Congress, the Supreme Court, and the Eleventh Amendment: A Comment on the Decisions during the 1988-89 Term

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INTRODUCTION

For the past decade, the eleventh amendment has received constant attention from law professors and judges. Major articles have regularly appeared on the subject by prominent scholars in the most prestigious law reviews.1 The Supreme Court has decided several important eleventh amendment cases during the 1980's.2 In fact, in the 1988-89 Supreme Court Term alone, there were five cases that presented issues concerning the scope and meaning of the eleventh amendment.3

Why has there been so much attention to this constitutional provision that probably few people even know about? First, I suggest that the focus on the eleventh amendment reflects the unsatisfactory state of the law in this

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area. The Supreme Court's desire to protect state sovereignty while still assuring state compliance with the Constitution and federal law has caused it to create many fictions and questionable distinctions. For example, a state government may not be sued in federal court, but its officers acting in their official capacity may be sued for injunctive relief, though not for money damages. Suits against state officers that cause the state to spend money are allowed if the relief is prospective, but not if it is retroactive. State officers can be sued in federal court on federal claims, but pendent state law causes of action are not permitted. The eleventh amendment is treated as a restriction on subject matter jurisdiction, but nonetheless a state can waive its immunity from suit. Together these rulings have created a set of legal doctrines that are regarded by virtually everyone as unsatisfactory. Numerous scholars have offered solutions and the Court continues to struggle with the eleventh amendment.

Second, the attention paid to the eleventh amendment is a product of its relationship to major themes of constitutional law. The eleventh amendment bears directly on federalism, separation of powers, and the protection of fundamental rights. Specifically, because it determines the ability of federal courts to hear suits against state governments, the eleventh amendment is crucial to defining the content of American federalism. Moreover, as the decisions from this Term illustrate, the question of congressional power to override the eleventh amendment raises issues concerning the allocation of power between Congress, the federal courts, and the states. Perhaps most important, central to the eleventh amendment decisions is the tension between safeguarding state sovereignty and assuring state compliance with the Con-

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4. See, e.g., Will v. Michigan Dep't of State Police, 109 S. Ct. 2304, 2311 n.10 (1989) (describing distinction between suits for injunctions and damages when state officers are sued in their official capacity), infra notes 61-67 and accompanying text; see also, Ex parte Young, 209 U.S. 123 (1908) (permitting suits against state officers for injunctive relief).

5. See, e.g., Edelman v. Jordan, 415 U.S. 651, 664-65 (1974) (articulating the distinction between retroactive and prospective relief). In Edelman, the Court held that the eleventh amendment bars an award of retroactive benefits for welfare and disability payments wrongfully withheld by the state because a judgment that state payment rules were inconsistent with federal regulations may only be given prospective effect. Id. More recently, the Supreme Court has stated,

Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant. . . . On the other hand, relief that serves directly to bring an end to a present violation of federal law is not barred by the eleventh amendment even though accompanied by a substantial ancillary effect on the state treasury.


stitution. As Professors Low and Jeffries explain: "The stakes involved in interpreting the Eleventh Amendment are very high. Virtually the entire class of modern civil rights litigation plausibly might be barred by an expansive reading of the immunity of the states from suit in federal court." 8

In this Article, I wish to examine the Supreme Court's most recent eleventh amendment decisions from both of these perspectives: considering the extent to which they added clarity or exacerbated the muddle, and discussing the impact of the decisions on underlying themes of constitutional law. Specifically, the analysis is divided into three Parts. Part I briefly summarizes the recent decisions and describes how they altered the law of the eleventh amendment. Part II suggests that the cases have added yet more confusion to an already incoherent set of doctrines; in fact, because of an unusual compromise the Court announced a rule that is inconsistent with the views of at least eight of the Justices. Finally, Part III argues that this Term's decisions have troubling implications for both separation of powers and federalism. Ultimately, the issue in interpreting the eleventh amendment is the proper balance between state sovereign immunity and constitutional enforcement by federal courts. However, the approach of both the majority and the dissent obscures this question and thus frustrates coherent analysis.

Thus, this Article has a limited scope. 9 The focus is on the Court's recent decisions and how they illuminate the larger difficulties in the law concerning the eleventh amendment. The legal principles in this area are simply a mess. I do not seek to solve the problem, but rather, partially explain how it got this way. Any solution, be it allowing more state liability or less, depends on altering the Court's method of interpreting the eleventh amendment. Analysis based on parsing the textual provision and discerning its Framers' intent is unhelpful; instead, eleventh amendment doctrines must rest on explicit value judgments about the proper place of sovereign immunity and constitutional enforcement in the American system of government.

I. THE RECENT DECISIONS AND THEIR LIKELY IMPACT

The eleventh amendment states: "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." 10 Although the text of the provision refers only to suits against a state by citizens of other states or countries, the Supreme Court has held since Hans v. Louisiana that the eleventh amendment also precludes a state from being sued by its own

10. U.S. Const. amend. XI.
citizens in federal court. Many scholars have criticized *Hans* and argued that it should be overruled because it is inconsistent with the text and history surrounding the adoption of the eleventh amendment. Other professors have defended the decision. In 1987, in *Welch v. Texas Department of Highways & Public Transportation*, the Supreme Court split four-to-four on the question of whether *Hans* should be overruled. Justice Scalia, the ninth Justice participating in the decision, voted that the eleventh amendment barred the action in *Welch*, but did not reach the question of whether *Hans* should be reversed because the issue had neither been briefed nor argued.

The five cases presenting eleventh amendment issues to the Supreme Court during the 1988-89 Term all involved the question of Congress' ability to impose liability on state governments. In 1976, in *Fitzpatrick v. Bitzer*, the Court held that states could be sued in federal court, even for money damages, pursuant to federal laws that had been adopted under section 5 of the fourteenth amendment. *Fitzpatrick* involved a suit brought directly against a state government for violating Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination. The Supreme Court reasoned that the fourteenth amendment was intended to limit state sovereignty, and therefore Congressional legislation under the fourteenth amendment can authorize suits directly against the states in federal court.

Subsequently, in *Hutto v. Finney*, the Supreme Court held that states may be sued for attorneys' fees pursuant to section 1988 of the federal code, a statute allowing successful plaintiffs in civil rights cases to recover

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11. 134 U.S. 1 (1890). In *Hans*, the Court held that a state cannot, without its consent, be sued in a federal court, even in cases where jurisdiction would be based upon a federal question. The issue whether *Hans* should be overruled continues to spark controversy among Supreme Court Justices. See infra notes 68-71 and accompanying text.

