deprives courts of subject matter jurisdiction.[107] The United States faces many practical problems when bringing claims for intellectual property, such as lack of resources and executive discretion.[108] In terms of quantum of utility per government spending, private rights of action are far more efficient than alternatives. Therefore, even under more stringent understandings of the Necessary and Proper Clause, Congress' creation of private rights of action against states is appropriate.

NFIB v. Sebelius brought another bar to usage of the Necessary and Proper Clause.[109] In *NFIB*, mandating people to purchase health insurance was considered drawing in people who otherwise would be unregulated, and therefore could not be justified under the Necessary and Proper Clause.[110] For example, creating a right of action for people to sue their own states for copyright infringement would not be drawing in otherwise unregulated entities because under the Supremacy Clause, states are regulated when Congress grants intellectual property rights. If the Necessary and Proper Clause cannot justify Congress creating rights of action under Article I, then under *NFIB*, states are generally unregulated

105. JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 417 (1827) (describing Madison's reasoning).

106. Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability of Intellectual Property Rights: How To "Fix"* Florida Prepaid *(And How* Not *To)*, 79 TEX. L. REV. 1037, 1130 (2001).

107. *Cf.* PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244, 2262 (2021) ("But under our precedents that no party asks us to reconsider here, we have understood the Eleventh Amendment to confer 'a personal privilege which [a State] may waive at pleasure.'") (quoting Clark v. Barnard, 108 U.S. 436, 447 (1883)).

108. Berman, Reese & Young, *supra* note 95, at 1117.

109. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012).

110. *Id.* at 560:

> No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is 'necessary' to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

Id.

entities when Congress passes laws pursuant to Article I.

The Court has never held that statutes passed under the Necessary and Proper Clause must pass the "congruence and proportionality" test established in *Boerne* for statutes passed under the Fourteenth Amendment. Setting aside whether that test makes sense for Fourteenth Amendment enforcement statutes, it does not make sense for statutes passed under Article I. The textual differences between the two provisions make this clear. This is the theoretical argument for the enforcement power being merely reactionary: The Fourteenth Amendment grants Congress the power to enforce its other provisions. Those provisions include prohibitions on states from denying due process, equal protection, or privileges or immunities. The argument goes that Congress can't "enforce" the denial of rights proactively. It must enforce only reactively because if there are no rights violations in the first place, what is there to enforce? That reasoning doesn't hold for the Necessary and Proper Clause and Article I. Under its Article I powers, Congress isn't just enforcing violations of its commerce or intellectual property laws, it's proactively regulating interstate commerce or establishing copyrights.

One could envision something similar to "congruence and proportionality" for the Necessary and Proper Clause that would require Congress to provide evidence that creating a right of action would actually further its end of, for example, creating intellectual property rights. But this standard would be untenable. Even if Congress had evidence that states were violating intellectual property rights, one could still object to granting a right of action by claiming that in practice, these claims wouldn't be frequent or successful enough to impact state behavior. However, even under Madison's restrictive formulation of the Necessary and Proper Clause, a significant empirical showing that the adopted right of action would further the end of the statute is not required.

More fundamentally, the Constitution clearly contemplates cases "arising under" federal statutes.[111] In that sense, the Constitution itself allows Congress to create rights of action which could have been interpreted to mean that Congress creates a right of action whenever it creates a statutory right, but it has been interpreted to mean Congress must expressly provide for a right of action. There is no distinction in Article III between creating a right of action against private entities and states.

Since there is sometimes nothing that makes creating a right of action against a state less necessary or proper than creating one against private entities, Congress can do.[112]

111. U.S. CONST. art. III.

112. *But see* Baude & Sachs, *supra* note 5, at 621 ("Even the discrepancy between *Seminole Tribe* and earlier cases like *Fitzpatrick v. Bitzer* was mostly comprehensible; abrogating immunity might turn out to be "incidental" to enforcing the Fourteenth Amendment's limits on states, but not (say) to the Patent

F. Recent Cases and Differences Between Article I Powers

Further inconsistencies in the Court's doctrine arose in 2006 with *Central Virginia Community College v. Katz*.[113] In this case, the Court held that Congress could enable private individuals to sue states via legislation passed pursuant to the Bankruptcy Clause, contrary to *Seminole Tribe.*[114] The Court laid out a few distinguishing features of the bankruptcy power, such as that bankruptcy cases rely on *in rem* jurisdiction and that orders directing preferential transfers were historically allowed.[115] The Court also attempted to describe this case as not implicating sovereign immunity "to nearly the same degree as other kinds of jurisdiction."[116] But as the dissent pointed out, none of the differences in the bankruptcy power were relevant to whether Congress should have more ability to enable suits against states.[117]

The plaintiffs in *Allen v. Cooper* argued that the Intellectual Property Clause was the only Article I power that allowed Congress to abrogate state sovereign immunity.[118] No doubt this position was strategically advantageous in order to ask for the narrowest possible rule. Nonetheless, the merits of that position should be evaluated. More broadly, this assessment will allow us to evaluate if the rule proposed by this article has any relevance outside of the intellectual property context.

The plaintiff's reasoning was that not only does the Clause give Congress the power to grant intellectual property rights, but it also allows for their "securing."[119] "Securing" entails Congress' right to enable suits against violators, including states.

The plaintiff's strong reading of 'securing' is incorrect. What would make something necessary or proper for individuals to be able to bring suit wouldn't necessarily be limited to instances in which individuals are granted a right that a state could infringe upon. It may be necessary for Congress to empower individuals to act as private attorneys general to enforce federal law if the federal government does not have the resources to do so itself. Individual plaintiffs could have standing even without direct personal injury so long as the generalized injury is defined by

Clause.").

113. 546 U.S. 356 (2006).

114. *Id.* at 379.

115. *Id.* at 369-378.

116. *Id.* at 378.

117. *Id.* at 392 (Thomas, J., dissenting).

118. Brief for Petitioners at 22-26, Allen v. Cooper, No. 18-877 (2020), https://www.supremecourt.gov/DocketPDF/18/18-877/111297/20190806124158930_No.%2018-877%20-%20Brief%20for%20Petitioners.pdf.

119. *Id.*

Congress and is still concrete.[120] Therefore, any power that Congress exercises under Article I that a state could undermine is a potential vehicle for Congress to abrogate common law atextual state sovereign immunity. This likely encompasses most Article I powers.[121]

After *Katz*, the bankruptcy power was held as the sole exception to *Seminole Tribe*'s rule until another exception was found in *PennEast Pipeline Company, LLC v. New Jersey*.[122] In this case, the Court held that the eminent domain power that stems from the Commerce Clause allows Congress to delegate to private parties the ability to condemn land in which the state has an interest.[123] The Court held that at the founding, the states implicitly surrendered immunity with respect to eminent domain because it was universally known that the eminent domain power could be delegated to private individuals.[124]

Most recently, the Court held that Congress' war powers allow it to abrogate state sovereign immunity.[125] *Torres v. Texas Department of Safety* involved a U.S. army veteran who sued the Texas Department of Public Safety in Texas court for contravening a federal law that entitles veterans to reclaim their jobs with state employers.[126] The Court reasoned that the war powers have always been exercised by Congress even at the expense of state sovereignty.[127] Again, this article argues that there was not a list of powers that the states implicitly surrendered their immunity to. The question of valid abrogation is simply a case-by-case, not clause-by-clause, question of whether it is "necessary and proper" with respect to that specific instance of Congressional action.

