State Sovereign Immunity

A Reference Guide to the United States Constitution

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Melvyn R. Durchslag

Foreword by William P. Marshall

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I dedicate this book to my only real love, my wife and family.

Series Foreword

JACK STARK

One can conceive of the United States Constitution in many ways. For example, noting the reverence in which it has been held one can think of it as equivalent to a sacred text. Unfortunately, most of its devotees have had less knowledge and even less understanding of the document than they have had reverence for it. Sometimes it is treated as primarily a political document and on that basis has been subjected to analysis, such as Charles Beard's *An Economic Interpretation of the Constitution of the United States*. One can plausibly argue that the Constitution seems most astounding when seen in light of the intellectual effort that has been associated with it. Three brief but highly intense bursts of intellectual energy produced, and established as organic law, most of the Constitution as it now exists. Two of those efforts, sustained over a long period of time, have enabled us to better understand the document.

The first burst of energy occurred at the Constitutional Convention. Although some of the delegates' business, such as the struggle between populous and non-populous states about their representation in Congress, was political, much of it was about fundamental issues of political theory. A few of the delegates had or later achieved international eminence for their intellects. Among them are Benjamin Franklin, Alexander Hamilton, and James Madison. Others, although less well known, had first-rate minds. That group includes George Mason and George Wythe. Many of the delegates contributed intelligently. Although the Convention's records are less than satisfactory, they indicate clearly enough that the delegates worked mightily to constitute not merely a polity—but a rational polity that would rise to the standards envisioned by the delegates' intellectual ancestors. Their product, though brief, is amazing. William Gladstone called it "the most wonderful work ever struck off."

Despite the delegates' eminence and the Constitution's excellence as seen from our place in history, its ratification was far from certain. That state of affairs necessitated the second burst of intellectual energy associated with that document: the debate over ratification. Soon after the convention adjourned, articles and speeches (some supporting the Constitution and some attacking it) began to proliferate. A national debate commenced—not only about the document itself but also about the nature of the polity that ought to exist in this country. Both sides included many writers and speakers who were verbally adroit and steeped in the relevant political and philosophical literature. The result was an accumulation of material that is remarkable for both its quantity and its quality. At its apex is the *Federalist Papers*, a production of Alexander Hamilton, James Madison, and John Jay that deserves a place among the great books of Western culture.

Another burst, although not as impressive as the first two but highly respectable, occurred when the Bill of Rights was proposed. Some delegates to the Constitutional Convention had vigorously asserted that such guarantees should be included in the original document. George Mason, the principal drafter of the Virginia Declaration of Rights, so held, and he walked out of the convention when he failed to achieve his purpose. Even those who had argued that the rights in question were implicit recognized the value of adding protection of them to the Constitution. The debate was thus focused on the rights that were to be explicitly granted, not on whether any rights ought to be explicitly granted. Again many writers and speakers entered the fray, and again the debate was solidly grounded in theory and was conducted on a high intellectual level.

Thus, within a few years a statement of organic law and a vital coda to it had been produced. However, the meaning and effect of many of that document's provisions were far from certain; the debates on ratification of the Constitution and the Bill of Rights had demonstrated that. In addition, the document existed in a vacuum, because statutes and actions had not been assessed by its standards. The attempt to resolve these problems began after Chief Justice John Marshall, in Marbury v. Madison, asserted the right of the U.S. Supreme Court to interpret and apply the Constitution. Judicial interpretation and application of the Constitution, beginning with the first constitutional case and persisting until the most recent, is one of the sustained exertions of intellectual energy associated with the Constitution. The framers would be surprised by some of the results of these activities. References in the document to "due process," which seems to refer only to procedures, have been held also to have a substantive dimension. A right to privacy has been found lurking among the penumbras of various parts of the text. A requirement that states grant the same "privileges and immunities" to citizens of other states that they granted to their own citizens, which seemed to guarantee important rights, was not held to be particularly important. The corpus of judicial interpretations of the Constitution is now as voluminous as that document is terse.

