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The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity

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INTRODUCTION

The Eleventh Amendment to the United States Constitution is an enigma of increasing concern to the Supreme Court and to scholars.¹ While its language is specific, technical, and limited,² the amendment has been construed to embody or recognize a broad constitutional immunity for states from being sued in federal courts. The Court first articulated this view of the Eleventh Amendment in 1890 in *Hans v. Louisiana*,³ a decision it has since adhered to and even expanded.⁴ Yet this principle of immunity is in tension with two other fundamental constitutional principles: that the law will generally provide a remedy for rights violated by the government ("governmental accountability")⁵ and that the judicial power of the United States over claims arising under federal law is as

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1. See, e.g., C. JACOBS, *THE 11TH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); J. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* (1987); Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139 (1977); Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hospital v. Scanlon*, 74 GEO. L.J. 363 (1985); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977) [hereinafter Field, Part I]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, Part II]; 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); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

2. See *infra* text accompanying note 28.

3. 134 U.S. 1, 19-21 (1890).

4. See, e.g., *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934) (state cannot be sued without its consent by foreign state); *Ex parte New York*, No. 1, 256 U.S. 490 (1921) (suits in admiralty against states barred).

5. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see generally Amar, *supra* note 1.

broad, within its sphere, as is the legislative power of the United States ("full judicial power").⁶

To accommodate the conflict between these competing principles, federal courts have used a set of arcane doctrines to limit application of this broad immunity. Thus, if a state officer is sued for a prospective injunction to restrain unconstitutional action, the doctrine of *Ex parte Young*⁷ permits adjudication of a direct challenge to state action on the fiction that the state itself is not the defendant. In other instances, states are subject to federal adjudication because of congressional abrogation of the immunity,⁸ or a state's supposed consent to the exercise of federal jurisdiction.⁹

These fictions ameliorate but do not eliminate the tension between accountability and judicial power, on the one hand, and immunity on the other. The constitutional status of the states' immunity continues to bar important forms of relief on federal claims¹⁰ and to impose unusual barriers to the exercise of Congress' power to overcome state immunity.¹¹ It thus remains important to ask: Does the Eleventh Amendment supply, or imply, a constitutional immunity for states as to claims arising under federal law? This article argues that it does not and that the consequences of the Court's acknowledging the error in its constitutional theory of state sovereign immunity would be less drastic than might be thought.

The Eleventh Amendment, and the doctrine of state constitutional immunity from suit in federal courts which it represents, has long been perceived as a doctrinal abyss, replete with inconsistencies borne of pragmatic adjustments to the principle for which it supposedly stands. Many scholars have concluded that *Hans* was wrongly decided insofar as it held that federal courts are barred from exercising jurisdiction over a suit arising under federal law and brought by a citizen against his own state.¹² Al-

6. *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 818-19 (1824); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821); Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985); Amar, *supra* note 1, at 1481-84; Fletcher, *supra* note 1, at 1074 n.170.

7. 209 U.S. 123 (1908).

8. See, e.g., *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Congress has power under Fourteenth Amendment to abrogate state's Eleventh Amendment immunity from suit for monetary relief by private individuals in federal court).

9. See, e.g., *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964), *overruled in part*, *Welch v. State Dep't of Highways*, 107 S. Ct. 2941 (1987).

10. See, e.g., *Papasan v. Allain*, 478 U.S. 265 (1986) (no monetary award against state trustees of public school fund even where breach of federal requirements alleged); *Green v. Mansour*, 474 U.S. 64 (1985) (no declaratory judgment available to determine whether state's prior administration of federal welfare program complied with controlling federal law).

11. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (Congress failed to make sufficiently clear that state could be sued for monetary relief under Rehabilitation Act); cf. Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C.A. § 2000d-7 (West Supp. 1987)) (legislative response to *Atascadero*).

12. J. ORTH, *supra* note 1, at 157; Amar, *supra* note 1, at 1473-75; Fletcher, *supra* note 1, at 1078-87; Gibbons, *supra* note 1, at 2004; see also Tribe, *supra* note 1 (federal question jurisdiction would extend to statutory claims where Congress abrogates immunity); cf. Field, Part II, *supra* note 1, at 1265-68 (*Hans* correct as interpretation of contracts clause under common law immunity).

though divided on its precise outlines,¹³ most modern scholarship would limit the amendment's scope and its implications as to whether Article III itself embodies a rule of state immunity. Several members of the Court have recently embraced the view that the amendment does not bar federal question jurisdiction, at least over claims by citizens against their own states;¹⁴ the Court, however, remains divided on the fundamental meaning of the amendment and on the implications of a revised understanding for the states and federal courts. Indeed, in its most recent decision, *Welch v. State Department of Highways*,¹⁵ the Court split four-four on whether the *Hans* view was correct or should be overruled. The dispositive opinion by Justice Scalia rested on statutory grounds but indicated that the Eleventh Amendment issue was a difficult one, virtually inviting further efforts to overrule *Hans*.¹⁶

Despite the wealth of scholarship on the history and meaning of the amendment, relatively little attention has been paid to the effect of the amendment on the Supreme Court's appellate jurisdiction.¹⁷ The Court

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13. This article and several other recent works see the amendment as a limited repeal of a party-based head of jurisdiction, implying no constitutional immunity over claims arising under the federal question or admiralty heads of jurisdiction. *See, e.g., Fletcher, supra* note 1. Others see the amendment as embodying a rule of judicial restraint in implying causes of action against states but not as constraining jurisdiction over claims created by Congress. *See, e.g., Tribe, supra* note 1. For a criticism of this latter view, see *infra* Part III (A).

14. *Compare Employees v. Department of Pub. Health*, 411 U.S. 279, 313-15 (1973) (Brennan, J., dissenting) (Justice Brennan alone arguing that Eleventh Amendment, which by its terms prohibits only suits by out-of-state citizens against a state, has no application to federal question cases brought by citizens against their own state) with *Welch v. State Dep't of Highways*, 107 S. Ct. 2941, 2964 (1987) (Brennan, J., dissenting) (three justices join Brennan's argument that Eleventh Amendment does not apply to federal question cases, suits in admiralty, or to suits by citizen against own state). Until 1984, Brennan alone viewed the Eleventh Amendment as not restricting citizen suits against states for violations of federal law. After *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), however, Justice Stevens explicitly disavowed reliance on *stare decisis*. In light of the majority's alleged violation of *stare decisis* and the weight of evidence that *Hans* was "egregiously incorrect," he joined Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, at 304 (Stevens, J., dissenting). Justice Marshall, who also joined the Brennan dissents in *Atascadero* and *Welch*, had argued earlier that *Hans* was correct insofar as it concluded that Article III embraced a constitutional immunity for the states from federal judicial power. *Employees*, 411 U.S. at 287 (Marshall, J., concurring). *See also Welch*, 107 S. Ct. at 2957-58 (Scalia, J., concurring) (questioning *Hans*' correctness).

15. 107 S. Ct. 2941 (1987).

16. Justice Powell, for the plurality, concluded that the state was not subject to suit in federal court on a Jones Act claim to recover damages for injury suffered by a state employee, reiterating the classic view that the Eleventh Amendment "embodies a broad constitutional principle of sovereign immunity" that bars citizens (as well as noncitizens) from suing a state in admiralty or federal question cases. *Id.* at 2952. Assuming *arguendo* that Congress might expressly abrogate such immunity, he found no such express abrogation in the Jones Act's general application to "employers." *Id.* at 2947. Justice Brennan, for the four dissenters, argued that the *Hans* view of the amendment should be overruled. *Id.* at 2970. Justice Scalia agreed with the plurality that the general provisions of the Jones Act providing a monetary remedy in federal court did not permit actions against states. *Id.* at 2957-58. His reasoning, however, did not depend on a constitutional principle of immunity. Rather, he wrote, regardless of whether *Hans* was correct, its view of the amendment was widely held when the Jones Act was passed and thus Congress could not be presumed to have intended the act to apply to states.

17. The anomaly has been briefly noted in, e.g., *Atascadero*, 473 U.S. at 295-96 n.51 (Brennan, J., dissenting); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U.

routinely asserts that the amendment bars the exercise of judicial power in cases against states. Yet, just as routinely, it reviews state court decisions involving claims against the states for monetary relief.¹⁸ The conventional reference point for this practice, *Cohens v. Virginia*,¹⁹ simply does not account for its breadth.

The contradictions of this element of the jurisprudence are striking, particularly after *Green v. Mansour*.²⁰ The Court there held that a federal district court could not award declaratory relief against a state official if the judgment might have preclusive effect in subsequent state court proceedings for monetary relief.²¹ Yet on direct review of state court judgments, the Court frequently renders opinions requiring state courts to award monetary relief on affirmative claims against states. As discussed in Parts II and III below, direct review of such state court judgments is best accounted for by an understanding that the Eleventh Amendment does not limit the "judicial power" over questions "arising under" federal law. Rather, the amendment was intended to repeal part of a diversity-based jurisdiction that had been construed to permit federal adjudication of state law claims. This understanding of the amendment will not only refocus analysis in federal statutory cases like *Green* but may also imply some constitutional protection for states from federal adjudication of pendent state law claims.

Although many scholars have argued that the Eleventh Amendment, properly read, does not apply to federal claims brought in federal courts, fewer have considered the effect such a revised understanding would have for state liabilities and the business of the district courts.²² If the Eleventh Amendment does not represent a constitutionalized rule of state sovereign immunity, what principles will inform the remedial discretion of the federal courts in awarding relief against states for violation of federal law? Parts IV and V address this question.

Sovereign immunity, I argue, is a federal common law principle that, even if *Hans* is discarded, will continue to limit the remedial discretion of federal courts and constrain the likelihood of substantial reallocations of judicial power from state to federal courts. Understood as a form of federal common law, state sovereign immunity can more accurately reflect

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COLO. L. REV. 1, 64-66 (1972); see Gibbons, *supra* note 1, at 1935, 1946 (retaining ability to represent to foreign nations that Supreme Court review of state court judgments in federal question cases would control states was critical to Federalists who supported Eleventh Amendment).

18. See *infra* text accompanying notes 59-64.

19. 19 U.S. (6 Wheat.) 264 (1821).

20. 474 U.S. 64 (1985).

21. *Id.* at 73-74. For detailed discussion, see *infra* Part III(C)(2).

22. Compare J. ORTH, *supra* note 1 (historical analysis) and Gibbons, *supra* note 1 (same) with Amar, *supra* note 1 (Constitution requires full remedies for constitutional wrongs, including compensatory relief) and Fletcher, *supra* note 1 (Tenth Amendment imposes substantive limits on liabilities that federal government may impose on states). For further discussion, see *infra* notes 408-09.

legitimate judicial concerns in identifying appropriate remedies for governmental wrongdoing.

Even now the Eleventh Amendment caselaw bars only some forms of relief on federal claims. Injunctions against future misconduct are permitted; damage awards generally are not. Present Eleventh Amendment jurisprudence operates in large measure as a specialized form of remedial hierarchy, albeit one that bears no resemblance to the text of the amendment which applies to suits "in law or equity." This remedial hierarchy, applied to cases originating in federal district courts, intersects with another important functional aspect of Eleventh Amendment jurisprudence—the availability of federal review of state court judgments on those claims barred from federal district courts. As to disfavored forms of relief, then, the Eleventh Amendment functions less as an absolute jurisdictional bar than as a form of abstention, mandating that state courts have the first opportunity to consider certain claims for relief arising under federal law.

These functional aspects of Eleventh Amendment jurisprudence are not reflected in its doctrinal underpinnings and are inconsistent with the Court's repeated characterization of the immunity. Their existence, however, illuminates three important reasons for abandoning the present doctrinal framework. First, institutional values of *stare decisis* are ill-served by formal adherence to a doctrine riddled with exceptions designed to counterbalance its evils. Continued homage to the supposed constitutional principle of *Hans* is a form of "verbal disguise,"²³ denying the reality of change and undermining the principal sources of judicial legitimacy: reasoned and honest disclosure of the basis for decision. Second, restoring the Eleventh Amendment to its rightful place in the Constitution will not create a massive shift in power between federal and state judiciaries inconsistent with principles of federalism or separation of powers. The remedial preference and forum allocation rules of Eleventh Amendment law are grounded in a defensible federal common law of remedies for governmental wrongdoing, and thus need not be wholly abandoned even if the present doctrinal framework is. Finally, understanding state sovereign immunity as a creature of federal common law clarifies two problems of Eleventh Amendment jurisprudence: whether federal courts have power to award monetary relief against states based on the Constitution itself; and whether Congress may, pursuant to its Article I powers, render states subject to suit in federal court. Reconceiving both the Eleventh Amendment and state sovereign immunity will provide more satisfactory answers to those questions, and a better doctrinal account of the present functioning of that jurisprudence.

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23. J. FRANK, *LAW AND THE MODERN MIND* 293 (1930).

I. THE PRESENT FRAMEWORK

The problem of Supreme Court review of state court judgments against states cannot be appreciated without understanding the limitations on district court jurisdiction the Court has found in the Eleventh Amendment. Likewise, the argument that this body of jurisprudence is functionally different from its doctrinal basis and can more properly be understood as a form of federal common law requires some knowledge of present doctrine and its history.

The Eleventh Amendment was the first amendment added to the Constitution for the purpose of overturning a Supreme Court decision. In *Chisholm v. Georgia*,²⁴ the Supreme Court rejected objections to its original jurisdiction over an action in assumpsit against the State of Georgia. Four members of the Court read the grant of jurisdiction in Article III over "Controversies . . . between a State and Citizens of another State" to extend the judicial power to the case, rejecting the view that the clause applied only where states were plaintiffs.²⁵ Only Justice Iredell dissented, arguing that the Judiciary Act of 1789 did not extend to such cases and expressing doubt as to Congress' power to so extend jurisdiction.²⁶ Promptly after the decision, proposed amendments were offered and, within a year, Congress passed what is now the Eleventh Amendment.²⁷ As ratified by the states over the next four years, its text is familiar: "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."²⁸

Early constructions of the amendment generally gave it a literal and narrow reading. The Marshall Court found that it did not apply to controversies between a citizen and his own state,²⁹ or to suits against state officers to recover money in the state treasury claimed to be due under federal law.³⁰ The Court in an 1872 opinion emphasized a technical and

24. 2 U.S. (2 Dall.) 419 (1793). According to recent scholarship, plaintiff was a South Carolina citizen, acting as executor for the estate of another South Carolina citizen, seeking payment for goods purchased by the state during the revolution. Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207 (1968).

25. *Id.* at 450-51 (opinion of Blair, J.); *id.* at 464-66 (opinion of Wilson, J.); *id.* at 467-68 (opinion of Cushing, J.); *id.* at 476-78 (opinion of Jay, C.J.).

26. *Id.* at 433-37, 449 (Iredell, J., dissenting). Some view the Eleventh Amendment as an enactment of the Iredell dissent, see Field, Part I, *supra* note 1, at 541-42, despite the dissent's primarily statutory basis.

27. Fletcher, *supra* note 1, at 1059. For a more detailed description, see *id.* at 1054-1063; Gibbons, *supra* note 1, at 1926-38.

28. U.S. CONST. amend. XI.

29. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

30. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). See also *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809) (amendment does not bar federal jurisdiction over action against executors of state treasurer's estate even though state asserted interest in proceeds). But see *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 123-24 (1828) (*Madrazo I*) (foreign citizen's admiralty claim against governor treated as one against state; thus, if not barred by amendment, subject to

limited view of the amendment, indicating that if a state could not be named as a party defendant because of the amendment, that was a sufficient reason to permit an action to proceed against a state officer.³¹ By the 1880's, however, as debt repudiation mounted in southern states, the Court increasingly came to find that suits nominally against state officers, and brought by out-of-state citizens or foreign citizens, were in fact "against the state" and thus barred by the amendment.³²

In 1890, under the pressing political likelihood that the executive branch would not enforce judgments against the southern states,³³ the Eleventh Amendment was profoundly reinterpreted to exemplify a broad constitutional prohibition against the exercise of Article III judicial power over states. In *Hans v. Louisiana*,³⁴ the Court unanimously concluded that the existing federal question jurisdiction of the federal circuit courts did not embrace an unconsented to suit on a contract by a state citizen against his own state, notwithstanding the allegation that the claim arose under the federal Constitution.³⁵ On the assumption that the amendment barred federal question jurisdiction over claims by diverse citizens against a state, the *Hans* court found it inconceivable that the amendment was intended to permit citizen suits on federal questions.³⁶ While acknowledg-

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dismissal because not brought originally in Supreme Court); *Ex parte Madrazo*, 32 U.S. (7 Pet.) 627, 632 (1833) (*Madrazo II*) (case not within admiralty jurisdiction, and no person may commence personal suit against state in Supreme Court). For detailed discussion, see Gibbons, *supra* note 1, at 1961-68 (*Madrazo I* reasoning knowingly flawed in suggesting that admiralty actions against states could only proceed in Supreme Court; *Madrazo II* reasoning applied Eleventh Amendment to bar claims against state where jurisdiction based solely on party status); see also *infra* note 118 (discussing *Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530 (1857)).

31. *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220-21 (1872) (enjoining state governor from granting patents to land claimed by railroad company under pre-Civil War contract). Cf. *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541 (1875) (granting partial relief on federal grounds against state board for violating plaintiff's bond contract). Soon after *Osborn*, the Court had disclaimed the most extreme version of the nominal party rule, that the amendment applies only when the state is named as a party. *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828).

32. See, e.g., *Christian v. Atlantic & North Carolina R.R.*, 133 U.S. 233 (1890); *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52 (1886); *Louisiana v. Jumel*, 107 U.S. 711 (1882). But cf. *Poindexter v. Greenhow*, 114 U.S. 270 (1884) (suit against collector to recover property seized for alleged nonpayment of taxes not one against state).

33. J. ORTH, *supra* note 1, at 77-80. But see Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212 (1988) (arguing that Orth understates degree of continuity in decisions on state sovereign immunity and thus overstates importance of changed political circumstances in accounting for doctrinal expansion of Eleventh Amendment in *Hans*).

34. 134 U.S. 1 (1890).

35. *Id.* at 19-21. Proceeding under the newly conferred federal question jurisdiction, *Hans* sought judgment of \$87,000, arguing that since he alleged that state laws unconstitutionally impaired his contract with the state and that the party configuration was not within the literal terms of the Eleventh Amendment, the Court had jurisdiction. *Id.* at 4-9. The state objected to the Court's jurisdiction on the ground that plaintiff could not sue the state without its consent. *Id.* at 3.

36. 134 U.S. at 15. See *Louisiana v. Jumel*, 107 U.S. 711 (1882) (impliedly concluding that Eleventh Amendment and common law sovereign immunity doctrines barred adjudication of federal question claim by out-of-stater against state). The *Hans* Court insisted that Article III was never intended to embrace any private suit against a state, and that *Chisholm* was wrongly decided. 134 U.S. at 11-12, 15. But see *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (Article III originally permitted out-of-state citizen to sue another state; thus state-state head of jurisdiction not available for assertion of personal grievances against state's citizens); see generally, J. ORTH, *supra* note 1, at

ing the Marshall Court's earlier conclusion in *Cohens v. Virginia*³⁷ that the Eleventh Amendment posed no constitutional bar to a suit by an individual against his own state, *Hans* concluded that the amendment's limited language instead signalled an understanding that the Article III judicial power did not extend to any unconsented suit against a state. Notwithstanding that *Cohens* was written many years closer to the enactment of the Eleventh Amendment, the *Hans* Court found that Marshall had incorrectly concluded that the prohibition of suits applied only to cases encompassed by the express terms of the amendment.³⁸

Apart from this apparent constitutional basis for the decision, the *Hans* Court specifically identified a statutory ground as "an additional reason why" the jurisdiction claimed for the circuit court did not exist: Congress had not given the circuit courts jurisdiction over such suits.³⁹ Despite the alternative grounds for decision, *Hans* was soon read as having embedded in the Constitution a principle of state sovereign immunity from suit by private individuals. Two years later, in *United States v. Texas*,⁴⁰ the Court restated its conclusion in *Hans*: "[E]ven where . . . suits [against a State are brought by its own citizens and] arise under the Constitution, laws and treaties of the United States, . . . the judicial power of the United States does not extend to suits of *individuals* against States."⁴¹ In *Ex parte New York*,⁴² the Supreme Court concluded that federal judicial power over admiralty matters did not extend to suits against states, even though the amendment by its terms applied only to suits "in law or equity."⁴³ The modern development of the Eleventh Amendment as a consti-

69-70, 74-75 (noting discrepancy). *Hans*' reliance on the Eleventh Amendment to interpret what Article III originally embraced reflects a confusion as to the source of state immunity that persists today. Compare *Welch*, 107 S. Ct. at 2945, 2949 (amendment affirms sovereign immunity as limit on Article III) with *id.* at 2952 (amendment embodies broad constitutional principle of immunity). See *infra* text accompanying notes 179-200, 220-23 (neither amendment nor Article III supplies immunity on federal claims).

37. 19 U.S. (6 Wheat.) 264 (1821).

38. 134 U.S. at 19-20 (also arguing that *Cohens*' discussion was dictum given *Cohens*' conclusion that writ of error there was not suit against state). *Hans* referred to a "presumption that no anomalous and unheard of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted." *Id.* at 18. The "cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power," *id.* at 15; the Court wrote that "[t]he suability of a State without its consent was a thing unknown to the law," and thus not justiciable. *Id.* at 16.

39. 134 U.S. at 18. The language of the statute conferring jurisdiction was that the "Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States of all suits of a civil nature at common law. . . arising under" federal law. *Id.* at 9. The state courts, went the argument, did not have concurrent power here because they could not entertain a suit against the state without its consent; the circuit courts, "having only concurrent jurisdiction," could not acquire any such power either. If the judicial power of Article III did not in its entirety extend to suits against states, however, this statutory point would have been completely unnecessary. See Engdahl, *supra* note 17, at 61-62.

40. 143 U.S. 621 (1892).

41. *Id.* at 644.

42. 256 U.S. 490 (1921).

43. *Id.* at 497-98. This decision overruled the views expressed in *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647) (jury charge by Justice Washington, sitting as Circuit

tutional principle of state sovereign immunity was largely completed in *Principality of Monaco v. Mississippi*,⁴⁴ where the Court likewise held that, notwithstanding the amendment's failure to mention foreign states as among those parties who could not sue a state in a federal court, the "postulates which limit and control" the understanding expressed in Article III and the Eleventh Amendment required that result.⁴⁵

While the amendment was read expansively to apply to cases against states that were beyond its literal reach, efforts to avoid its application increasingly centered on the ability to name an officer and a form of relief that would not be regarded as within its scope. Under the doctrine of *Ex parte Young*,⁴⁶ a state officer executing an unconstitutional statute was regarded as acting *ultra vires*; accordingly, relief against the officer named as defendant was not against the state and thus was not barred by the Eleventh Amendment.⁴⁷

The most important modern decision demarcating when a case is "really" against the state, and hence within the Eleventh Amendment's prohibition, notwithstanding the expedient of naming an officer, is *Edelman v. Jordan*.⁴⁸ The Court there articulated a prospective-retrospective relief distinction: If the plaintiff sought prospective relief, such as an injunction concerning future behavior, the Eleventh Amendment permitted the relief; if, however, the plaintiff sought a monetary award for past wrongdoing,

Justice). Although some treat *Bright* as the recognized precedent on this point in the nineteenth century, see, e.g., J. ORTH, *supra* note 1, at 37, John Marshall repeatedly avoided clear resolution of whether the Eleventh Amendment applied to suits sounding in admiralty. See, e.g., *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110, 121 (1828) (even if Eleventh Amendment did not apply to admiralty proceeding in lower federal court, action to recover slaves and money in possession of state nonetheless improper because within exclusive original jurisdiction of Supreme Court); *Fletcher*, *supra* note 1, at 1078-79.

44. 292 U.S. 313 (1934).

45. *Id.* at 322-23 (referring to postulate that states are immune from suit without consent except where there has been "surrender of this immunity in the plan of the convention," quoting *The Federalist* No. 81 (A. Hamilton)). These postulates, the Court discerned, precluded suits by private individuals or by foreign states against a state, but permitted suits by one state against another, and by the United States against a state. *Id.* at 328-29. Since the language of Article III is seemingly parallel with respect to claims by states and foreign states, the distinction drawn between them is difficult to justify. See Field, Part I, *supra* note 1, at 525-26 (Court's distinctions drawn on "ad hoc" basis). Likewise difficult to justify doctrinally is the conclusion in *United States v. Texas*, 143 U.S. 621 (1892), that the United States could sue a state within the original jurisdiction of the Supreme Court, in light of the Court's conclusion elsewhere that the fact that a state is a party is insufficient, standing alone, to bring the case within the Court's original jurisdiction and that only those cases to which the judicial power extends because of a party-alignment including a state are within the original jurisdiction; a suit by a state against its own citizen on a federal question would fall only within the Supreme Court's appellate jurisdiction. See *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158, 163-64 (1922) (citing *California v. Southern Pac. Co.*, 157 U.S. 229 (1895)); see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398-99 (1821). But see C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION* 2D § 4043, at 175 (1988) (criticizing these decisions).

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

47. *Id.* at 157-60.

48. 415 U.S. 651 (1974).

the relief was barred since, the Court assumed, it could come only from the state treasury.⁴⁹

Recently, the Court has explicitly justified this remedial distinction as the necessary result of a balance between the supremacy of federal law and the demands of a constitutional rule of state immunity.⁵⁰ Any relief on *state* law grounds that is effectively against a state cannot be justified in the face of this immunity.⁵¹ And while the need to stop ongoing violations of federal law overcomes the state's constitutional immunity, compensatory and deterrent interests in vindicating federal rights through damage awards are insufficient to override the command of the Eleventh Amendment.⁵² As a result of these doctrinal developments, the amendment does not bar injunctive relief to redress ongoing violations of federal law. Yet, monetary relief in the nature of damages for accrued liabilities under federal law cannot be awarded by federal district courts, though such relief may be available in actions filed in state courts, with review available in the Supreme Court.

Even disfavored forms of relief, however—compensatory awards for past wrongs, for example—can be granted if the state consents to suit in federal court⁵³ or, in some circumstances, if Congress abrogates the state's immunity. In *Fitzpatrick v. Bitzer*,⁵⁴ the Court held that under the Fourteenth Amendment, Congress could authorize abrogation of any Eleventh Amendment limits on the judicial power of the United States and permit states to be sued for damages in federal district court.⁵⁵

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49. *Id.* at 664–65. *But cf.* *Scheuer v. Rhodes*, 416 U.S. 232, 237–38 (1974) (damages award against state governor personally not barred by Eleventh Amendment).

50. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

51. *Id.* at 105–06 (“fiction” of *Ex parte Young* should not be extended to permit injunctive relief to issue against state officers on state law grounds, since there is no federal interest in supremacy of federal law that would justify intrusion on state sovereign immunity). *See also* *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251–53 (1985) (extending *Pennhurst* to bar exercise of jurisdiction over ancillary claim for indemnity based on state law).

52. *Green v. Mansour*, 474 U.S. 64, 72–73 (1985). *See also* *Papasan v. Allain*, 478 U.S. 265 (1986) (no relief against state trustee for failing, in violation of federal law, to repay losses incurred by the imprudent investment of plaintiff counties' trust corpus).

53. Nineteenth century cases established that a state could waive its immunity or consent to the jurisdiction of the federal courts. *See, e.g., Clark v. Barnard*, 108 U.S. 436 (1883). The significance of the consent or waiver doctrine in Eleventh Amendment law has been mitigated by the rigor with which the Court has insisted that such consent be shown. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (state's general waiver of immunity insufficient to constitute consent to suit in federal court on federal claims); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577–80 (1946) (state consent to be sued “in any court of competent jurisdiction” construed as limited to state courts). *But cf. Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1957) (implying consent from “sue and be sued” clause in congressionally approved compact).

54. 427 U.S. 445 (1976). *See also* *City of Rome v. United States*, 446 U.S. 156, 179–80 (1980) (applying *Fitzpatrick v. Bitzer* reasoning to Congress' power under Fifteenth Amendment).

55. *See also* *Hutto v. Finney*, 437 U.S. 678, 693–94 (1978) (upholding Congress' power to set aside Eleventh Amendment immunity and to require states to pay attorney fees to prevailing plaintiff on constitutional claim); *Maher v. Gagne*, 448 U.S. 122 (1980) (same where plaintiff prevails on statutory claim pendent to substantial constitutional claim). Whether Congress has power to establish such liabilities pursuant to its Article I powers, unamplified by the Fourteenth Amendment, the Court has not yet resolved. The Court has indicated, however, that if Congress does have such a power, it

This brief sketch of the Court's development of the amendment permits identification of some oft-noted paradoxes that emerge both within the doctrine and from its functional effects. Why is action by a state official "state action" for purposes of substantive Fourteenth Amendment law but not for the assertedly jurisdictional bar of the Eleventh?⁵⁶ Why has the Eleventh Amendment been, in effect, read out of federal claims for injunctive relief against state action, while damage actions are treated so differently? Why has the definition of when a suit is one "against a state" come to turn on both the remedy sought and the source of law from which the plaintiff's right derives? And why is a supposedly constitutional limitation on Article III courts subject to waiver by consent, or to abrogation by Congress?⁵⁷ These inconsistencies have led many to conclude that the *Hans* Court was in error in its apparent view that the judicial power of the federal courts did not extend to federal claims against states. That conclusion is supported by consideration of another anomaly: that the Supreme Court, exercising the judicial power of the United States, can require state courts to provide affirmative relief against the state that federal district courts are constitutionally barred from awarding.

II. *COHENS V. VIRGINIA*, THE ELEVENTH AMENDMENT AND THE SUPREME COURT'S APPELLATE JURISDICTION: AN ANOMALY

The Eleventh Amendment applies to the entire "judicial power of the United States." That "judicial power" is "vested" by Article III in the Supreme Court, and is distributed between the Court's appellate and original jurisdiction. Thus, an untutored reading of the Eleventh Amendment suggests that the "judicial power" being constrained is the entire judicial power of the United States. Indeed, the Supreme Court has said that: "[T]he *entire judicial power* granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given. . . ."⁵⁸ The Eleventh Amendment, however,

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must exercise that power in clear and unmistakable language. *Welch v. State Dep't of Highways*, 107 S. Ct. 2941, 2948 (1987).

56. The fiction of *Ex parte Young*—that injunctive relief against an officer was not against the state—was justified as necessary to secure the supremacy of federal law, particularly the constraints on states imposed by the Fourteenth Amendment. 209 U.S. at 159–60. Yet if the Fourteenth Amendment authorizes Congress to abrogate immunity, it is difficult to see why it would not equally authorize federal courts to do so. *But see* Nowak, *supra* note 1 (Fourteenth Amendment authorized Congress, but not courts, to overcome Eleventh Amendment immunity). If it did not so authorize federal courts, then was the Court justified in adopting the fiction of *Ex Parte Young*? And if Congress could abrogate state immunity under the Eleventh Amendment, why was judicial creation of the *Ex parte Young* fiction necessary?

57. This list is by no means exhaustive. One might also ask: Why, if the United States can sue a state without its consent, may a foreign state, or an individual suing on a federal claim, not do so? *See supra* note 45. Why has the Court ignored the important eighteenth century distinction between "suits in law or equity" and admiralty cases? As I will later suggest, many of these anomalies result from the incorrect "constitutionalization" of principles of sovereign immunity. Instead, the sovereign immunity doctrine emerges more coherently if seen largely as one of federal common law.

58. *Ex parte New York*, 256 U.S. 490, 497 (1921) (emphasis added); *accord* *Pennhurst State*

while given an expansive construction as it applies to original actions in the lower federal courts, has been construed to have little or no application to the appellate jurisdiction of the Supreme Court.

Conflicts between the Supreme Court practice of reviewing state court judgments and the "Eleventh Amendment" constraints on federal district court jurisdiction are striking. The Supreme Court has routinely reviewed on the merits adverse judgments entered by state courts on claims for affirmative monetary relief made by individuals against states.⁵⁹ Yet Eleventh Amendment doctrines would preclude many of these cases from being filed *ab initio* in the district courts. The Eleventh Amendment, the Court has held, precludes actions against states for monetary relief payable by the state for past wrongful acts.⁶⁰ Many of the state cases reviewed by the Court have involved precisely such claims for monetary relief from the state treasury, particularly in tax disputes.⁶¹ If the suit is filed against the state in its own name for an injunction, the suit is barred by the Eleventh Amendment even though injunctions against state officers to restrain unconstitutional official conduct will issue.⁶² Yet suits against states *eo nomine*, if brought in state court, are routinely reviewed within the Supreme Court's appellate jurisdiction.⁶³ A general consent to suit provided for by state law is not a sufficiently clear waiver of Eleventh Amendment

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School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Duhne v. New Jersey, 251 U.S. 311, 313 (1920); *see also* Gibbons, *supra* note 1, at 1946 (if amendment intended to constitutionalize state sovereign immunity, it would apply to both appellate and original federal jurisdiction).

59. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Thomas v. Review Bd. of Indiana Employment Div., 450 U.S. 707 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Martinez v. California, 444 U.S. 277 (1980); Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275 (1972); Laurens Federal Savings & Loan Ass'n v. South Carolina Tax Comm'n, 365 U.S. 517 (1961); *cf.* Hughes v. Washington, 389 U.S. 290 (1967) (suit against state to try title to land). Even at the height of southern debt repudiation, the Court reviewed state court decisions on the merits. *See, e.g.*, Baltzer v. North Carolina, 161 U.S. 240 (1896) (affirming state court decision that had dismissed action for lack of jurisdiction on grounds that withdrawal of state court jurisdiction does not violate federal nonimpairments of contracts clause); Railroad Co. v. Tennessee, 101 U.S. (11 Otto) 337 (1879) (repeal of state consent to suit no violation of contracts clause). Although it is likely that in many cases the states raised no Eleventh Amendment objection, the practice described in this section cannot be accounted for as resulting simply from a case-by-case waiver of immunity. *But cf.* Patsy v. Board of Regents, 457 U.S. 496, 515-16 n.19 (1982) (Court need not *sua sponte* dismiss on Eleventh Amendment grounds not raised by parties). The Court's later decisions rationalizing this practice are not consistent with the view that states could limit the appellate jurisdiction over cases initially brought in state court by raising an Eleventh Amendment objection. *See infra* text accompanying notes 136-60.

60. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945).

61. *See, e.g.*, Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7 (1983) (reversing adverse state court judgment in tax refund suit); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (same); Halliburton Oil Well Cementing Co. v. Reiley, 373 U.S. 64 (1963) (same).

62. *Compare Ex parte* Young, 209 U.S. 123 (1908) (upholding lower federal court's power to issue injunction against state officer) *with* Alabama v. Pugh, 438 U.S. 781 (1978) (dismissing action for injunctive relief against state as named defendant).

63. *See, e.g.*, Williams v. Vermont, 472 U.S. 14 (1985) (refund suit); Philadelphia v. New Jersey, 437 U.S. 617 (1978) (commerce clause challenge to environmental law); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (contracts clause challenge to law modifying state bond obligations); Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) (quiet title to land).

immunity to permit suit in federal district court; yet such consent may result in the Supreme Court's exercise of appellate jurisdiction over a case initiated in state court.⁶⁴

With respect to federal claims that would be barred from federal district court, then, the Eleventh Amendment functions less as an absolute bar to the exercise of the judicial power than as a specialized initial forum allocation principle. Certain kinds of federal claims against states may be brought in the first instance only in a state court. Review of any dispositive federal issues presented therein, however, is available through the Supreme Court's appellate jurisdiction. To understand how this came to be, we must return to near the beginning of Eleventh Amendment jurisprudence.

A. *Cohens v. Virginia*

*Cohens v. Virginia*⁶⁵ is popularly cited for the proposition that the Eleventh Amendment does not preclude Supreme Court review of state court judgments, whether in favor of or against the state as a formal party.⁶⁶ In this respect, the opinion is read for far more than it in fact decided. The reasoning of *Cohens v. Virginia* on the Eleventh Amendment is surprisingly limited and has, moreover, in large measure been undermined by subsequent decisions. Nevertheless, the Supreme Court has generally not regarded the amendment as a barrier to its review of the judgments of state courts, even in cases involving affirmative claims against the state that under "Eleventh Amendment law" could not be initiated in federal courts.⁶⁷

The Court's quiet transformation of *Cohens* to sustain its appellate jurisdiction over all dispositive federal questions arising in state court litigation suggests that something is profoundly wrong with its interpretation of the Eleventh Amendment as implying a constitutional bar to federal district courts' jurisdiction over federal claims against states. No such bar is required by Article III or by the Eleventh Amendment, properly understood.

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64. *Smith v. Reeves*, 178 U.S. 436, 445 (1900); see *Chandler v. Dix*, 194 U.S. 590 (1904); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985).

65. 19 U.S. (6 Wheat.) 264 (1821). The case is captioned "*Cohens v. Virginia*" in the official U.S. Reports. The text, however, makes clear that the defendants were two men with the last name "Cohen." See, e.g., 19 U.S. (6 Wheat.) at 265 (describing "presentment" against P.J. and M.J. Cohen). The correct caption should, therefore, have been "*Cohen v. Virginia*."

66. "[I]t was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the [Eleventh] Amendment." *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908) (Harlan, J. concurring) (citing *Cohens*, 19 U.S. (6 Wheat.) at 408-09). See, e.g., Field, Part I, *supra* note 1, at 549 n.117; Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 303-04 & n.534 (1981).

67. See *infra* text accompanying notes 111-35; see, e.g., *Atascadero*, 473 U.S. at 294 (Brennan, J., dissenting); Gibbons, *supra* note 1, at 1956; Wolcher, *supra* note 66, at 303-04 nn.533-34.

Cohens v. Virginia is significant not only for its analysis of the Supreme Court's appellate review of state court judgments but also because it was the Court's first major exposition of the scope of the Eleventh Amendment.⁶⁸ *Cohens* is frequently cited by critics of *Hans* and its progeny for the proposition that Chief Justice Marshall believed that the Eleventh Amendment did not restrict federal jurisdiction over federal question claims against the states.⁶⁹ The opinion, however, is not straightforward, reflecting a tension between the nationalist view of the constitutional structure that dominates Marshall's jurisprudence, a lawyer's understanding of the common law traditions of governmental immunity from suit and of remedies for governmental wrongdoing, and a politician's awareness of the more particular history and text of the amendment itself. As I suggest below, the decision in *Cohens* can be seen as a harbinger of the later, more fully developed agonies of interpretation seemingly occasioned by this amendment. And John Marshall's appreciation for the difficulties posed by the question of what judicial remedies are available against the state may still, two centuries later, assist in providing a more acceptable account of this question.

1. *Facts.* The facts of *Cohens* were simple, and agreed to: The Cohen brothers of Virginia sold tickets in Virginia for the Washington, D.C. lottery and were prosecuted for violating Virginia's anti-gambling law.⁷⁰ The state trial court rejected their defense that their conduct was specifically authorized by a federal law permitting the District to authorize lotteries.⁷¹ They were fined \$100, and their appeals to higher state courts were "refused . . . inasmuch as cases of this sort are not subject to revision by any other Court of the Commonwealth."⁷² Application was made for and writ of error granted to the United States Supreme Court.

2. *Counsels' Arguments.* Argument concerning the presence of a state as a party focused on two questions: first, whether, in view of the Constitution's grant of original jurisdiction to the Supreme Court in cases to which a state was a party, the Court could nonetheless exercise its appellate jurisdiction based on the presence of a federal question; and second,

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68. See also *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809). *Cohens* was also controversial in the general contemporary debate over the scope of federal power, judicial and legislative, *vis-a-vis* the states. See 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 541-64 (1928).

69. See, e.g., J. ORTH, *supra* note 1, at 39-40; Gibbons, *supra* note 1, at 1946, 1953; see also D. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT, 1789-1889*, at 99-100 & nn.56, 61 (1985) (noting ambiguity of opinion, but suggesting that Marshall rejected state sovereign immunity on federal question claims). But see C. JACOBS, *supra* note 1, at 87 (*Cohens* reflects Marshall's unwillingness to decide whether citizen could sue his state on federal questions).

70. 19 U.S. (6 Wheat.) at 265-67, 303 (defendants described in indictment as being recent residents of the "borough of Norfolk," and by counsel as citizens of Virginia); D. CURRIE, *supra* note 69, at 96.

71. 19 U.S. (6 Wheat.) at 289-90. Pursuant to an act of Congress, the then City Council of the District of Columbia had enacted a lottery law.

72. *Id.* at 290.

whether the Eleventh Amendment or its implications barred the Court from reviewing the judgment at the behest of the private defendants.

Acknowledging that the precise terms of the Eleventh Amendment did not apply to a case between a state and its own citizens, counsel for Virginia argued that Article III had never extended the judicial power to any such cases but only to cases involving out-of-staters, a power limited by the Eleventh Amendment.⁷³ Thus, federal judicial power could operate in a case in which a state and an individual were the parties only when the state invoked the Supreme Court's original jurisdiction as a plaintiff. The grant of federal question jurisdiction, in Virginia's view, did not embrace any authority to adjudicate claims against a state. The Eleventh Amendment confirmed an understanding that a state could never be sued by its own citizens in a federal court, "for it cannot be presumed, that a right to prosecute a suit against a State would be taken from a foreigner or citizen of another State, and left to citizens of the same State."⁷⁴

Virginia, in support of its challenge to the Court's jurisdiction, also made the more technical argument that a writ of error was a "suit" against the state, within the meaning of the Eleventh Amendment. The term "suit" itself embraced a writ of error, as evinced by the general understanding that a "release of all suits" included release of writs of error.⁷⁵ Moreover, the language of the Eleventh Amendment prohibiting the "prosecution" as well as commencement of suits supported the view that the judicial power of the United States could not extend to cases which, while not "commenced" against a state, came to be "prosecuted" by writ of error against the state in federal court.⁷⁶

Counsel for the Cohens rejected Virginia's contention that the states remained, after the Constitution, independent sovereigns immune from claims in national tribunals.⁷⁷ D.B. Ogden argued that the judicial power extended to "all cases" arising under the Constitution and laws of the United States, and that Virginia had failed to show any exception as to either the entire grant of judicial power over this subject or the exercise of that power in its appellate form.⁷⁸ The Eleventh Amendment, he argued, imposed no restriction, express or implied, on the federal question jurisdiction; rather, it barred only "the other class of cases, where it is the character of the parties, and not the nature of the controversy, which alone gives jurisdiction."⁷⁹

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73. *Id.* at 303-09 (arguing, *inter alia*, that use of express words required to make states parties).

74. *Id.* at 315. The perception that the amendment, in order to support a constitutional doctrine of state sovereign immunity, had to mean either more or less than its literal terms, was early recognized.

75. *Id.*

76. *Id.*

77. *Id.* at 347-48.

78. *Id.* at 348-50.

79. *Id.* at 348. This is the same argument that several recent pieces of Eleventh Amendment scholarship have urged, and that I adopt as well. J. ORTH, *supra* note 1, at 134, 149; Fletcher, *supra*

Turning to the claim that the Supreme Court's jurisdiction over states could be exercised only as an original matter, Ogden argued that when a state brought proceedings in its own court against a citizen, it gave up any privilege of having cases to which it was a party heard only as an original matter in the Supreme Court.⁸⁰ The need to produce uniformity of decisions on federal questions, and to prevent affirmative use of state courts to achieve unconstitutional ends, led Ogden to his final argument—that the matter before the Court was, in any event, not a “suit against” the state:

[Assuming arguendo] that a State cannot be sued in any case; the State is not sued here: she has sued a citizen, in her own tribunals, who implores the protection of this high Court . . . The jurisdiction does not act on the State; it merely prevents the State from acting on a citizen, and depriving him of his constitutional and legal right.⁸¹

Pinkney, who argued next for the Cohens, likewise urged that a writ of error was not a “suit” because no one was to be restored to anything; a reversal of the judgment would simply leave things as they were before the judgment.⁸²

Pinkney also emphasized that under the structure and spirit of the Constitution, which the Eleventh Amendment did not change, “judicial control of the Union over State encroachments and usurpations, was indispensable to the sovereignty of the constitution—to its integrity—to its very existence.”⁸³ The necessity for federal appellate review is particularly strong, he argued, when the state is prosecuting in its own courts because of the “motives to judicial leanings and partialities” that might be present

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note 1, at 1045–63; Gibbons, *supra* note 1, at 2004. If this was Justice Marshall's view, however, he did not explicitly embrace it. See *infra* text accompanying notes 103–109. His failure to do so, when it was made explicitly in argument, is either an uncharacteristic bit of timidity from the author of *Marbury v. Madison* or a sign of genuine uncertainty as to the relationship between the Eleventh Amendment and Article III. See also *infra* note 109 (discussing Marshall's opinion in *Osborn*).

80. 19 U.S. (6 Wheat.) at 349–50. Ogden's suggestion that the power-distributing clauses of Article III were intended to protect states from being subject to original suit in any federal court other than the Supreme Court is in tension with later decisions. See, e.g., *Illinois v. Milwaukee*, 406 U.S. 91, 93–98 (1972) (original jurisdiction need not be exercised in view of concurrent district court jurisdiction); *Ames v. Kansas*, 111 U.S. 449, 469 (1884) (acknowledging Congress' power to give inferior federal courts concurrent jurisdiction in cases where Supreme Court has original jurisdiction and upholding federal question removal of case initiated by state in state court). Interestingly, Ogden's conception of the division of the judicial power into original and appellate categories as representing a privilege of the state that could be waived by its conduct presages the concept of the “waivable” Eleventh Amendment immunity.

81. 19 U.S. (6 Wheat.) at 350.

82. *Id.* at 366. Pinkney also argued that, notwithstanding the recognized immunity of the United States when it won a case brought in the lower courts, the appeal was not barred by immunity. *Id.* Further, he claimed that the state of Virginia was not compelled to do anything, since the writ did not act on the state, but only on the state court, *id.* at 366, 372–73, a somewhat disingenuous argument echoed in the Court's opinion. *Id.* at 410 (writ acts on record); see *infra* note 141.

83. *Id.* at 370, 371.

there.⁸⁴ The appellate form of review was at once less intrusive and more necessary than original jurisdiction: Though "trifling, compared with the original [jurisdiction of the Court] as it formerly stood," the appellate jurisdiction over federal questions, he urged, "stands upon high considerations of self-defen[s]e, . . . [and] of constitutional necessity . . . . The suability of States might have been dispensed with, and the constitution still be safe."⁸⁵ The power of appellate control of state court judgments against individuals and in favor of the state, however, was indispensable.

3. *The Court's Opinion.* In his opinion for the Court, Marshall framed the first inquiry as "whether the jurisdiction of this Court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State."⁸⁶ His discussion of this question proceeds in three segments which consider, sequentially: (1) whether under Article III, as originally written, the judicial power of the United States over cases arising under federal law extended to cases in which a state was a party; (2) if so, whether that judicial power could be exercised in the appellate form; and (3) whether, if under the original Constitution the Supreme Court could exercise appellate jurisdiction over the writ of error in this case, the Eleventh Amendment required a different result.

As will be seen below, Marshall was unusually and perhaps atypically careful not to resolve the relationship between the Eleventh Amendment and federal question jurisdiction over cases within the literal reach of the amendment's text. The Eleventh Amendment discussion is of limited scope, as is the discussion of remedies available against a state for breach of federal law, and reflects what appears to have been a deliberate decision to avoid clearly holding states subject to federal judicial power over

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84. *Id.* at 372.

85. *Id.* at 371. Pinkney emphasized that the appellate jurisdiction would act only on state courts, not states, *id.* at 372, avoiding whether in a different case original federal question jurisdiction could be exercised over a state. *Id.* at 369, 372.

86. *Id.* at 378. With his customary rhetorical skill, Marshall emphasized the importance of the principal jurisdictional issues "[because] [t]hey exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment [under review] . . . and maintain that, admitting such violation, it is not in the power of the government to apply a corrective[.] . . . that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made . . . against the legitimate powers of the whole. . . ." *Id.* at 376-77. Marshall regarded only two of the several questions argued as important: whether the character of the party as a state precluded the exercise of jurisdiction and whether as a general matter the Court could review state court decisions. He found the jurisdictional arguments premised on the allegedly non-federal character of the law of the District of Columbia less important. *Id.* at 376-77. *But see* Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 688 n.261 (1982) (issue not as free from doubt as opinion implies, particularly since one law in question enacted by City Council of District of Columbia). To contemporary critics, the implication that a local law for the District of Columbia could preempt state law was anathema, even though on the merits the convictions were affirmed. 19 U.S. at 448. *See* Roane (writing under name Algernon Sidney), *Virginia Opposition to Chief Justice Marshall*, *Richmond Enquirer*, May 25, 1821, reprinted in 2 JOHN P. BRANCH HIST. PAPERS OF RANDOLPH-MACON COLLEGE 78, 81 (1906); *see also* Smith, *Spencer Roane*, in 2 JOHN P. BRANCH HIST. PAPERS OF RANDOLPH-MACON COLLEGE 4, 28-30 (1905).

affirmative claims made against them. The analysis of *Cohens*, then, standing alone, does not justify the subsequent course of practice in which the Supreme Court has reviewed state court judgments in actions involving such affirmative claims.

In the first part of Marshall's analysis, the opinion propounds the now-familiar distinction between the two classes of cases to which the judicial power extends: those based on the "character of the cause" regardless of the parties, and those based on "the character of the parties" regardless of the cause.⁸⁷ Thus, Marshall argued that under the Constitution, as it originally stood, federal question jurisdiction was separate and independent from those heads of jurisdiction based on the parties to the controversy. The federal question jurisdiction applied to "all cases of every description,"⁸⁸ and thereby extended the judicial power to cases to which a state might be a party, regardless of the party alignments specified elsewhere in Article III. The burden was on those who argued for an implied exception from this broad coverage.⁸⁹ Granting the state's general proposition "that a sovereign independent State is not suable except by its own consent," Marshall concluded that such consent could be given in the Constitution by which the states surrendered large elements of sovereignty to the national government and extended the federal judicial power to all cases arising under federal law.⁹⁰ Thus, "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to the case."⁹¹ The correctness of this view, moreover, was supported by both the purpose of the Constitution, unlike the earlier confederation, to enforce the demands of federal law through a separate judicial department, and the appropriateness of a construction of the judicial power as coextensive with the legislative.⁹²

Concluding "that the judicial power, *as originally given*, extends to all

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87. 19 U.S. (6 Wheat.) at 378.

88. *Id.* at 382.

89. *Id.* at 379-80.

