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ARTICLES

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GENE R. SHREVE*

I. THE SETTING

In *Pennsylvania v. Union Gas Co.*, the Supreme Court must decide whether a private party can claim damages against a state in federal superfund litigation. The case involves some of the most debated and intellectually compromised doctrine under the Constitution, that interpreting the eleventh amendment. The issues that the parties have framed in *Union Gas* are (1) whether the eleventh amendment ever protects an unconsenting state from federal suit by its own citizens; (2) if so, whether Congress has authority under the commerce clause of article I to suspend the amendment; (3) if so, whether Congress did that in the Superfund Act.

Most significant of the three, the first issue is certain to revive longstanding conflict on the Court over adherence to eleventh amendment precedent.

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3. See, e.g., L. Tribe, *American Constitutional Law* 173 (2d ed. 1987) (The Court’s decisions are marked by “resort to legal fictions” reached through “complex and often counterintuitive interpretations of the eleventh amendment that have made that amendment far more controversial than its language would, on its face, suggest.”); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) (The same are “little more than a hodgepodge of confusing and intellectually indefensible judge-made law.”).
barring citizen suits. Whether states should be immune to such suits has been much debated in the literature. Rather than add to that debate, this paper takes a different course. My thesis is that the quality of the state immunity dialogue suffers from the tendency of both sides to overstate the significance of the eleventh amendment. I will suggest why it may be equally wrong either to claim general sanctuary for states in the eleventh amendment or to suggest that, when the eleventh amendment does not protect states from federal suit, they enjoy no protection under the Constitution. From this perspective, Union Gas creates an opportunity in danger of being overlooked: to improve the quality of state immunity law by letting go of the eleventh amendment.

The eleventh amendment owes its existence to Chisholm v. Georgia. The Supreme Court applied the federal judicial power under article III of the


5. The term "sovereign immunity" is often used to describe law setting the degree to which states are to be exposed to federal suit. See, e.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1467 (1987). Yet the idea of state sovereign immunity in federal court seems a little confusing in this context; the only authority sovereign in the sense of limiting the extent to which it may be sued in its own courts is the United States. On sovereign immunity enjoyed by the United States, see generally Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 29-39 (1963); Webster, Beyond Federal Sovereign Immunity: 5 U.S.C. § 702 Spells Relief, 49 Ohio St. L.J. 725 (1988); Developments in the Law—Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827 (1957). None of this is to say, of course, that states should not be entitled to a measure of immunity to federal suit secured by the Constitution. See infra Conclusion.

6. See infra notes 33-72 and accompanying text.

7. See infra Conclusion.


Constitution to adjudicate a damage action by a South Carolinian against the State of Georgia. States might enjoy sovereign immunity in their own courts but had to yield to federal judicial power. This conclusion was not obvious from the text of the Constitution or the ratification debates. Quite unpopular, Chisholm was squarely overruled by the eleventh amendment five years later. The amendment became part of the constitutional law of federal subject matter jurisdiction for article III courts.

Let us consider the state immunity controversy into which the eleventh amendment has been drawn.


11. The amendment was presented in the Senate within two days of the decision. J. SCHMIDHAUSER, supra note 10, at 20. Initiatives in the House of Representatives were also prompt. Fletcher, supra note 4 at 1058-59. Some three weeks later both houses had proposed the amendment. J. ORTH, supra note 8, at 20. “[L]ess than a year after its proposal, the requisite number of state legislatures had acted favorably.” Id. “Certification of action by the ratifying states was extremely erratic, however, and for this reason the amendment was not immediately recognized as part of the Constitution.” C. JACOBS, supra note 8, at 67.

Denying federal judicial power for suits “against one of the United States by Citizens of another State,” the amendment reflects the feature in Chisholm of suit against Georgia by a South Carolinian. Why the amendment imposes the same disability on “Citizens or Subjects of any Foreign State” is less clear. It may reflect the impression, discussed in Orth, The Interpretation of the Eleventh Amendment, 1798-1908, 1983 U. ILL. L. REV. 423, 427, that Chisholm was brought by a British subject.


13. Article III creates and, by implication, limits federal judicial power. The eleventh amendment only limits it. In certain respects, however, the limitations added by the amendment are less rigid than the kind imposed by article III.