As judicial interpretations multiplied, another layer (interpretations of interpretations) appeared, and also multiplied. This layer, the other sustained intellectual effort associated with the Constitution, consists of articles, most of them published in law reviews, and books on the Constitution. This material varies in quality and significance. Some of these works of scholarship result from meticulous examination and incisive thought. Others repeat earlier work, or apply a fine-tooth comb to matters that are too minute even for such a comb. Somewhere in that welter of tertiary material is the answer to almost every question that one could ask about constitutional law. The problem is finding the answer that one wants. The difficulty of locating useful guidance is exacerbated by the bifurcation of most constitutional scholarship into two kinds. In "Two Styles of Social Science Research," C. Wright Mills delineates macroscopic and molecular research. The former deals with huge issues, the latter with tiny issues. Virtually all of the scholarship on the Constitution is of one of those two types. Little of it is macroscopic, but that category does include some first-rate syntheses such as Jack Rakove's *Original Meanings*. Most constitutional scholarship is molecular and, again, some fine work is included in that category.

In his essay, Mills bemoans the inability of social scientists to combine the two kinds of research that he describes to create a third category that will be more generally useful. This series of books is an attempt to do for constitutional law the intellectual work that Mills proposed for social science. The author of each book has dealt carefully and at reasonable length with a topic that lies in the middle range of generality. Upon completion, this series will consist of thirty-seven books, each on a constitutional law topic. Some of the books, such as the book on freedom of the press, explicate one portion of the Constitution's text. Others, such as the volume on federalism, treat a topic that has several anchors in the Constitution. The books on constitutional history and constitutional interpretation range over the entire document, but each does so from a single perspective. Except for a very few of the books the special circumstances of which dictate minor changes in format, each book includes the same components—a brief history of the topic, a lengthy and sophisticated analysis of the current state of the law on that topic, a bibliographical essay that organizes and evaluates scholarly material in order to facilitate further research, a table of cases and an index. The books are intellectually rigorous (in fact, authorities have written them) but, due to their clarity and to brief definitions of terms that are unfamiliar to laypersons, each is comprehensible and useful to a wide audience, one that ranges from other experts on the book's subject to intelligent non-lawyers.

In short, this series provides an extremely valuable service to the legal community and to others who are interested in constitutional law, as every citizen should be. Each book is a map of part of the U.S. Constitution. Together they map all of that document's territory that is worth mapping. When this series is complete, each

book will be a third kind of scholarly work that combines the macroscopic and the molecular. Together they will explicate all of the important constitutional topics. Anyone who wants assistance in understanding either a topic in constitutional law or the Constitution as a whole can easily find it in these books.

Foreword

WILLIAM P. MARSHALL

In 1793, a fledgling United States Supreme Court decided the case of Chisholm v. Georgia. The subject matter of this case might strike the modern observer as tame. The question in *Chisholm*, after all, was only the relatively technical jurisdictional issue of whether the federal courts had the power to entertain contract claims brought against states by out-of-state citizens.

But the controversy created by the case was as fervent as any generated by the individual and criminal rights decisions of our current era. The Court's holding that states could be subject to suit fell upon the nation, as the historians' claim, with a "profound shock" and reaction that followed was swift. The Congress immediately proposed, and the states quickly ratified, the Eleventh Amendment. The amended Constitution now provided that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecute against one of the United States by Citizens of another State, or by Citizens of any Foreign State." *Chisholm* was reversed.

The passage of the Eleventh Amendment, however, only begins the story. Two hundred years after its ratification, the meaning and significance of the Eleventh Amendment remain unclear. The United States Supreme Court decisions interpreting the amendment have fluctuated widely and have compounded legal fiction upon legal fiction. There is neither consensus on the historical meaning and intent of the provision nor on the policies and considerations that would guide its interpretation and application. The only thing certain about the Eleventh Amendment, in short, is that its meaning and application remain entirely unresolved.

Meanwhile, the stakes in the Eleventh Amendment controversy continue to rise. The debate over the Eleventh Amendment has become shorthand for the debate over the meanings of federalism and state sovereignty. The issues

presented in the Eleventh Amendment debate are as basic as the definition of statehood and the supremacy of federal law. What is the relationship of the rule of law to the sovereignty of states? To what extent may the Congress subject state governments and state treasuries to suits by individual citizens? When are states immune from the applications of civil rights laws? The significance of the answers to these and other questions surrounding the Eleventh Amendment cannot be overstated. They implicate the very structure of American government and the central meaning of the Constitution itself.

