SOVEREIGN IMMUNITY AND THE RULE OF LAW: ASPIRING TO A HIGHEST-RANKED VIEW OF THE ELEVENTH AMENDMENT

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> Out of the crooked timber of humanity nothing straight was ever made. Immanuel Kant[1]

The irrepressible debate over the proper interpretation of the Eleventh Amendment has ironically become something of a constitutional cause célèbre.[2] The notoriety is ironic because the Eleventh Amendment was, until relatively recently, rather obscure. Facially, the amendment appears merely to limit the federal courts' subject matter jurisdiction over certain types of lawsuits. The amendment has come to involve much deeper constitutional and jurisprudential issues, however, including the nature of state/national relations, individual rights, and the nature of sovereignty in a democratic government that presumes that individuals have fundamental rights.

The forty-three words of the Eleventh Amendment, which one would erroneously assume have determinate meaning, would apparently bar all suits in law or equity against a state, but only if (i) the plaintiff is citizen of another state, or (ii) the plaintiff is a citizen of a foreign nation. Based on these words, or notwithstanding these words, the Supreme Court has held that equity actions are not barred by the Eleventh Amendment as long as the named defendant is a state official and not the state itself,[3] that a state cannot be sued by its own citizens,[4] and that a foreign government cannot sue a state without her consent.[5]

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[1] Quoted in ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS vii (1991).

[2] The Eleventh Amendment provides:

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

U.S. CONST. amend. XI.

[3] *Ex parte* Young, 209 U.S. 123 (1908).

[4] Hans v. Louisiana, 134 U.S. 1 (1890).

[5] Monaco v. Mississippi, 292 U.S. 313 (1934).

In the Alice-in-Wonderland world of Eleventh Amendment jurisprudence, words do not always have apparent meaning.

In *Hans v. Louisiana*,[6] the Court abandoned the words of the Eleventh Amendment and held that a citizen could not sue his own state in federal court for a violation of federal law. The Court's holding was premised on the belief that the Eleventh Amendment embodies the doctrine of sovereign immunity. Although the *Hans* Court's transcendental interpretation of the Eleventh Amendment has been pickled in the preserving juices of Supreme Court precedent, as of late those precedents have been accepted only by a razor-thin majority of Justices.[7] Thus, *Hans*, the linchpin of the modern Supreme Court's unwieldy Eleventh Amendment doctrine, is at the center of a contentious debate among the Justices.

For example, three current members of the Court believe that the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the States,"[8] and further believe that the "significance of this amendment 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution."[9] These Justices therefore believe that the Eleventh Amendment bars suits for money damages against unconsenting states for violations of constitutional and federal rights unless Congress "unmistakably" abrogates the states' immunity.[10] Justice Scalia, a newcomer to this debate, believes that "the question is at least close,"[11] but, for reasons primarily associated with

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[6] 134 U.S. 1 (1890).

[7] For example, in Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987), four Justices concluded that the Eleventh Amendment bars a state employee from suing a state in federal court under the Jones Act, 46 U.S.C. § 688 (1982 & Supp. I. 1983), while four other Justices vigorously dissented. *Id.* 504-21. (Brennan, J., dissenting). Justice Scalia concurred in the judgment but expressly declined to join the plurality's opinion that *Hans* was correctly decided. *Id.* at 495-96 (Scalia, J., concurring in part and concurring in the judgment). Justice Powell, who wrote the plurality opinion, and Justices Brennan and Marshall, who dissented, have retired from the Court.

[8] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). Five Justices formed the majority, including three current members of the Court—Chief Justice Rehnquist, and Justices White and O'Connor.

[9] *Id.* (quoting Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 98 (1984)).

[10] *Id.* at 242.

[11] Pennsylvania v. Union Gas Co., 491 U.S. 1, 34 (1989) (Scalia, J., concurring in part, dissenting in part).

stare decisis, Scalia apparently would agree that the Eleventh Amendment embodies a broad notion of state sovereign immunity.[12]

Two current Justices categorically reject the view that the Eleventh Amendment embodies the doctrine of sovereign immunity. These Justices have asserted that the "doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect."[13] Justice Stevens has even opined rather disdainfully that the Court's Eleventh Amendment doctrine is "egregiously incorrect."[14] These Justices believe that the Eleventh Amendment has nothing whatsoever to do with federal question jurisdiction and therefore should not bar federal lawsuits in federal courts.

Numerous scholars have also participated in this acrimonious debate, and have made especially valuable contributions to our historical understanding of the Eleventh Amendment and the seminal cases of *Chisholm v. Georgia*,[15] which precipitated the ratification of the Eleventh Amendment, and, *Hans v. Louisiana*,[16] which is the cornerstone of the Supreme Court's Eleventh Amendment doctrine.[17] The scholarly community has overwhelmingly lined up on the same side of the fault line as Justice Brennan and the Justices who reject the Court's Eleventh Amendment doctrine.[18]

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[12] *Id.* In *Union Gas*, the Court did not address the issue of whether *Hans v. Louisiana* should be overruled.

[13] *Atascadero*, 473 U.S. at 248 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justices Marshall, Blackmun, and Stevens.

[14] *Id.* at 304 (Stevens, J., dissenting).

[15] 2 U.S. (2 Dall.) 419 (1793).

[16] 134 U.S. 1 (1890).

[17] Justice Scalia has opined that the likely outcome of the debate will feature *Hans*: "We shall either overrule *Hans* in form as well as in fact, or return to its genuine meaning." *Union Gas*, 491 U.S. at 45 (Scalia, J., concurring in part, dissenting in part).

[18] *See, e.g.*, JOHN ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 74-77 (1987); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); H. Stephen Harris and Michael P. Kenny, *Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash with Antitrust, Copyright and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction*, 37 EMORY L.J. 645 (1988); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983). *But see* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372 (1989). Professor Massey rejects the view that *Hans* embodies some broad view of sovereign immunity, but also rejects the view, based on the precise language of the Eleventh Amendment, that the Eleventh Amendment does not prohibit non-citizen suits based on federal causes of action. *See* Calvin R. Massey, *State Sovereignty and the*

The nub of the debate is this: Does the Eleventh Amendment, the text of which does not mention sovereign immunity, embody a free-standing concept that states are generally immune from all private suits for money damages in the federal courts, or rather, does the Eleventh Amendment merely narrow the state-citizen diversity clause of Article III of the Constitution, even though the text expressly refers to "any suit in law or equity?" For most practical purposes, the debate concerns the question of whether the Eleventh Amendment closes the federal courthouse doors to suits for money damages by citizens against states for violations of constitutional and federal statutory rights.

The debate, at least among the Justices, is at an intellectual impasse. Both sides have vigorously argued their respective positions. Based on the results in *Atascadero State Hospital v. Scanlon*[19] and *Welch v. Texas Department of Highways and Public Transportation*[20] on the one hand, and on the result in *Pennsylvania v. Union Gas Co.*[21] on the other, the Justices have reached no more than a *modus vivendi* at the expense of doctrinal coherence.[22] In light of the spirited positions taken by the two factions, it is unlikely that either side will concede that the other is "right."

Justice Scalia recognized this unfortunate state of affairs in *Union Gas* and has predicted a final resolution, one way or the other.[23] The stakes are too high, however, for the debate to be resolved merely by capitulation to one side's obstinate refusal to be persuaded by the "right" argument. Instead, the best, not necessarily the correct,[24] interpretation of the Eleventh Amendment should ultimately prevail in the course of reasoned discourse. Any effort to prove that one side to the constitutional debate is wrong would not only be misguided, it would

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Tenth and Eleventh Amendments, 56 U. CHI. L. REV. 61, 149 (1989). Although Professor Massey's textual point is technically correct, it does not lead inexorably to the conclusion that the Eleventh Amendment prohibits non-citizen suits based on federal law against states in federal court. *See infra* notes 56,72 and accompanying text.

[19] 473 U.S. 234 (1985).

[20] 483 U.S. 468 (1987).

[21] 491 U.S. 1 (1989).

[22] *See Union Gas*, 491 U.S. at 44-45 (Scalia, J., concurring in part, dissenting in part) decrying the "clutter" of Eleventh Amendment jurisprudence).