The Court went further in *Torres* than it did in *Katz* and *PennEast* in holding that, contrary to *Alden*, Congress could compel state courts to hear cases against their own state.[128] This article does not delve deeply into the question of whether Congress can force states to hear cases against them beyond the fact that when necessary and proper, Congress

120. FEC v. Akins, 524 U.S. 11, 23-24 (1998).

121. Pennsylvania v. Union Gas Co., 491 U.S. 1, 42 (1989) (Scalia, J, concurring in part and dissenting in part). ("As suggested above, if the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers."). Justice Brennan in *Union Gas* only discussed that abrogation was possible under the Commerce Clause, noting that the power greatly affects the power of the states. *Id.* at 20. But that does not disqualify other powers from usage—it just may be less likely that it would be necessary and proper to create a right of action pursuant to powers that are less intrusive on states.

122. 141 S. Ct. 2244.

123. *Id.* at 2251.

124. *Id.* at 2251-2252.

125. Torres v. Texas Department of Safety, 142 S. Ct. 2455 (2022).

126. *Id.* at 2460.

127. *Id.* at 2465 ("An unbroken line of precedents supports the same conclusion: Congress may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces.").

128. *Id.*

should be able to. The Madisonian Compromise, which contemplated that there could be no lower federal courts, could suggest that Congress can force state courts to hear cases against themselves in certain circumstances. But even in that scenario, one could argue that Congress would be forced to create lower federal courts to hear these suits instead of forcing state courts to hear them, unless there was some practical difficulty preventing Congress from creating federal courts. But even given the existence of lower federal courts that have jurisdiction, Congress should be just as able to force state courts to hear cases against themselves so long as doing so is necessary and proper, just as Congress can force states to hear cases against other states. Doing so could be seen as less "necessary" because in-staters would have federal court as an option, unlike out-of-staters, but a proper exercise of Congress' enumerated powers should still be sufficient to override common law principles of sovereign immunity, not just state immunity in other courts.

Note that none of these cases contained significant discussion of the in-state or out-of-state status of the plaintiffs. These cases show the inconsistency that the Court's doctrine gives rise to. The distinctions drawn between certain Article I powers and others aren't supported by text or relevant reasoning. The textually supported distinction that should be drawn is between in-staters and out-of-staters. If the plaintiff is in-state, the Court need only ask whether enabling the suit is necessary and proper rather than trying to divine whether a particular power was abrogated immunity under the "plan of the convention."[129]

Take, for example, the power "[t]o borrow Money on the credit of the United States."[130] No individual would suffer particularized harm if a state disrupted Congress' activities in this field, just a generalized tax-

129. It's clear that "necessary and proper" requires more than just a measure being necessary. One could argue that determining if something is "proper" involves considering if something was considered at the time of ratification or if there is significant historical precedence for an action. But there isn't anything to suggest that's what "proper" means. "Proper" is a rather vague word. But it more likely refers to a particular measure being "appropriate", such as in the Fourteenth Amendment. This could mean that Congress cannot pass legislation that is unreasonable, even if doing so is necessary for Congress to exercise its power. One way unreasonableness could manifest is in the burden it places on those affected. The weakest form of "proper" could just be reiterating that the acts of Congress cannot violate limitations such as those in the Bill of Rights. A stronger "proper" could mean that Congress can't unreasonably burden entities even beyond those enumerated limitations. In any case, "proper" works in tandem with the open-ended Ninth and Tenth Amendments to just generally limit the powers of Congress. Although the weaker form of "proper" is more redundant than the stronger version, it can't be immediately discounted. The word "proper" simply doesn't have much content to it. But even under the stronger "proper," it is unlikely enabling suits could ever be improper unless states began facing crippling problems because of private suits that it couldn't fix by simply complying with federal law.

Both "proper" and "appropriate" seem to suggest a kind of fitness requirement in that the legislation must effectuate the end. But in the case of the Necessary and Proper clause, that function is subsumed by "necessary".

130. U.S. CONST. art. I, § 8, cl. 2.

payer harm. But if a state borrowed money on the credit of the U.S. in violation of federal law, Congress could create a right of action to rectify it.

The most expansive Article I power is the Commerce Clause. In *Pennsylvania v. Union Gas*, the plurality held that Congress could abrogate sovereign immunity under the Interstate Commerce Clause.[131] This was overruled in *Seminole Tribe*.[132] While the Court was incorrect in *Union Gas* that the Commerce Clause could be used to ignore the Eleventh Amendment, the clause could be used to abrogate common law immunity. Whenever a state disrupts interstate commerce in violation of federal law, it could be necessary and proper for individuals to commence suit.

The recent eroding of *Seminole Tribe* through cases such as *PennEast* and *Torres* certainly brings us closer to the textual meaning of the Constitution in terms of outcome but the Court still has steps to take to fully embrace it in a consistent manner.

G. Abrogating Constitutional Common Law in Other Contexts is Feasible Under Article I.

Constitutional common law, meaning judge-made doctrines of constitutional law that are not derived from the text, has been often held to be abrogable. Examples are official immunity, possibly the exclusionary rule,[133] and, arguably, state sovereign immunity against same-state suits arising under federal law.

Recent literature has explained how same-state suits and out-of-state suits both cannot be called "Eleventh Amendment Immunity."[134] Contrary to the Supreme Court's characterization, Baude and Sachs explain that there are two types of sovereign immunity: out-of-state suit immunity from suits in federal court stemming from the Eleventh Amendment, and same-state immunity stemming from the common law doctrine.[135] One is mandated by the Constitution and the other is "constitutional common law" in the same vein as *Bivens* suits, and official immunity and can be overridden by Congress' exercise of powers.

131. 491 U.S. 1, 15 (1989).

132. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

133. *But see* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890 (2014)

(arguing that the exclusionary rule is mandated by the Due Process Clause); TIM LYNCH, IN DEFENSE OF THE EXCLUSIONARY RULE 1 (1998) (arguing that the exclusionary rule is mandated because of separation of powers). If these papers are correct, the exclusionary rule would be required by the text of the Constitution and would not be constitutional common law that can be abrogated by Congress.

134. *See generally* Baude & Sachs, *supra* note 5.

135. *Id.* at 621. Unlike in this paper, Baude & Sachs express doubts that Congress may abrogate common-law immunity.

