Volume 61, Issue 5 Page 1233

Stanford Law Review

PLEADING SOVEREIGN IMMUNITY: THE DOCTRINAL UNDERPINNINGS OF *HANS V. LOUISIANA* AND *EX PARTE YOUNG*

Sina Kian

NOTES

PLEADING SOVEREIGN IMMUNITY: THE DOCTRINAL UNDERPINNINGS OF *HANS V. LOUISIANA* AND *EX PARTE YOUNG*

Sina Kian*

INTRODUCTION

The Eleventh Amendment states plainly: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] Despite decades of vociferous

* B.A. 2007, University of Virginia; J.D. candidate 2010, Stanford Law School. I would like to thank Lawrence Lessig and Larry Marshall for their invaluable feedback and for always challenging me. I also owe thanks to Brooke Coleman and Anthony Dick for reading and commenting on earlier drafts.

1. U.S. CONST. amend. XI.

debate,[2] this seemingly docile text has eluded even the most valiant efforts to produce scholarly consensus.[3]

Hans v. Louisiana[4] and *Ex parte Young*[5] are two of the most important pillars bracing sovereign immunity law.[6] They are also the two most misunderstood. *Hans* is widely accepted as standing for a simple proposition: the Eleventh Amendment precludes citizens from bringing suits against their own states. Practically every discussion of *Hans* implicitly yet erroneously assumes that the decision represented some sort of departure from prior case law. Moreover, scholars and judges currently understand *Hans* as a decision that, in interpreting the Eleventh Amendment, either obfuscated its text or illuminated its soul. *Hans* does neither or, at least, it meant to do neither. *Hans* was not an atextual exegesis of the Eleventh Amendment; it was not even a reading of the Eleventh Amendment. More importantly, and contrary to conventional wisdom, *Hans* was consistent with every sovereign immunity case that preceded it. *Hans* was, in fact, a mundane application of a remarkably consistent set of common law doctrines.

Current accounts of *Ex parte Young* uniformly overlook the indispensable role played by these doctrines. The lore surrounding *Ex parte Young* is by now cliché: the Court employed a novel "legal fiction" that treated an officer as a state actor for purposes of the Fourteenth Amendment, yet as a private individual for purposes of the Eleventh.[7] The result was a supposedly new, somewhat nebulous cause of action. Recently, John Harrison argued that

> *Ex parte Young* does not represent an exception to ordinary principles of sovereign immunity, it does not employ a legal fiction, it does not imply a novel cause of action under the Constitution or other federal law, and it does not create a paradox by treating officers as state actors for one purpose and private persons for another.[8]

---

2. *See* Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. (forthcoming 2009) (manuscript at 2-4, on file with author).

3. *See* Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2518 (2006) ("The bottom line is this: The history of the Eleventh Amendment is fundamentally inconclusive.").

4. 134 U.S. 1 (1890).

5. 209 U.S. 123 (1908).

6. These cases are the historical battlegrounds on which modern decisions base themselves. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996).

7. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 104-05 (1984) ("[The *Ex parte Young*] rationale, of course, created the 'well-recognized irony' that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment." (quoting Fla. Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (plurality opinion))).

8. John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 989 (2008). I address his arguments later in this Note.

He is right, but for the wrong reasons. In describing *Hans* and *Ex parte Young*, contemporary narratives commit the same underlying sin: they do not consider how of the substance of sovereign immunity law was shaped by circumstances of common law procedure.

This Note argues that judges and scholars have overlooked the procedural centerpiece of sovereign immunity: the common law pleading system. The rules of pleading interacted with substantive doctrines of law to create a system of remedies universally familiar to lawyers of the nineteenth century. The dynamics were simple but counterintuitive. If the victim of a state-sanctioned wrong brought suit against an officer, then the common law was initially unconcerned with the defendant's status as a state official. For purposes of pleading, he could be a sailor, chariot chauffeur, or chair salesman; as long as there was personal jurisdiction over the defendant, he could not escape the court's jurisdiction merely by asserting his status as an officer. However, in responding to the plaintiff's declaration, the defendant was then allowed to plead to the jurisdiction, arguing his actions were authorized by the state and hence shielded by sovereign immunity. This did not automatically close the matter. If the Constitution barred the state from providing such authorization, then the court would ignore the unconstitutional authorization and pierce the state immunity shield that otherwise protected officers.

This seemingly trivial pleading sequence was the mainspring behind sovereign immunity, and we have forgotten it. As a result, the two most important cases in sovereign immunity law have been rather dramatically misunderstood. Part I of this Note recapitulates how modern scholars have characterized *Hans*—understanding this mischaracterization will later, in Part VI, allow us to understand the governing dynamics undergirding *Ex parte Young*. Part II describes the fundamentals of sovereign immunity. Part III addresses a somewhat appealing but ultimately misguided approach to immunity doctrine, which is based on a distinction between torts and contracts. Part IV introduces the common law pleading system and the relevant doctrines that complemented its role in sovereign immunity. Part V applies this framework to a detailed chronology of nineteenth-century immunity cases. Part VI argues that *Hans v. Louisiana* and *Ex parte Young* were predictable applications of this framework. And finally, this Note concludes briefly with some possible implications of our new understanding.

I. SOVEREIGN IMMUNITY: THE POLITICAL NARRATIVES OF *HANS V. LOUISIANA*

The jurisprudence surrounding the Eleventh Amendment has been criticized from every angle, particularly for its apparent departure from text.[9]

9. *See, e.g.*, Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Calvin R.

Hans v. Louisiana has been indicted as the cardinal culprit; it is often described as a doctrinal turning point,[10] a blatant textual contradiction,[11] and an opinion that simply got it wrong.[12]

There is no doubt that *Hans* departed from the plain language of the Eleventh Amendment. The Eleventh Amendment rather lucidly provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit . . . commenced . . . against one of the United States by citizens of another state."[13] However, in plain contradiction of this language, the Court unanimously concluded that citizens could not bring suits against their *own* states under federal question jurisdiction,[14] a situation clearly not contemplated by the mere words of the Eleventh Amendment.

In explaining these cases, legal historians have taken a cynical approach. John Orth, a leading Eleventh Amendment scholar, argues that *Hans* can be explained by the postbellum political climate.[15] After the Compromise of 1877—where Democrats agreed to support Rutherford B. Hayes as president in

---

Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61 (1989); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

10. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) ("In *Hans v. Louisiana* . . . however, the Court departed from the plain language, purpose, and history of the Eleventh Amendment, extending to the States immunity from suits premised on the 'arising under' jurisdictional grant of Article III."); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 69-71 (1984) (arguing that the Court in *Hans* abandoned "ample justification in history and precedent").

11. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 140 (1984); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1476 (1987) ("The problem, of course, is that the results in *Hans* and *Ex parte New York* contradict the unambiguous limitations of the Eleventh Amendment's text—a contradiction that suggests the clear error of the Supreme Court's first interpretive premise that the Amendment is in fact concerned with sovereign immunity."); William Burnham, *"Beam Me Up, There's No Intelligent Life Here": A Dialogue on the Eleventh Amendment with Lawyers from Mars*, 75 NEB. L. REV. 551, 552-53 (1996).

12. *See, e.g.*, Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 519 (1987) (Brennan, J., dissenting) ("Sound precedent should produce progeny whose subsequent application of principle in light of experience confirms the original wisdom. Tested by this standard, *Hans* has proved to be unsound. The doctrine has been unstable, because it lacks a textual anchor, an established historical foundation, or a clear rationale."); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 32 (1972) ("Loosed from the moorings of letter and precedent, shunning the oars of patient analysis, at large on the sea of immediate convenience with only the rudder of predisposition to guide it, the Court in *Hans* veered far from the course that had been charted before and set the ship toward alien waters where effective redress for governmental wrongdoing would be the exception instead of the norm."). Some scholars have admonished other cases, but for similar reasons. *See, e.g.*, JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY 58-89 (1987).

