When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment

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Legal fiction permeates eleventh amendment analysis. *Ex Parte Young,* which the Supreme Court openly calls a fiction, enables citizens, kept from suing states by the eleventh amendment, to sue state officials and achieve virtually the same result, at least with respect to those claims the Court decides fall within the scope of *Young.* The other major fiction is contained in *Hans v. Louisiana.* *Hans,* which has managed to avoid the stigmatizing label “fiction,” takes constitutional language that refers only to cases brought against a state by a citizen of another state or a foreign country and finds that it bars cases brought by citizens against their own states. Both the majority that supports *Hans* and the minority that would overrule it view the issue it presents as a matter to be determined by historical interpretation. Despite the difficulty of finding an original meaning for the amendment, a difficulty intensified by the likelihood that the relevant constitutional provision is not the amendment at all but Article III, the entire Court, as well as most commentators, continues to comb the historical record attempting to understand...
whether a ban on citizen suits against their own states should lie at the heart of the amendment's meaning.

This Article will take a different approach. In reviewing what the Court has done with eleventh amendment interpretation, particularly some of its recent candid statements, this Article will show that the Court makes its difficult decisions in response to what it perceives as the federal interest at stake. Whether the Court endorses a legal fiction, like *Ex Parte Young*, or sifts the historical evidence and claims to find the intent of the framers of the eleventh amendment, the Court defines federal court jurisdiction according to its conception of federal interest. This Article does not contend that federal interest analysis can accurately predict results, for the justices' assessments of federal interest will vary. An interest strong enough to motivate one Justice to extend federal jurisdiction will seem insufficient to another. Instead, this Article identifies a process underlying the Court's decisionmaking and engages in an eleventh amendment analysis based on federal interests, without resorting to the legal fictions and unanswerable questions of historical intent that currently dominate the written opinions.

Section I of the Article details the existing debate over *Hans*, showing the conflicting historical interpretations and how the members of the Court have justified their interpretations with appeals to present day federal interests. Section II explores several areas of eleventh amendment doctrine, highlighting the federal interest analysis that has gone on thus far and how courts might use it in the future. This section also notes how the complex doctrine that has evolved under *Hans* has avoided *Hans*' harsh potential for keeping important federal cases out of federal court. Thus, the difficult and self-contradictory doctrine that would prompt some to overrule *Hans* actually has led a majority of the Court to tolerate *Hans* and the disturbing complexity it brings to the law.

Recognizing that the Court may choose not to overrule the century-old precedent and its cumbersome doctrinal baggage in the near future, this Article considers a less drastic improvement. Section III draws on many

by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

judicial decisions and the powers of Congress to abrogate the eleventh amendment and suggests that the central distinction in eleventh amendment law should be between cases arising under the federal Constitution and cases arising under nonconstitutional law. Finally, Section IV compares the effects of restructuring current doctrine using a constitutional-nonconstitutional distinction with the effect of overruling Hans. Ultimately, the two proposed changes do not differ as much as one might expect, though the former retains much of the basic framework of existing doctrine. The choice between these two changes should depend on one's understanding of Congress' ability to protect the interests of the states and the meaning of congressional silence on the question of state immunity.

I. Overturning Hans v. Louisiana: The Historical and the Nonhistorical Arguments

A. Historical Interpretation

In recent years, a minority of the Supreme Court, led by Justice Brennan, has gone to war against Hans v. Louisiana,7 the case that lays the groundwork for modern eleventh amendment interpretation. The language of the eleventh amendment refers only to suits brought against a state by a citizen of another state (or a foreign state).8 In Hans the Court made the great extraliteral leap of finding eleventh amendment immunity when citizens sue their own states.9 The Court reasoned that Congress had tailored the amendment to the narrow purpose of overruling the case of Chisholm v. Georgia,10 which held that Article III authorized suits against a state by citizens of another state.11 Under this

7. 134 U.S. 1 (1890).
8. U.S. Const. amend XI.
10. 2 U.S. (2 Dall.) 419 (1793). The amendment refers to both citizen-state diversity and alien-state diversity though the plaintiff in Chisholm was a South Carolina citizen. The fact that the language of the amendment covers cases broader than the one presented in Chisholm may be because the Chisholm plaintiff brought the claim on behalf of a British citizen. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 248, 281 n.32 (1985) (Brennan, J., dissenting).
11. Hans, 134 U.S. at 12. The judicial power described in Article III is not a self-executing grant of jurisdiction. The jurisdiction of lower federal courts depends upon statutory grants of jurisdiction. This being the case, Congress could simply have withdrawn the offending jurisdiction from the lower federal courts. See Sheldon v. Sill, 49 U.S. (8 How.) 441, 448 (1850). Why then did Congress go to the trouble of introducing a constitutional amendment? It may have chosen this route in order to expunge the Supreme Court's original jurisdiction in suits in which a state is a party. See Wolcher, Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations, 69 Calif. L. Rev. 189, 203 n.50 (1981). Indeed, Chisholm was just such a Supreme Court original jurisdiction
interpretation, the amendment takes the form of a rule of construction aimed at the definition of "judicial power" in Article III. Thus, it tells the Court, which in Chisholm had misconstrued Article III, how to go about proper construction in the Chisholm context. Confronted with a different context, the Hans Court would construe Article III properly and, in accordance with the intent of the framers of Article III, respect suit. The Supreme Court's jurisdiction is created by Article III and Congress may restrict its appellate jurisdiction under the exceptions and regulations clause. U.S. CONST. art. III, § 2, cl. 2. See Ex Parte McCordle, 74 U.S. (7 Wall.) 506, 512-13 (1868). Congress cannot, however, change the Court's original jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803). In cases in which the state is a party, like Chisholm, the Supreme Court's jurisdiction is original, not appellate. Moreover, at the time of Chisholm, the Supreme Court had not yet defined the extent of congressional power over lower federal court jurisdiction. Because Chisholm spoke in terms of the Constitution's power to authorize suit, rather than merely interpreting the statute granting jurisdiction, Congress responded on a constitutional level. Chisholm, 2 U.S. (2 Dall.) at 430.

12. See Hans, 134 U.S. 1 (1890). In detailing the relevant intent, the Court set out the following three quotations, upon which later cases and commentary also have relied heavily. See supra note 6. First, James Madison, addressing the Virginia Convention, stated, [The Supreme Court's] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation [the Clause] can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.

3 Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861) quoted in Hans, 134 U.S. at 14. John Marshall, also addressing the Virginia Convention, said,

I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. . . . I see a difficulty in making a state defendant, which does not prevent its being plaintiff.

Id. at 555-56, quoted in Hans, 134 U.S. at 14. Finally, Alexander Hamilton, addressing primarily the New York Convention in The Federalist, wrote,

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. . . . [T]here is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against states, for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting state; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.
sovereign immunity. After Hans, the eleventh amendment became a gen-

eral direction to the federal courts to read sovereign immunity between

the lines of Article III in all instances.13 As memorably characterized by

Professors Hart and Sacks, the amendment took on the qualities of a

judicial precedent, from which the Court would derive principles that

would serve as a basis for further doctrinal exposition.14

Justice Brennan, joined by Justices Marshall, Blackmun, and Stev-

ens, has attacked Hans in virtually every eleventh amendment case that

the Court has decided in recent years.15 He argues that Article III was

never intended to preserve the states’ sovereign immunity in cases arising

under federal law or, indeed, in any categories of Article III judicial

power other than that encountered in Chisholm itself: the diversity pro-

vision for federal jurisdiction in suits between a state and a citizen of

another state. According to Justice Brennan, the framers and ratifiers of

the Constitution were concerned only with whether states could be sued

for their Revolutionary War debts, cases that they did not see as arising

under federal law. Thus, war debt cases were thought susceptible to fed-

eral jurisdiction only if the plaintiff were a citizen of another state or a

foreign state attempting to use the provision for diversity jurisdiction.16

Justice Brennan interprets all of the historical evidence of the intent of

the framers and ratifiers of the Constitution marshalled by the Hans

Court to support its broad proposition17 as limited to diversity-based

13. It is more sensible, then, to cite Article III as the source of the states’ constitutional

immunity from suit in federal court. See Currie, supra note 5, at 328-29. But since the

Supreme Court refers to the eleventh amendment this Article follows that convention. See,


immunity limits the grant of judicial authority in Art. III”).


concurring in part and dissenting in part); Green v. Mansour, 474 U.S. 64, 78 (1985) (Brennan,

J., dissenting); Atascadero, 473 U.S. at 248 (Brennan, J., dissenting). But see Pennsylvania v.

Union Gas Co., 57 U.S.L.W. 4662, 4667 (1989) (Justice Brennan writing for a plurality that

finds Congress has the power to abrogate sovereign immunity under the commerce clause and

not reaching the Hans issue).


17. See supra note 12. These same few pieces of information are recounted repeatedly.

They are the most significant historical evidence of original intent because they are the fram-

ers’ response to criticisms by those who would determine the fate of the Constitution. If un-

met, these attacks could have defeated ratification. See, e.g., Welch, 107 S. Ct. at 2949-51;

Atascadero, 473 U.S. at 248, 263-80; Monaco v. Mississippi, 292 U.S. 313, 323-26 (1934). In a
suits. Indeed, *Chisholm*, which was based on a common law contract claim, was just such a suit and threatened the precise injury that the framers feared. Because the states surrendered a portion of their sovereign powers, a majority of the Supreme Court has held that the states may be sued in federal court. One prominent historian has written, "The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.


18. Justice Brennan has emphasized that the sovereign immunity defense to these "state law" claims predated the Constitution and limited judicial remedies available to the states' creditors (who entered into their agreements with the states subject to these known limitations and stood to gain a windfall if suit in federal court became possible). *See Atascadero*, 473 U.S. at 262-64 (Brennan, J., dissenting). Justice Brennan has not explained why sovereign immunity would not, as a matter of common law (and not constitutional law), limit the availability of remedies even in federal question suits against the states. *See Employees of the Dep't. of Pub. Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279 (1973) (Marshall, J., concurring); *see also Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 75 (1988) (state law and federal common law basis for sovereign immunity would survive overruling *Hans*). He also fails to acknowledge that in a pre-*Erie v. Tompkins* world, the applicable law would have been considered simply common law and not specifically state law. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (overruling *Swift v. Tyson*, 41 U.S. 9 (1841)). Presumably, the common law applied by the courts, federal or state, could have accommodated the principle of sovereign immunity. Justice Brennan has indicated that the states were concerned about losing control over the use of their own law, especially when federal courts applied state law to reach results that they did not intend. *Cf.* Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1522-23 (1987) (state has an ongoing interest in how the law is applied, which is an aspect of its power to legislate). But this argument loses some force if the law in question is not regarded as state law at all. *See Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1391-95 (1989). At the time of the states' debates over ratification of the Constitution, some feared that the citizen-state diversity clause would make the states suable for their debts in federal courts even though state courts would find the state immune. Some supporters of ratification indicated that the defense of sovereign immunity would indeed be available in federal court. *See Atascadero*, 473 U.S. at 263-73 (Brennan, J., dissenting). Nevertheless, suit against a state was certainly not "inconceivable" to those debating the merits of the Constitution; in fact, some of its supporters openly favored making the states suable for their debts in federal court. *Id.* at 279-80.

19. *See Atascadero*, 473 U.S. at 281. In *Chisholm*, a citizen of South Carolina brought an action in assumpsit seeking payment for military goods sold to Georgia in 1777. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). One problem with this attempt to limit the meaning of the eleventh amendment to diversity-based suits is that *Hans* itself was a suit to enforce debts against the state involving Civil War debt. Federal question jurisdiction, which would have opened the federal courts to citizens suing their own states, was premised on a violation of the contract clause. Professor Field has argued that the eleventh amendment could nevertheless be confined to the narrow purpose of protecting the states from suits for these debts if the substantive law of the contract clause were interpreted to preclude private rights of action.
eignty to the substantive lawmaking power granted to Congress in Article I, he argues, sovereign immunity does not exist with respect to cases arising under federal law. Moreover, there is no reason to think that any intent with respect to federal question cases existed at the time of the states' acceptance of either Article III or the eleventh amendment. First, there was no statutory grant of general federal question jurisdiction at the time of the passage of the eleventh amendment. Second, the kinds of claims that would later account for most of the federal question litigation against the states grew out of the fourteenth amendment, which was ratified by the states more than half a century after the eleventh amendment.

A five member majority of the Court, unable to find in the historical evidence any explicit suggestion of the limitation urged by the minority, has repeatedly rebuffed this attack and affirmed the rationale of Hans. This five member majority at one time consisted of Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor. A short interval of doubt about the security of the Hans precedent followed the resignations of Chief Justice Burger and Justice Powell. This Term, however, in Pennsylvania v. Union Gas Company, Justices Scalia and

Under this interpretation, the contract clause would serve only as a defense to private actions. See Field, supra note 6, at 1266.

20. Atascadero, 473 U.S. at 279-80. According to Justice Brennan, Justice Iredell, who dissented in Chisholm, expressly avoided articulating an opinion as to the existence of sovereign immunity in a federal question case. Id. at 283 (citing Chisholm, 2 U.S. at 449). Justice Powell, writing for the majority in Welch, refers to Justice Iredell's statement that "it may not be improper to intimate that my present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against the State for the recovery of money." Welch, 107 S. Ct. at 2951 n.16. (citing Chisholm, 2 U.S. at 449) (emphasis supplied by Justice Powell).

21. The eleventh amendment was ratified in 1789. For a discussion of Congress' sparing use of the "arising under" clause of Article III, section 2, and the post-Civil War expansion of federal jurisdiction including the general federal question grant in the 1875 Judiciary Act, see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart & Wechsler's, The Federal Courts and the Federal System 960-66 (3d ed. 1988) [hereinafter HART & WECHSLER]. There was general federal jurisdiction very briefly at an earlier point, though after the ratification of the eleventh amendment. See Judiciary Act of 1801, ch. 4, 2 Stat. 89 (repealed 1802).

22. See Marshall, supra note 18, at 1381.

23. See, e.g., Welch, 107 S. Ct. at 2943.


25. Justice Scalia was a member of the Welch Court, 107 S. Ct at 2958 (Scalia, J., concurring), but unlike the other members of the Court, he declined to state his position on the correctness of Hans. For a discussion of his participation in that case, see infra text accompanying notes 261-64. Prior to Union Gas, Justice Kennedy had not participated in a Supreme Court case raising the question.

26. 57 U.S.L.W. 4662, 4672 (1989) (Scalia, J., concurring in part and dissenting in part). Joining Justice Scalia's opinion were Chief Justice Rehnquist and Justice O'Connor, as well as Justice Kennedy. On the issue of congressional power to abrogate, Justice White voted with
Kennedy declared their support for *Hans*, thus giving rise to a new five-member majority favoring a pervasive eleventh amendment immunity that covers suits by citizens as well as noncitizens and federal question as well as state law claims.

The Court's disagreement over the significance of the ambiguous historical evidence reveals one of the essential problems with searching for original intent. In the words of Professor Powell:

> Where the credibility of conflicting interpretations of the historical evidence is in equipoise, the prudent constitutional interpreter might well conclude that history in that instance is too inconclusive to be of even the limited assistance it sometimes affords. The originalist, however, if he is incautious, may make the mistake of choosing the historical position that accords with his personal or political preferences, and build his normative arguments upon it. . . . If the originalist does not justify historically his choice among the historical options, his arguments will be completely unpersuasive because they are logically defective: without historical justification for his choice, his "use" of history is nothing but a normative conclusion decorated with quotations from the founders.27

In the area of the eleventh amendment, the Court reveals the very problem that Professor Powell describes. The two sides have cogently set out their two historical interpretations. Neither side is moved by the other's historical arguments, because the historical evidence is nebulous enough that either position can be maintained. One must therefore doubt that the Justices have based their positions on any marginal superiority of one historical interpretation over the other.

In fact, the historical evidence is particularly unconvincing because the framers and ratifiers of Article III and the eleventh amendment never focused on the issue presented today.28 If we could resurrect them and pose the issue, outlining in detail the theories of interpretation that have evolved since *Hans*, it is likely they would be as perplexed as the average

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28. See HART & WECHSLER, supra note 21, at 1169 ("Chisholm was an assumpsit action. In drafting a provision to overrule it, the Framers of the Eleventh Amendment gave little if any explicit consideration to the question of an unconsenting state's liability under federal law."). Because state immunity can flow from either the amendment or Article III, an added level of complexity exists. When we decide to search for the ever-elusive original intent, the need to chase down two different groups of "framers and ratifiers" makes our task even more difficult.
law student hearing the theories for the first time. If asked to take a position, they would, I suspect, choose the “position that accords with [their] personal and political preferences.” But it is not even possible to reconstruct their preferences as a way of choosing between the two meanings: though individuals acted collectively in framing and ratifying Article III and the eleventh amendment, they held dramatically different positions about whether states could be sued and thus would have varied in their reactions to any given proposal. Moreover, since they could not have foreseen the way federal law would affect the states after the post-Civil War constitutional amendments and the expansive interpretations of congressional power in the twentieth century, any attempt to present their thinking about federal question jurisdiction is an anachronistic fantasy.

B. Nonhistorical Interpretation

Although the members of the present Court center their discussion on historical evidence, they also reveal some of the nonhistorical analysis that undoubtedly shapes their historical interpretations. For example, Justice Brennan has written that he generally does not object to “the interpretation of the Constitution in light of changed circumstances and unforeseen events—and with full regard for the purposes underlying the text.” He has also admitted that he resorts to argument about the intent of the framers because he is convinced that the Court’s eleventh amendment doctrine represents “an untenable vision of the needs of the

29. I have occasionally felt the urge to write a film script about a superhero called Framerman. Framerman appears upon the legal scene whenever judges have difficulty interpreting the Constitution. His superpower is the possession in a single mind of the collective consciousness of all the framers and ratifiers. He stands ready to answer any question, however unforeseen at the time of ratification, precisely as the entire body of relevant decisionmakers at the time would have resolved it. No more guesswork! No more result-oriented historical mumbo-jumbo! Dramatic conflict heightens as Framerman gives answers that surprise and then outrage the judges. The judges could rise up in anger and murder our poor superhero in the end, but this seems out of judicial character. Instead, what happens is this: the judges begin to write opinions rejecting the controlling effect of original intent. Hearing this, Framerman—bearing a slight resemblance to Tinkerbell, who would die if people stopped believing in fairies—clutches at his heart and succumbs.