Parties cannot confer subject matter jurisdiction lacking under article III through waiver or consent, e.g., United States v. Johnson, 319 U.S. 302 (1943), but a defendant state can waive objection or consent to federal jurisdiction in a suit otherwise barred by the eleventh amendment, e.g., Welch v. Texas Dep’t of Highways & Pub. Transp., 107 S. Ct. 2941, 2945 (1987) (plurality opinion).

Similarly, Congress may not create jurisdiction for article III courts beyond the limits set in the article. E.g., Verlinden B.V. v. Bank of Nigeria, 461 U.S. 670, 491 (1983); Hodgson v. Bowerback, 9 U.S. (3 Cranch) 303 (1809) (Congress cannot confer jurisdiction on courts it creates under article III of a kind not described in the article.); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (Congress cannot enlarge the original (viz. nonappellate) jurisdiction conferred on the Supreme Court by article III.). But Congress may deny states eleventh amendment protection, so long as Congress makes its intent to do so “unmistakably clear in the language of the statute.” Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). Congress can suspend the eleventh amendment when it acts under § 5 of the fourteenth amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). Whether it has the same power when legislating under article I is an open question, Welch, 107 S. Ct. at 2948 n.8, one the Supreme Court could resolve in the pending Union Gas case. See supra notes 1-2 and accompanying text.
II. FEDERAL RIGHTS AND THE POLITICS OF FEDERAL JURISDICTION

Defining federal subject matter jurisdiction is a classical political exercise. This is true whether that law determines the relationship of the federal judiciary to other branches of the United States government14 or (as by the eleventh amendment) allocates cases between state and federal trial courts.15 To comprehend the state immunity controversy, however, it is necessary to consider the politics of federal jurisdiction in a second sense—as an extension of the politics of federal substantive law.

Federal substantive law politicizes federal question jurisdiction because of the assumption that federal judges are inclined to give wider application than state judges to the same federal substantive law.16 That is, federal courts often are thought to give broader definition to federal rights and to provide earlier opportunities for their vindication.17

The Constitution itself does not invite this assumption. State and federal judges are equally bound under the supremacy clause to disregard state law that cannot be reconciled with federal law.18 Nothing in the Constitution requires federal judges to give greater reach to federal substantive law. Some argue that state judges actually are as willing as federal judges to apply federal law, or that at least we should assume this is true absent convincing proof to the contrary.19

14. Thus, the Supreme Court limits interference by the federal judiciary with the operation of the executive and legislative branches. See, e.g., Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597 (1976); Redish, Judicial Review and the "Political Question," 79 NW. U.L. REV. 1031 (1984).
18. The supremacy clause states that the Constitution and all other, duly created 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." U.S. CONST. art. VI.
However, one need not question the good faith or diligence of state judges to conclude that they are unlikely overall to read as much into federal substantive law. Since they work with their state law more than federal judges do, it would be natural for them to give it more life and federal law correspondingly less. Indeed, that federal courts might provide a more receptive climate for federal substantive law is a reality acknowledged by federal question jurisdiction.

Federal substantive law always leaves some better off than they would be under only state law. In civil litigation, it now seems generally to favor

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20. For elaboration of this point, see Shreve, Federal Injunctions and the Public Interest, 51 GEO. WASH. L. REV. 382, 418 (1983). If state judges read federal law less broadly than federal judges, they are not a priori in violation of the supremacy clause. The duty imposed by the supremacy clause to enforce federal law is not the duty to give it the broadest possible reading, only a duty to give it a reasonable reading and one in keeping with controlling precedent. The only federal decisions on the meaning of federal law which bind state courts are those of the United States Supreme Court. See Shapiro, State Courts and Federal Declaratory Judgments, 74 Nw. U.L. REV. 759 (1979); Note, Authority in State Courts of Lower Federal Court Decisions on National Law, 48 COLUM. L. REV. 943 (1948).