90. *Id.* at 380. Marshall specifically rejected Virginia's argument that the judicial power did not extend to cases between a state and its own citizens: While this was true where jurisdiction depended on the character of the parties, the purpose of federal question jurisdiction was "to give jurisdiction where the character of the parties would not give it." *Id.* at 391.

91. *Id.* at 383. This language, often relied on by others for the proposition that Marshall embraced the argument that the Eleventh Amendment applied only to those cases in which federal jurisdiction was based solely on the character of the parties, is found in his discussion of the Constitution as originally enacted. *See infra* note 108.

92. 19 U.S. (6 Wheat.) at 387-88. Marshall explained that the federal judiciary was better suited than state courts to act "impartially" in upholding the supremacy of federal law because "[i]n many States the judges are dependent for office and for salary on the will of the legislature." *Id.* at 386. He observed that, "given the importance which the Constitution attaches to the independence of federal judges," it cannot "have intended to leave these constitutional questions to tribunals where this independence may not exist . . . where a State shall prosecute an individual who claims the protection of an act of Congress . . . How extensive may be the mischief if the first decisions in such cases should be final!" *Id.* at 386-87. The case at hand provided an interesting illustration of such "mischief." Under Virginia law, the only tribunal available to hear the *Cohens'* claim that their conduct was protected by an act of Congress was the trial court in the borough of Norfolk. *Id.* at 265, 290.

cases arising under the constitution or a law of the United States, whoever may be the parties,"⁹³ Marshall next considered whether that judicial power could be exercised in the appellate form in cases to which a state was a party.⁹⁴ Notwithstanding dictum from *Marbury* suggesting that the grant of original jurisdiction to cases in which states were parties precluded the Court's appellate jurisdiction over such cases, Marshall concluded that the Constitution required a choice between two competing rules: that the Court review federal questions in an appellate mode, or that it exercise original jurisdiction over cases in which the state was a party. Since a federal question could arise defensively in the course of proceedings initiated by a state in its own courts, the comprehensive language of the "arising under jurisdiction" compelled the conclusion that, even where the state was a party, the Court could exercise appellate, rather than original jurisdiction, to review federal questions.⁹⁵

Whether an affirmative demand against a state could be a "case," however, was a matter of some uncertainty for Marshall. In many instances of allegedly unconstitutional state conduct, he concluded, the proper remedy would be suit against another individual in which the consequences of the state's misconduct could be challenged.⁹⁶ Even where the only possible affirmative remedy was against the state, Marshall was hesitant to affirm that federal courts would provide it. "Were a State to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it . . . maintain a suit in this Court against such State, to recover back the money? Perhaps not"—because the law would imply an assumpsit, breach of which "may be no" violation of the Constitution.⁹⁷ What about the "case of a State which pays off its own debts with paper money[?]" The courts, he concluded again, "have no jurisdiction over the contract; they cannot enforce it, nor judge of its violation," even if the act discharging the debt is a nullity and the debt still due.⁹⁸ That such claims

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93. *Id.* at 392 (emphasis added).

94. *Id.*

95. *Id.* at 393–405. Marshall also concluded that the original jurisdiction over cases in which a state is a party was intended only for those cases in which judicial power under Article III exists because a state is a party. Thus, the Supreme Court's original jurisdiction could not have been exercised in this case, which was between a state and its own citizens. *Id.* at 397–99. *But see* *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) at 124 (admiralty case should have been brought as original action in Supreme Court).

96. *See Cohens*, 19 U.S. (6 Wheat.) at 403 (if state confiscates debt or property in violation of treaty, remedy is to sue original debtor or to sue occupant of confiscated land). Although this discussion appears in the middle of the analysis of whether the Court could properly exercise appellate jurisdiction, it has no evident relation to that issue but rather concerns the general reach of the judicial power over cases arising under the Constitution. What seems important is that this hypothetical discussion of remedies for state violation of federal law precedes any consideration of the Eleventh Amendment and thus pertains to the original Article III. In his earlier discussion, Marshall had said that there was "force" to the view that citizens could not make "demands" on their own state in federal court, implying that these were "ordinary controversies" under state law. *Id.* at 391.

97. 19 U.S. (6 Wheat.) at 402–03.

98. *Id.* at 403.

might not be "cognizable," however, flowed from something other than the states' exemption from the judicial power over "Cases, in Law and Equity," arising under federal law.⁹⁹ Were the state to initiate enforcement proceedings in which a federal defense concerning attempted discharge of the debt were raised, moreover, the Court would have jurisdiction; otherwise "the constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases."¹⁰⁰ Thus he concluded that "as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party."¹⁰¹

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99. *Id.* at 403-05 (there cannot be "case in law or equity" arising under Constitution to which judicial power does not extend). That the constraint was not a jurisdictional bar based on sovereign immunity—a principle that a state, as a sovereign, could not be sued—is also suggested by Marshall's opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). Marshall concluded that there was no original jurisdiction over the action to enjoin Georgia from enforcing various laws alleged to be in violation of rights of the Native Americans, not because sovereign immunity prohibited the suit, but because Indian tribes did not fall within the Article III term "foreign nations." *Id.* at 19. He went on to indicate that, even if there were jurisdiction, the case was still non-justiciable—but once again, not because of sovereign immunity, but because the particular claims presented and the relief sought were "political" in nature. *Id.* at 20. See also Currie, *supra* note 86, at 721 n.449. This is consistent with Marshall's argument in *Cohens* that the states had surrendered their sovereign immunity in all cases arising under federal law. See *supra* text accompanying note 90; see also *Cherokee Nation*, 30 U.S. (5 Pet.) at 58, 68-69 (Thompson, J., dissenting) (tribes are "foreign nations" and some injunctive relief to restrain violations of federal law should be available).

100. 19 U.S. (6 Wheat.) at 403-04.

101. *Id.* at 405. Marshall's views on the nature of the Article III judicial power, before the Eleventh Amendment, over affirmative claims against the states remain puzzling. In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810), Marshall alluded to the difference between "the constitution, as passed," and the Constitution as amended. The former, he claimed, "gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation." In such a suit, he continued, a defense based on enactment of a state law "absolving itself from the contract" would have been rejected, since the states were restrained by the Constitution. In a delicate but fairly obvious reference to the Eleventh Amendment, Marshall stated that "[t]his feature [the suability of states on contracts] is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated." Marshall evidently was arguing that while states could no longer be sued on their contracts, the contracts clause still limited their conduct. In this context, he seemed to assume that the only basis for original federal jurisdiction over a contract claim against a state is under the party-based head of jurisdiction. See also *Cohens*, 19 U.S. (6 Wheat.) at 402 ("[F]ederal Courts never had jurisdiction over contracts between a State and its citizens.").

In view of the non-impairments clause, U.S. CONST. art. I, § 10, cl. 1, and Marshall's broad description of federal question jurisdiction in *Osborn*, 22 U.S. (9 Wheat.) at 821 (whenever federal question is ingredient in original cause, jurisdiction may be exercised), one is left to wonder about his understanding of either the contracts clause or federal jurisdiction. It is possible that his view was influenced, or confused, by the then-statutory structure of jurisdiction and the absence of any lower federal court with general "arising under" jurisdiction. Alternatively, he may have believed that until the state took action to enforce its breach against the citizen, the citizen's claim for assumpsit arose solely under state law and raised no federal question on which jurisdiction, other than through the state-citizen diversity clause, could be grounded. The discussion in *Cohens* lends some support to this latter view. See also D. CURRIE, *supra* note 69, at 99 n.56 (Marshall's view was that affirmative claim to recover improper taxes would sound in assumpsit). But cf. *Cohens*, 19 U.S. (6 Wheat.) at 379 (case consists of rights of both parties). It is possible that Marshall never fully resolved his views on the scope of the original state-citizen clause. Compare *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 139, with 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 555-56 (J. Elliot 2d ed. 1836) [hereinafter ELLIOT'S DEBATES] (Marshall, in Virginia ratifying convention, stating that state-citizen clause of Article III did not authorize suits against states

Finally, Marshall reached the question of whether the Eleventh Amendment required a different result. Instead of adopting Ogden's argument that the amendment did not affect federal question jurisdiction, Marshall principally argued that the Eleventh Amendment was "intended for those cases, and for those only, in which some demand against a State is made by an individual in the Courts of the Union."¹⁰² Motivated by a fear that pre-existing debts would be enforced by out-of-state creditors, the amendment was, in Marshall's view, narrowly drafted to extend only to those suits commenced by "persons who might probably be its creditors."¹⁰³

Under this view, a writ of error to review a judgment obtained against a state court defendant was not a "suit" against the state. Marshall noted that a writ of error could operate either defensively or affirmatively: If the plaintiff could recover or be restored to the possession of anything by the writ of error, the writ could be "released by the name of an action" and would be a "suit."¹⁰⁴ Here, however, the writ of error had no such affirmative operation but was "entirely defensive":

Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of any thing. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment.¹⁰⁵

After further emphasizing the defensive nature of the invocation of federal jurisdiction, Marshall summed up the opinion of the Court as follows:

[T]he defendant who removes a judgment rendered against him by a State Court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the constitution or

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and noting difficulty in making state defendant). If one accepts the conclusion that Marshall viewed the non-impairments clause as creating no affirmative federal right until state action inconsistent with the underlying obligation was fully complete, however, this uncertainty should have no effect on the more important question of the judicial power over claims arising under federal law.

102. *Cohens*, 19 U.S. (6 Wheat.) at 407. Marshall elaborated this argument:

A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation.

Id. The opinion is again ambiguous, for whether "active violation" embraces all actionable violations of federal law by a state or only those in which a state makes a demand on a citizen is unclear.

103. *Id.* at 406.

104. *Id.* at 409.

105. *Id.* at 410. *See also id.* at 411-12 (writs of error routinely issued to review judgments in favor of the United States, even though it was "universally received . . . that no suit can be commenced or prosecuted against the United States . . . [and] that the judiciary act [did] not authorize such suits").

laws of the United States, does not commence or prosecute a suit against the State, *whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands*.¹⁰⁶

The principal holding, then, turned on the fact that the federal petitioner had not sought the return of anything from the state.

Only after fully arguing this conclusion does Marshall pronounce, without further explanation, an alternative holding:

But should we in this be mistaken, the error does not affect [this] case. . . . If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted 'by a citizen of another State, or by a citizen or subject of any foreign State. . . .' It is not then within the amendment, but is governed entirely by the constitution as originally framed, [in which] the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.¹⁰⁷

While it is clear from this statement that, except where the party alignments specified in the Eleventh Amendment were present, the amendment had no effect on the judicial power, Marshall left open how, if at all, the amendment would have applied in this case had the Cohens been out-of-staters.

Marshall's analysis of the relationship between federal question jurisdiction and the Eleventh Amendment, then, is somewhat opaque.¹⁰⁸ If

106. *Id.* at 412 (emphasis added).

107. *Id.*

108. Judge Gibbons has concluded that *Cohens* supports the view that the Eleventh Amendment was not intended to bar the exercise of federal jurisdiction in any case presenting a substantial federal question. Gibbons, *supra* note 1, at 1952-53. For support, he relies on the alternative holding, *see supra* text accompanying note 107, and the statement earlier in the opinion that "a case arising under . . . [the] laws of the United States. . . is cognizable in the courts of the Union, whoever may be the parties to that case." 19 U.S. (6 Wheat.) at 383. The quoted passage, however, appears in a section of *Cohens* explicitly devoted to an analysis of the scope of the federal question jurisdiction under the unamended Constitution. This is emphasized by Marshall's discussion, in the very next paragraphs of the opinion, of the enumeration of cases to which Article III jurisdiction extends: "The mere circumstance, that a State is a party, gives jurisdiction to the Court. . . . The constitution gave to every person having a claim upon a State, a right to submit his case to the Court of the nation." *Id.* A careful reading of the full opinion suggests that Judge Gibbons placed undue emphasis on a statement taken out of context to reach his conclusion. For readings similar to Gibbons', see J. ORTH, *supra* note 1, at 39; Fletcher, *supra* note 1, at 1084 & n.207.

Judge Gibbons' reliance on *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), to support the claim that the Marshall Court believed that the Eleventh Amendment did not bar federal question jurisdiction is similarly problematic. Gibbons, *supra* note 1, at 1953-54. *Worcester v. Georgia* was a criminal prosecution of a federal agent for living on an Indian reservation without a state license. Since the agent was a citizen of Vermont, the *alternative* holding in *Cohens* was unavailable to sustain the jurisdiction. The case presented the party alignment specifically addressed by the Eleventh Amendment. Yet the case fits squarely within the contours of the extensive *Cohens* analysis of a "suit." Thus, it cannot properly be seen as evidence of a contemporaneous understanding that the Eleventh Amendment did not apply to cases in which the foundation for federal jurisdiction was the presence of a claim arising under federal law. The case only supports that view if one ignores the primary holding

federal question jurisdiction were not restricted by the Eleventh Amendment, it would seemingly have been unnecessary to argue that the writ of error was not a "suit." Marshall could simply have embraced Ogden's argument that the Eleventh Amendment applied only where federal jurisdiction was based solely on the character of the parties.¹⁰⁹ On the other hand, Marshall plainly did not read the Eleventh Amendment as based on broad notions of sovereign immunity, concluding that, outside its literal language, the amendment did not restrict the originally granted jurisdiction of the Court. Whether the federal courts could take cognizance of certain affirmative claims against states was more troubling,¹¹⁰ but the power of the Court to assure the defensive operation of the Constitution against abuses of state power was plain.

B. *Supreme Court Review of State Court Judgments in Actions against States: From Cohens to the Present*

While some scholars conclude from *Cohens* that Marshall believed the Eleventh Amendment had no application to the exercise of federal question jurisdiction, a more complete analysis suggests that Marshall was not entirely clear on this point or was unable fully to persuade his colleagues of it. The Court's subsequent exercise of its appellate jurisdiction, however, strongly suggests that this understanding has been accepted: For the purpose of reviewing state court judgments in actions against states, federal question jurisdiction is essentially unencumbered by the Eleventh Amendment.

Marshall's reliance on the distinction between negative and affirmative relief against a state did not go uncondemned. Marshall's arch-rival Spen-

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in *Cohens*—that where a state prosecutes an individual and the defendant raises a federal law in defense, adjudicating that federal claim does not involve a "suit in law or equity" against a state, since no demand or judgment for a thing can be entered against the state.

109. In *Osborn*, Marshall once again stopped short of embracing this view. Counsel for the bank in *Osborn*, like Ogden in *Cohens*, argued that even if a state were a party, the Court would have jurisdiction "in a case arising under the Constitution and laws of the Union." 22 U.S. (9 Wheat.) at 798. Marshall seems to accept that the Eleventh Amendment applied to the head of jurisdiction established by the state-citizen diversity clause, stating: "[t]he amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by citizens of another State, or by aliens." *Id.* at 857–58. Yet a thorough acceptance of the implications of this argument might have rendered unnecessary, for jurisdictional purposes, the "party of record" rule for which *Osborn* is justly famous. *See also id.* at 847, 849 (asserting that state could not be made party because, by the Eleventh Amendment, state could not be sued by alien or citizen of another state). *But see* Gibbons, *supra* note 1, at 1958 n.370 (suggesting that Marshall was paraphrasing counsel's argument). Marshall's lengthy discussion of why the case could safely be regarded as one not against a state and his failure to embrace clearly the argument that the amendment did not affect jurisdiction over federal claims suggest that the uncertainty evinced in *Cohens* had not totally dissipated. *See Osborn*, 22 U.S. (9 Wheat.) at 846–59; *infra* note 310 (Marshall's concern reflecting common law, as well as constitutional, concerns).

110. Professor Currie notes the possibility that Marshall discussed sovereign immunity in *Cohens* in order to suggest that a state could be made a defendant. Currie, *supra* note 86, at 691. This seems unlikely: Marshall's treatment of the issue corresponds in emphasis to that of the arguments of counsel and does not extend as far as counsel for the *Cohens* urged.

cer Roane attacked *Cohens*, arguing that whether the state or the citizen possessed the thing in dispute was unimportant compared with the question of which one had the right—and who could decide that.¹¹¹ As Roane's critique implied, the dividing line between affirmative and negative relief against the state as a limitation on Supreme Court review evaporated over time. What might have surprised Roane was that it did so virtually unnoticed and with nearly unanimous acquiescence.

For several years after *Cohens*, the Court's exercise of appellate jurisdiction over state court decisions in disputes to which a state was a party apparently occurred primarily in cases in which the state was the original plaintiff and the federal right arose in defense.¹¹² But in the 1850's, the Taney Court was called on to review claims for affirmative monetary relief filed in state court against a state. In *Curran v. Arkansas*,¹¹³ the Court, without referring to the Eleventh Amendment, reversed the state court judgment in favor of the state, in an action seeking to hold the state liable for debts owed by the defunct state bank.¹¹⁴ Although the state apparently objected to the suit against it, the Court found that whether the state was "capable of being thus sued" was purely a question of state law, resolved in favor of petitioner by the state supreme court and that, accordingly, by "its own consent, the state" could be subject to a decree in favor of the complainant.¹¹⁵ Since Curran was a state citizen,¹¹⁶ it is perhaps not surprising after *Cohens* that the Court did not discuss the Eleventh Amendment. Yet the Court's terse reliance on the state's consent to have matters tried in its own courts contrasts sharply with the detail of the

111. Roane, *supra* note 85, at 157–61. Judge Gibbons notes that Roane, as a judge on the Virginia Supreme Court, in *Hunter v. Martin*, 18 Va. (4 Munf.) 1 (1813), *rev'd*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), viewed the Eleventh Amendment as not affecting federal question jurisdiction. Gibbons, *supra* note 1, at 1950–52. Roane's view, however, was that Article III's federal question jurisdiction did not permit any exercise of jurisdiction over a case in which a state was a party defendant. Roane, *supra* note 85, at 117–18, 143.

112. See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (state court criminal prosecution in which defendant raised federal defense); *Craig v. Missouri*, 29 U.S. (4 Pet.) 410 (1830) (state sued Craig on promissory note in state court; Craig asserted federal defense that consideration for note invalid as "bill of credit"); see also *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257 (1837) (same procedural posture as *Craig*). But cf. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (adjudicating on merits contracts clause claim against proprietors of bridge which, during pendency of litigation, had become property of state).

113. 56 U.S. (15 How.) 304 (1853).

114. *Id.* at 320–21. Plaintiff, a creditor of the state bank, alleged in his state court complaint that the effect of several state statutes, appropriating the assets of the state bank to pay obligations of the state, impaired his contract with the bank and entitled him to proceed against the state itself to satisfy the debt. *Id.* at 306–07. The state court upheld the validity of the laws, rejecting the contracts clause argument, and dismissed the complaint.

115. *Id.* at 309. The Court also observed that by owning capital stock in the bank the state had "[l]aid down its sovereignty" as to claims arising out of that ownership. *Id.* at 308; see *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824) (states have no sovereign immunity when acting in their "proprietary capacity" as shareholder of corporation). The *Curran* Court's discussion of general sovereign immunity principles is not surprising in this pre-*Erie* opinion. See *infra* notes 307–08, 316.

116. Plaintiff's Bill of Complaint, *Curran v. Arkansas*, 56 U.S. (15 How.) 304 (1853) (contained in Supreme Court Record).

Cohens rationale and with the later conclusion in *Hans* that the Eleventh Amendment prohibited the exercise of federal question jurisdiction over claims by a citizen against his own state.¹¹⁷

In later cases against Arkansas by creditors seeking repayment of debts and challenging state laws as violating the contracts clause of the Constitution, the state courts found themselves to lack jurisdiction by virtue of changes in state law imposing restrictions on previously available remedies. The Supreme Court adhered to the view that state law controlled. In explaining its decision in a case brought on behalf of an out-of-state bank, the Court remarked that the state could not be sued in state court without its consent and that the courts of the United States were "expressly prohibited" from exercising such jurisdiction.¹¹⁸

These cases can be read to hold that consent to suit was governed en-

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117. See also *Woodruff v. Trapnell*, 51 U.S. (10 How.) 190, 209 (1850) (reversing state court decision declining to compel state Attorney General to accept former bonds in payment of debts owed state); *Gordon v. Appeal Tax Court*, 44 U.S. (3 How.) 133, 150 (1845) (writ of error to Maryland Court of Appeals in which, according to counsel's argument, nominal defendant party was Appeals Tax Court, but actual defendant in interest was state; state court finding of no impairment of contract reversed and entry of judgment for plaintiff directed). Justice Story's dissenting opinion in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), is worth noting. After the state court decision rejecting plaintiff's contracts clause challenge to defendant's construction of a bridge, defendant recouped the expenses of construction, and under the terms of its contract, the bridge became property of the state. The parties to the litigation did not change, however, and the Court affirmed on the merits. Story, disagreeing on the merits, addressed the jurisdictional issue first, writing that when a state court decides against a claim of federal right, "this Court has a right to entertain the suit, and decide the question; whoever may be the parties to the original suit, whether private persons, or the state itself." *Id.* at 585. Story relied entirely on *Cohens* for this proposition, ignoring Marshall's emphasis on the defensive nature of the invocation of federal jurisdiction. Story also argued that Massachusetts was not a party of record and that, under *Osborn*, jurisdiction could be exercised over state agents. *Id.*

118. *Bank of Washington v. Arkansas*, 61 U.S. (20 How.) 530, 532 (1857) ("the judiciary of the State cannot interfere to enforce . . . contracts without the consent of the State, and the courts of the United States are expressly prohibited from exercising such a jurisdiction"). Whether the Court was alluding to the Eleventh Amendment in its reference to what was "expressly prohibited" is difficult to ascertain, given the very different contours of that Court's presumed understanding of the amendment. For one thing, the Bank of Washington was a federally chartered corporation of the District of Columbia. At that time, the Court had taken the position that a citizen of the District was not a "citizen of a state" for diversity jurisdiction purposes, *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805); thus it is not clear whether the Eleventh Amendment would have "expressly prohibited" the party alignment, assuming the bank's citizenship were relevant. But see *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809). Moreover, until *Smith v. Reeves*, 178 U.S. 436, 446-49 (1900), it was not decided that a federal corporation was barred by the Eleventh Amendment from suing a state. It is also possible that the "expressly prohibited" language could refer to the language of section 25 of the Judiciary Act limiting review of federal questions to those decided by the state court. If the jurisdiction of the state court was regarded as entirely a question of state law, then jurisdiction to review the claim was arguably prohibited by section 25. Given the context, however, it seems likely that the Court was referring to the Eleventh Amendment, a possibility apparently overlooked by others. See *Gibbons supra* note 1, at 1968 (*Madrazo* only pre-Civil War case dismissed as barred by Eleventh Amendment; amendment was considered applicable only where federal jurisdiction depended solely on party status); J. ORTH, *supra* note 1, at 41-42 (in no case did Taney Court apply Eleventh Amendment to defeat its jurisdiction). In *Beers v. Arkansas*, 61 U.S. (20 How.) 527 (1857), while purporting to dismiss for lack of jurisdiction, the Court also reached the federal question of whether modification of the remedy itself violated the impairments of contracts clause and concluded that it did not. *Id.* at 529-30 (state law only regulated jurisdiction of state courts and did not impair contract with state); see *Gibbons, supra* note 1, at 1937 n. 256, 1955 n. 356 (treating *Beers* as merits decision); Wolcher, *supra* note 66, at 264 (same).

tirely by state law and that a state's consent to suit in its own courts ended any question as to its immunity from federal judicial power. But by the beginning of this century the Court reached the seemingly contradictory conclusion that a waiver of immunity from suit in state courts was *not* a waiver of Eleventh Amendment immunity.¹¹⁹ Nonetheless, the Supreme Court continued to review state court judgments in cases involving affirmative claims against states.¹²⁰

The Court's most extensive effort to rationalize these discrepant practices came in *Smith v. Reeves*,¹²¹ on review of a federal circuit court action against a state treasurer for refund of taxes. Justice Harlan, writing for the Court, addressed two questions: whether the suit was against the state for purposes of the Eleventh Amendment, and, if so, whether the state had consented. Harlan answered the first question affirmatively—a suit against the Treasurer of California, in his official capacity, for the recovery of previously paid taxes, was one against the state.¹²² While acknowl-

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119. See *Smith v. Reeves*, 178 U.S. 436 (1900). Indeed, the Court has imposed increasingly stringent standards for determining when a state has, by conduct or statute, waived its Eleventh Amendment immunity from suit in the lower federal courts. Compare *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273 (1906) (state waived immunity by appearance of attorney general who was authorized to defend) with *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 466–68 (1945) (state Attorney General, though authorized to defend, not authorized to waive immunity).

120. See *supra* note 59. In addition to *Bank of Washington*, 61 U.S. (20 How.) at 532, which arguably treated the Eleventh Amendment as a constraint on the Court's appellate jurisdiction, see *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911), and *Poindexter v. Greenhow*, 114 U.S. 270 (1884). In *Hopkins*, the Court's treatment of the issue appears to reflect the notion, since clearly repudiated in *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980), and *Nevada v. Hall*, 440 U.S. 410, 418–21 (1979), that the Eleventh Amendment constrains the jurisdiction of state courts. The state court dismissed plaintiff's constitutional claim for damages on the ground that it lacked jurisdiction over actions against the state. The Supreme Court reversed, concluding that the damage claim was not against the state because the defendant was a legally separate entity; on remand, however, it noted that any relief requiring disposition of state-owned lands was foreclosed by Eleventh Amendment doctrines of immunity. *Id.* at 642–45, 649. The Court thus treated the Eleventh Amendment as applying to federal claims brought in state courts, rather than as limiting its own appellate jurisdiction. See also *Louisiana ex rel. New York Guar. & Indem. Co. v. Steele*, 134 U.S. 230 (1890) (affirming state court's dismissal of action against state auditor on ground that suit was against state; both Supreme Court and state court opinions cite Eleventh Amendment cases). In *Poindexter*, the state court found that it had jurisdiction over the action against a state tax collector to return property seized for failure to pay taxes, but gave judgment for the defendant, apparently rejecting plaintiff's constitutional claim that state laws prohibiting use of bond coupons to pay taxes and withdrawing plaintiff's remedy against the collector for failure to receive the coupons violated the contracts clause. *Id.* at 274. The Supreme Court reversed, directing entry of judgment for plaintiff. In response to the argument that the "suit below" was in effect against a state, *id.* at 285, the majority discussed the Eleventh Amendment at length, concluding that the suit should not be regarded as one against the state. Neither the majority nor the dissent considered what significance to attribute to the state court's exercise of jurisdiction. To the extent that *Poindexter* may have assumed that the Eleventh Amendment might preclude Supreme Court review of federal questions decided in state court actions "against a state," this assumption seems inconsistent with *Smith v. Reeves*, 178 U.S. 436 (1900); see also *General Oil Co. v. Crain*, 209 U.S. 211 (1908).

121. 178 U.S. 436 (1900).

122. *Id.* at 440. Harlan distinguished earlier cases involving prospective relief against enforcement actions, such as *Smyth v. Ames*, 169 U.S. 466 (1898), and *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894), from those seeking tax refunds, by arguing that in the former the suit was not against the state, but only against the officer to restrain the performance of an unauthorized act. In this case, however, which Harlan saw as one "to compel an officer of the state, by affirmative action on his part, to perform or comply with the promise of the State," *Reeves*, 178 U.S. at 445, the action

edging that the State had indeed consented to be sued, Harlan concluded that "it has not consented to be sued except in one of its own courts."¹²³

In explaining why, and to what degree, a state could limit its consent, Harlan suggested that some principle of federal law constrained a state from insulating itself from the appellate jurisdiction of the Supreme Court over "federal questions":

[A] state [may] . . . consent to be sued in its own courts . . . in respect of any cause of action against it and at the same time exclude the jurisdiction of the [f]ederal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the [s]tate in any action brought against it with its consent may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.¹²⁴

This is the extent of Harlan's effort to explain why a state's consent to suit is effective for state trial courts and for the appellate jurisdiction of the Supreme Court over federal questions, but is ineffective for the exercise of jurisdiction by the lower federal courts over federal questions.¹²⁵ This cryptic explanation leaves unclear the relationship between the concepts of consent, on the one hand, and federal supremacy, on the other, in justifying federal review.¹²⁶

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was against the state itself. See generally Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 153-55 (doctrinally coherent under common law agency principles to hold officer liable for his tortious conduct, but not for breach of state contract, though irrational to link question of officer liability with question of whether action is one against state).

123. *Reeves*, 178 U.S. at 441. While the exclusion of federal courts from consent was "not expressly declared in the statute," Harlan wrote, that was its meaning. The consent statute in *Reeves* authorized the Treasurer to demand trial in the Superior Court of Sacramento County, a limitation providing some textual support for the proposition that the consent was limited to the state court system. The principle of *Smith v. Reeves*, however, has been applied to seemingly unrestricted waivers of immunity applicable to "any court of competent jurisdiction," *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 461 n.3, 465 n.8 (1945), and has developed into a strong presumption that a state's consent to suit is limited to state court. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam); *supra* note 53.

124. 178 U.S. at 445.

125. Particularly in light of the emphasis *Reagan*, 154 U.S. at 391, and *Smyth*, 169 U.S. at 516-517, placed on the importance of a federal forum for out-of-staters to vindicate rights and remedies provided in state courts, Harlan could have concluded either that consent was equally effective in both tribunals or that, by consenting to the suit against the officer, the state had either waived its immunity or rendered the suit one not against itself. Cf. *Atchison T. & S.F. Ry. v. O'Connor*, 223 U.S. 280, 287 (1912) (in permitting refund suit in federal court against state tax collector, Court notes state law authorizing treasurer to refund taxes erroneously paid).

126. Harlan's opinion simply does not attempt to reconcile the exercise of Supreme Court appellate jurisdiction over a suit in state court based on a consent limited to state court with the view, expressed in his *Hans* concurrence, that Article III does not extend to any suit against a state by its own citizens absent state consent. 134 U.S. at 21. Is Harlan in *Reeves* referring to a constitutional principle, implicit in the supremacy clause, that would permit states to withhold consent to suit alto-

Harlan firmed up his position as the modern architect of the rationale supporting extension of the *Cohens* doctrine in his concurring opinion in *General Oil Co. v. Crain*,¹²⁷ a case also notable for the majority's willingness to be less deferential to state court determinations of state court jurisdiction. The suit for injunctive relief against the enforcement of an allegedly unconstitutional statute originated in Tennessee state court.¹²⁸ The state court had dismissed the action on the ground that it was effectively against the state; by general statute the state courts were deprived of jurisdiction in such cases.¹²⁹ Viewing the lower federal courts as closed to the claim by virtue of the Eleventh Amendment,¹³⁰ the Court concluded that the state court was required by the Constitution to hear the case; its denial of jurisdiction could, in effect, deprive the plaintiff of rights under the Fourteenth Amendment.¹³¹ Treating the state court's decision as one denying plaintiff's federal claim, the Court reviewed the merits of the constitutional challenge.¹³² In explaining its decision, the majority implicitly

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gether, but would not permit states to limit consent to suit in state court? If so, then once the state consents, why is district court jurisdiction still barred? Is his reference to the "condition" instead a statutory reference—to the well-established authority of section 25 of the Judiciary Act of 1789 for Supreme Court review of state court judgments? If so, why does Congress have power to impose such a condition on the states, in light of the Eleventh Amendment? If Article III's grant of appellate jurisdiction to the Supreme Court in some way establishes conditions for the exercise of state court jurisdiction over questions of federal law, regardless of the identities of the parties, it is difficult to see why the entire federal judicial power does not extend to such cases when Congress confers such jurisdiction on inferior federal courts. *See infra* text accompanying notes 146–60 (arguing that consent rationale is fictive and that supremacy clause rationale supports understanding of federal question jurisdiction as unconstrained by constitutional principle of state sovereign immunity); Amar, *supra* note 1, at 1477 n.211.

127. 209 U.S. 211 (1908).

128. *Id.* at 216.

129. *Id.*

130. *See infra* note 131. The Court on the same day decided, in *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not preclude a federal court from granting injunctive relief to restrain a state officer from enforcing an allegedly unconstitutional state statute. Thus, it is difficult to account for the Court's assumption in *Crain* that the federal courts were closed to the plaintiffs. *See* Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187, 209 n.89. The assumption, however, is important to an understanding of *Crain's* implication that, even where a state would have immunity in the lower federal courts, the Supreme Court may require the case to be heard in state court.

131. 209 U.S. at 228. The Court wrote:

If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution and may be forbidden by a State to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.

Id. at 226.

132. *Id.* at 228. Although the majority upheld on the merits the constitutionality of the regulation plaintiffs sought to challenge, the majority's willingness to ignore the state court's jurisdictional determination, treating the jurisdictional holding based on state law as an effective denial of the federal right claimed, is in marked contrast to the Taney Court's treatment of state court determinations of their own jurisdiction as virtually conclusive. *See supra* text accompanying notes 113–20; *see also* *Hopkins v. Clemson Agricultural College*, 221 U.S. 636, 643 (1911) (state court's determination of its own lack of jurisdiction, on ground that suit was really against state, reversed on apparent interpretation of Eleventh Amendment); *cf. McCullough v. Virginia*, 172 U.S. 102, 123–25 (1898) (rejecting argument that jurisdiction was lacking because state legislature repealed statute authorizing refund

asserted power to review, and override, state laws forbidding suits against state officers in state courts, in order to assure "enforcement of many provisions of the Constitution," specifically including the Fourteenth Amendment.¹³³

Harlan, writing separately, argued that, once the Tennessee court determined that it lacked jurisdiction based on an interpretation of state law, its decision must be accepted by the Supreme Court. The Eleventh Amendment was irrelevant:

Th[e] Amendment relates wholly to the judicial power of the United States, and has absolutely nothing to do with the inquiry as to the jurisdiction of the inferior state court. . . . In determining what relief this court can or should give . . . we need not consider the scope and meaning of the Eleventh Amendment; for, *it was long ago settled that a writ of error to review the final judgment of a state court, even when a State is a formal party and is successful in the inferior court, is not a suit within the meaning of the Amendment.* *Cohens v. Virginia*, 6 Wheat. 264, 408, 409.¹³⁴

This broadly recasts the holding of *Cohens*.¹³⁵ *Cohens* did not hold that in any case in which a state is a formal party and successful, a writ of error was not a suit; rather, it held that where the state was acting as plaintiff in the state courts and was successful, the defendant may appeal without running afoul of the Eleventh Amendment. Harlan's restatement simply eliminates the amendment as a bar to review of state court judgments.

Harlan's concurrence completed the transformation of the Eleventh Amendment from a prohibition applicable to the judicial power of the

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action and conferring jurisdiction on state court). *Poindexter v. Greenhow*, 114 U.S. 270, 298-303 (1884) (state law cannot deny all remedy for federal right in state court). *But see* *Palmer v. Ohio*, 248 U.S. 32 (1918) (right of individuals to sue state, in either federal or state court, not derived from federal law but only from the consent of state as determined by state law). In *Palmer*, however, the Court qualified this assertion by noting that "no federal right" was involved, *id.* at 34, apparently because of the Court's view that the "taking of property" claim, pled as one under the Fifth Amendment, was "palpably groundless." In support of the latter assertion, the Court cited *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Fifth Amendment does not constrain states), ignoring that the case had been effectively overruled by the Fourteenth Amendment as interpreted in *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226 (1896) (Fourteenth Amendment prohibits uncompensated takings by states). *Cf.* *Martinez v. California*, 444 U.S. 277 (1980) (upholding constitutionality of state immunity statute on state law tort claim).

133. 209 U.S. at 226.

134. *Id.* at 233 (emphasis added). *See also* *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 585 (Story, J., dissenting) (Court may "entertain the suit" when state court rejects federal claim, even if state is party). While Harlan's focus in *Crain* on whether an "appeal" is a "suit" would not affect application of the amendment in the lower federal courts, Story's formulation—that a suit involving a federal question may be heard by the Court—might support the view that the Eleventh Amendment did not affect federal question jurisdiction at all. *But cf.* J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, at 642 (Nowak & Rotunda eds. 1987) (amendment intended to affect institution of original actions against states, not to control appellate jurisdiction over action brought by state).

135. *See supra* Part II(A).

United States to a prohibition applicable only to the judicial power of the United States courts in its "original" form. The rationale for this transformation, such as it was, took several forms:

Cohens rested on the view that assertion of a federal defense to a state prosecution was not a "suit" and, alternatively, that the Eleventh Amendment did not apply in litigation between a state and its own citizens. Later nineteenth century cases rested on the consent of the state to be sued in state court. In *Smith v. Reeves*, Harlan offered a third justification for the Supreme Court's power of appellate review by reference to the "supremacy of federal law," at least where the state consented to state court jurisdiction. He thus implicitly embraced the view that some portion of federal question jurisdiction was unaffected by the Eleventh Amendment. Finally, in *General Oil Co. v. Crain*, Harlan cast the decision on the quite different, formal interpretive ground that an "appeal" from a state court is not a "suit."

C. *Inadequacy of the Proffered Rationales*

None of these four rationales sufficiently accounts for the anomaly with which this Part opened: that the Supreme Court can exercise the judicial power in review of suits against states brought in state courts even though such suits cannot constitutionally be initiated in federal district courts.¹³⁶

1. *Cohens*. The rationale of *Cohens* with respect to the defensive posture of the federal petitioner does not account for, indeed is in tension with, review of state court judgments in, for example, tax refund actions; and where those refund actions are brought by out-of-staters,¹³⁷ the alternative holding of *Cohens* cannot account for the practice either. Under the *Hans* formulation, moreover, affirmative claims by in-staters are equally suspect.

2. *Appeal Not a Suit?* The proposition that a "suit" does not include an "appeal" is only barely plausible. Such a technical construction suggests that its legitimacy is grounded in its accurate reflection of the intent of those who framed the Eleventh Amendment. Yet had the framers and

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136. In *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court noted in passing that giving state courts the first opportunity to rule on questions of state law relevant to the federal claim is a benefit of requiring tax refund actions to be brought initially in state court. *Cf. Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941) (equitable action stayed to permit parties to obtain state court construction of state law). Since state law questions are often present, this reasoning suggests that another ground for the Supreme Court's practice of reviewing cases against states barred from the district courts is an abstention principle resulting in state courts having the first opportunity to consider certain claims against states. Yet there is little reason to think that only in actions for monetary relief will such state law issues arise, or that in every such action state law issues will be important or dispositive. While *Ford Motor Co.* illustrates a policy concern that may be animating the structure of Eleventh Amendment jurisprudence, it does not articulate any connection between this principle and the text or historic purpose of the Eleventh Amendment.

137. See, e.g., *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275 (1972). *Heublein* had only one employee in South Carolina, and its home office was in Connecticut. *Id.* at 277.

adopters intended the word "suit" not to include any appeals, surely counsel for the Cohens would have so argued. But to the contrary, Ogden, the Cohens' counsel, argued, and John Marshall wrote, that whether an appeal (or writ of error) is a "suit" within the meaning of the amendment turns on whether the effect of a reversal would be to award affirmative relief against the state or only to restrain the state from obtaining the relief it sought in enforcement proceedings.¹³⁸

That John Marshall in *Cohens* did not hold that "an appeal is not a suit" does not necessarily make it wrong to interpret the amendment this way. Given the fierce resistance of many states to the appellate jurisdiction conferred by section 25 of the First Judiciary Act,¹³⁹ however, it is unlikely that, if the amendment were intended to constrain federal question jurisdiction at all, it would have excepted from that constraint appeals to the Supreme Court. Certainly no difference in the coercive effect of a judgment from the Supreme Court on appeal, and in an original federal court action, would seem to justify any such distinction. Notwithstanding the suggestion in *Cohens* that a writ of error acts "only on the record [and not] upon the parties,"¹⁴⁰ the effect of a reversal by the Supreme Court is as binding, and enforceable, as an original federal judgment.¹⁴¹ Nor does

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138. See *supra* text accompanying notes 81, 104-05; cf. *infra* note 140. It is true that the primary motivation for the amendment was the prosecution of a suit within the original jurisdiction of the Court. See *Bank of the United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 906 (1824) (Marshall, C.J.) (if case involving state could not have been brought in Supreme Court's original jurisdiction, it should be regarded as outside reach of Eleventh Amendment). Yet an understanding that the amendment did not apply to the appellate jurisdiction of the Supreme Court, but *did* apply to the *federal question* jurisdiction of the lower federal courts, is arguably inconsistent with the prohibition on the "prosecution" as well as the bringing of suits. See *Cohens*, 19 U.S. (6 Wheat.) at 408 ("to prosecute . . . suit[] is . . . to continue" demand for something previously sought by institution of process in court). But cf. *id.* ("prosecution" language intended to apply amendment to then-pending cases).

139. See *Craig v. Missouri*, 29 U.S. (4 Pet.) 410, 415-16 (1830) (Missouri made no Eleventh Amendment objection to Court's jurisdiction, but vigorously sought to reargue constitutionality of section 25 of First Judiciary Act); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 312-29 (rearguing constitutionality of section 25 review); see generally Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 3-4 (1913) (between 1789 and 1860, courts in seven states and legislatures in two others denied constitutional power of Supreme Court to review state court judgments). Although most of these incidents occurred several years after enactment of the Eleventh Amendment, at least one incident of state courts asserting this position occurred in the 1790's, though after the amendment was enacted. *Id.* at 4-5 (quoting *Republica v. Cobbett*, 3 U.S. (3 Dall.) 467, 473-74 (Pa.S.Ct. 1798)).

140. 19 U.S. (6 Wheat.) at 410. See also *id.* at 411 (citation does not require state's appearance); *supra* note 82 (discussing Pinkney's argument). Marshall's characterization of the writ of error seems intended to show that, given the defensive posture of the federal petitioner, there was nothing in the writ that should be regarded as making an affirmative demand on the state. But cf. *Gibbons*, *supra* note 1, at 1946 nn.309-10 (drafters of amendment would have intended prohibition to apply to all writs of error from superior court).

141. The Court has been authorized to enforce its mandate in section 25 appeals since the First Judiciary Act. Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-86 (writ on review of state court to have same effect as on review of lower federal court, except that on second writ of error in same case Supreme Court may proceed to final judgment and award execution); see P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 458 (2d ed. 1974) [hereinafter *HART & WECHSLER 2D ED.*] (title 28 provides Court no less authority to enforce mandate directly than under prior law; state recalcitrance can be met by entry of

any difference in the scope of what the federal court will decide in original as compared with appellate proceedings readily correspond to the concept of jurisdiction over a "suit."¹⁴² It is generally true that the Supreme Court will only review state court decisions of federal questions, whereas in an original federal action, decision on questions of state law may be required.¹⁴³ But the conclusion that the federal questions reviewable on appeal are not part of the suit does not follow from the observation that they are less than the whole of the suit. While the scope of what the Supreme Court will decide on review of state court judgments may be smaller than what can be decided in original federal actions (and while there may be policy reasons to prefer state courts as decisionmakers on state law issues),¹⁴⁴ this difference in scope does not readily account for the text of the amendment.

Thus, to say that there is appellate jurisdiction because an "appeal" is not a "suit" seems unsatisfactory as constitutional exegesis.¹⁴⁵ It was not how the phrase was construed relatively soon after its enactment by a nationalist Chief Justice eager to preserve the Court's jurisdiction to vindicate federal law. And the relative powers of the two levels of federal courts in making and enforcing their decisions, while supporting the idea that an appeal is only part of a suit, cannot support the formalistic pro-

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judgment or award of execution); see also J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS 481 (1971) (describing Ellsworth's experience with state court recalcitrance as basis for authority to proceed to final judgment and award execution). Cf. *Virginia v. West Virginia*, 246 U.S. 565 (1918) (Court can directly compel enforcement of monetary judgment against state in original proceeding).

142. Cf. U.S. CONST. amend. VII (in "Suits" at common law, amendment provides rules for trial and subsequent appellate proceedings). Although the Seventh Amendment does articulate differences between appellate and original jurisdiction in "Suits at common law," constraining appellate review of jury findings, the text strongly suggests that the word "suit" was understood to include both trials and appeals. Moreover, the concerns underlying the enactment of the Eleventh Amendment had virtually nothing to do with fact-finding by the Supreme Court, but rather with its ruling on issues of law on jurisdiction, immunity, and assumpsit. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

143. Compare *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (Supreme Court's jurisdiction over state court judgments limited to deciding federal questions) with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (federal district courts in diversity cases must decide questions of state law in diversity cases, in accordance with state common law). The implications of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), are important to note. If, as *Pennhurst* appears to hold, the Eleventh Amendment bars federal courts from exercising pendent jurisdiction over state law claims against state officers, then the scope of state law questions that may be decided in federal district court litigation directly challenging state actions may be closer to that of the Supreme Court in reviewing state court decisions. In both instances, the federal court may be limited to deciding or reviewing only those questions of state law that are so interwoven with the federal issues that the latter depend on an interpretation of the former, *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (citing *Enterprise Irrigation Dist. v. Canal Co.*, 243 U.S. 157, 163-65 (1917)), although the Supreme Court would be deciding only whether the state court finding was "adequate" to foreclose the federal claim.

144. Cf. *infra* note 398.

145. As I argue in Part III(B) below, one of the concerns underlying the Eleventh Amendment's enactment was Congress' perceived inability otherwise to diminish the Supreme Court's original jurisdiction. In a sense, then, the amendment can be correctly understood as directed against certain original cases and not appeals. This is so, not because of a special rule or meaning of the amendment as applied to appeals in federal question cases, but because the thrust of the amendment was to restrict a party-based head of jurisdiction within the Supreme Court's original jurisdiction.

position that an "appeal is not a suit" for purposes of an amendment restraining the entire judicial power of the United States.

3. *Consent and Supremacy*

The proposition that once a state consents to be sued in its own courts, it likewise consents to Supreme Court review of federal questions decided therein, accords with the general structure of judicial federalism established in such early decisions as *Cohens v. Virginia* and *Martin v. Hunter's Lessee*.¹⁴⁶ Yet in light of present doctrinal foundations of the Eleventh Amendment as conferring a constitutional immunity in federal question cases, this proposition suffers several defects.

First, if the amendment is, as its language suggests, an absolute restriction on the judicial power, the proposition that a party can waive its provisions is not self-evident.¹⁴⁷ The provisions limiting the judicial power of Article III are generally not regarded as waivable.¹⁴⁸ But even accepting waivability as a "well-established" anomaly of Eleventh Amendment jurisprudence,¹⁴⁹ extending that concept to justify Supreme Court review of state court judgments but not district court jurisdiction is questionable.

The Court has emphasized that the constitutional immunity of states includes not only the power to decide *whether* to consent to suit, but *where*.¹⁵⁰ As we saw in the discussion of *Smith v. Reeves*, the Court has repeatedly construed state consent to suit provisions as inadequate to authorize suits against the states in inferior federal courts. Why, then, when those suits are brought in state court and federal questions are decided, is that consent to suit adequate for the exercise of federal appellate jurisdiction?

The appellate jurisdiction of the Supreme Court in some respects poses

146. 14 U.S. (1 Wheat.) 304 (1816). The separate rationales of "consent" and "supremacy" were linked by *Smith v. Reeves*, which held that, once a state consents to suit in state court, any dispositive federal questions decided therein are reviewable by the Supreme Court. Because of the linkage, I treat the two rationales together.

147. To justify the Supreme Court's exercise of appellate jurisdiction on a theory of consent, then, turns on the more general anomaly that a state can sometimes waive its Eleventh Amendment immunity. The rule of waiver is, indeed, more consistent with the premise that much existing Eleventh Amendment caselaw stems from a federal common law of state sovereign immunity from suit than from a presumed constitutional constraint on the reach of the judicial power. This common law rule of immunity applied only where consent was lacking. *See infra* Part IV.

148. *See, e.g., American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379 (1884). The theory of waiver standing alone does not distinguish between federal and state causes of action, and thus, presumably, the states may control the Court's jurisdiction over both federal and state claims against states through waivers of immunity. The Court, however, has already developed discretionary doctrines to limit resort to its original jurisdiction. *See, e.g., Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

149. *Employees v. Department of Pub. Health*, 411 U.S. 279, 294 n.10 (1973) (Marshall, J., concurring).

150. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (*per curiam*).

less of a threat to state autonomy than does the jurisdiction of the district courts.¹⁵¹ Thus, although hard to square with the Court's insistence that consent not be "implied" but be clearly and unequivocally given for original jurisdiction cases, the notion that a more relaxed standard of consent would apply to determine whether the state had submitted itself to the appellate jurisdiction of the Supreme Court has attraction.¹⁵²

It is, however, difficult to imagine that a state could, at this juncture, constitutionally authorize its courts to hear claims against the state subject to an enforceable proviso that state court rulings, even on questions of federal law, could not be reviewed by the Supreme Court.¹⁵³ The consent to Supreme Court jurisdiction thus arises both constructively and conclusively from using state courts to adjudicate these claims.¹⁵⁴ It follows that,

151. Although a single Supreme Court decision has broader binding effect than a similar district court decision, the existence of Supreme Court appellate jurisdiction may present less of a threat than lower federal court jurisdiction, particularly if states can refuse altogether to consent to suit in state or federal court. *But see infra* text accompanying notes 156-58. Even if states do not have such discretion, limiting initiation of actions against a state to state courts offers real advantages for state autonomy. First, if the case is resolved in the state court on an issue of state law, appellate review is unavailable. Even where state law is inextricably interwoven with the federal claim, the state court may dispose of the issue differently if it rules on the state law question first. *See supra* note 136. Second, given the very limited scope of appellate review of facts, state court control over the factfinding process is quite important, as is initial control over the procedures and timing of a lawsuit. Third, the Supreme Court can hear only a fraction of the cases brought before it by petition or appeal; the federal district courts, however, are not similarly encumbered *and* do not have the same discretion the Supreme Court has through certiorari review to decline to decide cases within their jurisdiction.

152. The argument in favor of a more relaxed standard of consent for Supreme Court review of state judgments than for original district court jurisdiction should not be overstated. Whenever the Court takes jurisdiction, the supposedly "consenting" state is as much subject to federal judicial coercion as it is in a federal district court. When review is sought of a state court decision favorable to the state, moreover, the state only stands to lose through the exercise of federal judicial power. Before the filing of an original action, whether the state would do worse in a federal than in a state forum is more uncertain.