It is generally understood that Congress can remove official immunity. Even the general language of 42 U.S.C. § 1983, "[e]very person…shall be liable," would be understood by the Court to abrogate official immunity but for legislative history that suggests Congress intended to keep official immunity intact in suits brought under §1983.[136]

The justification that the Court used for §1983's lack of abrogation of official immunity is not generally applicable to congressional acts that create rights of action against states, such as the Copyright Remedy Clarification Act. For these acts to not abrogate state sovereign immunity, there would have to be positive evidence that Congress intended to preserve the common law immunity that states have from in-state suits. Given that these statutes usually specify that states may be sued, the justification that prevents §1983 from abrogating officer immunity should not be generally applicable to grants of action against states.

For example, assuming the exclusionary rule derives from constitutional common law rather than the Constitution itself, could Congress abrogate it? The "Exclusionary Rule Reform Act of 1995," which passed in the House but not the Senate, attempted to wholly abrogate it.[137] The "Taking Back Our Streets Act," which did pass in 1995, introduced a good faith exception to the exclusionary rule.[138] The Court hasn't suggested that the Taking Back Our Streets Act is unconstitutional and would likely allow Congress to abrogate the exclusionary rule even further.[139]

Contrast this with *Dickerson*, in which the Court held that the warnings first required in *Miranda v. Arizona* cannot be abrogated by Congress because *Miranda* is mandated by the Constitution and is not merely constitutional common-law.[140] Unlike *Miranda*, immunity from in-state suits is not mandated by the Constitution. *Miranda* is mandated because police asking questions without detailing the *Miranda* warnings is

136. Pierson v. Ray, 386 U.S. 547, 554-55 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine.").

137. H.R. 666, 104th Cong. (1995).

138. H.R. 3, 104th Cong. (1995) ("Title VI: Exclusionary Rule Reform - Amends the Federal criminal code to prohibit, in a proceeding in a court of the United States, the exclusion of evidence on the ground that: (1) the search or seizure was in violation of the Fourth Amendment of the U.S. Constitution if it was carried out in circumstances justifying an objectively reasonable belief that it was in conformity with the Fourth Amendment (makes the fact that evidence was obtained pursuant to and within the scope of a warrant prima facie evidence of the existence of such circumstances) . . . .").

139. The Court seems to be acting consistently with this legislation in creating good faith exceptions such as in *Herring* and tying all justification of the exclusionary rule to deterrence. *Herring v. United States*, 555 U.S. 135, 142 (2009). However, it's unclear how much this was motivated by congressional action. Congress' definition of "good faith" arguably exceeds that laid out in *Herring* because under the Act, simply acting in pursuit of a warrant presumptively makes something good faith. *Id.*

140. *Dickerson v. United States*, 530 U.S. 428, 437.

inherently coercive and the Fifth Amendment bars people from being "compelled…to be a witness against [them]self." There is no similar provision that provides a constitutional anchor for immunity against same-state suits.

The Court has explicitly held other constitutional common law to be abrogable by Congress, including prudential standing requirements and the common law requirement that an injury not be generalized or shared among the entire citizenry.[141]

But Congress cannot abrogate the constitutionally mandated standing requirements of injury, causation, and redressability, which stem from Article III's case or controversy requirement. State sovereign immunity should essentially be treated like standing, with some aspects being abrogable and others not. Same-state suits would be the former and out-of-state suits would be the latter, based on a literal reading of the Eleventh Amendment that covers only out-of-state suites.

As noted in *Hans*, when they argued for ratifying the Constitution, prominent Federalists reassured the public that states could not be sued by individuals.[142] The first problem with using the fact that Federalists did this is it's unclear how much the state ratifying conventions even relied on those reassurances by the Federalists because several states had already ratified by the time Federalist No. 81 and the statements at the Virginia Convention were made.[143] Second, as noted in Section III(B), these statements referred to an immunity that existed in the absence of contrary legislation. They say nothing about whether legislation could abrogate it, and the law of nations at the time suggested it could.

Assuming the *Hans* court is correct in asserting that most states ratified with the Federalists' statements in mind, those statements are not necessarily part of the Constitution that is the law today.[144] Even if constitutional state sovereign immunity was the expectation of the majority of ratifiers, that doesn't mean it exists, at least if one has the view

141. FEC v. Akins, 524 U.S. 11 (1988).

142. Hans v. Louisiana, 134 U.S. 1, 12-14 (1890).

143. Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 722 HASTINGS CON. L. Q. 721, 730 n.35 (citing Joan Meyler, *A Matter of Misinterpretation, State Sovereign Immunity, and Eleventh Amendment Jurisprudence: The Supreme Court's Reformation of the Constitution in Seminole Tribe and its Progeny*, 45 HOW. L.J. 77, 86 n.33 (2001)) ("It is entirely possible that some states ratified believing Article III permitted suits against them, while other states ratified trusting the statements of Madison, Marshall, and Hamilton."). There is evidence that other states did not reach a conclusion regarding state sovereign immunity. CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 27-40 (1972).

144. *See* RODERICK M. HILLS, JR., STRATEGIC AMBIGUITY AND ARTICLE VII'S TWO-STAGE RATIFICATION PROCESS: WHY THE FRAMERS (SHOULD HAVE) DECIDED NOT TO DECIDE 66 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3454955 (arguing that the ratification process and the widespread distaste for the Articles of Confederation granted superior leverage to the Federalists, who could make significant unenforceable claims about ambiguities in the Constitution to aid in ratification that may or may not have been actually part of the text).

that the text of the Constitution is the ultimate source of law.[145] That would just be how the founding generation implemented or liquidated the Constitution. Once the text is ratified, the founding generation has no formal authority to permanently settle ambiguous matters of the Constitution, even assuming text is the ultimate source of constitutional law.[146]

Some argue that ratifying the Constitution could authorize federal courts to hear suits commenced by individuals against states as some Anti-federalists actively argued that Article III could be interpreted as such.[147] The fact that Federalists tried to convince people this wouldn't happen doesn't mean the Anti-federalists misinterpreted the text. That understanding, given that it is a reasonable understanding of the text even at the time of the founding, can be adopted today.

H. Enabling Suits Against States is Less Intrusive Than Other Things Congress Does.

Congress' power to invalidate state law and executive action by preempting them under Article I or violating them under the Fourteenth Amendment is a greater intrusion on pre-founding era notions of sovereignty than enabling suits against states in federal courts is.

