Suing a State in Federal Court under a Private Cause of Action: An Eleventh Amendment Primer

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SUING A STATE IN FEDERAL COURT UNDER A PRIVATE CAUSE OF ACTION: AN ELEVENTH AMENDMENT PRIMER

DONALD L. BOREN*

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I. INTRODUCTION

A major obstacle facing an attorney, whose client is suing a state in federal court under a right created by a federal law, is the restraints placed on the federal court's jurisdiction by the eleventh amendment to the United States Constitution.1 Often the attorney has no choice but to pursue his remedy in federal court, because Congress has either given exclusive subject matter jurisdiction to the federal courts, or there is not an adequate state remedy available. The attorney, in this case, is entering what one federal judge has characterized as "a wonderland of judicially created and perpetuated fiction and paradox."2 The purpose of this article is to provide assistance through this wonderland of eleventh amendment jurisprudence.

Before beginning this journey, one must realize that, as in Wonderland, things are not always as they seem. The eleventh amendment today is an evolving doctrine. There are three basic issues on which the Supreme Court is either very closely divided or has avoided addressing. The most fundamental division is over whether the amendment prohibits a federal court from hearing a case when a state is being sued on a federal question. If one reads the amendment literally, it only prohibits a state from being sued in federal court on diversity grounds ("by citizens of another State, or by Citizens or subjects of any foreign state.").3 Yet, at the time the amendment was enacted federal courts did not have jurisdiction over federal question cases.4 It was not until 1875 that Congress granted the federal courts general federal question jurisdiction5 and it was not until 1890, nearly one hundred years after the enactment of the amendment, that the Court first addressed this issue. The Court, in Hans v. Louisiana,6 held that the amendment barred a state from being sued by a citizen of the state in federal court. Hans was based on the concept of state sovereignty. According to Justice Bradley's majority opinion, states are sovereign and cannot be sued without their consent.7

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1 U.S. CONST. amend. XI states: "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.


3 U.S. CONST. amend. XI.

4 Judiciary Act of 1789, 1 STAT. 73 (1789). The Judiciary Act of 1801, 2 STAT. 132, 156 (1802) did grant general federal question jurisdiction to the federal circuit courts, but that grant was repealed one year later. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

5 Judiciary Act of 1875, 18 STAT. 470 (1875).

6 134 U.S. 1 (1890). Hans, a citizen of Louisiana, sued the state to recover the amount owed on certain bonds issued by the state. The Court held that the eleventh amendment barred such suits.

7 Id. at 13.
Since *Hans*, the Court has consistently held that the amendment protects a state from being sued in federal court under federal question jurisdiction. The states' protection, however, under *Hans* is by no means secure. Most of the recent cases have been five-four vote decisions. The majority in these cases have continued to reaffirm *Hans*, but four of the current justices believe that the premise in *Hans* was incorrect, that the amendment was not intended to establish state sovereignty. In Justice Brennan's view, "[t]here simply is no constitutionally mandated policy of excluding suits against States from federal court." The dissent would interpret the amendment as only prohibiting a state from being sued in federal court by a citizen or subject of another state or nation. Justice Brennan points to new historical evidence which supports the finding that the amendment was not intended to establish state sovereignty.

The Court's latest examination of *Hans* occurred during the last week of the 1986-87 term, in *Welch v. State Department of Highways and Public Transportation*. *Welch* was of particular interest in that it was the first examination of *Hans* following the appointment of Justice Scalia. Oddly enough, the petitioner in *Welch* did not assert, as a basis for reversing the judgment, that *Hans* had been incorrectly decided. Justice Scalia voted with the majority, but expressly reserved judgment on, *Hans* because the case presentation focused on other matters.

A closely related question, which the Court has not ruled on, is whether the eleventh amendment prohibits Congress from enacting laws which would give federal courts jurisdiction over states. If the eleventh amendment was intended to grant states sovereign immunity, it would follow that Congress could not abolish this immunity. So far the Court has carefully avoided this question.

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14 Id. at 2958.

15 *See infra* note 76.
The Court is sharply divided over what is the appropriate standard for finding a waiver or abrogation of a state's eleventh amendment immunity. Prior to 1974, the amendment received little attention because there were several effective ways of avoiding its bar. However, beginning in 1974, with the case of Edelman v. Jordan, the Court has gradually increased the requirements for finding a waiver or abrogation of a state's immunity. The Court's most recent decision on abrogation and waiver occurred in 1985, in Atascadero State Hospital v. Scanlon. The Court, in Atascadero, held "that Congress may abrogate the states' constitutionally secured immunity from suits in federal court only by making its intention unmistakably clear in the language of the statute."

This article examines all three of these issues, plus—and perhaps more importantly—methods of avoiding eleventh amendment litigation. Section One of the article examines the historical evidence on whether the amendment was intended to apply to cases in which a citizen of a state is suing a state for violating a federal law. Section Two analyzes whether the amendment was intended to limit congressional power to make states subject to federal law. Section Three analyzes the requirements for finding a waiver or abrogation of a state's eleventh amendment immunity. In this part, a variety of federal statutes are examined to determine whether they apply to the states under the Atascadero standard. This section also explores possible ways of avoiding the high hurdle established by Atascadero. Section Four analyzes methods of avoiding the eleventh amendment bar. This section will explore such devices as suing a state official rather than the state, or suing for equitable relief.

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16 See infra text accompanying note 98-102.
II. WAS THE ELEVENTH AMENDMENT INTENDED TO ESTABLISH STATE SOVEREIGN IMMUNITY?

The decision in *Hans* was based on the premise that, when the Constitution was enacted, the Framers did not intend to extend federal court jurisdiction to private claims against states.\(^{21}\) The Court reasoned that the decision in *Chisholm v. Georgia*,\(^{22}\) in which the Court held that the federal courts had such jurisdiction, was in error. The Court concluded that the eleventh amendment was intended to overturn *Chisholm* and restore the state's sovereign immunity.\(^{23}\) Both of these premises must be examined, because if either is true, states are immune from suit in federal court.

A. Was Article III, Section 2 of the United States Constitution Intended to Grant Federal Courts Jurisdiction over Private Causes of Action Against a State?

Article III, section 2, of the Constitution grants the federal courts jurisdiction over two types of cases, identified either by subject matter or...
parties. The subject matter jurisdiction includes federal questions ("all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made."). Party based jurisdiction is grounded in diversity of citizenship. It encompasses three types of diversity including ordinary diversity ("Controversies . . . between Citizens of different States"), state-citizen diversity ("between a state and Citizens of another State"), and state-alien diversity ("between a state . . . and foreign . . . Citizens").

The records of the Federal Convention offer little guidance as to whether article III, section 2, was intended to apply to suits against states based on private causes of action created by federal law. The following facts are known. A proposal for a federal judiciary was part of a series of sixteen resolutions introduced by Edmund Randolph on May 29, 1987. There is a considerable body of evidence that the proposal on the federal judiciary was probably drafted by James Madison. Madison had earlier expressed concern that a debtor state might act in favor of its citizens and thus disturb the domestic tranquility and involve the nation in foreign contests. The Randolph Resolution along with two others was referred to the Committee of Detail. The Committee report contained the first reference to the federal judiciary having jurisdiction between a state and citizens of another state. The debate centered on the method of selecting and the tenure of federal judges. The question of federal jurisdiction appears to have received little attention. Motions dealing with the federal tribunal were passed on June 13, 1787 and July 18, 1787, and most of this action was by unanimous vote.

This was not the case at the state level. On the eve of the states' ratification conventions, there was a great deal of concern about debts the states had incurred during the Revolutionary War. While the Treaty of Paris subjected the states to substantial liability to British creditors, the collection of these debts was largely impossible under the Articles of Confederation. The states were fearful that this would not be the case under the proposed Constitution. This concern was not limited to just

24 U.S. Const. art. III, 3 cl. 1.
25 Id.
26 1 J. Elliot, Debates on the Federal Constitution 143 (1907).
28 Id. at 14.
29 Id. at 17.
31 See 1 J. Elliot, supra note 27, at 160, 174, 209, & 288-70.
32 The Treaty of Paris of 1783, 8 Stat. 80, between Britain and the United States, included a number of provisions that could subject the states to liability to British creditors. Article V of the Treaty recognized completed State confiscations, or escheats, of British property. Article VI, however, prohibited escheats that had not yet been completed. See generally Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Column. L. Rev. 1899, 1899-1902, 1903-08 (1983). See also 1 J. Elliot, supra note 27, at 529.
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the claims of British creditors. There was an equal concern about the
claim of United States creditors. While a number of states had made
substantial progress toward the payment of these debts, others had not.
Some states resorted to putting into circulation new paper money as a
painless way of meeting their obligations.