[23] *Union Gas*, 491 U.S. at 44-45 (Scalia, J., concurring in part, dissenting in part).

[24] The quest for certainty in the law all too often is a quixotic and misguided endeavor. *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW 100 (1977) ("the quest for the laws which will explain the riddle of human behavior leads us not towards truth but toward the illusion of certainty, which is our curse.").

misapprehend the nature of constitutional interpretation in our democratic society.

In his book PHILOSOPHICAL EXPLANATIONS,[25] the philosopher Robert Nozick opines that "trying to get someone to believe something whether he wants to believe it or not, is not . . . a nice way to behave towards someone."[26] This phenomenon accurately characterizes the Justices' debate over the "correct" interpretation of the Eleventh Amendment. Nozick explains that such a "coercive" approach to argument is imbedded firmly in the philosophical tradition.

> The terminology of philosophical art is coercive: arguments are powerful and best when they are knocked down, arguments force you to a conclusion, if you believe the premises you have to or must believe the conclusion, some arguments do not carry much punch, and so forth. A philosophical argument is an attempt to get someone to believe something, whether he wants to believe it or not. A successful philosophical argument, a strong argument, forces someone to a belief.[27]

Nozick would substitute for this traditional "coercive proof" approach to philosophy an approach that emphasizes explanations of difficult philosophical issues.[28]

Nozick is not a nihilist, however. As he explains:

> The explanations to follow are put forward not as the sole correct view on their topics, but as members among others of admissible classes, with the hope that they will be ranked first, or at least highly. On the view presented here, philosophical work aspires to produce a highest rank view, at least an illuminating one, without attempting to knock all other theories out as inadmissible.[29]

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[25] ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS (1981).

[26] *Id.* at 13.

[27] *Id.* at 4 (emphasis in original).

[28] In a recent article on the nature of legal reasoning, Professor Wetlaufer describes a similar approach to legal argument. Gerald B. Wetlaufer, *Rhetoric and its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1545 (1990) ("What we lawyers and law teachers try to bring to that business is clarity, objectivity, rigor, and toughmindedness. We work hard to find the right answer, to prove one claim and disprove another.").

[29] *See* Nozick, *supra* note 25, at 23-24.

A philosophical explanation recognizes that "the world looks a particular way from a particular perspective,"[30] and describes how the world would look from the philosopher's highest-ranked view.

What follows here is an attempt to present the "highest-ranked view" of the Eleventh Amendment, not by demonstrating that the other views are wrong, but by aspiring to illuminate a constitutional world that looks better, or more desirable, from the proffered view. This attempt accepts that, ultimately, many issues of constitutional interpretation are indeterminate in the sense of having right and wrong answers.[31] If constitutional interpretation were apodictic, coercive proofs might be possible; but incontestable premises, necessary truths, and geometric proofs are not the coin of the realm in constitutional interpretation. Moreover, constitutional interpretation, for all of its alluring philosophical and intellectual potential, is at its core a principled but practical endeavor: Real disputes between real disputants must be fairly resolved, typically in a zero-sum manner. Thus, notwithstanding inherent skepticism attendant to constitutional "solutions," best or highest-ranked solutions to constitutional issues are the unavoidable goal of constitutional interpretation. Judicial review in a democratic world demands nothing less.

This article, then, attempts to explain that the Supreme Court's Eleventh Amendment doctrine, which embodies an attenuated notion of sovereign immunity, is not the highest-ranked interpretation of that amendment; indeed, the Court's doctrine is something of an oxymoron. In the Court's reified view of "sovereignty," the "sovereign" is treated as a concrete, political "thing" that not only exists apart from "We the People of the United States,"[32] but as something that is greater than the sum of its parts. Although the eschatological tail of "Our Federalism"[33] that wags this explanatory dog has much to commend it, the liberty corpses that litter the legal landscape when states are *legibus solutus* (not bound by the laws) are the license fee that we have had to pay. Thus, for example, citizens, the principals of our state govern-

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[30] *Id.* at 22.

[31] *See, e.g.*, JOHN H. ELY, *Democracy and Distrust: A Theory of Judicial Review* (1980), and his discussion of the "impossibility of clause-bound interpretivism."

[32] *See* Amar, *supra* note 18, at 1427, arguing that "We the People of the United States, through the Constitution, have delegated limited 'sovereign' powers to various organs of government; but whenever a government entity transgresses the limits of its delegation by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative 'sovereign' immunity it might otherwise possess."

[33] *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971).

ments, are left without satisfactory remedies when state governments, our agents, violate our constitutional rights,[34] infringe our copyrights,[35] and inflict antitrust injury upon us.[36] If this price were necessary to secure, in the words of the Preamble to the Constitution, "the Blessings of Liberty to ourselves and our Posterity," then so be it. But such a price is not necessary, and is indeed antithetical to the very design of a federal system.

The competing Eleventh Amendment interpretations can best be analyzed in two steps. The first step is to stand side-by-side the "pillars" that support the competing general interpretations of the Eleventh Amendment. These pillars are textual, historical, juridical, institutional, and philosophical/normative. A textual analysis is just that: What are the words of the Eleventh Amendment and what do they mean? An historical analysis examines the "factual" basis for the assertion that sovereign immunity was firmly established in the American experience. A juridical analysis considers the "multiplier effect" and the collateral consequences of the Court's Eleventh Amendment reasoning on related areas of federal jurisdiction. The institutional analysis has two prongs: it evaluates the Court's federalism concerns and the stare decisis rationale for not overturning the Court's Eleventh Amendment doctrine. Finally, the philosophical/normative pillar asks the questions: What is (or should be) be the nature of "sovereignty" in a limited, representative government and should the sovereign be immune from suit if it violates its citizens' constitutional and federal rights?

The second step in the analysis attempts to illuminate the way the world looks from the competing interpretations of the Eleventh Amendment. Based on this two-step analysis, I argue that the Court should aspire to a highest-ranked Eleventh Amendment interpretation which rejects the view that the Eleventh Amendment embodies the doctrine of sovereign immunity. Rather, it is a view that accepts that citizens (i.e., us) can sue states for money damages in federal court for deprivations of their (our) constitutional and federal rights. This highest-ranked view of the Eleventh Amendment best comports with the rule of law and best protects the fundamental liberties that "Our Federalism" is designed to protect.

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[34] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 663-669 (1974).

[35] BV Engineering v. Univ. of Cal., 657 F. Supp. 1246 (C.D. Cal. 1987).

[36] *See, e.g.*, Mizlou Telev. Network v. National Broadcasting Co., 603 F. Supp. 677 (D.D.C. 1984). *See generally* Harris & Kenny, *supra* note 18, at 683.

I. THE TEXT AND HISTORY OF THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY

The words "sovereignty" and "sovereign immunity" do not appear in the Constitution. Nor do those words appear in the language of the Eleventh Amendment. Instead, the Eleventh Amendment doctrine of sovereign immunity did not really take root until nearly 95 years after the amendment's ratification when the Supreme Court in *Hans v. Louisiana* shoehorned the doctrine into the amendment. There are many excellent scholarly studies of the Eleventh Amendment prior to *Hans*, and with some minor differences, those studies agree on the more material historical facts, including the conclusion that a royal concept of sovereign immunity did not exist in the United States prior to *Hans*.[37]

A. *Chisholm v. Georgia and the Eleventh Amendment*

There appears to be no dispute that the Eleventh Amendment was passed and ratified by the requisite number of states to overrule the Supreme Court's decision in *Chisholm v. Georgia*.[38] The "particular result" in *Chisholm* was not a rule of decision on the merits, rather, it was a jurisdictional decision that the state-citizen diversity clause of Article III, section 2 of the Constitution[39] and the Judiciary Act of 1789[40] conferred original jurisdiction on the Supreme Court to hear a South Carolinian's suit in assumpsit for damages against the State of Georgia.[41]

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[37] *See, e.g.*, Louis L. Jaffe, *Suits Against Governments And Officials: Sovereign Immunity*, 77 HARV.L. REV. 1, 2-19 (1963); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Harris & Kenny, *supra* note 18, at 683-699. Professor Shapiro has even commented that the "notion of the state's immunity from suit is itself the fiction, one that never properly stands in the way of ultimate vindication of the rights of the individual against the state." David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV.L. REV. 61, 85 (1984) (citing Poindexter v. Greenhow, 114 U.S. 270, 290-91 (1885); United States v. Lee, 106 U.S. 196, 220-23 (1882)).