153. The insistence in *Smith v. Reeves* that appellate federal question jurisdiction can be exercised in cases initially heard in state courts is well-accepted. *See, e.g.,* *Chandler v. Dix*, 194 U.S. 590, 592 (1904) ("of course" appeal lies from state court); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 470 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 57 (1944); *see also* *Iowa Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 246 n.5 (1931) (reversing state court judgment declining to refund unconstitutional taxes, and asserting that Eleventh Amendment cases "have no bearing on the power of this Court to protect rights secured by the federal Constitution"). *But cf. Bolens v. Wisconsin*, 231 U.S. 616 (1914) (citing *Smith v. Reeves*, but dismissing writ of error where, under state mandamus law, state was real party plaintiff in interest but did not seek writ or consent to it). *Bolens*, which rests on several alternate grounds, has never been cited in any other federal opinion. Under the reasoning of *Cohens* as to why that appeal was not a "suit," Eleventh Amendment jurisprudence might have developed to permit appeals in cases involving affirmative claims based on federal law against the states only when the state lost. Such a "one-way" result, however, would have been contrary to the entire thrust of federal appellate jurisdiction over state courts from 1789 until well into this century. *Compare* Judiciary Act of 1789, 1 Stat. 73 (section 25 made review available only where state court rejected federal claim or defense) with Judiciary Act of 1914, 38 Stat. 790 (review generally available of final decisions of state courts on issues of federal law). *See generally* F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 190-99 (1927).

154. Concepts of constructive consent have played a significant role in the development of sovereign immunity law. *See, e.g.,* *United States v. Shaw*, 309 U.S. 495 (1940) (action by United States subjects it to counterclaim up to set-off on amounts owed to United States); *United States v. The Thekla*, 266 U.S. 328, 340 (1924) (by submitting libel in admiralty action arising out of vessel collision, United States becomes liable for damages on cross-claim to permit "justice [to be] done with regard to the subject matter"). Constructive waiver also played a role in some early Eleventh Amend-

to the extent the Supreme Court's appellate jurisdiction is grounded on consent, it was a consent given at the time the Constitution was adopted—a "surrender of the immunity" inherent in the structure of the Union.¹⁵⁵ This is suggested by Harlan's reference in *Smith v. Reeves* to the "supremacy of federal law."

To say, then, that the exercise of jurisdiction rests on a state's consent given at the ratification of the Constitution is merely to say that the exercise of jurisdiction is authorized by Article III. But if the states consented, when they adopted the Constitution, to Supreme Court review of state court decisions even in actions against states, then surely they also consented to the exercise of inferior federal court jurisdiction over federal question cases, in the event that Congress exercised its authority to so provide. And if that state consent survived the Eleventh Amendment—the text of which does not distinguish between the judicial power of the Supreme Court and that of inferior federal courts over cases arising under federal law—then to explain the power of the Supreme Court to review state court judgments as a matter of consent fails to distinguish that exercise of the federal judicial power from the inferior federal courts' original jurisdiction.

Of course, if the federal judicial power can be exercised against states only in a case that a state court has already entertained on the merits, the appellate power over state court judgments would differ significantly from

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ment cases. See *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883) (waiver accomplished by state's intervention and request for affirmative relief).

The consent supposedly involved in justifying Supreme Court review of state court decisions in cases within the prohibitory framework of the Eleventh Amendment is quite different in both degree and principle from these cases. In terms of degree, waiver predicated simply on a state's use of state courts in a case involving the state is obviously broader than waiver predicated on participation in an individual case before a federal court. In the latter instance, the state has already specifically consented to some exercise of federal judicial power over it. The difference in principle may be more important: Constructive waivers were justified by the need to "do justice" and reflected the perceived unfairness of permitting one party both to assert a claim and to shield itself from a claim by the other. In the case of Supreme Court review of adverse state court judgments on affirmative claims against the state, it is not unfairness to a party but the supremacy of federal law that justifies the presumption of consent. But that principle, as suggested in the text, cannot sustain the distinction between Supreme Court and district court jurisdiction.

155. THE FEDERALIST NO. 81, at 487 (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter all citations to *The Federalist* are to this edition]. *Smith v. Reeves*, then, implies that the judicial power of the United States operates necessarily as a limitation upon the power of the states to control the uses of their own court systems. The use of state courts to administer justice between states and citizens, whether on affirmative claims or defenses, carries with it the appellate power of the Supreme Court (subject to congressional limitation) and of other federal courts (if given such jurisdiction by Congress) to review the decisions on questions of federal law. See *Ames v. Kansas*, 111 U.S. 449 (1884) (upholding removal jurisdiction over action initiated by state); see also *Tennessee v. Davis*, 100 U.S. 257, 266–67 (1880) (sovereignty of states and of state judicial power is restricted by Constitution's conferral of federal question jurisdiction on federal courts).

When the Eleventh Amendment was being framed, Congress rejected a proposed change in its language that sought to preserve federal judicial power over claims against states that failed to provide a state forum for adjudication. See *Fletcher*, *supra* note 1, at 1059 & nn.119–120. Ironically, under *Smith v. Reeves*, those states that provide a state forum for adjudication of affirmative claims are more clearly subject to the federal judicial power, over the federal questions presented therein, than those that do not.

the original jurisdiction of the lower federal courts.¹⁵⁶ But *General Oil Co. v. Crain* is inconsistent with the idea that the Supreme Court's power to review state court judgments in actions against the state rests on the state court's willingness to entertain the lawsuit.¹⁵⁷ The mere existence of the state court of general jurisdiction to which a claim against the state might be presented, even absent the state's consent to be sued, has justified the Supreme Court's assertion of constitutional obligations to provide remedies against the state.¹⁵⁸ If the mere existence of a state court of general jurisdiction warrants the exercise of the federal judicial power in prescrib-

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156. Since Congress' power under the Fourteenth Amendment to subject states to suits in federal district courts otherwise barred by the Eleventh Amendment is well-established, the significance of this assumed disparity would be minimized.

157. See *supra* text accompanying notes 128-33 and *infra* note 480. But see *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (contracts clause challenge to state tax collection, unaddressed in state court on grounds of lack of consent, dismissed by Supreme Court because of adequate state ground). *Musgrove* is, at first glance, substantially in tension with *Crain*, and some have suggested that it in effect overruled *Crain*. See, e.g., HART & WECHSLER 2D ED., *supra* note 141, at 935. To the extent *Musgrove* is read as holding that state sovereign immunity law can generally preclude federal review of federal claims, that tension cannot be denied. However, such a broad reading is not required. See Wolcher, *supra* note 66, at 244 n.234 (*Musgrove* consistent with view that refund actions, rather than restraint on collecting unconstitutional tax, is proper remedy). The Supreme Court subsequently upheld federal district court jurisdiction to entertain the identical claim by the *Musgrove* plaintiff, on a finding that the state's alternative remedies were not "plain, speedy and efficient" within the meaning of the Tax Injunction Act. *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952). Thus, the plaintiff in *Musgrove* had a federal forum to adjudicate the merits of the constitutional claim. *Musgrove*, therefore, need not be read as authorizing state sovereign immunity doctrines to preclude federal judicial review of federal claims against the state. It is, rather, consistent with an understanding of the federal common law of remedies, described in Part IV, that recognizes the interactive nature of state and federal remedies in the vindication of federal rights. See P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 587-88 n.2 (3d ed. 1988) [hereinafter HART & WECHSLER 3D ED.]; *infra* note 394.

Even if a state could defeat Supreme Court review—or any exercise of federal judicial power—by refusing jurisdiction in its own courts over claims against the state, this would not explain why, when a state does consent to suit but only in its own courts, the Supreme Court can nonetheless review that state court decision or, alternatively, why state consent to suit in state court is not sufficient to permit exercise of original, as well as appellate, federal jurisdiction. See *supra* text accompanying note 150 (sovereign immunity implies control over both whether and where to be sued).

158. While *General Oil Co. v. Crain* involved injunctive relief that, despite the Court's contrary assumption, might have been sought in lower federal courts, in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239-40 n.2 (1985), the Court implied that state courts would be obligated to hear a statutory damage claim barred by the Eleventh Amendment from federal district courts. In addition to *Crain*, in other cases the Court has found state courts to be required to provide remedies for state misconduct, notwithstanding the state court's purported lack of jurisdiction or authority to provide the relief. See *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911) (reversing state court conclusion that defendant protected by state's sovereign immunity); *Poindexter v. Greenhow*, 114 U.S. 270, 306 (1884) (requiring state court to furnish remedy against tax collector assertedly barred by state law); see also *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931) (state court remedy for unconstitutional taxation inadequate); *Ward v. Love County*, 253 U.S. 17 (1920) (rejecting state court conclusion that state law barred refund remedy for taxes collected in violation of federal law); *McCullough v. Virginia*, 172 U.S. 102, 124-25 (1898) (questioning whether state consent to suit could be withdrawn); see generally Gordon & Gross, *Justiciability of Federal Claims in State Court*, 59 NOTRE DAME L. REV. 1145, 1171-77 (1984) (state courts obligated to entertain federal claims against state, regardless of state sovereign immunity); Wolcher, *supra* note 66 (same); *supra* notes 120 & 132; cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (not deciding whether state courts must hear claims against state under section 1983; when state court hears section 1983 claim, it must award fees even if state law does not permit fees against state).

ing the remedies available for violations of the Constitution, then to speak of the state's consent or waiver collapses even more fully into the inquiry of what the Constitution itself provides.

Thus, a consent theory to support the broader exercise of appellate jurisdiction than original jurisdiction over claims against states has several serious problems. First, this theory is inconsistent with the standard for determining waivers as to the original jurisdiction of the federal courts. Second, and more fundamentally, a theory based on consent, apart from that given in the Constitution, would seemingly accord states the right to withhold appellate review of federal questions decided in their courts and thus contravene the basic structure of judicial federalism.¹⁵⁹ To the extent that states may not withhold consent to Supreme Court review because of the supremacy of federal law, it is difficult to justify withholding consent to district court jurisdiction.¹⁶⁰ And to the extent consent refers to the mere existence of a state court system, the concept no longer seems aptly captured by the word "consent." Finally, the theory of consent itself rests on an anomaly of federal jurisdiction and wholly fails to account for the text of the amendment.

The principal justifications offered by the Court for its power to review state court judgments in actions against states for monetary relief are therefore unsatisfactory. A fundamental tension remains between the *Hans* rule—that the Eleventh Amendment bars federal courts from adjudicating federal claims against the states—and Supreme Court review of state court judgments. As the next section will argue, that tension is resolved by the revisionist view that the Eleventh Amendment does not constrain the federal question jurisdiction.

III. THE ELEVENTH AMENDMENT, THE REPEAL OF PARTY-BASED JURISDICTION OVER STATES, AND SOVEREIGN IMMUNITY

The Court has not yet articulated an adequate rationale for its exercise of appellate jurisdiction over federal question claims against states that could not be brought in district courts. Yet the exercise of this jurisdiction

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159. A thoroughgoing theory of consent would create obvious prospects for substantial lack of uniformity in the articulation and application of federal law. Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

160. Harlan's reference to the "supremacy of federal law" is, then, profoundly unilluminating. The supremacy clause binds not only state court judges but also all other state officials. See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (combined effect of supremacy clause and oath required by Article VI makes federal law binding on state legislative, executive, and judicial officers). Thus, it cannot be said that it is only when state courts reach erroneous conclusions as to state obligations under federal law that the supremacy clause is threatened. Why, then, are the lower federal courts barred from enforcing the supremacy of federal law in original actions against the states? Moreover, reliance on the supremacy clause begs the question: Why is the Eleventh Amendment itself not supreme federal law that constrains the entire federal judicial power, whether to redress erroneous state court interpretations of federal law in actions against states or to redress erroneous state action in original proceedings?

is a fundamental aspect of our basic jurisprudence that clearly should and will continue. As a functional matter, the differential treatment of federal appellate and original jurisdiction over federal question claims against states may, by allocating some "federal" business to state courts, enhance the state courts' role and function within the federal system.¹⁶¹ This allocation serves some of the interests identified as important in comity and abstention cases and presents many of the same risks to the supremacy and uniformity of federal law.¹⁶²

But for those who take seriously the proposition that Article III courts are courts of limited jurisdiction, the basis of appellate review of state court decisions must go beyond "acquiescence" or "functionality." As the inadequacy of the Court's rationales suggest, it is difficult to rationalize this practice consistently with the doctrinal framework of Eleventh Amendment jurisprudence for district court jurisdiction.

Two sets of revisionist theories of the Eleventh Amendment presently compete for acceptance. One argues that the amendment was intended only to restrain judicial creativity in implying the abrogation of state sovereign immunity solely from jurisdictional grants.¹⁶³ Under this view, Congress has power to abrogate the states' immunity and authorize federal courts to hear claims otherwise barred. As I will show, this explanation, while attractive in some respects, does not account for large elements of the present jurisprudence, particularly Supreme Court review of state court judgments. The second approach views the amendment as simply repealing a party-based head of jurisdiction, without generally constitutionalizing the doctrine of state sovereign immunity.¹⁶⁴ This understanding of the Eleventh Amendment, which implies that the amendment does not constrain the judicial power over cases arising under federal law, fully accounts for the Supreme Court's power and better accords with basic principles of our constitutional system. Accepting this view of the Eleventh Amendment, however, requires a revised understanding of the constitutional jurisdiction of the district courts in federal question cases.

A. *Congressional Abrogation*

Any effort to account for the Court's exercise of appellate jurisdiction must consider the theory that Congress can abrogate the states' constitutional immunity and authorize federal courts to hear claims against states. Professor Tribe, for example, argues that the Constitution distinguishes

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161. See *infra* text accompanying notes 396-98.

162. See *infra* text accompanying notes 404-07.

163. See, e.g., Nowak, *supra* note 1; Tribe *supra* note 1; see also Brown, *supra* note 1 (Eleventh Amendment protects state sovereignty through "process federalism," permitting Congress to authorize suit in federal court but only by clear statement); Field, Part I, *supra* note 1 (Eleventh Amendment restores common law immunity, which Congress may change).

164. See, e.g., Amar, *supra* note 1; Fletcher, *supra* note 1; Gibbons, *supra* note 1.

"rights conferred against the federal judiciary from rights conferred against Congress."¹⁶⁵ The word "construed" in the Eleventh Amendment is seen as a special admonition to courts to refrain from implying causes of action against states in the "core area" of monetary damages.¹⁶⁶ The Eleventh Amendment can be given its full force if federal courts decline to entertain actions against states for monetary relief until Congress, with primary constitutional responsibility for safeguarding the interests of states in the federal system,¹⁶⁷ explicitly creates such state liabilities enforceable in federal courts. The "clear statement" rule¹⁶⁸ assures that Congress acts deliberately and with notice to the states when creating monetary liabilities enforceable in federal courts. The rule thereby enhances the ability of Congress to safeguard the federalism interests represented by the amendment.

An approach grounded in congressional power to abrogate state sovereign immunity in federal courts does not, however, readily account for the distinctive treatment of appellate and original jurisdiction over claims for monetary relief against states. Indeed, in explaining the Supreme Court's appellate power over state court decisions in cases against states presenting federal questions, Professor Tribe has stated only that "neither sovereign immunity nor the eleventh amendment bars Supreme Court review of suits in which a state is a party, since supremacy of federal law requires review of the federal questions presented in such suits."¹⁶⁹ He does not attempt to account for this practice in terms of his general theory, nor can it be done. True, section 25 of the First Judiciary Act authorized the Supreme Court to review state court judgments in which the exercise of state power was under attack. Section 25 was invoked in its early years to review claims against states from state courts, and thus, might be regarded

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165. Tribe, *supra* note 1, at 693. Professor Nowak advances a similar thesis, focusing on Congress' powers to enforce the Fourteenth Amendment. Nowak, *supra* note 1, at 1441-50, 1453-64. See also *infra* note 297 (discussing Professor Field's argument).

166. Tribe, *supra* note 1, at 687.

167. As George Brown has recently argued, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), supports this structural premise of the congressional abrogation approach to state sovereign immunity from suit in federal court. Brown, *supra* note 1, at 390.

168. See, e.g., *Atascadero*, 473 U.S. at 243 ("unmistakable language"); *Employees v. Department of Pub. Health*, 411 U.S. 279, 285 (1973) ("clear language").

169. Tribe, *supra* note 1, at 685. This theory resembles that of *Smith v. Reeves*, 178 U.S. 436 (1900), and is subject to some of the same criticisms. See *supra* text accompanying notes 153-58. If Article III and the Eleventh Amendment preclude judicial abrogation of state sovereign immunity, why do they not apply to appellate as well as original federal jurisdiction? If federal supremacy requires correction of an erroneous state court determination of a federal question, then why is the supremacy clause not likewise offended by the complete denial of a forum to review a nonjudicial violation of federal law by a state official? If Tribe's theory of appellate review is founded on an exception to the general requirement of congressional abrogation, the constitutional principles by which that exception is limited to federal question cases within the Supreme Court's appellate jurisdiction are not readily apparent. And if Tribe's justification for the appellate powers of the Supreme Court is not founded upon an exception to the abrogation theory, then one must ask what statutory basis justifies the disparate treatment of states' jurisdictional immunities in the Supreme Court and in other federal courts.

as an abrogation of state immunity. But in the 1870's, Congress provided both for general federal question jurisdiction and for jurisdiction over civil rights claims in the lower federal courts to implement an amendment aimed at restraining state action.¹⁷⁰ These grants of jurisdiction, however, have not been construed to abrogate state immunity, though they apparently provide the basis for subject matter jurisdiction in the district courts when Congress otherwise acts in substantive legislation to do so.¹⁷¹ The theory of congressional abrogation, then, does not readily account for the anomaly of Supreme Court review.¹⁷²

The congressional abrogation theory suffers from other defects. First, it fails to account sufficiently for the specific prohibition of the amendment. An approach relying on Congress to address federalism concerns inherent in the Tenth Amendment has been adopted by the Court to sustain congressional imposition of substantive obligations on states.¹⁷³ But such an approach is far less satisfying in the face of an explicit textual restraint on the federal judicial power than in the face of the arguable redundancy of the Tenth Amendment.¹⁷⁴ To the extent that the Eleventh Amendment has the federalism purpose of protecting states from having to litigate even federal claims in federal courts, one can understand why a state can waive

170. See, e.g., Judiciary Act of 1875, ch. 137, 18 Stat. 470 (present version codified at 28 U.S.C. § 1331 (1982)); Civil Rights Act of 1871, § 1, 17 Stat. 13 (present version codified at 28 U.S.C. § 1343(3) (1982)).

171. See *Hutto v. Finney*, 437 U.S. 678 (1978) (upholding awards of attorneys' fees against state under section 1988). Presumably, the subject matter jurisdiction of the Court to entertain the claim and award the relief in that case arose from section 1343. See also Engdahl, *supra* note 17, at 72-75 (present federal question statute for district courts should be construed to embrace actions against states without consent).

172. Another effort to apply Tribe's congressional abrogation approach to account for the different interpretations of Supreme Court and district court jurisdiction over claims against states might proceed from the singularity of the Supreme Court in the constitutional scheme. Because the Supreme Court was the only federal court whose jurisdiction was set forth in Article III, and if federal question jurisdiction over "all cases" includes cases against states, then it could be argued that Congress must specifically remove that jurisdiction in the exercise of its exceptions clause power to deprive the Court of its constitutionally conferred jurisdiction. Cf. Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960) (Congress' powers under exceptions clause limited by need to preserve Court's essential functions, especially in review of state court judgments). On this view, the Constitution puts the burden on Congress to show that it has reduced the Court's appellate jurisdiction, a burden simply not met by anything in section 25 or its descendants. By contrast, one might argue that because Congress is given plenary control over the creation of lower federal courts, they have only that jurisdiction affirmatively granted by Congress. But see Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974) (authority not plenary). In determining whether Congress gave the lower federal courts jurisdiction over claims against states, the tradition of sovereign immunity could be seen to weigh against the presumption that general language embraces such claims. The difficulty with this approach, however, is that it contradicts the established interpretive rule that Congress' "affirmation of [the Supreme Court's] appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been" provided. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 513 (1869); accord *Luckenbach Steamship Co. v. United States*, 272 U.S. 533, 536-37 (1926); *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 318 (1810); *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 327 (1796).

173. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

174. See Field, Part II, *supra* note 1, at 1260-61 (Tribe-Nowak theory derives from nothing peculiar to Eleventh Amendment); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 150-51 (1980) (same).

that protection. But the congressional abrogation theory might better account for constitutional text if it merely recognized a right in Congress to create federal claims against states enforceable solely in state courts.¹⁷⁵ Second, given *Marbury v. Madison*,¹⁷⁶ it is difficult to understand how a constitutional instruction to the courts that they not construe their jurisdiction to extend to certain cases can be overcome by Congress. One abiding lesson of *Marbury* is that Congress cannot extend the jurisdiction of the federal courts beyond the boundaries provided by the Constitution, as construed by the courts.¹⁷⁷ Third, an underlying premise of the congressional abrogation thesis—that Congress is the constitutionally appropriate body to protect state interests—is subject to empirical and structural doubt, especially since the matter concerns what, at the time of enacting legislation, may appear to be a relatively minor detail of enforcement.¹⁷⁸

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175. See *Employees v. Department of Pub. Health*, 411 U.S. 279, 297-98 (1973) (Marshall, J., concurring). Professor Tribe states that "[c]ongressional power to abrogate the states' sovereign immunity" is limited by the principle that "Congress cannot confer upon an article III court any authority to resolve disputes outside the textual confines of that article." Tribe, *supra* note 1, at 696. If suits against states for affirmative relief under, for example, the commerce clause, are *not* outside the textual confines of Article III, however, then what is the constitutional basis for concluding that, in exercising Article III powers, the courts themselves may not abrogate state sovereign immunity? Tribe answers that the Eleventh Amendment was intended to overcome a reading of Article III as having the self-executing force of an abrogation of state immunity and that the Court's authority absent congressional action must accordingly be limited. *Id.* at 684. *Chisholm*, however, was an interpretation of only one part of Article III (the "state-citizen" clause) and thus has no necessary implications for the scope of the "judicial power" in claims "arising under" federal law. The congressional abrogation theory, in addition, fails to explain why some forms of relief are regarded as within, and others outside, the constitutional restraint. *Id.* at 687 (referring without explanation to "core area" of damage suits). But see Nowak, *supra* note 1 (historical arguments that Eleventh and Fourteenth Amendments permit injunctive relief but not monetary relief unless expressly provided for by Congress).

176. 5 U.S. (1 Cranch) 137 (1803).

177. See M. REDISH, *supra* note 174, at 150-51 (Tribe's "pragmatic theory" falters on "explicit directives" of Article III and Eleventh Amendment as limits on Congress' power to invest federal courts with jurisdiction); Field, Part II, *supra* note 1, at 1258 (same). In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the Court implied that the Fourteenth Amendment modified the Eleventh with respect to actions authorized by Congress under section 5 of the Fourteenth Amendment. But see Field, Part II, *supra* note 1, at 1231 (analyzing *Fitzpatrick* as distinguishing between Congress' power to regulate and Congress' power to impose suits for retroactive monetary relief in federal court).

Professor Nowak does not argue that the Fourteenth Amendment "modified" the Eleventh. Nowak, like Tribe, views the Eleventh Amendment as directed primarily against judicial abrogation of states' immunity without specific authorization by Congress. Nowak, *supra* note 1, at 1442. He argues, however, that because of core Eleventh Amendment concerns about assigning retroactive liability to states, even Congress cannot authorize a cause of action for monetary relief based on acts predating the legislation. *Id.* at 1444. His separate historical analysis of the Fourteenth Amendment reaches a similar conclusion: that the framers of the Fourteenth Amendment contemplated that federal courts would enjoin prohibited state action but did not contemplate judicial implication of damage actions against states without specific congressional authorization. While the ambiguous history of the Eleventh Amendment can be read, as Nowak does, to reflect special concern over pre-existing debt (a concern I construe, in view of that amendment's text, as limited to state law claims), Nowak's argument about the Fourteenth Amendment seems less convincing, as it derives its support virtually entirely from the silence of the debates and weak inferences drawn from concern about northern states not having to assume the Civil War debts of the South. *Id.* at 1455-64.

178. See Lee, *The Political Safeguards of Federalism? Congressional Response to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301, 334 (1988) (Congress unlikely to recognize federalism problem on its own); see also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM* (1984);

There is considerable merit in the argument that, absent congressional abrogation of immunity, the federal courts should hesitate to infer federal statutory authorization of monetary causes of action against states. This has nothing to do with the Eleventh Amendment or with any constitutional restraint on the federal courts' power over federal question cases involving states. Instead, this caution derives from a federal common law of governmental immunities that applies to claims against states in federal courts. The section that follows will explain why the Eleventh Amendment, properly understood, must be disengaged from federal doctrines of state sovereign immunity in the adjudication of federal questions.

B. *The Eleventh Amendment: Party-Based vs. Federal Question Heads of Jurisdiction*

The persistent exercise by the Supreme Court of appellate jurisdiction over state court cases, regardless of whether the state itself is the named party defendant or the form of relief sought, is best explained by the proposition that the Eleventh Amendment does not restrict the judicial power over cases arising under federal law. In recent years several scholars have, for somewhat different reasons, reached this conclusion.¹⁷⁹ As was argued in both *Cohens* and *Osborn*, the Eleventh Amendment removed from the federal judicial power only certain cases that had been within it solely because of the "state-citizen" diversity clause. Implying no general constitutional principle of state sovereign immunity, the amendment carefully modified Article III by withdrawing jurisdiction that the "state-citizen" clause had been construed to confer over state law claims by individuals against states.

Under this view, the Eleventh Amendment does not apply to the "head" of jurisdiction conferred by the "arising under" federal law

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Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 860-68 (1979); Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 393-95. The classic article supporting the premise that the structure of Congress will protect states is Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); see also J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-258 (1980).

179. See, e.g., Amar, *supra* note 1, at 1467-84 (emphasizing political theory of Constitution, need for jurisdiction over constitutional claims, and state law character of *Chisholm* claim); Fletcher, *supra* note 1, at 1045-63 (emphasizing legislative history of amendment); Gibbons, *supra* note 1, at 1920-70 (emphasizing diplomatic situation of 1790's and need for jurisdiction over treaty-based claims). For an earlier work reading similar conclusions, see R. BERGER, CONGRESS V. THE SUPREME COURT 326-28 (1969); see also J. ORTH, *supra* note 1, at 12-46 (approving limited readings of amendment); Engdahl, *supra* note 17, at 9-11 (early cases properly construed Eleventh Amendment as not barring federal question claims by citizen against own state). This body of work is remarkably consistent in its evaluation of the historical evidence and text of the amendment as not supporting a broad rule of constitutional immunity for states. One commentator has noted that, for those who ascribe to an "originalist" view of the Constitution, present Eleventh Amendment jurisprudence is difficult to justify. See Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. LAW. 519, 531 (1986).

clause.¹⁸⁰ Understanding the amendment only as a repeal of the party-based head of original Supreme Court jurisdiction implies that the judicial power over all cases arising under federal law was unimpaired by its enactment, even as to cases arguably within its literal terms (for example, those by a citizen of one state against another state), and certainly as to cases outside its literal reach, that is, cases brought by citizens against their own states (the great bulk of federal question cases).¹⁸¹ So understood, the Eleventh Amendment is irrelevant to the Supreme Court's appellate jurisdiction over state cases that arise under federal law for Article III purposes.

Not only does this interpretation best account for the Supreme Court's exercise of appellate jurisdiction over state court judgments in cases raising affirmative claims against states, but it accords well with both the text and history of the amendment. Without unduly duplicating the work of others,¹⁸² several points in addition to the anomaly of Supreme Court review bear emphasis.

First, *Chisholm v. Georgia*,¹⁸³ the case which provoked enactment of the amendment, was a state law claim, presenting no substantive federal issues. Original jurisdiction in the Supreme Court was sustained solely on the basis of the state-citizen clause. Because of the perception that the original jurisdiction of the Supreme Court could not be divested by statute, a constitutional amendment was thought necessary to overcome *Chisholm's* effect.¹⁸⁴

180. Although neither Nowak nor Tribe is explicit on this point, the evident premise of their articles is that "arising under" jurisdiction does extend to some claims against states if Congress so provides. I dispute their view that state sovereign immunity, *absent* specific authorization from Congress, is constitutionally required in federal question cases. I agree with Professors Amar, Field, and Fletcher and Judge Gibbons that the Constitution did not, either in Article III or in the Eleventh Amendment, mandate a constitutional rule of sovereign immunity for the states in federal question cases. Like Professor Fletcher, I believe that there may be a federal basis for continued application of sovereign immunity rules in actions against states. Unlike Professor Fletcher, I do not argue that those federal rules are constitutionally required by implicit limits on Congress' substantive powers to impose monetary causes of action on states. And unlike Professor Field, I do not believe that the Constitution mandates judicial "neutrality" on state sovereign immunity, an approach that does not seem to differ significantly in effect from the Tribe thesis that Congress, but not the courts, can abrogate immunity.

181. *But cf. infra* Part III(C)(1) and note 235 (discussing implications of Eleventh Amendment for pendent state law claim under federal question jurisdiction).

182. *See supra* note 179.

183. 2 U.S. (2 Dall.) 419 (1793).

184. *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 699 (1838) (counsel argued that Eleventh Amendment required because Congress could not divest Court of original jurisdiction); *see* *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (of all federal courts, only Supreme Court possesses jurisdiction derived immediately from Constitution and of which legislature cannot deprive it); *see also* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 332-33 (1816) (implying that Congress cannot "withhold original jurisdiction" from Supreme Court though it can make exceptions to Supreme Court's appellate jurisdiction); *cf.* Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 824 n.284 (1984) (Court's original jurisdiction vested by Constitution and not subject to control except by amendment). Although somewhat ambiguous, the Court's opinion in *Rhode Island* implies that only an amendment could diminish the Court's own construction of its original jurisdiction. *Compare* 37 U.S. (12 Pet.) at 721-22 (Congress had power to organize judicial department and

Second, the language of the amendment closely parallels the language of Article III that extends the judicial power to cases between a state and a citizen of another state or of a foreign state, suggesting that it was this aspect of the judicial power that was being amended. This interpretation is supported by Congress' failure to adopt proposed language that would have explicitly prohibited all federal courts from entertaining any suits against states.¹⁸⁵ Third, the amendment was widely supported in Congress by federalists and non-federalists alike, suggesting that Congress did not intend a broad change in the power of the national government.¹⁸⁶ Had federal courts been made powerless to enforce federal law against states, that would have adversely effected national interests and the supposed reach of national power.¹⁸⁷

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thus to determine mode for proceeding) *with id.* at 722, 723, 730 (if Court upholds its jurisdiction, there is "but one power" superior to it that can effect change, as occurred in Eleventh Amendment; Court will not presume that Congress in Judiciary Act failed to grant Supreme Court that original jurisdiction which Constitution conferred). See generally HART & WECHSLER 2D ED., *supra* note 141, at 242; C. WRIGHT, LAW OF FEDERAL COURTS 764-73 (4th ed. 1983). But see Amar, *supra* note 6, at 254 n.160 (arguing that Congress could abolish Supreme Court's original jurisdiction over states).

185. One proposal read:

That no state shall be liable to be 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, of any body politic or corporate, whether within or without the United States.

Pa. J. & Weekly Advertiser, Feb. 27, 1793, at 1. col. 2, *cited in* Fletcher, *supra* note 1, at 1058-59 & n.116; see Nowak, *supra* note 1, at 1436 & n.132 (quoting virtually identical language from Pennsylvania Journal, Feb. 20, 1793). Neither this language nor that of a similarly worded proposal described in C. WARREN, *supra* note 68, at 101, can be found in the ANNALS OF CONGRESS. Compare Fletcher, *supra* note 1, at 1058 (proposal introduced in House) and C. WARREN, *supra* note 68, at 101 (same) *with* Gibbons, *supra* note 1, at 1926 n.186 (doubtful that proposal was introduced). Its mere existence, however, demonstrates that more comprehensive language could have been enacted.

186. Amar, *supra* note 1, at 1474 n.202, 1481-84; Fletcher, *supra* note 1, at 1060-63; Gibbons, *supra* note 1, at 1926-27 & n.186. The limited available legislative history of the Eleventh Amendment is somewhat ambiguous. As noted above, a proposal that would have prohibited all exercise of federal jurisdiction over claims asserted against a state, by anyone and in any form, was not enacted. See *supra* note 185. It must be noted, however, that Senator Gallatin's effort to amend the proposed text of the amendment explicitly to preserve federal power over treaty-based claims was also rejected. 3 ANNALS OF CONG. 30-31 (Jan. 14, 1794). Yet Gallatin's amendment might have been interpreted to mean that *only* treaty jurisdiction was preserved when other federal question jurisdiction would have been lost. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 287 n.40 (1985) (Brennan, J., dissenting). Because these actions of nonconsideration and rejection diverge, it may be difficult to draw any conclusion other than that the framers specifically focused on the particular problems of state-diverse party jurisdiction, as exemplified in *Chisholm*, and sought to address only that problem. But cf. C. JACOBS, *supra* note 1, at 94-95 (noting rejection of Gallatin amendment and that some of suits filed against states under Court's diversity jurisdiction presented federal questions); *infra* note 221.

187. Given the importance at that time of the belief that the judicial power of a sovereign should be coextensive with that of the legislature, an understanding that the amendment constrained the federal question jurisdiction of the federal courts is unlikely to have gone unremarked. Judge Gibbons, for example, speculates that the framers must have understood that the Supreme Court could exercise appellate jurisdiction to review federal questions arising in state court proceedings. Gibbons, *supra* note 1, at 1935. The diplomatic goals of supporters of the amendment required that they be able to assure Great Britain that violations of treaty rights in the state courts, some of which could involve claims against the state resulting from the operation of state escheat laws, could be corrected by the Supreme Court. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 348 (1821) (counsel argues that in case of escheat violating privileges and immunities clause federal court must be open to provide relief). Although Judge Gibbons adduces no direct evidence in support of this contention, Gibbons, *supra*

Nor did Article III itself, as originally enacted, establish a constitutional rule of state sovereign immunity from suit in federal court. As others have argued, the express terms of Article III—extending the judicial power to cases in which states were parties, based on the identity of the parties of the litigation—plainly contemplated that states could be defendants in such suits.¹⁸⁸ Moreover, in the ratification debates, more comments—from both supporters and opponents of the Constitution—indicated that it was so understood than otherwise.¹⁸⁹ Although there was virtually no discussion of state sovereign immunity in connection with federal question jurisdiction, that head of jurisdiction—together with Congress' power to establish inferior federal courts—was discussed as a potential threat to state autonomy.¹⁹⁰ And unlike the disingenuous defense of

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note 1, at 1922–23, 1925–26 (and while it may be inappropriate to attribute dispositive weight to views of framers without some basis to believe those views were disseminated among state ratifying conventions), diplomatic concerns arising out of state court resistance to treaty obligations support interpreting the amendment in accord with its narrow and technical phrasing.

188. Several clauses of Article III provided for jurisdiction over a state as a party without limiting jurisdiction to cases in which states were parties plaintiff. See Fletcher, *supra* note 1, at 1072–73. Some supporters of the Constitution did argue that states would not be subject to suit without their consent under the state-citizen clause. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 101, at 533 (Madison stating state-citizen clause only authorized states to sue as plaintiffs); *id.* at 555–56 (Marshall, agreeing with Madison, though suggesting that state legislature could be sued); cf. THE FEDERALIST No. 81, at 487 (A. Hamilton) (states not subject to suit without consent, except to extent they surrender immunity in plan of convention; under that plan, states not subject to suit without consent on their debts). Other supporters, accepting the characterization of the opponents, argued that states should be liable for their debts in federal court. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 101, at 207, 573–75 (remarks of Edmund Randolph of Virginia); 2 ELLIOT'S DEBATES, *supra* note 101, at 491 (remarks of James Wilson of Pennsylvania); see also 3 ELLIOT'S DEBATES, *supra* note 101, at 549 (remarks of Edmund Pendleton of Virginia favoring jurisdiction over states); 14 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 204 (Kaminski & Saladero eds. 1983) (letter of Timothy Pickering in support of all heads of diversity jurisdiction). And while some opponents of the Constitution argued that it should be rejected as inconsistent with state sovereign immunity, they clearly understood Article III to have rendered states subject to such jurisdiction under the diversity clauses. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 101, at 526–27 (remarks of George Mason); *id.* at 542 (remarks of Patrick Henry); 2 THE COMPLETE ANTI-FEDERALIST 245 (H. Storing ed. 1981) (remarks attributed to Richard Henry Lee); *id.* at 429–31 (“Brutus” letters in New York papers). Four of the five members of the *Chisholm* Court, including James Wilson, a member of the Committee of Detail that helped draft Article III, believed that the state-citizen clause extended jurisdiction over any claim against a state by an out-of-stater. In addition, the continued exercise of jurisdiction in suits against states by the United States and by sister states belies the claim that Article III embraced a general principle of immunity. For more detailed analyses, see Field, Part I, *supra* note 1, at 527–36; Fletcher, *supra* note 1, at 1068–77; Gibbons, *supra* note 1, at 1899–1914.

189. See *supra* note 188; see generally *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 279 (1985) (Brennan, J., dissenting) (majority of recorded comments contradict *Hans* Court's assertion that private suits against states in federal courts not embraced within Article III); Field, Part I, *supra* note 1, at 531–34 (same).

190. See, e.g., 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 366–67, 418–20 (“Brutus” letters arguing that federal jurisdiction over constitutional questions together with inferior federal courts will lead to federal judicial subversion of state judiciaries and legislatures); *id.* at 147–48 (“Centinel” letters claiming that state courts will fall into disuse because of federal jurisdiction). The absence of discussion of sovereign immunity and federal question jurisdiction does raise another possibility: that, while *Chisholm* was correctly decided, the only jurisdiction under the original Constitution in which the states consented to be sued was the party-head clauses of Article III. On this view, federal question jurisdiction was not a “surrender of immunity” and never embraced federal judicial authority to hear suits against states, and the Eleventh Amendment narrowed the circumstances under which diversity-based claims could be brought in federal court. Some support for this view can be

the state-citizen clauses made by some powerful proponents of the Constitution,¹⁹¹ the jurisdiction over federal questions was unflinchingly defended as necessary to enable the national government to enforce its powers, including restrictions on state authority.¹⁹² Marshall was evidently correct, then, in *Cohens*, when he concluded that the jurisdiction over all cases arising under federal law, originally given in Article III, extended to all such cases regardless of whether a state was a party.¹⁹³

found. See, e.g., *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 328 (1837) (Thompson, J., concurring) ("state was not suable under the old confederation, nor under the present constitution, even before the amendment . . . by citizens of the same state"); see also *Hans*, 134 U.S. at 21 (Harlan, J., concurring) (*Chisholm* correct at time, but judicial power does not extend to federal question claim against state by own citizen without state consent). There are many more reasons to reject this view. The unanimous opinion in *Cohens* rejected this interpretation of the original federal question jurisdiction, though it was forcefully urged by Virginia. Given the divergences in opinion on the question of sovereign immunity under diversity jurisdiction, *Cohens* was surely correct in finding no persuasive reason to assume that broad immunity was implicit in the power plainly conferred by Article III over "all cases" arising under federal law. Indeed, in view of the support for the proposition that suits arising under state law but brought by a noncitizen should be heard in federal courts, see *supra* note 188, the notion that states had a constitutional immunity from federal question jurisdiction cannot be sustained. See also Nowak, *supra* note 1, at 1436 (lack of unified press opposition to *Chisholm* suggests that Eleventh Amendment intended only to remedy assumption of jurisdiction in *Chisholm* and not to bar federal jurisdiction over all damage actions against state governments).

191. See *supra* note 188 (describing remarks of Madison, Marshall and Hamilton). As others have argued, however, Hamilton's remarks are consistent with the view that part of what was "inherent in the plan" of the convention was a surrender of immunity to federal jurisdiction over all cases arising under federal law. See Gibbons, *supra* note 1, at 1909-10, 1911-12 & nn.102-04. State-incurred debts were apparently not viewed as claims arising under federal law. See *supra* note 101.

192. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 101, at 532 (Madison defending federal question jurisdiction as necessary because "states are laid under restrictions, and . . . the rights of the Union are secured by these restrictions"); 2 ELLIOT'S DEBATES, *supra* note 101, at 489-90 (Wilson of Pennsylvania defending federal question jurisdiction because "I am sorry to say . . . that, in order to prevent the payment of British debts . . . many states in the Union have infringed the treaty"). Indeed, of greater concern to some opponents of the Constitution were the provisions for diversity jurisdiction, by which federal courts were understood to have the power to intermeddle in questions of state law. See 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 188, at 243 ("Federal Farmer" approving federal question jurisdiction as appropriate on ground that judiciary has power coextensive with federal legislature, but criticizing diversity-based jurisdiction as authorizing federal courts to decide issues of state law).

193. John Marshall's failure to embrace fully the view that the Eleventh Amendment does not constrain federal question jurisdiction should not prevent adoption of that understanding. First, Marshall was quite clear that the Eleventh Amendment did not restrain federal question jurisdiction in cases between citizens and their own states. He thus plainly did not read the Eleventh Amendment as a broad grant of immunity. Second, Marshall may well have avoided a decision on the relationship between the Eleventh Amendment and federal question jurisdiction in suits by out-of-state citizens against a state to avoid the unnecessary provocation caused by reading the amendment in a manner arguably at variance with its plain meaning. Third, Marshall may have felt constrained by the apparent clarity of the amendment's text, insofar as it extended to "any suit in law or equity." Time and reflection have made more clear the full implications of Marshall's view, first articulated in *Cohens*, that the different heads of jurisdiction were independent and thus permit us to conclude that the repeal of jurisdiction over suits under one head of jurisdiction does not affect another head of jurisdiction.

Finally, Marshall evidently believed that both constitutional and common law doctrines would bar some forms of relief against a state. These grounds were derived not from a constitutional immunity from federal jurisdiction, but from the "political" aspects of particular forms of relief. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19-20 (1831) (alternative ground for decision that injunction to restrain exertion of physical force by state "savours too much of the exercise of political power to be within the proper province of the judicial department," though "mere question of right [to the land] might perhaps be decided by this court in a proper case with proper parties"). Marshall's opaque

Thus, *Chisholm* was in all likelihood correctly decided as to the question of jurisdiction,¹⁹⁴ but was overruled by an amendment that withdrew from the judicial power and the Supreme Court's original jurisdiction the head of jurisdiction defined by the configuration of certain parties plaintiff against states.¹⁹⁵ The Court's appellate jurisdiction over federal question cases was not, however, affected by the amendment, nor the power of Congress to establish inferior federal courts to exercise original jurisdiction over federal question claims against states, whether by citizens or noncitizens.

This interpretation best resolves the anomaly of *Hans*: that the amendment, if applied literally, would deprive out-of-staters but not in-staters of the benefit of a federal forum on claims based on federal law.¹⁹⁶ *Hans*

discussion in *Cohens* of whether federal courts could award certain relief against a state can be understood, in part, as reflecting both a view that such claims would arise under state law, and an awareness of what might then have been understood as a general common law remedial tradition embracing both sovereign immunity and the availability of relief against individuals for state wrongdoing. See *infra* note 310 and text accompanying notes 306-35; see also Amar, *supra* note 1, at 1486-87 (Marshall may have believed that constitutional rights against states could be fully vindicated through, e.g., suits against officers); cf. J. ORTH, *supra* note 1, at 41 (noting Marshall's use of English common law immunity tradition to minimize jurisdictional bar of Eleventh Amendment).

194. See *supra* note 188; C. JACOBS, *supra* note 1, at 22-25, 40. Whether the state law of immunity should not have applied to a state law claim of assumpsit is a separate issue. To the extent that the Court failed to apply state law on the immunity issue, this may well have been an error under the Judiciary Act of 1789, § 34, 1 Stat. 92 (codified at 28 U.S.C. § 1652 (1976)) (referred to as "Rules of Decision Act").

195. As noted earlier, this constitutional withdrawal was important to the states because Congress may well have been perceived to lack authority to diminish the Court's original jurisdiction. See *supra* note 184. This understanding may have one important implication for the congressional abrogation thesis discussed above. The protection of states from the exercise of federal question jurisdiction by inferior courts of the United States may have been understood to arise from Congress' control over the establishment of the inferior courts—not from a constitutional immunity from jurisdiction.

In response to repeated concerns about the threat that federal question jurisdiction and the existence of inferior federal courts might pose to state autonomy, see *supra* notes 190 & 192, proponents of the Constitution uniformly relied on the Article III compromise concerning inferior federal courts. See generally J. GOEBEL, *supra* note 141, at 211, 215-16, 226, 239-40, 246 (describing controversy over compromise giving Congress power to establish such courts and repeated efforts to undo that compromise and provide only for single Supreme Court). Proponents emphasized that the Constitution itself did not establish such courts but that Congress would decide on their necessity, arguing that in many cases (except for admiralty) Congress would probably choose to rely first on the state courts. See, e.g., 3 ELLIOT'S DEBATES, *supra* note 101, at 517 (Pendleton in Virginia convention); *id.* at 534-36 (Madison at Virginia convention); J. GOEBEL, *supra* note 141, at 356-57 (describing New Hampshire convention); THE FEDERALIST No. 81, at 485-86 (A. Hamilton) (Congress has authority to make exceptions and provide regulations to redress any "inconvenience" resulting from scope of judicial power). States, then, could be protected from the federal question jurisdiction of the inferior federal courts through Congress' power to control their establishment and jurisdiction. This understanding is inconsistent with the thesis that Congress lacks discretion not to establish lower federal courts, see Eisenberg, *supra* note 172, and in tension with the view that the entire Article III power over "all" cases arising under federal law must be vested in some federal court. Cf. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329-31 (1816); J. GOEBEL, *supra* note 141, at 247; Amar, *supra* note 6. It nonetheless seems to reflect the prevailing understanding of the role of Congress in protecting states and state judiciaries from feared federal judicial power in a more straightforward manner than does the theory that states have a constitutional immunity from federal jurisdiction that Congress can abrogate.

196. This interpretation admittedly does not entirely account for the interpretive problems created by the text of the amendment. The text states that "the Judicial power" shall not be construed to extend to "any suit in law or equity." The use of the word "any" is arguably inconsistent with a view

solved this apparent discrimination by extending the Eleventh Amendment to all claims by individuals based on federal law. Instead, the Eleventh Amendment can best be interpreted to mean that out-of-staters were deprived of a federal forum only as to those cases in which in-staters lacked a federal forum as well. This interpretation fully accounts for Congress' power to render states subject to suit on statutory causes of action and for the Supreme Court's appellate practice in cases against states. And, coupled with the understanding that a federal common law doctrine of state sovereign immunity is available as a defense in cases within the jurisdiction of the federal courts, it explains why states can waive that immunity without conferring subject matter jurisdiction by consent.¹⁹⁷

More important, by recognizing that a general principle of sovereign immunity is embodied in neither the Eleventh Amendment nor Article III, this interpretation removes the contradictions that would otherwise exist between the general constitutional structure and the doctrinal basis for state immunity from suit.¹⁹⁸ To the extent that the doctrine derived from the notion that sovereignty resided in the person of the monarch, it conflicts with the premise of the Constitution that sovereignty derives from the people. The first premise of a constitutional system of government was that for a violation of a right, the laws should provide a remedy, a principle in tension with a doctrine that insists on the absence of a judicial remedy for wrongs committed by the government. A second important premise of the Constitution, as expounded in its early days, was that the judicial power, rather than force or impotent requests, was to mediate conflicts between different parts of the union. Achieving this goal required a judicial power coextensive with the powers of the national government.¹⁹⁹ This revised understanding of the Eleventh Amendment is thus

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that the amendment does not apply to federal question suits by out-of-staters against a state. See Note, *More Plenary Than Thou: A Post-Welch Compromise Theory of Congressional Power to Abrogate State Sovereign Immunity*, 88 COLUM. L. REV. 1022, 1023 (1988). But the objection of failure to account fully for text can be raised to virtually every element of Eleventh Amendment doctrine. The amendment itself seems poorly drafted to achieve any of the various goals ascribed to it. If its purpose was to constitutionalize state sovereign immunity, even if only in federal court and by individual suit, then its language was far too narrow. If its purpose was to preclude only actions for monetary relief, then its language is too broad, including, as it does, all suits "in equity." If its purpose was, as suggested here, to remove the "state-citizen" head of jurisdiction, then its language might better have been qualified by the addition of the words "based solely on the character of the parties." Cf. Amar, *supra* note 1, at 1482 & n.233 ("construed" language inserted to indicate that jurisdictional repeal applied only to head of jurisdiction based on party status). Since no interpretation conforms fully to the text of the amendment without offending a sense of coherence, and since this interpretation, in my judgment, best accounts for its peculiar language, I do not find this objection dispositive.

197. This interpretation also resolves an anomaly of the *Ex parte Young* doctrine: that the action of an officer can be "state action" for purposes of defining a constitutional violation, but not for purposes of jurisdiction to grant relief. It would instead be clear that relief can be granted against a state for state action that violates the Fourteenth Amendment.

198. See generally *infra* Part IV(B) (discussing comparative immunities of federal, state, and foreign governments, and arguing that doctrinal bases of common law of sovereign immunity have no application to constitutional relationship of states to courts of union, at least on federal claims).

199. Even some anti-Federalists conceded the appropriateness of a judicial power over questions arising under federal law. See *supra* note 192.

more consistent with the general principles of governmental accountability and full judicial power than present doctrine.²⁰⁰

C. *Cracks in the Present Framework: An Appreciation of Pennhurst and a Critique of Green v. Mansour*

The view of the scope of federal question jurisdiction set forth above seems inconsistent with much prevailing doctrine. Why change now, a skeptic might ask, if the courts have gotten along fairly well with a complex, but relatively established, set of doctrines that ameliorate many of the worst consequences of the *Hans* view?

First, the difficulty of relying on the political process to redress constitutional error places a special burden on the Court to reevaluate its past constitutional decisions, particularly when they have led to a body of inconsistent and fictive doctrines the application of which consumes substantial energy and time.²⁰¹ If the Eleventh Amendment only repealed the party-based head of jurisdiction, it would be unnecessary to resort to the highly fictionalized analyses needed to determine jurisdiction over federal question claims against state officers.

Second, while *stare decisis* may protect parties' reliance interests in some settings, as Congress has increasingly expanded efforts to regulate states and subject them to suit, states presently face substantial uncertainty as to their liabilities—uncertainty that remains, partly due to statutory ambiguity and in equal measure due to the Court's failure to resolve fully the question of congressional power to overcome state immunity.²⁰² Given Congress' established power to abrogate states' immunity under the Fourteenth Amendment, and the large number of potentially applicable provisions enacted thereunder, questions of statutory interpretation may have far greater immediate effect on the states than will the Eleventh Amendment.²⁰³

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200. The implications of this understanding of the Eleventh Amendment apply equally to admiralty jurisdiction. The Eleventh Amendment was not intended to restrict federal jurisdiction over admiralty claims, a conclusion strengthened by the amendment's pointed exclusion of "suits in admiralty" from the description of prohibited litigation. Because the remedial traditions of admiralty and maritime law differ significantly from those of law and equity, however, I do not seek to elaborate a federal common law of state sovereign immunity in admiralty.

201. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627–28 (1974) (Powell, J., concurring); *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring); see also *Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (overruling prior summary affirmances awarding past due welfare benefits on ground that Eleventh Amendment prohibited such awards). If the congressional abrogation theory were adopted, however, the ordinary process of legislation would be available to correct rulings that barred relief against states. Yet, as noted *infra* text accompanying notes 449–66, individual rights arising from the Constitution itself may be impaired through the *Hans* interpretation even as modified by the congressional abrogation theory.

202. See *infra* text accompanying notes 412–33. Moreover, it is likely that states are more concerned with the substantive liabilities federal law imposes on them, than with the forum that enforces those obligations.

203. See *infra* Part V(A). On the "statutorification" of American law generally, see G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1–7 (1982); G. GILMORE, *THE AGES OF*

Finally, to the extent that *stare decisis* is intended to promote continuity in the development of legal doctrine, as well as the image of judicial decisions flowing from discernible principles rather than from competing personal views about policy,²⁰⁴ these purposes can no longer realistically be served by mere adherence to *Hans*. The increasingly fierce division in recent Eleventh Amendment opinions²⁰⁵ and threats by various members of the Court to "withdraw" *stare decisis* protection from one set of doctrine if changes are made in another,²⁰⁶ undermine these values and make *stare decisis* a weak and inadequate answer to the pressing case for abandoning *Hans*.

These general arguments in favor of correcting the error of *Hans* can be illuminated by a consideration of two cases, *Pennhurst State School & Hospital v. Halderman*²⁰⁷ and *Green v. Mansour*.²⁰⁸ *Pennhurst* shows that the Court itself has begun the movement towards a more authentic and limited understanding of the Eleventh Amendment, albeit in a case that at the same time wrongly expands the potential reach of the sovereign immunity doctrine. *Green* dramatically illustrates the doctrinal incoherence to which continued reliance on *Hans* leads the Court, undermining its authority and legitimacy as a reasoned expositor of constitutional law.²⁰⁹

1. *Pennhurst and the "Original" Eleventh Amendment*

In *Pennhurst*, the closely divided Court held that the Eleventh Amendment prohibited granting injunctive relief against state officials to comply with state law concerning conditions at a residential facility for the mentally retarded.²¹⁰ The decision, I believe, correctly recognizes that the Eleventh Amendment should apply differently to issues of federal law than to state law claims. Nevertheless, the Court fails adequately to ad-

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204. See *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 419-20 (1983) (*stare decisis* fosters respect for "rule of law"); *Moragne v. State Marine Lines*, 398 U.S. 375, 403 (1970) (respect for judiciary).

205. The following decisions were by a 5-4 vote: *Welch v. State Dep't of Highways*, 107 S. Ct. 2941 (1987); *Papasan v. Allain*, 478 U.S. 265 (1986); *Green v. Mansour*, 474 U.S. 64 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

206. See, e.g., *Welch*, 107 S. Ct. at 2956 & n.27 (Powell, J., plurality opinion) (if *Hans* overruled, other cases concerning, for example, municipal liability for civil rights actions in federal courts or state immunity in state courts, will have to be reconsidered); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 304 (1985) (Stevens, J., dissenting) (majority's lack of respect for *stare decisis* in *Pennhurst* contributed to his change in view on need to overrule *Hans*).

207. 465 U.S. 89 (1984).

208. 474 U.S. 64 (1985).

209. See *Solem v. Helm*, 463 U.S. 277, 312 (1984) (Burger, C.J., dissenting) ("decent regard" for orderly development of law requires that controlling cases be either followed or candidly overruled). Parts IV and V below explore a somewhat different consideration relevant to *stare decisis*: that the functional content of most of what is now called Eleventh Amendment jurisprudence is likely to be retained even if the *Hans* mistake is corrected.

210. 465 U.S. at 105-06.

dress the implications of its own revisionist view of *Ex parte Young*²¹¹ for sovereign immunity law. While the *Pennhurst* decision has met with concerted academic criticism,²¹² it reflects a move toward a better and more historically authentic understanding of the amendment.

In *Pennhurst*, the Court addressed "whether a federal court may award injunctive relief against state officials on the basis of state law" and concluded that, even where the state law claim was pendent to federal question claims, it could not.²¹³ Emphasizing that the "principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art[icle] III," Justice Powell's majority opinion asserted that a suit against a state officer that would operate against the state is a suit against the state, whether it seeks damages or injunctive relief.²¹⁴

Ex parte Young, according to the *Pennhurst* majority, was an "exception" to a more general rule that bars suits against a state officer that would interfere with public administration.²¹⁵ Rejecting the articulated theory of *Young* itself—that a state officer's unconstitutional acts were *ultra vires* and not those of the state—the *Pennhurst* Court recast the *Young* rationale as resting on the need to vindicate the supremacy of federal law while "accommodat[ing] . . . the constitutional immunity of the states."²¹⁶ Under this overt balancing theory, injunctive relief based on federal law is permitted although monetary relief is not.²¹⁷ But when state

211. 209 U.S. 123 (1908).

212. See, e.g., Shapiro, *supra* note 1; Smith, *Pennhurst v. Halderman: The Eleventh Amendment, Eric and Pendent State Law Claims*, 34 BUFFALO L. REV. 227 (1985); see also Brown, *Beyond Pennhurst—Protective Jurisdiction, the Eleventh Amendment, and the Power of Congress to Enlarge Federal Jurisdiction in Response to the Burger Court*, 71 VA. L. REV. 343 (1985); Dwyer, *Pendent Jurisdiction and the Eleventh Amendment*, 75 CALIF. L. REV. 129 (1987). But see Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1514-27 (1987) (approving of *Pennhurst*); Amar, *supra* note 1, at 1480 n.224 (approving in part).

213. 465 U.S. at 117-21. Plaintiffs, residents of the Pennsylvania State School and Hospital for the mentally retarded, sued state and county officials responsible for the residential facility. *Id.* at 92. Alleging that conditions at the institution violated the Constitution, federal statutes, and state statutes, they obtained massive injunctive relief from the district court. *Id.* at 93. In its first decision, *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (*Pennhurst I*), the Court had reversed the lower court's conclusion that a federal statute supported the relief. 465 U.S. at 95. The Supreme Court directed a remand to consider whether the Constitution, state law, or other federal statutes would support the injunctive order. On remand, the court of appeals held that state law, as interpreted in a recent state supreme court decision, supported the relief. *Pennhurst II* reversed this decision. *Id.* at 124-25 [hereinafter all references to *Pennhurst* are to *Pennhurst II*]. The Court essentially held that it had erred in remanding the major institutional conditions suit to the federal court of appeals two years earlier for consideration of whether injunctive relief could be granted on, *inter alia*, state law grounds.

214. *Id.* at 98. Without deciding whether there were any acts "without color of authority" for which a state officer could be sued for injunctive relief, the Court indicated that the scope of any such *ultra vires* doctrine based on wrongs under state law was very narrow. *Id.* at 101-02 n.11, 114 n.25.

215. *Id.* at 101 n.11 & 102.

216. *Id.* at 105. The Court sought to distinguish earlier cases upholding injunctive relief against state officials based on violations of state law as either not fully reasoned, not addressing the Eleventh Amendment, or involving the performance of ministerial duties. *Id.* at 109 & n.18. That the duty involved is ministerial rather than discretionary, however, offers no coherent basis for distinction under a theory in which relief is available only to vindicate the supremacy of federal law.

217. *Id.* at 105-06.

law is the ground on which relief is sought, according to *Pennhurst*, the supremacy of federal law is not at issue and thus the balance tips always against jurisdiction to award relief.²¹⁸ Pendent jurisdiction, which the Court described as a "judge-made doctrine inferred from the general language of Art[icle] III," could not "displac[e] the explicit limitation on federal jurisdiction contained in the Eleventh Amendment."²¹⁹

The Court's view that the Eleventh Amendment bar applies with greater force to claims arising under state, rather than federal, law is consistent with the understanding that the amendment was intended only to repeal a party-based head of jurisdiction.²²⁰ The principal object of the Eleventh Amendment was to remove the head of jurisdiction that permitted a federal forum, unwilling to apply state sovereign immunity doctrine, to adjudicate monetary claims against a state under a jurisdiction based solely on the identity of the parties and thus embracing purely state law causes of action.²²¹ The *Chisholm* decision reactivated concerns over the

218. *Id.* at 106 (all federal interests "disappear" when state law is basis for claim).

219. *Id.* at 117-18. Pendent jurisdiction, resting on judicial interpretations of what a case is for Article III purposes, is no more judge-made than many of the Eleventh Amendment doctrines the *Pennhurst* majority found applicable. See Smith, *supra* note 212, at 261. *Pennhurst* also held that the *Siler* doctrine, announced in *Siler v. Louisville & Nashville Ry.*, 213 U.S. 175 (1909), under which constitutional issues were avoided by reliance on state law grounds, did not displace the "constitutional" status of the states' sovereign immunity. *Pennhurst*, 465 U.S. at 118. The many prior cases granting relief against state officials on state law grounds under *Siler* were, apparently, simply in error. See also Werhan, Pullman *Abstention After Pennhurst: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449, 502 (1986) (criticizing *Pennhurst* for undue rigidity; federal courts do not intrude on state autonomy by enforcing clear state law).

220. Although some argue that *Pennhurst* should be read to turn on the structural nature of the relief sought, see Dwyer, *supra* note 212, at 131; cf. Shapiro, *supra* note 1, at 83 (suggesting intrusiveness of structural relief as possible motivation for holding), the opinion itself repeatedly treats the state law source of the claim as dispositive. See 465 U.S. at 121 (claim that "state officials violated state law in carrying out their official responsibilities is a claim against the State"); *id.* at 106 (describing intrusiveness of federal court instructing state officials on "how to conform their conduct to state law"; *Young* exception "inapplicable" to state law claims).

221. If the purpose of the amendment was to repeal Article III's conferral of jurisdiction over claims against states under the state-noncitizen clauses of Article III, it was presumably the exercise of that jurisdiction that was problematic. And where the basis for federal judicial power lay solely in the fact that a state was a party, federal jurisdiction would extend to state law causes of action that otherwise could not be brought before the Court. It is true that some of the cases against states pending at the time the Eleventh Amendment was enacted may have involved assertedly federal questions. See C. JACOBS, *supra* note 1, at 94; see also Gibbons, *supra* note 1, at 1934-36 (amendment intended for immediate political reasons to affect these particular cases but not federal jurisdiction to hear types of issues raised therein). Because the basis for jurisdiction in those cases was the state-citizen clause and not the presence of a federal question, they were dismissed upon enactment of the amendment. See *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). The principal articulated purpose of the diversity heads, however, was not to vindicate substantive federal law, but rather to provide a neutral forum for adjudication of disputes between diverse parties. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87-88 (1809); cf. THE FEDERALIST NO. 80, at 478 (A. Hamilton) (discussing both impartiality and federal privileges and immunities clause); but see Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 n.44 (1928) (criticizing Hamilton's privileges and immunities argument as specious because of federal question jurisdiction). It was a portion of this party-based jurisdiction that was withdrawn in response to a case involving no federal claims whatsoever. In view of the particular case that prompted its enactment, as well as the compelling political and structural reasons for presuming that there was no change in the breadth of the judicial power to vindicate federal law under the federal question jurisdiction, the Eleventh Amendment cannot be read as directed at juris-

party-based jurisdiction over claims against states, which had figured prominently in the ratification debates over the Constitution.²²² Congress' perceived inability to control the Supreme Court's original jurisdiction over such cases may have been thought to require action by amendment.²²³

To the extent that the historic purpose of the Eleventh Amendment may be useful as a guide to modern decisionmaking, it suggests that the primary objective of the Eleventh Amendment was to ensure that the Constitution not be construed to permit an adjudication against a state, where suit was (1) based only on liabilities arising under state law, and (2) brought originally in a federal forum whose jurisdiction was not subject to legislative change or direction. As the *Pennhurst* majority saw the case, it involved one of these two elements: Although the suit was brought under the federal question head of jurisdiction of an inferior court subject to some congressional control, the particular claim at issue arose under state law. The Court should have focused on the relationship between the source of the federal court's jurisdiction and the state law basis for the claim of right. Assuming that inferior federal courts may, in effect, exercise federal question jurisdiction over a state defendant,²²⁴ does this conclusion necessarily imply that the case which the lower federal courts have power to decide includes causes of action based on state law?

The historical interpretation of the Eleventh Amendment as directed at

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diction over federal claims against states.

222. Although the ratification debate over Article III did not specifically distinguish claims against states arising under state law from those under federal law, the state-citizen clause of Article III gave rise to more concern than did federal question jurisdiction. The preoccupation with the state-citizen clause was understandable. First, it was that clause in the Constitution that most clearly laid open the possibility of a state being sued in a federal court. Second, more concern in general was expressed over the diversity-based jurisdictions over state law than over federal question jurisdiction. See *supra* note 192. Third, to the extent that the debate concerned creditor suits, see *THE FEDERALIST* NO. 81, at 488 (A. Hamilton), state debts were evidently perceived to arise under state law, subject to federal adjudication only through the Court's original jurisdiction under the party-based heads of Article III jurisdiction. See *supra* note 101. Finally, since Congress' power to make "exceptions" to the jurisdiction of the Supreme Court was arguably limited to appellate cases, see *supra* note 195, there was no statutory check on the Court's jurisdiction under the party-based head to attempt to enforce state law obligations on the states. *But cf.* Nowak, *supra* note 1, at 1425 (suggesting that drafters of Article III intended Congress to control jurisdiction over diversity-based suits against states, but ignoring distinction between congressional power over original Supreme Court jurisdiction and other exercises of federal judicial power).

223. While Congress' control over the establishment of the lower federal courts and the Supreme Court's appellate jurisdiction was widely referred to during the ratification debates to reassure those fearful of judicial intermeddling with the powers of the states, such assurances were generally not offered concerning the Court's original jurisdiction. See *supra* notes 184, 195.

224. The grant of original jurisdiction to the Supreme Court in cases to which a state was a party may have been intended to recognize the sensitivity of states being subject to adjudication in federal courts and to assure that the highest federal court could be available for such an adjudication. See, e.g., *United States v. Texas*, 143 U.S. 621, 639-40 (1892). However the proposition that original federal jurisdiction may be exercised over a state as party litigant only in the Supreme Court has been rejected. See *supra* notes 45, 80 (discussing removal jurisdiction and jurisdiction in federal question cases brought by states); HART & WECHSLER 3D ED., *supra* note 157, at 305-06 (collecting cases and statutes permitting United States to sue states in federal district court).

the exercise of federal jurisdiction over claims arising under state law demonstrates a reason to except from the reach of pendent federal jurisdiction state law claims against the states themselves. Since the amendment was enacted to overcome a prior interpretation by the Court of the scope of its Article III jurisdiction over states, the Court may have less latitude in defining the scope of a federal question case where the party defendant on the putative pendent or ancillary claim is a state.²²⁵ An order based solely on state law and issued against a state by a federal court would seem to fall within the purview of the Eleventh Amendment's purpose that is advocated as the basis for its inapplicability to federal question cases.²²⁶ If one calls on history and original intent to demonstrate the error of the *Hans* decision and to read the Eleventh Amendment (and Article III) as not barring federal question jurisdiction in suits against states, one must recognize that history also lends support for the conclusion reached in *Pennhurst*, insofar as the claim against the state public officials is regarded as one against the state. If the drafters of the Eleventh Amendment sought to prevent the adjudication of state law claims against states by withdrawing the head of jurisdiction permitting such cases to be heard in federal court, adjudication of state law claims against a state, even where an independent basis of federal jurisdiction exists, would be inconsistent with one underlying purpose of the amendment.²²⁷

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225. In this respect, the presence of the Eleventh Amendment might have a different effect on the scope of federal jurisdiction than would have resulted from the original enactment of Article III without the state-noncitizen clauses, since we know that there was something objectionable about the exercise of jurisdiction over the claim in *Chisholm*. Cf. Currie, *supra* note 122, at 151 n.11 ("People are not likely to amend constitutions just to change captions on complaints."). But see *Bank of United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 906-07 (1824) (if suit could not have been originally brought in Supreme Court, it is not within Eleventh Amendment), discussed *infra* note 235.

226. Although in some respects *Pennhurst* would be easier to understand if it had been decided before rather than after *Erie*, federal court application of state sovereign immunity doctrines on state law causes of action is not as complete a solution to the perceived evil of *Chisholm* as it might appear. First, the interpretive questions that arise in resolving sovereign immunity issues are no less difficult under state law than under federal law; accordingly, federal courts, in good faith application of *Erie* principles, may reach different results than would state courts. Cf. *Pennhurst*, 465 U.S. at 129 n.2 (Stevens, J., dissenting) (inappropriate for Supreme Court to review unanimous lower federal court rulings on issues of state law). It is also possible that federal court decisions on issues of state sovereign immunity law would tend more than state court decisions to derogate state sovereign immunity. See Althouse, *supra* note 212, at 1522-23 (*Pennhurst* promotes value of leaving to state governments control over interpretation of remedies available to vindicate state rights); Dwyer, *supra* note 212, at 163-64 (greater sensitivity of state court judges to full meaning of state law); cf. *Pennhurst*, 465 U.S. at 122 n.32 (if state law claim adjudicated in federal court, state has no opportunity to review interpretation of state law or choice of remedies). Given the polycentric range of remedial choices in litigation like *Pennhurst*, moreover, it may be hard to ascertain in advance what the state law is. The efficacy of federal abstention and certification of the issue to state courts seems doubtful because myriad factors must be weighed in structuring (and possibly in modifying) the remedy. But cf. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knights' Green Whiskers)*, 5 Hous. L. REV. 1, 19 (1967) (Eleventh Amendment requires recognition of state law immunity defenses on state-created claims); Smith, *supra* note 212, at 229 (state adequately protected by federal court application of state immunity law).

227. Given the present scope of substantive federal law and the consequent reach of federal question jurisdiction, a view of pendent jurisdiction wholly unrestrained by the purposes of the Eleventh Amendment might permit federal jurisdiction over, for example, state law debt claims against states,

This does not mean the Court was necessarily correct in concluding that the judicial power under Article III does not extend to such pendent state claims. The text of the amendment itself does not require such a result,²²⁸ and a basis for federal jurisdiction exists independently of the identity of the state as a party defendant.²²⁹ The Court's balancing approach rings hollow: The majority failed to consider whether pendent jurisdiction may be necessary fully to effectuate the constitutional and statutory federal question jurisdiction.²³⁰ Federal interests in complete federal adjudication of civil rights actions are far more compelling than the Court recognized.²³¹ The adverse impact on claimants under federal right of

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situations paradigmatic of the central concerns of the amendment. But while a state law debt claim may have occasioned enactment of the amendment, it would be a mistake to conclude that the amendment was generally concerned with protecting states from monetary liabilities and that this concern ought to constrain federal question jurisdiction with respect to monetary relief on federal claims. It is one thing to say that, because the Eleventh Amendment sought to remove a jurisdiction that permitted adjudication of state law claims against states, exercise of pendent jurisdiction over such claims ought to be constrained. What the diversity head of jurisdiction limited by the amendment plainly permitted that federal question jurisdiction did *not* was adjudication of purely state law claims against states—not claims for monetary relief. To draw a similar inference concerning monetary relief on federal claims is unwarranted. Indeed, scholars disagree on the extent to which the amendment was in fact primarily motivated by fiscal concerns. Compare Nowak, *supra* note 1 (protection of states from retroactive monetary liabilities imposed by courts as central concern) with C. JACOBS, *supra* note 1, at 69–71 (explanation that amendment was supported because states feared being compelled to pay debts very “doubtful”; instead, amendment was adopted largely as a formal concession to state sovereignty). The federal question jurisdiction has long been regarded as the one source of jurisdiction most essential to the union because of the need to declare and enforce *federal* rights and *federal* law, a perception that counsels against any inference restraining that aspect of the judicial power from an amendment directed at a diversity-based head of jurisdiction.

228. In *Pennhurst*, plaintiffs were residents and apparently citizens of Pennsylvania so that, in any literal sense, the amendment was no bar to jurisdiction.

229. If we assume, furthermore, that Congress could limit the jurisdiction of the lower federal courts to preclude relief on state law grounds, then at least one possible purpose of the Eleventh Amendment is not at issue. See *supra* text accompanying note 184; cf. Brown, *supra* note 212, at 381–82 (Congress should act to authorize grants of relief on state law grounds provided relief is no more extensive than relief that would have been available under federal law creating jurisdiction). The traditional view is that Congress has substantial, if not plenary, control over the lower federal courts' jurisdiction. See, e.g., Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030, 1034–35 (1982); Gunther, *Federal Court Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363–65 (1953); see also Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143, 150 (1982) (language of salary and tenure provision consistent with congressional authority over federal courts). Others have argued, however, that Article III requires Congress to vest certain jurisdiction in the lower federal courts or in some federal court either as an original or appellate matter. See, e.g., Amar, *supra* note 6; Clinton, *supra* note 184; Eisenberg, *supra* note 172; see also Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

230. This concern could have been understood as one of competing constitutional magnitude—whether prohibiting the exercise of pendent jurisdiction would so disable the effectiveness of federal question jurisdiction as to warrant retention of the pendent claim. See Dwyer, *supra* note 212, at 152–61; see also Smith, *supra* note 212, at 290–91 (*Pennhurst*'s pressure to litigate in state court inconsistent with purposes of federal question jurisdiction).

231. Although the interest in having a uniform and correct interpretation of federal law does not directly support the exercise of pendent jurisdiction, the *Pennhurst* rule may, as a practical matter, make it more difficult to vindicate that interest by routing cases into state courts from which Supreme Court review is difficult to obtain. See *supra* note 151; *infra* note 232.

having either to bifurcate their litigation into two fora or to abandon their right to a federal forum on their federal claim and consolidate their claims in state court raises serious questions of the genuineness of the majority's concern with vindicating federal rights.²³² Important federal interests, moreover, are ordinarily regarded as being served by avoiding decision on constitutional grounds,²³³ as well as by preferring state grounds for decision over any federal grounds which state governments cannot change.²³⁴

Yet to the extent that the Court's construction of the amendment in *Pennhurst* rests on its application to state law claims against states, it is a far more plausible explication of constitutional purpose than, for example, the decision in *Hans* as conventionally understood.²³⁵ Because there was

232. As others have shown, the implications of *Pennhurst* appear to drive plaintiffs to state courts for the adjudication of both state and federal claims. See Shapiro, *supra* note 1, at 81; Smith, *supra* note 212, at 288. Questions of costs and concerns over claim and issue preclusion may force many plaintiffs to the choice of abandoning reliance on the state law claim altogether, no matter how substantial, or abandoning their congressionally-established right to a federal trial forum for adjudication of their federal claim. If Congress found it important to provide an initial federal forum for adjudication of civil rights claims against state officials, this adverse impact cannot be brushed off as mere concern over efficiency.

233. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

234. See, e.g., *Pennhurst*, 465 U.S. at 150-51 (Stevens, J., dissenting). The Court's apparent abandonment of the *Siler* doctrine in litigation against a state may have detrimental consequences for states, as well as for federal plaintiffs, since federal courts are now forced to resolve claims solely on the basis of federal law that a state acting by itself cannot change. Compare Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 657 (1985) (injunction against violating state law infringes sovereignty less than one based on federal law) with Althouse, *supra* note 212, at 1523 (injunction based on state law interferes with state's control of its own law-making capacity). On the other hand, it might be argued that when a federal judgment rests on pendent state law grounds without decision of the underlying federal law claim, states are deprived of guidance on questions of federal law that might avoid time-consuming efforts to modify the state law on which relief was granted, only to find out later that federal law was an obstacle. This is true, in theory, whenever a federal question case is decided on state law grounds. Yet especially when the state is sued for prospective relief concerning its future conduct, the need for guidance on requirements of federal law may outweigh other state and federal interests.

235. One could argue that since the only purpose of the Eleventh Amendment was to withdraw a party-based head of jurisdiction, it has no implications at all for cases brought under other heads of jurisdiction. See *Bank of United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904, 906-07 (1824) (amendment has full effect if state-citizen clause construed not to authorize suits in Supreme Court against states). *Planters' Bank* arguably implies that where jurisdiction is based on the presence of a federal question, the amendment would have no application even to adjudication of a state law debt claim. But see *id.* at 907-08 (apparently resting decision on ground that bank was separate entity from state that incorporated bank). On this view, the state law character of the claim in *Pennhurst* would be irrelevant to the constitutional jurisdiction of the Court. Nonetheless, adjudication of the state law claim might still be improper. Under *Erie*, state law principles of immunity would still be applicable. Beyond that, the ordinary exercise of discretion in pendent jurisdiction might counsel against decision of complex questions of state law. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

Alternatively, the federal common law of state sovereign immunity, see *infra* Part IV, might take different forms depending on whether the cause of action arises under state or federal law. Under this view, however, the purpose of the Eleventh Amendment to eliminate federal jurisdiction over purely state law claims against states would influence my analysis. A proper understanding of what the Eleventh Amendment did—withdraw the party-based head of jurisdiction—should embrace some idea of the nature of what was offensive about use of that party-based jurisdiction. The purpose can be characterized in many ways—for example, as protecting states from original Supreme Court jurisdiction, from any original federal jurisdiction, from jurisdiction over state law claims, or from creditor

an independent basis for jurisdiction over the federal question raised, the Court should have more fully considered whether the exercise of pendent jurisdiction over the state claims was necessary to exercise federal question jurisdiction and the degree to which adjudication of this claim impinged on the state's constitutional interest in avoiding federal court adjudication of state law claims against the state itself.²³⁶ The constitutional inquiry, framed as whether this particular state law claim was one against the state, might have focused on particular features of the claim and relief sought that impinged on this interest.²³⁷

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suits. Cf. Baker, *supra* note 1 (discussing different characterizations of purpose). If, as argued above, the amended Constitution was intended to prevent the exercise of jurisdiction over state law claims within the Court's original jurisdiction, this would suggest at least a cautionary note where lower federal courts seek to adjudicate purely state law claims against states.

236. A full-fledged theory of states' constitutional immunity on state law claims would need to address the issues of waiver and congressional abrogation. Some tentative thoughts on the resolution of these issues are presented here.

There might be considerable play for a doctrine of state waiver for state claims pendent to federal question cases. The state is already properly before the federal tribunal, and there are competing federal interests in assuring complete adjudication of the federal case. Reserving to the state the choice of whether to permit federal courts to interpret state law may sufficiently meet the underlying purposes of the constitutional immunity on state law claims to tip the balance in favor of exercising jurisdiction over the pendent claims. See also Fletcher, *supra* note 1, at 1092-93 (no federalism-based need to dismiss *sua sponte* when state's presence as party permits it to protect itself through timely objection). With respect to purely diversity-based claims, however, exercising jurisdiction based on a waiver seems to conflict with an express textual limitation without serving any competing federal constitutional policy. Yet, unless the Eleventh Amendment were seen as protecting federal courts as well as states, the purpose of the amendment to protect states might permit waiver on a theory that this Article III restriction was intended for the protection of the litigants and was thus waivable.

Where a state law claim is pendent to a federal question, congressional action to abrogate immunity might be relevant, if not dispositive, in defining the balance of constitutional interests between maintaining an effective federal question jurisdiction and avoiding adjudication of state law claims against states. Where there is no other basis for federal jurisdiction, however, I would read the Eleventh Amendment as an absolute bar to the creation by Congress of federal jurisdiction over claims against a state by a citizen of another state or of a foreign state. No federal interest simply in providing a neutral forum may legitimately be invoked after the Eleventh Amendment to support such jurisdiction. For a discussion of the relationship of protective jurisdiction to Eleventh Amendment problems, see Brown, *supra* note 212, at 367-82.

237. For example, the Court might consider the degree to which the content of state law—both substantive and remedial—was clearly established. The greater the clarity of the state law principles, the less federal reliance on those state law grounds would intrude on the state's interest in controlling the meaning of state law. Cf. Werhan, *supra* note 219 (arguing that *Pennhurst* concerns more appropriately resolved through flexibility of *Pullman* abstention than absolute jurisdictional bar based on Eleventh Amendment). Although the question is difficult, I am inclined to think that, given the comprehensive nature of the relief and the broad and loosely defined contours of the state law right to the "least restrictive environment," it was appropriate in *Pennhurst* to reject jurisdiction on the ground that this state law claim was one "against the state." See also Dwyer, *supra* note 212, at 138-40 (*Pennhurst* might have rested on grounds that structural relief is more clearly "against" state than other forms of injunctive relief because of sizeable monetary costs and difficulties of state legislative response); cf. Rudenstine, *Pennhurst and the Scope of Federal Judicial Power to Reform Social Institutions*, 6 CARDOZO L. REV. 71, 92 (1984) (noting that state law was unclear).

Apart from the state's interest in controlling the interpretation of its own law—as to rights, application of law to facts, and remedies, see Althouse, *supra* note 212, at 1511-27—a fully developed theory of state immunity from suit in federal court on state law claims might consider other possible underlying values. For example, if a primary value is protecting state treasuries, the definition of when a suit is one against a state on state law claims would focus on the financial impact of the relief sought—whether prospective or retrospective. If, however, the relevant interest is protecting the jurisdiction of the state courts over such claims, a broader definition of when a suit is one against a state might be more appropriate. These interests, moreover, can only be evaluated against the common law

Instead—and more troubling than the refusal to exercise jurisdiction over state law claims against a state as such—the Court undertook a broad revision of the rationale of *Ex parte Young* to support the conclusion that virtually all state law claims for injunctive relief against state officers should be regarded as claims against a state.²³⁸ *Pennhurst* quite properly recognizes that *Young* rests on a fiction insofar as it pretends that the litigation is not against a state.²³⁹ What is troubling is that the Court justifies this fiction, not by reference to the unfairness of the doctrine of sovereign immunity, nor by reference to the traditional range of remedies available at common law against officers, but rather solely by reference to the superior demands of the Constitution in the face of prohibited state conduct.²⁴⁰ This shift from more traditional formulations may herald a willingness on the part of the Court to jettison other traditional remedies against governmental officers in the name of its own unmoored sense of balance, impairing significantly the range of remedies available to cure governmental misconduct.²⁴¹

Further, because of its sweeping rejection of the *Young* rationale, the Court's analysis of when a claim nominally against an officer is really against a state fails to account for the competing constitutional policy of providing diversity jurisdiction in cases in which state law claims are asserted by an out-of-stater against a state official or employee. *Pennhurst* held that, as to injunctive relief, pendent jurisdiction could not be exercised if state law claims were asserted by a citizen against his state's officers. But insofar as it rests on a presumption that any action for prospec-

understanding, when the amendment was adopted, since there were some remedies, *see, e.g.*, *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (damages available against officers at common law), that the amendment would not have been understood to affect. Full consideration of this problem is beyond the scope of this article.

238. *See supra* note 214. If the Eleventh Amendment is to be given any significant meaning, its reach cannot be avoided simply by naming an officer as a defendant. Thus, it remains necessary, whether solely for diversity jurisdiction cases or for state law claims asserted under other jurisdictional heads, to determine when a suit against an officer is really against a state. *See infra* text accompanying notes 239–44. For this purpose, I agree with Professor Shapiro's condemnation of the Court's expansion of a sovereign immunity doctrine that stands as an obstacle to achieving individual justice. *See* Shapiro, *supra* note 1, at 85. I disagree in part with his criticism of *Pennhurst* as an Eleventh Amendment decision, however, since the logical implication of *Pennhurst* is that the Eleventh Amendment does not bar federal question claims against states in district court.

239. 465 U.S. at 105. The fiction is that an injunction against a state officer is not an injunction against the state, even though the injunction may be binding on successors and agents—in short, on every person capable of acting who would be bound by a decree against the state itself. *See, e.g., id.* at 114 n.25.

240. *See id.* at 105.

241. The Court's approach raises a number of unanswered questions. Is the Court's new, realistic view of when an action is one against the state likely to affect its balance of interests in deciding whether federal relief is available, on concededly federal grounds, against state officers? What are its implications for suits against officers to recover specific property? For suits against individual officers for damages sounding in tort, or sounding in implied constitutional rights of action? For suits against state officers in ejectment or otherwise to try title to land? The Court's continued expansion of the contours of sovereign immunity law is troubling given these questions. *See* Chemerinsky, *supra* note 234, at 657–58; *cf. Currie, supra* note 122, at 166–67 (criticizing *Pennhurst* for departure from prior *ultra vires* principles).

tive relief against a public official based on performance of her duties as a public official is really one against the state, its reasoning would apply *a fortiori* to cases in which there is an independent basis for federal jurisdiction based on the diversity of the parties. If the injunction is really against the state, then the Eleventh Amendment expressly forbids federal courts hearing the claim since it would be regarded as a claim brought by a citizen of one state against another state.²⁴²

Yet the seeming simplicity of the *Pennhurst* analysis in this setting is now confronted with the constitutional policy of affording citizens of one state a federal forum for their state law claims against citizens of another.²⁴³ There is thus a competing, textually-based federal constitutional policy that would support the exercise of jurisdiction under a balancing analysis. Determining what the federal interest is turns on whether the defendants are really individuals or the state, which in turn depends, in the Court's new view, on what the federal interest is. The circularity of the methodology eludes principled capture.

The Court's gross articulation of the balancing test—federal versus state law, stopping future misconduct versus compensating for past

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242. For example, assume a New York citizen is arrested by a New Jersey State trooper. The arrest and the officer's subsequent abusive treatment of the plaintiff is improper under state law and also violates the Fourth Amendment. Plaintiff sues for injunctive relief and damages in federal court, alleging federal question jurisdiction over the constitutional claims and diversity jurisdiction over the state law claims against the officer. An injunction may be available to vindicate the federal constitutional claim if plaintiff can show that he is likely to be injured by a repetition of the arrest. *Compare* *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (showing of likely future harm to plaintiff injured by police chokehold not made) *with* *Kolender v. Lawson*, 461 U.S. 352 (1983) (showing of likely future arrest made). Under *Pennhurst*, however, an injunction seemingly could not issue against the officer to restrain violations of state law, since it would control him in the performance of nonministerial duties as a state employee. To recover damages on the federal claim, plaintiff must show that a reasonable trooper would have known that the arrest violated clearly established rights, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). But even if monetary relief would be available in state court when the officer acted either maliciously or in violation of established law, under *Pennhurst*, this form of relief may not be available in federal court. *See* 465 U.S. at 135 n.10 (Stevens, J., dissenting) (arguing that under majority reasoning, damages against individual officers are barred). While Stevens may have made his point too broadly, if the state *indemnifies* its officers, a damages award, on the state and possibly even the federal claim, may in effect be against the state and thus barred by the Eleventh Amendment under the majority's reasoning: Suits against state officers for official wrongdoing will be expansively characterized as against the state; and only where prospective relief is necessary to vindicate the supremacy of federal law will such an action be permitted. Although *Pennhurst* evinces no intent to overturn the settled sovereign immunity doctrine that permits damage suits against an officer individually, *cf.* *Demery v. Kupperman*, 735 F.2d 1139, 1146-50 & n.9 (9th Cir. 1984) (indemnity does not invoke Eleventh Amendment bar on federal claim against state officer individually; reserving question as to state law claims), *cert. denied*, 469 U.S. 1127 (1985), the logic of *Pennhurst's* abandonment of the *Young* rationale in fact may threaten its viability.

243. For application of this approach, see *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 221-22 (1872) (principle of affording federal forum to out-of-stater supports exercise of jurisdiction in action against state governor to restrain performance of his official duties). *See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *THE FEDERALIST* No. 80, at 477 (A. Hamilton) (impartial national judiciary should hear all cases in which one state or its citizens are opposed to another state or its citizens); *see also* *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1868) (state law limiting jurisdiction of suits against counties to state courts ineffective in restricting federal diversity jurisdiction); *Markham v. City of Newport News*, 292 F.2d 711, 718 (4th Cir. 1961) (discussing *Erie* and reaching same conclusion as to state statute governing tort actions against city).

wrongs—does not readily account for important federal law interests. The Court neglects the federal interests in providing an effective federal forum for adjudicating federal question claims and in providing a neutral federal forum for adjudicating claims by out-of-staters against in-staters.²⁴⁴ Paradoxically, though, the vision of the Eleventh Amendment as a broader bar to the exercise of jurisdiction over state law claims against state officers is a real advance towards seeing the Eleventh Amendment as not constraining the exercise of jurisdiction over federal questions.²⁴⁵ So, too, is the Court's recognition that *Young* is a fiction—that injunctive relief against state officials under federal law is, in fact, a form of equitable relief against a state. If the judicial power extends to this form of relief on federal claims, then the Court has offered only an ill-defined account of the values that permit the fiction to evade a constitutional barrier to jurisdiction for one type of relief but not for others treated alike by the text of the Eleventh Amendment. Thus, the frank recognition of the *Young* fiction should hasten the death of the fiction that a constitutional principle of state sovereign immunity constrains the federal question jurisdiction of the lower federal courts.

2. *Green v. Mansour* and the Problem of Preclusion

If *Pennhurst* points the way towards a more coherent and limited theory of the Eleventh Amendment, *Green v. Mansour*²⁴⁶ demonstrates the necessity for a revised understanding.²⁴⁷ *Green* held that federal district courts lack jurisdiction to issue declaratory judgments against state officers concerning federal welfare benefits issues if the state is no longer engaged in the challenged conduct.²⁴⁸ The Court's reliance in *Green* on the preclusive effect of the federal judgment in state court proceedings as a ground for dismissal in light of the Eleventh Amendment is in tension with the Supreme Court's accepted authority to review state court judgments in actions against states. The decision thus brings into vivid relief the internal inconsistency of the present framework of Eleventh Amendment analysis.

In *Green*, AFDC recipients sued the Michigan Director of Social Ser-

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244. If this constitutional policy were given greater weight in determining when a suit against an officer will be regarded as one against the state, it would facilitate the continued availability of traditional remedies on common law claims against official misconduct. See *supra* note 242.

245. See Amar, *supra* note 1, at 1480 n. 224 (viewing *Pennhurst* as returning to core of Eleventh Amendment, inviting reorientation of caselaw from distinctions based on nature of relief to distinctions based on source of right); see also Shapiro, *supra* note 1, at 83-84 (silver lining to Court's treatment of *Young* in context of federal claims is that it provides theoretical basis for expanding nature of relief available on such claims).

246. 474 U.S. 64 (1985).

247. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 195 (2d ed. 1988) ("The need for a reexamination of the Court's fundamental premises about the Eleventh Amendment has never been more pressing.").

248. 474 U.S. at 67-68, 72-73.

vices in federal district court for declaratory and injunctive relief, claiming that two of the defendant's policies for calculating AFDC benefits were inconsistent with the controlling federal law. On one of the two claims, the district court entered a preliminary injunction. While both cases were pending in the district court, Congress amended the statute to clarify both requirements, and the state brought itself into compliance with the amended law.²⁴⁹ Plaintiffs nonetheless pressed their claim for a declaratory judgment that the state's past practices had violated then-controlling federal law and for notice to members of the class they sought to represent advising them of the outcome of the litigation.²⁵⁰

In *Quern v. Jordan*,²⁵¹ the Court had earlier upheld issuance of notice relief to similarly situated class members, advising them of the possibility of asserting claims for past due benefits against Illinois.²⁵² In *Green*, however, the Court concluded that neither a declaratory judgment nor "class notice" was permissible.²⁵³ Resolving the Eleventh Amendment issues by reference to a balance between the supremacy of federal law and state sovereign immunity from suit, the Court distinguished sharply between "[r]emedies designed to end a continuing violation of federal law . . . necessary to vindicate the federal interest in assuring the supremacy of that law" and remedies intended to serve only "compensatory or deterrence interests."²⁵⁴ The latter, such as monetary awards for past misconduct or the notice relief sought here, could not "overcome the dictates of the Eleventh Amendment" because they were not needed to prevent ongoing violations.²⁵⁵ Absent such ongoing violations, the notice could not be justified, as it was in *Quern*, as a "case-management device . . . ancillary to . . . prospective relief,"²⁵⁶ thus, the availability of the right to a notice turned on whether the court could properly grant a declaratory judgment.

On that issue, after observing that there was discretion as to whether to

249. *Id.* at 65-66.

250. *Id.* at 65.

251. 440 U.S. 332 (1979). For a useful discussion, see Burnham, *Federal Court Remedies for Past Misconduct by State Officials: Notice Relief and the Legacy of Quern v. Jordan*, 34 AM. U.L. REV. 53 (1984).

252. Illinois had been found in violation of federal law in *Edelman v. Jordan*. 415 U.S. 651 (1974). While upholding injunctive relief, the Court had forbidden, in the name of the Eleventh Amendment, an order directing the state to make restitution to the plaintiffs. *Id.* at 677-78. An order that the state give notice of available state remedies, however, was later upheld in *Quern*, against the argument that notice was a form of retroactive relief prohibited by *Edelman*. *Quern v. Jordan*, 440 U.S. at 346-49.

253. 474 U.S. at 67-68.

254. *Id.* at 68.

255. *Id.* The *Green* Court sought to distinguish *Quern* by the fact that at the time of the district court's final judgment granting a permanent injunction, of which notice was later given in *Quern*, there was an ongoing violation. *Id.* at 69, 71-72, 74. Final judgment had not been entered in *Green* at the time the alleged violations stopped. *But see infra* note 261.

256. 474 U.S. at 71. *Quern*, however, arguably treated notice relief itself as a form of prospective relief. 440 U.S. at 346-49; *cf.* Burnham, *supra* note 251, at 85-88 (order enforcing current and future duty under federal welfare statute to compensate is prospective).

issue the declaratory judgment,²⁵⁷ the Court concluded that granting the relief "would be useful in resolving the dispute . . . only if it might be offered in state-court proceedings as *res judicata* on the issue of liability. . . ." ²⁵⁸ But if it were *res judicata*, this would circumvent the Eleventh Amendment principles articulated in *Edelman v. Jordan*.²⁵⁹ Thus, because "issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court, the latter kinds of relief being of course prohibited by the Eleventh Amendment," a declaratory judgment was unavailable.²⁶⁰

The four dissenters, maintaining that the case was not distinguishable from *Quern*,²⁶¹ argued vigorously that the balance struck by the majority insufficiently protected the supremacy of federal law, since it permitted states to have "one bite at the apple" of skirting federal requirements without incurring liability to repay what was withheld.²⁶² Justice Marshall, in a separate dissent, disputed the majority's characterization of the relief as equivalent to a federal court entering a monetary award.²⁶³ He pointed out that, as in *Quern*, the declaratory judgment and notice relief would impose neither direct liability on the state nor significant costs on the institutions of state government. Indeed, he argued that giving "notice of . . . possible relief through existing state administrative remedies,

257. The opinion is thus ambiguous about whether it rests on an interpretation of the Eleventh Amendment or the Declaratory Judgment Act. See 474 U.S. at 65-66 ("We now affirm . . . holding that the Eleventh Amendment . . . and applicable principles governing the issuance of declaratory judgments forbid the award of either form of relief."). To the extent that the Court's exercise of discretion under the act was based on a perceived constitutional barrier to the award of the judgment, however, the two inquiries merge. To the extent that the Court exercised discretion not compelled by the Constitution, its failure to consider the congressionally-established remedial structure in deciding how to exercise that discretion is striking. See *infra* text accompanying notes 447-48.

258. 474 U.S. at 73.

259. *Id.* In *Quern*, by contrast, the Court reasoned that notice relief, even when accompanied by a declaratory judgment that the state had violated federal law, would not require payment of monetary relief in violation of the Eleventh Amendment because the "chain of causation" between the federal relief and the ultimate payment of state benefits was too contingent. 440 U.S. at 347-48.

260. 474 U.S. at 73. The Court added that, if the judgment were not *res judicata*, there would be no reason to issue it. See discussion *infra* at notes 274-82.

261. *Id.* at 76 & n.2 (Brennan, J., dissenting) (notice relief in *Quern* issued long after injunction became moot through termination of federal program). As Brennan's dissent suggests, the only practical effect of the *Quern* notice was to facilitate recovery of past due benefits. The majority's willingness in *Green* to describe the notice in *Quern* as a "case-management" technique is one example of its insensitivity to the importance of procedure in the vindication of rights through litigation. In a putative class action, notice serves the important purpose of letting those whose interests had been represented in the litigation know what the district court decided. See *id.* at 75 n.1 (Brennan, J., dissenting); see also *id.* at 79 (Marshall, J., dissenting) (*Quern* did not approve notice as "mere case-management device"; notice of state administrative procedures does not serve case management functions in federal court litigation).

262. *Id.* at 77. (Brennan, J., dissenting) ("States may refuse to follow federal law with impunity. . . . During the period of noncompliance, States save money by not paying benefits according to the criteria established by federal law."). To the extent that litigation costs and possible attorneys' fees in suits for prospective relief are less than the money saved from skirting federal requirements, the point appears to be true. But see *infra* text accompanying notes 283-89.

263. *Id.* at 80-81 (Marshall, J., dissenting).

where the state agency and state courts would be the sole arbiters of what relief would be granted, assists in the vindication of state law by informing class members that they may have causes of action under that law."²⁶⁴

Both the majority and dissent, however, overlook a more fundamental difficulty with the approach employed: Why should the possibly preclusive effect of the federal court judgment have any bearing on the jurisdiction of that court? Assume for the moment that the Eleventh Amendment, or some other constitutional principle, prevents the federal courts from granting monetary relief against the states: Why should that principle restrain federal courts from ruling on nonremedial issues of substantive federal law where a ruling might constrain state organs of government to grant relief?²⁶⁵

Surely if a state provided for judicial review of administrative denials of welfare rights and, in such a proceeding, erroneously concluded that the grounds for denial of benefits were consistent with federal law, the Supreme Court of the United States would have the power to review that state court determination and to reverse it by ruling that the state grounds for denial were inconsistent with federal law. That Supreme Court ruling would be binding on the state courts. Given this, it cannot be correct that the Eleventh Amendment precludes federal courts from issuing declaratory rulings on questions of federal law simply because those rulings may have preclusive effect in state courts.²⁶⁶ The linchpin of the Court's rea-

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264. *Id.* at 80 (Marshall, J., dissenting).

265. The argument from preclusion is present in cases involving both ongoing and past violations. Although preclusion effects are tolerated in ongoing violation cases, *Green v. Mansour* was not the first case to hint that the preclusive effect in state court proceedings of a federal judgment would invoke an Eleventh Amendment-type bar. See *Florida Dep't of State v. Treasure Salvors*, 458 U.S. 670 (1982) (Stevens, J., plurality opinion) (Eleventh Amendment does not bar attachment of property in hands of state officers but state not bound as to its interests in property); see also *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. Lee*, 106 U.S. 196 (1882). But see HART & WECHSLER 3D ED., *supra* note 156, at 1125 (sovereign immunity should not prevent United States from being bound by judgment in action against officer which it defended).

266. If the district court's issuance of a declaratory judgment were, through *res judicata*, to preclude states from raising unadjudicated defenses of state law in the state court proceedings, the preclusive effect of such a judgment might be broader than the preclusive effect of Supreme Court review. On appeal from or certiorari to a state court judgment, the Supreme Court can review only decisions on matters of federal law. But the Court in *Green v. Mansour* did not raise any concern about the preclusive effect of the judgment on state law defenses, nor would such concern have been apposite. The declaratory judgment sought by the plaintiffs did not appear to speak to the state's obligation to make retroactive payments, but only to the question of whether, in denying payments based on certain regulations, it violated existing federal law. See *Banas v. Dempsey*, 742 F.2d 277, 280 (6th Cir. 1984) *aff'd sub. nom.* *Green v. Mansour*, 474 U.S. 64 (1985); *infra* note 274. Contrary to the Court's assumption, the declaratory judgment might have determined only one issue concerning the state's possible liability—the fact of past violations—leaving state courts initially to decide whether retroactive payments should be made. Moreover, since no individualized determinations of entitlements were sought, the claim being adjudicated would not, in any event, have embraced those particularized defenses in state law to retroactive payment that might be asserted in defense of particular state administrative claims. See *Burnham*, *supra* note 251, at 80 (previously unadjudicated defenses to federal claim could be raised in state benefit proceedings).

It is, moreover, a question of federal law whether a state, in the administration of a federal benefits scheme, is obligated to make retroactive payments to the beneficiaries. Behind the assertion of a state law defense to a claim made in state tribunals for retroactive payments stands the federal question

soning in *Green*, then, is impossible to square with the power of the Supreme Court to review state court judgments in claims against states.²⁶⁷

Indeed, the Court's reasoning in *Green* is also inconsistent with its decision that Term in *United Automobile Workers v. Brock*,²⁶⁸ which upheld district court jurisdiction to grant a declaratory judgment concerning federal unemployment compensation regulations that were no longer in effect, but whose meaning was central to the administrative determination by states of claims for past due benefits. The benefits, while funded from federal revenues, were to be administered by the states, with review of eligibility determinations to be made "in the same manner and to the same extent as determinations under the applicable State law *and only in that manner and to that extent*."²⁶⁹ Despite this statute, the Court rejected the government's argument that *Green* precluded entry of the declaratory judgment, distinguishing *Green* on the ground that the statute "does not foreclose review in federal court of every claim relating to the Act's application by federal and state officials"²⁷⁰—but neither does the Eleventh Amendment. While *Auto Workers* differentiated individual entitlement questions from "statutory or constitutional challenges to the federal guidelines themselves,"²⁷¹ the Eleventh Amendment likewise permits statutory or constitutional challenges to state regulations—but, according to *Green*, not when the violation of federal law has ended. The impact of the federal declaratory judgment, in either case, on state eligibility determinations resulting in monetary liabilities appears to be identical.²⁷² Thus, the *Green* Court's concern about the preclusive effect of a lower federal court's ruling in subsequent state court proceedings is simply unacceptable as a principled account of the constitutional relationship of fed-

whether the state law defense is consistent with the federally-mandated remedial scheme. Federal law, then, constrains the relevance of state law in delimiting any such obligation. Cf. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 888, 973-74 (1986) (arguing that very little state law operates truly of its own force, but must be seen as operating within constraint of federal power to preempt or change it).

267. The inconsistency does not depend on any assumption that state courts must entertain the claim. Even if one assumes states could deny a forum entirely, this does not distinguish Supreme Court review from the preclusive effect of a district court judgment: in either event, if the state provides a forum a federal judicial decision on issues of federal law may be binding.

268. 477 U.S. 274 (1986) [hereinafter *Auto Workers*].