21. Since errors can favor either side, the possibility that state judges might misunderstand federal law more frequently than federal judges may not suggest that federal claimants are on the whole worse off in state court. However, "[w]here the difficulty is not misunderstanding of federal law, but lack of sympathy—or even hostility—toward it, there is a marked advantage in providing an initial federal forum." AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 167 (1969) [hereinafter STUDY]. Original federal question jurisdiction is important, then, both to enhance uniformity in federal law and to reduce bias against it. Id. at 168. This is most evident in federal courts' exclusive jurisdiction, see the analysis and authorities in Shreve, Preclusion and Federal Choice of Law, 64 TEX. L. REV. 1209, 1240 (1986), and in their concurrent jurisdiction to enforce claims under the Constitution, see STUDY, supra, at 168; cf. Mitchum v. Foster, 407 U.S. 225, 242 (1972) (noting that original federal question jurisdiction for civil rights actions under 42 U.S.C. § 1983 was important in part because Congress "realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts").

22. Of course, not always the same group. The pendulum of political advantage swings over time. For example, federal law was politically conservative in the late nineteenth century,
interests supported by the liberal left. In particular, federal civil rights law, usually vindicated through 42 U.S.C. section 1983, has offered special advantages to minorities, to the disadvantaged, and to individuals who feel intruded upon by government. Typical section 1983 litigation finds persons so aggrieved suing state or local officials. The left is likely to be solicitous of the interests of such plaintiffs.

On the other side, conservatives are likely to sympathize with government defendants either because they see the benefit to which the plaintiff claims a right as one which government should have the discretion to withhold, or because they see the plaintiff's suit as interference with government's realization of some moral agenda. Moreover, conservatives favor local autonomy in making and enforcing moral judgments and find interruptions from without, i.e., from the federal government through its judicial branch, particularly irritating.

favoring monied, corporate interests to a greater extent than state law. This was true of both the general federal common law created under Swift v. Tyson, 41 U.S. 1 (1842), see J.W. Hurst, THE GROWTH OF AMERICAN LAW—THE LAW MAKERS 190 (1950), and federal constitutional law. Ex parte Young, 209 U.S. 113 (1908), offers an illustration of the latter. Concluding that the eleventh amendment did not bar suit, the Court held that Minnesota's statute attempting to set maximum railroad rates violated the due process clause.

23. That is, the near left. This paper does not suggest political attitudes toward jurisdiction which might be held by those farther left, notably the Critical Legal Studies movement. The view in some CLS writing which values both individual freedom and local government autonomy, see, e.g., Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980), would make that exercise difficult. Even to use the terms liberal and conservative in the manner intended by this paper carries with it the risk of oversimplification. "The belief systems of Americans are more complex than the liberal-conservative dichotomy acknowledges." Boaz, Foreward to W. Maddox & S. Lilie, BEYOND LIBERAL AND CONSERVATIVE—REASSESSING THE POLITICAL SPECTRUM ix (1984).


25. Most agree that the Warren Court reflected these sentiments. See, e.g., J. ELY, DEMOCRACY AND DISTRUST 73-75 (1980); D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 158-60 (1986).

26. For a liberal-conservative distinction similar to the one described in this paper, see A. Cox, THE COURT AND THE CONSTITUTION 348 (1987).

27. The Burger Court often exhibited these traits, see Gelfand, The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's, 21 B.C.L. REV. 763 (1980), as does the Rehnquist Court. Cf. Collins & Skover, supra note 19, at 193 (describing the present Chief Justice and Justices White, O'Connor, Scalia, and Kennedy as a "conservative phalanx"). Modern judicial conservatism is complicated, however, by periodic libertarian impulses. See Nowak, Forward: Evaluating the Work of the New Libertarian Supreme Court, 7 HASTINGS CONST. L.Q. 263 (1980). Libertarianism might seem close to the left/liberal model because it supports individuals against government restraint. However, it may be antagonistic to liberal sentiments, putting "freedom of the individual above values of egalitarianism or fairness." Id. at 284. But see W. Maddox & S. Lilie, supra note 23, at 14 ("Libertarians explicitly embrace most of the assumptions of classical liberalism."). In any event, the Court has often been willing to overlook libertarian arguments in order to advance the conservative agenda summarized in the text. See, e.g., Bowers v. Hardwick, 478 U.S. 186 (1986).
That federal jurisdiction enhances enforcement of federal substantive law is a point upon which liberals and conservatives might agree while preserving their ideological differences. They might similarly agree that often liberal interests are best advanced in federal court and, correspondingly, conservative interests in state court. The eleventh amendment has thus become a political battleground. The liberal position is to minimize the obstacle to federal jurisdiction posed by the amendment, and the conservative position is to use it to block federal court adjudication of as many cases as possible. Confirming this, the four Justices of the Court regarded to be most liberal are on record as wishing greatly to reduce the scope of the eleventh amendment, while conservative members of the Court who have spoken on the issue defend current law.