[38] 2 U.S. (2 Dall.) 419 (1793). *See* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 98 (1984) ("The [Eleventh] Amendment's language overruled the particular result in *Chisholm* . . ."); *See generally* Harris & Kenny, *supra* note 18, at 652-54.

[39] In pertinent part, U.S. CONST. amend. III, § 2 provides: "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies . . . between a State and Citizens of another State. . . ."

[40] 1 Stat. 80, c. 20, § 13 (1789).

[41] *See also* Massey, *supra* note 18, at 103 (". . . *Chisholm* decided only that there was no constitutional *jurisdictional* barrier to the federal courts hearing claims made against a state by a citizen of another state."). For a more complete discussion of *Chisholm see* CLYDE E. JACOBS,

In *Chisholm*, one of the defenses Georgia asserted to the contract claim was that the doctrine of sovereign immunity protected it from suit under state law by a resident of another state.[42] This "rule of decision" argument was never decided on the merits by the Court. There is no basis, therefore, for arguing that the Eleventh Amendment was intended to overrule the *Chisholm* Court's so-called "sovereign immunity" decision: *Chisholm* was no such decision. Two of the Justices, however, did expressly reject Georgia's sovereign immunity argument.

Justice Wilson, for instance, noted that it is the people, and not the individual States, who are the American sovereign and opined that "to the Constitution of the United States, the term sovereign is totally unknown. . . . They might have announced themselves 'the sovereign' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration."[43] Chief Justice Jay agreed that the sovereignty of the United States is in the people, and that the residuary sovereignty of each State is in the people of each State.[44]

Justice Iredell was the lone dissenter in *Chisholm*. Although both the opponents and the proponents of the modern Court's Eleventh Amendment doctrine believe that the Eleventh Amendment incorporated Justice Iredell's dissent,[45] they disagree on which aspect of his opinion the Eleventh Amendment incorporated. Justice Iredell dissented from the holding that the Judiciary Act of 1789 vested original jurisdiction in the Supreme Court for common law actions against states by non-citizens of those states, but he also "intimated" that he would not construe the Constitution to permit any claim for money damages against a state.[46] For example, Justice Brennan believes that Justice Iredell's dissent "rested on a conception of state sovereignty

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THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 56-57 (1972); Amar, *supra* note 18, at 1456.

[42] *See also* Amar, *supra* note 18 at 1470-71.

[43] 2 U.S. (2 Dall.) at 419, 454.

[44] "In *Europe* the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people. . . ." *Id.* at 472. *See generally* Massey, *supra*, note 18, at 89 ("In eighteenth century colonial America there was no universal belief that the sovereign was immune from suit.").

[45] *Compare* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 513 (1987) (Brennan, J., dissenting); Amar, *supra* note 18, at 1077; Fletcher, *supra* note 18, at 1077, *with* Hans v. Louisiana, 134 U.S. 1, 12-19 (1890).

[46] *Chisholm*, 2 Dall. at 499 ("So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against the state for the recovery of money.").

that justified the incorporation of the sovereign immunity doctrine through the state common law, but *only* in *diversity* suits."[47] Justice Powell, in his plurality opinion in *Welch*, correctly observed that Justice Iredell's opinion "rests primarily on the absence of a statutory provision conferring jurisdiction on the Court in cases such as Chisholm's,"[48] but then attempted to rely on Iredell's non-statutory "intimation" to conclude that, "to the extent that Justice Iredell discussed the constitutional question, his opinion is consistent with the more recent decisions of this Court."[49]

The search for the Eleventh Amendment meaning in Justice Iredell's fertile dissent is ultimately not only beside the point, it is a will-o'-the-wisp. Both opponents and proponents of *Hans* can find ammunition in Justice Iredell's opinion, ammunition which can be used liberally because the historical record is devoid of any evidence that Congress or the ratifying states intended to incorporate any particular part of Iredell's dissent into the Eleventh Amendment. Intellectual honesty suggests that there is no right or true way to interpret Justice Iredell's opinion with respect to the Eleventh Amendment. What is important, however, is that Justice Brennan's "statutory" interpretation of Justice Iredell's dissent is more plausible than Justice Powell's "non-statutory" interpretation.

The Eleventh Amendment quickly followed *Chisholm*.[50] The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign Nation."[51] In *Welch*, Justice Powell's plurality opinion tersely opined that the text of the Eleventh Amendment is outcome determinative on the question of whether that amendment applies to federal causes of action. Justice Powell noted that the Eleventh Amendment refers to "any suit in law or equity," and therefore concluded that because federal question actions are such suits, the Eleventh Amendment applies to them.[52] Justice Powell's conclusion is no doubt plausible, but requires an ahistorical interpretation of the amendment and the concomitant transcendental

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[47] *Welch*, 483 U.S. at 516 (Brennan, J., dissenting) (emphasis in original).

[48] *Id.* at 510 n.16. Professor Massey agrees on that point. Massey, *supra* note 18, at 107.

[49] *Id.*

[50] *See generally* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 56-67 (1972).

[51] U.S. CONST. amend. XI.

[52] 483 U.S. at 485.

assumption that "any suit in law or equity" has a fixed meaning.[53] Justice Powell's interpretation also requires a reversal of *Ex parte Young*.[54]

By its limited textual terms, the Eleventh Amendment certainly does not appear to embody a sweeping notion of sovereign immunity. As Professor Fletcher cogently argues:

> The most plausible interpretation of the Eleventh Amendment thus appears to be that it was designed simply and narrowly to overturn the result the Supreme Court had reached in *Chisholm v. Georgia*. Under this interpretation, the adopters of the Amendment were following the traditions of common law lawyers in solving only the problem in front of them by requiring a limiting construction of the state-citizen diversity clause. . . . It therefore appears from the available evidence surrounding the drafting of the clause, from the decision in *Chisholm*, and from the passage of the Amendment that the adopters did not intend it to prohibit a broad range of cases with which they had so far had little or no experience and as to many of which they could then have had little clear idea.[55]

Professor Fletcher's historical analysis is more persuasive than the ahistorical, transcendental analysis of the *Welch* plurality. At the time of the passage of the Eleventh Amendment, there were no federal causes of action.[56] There is absolutely no reason to believe, therefore, that the drafters and ratifiers of the Eleventh Amendment intended to immunize states from federal or constitutional causes of action. Moreover, had the drafters and ratifiers intended such broad immunity, it is more reasonable to assume that they would have drafted an amendment that would have expressly barred suits by citizens of the defend-

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[53] *Compare* Justice Holmes' insightful observation that "a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918).

[54] 209 U.S. 123 (1908). Because a suit for injunctive relief is an equity action and because the Eleventh Amendment makes explicit reference to "any suit in law or equity," the injunction sought by the plaintiff in *Ex parte Young* would not be cognizable in federal court based on Justice Powell's reasoning.

[55] Fletcher, *supra* note 18, at 1065.

[56] It was not until 1875 that Congress vested the federal courts with general federal question jurisdiction similar to that which is now codified at 28 U.S.C. § 1331. *See Atascadero*, 473 U.S. at 294. Prior to this time, however, there were a few federal causes of action pursuant to specific federal laws. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818 (1824).

ant state who are more likely to be victims of lawless action by that state. Such an amendment, in fact, was proposed but was rejected.[57]

Justice Powell, a proponent of *Hans*, is also an inconsistent champion of "textual construction" in Eleventh Amendment analysis. By its terms, the Eleventh Amendment prohibits federal court jurisdiction only in two circumstances: where the plaintiff is a citizen of another state or is a citizen of a foreign nation. The text of the amendment does not prohibit jurisdiction if the plaintiff is a citizen of the defendant state; only a meta-textual construction of the Eleventh Amendment would prohibit jurisdiction under that circumstance.