13. U.S. CONST. amend. XI.

14. Hans v. Louisiana, 134 U.S. 1 (1890).

15. ORTH, *supra* note 12, at 58-89.

exchange for Northern withdrawal of troops from the South[16]—the Court manipulated the text of the Eleventh Amendment in order to emancipate the South from claims brought by its creditors.[17]

Orth is not alone. John Gibbons also explains *Hans* by alluding to "popular pressure that actually dictated [the] ultimate decision."[18] Edward Purcell goes further, arguing *Hans* should not be dignified as a valid precedent.[19] He contends that the Court was essentially forced to abandon its "general position [of] guaranteeing the worth of government bonds" by two factors: (1) the determination of many Southern state governments to repudiate their debts, and (2) the notion that sectional reconciliation was perceived as the "highest good."[20] In the words of another scholar, "the Court was faced with the unpalatable choice of abandoning accepted Contract Clause doctrine or establishing the potentially crippling precedent of state non-compliance with Supreme Court judgments."[21] In other words, these scholars posit that *Hans* was the Court's attempt to preserve the delicate political equilibrium that was beginning to form after the bitter years of war and Reconstruction. To meet this end, and to avoid widespread state noncompliance with federal court decisions, the Court was forced to contradict not only the Eleventh Amendment but also its own precedent.[22]

The Court had apparently traded the literal words of the Eleventh Amendment[23] for the greater good of political tranquility or, at worst, political convenience.[24] Whatever the particulars of each narrative, scholars seem to agree that the history of the Eleventh Amendment "is in large measure an unflinchingly political one."[25] With the bulk of scholarly commentary focusing

16. Particularly noteworthy was the Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152 (1878) (generally forbidding the exercise of federal uniformed services from acting in a law enforcement capacity).

17. ORTH, *supra* note 12, at 58-89.

18. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2001 (1983).

19. Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts"*, 81 N.C. L. REV. 1927, 2059 (2003). David Shapiro also argues that "[r]egardless of its possible political justification, the rationale of *Hans v. Louisiana*, if not the result, should be regarded as an unforced error—a choice that was neither required nor fruitful." Shapiro, *supra* note 10, at 70.

20. Purcell, Jr., *supra* note 19, at 1946.

21. Massey, *supra* note 9, at 135.

22. *See also* Shapiro, *supra* note 10, at 69-70.

23. *See* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1089 (1983).

24. *See also* Massey, *supra* note 9, at 135 (arguing that current notions of sovereign immunity did not emerge until Reconstruction); Shapiro, *supra* note 10, at 69-70.

25. Gibbons, *supra* note 18, at 2003. For another such account, see JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 180 (1995) ("The *Hans* decision can best be understood as part of the Supreme Court's refusal, on claimed jurisdictional grounds, to confront the widespread repudiation of bonds by southern states.").

on *Hans* as the outgrowth of a political situation, it is no surprise that this view has seeped into contemporary Court decisions.[26]

This approach is misleading. The political climate may or may not have facilitated the Court's immunity jurisprudence. What it did not do is mark a shift in the application of that jurisprudence. *Hans v. Louisiana* was a predictable case, consistent with every sovereign immunity case that came before it. So too was *Ex parte Young*.

When contemplating state immunity, contemporary scholars have often unduly limited their discussion to one about the Eleventh Amendment.[27] When scholars do consider sovereign immunity as an independent doctrine, they typically focus on the origins of such a doctrine. Martha Field advanced a relatively straightforward argument: sovereign immunity existed as a doctrine of common law, which was neither ratified nor rejected by the grants of jurisdiction in Article III.[28] More recently, Caleb Nelson insightfully argued that sovereign immunity was ultimately derived from principles of personal jurisdiction.[29] This suggests that courts were powerless to instruct states to appear before them.

The strength of this scholarship is that it disentangles sovereign immunity from the Eleventh Amendment and treats it as a separate doctrine. The concern here is not with an "objective" analysis of what sovereign immunity is or whence it came.[30] Rather, this Note attempts a doctrinal history as told by the nineteenth-century Court opinions—this means, as we will see, separating sovereign immunity from Eleventh Amendment immunity. More importantly, it means placing state immunity in its appropriate procedural and substantive context. To do this, we must first understand the general idea behind sovereign immunity.

---

26. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 110 n.8 (1996) (Souter, J., dissenting); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 248, 258, (1985) (Brennan, J., dissenting) (citing Shapiro, *supra* note 10, and other scholars arguing that *Hans* was the consequence of the political atmosphere).

27. *See, e.g.*, Amar, *supra* note 11; Fletcher, *supra* note 23; Gibbons, *supra* note 18.

28. Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978).

29. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

30. For a thoughtful analysis of the distinction between common law sovereign immunity and law-of-nations sovereign immunity, see James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 581-88 (1994). However, it is important to note that this distinction does not change my analysis. As Caleb Nelson has pointed out, American courts have essentially merged these two doctrines by having them operate through the same mechanism. *See* Nelson, *supra* note 29, at 1574 n.70.

A. *Sovereign Immunity: A Crash Course*

The principle of sovereign immunity is a simple one: a state cannot be sued by an individual without its consent.[31] This resembled, or perhaps derived from, doctrines of personal jurisdiction.[32] First-year civil procedure courses often begin with a fundamental axiom: before a court can adjudicate a defendant's rights, it must have power over that defendant. If a defendant did not appear voluntarily, the court could not proceed unless it could command the defendant to appear—that is, unless it had personal jurisdiction over the defendant.

Under the general law of nations, sovereigns enjoyed a broad exemption from this command. This basic principle has been articulated, justified, and explained by a wide range of commentators.[33] International commentators well known in the Founding era[34] cite with disdain notorious examples where this

31. More precisely, a state cannot be made a defendant by an individual. Similarly, if a state holds title to a property, courts cannot proceed against the property without the state's consent.

32. *See, e.g.*, Wis. Dep't of Corrections v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring) (stating that "the immunity bears substantial similarity to personal jurisdiction requirements, since it can be waived and courts need not raise the issue *sua sponte*"). *See generally* Nelson, *supra* note 29.

33. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *243 ("A subject . . . so long he continues a subject, hath no way to *oblige* his prince to give him his due.") (quoting SAMUEL PUFFENDORF, OF THE LAW OF NATURE AND NATIONS (1670)); 2 EMMERICH DE VATTEL, THE LAW OF NATIONS ch. 4, §§ 54-56 (7th Am. ed. 1849); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *21 (Oliver Wendell Holmes, Jr. ed., Boston, Little, Brown & Co. 12th ed. 1878) (asserting that the broad exemption from court command provided by sovereign immunity comes from the "fundamental principle of public law" that nations enjoy "perfect equality, and entire independence") (The importance of Kent's commentaries in early American thought is reiterated by LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 290-92 (1973)); THE FEDERALIST NO. 81, at 420 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*."); *cf.* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) ("A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."). For a general discussion of these immunities, see Pfander, *supra* note 30, at 578-89.

34. Emmerich de Vattel has been described as the a "clear favorite" of the Founders among international authorities, and his book *The Law of Nations* was well-read throughout colonial America. *See* Thomas H. Lee, *The Safe Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 847-48 (2006); J.S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 549 ("At the time of the American Revolution, the work of Vattel was the latest and most popular if not the most authoritative of the Continental writers. Citations of Grotius, Pufendorf, and Vattel are scattered in about equal numbers in the writings of the time. Possibly after the Revolution Vattel is quoted more frequently than his predecessors."); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967) ("In pamphlet after pamphlet the American writers cited . . . Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.").

general law was violated.[35] It is beyond the purview of this Note to examine or scrutinize these justifications, but it is important to note that the doctrine itself was taken seriously[36] and that it was not disturbed by the novel constitutional structure of the early American Republic.[37]

Whatever we might think of this principle, it was an important limitation on the power of the courts. Without the power to command states to appear, federal (and state) courts lacked the rough equivalent of personal jurisdiction over the states. In other words, states could only be sued if they consented.[38]

This principle is indispensable to understanding the rhetoric of states when faced with suits after 1791. For example, when Georgia was sued by a plaintiff seeking to enforce a contract, the Governor of Georgia asserted that Georgia has long been "a free, sovereign and independent State, and that the said State of Georgia cannot be *drawn or compelled* [by an individual] . . . to answer, against the will of the said State of Georgia, before any . . . Court."[39] This

---

35. The Spaniards violated *all rules* when they set themselves up as judges of the Inca Athualpa. If that prince had violated the law of nations with respect to them, they would have had a right to punish him. But they accused him [of transgressions that violated not the general law of nations, but instead violated the laws of another sovereign, Spain]; and, to fill up the measure of their extravagant injustice, they condemned him by the laws of Spain.

DE VATTEL, *supra* note 33, § 55 (emphasis added). The point here is that the Spanish were wildly out of bounds in subjecting a sovereign to their command for anything that did not constitute a violation of laws of nations (such violations could justify war, so surely a demand for remedy in court was justified).

36. *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354 (1822) ("[A]ll persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his Courts: and that the exceptions to this rule are such only as by common usage, and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights."); L'Invincible, 14 U.S. (1 Wheat.) 238, 256 (1816) (ruling that jurisdiction over French ship "would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another"); Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) (reversing circuit court decision granting jurisdiction over France); Coolbaugh v. Commonwealth, 4 Yeates 493, 494 (Pa. 1808) (invoking the "settled principle" that "no sovereign power [is] amenable to answer suits either in its own courts, or those of a foreign country, unless by its own consent"). For English cases, see Vavasseur v. Krupp, (1878) 9 Ch.D. 351; Twycross v. Dreyfus, (1877) 5 Ch.D. 605; Goodwin v. Robarts, (1875) 1 App. Cas. 476; Smith v. Weguelin, (1869) 8 L.R.Eq. 198; Gladstone v. Ottoman Bank, (1863) 71 Eng. Rep. 221; Gladstone v. Musurus Bey, (1862) 71 Eng. Rep. 216; Duke of Brunswick v. King of Hanover, (1848) 9 Eng. Rep. 993 (H.L.).