The question of whether article III, section 2, would give the federal
courts jurisdiction over states was debated in at least six state conventions
and at least four of these states considered amendments that would have
prohibited federal courts from hearing cases when a state was being sued
by a citizen of another state or nation. None of these amendments was
adopted.

It is by no means clear that the delegates to the ratification convention
enacted article III, section 2, on the assumption that states would be
immune from suit in federal court. Justice Bradley supported his position
in *Hans* by citing the position taken by Madison, Hamilton and Mar-
shall. Yet, in none of these quotations was the question of federal ques-
tion jurisdiction addressed. All three expressly limited their remarks to
cases when a state was being sued by a citizen of another state. Madison

33 This concern was expressed by Patrick Henry at the Virginia Convention:
I am convinced, and I see clearly, that this paper money must be dis-
charged, shilling for shilling. The honorable gentleman must see better
than I can, from his particular situation and judgment; but this has
certainly escaped his attention. The question arising on the clause
before you is, whether an act of the legislature of this state, for scaling
money, will be of sufficient validity to exonerate you from paying the
nominal value, when such a law, called *ex post facto*, and impairing
the obligation of contracts, is expressly interdicted by it. Your hands
are tied up by this clause, and you must pay shilling for shilling; and,
in the last section, there is a clause that prohibits the general legis-
lature from passing any *ex post facto* law; so that the hands of Congress
are tied up, as well as the hands of the state legislatures. This state
may be sued in the federal court for those enormous demands, and
judgment may be obtained, unless *ex post facto* laws be passed. To
benefit whom are we to run this risk? I have heard there were vast
quantities of that money deposited in the ... Northern States, and
whether in public or private hands makes no odds. They have acquired
it for the most in considerable trifle. If you accord to this part, you are
bound hand and foot. Judgment must be rendered against you for the
whole.


35 Id. at 28.
36 Id. at 27.
37 James Madison addressed the issue of federal court jurisdiction at the Vir-
ginia Convention on the adoption of the Federal Constitution. He stated:
Its jurisdiction (the federal jurisdiction) in controversies between a
State and citizens of another State is much objected to, and perhaps
without reason. It is not in the power of individuals to call any State
into court. The only operation it can have, is that, if a State should
wish to bring a suit against a citizen, it must be brought before the
federal court. This will give satisfaction to individuals, as it will pre-
vent citizens, on whom a State may have a claim, being dissatisfied
with the state courts ... . It appears to me that this (clause) can have
no operation but this — to give a citizen a right to be heard in the
federal courts; and if a state should condescend to be a party this court
may take cognizance of it.

III J. ELLIOT, supra note 27, at 533.

Alexander Hamilton addressed the issue of federal court jurisdiction in The Federalists No. 81.

Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here, a supposition which has excited some alarm upon very mistaken ground. It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in federal courts for the amount of those securities; A suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. The circumstances which are discussed ... in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to the compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against states for the debts they owe? How could recoveries be enforced? It is evident, that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such consequence, would be altogether forced and unwarrantable.


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

III J. Elliot, supra note 27, at 555-56.
appears on other occasions to have expressed a different opinion, and Marshall subsequently interpreted the eleventh amendment not to prohibit a state from being sued under federal question jurisdiction.

But, whatever the views of these three men, their views alone could hardly be taken as expressing the intent of the thirty-nine delegates who signed the Constitution. There was an equally strong view, particularly that of the anti-Federalist, that this provision would subject the states to just such suits. George Mason, Patrick Henry and Edmund Pendleton all believed that the section would confer to the federal courts jurisdiction over claims against the states. This view was not limited to the anti-Federalist, Edmund Randolph, who introduced article III, section 2, to the Constitutional Convention, stating that he “admired that part which forces Virginia to pay her debts.” At least two of the five members of the Committee of Detail who drafted the final version of article III, section 2, believed that the section granted the federal courts jurisdiction over the states. The failure to amend the section to comport to the interpretation placed on it by Madison, Hamilton, and Marshall, appears not to be just an oversight. In fact, one of the recommended amendments at the New York Convention was to expressly address this question. The amendment provided “nothing in the Constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any matter whatever.” This and similar amendments were not adopted.

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40 C. Jacobs, supra note 28, at 10-12.
41 Marshall's position on the eleventh amendment is unclear in Cohens v. Virginia, 6 U.S. (6 Wheat.) 264, 410, 412 ( ). The Court was considering the power of review exercisable by the court over the judgments of a state court, wherein it might be necessary to make the State itself a defendant in error. Marshall writing for the majority stated: “if the court were mistaken in this, its error did not affect that case, because the writ of error therein was not prosecuted by 'a citizen of another State' or 'of any foreign state'.”
43 III J. Elliot, supra note 27, at 533.
44 Id. at 543.
45 Id. at 549.
46 Id. at 573.
47 Id. at 207.
48 Members of the Committee of Detail were John Rutledge, Edmund Randolph, Oliver Ellsworth, Nathaniel Gorham and James Wilson. In Chisholm v. Georgia, 2 Dall. 419 (1793) Edmund Randolph, the Attorney-General of the United States, was counsel for the plaintiff and James Wilson was a Supreme Court Justice. Both believed that article III, section 2 conferred jurisdiction to the federal courts over claims against the states. There is also some evidence that Oliver Ellsworth shared Randolph’s and Wilson’s view. See C. Jacobs, supra note 28, at 25.
49 II J. Elliot, supra note 27, at 409.
50 See generally Nowak, supra note 43, at 1427; C. Jacobs, supra note 28, at 28.
The interpretation in *Hans* is also at odds with the economic conditions of the time. One of the primary motivations of the delegates to the Constitutional Convention was to protect economic rights from the abuse of state government. This was evidenced by the Constitutional grant of congressional power over significant economic interests and limiting the states' power to impair the right of contract. It would be highly unusual for the Framers of the Constitution to establish these rights, but prohibit the federal courts from enforcing them.

**B. Was the Eleventh Amendment Intended to Apply to Federal Question Cases?**

The second premise in *Hans* was that the amendment was intended to overturn *Chisholm* and to reinstate the original intent of article III, section 2, that states were to be immune from private causes of action in federal court. Unfortunately, the decision in *Chisholm* and the record of the enactment of the eleventh amendment offer little guidance on whether this conclusion is correct. The following facts are known.

The eleventh amendment was enacted as a result of the Court's holding in *Chisholm*. The Court, in *Chisholm*, held that federal courts had jurisdiction under article III, section 2, to hear private claims against a state. *Chisholm* drew an immediate reaction. On February 19, 1793, the day after the decision was announced, Representative Theodore Sedwick introduced the following Constitutional amendment:

That no state shall be liable to one made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, or any body politic or corporate, whether within or without the United States.

The following day another amendment to the Constitution was proposed:

The Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

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51 See C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1925). The central premise of Beard's work was that large and important economic interest were adversely affected by the system of government under the Articles of Confederation, particularly those of public creditors. The constitutional convention was originated and spearheaded by this influential group. *But see* F. MCDONALD, WE THE PEOPLE, THE ECONOMIC ORIGINS OF THE CONSTITUTION (1958); F. MCDONALD, NORVUS ORDO SECLORUM (1985).

52 Pennsylvania Journal, Feb. 20, 1793. No mention is made of the Sedwick Amendment in the House Journal or Annals of Congress. *See also* Nowak, *supra* note 43, at 1436; *but see* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 101 (1926).