30. Powell, supra note 27, at 689.

31. The Court in Hans undertakes precisely this form of analysis in deciding to extend the amendment beyond its literal meaning. See text accompanying note 60.


federal system it purports to protect,"34 and "intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct."35 This makes the historical argument seem almost irrelevant: the real issue is what "vision of the needs of the federal system" should prevail. If the Hans interpretation squared with his "vision," would Justice Brennan argue that the historical record shows that the framers intended sovereign immunity to inhere in Article III?

Justice Powell, who has written the majority opinion in the Court's recent key eleventh amendment cases,36 has countered with his own invocation of the present day value of the Hans interpretation, stating that "the doctrine of sovereign immunity plays a vital role in our federal system"37 and that the "contours" of the doctrine follow the "structure and requirements of the federal system."38 The point of preserving the vitality of the states, according to Justice Powell, is to maintain a "counterpoise" to the power of the federal government.39 Justice Powell and the justices who agree with him assume there must be some significant separate sphere for the states that the amendment protects and assert that the doctrine that has developed reflects the proper vision of federalism. But what exactly is this vision? Certainly, it consists of something less than maximum enforcement of federal law in federal court and involves a balance between enforcing federal law and preserving inviolate a state enclave. The majority, however, does not offer any positive reason for preserving such an enclave at the expense of federal law. Thus, it has little success in convincing anyone who does not share the assumption that one must exist for its own sake.

In the 1970s, before the Court began to focus so intensely on historical evidence, then-Associate Justice Rehnquist wrote several of the Court's key eleventh amendment opinions. In Edelman v. Jordan,40 he seemed to assume that the states ought to be given some significant separate sphere when he wrote that the "use of state funds to make reparation for the past . . . would appear to us to fall afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having

34. Id. at 248.
35. Id. at 302.
38. Id. at 2953.
39. Atascadero, 473 U.S. at 239 n.2.
any present force." Thus, his argument against accepting Justice Brennan's limitation of state immunity to citizen-state diversity suits would be that those cases lack "present force." But citizen-state diversity suits held obvious importance to the framers and ratifiers of the eleventh amendment who were reacting to *Chisholm*, so Justice Brennan's limited interpretation does not work the kind of deprivation of meaning that would undermine its plausibility. It may be that a constitutional provision historically important in protecting states from their overburden-some war debts has dwindled into insignificance.

Moreover, to say that the amendment must have "present force" is to abandon the originalist position. If we are to shift from historical analysis and look at present needs, should we not take into account the competing needs of individuals who allege state violations of federal law, which Justice Brennan includes in his vision of federalism? These needs may well overshadow the state's competing interest in retaining some significant immunity. The mere existence of the eleventh amendment does not demand that the Court strain to find some presently forceful new use for it. Indeed, refocusing the question on present needs should call into question whether the states deserve immunity at all.

A convincing argument for the *Hans* position, addressed to those who voice concern about preserving federal rights, would have to present a vision of the states as alternative institutions capable of enforcing federal law and using state law to protect the same interests that federal law addresses. Obviously, states are not serving federal interests when they are allegedly violating federal law. Hence, the short-term federal interest

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41. *Id.* at 665 (quoting Rothstein v. Wyman, 467 F.2d 226, 236-37 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973)) (emphasis added). *See also id.* at 695 (Marshall, J., dissenting) ("If sovereign immunity is to be at all meaningful, the Court must be reluctant to hold a State to have waived its immunity simply by acting in its sovereign capacity.").

42. A few constitutional provisions are permitted to be insignificant. The protection the Court once extended to the states under the tenth amendment has been withdrawn, replaced by whatever protection Congress may decide to give, as a matter of political judgment, not constitutional right. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). As this Article argues, Congress has power to modify the substantive law that may be used to achieve the equivalent of constitutional sovereign immunity. *See infra* text accompanying note 265. Thus, it is not necessary that the Court decide whether there is a present need to retain some immunity for the state and strain the meaning of the eleventh amendment to create such a protection.


44. *See generally Althouse, The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. Rev. 1051. 1083-86 (1988) (*Younger* abstention justified only by the capacity of state courts to enforce federal law); Althouse, *supra* note 18, at 1537-38 (deference to states justified when state law offers alternatives that satisfy—or exceed—the goals established in federal law).
in a particular case would justify intruding on the states. But arguably, long-term federal interests might support refraining from imposing some types of lawsuits on the states. If a certain degree of state power and independence serves a function recognized as valuable and affirmative, then refraining from enervating or destroying the states may serve long-term federal interests. Nonetheless, the "counterpoise" afforded by state independence must consist of an identifiable, affirmative function, otherwise it is not reasonable to balance it against the interest in enforcing federal law. Therefore, when analyzing the present purposes served by sovereign immunity, we should go beyond the mere assumption that some area of immunity must be given to the states for no particular reason and ask what desirable function is enhanced by allowing the states immunity. It is possible that a balance between intervention and immunity is a positive good, but the Court's present analysis makes no direct attempt to demonstrate this good or to tailor its doctrine to "follow the contours" of any such positive function.

Before analyzing Hans in these federal interest terms, however, it is useful to explore the doctrine that mitigates the more harmful effects Hans might otherwise have on the enforcement of federal law. The next section of the Article explains much of this doctrine and, in doing so,

45. For an analysis of the historical background for viewing state sovereignty in terms of the positive function of the states, see Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425 (1987).

46. The Court's present eleventh amendment analysis contrasts with the more functional analysis it has used to determine the scope of the official immunities that shield individual state officials from personal liability when they are sued for violating federal rights under color of state law. In deciding the scope of immunity for these officials, the Court carefully considers the effect of the immunity given. It identifies the positive values served by immunity and tailors immunity to "follow the contours" of those values. The Court has given absolute immunity to some officials, chiefly judges, legislators, and prosecutors in the judicial phase of their functioning; others enjoy only qualified—or "good faith"—immunity. Absolute immunity is restricted to those officials who, at least in the Court's judgment, need the greatest freedom from inhibition. See Scheuer v. Rhodes, 416 U.S. 232, 247 (1974). Even these officials emerge from the cloak of immunity when they act beyond the scope of their official duties. Id. at 243. Most officials receive only good faith, qualified immunity from liability for damages. Unless these officials sincerely believed that they were acting in accordance with federal law and their belief was reasonable, they cannot avail themselves of the immunity defense. See Wood v. Strickland, 420 U.S. 308, 318 (1975). Visiting personal liability upon officials who had no reason to think they were acting unlawfully arguably would discourage individuals from entering public employment or would lead them to perform their duties timidly and thus to disserve the public in general. On the other hand, the threat of personal damages deters activity that the official is capable of perceiving as unlawful at the time the action is taken. Although the complex official immunity doctrine the Court has created does not perfectly track functional goals, the case law that develops these doctrines deserves some praise for the way it has used the concepts of deterrence and encouragement to shape doctrine.
brings out the signs of federal interest analysis found in the cases. It will then take up the *Hans* debate once again.

II. Searching for a "Vision of the Needs of the Federal System" in Current Eleventh Amendment Doctrine

The legal fiction created in *Ex Parte Young* and the tailoring the Supreme Court has engaged in over the years, complicated and contradictory though it is, can nevertheless illuminate the federal interests underlying the Court's decisionmaking. To a large extent, the Supreme Court in fact has followed and begun to articulate the kind of federal interest analysis outlined in this Article. The majority of the Supreme Court has asserted that the "contours" of its eleventh amendment doctrine follow the "structure and requirements of the federal system."47 This section of the Article does not assume the perfection of existing doctrine, but it does consider how that doctrine reveals ideas about federal interests and gives these ideas definition. New understanding of these ideas will make it possible both to assess existing doctrine and to propose ways in which doctrine might develop.48


48. For a similar analysis of eleventh amendment case law, see Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4668 (1989) (Stevens, J., concurring). Justice Stevens, reviewing the entire range of case law, concludes that the Court's eleventh amendment jurisprudence represents a judicial balancing of federal and state interests. Looking at the same cases and citing much of the same evidence that Justice Stevens relies on, this Article concludes that the Court dispenses with state immunity when it perceives strong enough federal interests. Justice Stevens further argues that the Court's eleventh amendment jurisprudence cannot rest on a constitutional foundation, as the majority contends it does, because the balancing of federal and state interests "is antithetical to traditional understandings of Article III subject-matter jurisdiction." *Id.* at 4669. Thus, according to Justice Stevens, with the exception of the one "correct and literal" interpretation of the eleventh amendment (barring citizen-state diversity suits that do not raise federal questions), all of the Court's eleventh amendment doctrines, including *Hans* itself, are judge-made, "prudential" doctrines. *Id.* at 4668-69. These doctrines, motivated by federalism concerns, resulting from judicial interest balancing, resemble the Court's abstention doctrines. *Id.* at 4668-69 (citing Younger v. Harris, 401 U.S. 37 (1971), and cases that follow it). *Hans*' status as a mere judicial creation, according to Justice Stevens, explains the Court's ability to impose federal court jurisdiction when federal interests demand it. *See* 57 U.S.L.W. at 4469 & n.3. It also explains why Congress has the power to abrogate the state's immunity: "Congress is not superseding a constitutional provision in these cases, but rather is setting aside the Court's assessment of the extent to which the use of constitutionally prescribed federal authority is prudent." *Id.* at 4669. While Justice Stevens' analysis coincides to a large extent with the perceptions of the case law explained in this Article, I do not find the balancing of interests "antithetical" to Article III interpretation; balancing commonly underlies constitutional interpretation, whether or not the written opinions reveal it. Certainly, Justice Stevens' ideas deserve more extensive study than is possible here. One could
A. The Troublesome Coexistence of Hans and Young

Although Hans v. Louisiana brings federal question cases within the states' eleventh amendment immunity, other doctrinal permutations restrict its force. Not all federal question cases aimed at controlling state violations of federal law meet eleventh amendment exclusion from federal court. Just as a majority of the Supreme Court has seen Hans as necessary to prevent the amendment from dwindling into insignificance, it also has seen the need for the legal fiction of Ex Parte Young to ensure that states do not violate important federal rights with impunity.

In the often quoted words of Professor Wright, "The doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law." Under Young, plaintiffs can receive federal court relief—at least prospective relief—from violations of their federal rights by naming as defendants the individual state officials who acted for the state. Since the state can never act without a human agent, this device would work a complete circumvention of Hans were it not for additional doctrinal embellishments designed to hem in Young.

Young began as an attempt to enjoin Minnesota's attorney general from enforcing a state statute, on the ground that it violated the federal Constitution. The Supreme Court permitted the federal court to hear this suit by theorizing that the individual state official's violation of constitutional law stripped him of his status as a representative of the state. Thus, to sue the official was not to sue the state. The majority reached

attempt to reinterpret a great deal of constitutional law this way: to separate the "correct and literal" from the mere products of balancing and then to reclassify the latter category as judge-made prudential law, subject to further judicial or congressional lawmaking. Whether this kind of reinterpretation is advisable or even possible must remain a matter for future study.

49. 209 U.S. 123 (1908).
50. Even before Young, the device of suing state officials to avoid sovereign immunity existed. Chief Justice Marshall recognized the availability of this device in Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 741 (1824). Professor Collins provides an excellent discussion of the way in which courts limited the device to suits involving state officials who were liable in common-law tort, but who were unable to raise the defense of state authorization because the state law in question was unconstitutional. Collins, The Conspiracy Theory of the Eleventh Amendment (Book Review), 88 COLUM. L. REV. 212, 222-27 (1988) (reviewing J. Orth, supra note 6). The innovation of Young was to permit suit based directly on the violation of federal law. Id. at 240-41. For a contrary view of the history of eleventh amendment interpretation, viewing the post-Reconstruction period typified by Hans as aberrant, and Young as consistent with an earlier line of cases beginning with Osborn, see J. Orth, supra note 6, at 121-35.
51. C. Wright, LAW OF FEDERAL COURTS 292 (4th ed. 1983). Professor Wright makes this statement after writing that Young "rests on the purest fiction, . . . is illogical [and] only doubtfully in accord with the prior decisions." Id.
52. Young, 209 U.S. at 167; see infra text accompanying notes 72-88, 135-47.
53. Id.
this holding even though the injunction sought could supply relief only because the state charged its attorney general with the responsibility of enforcing its laws and even though the attorney general's capacity to violate the Constitution depended on viewing his action as state action.\textsuperscript{54} Untenable as the theory of \textit{Young} may appear, and as deeply divided as the Supreme Court has been in recent years, \textit{Young} stirs no controversy today.\textsuperscript{55} \textit{Young} does not itself purport to create a legal fiction. The written opinion speaks with judicious rationality. It is only in later cases that use \textit{Young} despite criticisms of its logical integrity that the Court has simply called the \textit{Young} analysis a fiction and persisted in relying on it, without insisting on the logical structure of the case.\textsuperscript{56} Openly calling \textit{Young} a legal fiction hardly signals its imminent demise; indeed, we may think of a legal fiction as a logically untenable concept that the Court fully intends to cling to.\textsuperscript{57}

\textit{Hans} is not terribly different from \textit{Young} in its style and subsequent history. Indeed, \textit{Hans} could be stigmatized as every bit as much of a legal fiction as \textit{Young}. \textit{Hans} claims constitutional status for an idea that has no tie to any constitutional language. Article III says nothing about state immunity. In particular, the state-citizen diversity clause\textsuperscript{58} suggests—as the \textit{Chisholm} Court held—just the opposite.\textsuperscript{59} The eleventh amendment refers only to suits brought by noncitizens of a state. In finding constitutional immunity for suits brought by citizens suing their own states, \textit{Hans} constructs a nonexistent scenario—proposing the idea of

\textsuperscript{54} Id.

\textsuperscript{55} See infra text accompanying notes 67-71.

\textsuperscript{56} See, e.g., Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). Professor Orth writes that "stigmatiz[ing]" \textit{Young} as a fiction ignores the reality that the official is in fact made the defendant in the case, that the official is actually the actor about to injure the plaintiff (in a suit for prospective relief), and that it is true that the state cannot authorize him to act unconstitutionally. J. ORTH, supra note 6, at 138. Orth decries the "heavy conceptual handicap" imposed on \textit{Young} by openly tagging it a fiction, with the result that it "often fall[s] victim to concepts whose fictitiousness is better masked." Id. For an expansion of Orth's implicit suggestion that \textit{Hans} is a legal fiction, see infra text accompanying notes 58-60.

\textsuperscript{57} For an extended and wide-ranging study of legal fictions, see Fuller, \textit{Legal Fictions}, 25 ILL. L. REV. 363, 513, 877 (1930). Professor Fuller observes that courts create legal fictions to express needed legal developments that they are unable to weave into the law's seamless web. Later, as the law develops, courts become able to revise their fictions and express them in standard, rational, logical form. Id. at 519-29. \textit{Young}, however, does not follow this pattern. Originally, the Court expressed the \textit{Young} doctrine "nonfictionally." Then when its logical deficiencies became apparent the Court began to call it a fiction. Use of a legal fiction did not turn out to be part of a process of developing a coherent legal framework, but a concession that the law's needed elements did not fit logically and a decision to tolerate that lack of fit.

\textsuperscript{58} U.S. CONST. art. III, § 2.

\textsuperscript{59} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450-53 (1793).
federal question jurisdiction in a suit brought by a citizen against his own state and imagining the framers of the eleventh amendment rejecting that jurisdiction as well—and then treats the amendment as if that scenario had taken place.

*Hans* established the terms of eleventh amendment discussion. *Hans'* theory may be just as fictitious as *Young*'s, but since it came first, *Hans* established its rule free from the constraint of keeping its rationale consistent with *Young*. The *Young* Court, however, could not lay down its rule without creating conflicts that would invite the "legal fiction" label. There is a tyranny to chronology here. The first interpretation may be no more accurate than the second. In fact, there is reason to think that the later, conflicting story lies closer to the truth: the effort the Court made to set out such a strained doctrine suggests a strong conviction of its correctness.

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60. Justice Bradley wrote,

Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).

This statement itself validates a method of constitutional interpretation that is "an absurdity on its face." Using this approach, one could propose any formulation of words and read it into the Constitution if one could argue successfully that there was ever a point in history when the states would have ratified it as an amendment to the Constitution. *Hans* makes more sense if one assumes instead that sovereign immunity was implicit in Article III and that Congress proposed the eleventh amendment to correct the Supreme Court's failure to perceive the implication in *Chisholm*. It is one thing to read the original Constitution to contain a multitude of unstated assumptions, particularly when there was actual debate during the ratification process. See * supra* note 12. It is quite another to allow subsequently arising assumptions to modify that document without following the prescribed amendment process.

61. *Hans* simply ignores any earlier cases that conflict with its holding and creates a new legal context. By framing its rule in straightforward terms that would not appear at all fictitious, the *Young* Court could have overruled *Hans* or limited it to contract clause cases and consigned the case to the doctrinal dust heap. See * supra* note 19.

62. Some authors would characterize all legal formulations as fictions. Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 876 (1986) ("In our post-realist world... our sense is that legal fictions are not some small, awkward patch but rather the whole seamless cloth of the law."); see also Riker, *Six Books in Search of a Subject or Does Federalism Exist and Does It Matter?*, 2 COMP. POL. 138, 146 (1969) ("Federalism is no more than a constitutional legal fiction which can be given whatever content seems appropriate at the moment."). The distinction of *Young* is that it is openly called a legal fiction by justices who otherwise craft rational and realistic-looking rules.

63. See generally Fuller, * supra* note 57, at 519-29 (discussing judicial motives for engaging in legal fictions). According to Professor Fuller, "legal categories are constantly being remade to fit new conditions," and a legal fiction is just "a cruder outcropping of a process of intellectual adaptation which goes on constantly without attracting attention." *Id.* at 525. That is to say, the use of the term "fiction" occurs when a change "has taken place in an
of the Young opinion may have resulted from the Court's attempt to state its rule in the "language of Hans." If Hans were overruled, the Court could reach the same result in a simple and straightforward manner.

Despite the strength of its commitment to Young, the Court also has developed doctrines restricting its effect, just as Young was needed to restrict the effect of Hans. This attempt to reach a middle ground between the absolute immunity that would result from an unrestricted Hans and the nearly full access to federal court that would result from an unrestricted Young has produced the present complexity of eleventh amendment doctrine. The decision to recognize simultaneously the importance of federal court access and the importance of state immunity inevitably leads to confusion, contradiction, and incoherence. The Court easily could dispel the fog by rejecting either concept. If Hans were overruled according to the theory argued by the Supreme Court minority, plaintiffs could sue states in federal court under federal question jurisdiction, rendering the Young fiction obsolete. If Young were overruled, ungraceful and inelegant manner." Id. Professor Fuller expected the law to continue to develop so that the fiction would only be used temporarily, until the context which made it appear out of place changes enough to cause it to fit in quite well. Id. at 529. The fiction thus serves as a "scaffolding" that need only remain in place until courts erect the new legal structure. Id.