37. *See* Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 37 (2003).

38. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 303 (1821) ("It is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent."). *See generally* Nelson, *supra* note 29.

39. Doyle Mathis, Chisholm v. Georgia*: Background and Settlement*, 54 J. AM. HIST., June 1967, at 19, 22 (citation omitted) (emphasis added).

principle survived the Constitution and was fundamentally assumed in Article III.[40]

Because states cannot be sued without their consent, state immunity cases rarely dealt with plaintiffs suing states qua states. Rather, plaintiffs sued state officials—governors, treasurers, tax collectors, and the like—as individuals. This forced the courts to confront the same jurisdictional question over and over: can this plaintiff sue this defendant without actually suing the state as a sovereign?[41]

B. *Torts Versus Contracts: A Misstep*

The answer often depended on the dynamic, interrelated framework of the general common law. Some scholars have suggested that an officer's suability turned on whether the action was for breach of contract or tort.[42] This framework can provide a somewhat appealing narrative,[43] but even when it yields the right answers, it asks the wrong question. As a result, there are cases where the framework simply lacks explanatory power.

The basic idea behind the distinction is relatively simple. When a state breached a contract, the plaintiff-counterparty had no cause of action against a third-party officer who was not privy to that contract.[44] If the contract was with

---

40. *See* Nelson, *supra* note 29, at 1576-92 (examining the early American Republic and concluding that these general principles were accepted by the Founding era, though not without controversy).

41. As we will see, this is a somewhat oversimplified question, especially if we do not properly account for the context in which the court poses the question. The purpose of this Note is to explain the doctrinal mechanisms by which the Court approached this question. Throughout the Note, I will refer to this (oversimplified) question as a "shorthand" for the grander procedural and substantive analysis that is taking place.

42. *See, e.g.*, Engdahl, *supra* note 12, at 16-17, 20; Michael G. Collins, *The Conspiracy Theory of the Eleventh Amendment*, 88 COLUM. L. REV. 212, 224-26 (1988) (book review); *see also* David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 167-68; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 29 (1963).

43. For an example of a narrative woven this way, see generally Collins, *supra* note 42. The framework is also still used to explain modern immunity cases, which goes beyond the scope of this Note. *See* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 62-68 (1998).

44. Article I, Section 9 is enforced through an indirect mechanism. As the Court explains in *Carter v. Greenhow*:

> That constitutional provision, so far as it can be said to confer upon or secure to any person any individual rights, does so only indirectly and incidentally. It forbids the passage by the states of laws such as are described. If any such are nevertheless passed by the legislature of a state, they are unconstitutional, null, and void. In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, the individual has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the constitution.

114 U.S. 317, 322 (1885).

the state, the only potentially suable defendant was the state.[45] In a tort action, the officer was the actual tortfeasor, not the state.[46] Of course, the officer could point to a statute authorizing his actions, but merely alleging authorization did not excuse a tort; rather, the officer had to produce a constitutional and otherwise valid source of authorization for his actions. The result was, of course, that the officer-defendant could not defend his tortious activities by claiming authorization from an unconstitutional statute.[47] The reason was simple, perhaps simplistic: states cannot pass unconstitutional laws, so when an officer pointed to an unconstitutional law, he was pointing to nothing. These laws could not be recognized as legal defenses, because no governing body was authorized to pass them.[48] Consequently, the officer was left naked against the plaintiff's claims.[49]

The distinction between contracts and torts begins to answer the original jurisdictional question by shifting focus towards the nature of the remedy sought by the plaintiff. State immunity is, if anything, about the formal role of the courts vis-à-vis the sovereign authority of the states.

Contract remedies, so it goes, tend to be the most intrusive. Decrees for specific performance would essentially coerce states into carrying out judicial will. Similarly, damages awards arising from contract claims place courts in the uncomfortable position of overseeing how a state allocates its resources—that is, whether it should spend the next dollar on its police force or fulfilling a debt obligation. By contrast, injunctions against torts such as trespass were minimally intrusive because they could operate against individuals without involving the state.[50] Even tort damages were not intrusive, insofar as they

---

45. Currie, *supra* note 42, at 153-54.

46. 1 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY, §§ 1357, 1406, 1455, 1457 (2d ed. 1914) (stating that an agent is liable for his own torts, even though committed in the course of his employment, but not liable for breach of his employer's contracts to which he is not a party).

47. This was not an innovation of American law. In England, officers could not plead sovereign immunity, nor could they plead command of the Crown as a defense. *See, e.g.*, Entick v. Carrington, (1765) 95 Eng. Rep. 807, 816 (K.B.).

> 48. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

THE FEDERALIST NO. 78, *supra* note 33, at 403 (Alexander Hamilton).

49. As a result, if officer suits did not violate principles of sovereign immunity, they typically did not violate the Eleventh Amendment. *See, e.g.*, New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812) (entertaining a suit against an officer without mentioning the Eleventh Amendment). One exception is an antisuit injunction, brought in equity to prevent a proceeding at law. In such a case, the plaintiff sues in a defensive posture, thus technically not making the state a defendant. However, the plain language of the Eleventh Amendment still bars these suits when brought in diversity. *See infra* Part II.H.

50. Collins, *supra* note 42, at 224-26. For a general discussion, see Engdahl, *supra* note 12, at 15-17 (1972).

demanded that officers return what they unlawfully took. Unlike tort damages today (which involve emotional and psychological harm), torts then typically involved causes of action such as detinue, the remedy for which was either the return of unlawfully seized property or damages equivalent to the value of that property.

The distinction seems formalistic for a simple reason: it was formalistic. Courts never contended that injunctions against officers had no effect on the state; indeed, they could effectively prohibit states from implementing important policies.[51] But the courts were not trying to discern whom the plaintiff was *really* suing—nor did immunity jurisprudence busy itself with substantive concerns about facilitating state policymaking. Rather, the Court adopted a formalistic principle to satisfy sovereign immunity concerns: it required that the particular plaintiff could sue the particular defendant (some relevant state officer) without suing the state.[52] This, and not the somewhat anachronistic distinction between torts and contracts, lay at the root of state immunity decisions. The Court did not in any holding base its decision merely on the status of the action as a tort or contract.

While it was typically easier to find individual liability in tort-like actions, many plaintiffs also succeeded in pursuing assumpsit actions against customs officials.[53] Breaches of contract could be actionable if, for example, the breach had a trespassory form. *Davis v. Gray* is a perfect illustration. There, Texas entered into a contract with a railroad it was incorporating.[54] The railroad would be incorporated and given land on the condition that it develop a railroad across the state—what amounted, in the Court's view, to a vested title subject to condition subsequent.[55] Unfortunately, the plan went awry. The railroad became insolvent and, when progress slowed, Texas state officers began issuing patents to settlers to settle along the railroad's land—this despite a contractual duty to provide the railroad with reasonable time to complete construction.[56] The railroad's receiver sued for an injunction against the issuance of these patents, claiming that they interfered with his ability to sell

51. This is without even considering the modern idea of structural injunctions.

52. This is not to say that the Court simply made up a principle. This principle was the historical understanding of how sovereign immunity should function. Nor does the "formalistic" nature of the principle make it any less important in the Court's jurisprudence. As this Note seeks to demonstrate, the courts took the principle seriously and treated with care its nuances—nuances that are not readily apparent to contemporary lawyers.

53. Atchison, Topeka, & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912) (allowing assumpsit action against an official); Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75 (1872) (allowing recovery against tax collector for taxes illegally assessed and paid under protest); City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1866) (action to recover excess duties); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839) (same); Hardy v. Hoyt, 38 U.S. (13 Pet.) 292 (1839) (same); Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) (same).

54. Davis v. Gray, 83 U.S. (16 Wall.) 203, 205 (1872).

55. *Id.* at 205-08, 230.