53 3 ANNALS OF CONG. 651-52 (1793).
Both of these resolutions were tabled and no action was taken on them during the remainder of the Second Congress. The Third Congress convened in December of 1793. On January 2, 1794, the following resolution was introduced to the Senate:

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.\(^{54}\)

This resolution, which is now the eleventh amendment, was passed by the Senate by a vote of 23 to 2 on January 14, 1794.\(^{55}\) The resolution was passed by the House of Representatives on March 4, 1794, by a vote of 81 to 9.\(^{56}\) While support for the eleventh amendment was overwhelming, certification of the Action by the ratifying states was extremely erratic. It was not until 1798 that Adams notified Congress that the requisite twelve states had ratified the amendment.\(^{57}\)

The theory adopted in Hans, [hereinafter referred to as the traditionalists’ theory], is that the primary reason the eleventh amendment was enacted was to protect the states from paying debts incurred during the Revolutionary War.\(^{58}\) Proponents of this view point to the fact that the states were heavily indebted as a result of the Revolutionary War. Suits to enforce these claims were the primary source of litigation facing the pre-Marshall Court. Seven suits involving six jurisdictions were filed prior to the ratification of the eleventh amendment.\(^{59}\) The states were concerned, after the decision in Chisholm, that the dire prophecies made by the anti-Federalist in the Virginia Convention were coming true.\(^{60}\) As a result, the eleventh amendment was enacted to repudiate Chisholm and to restore sovereign immunity. Proponents of this view point to the wording of the eleventh amendment which states that: “The Judicial power shall not be construed to extend to...” as proof that the amendment was intended to have retroactive effect and bar the federal courts from hearing cases which had already been filed against the states. The Supreme Court interpreted the amendment this way in Hollingsworth v. Virginia\(^{61}\) and dismissed all the pending suits against the states.

\(^{54}\) Id. at 25 (1794).
\(^{55}\) Id. at 30 (1794).
\(^{56}\) Id. at 476-78 (1794).
\(^{57}\) See J. Richardson, Messages and Papers of the President 260 (1896). See also C. Jacobs, supra note 28, at 67.
\(^{58}\) 1 C. Warren, The Supreme Court in United States History 99 (1926).
\(^{59}\) Vanstophost v. Maryland, 2 U.S. (2 Dall.) 401 (1791); Oswald v. New York, 2 U.S. (2 Dall.) 401 (1792); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796); Vassall v. Massachusetts, Docket of the Supreme Court, August Term, 1793, Minutes of the Supreme Court, Aug. 6, 1793; Cutting v. South Carolina, Minutes of the Supreme Court, Feb. 1796; Moultrie v. Georgia, Docket of the Supreme Court, Feb. Term 1797.
\(^{60}\) Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (the decision “created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.”) See 1 C. Warren, supra note 59.
\(^{61}\) 3 U.S. (3 Dall.) 378 (1798).
There is a substantial body of evidence that tends to support a different conclusion. A second theory, [hereinafter referred to as the revisionists' theory], holds that the eleventh amendment was not intended to abrogate the states' liability for wartime debts, but simply to prohibit a state from being sued in federal court by a citizen or subject of another state of nation. The revisionists point to the fact that economic conditions of the states had changed between 1787 and 1794. By 1794 the federal government had assumed over two-thirds of the state debts and the states for the most part were willing and able to pay the remainder of these debts.

The revisionists' theory is supported by the limited wording of the amendment. Chisholm was a broadside attack on the principle of sovereign immunity. Four of the five justices held, in separate opinions, that the principle of sovereign immunity did not exist under our constitutional framework. If the intent of the eleventh amendment was to restore sovereign immunity, one would assume that after the attack on state sovereignty in Chisholm, Congress would have adopted an amendment, such as that proposed by Representative Sedwick, which would have clearly accomplished this objective. Yet instead, Congress chose a much more narrowly worded amendment that does not mention state sovereignty.

The traditionalists' view also does not adequately explain the widespread support which the eleventh amendment received from the Federalists. Professor Nowak points out that when Chisholm was announced, it received largely favorable response from the Federalists' press, but only one member of the Federalist party in each House voted against the amendment. Why would the Federalists, who favored a strong central

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62 See C. Jacobs, supra note 28, at 69.
63 Id.
64 2 U.S. (2 Dall.) 419, 471 (1793). Chief Justice Jay stated:
It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles .... No such ideas obtain here; at the Revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects .... and have none to govern but themselves; the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty. From the differences existing between feudal sovereignties and Governments founded on compacts, it necessarily follows that their respective prerogative must differ. Sovereignty is the right to govern; a nation or State-sovereign is the person or persons in whom that resides. In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents in Europe stand to their sovereigns.
65 Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 471 (1793).
66 See supra text accompanying note 53.
67 Nowak, supra note 43, at 1435.
68 The Senate passed the eleventh amendment by a vote of 23 to 2. The yea votes were Federalists 7, Democratic-Republicans 6, No party 9, Law & Order 1. The nay votes were Federalist 1, Democratic-Republicans 1. The House of Representatives passed the eleventh amendment by a vote of 81 to 9. The yea votes were Federalists 21, Democratic-Republicans 22, Antifederalists 1, No Party 37. The nay votes were Federalists 1, Democratic-Republicans 2, No. Party 4. See 3 ANNALS OF CONG. 651-52 (1793).
government and the payment of these debts, support the amendment? The traditionalists' view is that the amendment was supported by both parties because it simply reaffirmed the common understanding of article III, section 2, that the states could not be sued in federal court. 69

A more plausible explanation is that the Federalists' support was a product of the political climate of the times. In 1794, the central political issue in the United States was the possibility of war with Great Britain. 70 The narrowly worded amendment would allow the Federalists to prevent Tories and British creditors from suing the states in federal court, but still allow Congress to control court jurisdiction in federal question cases. While no direct proof exists that the Federalists voted for the amendment for this reason, a convincing argument can be made that this accounted for the very limited nature of the wording and the Federalist support.

III. WAS THE ELEVENTH AMENDMENT INTENDED TO LIMIT CONGRESSIONAL POWER TO GRANT FEDERAL COURTS JURISDICTION OVER THE STATES?

A closely related question is whether the eleventh amendment prohibits Congress from granting federal courts jurisdiction over the states. So far, the Supreme Court has carefully avoided this question. In Fitzpatrick v. Bitzer, 71 the Court recognized Congressional power to abrogate a state's eleventh amendment immunity under the enforcement provision of the fourteenth amendment. 72 Justice Rehnquist, in the majority opinion in Fitzpatrick, distinguished the powers of Congress under the fourteenth amendment from those granted under article I. 73 Justice Rehnquist relied on the fact that section five of the fourteenth amendment expressly grants Congress power over the states. 74 Fitzpatrick could be interpreted to stand

69 See Warren, supra note 59, at 96.
70 The vote in the Senate occurred just one month after the British announced that they had signed a treaty with the Algerian pirates which would allow the pirates to continue activities in the Atlantic. The House vote occurred just one week after word reached Congress that Great Britain had ordered the seizure of American vessels trading with the French islands in the West Indies. The Federalists responded to the increased tension by introducing in Congress a series of measures to improve the nation's military capacity. James Madison, a Democratic-Republican, accused the formerly pro-British Federalist of doing this only to gain the support of the people. Nowak, supra note 43, at 1438.
71 427 U.S. 445 (1976). The eleventh amendment does not prohibit states from being sued under the 1972 amendments of Title VII of the Civil Rights Act.
72 U.S. CONST. amend. XIV, § 5, provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
73 U.S. CONST. Article I, § 8.
74 427 U.S. 445, 456 (1976). Justice Rehnquist stated in the majority opinion: When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. 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.
simply as an application of the general rule of construction; that if two legal instruments of equal authority conflict, the more recent enacted prevails. At this time, the Court has not recognized this power under other sections of the Constitution and has, on at least one occasion, avoided the issue by addressing the abrogation question under the fourteenth amendment rather than the commerce clause.76 Welch v. State Department of Highways and Public Transportation76 was the Court's most recent examination of the abrogation question. In Welch, the Court expressly reserved judgment on whether Congress can abrogate a state's eleventh amendment immunity under other sections of the Constitution.77

The Court is likely to soon decide what limits the eleventh amendment places on Congressional action. Atascadero has already led to the amendment of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund)79 and several federal civil rights acts79 which expressly make states subject to suits in federal courts. Similar action is likely to take place with the copyright law80 and in other areas of federal law which will be based on article I powers. The issue of the limitations the eleventh amendment places on Congress will be raised by the states and its importance is such that it is likely to be addressed by the Court.