III. HARM FROM EXAGGERATING THE IMPORTANCE OF THE ELEVENTH AMENDMENT

The foregoing discussion suggests why debate about the proper scope of federal judicial power over states is not likely to end soon. What can and should end is preoccupation with the eleventh amendment. The amendment is really too insignificant to provide structure or direction to the debate between those wishing to protect states and those wishing to expose them

28. Particularly with an explanation of the difference presented earlier that does not impugn the good faith or intellectual capacity of state judges. See supra note 20 and accompanying text.

29. As Professor Wells observes:
Although the Court refuses to say so, nearly everyone else would agree that there are differences in the performance of state and federal courts. As between the two, state courts are more likely to decide close questions in constitutional cases in favor of the state, while federal courts will more often decide them in favor of the individual asserting a constitutional claim.


30. "The eleventh amendment lies at the center of the tension between state sovereign immunity and the desire to have in place mechanisms for the effective vindication of federal rights." L. Tribe, supra note 3, at 173.


32. In Welch, the Chief Justice and Justices White and O'Connor joined Justice Powell in defending Hans.
to federal suit. To pretend otherwise works mischief on state immunity law in at least two ways.

First, while each side has much to contribute in a dialogue determining when state sovereignty must give way to concerns of federal law enforce-
ment, each has obscured and denigrated the merits of its position by specious claims about the meaning of the eleventh amendment. Beyond this, there is harm from distorting the eleventh amendment that is more difficult to assess. Whenever courts engage in fictions, they diminish their institutional stature and the authority of the law they make. This is true even for fictions thought to be justified by higher necessity.

Second, preoccupation with the eleventh amendment sacrifices opportu-
nities to place important issues within a constitutional framework far more capable of receiving them. Except in the rare cases it describes, the eleventh amendment offers no help—certainly no authority—for determining how much immunity from federal suit the Constitution confers on states. The process for determining the appropriate amount will not be easy. But at least it should be possible from looking at other parts of the Constitution.

A. The Unyielding Language of the Eleventh Amendment

Some provisions in the Constitution are so general as to invite extensive interpretation. The Supreme Court has not always responded. It is ironic, then, that the Court has long been inclined to read common sense and broad-spectrum policy into eleventh amendment text so incapable of ab-

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33. The classical definition of a legal fiction is "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." H.S. MAINE, ANCIENT LAW 25 (C. Haar rev. ed. 1963).

34. For examples of fictions probably supported by higher necessity, see infra note 56. We shall see that higher necessity does not justify distortion of eleventh amendment text. See infra notes 57-72 and accompanying text.

35. This is because misuse of the eleventh amendment further confuses an area—governmental immunity—already often difficult to sort out. Cf. Bowen v. Massachusetts, 108 S. Ct. 2722, 2741 (1988) (a case involving an issue of the sovereign immunity of the United States: "The trouble with the sovereign immunity doctrine is that it interferes with consideration of practical matters, and transforms everything into a play on words.").

36. For example, the ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The amendment was largely overlooked prior to Justice Goldberg's concurrence in Griswold v. Connecticut, 381 U.S. 479, 486-99 (1965). There have been numerous suggestions about what the ninth amendment might mean since then. See, e.g., Berger, The Ninth Amendment, 66 CORNELL L. REV. 1 (1980); Franklin, The Ninth Amendment as Civil Law Method and Its Implications For Republican Form of Government: Griswold v. Connectic-
sorbing it. The amendment says only this: "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." The manner in which the eleventh amendment deals with state immunity may be arbitrary, but the text is no less clear for that. It does not protect states from suit by their own citizens. It applies without reference to the remedy sought. It restricts all of the judicial power, not merely that exercised under diversity jurisdiction.