B. *Hans v. Louisiana*

The destiny of the Eleventh Amendment was not to be consigned to a strict construction of the text itself. The Court in *Hans v. Louisiana*[58] divined that the Eleventh Amendment embodies the doctrine of sovereign immunity. *Hans* and the (faulty) premise it contains is the foundation of the Court's Eleventh Amendment doctrine.

In *Hans*, a Louisiana citizen sued the State of Louisiana to compel state officials to pay monies owed under state-issued bonds and coupons. The Court held that the doctrine of sovereign immunity immunized Louisiana from suit, and opined that a suit against an unconsenting state, even if brought by a citizen of the same state, was "unknown to the law . . . and not contemplated by the Constitution when establishing the judicial power of the United States."[59]

Justice Bradley, the author of *Hans*, purported to rely on Justice Iredell's *Chisholm* dissent. Bradley, however, mistakenly treated Iredell's dissent not as a jurisdictional opinion about the scope of the Judiciary Act of 1789, but rather as an opinion of constitutional law. As Professor Massey has correctly observed, "Bradley fused the concepts of state sovereign immunity and the Eleventh Amendment as a seemingly principled way to let Louisiana escape the consequences of its debts. Reasoning that it would be 'anomalous' to restrict the amend-

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[57] The very first version of the eleventh amendment read: "No state shall be liable to one made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of *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." PENNSYLVANIA JOURNAL, Feb. 20, 1793 (emphasis added). *See generally* Harris & Kenny, *supra* note 18, at 696-98.

[58] 134 U.S. 1 (1890).

[59] *Id.* at 15.

ment to its literal scope since the amendment had been intended to secure the prior understanding of a general grant of state sovereign immunity, Bradley simply ignored history and created the myth of the Eleventh Amendment's union with state sovereign immunity."[60]

Iredell's *Chisholm* dissent is best interpreted as a rejection of the majority's narrow holding that the Judiciary Act of 1789 vested the Supreme Court with original jurisdiction over common law contract claims by citizens of one state against another state. The rule of decision on the merits—whether some doctrine of sovereign immunity, from whatever source, protected Georgia from Chisholm's contract claim for damages—was never reached.[61] Thus, even if the Eleventh Amendment incorporated Iredell's *Chisholm* dissent, it should be interpreted as incorporating Iredell's jurisdictional opinion with regard to the Judiciary Act of 1789; it should not be interpreted as incorporating Iredell's "intimation" about an issue that was unnecessary to the majority's holding.

C. *Monaco v. Mississippi and Ex parte New York*

Hans was truly a landmark opinion. Prior to *Hans*, "there was not a single Supreme Court decision squarely holding that the Eleventh Amendment did more than deny federal jurisdiction based on party status when a state was sued by a non-citizen or an alien."[62] In *Hans*, the Court ignored the text of the Eleventh Amendment, and once that anchor was cut loose, the Court set sail adrift in the ethereal sea of sovereign immunity.

For example, in *Monaco v. Mississippi*[63] the Court reasoned:

> Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the Constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immuned from suits, without their consent, save

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[60] Massey, *supra* note 18, at 141.

[61] *See id.* note 18, at 103 ("The issue of whether local law or general common law might operate as the rule of decision on the merits and insulate the state from liability was reserved for another day. That day never came, for Georgia remained obdurate and the Eleventh Amendment prevented further development of the principles in question.").

[62] David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61, 79 (1984).

[63] 292 U.S. 313 (1934).

> where there has been 'surrender of this immunity in the plan of the convention.'[64]

Thus, the Court in *Monaco* held that foreign countries cannot sue states in federal courts, although nothing in the text of the Eleventh Amendment prohibits such suits.

The *Monaco* opinion is assailable not only on textual grounds but on logical grounds as well. It is a non sequitur to reason from the premise that the states "still possess attributes of sovereignty" to the conclusion that they "shall be immuned from suits."[65] Congress, the ultimate "sovereign," no doubt possesses attributes of sovereignty, but it is not immune from suit if it attempts to take private property for a public use without paying just compensation.[66] Thus, even if the states still possess some attributes of sovereignty, it does not follow that they can violate constitutional and federal rights with impunity.

In *Ex parte New York*,[67] the Court held that the Eleventh Amendment bars admiralty claims against states in federal court. For Justice Pitney, writing for the majority, the issue was easy. Pitney first asserted as his major premise the "fundamental rule of jurisprudence" that a state could not be sued without its consent.[68] Pitney next opined that the Eleventh Amendment "is but an exemplification" of this fundamental rule.[69] From these premises, and unanchored by *Hans*, Pitney could sail right by the language of the Eleventh Amendment and conclude that the Eleventh Amendment applies to admiralty suits.

> In *Hans v. Louisiana* . . . the court demonstrated the impropriety of construing the Amendment so as to leave it open for citizens to sue their own state in the federal courts; and it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a state in the admiralty jurisdictions by individuals, whether its own citizens or not.[70]

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[64] *Id.* at 322-23 (footnote omitted) (quoting THE FEDERALIST NO. 81) (Alexander Hamilton).

[65] The *Monaco* Court's unstated historical and normative assumptions about the concept of "sovereignty" are also assailable. Historically, the American concept of sovereignty referred to the people and not to the states. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 472 (1793).

[66] *See, e.g.*, United States v. Lee, 106 U.S. 196 (1882).

[67] 256 U.S. 490 (1921).

[68] *Id.* at 497.

[69] *Id.*

[70] *Id.* at 498.

The Court's unholy trinity of decisions in *Hans*, *Monaco*, and *Ex parte New York* are untethered to the Eleventh Amendment text. Indeed, those decisions are tantamount to a judicial rewriting of the Eleventh Amendment to avoid results the Court did not favor. These, however, were results that Congress did not prohibit. In those opinions the jurists turned hermeneuticians went "behind" the text of the Eleventh Amendment and divined "postulates which limit and control." From those invisible postulates, the Court deduced the "fundamental rule of sovereign immunity." The Court has since been able to conclude with procrustean logic that the federal courthouse doors are closed to a variety of claims not covered by the words of the Eleventh Amendment.

D. *Textually and Historically, The Highest-Ranked View of the Eleventh Amendment Rejects Hans*

Nothing in the text of the Eleventh Amendment indicates an intention to confer broad sovereign immunity on the states. Indeed, the amendment's silence as to suits brought by a state's own citizens more reasonably implies just the opposite conclusion. Moreover, the historical record does not support the "fundamental rule" of state sovereign immunity, but rather supports the position that the doctrine was antithetical to the early American experience.[71]

Although the text of the Eleventh Amendment refers to "any suit in law or equity," federal causes of action did not exist at the time of the passage of the Eleventh Amendment.[72] There is therefore no reason to believe that the Eleventh Amendment was intended to apply to cases arising under the Constitution or federal law. Only a transcendental interpretation of the Eleventh Amendment divorced from historical circumstances supports the Court's modern Eleventh Amendment doctrine. The best textual and historical analysis of the Eleventh Amendment supports Justice Brennan's conclusion that the Eleventh Amendment does not embody the doctrine of sovereign immunity and has nothing whatsoever to do with federal question jurisdiction. The Eleventh Amendment, a reaction to the holding of *Chisholm*, was intended only to narrow the citizen-state diversity clause of Article III.

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[71] *See supra* note 37.

[72] See *supra* note 56 and accompanying text.