A. The Impact of Hans v. Louisiana on Congressional Abrogation

If the Court is to find that Congress has power to abrogate the states' eleventh amendment immunity, it must either distinguish or overturn Hans. Hans appears to be a very broad endorsement of state sovereignty. The Court's language is explicit and clear that: "[i]t is inherent in the nature of a sovereignty not to be amenable to the suits of individuals without (the sovereign's) consent. This . . . attribute of sovereignty . . . is . . . enjoyed by the government of every state of the Union."78 If this is

76 See Justice Stevens' concurring opinion in Fitzpatrick v. Bitzer, 427 U.S. 445, 459 (1976), in which he states that Congress has power under the commerce power clause to abrogate the states' eleventh amendment immunity. Justice Stevens believed that the Court should have addressed the question of whether Congress has power to abrogate the states' eleventh amendment immunity in cases involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970) under the commerce clause rather than the fourteenth amendment.


77 Justice Powell writing for the majority stated: "We assume, without deciding or intimating a view of the question, that the authority of Congress to subject unconsenting States to suit in federal court is not confined to § 5 of the Fourteenth Amendment." Id. at 2946.

78 See infra note 93.

79 See infra note 84.

80 See infra note 118.

81 134 U.S. 1, 13 (1889) (quoting The Federalists No. 81 (A. Hamilton)). See also Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) ("its greater significance [eleventh amendment] lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority.").
the case, Congress could not statutorily change this result. It is likely, however, that Justice Bradley was only speaking of judicial assumption of power and not Congressional power to extend federal court jurisdiction to the states. In his opinion, Justice Bradley cited with approval Justice Iredell's dissent in *Chisholm*. Justice Iredell's dissent was based on the premise that the Constitution only extended federal jurisdiction to cases in which jurisdiction had either been conferred on it by Congress, or those which were recognizable at common law. 82 This fact was recognized by Justice Bradley and the language in the opinion appears to limit the holding to a judicial assumption of power. 83

The facts in *Hans* also support a narrow interpretation. Hans sued the state of Louisiana under the contract clause of the United States Constitution 84 for defaulting on bonds issued by the state. Since the contract clause expressly applies to the states ("No State shall...Law impairing the Obligation of Contracts"), holding that the eleventh amendment limited Congressional action would in effect make the contract clause meaningless in that the federal government could not provide a mechanism for its enforcement. The question of Congressional power to abrogate a state's eleventh amendment immunity was not before the Court in *Hans* and was not addressed by it.

82 Justice Iredell was the only dissenting vote in *Chisholm*. He did not accept Attorney General Randolph's view: "That the moment a supreme court is formed, it is to exercise all the judicial power vested in it by the constitution, by its own authority, whether the legislature has prescribed methods of doing so, or not." 2 U.S. (2 Dall.) 419, 431 (1793). Since Congress had not conferred jurisdiction with the Court to hear an action in assumpsit, and since an action is assumpsit would not lie against the sovereign at common law, Justice Iredell concluded that the Supreme Court would not have jurisdiction over this type of case. Since the question of congressional power to confer jurisdiction to federal courts was not addressed, this matter was not discussed by Justice Iredell. 2 U.S. (2 Dall.) 419, 434 (1793).

83 *Hans v. Louisiana*, 134 U.S. 1, 12 (1890). Justice Iredell, on the contrary, contended that:

It was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions as the suit of individuals (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts. (emphasis added).

84 U.S. Const. art. I, § 10.
Another factor entering in this equation is the relationship between the tenth and eleventh amendments. In *Garcia v. San Antonio Metropolitan Transit Authority* the Court held that Congress, in exercising its powers under the commerce clause, could constitutionally apply the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) to employees of the state. The Court interpreted the state’s protection under the tenth amendment as being one of process. Justice Blackmun in writing for the majority stated:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the “States as States” is one of process rather than one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a “sacred province of state autonomy.”

Just four months after *Garcia*, the Court in *Atascadero* reaffirmed *Hans* and held that the eleventh amendment prohibits a state from being sued in federal court. These cases are difficult to reconcile. Both cases were five-four decisions, with only Justice White voting both times with the majority. One interpretation is that Congress may enact laws to apply to the states, but may not give the federal courts jurisdiction to enforce these laws. Such an interpretation lacks merit. Both *Garcia* and *Atascadero* are based on the principle of state sovereignty. Inasmuch as state sovereignty is not mentioned in the Constitution, if it exists, it must be implied either from the intent of the Framers of the Constitution or from subsequent amendments. If it exists under one amendment, it would logically appear to exist under both. If the chief protection that the states receive is one of process under the tenth amendment, that would logically

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66 469 U.S. 528 (1985). In a period of less than twenty years the Court has twice reversed itself on whether state sovereignty restricts Congress in exercising its powers under the commerce clause. All three cases involved the same issue: whether Congress could constitutionally apply the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) to employees of state. In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court held that Congress could constitutionally apply FLSA to the states. *Wirtz* was reversed eight years later in *National League of Cities v. Usery*, 426 U.S. 833 (1976), in which the Court held that the state’s sovereign immunity under the tenth amendment prohibited the extension of FLSA to employees of the state fulfilling traditional governmental functions. *Garcia* reversed *Usery* and declared unworkable the government-propriety distinction adopted in that case.


68 469 U.S. 528, 554 (1985).
be the case under the eleventh amendment. While Garcia was not based on the eleventh amendment, it would be totally inconsistent to say that Congress, under its article I powers, can make the states subject to federal laws, but cannot authorize the federal courts to enforce these laws. A more rational explanation would be the one reached by the Fifth Circuit Court of Appeals in Welch v. Texas Department of Highways and Public Transportation. The Court reconciled the holdings in Garcia and Atascadero by adopting the position that Congress may abrogate a state's sovereign immunity under the commerce clause, but it must expressly do so under the eleventh amendment. 88

So far, all six of the United States courts of appeals that have considered this question have held that the eleventh amendment does not prohibit Congress from granting the federal courts jurisdiction over the states under its article I powers. 89

IV. ABROGATION AND WAIVER OF A STATE'S ELEVENTH AMENDMENT IMMUNITY

Federal courts have jurisdiction over a state if the state has either waived its immunity or Congress has abrogated its immunity under the fourteenth amendment. 90 A waiver is a voluntary action on the part of the state. A state may waive its immunity through state statute, 91 by either voluntarily participating or voluntary participation in a federally funded program which requires consent to suit in federal court as a con-

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89 W.J.M. v. Massachusetts Dep't of Pub. Welfare, 840 F.2d 996 (1st Cir. 1988); County of Monroe v. Florida, 678 F.2d 1124, 1128-35 (2d Cir. 1982), cert. denied, 459 U.S. 1104 (1983); United States v. Union Gas Co., 792 F.2d 372 (3d Cir. 1986); In re McVey Trucking, 812 F.2d 311 (7th Cir. 1987), cert. denied, 474 U.S. 1083 (1987); Peel v. Florida, 600 F.2d 1070, 1074-82 (5th Cir. 1979); Mill Music v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979).
91 The Court has established a very stringent requirement for finding a waiver of its eleventh amendment immunity through a state statute or state constitution. In Atascadero, the Court held that article III, section 5 of the California Constitution, which provides: "Suits may be brought against the State in such manner and in such courts as shall be directed by law," was insufficient to waive eleventh amendment immunity. The Court held that "in order for a state statute or constitutional provision to constitute a waiver of eleventh amendment immunity, it must specify the State's intention to subject itself to suit in federal court." Id. at 241: see also Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) ("Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment"); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984) ("[a] State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued.")
tion to participation,92 or by participating in a lawsuit.93

There has been a gradual tightening of the requirements for finding a waiver of a state's eleventh amendment immunity. In the 1960's, the Court used the concept of constructive consent to allow federal courts to hear some federal questions cases against the states. The lead case was Parden v. Terminal Railway Co.94 The Court held, in Parden, that an employee of a state-owned railroad could sue the state in federal court under the Federal Employers Liability Act (FELA) even though state-owned railroads were not expressly mentioned in the statute. The swing away from the constructive consent doctrine began in 1973, in Employees v. Missouri Public Health Department.95 The Court held, in Employees, that Congress must make its intention "clear" if it sought to make a waiver of the states' sovereign immunity a condition of participation in a federal program. Employees was followed the next term by Edelman v. Jordan.96 In Edelman, the Court set a still higher requirement for finding

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92 Atascadero held that section 505 of the Rehabilitation Act which provided remedies "to any person aggrieved by any act of failure to act by recipient of Federal assistance of federal provider of such assistance" was insufficient to constitute a waiver as a condition of participating in a federal funded program. See supra, note 22, at 246. See also Florida Dept of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981), which held that an agreement under the Medicaid Act (42 USC § 1396) in which the department "agrees to recognize and abide by all State and Federal Laws, Regulations, and Guidelines . . ." was insufficient to constitute a waiver. See generally infra text accompanying notes 94-98.

