the Constitution, it could not subsequently be applied in derogation of a "State's dignity" within our system of federalism.[42]

The Nature of the States' Immunity

A great deal of the difficulty in interpreting and applying the Eleventh Amendment stems from the fact that the Court has not been clear, or at least has not been consistent, with respect to what the Amendment really does and how it relates to the other parts of the Constitution. One view of the Amendment, set out above in the discussion of *Hans v. Louisiana*, *Ex parte New York*, and *Principality of Monaco*, is that *Chisholm* was erroneously decided and that the Amendment's effect, its express language notwithstanding, was to restore the "original understanding" that Article III's grants of federal court jurisdiction did not extend to suits against the states. That view finds present day expression.[43] It explains the decision in *Edelman v. Jordan*,[44] in which the Court held that a state could properly raise its Eleventh Amendment defense on appeal after having defended and lost on the merits in the trial court. "[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."[45] But that the bar is not wholly jurisdictional seems established as well.[46]

Moreover, if under Article III there is no jurisdiction of suits against states, the settled principle that states may consent to suit[47] becomes conceptually difficult, as it is not possible to confer jurisdiction where it is lacking through the consent of the parties.[48] And there is jurisdiction under Article III of some suits against states,

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[42] 535 U.S. at 755, 760.

[43] *E.g.*, Employees of the Dep't of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279, 291–92 (1973) (Justice Marshall concurring); Nevada v. Hall, 440 U.S. 410, 420–21 (1979); Patsy v. Florida Board of Regents, 457 U.S. 496, 520 (1982) (Justice Powell dissenting); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 64 (1996).

[44] 415 U.S. 651 (1974).

[45] 415 U.S. at 678. The Court relied on Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459 (1945), where the issue was whether state officials who had voluntarily appeared in federal court had authority under state law to waive the state's immunity. *Edelman* has been followed in Sosna v. Iowa, 419 U.S. 393, 396 n.2 (1975); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977), with respect to the Court's responsibility to raise the Eleventh Amendment jurisdictional issue on its own motion.

[46] *See* Patsy v. Florida Board of Regents, 457 U.S. 496, 515–16 n.19 (1982), in which the Court bypassed the Eleventh Amendment issue, which had been brought to its attention, because of the interest of the parties in having the question resolved on the merits. *See* id. at 520 (Justice Powell dissenting).

[47] Clark v. Barnard, 108 U.S. 436 (1883).

[48] *E.g.*, People's Band v. Calhoun, 102 U.S. 256, 260–61 (1880). *See* Justice Powell's explanation in Patsy v. Florida Board of Regents, 457 U.S. 496, 528 n.13 (1982) (dissenting) (no jurisdiction under Article III of suits against *unconsenting* states).