64. Even if the Court permitted the doctrine espoused in Young to expand to its full potential, it would not defeat state immunity from state claims that find their way into federal court solely through the citizen-state diversity—the jurisdiction specifically limited by the eleventh amendment. It is not clear what would happen to state claims that were pendent to federal claims. See infra note 258.

65. An alternative theory for rejecting Hans relies on the text of the eleventh amendment. Under this theory, the amendment bars all suits by noncitizens of a state, including those based on federal question. See Marshall, Fighting the Words of the Eleventh Amendment, 102 HARV. L. REV. 1342, 1346 (1989). If Hans were overruled on this ground, Young would remain useful for noncitizens asserting federal claims against the state. But see Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4672 (1989) (Scalia, J., concurring in part and dissenting in part). According to Justice Scalia:

"If [the text of the eleventh amendment] were intended as a comprehensive description of state sovereign immunity in federal courts . . . it would unquestionably be most reasonable to interpret it as providing immunity only when the sole basis of federal jurisdiction is the diversity of citizenship that it describes. . . . For there is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is a citizen of the state itself.

Id. at 4673 (emphasis in original). Justice Scalia goes on to reject this textual approach on the ground that the eleventh amendment is "important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." Id. (relying on Hans v. Louisiana, 134 U.S. 1 (1890)).
Hans would work a neat, flat bar to all suits against states, unless the state had consented or Congress had abrogated the states' immunity. 66

The voices favoring rejection of immunity by overruling Hans are persistent, 67 but no one urges overruling Young as a solution to the incoherence of eleventh amendment doctrine. In Edelman v. Jordan, Justice Douglas, dissenting from the Court's limitation on federal court access, wrote that if the majority really thought that litigants could not receive retrospective relief, it ought to overrule Young. 68 But this was an empty dare, which evoked no response. As Justice Douglas put it, "there is none eager to take the step." 69 Even the majority that adheres to Hans shows no inclination at all to overrule Young. That Hans and Young make such an unattractive and troublesome pair 70 indicates that, for the majority of the Court, both decisions uphold important constitutional values that cannot be sacrificed. The cost of this awkward coexistence is severe doctrinal disarray, 71 which this Article now takes up in detail.

B. The Retrospective-Prospective Distinction

The most prominent doctrine limiting the potential reach of Young is the retrospective-prospective distinction. Young's device of naming only the state official fails when the relief sought is retrospective. 72 The retrospective-prospective distinction forces plaintiffs to limit their federal court suits to requests for injunctions and declaratory relief. For example, they may ask a federal court to prevent a state attorney general from enforcing an allegedly unconstitutional state statute or to require state officials to improve allegedly unconstitutional conditions in a state prison or mental hospital, but they must go to state court if they want damages or other retrospective relief. 73

66. For a discussion of congressional power to abrogate states' immunity, see infra text accompanying notes 151-219.
67. See supra text accompanying notes 7-22.
69. Id.
70. According to Justice Brennan, Hans is "inconsistent with the essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land—and it has led to the development of a complex body of technical rules made necessary by the need to circumvent the intolerable constriction of federal jurisdiction that would otherwise occur." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 255-56 (Brennan, J., dissenting) (1984).
71. For a caveat on the present Court's tolerance of doctrinal disarray, see infra note 157.
73. Plaintiffs also may choose to bring all of their claims for relief to state court, but in so doing, they may encounter common-law doctrines of sovereign immunity. In Edelman, the plaintiffs ultimately did receive their retrospective relief in state court. See Lichtenstein, Retro-
Although initially the Court attempted to explain this distinction in terms of who would really pay for the relief requested, the distinction quickly became embedded in the case law, subject to little discussion at all. An examination of the cases, however, shows that the persistent adherence to this distinction reflects the majority’s judgment that the importance of ensuring compliance with federal law in the future simply outweighs compensation for past injuries. That is, an analysis of federal interests underlies the Court’s decisionmaking.

I. Why Draw the Line Between Past and Present?

In defense of the retrospective relief exception to the Young fiction, the Court accurately reasons that no one expects defendant state officials to pay damages with their own money. But no matter how expensive a prospective injunction becomes the Court does not relinquish its adherence to the fiction, even though no one expects an individual state employee to pay for the busing of school children, or the construction of new prison cells, or other similar expenses that may easily far exceed the forbidden damage awards.


74. See, e.g., Edelman, 415 U.S. at 664 ("These funds will obviously not be paid out of the pocket of petitioner Edelman."); Rothstein v. Wyman, 467 F.2d 226, 236-37 (2d Cir. 1972) cert. denied, 411 U.S. 921 (1973), quoted in Edelman, 415 U.S. at 668 ("It is not pretended that these payments are to come from the personal resources of these appellants.").

State officials may, however, be sued in their personal capacity for individual damages, to the extent permitted by doctrines of official immunity. See supra note 46. These lawsuits are limited to the tortious acts committed by the defendant-officials and can only be satisfied out of their personal assets, though state funds may be expended if the state indemnifies its officials. The Court overtly sloughs off this intrusion on the states’ treasuries, calling it voluntary, but states may have to provide indemnity in order to attract employees. See, e.g., Benson v. Allphin, 786 F.2d 268 (7th Cir. 1986). See infra note 156. State officials cannot be sued personally for contractual and other state obligations. See Collins, supra note 50, at 224-25. In such instances, they can only be sued in their official capacity, in which case the rule of Edelman applies and imposes state sovereign immunity. Curiously, the immunity extended to a state excludes all retrospective relief whereas the immunity granted to individual officials terminates if they knew or should have known that their actions would violate federal law. To further complicate immunity doctrine, local governments are denied not only eleventh amendment immunity, Monell v. New York City Dep’t of Social Serv., 436 U.S. 658, 663 (1978), but also any qualified immunity similar to the kind offered to individual officials who act in good faith. Owen v. City of Independence, 445 U.S. 622, 650 (1980).

75. Courts ordering prospective relief in the face of the obvious inability of the named defendant to pay for the ordered changes have found ways to gloss over the shortcomings of the litigation’s party structure. In one case, a defendant governor argued that he could not spend money to correct conditions in a state institution for the mentally retarded without an act by the legislature that he was unable to obtain. The district court found the governor in contempt for failing to spend money even though to do so would have violated state law. The appellate court noted that the district court should instead “order the state either to take the
An interesting aspect of this paradox is the way courts began accepting expensive injunctions with no real analysis, perhaps fearing that close scrutiny would undermine Young itself. The Supreme Court made the initial distinction in *Edelman v. Jordan*, in which it accepted a prospective order that welfare payments be made in accordance with federal standards. Then in *Milliken v. Bradley*, it faced the more difficult problem of ordering a state to provide remedial education as part of a school desegregation plan. The Court spoke entirely in terms of the prospectiveness of the injunction and distinguished it from a one-time "raid on the state treasury for an accrued monetary liability." This analysis rendered the issue quite simple, removing it from the realistic concerns about who really pays, which were confronted in *Edelman*. Lower courts thereafter could avoid a realistic discussion of who pays for the relief with a simple citation to *Milliken*.

Since, clearly, the retrospective-prospective distinction does not flow from any realistic assessment of who pays for the relief or who deserves the label "real party in interest," justification for the distinction must lie elsewhere. A clue may be found in the Court's references to the expenses of complying with a prospective order as having only an "ancillary effect on the state treasury." The term "ancillary" suggests that the Court sees compliance with federal law as the primary goal and the spending of money as secondary, in the Court's words, merely an "inevi-

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78. *Id.* at 289-90 & n.22.
79. *See, e.g.* Clark v. Cohen, 794 F.2d 79, 84 (3d Cir. 1986). *But see* Chu Drua Cha v. Noot, 696 F.2d 594, 599 (8th Cir. 1982) ("For some reason, the courts regard an order for the future payment of money, no matter what the amount, as somehow less destructive of state sovereign immunity than an order for the payment of sums past due.").
80. The Court, however, speaks of the state as the "real party in interest," even though that concept does not clarify the retrospective-prospective distinction. The Court frequently quotes language from Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945): "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *See, e.g.*, *Edelman*, 415 U.S. at 663.
table consequence of the principle announced in *Ex Parte Young.*" The *secondaryness* of the expense, rather than the amount, distinguishes future from past relief. In contrast, one can characterize past relief as only the spending of money, secondary to nothing. According to this view, the action in violation of federal law already has taken place and cannot be undone. If a state must use its present budget to compensate for past violations of federal law in administering its public aid system, it "will invariably mean there is less money available for payments for the continuing obligations" of that system.

Seen this way, the Court's retrospective-prospective distinction reflects a comparative valuation of federal interests in the two different forms of relief. Retrospective relief will only compensate for harm suffered in the past and thus does not directly promote the interests embodied in the public aid system. In the rather callous and simplistic logic of *Edelman,* compensation may appease those whose needs went unsatisfied in the past, but only prospective relief actually meets the daily needs of the poor. The Court, sensitive to the finite nature of the state’s budget,

82. *Id.*

83. Another reason for the retrospective-prospective distinction is the different impact that retrospective relief has on the state budget. Accumulated liability for past wrongs affects the state all at once and after it has expended its budget for the relevant time period. A state can, however, attempt to accommodate prospective relief within each year's current budgeting process. See *Hutto v. Finney,* 437 U.S. 678, 708 (1978) (Powell, J., concurring in part and dissenting in part). Moreover, states may find ways to adjust future conduct to minimize the expense of prospective relief orders; this flexibility is, of course, foreclosed with respect to retrospective relief. *Id.* Expensive injunctions are frequently justified by the lower federal courts on this ground. See, e.g., *Williams v. Edwards,* 547 F.2d 1206, 1212-13 (5th Cir. 1977) (noting that a state has the alternative of closing the institution, thus avoiding any expenditures); see also *Hiirschhorn,* *supra* note 75, at 1860 (distinguishing retrospective relief, which runs to "identifiable individuals," from prospective relief because it runs to a class of "unspecified future clients of the institution" who will receive relief as a "side effect of a properly functioning institution"); *Jackson,* *supra* note 18, at 95-96 (prospective relief, while expensive, allows state legislative flexibility, and may also be easier to enforce than retrospective relief requiring legislative action).

84. *Edelman,* 415 U.S. at 666 n.11. Without affording any explanation, the majority assumes that the state would be forced to use its "definable allocation" in the payment of public aid benefits to compensate victims of past violations and therefore that retroactive relief would necessarily diminish the total pool of state funds available for public aid. *Id.* The Court may have recognized this limitation because it envisioned public officials who are sued as ineffectual in forcing a state to allocate more money to public aid, or to increase its total revenues to fund past relief, but as capable of spending the money already allocated to their department in accordance with the court’s order.


[The fundamental goal of congressional welfare legislation is] the satisfaction of the ascertained needs of impoverished persons. Federal standards are designed to ensure that those needs are equitably met; and there may perhaps be cases in which prompt
responds by drawing a line in what appears to be the most sensible place: between prospective and retrospective relief. It is not that the cost of prospective relief is inconsequential compared with retrospective relief, but that it more sharply and directly connects to the federal interest embodied in the particular federal law upon which the case is based.

Thus, the retrospective-prospective distinction represents a drawing of a jurisdictional boundary in response to the strength of the federal interest at stake. One must, of course, recognize that there is a difference between following this principle of jurisdictional line-drawing in accordance with the federal interest and choosing to draw that line in the best place. In making the retrospective-prospective distinction, one can safely say, the majority has appropriately ranked the forms of relief in order of importance. Nevertheless, it may be that both forms of relief ought to fall within the boundaries of federal jurisdiction, since the enforcement of federal law with either form of relief serves the federal interest. Even emphasizing, as the majority does, the prominence of the federal interest in ongoing compliance with federal law, one cannot readily exclude retroactive relief. Past relief serves not only to compensate but to deter. For example, in the instance of a state-administered federal benefits program, Justice Marshall argued that the state has “everything to gain and nothing to lose” by following an erroneous but money-saving standard until it is sued for prospective relief. If the Court does indeed construct its eleventh amendment doctrine in response to its ideas about the federal interests at stake, as this Article contends, then there is a great deal of room for litigants to elaborate and emphasize the dimension of interest involved in particular kinds of remedies and particular kinds of cases. Arguments of this kind, in addition to formalistic arguments about what is truly prospective and what is not, may help to avoid the kind of result encountered in Edelman, in which the majority saw little significance in retrospective relief.

payment of funds wrongfully withheld will serve that end. As time goes by, however, retroactive payments become compensatory rather than remedial; the coincidence between previously ascertained and existing needs becomes less clear.

86. See supra text accompanying notes 44-46.
88. Id. It may be that a state is following a reasonable standard, but is challenged by plaintiffs, and that the state may, if subjected to jurisdiction, ultimately prevail in the lawsuit. The threat of lawsuits, however, may “overdeter” states, causing them to restrict their activities or to hedge their policy choices in ways not mandated by federal law. Yet the Edelman doctrine is not the only way to control this sort of overdeterrence. The Court could fashion limited substantive, rather than jurisdictional immunity, similar to the qualified immunity that shields individual officers from liability. See supra notes 46, 74.
2. The Federal Interest in “Notice Relief”

*Edelman* handed federal courts the task of determining which kinds of expenses are merely “ancillary” to prospective relief and thus permissible and which too closely resemble compensation for past wrongs and are thus barred. In Justice Rehnquist’s memorable concession, “the difference between the type of relief barred by the Eleventh Amendment and that permitted under Ex Parte *Young* will not in many instances be that between day and night.”\(^8^9\) This section considers the issue of notice relief, one area in which the Supreme Court has drawn that difficult line. Examining the Court’s reasoning helps identify the notions of federal interest that determine jurisdictional doctrine.

The form of relief that has proven most difficult to classify falls under the rubric “notice relief.” Notice relief consists of ordering that letters be sent to the alleged victims of some past violation of law by the state to inform them that they may go to state court for the very recovery that *Edelman* makes unavailable in federal court. In *Quern v. Jordan*,\(^9^0\) a later stage of the *Edelman* litigation, the Supreme Court validated federal court power to issue this form of relief. *Edelman* had denied the federal court power to order the payment of welfare benefits already lost because of the state’s illegal delays, although it affirmed the power to enjoin state officials to avoid future delays.\(^9^1\) In *Quern*, in an opinion written by Justice Rehnquist, the Court viewed notice relief as falling on the *Young* side of the notably obscure line between permissible and impermissible relief.\(^9^2\) Sending notice to would-be claimants did not exactly equate with the actual payment of retroactive benefits: there were several intervening steps over which the state had control.\(^9^3\) The Court was therefore willing to view the notice sent as an aspect of the prospective relief ordered.\(^9^4\) The expense of notice relief could qualify for the magical adjective “ancillary,” and thus merit *Young* treatment.

\(^8^9\). *Edelman*, 415 U.S. at 667.
\(^9^1\). *Edelman*, 415 U.S. at 658-59. For further discussion of *Edelman*, see *supra* text accompanying notes 76-88. The plaintiffs had attempted to bring their request for past relief within the ambit of *Young* by characterizing it as equitable restitution and arguing that the distinction to be made was between legal and equitable relief. The Court instead articulated the retrospective-prospective distinction described above.
\(^9^3\). *Id.* The Court noted that the “chain of causation” between the notice and the payment of retroactive benefits was “by no means unbroken” and “contain[ed] numerous missing links.” *Id.* at 347. The notified persons would have to decide whether to seek relief, and to initiate the available state administrative procedures, and then the state would make the ultimate determination of eligibility for past benefits. *Id.* at 347-48.
\(^9^4\). *Id.* at 347-49. The expense of sending the notice was minimal and even the state did
The recent case of *Green v. Mansour* presented a key difference that led the Court to reject notice relief, and in doing so, to shed some indirect light on its vision of federalism. In *Green*, the federal court could not grant an injunction affecting future conduct, and consequently notice relief was the sole remedy available in the case. The *Green* litigation began as an attack on Michigan's method of calculating benefits under the federal Aid to Families with Dependant Children program. While the litigation was pending, however, Congress made two changes in the program that mooted the claims for prospective relief. First, Congress expressly required that the states deduct childcare costs from the calculation of earned income, and Michigan began complying with the new provision. Though it was now clear that the state's past practice, if continued, would violate federal law, it remained unsettled whether the past denial of this deduction had violated federal law. Second, Congress required automatic inclusion of a step-parent's income, which was the practice Michigan had followed all along. Still, it was possible that automatic inclusion of this income was illegal before Congress amended the program. With the requests for prospective relief mooted, the district court dismissed the remainder of the litigation on eleventh amendment grounds. The plaintiffs appealed, citing *Quern* for the proposition that the federal court still had jurisdiction to consider whether they were entitled to notice relief.

The plaintiffs argued that notice relief is an "independent form of prospective relief," and thus that it did not matter that other prospective relief was unavailable. In analyzing this question, Justice Rehnquist stressed the federal interest underlying the use of *Young* to allow suits for prospective relief in federal court: "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest not make any objection to this "incidental administrative expense." *Id.* at 347. Its real objection was to the fact that the notice concerned unpaid past benefits. *See also Hutto v. Finney*, 437 U.S. 678, 692 (1978). In that case, the Court awarded plaintiff's attorney's fees accrued in their effort to force state compliance with the federal court's injunction to remedy prison conditions. The *Hutto* Court emphasized that federal courts needed a way to enforce the injunctions that *Young* permits them to issue. *Id.* at 690.