93 In Atascadero, the Court required "an unequivocal indication that the State intends to consent to federal jurisdiction" before finding a waiver of its eleventh amendment immunity. 473 U.S. 234, 238 (1985); Barnes v. Bosley, 625 F. Supp. 81, 86 (1985) ("The State's neglect in asserting the eleventh amendment does not constitute an unequivocal indication of its consent to suit."); Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 467 (1944) (eleventh amendment may be raised for the first time in the Supreme Court). Since a federal court can enjoin future violation of federal law (Green v. Mansour, 474 U.S. 64 (1985)), action by a state official which delays prospective injunctive relief will constitute a waiver. See Toll v. Moreno, 458 U.S. 1 (1981) (a state university waived the eleventh amendment immunity by promising that if the trial court stayed its order pending appeal, it would make appropriate refunds of tuition if it lost the appeal); Vargas v. Tranor, 508 F.2d 403 (7th Cir. 1974) (a state official's promise, that the state would pay benefits wrongfully withheld if the court would not issue an injunction pending appeal, was sufficient to constitute a waiver of the eleventh amendment); Barnes v. Bosley, 625 F. Supp. 81 (1985) (the state waived a portion of its eleventh amendment immunity by filing an answer in a wrongful discharge action seeking reinstatement and back pay.); W.J.M. v. Massachusetts Dept of Pub. Welfare, 840 F.2d 996 (1st. Cir. 1988) (the state waived its eleventh amendment immunity by filing a bankruptcy proof of claim). The state only waives its immunity for prospective benefits. See Buchanon v. Percy, 708 F.2d 1209, 1216 (7th Cir. 1983) (payment of state benefits prior to court's order retroactive); Nevels v. Hanlon, 656 F.2d 372, 377 (8th Cir. 1981) (payment of benefits from date of order allowed); Kimble v. Solomon, 599 F.2d 599, 605 (4th Cir. 1979) (state required to pay benefits after court's decree entered on remand); Townsend v. Edelman, 518 F.2d 116, 120 (7th Cir. 1975) (payment prior to entry of injunctive relief barred).

94 377 U.S. 184 (1964) (a "common carrier by railroad . . ." was held to include state owned railroads.) Parden was overthrown by Welch. See infra text accompanying note 99.

95 411 U.S. 279, 285 (1973)

a waiver by stating that "we will find waiver only where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."97 Welch v. State Department of Highways and Public Transportation98 is the latest case in which the Court considered a state's waiver of its eleventh amendment immunity. In Welch, the Court affirmed the standard set forth in Edelman and overturned the concept of constructive consent.

Abrogation is distinguishable from waiver in that abrogation is based upon congressional power and not upon state consent. The Court has also tightened the standards for finding an abrogation of a state's eleventh amendment immunity. In 1984, in Pennhurst State School & Hospital v. Halderman,99 the Court required "an unequivocal expression of congressional intent" to find an abrogation. Pennhurst was followed one year later by Atascadero and the adoption of the "unmistakably clear language of the statute" requirement.100

A. The Impact of Atascadero State Hospital v. Scanlon on Federal Court Jurisdiction

This section examines the cases in which federal courts have applied the Atascadero standard. This examination will be followed by an analysis of means of avoiding Atascadero.

1. Protection of Intellectual Property

The eleventh amendment would appear to protect the states from being sued as an infringer under the Patent Act,101 the Copyright Act of 1976,102 and the Lanham Act (Trade-Marks Act).103 Each of these Acts uses very broad language to describe the group to whom the statute applies. The Patent Act provides that, "[w]hoever actively induces infringement of a patent shall be liable as an infringer."104 The Lanham Act defines an infringer as being "[a]ny person who shall, without the consent of the registrant . . . ."105 The Copyright Act of 1976 uses equally broad language. The Act defines an infringer as "Anyone who violates any of the exclusive rights of the copyright owner . . . ."106 None of these Acts appears to meet the standards set forth in Atascadero.

97 Id. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).
Eleventh amendment litigation of intellectual property rights has centered on the Copyright Act of 1976. Yet even here, case law on this question is quite sparse. Prior to Atascadero, only two federal courts had addressed a state’s eleventh amendment immunity under the 1976 Act.\(^7\) In Mills Music v. Arizona,\(^8\) the Ninth Circuit Court of Appeals construed the Act’s application to “any person” as being sufficiently explicit to include a state. In Johnson v. University of Virginia,\(^9\) the Federal District Court for the Western District of Virginia adopted the Mills Music interpretation and held that a state university was not immune from suit for a copyright violation.

This question has been addressed by three federal district courts after Atascadero. All three held that under the new standard “any person” would not include states.\(^10\) In one of these cases, Woelffer v. Happy States of America,\(^11\) the court also held that the eleventh amendment prohibited a state from being sued under the Lanham Act. Recently, the Copyright Office sought public comment on the issue, and is preparing a “green paper” on the assessment of any constitutional limitation with respect to congressional action.\(^12\)

2. Civil Rights Cases

The area of the law receiving the greatest amount of attention since Atascadero has been the states’ liability under federal civil rights acts. As mandated by Atascadero, the states’ liability for violation of a civil rights statute is dependent on the language used in the statute. The civil rights acts of the Reconstruction Era use very broad language in identifying defendants. Section 1983 of Title 42 of the United States Code\(^13\) identifies potential defendants as: “Every Person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory. . . .”\(^14\) In Quern v. Jordan,\(^15\) the Court held that Congress in enacting section 1983 did not intend to abrogate a state’s eleventh amendment

\(^10\) Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) held that the Copyright Act of 1909 did not waive eleventh amendment immunity.

\(^11\) 591 F.2d 1278, 1286 (9th Cir. 1979).


\(^14\) Id.

immunity. Quern was decided prior to Atascadero and was based upon the statute's legislative history rather than the actual wording of the statute. Atascadero strengthens the holding in Quern, but Section 1983 continues to be a major source of litigation against the states.

Prior to Atascadero, the question of whether the eleventh amendment granted the states immunity from suit under section 1983 of Title 42 of the United States Code was very much undecided. Section 1983 provides that, "all persons within the jurisdiction of the United States shall have the same right ... to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ..." A literal reading of the section identifies the class of plaintiffs protected by the statute — those denied the rights of white citizens — but it does not identify or grant immunity to any particular groups of defendants. While there is some evidence that Congress intended Section 1983 to apply to the states, the few courts that addressed this question prior to Atascadero held that the eleventh amendment granted the states immunity. Atascadero makes states' eleventh amendment immunity defense even stronger in that section 1983 does not make Congress' intent "unmistakably clear in the language of the statute" as required by Atascadero.