In the pre-founding era, states at least had the "raw power" to hear suits against other sovereigns, even if it violated certain norms. But no sovereign could unilaterally invalidate the laws and executive acts of another. If it's clear that Article I and the Supremacy Clause allow Congress to completely invalidate state action,[148] then it seems odd that,

145. *See* Manning, *supra* note 8, at 1701 (arguing that because amending the Constitution's text requires such a high degree of compromise as outlined in Article V, adherence to the precise text of the Constitution is how judges should implement it). Even if most people at the founding agreed with Hamilton and Madison that states being sued could not happen, "[i]n reading an amendment, one cannot ignore the possibility that its language was crafted as it was – however broadly or narrowly – because someone or some set of people made the calculation, perhaps not on the public record, that the particular formulation would most likely ensure the requisite supermajorities in Congress and the large supermajority of ratifying states. Article V, in other words, sets up a carefully designed and elaborate process for filtering constitutional impulses into constitutional law, and the text is the one and only thing that has come through that process." *Id.* at 1716.

146. *See also* Coan, *supra* note 8, at 2517 ("Therefore, this Essay argues for a textualist interpretation--not on originalist grounds--but as an alternative to the costly, irresolvable debate originalism has produced.").

147. Clark, *supra* note 3, at 1823 ("During ratification, however, Antifederalists threatened to undermine the Federalists' structural case for the Constitution by pointing out that Article III could be construed as an express authorization for federal courts to hear suits against states by citizens of another state or a foreign state.").

148. Pennsylvania v. Union Gas Co., 491 U.S. 1, 20 (1989),

> The Commerce Clause, we long have held, displaces state authority even where Congress has chosen not to act, and it sometimes precludes state regulation even though existing federal law does not pre-empt it. Since the States may not legislate at all in these last two situations, a

when it's necessary and proper, Congress cannot enable suit in federal court. Even if sovereign immunity was regarded as a more sacrosanct feature, that may just be because of how obvious it is that one sovereign cannot invalidate the laws of another. If the Supremacy Clause allows for the disruption of that fundamental feature of sovereignty, why doesn't it allow for the arguably lesser disruption of abrogating state sovereign immunity?

The reason things have developed this way is that for most Article I powers, Congress can clearly legislate as a recourse, whereas enabling suit against states isn't really necessary and proper to advance most Article I ends. Therefore, it's arguably less obvious that Article I and the Supremacy Clause abrogate state sovereign immunity, whereas they clearly do abrogate state lawmaking power. But to the extent they are necessary and proper, the Constitution would seem to allow this lesser intrusion.

IV. CONGRESS CAN ENABLE SAME-STATE SUITS UNDER THE FOURTEENTH AMENDMENT IF DOING SO IS "APPROPRIATE."

In-state and out-of-state suits against states in federal court should be treated differently, as opposed to being treated the same, as they are now. Unfortunately, because of *Hans*, the Court has largely adopted a one-size-fits-all standard. Naturally, the Court has been hesitant to make abrogation of "Eleventh Amendment Immunity" as easy as in-state suits should be because it doesn't want to also easily enable violations of the Eleventh Amendment. On the other hand, it contradicts the text as well as principles of justice to completely prevent same-staters from suing states for rights violations in federal court.

As explained in Section I, the Court has set up many obstacles against Congress' employment of its Fourteenth Amendment power. While Congress' Fourteenth Amendment power cannot be used to ignore the Eleventh Amendment and enable out-of-state suits against states, it can be used to enable in-staters to do so. Additionally, the showings Congress must make to do so are not as high as current doctrine holds.

A. Clear Statement is Not Required.

When Congress writes laws that permits plaintiffs to sue a state without specifying in-state or out-of-state, or even without specifying any defendant, it should be read to enable citizens to sue their own state in

conclusion that Congress may not create a cause of action for money damages against the States would mean that no one could do so.

Id.

federal court, but not to allow citizens to sue other states in federal court. Reading statues as allowing out-of-staters to sue would violate the Eleventh Amendment and should therefore be avoided if the statute can bear a constitutional meaning.[149] It would still be consistent with the text of the hypothetical general statute to only allow in-state suits in federal courts. Since state courts exercise concurrent jurisdiction with federal rights of action, the statute should also be read to allow out-of-staters to sue in their state courts, which would justify general language over specifying in-staters.

In *Atascadero State Hospital v. Scanlon*, the Court held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." [150] The Court reasoned that since suits against states violate the Eleventh Amendment, federal courts must be certain of Congress' intent to abrogate.[151] But enabling only in-staters to sue, while reading general rights of action to do so to avoid constitutional problems, does not "override the guarantees of the Eleventh Amendment." The Court naturally wanted to limit the ability for Congress to abrogate a constitutional provision, creating a high barrier to do so. But precluding that possibility entirely and only reading grants of jurisdiction against states as allowing in-staters to do so removes that need for an artificially high bar.

Contrary to *Atascadero,* for Congress to create a right of action against states, it doesn't necessarily need to specify that actions can be brought against a "state." If Congress writes that a defendant can be "any public entity" or even "any entity," it semantically covers states. If Congress is validly exercising its textually granted power, a historic state sovereign immunity isn't sufficient to alter the meaning of Congress' words. The fact that there was an atextual sovereign immunity doesn't heighten the drafting requirements for Congress. Such atextual rules that change the meanings of Congress' duly enacted statutes are essentially courts illegitimately interfering with the legislative power and Congress' policy decisions.[152] On the other hand, the Court must instead allow the

149. Ashwander v. Tenn. Valley Auth., 297 U.S. 298, 346-48 (1936) (Brandeis, J. concurring). Justice Brandeis lays the modern foundation of the avoidance canon.

150. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)

151. *Id.* at 243 ("it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment.").

152. John C. Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 772, 806 (1995) ("Moreover, a clear statement rule threatens legislative supremacy, especially because Congress does not share the same enthusiasm for sovereign immunity that the Court has demonstrated in its most recent decisions."). Professor Nagle also argues that clear statement rules are particularly problematic in the sovereign immunity space because "[i]t is hard for Congress to write a provision that specifies the scope of a waiver of sovereign immunity," making a clear statement rule too burdensome for the judiciary to impose. *Id.* at 776.

Constitution itself to inform its reading of statutes to not enable something that is unconstitutional, even if there is no specification that only in-state citizens may bring suit in federal court. Congress may pass statutes using text that assumes people are aware of the Constitution's limitations on the federal government; it does not have to reproduce them in its legislation. There is an implicit "to the extent consistent with the Constitution" that comes with federal legislation.

The employment of a clear statement rule can be compared to the avoidance canon. Clear statement rules protect certain rules not enumerated by the Constitution,[153] while constitutional avoidance protects its textual provisions. While constitutional avoidance fully discards the unconstitutional reading, the clear statement rule requires a higher degree of specification. The problem with the clear statement rule is that, at least in the sovereign immunity case, there is no textual constitutional provision that justifies impinging on the legislative power. The clear statement rule, like sovereign immunity itself, is a measure imposed to elevate atextual principles over the text.

Furthermore, if the Court required grants of rights of action to specify "in-state," then it would seem to also require specification in many other contexts. Congress would have to specify carveouts for each type of constitutional violation for all kinds of provisions that it passes. Such an approach is impractical given limited congressional resources.