*95. 474 U.S. 64 (1985).*
*96. *Id.* at 66.
*97. *Id.*
*98. *Id.*
*99. *Id.*

*100. *Id.* at 67. Since a determination of whether the state's practices were illegal was unnecessary to the adjudication of claims for prospective relief, the plaintiffs sought a declaratory judgment to obtain a ruling that the past practices were illegal. *Id.*

*101. *Id.* at 69.*
in assuring the supremacy of [federal] law.’’102 The Court also spoke in terms of whether the relief was “ancillary,” but it seems more accurate to say that the absence of a strong federal interest—defined by the Court as an interest in compelling ongoing compliance with federal law—influenced where the Court drew the line limiting federal court jurisdiction.103

In his discussion of whether the notice relief was permissible Justice Rehnquist made a key shift in usage of the term “ancillary.” He wrote that notice relief was barred because there was no other form of relief that was prospective and to which the notice relief could be made “ancillary.” But prior to Green the Court had used the word “ancillary” to describe the expense the state would encounter in carrying out a prospective injunction.104 To be consistent with prior usage, the Court should have decided whether notice relief was prospective or retrospective, and if prospective, it then could have brushed aside the argument that the state, not the named defendant, would bear the cost of complying with the prospective relief by tagging that expense “ancillary.”105 Had it undertaken this analysis, the Court might have characterized the giving of notice as prospective since it is an act that defendants are compelled to perform in the future,106 although it is causally tied to the eventual payment of benefits, through a state court action of the sort that Edelman held to be retrospective. The litigants had framed the issue this way, using the language of Quern. That the Court nevertheless declined to enter into this analysis indicated that it was not primarily concerned with whether the relief requested was truly prospective.

This deviation from prior usage of the term “ancillary,” whether unwitting or not, is revealing. From it, we may perceive the essential motivation that underlies the Court’s decisions to extend or curtail fed-

103. See Green, 474 U.S. at 70. Justice Brennan was joined in dissent by Justices Marshall, Blackmun, and Stevens. This minority has consistently urged overruling Hans. See supra text accompanying notes 7-22. Justice Brennan argued that because no significant costs are imposed in giving notice, there is no eleventh amendment bar. Green, 474 U.S. at 80 (Justice Marshall in dissent, joined by Justices Brennan and Stevens). Unlike the majority, which began its analysis with a presumption of state separateness, requiring a sufficient federal interest to justify encroachment, the dissenting justices began their separate opinions with a presumption of federal jurisdiction looking instead for sufficient state interest to overcome the federal presumption. Id. (“[I]t is... hard to see what weight, if any, exists on the State’s side of the scale, and why that weight should overcome the interest in vindicating federal law.”).
105. At least one court has taken note of this shift in usage. See Appleyard v. Wallace, 754 F.2d 955, 961 (11th Cir. 1985).
106. At least one court has taken this approach in interpreting Quern. See Moore v. Miller, 612 F. Supp. 952, 957 (N.D. Ill. 1985).
eral court jurisdiction in the face of federalism concerns. Notice relief did not justify indulgence in the Young fiction, not so much because the Court lacked a prospective injunction to append it to, but because only the federal interest in the ongoing compliance with federal law would have impressed the majority as strong enough to justify expanding the boundary of federal court jurisdiction into an area entailing eleventh amendment concerns.107 Perhaps we should stigmatize the retrospective-prospective distinction as a legal fiction as well, for it hides the Court's real concern with the varying levels of federal interest in providing different types of relief for violations of federal law.108

Recognizing that an assessment of federal interest underlies doctrinal linedrawing will not enable us to predict decisions infallibly, for decisionmakers will differ in their assessment of the federal interest at stake. One could contend, as did Justice Marshall in Edelman, that the interest in "assuring the supremacy of federal law" also supports the extension of federal jurisdiction to compensate victims of past violations, particularly given the future deterrence value of that compensation.109 The majority, however, viewed these interests as "insufficient to overcome the dictates of the Eleventh Amendment."110 Despite the inevitable uncertainty that arises from these different assessments, analyzing jurisdictional issues in terms of federal interest at least reflects the thought processes that lead to the Court's decisions more accurately than does the use of amorphous categories like prospective, retrospective, and ancillary.

In a somewhat different jurisdictional context, Justice Brennan has raised the following criticism of federal interest analysis: "[A] test based upon an ad hoc evaluation of the importance of the federal interest is infinitely malleable: at what point does a federal interest become strong enough to create jurisdiction?"111 The only answer is that federal interest analysis goes on whether the Court admits it or masks it. The formal logic and legal fictions used to mask it also are malleable, and federal interests determine the shape they ultimately take.

107. Green, 474 U.S. at 71.
108. For an alternate analysis of the foundation of the Court's distinctions, see Pagan, Eleventh Amendment Analysis, 39 ARK. L. REV. 447, 473 (1986) (the intrusiveness of the remedy sought determines the distinctions made).
110. Green, 474 U.S. at 68.
111. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 882 n.1 (1986) (Brennan, J., dissenting). In Merrell Dow, the majority determined the outer boundary of federal question jurisdiction under 28 U.S.C. § 1331 by looking at the federal interest in adjudicating a state law cause of action that contained an element of federal law. Id. at 806-07 n.1.
Prospective Relief for Past Violations of Federal Law

In *Papasan v. Alain*, another recent Supreme Court case employing the retrospective-prospective distinction, the Court made surprisingly revealing statements about its reasons for using the *Young* fiction. *Papasan* concerned the history of school land grants in Mississippi. The northern twenty-three counties of Mississippi, which had belonged to the Chickasaw Indian Nation until their cession to the United States by treaty in 1832, were sold by the United States without reserving sections of the land for the support of schools, the practice it followed in the sale of all the other portions of Mississippi. To "remedy this oversight," Congress, in 1836, provided for the reservation of other land for schools, giving this land to the state. In 1856 Mississippi sold the land and invested the proceeds in loans to railroads, an investment that lost all value when the railroads were destroyed in the Civil War. This left a great disparity between the schools in the Chickasaw Cession and the schools in the rest of Mississippi, which received income from reserved lands. To compensate for this lack of income, the state legislature annually allocated to the Chickasaw schools an amount equivalent to interest on the lost loan to the railroad. Despite this allocation, the schools in the Chickasaw Cession found themselves at a severe disadvantage; the annual allocation amounted to about 63 cents per pupil, compared to the average $75.34 per pupil in townships provided with income from the reserved lands.

Chickasaw Cession school officials and students sued various state officials in federal court, asserting a federal common-law breach of trust in the sale of the land and the subsequent investment in the railroad and a violation of equal protection in the resulting deprivation of a minimally adequate education. The plaintiffs sought either a trust fund or the allocation of land sufficient to remedy the disparity in income.

113. *Id.* at 269-72.
114. *Id.* at 271-72.
115. *Id.*
116. *Id.* at 273.
117. *Id.*
118. *Id.* Three members of the Court (Burger, Powell, and Rehnquist, concurring in part and dissenting in part) rejected the equal protection claim on the merits, finding this disparity de minimis in light of the small percentage—1½%—of school funding consisting of this income. *Id.* at 296, 300-01 (noting an average spending per pupil of $1965.78 in the entire state and spending in the various Chickasaw Cession school districts roughly consistent with spending outside the Cession).
119. *Id.* at 274.
120. *Id.* at 275.
In an opinion written by Justice White, the Court attempted to explain the guiding force behind the permutations of Young.\textsuperscript{121} The explanation went as follows. Applicability of Young depends not on formal categorizations but on federalism concerns: cases that “stretch [Young] too far and would upset the balance of federal and state interest that it embodies” fall outside of federal court jurisdiction.\textsuperscript{122} Young’s potential to disrupt the balance of federalism, if applied too broadly, has led the Court to “tailor” it narrowly, applying it only when it is “necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to ‘the supreme authority of the United States.’”\textsuperscript{123} This narrow tailoring has led the Court to restrict the Young fiction to cases aimed at ending ongoing violations of federal law.\textsuperscript{124} Thus, when faced with the task of deciding when Young applies, the Papasan majority made its choice based on its assessment of the strength of the federal interest involved in that case.

Just as the Green plaintiffs had tried to characterize notice relief as genuinely prospective,\textsuperscript{125} the Papasan plaintiffs tried to make the relief sought sound prospective even though their injury resulted from past actions—the ill-fated sale of land and investment in the railroads—that had occurred in the distant past. Thus, they did not seek to hold the trustees liable for a past breach of trust but to compel them to comply with their ongoing obligation to pay income from the trust.\textsuperscript{126} Finding this distinction too formal, since the “continuing payment of the income from the lost corpus is essentially equivalent in economic terms to a one-time restoration of the lost corpus itself,” the Court held that the case fell outside of the ambit of Young.\textsuperscript{127}

Having set out its federalism concerns in detail, the Papasan Court nevertheless failed to analyze the federal interest in particular. It did not explain why, if federal law provided land to the state for the purpose of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{121} Id. at 292 (Brennan, J., concurring in part and dissenting in part).
\item \textsuperscript{122} Id. at 277.
\item \textsuperscript{123} Id. (citing Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) (quoting Ex Parte Young, 209 U.S. 123, 160 (1908))).
\item \textsuperscript{124} Papasan, 478 U.S. at 278 (citing Green v. Mansour, 474 U.S. 64, 68 (1985)). The Court justified excluding past compensation that could have an effect on the future through its deterrent value because this effect was too indirect to fit within the narrowly tailored federalism concerns of Young. Id.
\item \textsuperscript{125} See supra text accompanying notes 101-06.
\item \textsuperscript{126} Papasan, 478 U.S. at 279. Even this formal characterization had a serious deficiency: could the trustees have an ongoing obligation to pay the income from the trust once they had lost the corpus of the trust? Id. at 279 n.12. The Court, relying upon Restatement (Second) of Trusts, § 74 (1959), suggested that only an action for damages for past breach of trust remained open to these plaintiffs. Papasan, 478 U.S. at 279 n.12.
\item \textsuperscript{127} Id. at 281.
\end{enumerate}
\end{footnotesize}
promoting education, that purpose did not continue indefinitely into the future. If the income from the land stops, is there not a continuing prospective federal interest in restoring it? The plaintiffs sought payments in the future that would further the specific goal—education—that led to the federal law allegedly violated.\textsuperscript{128} The Court compared the relief requested to the past lost benefits in \textit{Edelman},\textsuperscript{129} but in \textit{Edelman} the Court could say that equitable restitution of lost benefits would no longer serve the day-to-day needs of the poor, for which Congress designed welfare, and thus resembled mere compensation. The restored income in \textit{Papasan}, on the other hand, would provide future education, not compensation for lost education. Therefore, the Court's reliance on \textit{Edelman} is unsatisfying.

Passing to the constitutional claim, the \textit{Papasan} Court found no eleventh amendment bar. Although the federal interest in creating a perpetual trust through land grants for the benefit of the public schools did not motivate the Court to indulge in the \textit{Young} fiction, the Court responded differently to the asserted constitutional right under the fourteenth amendment equal protection clause to a minimally adequate education.\textsuperscript{130} The Court saw the ongoing "unequal distribution by the State of the Benefits of the State's school lands" as "precisely the type of continuing violation for which a remedy may permissibly be fashioned under \textit{Young}."\textsuperscript{131} Although the same action in the past, the sale of the land and the investment in the railroads, produced this ongoing alleged violation, here, the remedy "would ensure compliance \textit{in the future} with a substantive federal-question determination."\textsuperscript{132}

The \textit{Papasan} Court cannot be accused of using fine distinctions to mask policy-driven choices. The rejection of the trust claim had no effect on the outcome since the fourteenth amendment claim provided an alternate ground for the relief requested.\textsuperscript{133} The Court writes plainly and

\begin{itemize}
  \item \textsuperscript{128} \textit{Id.} Cf. \textit{Milliken v. Bradley}, 433 U.S. 267 (1977) (remedial action viewed as prospective relief).
  \item \textsuperscript{129} \textit{Papasan}, 478 U.S. at 280-81; \textit{Edelman v. Jordan}, 415 U.S. 651 (1974). To the extent that they also sought past income lost and interest income, the comparison to \textit{Edelman} is apt. The inability to obtain all of the relief requested does not, however, undermine the federal court's jurisdiction to award other relief. \textit{See id.} at 281 n. 13.
  \item \textsuperscript{130} \textit{Id.} at 282.
  \item \textsuperscript{131} \textit{Id.}
  \item \textsuperscript{132} \textit{Id.} (quoting \textit{Milliken v. Bradley}, 433 U.S. 267, 289 (1977) (quoting \textit{Edelman v. Jordan}, 415 U.S. 651, 668 (1974))) (emphasis in original). For a suggestion that \textit{Milliken} itself may involve a prospective remedy for past violations, see \textit{HART \\& WECHSLER, supra} note 21, at 1192.
  \item \textsuperscript{133} This assertion is true except to the extent that the trust claim may have more chance of success on the merits than the fourteenth amendment claim.
\end{itemize}
forthrightly about the determinative force of the federal interest. But how do the two claims really vary in terms of federal interest? It could be argued that *Young* only works when the condition persisting in the future—disparity in school district income—is itself the violation of federal law. If plaintiffs complain of an existing condition that is merely the result of a violation of federal law in the past, *Young* will elude them. Thus, the federal interest needed to invoke *Young* could be limited to ongoing compliance with federal law.

There is, however, another way of identifying the real federal interest that moves the Court to invoke its legal fiction. The claim that warranted the use of *Young* arose under the Constitution, while the rejected claim was a matter of federal common law that more or less paralleled a field of state law. Indeed, as this Article will elaborate, a distinction between constitutional and nonconstitutional law may underlie much of the development of eleventh amendment doctrine.\textsuperscript{134}

C. The Exclusion of Claims Arising Under State Law

Another eleventh amendment case that explicitly uses a federal interest analysis is *Pennhurst State School & Hospital v. Halderman*,\textsuperscript{135} which presented the question whether the *Young* fiction would avoid the defense of state immunity to claims based on state law. The state law claim in *Pennhurst* found its way to the Supreme Court not through the citizen-state diversity clause at issue in *Chisholm*, but because it arose out of the same "nucleus of operative fact" as several federal question claims that also were raised in the case.\textsuperscript{136} Justice Powell, writing for the majority, employed a federal interest approach to ascertain the scope of *Young*. He traced the Court's willingness to embrace what he openly called a legal fiction to the important values it served: it "promote[d] the vindication of federal rights [and] the supremacy of federal law."\textsuperscript{137} It thus "harmonize[d] the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution."\textsuperscript{138} When the claim comes from state law, *Young* would not serve

\textsuperscript{134} See infra text accompanying notes 221-76.


\textsuperscript{136} *Pennhurst*, 465 U.S. at 117-18.


\textsuperscript{138} *Pennhurst*, 465 U.S. at 105 (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Brennan, J., concurring in part and dissenting in part)).
those federal interests, according to Justice Powell, and therefore the Court would not accept its application.  

_Pennhurst_ directly identified the idea of federal interest as the determinative factor in structuring eleventh amendment doctrine and rejected the more formalistic reasoning suggested by Justice Stevens in dissent. Justice Stevens wrote in terms of the state officials acting beyond the scope of authority extended to them by the state and the consequent failure of the state’s immunity to flow to them, language quite similar to that used by the _Young_ Court itself in justifying its result. One suspects, however, that Justice Stevens too was motivated by his vision of the federal system, even though he declined to phrase his written opinion to directly concede this and spoke instead in the formalistic terms of the concept of _ultra vires_. The suggestion made in this Article that federal interests determine the shape of eleventh amendment doctrine extends beyond the written opinions that happen to concede as much.

Again, it is important to remember that even if all judges openly followed a federal interest analysis, their conclusions would differ. Assessments of federal interest would vary. It is likely that Justices Stevens maintained a different assessment of the federal interest at stake in _Pennhurst_ from Justice Powell’s. Justice Powell’s argument that the purpose behind _Young_ “disappeared” when the claim arose under state law could have been countered with the argument that there was a strong federal interest in the federal claims that the state law claim was pendent.


140. 465 U.S. at 105-08. The majority seems to have realized that legal fictions are valuable in part because one recognizes their falsity and thus focuses upon the purposes that motivated them. See Fuller, _supra_ note 57 at 363, 368-70. “A fiction taken seriously, i.e., ‘believed’, becomes dangerous and loses its utility.” _Id._ at 370.

141. 465 U.S. at 104-05 (Stevens, J., dissenting).


143. In _Pennsylvania v. Union Gas Co._, 57 U.S.L.W. 4662, 4668-69 (1989) (Stevens, J., concurring), Justice Stevens undertook a comprehensive review of eleventh amendment doctrine and concluded that _Pennhurst_, like many other cases, represented a balancing of federal and state interests. He also indicated that he favors a different balance: “In my view, federal courts ‘have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution’ and the laws, and generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy.” _Id._ at 4669 (quoting _Harris v. Reed_, 57 U.S.L.W. 4224, 4228 (1989) (Stevens, J., concurring)).
to and that to bar consolidation of related state claims in a single litigation would impair those federal claims. Indeed, uncertainties created by abstention doctrines and even res judicata (should the state claim brought in state court proceed to judgment before the federal claim) could have been characterized as detracting from the federal interest in enforcing the federal claims.\footnote{144}

In saying that \textit{Young} "harmonize[d] the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution," the Court again evinced the belief that the eleventh amendment must have some significant present force,\footnote{145} implying some ill-justified and ill-defined state interest in immunity. Federal interests may control the application of \textit{Young}, but seemingly only when they outweigh the supposed state interest.\footnote{146} But one might view \textit{Pennhurst} from a different perspective. Instead of saying \textit{Young} only applies to the extent that it serves federal interests, one might say the states can only claim sovereign immunity to the extent that immunity serves federal interests. The state in \textit{Pennhurst} gained immunity not simply because it was a state and because immunity must have some present force; it received immunity because it had enacted statute that was directed at curing the same ills addressed by federal law. In this situation, using immunity as a reward to encourage states to create such alternatives to federal remedies may promote federal interests.\footnote{147}

D. Summary

A majority of the Supreme Court, having reaffirmed the initial choice in \textit{Hans} to extend eleventh amendment immunity to federal ques-

\footnote{144} For a more detailed consideration of some of these issues raised in \textit{Pennhurst}, see Althouse, \textit{supra} note 18, at 1517-25.
\footnote{145} \textit{Pennhurst}, 465 U.S. at 105; see \textit{supra} text accompanying notes 41-43.
\footnote{146} For another case suggesting an eleventh amendment balancing test, see Green v. Mansour, 474 U.S. 64, 71 (1985). Cf. Althouse, \textit{supra} note 44, at 1083-90 (arguing that the Court obscures the meaning of the \textit{Younger} abstention doctrine by confusing what could be a cogent federal interest analysis with notions of state interest).
\footnote{147} Interpreted this way, \textit{Pennhurst} reflects a functional approach. 465 U.S. at 89. The federal system properly tolerates state separateness only when a state has taken an affirmative step that serves the federal interest by creating an alternative remedy. By allowing the state to retain exclusive jurisdiction over its legislative creations and empowering the states to attract institutional litigation into their own courts, the \textit{Pennhurst} doctrine gives states an incentive to create new state law remedies aimed at improving their own institutions. A state that does not take such affirmative steps will gain no immunity. A state that offers a pale substitute for federal law will also invite federal court litigation, since plaintiffs need not initially pursue their state remedies when they have the option to litigate in federal court relying solely on their federal claims. The state can only realize the reward of separateness by convincing plaintiffs that the state court remedy is preferable.
tion suits, still recognizes the need for access to federal courts to vindicate the supremacy of federal law. Consequently, it has had to find a way to meet that need, using the Young fiction and at the same time restricting it, for Young without restriction would open the federal courts to all federal question suits, despite Hans. One key device for restricting Young has been the retrospective-prospective distinction. As shown above, that distinction does not depend on a realistic analysis of whether the individual defendants named in accordance with Young actually will fund any relief granted by the federal court. Instead, it represents an assessment of the strength of the federal interest in making the federal courts available to provide the requested relief. Because a majority of the Court has found the federal interest strong enough only when there is an ongoing violation of federal law, it has created the retrospective-prospective distinction and has groped, in Papasan, toward a distinction between prospective injunction that remedies past violations and prospective relief from ongoing violations of federal law. The second major limitation of Young is the exclusion of pendent state law claims, seen first in Pennhurst. There, too, a conclusion about federal interest determined the scope of state immunity.