12. See, e.g., *Fletcher*, supra note 1, at 1087-91 (because *Hans*, if read broadly, would have made implementing the Civil War amendments virtually impossible, the Supreme Court adapted the legal fiction that distinguished between a state and its officers to the eleventh amendment); *Shapiro*, supra note 1, at 70 ("the rationale of [Hans], if not the result, should be regarded as an unforced error—a choice that was neither required nor fruitful. Had it not been made, the doctrine of state sovereign immunity could far more readily have yielded to federal interests when those interests properly required action by the federal courts.") (footnote omitted).

13. See, e.g., W. Marshall, infra note 1, at 1375 (arguing that proponents of the diversity theory have not established "proper historical understanding" that would subject states to "federal question suits for monetary relief in federal court.").

14. 483 U.S. 468 (1987) (Justice Powell announced the judgment of the Court, and Chief Justice Rehnquist and Justices White and O'Connor concurred in his opinion); *id.* at 519-21, 519 n.19 (Brennan, J., dissenting) (arguing that *Hans* should be overruled). Justice Brennan was joined by Justices Marshall, Blackmun and Stevens. *Id.* at 496.

15. 483 U.S. at 495-96 (Scalia, J., concurring in part and in the judgment).


18. 427 U.S. at 456 (quoting section 5 of the fourteenth amendment, which authorizes Congress to enforce it "by appropriate legislation"). The Court stated, "the 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.* (citation omitted).

19. 437 U.S. 678 (1978). The issue in *Hutto* concerned the award of attorney's fees in
attorneys' fees. Despite the absence of an explicit authorization of suits against states in that statute, the Court said attorneys' fees against states are appropriate because of clear congressional intent to include states and because of statutory language that seemingly allows attorneys' fees to be awarded against all defendants.21 In *Quern v. Jordan*22 and in *Atascadero State Hospital v. Scanlon,*23 however, the Supreme Court limited the circumstances in which federal statutes may authorize relief against state governments in federal court. In *Quern,* the Supreme Court held that states cannot be sued in federal court pursuant to section 1983 of the federal code.24

litigation involving prisoners' civil rights. See id. at 681-85 & nn.2-7 (describing thirteen years of litigation and the "dark and evil world completely alien to the free world," Holt v. Sarver, 309 F. Supp. 362, 381 (E.D. Ark. 1970), underlying claims that prison conditions violated the eighth and fourteenth amendments).


In *Hutto,* the Supreme Court held that the district court's award of attorney's fees was ancillary to the prospective relief afforded by an injunction as well as analogous to fines which enforce a civil contempt ruling. 437 U.S. at 689-93. Moreover, the district court's award of attorney's fees was firmly grounded on the defendants' bad faith. Id. at 689 n.14 (citing Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) and Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)). The Supreme Court, noting that the Eighth Circuit's award of fees for the appeal was grounded on 42 U.S.C. § 1988, stated that "[t]he Act . . . applies to 'any' action brought to enforce certain civil rights laws." *Hutto,* 437 U.S. at 694 (quoting 42 U.S.C. § 1988 (1982)). In addition, the Act contains no exceptions for the states. "[T]he Act primarily applies to laws passed specifically to restrain state action." Id. (citing 42 U.S.C. § 1983 (1982)). Moreover, the legislative history was "plain." *Id.* "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. Fitzpatrick v. Bitzer [427 U.S. 445 (1976)]." H.R. REP. No. 1558, 94th Cong., 2d Sess. at 7, n.14 (1976), quoted in *Hutto,* 437 U.S. at 694.

21. 437 U.S. 678, 693-98. In response to the state's argument that Congress had not enacted sufficiently express statutory language, the Court stated that the award of fees was "'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity." *Id.* at 695 (quoting 42 U.S.C. § 1988 (1976)). The state's argument failed, and the Court concluded, "'[i]t is much too late to single out attorney's fees as the one kind of litigation cost whose recovery may not be authorized by Congress without an express statutory waiver of the States' immunity.'" *Id.* at 698.

22. 440 U.S. 332 (1979). *Quern* involved later proceedings after Edelman v. Jordan, 415 U.S. 651 (1974), *supra* note 5 and accompanying text. On remand in *Edelman,* the district court ordered state welfare officials to send notices to recipients indicating that they had been wrongfully denied benefits to be sent with a form to be used to initiate an administrative appeal for benefits. See Jordan v. Trainor, 405 F. Supp. 802 (N.D. Ill. 1975). The Court of Appeals for the Seventh Circuit reversed because the form of the notice would have violated the eleventh amendment in that it purported to assert claims against the state treasury. See Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977). At issue in the Supreme Court in *Quern* was the court of appeal's alternative notice which would have simply informed "'class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue.'" *Quern,* 440 U.S. at 349.


Section 1983 is the basic federal civil rights law, creating an action against those acting under color of state law who violate the Constitution or federal laws. The Court, in *Quern*, ruled that although section 1983 was adopted under section 5 of the fourteenth amendment, there was insufficient indication of an express congressional desire to make state governments liable under that statute.\(^{25}\)

In *Atascadero*, the Court refused to allow suits against states pursuant to the Rehabilitation Act of 1973.\(^{26}\) There was strong evidence from the legislative history that Congress intended for the states to be liable under the Act. Nonetheless, the Court, in a five-to-four decision, refused to allow a suit against the state of California on the grounds that Congress had not been sufficiently explicit concerning its desire to make states liable in federal court.\(^{27}\) The Court stated: “We . . . affirm that Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”\(^{28}\)

Following these decisions, several questions remained about the relationship of Congress’ power and the eleventh amendment.\(^{29}\) For example, which statutes adopted under section 5 of the fourteenth amendment are sufficiently specific in creating state liability so as to override the eleventh amendment? Furthermore, may Congress by express language override the eleventh amendment only based on the fourteenth amendment or may it do so based on any of its legislative powers?

The Supreme Court’s five decisions concerning the eleventh amendment during the 1988-89 Term partially resolved these questions. Perhaps the most important of the cases was *Pennsylvania v. Union Gas*.\(^{30}\) The specific issue before the Supreme Court was whether states could be sued for monetary damages in federal court pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"),\(^{31}\) as

25. 440 U.S. at 345 (text of section 1983 lacks explicit and clear indication of intent “to sweep away the immunity of the States” and the legislative history is not focused upon state liability nor upon congressional consideration of, and decision regarding, such liability).


27. 473 U.S. at 242. “States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.” *Id.* at 246.

28. *Id.* at 242.

29. These questions are discussed in greater detail in E. CHEMERINSKY, supra note 9, at 365-66 (also questioning whether suits brought directly under the fourteenth amendment override the eleventh amendment).

30. 109 S. Ct. 2273 (1989). For a discussion of the importance of the case, prior to the Supreme Court’s decision, see Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 601-02 (1989) (*Union Gas* involves some of the most debated and intellectually compromised doctrine under the Constitution, interpreting the eleventh amendment).

amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). To decide this issue, the Supreme Court needed to resolve two questions: (1) does the statute authorize suits against states in federal court; and, (2) if so, does Congress, when legislating pursuant to the commerce clause, have the authority to create such state government liability?