Reading general grants as only permitting in-state suits would not be considered a delegation of legislative power to the Court. Such a justification usually works when a legislation is unconstitutionally vague.[154] A general grant wouldn't be vague like a description of a "violent crime." There is no vague adjective that the Court would have to elaborate.

In discussing foreign sovereign immunity, Chief Justice Marshall noted in *Murray v. The Charming Betsey* that:

> [a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country.[155]

But the relationship between the U.S. and foreign nations is different than that between U.S. and the states, as the U.S. is a superior sovereign in the latter context. Therefore, the onus that is put on Congress in abrogating the common law immunity of the states might be lower than that imposed

153. *Id.* at 805. ("Clear statement rules can guard values deserving special judicial protection.").

154. *See, e.g.*, United States v. Davis, 139 S. Ct. 2319 (2019).

155. 6 U.S. 64.

when abrogating foreign sovereign immunity. Certainly, when we have affirmative acts of Congress such as the Foreign Sovereign Immunities Act that establish foreign sovereign immunity, the bar may be higher since there is no equivalent statute protecting state sovereign immunity.

B. "Congruence and Proportionality" Under the Fourteenth Amendment

The Court is correct that Congress cannot completely define the content of the Fourteenth Amendment under its enforcement power.[156] Congress can only prevent or stop violations of the Fourteenth Amendment.

Some scholars, like Professor McConnell, argue that Congress is owed some deference in determining what constitutes a Fourteenth Amendment violation.[157] This is reflected in the framers of the amendment's mistrustfulness of courts and the fact that the power to enforce the provision is granted to Congress, arguably in lieu of the Court.

Professor McConnell still agrees, though, that the power is "remedial" in the sense that it can only be employed after a violation of the Fourteenth Amendment has occurred.[158]

Setting aside what level of deference Congress is owed in interpreting the Fourteenth Amendment, this article challenges the idea that the power to "enforce" the Fourteenth Amendment can only be used in response to state wrongdoing. There is nothing inherent in the word "enforce" that requires it to be reactive. Enforcing the law encompasses not just punishing and restoring the law after violations, but also preventing it from being violated in the first place. One can enforce a rule without the rule ever having been broken. A police officer watching over their post is enforcing the law, even if no law is being broken.

The only limitation that the text of the Fourteenth Amendment imposes on Congressional enforcement is that Congress' actions must be reasonably tailored to stopping or preventing Fourteenth Amendment violations. This requirement produces two changes in current doctrine.

First, Congress doesn't need to wait for states to violate the Fourteenth Amendment to act so long as its action is "appropriate" in preventing future violations. The standard for "appropriate" shouldn't be extraordinarily high; there likely must be some rational basis for thinking that a violation could occur absent the congressional action in question, but it need not be inevitable.

156. Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 181 (1997).

157. *Id.* at 188.

158. *Id.* at 181.

Second, the amount of evidence establishing that link probably doesn't have to be very significant. Congress's legislation must merely be "appropriate." In that sense, the legislation Congress enacts under the Fourteenth Amendment must be targeted at preventing or stopping violations; it can't be a workaround to doing other things. There must also be reason to believe the legislation would actually have that effect. If Congress can act before a violation has even occurred, there theoretically doesn't need to be any evidence of past violation, though there still would need to be reason to think a future violation may reasonably occur. Therefore, contrary to *Garrett*, there need not be a "pattern of discrimination by the States which violates the Fourteenth Amendment."[159] Additionally, cases like *Coleman*, which required Congress to have specifically identified the category of people to be protected,[160] are invalid under this reading.

One of the drafts of the Fourteenth Amendment read, "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States . . . ."[161] The change to "Congress shall have power to enforce this article by appropriate legislation" isn't the difference between the power being affirmative or reactive. The act of enforcing the law can be affirmative and preventative, not just reactive.

In *Allen*, the Court noted that evaluating the level of constitution violations "usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong."[162] Although the Court noted in *Allen* and *Florida Prepaid* that the congressional record is not dispositive, there shouldn't even be a focus on it. The question that arises when Congress employs its enforcement power is whether Congress is in fact enforcing the Fourteenth Amendment through appropriately adapted means. In light of successful attacks against giving weight to legislative history and intent over the text, evidence in the Congressional record, or lack thereof, should not hold much weight in the analysis. The determinative question should be whether the legislation at hand could reasonably prevent or stop a violation.

V. STATE COURTS MAY HEAR CASES AGAINST STATES.

One practical reason for why the distinction between in-state and out-of-state is workable is that, were it not for *Franchise Tax Board v. Hyatt*,

159. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

160. Coleman v. Ct. of Appeals of Md., 566 U.S. 30, 38 (2012).

161. CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866).

162. Allen v. Cooper, 140 S. Ct. 994, 1004 (2020).

out-of-staters would at least have their own state courts as venues to sue other states. In contrast to in-staters, who could be disfavored in or even barred from suits against their own state in their own states' courts, out-of-staters suing another state in their home state courts would not face that risk, eliminating the need for a 'neutral' forum like the federal courts.

A. Nothing in the Constitution Bars State Jurisdiction Over Claims Against States.

Of course, *Franchise Tax Board* currently precludes out-of-state courts from entertaining a suit against another state.[163] However, there is strong reason to believe that *Franchise Tax Board* was incorrectly decided. The Constitution does not preclude such suits. The Eleventh Amendment specifies that the "Judicial power of the United States" does not extend to suits prosecuted against a state by a citizen of another state. State courts do not depend on the judicial power of the United States to issue judgments; they exercise the judicial power of their state. The specification of the judicial power of the United States and the enumeration of other limits on state power create the textual implication that when validly enacted pursuant to Congress' powers, Congress can create rights of action for out-of-staters to sue in state courts. This interpretation is also consistent with the background of the ratification of the Constitution as a replacement to the Articles of Confederation.[164]

The Court in *Hyatt* reasoned that:

> [a]lthough the terms of that Amendment address only 'the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision,' the 'natural inference' from its speedy adoption is that 'the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits.'"[165]

But it's unclear how rapid ratification of the amendment creates an inference that the Constitution was meant to regulate the state judicial power in this way. Even if that inference exists, it cannot trump the inference created by the text of that amendment, that the Constitution does

163. 139 S. Ct. 1485 (2019) (holding that states cannot states cannot be sued in the courts of another state).

164. *See* Coan, *supra* note 8, at 2533-34:

> States, under the Articles, were at liberty to comply with federal commands if and when they chose to do so. With this background, an Eleventh Amendment that requires Congress to act through state courts to subject states to suit might easily be seen as less coercive, not more coercive than the alternative of allowing it to act through federal courts. Contrary to the assertions of the Alden majority, this approach would also be wholly consistent with the role and competence of state courts, which routinely interpret and apply federal law, pursuant to the Supremacy Clause.