Into this picture steps this very important book by Professor Melvyn Durchslag. This book is as comprehensive as it is illuminating. Durchslag traces the history of the Eleventh Amendment's promulgation. He addresses the pre-amendment understandings of the constitutional Framers and of the Court in the case that gave rise to the amendment's passage, Chisholm v. Georgia. He navigates us through the maze of the judicial decisions interpreting the provision, while simultaneously alerting us to the external and internal inconsistencies inherent in the cases. He comprehensively advances the competing sides in the policy debates. He provides invaluable insight into how Eleventh Amendment law may continue to develop.

The debates over the structural issues of American constitutional law, of which the Eleventh Amendment is a significant part, are unlikely to abate in the foreseeable future. Constitutional law is in a period of fundamental reformation, and the Eleventh Amendment cases are at the core of this process. Professor Durchslag's treatise, however, provides the necessary insight and analysis from which a meaningful understanding of Eleventh Amendment law—past, current, and future—can effectively be obtained.

Acknowledgments

Several of my colleagues encouraged me to undertake this venture despite my initial doubts. Whether Jon Entin, Eric Jensen, Bob Lawry, Max Mehlman, and Calvin Sharpe were correct in doing so remains to be seen. In addition, I could not have completed this project without the invaluable research and editorial assistance I received from my research assistants over the past two and one-half years. I list them in alphabetical order: John Allota, Jamie Campbell, Rob Hahn, Heather Lang, and Carrie Nixon.

A special thanks, however, is reserved for two people. First is my wife, Susan, who has had to put up with more than my usual state of preoccupation. Second is my friend and erstwhile colleague, Bill Marshall, who not only has written the Foreword and read and commented upon an early draft of this book, but, more importantly, continues to stimulate my interest in federalism generally and the Eleventh Amendment in particular.

Introduction

The Judicial Power of the United States shall not be construed to extend to any suit in law and equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment to the United States Constitution was the first amendment ratified after the Bill of Rights. The significance of the timing of the Eleventh Amendment lies in its subject matter, federalism—the legal and political relationship between the federal government and the states.

The seeds of the Eleventh Amendment were sown in the Constitutional Convention. As most who are even vaguely familiar with the founding period know, the Constitutional Convention of 1787 was rife with controversy. Some, like the disputes between the large and small states, and whether slaves could be counted in the census, were contests between states for influence in the new Union. But it was the fear that the yet-to-be-formed federal government would displace the states as the dominant political force and, in so doing, trample the rights of individual citizens that dominated the Constitutional Convention of 1787 and formed the core of the Anti-Federalist opposition to ratification. Moreover, the division between those who wanted to create a new, strong national government and those who desired merely to tinker with the Articles of Confederation, was not at all regional in nature. While Alexander Hamilton of New York (who actually left the Convention not long after it convened and returned only six days before its end) is often described as the nationalist, some of the most ardent and influential nationalists, in fact, came from Southern states. It was they, not their northern brethren, who most distrusted the states.

Citing, among other practices, the states' confiscation of land, prevention of the collection of legitimate pre-war debts (a practice that is directly pertinent to the

Eleventh Amendment), and issuance of worthless paper "money" (declared to be legal tender), Southern nationalists, led by James Madison and Edmund Randolph of Virginia and Charles Pickney of South Carolina demanded explicit restrictions on states. The most radical proposal was offered by Pickney and seconded by Madison. It called for the Senate to be empowered to veto any legislation enacted by the states it deemed to be "'improper.'"[1] While this proposal was soundly defeated, the Convention did adopt a series of explicit restrictions on states now contained in Article 1, § 10. These include prohibiting states from coining money or issuing Bills of Credit, passing bills of attainder (legislative declarations of guilt), and abrogating contractual obligations (the fear here was states enacting debtor relief/bankruptcy laws).

The nationalists won the initial round of the states' rights debate, not only in the Convention where their influence predominated, but also in the state ratification conventions, albeit not without some significant difficulty. The Constitution of 1787, however, was incomplete, not only for the reason most often cited, the absence of a Bill of Rights, but also because the contours of federal power remained largely undefined. The former was rectified in 1791 with the ratification of the first eight amendments, which afforded individuals protection from actions of the federal government.