The Court answered both questions affirmatively. However, the Court did so without a majority opinion and was very splintered. Four Justices—Justices Brennan, Marshall, Blackmun, and Stevens—concluded that the statute permits suits against states and that Congress may authorize such litigation under its commerce power. Not surprisingly, these are the same four Justices who narrowly interpret the eleventh amendment as preventing federal court suits against states when jurisdiction is based on diversity of citizenship. These Justices do not believe that the eleventh amendment precludes suits against states when jurisdiction rests on a federal question.

More specifically, in Union Gas, these Justices said that CERCLA expressly defines "persons" to include states, and other parts of the statute explicitly exclude states where Congress wanted to protect them from liability. As such, the Justices held that "the language of CERCLA as amended by SARA clearly evinces an intent to hold States liable in damages in federal court."

Three Justices—Chief Justice Rehnquist, and Justices O'Connor and Kennedy—concluded that CERCLA did not expressly authorize suits against state governments and that even if it did, the federal courts lacked jurisdiction because Congress could not override the eleventh amendment pur-

33. Union Gas, 109 S. Ct. at 2276.
34. Id. at 2280 (Congress intended to permit suits brought by private citizens against the state under CERCLA). Justice Brennan announced the judgment of the Court and Justices Marshall, Blackmun and Stevens concurred in his opinion.
35. Id. at 2281 (Congress may abrogate states' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution).
36. See, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. at 252-58 (Brennan, J., dissenting) (reliance on the constitutional policy that federal courts ought not to hear suits brought by individuals against states reverses the role of federal courts of interpreting the will of Congress in federal question cases). Justices Blackmun, Marshall, and Stevens joined Justice Brennan's dissent. Id. at 247.
37. Union Gas, 109 S. Ct. at 2278 ("The express inclusion of States within the statute's definition of 'persons,' and the plain statement that States are to be considered 'owners or operators' in all but narrow circumstances, together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA.").
38. Id. at 2280.
39. Id. at 2289 (White, J., concurring in the judgment) (stating that CERCLA did not authorize suits against state governments). Chief Justice Rehnquist and Justices O'Connor and Kennedy agreed with Justice White on the issue of state immunity under CERCLA and SARA. Id.
suant to its commerce power. Justice White agreed with the dissenters that this statute was not sufficiently specific to permit state governments to be sued in federal court. He reasoned that federal courts lacked jurisdiction because CERCLA “did not include an ‘unmistakable’ declaration of abrogation of State immunity.”

However, Justice White stated that he agreed with Justices Brennan, Marshall, Blackmun, and Stevens that Congress has the constitutional power to abrogate the states’ immunity. In a short paragraph, Justice White stated that he concurred in this conclusion although he said, “I do not agree with much of his [Justice Brennan’s] reasoning.” Also, in a footnote, Justice White stated that he believes that Hans should not be overruled.

Justice Scalia’s position was exactly the opposite of Justice White’s. Justice Scalia stated that he believes that CERCLA clearly expressed a desire to impose liability on state governments in federal court. However, he forcefully argued that Congress should not be able to authorize suits against states under its commerce power.

Thus, there were five votes that CERCLA permits states to be sued for monetary liabilities in federal court (Justices Brennan, Marshall, Blackmun, Stevens, and Scalia). There also were five votes that Congress, acting pursuant to its commerce authority, can create such federal court jurisdiction (Justices Brennan, Marshall, Blackmun, Stevens, and White). Additionally, there were fives vote to reaffirm Hans v. Louisiana, that the eleventh amendment prevents a state from being sued by its own citizens in federal court (Chief Justice Rehnquist and Justices White, O’Connor, Kennedy, and Scalia).

A second eleventh amendment case decided last Term was Dellmuth v. Muth. The issue in Dellmuth was whether states could be sued in federal court pursuant to the Education of the Handicapped Act, a federal law that assures that handicapped children may receive a free public education appropriate for their needs. The Supreme Court, in a five-to-four decision, ruled that the Act did not authorize suits against state governments in federal court. This time, the majority was comprised of Chief Justice Rehnquist and Justices White, O’Connor, Scalia, and Kennedy.

In Dellmuth, the Court reiterated its statement in Atascadero that “Congress may abrogate the States’ constitutionally secured immunity from suit

40. Id. at 2295 (Scalia, J., concurring in part and dissenting in part) (stating that Congress may not override the eleventh amendment pursuant to its commerce power). Chief Justice Rehnquist and Justices O’Connor and Kennedy agreed with Justice Scalia as to the constitutional issue. Id.
41. 109 S. Ct. at 2290 (White, J., concurring in the judgment) (emphasis in original).
42. Id. at 2295.
43. Id. at 2295 n.8.
44. Id. at 2295 (Scalia, J., concurring in part and dissenting in part).
47. 109 S. Ct. at 2398. Justice Kennedy authored the majority opinion.
in federal court only by making its intention unmistakably clear in the
language of the statute."48 The Court said that "evidence of congressional
intent must be both unequivocal and textual."49 Accordingly, the Court
explained that legislative history is irrelevant and that states could not be
sued under the Education of the Handicapped Act because the statute did
not expressly authorize suits against state governments in federal court. The
dissent argued that Hans should be overruled, but that in any case, the Act
clearly intended that states could be defendants.50

In Hoffman v. Connecticut Department of Income Maintenance51 the
Court, again by the same five-to-four margin, held that states could not be
sued in federal court pursuant to the provisions of the Bankruptcy Code.
Section 106(c) of the Bankruptcy Code provides that "notwithstanding any
assertion of sovereign immunity" any provision of the Code "that contains
‘creditor,’ ‘entity,’ or ‘governmental unit,’ applies to governmental
units."52 Moreover, it states that "a determination by the court of an issue arising
under such a provision binds governmental units."53

Despite this language, the Supreme Court held that the statutory provisions
did not satisfy the standard of an "unmistakably clear" override of sovereign
immunity.44 The Court interpreted the law as allowing declaratory or in-
junctive relief against state governments in federal courts, but not money
damages.55 Moreover, the Court concluded that the legislative history of the
Code was irrelevant because only language in the statute’s text matters in
determining whether there is an override of eleventh amendment immunity.
The four dissenting Justices maintained that the Code was sufficiently specific
in expressing a desire to create state liability in federal court.56

In Missouri v. Jenkins,57 the Court ruled, five-to-three with Justice Mar-
shall not participating, that the eleventh amendment does not prohibit en-
hancement of a fee award against a state to compensate for delay in
payment.58 In so doing, the Court reaffirmed Hutto v. Finney59 that the