If the Court’s distinctions depend on individual judicial assessments of federal interest, litigants may enhance their arguments by demonstrating that the federal interests at stake in cases are in fact broader or stronger than what the majority has in the past recognized. It remains speculative, however, whether individual Justices would have varied their doctrinal choices in response to arguments that concentrated more on the strength of the federal interest and less on formally logical or fictional matters. A different assessment of the federal interest in past relief‡ might have produced an opposite result in Edelman. A different assessment of the federal interest in pendent state law claims§ could have produced an opposite result in Pennhurst.

This Article introduces a new possibility: the predominance of the interest in federal constitutional law over all other kinds of law that might be asserted against the states. To see the validity of this new distinction, it is necessary to understand the special power that Congress possesses with regard to the eleventh amendment.

148. See supra text accompanying note 88.
149. See supra text accompanying note 144.
150. See infra text accompanying notes 221-76.
III. Congressional Power over the Eleventh Amendment

Unlike Young and the recent eleventh amendment cases discussed above, the broad premises of Hans v. Louisiana do not measure up to federal interest analysis. Limited to its particular factual setting—a suit to force the state to pay its war debts—Hans may have lacked a sufficient federal interest to warrant any creativity in designing a doctrine to pull the case into federal court. But Hans did much more: it took the distinctly limited language of the eleventh amendment and conjured up an entirely new dimension in which it could operate, excluding all federal question cases without regard to the plaintiffs' citizenship. If the Hans question were to arise for the first time before the current Supreme Court, it is doubtful whether the Court would stretch to devise this extraliteral interpretation, which runs counter to the strong federal interest in a federal forum for suits against states that violate federal law. Yet, because the precedent is so well established, it is unlikely that the Court will overturn Hans unless it sees the case as seriously detrimental to federal interests. Hans lays the foundation for eleventh amendment doctrine, but much of the later doctrine was designed to mitigate its negative effects on federal interests.

Given the century of post-Hans case law, several members of the Court do not see it as posing a severe threat to federal interests. States that violate federal law cannot avoid suit entirely under existing law. As discussed above, federal suits for prospective relief remain available. Plaintiffs also may obtain relief, including past relief, if local government agencies, such as municipalities or school boards, are defendants, since the Court has restricted the eleventh amendment to the states and their agents. In addition, plaintiffs can reach the assets of individual de-

151. To the extent that Hans represented virtually the same fact pattern as Chisholm—repudiation of war debts, transformed into a federal law violation through the use of the contracts clause—the most satisfying answer may be that there is no private right of action for damages under that constitutional provision. Hans itself could have avoided subjecting states to federal court jurisdiction in exacting payment of war debts by rejecting the substantive law theory that the debts were also actionable under federal constitutional law. In that case, there would be no need to recognize a broad immunity covering federal questions in general. The suit simply would fail to state a claim. See supra note 19.


153. Id. at 2953.

154. See supra text accompanying notes 72-88.

155. Welch, 107 S. Ct. at 2953 (citing Monell v. New York City Dep't of Social Serv., 436 U.S. 658 (1978)). This limitation is particularly striking if one considers that National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), which used the tenth amendment to immunize cities from federal
fendants for damages if they are personally liable and official immunity does not bar relief.\textsuperscript{156} Ironically, the years of chipping away at \textit{Hans} have added staying power to the case. \textit{Hans}' persistence guarantees the complexity of eleventh amendment case law, but, as mentioned earlier, the majority tolerates that complexity as the cost of maintaining some "present force" for the amendment.\textsuperscript{157}

The most significant additional consideration affecting the endurance of the embattled precedent is congressional power. Ordinarily, constitutional decisions put an end to any interplay between the Court and the legislature, introducing a stagnation that only the Court can correct.\textsuperscript{158} Because of this stagnation, stare decisis has a weaker force in constitutional cases.\textsuperscript{159} This section of the Article considers Congress' power over eleventh amendment matters, which, because it too mitigates the harsher effects of \textit{Hans}, provides the majority with an additional reason to leave precedent alone. Based on an understanding of this power and an acknowledgment that \textit{Hans} continues to appeal to a majority of the Court, the final section proposes a revision of eleventh amendment substantive liability, made no distinction between cities and states in discussing federalism concerns. Nor did \textit{Garcia} make such a distinction in overruling \textit{National League of Cities}.

\textsuperscript{156} See supra notes 46 & 74. Thus, though individual officials have limited assets, they are often indemnified by their employers. Though they may not be named as defendants, the states often pay for past relief. See, e.g., Benson v. Allphin, 786 F.2d 268, 280 (7th Cir. 1986), cert. denied, 479 U.S. 848 (1986).

\textsuperscript{157} See supra text accompanying notes 41-43. Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4672 (1989) (Scalia, J., concurring in part and dissenting in part), however, suggests the emergence of a new, extreme pro-\textit{Hans} position, that does not rest on tolerance of complexity. Responding to a further complexity created by the four anti-\textit{Hans} justices (transformed into a majority with the addition of Justice White), Justice Scalia wrote, "[I]nstead of cleaning up the allegedly muddled Eleventh Amendment jurisprudence produced by \textit{Hans}, the Court leaves that in place, and adds to the clutter." \textit{Id.} at 4677. According to Justice Scalia, the case law is "unstable" and "at war with itself." \textit{Id}. Justice Scalia thus views complexity as a problem, not a benign manifestation of the tensions of federalism. He predicts, "[W]e shall either overrule \textit{Hans} . . . or return to its genuine meaning." 57 U.S.L.W. at 4672. Justice Scalia does not elaborate upon this notion of the "genuine meaning" of \textit{Hans}, though it is clear that it does not include congressional power to abrogate immunity under the commerce clause, the precise issue in \textit{Union Gas}, discussed infra text accompanying notes 161-86. His call for simplification suggests the potential for attack on some of the other complicating doctrines discussed in the previous section of the Article.

Since three justices (Rehnquist, O'Connor, and Kennedy) joined Justice Scalia's opinion and four justices (Brennan, Marshall, Blackmun, and Stevens) disapprove of \textit{Hans}, it may be that only Justice White continues to believe in the moderate pro-\textit{Hans} approach articulated by Justice Powell in recent years. See infra text accompanying notes 36-39.

\textsuperscript{158} See, e.g., G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 11 (1982).

doctrine, without overruling *Hans*, that reflects federal interests more accurately than does the present arrangement.

A. The Power of Congress to Abrogate State Immunity

Two years after *Edelman v. Jordan* barred use of the *Young* fiction to pursue retrospective relief in federal court, the Court opened up an entirely new area of eleventh amendment doctrine. Though the Court perceived the need for careful tailoring of the legal fiction it created in *Young*, it took a different view of an attempt by Congress to subject the states to suit in federal court. In *Fitzpatrick v. Bitzer*, the Court unanimously held that Congress could abrogate state immunity, at least when it acted under its fourteenth amendment enforcement power.

This past term, in *Pennsylvania v. Union Gas Company*, five members of the Court joined together to hold that Congress also has the power to abrogate immunity under the commerce clause and presumably under all of its Article I powers. The unanimity broke down over the question of whether the enforcement clause of the fourteenth amendment gives Congress a greater power against the states than do its other powers. Justice Rehnquist had written earlier, in *Fitzpatrick*, that section five of the fourteenth amendment "expressly granted [Congress] authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority." Justice Scalia, writing for the four members

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162. Id. at 4665-67 (Brennan, J., joined by Justices Marshall, Blackmun, and Stevens). Justice Brennan frames the issue in commerce clause terms and his reasoning relies in part on the particular importance of the commerce power. Nevertheless, most of his reasoning would also apply to other congressional powers.
163. Id. at 4668-69 (Stevens, J., concurring); id. at 4672 (White, J., concurring in part and dissenting in part). For a discussion of Justice Stevens' reasoning, based on the notion that *Hans* is merely a judge made doctrine, see supra note 48.
164. *Fitzpatrick*, 427 U.S. at 456. Justice Rehnquist also wrote, "We think that Congress may, in determining what is 'appropriate legislation,' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Id. at 456. It has been argued that the language implying limitation to the fourteenth amendment related only to the need to overcome the restrictions on congressional power imposed by *National League of Cities* and to permit abrogation even in core areas of state activity. See Field, supra note 6, at 1228. If so, legislation based on other powers, even during the reign of *National League of Cities*, could have survived the *Fitzpatrick* Court's restriction as long as it fell outside of those core areas. Thus, if only there had been the necessary explicit statement of abrogation in *Parden v. Terminal Ry. of the Ala. State Docks Dep't.*, 377 U.S. 184 (1964) (operation of railroad), or *Welch* (operation of ferry), Congress could have abrogated immunity without constitutional problems.
of the Court in *Union Gas*, emphasized that the "Fourteenth Amend-
ment . . . was avowedly directed at the power of the States."165 On the
other hand, Justice Brennan, writing for the plurality, saw no basis for
viewing the fourteenth amendment as an "‘ultraplenary’ grant of author-
ity" simply because it contains a separate section giving Congress power
to enforce its substantive provisions.166 According to Justice Brennan,
all constitutional grants of power to Congress automatically detract from
the states’ power.167

Both sides in *Union Gas* assessed the federal interests at stake, osten-
sibly as a way of determining what the Constitution must mean. Justice
Brennan emphasized that some problems, such as the environmental
harm caused by hazardous waste disposal at issue in *Union Gas*, can only
be solved on a national scale by the federal government.168 Moreover,
sometimes the states will be significant participants in these problems (for
example, the states own and operate many hazardous waste sites), and
the needed solutions may demand a private cause of action for money
damages in order “to be satisfactory.”169 Because of these needs, accord-
ing to Justice Brennan, “the commerce power must include the power to
hold the States financially accountable.”170 That is, federal interests sup-
ported the creation of a doctrine allowing the expansion of federal
jurisdiction.

Similarly, Justice Scalia asserted that "the Constitution envisions
the necessary judicial means to assure compliance with the Constitution
and laws,”171 and that therefore some inroads into state immunity were
“‘inherent in the constitutional plan.’”172 But although he noted the
“inherent necessity” for suits brought by the United States and by other
states against states in federal court, he did not share Justice Brennan’s

165. 57 U.S.L.W. at 4676. Justice Scalia also argued that the fourteenth amendment is
different from Article I powers because, unlike Article I, it postdates the eleventh amendment.
*Id.* Justice Brennan astutely pointed out that under Justice Scalia’s interpretation of the sover-
eign immunity, it preceded the Constitution, and therefore all of the Article I powers, like the
fourteenth amendment, postdate the concept of sovereign immunity. *Id.* at 4666.

166. *Id.* (referring to the enforcement clause, U.S. CONST. amend. XIV, § 5). Justice
White provided the fifth vote in support of congressional abrogation but did not elaborate his
reasons other than to state his lack of support for the plurality’s reasoning. *Id.* at 4672 (White,
J., concurring in part and dissenting in part).

167. *Id.* at 4666 (citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1880) (“[E]very addition of
power to the general government involves a corresponding diminution of governmental powers
of the States. It is carved out of them.”)).

168. *See id.* at 4667.
169. *See id.*
170. *Id.*
171. *Id.* at 4674.
172. *Id.* at 4673 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).
assessment of the need for suits brought by private individuals.\textsuperscript{173} In discounting the need for the kind of private suits made possible by congressional abrogation, he relied on the ability of private individuals to sue state officials for prospective relief and, under section 1983, to sue them personally for damages and to sue local government units for damages.\textsuperscript{174} Put in the terms of this Article, Justice Scalia saw the existing forms of jurisdiction as sufficient to meet federal interests and thus rejected an expansion of jurisdiction as unjustified by federal interests.

How can Congress give the federal courts a type of jurisdiction excluded from the definition of "judicial power" in Article III?\textsuperscript{175} It is elementary that Article III describes the potential reach of federal court jurisdiction and that Congress, which the Constitution gave the choice whether to create lower federal courts at all, has control over how much of that judicial power to give.\textsuperscript{176} Thus, the Article III limits on judicial power also are necessarily limits on Congress' power to confer jurisdiction. As mentioned earlier,\textsuperscript{177} the eleventh amendment is directed at Article III and limits how it may be construed. It can be argued that the ability of Congress to subject the states to suits in federal court, as well as the long-recognized ability of the states themselves to consent to suit in federal court,\textsuperscript{178} demonstrates the fallacy of Hans. According to this argument sovereign immunity cannot implicitly limit the categories of jurisdiction contained in Article III if consent to jurisdiction is possible.

\begin{footnotes}
\item 173. Id. at 4674.
\item 174. Id. (citing Ex Parte Young, 209 U.S. 123 (1908); Monell v. New York City Dept. of Social Service, 436 U.S. 658 (1978)). Compare supra text accompanying notes 154-57 (noting that this complex doctrine makes Hans more acceptable) with supra note 157 (citing evidence of Justice Scalia's dissatisfaction with complex doctrine).
\item 176. C. Wright, supra note 51, at 32-39.
\item 177. See supra text accompanying notes 5 & 13.
\item 178. See Smith v. Reeves, 178 U.S. 436, 441 (1900). Just as the Court stresses the clarity with which Congress must state its intent to subject the state to suit, see infra text accompanying notes 187-94, the Court will not find that a state has waived its immunity unless it makes a clear statement. In both instances, it is not enough to express the intent to make the states subject to suit (that is, to make the state liable). There must be a specific intent to make the state suable in federal court. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). In Atascadero, the plaintiffs argued, in addition to the point considered in the text of the Article, that Art. III, § 5, of the California Constitution waived eleventh amendment immunity. Id. That section, which the Supreme Court held insufficiently explicit, provided: "Suits may be brought against the State in such manner and in such courts as shall be directed by law." Id.
\end{footnotes}
since the consent of the defendant cannot create subject matter jurisdiction.\textsuperscript{179}

Although Justice Brennan, and all of the justices that joined him in \textit{Union Gas} except Justice White, consider \textit{Hans} incorrect,\textsuperscript{180} Justice Brennan does attempt to square plenary congressional power to abrogate with \textit{Hans}. His reasoning is as follows: Eleventh amendment immunity excludes only suits that the state has not consented to.\textsuperscript{181} Consented-to suits do fall within the judicial power defined in Article III, as indicated by the longstanding acceptance of suits that the states themselves have explicitly consented to.\textsuperscript{182} In ratifying the Constitution, the states have consented in advance to any suits that Congress might choose to subject them to, so long as Congress acts pursuant to one of its Article I powers.\textsuperscript{183} “States held liable under such a congressional enactment are thus not ‘unconsenting;’ they gave their consent all at once, in ratifying the Constitution . . . rather than on a case by case basis.”\textsuperscript{184} Seen this way, the states do not consent to a lack of subject matter jurisdiction, their ratification of congressional power has caused cases to fall into one of the categories of permissible jurisdiction defined by Article III: Consented-to federal question cases.\textsuperscript{185} This justification for abrogation may seem somewhat tortuous. Indeed, Justice Scalia wrote, “The suggestion that this is the kind of consent our cases had in mind when reciting the familiar phrase, ‘the States may not be sued without their consent,’ does not warrant response.”\textsuperscript{186} Perhaps Justice Brennan’s notion of consent

\textsuperscript{179} See \textit{Hart & Wechsler supra} note 21, at 1213 (noting the state’s ability to consent to suits against it in federal court and asking, “Is this an anomaly (however well-established) in light of the ordinary rule that the parties lack power to confer jurisdiction on the federal courts?”).

\textsuperscript{180} See Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4676-77 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Scalia considers the congressional abrogation doctrine so unreasonable that it can only make sense to those who would simply prefer to overrule \textit{Hans}. \textit{Id.} He cannot account for Justice White’s acceptance of both \textit{Hans} and plenary congressional abrogation power. \textit{Id.} at 4675. Since Justice White does not attempt to explain his concurrence with Justice Brennan’s \textit{Union Gas} opinion, \textit{id.} at 4672, there is no written explanation of the abrogation power by a judge that would also uphold \textit{Hans}.

\textsuperscript{181} \textit{Id.} at 4667 (citing \textit{Ex Parte} New York, 256 U.S. 490, 497 (1921) (“[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.”)).

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id.}


\textsuperscript{186} \textit{Union Gas}, at 4675. It should be noted that although Justice Stevens provided the
through ratification is best characterized as another fiction, designed to make a desirable power—this time congressional—fit into the existing framework.