165. Hyatt, *supra* note x, at 1496 (citing Alden v. Maine at 723-724).

nothing to protect states from suit in state courts. An inference that the Eleventh Amendment protects all "traditional immunity" is not derived from the text of the Constitution and is not itself codified. In other words, the context in which the amendment was passed was not itself ratified as part of the Constitution when it could have been in some precatory language.

Baude and Sachs point out that as a historical matter, even if states had no ability to enforce judgments against other states, they at least had the power to hear cases, and still have that power today.[166] Baude and Sachs write that judgments rendered against a state in another state's courts cannot be enforced by that state, despite the Full Faith and Credit Clause reading, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[167] They argue that the Clause only applies when a judicial proceeding occurs with proper jurisdiction, and that under founding-era immunity, there wouldn't be proper jurisdiction.[168]

But this article argues that immunity doesn't apply when Congress validly creates a right of action against states under Article I or when a claim arises directly from the Constitution, such as a takings claim. When Congress creates a right of action against states, under *Tafflin v. Levitt*, states are presumed to have concurrent jurisdiction.[169] This presumption should hold in abrogating the states' common law immunity provided it is considered an exercise of Congress' powers. At the very least, state courts should be considered competent to hear federal claims, as contemplated by the Madisonian Compromise. The Supreme Court holding otherwise in *Hyatt* derogates the states' sovereignty rather than protects it. It prevents states from protecting their citizens.

Therefore, a state would be exercising proper jurisdiction under this theory, and the Full Faith and Credit Clause would force the defendant state to comply.

166. Baude and Sachs, *supra* note 5, at 13-14:

> Nothing in the Constitution relevantly restricts those powers, and unlike federal powers, state powers don't have to be conferred by the Constitution. Had Nevada been one of the original thirteen states, it arguably would have had the power before Ratification to abrogate the common-law immunity (at least within its own courts). (So, under the equal footing doctrine,) it might seem that the Silver State retains this power today.

Even if the expectation of some framers such as Edmund Randolph was that states could not be sued in the courts of other states, that was not put into the text of the Constitution. According to Baude and Sachs, the backstop was a lack of enforceability, not a complete inability to render judgments at all. *Id.*

167. U.S. CONST. art. IV, § 1

168. Brief of Professors William Baude & Stephen E. Sachs, *supra* note 78, at 19-22.

169. Tafflin v. Levitt, 493 U.S. 455 (1990).

B. Congress Can Force States to Hear Diverse Suits Against States

Under the theory proposed by this article, if Congress generally creates a private right of action against states, federal courts would be able to hear only same-state suits because of the Eleventh Amendment. State courts are not subject to the Eleventh Amendment, and thus, would be able to hear diverse claims against states under the right created by Congress. Indeed, under *Testa v. Katt* and *Haywood v. Drown*, states could actually be obligated to hear diverse claims against other states, contrary to *Franchise Tax Board v. Hyatt*.[170] Refusing to open their courts to these federal claims would actually violate the Supremacy Clause and unconstitutionally frustrate federal law.

If creating a right of action against states is a valid exercise of the Necessary and Proper Clause and Article I, and the Supremacy Clause is read as broadly as it was in *Testa* and *Haywood*, it follows that states must hear diverse suits against states.[171] That the Eleventh Amendment prevents federal courts from hearing diversity suits makes it all the more necessary for Congress to be able to compel states to hear them, assuming that such suits are necessary and proper to exercise Article I powers.

If Congress, under *Testa* and *Haywood,* can mandate that state courts hear diversity suits against states, the Eleventh Amendment at that point would fit like a glove: same-staters who cannot rely on neutral courts have the federal courts as recourse, while out-of-staters can rely on their own state courts.[172] Even if a state cannot unilaterally enforce a money judgment against a state for one of its citizens, it can pursue other means of recovery. The state itself may be prompted to take action on behalf of the plaintiff in federal court under the Due Process Clause or *parens patriae*. A state can negotiate with a defendant state a means to pay out damages. A defendant state may not want to have many outstanding judgments against it for political reasons, even if they are not immediately enforceable.

The Court in *First English Evangelical Lutheran Church v. County of*

170. Testa v. Katt, 330 U.S. 386 (1947); Haywood v. Drown, 556 U.S. 729 (2009). *Haywood* suggests that § 1983 is special because it allows for vindication of constitutional rights. But if Congress validly creates a right of action to vindicate statutory rights under its Article I powers, that is no different from creating a right of action under its enforcement power. Both actions have constitutional force under the Supremacy Clause and are valid exercises of Congressional power. In light of the recent cases limiting *Bivens*, it's clear that the Constitution itself does not require damages actions to be available to plaintiffs whose constitutional rights are violated. Therefore, there is no reason to think § 1983 is special or requires more state court acceptance than rights of action vindicating statutory rights.

171. These readings are generally bolstered by the historical fact of the Madisonian Compromise, which suggests that federal courts are entirely optional.

172. At this point, one might ask, if the Eleventh Amendment does so little and people can just sue other states in their own state courts, is not the Eleventh Amendment almost worthless? It would not be, not entirely at least. It would still limit federal power.

Los Angeles suggests that federal sovereign immunity may not apply to claims for just compensation under the Takings Clause.[173] *City of Monterey v. Del Monte Dunes at Monterey* extends this suggestion to state sovereign immunity.[174] In *Battaglia*, the Second Circuit suggested that takings claims do not require a legislated right of action and cannot be abrogated by a legislature.[175] Were that view accepted, presumably the Eleventh Amendment would preclude federal courts from hearing takings claims brought against a state by an out-of-state claimant but allow them to hear claims brought by individuals against their own states. This makes practical sense, as most of the time, states will be taking property for public use from its own citizens, rather than from the citizens of other states.[176] But for out-of-state claimants, these cases, combined with the Eleventh Amendment, mandate that state courts hear these cases to comply with the Constitution.

VI. RECONCILING THE IN-STATE/OUT-OF-STATE DISTINCTION

Many scholars have found the in-state/out-of-state distinction drawn by the Eleventh Amendment unjustifiable.[177] This section justifies the distinction.

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173. 482 U.S. 304 (1987).

174. 526 U.S. 687 (1998).

175. Battaglia v. Gen. Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). It's unclear whether the Second Circuit would apply its reasoning to any other provision of the Constitution.

In *Reich v. Collins*, Justice O'Connor suggested that under Article I, Section 9, a claim for illegal taxes may also be unaffected by sovereign immunity. 513 U.S. 106, 111 (1994). It seems clear that no principal of atextual sovereign immunity could allow Congress to simply ignore Article I Section 9. But what's less clear is whether *Battaglia*'s principal of a right of action inherent in the Constitution applies to a claim of an illegal tax. *Alden v. Maine* seems to suggest otherwise, stating that in *Reich*, the state had promised a post-deprivation remedy and therefore the Due Process Clause required repayment. 527 U.S. 706, 740 (1999).