269. Trade Act of 1974, 19 U.S.C. § 2311(d) (1982) (emphasis added).

270. *Id.* at 284-85. The majority consisted of the dissenters in *Green* and Justice O'Connor, who did not write separately to indicate what factors she felt distinguished *Green*. The government's argument implied that, because *Green* would preclude declaratory relief for individual claimants against state officials in a state-funded program absent ongoing violation, the statutory limitation of jurisdiction likewise precluded this action even though the Secretary of Labor rather than a state official was the defendant.

271. *Id.* at 285.

272. Indeed, later in *Auto Workers*, the Court emphasizes that, as a practical matter, states will be obligated to comply with the Court's ruling on the meaning of the federal regulation and regards that obligation of compliance as supporting the grant of relief. *Id.* at 288-93. While *Auto Workers* involved only federal funds, the cases cannot easily be reconciled on the basis of the impact on the state treasury in view of the provision of the Trade Act of 1974, 19 U.S.C. § 2311(d), quoted *supra* text accompanying note 269.

eral and state courts in the adjudication of federally-based claims for relief against states.²⁷³

The Court in *Green* also indicated that, if plaintiffs "would make no claim" of res judicata in subsequent state proceedings,²⁷⁴ the federal declaratory judgment would "serve no purpose" and be improper.²⁷⁵ While Michigan provided for judicial review of AFDC determinations, the Court's cryptic comment may have been referring to the possibility that state law would provide no judicial forum before which a claim for benefits and reliance on the federal judgment could be made.²⁷⁶ But even if the state provided no such forum, its administrative officers and state legislators are "bound by Oath or Affirmation" to support the Constitution and the supremacy of federal laws enacted thereunder.²⁷⁷ That obligation, even absent any possibility of judicial compulsion, might confer sufficient benefit on the plaintiff to avoid a claim of "futility."²⁷⁸ Moreover, mere

273. Had the Court ignored the Eleventh Amendment in *Green*, it might still have exercised equitable discretion to abstain from giving a declaratory judgment, if it found that the state had provided an adequate forum for the determination of claims arising from past benefit awards in the state administrative and judicial system; without ongoing violations, an equitable balance of the interests within the context of "Our Federalism," see *Younger v. Harris*, 401 U.S. 37 (1971), might caution against premature federal intrusion on a state remedial scheme set up in response to congressional requirements. See *Green*, 474 U.S. at 72 (citing *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952)) (declining to grant declaratory judgment in absence of particular dispute and where judgment either would displace opportunity of state decisionmakers to make initial decisions in carrying out state scheme of regulation or would serve no useful purpose as final determination of right). But, unless the Court decided that there was a state forum open to consider the claims, abstention could be functionally indistinguishable from closing the door to all federal review. See also *infra* text accompanying notes 447-48. And, unless contemplated by Congress in establishing the AFDC scheme, such abstention is arguably inconsistent with Congress' general policy to give such litigants a choice of forum. Cf. *Patsy v. Florida Bd. of Regents*, 457 U.S. 495, 516 (1982) (exhaustion of state remedies not required in section 1983 actions).

274. Although the Court used the words "res judicata" effect, I do not understand it to have used the term to refer to "claim preclusion." See *C. WRIGHT, A. MILLER & E. COOPER, supra* note 45, § 4402. If the federal judgment had claim preclusion effect, presumably no proceedings on the same claim could be had in the state tribunal. What I believe the Court meant by its use of the term might more properly be called issue preclusion. See also *Burnham, supra* note 251, at 79 ("collateral estoppel" effect of merits determination important to plaintiffs in subsequent state court proceedings).

275. 474 U.S. at 73 & n.2. It remains unclear, see *supra* note 257, whether the Court was referring only to an exercise of discretion under the Declaratory Judgment Act, or whether it was implying that the judgment would have been "advisory" and thus beyond the powers of an Article III court. Cf. *Fanty v. Pennsylvania Dep't of Public Welfare*, 551 F.2d 2, 8 (3d Cir. 1977) (Garth, J., concurring) (Article III bars issuance of notice or declaratory relief where benefits could be made available only in state courts or agencies), *cert. denied*, 440 U.S. 957 (1979).

276. On the availability of judicial review in Michigan, see *infra* note 288; MICH. COMP. LAWS ANN. § 24.301 (West 1981); MICH. ADMIN. CODE r. 400.921 (1979). There is no apparent reason for plaintiff not to assert a favorable federal declaratory judgment as conclusive on the federal issue if there is a state forum to hear the claim. If the Court in *Green* was suggesting that the federal judgment would not have preclusive effect on the issue it decided, this seems simply incorrect. See *Shapiro, State Cases and Federal Declaratory Judgments*, 74 NW. U.L. REV. 759, 763-64 (1979); compare *Steffel v. Thompson*, 415 U.S. 452, 477 (1974) (White, J., concurring) (judgment would be preclusive in later-filed prosecution against federal plaintiff) with *id.* at 482 n.3 (Rehnquist, J., concurring) (reserving question).

277. U.S. CONST. art. VI. Since federal law required that states establish administrative decision-making bodies, those decisionmakers would be obligated to apply controlling federal law to the particular dispute.

278. See *Powell v. McCormack*, 395 U.S. 486 (1969). There, the House of Representatives ar-

uncertainty whether a federal judgment ultimately will be given effect is no impediment to the exercise of jurisdiction.²⁷⁹ In *Auto Workers*, the lower court found that declaratory relief would be futile, since any benefit to the claimants would turn on compliance by states, which were not parties to the lawsuit.²⁸⁰ The Court rejected this argument, having "little doubt" that state agencies would comply with federal administrative directives in a federal benefits program which the states had agreed to participate in.²⁸¹ The Court emphatically stated that it would not "prevent this suit from going forward simply because there is a slight chance that petitioners will not be able to obtain the full extent of the relief they seek."²⁸²

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gued that the claim by Adam Clayton Powell to be reseated and to receive his salary was not justiciable because it was impossible for the Court to "mold effective relief for resolving this case." *Id.* at 517. This contention was based on the premise that coercive relief was unavailable against officers of the House to perform specific official acts because of the speech and debate clause. The Court, expressing "no opinion about the appropriateness of coercive relief," concluded that declaratory relief was available if there is a "live dispute between the parties." *Id.* at 517-18. Such relief may be granted, "independently of whether other forms of relief are appropriate." *Id.*; see also Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1387-89 (1973) (sovereign immunity and possible unavailability of coercive relief should never bar declaratory judgment). The Declaratory Judgment Act itself is consistent with the view that the exercise of Article III power does not turn on whether further enforcement can be given. 28 U.S.C. § 2201 (1982) (court may "declare the rights and other legal relations of any interested party . . . whether or not further relief is or could be sought"). And the Court has repeatedly recognized that "case or controversy" requirements can be met without an award of process or execution. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *Fidelity Nat'l Bank & Trust v. Swope*, 274 U.S. 123, 132 (1927).

279. That complete cure of the injury may depend on subsequent acts of state courts, or legislative or executive officials, cannot by itself defeat the exercise of the judicial power. The ultimate dependence on other branches or levels of government to give effect to federal judgments, and the possibility of other government officials evading the consequence of the courts' rulings, are impermissible bases on which to limit the courts' power because they are often present. *Cf. Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 124 (1873) ("[t]he want of a remedy and the inability to obtain the fruits of a remedy are quite distinct. . .," implying that inability to secure payment of judgment does not impair judicial power to issue judgment itself). What is important is whether the judgment of the federal court is binding as to what it decides and whether it is sufficiently related to the plaintiff's injury as to be likely to effect a cure. See *Allen v. Wright*, 468 U.S. 737 (1984) (relief must be likely to cure injury complained of); *cf. Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (Court sits to correct judgments, not revise opinions and thus will not review state court judgments resting on independent and adequate state ground). Where an independent and adequate state ground sustains the state court judgment on which Supreme Court review is sought, it is relatively certain that the ruling on the federal law issue will have no effect on the parties' legal rights and relations. That is quite different from where the ultimate effect of the federal judgment is *uncertain* because it depends on possibly relevant but unresolved issues of state law, or on the willingness of state officials to implement its consequences. *Compare La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 461 (1899) (as long as judgment was "final [and] conclusive" on government, Court could render decision on obligation to pay claim) with *District of Columbia v. Eslin*, 183 U.S. 62 (1901) (where, after judgment in Court of Claims, Congress enacted law directing that no appropriations be spent to satisfy judgment and repealing jurisdiction over claims, Court lacked judicial power to review).

280. 477 U.S. at 291-92. Plaintiffs had conceded that states could not be joined because of the Eleventh Amendment. The lower court found that the states were "indispensable parties" and that the case should be dismissed. *Cf. Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1482, 1522 (1962) (discussing relationship of indispensable party, mandamus, and sovereign immunity questions).

281. 477 U.S. at 292. The Court noted that it was unlikely that a directive from the Secretary of Labor would be resisted: State agencies were amenable to a sanction of having employers in their state lose tax credits on their federal unemployment tax, and the federal government fully reimbursed state agencies, for both the benefits and administrative cost of processing the benefits. *Id.*

282. *Id.* at 293.

The reasoning of *Green v. Mansour*, therefore, appears to fall of its own weight, and its result cannot be sustained as a reasoned and principled interpretation of the Constitution. The opinion, however, is not just another example of the faulty reasoning that seeps from the Court's quagmire of Eleventh Amendment law. It keenly illustrates the misleading symbolism that this terribly complex body of doctrines serves and marks a further reason for its abandonment.

A reading of the opinions in *Green* might leave one with the impression that the effect of the refusal to exercise jurisdiction over the claim for declaratory relief was to leave state tribunals, designated by the states, entirely free to decide (1) whether federal law had been violated by the challenged practice, (2) if it had been, whether welfare recipients who were wrongly denied benefits should recover retroactively to the date of the wrongful decision, and (3) if so, whether particular recipients were entitled to recover.²⁸³ But since 1981 federal law had required states that had underpaid AFDC benefits to "take all necessary steps to correct" underpayments, including specifically, "corrective payment[s]" to the claimants.²⁸⁴ Federal law had long required states to provide administrative tribunals to adjudicate welfare benefit disputes and, in such contested cases, federal regulations specified the procedures and required states to provide "payments retroactively to the date the incorrect action was taken," where the claimant prevailed.²⁸⁵

The federal AFDC law did not, it is true, require that states provide for judicial review of the agency decision; regulations required only that the claimant be notified of his right to judicial review "to the extent it is

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283. Both the majority opinion and the dissenting opinions proceed on the premise that all of these questions have now been left to state organs of government to decide. See 474 U.S. at 70-71 (majority opinion) (in *Quern*, notice relief allowed only because ancillary to permanent injunction and "state agencies rather than federal courts would be the final arbiters of whether retroactive payments would be ordered"); *id.* at 480 (Marshall, J., dissenting) (notice would mean that "state agency and state courts would be the sole arbiters of what relief would be granted"). Justice Brennan's powerful "one bite at the apple" argument is surely based on the premise that, as a result of the court's decision, states are now free—even where federal requirements were violated—to fail to restore wrongly withheld benefits. See *supra* text accompanying note 262.

284. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2318, 95 Stat. 357; 42 U.S.C. § 602(a)(22) (1982 & Supp. 1987). Although the disputed payments predated this statute, petitioners argued that the affirmative statutory obligation, one apparently not dependent on a claimant's request for a hearing, applied. Brief for Petitioner, at 26, *Green v. Mansour*, 474 U.S. 64 (1986); see 45 C.F.R. 233.20 (a)(13)(iii) (1984) (implying that statutory repayment requirement applies to underpayments identified after September 30, 1981). The state argued, in response, only that no "underpayments" had yet been identified. Brief for Respondent, at 35. Since 1973, moreover, federal regulations required states to provide hearings to a recipient challenging state reductions or denial of benefits, and, if the recipient's claim was upheld, to "make corrective payments retroactively to the date the incorrect action was taken." 45 C.F.R. § 205.10(a)(18) (1973-86); see also MICH. ADMIN. CODE r. 400.918 (1979) (implementing federal retroactive payment requirement). Each opinion, except for Justice Marshall's, simply ignores these provisions, and Marshall refers only tangentially to section 602(a)(22) in a footnote arguing that notice relief should be regarded as prospective because states have a continuing duty to repay. 474 U.S. at 80 n.*. Cf. *Edelman v. Jordan*, 415 U.S. 651, 674 (1974) (no intent to create cause of action in federal court based on HEW regulations).

285. 45 C.F.R. § 205.10(a)(18) (1973-86); see 42 U.S.C. § 602(a)(4); 45 C.F.R. § 205.10(a)(5).

available to him."²⁸⁶ The federal regulatory scheme itself, then, did not require that the agency's decisions on issues of federal law be subject to ultimate federal judicial review, as plainly would be the case if states were required to provide judicial review of the agency decision.²⁸⁷ In Michigan, however, as in many other states, the decisions of state agencies on AFDC claims were subject to state judicial review.²⁸⁸ Plaintiff Green, subsequent to the Supreme Court decision, filed a request for hearing under the state administrative code. The state administrative law judge rejected the argument that the request was barred by a ninety-day statute of limitations, and adjudicated the claim on the merits; the former federal plaintiff received the full relief requested—\$347.²⁸⁹

What then did the Eleventh Amendment decision in *Green* really mean for enforcement of the plaintiffs' federal law claims to monetary relief against the state? Instead of proceeding to judgment on the merits in a federal district court section 1983 action, the plaintiffs in *Green* were forced to utilize the state-provided administrative forum. Class-wide notice was not granted, and presumably fewer recipients were informed of their potential entitlement to back benefits. Attorneys' fees for the legal work related to recovery of the back payments were not available, as they would have been had the matter been litigated in district court. The parties were required to acquaint a new decisionmaker with the case. A state decisionmaker, whose presence was mandated by federal law (and paid for in part by federal funds),²⁹⁰ then concluded that under federal law plaintiff was entitled to the additional amount sought.

286. 45 C.F.R. § 205.10(a)(17) (1973-1986).

287. Even if a state failed to provide for judicial review of administrative determinations, Supreme Court review of such determinations might be obtainable. Were state courts to deny review for lack of jurisdiction, the Supreme Court might conclude that this was not an adequate state ground for decision and, accordingly, reach the merits of the federal claim. *See supra* notes 156-58. Moreover, the absence of state judicial review might itself be challenged, in state or federal court, as an independent violation of federal law. *Cf. Redish, Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination*, 27 VILL. L. REV. 900, 915 & n.61 (1982) (due process requires some "independent" court, state or federal, to be open to hear constitutional claims). *But cf. Edelman v. Jordan*, 415 U.S. at 677 n.19 (noting dispute whether Illinois permitted suits in state court to recover benefits).

288. *McKee v. Dempsey*, 424 Mich. 404, 381 N.W.2d 679 (1986); *Pease v. Social Servs. Director*, 105 Mich. App. 689, 308 N.W.2d 432 (1981); *Evans v. Department of Social Servs.*, 22 Mich. App. 633, 178 N.W.2d 173 (1970); in other states, *see, e.g., Porter v. D'Elia*, 522 N.Y.S. 2d 618 (App. Div. 1987); *Woodman v. Department of Health & Social Servs.*, 101 Wis.2d 315, 304 N.W.2d 723 (1981).

289. Telephone Interview with Professor William Burnham, plaintiff's counsel (June 1987); *In re Green*, Case No. K8148787A (Mich. Dep't Social Servs., May 28, 1986).

290. *See* 45 C.F.R. § 205.10(b)(4)(iii) (1974-86). If state courts are to serve as the natural line of defense against congressional contraction of federal court jurisdiction to vindicate the Constitution, *see Hart, supra* note 229, at 1401, using the federal spending power, with its potentially broad conditions and additive side effects on state autonomy to finance state tribunals, *see* State Justice Institute Act of 1984, 42 U.S.C. §§ 10701-10713 (1986), may raise concern. Moreover, scholars and plaintiffs' attorneys, frustrated by the retrenchment in availability of federal judicial redress for governmental wrongs, increasingly seek to develop theories for why state courts are obligated to provide relief for federal claims that federal courts cannot or will not provide. *See, e.g., Wolcher, supra* note 66; Gordon & Gross, *supra* note 158; Taylor, *Section 1983 in State Court: A Remedy for Unconstitu-*

What seems to be protected, then, in this decision is a facade of state sovereignty. States are not, in fact, acting autonomously to determine what remedies to provide, but rather are compelled by federal law both to establish decisionmaking mechanisms and to provide specific remedies. Had the state administrative law judge denied relief and been affirmed in state courts, review would then have been available in the Supreme Court as to any issue of federal law.²⁹¹

It is thus impossible, upon analysis, to see *Green* as supporting a principled argument that the judicial power does not extend to claims for declaratory relief against states when the disputed issue may affect potential monetary liabilities under federal law.²⁹² The Court's manipulation of doctrine in *Green* does require litigants to resort to state court before being able to invoke the ultimate federal forum for review of their federal claim.²⁹³ Thus stated, Eleventh Amendment jurisprudence takes on the character of a peculiar form of abstention, stemming not from the text or structure of the Constitution, but from a more discretionary doctrine designed to promote a vision, over time, of a particular "federalist relationship" between state and federal court systems.²⁹⁴

Green's unconvincing and misleading rationale and its inconsistency with Supreme Court review of state cases involving federal questions sup-

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tional State Taxation, 95 YALE L.J. 414 (1985). These two trends together could diminish the practical ability of state judiciaries to set and control their agendas and their dockets and thus their independence in the federal scheme. *But cf. Meador, Federal Law in State Supreme Courts*, 3 CONST. COMMENTARY 347, 355 (1986) (approving federal funding of state courts).

291. These would include (1) whether federal law generally required the states to make the payments and (2) whether any of the state grounds interposed to reject the federal claim were consistent with the requirements of the federal statute and regulations, as well as the due process clause, and were otherwise independent and adequate.

292. Under a proper understanding of the Eleventh Amendment, there was no constitutional bar to the exercise of jurisdiction in *Green*. This does not mean, however, that the federal courts should have made individualized awards; Congress may have intended awards of monetary relief to such claimants to have been made only in state administrative tribunals. The Court could have undertaken a more useful remedial inquiry: whether, in light of the possible availability of relief through state administrative proceedings mandated by Congress, a declaratory judgment was consistent with Congress' intent or otherwise appropriate. *Cf. Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970) (Congress sets welfare policy and Court enforces it). This inquiry was either not undertaken or was not candidly disclosed. *See infra* Part V(A).

293. The Supreme Court may be motivated to expand Eleventh Amendment doctrines protecting states from federal courts because of its inability or unwillingness to curtail Congress in its substantive regulation of the states, even in areas traditionally reserved to state law. *See, e.g., South Dakota v. Dole*, 107 S. Ct. 2793 (1987); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd*, 435 U.S. 962 (1978); *see also* REGULATORY FEDERALISM, *supra* note 178 (detailing expansion of federal regulation affecting states). But if so, the Court's use of the Eleventh Amendment to serve as a surrogate for the impotent Tenth has severe difficulties. *See* H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 152 (1984). *But see* Brown, *supra* note 1 (approving "process federalism" achieved by Court's Eleventh Amendment cases). Not least among them is the pervasive sense of dishonesty that characterizes many of the Court's recent Eleventh Amendment decisions—dishonest treatment of past precedents and misleading implications for the freedom that states retained, as in *Green v. Mansour*.

294. *See generally* Baker, *supra* note 1 (arguing that diverse strands of Eleventh Amendment law are part of effort to define demands of federalism on judiciary).

port the proposition that the time is ripe to abandon the erroneous doctrine that the Eleventh Amendment embodies a constitutional rule of state immunity from adjudication in federal tribunals. Doing so will have only a modest effect on the results of so-called Eleventh Amendment jurisprudence. Federal common law doctrines will continue to protect states from some forms of relief in federal courts, but will provide a firmer foundation for striking the correct balance in state-federal judicial relations and in assuring proper remedies for violations of federal law.

IV. FUNCTIONALITY AND FEDERAL COMMON LAW: THE REMEDIAL HIERARCHY AND FORUM ALLOCATION PRINCIPLES OF ELEVENTH AMENDMENT LAW

For over a decade, Eleventh Amendment scholarship has sought to demonstrate that the amendment cannot be regarded historically or textually as embodying the doctrines of immunity attributed to it. That task has been substantially accomplished.²⁹⁵ What stands in the way of the fruition of that scholarship is an explication of what happens if the constitutional theory of state sovereign immunity is abandoned. Scholars have focused less attention on this point and appear to hold more divergent views.²⁹⁶ As I argue below, the functional effect of state sovereign immunity is likely to survive as part of a federal common law of remedies for governmental wrongdoing.²⁹⁷

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295. The persuasive historical work by Professors Field, Fletcher, Jacobs, and Orth, and by Judge Gibbons, in rebutting the *Hans* Court's claim that *Chisholm* was an unexpected and erroneous decision and that the drafters of the Eleventh Amendment plainly intended to constitutionalize state sovereign immunity under all heads of federal jurisdiction has been widely acknowledged, *see, e.g.*, Shapiro, *supra* note 1, at 68, and even by those who do not share their prescription for the future. *See* L. TRIBE, *supra* note 247, at 175 n.8 (calling work "powerful").

296. Field, Part I, *supra* note 1 (common law immunity survives Article III, though whether that immunity is form of federal common law is unclear); Fletcher, *supra* note 1, at 1108-30 (Tenth Amendment, not Eleventh, may supply immunity from liability in some cases); Gibbons, *supra* note 1, at 2004 (acknowledging possible retention of "federal doctrine of state sovereign immunity"); Tribe, *supra* note 1 (states immune from judicially implied but not congressionally established causes of action); *see also* *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 300 (Brennan, J., dissenting) (only surviving immunity is state law immunity to state law claims); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 125 (Brennan, J., dissenting) (even as to state law claims, if state law forbids official's actions, he would not have immunity).

297. Ten years ago, Professor Field concluded that the Eleventh Amendment was intended to overcome an interpretation of Article III that construed it affirmatively to authorize suits against states in abrogation of their common law immunity. In her view, the amendment did not "constitutionalize" state sovereign immunity but rather reinstated a "common law doctrine" of sovereign immunity. Field, Part I, *supra* note 1, at 541-46 & n.98. My approach differs from Professor Field's in several respects. Professor Field believes that remedial limitations of sovereign immunity for states generally derive from "attitudes reflected in the eleventh amendment, and . . . the interpretation of article III thereby adopted . . ." Field, Part II, *supra* note 1, at 1265. I argue instead that the Eleventh Amendment prohibits the exercise of jurisdiction over states only with respect to diversity-based jurisdiction and, possibly, certain state law claims. Similarly, while I argue that the Eleventh Amendment limits the jurisdiction of federal courts over diversity claims against states, Professor Field's understanding of the Eleventh Amendment does not set outer limits on the constitutional jurisdiction of federal courts. Thus, Professor Field argues that the amendment and its principle of "neutrality" with respect to common law sovereign immunity are addressed only to the courts, *id.* at

A. *A Functional Description of "Eleventh Amendment" Law: Remedial Hierarchy and Trial Forum Allocation*

The complexity, arcanity and deviousness of modern Eleventh Amendment law warrant continued efforts to understand what purposes it actually serves so that its operation may be more understandable, even without a major overhaul of its doctrinal framework. A functional description of Eleventh Amendment jurisprudence reveals that the jurisprudence contains an arguably coherent content. This functional content, however, is not accurately described by present doctrine and does not flow from the Eleventh Amendment itself. While present doctrine purports to focus on when a suit is one against the state, the real inquiry concerns what relief will be made available, for what state misconduct, and in what forum.

The functional content of present Eleventh Amendment law consists in large measure of (1) defining a remedial hierarchy for state violations of federal law and (2) allocating certain cases arising out of that governmental misconduct to different courts of initial resort.²⁹⁸ The present remedial hierarchy generally precludes a monetary judgment against state treasuries for past wrongs²⁹⁹ and allows federal district courts to grant prospective injunctive relief to prevent ongoing violations of federal law.³⁰⁰ This preference is based on the nature of the remedy rather than on its cost; prospective relief requiring significant expenditures of state funds is sus-

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1261-62, and possibly with respect to all heads of federal jurisdiction. *Id.* at 1264 & n.272. I maintain that the amendment does not constrain jurisdiction over federal questions but that, with respect to diversity-based jurisdiction, it would constrain Congress as well as the courts.

Apart from these constitutional differences, our approaches to the common law of sovereign immunity differ significantly. First, Field does not clarify whether common law immunity derives from federal or state law. Compare Field, Part I, *supra* note 1, at 544 (federal and state sovereign immunity have same source, the "common law of sovereign immunity") and *id.* at 545 n.98 (referring to "federal common law") with Field, Part II, *supra* note 1, at 1269 ("true federal common law" irrelevant to judicial interpretation of federal statutes arguably imposing liabilities on states). I argue that federal common law principles support a doctrine of state sovereign immunity, but that the doctrine is not mandated by Article III or the Eleventh Amendment. Second, Field asserts that the only basis for judicial abrogation of the supposedly common law immunity (apart from statutory claims created by Congress) is where a specific clause in the Constitution was intended to abrogate states' immunity from suit. *Id.* at 1266-68. I argue that where jurisdiction is otherwise present, courts must abrogate states' common law immunity where necessary to vindicate the constitutional claim in light of all the circumstances including otherwise available remedies. See *infra* text accompanying notes 451-66. Finally, Field does not, as I do, attempt to account for the particular form of remedial structure embraced within the concept of sovereign immunity. See *infra* text accompanying notes 352-403. For further discussion of Field's articles, see *infra* notes 449, 457, & 496. For critiques of Field's view of the amendment, see M. REDISH, *supra* note 174, at 148-49; HART & WECHSLER 3D ED., *supra* note 157, at 1167-68.

298. Cf. O. FISS, *THE CIVIL RIGHTS INJUNCTION* 38 (1978) (describing relation between injunction and other remedies as part of "remedial hierarchy").

299. See, e.g., *Papasan v. Allain*, 478 U.S. 265 (1986); *Green v. Mansour*, 474 U.S. 64 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974) (all declining to award judgment perceived to be for past accrued monetary liabilities).

300. *Edelman*, 415 U.S. at 664 (injunction concerning states' future application of federal welfare standards). An exception even to this principle comes when the ongoing violation is a breach of a continuing duty to pay monetary liabilities accrued in the past. *Papasan*, 478 U.S. at 279-80 n.12; see also *Green*, 474 U.S. at 80 n.* (Marshall, J., dissenting) (notice relief barred by Eleventh Amendment might be seen as relating to continuing duty to repay wrongly withheld benefits).

tained while modest monetary relief for past wrongs is barred.³⁰¹ Indeed, the Court has said that "compensatory" or "general deterrence" remedies do not overcome immunity; only "specific deterrence" remedies to stop an ongoing violation of federal law are permitted.³⁰²

The rigors of the remedial preference principle are mitigated by the forum allocation principle. Under the forum allocation principle, the Eleventh Amendment does not bar review of any federal question presented in a case originating in the state courts, even those in which the amendment would bar initially filing the case in federal district court. In this respect, Eleventh Amendment doctrine functions as a form of abstention, deferring, as *Younger v. Harris*³⁰³ does, to state courts for initial adjudication of certain federal claims for relief.³⁰⁴ Thus, suits for damages against a state for violation of federal law or for recovery of wrongfully withheld federal welfare benefits or of unconstitutional taxes may be brought in state, rather than federal, court, with review by a federal court after judgment. Nevertheless such suits are as surely "against the state" as those filed initially in federal court.³⁰⁵

As argued above, the present framework does not adequately account for why federal judicial power extends to cases seeking some forms of relief as an original matter and to cases seeking other forms of relief only in the exercise of its appellate jurisdiction. There is no constitutional mandate to apply these principles to the states. Nonetheless, these principles

301. Compare *Green*, 474 U.S. 64 (1985) (declaratory judgment in action involving wrongly withheld benefits for named plaintiff of \$347 barred by Eleventh Amendment) and *Burnham*, *supra* note 251, at 69 n.87 (ultimate aggregate recovery in state courts in *Edelman-Quern* litigation was \$533,335) with *Milliken v. Bradley*, 433 U.S. 292-93 (1977) (Powell, J., concurring) (upholding order to state to fund half of remedial education programs in Detroit at estimated cost of \$5.8 million). Even these functional principles, however, do not account for such decisions as *Alabama v. Pugh*, 438 U.S. 781 (1978) (Eleventh Amendment precludes suit for ongoing injunctive relief against state as named party defendant, although state officials could be sued). *Pugh*'s prohibition of suit against the state *eo nomine*, while consistent with the fictive theory of *Ex parte Young*, is inconsistent with the Court's present view that the supremacy of federal law overrides the Eleventh Amendment in situations involving ongoing violations of federal law to permit injunctions to issue. See *Pennhurst*, 465 U.S. at 152-53 n.8 (Stevens, J., dissenting).

302. See *supra* text accompanying notes 254-56.

303. 401 U.S. 37 (1971). As I explore *infra* at note 400, however, if the allocation of damage claims to state courts is to be sustained in its present form as a principled, or (less ambitiously) constrained, form of abstention, existing categories of abstention cannot supply the limiting principle.

304. If state courts can constitutionally refuse to provide a forum for claims barred from district courts, "Eleventh Amendment abstention" would completely foreclose access to any federal court, in a way that neither *Younger v. Harris* nor other recognized abstention doctrines do. As discussed *supra* notes 130-33, *General Oil Co. v. Crain* suggests that states cannot do so. See *supra* notes 157-58; see generally Wolcher, *supra* note 66. At a minimum, federal law poses substantial constraints on the validity of state courts' refusal to entertain actions on grounds that discriminate against federal claims. Brown, *supra* note 1, at 391; Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1131-35 (1969); Wolcher, *supra* note 66, at 238-44; accord *Testa v. Katt*, 330 U.S. 386 (1947). But cf. *American Trucking Ass'n, Inc. v. Conway*, 107 S. Ct. 3262 (1987) (denying certiorari to review state tax case in which, *inter alia*, state court found that sovereign immunity barred refund of unconstitutional taxes).

305. But cf. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. at 135 n.10 (Stevens, J., dissenting) (suggesting that where relief is authorized by state law, claim is not one against state).

can be sustained as a form of federal common law, which the Court can, within the jurisdictional parameters provided by Congress and the Constitution, shape in response to its changing experiences and views of constitutional exigencies.

B. *State Sovereign Immunity as Federal Common Law*

If neither Article III nor the Eleventh Amendment grants states a general constitutional immunity from private suits in federal court, does it follow that any such immunity enjoyed by the states exists solely as a matter of state law? Will the remedial hierarchy and forum allocation principles in federal question cases necessarily fall with the abandonment of the *Hans* view of the federal judicial power? I think not.³⁰⁶

1. *Sovereign Immunity Existing Only as State Law?*

Some Eleventh Amendment scholars have concluded that the only source of state immunity from suit in federal court is state law. Such law, while perhaps providing defenses available in federal courts under the *Erie* doctrine to claims arising under state law, would never bar relief on federal claims.³⁰⁷ But to conclude from history or the lack of textual support from the Constitution that state immunity is based solely on the laws of the states is to impose a post-*Erie* consciousness on a document framed and interpreted by men for whom the sources of law were not so narrowly or discretely cabined and described.³⁰⁸

306. See also H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 163 (2d ed. 1987) (suggesting that "except for the precise case addressed by the amendment, the federal courts may develop a common law of state sovereign immunity").

307. See, e.g., Cullison, *supra* note 226, at 19, 35 (*Erie* doctrine should control immunity cases; federal courts need only honor state immunity when enforcing state-created rights); see also *Atascadero State Hosp. v. Scanlon*, 473 U.S. at 300 (Brennan, J., dissenting). Professor Amar's argument generally appears to defeat any claim of state sovereign immunity from relief except where such immunity is supplied by state law with respect to a purely state law claim. Amar, *supra* note 1, at 1473-75, 1486-87, 1490 & n.261. Although Amar also writes that states may immunize themselves for unconstitutional conduct provided that other remedies, such as an action against a non-judgment proof officer, can "guarantee victims full redress," *id.* at 1490-91, perhaps implying some role for a doctrine of state immunity even in claims arising under federal law, he earlier indicates that actions against officers for monetary relief can rarely provide full redress (even if existing "good faith" immunities for officers were eliminated) consistent with the Constitution's "remedial imperative." *Id.* at 1487-88. Professor Fletcher argues that, apart from constitutional limitations on Congress' authority to create damage liability enforceable in either state or federal courts, no federal doctrine of jurisdictional immunity protects states from particular forms of relief in federal courts. Fletcher, *supra* note 1, at 1106-30.

308. See H. FINK & M. TUSHNET, *supra* note 306, at 858 (pre-*Erie* cases may have regarded state sovereign immunity as general common law); see also Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (characterizing *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), as articulation of established practice of federal courts in areas of commercial law uncontrolled by state statute to develop and apply a "general common law," that did not necessarily displace states' development of differing approaches to same issue); Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1039-1111 (1985) (debate over federal common law complex, continuous and intensely political in early decades of Constitution); cf. Hill, *supra* note 304, at 1124, 1131-35 (even where claim may be brought under

Common law concepts of sovereign immunity were part of the background against which the demands of the Constitution were to be interpreted.³⁰⁹ These concepts, whether seen as part of a general or specifically federal common law, were felt to constrain the remedial choices of federal courts in actions against states throughout our constitutional history. John Marshall's struggle in *Cohens* to grapple with the concept of federal affirmative claims against states suggests that he did not see sovereign immunity—and the host of related common law traditions as to the appropriate form of redress for injury—as a creature only of state law, of no relevance to claims arising under federal law.³¹⁰

Further support for the proposition that sovereign immunity arises from federal, rather than only state, law derives from the breadth of the federal courts' application of the principle. Attempts to account for the so-called "immunity" of states from federal court suits frequently gloss over the immunity of the United States and generally ignore the judicial immunities enjoyed by Indian tribes, United States territories and foreign sovereigns.³¹¹ Yet Marshall and succeeding Supreme Court justices have con-

state common law, substantive federal law constrains shape of liability and remedial rules in actions against government officials for official wrongdoing).

309. Justice Field wrote that "[i]t is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. . . . This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868); see *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869) ("[e]very government has an inherent right to protect itself against suits"); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857) (states not suable in any court without consent); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) at 411–12 (immunity of United States); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 333–36 (1816) (dicta suggesting that party-based jurisdiction did not permit suits against United States because not proper to submit sovereignty to judicial cognizance); Compare Engdahl, *supra* note 17, at 21–23 (sovereign immunity came into favor only after Civil War) with Collins, *supra* note 33, at 221–28 (emphasizing continuity in Court's treatment of immunity).

310. Scholars generally explain Marshall's struggle in *Cohens* with whether "affirmative claims" could be made against a state as reflecting his view that claims on a contract do not arise under federal law. D. CURRIE, *supra* note 69, at 99 n.56; C. JACOBS, *supra* note 1, at 87–89; see also Engdahl, *supra* note 17, at 9. This interpretation is in some tension with Marshall's broad view of federal question jurisdiction in *Osborn v. Bank of United States* and in *Cohens* itself. See *supra* note 101. Marshall's evident unease and uncertainty over the question discussed in *Cohens*—whether a state could be sued to recover taxes unconstitutionally collected—together with his lengthy discussion and justification of the nominal party rule in *Osborn*, may be accounted for in part by his familiarity with the remedial traditions of the common law doctrine of sovereign immunity. See also Baker, *supra* note 1, at 155–56 & n.81 (noting Marshall's use of common law sovereign immunity doctrines in *Osborn* as offering hope to states that federal courts would recognize sovereign immunity principles even if not constitutionally required to do so); *Board of Liquidation v. McComb*, 92 U.S. 531 (1875) (recognizing seemingly common law sovereign immunity principle and need to avoid interference with executive discretion, but permitting some forms of relief against state board).

311. The ready extension of federal and state sovereign immunity principles to territories of the United States and to Indian tribes suggests, in some cases explicitly, that the doctrine of sovereign immunity is in the nature of federal common law. On tribal immunity, see, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (tribes possess "common law immunity from suit traditionally enjoyed by sovereign powers"); Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 COLUM. L. REV. 173, 181 (1988) (tribal immunity doctrine is one of federal common law). On territorial immunity, see, e.g., *Bonet v. Yabucoa Sugar Co.*, 306 U.S. 505 (1939) (Puerto Rico not suable without her consent in tax refund action notwithstanding organic act including sue and be sued clause); *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 276 (1913) (same in suit to recover specific property; "American system" is one in which legislative power over claims against the government is

sistently stated that the United States government was not suable without the government's specific consent.³¹² And early on, Marshall's Supreme Court recognized as a principle of federal common law the public international law rule of sovereign immunity for vessels owned by foreign governments,³¹³ a principle later aptly described by then-Justice Rehnquist as "*judicially created* to effectuate general notions of comity among nations and among the respective branches of the Federal Government."³¹⁴

These doctrines of immunity for foreign, federal and state governments have developed in some respects along similar lines. It is commonplace for cases involving one to refer to reasoning in cases involving others.³¹⁵ At least two important common elements inform these schemes: the distinction between "the sovereign" and its agents,³¹⁶ and the influence of acts of

not subordinate to the judiciary); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Hawaii immune from suit without consent on claim under local law).

312. See, e.g., *Cohens*, 19 U.S. (6 Wheat.) at 411-12; *United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846); *United States v. Lee*, 106 U.S. 196, 204 (1882). The *Lee* Court, analyzing why the United States could not be sued without consent, said that the rule has "never been discussed or the reasons . . . given, but . . . treated as an established doctrine." As the Court explained, the rule had a misguided common law basis, derived from the common law of England, in which the sovereign king could not be sued without consent. The *Lee* court concluded that there were no justifiable reasons to require legislative consent to suit in a constitutional republic, but that the rule had been "adopted in our courts as a part of the general doctrine of publicists." *Id.* at 206. Treating the rule as "settled," the Court nonetheless held that the action for ejectment filed against federal officers in possession of the former Lee estate would not be treated as a suit against the United States for which consent was required. See also *infra* text accompanying notes 458-59.

313. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (foreign vessel of war belonging to friendly foreign sovereign is immune from libel, even as against claim by United States citizens that vessel is their private property). Neither the counsel arguing on behalf of the immunity nor the Court's opinion itself rests the decision in favor of immunity on constitutional principles. *Id.* at 133 (counsel arguing in favor of immunity concedes that "constitution . . . decides nothing"); *id.* at 146 (Marshall, C.J.) (conclusion as to sovereign immunity of vessel rests on "the nature of sovereignty" and "universal practice of nations").

314. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972) (plurality opinion) (quoted statement used to describe both act-of-state and foreign sovereign immunity doctrines) (emphasis added); accord *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (Court explicitly formulates federal common law act-of-state doctrine foreclosing adjudication of certain issues concerning legality of acts of foreign government).

315. See, e.g., *Pennhurst*, 465 U.S. at 112-13 (discussing federal sovereign immunity cases on enjoining officers); *Land v. Dollar*, 330 U.S. 731, 737 (1947) (referring to state sovereign immunity cases on right to sue officers to recover property).

316. See, e.g., J. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* vii, 53 (1963) (in public international law, officials have immunity only where "suit is in effect a suit against the state"). In this country, individual representatives of foreign governments are generally protected by "diplomatic immunity," while the state itself is protected by a now codified federal version of sovereign immunity. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982). Even that codification, however, distinguishes between foreign states and their separate state agencies, generally rendering the latter more readily liable for both judgment and execution. Compare 28 U.S.C. § 1610(a) (immunities of property of foreign states) with 28 U.S.C. § 1610(b) (immunities of property of foreign state instrumentality) and 28 U.S.C. § 1605(a)(3) (easier to obtain jurisdiction over claim of taking in violation of international law where instrumentality has property in United States than where only foreign state itself has property in United States).

Eleventh Amendment law protects states, but not municipalities or "separate" and subordinate agencies of government from suit in federal court. See *Mount Healthy v. Doyle*, 429 U.S. 274 (1977); *Lincoln County v. Luning*, 133 U.S. 529 (1890). Moreover, it does not necessarily extend to relief sought against state officers. See *infra* note 356. Similarly, federal sovereign immunity does not necessarily protect separate government corporations. See *Keifer & Keifer v. Reconstruction Fin. Corp.*,

another branch of government on the Court's willingness to let adjudication go forward.³¹⁷ Yet the law of foreign sovereign immunity was, until the recent Foreign Sovereign Immunities Act, clearly a species of judicially created federal common law. It has not been regarded as committed solely to other branches for the determination of its scope, at least where the other branches have been silent; rather, the courts' judicial power permits them to define the scope of the doctrine.³¹⁸

2. *State Sovereign Immunity and the Constitution*

As my earlier analysis implies, the justification for these related doctrines of governmental immunity is for the most part not founded upon constitutional text, particularly not upon Article III. Federal courts have jurisdiction over some claims against state, federal or foreign governments with their consent or with congressional authorization. Article III necessarily embraces the authority to adjudicate such claims if consent or authorization is given. However, nowhere in Article III is a principle of consent or of congressional abrogation articulated. 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.

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306 U.S. 381 (1939); *Sloan Shipyards v. United States Fleet Corp.*, 258 U.S. 549 (1922). While these cases may turn on interpretation of congressional acts, some early sovereign immunity cases suggest that when a sovereign entity engages in a proprietary or private activity, it loses its immunity as a matter of law. *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824) (state-owned bank). While the proprietary activity exception to sovereign immunity has declined in importance in the domestic common law of sovereign immunity, it has become increasingly important in the federal law of foreign sovereign immunity. See *Victory Transp. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360-62 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (foreign government not immune from suit for its commercial activities); 28 U.S.C. § 1605(a)(2) (permitting suit against foreign governments for their commercial acts).

317. States may waive their Eleventh Amendment protection and subject themselves to suit. *Clark v. Barnard*, 108 U.S. 436 (1883). The United States may consent to the jurisdiction of the courts, Tucker Act, 28 U.S.C. § 1346 (1982), and Congress can abrogate state immunity, see *infra* text accompanying notes 412-15. The executive branch can refuse to recognize a claim of foreign sovereign immunity and thus permit the Court to adjudicate the claim. See, e.g., *Mexico v. Hoffman*, 324 U.S. 30 (1945); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972) (Rehnquist, J., plurality opinion) (recognizing exception to act-of-state doctrine when State Department formally advises that it has no objection to court proceeding with adjudication). Finally, Congress has exercised its power to tell the federal courts that foreign sovereign immunity should not be recognized in certain instances. See *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480 (1983) (discussing Foreign Sovereign Immunities Act).

318. See, e.g., *Ex parte Peru*, 318 U.S. 578, 587-88 (1943) (in absence of executive branch recognition of foreign sovereign immunity, district court would have power to decide whether ship entitled to immunity); compare *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926) (despite State Department failure to so assert, court finds commercial vessel immune) with *Mexico v. Hoffman*, 324 U.S. 30 (1945) (silence of executive branch implies that courts should not recognize immunity). Further support for the proposition that the law of sovereign immunity is one of federal common law (at least insofar as it applies to states on federal claims) derives from the Court's common law approach to the determination and scope of immunities of both federal and state officers when sued in their personal capacity for damages. See *infra* text accompanying notes 338-40.

That a principle of law is not compelled or supported by constitutional text or clear intent of the framers does not necessarily render it non-constitutional.³¹⁹ Several other factors suggest, however, that the consent and abrogation requirements are, especially with respect to states, far less clearly derived from the Constitution than the competing claims of right asserted against them.³²⁰

The doctrinal bases of the common law doctrine of sovereign immunity have no application whatsoever to the constitutional relationship of the states to federal courts, especially on federal claims. At common law the doctrine of immunity barred suit against a sovereign, without his consent, in his own courts.³²¹ While foreign sovereigns were often accorded a similar immunity from suit in domestic courts, their immunity resulted not from a requirement of constitutional law but from a judicially created principle of comity.³²² Indeed, as the Court held in *Nevada v. Hall*,³²³ because of this common law feature of the doctrine of sovereign immunity, states could subject sister states to suits in their own courts. The doctrine, however, had no application at common law to suits against lesser lords in the courts of a higher sovereign.³²⁴ Thus, whether states are regarded as foreign to the jurisdiction of federal courts or, as seems more consistent

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319. See, e.g., C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 2041 (1980); Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985). But cf. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). I do not believe that either structural principles or an originalist view of the Constitution supports the conclusion that state sovereign immunity is required except under the diversity head of jurisdiction. By contrast, I do believe there is a structural constitutional argument, supported loosely by text, for the principle of sovereign immunity as applied to the United States. See *infra* text accompanying notes 378-83. But the dividing line between interpretation of constitutional text and development of federal common law is not capable of precise demarcation. One distinction between the two, generally, is Congress' power to overcome the judicial ruling; but given the established role of congressional abrogation, at least in Fourteenth Amendment cases, this distinction is less helpful in defining a demarcation. Another distinction is that resorting not only to precedent, founding intent, and structure, but also to experience and public policy may be more legitimate in the design of common law than in the articulation of constitutional law. See Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 34 (1975) ("debatable policy choices" and "uncertain empirical foundations" characteristic of constitutional common law); cf. *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868) (immunity of United States "rests upon reasons of public policy"). One result of my argument that state sovereign immunity, in federal question cases, is a matter of federal common law may be to draw attention to the more varied sources of guidance to which the Court can legitimately turn in creating rules of immunity, the greater degree of choice the Court exercises when it invokes sovereign immunity as a bar to relief in federal claims, and the concomitantly greater need to justify and explain why such a rule should continue to be observed.

320. The uncertainty over the doctrine of sovereign immunity in the early days of the republic, when questions of state-federal power received great attention, makes it difficult to accept that a broad requirement of state sovereign immunity from suit was embedded in the structure of the Constitution. See *supra* note 188.

321. See Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 2-5 (1963) (English common law rule of sovereign immunity arose in unitary system); see also Brown, *supra* note 1, at 369 (common law rule not developed in federal system).

322. See *supra* text accompanying note 314; *Nevada v. Hall*, 440 U.S. 410, 416 (1979).

323. 440 U.S. 410 (1979).

324. *Id.* at 414-15; 1 F. POLLOCK & F. MAITLAND, *HISTORY OF ENGLISH LAW* 516-17 (2d ed. 1952); Engdahl, *supra* note 17, at 2-5.

with the constitutional scheme insofar as claims arise under federal law, more like "lesser lords," the doctrine of sovereign immunity itself would not *require* recognition of their claim of immunity.

Two other themes in the common law of sovereign immunity are often sounded, neither of which readily corresponds with the constitutional status of states in our Union. The first, a concern about the Court's possible inability to enforce its judgments, while of some force with respect to claims against the United States, is far less persuasive with respect to claims against states based on federal law.³²⁵ The second, the logical positivist view of sovereign immunity "that there can be no legal right as against the authority that makes the law on which the right depends,"³²⁶ is completely irrelevant to the legal position of the states with respect to federal law. The states do not make the laws on which either a constitutional or federal statutory claim of right depends; the people, in conventions assembled, "made" the Constitution,³²⁷ and Congress makes the laws.

More fundamentally, the common law doctrine was founded on a notion that sovereignty resides in the person of the monarch, whereas the premise of the Constitution was that sovereignty derived from the people and that the government created under the Constitution was subject to that written law. Consequently, as John Marshall wrote in *Marbury*, the first premise of the courts was that for a violation of a right, even by the government, the laws should provide a remedy—a principle in opposition to that which insists on the absence of judicial remedy for government wrongs.³²⁸

In the face of these general aspects of the constitutional structure inconsistent with a pervasive constitutional incorporation of the common law doctrine, one might expect the doctrine of sovereign immunity to be supported by some clear and explicit text. Yet, to the contrary, the text of the Constitution, particularly Article III, consistently bedevils the Court's ef-

325. In litigation between states, or by the United States against a state, the Court has consistently asserted a power to render judgment and a concomitant power to enforce the judgment, even if it were for accrued monetary relief. *See* *Virginia v. West Virginia*, 246 U.S. 565 (1918) (after entry of substantial judgment on decades-old debt against West Virginia, Court asserted power to enforce judgment, possibly by compelling a tax levy, a seizure of property or otherwise, though formal decree not entered).

326. *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907). In *Polyblank*, the claim arose solely under the mortgage redemption law of Hawaii.

327. The positivist principle is hardly more relevant with respect to the immunity of the federal government as to claims arising under the Constitution itself. For it was not the government itself that made the Constitution, but the people who, through the Constitution, created a government with powers both given and limited by that instrument. *See supra* note 312; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401-05 (1819); *see generally* Amar, *supra* note 1, at 1440-41.

328. *See* Amar, *supra* note 1, at 1426-27, 1466-92 (theoretical underpinnings of Constitution inconsistent with sovereign immunity, in sense that without legislative consent court may provide no remedy against government for its wrongdoing). Amar argues that under the original Federalist theory of the Constitution, "governments have neither 'sovereignty' nor 'immunity' to violate the Constitution." *Id.* at 1427.

forts to draw principled lines of distinction. While the Constitution explicitly extended jurisdiction to suits between a state and a foreign state, and while the Eleventh Amendment is silent on that configuration, the Court nevertheless found that the "postulates" of the Eleventh Amendment precluded the exercise of judicial power over unconsenting states sued by a foreign state.³²⁹ However, while Article III does not explicitly grant jurisdiction over controversies to which the United States and a state are parties, that jurisdiction was found necessarily to arise from the extension of judicial power to any case to which the United States was a party and to preclude the assertion of state sovereign immunity.³³⁰ The same language that is found to authorize suits by the United States against a state does not similarly permit suit by a state against the United States.³³¹

Finally, although debated during ratification, the doctrine of sovereign immunity was not discussed in terms of a principle provided and mandated by the Constitution—but rather as a pre-existing common law doctrine whose survival was at issue.³³² In his defense of the provisions of Article III in *The Federalist* No. 81, Hamilton declared that it was "inherent in the nature of sovereignty not to be subject to suit except upon consent," and that, except to the extent that there was a "surrender of this immunity in the plan of the Convention," no change would result.³³³ The

329. *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

330. *United States v. Texas*, 143 U.S. 621 (1892); see generally *Monaco*, 292 U.S. at 328–32. Without disputing that Court's well-known admonition that "[b]ehind the words of the constitutional provisions are postulates which limit and control," *id.* at 322, the postulates of sovereign immunity at common law would not have required that state's immunity be recognized in the court of a different sovereign. See *supra* text accompanying notes 322–23. Moreover, to the extent that this understanding was not widely shared at the time of ratification, the conferral of jurisdiction over "all cases" arising under federal law amounted to a "surrender" of any such immunity. *Cohens*, 19 U.S. (6 Wheat.) at 383.