56. *Id.* at 210-13, 230-31.

the land to another railroad in a reasonably timely fashion.[57] In other words, the patents were obnoxious to the contract. The Court had little difficulty affirming a lower court decree in favor of the receiver.[58]

The receiver sued officers as individuals to prevent them from issuing patents that would amount to trespass on the railroad's property.[59] The officers responded by asserting no personal interest in the matter; rather, they were just acting in accordance with state authorization. Consequently, they argued, the suit was one against the state of Texas by Mr. Gray, a citizen of New York, and thus barred by the Eleventh Amendment.[60] In anticipation of this point, the receiver argued that the railroad and the state were parties to a contractual relationship, and any law or order by the state that violated the obligation of this contract was null and void.[61] Because the Court then considered the second law (the one authorizing officers to issue patents) null, all that remained was a contract (which gave title to the railroad) and patents that amounted to trespass on that property.[62]

At the same time, tort-like actions did not always clear the state immunity hurdle. For example, a plaintiff could not avoid sovereign immunity simply by naming the governor as defendant and suing in tort for damages, especially when the monetary damages sought were rightfully possessed by the state treasury.[63] The relevant inquiry remained the same: can this plaintiff sue this defendant without actually suing the state? In *Governor of Georgia v. Madrazo*, the answer was no. There, a Spanish shipowner's vessel and cargo (slaves) were stolen and, through a complicated set of transactions, ended up in the possession of Georgia, which sold some of the slaves and retained others.[64] Madrazo's libel was dismissed because he sought "money actually in the

---

57. *Id.* at 210-13.

58. *Id.* at 233.

59. *Id.* at 212. Because the receiver was demanding an injunction in a court of equity, there was no need to allege a trespass at common law. Rather, the receiver merely had to allege that the officer's actions would violate the exclusive property right extended to the railroad, and that it would do so in a way that would cause irreparable harm.

> A case more imperatively demanding the exercise of jurisdiction in equity could hardly be imagined than that presented in this bill. Should the interposition invoked be refused, doubtless the reservation would speedily be thatched over with adverse claims. A cloud would not only be thrown upon the title of the company, but the time, litigation, labor, and expense involved in the vindication of its rights, would very greatly lessen the value of the grant and materially delay the progress of the work it was intended to aid. The injury would be irreparable. It is the peculiar function of a court of equity in a case like this to avert such results.

Id. at 232.

60. *Id.* at 213-14.

61. *Id.* at 213.

62. *Id.* at 232.

63. *See, e.g.*, Governor of Ga. v. Mardazo, 26 U.S. (1 Pet.) 110 (1828). Here, "rightfully possessed" means that the state acquired the property by legal means—it does not mean that the party conveying the property to the state also acquired the property rightfully.

64. *Id.* at 110-13.

treasury of the state, mixed up with its general funds"[65]—in other words, there was an issue of sovereign immunity, despite the tort-like nature of the action.

The distinction between torts and contracts no doubt muddies on the margins. While accepting the distinction as a generally useful idea, we can more precisely understand sovereign immunity by placing it in the context of the common law causes of action. This means understanding the common law pleading system.

II. THE COMMON LAW PLEADING SYSTEM

The central goal of this Note is to address the shortcomings of overlooking the common law pleading system. There are three reasons why scholars trying to understand sovereign immunity should be concerned with the mechanics of common law pleading. First, pleading played a central role in the legal system, more so than pleading does today. It follows that we should be sensitive to anachronistically overlooking the nuances and implications of this procedural context. Second, the contracts and torts distinction did not exist in the 19th century with the clarity that it does today. While the distinction certainly existed,[66] there are more fruits to be had by inquiring into the specific causes of action. Third, and most importantly, the mechanics of the pleading system had direct and counterintuitive implications for how courts treated the most important exception to sovereign immunity: officer liability. Consequently, to understand cases like *Madrazo*—and all nineteenth century sovereign immunity cases—we need to understand the common law pleading system.

Common law pleading was a highly structured, formalistic affair. Courts placed much emphasis on the technicalities of this pleading system and, as a result, much of what we understand as "substance" was bent to the requirements of process.[67]

The plaintiff began his pleading with the declaration. The declaration was set out in the writ, which provided allegations regarding jurisdiction, the facts, and the cause of action.[68] While federal courts only recognize one form of action today,[69] the common law recognized ten: debt, detinue, covenant, special assumpsit, general assumpsit, trespass, trover, replevin, case, and ejectment.[70] The first five were violations of special rights, or rights that

65. *Id*. at 123.

66. *See, e.g.*, JOSEPH STORY, A SELECTION OF PLEADINGS IN CIVIL ACTIONS 51 (Benjamin L. Oliver ed., Boston, Carter & Hendee 2d ed. 1829) (1805).

67. *See, e.g.*, Burser v. Martin, (1378-1865) 79 Eng. Rep. 39 (arresting judgment for the plaintiff because in his plea, the plaintiff did not specifically say that the horse the defendant stole was *his* horse).

68. JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING § 3 (2d ed. 1917).

69. FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

70. MCKELVEY, *supra* note 68, § 8.

existed because the parties entered into special relations.[71] The latter five addressed wrongs that violated original or natural rights, or rights that existed regardless of these relations.[72]

For basically all causes of action, the declaration had two features: a right and a wrong. First, the plaintiff would lay out his right. For example, if the defendant had trespassed onto the plaintiff's land, the plaintiff would first have to show he had title to said land. Second, the plaintiff would explain how the defendant violated that right. No part of the properly pleaded declaration required the plaintiff to address the status of the defendant. The important implication here is simple: if a plaintiff sued an officer, the declaration did not mention the defendant's status as an officer, at least not as a relevant legal fact. On a common law declaration, all defendants, whether officer, doctor, or janitor, were created equal.

The defendant responded to the declaration in one of two ways: a demurrer or a plea.[73] Demurrers raised questions of law, or questions about the sufficiency of a legal claim.[74] Pleas came in many forms,[75] but they all had one thing in common: they raised issues of fact, or presented new matters of fact.[76] Two pleas were particularly relevant to sovereign immunity analysis. First is the plea to the jurisdiction, which was used when the plaintiff commenced his action in the wrong court, either because the court had no subject matter jurisdiction or personal jurisdiction over the parties. Consequently, this plea typically argued that, on such an account, the defendant should not be compelled to plead with regards to the facts. A plea to the jurisdiction was used in the rare cases where the plaintiff sued the state qua state, such as *Chisholm v. Georgia*.[77] In those cases, the state did not mention the facts, but simply declared that it was not amenable to suit.[78]

More important for sovereign immunity was the plea by confession and avoidance. This was where the defendant confessed the facts alleged by the plaintiff, but introduced new facts that negated the cause of action.[79] In a case involving a trespass against one's person (an assault), the defendant could

71. *Id.* § 16.

72. *Id.* § 43.

73. *Id.* § 93.

74. *Id.* §§ 95, 97.

75. For example, plea to the jurisdiction, plea in suspension of the action, plea in abatement. *Id.* §§ 96, 130.

76. *Id.* § 96.

77. 2 U.S. (2 Dall.) 419 (1793).

78. *See, e.g.*, *id.* These cases are rare because plaintiffs, aware of immunity issues, typically name officers in an attempt to circumvent immunity.

79. MCKELVEY, *supra* note 68, § 142. Technically, there are two kinds of plea by confession and avoidance. The one I describe here is called the "plea in excuse." The other form is a "plea in discharge," where the defendant admits the facts, and even that the plaintiff at one point had a cause of action, but that cause of action no longer exists. *Id.* § 148.

confess to the facts, but avoid culpability by alleging the plaintiff attacked her first and that she was acting in self-defense. Or, more pertinently, in a case against a tax collector, the defendant could agree that he took the plaintiff's money, yet still avoid culpability by alleging that his actions were authorized by a legitimate tax law.

This meant that when an officer claimed a law or other authorization as his defense, the court was invited to review the validity of such an authorization. The result was harsh. If the law was unconstitutional or otherwise invalid, the defendant had no defense and had basically pled guilty. Thus when states passed unconstitutional laws, state officials would be liable if "carrying out" the law meant doing something that would create a common law cause of action against them. Against this liability, they had no cognizable defense; that is, they would point to an unconstitutionally based "authorization" that courts simply could not and would not honor.[80]

This was not a flaw or an overlooked exception to sovereign immunity: officer liability was fundamentally built into sovereign immunity. Without officer liability, sovereign immunity would have left governments totally unchecked—a design that would have been unbecoming of the young Republic.[81]

A. *Common Law Framework: A Case Study*

The harshness of officer liability was exposed early in maritime tort cases. For example, in 1799, the Flying-Fish, a Danish vessel bound for St. Thomas, was captured by the commander of a U.S. warship, pursuant to executive instruction.[82] The ship was suspected of being in violation of a nonintercourse law prohibiting American vessels from landing at French ports.[83] While the nonintercourse law itself was valid, the Court found that the executive instruction had misconstrued the statute.[84] The interesting question was whether or not to award damages against the officer, who was simply obeying orders.[85] The district court judge directed restoration of the vessel and the cargo, but denied damages.[86] The circuit court reversed, and the Supreme

80. For a more in-depth discussion of the intricacies of officer liability, see Engdahl, *supra* note 12, at 17-21.

81. Louis Jaffe lays out the history of officer liability in both England and the United States and persuasively points out that formal ideas about immunity were acceptable mostly because of creations like the officer liability valve. Jaffe, *supra* note 42.

