"TWO QUESTIONS ABOUT JUSTICE"†

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When I was a law student shortly after World War II, my professors used the Socratic method of teaching. Instead of explaining rules of law, they liked to propound questions that had no clear answers, or at least no answers that were clear to freshman law students. During my first year on the Supreme Court, I was presented with a number of questions that reminded me of my frequent puzzlement during my law school days. It is the relationship between two of those puzzling questions that is the subject of my talk today.

The first of those questions was asked by a student during an informal meeting with a grammar school class. It was a simple question: "What is justice?" That should have been an easy question for a person occupying an office bearing that title, but I'm afraid that my answer would not have merited a passing grade. This afternoon, I shall identify four possible answers to that question while I comment on a second question that puzzled me during the 1975 Term. That was a question that was presented in a case called *Fitzpatrick v. Bitzer*.[1]

In that case, present and retired male employees of the State of Connecticut brought suit in a federal court claiming that the State's retirement benefit plan discriminated against them because of their sex in violation of Title VII of the Civil Rights Act.[2] Congress had amended the statute in 1972 to authorize such actions against States. The District Court found that the State's plan did violate the Act and enjoined future violations, but held that any award of retroactive benefits, though expressly authorized by Congress, was barred by the Eleventh Amendment to the federal Constitution.[3] The Court of Appeals agreed,[4] but the Supreme Court unanimously reversed. In his opinion, joined by seven Members of the Court, then-Justice Rehnquist held that despite the shield of sovereign immunity afforded by the Eleventh Amendment,

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1. 427 U.S. 445 (1976).
2. 42 U.S.C. § 2000 (2000).
3. *Fitzpatrick*, 427 U.S. at 449–50.
4. 519 F.2d 559 (2d Cir. 1975).

Congress had the power to authorize an award of damages against the States when it legislated pursuant to section 5 of the Fourteenth Amendment.[5] That section simply provides that Congress shall have the power to enforce the provisions of the Fourteenth Amendment with appropriate legislation. It does not mention the Eleventh Amendment.

I did not join that opinion because I was unable to answer the second question that I propose to discuss today. How could an act of Congress effectively amend a provision of the Constitution? The majority had simply stated that the statute had been enacted pursuant to Congress's power to enforce the Fourteenth Amendment, but the District Court had not found any violation of that Amendment—the pension plan just violated Title VII. I did not understand why the source of the congressional power to enact a valid law had any relevance to the impact of the statute on the State's Constitutional defense. I therefore wrote a separate concurrence, explaining that I thought the Eleventh Amendment was simply inapplicable because the plaintiffs' recovery would be from assets of the pension trusts, rather than directly from state revenues.[6]

During the ensuing fifteen years the congressional power to abrogate the States' so-called "shield of sovereign immunity afforded by the Eleventh Amendment" was the subject of discussion in Supreme Court opinions and in Congress. None of those discussions focused on the question that had puzzled me in the *Fitzpatrick* case. In *Atascadero State Hospital v. Scanlon*,[7] for example, a case arising under the Rehabilitation Act of 1973, the Court reaffirmed the existence of Congress's power effectively to amend the Constitution, but significantly narrowed it. Despite clear evidence that Congress intended to authorize a remedy against every recipient of federal funds, which included the state hospital defendant in that case, the Court held that Congress had failed to "express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."[8] In response to that opinion Congress amended several statutes to include "unmistakable language" expressing its intent to authorize remedies against States and state agencies.[9]

A few years later a closely divided Court held that Congress could authorize suits for money damages against the States even when legislating pursuant to its power to regulate commerce among the States. In his

5. *Fitzpatrick*, 427 U.S. at 456.

6. *Id*. at 458–60 (Stevens, J., concurring).

7. 473 U.S. 234 (1985).

8. *Id*. at 243.