The most notorious distortion of the eleventh amendment came in *Hans v. Louisiana*. There the Supreme Court held that federal courts were without jurisdiction to entertain suits brought against unconsenting states by their own citizens. The Court based its decision on the eleventh amendment, but not its text. It appeared to rely instead on dissenting Justice Iredell's article III analysis in *Chisholm v. Georgia*. The *Hans* Court argued that it would be illogical to vary state immunity under the Constitution according to the plaintiffs' citizenship.

37. That is, it is arbitrary if made to speak to broad state immunity concerns. In contrast, the scope of the amendment conforms quite naturally to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), and the atmosphere surrounding it. See supra note 11.

38. Some would dispute the suggestion that the text of the amendment is clear on the last point. True, the description of parties plaintiff in the amendment to an extent seems to track language in section 2 of article III creating federal diversity jurisdiction. Yet the language of the eleventh amendment offers little to support a reading that fewer than all categories of federal jurisdiction are affected. It limits "[t]he Judicial power of the United States." The matter is discussed (and debated) at greater length elsewhere. Compare authorities cited infra note 49 (arguing the diversity-only theory) with Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARv. L. REv. 1372 (1989) and Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. Rev. 61 (1989) (forthcoming).


40. The Court noted that "on this question of the suability of the States by individuals," the eleventh amendment is "the highest authority of this country." 134 U.S. at 12.

41. 2 U.S. (2 Dall.) 419, 429-50 (1793). *Hans*'s vague reference, 134 U.S. at 12, apparently is to the concluding portion of Iredell's dissenting opinion in *Chisholm* where, after arguing at length that the Judiciary Act did not support jurisdiction, he questioned whether such jurisdiction was possible under the Constitution. He stated: "[M]y present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money." 2 U.S. (2 Dall.) at 449. Yet it may go too far to suggest, as some have, e.g., Collins, *Book Review*, 88 COLUM. L. Rev. 212, 214 (1988), that *Hans* is essentially an article III case. See supra note 40. On the significance of *Hans*'s allusions to article III, see infra note 60 and accompanying text.

42. Noting furor over *Chisholm* leading to the eleventh amendment, the Court asked: Can we suppose that, when the Eleventh Amendment was adopted, it was
widespread and has much to recommend it. The eleventh amendment has neither residuary language nor imprecise categories. The amendment is about as capable of a fixed meaning as language can make it. It does not reach citizen suits like Hans.

Hans set up the possibility that federal courts would be powerless to enjoin state-based deprivations of federal rights. The Court avoided this by creating another fiction. In Ex parte Young, it held that the eleventh amendment did not prevent federal courts from enjoining state officials threatening to violate federal law. Since states could not authorize their officials to violate federal law, the Court reasoned that they were not acting on behalf of their states when they did. Thus, Young concluded, federal injunctions under such circumstances left states unaffected. The Supreme Court continues to adhere to this transparent distinction, turning away those seeking civil rights injunctions who commit the gaffe of suing states by name.

An interpretation popular with those wishing to overrule Hans offers yet another fiction, that the amendment should be understood to affect only diversity jurisdiction. This seems unnecessary to the case against Hans

understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

134 U.S. at 15.

43. Four Justices (Blackmun, Brennan, Marshall, and Stevens) wish to overrule the case. See supra note 31. Many commentators support this course. See, e.g., Fletcher, supra note 4; Gibbons, supra note 3; Shapiro, supra note 4.

44. Only under a deconstructionist view that "a text has no fixed, single meaning," Johnson, Decoding Deconstruction: A Whole New Style of Thinking, N.Y. Times, July 17, 1988, at E6, col. 2, is the scope of the eleventh amendment less than clear. On the emergence of deconstruction as a mode of legal analysis, see generally Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743 (1987); Hegland, Goodbye to Deconstruction, 58 S. CAL. L. REV. 1203 (1985).

45. The Supreme Court pulled a second rabbit out of the hat when it read the amendment to protect states from suit by foreign countries. See Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

46. 209 U.S. 123 (1908).

