such as those brought by the United States or by other states.[49] Furthermore, Congress is able in at least some instances to legislate away state immunity,[50] although it may not enlarge Article III jurisdiction.[51] The Court has declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived."[52]

Another explanation of the Eleventh Amendment is that it merely recognized the continued vitality of the doctrine of sovereign immunity as established prior to the Constitution: a state was not subject to suit without its consent.[53] This view also has support in modern case law: "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[54] The Court in dealing with questions of governmental immunity from suit has traditionally treated interchangeably precedents dealing with state immunity and those dealing with Federal Governmental immunity.[55] Viewing the Amendment and its radiations into Article III in this way provides a consistent explanation of the consent to suit as a waiver.[56] The limited effect of the doctrine in this context in federal court arises from the fact that traditional sovereign immunity arose in a unitary state, barring unconsented suit against a sovereign in its own courts or the courts of another sovereign. But upon entering the Union the states surrendered their sovereignty

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[49] *See*, *e.g.*, the Court's express rejection of the Eleventh Amendment defense in these cases. United States v. Texas, 143 U.S. 621 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904).

[50] *E.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

[51] The principal citation is, of course, Marbury v. Madison, 5 U.S. (1 Cr.) 137 (1803).

[52] Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98, 99 (1984).

[53] As Justice Holmes explained, the doctrine is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Of course, when a state is sued in federal court pursuant to federal law, the Federal Government, not the defendant state, is "the authority that makes the law" creating the right of action. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 154 (1996) (Justice Souter dissenting). On the sovereign immunity of the United States, see *supra* pp. 746–48. For the history and jurisprudence, see Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963).

[54] Alden v. Maine, 527 U.S. 706, 713 (1999).

[55] *See*, *e.g.*, United States v. Lee, 106 U.S. 196, 210–14 (1882); Belknap v. Schild, 161 U.S. 10, 18 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642–43, 645 (1911).

[56] A sovereign may consent to suit. *E.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 514 (1940).