9. *See, e.g*., Bankruptcy Reform Act of 1994, 11 U.S.C. § 106(a) (2000); Trademark Remedy Clarification Act of 1992, 15 U.S.C. § 1122(b); Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511(a); Patent and Plant Variety Protection Remedy Clarification Act of 1992, 35 U.S.C. § 271(h); Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a); Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9601(20)(D); Americans with Disabilities Act of 1990, 42 U.S.C. § 12202.

opinion in *Pennsylvania v. Union Gas Co.*,[10] Justice Brennan relied on an earlier case holding that the States had surrendered whatever portion of their sovereignty that might obstruct effective regulation of commerce when they granted Congress that power.[11] In his dissent, Justice Scalia correctly noted that the earlier case involved a State's waiver of sovereign immunity rather than the congressional power to abrogate such immunity.[12] This debate added another wrinkle to the puzzling question of how Congress can effectively amend the Constitution by simply enacting a valid statute. The source of that wrinkle is the black letter rule of law that the parties' consent cannot create federal subject matter jurisdiction. If, as its text rather plainly states, the Eleventh Amendment prescribes a limit on the subject matter jurisdiction of the federal courts, how can a State's consent override that constitutional limit?

The answer to that question, as well as to the question that puzzled me when we decided the *Fitzpatrick* case, had dawned on me by the time we decided the *Union Gas* case. As I pointed out in my separate opinion,[13] our law actually includes two different Eleventh Amendments. They correspond to the two basic grants of federal jurisdiction in Article III of the Constitution—diversity jurisdiction over controversies between citizens of different States and federal question jurisdiction over cases arising under the Constitution, the laws or the treaties of the United States. A page or two of history will help to explain the critical importance of the distinction between the two Eleventh Amendments.

Four years after the Constitution was ratified, in *Chisholm v. Georgia*,[14] the Supreme court had to decide whether it had jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia. Each of the five Justices then sitting wrote a separate opinion. Only Justice Iredell expressed the view that a State, like an English sovereign, could not be sued without its consent. Two of the four Justices in the majority (Justice Blair and Justice Cushing) thought that the text of Article III of the Constitution and the Judiciary Act plainly supported jurisdiction. Justice Wilson and Chief Justice John Jay, while agreeing with their colleagues' reading of the text, also explained why feudal notions of sovereignty should not provide a State with immunity from suit in the courts of the national Government.

In an eerie echo of a later case, both in substance and in name, Jay wrote that for a feudal state "sovereignty is generally ascribed to the *Prince*," and princes have "*personal* powers, dignities, and pre-eminences." After the American Revolution, however, sovereignty devolved on the people, who, the Chief Justice believed, "are equal as fel-

10. 491 U.S. 1 (1989).
11. *Id.* at 14.
12. *Id*. at 41 (Scalia, J., dissenting).
13. *Id*. at 23–24 (Stevens, J., concurring).
14. 2 U.S. (2 Dall.) 419 (1793).

low citizens, and as joint tenants in [that] sovereignty." Responding to the suggestion that amenability to suit would not comport with the dignity of a State, Jay observed that the population of the State of Delaware was comparable to the population of the City of Philadelphia and suggested that for "those who dislike aristocracy," even if the office of the governor of a State is "more exalted" than a Mayor's office, "that circumstance could not be a good reason for impeding the course of justice."[15]

On the day after *Chisholm* was decided, Representative Theodore Sedgwick of Massachusetts introduced a draft of what became the Eleventh Amendment in the House of Representatives. That draft provided that no State could be made a defendant in an action filed in any federal court by "any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States."[16] The text of the Amendment that was actually adopted, however, is much narrower; it merely provides that the "Judicial Power of the United States shall not be construed to extend to any suit in law or equity . . . prosecuted against any one of the United States by citizens of another State, or by Citizens or subjects of any Foreign State . . . ."[17]

Thus, that text unquestionably overruled the holding in *Chisholm* that the Court's diversity jurisdiction included common law actions brought against States by citizens of other States. But neither *Chisholm*, nor the text of the Amendment itself, presented any question concerning jurisdiction over cases brought against a State by its own citizens. Indeed, in 1821 in his opinion in *Cohens v. Virginia*,[18] Chief Justice Marshall expressly noted that the Eleventh Amendment had no application to a case that was not prosecuted by "a citizen of another state" or "of a foreign state" but instead was governed by the general grant of judicial power extending to cases arising under federal law.