But it's highly plausible that even without this promise from the state, the Constitution creates a right of action for illegal taxes. The Due Process Clause states that property shall not be deprived without due process of law. If the government exacts a tax in violation of Article I, Section 9, that would be the government depriving property without due process of law, and continuously holding on to the taxed money would be a continuous deprivation. To halt the continuous violation, an individual seems entitled to make a claim. It can be characterized as injunctive relief in that holding the tax is a continuous due process violation and returning the funds would be stopping current and future violations.

A claim of an illegal tax may often be recharacterized as a takings claim. A tax is often exacted "for public use." U.S. CONST. amend. V. Therefore, it should be possible to challenge an illegal tax under the Taking Clause, with the just compensation being a returning of the tax.

176. The practical effect of barring out of state claims is minimal, though that is not necessarily an affirmative reason to bar them. The affirmative reason is greater adherence to the text, which some view as its own good.

177. Meltzer, *supra* note 47 at 10. ("Although the Amendment's text can easily be read to support such a distinction, existing efforts to supply a supporting rationale strike me as unpersuasive."). Clark, *supra* note 3, at 1899 (critiquing "compromise" positions as accepting that the text creates an anomaly).

As explained above, contrary to *Franchise Tax Board v. Hyatt*,[178] other states can exercise concurrent jurisdiction and hear the claims enabled by Congress, the judgments of which must be given full faith and credit. This gives out-of-staters recourse that in-staters, potentially facing biased courts when suing their own states, may not have. Thus, whether plaintiff is diverse or nondiverse, that plaintiff has a recourse in a theoretically neutral forum: federal court or another state's courts. Another recourse that exists for out-of-staters but not in-staters is the ability for states to sue on behalf of their citizens.

Under the textual approach to the Eleventh Amendment, more plaintiffs would be able to vindicate their federal rights against states. In-staters are the main victims of state violations of federal rights, and they have been prevented from vindicating their rights in many instances by the interpretation of the Eleventh Amendment codified in *Hans*. A textual interpretation of the Eleventh Amendment would allow for rights of action to sue states directly for alleged violations of constitutional rights.

Even when individuals are permitted to sue officials, they must overcome qualified immunity. Under a statutory of constitutional right of action, this article's interpretation of the Eleventh Amendment would enable in-state citizens to sue their states directly, instead of suing officials. This circumvents the burden of having to overcome official immunity, such as qualified immunity, which protects state officials from suit when their alleged violation did not violate "clearly established law."

That said, there would be a seemingly peculiar dichotomy between in-staters and out-of-staters. Some have justified a hard line between same-state and out-of-state plaintiffs in their ability to sue states. One explanation, offered by Professor Larry Marshall, is that at the time of ratification of the Eleventh Amendment, in-state citizens are the most likely to suffer core rights violations whereas out of staters are disproportionately likely to be speculators and loyalists, so blocking their suits was reasonable.[179] Professor Coan notes that "the citizens of one state in their collective capacity possess a sovereign interest vis-à-vis out-of-staters that a state government does not possess vis-à-vis its own citizens—whose consent, according to the principles of popular sovereignty, is the source and limit of its power."[180] As noted in Section III, the Eleventh Amendment was designed to eliminate the ability for individuals to sue states in federal court for common law violations through diversity jurisdiction. But since abrogation via legislation was not common and may not have been contemplated, the verbiage in the actual

178. *See supra* part V.A.

179. Marshall, *supra* note 8, at 1367-68; *but see* Pfander, *supra* note 47. This explanation is challenged by diversity reading proponents like Pfander.

180. Coan, *supra* note 8, at 2532.

Eleventh Amendment was broader and banned all suits. This article provides additional reasons for the distinction, namely the need for an unbiased forum and the ability for other states to represent their harmed citizens.

This article argues that drawing a sharp distinction between in-staters and out-of-staters access to federal courts makes practical sense and is not anomalous. This article does not argue that these reasons were necessarily consciously considered by the framers or ratifiers of the Eleventh Amendment while they were drafting and passing it but it does argue that most of these practical differences at least existed at the time of the amendment's passage, even if they weren't consciously considered as reasons for making this distinction.

If a two-tier system were adopted, it would still be somewhat inequitable if federal court is considered a superior forum than any state court. A New Jersey citizen who had their copyrights under the CRCA violated by North Carolina would not be able to sue in federal court, whereas a similarly situated North Carolinian would be able to. A more serious inequity exists with citizens of foreign states suing the state in which they reside. By the text of the Eleventh Amendment, the judicial power does not extend to suits commenced by citizens of foreign states. U.S. Const. amend. XI. If a foreign citizen therefore sued the state in which they resided, they would only have recourse in state court, which could be biased in favor of the state, or in the courts of the nation of which they are a citizen.[181] Unfortunately, that inequity is constitutionally mandated by the Eleventh Amendment. The inequities seem to be compounded by the fact that it is only in-state citizens who can use democratic avenues to shift state policies. But this fact may also enhance the justification for in-state citizens being able to sue their states. If states are ultimately responsible to their citizens anyway, it shouldn't be a significant additional burden on states to be liable to their citizens when they violate federal law.

A. States Representing Their Citizens

However, in the absence of a constitutional amendment, out-of-staters are not completely out of luck. The Privileges and Immunities Clause protects citizens from discriminatory treatment from other states. Under

181. And unlike with diversity jurisdiction, Congress cannot change the definition of citizen for purposes of the Eleventh Amendment if it would expand the judicial power. Although 28 U.S.C. § 1332(a)(2) states that "district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State," that provision serves to limit the judicial power, which is constitutional permissible. Congress can limit the jurisdiction of the district courts, but it cannot expand them beyond what the Constitution allows.

this provision, it seems that out-of-staters deserve some legal recourse. In practice, out-of-staters would likely have to lobby their state or the United States to sue the offending state.

Other states face a potential problem establishing injury to the state qua state in cases where one of its citizens is being harmed by another state. States would have to sue under *parens patriae* standing, which allows a state to sue on behalf of its citizens.[182] A state would likely not be considered a "[c]itizen of another state" for Eleventh Amendment purposes. Additionally, the common law doctrine of sovereign immunity does not generally extend to suits commenced by states or the United States.[183] The doctrine would be in full force because these suits would not be against the United States, unlike in *Mellon.*[184] Additionally, suits brought first in district courts instead of directly to the Supreme Court may have lower standards for establishing *parens patriae* standing.[185] The United States can sue to enforce its statutes that it has an interest in protecting but an individual's need to lobby state or federal governments to bring such a suit on their behalf imposes a much heavier burden than being allowed to bring the suit themself.