82. Little v. Barreme, 6 U.S. (2 Cranch) 170, 170-71 (1804).

83. *Id.* One might note an oddity here: a ship headed to St. Thomas was captured under a law that prohibited American ships from landing in *French* ports. However, the mistake was not as silly as it may sound. St. Thomas was commonly used to elude the nonintercourse laws. *Id.* at 173.

84. *Id.* at 177-78.

85. *Id.* at 178.

86. *Id.* at 172.

Court affirmed, awarding $8504 in damages.[87] Such a large sum, directed against an officer following executive instruction, was harsh enough to give Chief Justice Marshall pause: "I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages."[88] Nonetheless, he acquiesced to the opinion of his "brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass."[89]

This case illuminates a couple of key points. First, despite the fact that a foreign citizen was suing a U.S. military officer acting pursuant to an executive instruction, there was no mention of the Eleventh Amendment—or, for that matter, of the Constitution. One might rightly object: of course this went unmentioned because the Eleventh Amendment does not apply to the federal government. Nonetheless, this is an important point to my argument. Federal sovereign immunity and state immunity were basically identical doctrines, despite the fact that the Constitution makes no explicit mention of federal immunity.[90] Some might argue (wrongly) that the Eleventh Amendment was later applied to the federal government. A central premise of this Note is that sovereign immunity[91] and Eleventh Amendment immunity were different doctrines,[92] and the unwillingness of the Court to implicate the Eleventh Amendment in federal immunity cases is probative of that argument.

Nonetheless, Chief Justice Marshall did exhibit a reflexive concern about federal sovereign immunity, but still was persuaded otherwise by a sequential framework engrained in the common law pleading system. This framework is simple, but counterintuitive. As laypersons, when we look at a case like *Little v. Barreme*, we effortlessly draw the narrative a certain way: the officer, pursuant to an executive order, wrongfully took someone's ship. In other words, we construct the narrative chronologically, and build the individual's job into the transaction. By contrast, the courts approached the problem with a framework sensitive to the sequence of legal events. The sequence went like this:

> Stage 1: The victim sued the defendant, alleging the maritime equivalent of trespass.
> Stage 2: The defendant admitted he committed the act alleged to be the trespass.
> Stage 3:[93] The defendant argued, despite Stage 2, that the authorization he

87. *Id.* at 175, 179.

88. *Id.* at 179.

89. *Id.* at 179.

90. For a brief mention of the federal line of cases, see *infra* Part II.F.

91. This includes state sovereign immunity and federal sovereign immunity.

92. This argument has been made persuasively by other scholars. *See, e.g.*, Martha Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978).

93. Stage 2 and Stage 3 are actually part of the same plea, but I separated them here for purposes of conceptual clarity.

> received by the state in his official capacity was a perfect defense.
> Stage 4: The victim countered that the authorization, whether a statute or executive order, was unconstitutional or otherwise invalid.

Stage 1 and 2 constituted the "transaction" that Chief Justice Marshall spoke about. In Stage 3, the defendant simply argued that he was doing what the state told him to do. Here we must understand two key constructions to appreciate why the courts went the way they did. First, while private employers were liable for torts committed within the scope of employment, thus making a suit against impecunious employees generally undesirable, the doctrine of *respondeat superior* did not apply to the government (it would encroach upon traditional principles of sovereign immunity).[94] Consequently, government employees were solely responsible for torts committed while on duty. Second, unconstitutional statutes, regulations, or interpretations were nullities[95]—they would not be honored in courts. These two legal understandings rendered the defendant helpless. He could not say "it was my employer's fault" nor could he point to state authorizations that the court considered invalid and therefore nonexistent. Because the defendant's defense was a law that did not exist, all that remained was the original transaction: a trespass. This is what Chief Justice Marshall meant when he said that "the instructions cannot change the nature of the transaction."[96] An invalid defense does not thwart a claim. So in *Governor of Georgia v. Madrazo*, if an officer had wrongfully seized the ship, the plaintiff would have had relief. But, as we will see, an officer's otherwise illegal activities were defensible only if legally excusable. In turn, the predominant legal excuse for an officer was, not surprisingly, that his actions were done according to valid state authority.

Understood one way, this basically eliminates any meaningful principle of sovereign immunity. If the state did something illegal, plaintiffs could simply name officers as defendants, and sue them instead of the state. However, it is important to remember that the law required the plaintiff to have a claim against the defendant as an individual. In other words, we have to ask: could this plaintiff file a declaration against the defendant that made out a legitimate cause of action without necessarily suing the state? There were certain cases where the answer was simply no. For example, if a state borrowed money from someone, and failed to pay them back in accordance with the contract, that

---

94. JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 319 (Boston, Little, Brown & Co. 5th ed. 1857). Also, more fundamentally, sovereign immunity was more or less a palatable doctrine because it allowed this kind of officer liability. The history of sovereign immunity at English common law makes it difficult to believe that the doctrine would have existed absent generous exceptions. *See* Jaffe, *supra* note 42, at 1-20.

95. The word "nullity" is borrowed from the language used by courts. However, as used, it is imprecise. Put more precisely, unconstitutional laws/statutes/regulations had no legal effect—or, even better, they had no effect as a legal defense. In any event, an unconstitutional act (i.e., authorizing slavery) was not a legal nullity in that it had legal ramifications (enslaved individuals were given causes of actions).

96. Little v. Barreme, 6 U.S. (2 Cranch) 170, 179.

person (given these facts) had no legal redress.[97] She had no cause of action against an officer, for no officer is privy to the contract, and no officer can be forced to perform a contract he is not privy to.[98] The only proper defendant was the state and, absent the state's consent, such a suit would be barred by sovereign immunity. The sequence on such an assumpsit[99] claim would look like this:

> Stage 1: The plaintiff sued the officer, alleging the officer failed to pay a debt in accordance with a state-issued bond.
> Stage 2: The defendant could admit that he had not paid the money in accordance with the plaintiff's contract with the state.
> Stage 3:[100] The defendant pled to the jurisdiction by saying he was not privy to the contract, and therefore there was no cause of action against him on the contract.
> Stage 4: The victim could not counter Stage 3; the officer did not have any specific obligation to the victim (unlike in a trespass case, where the defendant has a duty to the trespass). The entirety of the duty owed here was by the state, which could not be made a defendant.

And that would be it. Plaintiffs did have a different, though related, approach: filing a writ of mandamus. However, courts were reluctant to use mandamus for any purpose other than forcing officers to perform specifically mandated, nondiscretionary duties. Contracts between private persons in the state rarely created such duties.[101] According to the pleading rules, the proper defendant here is the unsuable state; thus, without a cause of action against a particular individual, the plaintiff was out of luck. This was exactly what Alexander Hamilton meant in this generally misunderstood passage from Federalist No. 81, where he posited:

> 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. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.[102]

This is not, as some have suggested, a sweeping statement of sovereign

---

97. *Chisholm v. Georgia* faced such a question. The Court decided that despite traditional understandings of sovereign immunity, such a suit was allowed because Article III, Section 2 allowed for suits between states and citizens of other states. 2 U.S. (2 Dall.) 419, 430-31 (1793). After the Eleventh Amendment was passed, this was no longer a legal avenue, and thus there was no plausible jurisdiction over the state in such cases.

98. STORY, *supra* note 94, § 302.

99. This could just as easily be a different cause of action, such as debt or covenant.

100. Again, stage 2 and stage 3 are actually part of the same plea device, but I separated them here for purposes of conceptual clarity.

101. *But cf.* Bd. of Liquidation v. McComb, 92 U.S. 531 (1875) (contract puts state officer in the position of a trustee).

102. THE FEDERALIST No. 81, *supra* note 33, at 420 (Alexander Hamilton).

immunity.[103] The statement is in response to that which immediately preceded it: "It has been suggested that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation."[104] Hamilton is arguing that the common law cause of action one would use to prosecute a debt is one that could only be used against the state and not an officer. Hence the conclusion of his argument, that states are not "divested of the privilege of paying their own debts in their own way."[105] But this only applied to causes of action that could be directed at no one but the state; causes of action against officers were fair game.