Quern did not decide whether Congress in adopting section 1983 intended the term "person" to include states for purposes of section 1983 actions in state court. See Smith v. Department of Pub. Health, 428 Mich. 561, 566, 410 N.W.2d 749, 757 (1987) (suit by former resident of training school against state and public official for false imprisonment due to improper commitment to institution for retarded, breach of duty of care and violation of the state and federal constitution. Held neither a state nor state official sued in official capacity is a person for purposes of a section 1983 damage suit.) If a state is not a person within the meaning of section 1983, it would appear that states could not waive their immunity. But, several recent cases hold that a state may waive its section 1983 immunity. See Allen v. Alabama State Bd. of Educ., 636 F.Supp. 64, 70 (M.D. Ala. 1986) (eleventh amendment barred enforcement of settlement agreement against state of Alabama in case challenging state's teacher certification test as racially discriminatory, in the absence of finding of violation of federal constitutional or statutory law, and in the absence of clear and unequivocal consent by state to waive its eleventh amendment immunity); Syre v. Comm'r, 662 F. Supp. 550 (E.D. Pa. 1987) (state had not waived its immunity under the Pennsylvania Wiretapping and Electronic Surveillance Control Act.); Minotti v. Lensink, 798 F.2d 607 (2d. Cir. 1986) (state had not waived it eleventh amendment immunity under section 1983.); Gamble v. Florida Dept. of Health, 779 F.2d 1509 (eleventh Cir. 1986) (Florida has not waived its immunity to section 1983 suits.); Barnes v. Bolsley, 625 F. Supp. 81 (E.D. Mo. 1985) (Missouri waived its eleventh amendment immunity to a portion of the claims by filing answer to a wrongful discharge action seeking reinstatement and back pay filed by deputy clerk of the St. Louis Circuit Court); Grotta v. Rhode Island, 781 F.2d 343 (1st Cir. 1986) (state is a person within section 1983 such that where it has voluntarily waived its eleventh amendment immunity in federal courts it may be held liable in the same respect as municipal and local governments).

Justice Rehnquist, writing for the majority, held that the legislative history of the Civil Rights Act of 1871 would not support the finding that the Act was intended to apply to the states. He stated:

But neither logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compel, or even warrant, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.

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Brennan and Marshall concurred in the judgment but expressed the view that a state was a person within the meaning of section 1983. Brennan stated:

The plain words of § 1983, its legislative history and historical context, all evidence that Congress intended States to be embraced within its remedial cause of action. The Court today pronounces its conclusion in dicta by avoiding such evidence. It chooses to hear, in the eloquent and pointed legislative history of § 1983, only 'silence'.

Id. at 350.

By And Through P-1 v. Turlington, 464 F. Supp. 1179, 1184 (S.D. Fla. 1986) (class action against Florida officials and agencies alleging misclassification on race in special education program for educable mentally retarded students. Congress did not intend to abrogate the states' eleventh amendment immunity by enacting section 1983); La Courte Oreilles Chippeewa Ind. v. Wisconsin, 663 F. Supp. 652, 691 (W.D. Wis. 1987) (Wisconsin not a person under section 1983); Richardson v. Penfold, 650 F. Supp. 810 (N.D. Ind. 1986) (inmate suit under section 1983 against prison officials for failure to protect him from sexual assaults by other inmates barred by the eleventh amendment); Abick v. Michigan, 803 F.2d 874 (6th Cir. 1986) (bailiffs' action alleging that State of Michigan deprived them of property interest in their positions without due process or just compensation barred by the 11th amendment); Berndt v. Tennessee, 796 F.2d 879, 881 (6th Cir. 1986) (section 1983 action by patient at state mental institution for injuries sustained barred by the eleventh amendment); Clift v. Fincannon, 657 F. Supp. 1535 (E.D. Tex. 1987) (section 1983 action against the state for the wrongful death of a child in the custody of the Texas Dept of Mental Health and Retardation barred by the eleventh amendment); Holman v. Walls, 448 F. Supp. 947 (D. Del. 1986) (action by municipal police officer for indemnity from state when he was being sued under section 1983 was barred by the eleventh amendment); Keenan v. Washington Metro Area Transit Auth., 643 F. Supp. 324 (D.C. 1986) (section 1983 suit against metro transit police officer for assault and battery, false imprisonment, and negligent hiring barred by the eleventh amendment); Doyle v. Dukakis, 643 F. Supp. 1441 (D. Mass. 1986) (governor cannot be sued as a state official pursuant to section 1983); Shaw v. California Dep't of Alcohol Beverage Control, 788 F.2d 600 (9th Cir. 1986) (suit for improper revocation of liquor licence barred by the eleventh amendment); Mazanec v. North Judson-San Pierre School, 614 F. Supp. 1152 (D.C. Ind. 1985) (section 1983 action arising from enforcement of Indiana compulsory school attendance law was barred by the eleventh amendment); Miller v. Rutgers Univ., 619 F. Supp. 1386 (D.C.N.J. 1985) (eleventh amendment barred false arrest claim against state university police officer).

Section 1981 has its origin in the Civil Rights Act of 1870. The section was enacted pursuant to the thirteenth amendment. As a result "private citizens are proper defendants in suits brought under this section." See, 1 C. ANTIEAU, supra note 121, at 52.

States are clearly not immune from suit under Title VII of the Civil Rights Act of 1964. The Equal Employment Opportunity Act of 1972 amended Title VII to include "governments, governmental agencies, [and] political subdivisions." The Court, in *Fitzpatrick*, held that Congress had expressly abrogated the states' eleventh amendment immunity in Title VII cases. While no case has addressed this question since *Atascadero*, it would appear that *Atascadero* would not change this result.

The states' eleventh amendment immunity is much less clear under the Civil Rights Attorney's Fees Award Act of 1976 [hereinafter section 1988]. Section 1988 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title (title 42), title IX of Public Law 92-318 (popularly known as the Education Amendments of 1972), or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In *Hutto v. Finney*, the Court held Congress, in enacting Section 1988, intended to override the states' eleventh amendment immunity. The Court found that "[t]he legislative history [was]... plain... [Congress] intended that attorney's fees [would] be collected... from the state..." Whether *Hutto* is still good law is in question in that *Hutto* was based on the legislative history of Section 1988, and states are not identified in "the language of the statute" as required by *Atascadero*. In *Kelly v. Metro County Board of Education*, the Sixth Circuit Court of Appeals held in a split decision that *Atascadero* did not bar a state from being sued under Section 1988.

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133 Id. at 694 (quoted in *In re McVey Trucking*, Inc., 812 F.2d 311, 326 (7th Cir. 1987), cert. denied, 474 U.S. 1083 (1987)).

134 Id.


136 773 F.2d 677, 687 (6th Cir. 1985) (award of attorney's fees under the Civil Rights Attorney Fees Act (42 U.S.C. § 1988) not barred by the 11th amendment. Judge Kennedy dissented on the grounds that the 11th amendment barred suit awards). See also *In re McVey Trucking*, Inc., 812 F.2d 311, 326 (7th Cir. 1987), cert denied, 474 U.S. 1083 (1987) (dictum in the decision indicates that *Atascadero* was not intended to overturn *Hutto*).
3. Federal Statutes Prohibiting Discrimination by Recipients of Federal Assistance

One of the major sources of eleventh amendment litigation since *Atascadero* has concerned federally assisted programs designed to prevent various forms of discrimination. Courts have applied *Atascadero* to these cases even though, arguably, the less demanding waiver standard should be applied since jurisdiction is predicated on participation in federally assisted programs. The United States Seventh Circuit Court of Appeals has interpreted the Equal Educational Opportunities Act (EEOA)—which provides in pertinent part that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin..."—as meeting the *Atascadero* standard. States have been held to be immune from suit under Title VI of the Civil Rights Act of 1964, which provides in pertinent part that "[n]o person... shall on the ground of race, color, or national origin be denied the benefits of... any program... receiving federal financial assistance." There is a split as to whether states are immune from suit under the Education of the Handicapped Act (EHC). While the EHC does not expressly mention states, two courts have held that the *Atascadero* standard has been met by the preamble to the Act. The Education for All Handicapped Children Act of 1975 allows suit in federal court by "[any party aggrieved]." The United States Court of Appeals for the Seventh and Ninth Circuits have held that states are immune from suit under this provision. The Court in *Atascadero* held that the Rehabilitation Act of

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137 811 F.2d 1030, 1037 (7th Cir. 1987).
139 United States v. Alabama, 791 F.2d 1451 (11th Cir. 1986) (holding that state employees, but not the state may be enjoined from violating Title VI); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987) (state immune from suit under Title VI for not testing students for English proficiency and not providing for bilingual instruction or compensatory instruction). But see Parents For Quality Education v. Fort Wayne Community Schools, 662 F.Supp. 1475 (N.D. Ind. 1987) (decided after the enactment of 42 U.S.C. § 2000 infra note 141, holding that states are not immune in school segregation cases under Title VI).
143 David D. v. Darmouth School Community, 775 F.2d 411 (1st Cir. 1985), *cert denied*, 108 S. Ct. 1780 (1986) (Congress abrogated the states' eleventh amendment immunity under the Education for the Handicapped Act); Antkowiak v. Ambash, 653 F. Supp. 1405 (W.D.N.Y. 1987) (handicapped child and her father brought action against Commissioner of N.Y. Educ. Dep't to require Dep't to pay for placement at private residential and educational facility in Pennsylvania. Education for the Handicapped Act abrogated the state's eleventh amendment immunity); but see Alexopoulos v. San Francisco Unified School Dist., 817 F.2d 551 (9th Cir. 1987) (suit against San Francisco & Cal. Dep't of Educ. for denying a severely handicapped autistic student an educational opportunity under the Education of the Handicapped Act barred by the eleventh amendment).
145 Doe v. Maher, 793 F.2d. 1470, 1493 (9th Cir. 1986); Gary A. v. New Trier High School Dist. No. 203, 796 F.2d 940 (7th Cir. 1986); but see John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986) (the eleventh amendment does not prohibit the state from being sued under the Education for All Handicapped Children Act).