In developing the congressional abrogation doctrine, the Court has required an express statement of intent to overcome state immunity. *Atascadero State Hospital v. Scanlon* 187 took this trend to its current extreme. The plaintiffs in that case sought to establish that Congress intended to abrogate the state's eleventh amendment immunity by enacting the Rehabilitation Act.188 Rejecting the plaintiffs' attempt to demonstrate congressional intent by using legislative history and "inferences from general statutory language,"189 the Court limited Congress to a single form of expression: it must "mak[e] its intention unmistakably clear in the language of the statute."190

Congress' subsequent amendment of the Rehabilitation Act191 providing the requisite clear statement may shed some light on the *Atascadero* rule.192 Either the Court's strict rule led it to mistake congressional intent and thus ought to be abandoned, or the strict rule has functioned well in teaching Congress how to abrogate immunity effectively.193 If Congress retains this lesson and from now on systemati-

190. *Id.* The lack of a citation for this limitation indicates its novelty. See also Hutto v. Finney, 437 U.S. 678, 694 (1978) (relying on legislative history to find congressional intent to abrogate eleventh amendment immunity). Prior to *Atascadero*, the established requirement was that "Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court." *Atascadero*, 473 U.S. at 242 (citing Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4672 n.7 (1989) (White, J., concurring in part and dissenting in part). Justice White, who was joined in this portion of his opinion by the Chief Justice and Justices O'Connor and Kennedy, "would not go so far" as to require an explicit reference to the eleventh amendment, but he did note that the language at issue in *Union Gas* suffered by comparison to the language used to over-
cally focuses on the immunity issue, by drafting an express statutory provision when it chooses to abrogate, the restrictiveness of *Atascadero* will only matter to those who want the courts to find broader abrogation than Congress intends and with respect to statutes written prior to *Atascadero*. It is not unlikely, however, that after *Atascadero*, Congress simply focused on the narrow problem of effectuating the Rehabilitation Act. If so, it will not necessarily approach future legislation with the Court's drafting lesson foremost in mind.  

**B. The Constructive Waiver Theory and Its Demise**

Until recently there also had been a theory of constructive waiver, a creature of judicial imagination premised on an odd mix of state and congressional action. In *Welch v. State Department of Public Highways & Public Transportation*, this theory met its demise. The Supreme Court faced the question whether a state may be sued under the Jones Act, which gives "seamen" injured in the course of their employment a federal claim against their employers and explicitly states that federal

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19. The *Welch* plaintiff was a female dockworker, but no one questioned that the Jones Act covered her. *Id.* at 2961 n.6.
courts may hear these claims.\textsuperscript{197} Although the statute does not name the states as possible defendants, it is conceivable that the employer could be a state.

The legal question in \textit{Welch} was similar to that in \textit{Parden v. Terminal Railway of the Alabama State Docks Department},\textsuperscript{198} which considered whether an employee injured by a state-operated railroad could sue the state in federal court under the Federal Employer's Liability Act (FELA).\textsuperscript{199} Like the Jones Act, the FELA authorized suit in federal court against defendants that could include the state if the state happened to engage in the injury-causing activity. Like the Jones Act, the FELA omitted any specific reference to the state. This omission precluded the use of the doctrine of congressional abrogation developed in \textit{Fitzpatrick} and \textit{Atascadero}. But in \textit{Parden} the Court had staked out a more complex doctrine to find consent to suit when both Congress and the state had taken some limited action suggesting waiver, though neither had gone far enough to overcome sovereign immunity. Justice Brennan, writing for the \textit{Parden} majority, reasoned that Congress "meant what it said" when it wrote a statute subjecting interstate railroads to suit in federal court.\textsuperscript{200} Thus, if a state operated a railroad, the FELA covered it.\textsuperscript{201} Moreover, Congress had the constitutional power to impose this liability on the states under the commerce clause.\textsuperscript{202} Finally, recognizing that "a State may not be sued by an individual without its consent,"\textsuperscript{203} he found the necessary consent in the state's entry into the railroad business after the enactment of the FELA, by which "Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act."\textsuperscript{204} That is, the act of oper-

\textsuperscript{197} 46 U.S.C.A. § 688 (West 1975).
\textsuperscript{198} 377 U.S. 184 (1964).
\textsuperscript{199} 45 U.S.C. §§ 51-60 (1908).
\textsuperscript{200} Parden v. Terminal Ry of the Ala. State Docks Dep't., 377 U.S. 184, 187 (1964).
\textsuperscript{201} \textit{Id.} at 187-90. In an inversion of \textit{Atascadero}'s clear-statement rule, Justice Brennan wrote that the state is included unless there is "an express provision to the contrary." \textit{Id.} at 190.
\textsuperscript{202} \textit{Id.} at 190-92. In fact, Justice Brennan implies at this point that the statute alone, without the addition of the constructive waiver step described in the text, results in a waiver. \textit{See also id.} at 193-94 n.11. As explained above, this aspect of \textit{Parden} died long ago: Congress must specifically name the states to waive immunity for them. \textit{See infra} text accompanying notes 187-94. In \textit{Parden}, four justices (White, Douglas, Harlan, and Stewart) dissented on the ground that Congress had to subject the state to suit explicitly—proposing the clear-statement rule and opining that "Congress did not even consider the possible impact of its legislation upon state immunity from suits." \textit{Id.} at 199.
\textsuperscript{203} \textit{Id.} at 192.
\textsuperscript{204} \textit{Id.}
ating a railroad constituted acceptance of the condition supposedly laid down by Congress, and hence a constructive waiver of immunity.\footnote{205}{Id.}

As the Court's requirement of a clear statement of congressional intent to abrogate immunity grew increasingly stringent over the years, \textit{Parden} seemed more and more out of place. Unlike the congressional abrogation cases that looked narrowly at Congress' stated intent, the \textit{Parden} doctrine was a judicial leap of imagination, capable of overcoming the lack of a direct abrogation of state immunity. The elements making up a waiver did not point toward the state's intent to consent to suit.\footnote{206}{See Field, \textit{supra} note 6, at 1215.} A state does not enter into the railroad business as a way of expressing consent to suit in federal court. Nor is there any reason to think that Congress, in passing the FELA, meant to lay down a condition alerting the states that operating a railroad constitutes a waiver of sovereign immunity. Thus, one might fairly call \textit{Parden}—like \textit{Young}—a legal fiction.\footnote{207}{For an argument that \textit{Hans} is also a legal fiction see \textit{supra} text accompanying notes 58-63.}

Later cases limited \textit{Parden} by emphasizing the need for clarity in Congress' expression of the condition.\footnote{208}{In an article written before \textit{Welch}, Professor Brown wrote that the inquiries for congressional abrogation and state waiver had become the same, though with different purposes, to "ensure[] that Congress knew what it was doing" and to ensure "that the state knows what it is getting into," respectively. Brown, \textit{supra} note 139, at 388.} With newfound respect for the states' immunity, the Court began to view waiver as a "surrender of constitutional rights," that ought to be treated the way the Court would treat the waiver of a constitutional right by an individual.\footnote{209}{Edelman v. Jordan, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.") See also Employees of the \textit{Dep't of Pub. Health and Welfare v. Department of Pub. Health & Welfare}, 411 U.S. 279 (1973). Justice Douglas, who joined the dissenting opinion in \textit{Parden}, which criticized the majority for not requiring a clear statement of intent to condition entry in to the railroad business on consent to suit in federal court, wrote for the majority in \textit{Employees}: "It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution." \textit{Id.} at 285.} Accordingly, the Court stressed the state's awareness of the condition, its realization that taking a particular action would constitute waiver, and the voluntariness of taking the action.\footnote{210}{See \textit{Employees}, 411 U.S. at 279, 293-98 (Marshall, J., concurring in the result). \textit{See also Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism}, 89 \textit{Harv. L. Rev.} 682, 692 (1976). Professor Tribe questions Justice Marshall's assumptions on the ground that they impose unconstitutional conditions: "[I]f states have a right under article III and the eleventh amendment not to}
provide some traditional service to its citizens, as opposed to entering a nontraditional business, the Court would hesitate to find waiver.211

After all of this constriction of Parden, Welch may have been little more than a delayed death announcement. If Congress gave enough thought to making the states subject to suit in federal court that it managed to compose a sufficiently clear statement of the condition, one would think it would simply go on to make the explicit "Atascadero statement" that would avoid the need to find an additional act of waiver by the state. It is difficult to imagine Congress, either intentionally or unwittingly, writing a clear statement that would serve as a predicate for constructive waiver but would not work as a direct abrogation, independent of any additional act by the state. A statute only would do the former without also doing the latter if it expressly rendered a state subject to suit in federal court as a condition of engaging in a particular activity. But even then, Parden seems extraneous. Such a provision would occur in a statute imposing liability for some activity conducted in violation of federal law. The state could not face that substantive liability unless it had undertaken the activity regulated by federal law. Whenever the possibility of a lawsuit under the statute existed, the state would have engaged in the activity that the federal court could read as constituting

be subjected to unconsented suits in federal court, then it would seem that Congress lacks the power to condition even their subsequent entry into various activities upon state forfeiture of that right, however knowing and voluntary." Id. at 692. This problem inheres in the constructive waiver doctrine of Parden, where the state's act constitutes the consent to suit. See also Field, supra note 6, at 1216-17 (suggesting the conditioning is acceptable because of the "nexus between the privilege granted and the demanded waiver"). Presumably, the problem is avoided when Congress directly imposes suit on the state, as in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), since no conditioning occurs. The act that constitutes consent is taken by Congress and not coerced from the state. This is an oddly formal distinction. In either case the susceptibility to suit occurs because the state engages in the regulated activity. See supra text accompanying note 12.

211. See Employees, 411 U.S. at 279. In Employees, the Court wrote,

Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. Congress, acting responsibly, would not be presumed to take such action silently. The dramatic circumstances of the Parden case, which involved rather isolated state activity can be put to one side. We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a State's governmental hierarchy.

Id. at 284-85. Concurring, Justice Marshall distinguished these proprietary and governmental state functions in a different way, producing the same result. Traditional state functions would tend to precede the enactment of a statute expressing the condition. According to Justice Marshall, the Court should not construe the activity as a waiver; waiver should not flow from the mere continuation of the activity or the failure to cease it. Id. at 296-97.
waiver. The state would never find itself in the position of a defendant in a FELA case in the first place if it had not entered into the railroad business as Alabama did in Parden.\textsuperscript{212}

Justice Brennan, who wrote Parden, subsequently incorporated Parden into his general thesis of eleventh amendment interpretation.\textsuperscript{213} For him, Parden indicated that the states gave up their sovereignty with respect to any area in which Congress received power. Thus, if Congress creates a cause of action that can be asserted against a state, a lawsuit may be brought as a simple matter of federal question jurisdiction.\textsuperscript{214} Under Justice Brennan's later elaboration, not only could the Court cease to look for an act by the state that might constitute waiver, but it would not even need to look for a statement by Congress that it intended to subject the state to suit in federal court. As long as Congress created substantive liability that could apply to a state, no immunity problem would exist. Of course, this is another way of saying the Court should reject Hans.

In Welch, the Supreme Court majority buried Parden with very little ceremony. After finding the suit barred because the Jones Act lacked a clear statement of intent to abrogate as required by Atascadero,\textsuperscript{215} the Court stated that no other route to finding the state suable in federal court existed.\textsuperscript{216} It brushed aside Parden as a virtual nullity, based on the misinterpretation of earlier cases and simply disregarded by later cases.\textsuperscript{217} Interestingly enough, the very next section of its opinion, the majority, answering Justice Brennan's call to overrule Hans, also went on to sing the praises of stare decisis.\textsuperscript{218} This variable respect for precedent is not particularly surprising. Stare decisis always has some force; the real issue is whether a justice will perceive sufficient reason to overcome it on a given occasion. The majority felt sufficient motivation to overrule Parden but not Hans. The minority was ready to overrule Hans, but,

\textsuperscript{212} 377 U.S. at 184. See Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4672, 4676 (1989) (Scalia, J., concurring in part and dissenting in part) (noting the insignificance of the waiver step, given that substantive law only applies to those who "engage in the activity or hold the status that produces liability"). It should be noted that the roundabout Parden analysis did serve one key purpose: it allowed the federal courts to avoid the question of whether Congress can abrogate the states' immunity using constitutional provisions other than the fourteenth amendment, a question that the Supreme Court left unresolved until this Term's Union Gas decision. Id.

\textsuperscript{213} See supra text accompanying notes 7-22.

\textsuperscript{214} Parden v. Terminal Railway of the Alabama State Docks Dep't., 377 U.S. 184, 192 (1964).


\textsuperscript{216} Id.

\textsuperscript{217} Id. at 2948.

\textsuperscript{218} Id. at 2948-49.
failing that, would have retained *Parden*, which mitigates *Hans* at least to a degree. The majority in *Welch* characterized the precedent it rejected as a misguided deviation from earlier cases, eroded by later cases.219 Yet precisely the same argument could be made for overruling *Hans*: there are earlier eleventh amendment cases that *Hans* arguably deviates from,220 and later cases, such as *Young*, that reduce much of its force.

C. Summary

By requiring plaintiffs to name individual state officials and not the state itself as a defendant, the *Young* doctrine disguises the reality that state action in violation of federal law deprives the state of its immunity. Loss of the states' immunity, as an involuntary result of its action and in the absence of express consent, is nonetheless the effect of that doctrine. Beyond the *Young* doctrine, however, the Court carefully guards against involuntary or constructive waiver—express consent by Congress is considered a crucial element. Under *Young*, the Court is willing to piece together an admitted fiction to impose liability on the states. Under *Atascadero* and *Welch*, immunity prevails unless the clearest congressional statements dictate otherwise. The theoretical break between the congressional abrogation cases, on the one hand and *Young* and its progeny on the other, brings a disturbing incoherence to eleventh amendment case law. One way to integrate these two divergent lines of thought without rejecting either *Hans* or *Young* is to distinguish immunity under constitutional and nonconstitutional law. The next section of the Article proposes using this distinction to restructure eleventh amendment doctrine and contrasts this change with overruling *Hans*.

IV. A Proposed Distinction Between Constitutional and Nonconstitutional Law

A. Moving Beyond *Young*'s Constitutional Law Limitation

*Parden* created a device that permitted federal courts to grant compensation for past injuries based on federal statutory law, even though Congress failed to abrogate the state's immunity expressly and even though the prospective-retrospective distinction precluded the use of *Young*. This new creation, constructive waiver, would only work, however, in cases based on federal statutes. It depended on express statutory

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219. Id. at 2948.
220. This argument is made in great detail in J. Orth, supra note 6, at 222-28. For a contrary argument, finding that the cases cited by Professor Orth actually comport with *Hans*, see Collins, supra note 50, at 222-27.
language that a federal court could construe as notifying the states that their entrance into a particular activity would constitute waiver of eleventh amendment immunity. Conversely, constructive waiver could never take place in cases based on a violation of constitutional law.\textsuperscript{221} Oddly, then, the \textit{Parden} doctrine reflected an inversion of the usual order of priority: constitutional cases generally present the most compelling demand for relief in federal courts.\textsuperscript{222}

Indeed, in \textit{Young}, it was the need to provide a federal forum for the enforcement of federal constitutional law that led the Court to evade the full force of \textit{Hans} by creating a legal fiction. The discussion of federal law in the text of \textit{Young} itself is restricted to constitutional law, as is the oft-quoted passage of \textit{Young} that sets forth its doctrine:

\begin{quote}
The act \[the challenged state statute\] to be enforced is alleged to be \textit{unconstitutional}, and if it be so, the use of the name of the State to enforce an \textit{unconstitutional} act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity . . . . If the act . . . be a violation of the Federal \textit{Constitution}, the officer in proceeding under such enactment comes into conflict with the superior authority of that \textit{Constitution}, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.\textsuperscript{223}
\end{quote}

There is no mention here of nonconstitutional federal law, such as the statutes and regulations permitted to invoke the \textit{Young} fiction in later cases.\textsuperscript{224} For example, in \textit{Edelman} the plaintiffs charged the state de-

\textsuperscript{221} Conceivably, however, Congress could write a general statute that would abrogate state immunity for all federal question cases or all constitutional cases. It has been argued, though unsuccessfully, that 42 U.S.C. § 1983 is such a statute. \textit{See infra} note 267. In rejecting this argument, the Court has not disaffirmed Congress' power to make such a general abrogation. Instead, it has relied on the statutory interpretation that Congress directed § 1983 against individuals acting under color of law and not against the states themselves. \textit{See} \textit{Quern v. Jordan}, 440 U.S. 332, 345 (1979).

\textsuperscript{222} \textit{See} Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 293 n.8 (1973) (Marshall, J., concurring in the result) (noting the "strange hierarchy that would provide greater opportunity to enforce congressionally created rights than constitutionally guaranteed rights in federal court"). Professor Field, however, writes that the hierarchy makes sense if the policy of the eleventh amendment is to limit the judiciary and not Congress, though she finds no textual or historical support for this policy. Field, \textit{supra} note 6, at 1256-58. She goes on to write that without any such support, it is "strange" to permit statutes but not constitutional provisions to overcome state immunity. \textit{Id.} at 1260-61.

\textsuperscript{223} \textit{Young}, 209 U.S. at 159-60 (emphasis added).

\textsuperscript{224} \textit{See}, e.g., Worchester County Co. v. Riley, 302 U.S. 292 (1937). In that case, the Court notes that eleventh amendment immunity is overcome "when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States." \textit{Id.} at 297. The Court did not discuss why \textit{Young} extends beyond the constitutional context presented, and moreover, it assumed \textit{Young} applies to violations of state
fendants with failing to comply with federal administrative regulations, yet the Court concentrated entirely on making the retrospective-prospective distinction to limit the scope of Young.\textsuperscript{225} It quoted the Young passage above containing the textual limitation to constitutional law, and then accepted without discussion that Young permits federal courts to adjudicate the claim for prospective injunctive relief.\textsuperscript{226} Since Justice Douglas, in dissent, mentioned the issue,\textsuperscript{227} we may assume the Court was not oblivious, but rather decided to ignore the discrepancy.

The Court's silence seems to confirm the federal interest analysis that this Article describes in section II. The federal interest in federal statutory and regulatory law may have seemed so strong that no discussion of the Young expansion was even needed.

Despite the difficulty of quoting Young and applying it in nonconstitutional settings, this logical gap attracts little judicial attention.\textsuperscript{228} Most

\textsuperscript{225} For a discussion of Edelman, see supra text accompanying notes 72-88.

\textsuperscript{226} Edelman v. Jordan, 415 U.S. 651, 653-54 (1974). The plaintiffs alleged that in addition to violating the federal regulations under the Aid to the Aged, Blind, and Disabled program, the failure to process some applications for aid within the prescribed time violated the fourteenth amendment's equal protection guarantee. \textit{Id.} at 653 n.1. This footnote refers to pendent jurisdiction, but not as a means of overcoming the eleventh amendment problems: pendent jurisdiction overcame the requirement existing at that time that the claim exceed some jurisdictional amount for claims governed by 28 U.S.C. § 1331 but not for civil rights claims under 28 U.S.C. § 1343. \textit{Id.} (citing \textit{Hagans v. Lavine}, 415 U.S. 528 (1974)). The use of pendent jurisdiction to overcome an eleventh amendment bar is questionable after Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984). For federalism reasons, that case barred the use of pendent jurisdiction to file state law claims against state officials in federal court. \textit{Id.} at 122-30. Federalism concerns, however, would have a different impact on a federal statutory claim linked to a federal constitutional claim.