Courts and scholars have often labeled this a legal fiction: the Court pretends the officer is just a private individual, and not a representative of the government.[106] In the context of Fourteenth Amendment cases, the fiction is supposedly even more pronounced: the Court is pretending the officer is a "state actor" for purposes of the Fourteenth Amendment, but treating the same officer as a private individual for purposes of the Eleventh Amendment.[107] This is based on a slightly imprecise reading. The Court, as shown above, did not pretend the officer was not an officer; rather, the officer was always understood to be an officer though his status as an officer was never, by itself, sufficient to shield him from liability under sovereign immunity law. The critical question was whether or not his official authorization was valid. Of course, this employed a set of fictions, but none so crass as pretending the officer was not an officer. Without these fictions, officers could commit any variety of torts as instructed by the President, without any liability. This reductio reasoning was powerful enough to overcome Chief Justice Marshall's "very strong" bias against damages.[108]

Finally, to the extent that this analysis employed fictions, these fictions were built into the Framers' understanding of the Constitution. For example, we see this in the original remedies provided by the Fourth Amendment. When

---

103. *See, e.g.*, Nelson, *supra* note 29, at 1575-78 (accepting Hamilton's statement as a broad endorsement of sovereign immunity).

104. THE FEDERALIST No. 81, *supra* note 33, at 420 (Alexander Hamilton).

105. *Id.*

106. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 173-74 (1996) (Souter, J., dissenting); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984); PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 937 (5th ed. 2004) ("However desirable the result in *Ex parte Young*, the Court's theory rests on a fictional tour de force."); Kenneth Culp Davis, *Suing the Government by Falsely Pretending to Sue an Officer*, 29 U. CHI. L. REV. 435, 437 (1962). John Harrison argues that this does not constitute a legal fiction in the context of antisuit injunctions. *See* Harrison, *supra* note 8 at 989-90.

107. *See, e.g.*, JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 12 (2d ed. 2007).

108. Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

enacted, the remedy for "violations" of the Search and Seizure Clause was an action in trespass.[109] A federal officer's claim that he was authorized would be null, because the Constitution prohibited the federal government from authorizing illegal searches and seizures. The Amendment was assumed to operate by giving the plaintiff a constitutional tool in Stage 4 by which to defeat any Stage 3 argument propounded by the officer-defendant.[110]

B. Madrazo *Revisited*

With our new set of common law tools, we can now consider the rather complex case of *Madrazo*, where the plaintiff failed in his action despite having a tort-like claim. There, the state came by a ship and a set of slaves that were earlier stolen.[111] The law that authorized Georgia's attainment of the property was valid,[112] which had two implications. First, it meant that pursuant to a valid law, Georgia actually held title to the property.[113] While the state could not arrest the court's proceedings merely by asserting title to the property, the fact that the proceeds were the actual property of Georgia was sufficient to raise the sovereign immunity bar.[114] Second, it meant that no officer committed an unauthorized trespass; they simply obeyed valid laws. The plaintiff filed a libel, the defendant agreed that he did everything the plaintiff said he had, but then defended his actions by pointing to statutory authorization. The Court reviewed that authorization and determined it was valid—for an officer, a valid statute was a complete defense in that it signaled that the only remaining qualm was against the state that authorized the statute.[115]

Because there was no claim against an officer—in this case, the Governor of Georgia—the Court had two options: 1) throw the suit out on the ground that

---

109. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994). This remedy has been superseded by the modern invention known as the exclusionary rule. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961), *overruling* Weeks v. United States, 232 U.S. 383 (1914).

110. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1229 & n.232 (1993).

111. Governor of Ga. v. Madrazo, 26 U.S. (1 Pet.) 110, 110-11 (1828).

112. *Id.* at 111, 123.

113. *Id.*

114. *Cf.* United States v. Peters, 9 U.S. (5 Cranch) 115, 139 (1809) (holding that Pennsylvania's claim to title of property held by a third person did not prevent courts from examining the validity of the title, but suggesting that if the proceeds "had been the actual property of Pennsylvania," it would have presented a different case).

115. "The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially." *Madrazo*, 26 U.S. at 123. This somewhat cryptic statement simply means that because the law Georgia passed was valid, the officer as potential tortfeasor had a valid defense: state authorization. Consequently, what was left of the plaintiff's complaint was a desire to sue the state, which, of course, is barred by sovereign immunity.

there was no cognizable legal claim against the governor as an individual, or 2) treat the suit as what the legal claim implied it was: a suit against the state. While the Court chose the latter,[116] it nonetheless dismissed the case on an important technicality: if the Eleventh Amendment did not extend to cases in admiralty, then this case was for the original jurisdiction of the Court.[117] Yet when Madrazo refiled his case in the Supreme Court, the Court tersely dismissed the case in two lines: the suit was a "mere personal suit against a state, to recover proceeds in its possession, and in such a case, no private person has a right to commence an original suit in this court against a state."[118] In other words, the suit was brought by an individual against the state and, as such, violated the principles of sovereign immunity. Importantly, it did not violate the Eleventh Amendment, because the Eleventh Amendment was not applicable to admiralty law. This was no help to the plaintiff, however, because the independent doctrine of sovereign immunity did in fact raise this bar, without concern for whether the suit was brought in law, equity, or admiralty.

Again, the formalism underlying such decisions has raised eyebrows. One scholar states: "Why, without an earlier trespass, detention by an officer of property to which the state has no title cannot equally be considered a 'wrong' is somewhat obscure."[119] This analysis exemplifies why focusing on trespasses per se asks a potentially misleading question. First of all, the statute giving title of the ship and cargo to the state was constitutional and otherwise valid.[120] However, we can only know the importance of this validity if we understand its role in the common law pleading system. Thus, when the officer delivered title to the state, the state obtained the property through legitimate means. At this point, the officer was absolved from the issue and, strictly speaking, he was no longer "detaining" any property because he had conveyed it, through legitimate means, to the state.[121] This meant that the state did in fact hold title to the property.[122] This did not mean that Madrazo had no claim. It meant that for Madrazo to settle his claim, he had to sue the state. Because the officer acted with valid authorization, he had a winning plea against the suit. Consequently, the plaintiff could not sue the governor without suing the state; his only claim was against the state.

Put differently, the first question was whether the plaintiff could attach his suit to a person. The Court answered this question by determining what wrong

116. *Id.* at 123-24 (stating that "where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record").

117. *Id.* at 124.

118. *Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627, 632 (1833).

119. Jaffe, *supra* note 42, at 22.

120. *Madrazzo*, 26 U.S. at 123 ("The possession has been acquired, by means which it was lawful to employ.").

121. *Id.* at 111.

122. *Id.* at 111, 123.

the plaintiff was claiming against the defendant (the Governor). In *Madrazo*, the governor had not committed a common law wrong in originally obtaining the property; it came to him through valid means. All of the "wrong" happened beforehand, far away from Georgia or any Georgian officer. Therefore, the plaintiff was basically claiming that the Governor had not given him his property back. That would have been fine if the Governor held the property, but here it was passed to the state. Once the state had a valid title to the property, sovereign immunity was triggered, even though the property had originally been stolen.

There was one important wrinkle that may not immediately be clear. If the Governor had not yet conveyed the property to the state, he would have been amenable to suit. In *United States v. Peters*,[123] a national prize court, on appeal, entered a judgment in favor of a prize case claimant and citizen of Connecticut, Gideon Olmstead. The Pennsylvania admiralty court refused to recognize the judgment, and the proceeds went to David Rittenhouse, Pennsylvania's treasurer, in the form of loan certificates.[124] Olmstead then filed a libel in admiralty to enforce his appellate victory, and the district court decided in his favor.[125]

Pennsylvania's legislature, prompted by an Antifederalist governor, passed a statute nullifying the district court decision and requiring the Rittenhouse estate to pass the loan certificates to the Commonwealth.[126] The Supreme Court granted mandamus.[127] First, the Court disposed of a minor point: Chief Justice Marshall rejected Pennsylvania's argument that the Eleventh Amendment barred the plaintiff's claim.[128] The plaintiff's suit was against Rittenhouse, not the state of Pennsylvania, and therefore fit neatly into regular diversity jurisdiction.[129] The Eleventh Amendment had no implication for what was a prototypical case of officer liability.[130]

More importantly, we saw in *Madrazo* that once the state has title to the property, immunity kicked in, even if the property was wrongfully acquired. This raises a critical question: why didn't Rittenhouse just hand the property over to the state, thus triggering sovereign immunity and ending the matter?

The answer exists in the common law of agency. If an agent was put on notice that property in her possession was subject to a claim adverse to her

123. 9 U.S. (5 Cranch) 115, 115 (1809).

124. *Id.* at 122-24.

125. *Id.* at 115.

126. Gibbons, *supra* note 18, at 1942.

127. *Peters*, 9 U.S. at 141.

128. *Id.* at 139.

129. As opposed to the state/out-of-state diversity jurisdiction which the Eleventh Amendment overruled insofar as it allowed individuals to sue states based on diversity.