What I regard as the second Eleventh Amendment is the defense of sovereign immunity that the Court has both endorsed and found to have been abrogated or waived in cases like *Fitzpatrick v. Bitzer* in which a State's own citizens asserted federal claims. The first of those cases, *Hans v. Louisiana*,[19] was decided almost a century after the Eleventh Amendment was ratified. In *Hans* the Court recognized that the text of the Amendment did not bar the action. It held, however, that when the Constitution was adopted, the "suability of a State, without its consent, was a thing unknown to the law,"[20] and that we should presume that "no

15. *Id*. at 472–73.

16. Gazette of the United States, Feb. 20, 1793, *reprinted in* 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 605–06 (Maeva Marcus ed., 1994).

17. U.S. CONST. amend. XI.

18. 19 U.S. (6 Wheat.) 264, 305 (1821).

19. 134 U.S. 1 (1890).

20. *Id*. at 16.

anomalous or unheard-of proceedings or suits were intended to be raised up by the Constitution."[21] Moreover, the statute conferring jurisdiction on the federal courts "concurrent with the jurisdiction of the several States" should not be construed to authorize a suit that the state courts would not entertain. In short, the Court endorsed the views expressed by Justice Iredell in his dissenting opinion in *Chisholm*; the common law doctrine of sovereign immunity had not been abrogated by either the Constitution or by any statute enacted by Congress. Whether Congress could abrogate or modify that common law rule is a question that was neither presented nor decided in *Hans*. The Court did acknowledge, however, that jurisdiction could have been conferred by the consent of the State.

It is the distinction between the correct and literal interpretation of the plain language of the Eleventh Amendment itself, which limits the jurisdiction of federal courts in cases brought against a State by citizens of another State, on the one hand, and the defense of sovereign immunity, which the Court added to that text in cases brought against a State by its own citizens, on the other hand, that answers my first question. With respect to the former, I do not believe Congress has the power, under the Commerce Clause, or under any other provision of the Constitution, to abrogate a State's immunity. Congress cannot create federal jurisdiction that Article III, as limited by the Eleventh Amendment, does not authorize. In short, the proper answer to my question about how a statute can amend the Constitution is that it cannot do so. With respect to the latter—the judicially created doctrine of State immunity even from suits that allege violations of federal rights—I believe Congress has plenary power to subject the States to suit in federal court.

In my judgment, it is the Court's failure to recognize, or to acknowledge, the critical difference between the two Eleventh Amendments—the one that was ratified by the States in 1795 and the one that was created by the Court almost a century later in *Hans v. Louisiana*—that is responsible for a series of recent decisions overruling *Union Gas* and invalidating acts of Congress creating federal remedies against state agencies violating federal law. These decisions have been severely criticized in dissenting opinions, in scholarly writing, and—most recently—in a book entitled "Narrowing the Nation's Power" written by John Noonan, a highly respected judge sitting on the Court of Appeals for the Ninth Circuit.

In the last chapter of his book, after reviewing each of the arguments advanced in support of sovereign immunity, Judge Noonan concludes that "the immunity of the fifty states is a relic of the past without justification of any kind today."[22] And then, in his final paragraph, he

21. *Id*. at 18.

22. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 154 (2002).

makes the criticism that reminded me of my interview with the grammar school student who asked me about the meaning of the word "justice." This is what he says in that paragraph:

> A doctrine that has swelled beyond bounds, a doctrine that cannot be consistently applied or reconciled with the federal system, state immunity from suit suffers from one further, final difficulty for a doctrine of the law. It is unjust. Why should a state not pay its just debts, why should it be saved from compensating for the harm it tortiously causes? Why should it be subject to federal patent law, federal copyright law, and federal prohibitions of discrimination in employment and not be accountable for the patent or copyright it invades, not accountable for its discriminatory acts as an employer? No reason in the constitution or in the nature of things or in the acts of Congress supplies an answer. The states are permitted to act unjustly only because the highest court in the land has, by its own will, moved the middle ground and narrowed the nation's power.[23]

The validity of the conclusion that the Court's sovereign immunity jurisprudence is "unjust" depends, at least in part, on one's understanding of the term "justice." That is a term that is by no means easy to define. As I indicated at the outset, I will identify four possible definitions and, with respect to each, briefly consider whether Judge Noonan has correctly concluded that the Court's sovereign immunity jurisprudence is unjust.