II. THE COURT'S MODERN ELEVENTH AMENDMENT DOCTRINE AND ITS COLLATERAL EFFECT ON FEDERAL JURISDICTION

Monaco v. Mississippi and *Ex parte New York* suggest that the doctrine of sovereign immunity prohibits Congress from creating private causes of action against unconsenting states. The Court's more recent decisions, however, have held that the Eleventh Amendment prohibition is directed only at the power of the federal courts to hear certain types of cases in federal courts against unconsenting states.[73]

This subtle distinction is significant because it has led to an incoherent, bastardized form of sovereign immunity. On the one hand, the Court has held that the doctrine of sovereign immunity is a limit on the federal judiciary, but on the other hand, the Court has held that Congress has the plenary power to abrogate this immunity by the mere incantation of "unmistakable" words. This "abrogation theory" has evolved, as Justice Brennan observed in dissent in *Atascadero*,[74] from a requirement that Congress make its intention clear that it intends to abrogate sovereign immunity,[75] to a requirement that the intent be stated in the "most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction."[76] The test was then stepped up to a requirement of "an unequivocal expression of congressional intent,"[77] and finally to the requirement articulated in *Atascadero* that Congress, "in unmistakable language in the statute itself,"[78] demonstrate its intent to abrogate the states' sovereign immunity.[79]

Each time the court ratchets up the abrogation requirement, another right litters the legal landscape.[80] The victims have included pur-

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[73] *See, e.g., Atascadero*, 473 U.S. at 238, where the Supreme Court declared that the significance of the Eleventh Amendment "lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."

[74] 473 U.S. at 253-54 (Brennan, J., dissenting).

[75] Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973).

[76] Edelman v. Jordan, 415 U.S. 651, 673 (1974).

[77] Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984).

[78] *Atascadero*, 473 U.S. at 243.

[79] The Court's novel but unsound approach to statutory construction in Eleventh Amendment cases eschews an attempt to discern legislative intent and instead imposes upon Congress a judicially-created standard for statutory *drafting*. *See generally* Harris & Kenny, *supra* note 18, at 676-78. If federalism wins (and it does not), separation of powers loses.

[80] At common law it was axiomatic that, where there is a right, there is a remedy ("*Ubi jus, ibi remedium*"). *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23, 109 (1765-69).

chasers of state-issued bonds and coupons,[81] beneficiaries of the Fair Labor Standards Act[82] and of the Aid to the Aged, Blind and Disabled Act,[83] beneficiaries of the Rehabilitation Act of 1973,[84] holders of copyrights,[85] and victims of antitrust violations.[86] Individual rights and liberties have not been the only casualties of the Court's convoluted Eleventh Amendment doctrine. "Collateral damage" has also been inflicted on fundamental tenets of federal jurisdiction.

A. *The Court's Equity/Damages Distinction*

Once the Supreme Court cut loose from its textual moorings in *Hans*, it created the opportunity for conflict, confusion, and inconsistency in federal jurisdiction decisional law. That opportunity has been realized.

In *Ex parte Young*,[87] the Court backed away from its previously-espoused fealty to sovereign immunity in *Hans* and held that a suit for injunctive relief against a state official who acted beyond the scope of his authority was not barred by the Eleventh Amendment.[88] The Court reasoned that such injunctive relief against an ultra vires state official was not a suit against the state for the purposes of the Eleventh Amendment.[89] Astonishingly, however, the action was found to be a suit against the state for the purposes of the Fourteenth Amendment.[90] With the mere expedients of stipulative definition, Humpty-Dumpty logic and legal fiction, the Court was able to avoid the consequences of its holding in *Hans* that the Eleventh Amendment embodies the doctrine of sovereign immunity.[91] *Ex parte Young*, however, has led to tangled webs of paradox and doctrinal confusion. Although *Ex parte*

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[81] *See, e.g.*, Hans v. Louisiana, 134 U.S. 1 (1890).

[82] Employees of the Dep't of Public Health & Welfare v. Missouri Dep't of Public Health & Welfare, 411 U.S. 279 (1973).

[83] Edelman v. Jordan, 415 U.S. 651 (1974).

[84] *Atascadero*, 473 U.S. 234.

[85] BV Engineering v. Univ. of Cal., 657 F. Supp. 1246 (C.D. Cal. 1987).

[86] Mizlou Television Network v. National Broadcasting Co., 603 F. Supp. 677 (D.D.C. 1984).

[87] 209 U.S. 123 (1908).

[88] *Id.*

[89] *Id.*

[90] *See generally* Harris & Kenny, *supra* note 18, at 661-62.

[91] *Ex parte Young* is just one of the many Supreme Court Eleventh Amendment decisions that utilizes the rhetorical techniques of stipulative definition and dubious logic. *See* Spicer v. Hilton, 618 F.2d 232, 235 (3d Cir. 1980) ("Any step through the looking glass of the Eleventh Amendment leads to a wonderland of judicially created and perpetuated fiction and paradox.").

Young has been described as "one of the cornerstones of the Court's Eleventh Amendment jurisprudence,"[92] that characterization is of dubious distinction because the Court's pragmatic but unprincipled reasoning in *Ex parte Young*[93] has led to absurd results.[94]

For example, in *Edelman v. Jordan*,[95] the Court held that a class of intended welfare recipients could not sue state officials for retroactive payment of benefits. The *Edelman* Court reasoned that the imposition of such liability payable from the state treasury was barred by the Eleventh Amendment.[96] The Court, however, left undisturbed the district court's ruling that the plaintiffs could sue the state officials for prospective injunctive relief, including payment of the benefits.

Although *Edelman* might represent a good attempt at political compromise, it is eminently assailable as a matter of constitutional principle. The Court clearly attempted to provide some protection to state treasuries from damages claims,[97] but the artificial distinction the Court conjured up between retroactive monetary relief and prospective monetary relief could only partially serve that dubious objective.[98] Moreover, an injunction has an "obvious impact on the State itself,"[99] and an injunction that orders future remedial action could threaten

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[92] Florida Dept. of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) ("there is a well-recognized irony in *Ex parte Young*; unconstitutional conduct by a state officer may be 'state action' for purposes of the Fourteenth Amendment yet not attributable to the state for purposes of the Eleventh. Nevertheless, the rule of *Ex parte Young* is one of the cornerstones of the Court's Eleventh Amendment jurisprudence.").

[93] Harris and Kenny, *supra* note 18, at 662-63.

[94] Law students are taught that Ralph Waldo Emerson believed that a "foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines." Ralph Waldo Emerson, *Self-Reliance, in* 1 THE NORTON ANTHOLOGY OF AMERICAN LITERATURE 895 (Nina Baym et al. eds., 1985). An "unfoolish" consistency, however, is a worthy objective. That inconsistent propositions can prove most anything is demonstrated by a story Jacob Bronowski tells of Bertrand Russell. Russell started with the proposition that 2 equals 1. Challenged to prove that he (Russell) was the pope, Russell reasoned, "the pope and I are two, but two equals one, therefore the pope and I are one." JACOB BRONOWSKI, THE ORIGINS OF KNOWLEDGE AND IMAGINATION 79 (1978).

[95] 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974).

[96] *Id.* at 678.

[97] *See infra* text accompanying notes 98-100 for a critique of the normative basis for such a policy goal.

[98] Even the *Edelman* Court recognized the speciousness of this distinction when it noted in a classic case of British understatement that the difference between retroactive monetary relief and prospective monetary relief "will not in many instances be that between night and day." *Edelman*, 415 U.S. at 667. *See generally* Harris and Kenny, *supra* note 18, at 661-63.

[99] *Pennhurst*, 465 U.S. at 104.

state treasuries far more than a retroactive award of monetary damages.[100]

B. *Subject Matter Jurisdiction and The Waiver Exception*

In *Atascadero*, the Supreme Court reiterated that the significance of the Eleventh Amendment " 'lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III' of the Constitution."[101] The Court then curiously noted that states can waive their (jurisdictional) sovereign immunity by consenting to suit in federal court.[102] This "waiver" exception is completely contrary to established principles of federal court jurisdiction.

It is an axiomatic principle of federal court jurisdiction that parties cannot by consent confer subject matter jurisdiction on a federal court.[103] Either the federal courts have subject matter jurisdiction over certain types of claims, or they do not; the willingness of the parties to litigate in the federal forum is simply irrelevant to the issue of subject matter jurisdiction. The Court's Eleventh Amendment "waiver" exception disregards this jurisdictional tenet.

C. *The Abrogation Exception and Marbury v. Madison*

Since *Marbury v. Madison*[104] it has been the law that Congress does not have the power to expand federal court jurisdiction at the expense of a constitutional restriction.[105] In *Pennhurst*, the Court held that the Eleventh Amendment "is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts."[106] Thus, based on *Marbury v. Madison*

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[100] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267, 288-90 (1977) (holding that the Eleventh Amendment is no bar to an injunction against the Governor of Michigan ordering him to pay a share of the costs of court-ordered remedial desegregation of schools); Graham v. Richardson, 403 U.S. 365, 370, 379-80 (1971) (holding that Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified applicants who were aliens).

