

The concept of state sovereign immunity from citizen suits has also been infused with new potency over the last decade, while exposing deep theoretical differences among the Justices. To a minority of the Justices, state sovereign immunity is limited to the textual restriction articulated in the Eleventh Amendment, which prevents citizens of one state from bringing a federal suit against another state. To a majority of the Justices, however, the Eleventh Amendment was merely a technical correction made by Congress after an erroneous approval by the Court of a citizen-state diversity suit in *Chisholm v. Georgia*. These justices prefer the reasoning of the post-Eleventh Amendment case of *Hans v. Louisiana*, which, using non-textual precepts of federalism, dismissed a constitutionally based suit against a state by its own citizens. The true significance of this latter case was not realized until 1992 in *Seminole Tribe of Florida v. Florida*, where the Court made clear that suits by citizens against states brought under federal statutes also could not stand, at least if the statutes were based on Congress's Article I powers. The "fundamental postulate" of deference to the "dignity" of state sovereignty was also the basis for the Court's recent decisions to prohibit federal claims by citizens against states in either a state's own courts or federal agencies.

The Court has ruled, however, that Congress can abrogate state sovereign immunity under the Bankruptcy Clause and section 5 of the Fourteenth Amendment. Nevertheless, the Court has also shown a significant lack of deference to Congress regarding its Civil War era power, requiring a showing of "congruence and proportionality" between the alleged harm to constitutional rights and the legislative remedy. Thus, states have been found to remain immune from federal damage suits for such issues as disability discrimination or patent infringement, while the Congress has been found to be without any power to protect religious institutions from the application of generally applicable state laws. Further, where Congress attempted to create a federal private right of action for victims of gender-related violence, alleging discriminatory treatment of these cases by the state, the Court also found that Congress exceeded its mandate, as the enforcement power of the 14th Amendment can only be applied against state discrimination. In all these cases, the Court found that Congress had not sufficiently identified patterns of unconstitutional conduct by the States.

The Spending Clause, long seen as one of the last bedrocks of congressional authority, has also come under the Court's increasing scrutiny. While the Court had opined on the limits of the authority of Congress to impose "voluntary" grant conditions on states, it was not until Congress required states to adopt a broad expansion of Medicaid or leave that program that the Court found such legislation to be overly "coercive." The impact of the decision, however, was diminished not only by the Court severing only the enforcement mechanism (making the states' decision to participate voluntary), but by indications (both in reasoning and *dicta*) that the standard set by the splintered Court would be easily met by most Spending Clause regulation.

The overriding view of the present Court is that where it has discretion, even absent constitutional mandate, it will apply federalism concerns to limit federal powers. For instance, the equity powers of the federal courts to interfere in ongoing state court proceedings and to review state court criminal convictions under *habeas corpus* have been curtailed, invoking a doctrine of comity and prudential restraint. But the critical fact, the scope of congressional power to regulate private activity, remains: the limits on congressional power under the commerce clause and other Article I powers, as well as under the power to enforce the Reconstruction Amendments, remain principally those of congressional self-restraint.

SECTION II

For much of the latter half of the 20th century, aggregation of national power in the presidency continued unabated. The trend was not much resisted by congressional majorities, which, indeed, continued to delegate power to the Executive Branch and to the independent agencies at least to the same degree or greater than before. The President himself assumed the existence of a substantial reservoir of inherent power to effectuate his policies, most notably in the field of foreign affairs and national defense. Only in the wake of the Watergate affair did Congress move to assert itself and attempt to claim some form of partnership with the President.