130. The Court noted that "it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant." *Peters*, 9 U.S. at 139.

principal, she was required to retain that property; if she forwarded it to her principal, she did so at her own peril.[131] Thus, putting officers on notice of adverse claims was a standard way of preventing one's property from being handed over to the state, where it would be lost behind the immunity shield.[132] If the officer ignored the notice, she would be liable to suit.[133] While this may seem harsh for officers, the courts believed it better than the alternatives.[134] If the plaintiff failed to put the agent on notice, then his only recourse was with the principal. The problem in this context, however, was that the principal was a state, and thus not amenable to suit without its consent. Thus, the failure to put an officer on notice, or, more harshly, the failure to dispute an officer's wrongful and unauthorized action—when such a failure resulted in the property being handed over to the state—would often end the potential for any legal claim.[135]

C. *Marshall Court: Continued*

The Marshall Court more or less adhered to these patterns. Outside of officer liability, sovereign immunity was held as a consistent principle: individuals cannot sue the state. In *Cohens v. Virginia*,[136] the Court held that a writ of error was not a suit against the state. The state of Virginia explicitly discussed sovereign immunity as a doctrine separate from the Eleventh Amendment, arguing that even before the Eleventh Amendment, principles of sovereign immunity barred in-state citizens from suing their states in federal courts.[137] The Court, speaking through Chief Justice Marshall, agreed: "This general proposition will not be controverted."[138] Nonetheless, sovereign

131. Gibbons, *supra* note 18, at 1943 & n.295-96.

132. *Id.* at 1943 & n.296.

133. The problem with this, however, was that agents were often insolvent. As we will later see, the insolvency of an agent was typically a sufficient enough defect in the common law remedy to warrant the interference of courts of chancery. *See infra* text accompanying notes 160-66.

134. *See, e.g.*, Elliott v. Swartwout, 35 U.S. (10 Pet.) 137, 156 (1836) (stating that "recourse must be had to the government for redress" and failure to impose this liability would be "carrying an exemption to a public officer beyond any protection, sanctioned by any principles of law or sound public policy").

135. *See id.* at 150 (action to recover excess duties paid to a collector was rejected because the plaintiff made no "intimation" that "the duty was not legally charged" until after the collector paid the money to the state); City of Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1866) (same); Hardy v. Hoyt, 38 U.S. (13 Pet.) 292 (1839) (same); Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839) (same); *see also* Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75 (1872) (allowing recovery against tax collector for taxes illegally assessed and paid under protest); *cf.* Atchison, Topeka, & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912) (similar).

136. 19 U.S. (6 Wheat.) 264 (1821).

137. *Id.* at 302-10.

138. *Id.* at 380.

immunity was not applicable simply because the state was involved. In *Cohens*, there was no suit brought against the state. Suits demand something; writs of error are, by contrast, entirely defensive.[139] In *Cohens*, the state of Virginia had brought criminal proceedings against the defendant.[140] After being convicted, he essentially appealed by bringing a writ of error, and though his conviction was ultimately upheld, his writ was perfectly acceptable.[141] This was because the state of Virginia waived personal jurisdiction by bringing the proceedings in the first place.[142] The principle was simple: a state could not bring a suit against a defendant and then complain when the defendant used the available legal apparatus to defend himself.[143]

Critics of *Hans* often cite *Cohens*[144] for its broad, sweeping dicta, such as: "We think a case arising under the constitution or laws of the United States is cognizable in the Courts of the Union, whoever may be the parties."[145] By itself, this does seem to imply federal-question jurisdiction over states. However, the context gives us two reasons to read this statement narrowly. First, this is Chief Justice Marshall's response to a more narrow rhetorical inquiry: should there be a "general grant [of immunity], an exception of those cases in which a State may be a party?"[146] By answering no, the Court was flatly denying the notion that states may claim immunity whenever they are a party. Construed more narrowly, the Court held that states could not claim immunity against writs of error.[147]

Second, and related, Marshall refers to "case[s]."[148] The word "case" was a legal term of art, implying among other things that the Court had personal jurisdiction over the parties.[149] At the same time, the doctrine of sovereign immunity denied courts this jurisdiction when the state was the party being sued. So, in response to the above quote, one must properly consider the following:

---

139. *Id.* at 409-10.

140. *Id.* at 375.

141. *Id.* at 409-10.

142. *Id.*

143. For a more in-depth review of the procedures surrounding writs of error, see ROGER FOSTER, A TREATISE ON PLEADING AND PRACTICE IN EQUITY §§ 394-400 (1890).

144. *See, e.g.*, ORTH, *supra* note 12, at 39-40; Gibbons, *supra* note 18, at 1946, 1953; Shapiro, *supra* note 10, at 69-71. Shapiro cites *Cohens* in general, and not this particular quotation, but presumably he had this proposition in mind. *See* DAVID CURRIE, THE CONSTITUTION IN THE SUPREME COURT, 1789-1889, at 99-100 nn.56, 61 (1985); Engdahl, *supra* note 12, at 29.

145. 19 U.S. (6 Wheat.) 264, 383 (1821).

146. *Id.* at 382-83.

147. This was not a very contested holding, as later cases involving writs of error did not even discuss the Eleventh Amendment. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

148. *Cohens*, 19 U.S. at 379-80.

149. Nelson, *supra* note 29, at 1556-89.

> It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it.[150]

This was a view with which Chief Justice Marshall was unlikely to have disagreed.[151]

When read this way, the Court was asserting a rather narrow proposition: federal courts may handle federal questions, assuming they already had personal jurisdiction over the parties. While this may seem a bit obvious, it must be considered in light of the facts. Virginia was claiming that federal courts had no jurisdiction when states were parties and, consequently, writs of error were barred by sovereign immunity.[152] In other words, the Court was saying that once there was personal jurisdiction, federal courts could obtain subject-matter jurisdiction in the presence of a federal question.[153]

There is strong evidence in the case that Chief Justice Marshall believed sovereign immunity—a doctrine that existed apart from the Eleventh Amendment—could bar federal courts from considering even federal questions. In his discussion, Marshall responded to some interesting (and at first, seemingly irrelevant) hypothetical scenarios proposed by the counsel for Virginia. For example, if a state (unconstitutionally) laid a duty on exports, and her citizens paid it, could the citizen maintain a suit in federal court to recover the money?[154] Such a case would surely present a federal dispute arising under

---

150. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1646 (4th ed. 1873) (emphasis added).

151. *See, e.g.*, Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (asserting that a dispute only "becomes a case" when subject is submitted to the court "by a party who asserts his rights in the form prescribed by law"—only then can the judicial department "receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States"). This view also helps us understand otherwise peculiar statements made in later court decisions. For example, in *Davis v. Gray*, discussed *supra* in text accompanying notes 54-62, the Court asserted:

> When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.

83 U.S. 203, 232 (1872). This simply means that citizens can, in effect, sue states even for contract claims, as long as they are properly able to bring the state or its officers into court. Typically this is barred by sovereign immunity, but as this Note demonstrates, there were safety valves such as causes of action against officers, or obtaining a waiver from the state.

152. *Cohens*, 19 U.S. at 301.

153. Diversity question, by contrast, would presumably have been barred by the Eleventh Amendment.

154. We must remember that in 1824, there were not many federal or constitutional rights against states. The main source of limitation on state power was Article I, Section 10; this is why the hypotheticals presented by counsel for Virginia harped on issues presented by Article I, Section 10, issues such as the laying of exports.

the Constitution (Article I, Section 10). Marshall dismissed this tersely: the mere involvement of federal law did not create personal jurisdiction over a state.[155] Contracts weighed down by unconstitutional exports were clearly illegal, but this was not enough to trigger jurisdiction over the state. Marshall's response to this hypothetical was clear and dismissive: "federal Courts never had jurisdiction over contracts between a State and its citizens."[156] In other words, citizens cannot sue their own states or other states merely because they have a federal or constitutional claim against the state.

This is a fascinating and important point. *Hans* is often accused of departing from precedent, and scholars who make this argument often cite the holding in *Cohens*,[157] without considering that holding in its entire context. Here, in *Cohens*—the opinion often cited as compelling a different conclusion in *Hans*—the Court took for granted the allegedly controversial conclusion in *Hans*, mainly that a citizen could not sue his own state merely because he had grounds for federal question jurisdiction.

Nonetheless, Chief Justice Marshall's analysis did not imply that there were no remedies against unconstitutional statutes such as one that purported to impose tariffs barred by Article I, Section 10. The opinion goes on to argue that the citizen could refuse to pay the export, then use Article I, Section 10 as his defense when the state brought an action against him.[158] Or, as we saw in other cases, the citizen could complain, refuse to pay the tax, then immediately sue the officer who seized the tax money. The difference harkens back to the formal pleading distinctions discussed earlier. In the first dispute, the plaintiff was suing the state to recover money illegally obtained but now in the state treasury.[159] Such a dispute was quintessentially barred by sovereign immunity, even if the state exacted an unconstitutional duty. In the situation where the citizen refused to pay the export and faced a state-initiated suit, the state waived its immunity by bringing an action against the citizen. Sovereign immunity surely did not bar the citizen from defending himself by claiming that the action against him was unconstitutional. In the other option, where the citizen complained, paid, and then sued the officer, the citizen preserved a cause of action against the officer, albeit a rather dramatic and uncertain one. Despite the formalistic reasoning, the conclusion was straightforward: where the court already had personal jurisdiction over the state, federal courts could exercise federal-question jurisdiction. Without personal jurisdiction, the only remaining option was officer liability.