331. Compare *Texas*, 143 U.S. at 621 (United States can sue state originally in Supreme Court) with *Kansas v. United States*, 204 U.S. 331, 342 (1907) ("[I]t does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."). Although it is well-established that the federal courts may exercise jurisdiction over suits against the United States to which it consents, in *Williams v. United States*, 289 U.S. 553, 573, 577 (1933), the Court suggested that this was not correct, at least insofar as judicial power was premised on the United States party-status clause of Article III. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 542–43, 550–51 (1962) (repudiating *Williams*' reasoning). The Court's confusion in *Williams* may stem from the failure of Article III to reflect or justify the divergent uses of judicial power in actions against state or federal governments that have in fact occurred.

332. See Field, Part I, *supra* note 1, at 536–38 (debate between those who saw Article III state-citizen clause as taking away state immunity and those who saw Article III as leaving common law immunity unimpaired); cf. *supra* note 188.

333. THE FEDERALIST NO. 81, at 487 (A. Hamilton). Arguing that the diversity head of jurisdiction would not permit states to be sued in federal court on their public securities held by out-of-staters, Hamilton suggested that the Constitution had not changed the rule that contracts with a sovereign "confer no right of action independent of the sovereign will." *Id.* at 488. Since Hamilton also suggested that there could be a "surrender of [sovereign] immunity in the plan of the Convention," and implied that states could be sued for violations of the federal privileges and immunities clause, see THE FEDERALIST NO. 80 at 478; Field, Part I, *supra* note 1, at 535 n.75, his position apparently was that the Constitution did not change the law of government contracts so as to create a cause of action, and not that there was a general principle of state sovereign immunity preserved in the Constitution. See also Field, Part II, *supra* note 1, at 1266 (reading *Hans* as contracts clause

question was whether Article III did away with the principle of sovereign immunity—not whether it constitutionalized the doctrine.³³⁴ The principle itself was one of the common law.³³⁵

3. *Federal Interests Underlying a Common Law Immunity*

As we have seen, the Constitution itself does not readily account for the existence or content of the doctrine of state sovereign immunity from certain forms of relief in federal courts. Historically, though, doctrines of immunity have been pervasively applied by federal courts to sovereign entities, domestic and foreign, indicating that an interest transcending state law has been at work in providing some protection in derogation of plaintiffs' rights, and that the judicial power was broad enough to develop such federal common law doctrines. With respect to state conduct that violates either the Constitution or federal statutes, a similar power can be exercised.

At least two important federal interests in defining the remedial structure for state conduct in violation of federal law can be identified: assuring that some remedy be available to vindicate individual rights secured by the Constitution and laws of the United States and, at the same time, assuring that the remedial structure not intrude unduly on the performance of other branches and levels of government. State law remedies for governmental wrongdoing may not appropriately give effect to those federal interests, and therefore federal courts must be free to decide what remedies should be provided to redress violations of federal right. Federal courts, when exercising jurisdiction over federal question claims arising out of conduct by state officers or legislatures, will frequently confront remedial questions not answered by congressional statutes. In providing the answer

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case). Despite their ambiguity, Hamilton's words have been treated as an assurance to states that they would not be subject to suit in federal courts. *See, e.g.,* *Hans v. Louisiana*, 134 U.S. 1, 13–15 (1890).

334. *See* Field, Part I, *supra* note 1, at 536–37. Field believes *Hans* regarded the sovereign immunity of the states as a common law doctrine that survived, but was not compelled by, Article III. *Id.* at 537 n.81, 541–42 nn.90–94. She finds the language of the opinion, which posed the question whether Article III itself “created a power to enable the individual citizens of one state to sue another state in federal court,” as inconsistent with the view that Article III requires state sovereignty. She also argues that, to the extent the Eleventh Amendment was intended to enact Justice Iredell's *Chisholm* dissent, 2 U.S. (2 Dall.) 419, 429 (1793), it rested primarily on the presence of a common law immunity.

335. *See* *United States v. Lee*, 106 U.S. 196, 207–09 (1882); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2 (1924); Jaffe, *supra* note 321, at 209. The law of sovereign immunity may have been treated by early courts as a form of general common law, emanating from no single sovereign but based on custom among states. *See supra* note 308. Such “general” common law differed from supreme federal law that bound the states, *see* Fletcher, *supra* note 308, at 1513, 1521–25, and after *Erie* is beyond the power of federal courts to promulgate. While federal common law must derive from the Constitution and laws of the United States, I do not believe there is anything inconsistent in conceiving of sovereign immunity as flowing from the Constitution in the sense of being within the power of the federal courts, acting under Article III, to effectuate, without seeing it as having a constitutionally mandated content.

to the remedial question posed by a violation of federal rights, those courts must necessarily make decisions in the common law method.³³⁶

Federal common law in the area of governmental accountability is typically thought of as a law that provides for causes of action or remedies not spelled out in constitutional or statutory text. But federal common law may, through immunity doctrines, restrict remedies for government wrongdoing as well as confer them.³³⁷ For example, in damage suits against state or federal employees, the Court has expanded the doctrine of qualified immunity so that many presumptively injured plaintiffs, asserting bona fide claims of violation of federal right, nevertheless cannot recover.³³⁸ In formulating the standard of official immunity, moreover, federal courts have not constrained themselves to applying the common law as it existed at any particular time and as referred to in constitutional or statutory text.³³⁹ Rather, they have felt free to modify substantially those common law standards, exercising a power that can be most accurately described as a federal common law power.³⁴⁰ Both the law of official immunity and of sovereign immunity revolve around the essential question of judicial redress for official wrongdoing. That the Court exercises a common law power to adjust officer immunities strongly suggests that it pos-

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336. While constitutional and federal common law decisions may be made in a similar common law method, it is conventional to understand constitutional decision-making as involving interpretation of a text or policy clearly laid out in the Constitution itself, whereas federal common law is regarded as a judicial elaboration of rules of decision less firmly anchored in the text of either the Constitution or a statute. See *supra* note 319; *infra* note 346.

337. Cf. *Boyle v. United Technologies*, 108 S. Ct. 2510 (1988) (establishing federal common law "government contractor" defense applicable to tort actions brought against military contractor with United States); *Westfall v. Erwin*, 108 S. Ct. 580 (1988) (defining federal immunity for federal official sued for common law tort).

338. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court abandoned its formerly articulated standard of officer immunity, developed in cases against state officials, see, e.g., *Wood v. Strickland*, 420 U.S. 308 (1975), and adopted the so-called "objective" standard for determining immunities of both federal and state officials when sued for damages.

339. In *Harlow*, the Court quite frankly explained its decision on the basis of its own recent experience and the demands of public policy. *Harlow*, 457 U.S. at 815-19; see also *Anderson v. Creighton*, 107 S. Ct. 3034, 3041-42 (1987) (describing *Harlow* as complete reformulation of American common law tradition). Although the Court at times has justified its development of officer immunity law under section 1983 on the theory that it was interpreting Congress' intent, see, e.g., *Briscoe v. LaHue*, 460 U.S. 325, 326, 334 (1983) (implying that Court, in formulating immunities, has been interpreting legislative intent of section 1983 to preserve common law immunity); *Pierson v. Ray*, 386 U.S. 547, 554 (1967); see also *Tower v. Glover*, 467 U.S. 914, 922-23 (1984) (denying court's power to establish immunities based on public policy), the Court's modification of the immunity standard in *Harlow* is a type of decisionmaking that was not (and cannot reasonably be) justified as "interpretation," particularly since the same standard is applied to nonstatutory actions against federal officials and statutory actions against state officials. *Butz v. Economou*, 438 U.S. 478, 500 (1978) (no reason to distinguish between official immunities in actions against state officials under section 1983 and implied constitutional claims against federal officials).

340. See, e.g., *Field*, *supra* note 266, at 893 n.48, 897 n.61 (treating federal officers' immunities as form of federal common law); Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 291 & n.243 (1988) (immunity doctrines shielding state and federal officials as federal common law); see also *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980) (legislative immunity in section 1983 cases based on "federal common law").

sesses a similar power with respect to the immunities of the government itself.

Some form of state sovereign immunity—understood as part of a special law of remedies against state wrongdoing—may, therefore, be regarded as a part of the federal common law, not compelled by the Constitution, but shaped by its earliest interpretations and informed in its development by the allocation and separation of powers under the Constitution.³⁴¹ This special law of remedies, however, is subject to varying application not only by Congress, but, under appropriate circumstances, by the courts as well.³⁴²

4. *Source of Authority*

The authority of the federal courts to develop and apply a federal common law of remedies against the government may be seen to arise from the judicial power itself.³⁴³ While grants of jurisdiction do not always justify the articulation of substantive rules of federal common law,³⁴⁴ the

341. See *infra* text accompanying notes 378–86; cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (explaining “constitutional underpinnings” of federal common law act-of-state doctrine in actions against foreign government); *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., dissenting) (“Federal common law implements the federal Constitution and statutes, and is conditioned by them.”).

342. Federal courts play a special role, in a government of cross-checking and separated powers, by providing a forum which must hear and decide something about each complaint filed with it. Structural constitutional principles thus should constrain courts in expanding immunity doctrines that undermine this individually invoked mode of redress and restraint on other levels and branches of government. Cf. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1318 (1982) (judicially created remedies for statutory rights justified by “amalgam of concerns, including the desirability of enforcing statutory limits on official discretion [and] the need for judicial checks in a system of separated powers”). But cf. *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988) (Congress in better position than Court to decide whether to permit monetary relief on constitutional due process claim against federal official). Thus, the Court’s power to articulate and apply federal common law rules of immunity ought not be used to expand governmental immunity so as to impair significantly the availability of judicial redress. See Engdahl, *supra* note 17, at 79 (arguing that expansion of officer immunities makes necessary a contraction in sovereign immunities to preserve “the tradition of judicially enforceable legal and particularly constitutional limitations”).

343. *Dellinger, Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1541, 1552 (1972); see *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (federal question jurisdiction under section 1331 authorizes courts to fashion “wide variety” of nonstatutory remedies for constitutional violations by state and federal officials); Hill, *supra* note 304, at 1113–14, 1156–57 (same); see also Field, *supra* note 266, at 973 n.394 (implying that where federal right is violated courts always have power to define federal remedy). But see *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 640–41 (1981) (power to develop common law does not arise from jurisdictional grants alone). *Dellinger* argues that federal courts have power, in order to enforce the affirmative rights established by *Bivens* under the Fourth Amendment, either to abrogate the good faith immunities of individual federal officers or to “mak[e] a direct assault” on the citadel of sovereign immunity. *Dellinger, supra*, at 1556. Because I believe there is a firmer constitutional basis for federal rather than state sovereign immunity with respect to claims arising under federal law, *Dellinger’s* argument would apply a *fortiori* to remedies allegedly barred by state sovereign immunity.

344. Compare *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (diversity jurisdiction does not carry with it power to make federal common law, but only to apply state law as states would) with *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (grant of admiralty jurisdiction embraces judicial and legislative law-making capacity) and *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957) (statutory grant of jurisdiction over breach of labor contracts carries with it power to develop substantive federal common law governing disputes). Controversy surrounds the federal

grant of power over cases arising under federal law necessarily carries with it the power to make "principled choices among traditional judicial remedies" for the vindication of federal rights.³⁴⁵ Organic statutes like the federal question jurisdictional provisions authorize federal courts to consider both background understandings of remedial traditions and evolving public needs to create "the best rule of law" in situations not addressed by more specific statutory pronouncements or constitutional requirements.³⁴⁶

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courts' power to imply or provide remedies that have not traditionally been available or that are not expressly authorized by statute. See Field, *supra* note 266, at 923-25 (power to develop federal common law does not arise from grant of jurisdiction alone); Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (same). Merrill argues that only where a constitutional or federal statutory policy would clearly be threatened by applying an existing state rule, or where the Constitution or a federal statute has delegated, with clear and specific guidance, a power to the Court to declare law (as in the Bill of Rights), is such judicial law-making legitimate. See also Field, *supra* note 266, at 928 (although only requirement for promulgation of federal common law is some federal enactment that authorizes its creation, *Erie* means that jurisdictional provisions in Constitution are not sufficient "enactments"). But see *id.* at 915-19 (acknowledging argument that constitutional basis exists for concluding that federal courts' common law-making powers extends to any case over which they have jurisdiction, and that while judicial power does not encompass power to make rules in diversity cases, it does in other jurisdictional categories).

As I argue below, the grant of jurisdiction must be exercised in a manner consistent with the role of the courts in the federal separation of powers scheme and in a way that does not itself violate the Constitution. If, as to a case within its jurisdiction, a federal court finds a federal right violated and a particular remedy essential to that right's protection, the Constitution may not only authorize but compel the Court to give it effect. See also *Davis v. Passman*, 442 U.S. 228, 242 (1979) (victims of constitutional wrongs, without other effective redress, "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"). Here, however, I argue that the grant of federal question jurisdiction also embraces power to recognize certain remedial limitations.

345. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 408 n.8 (1971) (Harlan, J., concurring); cf. Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817, 818 (1979) (problem of judicial legitimacy associated with creation of new rights, not new remedies). Given Justice Harlan's emphatic limitation of this principle to "traditional" remedies (not necessarily including "special prophylactic" remedies such as the exclusionary rule), it is unclear whether he would regard an action against a government for monetary relief as traditional, where consent had not been given. See also *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (court may "choose among available judicial remedies" to vindicate federal right); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (where federal rights invaded, courts will adjust remedies to grant necessary relief). Those who argue that the implication of damage actions under the Constitution is constitutionally required might question whether the Court's authority to recognize such causes of action in any way supports authority to recognize a nonconstitutional doctrine of state sovereign immunity. But while *Bivens* claims are clearly constitutionally inspired, recent cases seem to suggest that they are not constitutionally required, at least in the sense that Congress' provision of alternative remedies may counsel against judicial recognition of damage actions. See, e.g., *Bush v. Lucas*, 462 U.S. 367 (1983) (declining to recognize constitutional cause of action for federal employee in light of statutory remedies); *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988) (same for public benefits recipients). Thus, implied constitutional rights of action appear to be somewhat closer to federal common law than to the kind of constitutional law on which congressional action would not be expected to have a significant impact. Moreover, even if *Bivens* claims are regarded as constitutionally required, this has not prevented the Court from articulating nonconstitutional doctrines of official immunity which frequently foreclose recovery on the *Bivens* claim. This suggests that the Court has some power, even where a remedy might be regarded as constitutionally required, to limit the circumstances in which it will be made available in order to serve other goals. See *supra* notes 339-40.

346. G. CALABRESI, *supra* note 203, at 215 n.30; see also Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 n.49 (1981) (importance of background understandings in statutory interpretation); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548-50 (1985) (inevitability of discretion in exercise of jurisdiction guided by traditions of equity). This is not to say that federal question jurisdictional statutes are limited by the particular

The federal courts' power to determine appropriate remedies for governmental wrongdoing for cases within their jurisdiction can be and has been exercised in developing the federal common law of state sovereign immunity.³⁴⁷ As a common law doctrine, it can be modified by federal courts acting under a jurisdiction conferred by the Constitution and Congress, and should be modified where essential to protect specific federal interests or rights.³⁴⁸ The courts' determination of what remedies are essential may change based on legislative action or the development of remedies in state courts.³⁴⁹ But if the federal courts are to function as an effec-

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remedies existing at the time of their enactment, an understanding that would be inconsistent with their intentionally broad grant of decisionmaking power.

Although some have argued that the Rules of Decision Act, 28 U.S.C. § 1652 (1982), should be read to restrict federal common law, *see, e.g.*, Merrill, *supra* note 344, at 27-32, the language of the act, which requires use of the "laws of the several states" only "in cases where they apply," can be read to exclude those cases in which a federal common law rule applies. *See* M. REDISH, *supra* note 174, at 81; Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1168 n.194 (1986); *see also* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 159-60 n.12 (1980) (reading Rules of Decision Act to contemplate exception for federal common law).

347. In *Nevada v. Hall*, 440 U.S. 410 (1979), the Court held that the state of Nevada could be sued without its consent in California state courts on a state tort claim. Much of what the Court said in that case about the nonconstitutional nature of state sovereign immunity is consistent with the view that there is no constitutional doctrine of state sovereign immunity that should limit the remedies available against states in federal courts for violations of federal law. Yet, if a federal common law of state sovereign immunity were to survive the disavowal of the supposed constitutional basis for the doctrine, why would that federal common law doctrine not compel the state of California to recognize Nevada's claim of immunity?

One possibility is that *Nevada v. Hall* was wrongly decided, and that, except where necessary to vindicate a more important federal constitutional or statutory requirement, the presumptive federal interest in permitting states to control the development of remedies in their own courts for state wrongdoing is sufficiently weighty that states should not exercise jurisdiction to award accrued monetary relief against sister states without their consent or congressional authorization. Vindication of this interest in state autonomy, however, can be achieved only at the expense of the autonomous decision of a sister state seeking to exercise jurisdiction over another. Another possibility is that *Nevada v. Hall* is not inconsistent with the federal common law of immunity, because such immunities may apply only to claims arising under federal law (and possibly admiralty claims). There may be no federal interest in departing from a nondiscriminatory state law denying sovereign immunity on a claim arising only under state law and in state courts. *But see id.* at 424 n.24 (in some circumstances full faith and credit clause might require recognition of another state's immunity).

Even as to federal claims, a state may enjoy a federal common law immunity in federal court that it does not enjoy in state court. This form of federal common law need not preclude the development of alternative remedial schemes within the state judicial systems. *See infra* notes 349, 394. How this view would apply where a state forum seeks to hold another state liable on a federal claim may raise some additional concerns. However, states would be restrained from unfairly applying such remedies to sister states by both the possibility of retaliation (which states do not enjoy in their relations with the federal government) and the requirement of nondiscrimination that *Nevada v. Hall* embraces. For a different view of *Nevada v. Hall*, *see* Simson, *The Role of History in Constitutional Interpretation: A Case Study*, in POWER & POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW, 211, 217-20 (M. McDougal & W. Reisman eds. 1985) (Eleventh Amendment should be construed to prohibit suits against state in another state's court on state law claim).

348. Notwithstanding his view that the availability *vel non* of a particular remedy presents questions of legitimacy when decided by the Court and not by Congress, Professor Merrill has argued that judicial development of remedies for conduct in violation of federal law, where other remedies are inadequate, is justifiable as "preemptive lawmaking"—that is, as law-making necessary to protect a clearly specified federal interest or right. Merrill, *supra* note 344, at 51.

349. *Cf. id.* (necessity of remedy for constitutional violation turns in part on adequacy of remedies created under state law and remedies provided by Congress); Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Discretion*, 91 YALE L.J. 635, 692-97 (1982) (Court's exercise of discretion in imposing detailed affirmative decrees in institutional litigation is illegitimate,

tive third branch of the national government, they must, as to cases within their jurisdiction, have the power not only to limit the availability of certain remedies, but also to grant remedies essential to avoiding defeat of the right found to exist.³⁵⁰

except where other branches or levels of government default in their responsibilities). The proposition that federal common law, conceived of in post-*Erie* terms, is uniformly applicable in both state and federal courts, is widely assumed. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964); see Meltzer, *supra* note 346 (because “independent and adequate state ground” doctrine is form of federal common law, it should apply to states and control procedure for deciding federal questions in state courts); Merrill, *supra* note 344, at 57–58 (distinguishing between forms of federal common law that can and cannot be changed by Congress, but assuming that federal common law is applicable in state as well as federal courts). An evident question is whether the federal common law of state sovereign immunity is applicable in state as well as federal courts. This question has two aspects: First, must any remedy normally available in federal district court against state wrongdoing be available in state court as well? Second, if a remedy is normally unavailable in federal court, can the state rely on that federal common law immunity to protect itself from relief in state court?

Two arguments support the proposition that the content of the federal common law of remedies may be complementary to state court remedies for state misconduct rather than binding upon state courts in such litigation. First, if the power to develop a federal common law of state sovereign immunity flows, at least in part, from the conferral of the judicial power itself, one can conceive of the remedial rules established thereunder as an elaboration of the form in which that federal judicial power will, and will not, ordinarily be exercised. If so, this form of federal common law would bind other federal courts but not necessarily state courts. See Merrill, *supra* note 344, at 13–14 n.53; cf. Monaghan, *supra* note 319, at 18 n.25 (implying, although critically, that if grant of judicial power is basis for federal common law, it would not bind state courts). Second, if the remedial requirements of federal law are determined by an inquiry bounded by the *need* for a federal court to provide a particular remedy—a need determined in light of other available remedies—then the federal common law remedies may be understood to complement remedies available in state courts. Cf. Amar, *supra* note 1, at 1518–19 (existence of federal and state sovereignties can protect individual freedoms by providing complementary remedies for governmental wrongdoing).

On the other hand, where state courts have ordinary remedial authority and jurisdiction, for example, to issue injunctions against state officers on state law grounds, principles of nondiscrimination would preclude their denying such relief on federal grounds. *Testa v. Katt*, 330 U.S. 386 (1947); see generally Hill, *supra* note 304. Thus, in state courts with broad general jurisdiction, federal remedies against official wrongdoing by state or local governments will also be available in state courts. Yet the availability of relief in a federal forum might caution against an overly liberal interpretation of what, absent clear discrimination based on the federal character of the claim, the state court’s “ordinary jurisdiction” would include. Cf. *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (state sovereign immunity adequate ground for state court’s denial of federal claim for injunctive relief); *infra* note 480.

Even if the federal common law of remedies does compel state courts to meet minimal federal standards of remedial efficacy, the federal common law of immunity should not preclude state courts from granting more protection to federal rights than is available in a federal court. Where the alleged violators of the federal right are state officials, it is doubtful that any substantial federal interest would be injured by a state court providing “too much” remedy for the federal right (although with respect to statutory rights, additional remedies may be preempted). Cf. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1248–50 (1978) (no federal interest harmed in state courts’ more expansive interpretation of federal constitutional rights). Thus, states are free to develop supplementary state remedies for violations of federal rights, especially constitutional rights. The federal common law of state sovereign immunity, like other federal doctrines of abstention, e.g., *Younger v. Harris*, 401 U.S. 37 (1971), or comity, e.g., *Fair Assessment In Real Estate Ass’n v. McNary*, 454 U.S. 100 (1981), need foreclose relief only in the lower federal courts. Cf. Wells, *Why Professor Redish is Wrong*, 19 GA. L. REV. 1097, 1121–32 (1985) (viewing abstention as form of federal common law).

350. See *supra* notes 342–44; cf. Stewart & Sunstein, *supra* note 342, at 1229–32, 1317–21 (generally supporting judicial lawmaking to provide remedies to vindicate individual rights and to enhance accountability of government entities, but suggesting that most judicially created remedies for review of administrative programs are federal common law that Congress can displace).

As has been true in the development of other areas of federal common law,³⁵¹ the Constitution is by no means irrelevant to the content of the federal law of sovereign immunity. The federal common law of sovereign immunity is shaped not only by common law and public international law traditions, but also, as it applies to the United States government, by the constitutional allocation and separation of powers among the three branches of government. As applied to the states, the federal common law of sovereign immunity has been influenced not only by the shape the doctrine took with respect to the federal government, but also by the perceived value in retaining a role for state courts in the vindication of federal rights.

C. *The Content of the Federal Common Law of Sovereign Immunity: Rationalizing Remedial Preferences*

Although sovereign immunity, understood as a common law doctrine, is not an absolute bar to a radical shift in the existing remedial preferences, respect for the case-by-case method of adjudication and for the value of reasoning from precedent in promoting judicial legitimacy supports some effort to seek rational explanations for the present doctrinal configuration.³⁵² In this section, I make such an effort with respect to the much-criticized distinction drawn in *Edelman v. Jordan* between prospective injunctive relief, which can be issued against state officers, and retroactive monetary relief against the state treasury, which cannot be issued.³⁵³ This

351. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (under federal common law act-of-state doctrine, with its "constitutional underpinnings," state courts must give effect to foreign expropriation decree, without regard to validity of expropriation under controlling principles of international law).

352. Such an effort is also warranted by the disinclination to correct the presently erroneous constitutional doctrine of state sovereign immunity that may result from a fear that such a correction would result in the substantial and immediate reallocation of judicial business from state to federal courts by judicial fiat. See *infra* text accompanying notes 467-68 (discussing Powell and Scalia opinions in *Welch*); cf. Merrill, *supra* note 344, at 69-70 (emphasizing importance and legitimacy of relying on precedent in constitutional adjudication under "delegated law-making" provisions such as Bill of Rights); Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1132 (1978) (common law adjudication not "experimental" but confined through "presumptive adherence to precedent and commitment to a course of principled development").

353. See, e.g., Burnham, *supra* note 251, at 74; Currie, *supra* note 122, at 160-61; Lichtenstein, *Retroactive Relief in the Federal Courts Since Edelman v. Jordan: A Trip Through The Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982). The distinction, insofar as it purports to distinguish those cases that are and are not against a state under the Eleventh Amendment, has been criticized on numerous grounds. First, it is unsupported by the language of the Eleventh Amendment, which does not distinguish between legal and equitable relief. Second, prospective relief requiring future payments can burden the state as much as past due monetary awards. Third, the *Edelman* distinction is unclear whether it is the compensatory purpose of the relief that is to be condemned (which might permit, for example, punitive monetary awards against the state) or whether it is any order to pay funds that is problematic (in which event prospective injunctive relief, for example to comply with federal welfare regulations, would be troublesome, although states do have the theoretical option not to participate). If both elements are required to render the relief prohibited, why does the conjunction of compensation and monetary awards make those cases "against a state" more than others? Finally, some have criticized the distinction on the ground that the dividing line between the two forms of relief is difficult to draw and has not been drawn consistently by the Court. Compare Milliken v.

distinction draws support from legislative primacy over the taxing and spending powers and from a corresponding reversal of the remedial hierarchy in the vindication of public rights.

One of the mysteries of sovereign immunity law is its ambivalence towards the remedial hierarchy—that is, the preferred remedies for governmental misconduct.³⁵⁴ In private litigation, the history of equitable remedies as supplementary to the monetary remedies of the common law courts persists in the general requirement for injunctive relief that the movant demonstrate irreparable injury that cannot be adequately redressed by remedies at law.³⁵⁵ Indeed, in common law actions against government officials for official wrongdoing damages were once permitted far more freely than they are today.³⁵⁶ However, in litigation seeking a monetary award directly against state or federal treasuries, that remedy is usually unavailable unless expressly provided for by explicit legislative consent.³⁵⁷

Bradley, 433 U.S. 267 (1977) (upholding order directing state to fund one-half of locality's expenditures to provide remedial education) with *Edelman*, 415 U.S. 651 (reversing order that state remit to plaintiffs welfare benefits wrongfully withheld).

In contrast, under a federal common law approach we need no longer be concerned about precisely which entity the relief is against on federal claims; a broader range of concerns can be considered, including common law traditions, perceived judicial competence in providing different forms of relief, ease of execution, advantages of different types of remedies in light of contemporary experience, and legislative guidance. Indeed, the Court's new constitutional balancing approach, *see supra* text accompanying notes 216–17, though framed in terms of a constitutional theory of immunity, might lend itself to the more flexible, policy-oriented inquiry of the federal common law approach advocated here.

354. *See also* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 42–47 (1979) (exploring ambivalence towards damage remedies against individual officers). Where relief is sought against a nonconstitutional sovereign, the Court's apparent ambivalence as to the preferred remedy is even more marked, with the Court at times seeming to prefer damages instead of injunctions against local governments. *See* *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (damages liability against city whose attorney had authorized illegal search); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (denying plaintiff standing to seek injunctive relief against police "chokehold" practice of which he had been victim, though permitting claim for damages to proceed); *Owen v. City of Independence*, 445 U.S. 662 (1980) (damages against city notwithstanding good faith immunity of officers); *cf.* Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public Lands Cases*, 68 MICH. L. REV. 867, 909–20 (1970) (sovereign immunity cases not consistent outside of discrete historical groupings).

355. *See generally* O. FISS, *supra* note 298 (arguing against "irreparable injury" requirement as one that improperly subordinates injunction to other forms of relief and obscures its major role in vindication of civil rights).

356. Engdahl, *supra* note 17, at 15–21; *see* HART & WECHSLER 3D ED., *supra* note 157, at 1091–95 (until recently, basic judicial remedy for governmental wrongdoing was damage action against individual officer); *cf.* HART & WECHSLER 2D ED., *supra* note 141, at 1377–85 (discussing mandamus). Until the modern development and expansion of protective doctrines of qualified immunity, government officials sued on certain common law causes of action were treated as having the same liability to the plaintiff as would any private individual, unless the official was legally authorized to take the challenged action. *Compare* *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (no official immunity for damage caused by good faith obedience to President's order not authorized by statute) and *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851) (army officer cannot defend trespass action for wrongful seizure of plaintiff's property by showing that seizure was ordered by superior officer) with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (strong governmental interest in protecting officers from suits requires immunity even where lack of subjective good faith alleged) and *Barr v. Matteo*, 360 U.S. 564 (1959) (to permit performance of government function, absolute immunity required for officers sued for libel).

357. *See, e.g.,* *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *McMahon v. United States*, 342 U.S. 25, 27 (1951); *Langford v. United States*, 101 U.S. (11 Otto) 341 (1879); HART & WECHS-

By contrast, injunctions to restrain conduct by state or federal officials in breach of federal law have often issued without explicit waiver of immunity.³⁵⁸

Why are courts willing, absent explicit legislative direction, to issue injunctive decrees but not monetary relief against the political branches of federal or state governments?³⁵⁹ Are there reasons, apart from constitutional misunderstandings and adherence to tradition, that support this distinction? Why are actions for accrued monetary relief "the core area" of the sovereign immunity doctrine?³⁶⁰

It is pure fiction to presume that prospective decrees do not impose significant burdens and demands on public treasuries.³⁶¹ Yet for public law claims, there are important differences in the way injunctive and pure monetary relief vindicate noneconomic political values, affect the discretion of the other branches in exercising their constitutional powers, and put the Court into potential confrontation with other agencies of govern-

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LER 3D ED., *supra* note 157, at 1110. Although this element of the remedial preferences of public law is strong, it is neither absolutely nor consistently applied. Compare *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) (suit to recover funds seized from plaintiff bank) and *Atchison T. & S.F. Ry. v. O'Connor*, 223 U.S. 280, 287 (1912) (suit against state officer in federal circuit court to recover taxes paid under duress) with *Smith v. Reeves*, 178 U.S. 436 (1900) (suit against treasurer for recovery of tax barred by Eleventh Amendment). But see *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 50-51 (1944) (attempting to reconcile *Reeves* and *O'Connor* on ground that *O'Connor* was action against officer individually, even though in both cases state law provided for action and for use of state funds to make repayment). In suits against federal officers, moreover, mandamus relief to compel tax refunds or credits has been available, in limited circumstances, despite its obvious impact on the treasury. See *Vishnevsky v. United States*, 581 F.2d 1249, 1255-56 (7th Cir. 1978) (collecting cases).

358. The principle of *Ex parte Young*, 209 U.S. 123 (1908), permits injunctive relief to restrain unconstitutional action not only by state but by federal officials as well. See *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-21 (1912). Federal injunctions against state officials have been issued in many different areas, ranging from ballot access and reapportionment cases, see, e.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Reynolds v. Sims*, 377 U.S. 533 (1964), to desegregation and prison reform, see, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977); *Hutto v. Finney*, 437 U.S. 678 (1978). Injunctive relief will not necessarily avoid a sovereign immunity bar, however, especially where the government has expressly provided a limited monetary remedy and no claim of constitutional or federal statutory violation is made. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703 n. 27 (1949) (denying relief against federal contracting officer, although Court of Claims can give monetary relief); *Malone v. Bowdoin*, 369 U.S. 643 (1962) (ejectment action against federal official); *Dugan v. Rank*, 372 U.S. 609 (1963) (action to restrain impoundment of waters). *Larson*, a much criticized opinion that revised the standards for when sovereign immunity would bar nonmonetary relief against officers, demonstrates the ambivalence of any preference even for injunctive relief. See *infra* note 463.

359. See HART & WECHSLER 3d ed., *supra* note 157, at 1181 (treating *Ex parte Young* as recognition of implied federal cause of action for equitable relief under Fourteenth Amendment). For an attempt at historical justification, see Nowak, *supra* note 1, at 1455-60.

360. Tribe, *supra* note 1, at 687. Part of the reason for the importance of injunctive remedies in vindicating rights against sovereigns under general jurisdictional statutes may be deference to a misunderstood common law tradition. See Jaffe, *supra* note 321. Those first charged with interpreting the Constitution gave meaning to constitutional rights through those remedies most familiar and comfortable. Understanding state sovereign immunity as a common law, not constitutional, rule does not mean that remedial traditions will or should *ipso facto* be abandoned because, as shown below, other factors might support federal common law retention of those traditions. See also *infra* note 363.

361. See *supra* note 353. Even in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where the power of mandamus over an officer of the executive branch was upheld, the mandamus—had it been issued—might well have imposed financial consequences, in the form of *Marbury's* salary as a judge, on the public treasury.

ment. These features, discussed below, may distinguish retroactive monetary relief from other forms of relief, especially the nonstructural prospective injunction, and justify retention of these remedial distinctions,³⁶² at least in part, under a new federal common law regime of state sovereign immunity.³⁶³

1. *Appearance of Public Benefit From Exercise of Judicial Power against Other Branches of Government*

Monetary awards for past wrongs to an injured citizen represent a direct transfer of public resources to a single individual or group of individuals. Where these resources are awarded as compensatory damages, the public has no control over the ultimate use of the transferred funds.³⁶⁴ Prospective injunctions, by requiring future compliance with law, can be seen to benefit the entire citizenry more directly.³⁶⁵ Delivery of the com-

362. My references to a remedial hierarchy should not be taken to imply that remedies for public wrongs are preferred by federal courts in a clear, descending order. In addition to the ambivalence of the presumptions for or against providing monetary or simple injunctive relief, structural injunctions imposing detailed affirmative obligations are often skeptically viewed when compared to monetary, or prohibitory injunctive relief. See P. SCHUCK, *SUING GOVERNMENT* 150-71 (1983); Fletcher, *supra* note 349, at 635. These concerns are usually not expressed under the rubric of sovereign immunity but rather in terms of a lack of judicial competence to make a clearly correct choice of decree (and to implement decrees once entered) and the intrusion of the remedy into the competence of other branches. See, e.g., D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 265 (1977) (courts lack ability to respond to consequential facts resulting from decrees for broad social change).

363. It is not my argument that the present remedial hierarchy has necessarily resulted from the values and concerns discussed in text. Indeed, many of the peculiarities of sovereign immunity law and the law of remedies for governmental wrongdoing result from a history that relates to these values only accidentally. See, e.g., I F. POLLACK & F. MAITLAND, *supra* note 324, at 516-17 (sovereign immunity in England was historical accident, resulting from pyramidal structure of feudal courts, not from inherent concept of sovereignty); Hill, *supra* note 304, at 1129 (injunctions to enforce federal rights against government officers became more broadly available than damage actions because of pleading differences between pre-merger equity and law practice that made it easier in initial pleading to show presence of federal question on equity side). Rather, it is my argument that some elements of the functional hierarchy of remedies can be justified today without reference to an Article III principle of constitutional sovereign immunity.

364. This is not to say that *Edelman* itself was correctly decided as a matter of federal common law or as a matter of statutory interpretation. Requiring payment of past-due welfare benefits may differ significantly from awards of compensatory damages, since the public, through its representatives, had already decided that the welfare benefits should go to persons so situated and in amounts relatively predetermined. But cf. *Edelman*, 415 U.S. at 666 n.11 (no assurance award would meet Congress' goal).

365. See Whitman, *supra* note 354, at 48-52. Whitman argues that equitable relief is superior to damages in its capacity to deter both specifically and generally—"to give a clear message," and at less cost to the public end of controlling official behavior. *Id.* at 48. The relative efficacy of damage awards against the government in achieving deterrence of wrongful conduct has been questioned. See Meltzer, *supra* note 340, at 285; cf. Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 363 (1984) (delay of awards against large firms hinders deterrence); Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 568-69 (1985) (noting incompetence of firms to reduce liability exposure). But see P. SCHUCK, *supra* note 362, at 102-05, 147-48 (government liability encourages appropriate levels of deterrence better than individual liability and with less intrusion than injunctions on executive decisionmaking); cf. Stewart & Sunstein, *supra* note 350, at 1297 (injunctions may result in over-enforcement). My argument, however, does not entirely depend on which type of remedy in fact best serves the public interest, but rather depends at least in part on the premise that the *appearance* of a direct public benefit is important when an electorally unaccountable judiciary imposes costs on politically accountable agencies of government without legislative guidance.

mission in *Marbury v. Madison* would have benefitted not only Marbury, but also the public for whom he would have served as a judge. Desegregation decrees benefit not only the individual plaintiffs, but also other citizens who may obtain access to integrated educational facilities. Even structural injunctions directed at reorganizing institutions like prisons or mental hospitals benefit the future occupants of those facilities in a way that damages awarded to individual prisoners do not.³⁶⁶

In *Milliken v. Bradley*,³⁶⁷ for example, a case frequently relied on to demonstrate the incoherence of the distinction between retroactive and prospective relief, the Court's injunctive order confers diffuse potential benefits on an uncertain class of children and citizens.³⁶⁸ Rejecting an Eleventh Amendment challenge, the Court upheld an order directing the state of Michigan to fund half of the costs of a remedial educational program to assist black children in recovering from the effects of past *de jure* segregation in Detroit. The children were not given a monetary award to expend in accord with private preferences; rather, the order directed funds to be dedicated to a specific public purpose.³⁶⁹ In terms of public perception, providing remedial education to school children in Detroit may have a better chance of producing good citizens and economically self-sufficient members of the community than would the use of the same state money to pay compensatory relief directly to the children.

Because of the potential of forward-looking injunctions to affect larger and less readily identified groups,³⁷⁰ such an injunction may foster a par-

as to remedial choice. This appearance can be better achieved by controlling the uses to which public resources are put than by simply placing those resources at the disposal of private citizens making autonomous economic decisions.

366. See generally Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 19 (1979) (structural reform as central mode of constitutional adjudication in modern bureaucratic state). But cf. *supra* note 362. When relief is granted in possessory actions concerning ownership of specific property, see *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. Lee*, 106 U.S. 196 (1882), the perceived public benefit may be no different in kind or degree from one resulting from an award of monetary damages to a private plaintiff. To some extent, then, the perception of public benefit flows from the nature of the substantive right being vindicated, as well as from the form of relief.

367. 433 U.S. 267 (1977).

368. Professor Currie criticizes *Milliken's* effort to distinguish *Edelman* on the ground that, in *Milliken*, the money the state was required to pay, for remedial purposes, did not go directly to the plaintiffs. Currie, *supra* note 122, at 162. While this feature of *Milliken* may derive, not from the relief's prospectivity, but rather from the relief's in-kind basis, the injunction characteristically provides in-kind relief, unlike the damage award which assesses a penalty for engaging in prohibited conduct, but does not directly constrain the conduct. Distinctions based on the in-kind nature of the relief may result in a more acceptable mode for the exercise of judicial remedial discretion in vindicating rights against state governments because of the perception that such relief achieves the desired public purpose.

369. Cf. Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 262-63 (1979) (consistent with Eleventh Amendment, compensatory relief may be provided to individual victims of unlawful conduct so long as it is provided in-kind to restore plaintiffs to *status quo ante*).

370. But see *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362 (1976). In these cases, the Court indicated its skepticism about awards of injunctive relief that would benefit large and diffuse classes. For a trenchant critique of *Lyons*, see Fallon, *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984);

ticipatory and active citizenry and polity better than awards of compensatory damages. It may thus be seen as a more justifiable judicial demand on state treasuries than one that will be seen in the short run (and perhaps long run) to benefit only an individual claimant or a class of claimants whose entitlement to share in the award is determined by their past acts.³⁷¹

2. *Affirmation of Public Rights as Fundamental*

Federal courts function not merely to resolve disputes but to articulate and give effect to fundamental constitutional values.³⁷² Monetary awards for past wrongs may be taken to imply that the rights violated can and should be monetized.³⁷³ For rights relating to the ownership and distribution of property this assumption seems to be embodied in the constitutional command against the "taking" of property without payment of compensation.³⁷⁴ Setting a value on a piece of land, even if it is land with which the owner does not wish to part, does not necessarily diminish the right of the owner vis-a-vis the government. On the other hand, setting a value on the loss of the right to vote, or to speak freely, or to be free from governmentally sanctioned race discrimination, may depreciate the value of those rights which, for purposes of defining the kind of community to which we aspire, we may want to regard as invaluable.³⁷⁵ Particularly for

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see also *infra* note 377.

371. It is true that we all may benefit from the perception that justice has been done when an individual who suffers economic losses through government misconduct is compensated. The widespread recognition of this interest has resulted in legislation providing monetary remedies for persons who suffer certain injuries from government conduct. See, e.g., Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (1982); see also P. SCHUCK, *supra* note 362 (arguing for increased reliance on government damage liability to achieve better compensation). But when a federal court confronts a remedial decision concerning government wrongdoing under a general jurisdictional statute, it must act under a dual obligation to do individual justice and to provide a remedy that is consistent with the public interest and the allocation of functions to the other branches. See *infra* text accompanying notes 378-86. In the absence of specific legislative direction, awarding a remedy that spreads benefits across an uncertain portion of the citizenry may enhance public support of the order and thus strengthen the legitimacy of the judicial choice of remedies.

372. For discussion of the role of courts in public law litigation involving such public values, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Monaghan, *supra* note 278; Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); see also Fiss, *supra* note 366, at 29 (taking position that "courts exist to give meaning to our public values, not to resolve disputes"); Spann, *Expository Justice*, 131 U. PA. L. REV. 585 (1983) (emphasizing federal courts' role in articulation of values).

373. Cf. Abel, *A Critique of American Tort Law*, 8 BRITISH J.L. & SOC'Y 199, 207 (1981) (criticizing reliance on dollar awards as reinforcing commodification of human values and relationships). But cf. P. SCHUCK, *supra* note 362, at 149 (although monetary relief may devalue rights, it should nevertheless be available for compensatory and deterrent purposes); Whitman, *supra* note 354, at 52-53 (damage awards serve purpose of condemning wrongdoing and affirming importance of rights involved). However, as Whitman later seems to argue, the affirmatory and condemnatory purposes of adjudication can in many cases be better served through injunctive or declaratory relief. *Id.*

374. U.S. CONST. amend. V.

375. Professor Amar, in arguing that the Constitution requires "full remedies" for vindication of constitutional violations, distinguishes constitutional rights from common law rights to be free from tortious harm, suggesting that for the former compensatory relief is more important than for the latter. Amar, *supra* note 1, at 1491 n.262. To the extent that the Constitution protects rights that are,

rights relating to participation in a polity and to the dignitary relationships between citizen and government, then, injunctive relief to stop the wrong should be preferred.³⁷⁶

Of course, this does not explain why courts are often not willing to give a monetary remedy against the government when equitable relief is not available. It only suggests that for certain kinds of violations of right, there are strong reasons to prefer the injunctive remedy.³⁷⁷ As I shall argue, however, that preference and the unwillingness to make available a monetary remedy against the sovereign are also supported by elements of the constitutional allocation of power.

3. *The Power to Tax And Spend*

The Constitution explicitly empowers Congress to "pay the Debts" of the United States and prohibits the expenditure of funds from the treasury except "in Consequence of Appropriations made by Law."³⁷⁸ The importance of the congressional role in controlling government resources is emphasized not only by those provisions, but also by the requirements that all bills for raising revenue originate in the House and that Congress make the rules governing disposition of government property.³⁷⁹

in some sense, "valueless" or "priceless," however, the choice of remedies does not necessarily follow from the importance of the rights. See also Whitman, *supra* note 354, at 53-56 (questioning commitment to compensation as important goal of constitutional tort litigation); cf. Leval, *The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 HARV. L. REV. 1287, 1292 (1988) (money award unnecessary to vindicate libel victim's reputational interests). It may be far more important for the victim of a major car accident involving, for example, a postal employee, to receive compensatory relief than for the victim of a violation of First Amendment rights. For the latter, redress through injunctive relief to cut short the period of violation is the primary concern, and the use of damages may be significant for punishment and general deterrence. Relying on damages to achieve these purposes, however, may undesirably suggest that the rights in question can be monetarily valued and thus "balanced" against other governmental interests.

376. See White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1278 n.21 (1983) (private law preference for damage remedy over specific relief should not apply where one party is government and other party is individual with noneconomic constitutional rights of liberty or property against it; here damages would be "a kind of forced exchange . . . incompatible with the idea of a right specifically against the government."). But cf. Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1357-61 (1986) (liability rules resulting in payment of damages may but need not imply that underlying right was simply right to compensation; in some cases compensation intended simply to redress injury, not to legitimate conduct).

377. In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Court applied a restrictive view of the scope of Article III standing, *id.* at 105, and rigorous application of the "irreparable injury" requirement of equity, *id.* at 111-13, to bar injunctive relief against police use of chokeholds. To the extent that *Lyons'* conclusion that plaintiff's remedy at law was adequate turned on the availability of damages from both police officers and the city, state immunity from monetary relief, if retained under a federal common law approach, might support broader availability of injunctions against comparable misconduct. Yet given the Court's hostility to actions seeking injunctive relief against law enforcement practices, see *Rizzo v. Goode*, 423 U.S. 362 (1976), there is little reason to hope results would differ. Although not involving a sovereign government, *Lyons* is a disturbing decision in tension with my view of the importance of injunctive relief in public law litigation. See *supra* note 370.

378. U.S. CONST. art. I, § 8, cl. 1; *id.* at art. I, § 9, cl. 7.

379. U.S. CONST. art. I, § 7, cl. 1; *id.* at art. IV, § 3, cl. 2. The importance of democratic accountability for those responsible for imposing taxes is emphasized by the first cited provision. See generally Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 740 (1978) (Congress is only federal body with institutional competence to make decisions concerning raising and allocating of

Judicial entry of judgments that can be satisfied only by additional appropriations, while not prohibited by this delegation of power to the Congress,³⁸⁰ does put pressure on this constitutionally primary role of the legislature. Although prospective relief in structural reform litigation may have the same practical effect, compliance with many prospective decrees can be achieved with little or no need for additional immediate appropriation. And in some cases involving sweeping affirmative decrees requiring substantial additional expenditures, the legislative body in question, at least in theory, has the option to comply with the decree by closing the system.³⁸¹ Moreover, such forward-looking decrees may offer the govern-

public funds).

In this respect, state sovereign immunity may stand on a somewhat different footing than federal sovereign immunity. Since Congress alone has power to make appropriations, the Court has held it improper to issue a mandamus against a federal official to draw money from the Treasury absent an appropriation. *Reeside v. Walker*, 52 U.S. (11 How.) 271, 288-91 (1850) (no mandamus against Secretary of Treasury to pay alleged debt where Congress has not appropriated funds); *see also* *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (denying request for transcript; expenditure of public funds only proper if authorized by Congress); *compare* *Kendall v. United States*, 37 U.S. (12 Pet.) 524 (1838) (allowing mandamus of Postmaster General to enter credits in payment of debt where Congress by law had directed settlement of claim). The less explicit delegation to the President to "take care that the laws" be faithfully executed has not been similarly interpreted as constraining the jurisdiction of the Court. *See* *United States v. Nixon*, 418 U.S. 683 (1974); *cf.* *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (although President immune from private damages, at least where not authorized by Congress, courts may exercise jurisdiction over President). Appropriations require action by the entire Congress, moreover, while presidential action or inaction may be redressed through orders to subordinate officers. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *But cf.* *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867) (refusing to enjoin President and military commander from executing allegedly unconstitutional law).

That a court may not compel the appropriation does not necessarily mean that the court lacks power to issue a judgment. *See supra* notes 278-79; *infra* note 380. It does, however, suggest that some constitutional basis exists for distinguishing between the court's adjudication of claims for monetary relief against the federal government, at least when the judgment requires additional appropriations, and claims for relief that can be satisfied without an additional appropriation. Whether these constitutional provisions in fact justify a distinction between relief against the Treasury and relief against executive branch action, that question with respect to the federal government can be more reasonably regarded as one of constitutional law, or federal common law strongly influenced by the Constitution, than can the same question with respect to states.

380. The history of the Court of Claims suggests that judicial entry of judgments for amounts not yet appropriated is not unconstitutional, even though the Court may not be able to enforce its monetary judgments. Until 1956, judgments of that court were presented to Congress annually, with appropriations made after judgments were entered. M. BENNETT, *THE UNITED STATES COURT OF CLAIMS, A 50-YEAR PERSPECTIVE*, reprinted in 216 Ct. Cl. 85, 161 (1978). From 1956 to 1977, Congress made a standing appropriation to satisfy judgments of the Court of Claims that were less than \$100,000; all other judgments had to be presented to Congress for further specific appropriations. *Id.* Only in 1977 did Congress authorize a standing appropriation to be used to satisfy any judgment of the Court of Claims. *See* Supplemental Appropriations Act of 1977, Pub. L. No. 95-26, 91 Stat. 96-97. As was noted in *Glidden v. Zdanok*, 370 U.S. 530, 570-71 (1962) (Harlan, J., plurality opinion):

"A 1933 study found] only 15 instances in 70 years when Congress had refused to pay a judgment [of the Court of Claims] . . . . This historical record . . . make[s] us doubt whether the capacity to enforce a judgment is always indispensable to the exercise of judicial power." Harlan thus concluded that the Court of Claims could "rely on the good faith of the United States," to "respond to its judgments," and could exercise the "judicial power" of the United States over claims against the federal government. *Id.*

381. *See* *Rhem v. Malcolm*, 371 F. Supp. 594 (S.D.N.Y. 1974), *aff'd*, 507 F.2d 333 (2d Cir. 1974) (New York City ordered either to make improvements by specific date or to close notorious "Tombs" jail; *Rhem v. Malcolm*, 432 F. Supp. 769 (S.D.N.Y. 1977) (noting that city closed jail in

ment more flexibility in timing and in the ability to develop and allocate resources than a decree for a money judgment, satisfiable only through a monetary payment.³⁸²

While the constitutional allocation to Congress of control over appropriations may support a remedial hierarchy disfavoring some forms of monetary relief in cases involving the federal government,³⁸³ no similarly explicit constitutional allocation of functions operates with respect to state governments and legislatures. Entirely different remedial rules might thus be adopted. But while the Constitution does not allocate responsibility for raising and spending the public funds of states to state legislatures, it does assign them certain functions, thus contemplating their performance of an

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late 1974; rejecting plan to reopen); *cf.* *Halderman v. Pennhurst State School & Hosp.*, 446 F. Supp. 1295 (E.D. Pa. 1977) (district court orders facility closed), *rev'd in relevant part*, 612 F.2d 84 (3d Cir. 1979) (en banc); *Rodriguez v. Jimenez*, 409 F. Supp. 582 (D.P.R. 1976) (ordering "La Princesa" jail closed but on schedule coinciding with planned opening of new facility), *aff'd*, 551 F.2d 877 (1st Cir. 1977); *see also* *Twelve John Does v. District of Columbia*, 668 F. Supp. 20 (D.D.C. 1987) (describing series of court-ordered population limits resulting in regular releases of prisoners to comply with court orders); Fletcher, *supra* note 349, at 650-51 nn.48, 50 (collecting cases where prisons were ordered shut or release of prisoners threatened or ordered by courts). *But see* *Griffin v. County School Bd.*, 377 U.S. 218 (1964) (court may order that public schools be reopened); Frug, *supra* note 379, at 716 n.5, 743-57 (impossible to close down prisons, school systems, or mental hospitals; district court's injunctive decrees thus equivalent to direct orders against state budget).