48. Id. at 2400 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).
49. Id. at 2401.
50. Id. at 2403 (Brennan, J., dissenting). Justices Marshall, Blackmun and Stevens joined
Justice Brennan’s dissent. Id.
51. 109 S. Ct. 2818 (1989). Justice White announced the judgment of the Court in an
opinion in which Chief Justice Rehnquist and Justices O’Connor and Kennedy concurred. Id.
at 2821. Justice Scalia separately concurred in the judgment. Id. at 2824. Justice Marshall
dissent and was joined by Justices Brennan, Blackmun and Stevens. Id. at 2824.
53. Id. § 106(c)(2).
234, 242 (1985)).
55. Id. at 2823.
56. Id. at 2824 (Marshall, J., dissenting). Justices Brennan, Blackmun and Stevens joined
in the dissent. Id.
58. In addition to the constitutional issue, the state of Missouri argued that the services of
eleventh amendment does not bar recovery of attorneys' fees from a state pursuant to a successful civil rights action. Not surprisingly, Justices O'Connor and Scalia and Chief Justice Rehnquist dissented as to the eleventh amendment issue, contending that such relief against state governments is barred by the eleventh amendment.\textsuperscript{60}

In the fifth and final decision, \textit{Will v. Michigan Department of State Police},\textsuperscript{61} the Court relied on eleventh amendment principles, even though no eleventh amendment issue was presented. The specific question in \textit{Will} was whether states, or state officials acting in their official capacity, could be sued in \textit{state} courts pursuant to 42 U.S.C. § 1983.\textsuperscript{62} Previously, in \textit{Quern v. Jordan},\textsuperscript{63} the Court ruled that section 1983 does not override the eleventh amendment. While \textit{Quern} barred section 1983 litigation against states in federal court, lower courts were divided as to whether suits were permissible in state courts that have concurrent jurisdiction to hear section 1983 claims.\textsuperscript{64}

The eleventh amendment only bars litigation in federal courts; it has no legal effect on state court jurisdiction. Nonetheless, the Court said that "in deciphering congressional intent as to the scope of § 1983, the scope of the Eleventh Amendment is a consideration, and we decline to adopt a reading of § 1983 that disregards it."\textsuperscript{65} The Court concluded that the eleventh amendment reflects and embodies state sovereign immunity. Accordingly, Congress can create state government liability—even in state courts—only

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\bibitem{59} 437 U.S. 678 (1978); \textit{see supra} notes 19-21 and accompanying text.
\bibitem{60} 109 S. Ct. at 2472 (O'Connor, J., concurring in part and dissenting in part). Justice Scalia joined Justice O'Connor's opinion, and Chief Justice Rehnquist dissented as to both the constitutional and the statutory issues. \textit{Id. at} 2475.
\bibitem{61} 109 S. Ct. 2304 (1989).
\bibitem{62} \textit{Id. at} 2305.
\bibitem{63} 440 U.S. 332 (1979); \textit{see supra} note 25 and accompanying text.
\bibitem{64} The Supreme Court cited this conflicting authority and the many courts ruling on each side of this issue. \textit{See Will}, 109 S. Ct. at 2306 n.3. \textit{Compare} Harris v. Missouri Court of Appeals, 787 F.2d 427, 429 (8th Cir. 1986) (only local government units considered not to be part of the state are unprotected by eleventh amendment), \textit{cert. denied}, 479 U.S. 851 (1986); Toledo, P. & W. R.R. v. Illinois, Dep't of Trans., 744 F.2d 1296, 1298 (7th Cir. 1984) ("State agencies are not 'persons' for purposes of the Civil Rights Act." (quoting Edelberg v. Illinois Racing Bd., 540 F.2d 279, 281 n.2 (7th Cir. 1976)), \textit{cert. denied}, 470 U.S. 1051 (1985); Ruiz v. Estelle, 679 F.2d 1115, 1137 (5th Cir. 1982) (Congress did not intend to override states' immunity), \textit{modified on other grounds}, 688 F.2d 266 (5th Cir. 1982), \textit{cert. denied}, 460 U.S. 1042 (1983); Aubuchon v. Missouri, 631 F.2d 581, 582 (8th Cir. 1980) (per curiam) ("Title 42 U.S.C. § 1983 is directed at individuals acting under color of state law, not individual states.") (emphasis in original), \textit{cert. denied}, 450 U.S. 915 (1981) \textit{with} Della Grotta v. Rhode Island, 781 F.2d 343, 349 (1st Cir. 1986) (state is a "person" within meaning of section 1983 and may be subject to same liability as municipalities and local governmental units); Gay Student Servs. v. Texas A & M Univ., 612 F.2d 160, 163-64 (5th Cir. 1980) (college does not have absolute section 1983 immunity), \textit{cert. denied}, 449 U.S. 1034 (1980).
\bibitem{65} \textit{Will}, 109 S. Ct. at 2309.
\end{thebibliography}
by clearly expressing a desire to impose such costs on the states. Because section 1983 does not explicitly say that states can be sued in state court, no such suits are allowed. Will, again, was a five-to-four decision, with Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy comprising the majority.

What does all of this mean to the law of the eleventh amendment? First, it now is clearly settled that five members of the Court are unwilling to overrule Hans v. Louisiana. Throughout this decade, four Justices and many scholars have argued that Hans should be overruled and that the eleventh amendment should be understood only as a restriction on suits grounded solely in diversity theory. If this view was adopted, then states could be sued in federal court under any federal claims. For example, there would be no bar to suits against states for alleged constitutional violations. After the Court was evenly divided in Welch, there seemed a real possibility that Hans might be overturned. But the recent decisions resolve this question and reaffirm that the eleventh amendment precludes suits against a state by its own citizens. In fact, Will reveals that the Court will aggressively protect state governments from liability under federal law.

Second, the decisions during the 1988-89 Term establish that Congress can likely override the eleventh amendment pursuant to any of its powers. If Congress desires to eliminate state sovereign immunity, it is not limited to acting under section 5 of the fourteenth amendment. Although the Court has authorized suits only pursuant to Congress' commerce power, the Court's reasoning justifies permitting Congress to override the eleventh amendment pursuant to any of its constitutional powers.