[101] 473 U.S. at 238 (quoting *Pennhurst*, 465 U.S. at 98) (*Pennhurst II*).

[102] *Id.*

[103] Sonsa v. Iowa, 419 U.S. 393, 398 (1975); Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

[104] 5 U.S. (1 Cranch) 137 (1803).

[105] *See generally* Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 653 (1985) ("[I]f the Eleventh Amendment is treated as a constitutional restriction, Congress may not override it and authorize suits against the states.").

[106] 465 U.S. 89, 120 (1984).

and *Pennhurst*, it would be logical to assume that Congress cannot create causes of action against states covered by the Eleventh Amendment.[107] The Court has held, however, that Congress can subject states to suit in federal court as long as Congress incants talismanic statutory words.

Thus, in *Atascadero* the Court affirmed "that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."[108] The clear implication is that the Eleventh Amendment does not prohibit the expansion of federal court jurisdiction; it merely conditions the way in which the expansion can occur.

Justice Scalia dissenting in *Union Gas* recognized this anomaly: "If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all."[109] In *Union Gas*, Justice Brennan, for once writing for the majority in an Eleventh Amendment decision,[110] held that Congress has the Article I authority pursuant to the Commerce Clause to create a cause of action for money damages against unconsenting states, and also held that the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[111] as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[112] unmistakably in the text of those statutes abrogates the states' sovereign immunity.

Justice Brennan does not believe that the Eleventh Amendment embodies the doctrine of sovereign immunity, nor does he believe that the Eleventh Amendment places any limitations on Congress' power to

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[107] *See* Harris & Kenny, *supra* note 18, at 673.

[108] 473 U.S. at 242.

[109] Pennsylvania v. Union Gas Co., 491 U.S. 1, 36 (1989) (Scalia, J., concurring in part, dissenting in part).

[110] Justice Brennan was a consistent and steadfast critic of the Court's Eleventh Amendment decisions. *See, e.g.*, Employees v. Dep't. of Public Health & Welfare, 411 U.S. 279, 309 (1973) (Brennan, J., dissenting) ("I emphatically question . . . that sovereign immunity is a constitutional limitation upon the federal juridical power to entertain suits against states."). In his most famous Eleventh Amendment dissent, Justice Brennan wrote:

> Because I believe that the doctrine rests on flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect, I believe that the Court should take advantage of the opportunity provided by this case to reexamine the doctrine's historical and jurisprudential foundations.

Atascadero, 473 U.S. at 248 (Brennan, J., dissenting).

[111] 42 U.S.C. § 9601-9675 (1988).

[112] Pub. L. No. 99-499, 100 Stat. 1613 (1986).

create federal causes of action for money damages against unconsenting states.[113] These beliefs may explain in part Justice Brennan's majority opinion in *Union Gas*. But if indeed the Eleventh Amendment is a constitutional restriction on Article III, then Justice Scalia is right that *Union Gas* has failed to "clean up the allegedly muddled Eleventh Amendment jurisprudence produced by *Hans*, . . . and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers."[114]

The problem, however, goes back to *Hans* and the Court's metatextual interpretation of the Eleventh Amendment in that case. The Court there held that the Eleventh Amendment applies to federal question cases and embodies a royal notion of sovereign immunity. Although the former can be divined with a hyper-technical reading of the text divorced from historical circumstances,[115] the latter was divined from whole cloth. Since *Hans*, the Supreme Court has struggled in case-after-case to avoid the undesirable consequences it compels, and as a result, the Court's Eleventh Amendment cases have played havoc with fundamental tenets of federal jurisdiction.

If Justice Brennan's view of the Eleventh Amendment were accepted, the Eleventh Amendment would not embody any notion of sovereign immunity, nor would it have anything whatsoever to do with federal question jurisdiction, but rather would merely narrow the state-citizen diversity clause of Article III. If Justice Brennan's view were accepted, the legal legerdemain engendered by *Ex parte Young* would be unnecessary and there would be no need for "waiver" and "abrogation" exceptions to an amendment that would otherwise close the federal courthouse doors to citizens whose constitutional and federal rights have been violated by government lawbreakers. The next section considers the principal reasons why *Hans* has survived.

III. THE INSTITUTIONAL CONCERNS OF FEDERALISM AND STARE DECISIS

A. *Federalism And The Eleventh Amendment*

In *Atascadero*, the five-member majority opined that "the Eleventh Amendment implicates the fundamental constitutional balance be-

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[113] *See* Justice Brennan's prodigious dissent in *Atascadero*, 473 U.S. at 247-302.

[114] See *Union Gas* 49 U.S. at 44-45.

[115] *See supra* notes 58-61, and accompanying text.

tween the Federal Government and the States,"[116] and expressed the belief "that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution."[117] The Court went on to assert that, "by *guaranteeing* the sovereign immunity of the States against suit in federal courts, the Eleventh Amendment served to maintain this balance."[118] Based on the Court's articulated abrogation theory in *Atascadero*, however, the Eleventh Amendment's "guarantees" are hollow indeed.[119]

If the Eleventh Amendment truly embodied a broad notion of state sovereign immunity, as suggested by *Hans* and its progeny, would Congress (i.e., the Federal Government) really be able to demolish that immunity, as it did under CERCLA and SARA, simply by asserting its will?[120] To the extent there was any doubt as to the answer to that question, the Court in *Union Gas* resolved the doubt by holding that Congress has the power to create federal causes of action for money damages against states when it legislates pursuant to its Article I Commerce Clause powers.[121] The Eleventh Amendment's "guarantee," therefore, is feckless.

Worse, the application of the so-called guarantee is antithetical to its stated justification. The "balance" between the states and the national government, the *Atascadero* majority noted, is "mandated" to "ensure the protection of 'our fundamental liberties.' "[122] The Court's Eleventh Amendment doctrine, however, serves only to "ensure" that governmental lawbreakers, the monopolists of legal power, are *legibus solutus* and thus shielded from money damages when they violate their citizens' constitutional and federal rights. The *Atascadero* decision, for example, deprived a handicapped individual of redress under the Title

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[116] 473 U.S. at 238.

[117] *Id.* at 238-39 n.1.

[118] *Id.* at 242 (emphasis added).

[119] Moreover, how is sovereign immunity "guaranteed" if Congress can create causes of action against states which can be litigated in state courts?

[120] In his *Union Gas* dissent, Justice Scalia recognized this "loophole" which was created by the *Hans*-supporters on the Court. As he succinctly stated the matter: "If *Hans* means only that federal-question suits for money damages against the States cannot be brought in federal court unless Congress clearly says so, it means nothing at all." 491 U.S. at 36. (Scalia, J., concurring in part, dissenting in part).

[121] 491 U.S. at 23.

[122] 473 U.S. at 242 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) (Powell, J., dissenting)).

V of the Rehabilitation Act of 1973.[123] Thus, while abstract liberties are preserved, concrete liberties are denied.

Finally, as the Court held in *Garcia v. San Antonio Metropolitan Transit Authority*,[124] it is not the province of the Court to arbitrate the "balance" of power between the states and the national government.

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[125]

Garcia expressly overruled *National League of Cities v. Usery*,[126] which had held that the Tenth Amendment[127] prevented Congress from regulating the "States as States"[128] pursuant to its Commerce Clause powers.

In *Garcia*, the Court held that the "freestanding" concept of state sovereignty does not restrict Congress from exercising its Commerce Clause powers.[129] Thus, the Court held:

> Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."[130]

Since the Court decided *McCulloch v. Maryland*,[131] it has been clear that the balance of power between the states and the national government has been "tilted" in favor of the national government. The

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[123] 29 U.S. § 794 (1982) as amended.

[124] 469 U.S. 528 (1985).

[125] *Id.* at 552.

[126] 426 U.S. 833 (1976).

[127] The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[128] 426 U.S. at 845.

[129] 469 U.S. at 550.