Two other amendments were ratified at the same time, the Ninth and the Tenth. While the first eight amendments largely prohibited the federal government from infringing on specific individual rights, the Ninth and Tenth Amendments cast a far wider net. Designed to appease those who feared that the national government would displace the states as the dominant political force, these amendments confirm, albeit in different ways, that the federal government is a government of *limited* and *defined* powers. Unlike the Articles of Confederation, however, these latter two amendments consciously did not limit federal authority to only those powers *expressly* enumerated in Article 1, § 8. To have done so would have restricted the new government in much the same way as it was restricted during the period of Confederation. The government of the United States would have been doomed to failure. The cost of the decision to express the limited nature of the federal government and leave the contours of its delegated powers undefined is that today, some 215 years later, the line that divides federal authority from state authority seems immune from precise definition.

It should come as no surprise then that the first constitutional amendment after the Bill of Rights would continue the dominant refrain of the Constitutional Convention, the ratification debates, and the Ninth and Tenth Amendments, and federal usurpation of state prerogatives. Indeed the decade in which the Eleventh Amendment was ratified, the last decade of the eighteenth century, saw some of the most vicious and divisive states' rights disputes in our history.[2] The decade began with a proposal by Alexander Hamilton, then Secretary of the Treasury, to have the federal government assume the states' remaining unpaid Revolutionary

War debts. While certainly a benefit to many states, those like Virginia, which had largely paid their debts, objected to being taxed to retire the debts of other states. More importantly, many viewed Hamilton's proposal as transferring still greater authority from the states to the central government. Despite Madison's early objections to Hamilton's proposal, the Congress enacted the bill. The congressional action prompted an immediate rebuke by the Virginia legislature, led by the ardent anti-federalist Patrick Henry. The reason—paying the Revolutionary War debts by the states was not enumerated in the Constitution as a federal authority. Paying a state's debt was therefore the sole responsibility of the state notwithstanding that these debts were incurred in a national effort to wrest control from the British Crown. Put differently, Patrick Henry and the Virginia Legislature assumed that unless *expressly* authorized by the Constitution, the federal government had no authority to act.

Following on the heels of the federal assumption of state debts dispute came the controversy over creating the First Bank of the United States. Again, the one time nationalist, James Madison led the congressional opposition to the bank, using the same arguments cited by Patrick Henry in the debt assumption controversy—Congress did not have the express power to create a bank corporation, or any other corporation for that matter, and thus if such a corporation was to be created it must be done by the states. Despite those objections Congress enacted the legislation. The debate then shifted to the executive branch where both Attorney General Edmund Randolph and Thomas Jefferson advised President Washington to veto the legislation because it infringed on state power. Alexander Hamilton, arguing the other position, relied on Article 1, § 8, Clause 18, which grants Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...." This clause, he argued, gave Congress the ability to select the means *appropriate* to the ends denominated as federal by the Constitution, including the power to establish a banking corporation. Washington, whether persuaded by Hamilton's legal interpretative arguments or not, signed the legislation.

Two other states' rights (or anti-federal power) disputes during this decade deserve mention. First was the Whiskey Rebellion in which refusals to pay the federal tax on whiskey had to be met with a force of federalized state militiamen. This aroused the ire of states' rights republicans who objected to the conscription of their soldiers in the effort of a national cause, particularly one that did not threaten their states directly but related only to the refusal to pay a federal tax. The other dispute was more serious. It involved a perceived threat of war with France (with which many republicans expressed more than a casual affinity) and ultimately an idea (never acted upon) by Alexander Hamilton to use federal force to seize the Louisiana Territory from Spain, an ally of France. Hamilton's proposal would have required marching federal troops through Virginia and North Carolina, an idea those states found antithetical to their sovereignty. The Union

may have been saved by Thomas Jefferson who persuaded Virginia not to secede over this issue.

But two more disputes, one that began in the early years and one that closed the decade, had effects well beyond the others. The latter was the congressional enactment of the infamous Alien and Sedition Acts in 1798. Enacted by a federalist Congress and signed by a federalist president (John Adams), the most controversial of these statutes was the Sedition Act, which imposed criminal penalties for uttering "false, scandalous, or malicious" statements about the federal government, the President, or the Congress. Today, we find the Sedition Act to be a reprehensible restriction of free speech. But in 1798 the objection was that it created a *federal* crime for activities not directly germane to any of the specific authorities denominated in the Constitution to be matters of federal concern. The statute was problematic, therefore, because it infringed the sovereignty of the states, and not (at least not directly) that it was an undue restriction on individual liberty. The states' rights issue prompted two resolutions, one drafted by Thomas Jefferson for the state of Kentucky and the other by James Madison for the state of Virginia. Both asserted, as a foundational principle, that the Union was a compact, not of the citizens of the nation, but of the sovereign states. The Union could therefore only act for peace and prosperity of the *states*.