Third, except when it is acting under Section 5 of the fourteenth amendment, Congress can create state government liability only by an explicit,

66. Id. at 2310.
67. Id. at 2305 (Justice White delivered the opinion of the Court); id. at 2312 (Brennan, J., dissenting). Justices Marshall, Blackmun and Stevens joined the dissent. Id.
69. See, e.g., Fletcher, supra note 1, at 1087-91 (arguing for diversity theory of the eleventh amendment); Shapiro, supra note 1, at 70 (arguing in favor of overruling Hans); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 252-58 (1985) (Brennan, J., dissenting) (effect of Court's doctrine is to insulate states that violate federal law from the consequences of their conduct).
70. See E. CHEMERINSKY, supra note 9, at 367-68 (discussing future of the eleventh amendment in light of split on the Court).
72. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2281 (1989) (reading Court's prior decisions as having recognized congressional "authority to abrogate States' immunity from suit when legislating pursuant to the plenary powers granted it by the Constitution."). The plurality opinion relied on the commerce clause's displacement of state power. Id. at 2284. It also relied on the "conclusion that, in approving the commerce power, the States consented to suits against them based on congressionally created causes of action." Id. at 2285.
clear, unmistakable statement in the text of the law.\footnote{73} The legislative history and even the law's overall structure are irrelevant; the sole question is whether the text expressly authorizes such suits. The rejection of state liability in \textit{Dellmuth} and \textit{Hoffman}, despite strong support for federal court jurisdiction in the statutes' text and legislative history, indicate that only a very explicit, truly unmistakable statutory provision warrants state liability in federal court. However, one reaffirmation of \textit{Hutto} which held that section 1988 overrides the eleventh amendment without a clear statement in its text, reveals that a different standard is used for laws adopted under section 5 of the fourteenth amendment. For laws enacted pursuant to this provision, an expression of intent in the text of the legislative history is sufficient.

\section*{II. Congress And The Eleventh Amendment: Do The Rules Make Sense?}

Many scholars have criticized other aspects of eleventh amendment law as being based on fictions and indefensible distinctions.\footnote{74} I contend that the recent decisions only exacerbate the confusion and the unsatisfactory state of the law in this area. The Court has defined Congress' power to override the eleventh amendment in a way that makes little sense. Regardless of one's ideology, the Court's compromises have created legal doctrines that are undesirable. Specifically, I contend that the "clear statement rule" that is the core of the current law concerning congressional authority to abrogate the eleventh amendment is unjustified in theory and is applied in an unduly restrictive manner.

\subsection*{A. Is the "Clear Statement Rule" Justified?}

First, the current law concerning congressional authority to create state liability is inconsistent with the views of at least eight of the Justices. As described above, the Court repeatedly held that Congress may override the eleventh amendment only if it does so in "unmistakably clear" language in the text of a statute.\footnote{75} Yet, this principle is at odds with the position of almost every member of the Court.

\footnote{73. For a discussion of the "clear statement rule" in the 1988-89 Term cases, see notes 30-67 and accompanying text.}

\footnote{74. See, e.g., \textit{Jackson}, supra note 1, at 3-4, 13 & n.56 (the concept of state immunity contradicts other fundamental constitutional principles); \textit{Massey}, supra note 1, at 69 ("doctrines and fictions" serve to protect against state infringement upon federal rights); \textit{Shapiro}, supra note 1, at 66-71, 69 (rather than deciding \textit{Hans} as it did, the Supreme Court, "[w]ith ample justification in history and precedent . . . could have held the eleventh amendment applicable only when jurisdiction was based on the identity of the parties and not when the claim was grounded on federal law").}

Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy believe that Congress should not be able to override eleventh amendment immunity, except for laws adopted pursuant to section 5 of the fourteenth amendment. In other words, these Justices maintain that no matter how explicit the statutory provision, Congress should not be able to create state liability in federal court under constitutional provisions such as the commerce clause and the bankruptcy power.

Justices Brennan, Marshall, Blackmun, and Stevens believe that the eleventh amendment does not bar suits against states when jurisdiction is based on a federal question; the provision only applies to bar suits when jurisdiction is based solely on diversity of citizenship. These Justices have explained that “[i]f federal jurisdiction is based on the existence of a federal question or some other clause of Article III, however, the Eleventh Amendment has no relevance.” The Justices reason that the text of the eleventh amendment only refers to suits by citizens of other states and countries and that the drafters' intent was to modify the clause in article III that authorized diversity suits against state governments. Therefore, for Justices Brennan, Marshall, Blackmun, and Stevens, states may be sued in federal court any time there is federal question jurisdiction. There is no need for a special congressional declaration of a desire to create state liability.

Hence, eight Justices reject the clear statement rule. For the conservative members of the Court, no statutory provision (except for those enacted under section 5 of the fourteenth amendment), regardless of its clarity, can override the eleventh amendment. For the more liberal Justices, any federal question is sufficient to create federal court jurisdiction over claims against states, regardless of whether the statute explicitly authorizes suits against state governments.

At most then, the clear statement rule reflects Justice White's view and has come to be the current law through an unusual compromise. Yet, Justice White has avoided explaining his position. In Pennsylvania v. Union Gas Co. he cryptically said that he agreed with Justice Brennan's conclusion that laws adopted under the commerce power could override the eleventh amendment, but he disagreed with most of Justice Brennan's reasoning. In both

76. See Union Gas Co., 109 S. Ct. at 2299-302 (Scalia, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices O'Connor and Kennedy joined Justice Scalia's opinion as to the constitutional issue. Id. at 2295.


78. Id. at 247-302 (Brennan, J., dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 497 (1987) (Brennan, J., dissenting) (the eleventh “[a]mendment bars only actions against a State by citizens of another State or of a foreign nation.”). See also Fletcher, supra note 1, at 1034 (view of the eleventh amendment as a “form of jurisdictional bar” is mistaken); Gibbons, supra note 1, at 1894 (eleventh amendment nothing more than “a narrow and technical redefinition of the two jurisdictional clauses of article III that grant jurisdiction over suits between a state and another state’s citizens or foreign citizens.”); L. Marshall, supra note 1, at 1342 (arguing for diversity theory of the eleventh amendment).

79. 109 S. Ct. 2289, 2295 (White, J., concurring in the judgment).
Hoffman and Union Gas, Justice White applied the clear statement rule, citing to earlier cases that briefly explained that out of respect for state sovereignty Congress can authorize suits against states only in "unmistakably clear language."81

But a crucial step is missing in this argument: why does respect for state sovereignty justify the clear statement rule? The answer to this question is not obvious or intuitive because no matter how great the concern for state sovereignty, the clear statement rule is inconsistent with the most prominent theories of the eleventh amendment. At this point, the two most widely accepted accounts of the amendment are the sovereign immunity and the diversity theories. The clear statement rule for state liability is at odds with both of these theories.