\textsuperscript{227} Edelman, 415 U.S. at 679. Justice Douglas found that, because the plaintiffs also pursued a fourteenth amendment claim, the case fell within Young. \textit{Id.} at 680.

\textsuperscript{228} Two able research assistants painstakingly combed the lower court case law through mid-1987 and found only one case that directly addressed the issue and discussed it at any length, Great Lakes Inter-Tribal Council, Inc. v. Voigt, 309 F. Supp. 60 (W.D. Wis. 1970). In that case Judge Doyle analyzed the alleged violation of a federal treaty by a state statute applying fish and game restrictions to Indians and equated the importance of the federal law at issue with constitutional law. He also rejected the plaintiff's attempt to characterize the suit as founded on constitutional law simply because it was urged that a state statute conflicted with federal law and thus was void under the supremacy clause, citing Supreme Court precedent established in the context of the former requirement of 28 U.S.C. § 2281 that a three judge court hear cases seeking an injunction on the ground that a state statute violated the Constitution. See \textit{id.} at 62-63 (citing Swift & Co. v. Wickham, 382 U.S. 111 (1965)).
courts have assumed Young applies whenever there is a violation of any federal law.229

B. Why Treat Federal Constitutional Law Differently?

Significant differences between federal statutory and constitutional law justify different treatment under the eleventh amendment. Specifically, a federal statute necessarily has received the attention of Congress. As explained in the previous section,230 Congress has the power to abrogate state sovereign immunity when it deems access to federal court a desirable aspect of the statutory enforcement.231 But the provisions of the Constitution have not received this attention, nor are they part of a detailed scheme that is expected to spell out remedies. The Constitution sets forth guarantees in outline form, and, consequently, the federal courts have taken on a fairly expansive role in supplying the detail needed to give meaning to those skeletal provisions.232 Notably, the

229. For a typical example of the way courts make the logical leap, see Frye v. Lukehard, 361 F. Supp. 60, 64 (W.D. Va. 1973). The Supreme Court once mentioned the issue in a footnote, in Ray v. Atlantic Richfield Co. 435 U.S. 151, 156-57 n.6 (1978). Justice Stevens, dissenting in Pennhurst, a case in which the majority made much of the need to control any expansion of the Young fiction, drew attention to that earlier statement and asked why the Court had made so little of expanding Young in Ray. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 137 n.13 (1984) (Stevens, J., dissenting). See supra text accompanying notes 135-47. Justice Stevens thought that the application of Young to violations of state law, at issue in Pennhurst, deserved the same offhand acceptance. Pennhurst, 465 U.S. at 137 n.13 (Stevens, J., dissenting). Quite the opposite of Pennhurst—in which the Court was able to assert, rightly or wrongly, that there is no federal interest in hearing a claim based on state law in federal court, id. at 106 (Stevens, J., dissenting)—in Edelman, the federal interest in federal statutory law must have appeared so strong that the Court allowed an expansive reading of Young to pass almost unnoticed.

Language in Pennhurst indicates that the Court equates federal statutory and constitutional law. Justice Powell, even as he hemmed in Young, affirmed its necessity to “promote the vindication of federal rights” and the “supremacy of federal law.” Id. at 105. In these words, there is ample room to include federal statutory law within the federal interest that Young was designed to preserve, though Justice Powell elsewhere characterizes the Young fiction as necessary to “harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.” Id. (quoting Perez v. Ledesma, 401 U.S. 82, 106 (1971) (Justice Brennan, concurring in part and dissenting in part)). It could be argued that the phrase “powers secured elsewhere in the Constitution refers to the power to make statutes, thus making this language also support the extension of the Young fiction to statutory law.

230. See supra text accompanying notes 160-94.

231. On the power of Congress to abrogate under article I powers other than the commerce clause, see supra, text accompanying note 163.

232. See Davis v. Passman, 442 U.S. 228, 241 (1979) (finding implied cause of action under Constitution). The Davis Court wrote,

Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. For example, statutory rights and obli-
courts elaborate the remedies available when constitutional rights are violated. Thus, resolution of conflicts between sovereign immunity and federal constitutional rights forms a natural part of the judicial role. The Court played out that role in *Young*. The subsequent extension of *Young* to nonconstitutional cases shifted this appropriate and desirable judicial activism to congressional creations, possibly giving them an unintended remedial reach.

Concerns about this overextension may have found expression in the *Edelman* Court's exclusion of retrospective relief from *Young* treatment. The desire not to exceed its proper role and overextend the reach of statutes (and regulations enforcing statutes, such as those involved in *Edelman*) may have led to the prospective-retrospective distinction. This distinction, however, has the additional effect of curtailing remedies for constitutional violations, where there is no need to be concerned about overextension of statutory remedies and where the Court's role in defining remedies is highly desirable.

A distinction between constitutional and nonconstitutional law would reorganize doctrine in a way that would affirm the Court's role in the area of constitutional law and would retain Congress' dominance over the remedial scope of its own statutes. If *Young* only governed constitutional law cases, the exclusion of claims for past relief, developed in the context of claims under federal regulations, could be eliminated. Plaintiffs could then pursue all forms of relief available under the Constitution, as a matter of judge-made law. On the other hand, courts then would cease to use devices of their own creation to bring federal nonconstitutional claims into federal court, as indeed they have already done with respect to state claims. Congress would retain exclusive control

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233. See discussion of Pennhurst State School & Hosp. v. Halderman, *supra* text accompanying notes 135-47. A similar phenomenon occurred in *Papasan* v. Alaim, 478 U.S. 265 (1986). The Court declined to use *Young* to allow a claim based on federal common law into federal court. *See supra* text accompanying notes 112-34. *Papasan* is, however, oddly out of keeping with an institutional understanding of the court's role since there is no congressional assessment of federal interest in remedies to defer to. *See infra* text accompanying notes 236-43.
over the question of access to federal court in cases based on federal statutes and other nonconstitutional law, though courts would still need to determine whether a given statute in fact authorizes federal jurisdiction.\textsuperscript{235}

This is a novel and perhaps unsettling proposal, at least to those steeped in eleventh amendment law and committed either to the existing doctrinal framework or to overruling \textit{Hans}. But let us examine it further, using a federal interest approach. The case of \textit{Ex Parte Young} itself represented judicial lawmaking designed to enforce constitutional rights. The Court recognized the need for a remedy,\textsuperscript{236} but also the importance of access to a federal trial court.\textsuperscript{237} The Court found a way, through the creation of a legal fiction, to provide that access. But when federal statutory law forms the basis of a case, no equivalent need for judicial activism to protect and further federal interests exists. When Congress has already had the occasion to consider the procedures needed to support the rights it has created and has neglected to make the state suable in federal court, it is hard to find any federal interest capable of motivating the Court to provide what Congress has omitted.

The federal interest in vindicating constitutional rights is independent of any action taken by Congress to enforce them. Congress' indifference or hostility to constitutional rights does nothing to impair the federal courts' role in enforcing those rights. If anything, the courts' activism ought to increase in the absence of congressional attention to those rights.\textsuperscript{238} But contrary considerations take hold when federal statutory rights form the basis of a claim. The federal courts could not have cre-

\textsuperscript{235} The clear-statement rule of \textit{Atascadero} is an example of the court's performing this interpretational function. It is important to note in connection with the proposal made here that if \textit{Young} were withdrawn from claims arising under nonconstitutional law, \textit{Atascadero} may not necessarily apply to requests for prospective relief which currently may be heard pursuant to \textit{Young}. For an argument that it should not, see infra text accompanying notes 244-46.

\textsuperscript{236} \textit{Ex Parte Young}, 209 U.S. 123, 161-68 (1908), is the well-spring of case law concerning the existence of private rights to sue that are implicit in the Constitution. \textit{See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics}, 403 U.S. 388, 400-03 & n.3 (1971) (Harlan, J., concurring).

\textsuperscript{237} In \textit{Young}, Justice Harlan urged unsuccessfully that plaintiffs could assert their constitutional rights as defenses in state law cases brought to enforce the offending state statute. \textit{Young}, 209 U.S. at 161-62 (Harlan, J., dissenting). In this view of federalism, the federal interest in accurate and uniform interpretation of federal law would be served by eventual Supreme Court review. \textit{Id.} at 176. Thus, we may see \textit{Young} as a recognition of the importance of federal judicial participation at the trial level.

\textsuperscript{238} \textit{See Bivens}, 403 U.S. at 398, 402-06 (Harlan, J., concurring) (emphasizing role of courts in area of constitutional law because it is "aimed predominantly at restraining the Government as an instrument of the popular will."). \textit{Id.} at 404.
ated those substantive statutory rights if the legislature had taken no interest in them. Moreover, those statutory rights exist only to the extent dictated by Congress. The procedures accompanying statutory rights define their dimension. Thus, in the absence of a statutory provision for federal jurisdiction over state defendants, there is no reason to indulge in a legal fiction to find jurisdiction.

If the Court's determination of the precise bounds of federal jurisdiction depends on an assessment of federal interests, when it looks at statutory law the Court should not ignore inclusions and omissions in the statute. A congressional failure to abrogate the states' immunity represents an assessment of the federal interest in access to federal court to enforce a particular statute against a state; an assessment made by the institution in the best position to know the nature and extent of that interest. If the Court refrains from creating jurisdiction-expanding doctrine when Congress has not imposed jurisdiction, the Court is essentially accepting Congress' assessment of the federal interest at stake. This process of deferring to Congress' role is similar to the position the Court has taken in tenth amendment analysis with respect to provisions of federal substantive law that have an impact on the states. In *Garcia v. San Antonio Metropolitan Transit Authority*, 239 the Court recognized that Congress plays a crucial role in preserving the residual sovereignty of the states. It conceived of that role as exclusive of any supplemental judicial function in protecting the states from intrusion, which federal courts had previously carried out in the name of the tenth amendment. *Garcia* rested on the assumption that Congress is the institution best structured to protect the interests of the states in relation to the federal interests

239. 469 U.S. 528 (1985) (interpreting U.S. CONST. amend. X). *Garcia* relies heavily on the thesis proffered by Professor Wechsler in, 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). Professor Wechsler thought that the structure of the Senate and the state control of House districting created a Congress "intrinsically well-adapted to retard- ing or restraining new intrusions by the [central government] on the domain of the states." *Id.* at 558. The Supreme Court, in his view, is on weak ground when it purports to protect state interests after Congress has taken a particular action, since Congress' action represents a more authoritative assessment of state interests and a judgment that they are outweighed by federal interests. *Id.* at 559. Wechsler's position has been challenged, most notably by Justice Powell, dissenting in *Garcia*. Justice Powell argued that the national government is isolated from the states and influenced by other, stronger interests groups. *Garcia*, 469 U.S. at 568-72, 576-77. Wechsler's theory, however, is not based on the belief that the states need to lobby Congress actively. Rather, he thought Congress would naturally be inclined to protect state interests. Wechsler, supra, at 558. See Lee, supra note 192. Lee details several examples of Congress' responding to Supreme Court cases affecting state or local government, including *Atascadero*. She argues that Congress views federal legislation from the perspective of federal policy, not as representatives of the states. *Id.* at 334-35.
furthered by congressional legislation. Given the process of balancing state and federal interests that takes place in the legislative setting, judicial tinkering under the tenth amendment could only place more weight on the state interest side of the scale. Since Congress, if it has passed substantive legislation affecting the states, has already determined that federal interests outweigh state interests, a judicial role under the tenth amendment would only replace Congress' determination with that of the Court.

Under the eleventh amendment a similar process occurs. When the Court uses a legal fiction to make it possible to sue the state under a federal statute, it substitutes its own valuation of federal interests for the one reflected in the statute. If the Court uses a legal fiction to take what Congress has declined to give, it ought also to engage in some kind of balancing of state interests. Yet, to do so would suspiciously resemble the tenth amendment scrutiny it abandoned in Garcia. The proposal made in this section, on the other hand, regards Congress' weighing of state and federal interests as definitive. If a statute fails to abrogate the states' immunity, it evinces the solicitude for the states that the framers expected from Congress in exercising its powers and that Garcia affirmed. The Court has chosen to entrust Congress with the function of protecting the states' tenth amendment interests. Likewise, it must treat Congress' decision whether to abrogate immunity as final.

240. Garcia, 469 U.S. at 550-51 (noting specifically the states' indirect control over the House and equal representation in the Senate).

241. See Fletcher, supra note 6, at 1128. Cf. Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4668, 4669 (1989) (Stevens, J., concurring) (citing Garcia and justifying congressional abrogation on the ground that "Congress is not superseding a constitutional provision in these cases, but rather is setting aside the Court's assessment of the extent to which the use of constitutionally prescribed federal authority is prudent"). It should be noted that two members of the present Court, Chief Justice Rehnquist and Justice O'Connor, strongly disagree with Garcia's conclusion that Congress is structured to protect the interests of the states. See Garcia, 469 U.S. at 556 (Powell, J., dissenting, joined by Justices Rehnquist, and O'Connor, as well as Chief Justice Burger); id. at 579 (Rehnquist, J., dissenting); id. at 580 (O'Connor, J., dissenting). Not surprisingly, both of these justices rejected the expansion of Congress' power to abrogate beyond the fourteenth amendment. See Pennsylvania v. Union Gas Co., 57 U.S.L.W. 4662, 4672 (1989) (Scalia, J., concurring in part and dissenting in part, joined by Chief Justice Rehnquist and Justice O'Connor, as well as Justice Kennedy).


243. Members of the Court inclined to overrule Garcia, should not reach a different result. See Garcia, 469 U.S. at 579-580 (Rehnquist, J., dissenting); id. at 580-89 (O'Connor, J., dissenting). If Garcia were overruled, the federal courts would resume active policing of statutes that impose burdens on the state. It would not increase scrutiny of legislation that shields the states from burdens, such as the kind of legislation that fails to abrogate eleventh amendment immunity.
C. Congressional Abrogation and Prospective Relief

A shift to a conceptual framework that refers solely to congressional intent with respect to federal statutory law would demand a reexamination of the Atascadero requirement that Congress expressly state its intent to abrogate eleventh amendment immunity in the language of the statute itself. The Court designed this requirement to prevent federal courts from finding implied rights to retrospective relief under statutes or regulations that offered explicit forms of relief. Provision of these explicit remedies suggests that Congress intended to maintain control over the types of remedies available. When these remedies specify their inclusion of states, one can infer that Congress has performed the role described in Garcia of guarding against excessive burdens on the states. These congressional attempts to tailor the remedial component of legislation deserve respect and should not attract possibly unwanted judicial accretions that may upset a delicate balance sought by Congress.244

Different considerations come into play, however, with respect to claims for declaratory or prospective injunctive relief. In awarding those forms of relief, federal courts are simply elaborating the meaning of statutes and requiring what statutes always require—that their prescriptions be followed. These forms of relief do not impose burdens beyond the precise intent of Congress or intrude on the states in a manner that may be inconsistent with protection that Congress may have meant to provide, pursuant to the role articulated in Garcia. For these reasons, the Atascadero level of scrutiny, which is arguably excessive in any event,245 should not apply to determinations of whether the federal courts can give prospective relief. In the absence of any statement to the contrary, statutes imply the abrogation of eleventh amendment immunity in claims for declaratory and injunctive relief. Thus, if the Court were to accept the proposal made here and withdraw nonconstitutional cases from Young’s scope, cases for prospective relief still should fall within federal court jurisdiction, as a matter of congressional abrogation.

244. See supra text accompanying notes 230-34.
245. But see Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 302 (1984) (Blackmun, J., dissenting). In Atascadero, Justice Blackmun, who wrote the Garcia opinion and whose doctrinal shift undid the five member National League, 426 U.S. at 833, majority, saw Hans v. Louisiana, 134 U.S. 1 (1890), as suffering from the same defect as National League. He wrote that Hans, like National League, “in derogation of otherwise unquestioned congressional power, gave broad scope to circumscribed language by reference to principles of federalism said to inform that language.” Atascadero, 473 U.S. at 303. For a discussion of the consistency between Garcia and the Court’s eleventh amendment doctrine, see Brown, supra note 175, at 388-89.
246. See Atascadero, 473 U.S. at 248-52 (Brennan, J., dissenting).
D. How Does a Constitutional-Nonconstitutional Framework Differ From Overruling Hans?

In the end, because it retains full availability of prospective relief under nonconstitutional law while also opening up constitutional law to all forms of relief, the practical result of this proposal may differ little from a decision to overturn Hans. The major difference, under the proposal, other than avoidance of the drastic gesture of overthrowing long-established precedent, is the retention of the Edelman restriction barring retrospective relief for violations of federal nonconstitutional law that do not contain clear provisions permitting that particular form of relief against the states.247 As discussed above, federal interests justify enabling Congress to control the remedies that flow from its statutory creations and to perform its Garcia function of protecting the states from undesirable burdens.248

Yet, if the Court were to overrule Hans, it might seek ways to avoid forcing unintended remedies, which could undermine Congress' role of protecting state interests and which otherwise might inhibit congressional action.249 If the Court did so, the similarity between overruling Hans and accepting the doctrinal shift proposed here would be even greater. There are two types of cases to consider if the Court overruled Hans: the Welch type of case in which federal legislation provides a specific remedy, such as past damages, but shows no sign that Congress thought about its application to the states; and the Edelman type of case in which the legislation clearly targeted the state but failed to provide the remedy sought.

With respect to the Welch type of case, the Court would have recourse to the tenth amendment. Overruling Hans would open the courts to many more cases against the states than we have seen thus far, cases particularly likely to disturb judges because they would directly name the states, not merely state officials or local entities such as cities or counties. Nor would those statutes contain the kind of explicit evidence of intent to include states that is present in the abrogating statutes the courts are accustomed to hearing. Even those members of the Court inclined to believe that Congress is responsive to the interests of the states may

248. See supra text accompanying notes 238-46.
249. See also Collins, supra note 50, at 245 (discussing how hostility to Hans has resulted in mitigating doctrines); Field, supra note 6, at 1265-68 (suggesting no pre-eleventh amendment constitutional provision can alter common law state immunity). For an argument that Congress alone should resolve practical federalism problems, noting the potential that the nonpolitical judiciary might erect inappropriately rigid principles of federalism, see Nowak, supra note 185, at 1441.
doubt whether any level of consideration of state interests has occurred when statutes like the Jones Act or the FELA happen to find application to the states. Given that some members of the Court have consistently mistrusted Congress’ representation of state interests, overruling *Hans* might revive interest in tenth amendment analysis. Alternatively, the Court could read an implicit exclusion of suits against the states into these statutes.