382. *See* Nowak, *supra* note 1, at 1445-46. There are important differences between structural and nonstructural injunctions in both cost and intrusiveness. *See* P. SCHUCK, *supra* note 362, at 14-20; Dwyer, *supra* note 212, at 161-67. In comparing damages to the nonstructural injunction, the threat to the legislative power to appropriate is more strongly posed by the former than the latter. In comparing damages to structural injunctions, the relative intrusiveness on state finances is less clear and would depend on such factors as the number of damage claimants, the amount of the claims, the size of the institution being reformed, and the relative detail of the decree. Structural decrees also may substantially limit both legislative and executive discretion to choose among alternatives for protecting legal rights. *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 707-12 (1978); *see also* Fletcher, *supra* note 349, at 652 (court may use spectrum of remedies for range of permissible ends). Nonetheless, in framing structural relief, courts have the power to mitigate intrusion by permitting state participation in framing the terms of the order and in postponing entry of relief to allow the state time to bring itself into compliance. In many of the cases where extensive and costly decrees have been entered, this has occurred relatively late in litigation in which the underlying question of constitutional violation had long since been adjudicated; in contrast, a money judgment, once entered, becomes due. *See e.g.*, *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971), *hearing on standards ordered*, 334 F. Supp. 1341, *enforced*, 344 F. Supp. 373, 390, *aff'd*, 503 F.2d 1305 (5th Cir. 1974) (after finding constitutional violation, court gave defendants three months to file and six months to implement curative plan; after nine months, court scheduled hearing on failure to comply and, thirteen months after original judgment, entered detailed remedial order). *See generally* P. SCHUCK, *supra* note 362, at 184-86, 189-96 (favoring use of affirmative decrees only where other means plainly ineffective under "least restrictive remedy" principle).

383. *See generally* Abernathy, *Sovereign Immunity in a Constitutional Government: The Federal Employment Discrimination Cases*, 10 HARV. C.R.-C.L. L. REV. 322, 354-57, 362-63 (1975); *see also* Wolcher, *supra* note 66, at 247. Professor Abernathy argues persuasively that Article III does not embody a rule of immunity for the federal government but requires that federal courts decide federal questions within the jurisdiction conferred. Separation of powers concerns for the province of other branches of the federal government could account for the courts declining to award relief in some cases within their jurisdiction. The availability of monetary relief against the federal government, he suggests, should turn on whether Congress has clearly appropriated and committed the monies sought. It is not clear whether Abernathy would conclude that *injunctive* relief that would require expenditure of unappropriated funds is barred. *See also* Frug, *supra* note 379, at 788-89 (arguing for judicial restraint in development of prospective remedies for unconstitutional conditions to permit state executives and legislators time to develop plans—including funding element).

integral role in the federal structure.³⁸⁴ Nonconstitutional principles of comity³⁸⁵ therefore may support a judicial presumption that remedial preferences flowing, at the federal level, from the separation of powers should be applied to the other constitutionally sovereign governments—the states.³⁸⁶

4. *The Power to Enforce Judgments*

Because of Congress' control over appropriations,³⁸⁷ some members of the Supreme Court may have once believed that courts could not exercise judicial power to enter judgments against the government because those judgments could not be enforced.³⁸⁸ However, the availability of compulsive process to enforce judgments against the government has not been found to be essential for the exercise of judicial power.³⁸⁹ Nonetheless, judgments that can be complied with solely by executive officials may pose

384. See, e.g., U.S. CONST. art. I, § 4 (time, place and manner of holding federal election for senators and representatives "shall be prescribed in each State by the Legislature thereof. . ."); *id.* at art. I, § 8, cl. 17 (state legislatures must consent to purchase by federal government of land for erection of forts, etc.); *id.* at art. II, § 1 (each state to appoint, "in such Manner as the Legislature thereof may direct," presidential electors); *id.* at art. IV, § 3 (consent of state legislatures required to form new state from part of existing one).

385. Comity involves the voluntary recognition of or deferral to the laws or processes of another jurisdiction. It has been invoked not only to justify federal courts' abstention from deciding cases within their jurisdiction concerning state misconduct, but also to explain judicial recognition of the immunity of foreign sovereign governments from the jurisdiction of United States courts. See *supra* text accompanying notes 313–14; see generally Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981).

386. See Abernathy, *supra* note 383, at 361 n.212; see also Shapiro, *supra* note 346, at 551–52 (abstention may appropriately serve interest of federalism and comity in actions for damages, as well as in actions for equitable relief). Younger tied the doctrine of comity to interests in federalism, defining comity to mean:

[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

401 U.S. at 44. Although the Constitution does not allocate to state legislatures the same powers over public resources that Congress is given, it nonetheless assumes some parallels between the two levels of legislatures. See U.S. CONST. art. I, § 2 (electors of House to have same qualifications as electors for most numerous branch of state legislature); *id.* at amend. XVII (same as to electors for Senate). To the extent that the constitutional allocation of powers at the national level supports some elements of the doctrine of federal sovereign immunity, then, there is a basis for the courts' voluntary extension of the doctrine to the states. Whether, under a federal common law approach, states should have more protection from monetary awards than the federal government does, *cf. supra* note 357, might turn, in part, on the availability and adequacy of state remedies.

387. For discussion of early congressional views, see W. COWEN, P. NICHOLS & M. BENNETT, *THE UNITED STATES COURT OF CLAIMS: A HISTORY* 5 (1978).

388. See draft opinion by Chief Judge Taney in *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), published as an appendix in 117 U.S. 697, 702–03 (1886) (judicial power cannot be exercised where executive certification and legislative appropriation needed to give effect to judgment); see also *Muskrat v. United States*, 219 U.S. 346, 362 (1911) (because judgment sought could not be executed, case outside judicial power).

389. See *supra* notes 278–79, 380; see also *Regional Rail Reorganization Act Cases*, 419 U.S. 102 148–51 (1974) (remedy available in Court of Claims for alleged "taking"); *id.* at 179–80 (Douglas, J., dissenting) (noting that requisite compensation might exceed \$100,000 limit for judgments payable by General Accounting Office without further appropriation from Congress).

less risk of being unenforceable than judgments for fixed monetary relief, which can only be effectuated if the executive and legislative branches act together in meeting the court's decree.³⁹⁰

These concerns—as to the power of the court, standing alone, to enforce its judgments against a government entity—are of significantly less weight in litigation against a state than in litigation against the federal government, because it is more likely that in the event of resistance the executive arm of the federal government will support relief ordered against state officials than against federal officials.³⁹¹ However, an order requiring compliance by executive branch officials of the state government may prove easier to enforce than one requiring a tax levy and expenditure by the state's legislative body.³⁹²

5. Remedial Hierarchy and Forum Allocation Revisited

Neither legislative control of appropriations, nor the relative ease of enforcing judgments directed solely against executive branch officials, nor the values of rights affirmance and public benefit from remedial orders is sufficient, standing alone, to justify all of the remedial distinctions drawn in recent Eleventh Amendment cases.³⁹³ Taken together, though, they plausibly account for a preference against awarding accrued monetary liability in litigation against a constitutional sovereign, and the consequent prefer-

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390. Where state official defendants are directly ordered to provide funding for specific remedial measures, *see, e.g.*, *Milliken v. Bradley*, 433 U.S. 267 (1977), concerns for the ease of enforcing judgment may appropriately underlie judicial reluctance to grant relief either in the form of a monetary judgment or in the form of a prospective decree requiring massive expenditures from state treasuries.

391. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J., concurring).

392. In major institutional cases, the necessary relief will often require legislative appropriations. Enforcing obligations through contempt proceedings directed at a small group of executive officials, however, may be more manageable than holding an entire legislative body in contempt. *See Mobile Co. Jail Inmates v. Purvis*, 551 F. Supp. 92 (S.D. Ala. 1982) (civil contempt of \$5,000 per day entered against county officials who had authority and resources to allocate funds for short-term redress of jail overcrowding but failed to do so), *aff'd by order*, 703 F.2d 580 (11th Cir. 1983); *cf. Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 628 (3rd Cir. 1982) (en banc) (state agency and official held in civil contempt, with \$10,000 per day fine, for failing to comply with order requiring payment of costs of special master where official instigated state legislature to cut appropriations), *cert. denied*, 465 U.S. 1038 (1984). *But see Frug, supra* note 379, at 792 (asserting that detailed orders in structural reform cases are unenforceable because courts cannot "imprison" state executive officials for failing to comply with decree or legislature for failing to appropriate funds). The confrontational potential of enforcement proceedings, then, only partially distinguishes damage awards from massive structural relief that requires combined efforts of state executive and legislative officials.

393. For example, in actions disputing the right to specific property, whether there is a separation of powers concern at all can be seen to rest on whether the property is the government's, thus rendering the question of immunity virtually identical to the question on the merits. *See, e.g.*, *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 694-97 (1982) (Stevens, J., plurality opinion); *see also Land v. Dollar*, 330 U.S. 731 (1947). Adjudication of specific rights to property may not create a perception of broad public benefit, but neither does it imply that the property rights involved are merely compensation rules involving no *a priori* restraint on government action. *See also supra* note 364 (questioning application of preference against monetary relief in *Edelman* itself); *infra* text accompanying notes 447-48 (sketching alternative statutory analyses).

ence, albeit an ambivalent one, in favor of prospective relief in the federal common law of state sovereign immunity in federal courts.

Moreover, in evaluating these preferences, the remedial hierarchy's interaction with the forum allocation principle must be considered. States are not necessarily immune in every forum from damage actions or from actions to recover wrongly withheld welfare benefits arising under federal law. Those actions certainly may, and perhaps must, be entertained in the first instance in state tribunals.³⁹⁴ Federal questions presented therein can be reviewed by the Supreme Court. By funneling some federal claims for relief to state tribunals, the forum allocation principle gives state courts the initial opportunity to engage in factfinding concerning state actions

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394. Where state courts are authorized to provide relief against the state under state law, they cannot discriminate against a similar claim under federal law. *See* *Martinez v. California*, 444 U.S. 277, 283-84 n.7 (1980); *Testa v. Katt*, 330 U.S. 386 (1947); *Wolcher*, *supra* note 66, at 240-41. Some go further, arguing that states have a constitutional obligation to provide remedies in state court for constitutional violations that federal courts are constitutionally prohibited from providing, *see id.* at 198-200; *Taylor*, *supra* note 290, and even where similar rights under state law are nonjusticiable, *see* *Gordon & Gross*, *supra* note 158, at 1151. Under the analytical framework proposed in this article, the question their argument presents is whether there are any remedies for violations of federal rights that a federal court should not give under the common law of state sovereign immunity, but that a state court must provide.

Where the state court lacks jurisdiction to award monetary relief against the state in comparable cases arising under state law, it is difficult to argue it must do so for federal claims except on the ground that federal law itself requires that the monetary remedy against the state be provided. If monetary relief is necessary to vindicate federal rights, however, the Supreme Court has several choices: It could require that state courts provide the remedy in the exercise of its appellate power over the state court systems and/or it could make that remedy available in federal district courts (assuming no statutory bar). Choosing between these alternatives is not easy. *Compare* *Sandalow*, *supra* note 130, at 206-07 (favoring presumption against requiring state courts to entertain federal claims) with *Redish & Muench, Adjudication of Federal Causes of Action in State Courts*, 75 MICH. L. REV. 311, 357 (1976) (arguing for contrary presumption). To note just one aspect of the inquiry: Despite the advantages of the forum allocation rule discussed in text, forcing state courts to adjudicate such claims poses federalism problems in its own right. *Cf.* *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O'Connor, J., dissenting) (antithetical to federalism to require state administrative agency to consider adopting federal regulation). Requiring state, rather than federal, judges to take the political heat for ordering substantial state expenditures might be thought, in the long run, to undermine the vitality of state courts as an independent judicial system capable of acting as a check on abuse of government power. But in either event, it would be an exercise of the federal judicial power to make the remedy available in federal district court or to require that state courts make available the remedy.

That the availability *vel non* of state remedies and procedures may interact dynamically with what relief is available in federal district court is an accepted feature of federal jurisprudence in areas ranging from habeas corpus, *see* *Stone v. Powell*, 428 U.S. 465 (1976), to taxes, *see* 28 U.S.C. § 1341 (1982); *infra* note 480; *see also* *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116-17 (1981) (noting availability of state court section 1983 action in dismissing federal damages suit on grounds of comity); *Althouse*, *supra* note 212, at 1531-34 (states can "earn" autonomy from federal jurisdiction by offering state fora in which federal claims can be presented, for example, in ongoing enforcement proceedings under *Younger* doctrine). Under a similarly interactive approach, whether monetary relief is available in federal district court against states may come to depend, in part, on the adequacy of the remedies available in the state courts. Federal statutes may bear significantly on both aspects of the question of which forum should provide the remedy. *Cf.* 42 U.S.C. §§ 1983, 1988; 28 U.S.C. § 1341; *Spencer v. South Carolina Tax Comm'n*, 471 U.S. 82 (1985) (affirming, by evenly divided Court, state court's refusal to apply sections 1983 and 1988 in tax adjudication); *Patsy v. Florida Bd. of Regents*, 457 U.S. 496 (1982) (federal relief under section 1983 not dependent on exhaustion of state administrative remedies); *Quern v. Jordan*, 440 U.S. 332 (1979) (section 1983 did not overcome states' immunity from monetary relief in federal courts). *See also infra* note 434.

attacked as violating federal law; to adjudicate both substantive and remedial claims of federal law; and to rectify violations of federal law with appropriate regard for peculiar state and local interests, perhaps vindicating state law at the same time. Operating within the constraints of federal appellate review of both merits and jurisdictional decisions,³⁹⁵ the allocation of these federal claims to state courts affords an opportunity for state judges to contribute to the development of substantive federal law,³⁹⁶ thereby enhancing their awareness of the requirements and evolving needs of federal law.³⁹⁷ Moreover, the forum allocation principle gives the state courts an opportunity to pass on questions of state law that may relate to the federal claim and to employ state procedures in doing so.³⁹⁸ The allocation thus may enhance the strength of state institutions of justice by remitting citizens to those fora for some federal claims. At the same time, it relieves federal courts of the burden of adjudicating the merits of such claims, preserving their time for other forms of federal litigation.³⁹⁹

These justifications, however, would support abstention in favor of initial state court jurisdiction over every federal claim for relief, including those for injunctions that are routinely granted in federal district courts, and are plainly insufficient to describe or prescribe the federal common

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395. See *supra* Part II(C).

396. Bator, *supra* note 229, at 1037 (allocating certain constitutional claims concerning state power to state courts provides politically healthy opportunity for state courts to enforce federal constitutional restrictions). It may be politically healthy to hear the voices of state court judges on issues of affirmative federal right in order to enhance their involvement in the elaboration of federal rights; yet, if those voices are systematically less sympathetic to the federal claim, implicit political purposes are also served by the doctrine. The legitimacy of using jurisdictional techniques to achieve substantive results is much debated. Compare *id.* at 1037 (legitimate for Congress to express concern about substantive constitutional matters through techniques of jurisdictional regulation) with Sager, *supra* note 229, at 74-77 (jurisdictional withdrawals motivated by desire to restrain enforcement of rights impermissible).

397. See Redish, *Supreme Court Review of State Court "Federal" Decision: A Study In Interactive Federalism*, 19 GA. L. REV. 861, 865, 902 (1985) (noting educational value for state courts of Supreme Court review).

398. Thus, in *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court, in concluding that the statute in which the state consented to suit did not contemplate suit in federal court, noted that:

[T]he advantage of having state courts pass initially upon questions which involve the state's liability for tax refunds is illustrated by the instant case where petitioner sued in a federal court for a refund only to urge on certiorari that the federal court erred in its interpretation of the state law.

Id. at 470. See *supra* note 226 (discussing value of having state judiciaries elaborate content of state law). If the purpose of the Eleventh Amendment were to require state court adjudication of any state law issue that might be germane to a case against a state, then construing the amendment to permit the exercise of federal jurisdiction in such cases, whether for equitable or legal relief, only on appeal and not in any original federal action, might follow. But cf. *supra* notes 141-143. In view of the importance of the federal question jurisdiction, and of its availability in its original as well as appellate form in the constitutional scheme, see *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 821 (1824), the inference of any such constraint is not warranted by an amendment directed at a diversity-based head of jurisdiction.

399. See Shapiro, *supra* note 346, at 587-88 (discretion whether to exercise subject matter jurisdiction is undeniable feature of federal jurisdiction and is necessary, *inter alia*, to avoid overburdening federal courts).

law doctrine.⁴⁰⁰ But the particular allocation of monetary claims against states to state courts may be supportable for reasons beyond those set forth above. First, the relative competence of federal and state trial benches might support the present allocation of remedies in two different respects. On the one hand, federal judges may be regarded as generally more competent and more expert in adjudicating federal law, and thus more likely to write clear and well-reasoned opinions that provide guidance for the future.⁴⁰¹ This skill is of considerable import where ongoing injunctive relief is at stake. On the other hand, state trial court judges may be closer to the competence of federal district court judges in the assessment and review of damage determinations, since state court civil dockets are typically dominated by tort and commercial contract cases,⁴⁰² in which damages would be the ordinary form of relief. Second, to the extent that a monetary award against the public fisc entails a potential confrontation with the politically accountable processes of tax appropriations, entry of the judgment by a state court judge, carrying with it the support of at least one branch of the state government itself, may decrease the potential for noncompliance or hostility to federal authority.⁴⁰³ Finally, this alloca-

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400. Whether federal courts can properly abstain from hearing damage claims against states on a principled basis that would not justify abstention in every other federal case challenging state action is not easily answered. If the forum allocation effect of Eleventh Amendment jurisprudence is recognized and retained as a form of federal common law, it will have to be justified on terms distinct from existing categories of abstention. Unlike *Younger* abstention, it cannot be justified by the desirability of avoiding interference with pending or imminent state proceedings since the burden of initiation would be on plaintiff. Unlike *Pullman* abstention, return to an original federal forum is not available, nor has the allocation to state courts been limited to cases in which state law is uncertain and a difficult constitutional question might be avoided. Moreover, the allocation of damage claims against states to state courts has not been limited to settings where there are complex and established state procedures for adjudication of the claims, as in abstention under *Burford v. Sun Oil*, 319 U.S. 315 (1943), though the tax and welfare rights cases might be so justified. And damage claims obviously differ from the complex injunctive relief that the *Rizzo* and *Lyons* Court may have thought justified equitable abstention in favor of state court adjudication. Finally, abstention has been traditionally invoked only where there is an adequate state remedy. While I suggest that such a requirement might well emerge from our revised understanding of state sovereign immunity, see *supra* note 394, it has not been a clear part of Eleventh Amendment jurisprudence to date.

401. Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121-23 (1977); see also R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 144 (1985) (noting widespread belief that federal judges are better than state court judges); M. REDISH, *supra* note 174, at 2-3 (federal courts superior to state courts for adjudication of federal rights because of greater expertise, independence, and competence).

402. See D. TRUBEK, W. FELSTINER, J. GROSSMAN, H. KRITZER & A. SARAT, *CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT I-69-I-71* (1983) (civil dockets in five sampled state courts were dominated either by tort or commercial contract cases, while public law and business regulation cases, virtually nonexistent in state courts sampled, occupied significant portion of five sampled federal court dockets); cf. R. POSNER, *supra* note 401, at 188 (state, rather than federal, courts should enforce federal due process rights of fired employees because issues involved are comparable to contract cases with which state courts are familiar); Whitman, *supra* note 354, at 37-38 (state court judges are competent to determine damage claims against state officials under good faith immunity rules limiting liability to violations of clearly established right). Even in the determination of damages, however, some expertise in peculiarly federal damages rules may be required. See, e.g., *Carey v. Phipps*, 435 U.S. 247, 253-67 (1978) (only nominal damages may be awarded to vindicate procedural due process violations absent proof of actual injury).

403. Cf. Brown, *supra* note 1, at 391 (state court may be better able to balance competing interests). On the other hand, because state court judges function without federal constitutional guarantees

tion maintains the ability of federal courts to stop ongoing violations of federal law.

Countervailing arguments, of course, exist. Abstention serves to delay, if not deny, ultimate federal judicial review of federal questions⁴⁰⁴ and to defeat plaintiffs' choice of forum. It may also pose significant risks to the ultimate vindication of federal rights and to the uniformity with which they are enforced.⁴⁰⁵ Considerations of competence and expertise aside, the ability and willingness of state court judges to protect nonmajoritarian rights is likely, over time, to compare unfavorably with that of the tenure- and salary-protected federal bench.⁴⁰⁶ If sovereign immunity is not constitutionally required, moreover, adherence to its remedial traditions in denying an original federal forum for some damage claims might be thought inconsistent with congressional provision of federal fora for the initial consideration of affirmative federal question claims.⁴⁰⁷

A more basic question is: Why justify any theory of sovereign immunity—a doctrine by which courts decline to grant certain remedies for governmental wrongdoing that would be available against a private wrong-

of independence in either tenure or salary, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1351–52 (1982), they may be particularly reluctant to enter awards against the state fisc that are either politically unpopular or so large as to have an adverse impact on the states' ability to fund court operations and judicial salaries.

404. See generally Edwards, *The Changing Notion of "Our Federalism"*, 26 WAYNE L. REV. 1015 (1987) (criticizing *Pennzoil* as unduly impairing ability to obtain federal ruling on federal issues); cf. *England v. Board of Medical Examiners*, 375 U.S. 411, 416 (1964) (appellate review inadequate substitute for initial federal adjudication, especially on issues of fact). Allocation of such claims to state courts will mean that in most cases merits review of the federal issue by a federal court will not occur, given the practical limitations on the Supreme Court's ability to review.

405. See *supra* note 403; *infra* note 406. For differing views on whether and when federal courts should abstain from deciding cases within their jurisdiction, compare Shapiro, *supra* note 346 (necessary for federal courts to exercise discretion on whether to decide cases on merits) with Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) (violates separation of powers for court to abstain from deciding case over which Congress conferred jurisdiction). For other useful discussions, see Field, *Abstention in Constitutional Cases: The Scope of Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Field, *The Abstention Doctrine Today*, 125 U. PA. L. REV. 590 (1977); Wells, *supra* note 349.

406. Allocating state damage claims to state courts provides an opportunity for the avoidance of the demands of federal law, a phenomenon likely to continue despite increased attention to and respect for state judiciaries. State court judges' dependence on elections is a structural constraint on their ability and willingness to protect nonmajoritarian rights of the sort that will frequently be at issue in litigation for monetary relief against the state. See Neuborne, *supra* note 401; see also Solimine & Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS L.Q. 213, 252 (1983) (lower federal courts more likely to uphold civil claims of federal rights than state courts). But cf. Bator, *supra* note 346, at 632–33 (that federal courts are more sympathetic to plaintiffs on constitutional claims does not mean that they are more correct on constitutional principles).

407. See Redish, *supra* note 405. But cf. Wells, *supra* note 349 (court expanded scope of section 1983 beyond Congress' intent and thus does not interfere with congressional judgment when it restricts jurisdiction over such claims). As Professor Shapiro has argued, however, exercise of a reasoned discretion to decline to exercise jurisdiction is an accepted and necessary feature of judicial power. See Shapiro, *supra* note 346, at 577–88. Given background understandings of state sovereign immunity, moreover, ascribing any specific intention to Congress in the enactment of federal question and civil rights jurisdiction statutes is no easy matter. Cf. *Welch v. State Dep't of Highways*, 107 S. Ct. 2941, 2957–58 (1987) (Scalia, J., concurring).

doer? Why retain, in any degree, a doctrine that denies or defers full public justice to victims of government malfeasance?

Sovereign immunity doctrines in actions against the United States have the potential to serve as retaining walls to support the constitutional allocation of control over taxes and expenditures to Congress, and to reconcile that power with the role of the federal courts in enforcing constitutional and federal statutory rights of individuals from wrongful government action. To argue that courts should order full remedies under general jurisdictional provisions for victims of governmental wrongdoing is to create tension within the constitutional allocation where the particular remedy requires appropriations.⁴⁰⁸ In the absence of the countervailing and widespread public good that may be achieved through many forms of prospective injunctive relief, judicial hesitancy to require payment of accrued damages without clear support from the constitutionally accountable branch may reflect sensitivity to the entire constitutional structure. As noted above, comity or respect for state governments lends mild support to a federal common law extension of those doctrines to claims against state governments.⁴⁰⁹

An additional reason to attempt to rationalize some elements of sovereign immunity doctrine is more pragmatic. Without some further indicia that the judgments will be enforced, judicial reluctance to grant monetary relief against constitutionally recognized sovereigns (domestic and foreign) is deeply ingrained. Efforts to abolish a doctrinal basis for sovereign immunity, therefore, seem likely to result in the contraction of the substantive definition of rights against government that are judicially protectable, or the expansion of other discretionary doctrines of abstention, or both,

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408. Professor Amar argues that, while the Constitution may originally have been understood by some to require only partial remedies, this understanding was based on the belief that those remedies would be adequate to vindicate an essentially prohibitory Constitution of negative rights; as our understanding of the Constitution has come to encompass more affirmative rights against the government, the principle of partial relief must yield to provide the "full relief" requisite to the substantive promise of the Constitution. Amar, *supra* note 1, at 1486-89. Neither argument, however, appears to take account of the possible limitations on judicially designed remedies that may be implied from or prudentially justified by constitutional allocations of specific powers to control government resources to other branches of government. To put it another way, full judicial power to confine other branches to action within the limits of the Constitution does not necessarily imply that all remedies for breach are available or should be utilized.

409. Professor Fletcher has argued that the critical inquiry in resolving whether a state can be sued in federal court should focus on the substantive scope of national power, rather than any limitation of federal court's jurisdiction: If Congress has power under the particular constitutional clause invoked to establish private causes of action against the state, then Congress also has power to provide for federal jurisdiction to enforce those remedies. Fletcher, *supra* note 1, at 1107-27. Writing after *National League of Cities* and before *Garcia*, Fletcher assumes that Congress' powers to impose such financial liabilities on states may be limited by constitutional principles of state sovereignty. For the present, however, the Court has largely eschewed efforts to develop substantive limitations on national regulation of state affairs. Moreover, the Fletcher approach focuses primarily on congressional power. Accepting that Congress' power to subject states to liabilities enforceable in federal courts is determined solely by the scope of the national legislative power, there will likely remain areas for judicial interpretation and discretion in implementing such congressional schemes in which appropriate resort may be had to the federal common law doctrines described above.

again with adverse consequences on the courts' willingness to stand up to other branches or levels of government when necessary to vindicate claims of individual right.⁴¹⁰ These results seem less desirable than a frank recognition that some forms of relief on some federal claims, absent legislative direction, will not be available in the lower federal courts.

Thus, a rational common law development might retain some of the functional aspects of the doctrine of state sovereign immunity, if it is understood, first, as a doctrine that limits only certain remedies, not all remedies against the government; second, as a doctrine whose shape is determined in part by what remedies have been provided through the acts of other levels or branches of government; and third, as a doctrine that can yield where federal law, statutory or constitutional, clearly requires a particular remedy.⁴¹¹

V. TOWARDS THE FUTURE: CONGRESSIONAL ABROGATION, CONSTITUTIONAL CLAIMS AND STATE SOVEREIGN IMMUNITY AS FEDERAL COMMON LAW

Understanding the immunity of the states as a federal common law rather than a constitutional doctrine has important implications for two open areas of this jurisprudence: Congress' power under Article I to subject states to private suits for monetary relief in federal court and the power of federal courts, exercising general jurisdiction over federal questions, to award monetary relief against states on claims alleged to arise directly from the Constitution. Under a federal common law approach, both of these issues are resolved in favor of the constitutional power of the courts and Congress.

Difficult interpretive issues remain. Revising our understanding of the basis for state immunity to reflect its common law derivation would change the focus of analysis in cases involving federal statutory rights, such as *Green v. Mansour*, from abstract conjectures about state sovereignty to concrete examination of the remedial structure of the particular statutory scheme and of the purposes served by allocating damage claims

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410. See Nagel, *supra* note 382, at 714 & n.265 (court masks concern over remedies by unconvincing and limited characterization of underlying violation); see also *Butz v. Economou*, 438 U.S. 478, 529-30 (1978) (Rehnquist, J., dissenting) (majority's rejection of "absolute immunity" for federal officers will either impair public officials' job performance or result in "a necessarily unprincipled and erratic judicial 'screening' of claims . . . an adherence to the form of law while departing from its substance"); cf. *Glidden Co. v. Zdanok*, 370 U.S. 530, 557 (1962) (Harlan, J., plurality opinion) (Court of Claims given jurisdiction only to award damages; "far from serving as a restriction, this limitation has allowed the court of claims a greater freedom than is enjoyed by other federal courts to inquire into the legality of governmental action"); Fletcher, *supra* note 349, at 664 (in areas where Court has reduced remedial discretion, it has been more willing to recognize constitutional rights than it might have otherwise).

411. See *infra* note 466; cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (implicitly rejecting "necessity" approach to implication of remedies against federal officers).

to state trial fora. The revised understanding will, however, have far less impact on the basic structure of judicial federalism created by the Court's prior decisions than adherents to the *Hans* view apparently believe.

A. *Congress' Power to Render States Subject to Suit for Monetary Relief in Federal District Courts*

The issue that is likely to propel the next hard look at state sovereign immunity is congressional abrogation: the scope of Congress' power to create causes of action against states for monetary relief enforceable in federal courts.⁴¹² In *Fitzpatrick v. Bitzer*,⁴¹³ the Court held that Congress, acting under section 5 of the Fourteenth Amendment, can subject states to suits in federal court for monetary relief. The Fourteenth Amendment could be taken to overcome or "limit" existing parts of the Constitution to the extent necessary to achieve its purpose.⁴¹⁴ The broad delegation of power to Congress in section 5 sufficiently authorized that body to implement the Fourteenth Amendment through mechanisms "constitutionally impermissible in other contexts," particularly since the Fourteenth Amendment "by . . . [its] terms embod[ies] limitations on state authority."⁴¹⁵

If the Eleventh Amendment and Article III are seen as constitutional limitations on judicial power to entertain federal claims against states, the

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412. Certiorari has been granted to review *United States v. Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted sub nom.*, *Pennsylvania v. Union Gas Co.*, 108 S. Ct. 1219 (1988) (under commerce clause Congress constitutionally abrogated states' immunity from damages on claims concerning hazardous waste disposal). The question of Congress' power is significant in several other areas of federal law in which Congress legislates under Article I powers. *See, e.g., In re McVey Trucking*, 812 F.2d 311 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 227 (1987) (Congress abrogated state immunity on claims in federal bankruptcy proceedings); *County of Monroe v. Florida*, 678 F.2d 1124 (2d Cir.), *cert. denied*, 459 U.S. 1104 (1982) (Congress may create cause of action against state under its extradition power); *Peel v. Florida Dep't of Transp.*, 600 F.2d 1070 (5th Cir. 1979) (immunity abrogated on cause of action created under war powers clauses); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979) (Congress abrogated state immunity by legislation pursuant to copyright clause).

413. 427 U.S. 445 (1976).

414. "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . ." *Id.* at 456. The Court relied on the rationale of *Fitzpatrick* in *Hutto v. Finney*, 437 U.S. 678 (1978) (upholding award of attorneys' fees against state under 42 U.S.C. § 1988), and in *Maher v. Gagne*, 448 U.S. 122 (1980) (allowing award of fees under section 1988 for statutory violations joined with substantial constitutional claim under Fourteenth Amendment).

415. 427 U.S. at 456. That the Amendment limits state authority would seemingly support judicial power to abrogate state immunity pursuant to section 1 of the Fourteenth Amendment, although the emphasis placed on Congress' section 5 power prevents one from so concluding based on *Fitzpatrick* alone. That case may also be read impliedly to limit Congress' power to abrogate Eleventh Amendment immunity to only those later-enacted portions of the Constitution specifically limiting state authority. But even as so limited, to the extent that Congress is viewed as having any power to "abrogate" a constitutional constraint on federal court jurisdiction, the decision would raise troubling issues in defining limits on Congress' power to abrogate other constraints on the structure of national government, for example, the rule allocating only two senators to each state. This difficulty contributes to the conclusion that state sovereign immunity should not be seen as embedded in the Eleventh Amendment or Article III of the Constitution.

decision in *Fitzpatrick* raises difficult questions about the power of Congress, pursuant to its Article I powers, to abrogate state immunity from suit in federal court.⁴¹⁶ In several cases the Court has implied or assumed that Congress does have such power. In *Parden v. Terminal Railway*,⁴¹⁷ the Court held that states could be sued in district court under the Federal Employers' Liability Act (FELA) for injuries suffered by an employee of a state-owned railroad. The opinion, however, could be read as resting either upon the theory that the state waived its immunity by engaging in the activity,⁴¹⁸ or alternatively upon the theory that states did not possess constitutional immunity from suit imposed by Congress' exercise of its enumerated powers under Article I.⁴¹⁹ *Employees v. Department of Public Health*,⁴²⁰ decided nine years later, declined to find either constructive consent or abrogation in a portion of the Fair Labor Standards Act (FLSA) whose language applied to states at least as clearly as the statutory language in *Parden*.⁴²¹ The majority distinguished the "for profit" state activity in *Parden* (running a railroad) from the "nonproprietary" activity at issue in *Employees* (running a state hospital), without specifying whether that difference went to Congress' power, the degree of clarity with which Congress must speak, or the inference of state consent.⁴²² The dispositive grounds for decision remained unclear, leaving uncertain on what, if any, basis rested Congress' power to create causes of action enforceable in federal courts against states.⁴²³

The decision in *Welch v. State Department of Highways*⁴²⁴ did not resolve this confusion. The Court there held that the state of Texas could

416. It likewise raises questions concerning the power of courts to abrogate state immunity pursuant to section 1 of the Fourteenth Amendment, absent expressed congressional abrogation. See *Edelman v. Jordan*, 415 U.S. 651, 694 (1974) (Marshall, J., dissenting) (arguing that Court did not rule on question).

417. 377 U.S. 184 (1964).

418. *Id.* at 192, 194 n.11 (though state cannot be sued without consent, by choosing to operate interstate railroad after enactment of FELA state had "necessarily consented" to suit).

419. *Id.* at 191-92 (states surrendered immunity when they granted Congress power to regulate commerce).

420. 411 U.S. 279 (1973).

421. *Id.* at 282-83, 285 (FLSA definitions specifically included employees of state hospital, and remedial section authorized suit against any employer; FELA provision in *Parden* covered "[e]very common carrier"). The Court's discussion of the extent to which generally worded statutory provisions would be regarded as embracing states was thus contrary to its treatment of the same issue in *Parden*.

422. *Id.* at 284-87. See generally *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (impossibility of distinguishing traditionally governmental activities from others). The majority in *Employees* also noted that Alabama's regulated activity in *Parden* was "isolated," but that the instant regulations more generally applied to state employees. 411 U.S. at 285. A concurring opinion, arguing that the Eleventh Amendment permitted federal district court adjudication only with the consent of the state, distinguished *Parden* because in *Employees*, the federal law was passed *after* the state began the regulated activity; the state could not be said voluntarily to have waived its immunity by its continued operation of the hospitals. *Id.* at 287-98 (Marshall, J., concurring).

423. 411 U.S. at 282 ("The *Parden* case in final analysis turned on the question of waiver;" question of waiver one of federal law because consent arose out of activity subject to federal regulation).

424. 107 S. Ct. 2941 (1987).

not be sued in federal district court for injuries suffered by a state-employed ferry boat worker, notwithstanding that the Jones Act authorized suit by "any seaman" against his employer for maritime injuries under the remedial scheme established by the FELA. Justice Powell, writing for a plurality of four, sought to reaffirm the correctness of *Hans*. The Eleventh Amendment and "the fundamental principle of sovereign immunity [which] limits the grant" of Article III power protect states from suits in federal courts, whether the suits are brought by in-staters and whether the suits sound in law, equity, or admiralty.⁴²⁵ Powell did not fully articulate the application of those principles to congressional power, however, for he assumed arguendo that Congress had the power to abrogate that "fundamental principle" in the exercise of its Article I powers.⁴²⁶ Under that important assumption, Powell concluded that, in the general language of the Jones Act, Congress had not abrogated the immunity in the requisite "unmistakably clear . . . language."⁴²⁷ *Parden*, to the extent inconsistent with this rigorous "clear statement" requirement, was overruled.⁴²⁸

With Justice Brennan, joined by Justices Marshall, Stevens and Blackmun, dissenting on the ground that the Eleventh Amendment was in-

425. *Id.* at 2945 (quoting from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984)).

426. *Id.* at 2946-47. As the parties briefed the case, congressional power to abrogate was assumed to exist and the case turned on what rules of construction should be used. Briefs for Petitioner and Respondent, *Welch v. State Dep't of Highways*, 107 S. Ct. 2941 (1987) (No. 85-1716).

427. *Id.* at 2944-45. Interestingly, *Welch* treats abrogation and consent as independent grounds on which to ignore the supposedly constitutional bar of the Eleventh Amendment, just as the Court did in *Atascadero*, 473 U.S. 234, 238 (1985), implying that congressional power to abrogate does not also require a finding of state consent (apart from that given in the Constitution). For a helpful analysis of these issues in earlier cases, see Field, Part II, *supra* note 1, at 1212-26.

428. 107 S. Ct. at 2946-48. Powell's opinion purported to reserve the question whether the Jones Act remedy applied to state-employed seamen. *Id.* at 2947 n.6. If it did, the state may be liable on that federal cause of action in suit initiated in state court. Justice White's brief concurring opinion, however, argued that the issue of substantive coverage was decided in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959). 107 S. Ct. at 2957 (White, J., concurring). Justice White's position, together with the views expressed by the four dissenters, *id.* at 2961 n.7 (Brennan, J., dissenting), indicate that five members of the Court believe that the Jones Act's "substantive" provisions apply to states. See also *Employees*, 411 U.S. at 283 (though FLSA wage and hour provisions applied to state employees, its authorization of suits in district courts did not).

Difficult practical problems emerge from Justice White's apparent position that language sufficient to impose substantive liabilities on states is not sufficient to subject them to federal court jurisdiction, if applied to situations in which concurrent state fora are prohibited by federal law. Compare *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979) (finding abrogation on copyright claims) with *BV Eng'g v. UCLA*, 657 F. Supp. 1246, 1250 (C.D. Cal. 1987) (copyright act not sufficiently clear abrogation under *Atascadero* standards) and *Richard Anderson Photography v. Radford Univ.*, 633 F. Supp. 1154 (W.D. Va. 1986) (Congress lacks power to abrogate immunity without state consent pursuant to copyright clause, although language of copyright act broad enough to include states). Under a federal common law approach, the creation of state liability under a federal law over which federal district courts have exclusive jurisdiction would overcome any mild presumption in favor of state fora adjudicating money claims against the state. See *BV Eng'g*, 657 F. Supp. at 1250 (given exclusive federal jurisdiction, it would be more reasonable to imply abrogation from copyright act, though clear statement rule not met); see also *infra* note 441 (discussing competing approaches to question of what inferences to draw from creation of monetary liability against states for availability of that relief in federal district court).

tended only to limit the state-citizen head of jurisdiction and affected neither federal question nor admiralty jurisdiction,⁴²⁹ Justice Scalia provided the key vote.⁴³⁰ While he joined Justice Powell in overruling *Parden*, he did so on a rather different rationale. Noting that an attack on *Hans* had been raised only in *amici* briefs, he was "unwilling" to address "both the correctness of *Hans* as an original matter, and the feasibility, if it was wrong, of correcting it without distorting what we have done in tacit reliance upon it," without full briefing by the parties.⁴³¹ However, he stated that these were both "complex . . . questions," plainly implying that the vitality of the *Hans* doctrine is open to question.⁴³² *Hans* figured importantly in his opinion, not as a matter of constitutional law but as a guide to legislative intent. Because *Hans* had been "assumed to be the law" during the time of Congress' enactment of both the Jones Act and the FELA, he concluded it would be unreasonable to "interpret the statutes as though the assumption never existed."⁴³³

The suggestion in Justice Scalia's brief opinion that many issues of Eleventh Amendment law can be resolved on statutory grounds is indicative of a broader point: Overruling *Hans* and its progeny and moving towards a federal common law view of state sovereign immunity in federal question cases may have little effect on the district courts' jurisdiction. A transition period governed by questions of statutory interpretation will be resolved largely in favor of the states. Indeed, with the important exception of section 1983 and related provisions,⁴³⁴ most significant federal reg-

429. Brennan also argued that the amendment did not bar suits by a citizen against his own state, and that, in any event, Congress had clearly abrogated any constitutional immunity that the states might enjoy. 107 S. Ct. at 2958-70 (Brennan, J., dissenting).

430. Justice (then Professor) Scalia, writing critically of the sovereign immunity of the federal government, has noted that sovereign immunity can result in a "blatant affront to the basic precepts of justice. . . ." Scalia, *supra* note 354, at 869 (1970). But see *id.* at 886 (sovereign immunity concept more important in cases against "foreign" states in federal court).

431. *Welch*, 107 S. Ct. at 2958 (Scalia, J., concurring).

432. *Id.*

433. *Id.* The Jones Act preceded *Ex parte New York*, 256 U.S. 490 (1921), in which the Court first clearly held that the Eleventh Amendment barred admiralty suits against states even though its text refers only to suits "in law or equity." While this chronology raises some questions about Scalia's methodology, see *Welch*, 107 S. Ct. at 2961 n.7 (Brennan, J., dissenting), once *Hans* was decided the Court's willingness to extend constitutional sovereign immunity principles to areas of federal jurisdiction not covered by the amendment's terms was evident. Cf. *Brown v. GSA*, 425 U.S. 820, 828 (1976) (relevant inquiry not whether Congress correctly perceived then-state of law but what its perception of state of law was); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 378 (1982) (same).

434. Section 1983 is an important exception to the potential application of the constitutionally erroneous but statutorily relevant view of *Hans* on which Scalia's opinion depends. Section 1983, derived from the Civil Rights Act of 1871, was enacted at a low point in the Court's willingness to bar relief on grounds of sovereign immunity and a corresponding high point in the use of the nominal party rule. See *Davis v. Gray*, 83 U.S. (16 Wall.) 203, 220 (1872) (if state cannot be sued, that is sufficient reason to permit case to proceed against named officer). Under a consistent application of the view that legislation is to be interpreted against the background of prevailing constitutional interpretations, section 1983 might be applied broadly to permit many forms of relief, at least if the nominal defendant is a state official. In view of *Fitzpatrick*, moreover, the question whether section 1983 authorizes suits for damages directly against the state is not one of congressional power but ultimately

ulatory statutes that might impose monetary liabilities on states enforceable in federal district courts were enacted after the 1880's, when the groundwork for *Hans* was completed.⁴³⁵ Some, in fact, were enacted after 1973 when the decision in *Employees* began to construct a "clear statement" rule for interpreting federal statutes. Scalia has articulated a rational basis for interpreting many earlier enacted federal statutes that do not specifically indicate that states as states may be sued in federal court for damages.⁴³⁶

Many of the Court's recent Eleventh Amendment decisions involved claims against states based on federal statutory rights.⁴³⁷ If *Hans*' reasoning were disavowed, the question whether states should be subject to a judicial cause of action for monetary relief in federal court will turn on interpretation of the statute in light of legislative purpose or intent.⁴³⁸ The

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only one of legislative intent (at least with respect to claims alleging violation of the Fourteenth Amendment or legislation enacted thereunder). Abandoning *Hans*, however, has no necessarily dispositive impact on whether section 1983 should be read as abrogating states' immunity or applying substantively to states themselves. Even against a constitutional background that is neutral as to state sovereignty, one must ask whether the statutory language "person [acting] under color of state law" encompasses states. See *Will v. Michigan*, 428 Mich. 540, 410 N.W. 2d 749 (1988), cert. granted, 108 S. Ct. 1466 (question presented whether states, or their officers when sued in official capacity, are "persons" for purposes of state court section 1983 damage suit); cf. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) (cities are "persons"). But see *Quern v. Jordan*, 440 U.S. at 338-45 (section 1983 does not overcome Eleventh Amendment immunity from suit in federal court, possibly implying that "states" are not "persons" under section 1983 as matter of substantive coverage). For discussion of whether section 1983 was intended to make states liable for actions at law, see Note, *Amenability of States to Section 1983 Suits: Reexamining Quern v. Jordan*, 62 B.U.L. REV. 731 (1982); see also Note, *Quern v. Jordan: A Misdirected Bar to Section 1983 Suits*, 67 CALIF. L. REV. 407 (1979); Comment, *Concurrent Jurisdiction and Attorney's Fees: The Obligation of State Courts to Hear Section 1983 Claims*, 134 U. PA. L. REV. 1207, 1231 (1986); cf. *Maine v. Thiboutot*, 448 U.S. 1 (1980) (where state court entertained section 1983 action against state to recover welfare benefits, attorneys fee provisions of section 1988 must be applied). Even if section 1983 were reinterpreted to authorize a cause of action for monetary relief directly against states, it is not clear, given the different understanding of state sovereign immunity from the 1880's until recent years, that federal courts should entertain such suits with respect to federal statutory violations under statutes that do not themselves authorize remedies against the state. But cf. *id.* at 7 (section 1983's reference to "laws" not limited to civil rights statutes).

435. See also *Maine v. Thiboutot*, 448 U.S. at 11 (Powell, J., dissenting) (summary of federal laws imposing obligations on state and local governments upon which section 1983 might permit suit); cf. *supra* note 434.

436. Whether Scalia will distinguish substantive coverage from remedies in the interpretation of statutes affecting states is unclear, as is his view whether remedial provisions might apply in state but not federal district courts. See *Welch*, 107 S. Ct. at 2958 (Scalia, J., concurring); see also *supra* note 120 (noting confusion in older cases between Eleventh Amendment and general sovereign immunity doctrines in state court litigation).

437. In addition to *Welch*, see *Green v. Mansour*, 474 U.S. 64 (1985) (federal welfare claim); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (federal Rehabilitation Act); *Quern v. Jordan*, 440 U.S. 332 (1979) (welfare); *Edelman v. Jordan*, 415 U.S. 651 (1974) (same); *Employees v. Department of Pub. Health*, 411 U.S. 239 (1973) (Fair Labor Standards Act). Most of these cases, moreover, involved claims by citizens against their own states. The major Eleventh Amendment cases in the federal courts of appeals likewise involve questions of state liability in federal courts under federal statutory schemes. See cases cited *supra* note 412.

438. "Sovereign immunity" as a catchphrase may obscure several related but distinguishable questions: (1) whether the substantive requirements of the statute apply to states; (2) whether the statute should be construed generally to authorize a private cause of action; (3) whether the cause of action is available against states; and (4) if so, whether it may (or in some cases, must) be brought in a federal or a state court. See also *Welch*, 107 S. Ct. at 2957 (White, J., concurring) (Jones Act does

Eleventh Amendment would have no bearing on the question of jurisdiction to award monetary relief under these statutes, since it would be understood not to apply to claims arising under federal law.

One might conclude that, if states' immunity from suit has no constitutional basis, then at least in the future there should be no special clear statement or clear evidence rule,⁴³⁹ whatever special rules apply to the interpretation of statutes enacted against prevailing but erroneous constitutional decisions. But understanding sovereign immunity as a form of federal common law, serving federal interests in providing appropriate remedies and in allocating some federal question claims to state courts, may support, on broader grounds than those Scalia suggested, some form of clear evidence approach to questions of statutory abrogation of immunity for both prior and newly crafted legislation.⁴⁴⁰ A clear evidence rule

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provide remedy against state, though not in federal court); *Employees v. Department of Pub. Health*, 411 U.S. at 287-98 (Marshall, J., concurring) (same as to FLSA). There is much disagreement generally over the proper role of courts in implying monetary causes of action from federal statutes, a debate reiterating disputes over whether interpretation should be governed by a strictly construed legislative intent or by more broadly discerned understandings of legislative purpose. See generally HART & WECHSLER 3D ED., *supra* note 156, at 943-50; HART & SACHS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1410-11, 1414-15 (tent. ed. 1958); Note, *Intent, Clear Statements and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892 (1982). If one generally presumes that courts should play an active role in developing remedies for statutory violations, one may be more likely to conclude that a cause of action is available against all regulated entities, including states, than if one believes that courts should not supply remedies not expressly provided for. See Field, Part II, *supra* note 1, at 1276 (principles generally limiting courts' implying monetary causes of action also support clear evidence rule for finding abrogation of immunity). Yet even if one generally believes it appropriate for courts to develop remedies not specified in a statute, federalism interests—both in assuring that states can use political mechanisms in Congress to forestall undesired regulation and in providing an important role for state courts in the development of federal constraints upon state action—might lead one to support some form of clear evidence approach.

439. The clear statement rule of *Atascadero* seems to require the use of unambiguous language in the statute itself to abrogate immunity. 473 U.S. at 240. Such a clear statement rule can plainly obstruct Congress' actual intent. If, as I argue, state sovereign immunity is not a constitutionally required principle, judicial insistence on such a stringent rule seems inconsistent with Congress' presumed primary role in law-making. Cf. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 264 (1973) (discussing clear statement rules as legitimate form of judicial resistance to legislative purpose to depart from established principles).

A clear evidence rule, such as Professor Field proposes, would protect states only where the statute and legislative history are ambiguous, but would find abrogation where, on all evidence, abrogation was Congress' intent. Field, Part II, *supra* note 1, at 1250-52. A "clear evidence" rule, while not necessarily obstructing legislative intent, represents a policy preference of the courts, that may be legitimate but which requires a reasoned basis. If clear evidence rules are applied prospectively, they appear to be a relatively mild form of judicial discretion, visible and amenable to congressional correction, without challenge to the authority of the courts as principled expositors of federal law.