One theory is that sovereign immunity creates a constitutional restriction on all types of federal court subject matter jurisdiction, precluding federal courts from hearing any suits against state governments. By this view, the eleventh amendment is part of a broader constitutional limitation on federal court jurisdiction created by sovereign immunity. The state governments' sovereign immunity pre-existed the Constitution and survived the adoption of article III and the eleventh amendment. The eleventh amendment and Hans v. Louisiana are reflections of the states' immunity to suits. The Supreme Court has declared that the eleventh amendment "affirm[s] that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III."82

But if sovereign immunity, and the eleventh amendment, are constitutional limits on federal court jurisdiction, then Congressional statutes cannot over-ride the Constitution and authorize suits against states. The clear statement rule is inconsistent with the sovereign immunity theory because any congressional attempt to impose liability on states—no matter how explicitly stated—is unconstitutional. Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, recognized this when he wrote in Pennsylvania v. Union Gas Co.:

[Instead of cleaning up the allegedly muddled Eleventh Amendment jurisprudence produced by Hans, the Court leaves that in place, and adds to the clutter the astounding principle that Article III limitations can be overcome by simply exercising Article I powers. It is an unstable victory as well, since that principle is too much at war with itself to endure.]

An alternative view of the eleventh amendment treats it as restricting only the diversity jurisdiction of the federal courts.84 As explained above, under

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83. 109 S. Ct. 2273, 2303 (Scalia J., concurring in part and dissenting in part).
84. See, e.g., Fletcher, supra note 1, at 1130 ("adopters of the amendment had the more
this theory, federal courts have jurisdiction to hear suits against state governments when there is federal question jurisdiction. Because the eleventh amendment is seen as barring only suits when jurisdiction is based solely on diversity of citizenship, there is no need for a clear statement in order for federal courts to hear suits against state governments.

These are certainly not the only theories of the eleventh amendment. Justice White could draw on alternative explanations in defending the clear statement rule. For example, Professors John Nowak and Lawrence Tribe wrote articles contending that the eleventh amendment is a limit on the federal judiciary's power, not on Congress' authority. Both argue that questions of federalism are best resolved through the political process; therefore, Congress should have authority to balance federal and state interests and, where necessary, create state liability in federal court. Alternatively, Professors Vicki Jackson and Martha Field have written articles contending that the eleventh amendment should be understood as reflecting a common law principle of sovereign immunity that can be overridden by statutes.

But the point is that the clear statement rule is inconsistent with the theories endorsed by eight of the current Justices and Justice White has not defended it in terms of other accounts of the eleventh amendment. It is not that a defense is impossible, just that it has not yet been provided. This omission is particularly troubling because the clear statement rule is the current law and the justification for it matters in defining other aspects of eleventh amendment law. As the deciding vote on an important and deeply

modest purpose of requiring that the state-citizen diversity clause of article III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen.

85. See supra text accompanying notes 77-78.


87. For a criticism of the Nowak and Tribe positions, see Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. PA. L. REV. 1203, 1260 (1978) (Nowak and Tribe "show nothing in either the language or the history of the amendment" to support a dichotomy between judicial and legislative power).

88. See Jackson, supra note 1, at 6, 75-84 (state sovereign immunity not derived from Constitution but is part of federal common law, subject to Congressional application); Field, supra note 87, at 1261-78 (correct historical interpretation is that sovereign immunity is common law doctrine rather than constitutionally required, subject to congressional modification, as well as development by federal courts with respect for balance between federal and state power). Professor Field concluded: "Surely it is preferable to arrive directly at these results by following the theory of the eleventh amendment allowing modification of sovereign immunity by usual common law processes, than to overread and underread the eleventh amendment's language as the Court's own approach has forced it to do." Id. at 1280.
contested constitutional question, Justice White had the responsibility to provide some inkling as to his reasoning and views.

**B. Has the "Clear Statement Rule" Been Applied in a Sensible Fashion?**

On its own terms, putting aside the question of whether it is theoretically justified or reflects the Justices' views, the clear statement rule followed in eleventh amendment cases is a unique interpretive canon. In fact, it is one that makes little jurisprudential sense.

In other constitutional areas, the Court has insisted that Congress provide a "clear statement" before the judiciary would enforce a legislative policy.98 Yet, the clear statement requirement used in eleventh amendment cases is much more demanding. Justice Brennan explained that "[w]here the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other situation."99 There is a "uniquely daunting requirement of clarity in Eleventh Amendment cases."99

The clear statement rule used in eleventh amendment cases is unique because of the Court's unwillingness to interpret statutes based on their overall structure or legislative history. Only explicit language in the statute is sufficient. However, even when such language exists, the Court often interprets it as inadequate to authorize suits against state governments.

For example, in *Hoffman v. Connecticut Department of Income Maintenance,*92 the Court considered a statute that authorized suits against states in unmistakable terms. Section 106(c) of the Bankruptcy Code states that

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89. See, e.g., *Pennhurst State School & Hosp. v. Halderman,* 451 U.S. 1, 24 (1981) (in holding that Congress did not, in section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act of 1975 (codified as amended at 42 U.S.C. § 6000 (1976 & Supp. III 1979)), impose an obligation on the states to spend state funds to provide specific types of treatment as a condition of receiving federal funds, the Court said, "Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds."), *later proceedings, Pennhurst,* 465 U.S. 89 (1984) (eleventh amendment bars pendent state law claims against state officers in federal court); *Johnson v. Robison,* 415 U.S. 361, 366-74 (1974). In holding that 38 U.S.C. § 211(a) (1970), which prohibits judicial review of decisions of Administrator of Veterans' Affairs, does not bar federal court review of constitutional challenge to veterans' benefits legislation, the Court stated, "neither the text nor the scant legislative history of § 211(a) provides the 'clear and convincing' evidence of congressional intent required by this Court before a statute will be construed to restrict access to judicial review." 415 U.S. at 373-74. *Cf. South Dakota v. Dole,* 483 U.S. 203, 208 (1987). In upholding 23 U.S.C. § 158 (1982 & Supp. I1 1985), which directs the Secretary of Transportation to withhold a percentage of federal highway funds from states allowing persons less than twenty-one years of age to purchase alcohol, the Court stated, "[t]he conditions upon which States receive the funds . . . could not be more clearly stated by Congress." *Id.*


91. *Id.* at 2314 (Brennan, J., dissenting).

"notwithstanding any assertion of sovereign immunity," any Code provision referring to "creditor," "entity," or "governmental unit," applies to the states. The Code expressly stated that states were to be bound by the determinations of bankruptcy courts. In fact, the legislative history of the Code contained declarations from members of Congress that they intended to create the "express waiver of sovereign immunity" needed to be effective.

But despite such clear textual language and intent, the Court concluded that the Bankruptcy Code does not authorize suits against states for monetary damages. The Court reasoned that section 106(c) authorizes declaratory and injunctive relief, but not monetary recovery from a state. However, the language of the statute does not draw this distinction. Rather, the Code could not be more explicit in its override of sovereign immunity. Moreover, if there are ambiguities in a statute's language, legislative history is traditionally used in its interpretation. The legislative history of section 106 strongly supports the view that Congress intended to create state liability. But the Court dismissed this legislative history because it believed that only the textual language was relevant in determining whether a statute overrides the eleventh amendment.