47. "There is no doubt that the reality is as [dissenting] Justice Harlan stated it, and that everyone knew that the Court was engaging in fiction when it regarded the suit as one against an individual named Young [the state attorney general] rather than against the state of Minnesota." C. Wright, THE LAW OF FEDERAL COURTS 289 (4th ed. 1983). Accord Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 114 n.25 (1984).


49. Some would certainly question portrayal of the diversity-only view as a fiction in the making. See supra note 38. Many urging that Hans be overruled employ a diversity-only argument. See, e.g., Welch v. Texas Dep't of Highways & Pub. Transp., 107 S. Ct. 2941,
and detracts from it. Prominent among the flaws in the diversity-only argument is the fact that it cannot be squared with the text. Whatever its reach, the eleventh amendment constrains exercise of the federal judicial power per se. Yet while the diversity-only fiction is an unnecessary price to pay for overruling Hans, it may seem a small price for unseating other eleventh amendment fictions.

Why has disrespect for the language of the eleventh amendment become such a tradition? Perhaps it is because the extent of state subservience to federal judicial power is a matter of transcendent political importance, and the eleventh amendment is the only part of the Constitution that addresses the subject explicitly. The amendment thus became a kind of lightning rod—or a platform for developing constitutional law of state immunity full enough to accommodate in a rational way the countervailing concerns of federal and state governments.

The importance of the state immunity questions may well suggest that rules governing them should have the stature of constitutional law. Thus, if the eleventh amendment provided the only outlet for addressing these

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2958-70 (1987) (Brennan J., dissenting) (Blackmun, Marshall, and Stevens, JJ., concurring in dissent); Amar, supra note 5; Fletcher, supra note 4.

50. The alternative faithful to the text, simply to confine the eleventh amendment to all noncitizen suits against states in federal court, would be little different in effect. Since the eleventh amendment now derives its significance from the manner in which (via Hans) it keeps plaintiffs from suing their own states, either reading of the amendment used to overrule Hans would radically diminish the amendment's scope.

51. For a trenchant critique of the diversity-only argument, see Marshall, supra note 38.

52. That is to say, whether noncitizens attempt to sue states under diversity, federal question, or admiralty jurisdiction, the eleventh amendment bars suit. Id. Hans's backers have been quick to point this out. In their plurality opinion in Welch, 107 S. Ct. at 2952, the Chief Justice and Justices Powell, O'Connor, and White quote the eleventh amendment in observing: "Federal question actions unquestionably are suits 'in law or equity'; thus the plain language of the Amendment refutes [the diversity-only] argument."

53. In overruling Hans, the Court would renounce the most egregious of eleventh amendment fictions. It would also relegate the amendment to obscurity, creating little need for federal courts to administer the state-versus-state-official fiction of Ex parte Young (explained supra notes 46-48 and accompanying text).

The most serious flaw in the approach taken by those on the Court wishing to overrule Hans is not the violence it does to the text of the eleventh amendment, but that it discounts the possibility of constitutional support for state immunity beyond the eleventh amendment. See infra notes 57-72 and accompanying text.

54. See Field, supra note 4, at 1279 (noting that "distortions . . . have been imposed upon the language of the eleventh amendment from the outset in order for it to support a workable and appropriate sovereign immunity doctrine").

55. Some are unwilling to make this assumption. See, e.g., Field, supra note 4 (arguing that, beyond the literal text of the eleventh amendment, rules determining state immunity in federal court should be common law or statutory); Jackson, supra note 4 (arguing the use of federal common law). Professor Jackson has taken the position that the Constitution offers no help. She writes: "Despite the Court's repeated and often eloquent insistence that state sovereign immunity is a principle fundamental to the Constitution, the doctrines of sovereign immunity applied to claims against states in federal courts cannot be justified by exegesis of any portion of the Constitution itself." Id. at 78.
concerns, higher necessity might have justified Supreme Court manipulation of the amendment's text, whether to assure federal civil rights injunctions or to recognize that federal suits by noncitizens and citizens alike diminish state authority. What makes these distortions ultimately indefensible is that other parts of the Constitution provide ample foundation for broad-spectrum law and policy concerning state immunity.