[130] *Id.*. at 554 (quoting Equal Employment Opportunity Comm'r v. Wyoming, 460 U.S. 226, 236 (1983) (holding that the Tenth Amendment does not preclude application to the states of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987)).

[131] 17 U.S. (4 Wheat.) 316 (1819).

American experience with the Articles of Confederation demonstrates the wisdom of that tilt. The Court's focus on "balance" in Eleventh Amendment cases not only ignores that experience, it, unlike the Court's *Garcia* decision, preempts the political process. The Court's misguided efforts have been more than matched by their ineffective solutions, which have provided the states with hollow guarantees of state immunity while at the same time undermining the very liberties the balance is supposed to protect.

B. *Stare Decisis And The Eleventh Amendment*

The second institutional justification for adhering to the Court's inert Eleventh Amendment doctrine is the doctrine of stare decisis. This malleable, chameleon-like doctrine serves all persons for all purposes. For example, in *Atascadero*, (now) Chief Justice Rehnquist and Justices White and O'Connor joined Justice Powell's majority opinion which stated that nothing less than that the rule of law depends on the doctrine of stare decisis.[132] These same Justices joined Justice Powell's plurality opinion in *Welch* reiterating that belief.[133]

Notwithstanding the sanctity of the rule of law rationale, Chief Justice Rehnquist, joined by Justices White and O'Connor, opined in *Payne v. Tennessee*[134] that when the Court believes that "governing decisions are unworkable or are badly reasoned, '[it] has never felt constrained to follow precedent.' "[135] In *Payne*, the Court, in a swift volt-face, overruled *Booth v. Maryland*[136] and *South Carolina v. Gathers*[137] and held that the Eighth Amendment does not prohibit a capital sentencing jury from considering victim impact evidence.

In *Planned Parenthood of Southeast Pennsylvania v. Casey*,[138] Chief Justice Rehnquist wrote almost disdainfully about the doctrine of

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[132] 473 U.S. at 243-44 n.3.

[133] 483 U.S. at 478-79.

[134] 111 S. Ct. 2597 (1991).

[135] *Id.* at 2609 (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)). The Chief Justice has reflected more recently on the doctrine of Stare Decisis: "Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question." Planned Parenthood of Southeast Pennsylvania v. Casey, 112 S. Ct. 2791, 2861 (1992) (Rehnquist, C.J., concurring in the judgment and dissenting in part) (citing West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 642 (1943); Erie R. Co. v. Tompkins, 304 U.S. 64, 74-78 (1938)).

[136] 482 U.S. 496 (1987).

[137] 490 U.S. 805 (1989).

[138] 112 S. Ct. 2791 (1992).

stare decisis in constitutional cases, opining that "the simple fact that a generation or more had grown used to these major decisions did not prevent the Court from correcting its errors in those cases, nor should it prevent us from correctly interpreting the Constitution here."[139] Rehnquist noted that "[o]ver the past 21 years, for example, the Court has overruled in whole or in part 34 of its previous constitutional decisions."[140] In language that is consistent with the argument propounded in this article, the Chief Justice noted that " 'in cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "[141]

In *Union Gas*, Justice Scalia wrote eloquently about *Hans* and the "mere venerability of an answer consistently adhered to for almost a century."[142] This same Justice Scalia wondered in *Payne v. Tennessee* whether the doctrine of stare decisis "rests upon anything more than administrative convenience."[143]

Notwithstanding some of the forensic uses to which the doctrine of stare decisis is susceptible, there is no need to marginalize or trivialize the doctrine in the context of the Eleventh Amendment.[144] One need not subscribe to Justice Holmes' pungent remark that "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,"[145] to conclude that both logic and experience revolt against the history of *Hans* and its progeny.

The Court has noted that "any departure from the doctrine of stare decisis demands special justification,"[146] but that the doctrine is "not rigidly observed in constitutional cases."[147] In *Payne v. Tennessee*, Chief Justice Rehnquist opined that "stare decisis is not an inexorable

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[139] *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment and dissenting in part). Justices White, Scalia, and Thomas joined the Chief Justice's opinion.

[140] *Id.* at 2863.

[141] *Id.* at 2861 (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting)).

[142] 491 U.S. at 34.

[143] 111 S. Ct. at 2613 (Scalia, J., concurring in part, dissenting in part).

[144] For an excellent general discussion of the doctrine of stare decisis, *see* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987). For a more philosophical discussion, *see* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L. J. 1029 (1990).

[145] OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 187 (1920).

[146] Arizona v. Rumsey, 467 U.S. 203, 212 (1984).

[147] Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 479 (1987).

command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' "[148] While voting to overrule *Booth v. Maryland*[149] and *South Carolina v. Gathers*,[150] Chief Justice Rehnquist observed that those cases "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by members of the Court in later decisions. . . ."[151]

Based on these considerations, there is no institutional imperative to adhere to *Hans* and the Court's Eleventh Amendment doctrine.[152] Special justifications exist to overrule *Hans* and the Court's Eleventh Amendment doctrine because *Hans* is unanchored to the text of the Eleventh Amendment, is contrary to our country's historical experience, is unworkable, and is badly reasoned. Consequently, it has created a muddle of federal jurisdictional tenets and undermines the very liberties it purports to protect. *Hans* continues to be opposed by numerous Justices and the overwhelming number of scholars who have written directly on the subject. Moreover, as demonstrated in the next section, *Hans* and its version of sovereign immunity also offend the moral underpinnings of limited, representative government.[153]

So why has *Hans* survived? What is it that *Hans* and the Court's other Eleventh Amendment decisions insist on protecting, notwithstanding all of the inconsistencies and difficulties they have spawned, which would justify fealty to the doctrine of stare decisis? The Court in *Atascadero* referred to the balance between the states and the national government, but that balance receives scant protection from the Court's Eleventh Amendment doctrine which holds that Congress may abrogate state sovereign immunity virtually whenever it wishes.[154] Moreover, the proffered justification for the protection of the bal-

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[148] 111 S. Ct. at 2609-10.

[149] 482 U.S. 496 (1987) *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

[150] 490 U.S. 805 (1989) *overruled by* Payne v. Tennessee, 111 S. Ct. 2597 (1991).

[151] *Payne*, 111 S. Ct. at 2611.

[152] In *Atascadero*, Justice Powell claimed that overturning the Court's Eleventh Amendment doctrine would require overruling 17 Supreme Court decisions. *Atascadero*, 473 U.S. at 243-44 n.3. Professor Jackson has responded to Justice Powell's claim by suggesting that it is "overblown." Jackson, *supra* note 18, at 119.

[153] *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) ("[Sovereign immunity] is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State."); Shapiro, *supra* note 62, at 85 ("the notion of the state's immunity from suit is itself the fiction, one that never properly stands in the way of ultimate vindication of the rights of the individual against the state.").

[154] *See supra* notes 120-21 and accompanying text.

ance—the protection of individual liberties—is undermined by the very doctrine that would protect those liberties.[155] Finally, it is difficult to understand how the national government would aggrandize political power that would otherwise remain with state governments if individual citizens are allowed to litigate against state governments in federal court when those governments violate constitutional and federal rights.

The best reason, the "special justification," for departing from the doctrine of stare decisis and overruling *Hans* is the rule of law. *Hans* and its progeny have closed the federal courthouse doors to "We the People" when those who possess a monopoly on legal power, our agents, have violated our constitutional and federal rights. It is manifestly not "Our Federalism" and consequently not our individual liberties that have been protected by the Court's Eleventh Amendment doctrine. Rather, the Court has protected state treasuries and an abstract conception of state rights from the consequences of government lawlessness. Such protection cheats concrete individuals, makes *our* "sovereign" less accountable to We the People, and consequently undermines the rule of law.

IV. THE NATURE OF SOVEREIGNTY IN A LIMITED REPRESENTATIVE GOVERNMENT

In a representative government, the question arises: who is the sovereign and what is the nature of its power? Professor Epstein, in his book TAKINGS,[156] forcefully argues that "representative government begins with the premise that the state's rights against its citizens are no greater than the sum of the rights of the individuals whom it benefits in any given transaction."[157] This notion of representative government, expressed so eloquently in the Declaration of Independence, rejects legal positivism and assumes, correctly, that individuals have certain rights and liberties that are not mere creatures of the state. Correlatively, there are certain rights and liberties that the state cannot strip with impunity.