The Kentucky Resolution was rather temperate, arguing little more than what had been asserted in the Bank and debt assumption disputes regarding the lack of federal power to act with respect to a matter not expressly authorized by Article 1. Madison's Virginia Resolution went one step further; it introduced interposition, the doctrine (later to become the legal raison d'étre of the secession that led to the Civil War) that the states could independently defy any exercise of federal authority that, *in their judgment*, was a threat to the state's sovereignty and to the rights of its citizens. The specific issue of the Sedition Act and federal authority to promulgate general criminal laws died due to both the inability of Madison and Jefferson to persuade any other state to enact a similar resolution and the subsequent election, in 1800, of Thomas Jefferson as President and a republican Congress.[3]

The other dispute, the one that prompted the Eleventh Amendment, began in the early part of the decade with a suit in the United States Supreme Court by a group of Dutch bankers against the state of Maryland. Unlike the Sedition Acts, which prompted an angry response from the usual cast of anti-federalist characters, protests over the simple filing of the bankers' lawsuit were both widespread and vehement. As the eminent historian, Forrest McDonald, wrote:

"An anonymous Philadelphia newspaper article ...declared that if the actions were maintained, 'one great National question will be settled—that is, that the several States have relinquished all their Sovereignties, and have become mere corporations,...for a sovereign State can never be sued or coerced by the authority of another government.' Another writer

asserted that the actions 'involved more danger to the liberties of America than the claims of the British Parliament to tax us without our consent.' They would lead 'to the consolidation of the Union for the purpose of arbitrary power, to the downfall of liberty and the subversion of the rights of the people.'" "(Y)et another predicted that 'if the sovereignty of the States is to be thus annihilated, there must be a consolidated Government and a standing army.'" [4]

Strong words, yet these were fully in accord with the views of Patrick Henry, James Madison, Thomas Jefferson, and others who had opposed other national efforts during this first full decade of the Republic. But this time the republicans won; they secured an amendment to the United States Constitution. Indeed this amendment was the first, and one of only three in our history, adopted in specific response to a ruling by the United States Supreme Court. The others are the Sixteenth Amendment that validated the graduated income tax and the Twenty-Sixth Amendment that granted eighteen year olds the right to vote. (The Fourteenth Amendment overruled the Court's infamous decision in Dred Scott v. Sanford (1857), but it had broader purposes.) This work attempts to define the scope and legal dimensions of that republican political victory. As will become painfully obvious, however, this is not an easy task. It may indeed be an impossible task. Two–hundred years after its ratification, the Eleventh Amendment continues to be a work in progress and is likely to continue to be so for quite some time.

At first blush, the Eleventh Amendment seems straightforward enough, albeit somewhat obtuse to those unfamiliar with the nuances of federal judicial authority. Article 3 of the U.S. Constitution allows federal courts to decide "*all* cases...arising under (the) Constitution, the Laws (and Treaties) of the United States...(and) to controversies between a State and a Citizen of another State...." As will be detailed in the first section of Part I, this language, particularly the last clause, prompted strong objections from anti-federalists who feared that the states would be held to account for their actions to unelected, life-appointed federal magistrates. Their predictions proved to be correct. In 1793, the United States Supreme Court held that the language of Article 3 meant precisely what it said—a state could be sued by a citizen of another state. The Eleventh Amendment, in what seems to be a clear textual expression, removes this possibility. Appearances, however, are oftentimes deceiving.

Supreme Court Justice Felix Frankfurter is reputed (but never with a direct citation) to have sarcastically quipped, "only when the history is ambiguous should one refer to the plain language of the [Constitution]." While he was directing his sarcasm at a misguided approach to statutory interpretation, Justice Frankfurter might just as easily have been describing the Court's Eleventh Amendment jurisprudence since 1890. In that year the United States Supreme Court decided Hans v. Louisiana (1890), in which it relied heavily on history, or at least its version of history, to extend the Eleventh Amendment's proscriptive reach well beyond its rather limited text.