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1973, which allows for suit against "any recipient of federal assistance," is too general to constitute congressional abrogation of eleventh amendment immunity. Post-Atascadero cases have consistently applied this standard.

Congress, as a result of Atascadero, recently enacted Public Law 99-506. This statute, which became effective on October 21, 1986, abrogates a state's eleventh amendment immunity for violating the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, section 794 of Title IX of the Education Amendments of 1972 (prohibiting discrimination based on sex or blindness), and "[f]ederal statutes prohibiting discrimination by recipients of federal financial assistance". Oddly enough, Public Law 99-506 does not include the Civil Rights Attorney's Fees Award Act within its coverage. A state's liability under the Act is still an unanswered question.

4. Environmental Law

State liability under various environmental laws was clouded by Atascadero. In United States v. Union Gas Co., the United States Third Circuit Court of Appeals held that states were immune from suit under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA or Superfund). CERCLA allows those who have incurred clean-up costs to sue "any person" who owned or operated the waste site for all costs incurred. Although the Act's definition of "person" included states, the court held that the general definition was not sufficient to abrogate a state's eleventh amendment immunity. The court distinguished CERCLA from the Clean Air Act, the Resource Conservation Act, and the Resource Conservation and Recovery Act, which do not evidence any congressional intent to abrogate eleventh amendment immunity of the states.
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and Recovery Act,\textsuperscript{155} and the Federal Water Pollution Control Act.\textsuperscript{156} The court reasoned that unlike CERCLA, these acts allowed states to be sued "to the extent allowed by the Eleventh Amendment."\textsuperscript{167} Congress recently amended CERCLA to allow private suits against the states.\textsuperscript{158}


\textit{Atascadero} has had a significant impact on several other areas of the law. In \textit{Welch}, the Supreme Court held that Congress had not abrogated the state's eleventh amendment immunity under either the Jones Act\textsuperscript{159} or the Federal Employer Liability Act (FELA).\textsuperscript{160} FELA applied to "every common carrier by railroad while engaging in commerce between any of the several States."\textsuperscript{161} While the Jones Act covered "[a]ny seaman who shall suffer personal injury in the course of his employment."\textsuperscript{162} Neither of these statutes met the requirements of \textit{Atascadero}.

In \textit{Charter Oak Federal Savings Bank v. Ohio},\textsuperscript{163} the State of Ohio was sued under the Securities Exchange Act of 1934.\textsuperscript{164} A 1975 amendment to the Act expanded the definition of "person" to include "government."\textsuperscript{165} The court held that this term was not sufficiently definite to include states under the \textit{Atascadero} standard.\textsuperscript{166} In \textit{Charley's Taxi Radio Dispatch v. SIDA},\textsuperscript{167} the Ninth Circuit Court of Appeals held states immune from suit under section one of the Sherman Act.\textsuperscript{168} However, in \textit{In re McVey Trucking Inc.},\textsuperscript{169} the Seventh Circuit Court of Appeals held that the term "governmental units" in the Bankruptcy Code included states.

\textsuperscript{155} 42 U.S.C. § 6972 (1982).
\textsuperscript{156} 33 U.S.C. § 1365 (1985).
\textsuperscript{157} 792 F.2d at 381.
\textsuperscript{160} 45 U.S.C. § 51 (1982).
\textsuperscript{161} Id.
\textsuperscript{163} 666 F. Supp. 1040 (S.D. Ohio 1987).
\textsuperscript{166} 666 F. Supp. 1040, 1043 (S.D. Ohio 1987).
\textsuperscript{167} 810 F.2d 869 (9th Cir. 1987) (the Hawaii Dept' of Transp. was immune from suit under section one of the Sherman Act for granting an exclusive contract for taxi service from the Honolulu International Airport).
\textsuperscript{169} 812 F.2d 311 (7th Cir. 1987).
B. Living With Atascadero

There are three possible solutions to the problems Atascadero poses. First, Congress can enact statutes expressly abrogating a state’s eleventh amendment immunity. Congress has already done this under the civil rights acts and under CERCLA and is likely to do so in other areas. This is not the best solution. Abrogation legislation is reactive. It is likely to be proposed only after case law establishes eleventh amendment immunity and there is a sufficient catalyst for action. Plaintiffs, in the meantime, will be denied their rights against a state even though the legislative history may indicate that Congress intended a different result. There is also the question of congressional power to abrogate a state’s eleventh amendment immunity except under the fourteenth amendment.

A better solution is for the Courts to narrowly interpret Atascadero. So far most courts which have examined Atascadero have interpreted it as setting a new and higher standard than that in Pennhurst. Such an interpretation is unwarranted. A strong case can be made that Justice Powell did not intend such a result. In the language of the case, Justice Powell acknowledges the fact that an intent to abrogate has not been established under the Pennhurst standard. Justice Powell states: “To reach respondent’s conclusion, we would have to temper the requirements, well established in our cases, [citing Pennhurst] that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court.” In the next sentence he affirms Pennhurst yet appears to set a higher standard by requiring that the intent be in the language of the statute. Justice Powell states: “We decline to do so, and affirm 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.”

Since Pennhurst did not require that an intent to abrogate be found in the language of the statute, lower courts may be interpreting Atascadero too broadly. There are several reasons to support a narrow interpretation of Atascadero. First of all, this broad interpretation negates federal court jurisdiction except when it is expressly set forth in the statute. This appears to be the case even though there may be overwhelming evidence that Congress intended to include the states. Applying this standard to statutes enacted before Atascadero thwarts congressional intent instead of following it. The Seventh Circuit Court of Appeals recently adopted this narrow interpretation in In re McVey Trucking.

The best solution is for the Court to overturn Atascadero. Under the current interpretation of the eleventh amendment the Court has established a higher standard for abrogation than for a waiver, in that a waiver does not have to be found in the language of the statute itself.

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170 See supra note 100 and accompanying text.
172 Id.
174 812 F.2d 311, 315 (7th Cir. 1987).
175 See supra note 100 and accompanying text.
would indicate that the opposite should be true. Requiring "expressed language" or "overwhelming implication" before a waiver will be found may be appropriate since a waiver requires voluntary action on the part of the state. But, when congressional action is based on its plenary powers, a state's waiving of its eleventh amendment protection is not a requirement. In these cases the Court should seek to determine congressional intent by applying standard rules of construction.

V. AVOIDING SUING A STATE IN FEDERAL COURT

Given the uncertainty surrounding the eleventh amendment, an attorney, except in cases where there has been a clear waiver or an abrogation of the state's immunity, would best serve his client's interest by avoiding suing a state in federal court. Not only are the uncertainties surrounding the constitutional issues avoided, but the remedies available in other tribunals are generally superior to those in federal court. There is also the problem of joining both federal and state claims in federal court that is not faced in other tribunals. This section will first examine the limitation on federal remedies and the problems of joining state and federal remedies in federal court. It will be followed by an analysis of ways of avoiding the eleventh amendment bar.