With respect to the *Edelman* type of case, involving a federal statute that does not explicitly provide a private cause of action, it is not enough to suggest that the courts would avoid finding implied private rights of action for damages under federal statutes. Section 1983 offers a federal cause of action to private individuals for any violation of federal law—constitutional or statutory—by state officials. Without the eleventh amendment restriction in statutory cases, any legislation binding the state to federal standards could give rise to a federal cause of action against an official acting for the state. To avoid this result, Congress would need to show an intent to disallow the section 1983 action. Recently, however, the Court has indicated that remedial structures deemed "sufficiently comprehensive" imply the needed intent. Because of section 1983, if *Hans* were overruled, states might actually bear a greater burden than other defendants covered by federal legislation that is silent on remedies, for when federal statutory claims are asserted against private defendants or federal officials and section 1983 does not apply, the Court has carefully restricted the availability of remedies that are not provided for in other federal statutes.

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250. On the other hand, the kinds of statutes that fail to focus on the potential for application to the states, like the Jones Act and the FELA, are more likely to deal with matters that fall outside of traditional state functions. Under *National League of Cities*, states conducting nontraditional state activities did not receive tenth amendment protection. National League of Cities v. Usery, 426 U.S. 833 (1976).

251. See Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After *Garcia*, 1985 SUP. CT. REV. 341, 418-19 (suggesting that Congress ought to note its inclusion of states explicitly and to make specific findings regarding the effect on state interests as part of the process of enacting substantive legislation that has an impact on the states); Comment, The Tenth Amendment After *Garcia*: Process-Based Procedural Protections, 135 U. PA. L. REV. 1657, 1681 (1987) (authored by Thomas Odom) (suggesting that substantive statutes should bear explicit statements of effect on states as tenth amendment requirement).


253. Given the instability of present § 1983 case law, it is difficult to predict the result of overruling *Hans*. No doubt it would create further pressure for change. For a discussion of *Thiboutot* and the problems it has raised, see Brown, Whither *Thiboutot*: Section 1983, Private Enforcement, and the Damages Dilemma, 33 DE PAUL L. REV. 31 (1983); Sunstein, Section 1983 and the Private Enforcement of Federal Law, 49 U. CHI. L. REV. 394 (1982).

expressly provided by federal statutes. It no longer finds implied remedies for damages without congressional intent to provide those remedies. When a federal statute provides a remedial structure that does not include private actions for damages, the Court is very unlikely to find them implied. If Hans were overruled, then the Court, seeking to treat state defendants more like other defendants, might begin to find an implicit intent to exclude causes of action under Section 1983 in statutes directed against states. Of course, requiring express causes of action leads back to the same problem we now face under Hans in asking whether Congress has abrogated state sovereign immunity.

It may be reasonable, however, to assume that after overruling Hans the Court would not attempt to cut off the resulting new claims against the states. If this assumption holds, the proposal made in this Article would differ from overruling Hans in retaining the eleventh amendment bar of nonconstitutional claims for retrospective relief. Yet this difference is not as great as it may at first seem given Congress’ power in this

255. See Cannon v. University of Chicago, 441 U.S. 677, 694 (1979) (emphasizing need to find congressional intent to create private causes of action). Even more strict, and indeed reminiscent of Atascadero’s approach to statutes, is Justice Rehnquist’s concurring opinion. He notes that Congress ought to be explicit and warns that “this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.” Id. at 718 (Rehnquist, J., concurring); see also Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388, 396 (1971) (existence of alternate remedy created by Congress is a “special factor counselling hesitation” to find an implied cause of action in a constitutional provision); Note, Bivens Doctrine in Flux: Statutory Preclusion of a Constitutional Cause of Action, 101 HARV. L. REV. 1251, 1268 (1988) (arguing for implied right of action under the Constitution unless statutes “provide effective remedies or, perhaps, when Congress has clearly stated its intent to preclude those actions”).

256. Cannon, 441 U.S. at 718 (Rehnquist, J., concurring).


258. Overruling Hans would leave open the issue raised in Pennhurst. See supra text accompanying notes 135-47. If the states subjected themselves, in 1787, to suit by delegating substantive powers to Congress, thus making immunity inapplicable in federal question cases (the position that overruling Hans would validate), it would take a further leap of interpretation to reach state law cases. One could say that if federal jurisdiction extends to a case arising under federal law, that jurisdiction applies to the entire case, subject only to the federal court’s exercise of discretion to send the state claim to state court under certain circumstances. This is the pendent jurisdiction argument which relies on United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The Court, however, rejected that logic in Pennhurst, when the federal court had jurisdiction under Young to grant prospective relief based on federal law. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) Pendent jurisdiction, according to the Court, could not overcome immunity that barred the state law claim. Id. at 120. It is hard to see why overruling Hans would change that: it would give jurisdiction over federal claims, without resort to Young and without the limitation to prospective relief. With regard to Pennhurst situation, it would change only the reason for the court’s jurisdiction over the federal claims. Moreover, even if pendent jurisdiction were sufficient to bring state law claims within the federal court’s jurisdiction, federalism concerns are among the factors federal courts consider in exercising their discretion over whether to hear the claim. See Gibbs, 383 U.S. at 726-
area. Indeed, we may characterize the difference between this Article's proposed reframing of existing case law and overruling *Hans* as a matter of choosing a presumption.

Under current doctrine, *Edelman* provides that *Young*'s fiction does not apply to claims for retrospective relief, unless Congress takes the step of abrogating eleventh amendment immunity.259 Similarly, under the doctrinal revision suggested in this Article, those claims would be impermissible, unless Congress has abrogated state immunity, because *Young* would not affect nonconstitutional cases. If *Hans* were overruled, however, those claims would be permissible unless Congress disallowed them, because no state immunity would remain. Section 1983 would supply the needed cause of action against state officials, whether or not the particular statute authorized the desired form of relief. The fundamental question is whether the federal courts should hear claims for retrospective relief against the states based on federal statutes when Congress has not cut off the right of action sought. Under the Article's proposal (as well as under present law), the answer is no; if *Hans* is overruled, the answer is yes.260

E. What Does Congress Intend by Silence?: Some Thoughts on Justice Scalia's *Welch* Opinion

As noted above, the Court generally views constitutional questions as less strongly bound by precedent than statutory ones.261 This divergent treatment stems from the Court's unique ability to alter its constitutional interpretations and, on the other hand, Congress' ability to amend statutes to reassert its control over their meaning. If the Courts' statu-

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27. These factors could move federal courts to decline jurisdiction without regard for the eleventh amendment.

Overruling *Hans* might not rest solely on the theory that federal question cases fall beyond the reach of the eleventh amendment. *See* Marshall, supra note 65, at 1346. It is also possible to base a rejection of *Hans* on a literal reading of the text of the amendment. In that case, the amendment only limits the federal court's jurisdiction over cases brought by noncitizens of a state and thus state law claims brought against the plaintiffs' own state could come within court's pendent jurisdiction. Still, a federal court could base a rejection of jurisdiction on federalism concerns as a matter of discretion following *Gibbs*.


tory interpretation remains unmodified by Congress, it is reasonable to assume that Congress acquiesces in the interpretation or, at least, does not actively or strongly disagree. The eleventh amendment, though a constitutional provision, interacts with numerous statutes that raise the possibility of suits against the states in federal court. In Welch, Justice Scalia focused on this point, writing that for "nearly a century . . . Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals," thus making it unreasonable suddenly to "interpret the statutes as though the assumption never existed." These concerns about untoward effects on statutory interpretation and the resulting burdens of revision that would fall on Congress if the Court were to overrule Hans led Justice Scalia to rest his concurrence on considerations of stare decisis.

The problem of disrupting the meaning of statutes presents another reason to consider making the distinction between constitutional and statutory claims under the eleventh amendment. Yet, the problem does not necessarily foreclose the possibility of discarding Hans. Justice Scalia's concern only involves existing statutes, not statutes that Congress might enact in the future nor constitutional provisions. The Court could address the problem by overruling Hans but interpreting statutes that predate the overruling in their proper context. That is, the Court could find that when Congress enacted these statutes, it assumed that the mere existence of a cause of action that could be asserted against states would not suffice to subject them to suit in federal court unless the statute contained an express statement to that effect. Congress had the power to disallow a private cause of action against the states as a matter of substantive law and might have seen fit to exercise that power if it had any reason to think the eleventh amendment did not already bar the suit. Accordingly, the Court could interpret all Hans-era statutes that lack an explicit statement subjecting the state to suit to contain an implicit exclusion.

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262. One should not read too much into Congress' failure to keep track of its old statutes. See, e.g., G. CALABRESI, supra note 158, at 1-7. The Court tends to base its interpretation on the intent of the Congress that enacted the statute. A different Congress, with different prevailing majorities and policy goals, often will have succeeded the enacting Congress. The significance of the later legislature's inaction is more questionable. The point remains, however, that Congress does have the power to amend the statute but not to change the Constitution, short of the exacting constitutional amendment process.


265. This limited form of overruling would differ little from the constitutional-nonconsti-
But has Congress over the years relied on the immunizing consequences of *Hans*? This question is virtually the same as the issue of what presumption—immunity or no immunity—ought to apply when Congress has not acted. Although present case law directs the presumption of immunity in the face of inaction, it is possible that Congress has not intended that effect, as indeed its post-*Atascadero* behavior shows. Even without overruling *Hans*, the Court could dispense with the clear-statement rule, and broadly read abrogation into all statutes that might be asserted against states. Justice Scalia’s concern rests on the belief that Congress has relied on the Court’s presumption of immunity. But if Congress has not realized in enacting legislation applicable to the states that its failure to address the issue explicitly would result in state immunity barring claims for retrospective relief in federal court, then there has

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266. *See supra* text accompanying notes 191-94.

267. Some of the language in *Parden* takes this approach. *See supra* note 202. One problem with this alternative is that it makes it is easier to bring statutory claims than constitutional claims, unless § 1983, which provides a statutory cause of action for violations of federal law including constitutional law is also viewed as abrogating, contrary to the Court’s ruling in *Quern v. Jordan*, 440 U.S. 332, 345 (1979). On two occasions, at different stages of the *Edelman* litigation, the Court considered whether § 1983 abrogated the state’s immunity. *Id.* at 345; *Edelman v. Jordan*, 415 U.S. 651, 676-77 (1974). The majority’s finding of no abrogation is now plainly compelled under *Atascadero’s* requirement of an explicit statement of intent to subject the state to suit: § 1983 only refers to “persons” and not specifically the states themselves, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1984). *See also Nowak, supra* note 185, at 1465-68 (historical evidence that § 1983 does not abrogate state immunity); Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189, 210 (1981) (the effect of § 1983 is so great that the courts should hesitate to apply it to the states). If the Court were to construe § 1983 as a congressional abrogation of immunity, then the states through their officials would be subject to awards of all forms of relief available under federal law. This is because § 1983 provides a cause of action for violations of federal law carried out under color of state law. This finding would have gone a long way toward making the retrospective-prospective distinction obsolete. Under the proposal made in this Article, § 1983 claims based on constitutional law would gain access to federal court, not through a finding of congressional abrogation, but under the *Young* fiction, shorn of its remedial limitations. But plaintiffs asserting statutory rights would need to look exclusively to the statutes that provide the rights they assert and not to § 1983. The *Edelman* litigation, in which the Court made its decision that § 1983 was a nonabrogating statute, dealt with violations of federal regulations that provided explicit remedies. The plaintiffs were using § 1983 as a supplement to the remedies provided along with their substantive rights. *Edelman*, 415 U.S. at 675-77. The situation is quite different when plaintiffs employ § 1983 as a vehicle for the assertion of constitutional rights. In that event, § 1983 provides the primary remedial means, and the legitimacy of judicial activism is far stronger.
been no reliance. Congress might instead have wrongly assumed that any statute creating a claim that might be asserted against a state will subject the state to suit in federal court, though only statutes that expressly name the states as objects of suit currently do so.\textsuperscript{268} If Congress has wrongly assumed this, then the existing presumption thwarts congressional intent, and Justice Scalia's reservations about overruling \textit{Hans} are groundless.

To overrule \textit{Hans} now would be to embrace the presumption that Congress intends to make the states suable whenever it enacts a statute creating a right that might be asserted against a state, regardless of whether it meets the present standard for abrogation. In the area of statutory cases, we may view overruling \textit{Hans} as a mere substitution of an alternate presumption, given Congress' power to exclude the states from suit. If \textit{Hans} were overruled, and it turned out that Congress disagreed with this new presumption, it would then need to make the explicit exclusions that now are unnecessary because the opposite presumption—that silence means immunity—holds sway.

If state immunity in the face of federal legislation surfaced as an important value in the wake of a shift in the Court's presumption, Congress would not need to propose another constitutional amendment, as it did after \textit{Chisholm},\textsuperscript{269} to express its disagreement. Congress would need only to remedy the relevant statutory silences with explicit provisions excluding states from federal jurisdiction. It might undertake a comprehensive review of existing statutes, or it might wait until individual cases using silent statutes against the states came to light in the federal courts and address these on a piecemeal basis. Obviously, it would take some effort to counteract the new presumption, but under the current law it takes effort to overcome immunity. Congress must exert some positive effort to rebut whichever presumption about immunity the Court establishes. So, again, the fundamental issue involves the Court's choice of a presumption.

H. Choosing a Presumption: Overrule \textit{Hans}?

What presumption of congressional intent ought to govern statutory claims that may be asserted against states? The particular role of Congress in representing state interests has a strong bearing on this question. A presumption of immunity tends to ensure that Congress has gone through the process of considering the interests of the states in passing

\textsuperscript{268} See supra text accompanying notes 191-94.

\textsuperscript{269} Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); see supra note 11.
legislation that will subject them to suit in federal court.\textsuperscript{270} Abrogation of immunity does not occur under the present doctrinal framework without explicit legislative intent to do so; a simple default by Congress in performing its role does not sacrifice the states' interest in avoiding burdensome lawsuits.\textsuperscript{271} Even if we accept the theory that Congress is structured to protect the interests of the states, it is still problematic to find an intent to include the states as potential defendants whenever a statute gives rise to a right of action that might be asserted against them. For example, when Congress enacted the railroad regulation at issue in \textit{Parden} \textsuperscript{272} or the shipping regulation in \textit{Welch},\textsuperscript{273} the potential application to the states was too remote to permit the inference that Congress had functioned to protect the states' interests. The recent rejection of the constructive waiver theory in \textit{Welch} emphasizes the need for a connection between abrogation and legislative awareness of the potential impact on the state. In other cases, statutes that do not meet the current standard for abrogation may have obvious enough potential for application to the states to support the conclusion that Congress has performed its role. Even after \textit{Atascadero}, a statute that explicitly covers the states subjects them to federal jurisdiction, despite the eleventh amendment.\textsuperscript{274} A shift to a presumption against immunity—overturning \textit{Hans}—would sacrifice the assurance that Congress had indeed fulfilled its function of considering state interests in creating new statutory obligations.\textsuperscript{275} The eleventh amendment would no longer provide any immunity when a federal statute could be asserted against the state, even if Congress had shown no sign of having considered the effect on the states. Though Congress could, once the application became apparent, act affirmatively to amend a statute to exclude the states as a matter of substantive law, the states

\textsuperscript{270} But see Lee, supra note 192, at 326-33 (showing state's lack of opportunity to affect legislation containing explicit provisions affecting state).

\textsuperscript{271} Cf. Comment, supra note 251, at 1685 (arguing that under tenth amendment there should be rule of construction that congressional silence signifies lack of intent to affect the states).

\textsuperscript{272} See supra text accompanying notes 198-205.

\textsuperscript{273} See supra text accompanying notes 195-97.

\textsuperscript{274} Note that even if \textit{Atascadero} went too far at the time in assuming Congress did not intend abrogation, its prospective application is much sounder. It makes more sense to interpret statutes enacted after \textit{Atascadero} that fail to make an explicit statement as nonabrogating because Congress may rely on \textit{Atascadero} and assume that it need not make a specific exclusion for the states when it does not mean to abrogate. This is similar to the reliance issue that Justice Scalia raised in \textit{Welch}. See supra text accompanying notes 261-65.

\textsuperscript{275} The only area remaining for the federal court protection of states is in interpreting legislation to determine whether Congress intends to include the states—unless the Supreme Court resumes tenth amendment scrutiny or restricts the applicability of § 1983, a possibility suggested above. See supra text accompanying notes 249-58.
would not have any guarantee that congressional consideration of their interests would precede their subjection to jurisdiction.

Retaining the basic doctrinal structure, with the shift to the constitutional-nonconstitutional distinction suggested in this Article, would preserve for the states this one guarantee. Perhaps this is the "present force" for the eleventh amendment that current federalism considerations justify.276

Conclusion

Ideas about federal interests, not historical interpretation, have shaped eleventh amendment doctrine, though historical justifications have quickly followed, clouding the written opinions. This Article has shown how the federal interest in the articulation and enforcement of federal law has affected doctrinal developments and has brought to light many of the Supreme Court's own concessions of the determinative effect of federal interest. This Article has attempted to illuminate a wide range of eleventh amendment doctrine, while making no effort to disguise the high degree of free play found in decisionmaking based on an assessment of federal interests. The aim here is to bring federal interest analysis into the open and to describe its possible uses.

The Article also has shown some of the areas where present eleventh amendment doctrine is vulnerable, where federal interest analysis suggests a turn in a different direction. The primary example given here of a new direction permitted by straightforward federal interest analysis is a distinction between federal constitutional and nonconstitutional law, a distinction that recognizes the particular importance of locating constitutional cases in federal court. It is not suggested that this restructuring of the existing doctrinal framework is necessarily superior to the often-proposed alternative of overruling Hans and completely rejecting the eleventh amendment's application to federal question cases. As section V of this Article shows, the comparison of those two changes involves extremely complex, interrelated questions about the power of Congress, the significance of statutory silences, and the capacity of Congress to protect the interests of the states. Ultimately, this Article sheds a different light on these and other eleventh amendment questions, and indeed, more generally, on the ongoing interaction between the states and the federal courts and between Congress and the federal courts.

276. See supra text accompanying notes 40-43.