Similarly, in Dellmuth v. Muth, the Court refused to allow suits against states in federal court pursuant to the Education of the Handicapped Act, despite statutory language and intent justifying such litigation. The Act creates many obligations on the part of state governments that receive federal funds. Moreover, the Supreme Court has recognized that the Act "confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a

94. 11 U.S.C. § 106(c)(2) (1988) ("a determination by this court of an issue arising under such a provision binds governmental units.").
97. See id. at 2825 (Marshall, J., dissenting).
98. See id. at 2827-28 (Stevens, J., dissenting) (describing the legislative history of section 106).
99. Id. at 2823-24.
100. 109 S. Ct. 2397, 2401-02 (1989).
102. To be eligible for federal funds under the Act, a state must develop and provide for the education of all handicapped children, assure that all applicable requirements of the Act are carried out, and "where a local education authority cannot or will not provide appropriate educational services to the handicapped, the State will do so directly." Dellmuth, 109 S. Ct. at 2403 (Brennan, J., dissenting).
State's compliance with the substantive and procedural goals of the Act.'

The statute expressly authorizes any aggrieved party to bring suit in either federal or state court. Because so much of the statute is directed at state governments, it is likely that the statute's drafters assumed that aggrieved individuals often would be directing their litigation against state governments. In fact, the legislative history contains express declarations of an intent to allow suits against state governments. Again, the majority opinion dismissed the legislative history saying that it was irrelevant to determining whether Congress intended to override the eleventh amendment.

Thus, the Court's approach to congressional statutes is quite unusual in eleventh amendment cases. The Court strains to interpret even clear language, like in Hoffman, as ambiguous. The Court does not consider the overall structure and purpose of the statute in deciding whether Congress intended to abrogate sovereign immunity. For example, in Dellmuth, the statute's repeated imposition of duties on state governments justified the conclusion that state liability was intended. Moreover, the Court eschews a traditional source of guidance in resolving ambiguity, legislative history. In other words, the Court goes out of its way to read statutes as ambiguous in their intent to create state liability. The conclusion of ambiguity by itself precludes abrogation of the eleventh amendment because the Court refuses to use any sources that might resolve the uncertainty in favor of allowing states to be sued.

Nor is it explained why legislative history cannot be used to aid interpretation and resolve ambiguities, like it is in all other areas of statutory construction. The Court's justification is tautological. The Court says that "if Congress' intention is not unmistakably clear, recourse to legislative history will be futile, because by definition the rule . . . will not be met." But this simply says that legislative history is rejected because it is not the text.

The question is: why should the Court not use legislative history as part of its determination of congressional intent, especially when the text is ambiguous? If the Court's true objective is following congressional intent, then it should look to all available evidence. Even if the Court insists on

103. Id. at 2404 (Brennan, J., dissenting) (quoting Honig v. Doe, 484 U.S. 305, 310 (1988) (emphasis in original)).
104. Id. (citing 20 U.S.C. § 1415(e)(2)). See supra note 101.
105. See 109 S. Ct. at 2404 (Brennan, J., dissenting) (quoting Senator Williams, 121 Cong. Rec. 37,415 (1975)) ("it should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled or alleging that a State or local educational agency has erroneously classified a child as a handicapped child.").
106. Id. at 2401. See infra text at note 109.
109. Id. at 2401.
unmistakable expressions of such intent, the Court should be willing to find such clarity on the basis of text, legislative history, and the overall design of the statute. From reading the cases, one gets the cynical impression that the conservative members of the Court want to preclude state liability in federal court and therefore do all they can to interpret the laws to prevent such suits. They consistently interpret the statutes to lack a sufficiently explicit authorization and they refuse to look to the legislative history because of the likelihood that it would allow the litigation against state governments.

III. MAKING SENSE OF THE ELEVENTH AMENDMENT

Ultimately, whether the "clear statement rule" makes sense and whether it is applied in a desirable manner depends on the underlying theory of the eleventh amendment. As explained earlier, from the perspective of the sovereign immunity and diversity theories—held by eight members of the Court—the clear statement rule is indefensible, but alternative theories advanced by academics could be used to justify the approach. Likewise, the degree of clarity required of Congress turns on the theory chosen. The key question is what does the eleventh amendment mean. Not surprisingly, all of the issues concerning the interpretation of the amendment ultimately turn on this question.

For example, a crucial question in applying the eleventh amendment is whether *Hans v. Louisiana* was correct in holding that suits against state governments by their own citizens are barred by the eleventh amendment. This, too, depends on the underlying theory one uses for understanding the eleventh amendment; *Hans* is justified by the sovereign immunity approach, but inconsistent with the diversity theory.

The eleventh amendment, of course, only speaks of suits by citizens of other states or of foreign countries. *Hans*, and its contemporary validation, are based on the notion that the Framers of the Constitution intended that the states would retain their sovereign immunity, even when sued for violating the Constitution. In *Hans*, the Court declared that "the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States."10

10. This question, of course, has been the focus of much scholarship on the eleventh amendment. See, e.g., Fletcher, *supra* note 1, at 1039 ("The [*Hans*] Court was careful to say that the eleventh amendment itself did not require [the] result" of barring suit by a state's citizen against the state); L. Marshall, *supra* note 1, at 1343 ("Like *Hans*, both the diversity and the congressional abrogation theories are thoroughly unfaithful to the essentially unambiguous dictates of the [eleventh] amendment's language.") (footnote omitted); Shapiro, *supra* note 1, at 70 ("the rationale of [*Hans*], if not the result, should be regarded as an unforced error—a choice that was neither required nor fruitful.") (footnote omitted). *Cf.* W. Marshall, *supra* note 1, at 1375 (diversity theorists' historical analysis is inadequate basis for overruling *Hans*).

In *Union Gas*, Justice Scalia wrote of "a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted." In other words, the Court justifies its theory and its result entirely based on historical interpretation.

But this means that principles nowhere mentioned in the Constitution supersede even textual provisions. For example, the position taken by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy is that state sovereign immunity limits congressional powers under article I of the Constitution and restricts judicial power under article III.

At minimum, to say that a nontextual principle is of greater significance than the text seems at odds with the supremacy clause of article VI, that declares the Constitution to be the supreme law of the land. Moreover, this position is based on the assumption that the Framers' intent is more important than textual provisions. This is a curious premise when the Court simultaneously insists that in interpreting statutes, legislative intent deserves no weight and only the text matters. In fact, a belief in natural rights and natural law also was part of the "understood background" to the Constitution. If the Framers' unwritten convictions are to be enforced by the Court, then is the Court obligated to implement their belief in natural law as well?