A. Limitation on Federal Remedies/The Prospective Relief Requirement

Suing a state official rather than the state for equitable relief has traditionally been an effective means of avoiding the eleventh amendment bar. In 1908, in *Ex parte Young*, the Court held that a suit against a state official to enjoin him from violating a federal law was not a suit against the state and as such not barred by the eleventh amendment. *Young* has been interpreted as allowing the federal courts to order states to pay retroactive benefits, from federally funded programs, which had been wrongfully withheld. This interpretation created a convenient

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176 209 U.S. 123, 159-60 (1908).

If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

*Ex parte Young* is perhaps the most noteworthy interpretation of the eleventh amendment. *Ex parte Young* created a convenient fiction by suing the state official rather than the state. The federal courts under their equitable powers could reach a result which would otherwise be unconstitutional. For a discussion of the use of the Young principle, see Lichtenstein, *supra* note 3, at 366.

fiction, instead of suing the state for monetary damages, which would be barred by the amendment, one could accomplish the same objective by suing the state official in federal court for equitable relief. The Court ended this practice in 1974 in *Edelman*. The Court, in *Edelman*, held that the eleventh amendment bars federal courts from ordering states to pay retroactive benefits. Under *Edelman*, if the plaintiff is “seeking to impose a liability which must be paid from public funds in the state treasury [such suit] is barred by the Eleventh Amendment.” *Edelman* was following by *Green v. Mansour* in which the Court held that a state could change its law to comply with federal law and thus bar federal court jurisdiction, since the need for prospective injunctive relief would be moot.

*Edelman* and *Green* create two very effective defenses for states. If there has not been a waiver or abrogation, the federal courts are prohibited from awarding monetary damages against the states and the states have the power to have the case dismissed as moot by a subsequent change in the law.

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178 415 U.S. 651 (1974). In *Edelman* the respondent, John Jordan, filed suit individually and as a representative of a class, against two former directors of the Illinois Department of Public Aid and the comptroller of Cook County. Health, education, and welfare regulations required the state to determine eligibility for aid to the disabled within forty-five days of the receipt of the application. The respondent’s application for benefits was not acted upon for almost four months. Jordan requested “a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.” The Court held by a five-four decision that eleventh amendment barred such a suit. *Id.*

Justice Rehnquist, in writing for the majority, distinguished *Edelman* from *Ex parte Young*. In *Ex parte Young* only prospective relief was requested; whereas, in this case prospective relief was being requested, which was in effect an award of damages. Justice Rehnquist stated:

> We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out to the state treasury, so long as the relief may be labeled “equitable” in nature.

Precedent for this distinction was quite sparse. Justice Rehnquist found support in two cases decided before *Ex parte Young*, which denied specific performance of a contract to which the state was a party. *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52 (1886).

However, *Edelman* was in conflict with more recent cases. The Court had earlier summarily affirmed three district court judgments requiring state directors of public aid to make retroactive active payments similar to those in *Edelman*. See *supra* note 178. Justice Rehnquist dismissed the precedential value of these cases since they were not orally argued. Stronger precedent was found in *Shapiro v. Thompson*, 394 U.S. 618 (1969). In *Shapiro*, the Court held that welfare benefits were unlawfully withheld and affirmed the order of retroactive payments. The Court, in *Shapiro*, did hear oral arguments that retroactive relief was barred by the eleventh amendment. The case turned on the eleventh amendment since the decision could have not been reached if the eleventh amendment barred the suit by the court. In Justice Rehnquist’s view, *Shapiro* did not establish a precedent since it did not address the eleventh amendment issue.


B. Pendent Jurisdiction in Federal Courts/The Pennhurst Doctrine

Suing a state in federal court under a pendent state claim presents needless complications and should be avoided. The Court held in Pennhurst,\(^1\) that unless the state had expressly waived its eleventh amendment immunity, federal courts are barred from hearing state law claims brought in federal court under pendent jurisdiction. Under Pennhurst, if the federal statute has granted the state court concurrent jurisdiction, the state court may hear both state and federal claims. However, the federal court would be limited to only hearing the federal claim.

Due to the limited remedies available in federal court and the bar on federal courts hearing claims based on state law, the plaintiff, in most cases, is better off pursuing his claim against the state in state court.

C. Methods of Avoiding the Eleventh Amendment/Suing a State in State Court

Since the amendment does not prohibit a state from being sued in state court, one should explore the remedies available in state court. If the statute in question does not grant the federal courts exclusive jurisdiction, a suit in state court for violation of a federal law may be a better alternative than suing in federal court. Even if the federal courts have exclusive subject matter jurisdiction, if there has not been a federal preemption, suing the state in state court based on a right created by state law is usually preferable because of the superior remedies available in state court.

D. Methods of Avoiding the Eleventh Amendment/Designating the Proper Defendant

Eleventh amendment problems may also be avoided by properly designating the defendant. The amendment does not protect local government entities.\(^2\) If an adequate remedy can be obtained from a local government, without joining the state as a party defendant, this would be preferable in that eleventh amendment problems are avoided. If the relief, however, is partial, or if the claim is based on a program substantially funded by the state, under Pennhurst, the eleventh amendment would bar the action.\(^3\)

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\(^2\) Lincoln County v. Luning, 133 U.S. 529 (1890); Kennecott Cooper Corp. v. Utah Tax Comm., 327 U.S. 573 (1946).
Suing a state official rather than the state is not an effective way to avoid the eleventh amendment bar. The Court, as early as 1824, in Osborn v. Bank of the United States, 184 held that the eleventh amendment did not bar a state official from being sued in federal court for violating a federal law. On numerous occasions, the Court has held that the eleventh amendment would bar a suit in federal court against a state official if the state was in fact the real party in interest. 185 But, the Court’s interpretation of this requirement has been both sporadic and inconsistent. 186 Edelman signaled the Court’s renewed emphasis on the real party in interest requirement. Justice Rehnquist cited with approval Ford Motor Co. v. Department of Treasury, 187 in which the Court held: “When the action is in essence one for the recovery of money from the state, the state is the real and substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.”188

Even in cases which are not barred by the eleventh amendment, the Court requires the public official rather than the state to be named as the defendant. 189

VI. CONCLUSION

With the revitalization of the eleventh amendment following Edelman v. Jordan, the Court began expanding the limits of the amendment’s bar. While vague notions of federalism have often been invoked to provide support for the Court’s interpretation, closer analysis, in the light of the history and purpose of the amendment, suggests that the Court has unduly restricted the power of federal courts. Limiting the federal courts to granting prospective injunctive relief and denying federal courts jurisdiction over pendent state claims results in duplication of suits, inconvenience, and unfairness to the litigants.

The author urges the Supreme Court to reexamine the line of cases which hold that the federal courts will not have jurisdiction over the states unless congressional intention is “unmistakably clear in the language of the statute.” Such a requirement may be appropriate when federal jurisdiction is based on states’ waiver of their eleventh amendment immunity as a condition of participating in a federally funded program, but when congressional action is based on its plenary powers, waiver is

184 9 U.S. (9 Wheat.) 738 (1824).
185 See C. Jacobs, supra note 28, at 111-49, 156.
186 See C. Jacobs, supra note 28, at 156-60. See also Carrow, Sovereign Immunity in Administrative Law, 9 J. Admin. L. 1-2 (1960).
189 Alabama v. Pugh, 43 U.S. 781 (1978) (a suit against the state by inmates of the Alabama prison system under the eighth and fourteenth amendments to the U.S. Constitution was barred by the eleventh amendment since the state was named as the defendant).
not a requirement. In these cases, the Court should apply standard rules of construction to determine congressional intent, but not require that this intent be "unmistakably clear in the language of the statute." Since most of the statutes in question were enacted prior to *Atascadero*, this standard appears to thwart, not follow, congressional intent.

The author believes that the standard set forth in *Pennhurst* is the appropriate one to determine congressional intent. Requiring "an unequivocal expression of congressional intent" to find an abrogation would protect the states from federal courts assuming jurisdiction when not clearly specified by Congress, but would not be as restrictive as *Atascadero*. Until the Court reexamines *Atascadero*, the author urges federal courts to adopt a narrow interpretation of *Atascadero*, as was done by the Seventh Circuit Court of Appeals in *McVey*.

Until the Supreme Court reexamines the line of cases limiting federal court jurisdiction, the author strongly urges attorneys, except in cases where there is a clear abrogation or waiver, to explore other alternative to suing a state in federal court.