B. Solutions Elsewhere in the Constitution

It is worth remembering that the Supreme Court decided the first state immunity case, *Chisholm v. Georgia*, within an article III framework. Substantial and continuing discussion about the correctness of *Chisholm* proves that article III can provide an arena for state immunity issues. Indeed, article III continued to exert some influence on the state immunity question (albeit indirect) after ratification of the eleventh amendment. Apart from stare decisis, it is fair to say that *Hans*’s only legitimacy comes from the Court’s attempt there to draw support from article III.

56. One example of higher necessity may be the Supreme Court’s ruling in United States v. Nixon, 418 U.S. 683 (1974), that an intramural dispute within the executive branch was nonetheless a justiciable controversy satisfying article III. The great importance of the result in the case (production of the Watergate tapes) makes the justiciability ruling bearable; however, difficult questions why or whether the Court really had authority to hear the case remain. See generally *Symposium on United States v. Nixon*, 22 UCLA L. Rev. 1 (1974) (contributions by Berger, Gunther, Henkin, Karst & Horowitz, Kurland, Mishkin, Ratner, Van Alstyne). In a different, nonconstitutional setting, the Court has in several cases read the Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), to require state courts to honor federal judgments, even though the language of the statute imposes no such obligation. While “[i]t would be unthinkable to suggest that state courts should be free to disregard the judgments of federal courts,” C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4468, at 648 (1981), the Supreme Court was forced to protect federal judgments through “strength of arm and sleight of hand.” Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 749 (1976).

57. How state immunity law can and should be recast under the Constitution is a matter deserving more than the brief treatment it receives here. Yet such is the inability of the eleventh amendment to underpin state immunity law in a forthright and inclusive way that this sketch may demonstrate the superiority of other sources in the Constitution. Whether the best approach for reforming current law lies in recasting constitutional doctrine is quite another question. On that, this paper may provide food for thought. It does not, however, provide a definitive response to the position taken by many (most recently in Professor Jackson’s excellent article, see Jackson, *supra* note 4) that the best approach lies through federal common law.

58. See *Pennhurst*, 465 U.S. at 97.


60. See *supra* note 41 and accompanying text. The Court continues to link *Hans* with article III. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); *Pennhurst*, 465 U.S. at 98.
Article III takes cognizance of both of the concerns juxtaposed in the state immunity debate. Of course, the nature and importance of federal judicial power are central to article III. Federalism concerns limiting article III are less explicit, but no one doubts that article III doctrine has been shaped in part by respect for state governments, particularly state courts.

Article III is complete in scope, authorizing all exercises of the federal judicial power of courts within it. Breadth alone, then, would seem to make article III superior to the eleventh amendment as an arena for accommodating countervailing concerns of federal law enforcement and state sovereignty. Yet the article is also inviting because of its ambiguity. Thus, while article III’s most prominent ambiguity surrounds the case-or-controversy limitation on federal power, it is also true that section 2 of the article confers authority to hear cases without clearly protecting states or clearly exposing them to suit—leaving room for the Supreme Court to conclude either way, or to strike a balance in between.

Other portions of the Constitution might supplement article III. The supremacy clause would prevent immunization of states from federal suit


63. See supra notes 13 and 61. The prevailing assumption is "that the text of Article III gives a clear direction that cases to which the federal judicial power extends must be tried, as a matter of original jurisdiction, in a court constituted as an Article III court if it is to be tried at all in a federal tribunal." See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 470-71 (3d ed. 1988) (emphasis in original). For a comparison of the role of article III courts and the more limited role of courts created under article I, see Resnik, The Mythic Meaning of Article III Courts, 56 U. COLO. L. REV. 581 (1985).


65. On the plausibility of opposing readings of article III on this issue in Chisholm, see supra notes 8, 10 & 59 and accompanying text.