From a certain point of view, it makes sense that people can sue their own state, but citizens of other states cannot. *Parens patriae* is not available for in-staters because their state wouldn't sue itself. Therefore, the in-stater should be able to sue on their own behalf. At least theoretically, out-of-staters can appeal to *parens patriae* even if the Eleventh Amendment bars them from suing directly.

There is reason to believe that the ratifiers of the Eleventh Amendment were aware of the ability of states to sue other states on behalf of its citizens, with or without an explicit right of action granted by Congress. The Court has recognized that *parens patriae* stems from pre-founding conceptions of the royal prerogative.[186] Recent literature challenges the Court's understanding, claiming that *parens patriae* stems from state police power and grew in tandem with it starting in the late nineteenth-

182. Louisiana v. Texas, 176 U.S. 1, 19 (1900)

183. *Parens patriae* apparently works even when the statute only specifies that any "person" could bring suit, such as in Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261 (1972) ("Hawaii plainly qualifies as a person under both sections of the statute, whether it sues in its proprietary capacity or as parens patriae.") This would result in an inconsistency. For Eleventh Amendment purposes, states would not be considered "Citizens of another State" but would be considered "persons" for statutory purposes.

184. Massachusetts v. Mellon, 262 U.S. 447, 485 (1923) (holding that *parens patriae* standing is weakened when suing the U.S.).

185. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607-08 (1982) (Brennan, J., concurring).

186. *Standard Oil*, 405 U.S. at 257.

century.[187]

But even under that understanding, and even though the scope of state police power was thought to be much narrower at the founding than it is now, the founding generation was aware that states had the power to prohibit violations of the privileges and immunities of its citizens.[188] The original understanding of privileges and immunities included "[p]references bestowed by law on some, but not all, persons and entities pursuant to government regulation of internal affairs."[189] If not an original expected application, it certainly is well within the original meaning of the Tenth Amendment that states can bring suit when its citizens' statutory rights, such as intellectual property rights, granted by Congress are violated by another state.

Whether the ability of states to sue on behalf of their citizens was intended when the Eleventh Amendment was ratified is an open question. Regardless, the ratifiers were on constructive notice of this ability, and as luck would have it, the distinction between in-staters and out-of-staters seems to at least make sense on this front.

Setting aside *parens patriae* standing, Congress has always been able to create a right of action for states to sue other entities. Under *Akins*, so long as Congress defines an injury, it can create standing, even for a generalized harm.[190] Congress could define an injury to a state as, for example, one of its citizens having their copyrights violated. Therefore, despite the Eleventh Amendment, a state could sue another state for violation of a federal law, provided that law explicitly allowed states to be plaintiffs and defendants in suits for enforcement.

B. The Textual Reading of the Eleventh Amendment Does Not Have a Detrimental Effect on Enforcing the Fourteenth Amendment For Out-of-Staters.

The first reason out-of-staters would not suffer significant loss in their ability to bring suits against states is that abrogation is already a dead letter. The Court has repeatedly curtailed Congress' ability to abrogate the Eleventh Amendment by progressively adding more requirements under

187. Margaret S. Thomas, *Parens Patriae and the States' Historic Police Power*, 69 S.M.U. L. REV. 759, 801 (2016).

188. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 475 (2004) ("The most obvious power of states that follows from the original meaning of the Privileges or Immunities Clause is the power to prohibit any violations by some citizens of the liberties or rights of other citizens.").

189. Robert G. Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GA. L. REV. 1117, 1149 nn.216-24 (2009) (citing founding-era debates explicitly naming statutorily granted trading privileges as privileges and immunities.).

190. FEC v. Akins, 524 U.S. 11 (1988).

congruence and proportionality. Since abrogation under the Fourteenth Amendment is already dead in practice, killing it in theory will not have a significant effect on out-of-staters.

As discussed above, a textual reading of the Constitution would allow individuals to sue in their state court under a federal right of action.[191] In terms of rights violations by states overall, Professor Larry Marshall explains that one possible reason for the textual distinction between in-staters and out-of-staters in the Eleventh Amendment is that the drafters believed that in-state citizens were more likely to suffer core rights violations whereas out-of-staters were more likely to be speculators and loyalists, and hence less deserving of legal protection.[192] If this was indeed conscious reasoning at the time of the Eleventh Amendment's ratification, it was quite prescient, given the later development of the Fourteenth Amendment and state law. When states violate Fourteenth Amendment rights, they typically do so with respect to their own citizens, not the citizens of other states.[193] State laws that prohibit the exercise of particular rights or treat different groups differently generally most directly affect the people who live in that state.[194] For example, legislation affecting marriage equality, voting rights, and reproductive rights mostly impact the people living in that state.[195] Therefore, in most cases in which states violate the Fourteenth Amendment, victims will not be precluded from suing in federal court by the Eleventh Amendment.

Whether or not this fact was anticipated by the framers of the Eleventh Amendment, it at least shows that most victims of Fourteenth Amendment violations would still have recourse in federal court if the Eleventh Amendment were enforced literally.

CONCLUSION

Current Supreme Court doctrine regarding the Eleventh Amendment and state sovereign immunity conflicts with the text of the Constitution in several ways. First, the Fourteenth Amendment does not allow Congress to simply ignore the Eleventh Amendment because it only expands

191. *See infra* part IV.A.

192. *See* Marshall, *supra* note 8, at 1367-68; *but see* Pfander, *supra* note 45, at 1358.

193. Marshall, *supra* note 8, at 1368 ("The vast majority of state violations affecting individuals involve in-state citizens.") (citing Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1478 n.214 (1987)).

194. Coan, *supra* note 8, at 2532 ("Since states today are still likely to violate the federal rights of their own citizens more frequently than they violate the federal rights of out-of-staters, allowing suits only by citizens may still be a good way to protect federal rights, while preserving some limits on states' potential liability.").

195. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Shelby Cnty. v. Holder, 570 U.S. 529 (2013); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

congressional power while the Eleventh Amendment limits judicial power.

On the other hand, the Eleventh Amendment does nothing to protect states from suits brought in their own state courts or those brought in federal court by their own citizens. The text of the Eleventh Amendment and Article III indicate only that citizens of other states cannot sue a state.

Furthermore, there's nothing preventing Congress from employing its Article I and Fourteenth Amendment powers to create rights of action against states, so long as those rights of actions are only read to allow in-staters to sue. If it is necessary and proper for Congress to allow in-staters to sue states, then the constitutional grant of power in Article I is sufficient to overcome atextual common-law sovereign immunity, as it is in other contexts.

Although enforcing the Eleventh Amendment as written would create a divide between in-staters and out-of-staters as to who could get into federal court, that distinction makes sense in that every plaintiff would at least have a theoretically unbiased forum. Additionally, out-of-staters could be represented by their own states.

Overall, changing Supreme Court doctrine to align with the text would enhance vindication of federal rights. Most state violations of federal rights are inflicted on their own citizens. Instead of having to sue state officials and deal with qualified immunity, citizens would be able to sue their states directly.