440. That sovereign immunity is a federal common law doctrine may not, by itself, be sufficient to justify narrowly construing statutes that arguably modify the common law rule, compare *Shaw v. Railroad Co.*, 101 U.S. (11 Otto) 557, 565 (1879) (statutes in derogation of common law to be narrowly construed) with *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952) (remedial statutes to be liberally construed), particularly in light of the Court's willingness to abandon federal common law remedies in the face of possible statutory preemption. See *Milwaukee v. Illinois*, 451 U.S. 304, 319 (1981) (no clear evidence requirement for federal statutory displacement of federal common law of environmental nuisance). But see Field, Part II, *supra* note 1, at 1276 (suggesting that common law character of sovereign immunity justified clear evidence requirement for federal statutory abrogation); see also W. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 657 (1988). The

for liabilities, remedies, and fora may increase the likelihood that Congress will actually focus on these questions and that the states have sufficient notice to permit them to advocate their interests in Congress. In light of Congress' heightened responsibility under *Garcia* as the primary protector of states' interests in their own sovereignty, such a rule may be particularly appropriate.⁴⁴¹

Court's refusal to find statutory displacement of common law immunities in section 1983 litigation, see *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *supra* note 339, however, suggests that common law governmental immunities are harder than at least some common law remedies.

Professor Field has suggested that constitutional doubts about the substantive regulation support a clear statement approach, in a case such as *Employees v. Department of Pub. Health*, 411 U.S. 279 (1973), Field, Part II, *supra* note 1, at 1251-52, 1274, and that federalism interests justify a clear evidence approach under which ambiguous statutes would be presumed not to abrogate immunity. See also Brown, *supra* note 1, at 383. The Court itself, however, has not limited the clear statement rule to constitutionally questionable substantive law. See *Atascadero*, 473 U.S. 234 (1985). It justifies the clear statement approach on the dual grounds that sovereign immunity is part of a constitutional balance of powers and that courts expand their own jurisdiction when they find that states can be sued. *Id.* at 242-243. Since jurisdiction is effectively exercised over states in injunctive actions, these justifications seem unpersuasive. Furthermore, since sovereign immunity is not a constitutional principle in federal question cases, the assertion that courts are "expanding" their jurisdiction is misleading—courts have constitutional power to exercise jurisdiction over federal claims against states, but have in effect abstained from doing so. See *supra* Part IV(C)(5); see also Shapiro, *supra* note 346, at 574-75 (discretion essential to proper exercise of jurisdiction).

441. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-56 (1985). The premise of *Garcia* could, considered abstractly, be fulfilled either by a rule providing that states will be subject to regulation, liability, and suit in the lower federal courts under generally worded federal statutes or that, without further specification, they will not. The important point for assuring informed congressional action arguably is the prospective application of whichever interpretive rule will be followed. But see Lane, *Legislative Process and its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 656-57 (1987) (state legislators unaware of rules of construction). Changes in the structure and political organization of Congress may cast doubt on the assumption that its processes can be relied on fully to account for state interests, see Kaden, *supra* note 178, at 860-68; Lee, *supra* note 178, at 338, and thus might justify the judicial assertion of clear evidence rules to protect states from the consequences of *Garcia*.

Whether separate clear evidence requirements should apply to issues of substantive coverage, liability to a damages remedy, and forum, is unclear. Where a federal statute plainly regulates the primary behavior of states, the federal common law factors discussed in Part IV above may nonetheless justify a clear evidence rule to defeat implication of a monetary remedy against a state. Where a federal statute both clearly applies to states and provides generally for a private cause of action, as for example in the FLSA provisions in *Employees*, imposition of a separate clear evidence rule on the sovereign immunity questions of forum and liability poses a somewhat greater risk of interfering with Congress' actual intent. It nonetheless may be justified on the assumption that inertia or inattention may prevent Congress from specifying its intent as to state damage liabilities and in view of the federal common law that disfavors monetary relief against states in federal court and supports state court adjudication of claims for monetary relief against states. In this setting, a finding that the statute did not provide for a monetary remedy in federal district court would permit state court involvement, subject to Supreme Court review, in the interpretation of ambiguous federal remedial provisions. But cf. *Employees*, 411 U.S. at 286 (implying that Congress did not intend to subject states to damages under section 16(b)); *id.* at 287 (reserving question whether such suits may be brought in state court against state). Were a federal statute clearly to authorize private suits against states for monetary relief, applying a separate clear evidence rule with respect to the availability of a federal forum may be more difficult to justify: It might be argued that Congress' intent to overcome the federal common law rule is clearly enough evinced in its authorization of suit. On the other hand, a separate clear evidence rule as to forum might be thought justified by those federal interests favoring state court adjudication of such claims—at least where other factors, such as Congress' attempt to affirmatively involve states and their agencies in the administration of the scheme, suggest that allocating the claims to state court is consistent with overall statutory purpose. In any event the Court would not be limited to the language of the statute in determining Congress' intent, and Congress' intention to provide a federal forum would control. See *infra* note 444.

There is a difference between legitimate interpretation and unwarranted obstruction, a difference obscured by the increasing rigor of the Court's clear statement approach.⁴⁴² In *Atascadero State Hospital v. Scanlon*, the Court, construing legislation enacted under the Fourteenth Amendment and clearly imposing substantive anti-discrimination rules on state recipients of federal funds, concluded that Congress could only subject states to suit in federal court by clear language in the statute itself; inferences from legislative history would not suffice.⁴⁴³ Congress promptly corrected the Court's apparently mistaken conclusion as to its intent.⁴⁴⁴ In general, the Court's interpretive approach to statutes enacted under the Fourteenth Amendment, expressly designed to enforce rights against state action, should differ from approaches toward statutes enacted under other, more general congressional powers.⁴⁴⁵ Where Congress enacts remedial legislation under the Fourteenth Amendment that substantively applies to states and generally provides for a private cause of action for damages, it is doubtful whether any rigorous clear evidence rule arising from the presumptions of common law sovereign immunity is an appropriate interpretive tool.⁴⁴⁶

Where state liabilities are established under other congressional powers, a more complex inquiry based on a range of indicia of Congress' intent and statutory purpose must be invoked. Critical to an intelligent resolution of these problems is an appreciation of the degree to which application of any presumption in favor of state court adjudication of monetary liabilities would frustrate or advance the purposes of the statutory scheme.

442. The Court's application of clear statement rules that may obstruct Congress' statutory purpose has not been limited to protection of sovereign immunity. See Note, *supra* note 438.

443. 473 U.S. at 242-43. In so holding, the Court marked a change from its past approach. See *Hutto v. Finney*, 437 U.S. 678, 693-94 (1978) (relying on legislative history to support fee award against state). See generally *Atascadero*, 473 U.S. at 248-52 (Brennan, J., dissenting); *id.* at 304 (Blackmun, J., dissenting). But cf. Brown, *supra* note 1, at 383, 387-88 (*Atascadero* might have come out same way under less rigorous standard; original statute created damages liability only by reference to different statute's implied right of action).

444. *Atascadero* had held that plaintiff could not maintain his statutory damages claim in federal court. Congress quickly amended the statute to make explicit that it intended to overcome Eleventh Amendment immunity and create the same remedies against states enforceable in federal court as are available against other covered entities for discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C.A. § 2000d-7 (West Supp. 1987)).

445. In *Atascadero*, the Court assumed the statute was enacted under both the spending clause and section 5 of the Fourteenth Amendment, 473 U.S. at 244-45 n.4. But cf. *EEOC v. Wyoming*, 460 U.S. 226, 259-60 (1983) (Burger, C.J., dissenting) (Fourteenth Amendment not "blank check" for Congress to override Tenth Amendment absent judicial declaration of right or obvious violation of section 1 of Fourteenth Amendment). Where Congress legislates on a subject affecting primarily private actors (though possibly including government entities), as in *Parden* or *Welch*, it might not carefully consider any special effects of its legislation on states; where Congress enacts legislation applicable to programs receiving federal financial assistance, as in *Atascadero*, the impact on states is obvious, and it is less plausible that Congress failed to consider state and local interests.

446. But see Brown, *supra* note 1, at 384-85 (noting with apparent approval that *Atascadero* establishes single clear statement rule for abrogations of state immunity under Fourteenth Amendment as well as under other congressional powers).

Thus, in *Green v. Mansour*, an inquiry freed of the misapprehension that a constitutional rule of state sovereign immunity barred monetary relief in federal court might have begun its statutory analysis with the following propositions: First, Congress intended to require states that had wrongfully withheld welfare benefits to pay the wrongly-withheld benefits. Second, one mechanism mandated by Congress to carry out the welfare scheme, that could provide such retroactive adjustments, was that states have administrative decisionmakers.⁴⁴⁷ Although the retroactive liability was established, there remained the question of whether Congress intended to overcome the federal common law presumption against affording monetary relief on accrued liabilities against states in federal district courts. Given the required establishment of state fora for the provision of such relief, one might reasonably conclude that the common law presumption was not overcome.⁴⁴⁸

The question precisely at issue in *Green*, whether a declaratory judgment should have been given, is more difficult. The relevance of the state administrative mechanism mandated by Congress is unclear. On the one hand, it could be said that Congress wanted to retain some important levels of state decisionmaking in the state systems; if declaratory relief were granted on purely retroactive claims, it would deprive those state decisionmakers of an opportunity to resolve the interpretive questions. On the other hand, by mandating administrative decisionmaking under a scheme of federal regulation, one could argue, Congress contemplated that the tasks reserved to the state would be relatively ministerial in character, involving application of clearly established standards. Thus, a federal declaratory judgment would not be inconsistent with the state scheme. Since the district court was familiar with the relevant facts and issues, considerations of judicial economy would have also favored proceeding to a final declaratory judgment. The issue is difficult to resolve, but the more important point is that there is an alternative framework for determining what relief is available in district courts against states that accounts for state interests in a way more consistent with Congress' power to overcome states' federal common law immunity.

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447. See *supra* notes 284-90; see also *Edelman v. Jordan*, 415 U.S. at 692-96 (Marshall, J., dissenting) (provision for federal funding of retroactive hearing awards showed intent to create federal right enforceable in federal court section 1983 action).

448. The relationship between these statutory issues and interpretive questions under section 1983 is complex, wholly apart from the issue of whether section 1983 covers states or abrogates their immunity from suit in federal court. See *supra* notes 434, 447; see also *Rosado v. Wyman*, 397 U.S. 397, 420-23 (1970) (HEW's power to cut off AFDC funds to noncomplying state does not preclude claimants from declaratory and injunctive relief); compare *Maine v. Thiboutot*, 448 U.S. 1 (1980) (section 1983 action in state court proceeding to review administrative decision concerning past due federal welfare benefits) with *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (Congress did not intend section 1983 actions to be available to enforce provisions of environmental statutes containing their own enforcement clause, notwithstanding clause saving other remedies). Full consideration of these questions is beyond the scope of this article.

B. *The Construction of Jurisdictional Provisions: Constitutional Necessity and the Judicial Power to Give Relief*

If the doctrine of sovereign immunity is one of federal common law, it operates, of necessity, within the constraints of Congress' power to control the jurisdiction of the inferior federal courts and the appellate jurisdiction of the Supreme Court. The significance of this obvious point is that, at some level, every sovereign immunity question (except perhaps for those arising in the Supreme Court's original jurisdiction) involves an issue of statutory interpretation, one statute in question being the general jurisdictional provision.⁴⁴⁹

If a state's claim of immunity from relief on federal grounds in federal court is raised, the court may ask: Does a general jurisdictional provision authorize this court to grant this remedy? The breadth and generality of the federal question statutes would seem to support an affirmative answer to this question.⁴⁵⁰ Yet since Congress has legislated against a background understanding of sovereign immunity—not necessarily an erroneous constitutional doctrine but a common law remedial preference—one might also conclude that in enacting general jurisdictional statutes Congress contemplated that a remedy disfavored under sovereign immunity doctrine would not be chosen unless that remedy were provided for by other statutes or was the only constitutional way in which to exercise the jurisdiction conferred.⁴⁵¹

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449. See H. FINK & M. TUSHNET, *supra* note 306, at 413–14; see generally Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301 (1979). Professor Field has argued that, to give the Eleventh Amendment its intended effect, general jurisdictional statutes enacted in the language of Article III conferring jurisdiction over suits between “a state and citizens of another” should not be construed to abrogate states’ common law immunity. Field, Part II, *supra* note 1, at 1275 n.311. It is unclear whether Field would extend this proposition to the language of 28 U.S.C. § 1331, the general federal question statute, see *id.* at 1264 n.272, or whether her point applies only to jurisdictional statutes framed in the language of that part of Article III that I argue the Eleventh Amendment was intended to repeal. It is also unclear under her proposed rules of construction the degree to which courts acting under such a general jurisdictional statute would be precluded from varying the common law rules of sovereign immunity. See *id.* at 1262–65, 1278. Her position suggests that the grant of jurisdiction would leave the court free to develop, though not abrogate, common law immunity except where abrogation is required by some other law that controls a controversy within the court’s jurisdiction. This conclusion appears to be at odds with her otherwise nonconstitutional theory of state sovereign immunity.

Although it may be sensible to say that a general jurisdictional statute does not by itself abrogate states’ common law immunity, I disagree with any suggestion that the Constitution requires this mode of construction in federal question or admiralty jurisdiction cases. If federal courts are given jurisdiction over questions arising under a federal law that refers generally to states, then I would construe the jurisdictional grant to give the courts the power to award whatever relief is necessary to vindicate the general right in question. On the other hand, my interpretation of the Eleventh Amendment would stand as an obstacle to efforts to confer jurisdiction based on diversity jurisdiction in state law cases.

450. See *supra* notes 343–346. See also H. FINK & M. TUSHNET, *supra* note 306, at 55 (arguing that principle of *Bell v. Hood* is that general grants of federal jurisdiction should be construed to authorize effective remedies for invasion of legal rights).

451. While Congress may have expected that, in exercising federal question jurisdiction, courts would employ traditionally available remedies, Congress cannot be presumed to have given the courts jurisdiction to effect an unconstitutional result or jurisdiction under which they may not interpret

The remedial preference described above, regarded as a form of federal common law, clearly must yield where the supremacy of constitutional law requires a remedy normally disfavored in the doctrine.⁴⁵² The Fifth Amendment is just such a provision and illustrates the point. The Court has recently held that the just compensation requirement of that clause is a "self-executing" command to provide for the payment of compensation for any governmental taking.⁴⁵³ Does the state's sovereign immunity from suit in federal court foreclose those courts from requiring states to provide compensation if the state fails to provide an adequate opportunity for the adjudication of those claims?⁴⁵⁴

For a court otherwise having jurisdiction of the claim to answer that question affirmatively would be inconsistent with the basic command of *Marbury* that the court must apply the Constitution as law where it is controlling in cases properly before the court.⁴⁵⁵ Where the Constitution

some part of the Constitution. See Bator, *supra* note 229, at 1035; Hart, *supra* note 229, at 1402. Where state remedies are inadequate or unavailable to vindicate the alleged federal right, application of the federal common law rules of state sovereign immunity in choosing remedies under a general federal jurisdictional statute could place the Court in that uncomfortable, and perhaps unconstitutional, position. Cf. *Jacobs v. United States*, 290 U.S. 13 (1933) (notwithstanding absence of provision for award of interest, where taking has occurred, Court having jurisdiction of claim against government is required by Constitution to award interest).

452. Professor Tribe agrees that, at least in those cases involving constitutional restraints operative on both federal and state governments, courts can abrogate what he sees as a constitutional rule of state sovereign immunity. Tribe, *supra* note 1, at 696 n.73. He argues that, where a constitutional rule constrains both levels of government, federal courts will exercise restraint because of the effect on other branches of the federal government; likewise, if the court oversteps the proper line, Congress is more likely to take action to correct the court's ruling. While Professor Tribe's analysis is intriguing, it is also more contorted than the common law approach. The distinction Tribe draws between prohibitions on both levels of government and prohibitions only upon states seems far removed from any understanding of the original intent of the Eleventh Amendment. If the amendment constrains the courts' exercise of federal question jurisdiction in actions against states, it is difficult to justify exceptions for both congressional and judicial abrogation, except perhaps on a chronological theory that the Civil War and subsequent amendments limit the Eleventh Amendment. Moreover, the premise that the Court may abrogate states' immunity only where it would also abrogate the federal government's immunity is in tension with the view that there is a more substantial constitutional basis for restraints on judicial entry of monetary relief against the federal than the state governments. See *supra* note 379. Finally, that Congress may "veto" judicial abrogation of the immunity of the United States, e.g., by providing alternative remedies, does not necessarily imply that it will be alert to do so with respect to the states.

453. *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2383-85 (1987). The Fifth Amendment is a good illustration, because there is no ambiguity on the substantive question of whether the Constitution itself requires the payment of money by the government that takes property. See U.S. CONST. amend. V.

454. *First English* strongly suggests not. The Court considered and rejected the Solicitor General's argument as *amicus curiae* "that the prohibitory nature of the Fifth Amendment combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the government to act, not a remedial provision." *Id.* at 2386 n.9 (citation omitted). The Court quite firmly rejected this position: "[our past] cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking." *Id.*

455. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); cf. *Davis v. Passman*, 442 U.S. 228, 242 (1979) (where there is no other effective means to enforce constitutional rights, litigant "must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights"); *Bush v. Lucas*, 462 U.S. 367, 378 (1983) (federal courts' statutory jurisdiction to decide federal questions confers adequate power to award damages to victim of constitutional violation, although whether to do so requires common law remedial analysis of other factors).

provides a self-executing command to a state to make payment, and where no other effective forum exists where the claim can be presented,⁴⁵⁶ it is fundamentally inconsistent with the predicate of a constitutional system to invoke a nonconstitutional tradition of sovereign immunity to defeat the claim. Indeed, the very clarity of this textual provision for a monetary remedy is inconsistent with a premise of sovereign immunity as a constitutional doctrine, at least as a doctrine separate and apart from whatever constraints on jurisdiction Congress may impose on the federal courts.⁴⁵⁷

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456. The Fifth Amendment, the only constitutional provision with a clearly self-executing requirement of a monetary remedy, has been interpreted consistently with the forum allocation principle discussed above. The Court has held that, with respect to takings under color of state law, no constitutional deprivation occurs by the mere fact of a taking so long as the state has provided a mechanism to award the constitutionally-requisite just compensation. No violation occurs until after unsuccessful attempts to obtain compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-97 (1985). Under *Hamilton Bank* claims against a state for compensation for takings are generally adjudicated initially in state courts, with federal review perhaps available only in the Supreme Court. *See* *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1980). But if a state did not provide an adequate mechanism for resolution of those claims, there is, in my view, no constitutional or jurisdictional barrier to a federal district court entertaining such a claim for relief.

A difficult question, though, is how to determine whether a state remedy is inadequate. Some might argue that if there is a state court that could hear the claim of remedial inadequacy, the general state court remedy is not inadequate. *Cf.* HART & WECHSLER 3D ED., *supra* note 157, at 1342 (discussing Tax Injunction Act); *compare* (if state court has procedure for hearing federal claim, remedy is adequate) *with id.* at 530 (Stevens, J., dissenting) (substance of state court remedy must also be adequate). On the other hand, where state law is clearly settled against the availability of a mechanism to vindicate the claim of federal right, requiring resort to state courts, with the slim chance of obtaining Supreme Court review, *see* Pub. L. No. 100-352, 102 Stat. 662 (1988) (eliminating Court's mandatory appellate jurisdiction over state court cases), may be an effective denial of the federal right. Where plaintiff demonstrates that the state remedial mechanism is inadequate, the federal common law doctrine ought not bar access to the only federal forum reasonably certain to be available. *Cf.* *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1528 (1987) (requiring presumption that state remedies are adequate where plaintiff fails to present federal claim in pending state court proceedings).

457. *See supra* note 195. Whether an individual is entitled to a monetary award against a state turns, not on a general constitutional rule of immunity, but on whether such a remedy is necessary to vindicate the particular constitutional right in question. In this respect, I differ somewhat from Professor Field, who believes that the relevant inquiry must be whether the particular constitutional provision in question abrogates states' common law immunity and that this abrogation question turns on the specific intent of the framers. The result in *Hans* would survive her common law approach to states' immunity because the only debate over state suability during the ratification of the Constitution concerned Article III, and "[n]o one intimated . . . that the contract clause of its own force might . . . remov[e] states' immunity." Field, Part II, *supra* note 1, at 1267. Indeed, Field suggests, given the limited debate on state suability, no other portion of the 1789 Constitution could be so construed. *Id.*

If, however, in determining what remedies are required against a state for violation of an affirmative command of the Constitution, the courts are limited to those remedies specifically contemplated by the framers, then it is difficult to see the task of the courts as "interpretation and development of the common law immunity doctrine." *Id.* at 1265. While Field elaborates an argument that the courts' power to vary common law immunities was "frozen" as of 1789, she then properly rejects that view as inconsistent with our present understanding of the nature of judicial power. Yet her "unfrozen" view seems surprisingly rigid or, alternatively, not based on principle: "[I]t is unnecessary to impose a freeze on federal judicial interpretation of sovereign immunity . . . [because] [f]ederal judicial abrogation is not a realistic possibility . . . . Absent a freeze . . . judicial interpretation and development of the common law immunity doctrine is to be expected, but judicial abrogation is not." *Id.* at 1264-65. Regardless of what is to be expected, I argue that federal courts have the power and, in some circumstances, the obligation to provide a monetary remedy against a state—where the court has been given jurisdiction over the question and where the Constitution itself requires such a remedy or where the constitutional right can be vindicated only by affording such a remedy.

Field's failure to take this position may derive from her apparent view that the Eleventh Amendment implies a constraint on the entire judicial power. Her notion that Article III is "neutral" on

The proposition that the federal common law of state sovereign immunity must yield to constitutional, as well as statutory, imperatives, is suggested by reasoning in *Malone v. Bowdoin*,⁴⁵⁸ in which an action in ejectment was brought against a forest service officer of the federal government to try his title as occupant of the land. An identical proceeding against two army officers, brought in *United States v. Lee*,⁴⁵⁹ had been decided in favor of the private plaintiff, with the Court rejecting the argument that the suit was really against the United States and barred by sovereign immunity. In *Malone*, however, the Court, noting its own earlier reference⁴⁶⁰ to the *Lee* decision as the application of the "constitutional exception to the doctrine of sovereign immunity,"⁴⁶¹ limited the holding in *Lee* to those instances "where there is a claim that the holding [of the property] constitutes an unconstitutional taking of property without just compensation."⁴⁶² Since the Court of Claims had been given jurisdiction, since *Lee*, to entertain claims against the government founded on a taking of property and to provide monetary remedies, in *Malone* there was no constitutional necessity to construe the action in ejectment as anything but a suit against the United States that was barred by the immunity of the United States.

What the Court can be understood to have done, in its movement from *Lee* to *Malone*, was to have insisted, first, that a remedy for unlawful government conduct be provided if there was a jurisdictional basis for doing so; second, in the absence of congressional direction to the contrary, permitted the remedy that did not directly invade the public fisc; and third, where Congress provided a monetary remedy, favored that remedy over injunctive relief.⁴⁶³ The recognition in this context that constitutional

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state sovereign immunity is ambiguous. Neutrality in this sense may mean that the enactment of Article III did not abrogate state immunity or that the enactment of Article III neither abrogated immunity nor authorized the federal courts to do so. I have argued that the Eleventh Amendment limits only a portion of the Article III judicial power, the head of jurisdiction over diverse citizen-state claims, and that Article III authorizes the federal courts to exercise the ordinary judicial power, including the power to develop or change federal common law, in entertaining actions for relief against states under federal question jurisdiction.

458. 369 U.S. 643 (1962).

459. 106 U.S. 196 (1882); see *Tindal v. Wesley*, 167 U.S. 204, 222 (1897) (relying on *Lee* in suit against state official).

460. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696 (1949) (refusing to enjoin War Surplus Administrator from disposing of government coal plaintiff allegedly had contractual right to receive and holding that action within officer's "statutory authority," even if wrongful, could not be enjoined unless it were alleged to be unconstitutional).

461. 369 U.S. at 647-48 (quoting *Larson*, 337 U.S. at 696). If sovereign immunity were constitutionally required, it would be bizarre to speak of a constitutional exception to the doctrine. The language of *Lee* and *Malone* thus suggests that, even as to the federal government, sovereign immunity may be largely a form of federal common law.

462. *Malone*, 369 U.S. at 648 (quoting *Larson*, 337 U.S. at 697). See *Malone*, 369 U.S. at 647 n.8 (noting that unlike in *Lee*, Court of Claims could give just compensation for taking of plaintiff's land).

463. The *Larson* Court, in explaining why monetary relief against the government (when authorized by Congress) was preferred, sought to justify the inversion of the remedial hierarchy for public wrongs:

requirements justify providing relief otherwise barred by immunity doctrines should have no less application with respect to claims against states.

This is not to say that, in *Malone*, the availability of a Court of Claims remedy should have been dispositive of the question whether the action against the officer should have been entertained. Rather, the Court should have asked whether any important federal interests warranted specific relief against the allegedly wrongful possession,⁴⁶⁴ and whether, in light of those interests, Congress intended the Court of Claims remedy to be exclusive where disputes as to title to property in the government's possession were raised.⁴⁶⁵ The question for the continued development of the federal common law of government immunities must ultimately be, as to cases within the courts' subject matter jurisdiction, what kinds of remedies are necessary or appropriate to vindicate the federal right. That inquiry can never be fully answered by an independent and co-equal judiciary blindly deferring to legislative remedies.⁴⁶⁶

[I]t is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

337 U.S. at 703-4. See also *id.* at 691 n.11 (dictum that even if officer acts unconstitutionally, relief requiring "affirmative action" or disposition of "sovereign property" barred). If, however, Congress had not seen fit to provide the monetary remedy, the tenor of the opinion suggests that "strong[] reasons of public policy" would require that the action for specific relief against the officer be permitted. The opinion thus illuminates the view of federal sovereign immunity as having a content influenced by the presence of statutorily prescribed remedies. The nominal question posed by the opinion is: When is a suit against an officer also one against the United States? The question it in fact answered was: What remedy, in addition to a monetary remedy provided explicitly by Congress, should courts make available in actions brought under general jurisdictional provisions for alleged governmental wrongdoing? This question is closely related to whether, from statutes providing no monetary remedy but specifically contemplating other forms of enforcement, a monetary remedy should nonetheless be implied. See *supra* notes 438, 441. Interestingly, Congress provided a substitute for the ejectment action barred by *Malone* when, in 1972, it authorized suits against the United States to quiet title. See 28 U.S.C. § 2409a (1982).

464. The federal common law of sovereign immunity should address not only the question of whether any remedy is available for the alleged violation of law, but also the adequacy of that remedy. See, e.g., *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (remedy provided by state law for discriminatory taxation inadequate). If the Fifth Amendment confers a right to be free from governmental takings absent a legislative decision that the particular property, or type of property, is needed for a public purpose, the availability of a monetary remedy would not necessarily be sufficient to vindicate the federal constitutional interest in retaining one's property. See also *Malone*, 369 U.S. at 648 (Douglas, J., dissenting) (damage award insufficient for claimant seeking possession of property). Compare *Dames & Moore v. Regan*, 453 U.S. 654, 680-90 (1981) (where President had authority to enter accord, Court of Claims remedy sufficient to redress taking) with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Court of Claims remedy uncertain and does not preclude injunction against President's unauthorized taking).

465. *Malone*, 369 U.S. at 650-51 (Douglas, J., dissenting); *Larson*, 337 U.S. at 722-23 (Frankfurter, J., dissenting) (both arguing that existence of Court of Claims remedy should not be dispositive on existence of remedy against officer). Apart from the question of individual right is the question of whether Congress itself would prefer not to proceed with a taking for which compensation would be required when the taking results from a misunderstanding of ownership interests. See Cramton, *Non-statutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 414 (1970).

466. Cf. *Davis v. Passman*, 442 U.S. 228, 236-44 (1979) (distinguishing implied rights of action

C. *Stare Decisis and The Problem of Transition*

In *Welch v. State Department of Highways*, Justice Powell stated that to abandon the view that the Eleventh Amendment principle of sovereign immunity limits the judicial power over claims arising under federal law, even when brought by a citizen against his own state, would result in overruling "at least 17 cases,"⁴⁶⁷ an unsettling development that might require major doctrinal changes in other areas of public law litigation.⁴⁶⁸ Close scrutiny of Justice Powell's list of cases that would be overruled, however, suggests that his claim is overblown. Overruling *Hans*' erroneous view of federal question jurisdiction need not drastically affect district court jurisdiction, but may offer substantial advantages to simplifying and making more coherent a body of law that has for many years been rightly condemned as anomalous and inconsistent, both internally and with respect to the basic constitutional norms by which we like to believe we are governed.

1. *Effect on Prior Caselaw*

The seventeen cases cited by Justice Powell can be divided into five groups: federal question claims involving rights under federal statutes; federal question claims relating to state taxation; claims arising under state law or diversity jurisdiction; admiralty claims; and claims within the Supreme Court's original jurisdiction.

a. *Federal Statutory Claims*

At least five of the cases on Justice Powell's list involved actions by citizens against their own states based upon a claim of federal statutory

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under statutes from those under Constitution; for former, Congress' intent controlling, but courts primary enforcers for latter). *But cf.* *Schweiker v. Chilicky*, 108 S. Ct. 2460 (1988) (asserting congressional superiority in formulating remedies for constitutional violations related to statutory rights); *Field*, *supra* note 266, at 934-37 (questioning divergence in Court's approach to constitutional and statutory implied rights). A "necessity" test is the standard that may be appropriate for inferring remedies against states which a strong federal common law tradition, supported by contemporary experience and functional concerns, does not provide. Without a stringent standard, it is unlikely that limitations on relief against states based on institutional concerns of federalism would long survive individual claims of right. *But cf.* *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971) (implicitly rejecting "essentiality" test in favor of "appropriateness" standard in inferring from constitutional provisions monetary causes of action against individual officers). In evaluating the necessity for, e.g., monetary relief against a state, the effectiveness of other federal judicial remedies would be of primary concern in view of the courts' special role in enhancing governmental accountability. *See supra* note 342; *see also* Engdahl, *supra* note 17 (contraction of common law damage actions against officers as effective remedy for government wrongs requires abandonment of sovereign immunity in damage suits against government treasuries); *cf.* *Kentucky v. Graham*, 473 U.S. 159, 161-62 n.2, 169 n.17 (1985) (apparently reserving question whether Fourteenth Amendment authorizes "official-capacity" damage suits against state officials).

467. 107 S. Ct. at 2956 n.27.

468. Justice Scalia also expressed concern over the effects of overruling precedent in settled areas of the law. *Id.* at 2958 (Scalia, J., concurring).

right.⁴⁶⁹ Since *Atascadero State Hospital v. Scanlon* involved legislation enacted pursuant to the Fourteenth Amendment, *Fitzpatrick v. Bitzer* would permit suit thereunder, without changing the basic Eleventh Amendment analysis, so long as sufficiently express words were used by Congress.⁴⁷⁰ Indeed, Congress rapidly overruled the effect of *Atascadero*.⁴⁷¹ Four of these cases involved federal conditions to spending programs in which issues of statutory interpretation rather than congressional power were dispositive.⁴⁷² The Court's recent rejection of state challenges to conditions on spending makes it likely that, under existing caselaw, Congress could subject states to suit in federal court as a condition of their participation in these programs, if Congress acts sufficiently clearly.⁴⁷³ Although *Employees* involved pure regulation, under present Eleventh Amendment jurisprudence, the question is at least open as to whether Congress has power to subject states to such suit under its Article I powers, if it acts with sufficient clarity, with even conservative members of the Court unwilling to deny the existence of such power.⁴⁷⁴

Thus, to contend that a change in the framework would "overrule" these cases in a way radically inconsistent with the existing framework of judicial federalism is simply inaccurate. Under the approach outlined above, inquiry would focus on Congress' intent; the result would at least sometimes be identical.⁴⁷⁵

b. *Challenges to State Taxation or Pending State Court Proceedings*

Three other cases on Justice Powell's list⁴⁷⁶ were tax refund actions against state taxing authorities that today would not differ in result were

469. *Green v. Mansour*, 474 U.S. 64 (1985); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Employees v. Department of Pub. Health*, 411 U.S. 279 (1973).

470. See *Atascadero*, 473 U.S. at 243; cf. *Maher v. Gagne*, 448 U.S. 122, 130-33 (1980) (upholding fee award on statutory non-civil rights claim pendent to constitutional claim). But cf. *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) (noting argument that even under section 5, Congress may not set aside immunity on statutory claims).

471. See *supra* note 444.

472. *Green*, 474 U.S. at 64; *Atascadero*, 473 U.S. at 242-46 (Rehabilitation Act); *Quern*, 440 U.S. at 342-46 (section 1983); *Edelman*, 415 U.S. at 674 (Social Security Act and section 1983).

473. See e.g., *South Dakota v. Dole*, 107 S. Ct. 2793 (1987); see also Field, Part II, *supra* note 1, at 1240 n.174. But compare *Parden v. Terminal R. Co.*, 377 U.S. 184 (1964) (sustaining waiver as regulatory condition to activities in interstate commerce) with *Welch v. State Dep't of Highways*, 107 S. Ct. 2941, 2948 n.8 (1987) (reversing *Parden's* statutory construction and purporting to reserve decision on Congress' power, in regulating states, to require waiver of immunity). But even granting that the question is open, abandoning *Hans'* view of the Eleventh Amendment will still not overrule the commerce clause, spending power, or Fourteenth Amendment cases discussed above, given the possible statutory grounds for those decisions.

474. See *Brown*, *supra* note 1, at 393 (Court will eventually adopt position that Congress can abrogate Eleventh Amendment immunity under Article I powers); L. TRIBE, *supra* note 247, at 185-86 (same). In *Welch*, all members of the Court were willing either to hold or to assume *arguendo* that Congress had regulatory power under Article I to subject states to suit in federal court on monetary claims. See *supra* text accompanying note 426.

475. See *supra* text accompanying notes 447-48.

476. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Great N. Life Ins. Co. v.*

there no constitutional doctrine of state sovereign immunity from suit. Numerous federal statutory policies and judicial doctrines strongly favor state court determination of challenges to state tax matters in the first instance. Congress has prohibited federal courts from issuing injunctions against the collection of state taxes where adequate state remedies are available.⁴⁷⁷ Both as a matter of statutory construction and of comity or equitable restraint, declaratory relief is likewise prohibited.⁴⁷⁸ Even damage actions against state tax assessors in their individual capacity under section 1983 have been judicially declared unavailable.⁴⁷⁹

The policy of both Congress and the federal courts has been to avoid even indirect interference with the state-established procedures for the collection of taxes and for the adjudication of disputes concerning the legality of those taxes. Only when the state provides no effective mechanism to challenge the validity of a tax, either before or after its imposition, will the Court articulate federal remedial constraints.⁴⁸⁰ Given the strength of the Court's policy to keep federal courts out of the initial process of adjudicating state tax disputes, there are ample statutory and doctrinal bases,⁴⁸¹ wholly apart from the Eleventh Amendment, on which the Court could refuse to permit refund cases to be filed in federal courts where state law provides an adequate refund procedure. Similarly, for some of the problems presented in two cases on Powell's list seeking equitable relief to

Read, 322 U.S. 47 (1944); *Smith v. Reeves*, 178 U.S. 436 (1900).

477. Tax Injunction Act, 28 U.S.C. § 1341 (1982).

478. *California v. Grace Brethren Church*, 457 U.S. 393 (1982); *Great Lakes Dock & Dredge Co. v. Huffman*, 319 U.S. 293 (1943).

479. *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981).

480. See also *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503 (1981) (state no-interest rule does not render refund action inadequate). Compare *Georgia R.R. & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (state court's denial of jurisdiction over action to enjoin collection of taxes as barred by sovereign immunity treated as adequate state ground precluding review) with *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952) (upholding federal district court jurisdiction over action to enjoin collection of same tax). After the federal action was initiated, the state asserted that other state court remedies were available. The federal action was then stayed, but the state court found that appeals were not available. The Supreme Court thereafter concluded that other available state court remedies were not "plain, speedy and efficient" so as to bar jurisdiction under the Tax Injunction Act and went on to reject the claim that the action to enjoin collection of the tax was a suit against the state for Eleventh Amendment purposes. *Id.* at 306. This litigation not only shows the Court's substantial deference to state proceedings for tax collection, but also reveals an exercise of federal judicial power to assure that some adequate remedy be afforded for vindication of the claimed federal constitutional right. See also *Ward v. Love County*, 253 U.S. 17 (1920) (disagreeing with state court that refund action unavailable due to alleged "voluntariness" of payment; state court finding of voluntariness denied federal right in substance; implying that refund remedy is constitutionally required when initial payment of illegal tax is coerced).

481. As Justice Rehnquist observed in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 109 (1981), there is no inconsistency between the principle of comity and the granting of relief where a federal court determines that available "state remedies did not adequately protect the federal rights asserted." Accordingly, only where state remedies did not "adequately" protect the asserted federal rights would the Court issue relief against state taxation, even absent the supposed bar of the Eleventh Amendment.

restrain state court prosecutions,⁴⁸² other grounds are available, apart from sovereign immunity, that might preclude such relief.⁴⁸³

c. *State Law Claims*

At least two of the cases Justice Powell cites, *County of Oneida v. Oneida Indian Nation*⁴⁸⁴ and *Pennhurst State School & Hospital v. Halderman*,⁴⁸⁵ involved state law claims against a state or state officers. *Oneida* involved a claim, based in part on state law, for a money judgment against the state by name, albeit not within the party configuration expressly prohibited by the Eleventh Amendment. In both cases, while the Eleventh Amendment need not be regarded as a bar to relief, as my previous discussion of *Pennhurst* indicated, there are substantial arguments that jurisdiction over such state law claims should not be exercised on a theory of either pendent or ancillary jurisdiction.⁴⁸⁶ Moreover, federal district courts have discretion, reviewable by the Supreme Court, over whether to exercise jurisdiction over appropriate pendent or ancillary claims.⁴⁸⁷ The results in both cases could be sustained without reliance on any broad constitutional theory of the Eleventh Amendment.

482. See *Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (state, which intervened in federal diversity action to request federal court to hold in its registry certain stocks, did not waive Eleventh Amendment immunity to equitable relief restraining it from prosecuting claim for inheritance taxes in pending state probate proceeding; federal question concerning res judicata effect of prior federal judgment could be raised in state court); *Fitts v. McGhee*, 172 U.S. 516 (1899) (Eleventh Amendment barred injunction against state officials proceeding against bridge company for charging rates in excess of those permitted by allegedly unconstitutional state law; after federal case filed and some preliminary relief issued, indictments issued against company employees).

483. Under *Younger v. Harris*, 401 U.S. 37 (1971), and *Hicks v. Miranda*, 422 U.S. 332 (1975), notions of "equitable restraint" and "Our Federalism" might preclude the lower federal courts from granting relief against the prosecution of criminal indictments in a case like *McGhee* (at least if indictments were properly filed prior to proceedings of substance on the merits), and, more speculatively, in a case like *Fiske*. Cf. *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987) (*Younger* abstention applied in private civil litigation to force litigant to raise federal claim in pending state appeal). In any event, injunctions against allegedly unconstitutional state conduct as in *McGhee* would not be barred by the Court's present view of the amendment. See *supra* text accompanying notes 216-17.

484. 470 U.S. 226, 250 (1985).

485. 465 U.S. 89 (1984). A third, *Murray v. Wilson Distilling Co.*, 213 U.S. 151 (1909), was a diversity jurisdiction suit by contract creditors of the state liquor commission. After substantial initial proceedings on the state law contract claim, an allegation under the contracts clause was added. To the extent that the suit was properly regarded as one against the state, dismissal was consistent with a view of the Eleventh Amendment as repealing only the party-based head of jurisdiction, notwithstanding the presence of a federal question which had not given the court jurisdiction.

486. The argument against jurisdiction may be stronger in *Oneida* than in *Pennhurst*, for two reasons. First, the claim by the county is clearly one against the state, rather than against a state officer, and thus, assuming the indemnity claim to arise under state law, implicates the concern underlying the Eleventh Amendment more clearly than where the relief is sought against state officials and could be satisfied without crossing common law barriers of sovereign immunity. Second, because this claim in *Oneida* was a cross-claim by the county defendant against the state defendant, it bears little relation to the need to make fully effective the exercise of federal question jurisdiction over a plaintiff's underlying federal claim. See *supra* text accompanying notes 210-45 (discussing *Pennhurst*). If the county's indemnity claim were found to arise under federal law, however, the Eleventh Amendment should not bar its adjudication under federal question jurisdiction.

487. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (pendent jurisdiction); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 45, § 3523, at 105-06 (ancillary jurisdiction).

d. *Admiralty and Original Jurisdiction Cases*

Of the cases remaining on Justice Powell's list, two are related cases in which the Court decided that the Eleventh Amendment required state consent before the state could be sued in admiralty.⁴⁸⁸ Exceptions to the rigor of this rule have developed over time, at least in the lower federal courts.⁴⁸⁹ Judicial recognition that states are not constitutionally immune to admiralty jurisdiction need not change their liability to suit in federal court in any significant way. Federal courts could continue to protect states from judgments that would be inconsistent with the common law of state sovereign immunity.⁴⁹⁰

Finally, we come to *Duhne v. New Jersey*,⁴⁹¹ an attempt by a citizen of New Jersey to invoke the Supreme Court's original jurisdiction over a constitutional challenge to the Eighteenth Amendment. Although the citizen's suit raised a federal question, the Court's original jurisdiction was invoked because of the state's status as a party, as was the case in *Chisholm*. But while the Court had entertained original actions between the United States and a state,⁴⁹² the Court had also suggested by the time of this decision that only the party configurations specified in the first clause of section 2 of Article III could be brought under the Supreme Court's original jurisdiction; and the Court soon thereafter held that the mere presence of a state as a party and of a federal question was not sufficient to confer such jurisdiction.⁴⁹³ Thus, dismissal would have been required in any event, even if the Eleventh Amendment had never been enacted, and accordingly, the revised understanding of the amendment embraced by this analysis need not change the result in *Duhne*.

e. *The Contracts Clause Cases*

The contracts clause cases, like *Hans* itself, should also be reconsidered. The contracts clause would seem to provide a constitutional command of sufficient clarity to override the presumptions of the federal common law of sovereign immunity. It expressly limits the states, and it was early on

488. *Ex parte New York*, No. 1, 256 U.S. 490 (1921); *Ex parte New York*, No. 2, 256 U.S. 503 (1921).

489. J. ORTH, *supra* note 1, at 140; Comment, *The Eleventh Amendment Immunity and State-Owned Vessels*, 57 TULANE L. REV. 1523, 1535 n.57 (1983); *see supra* note 200.

490. However, consistent with developments in the immunities of vessels of foreign governments, states might not retain immunity in admiralty jurisdiction from claims arising from their "commercial" conduct. *Cf.* 28 U.S.C. § 1605(b).

491. 251 U.S. 311 (1920).

492. *See, e.g.,* *United States v. Texas*, 143 U.S. 621 (1892).

493. *See Texas v. Interstate Commerce Comm'n*, 258 U.S. 158, 163-64 (1922); *see also* *Louisiana v. Texas*, 176 U.S. 1, 16 (1900); *California v. Southern Pac. Co.*, 157 U.S. 229, 258-59 (1895); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 393-94 (1821); HART & WECHSLER 2D ED., *supra* note 141, at 249; Amar, *supra* note 6, at 254 n.160. *But see* C. WRIGHT, A. MILLER & E. COOPER, *supra* note 45, §§ 4043, 4049 (arguing that "better view" would be that Court can exercise original jurisdiction over any claim against state within judicial power on any basis). Moreover, prospective relief like that sought in *Duhne* might be available against state officers despite the Eleventh Amendment.

treated as a judicially enforceable constraint on a state's own contracts.⁴⁹⁴ Yet as the contracts clause doctrine has developed, states have been given substantial latitude to eliminate or modify remedies provided in the contract to enforce its provisions.⁴⁹⁵

At least two important proponents of a more limited understanding of the Eleventh Amendment believe that the *Hans* result can survive abandonment of its articulated view of the Eleventh Amendment for reasons peculiar to the contracts clause.⁴⁹⁶ Although a difficult question, it is perhaps of less import today than in the nineteenth century, as the relative importance of the contracts clause in the constitutional scheme has diminished. Moreover, *Hans* rested independently (albeit alternatively) on the ground that the particular jurisdictional statute sued under did not extend to any form of action that could not be brought in the state court. The language of the modern federal question jurisdiction statute differs significantly from the one in *Hans*, and thus *Hans* can be reconciled to a quite different result should a state once again default on its debt obligations and fail to provide an adequate state court remedy so as to justify abrogation of the federal common law of state sovereign immunity.

494. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 132-36 (1810) (Marshall, C.J.); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); cf. L. TRIBE, *supra* note 247, at 613 (noting that contracts clause not directed at state's own contracts, but approving its application to them). Professor Field and Justice Brennan, however, have both argued that the contracts clause was not intended to permit the assertion of affirmative claims against states. See Amar, *supra* note 1, at 1470 n.188 (suggesting that *Fletcher v. Peck* was wrongly decided insofar as it held prohibition on impairments of contracts to apply to contracts of state).

495. See, e.g., *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398 (1934) (obligation of contract is not impaired by law modifying the remedy for its enforcement). But cf. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977) (when "state's self-interest" in own contracts at stake, contracts clause requires scrutiny of legislative changes). Moreover, to the extent that the contracts clause does not prohibit mere breach, as in failure timely to repay a debt, cf. *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924) (clause applies only to legislative acts), states would have substantial protection from debt actions in federal courts on substantive grounds, even if the claim were regarded as one arising under federal law for jurisdictional purposes. See Fletcher, *supra* note 1, at 1123 n.337 (*Chisholm* facts would present no constitutional claim).

496. Justice Brennan has argued that the contracts clause was a "self-imposed" limitation on the states, carrying with it no affirmative congressional power to enforce it. *Employees v. Department of Pub. Health*, 411 U.S. at 319-20 n.7. The difficulty with this position is that it hardly accounts for the clause being placed in the Constitution. If not even Congress was empowered to enforce the clause affirmatively, then why should courts be able to enforce its requirements defensively? See *id.* at 292-93 n.8 (Marshall, J., concurring). See also *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952) (entertaining action against state officer for violation of contracts clause). Field, by contrast, apparently would permit Congress to enforce the contracts clause by providing for actions for monetary relief against states, but she does not read the constitutional provision itself as abrogating state immunity. She concludes that, absent a congressionally created cause of action, the contracts clause is not enforceable by the courts in a manner inconsistent with the common law doctrine of sovereign immunity. Field, Part II, *supra* note 1, at 1265-68. This view, while somewhat more plausible than Brennan's, is troubling because of the degree to which it depends on a rigid adherence to a presumed but unarticulated intent of the framers of the Constitution. See *supra* note 457. Yet the argument that the contracts clause was not implicitly understood to authorize a federal cause of action might better account for evidence that state debts and contracts were intended to be enforced through the diversity, rather than the federal question, head of jurisdiction. The apparent tension between the early view of the sweep of federal question jurisdiction and the understanding that claims for money relief on a contract with a state could be heard only under the state-citizen clause is difficult to resolve. See *supra* notes 101, 333.

2. *Doctrinal Coherence as a Virtue in Federal Litigation*

Although some of the results of prior Eleventh Amendment decisions admittedly would be left unchanged by the revised understanding urged here, strong reasons nevertheless support the change.

First, articulated as a constitutional doctrine grounded in Article III and the Eleventh Amendment, the doctrine of state sovereign immunity to relief on federal claims is so inconsistent with the establishment of judicial power over all federal questions cases arising under a Constitution explicitly limiting state power that it lacks credibility as a reasoned exegesis. Something else is in fact going on, and a failure to recognize and give voice to that something has detracted from the Court's ability to serve as a principled expositor of the Constitution.

Second, it is difficult to reconcile a constitutional doctrine of state sovereign immunity with Congress' power to abrogate that immunity. The concept of a constitutional limitation on subject matter jurisdiction that Congress can expand is fundamentally in tension with *Marbury*. Yet the alternative, to conclude that Congress lacks power to subject states to federal judicial enforcement of obligations properly imposed by federal law—suggesting that the judicial power is not coextensive with the legislative—is even more fundamentally inconsistent with the structure and premise of the Constitution.

Viewing the doctrine of state sovereign immunity as one of federal common law better accommodates both the concepts of congressional abrogation and state waiver, clarifying the constitutional basis on which Congress can make states liable for monetary relief in federal court and by which states may consent to suit without threatening the stability of more general Article III jurisprudence. This approach would also resolve the tension that would otherwise exist between a constitutional rule of state sovereign immunity and a constitutional rule that states provide relief incompatible with the common law doctrine. Although the federal common law of sovereign immunity may recognize similar remedial distinctions, it does so not simply because one or another form of relief is really against the state, but because such forms of relief as the injunction (or even a mandate to return specific property) have features which render them more acceptable modes of providing judicial redress against governmental wrongdoing.

Finally, tumultuous change in the scope of the district courts' jurisdiction or of states' immunity from suit in federal district courts is unlikely to result from overruling the erroneous interpretation of *Hans*. First, numerous issues of congressional intent need to be resolved to find a state subject to district court suit on federal statutory claims. Second, the state court systems will likely provide remedies sufficiently adequate to forestall many

claims for monetary relief based on remedial inadequacy from being successful in the federal courts.

CONCLUSION

Marbury v. Madison proclaimed that the essence of civil liberty, of a government of laws and not of men, was the availability of a judicial remedy for governmental wrongdoing that invaded private legal rights. Against the force of this principle stood a common law tradition of sovereign immunity, a tradition of English law misunderstood in its transposition to the United States, but reinforced by early political battles of the young republic. Although federal separation of powers principles loosely support some of the remedial distinctions drawn under the rubric of sovereign immunity, the articulation of sovereign immunity as a constitutional principle has never been justified by logic as powerful as that of *Marbury*. It cannot be so justified today, especially as applied to the states in their relations to the demands of federal law. Recognizing the federal common law background for this set of doctrines is consistent with our basic constitutional structure and the role of the federal courts therein. And it will permit the gradual evolution of a more focused and candid development of the law of remedies for governmental wrongdoing in the continued struggle to maintain a form of government that can both "control the governed . . . and . . . control itself."⁴⁹⁷

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497. THE FEDERALIST NO. 51, at 322 (J. Madison).