Most importantly, the Court's position that sovereign immunity was intended by the Framers and therefore limits congressional and judicial power has focused the debate over the eleventh amendment in a manner that is, at best, unhelpful and at worst disingenuous. Both the majority and the dissent have centered their attention on lengthy examinations of what the drafters of article III and the eleventh amendment intended with regard to state sovereign immunity. Similarly, scholars supporting the diversity theory

113. *Id.* at 2301. Chief Justice Rehnquist and Justices O'Connor and Kennedy joined in this part of Justice Scalia's opinion. *Id.* at 2295.
114. The Court implicitly is drawing a distinction between interpreting the Constitution and statutes, with intent mattering for the former, but not the latter. At the very least, this is a difference that needs to be acknowledged and defended.
115. See, e.g., Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149, 153 (1928) (legality and supremacy of the Constitution are based on "the belief in a law superior to the will of human governors."); Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885 (1985) (authors of the Constitution were influenced by the British Protestant belief that the Bible's text was the only legitimate law and that human interpretation of it corrupted its "true" meaning, combined with the Enlightenment's general disdain for obscure, strictly-enforced legal rules); Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1134 (1987) ("[b]y the 1780s . . . the 'Constitution' of an American state consisted of its fundamental law (both positive and natural), the inherent and inalienable rights of man . . . and the . . . governmental mixture that would best protect and preserve the fundamental law and natural rights.").
116. See Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2296-2302 (1989) (Scalia, J., concurring in part and dissenting in part) (concluding that the eleventh amendment was not
largely attempt to defend this view based on the text and the Framers' intent, while academics who support the Court's position attempt to establish it on the same basis. In other words, the crucial underlying issue of what theory best explains the eleventh amendment is debated almost entirely in originalist terms of the text and the Framers' intent.

But this begs the question as to whether the Framers' intent should control constitutional interpretation. At the very least, an impressive body of literature over the past decade has challenged such an approach to constitutional law. For example, scholars have argued that originalist interpretation lacks a normative justification and that it self-destructs because the Framers did not intend that their views would control future interpretation. Furthermore, scholars have argued that Framers' intent does not exist in any meaningful sense because of the problems of deciding whose intent matters (the drafters? the Convention or Congress? the ratifiers?) and which of their views count. Undoubtedly, different participants in the process of adopting
The debate over the meaning of the eleventh amendment illustrates this perfectly. Both sides can marshal quotations from the Framers to support their respective positions. All this proves is that the Framers' disagreed on this issue. Even if Framers' intent deserves authoritative status in constitutional interpretation, the question of how the eleventh amendment should be understood cannot be resolved in terms of the Framers' views. The language of the eleventh amendment and the Framers intent can be used to support the sovereign immunity theory or the diversity theory or others as well. All of the attention to history by both sides of the debate seems misplaced and ultimately unhelpful.

In fact, the reliance on the text and the Framers' intent seems disingenuous. Conservative members of the Court think that preserving state sovereign immunity is more important than allowing suits against states in federal court to redress violations of the Constitution and federal laws. Therefore, they use history to support their restrictive interpretation. More liberal Justices have an opposite position, believing that assuring state compliance with federal law is more important than upholding state sovereign immunity. Accordingly, they cite textual and historical evidence to support this position.

The real issue, then, is not what the Framers' may have thought, but rather, what is the appropriate role of state sovereign immunity in the American system of government? Under what circumstances does sovereign immunity justify limiting state government accountability and when should states be liable in federal court? Yet relatively little attention has focused directly on these underlying value questions.

Justice Scalia, in his conclusion in *Union Gas*, remarked that "[t]he Court's holding today can be applauded only by those who think state sovereign immunity so constitutionally insignificant that *Hans* itself might as well be abandoned." But he offered no defense, apart from history, for why state, makes this determination virtually impossible); Brest, *supra* note 119, at 214 ("If the only way a judge could ascertain institutional intent were to count individual intention-votes, her task would be impossible even with respect to a single multimember law-making body, and a fortiori where the assent of several such bodies were required."); Shaman, *supra* note 119, at 267 (there is no basis to hold the intentions of those who drafted the Constitution superior to the intentions of those who ratified it and those who continue to uphold it); Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 509 (1964) (the Constitution was collectively drafted, ratified, and amended by so many people that "to admit the relevance of such a large number of states of mind is to set forth a task virtually impossible to fulfill.").


124. The resolution of these issues is best reserved for later law review articles.

sovereign immunity justifies limiting the power of Congress and the federal courts. Likewise, Justice Stevens remarked in a concurring opinion that “federal courts 'have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution' and laws, . . . and generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy.”

But that was the extent of an attempt to analyze and resolve the conflict between state accountability and state immunity in nonhistorical terms.

I contend that the discussion of the eleventh amendment should shift completely away from historical exegesis and focus entirely on the underlying values of holding the states liable and of preserving the states’ immunity. For example, those, such as myself, who believe that *Hans* should be overruled should defend this position based on the desirability of assuring state compliance with federal law and the inappropriateness of sovereign immunity in the American system of government. Those who wish to defend *Hans* must do so by justifying sovereign immunity and explaining why it deserves primacy over constitutional enforcement.

Ultimately, I believe that only such a candid approach to the eleventh amendment can resolve the doctrinal mess in the area. The fictions and distinctions are criticized by virtually everyone. Hopefully, discussion and decisions focused on the real matters in issue can lead to a more coherent set of principles. For example, if the Justices believe that states should be liable for injunctive relief, but not monetary judgments, they should articulate and defend this. No longer would it be necessary to rely on the fictional distinction created in *Ex parte Young.* Moreover, if the Justices openly expressed and justified this view it could then be debated. By focusing on history, when it is not really history that is in dispute, the Court has directed the discussion in an unproductive and unhelpful manner.

IV. Conclusion

The cases decided this past Term repeatedly saw Justices Brennan, Marshall, Blackmun, and Stevens arguing against state sovereign immunity and interpreting federal statutes to allow suits against state governments in federal court. At the same time, Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy expressed their belief in state sovereign immunity and repeatedly interpreted federal statutes as lacking a sufficiently clear

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126. *Id.* at 2288 (Stevens, J., concurring) (quoting Harris v. Reed, 109 S. Ct. 1038, 1045 (1989) (Stevens, J., concurring)).


statement to abrogate the eleventh amendment.\textsuperscript{129} The consistency in the Justices' positions demonstrates that the actual disagreement on the Court is over the relative importance of state immunity as opposed to state accountability in federal court. After a decade of unsatisfying decisions and unresolvable academic debate about the eleventh amendment, it is time finally to focus on what the dispute is really all about.

\textsuperscript{129} The primary exception was Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2295-96 (1989) (Scalia, J., concurring in part and dissenting in part), where Justice Scalia concluded that the statute was sufficiently specific to justify state liability. \textit{See supra} text accompanying notes 30-44.