Epstein's "natural law" theory insists that "individual rights (and their correlative obligations) exist independent of agreement and prior

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[155] *See supra* text accompanying notes 121-22.

[156] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[157] *Id.* at 331.

to the formation of the state."[158] These rights include private property and personal liberty; the normative justification for the existence of the sovereign is to preserve and expand these rights, not to "create" or to diminish them.[159] Epstein recognizes, as did the founding fathers,[160] that government is a necessary evil because of the precariousness that would characterize life in the absence of effective government.

Critical to the concept of sovereignty is the "transfer" from a world without government (the so-called state of nature) to the world with government. According to Thomas Hobbes, life offers us a Hobson's choice: either we can live in a state of nature where the condition of life is "solitary, poore, nasty, brutish and short,"[161] where life is a perpetual state of war "of every man against every man,"[162] or we can mutually agree to surrender unconditionally all of our rights to an absolute sovereign. This solution is not even "Pareto optimal," because while many people will be better off by the move, the most brutish, the nastiest, and the strongest stand to be made worse off. The real winner in the Hobbesian transfer is the "sovereign" whose absolute power negates "fiduciary" or other "agency" duties it should have to the people (i.e., his subjects). In a Hobbesian world there are no "moral side constraints" on the sovereign's behavior because, by definition, the sovereign can do no "wrong." *A fortiori*, the sovereign could not be made to account to his subjects in a court of law, much less be subjected to money damages for unlawful (a meaningless concept) behavior.

Hobbes' conception of sovereignty is a drastic solution to the world without government. His solution certainly is not the model for our Constitution and Bill of Rights, but his "transfer methodology" from the state of nature to a sovereign community has had a powerful influence on natural rights thinkers.

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[158] *Id.* at 334.

[159] *Id.* at 4-5. This position with regard to a "just government" is consistent with the positions advocated by two modern influential political theorists. *See, e.g.*, John Rawls, A THEORY OF JUSTICE 302 (1971) (arguing that the principles of justice that would be chosen by free and rational men are equal rights to the most extensive total system of basic liberties, equality of opportunity, and social and economic inequalities, but only if they maximize the benefit of the least advantaged class); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 29 (1974) (arguing that the state exists to protect individuals' natural rights).

[160] THE FEDERALIST NO. 51, at 160 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966) ("If men were angels, no government would be necessary.").

[161] *Id.* at 7 (quoting THOMAS HOBBES, LEVIATHAN, ch. 13 (1651)).

[162] *Id.*

John Locke utilized Hobbes' transfer methodology of contractarian logic to justify a civil government.[163] Professor Epstein has succinctly summarized the similarities in Hobbes and Locke,

> Locke did not challenge the form of Hobbes's argument but only sought the terms of the contract whereby individuals assumed sovereign power. The Hobbesian solution was in essence a compact among all individuals to renounce force against each other save in cases of immediate self-defense.[164]

and the differences,

> In contrast, Locke searched for the *tertium quid*, that is, for a set of institutional arrangements that would allow individuals to escape the uncertainty and risks of social disorder without having to surrender to the sovereign the full complement of individual rights. Stated in more modern terms, Locke sought to create a sovereign that could maintain good order without extracting monopoly rents from the exclusive legitimate use of force.[165]

Locke's genius was in the formulation of an institutional solution that preserved natural rights, which are not derived from the sovereign.[166] This institutional solution was Locke's theory of representative government.

> [The legislature] is not nor can possibly be absolutely arbitrary over the lives and fortunes of the people. For it being the joint power of every member of society given up that person, or assembly, which is legislator, it can be no more than those persons had in a state of nature before they entered into society, and gave it up to the community. For nobody can transfer to another more power than he has in himself; and nobody has an absolute arbitrary power over himself, or over any other to destroy his own life, or to take away the life or property of another.[167]

As Epstein has accurately noted, Locke "demystified" the sovereign, because "at every stage he is required to justify his own assertion

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[163] *Id.* at 9 (quoting JOHN LOCKE, OF CIVIL GOVERNMENT (1690)). Epstein agrees with much of Locke's theory but would substitute Locke's contractual theory and its corollary tacit consent, for a theory of "forced exchanges." Epstein, *supra* note 156, at 14-15.

[164] Epstein, *supra* note 156, at 9.

[165] *Id.* at 9-10.

[166] *Id.* at 12 (quoting JOHN LOCKE, OF CIVIL GOVERNMENT (1690)).

[167] *Id.*

of power."[168] The nature of sovereignty is limited and representational because "the rights of government are derived only from the individuals whom it represents in any given transaction."[169] The ascription of sovereignty to the people is a moral claim that aspires to be a political fact.

The Lockean theory of representative government, therefore, avoids the unacceptable either/or alternatives presented by Hobbes. The institutional solution of a limited, representative government recognizes that individuals have natural rights and attempts to preserve and expand those rights through the mechanism of civil government.[170] The sovereign, which derives its rights and powers from the citizenry, is responsible to and accountable to the citizens, and is not immune from the consequences of lawless behavior.[171] In a limited, representative government, the state is and should be accountable to an individual if it violates the individual's rights. Because in a limited, representative government, the sovereign is not some political abstraction that exists apart from the citizens; in a limited, representative government, the citizens can make the moral claim: *L'etat, c'est moi.*

V. WELTANSCHAUUNG

In *Union Gas*, Justice Scalia predicted that the Court "shall either overrule *Hans* in form as well as in fact, or return to its genuine meaning."[172] There is no doubt that the path the Court chooses will dramatically effect how our constitutional world will look.

If the Court reaffirms *Hans* and its modern Eleventh Amendment doctrine (excepting *Union Gas*), states will be able to continue to inflict economic injury with impunity by depriving citizens of constitutional and federal rights. The Court will be able to continue to convolve established principles of federal jurisdiction, conjuring up and perpetuat-

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[168] Epstein, *supra* note 156, at 13.

[169] *Id.* at 12.

[170] As Professor Epstein argues, "the implicit normative limit upon the use of political power is that it should preserve the relative entitlements among the members of the group, both in the formation of the social order and in its ongoing operation. All government action must be justified as moving a society from the smaller to the larger pie." *Id.* at 4.

[171] This Lockean theory of limited, representative government, as Epstein notes, was "dominant" at the time of the Constitution, *see* Epstein, *supra* note 156, at 16, which, as Alexander Hamilton recognized, "is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." THE FEDERALIST No. 8, at 515 (Alexander Hamilton) (Mentor ed., 1961). *See also* Epstein, *supra* note 156, at 16.

[172] 491 U.S. at 45 (Scalia, J., concurring in part, dissenting in part).

ing legal fictions and paradoxes with foudroyant flair. If the Court reaffirms *Hans*, concrete individual liberties will continue to be sacrificed at the altar of an abstract theory of states rights, and the Court can ossify once and for all a Hobbesian theory of state sovereignty.

Or, the Court can visualize the world from the perspective of the rule of law which takes rights seriously. The Court can overrule *Hans* and proclaim that the concept of sovereign immunity is an anachronism that has no moral place in a democratic society. The Court can eschew the webs of fiction and paradox in federal jurisdiction made necessary by *Hans* and its progeny. Finally, the Court can pronounce that because the doctrine of stare decisis exists to facilitate the rule of law, which requires respect for individual rights and liberties and not a slavish adherence to a senile doctrine, *Hans* must go the way of other "unworkable" and "badly reasoned" precedents.[173]

CONCLUSION

The highest-ranked view of the Eleventh Amendment rejects the notion that the Eleventh Amendment embodies the doctrine of sovereign immunity, and accepts the view that the Amendment has nothing whatsoever to do with federal question jurisdiction. *Hans* should be overruled not because it is wrong, but because our constitutional world would, in its absence, be a more desirable place in which to live.

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[173] *See* Planned Parenthood of Southeast Pennsylvania v. Casey, 112 S. Ct. 2791, 2861 (1992); Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991).