A significant portion of the dialogue between Socrates and his friends that is reproduced in Plato's Republic deals with the meaning of "justice." In a response to a comment by Cephalus, concerning justice, Sophocles asked: "[W]hat is it?—to speak the truth and to pay your debts—no more than this?"[24] Under that definition, it is quite obvious that a rule that enables the States to avoid paying their debts is unjust.

The question is more complex under the second definition of justice advanced by Thrasymachus, who forcefully proclaimed "that justice is nothing else than the interest of the stronger."[25] Arguably it is in the interest of the sovereign to retain the power to decide whether or not to pay its debts, and therefore Thrasymachus would regard sovereign immunity as a just doctrine. Ironically, however, in the *Hans* opinion itself, the Court refused to defend the doctrine as just, and even suggested that it might not serve the interests of the State:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals . . . . It is enough for us to declare its existence. The legislative depart-

23. *Id*. at 156.
24. PLATO, THE REPUBLIC 8 (Scribner ed., 1928).
25. *Id*. at 19.

> ment of a State represents its polity and its will, and is called upon by the highest demands of natural and political law to preserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent (of which the Legislature, and not the courts, is the judge), never fails in the end to incur the odium of the world, and to bring lasting injury upon the state itself.[26]

Even if one assumes that the State's power to invoke an immunity from suit may serve its interests in some cases, Thrasymachus's definition of justice would not necessarily be satisfied. For he asks us to focus on the interest of the stronger, and sovereign immunity jurisprudence has always recognized a distinction between the assertion of the defense in the sovereign's own courts and its assertion in the courts of another sovereign. In its own courts, the defense is asserted as a matter of right, but in the latter it is available only as a matter of comity. Thus, we have held that the California courts could accept or reject a defense of sovereign immunity advanced by the State of Nevada when sued in California.[27] In that case the interest of California prevailed over the interest of Nevada. It would seem to follow that when a State is sued in a federal court on a federal claim, that the federal interest should prevail over that of the State. Indeed, the conclusion that the federal interest is stronger than the State's is confirmed by the text of Article VI of the Constitution which provides that federal law "shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[28]

Thus, whether we define justice as paying one's debts or as serving the interest of the stronger, it seems quite clear that both Cephalus and Thrasymachus would view a doctrine that immunizes States from liability on federal claims as unjust. A third definition of justice might focus on procedures for resolving disputes. Perhaps justice is the essential characteristic of decisions made by disinterested and fully informed judges after hearing argument from those who have an interest in a controversy. Under this approach, the fact that Congress, which of course is composed of representatives of the States, has repeatedly enacted laws authorizing federal courts to enforce federal claims against States and state agencies, should weigh heavily in the balance. When disinterested and fully informed legislators decide that the sovereign immunity defense should be abrogated, it seems appropriate to conclude that the doctrine is unjust.

Finally, as with Justice Stewart's observation about obscenity, perhaps the best definition of justice is that we know it when we see it.[29] Two characteristics of the judicially created second version of the Elev-

26. Hans v. Louisiana, 134 U.S. 1, 21 (1890).
27. Nevada v. Hall, 440 U.S. 410 (1979).
28. U.S. CONST. art. VI.
29. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

enth Amendment are painfully obvious. It over-protects defendants, and it under-protects plaintiffs. Unlike its feudal ancestor that merely protected the sovereign itself, it provides protection to hundreds, if not thousands, of state agencies that are treated as so-called "arms of the state." Unlike its common law ancestor that merely protected the State in its own courts, it deprives federal courts of the power to remedy the deprivation of federal rights. However one defines "justice," Judge Noonan was surely justified in characterizing this doctrine as "unjust."