66. Read narrowly, the supremacy clause binds only state judges. But other provisions of the Constitution, most notably the fourteenth amendment, directly constrain the action of all state officials, often without regard to whether state courts have
when to do so would be destructive to federal substantive law. The tenth amendment provides further authority, if such be needed, for protecting state sovereign interests in federal litigation.67

It would not be the first time the Supreme Court recast law under a different part of the Constitution.69 What makes the move attractive here is that law suspect on the authority of the eleventh amendment seems to rest easily within a framework designed around article III. And, without suggesting that use of an article III-plus approach to state immunity would replicate present law, at least the shift alone would not seem to give significant advantage to either side.70 To illustrate both of these points, consider one possibility. The Supreme Court could draw from article III and possibly the tenth amendment to declare states generally immune from federal suit but could reserve federal judicial power under the supremacy clause to grant prospective relief.72

ruled on the validity of officials' acts; moreover, article VI declares that "the Members of the several State Legislatures, and all executive and judicial Officers . . . of the several states [sic] shall be bound by Oath or Affirmation, to support this Constitution." Accordingly, the Court has not limited to state judges its demand for compliance with the federal Constitution.

L. Tribe, supra note 3, at 33 (citations omitted).

67. 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. The moribund state of the tenth amendment under current doctrine could make a fresh application more difficult. For a survey of recent decisions, see Freilich, Connet & Walters, Federalism in Transition: The Emergence of New State and Local Strategies in the Face of the Vanishing Tenth Amendment, 20 Urb. Law. 863, 866-69 (1988).

68. For a comparison of the tenth and eleventh amendments, see Brown, supra note 4. One critic offers the tenth amendment as a foundation for a reformation of the constitutional law of state immunity. See Massey, supra at 38.

69. For example, the Supreme Court once relied on the due process clause of the fourteenth amendment to determine how information could be used to set death penalties in state court. See Gardner v. Florida, 430 U.S. 349 (1977). It has since substituted the eighth amendment as its frame of reference. See Booth v. Maryland, 107 S. Ct. 2529 (1987). The shift seems to stem less from a change in the character of the procedural rights of the accused (Booth cites Gardner with approval) than from the judgment that eighth amendment analysis presents opportunities to weigh procedural concerns arising in death penalty cases with greater clarity and precision. See generally Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143 (1980).

70. Article III is more insulated from congressional authority than the eleventh amendment. In theory, then, federal suitors might suffer if Congress lost the power to suspend state immunity it now enjoys because immunity is based on the eleventh amendment. See supra note 13. Had the Court made more serious use of its power in civil rights cases, the shift would be more significant. But it has not. In Quern v. Jordan, 440 U.S. 332 (1979), it refused to read 42 U.S.C. § 1983 to suspend the eleventh amendment. See generally Note, Quern v. Jordan: A Misdirected Bar to Section 1983 Suits Against States, 67 Calif. L. Rev. 407 (1979).

71. Presently, additions built on the eleventh amendment by Hans and Monaco, 292 U.S. at 313. See supra notes 39-45 and accompanying text.

72. This would be comparable to the exception to the eleventh amendment created by Ex
CONCLUSION

The eleventh amendment is a historical artifact. Its role in modern constitutional law should be only slightly greater than article I's denial to Congress of the authority to confer titles of nobility. The amendment should exist only to block the rare case where a noncitizen attempts to sue a state in federal court. To expect greater service from the amendment is unrealistic and counterproductive. It sets up a false dilemma to suggest that the Court must either force-feed policy and common sense into the language of the eleventh amendment or be without a means of setting state immunity standards under the Constitution. Acknowledgment of the eleventh amendment's insignificance would clear the way for serious thought about state immunity elsewhere, notably under article III.

This paper takes no view on the amount of immunity from federal suit states should enjoy. But letting go of the eleventh amendment would surely improve the process leading to an answer. To send parties elsewhere in the Constitution would put them in closer touch with countervailing policies of federalism and federal law enforcement. It would permit an exchange of views untroubled by charges and countercharges of illicit textual interpretation. Finally, it would reduce the amount of intellectual dishonesty in American constitutional doctrine.

parte Young. See supra notes 46-48 and accompanying text. The relationship between Young and the supremacy clause is much like that between Hans and article III (on the latter, see supra note 60 and accompanying text). Apart from stare decisis, the only legitimacy Young has comes from the extent that it can be grounded on the supremacy clause. Cf. Green v. Mansour, 474 U.S. 64, 68 (1985) ("[T]he availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause.").

73. Article I states, "No Title of Nobility shall be granted by the United States." U.S. Const. art. I, § 9, cl. 8. It is clear that not every part of the Constitution must have contemporary vitality.