---

155. *Cohens*, 19 U.S. at 402.

156. *Id.*

157. *See* sources cited *supra* note 144.

158. *Cohens*, 19 U.S. at 402.

159. The result would be different if an officer had collected the duty, yet had not placed the sum in the state's treasury. Then the plaintiff could sue the officer, who would be forced to use an unconstitutional statute as his defense.

The third option was perhaps unsatisfactory for the everyday, risk-averse citizen. Of course, the would-be plaintiff did not always have to wait until his property was seized. By becoming a plaintiff in equity, he could enjoin the enforcement of an unconstitutional statute.[160] However, to do this, the plaintiff seeking such relief had to meet the additional standards demanded by equity jurisdiction, such as demonstrating that he had inadequate remedies at law.[161] For example, in *Osborn v. Bank of the United States*, the state of Ohio had passed an unconstitutional tax on a federal bank, amounting to $100,000.[162] As discussed, the bank could resist the tax collector and bring a detinue action against the collector upon forcible seizure.[163] The rest should be familiar: the tax collector would claim he was authorized by statute, the bank would argue the statute was unconstitutional, and the court would award damages.

There were two reasons why this remedy was inadequate. First, it would create an annual lawsuit for the bank, thus promoting the state's goal of harassing the bank.[164] Second, the bank would risk having the tax collector (agent) turn the money over to the state (principal). Because the state was not amenable to the law, the only remedy would have been against the agent, who was unlikely to have that kind of money.[165] In sum, the remedy at law was inadequate, and the Court had no problem affirming the lower court's injunction.[166]

In *Osborn*, the tax collectors had already violated the lower court's injunction, seized the tax money,[167] and argued ex post facto that the injunction was void. Counsel for Ohio argued that the real party at interest was the state of Ohio, and, because the basis for jurisdiction was diversity, the original injunction violated the Eleventh Amendment.[168] The Court's response was simple: where jurisdiction was conferred by the identity of the parties (diversity jurisdiction),[169] courts should look to the parties of record.[170] The

160. *See* Harrison, *supra* note 8, at 997-98 nn.40-45.

161. *Id.*

162. *See* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 741 (1824).

163. *See id.* at 843-45.

164. *See id.* at 840.

165. *See id.* at 844.

166. *See id.* at 845.

167. While the money was credited to the state, it was held separate from the money in the treasury, allowing the Court to easily uphold a second decree ordering an official to return the money held in his possession.

168. *See Osborn*, 22 U.S. at 849.

169. One exception is in cases involving ambassadors. This exception flows from the language "affecting ambassadors" of Article III.

170. Today's Court has accepted the assertion by some scholars that this holding was contradicted or narrowed just four years later in *Governor of Georgia v. Madrazo*. *See, e.g.*, Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 272 (1997). The governor in *Madrazo* was the official party on record, but the Court nonetheless treated the suit as one against the state. The contradiction is not irreconcilable. In *Madrazo*, the plaintiff had no legal claim against the governor (as a person) at all. The Court could have thrown out the case for lack of a legal

assumption behind this was that jurisdiction was tied to the parties because the cause of action was linked to what the individuals, not the state, did (i.e., trespassed). When that was true—that is, when there was a cause of action against an individual—there was no reason to worry about parties beyond the record.

In such cases, the Eleventh Amendment was simply not an issue. The purpose of that amendment was to pretend that Article III did not extend jurisdiction to cases brought against a state by citizens of another state.[171] In Marshall's own words, the Eleventh Amendment "has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens."[172] The Court again declined to expand the Eleventh Amendment, but this had no implication for the separate doctrine of sovereign immunity.

D. *The Pattern Continues*

Through the mid-Nineteenth century, the Court continued to treat sovereign immunity as a doctrine separate from the Eleventh Amendment. In *Dodge v. Woolsey*, an out-of-state shareholder sued to enjoin an Ohio tax collector from collecting taxes from the state bank at a higher rate than agreed in the charter.[173] Despite the diversity jurisdiction, the Court did not once mention the Eleventh Amendment, for reasons which should by now be obvious. The case was a classic suit against an officer, and the officer's defense was rejected because it was based on an authorization that violated the Contracts Clause.[174]

---

claim, but this would have avoided the plaintiff's arguments, which were directed against the state—after all, he was seeking money from the state treasury, there pursuant to valid law. So, rather than tossing the claim out for lack of a legal claim against the named defendant, the Court treated the suit against the governor as what it was: a suit against the state. In other words, the Court would look to the parties on the record, but only if there were a legal claim against these parties as individuals. The ultimate question running through these cases does not change: can this plaintiff sue this defendant without suing the state?

171. Consequently, Article III, Section 2 would be like this:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other public ministers and consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State [*when a State initiates the suit*];—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

172. *Osborn*, 22 U.S. at 857-58.

173. *See* Dodge v. Woolsey, 59 U.S. (18 How.) 331, 336-40 (1855).

174. *Id.* at 360-61.

Let's briefly revisit the facts of *Davis v. Gray*.[175] In the mid-Nineteenth century, Texas had a policy of granting public land to corporations contingent on the fulfillment of certain conditions. One such corporation was a railroad chartered to build tracks across the state from east to west.[176] However, the railroad became insolvent and stopped making progress.[177] In turn, state officers began issuing patents to settlers, basically allowing them to settle along the railroad's lands.[178] The railroad's receiver, appointed as an agent to oversee the railroad's decisions, sued for an injunction against the issuance of these patents, claiming they interfered with his ability to sell the land to another railroad.[179] The Court affirmed a lower-court decree in favor of the receiver.[180]

This case fits cleanly into the officer-liability framework. The officers began authorizing settlers to trespass on the railroad's land; the plaintiffs sued to enjoin these trespasses that the defendants claimed the law authorized; and finally, the plaintiffs argued that that law that supposedly authorized the defendants' actions violated the Contracts Clause and was therefore null, leaving the officers naked against the plaintiffs' suit.

In accepting the plaintiffs' arguments, the Court adhered to the three principles of *Osborn*: (1) when cases are properly brought in equity, circuit courts may enjoin state officers from executing state laws that are unconstitutional or otherwise invalid if executing the laws violates the rights of the complainants; (2) the inability to make the state a party "is sufficient reason for the omission to do it"; and (3) "in deciding who are parties to the suit the court will not look beyond the record."[181]

John Orth and other scholars claim these principles were contradicted by later case law,[182] a position accepted by the Court today.[183] However, these claims overlook key points. First, as discussed earlier, "cases" must be "properly" brought in courts of equity—suits against states were not properly before the Court because without consent from the states, the courts of chancery had no personal jurisdiction over the states. These scholars also harp on the third point, the so-called "party of record" rule. The rule did not mean that courts would or should blindly accept any suit against any defendant so long as the actual state was not named as a party. True, the mere fact that an officer was a party did not make the state a party, even if the state was the "real

175. See *supra* text accompanying note 54.

176. *See* Davis v. Gray, 83 U.S. (16 Wall.) 203, 205 (1872).

177. *See id.* at 211.

178. *See id.* at 210.

179. *See id.* at 211.

180. *See id.* at 233.

181. *See id.* at 220 (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)).

182. *See* ORTH, *supra* note 12, at 58-59.

183. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 272 (1997) (asserting that the Osborn rule was abandoned by the Court in *Governor of Georgia v. Madrazo*).

party in interest."[184] The relevant inquiry was in the nature of the declaration and, more specifically, the cause of action. When the cause of action was against the officer, then there was no need to look any further, and there was certainly no impetus to ponder the effects such an action might have on state sovereignty. However, if the declaration named the officer but the cause of action was actually against the state, then courts systematically pierced the declaration—that is, they looked beyond the declaration to determine if the cause of action was actually against the state. These cases were seen as listing an officer but suing the state. As the Court in *Davis* put it, states can be made parties "only by shaping the bill expressly with that view, as where individuals . . . are intended to be put in that relation to the case."[185] This last clause explains that a suit could still be against the state even if an individual was named the defendant. This happened, as we've seen, when a plaintiff sued an officer but had no cause of action against the officer as an individual.[186]

Now that we have a sense of the case law before the Civil War, we can understand how the post-bellum cases were actually quite consistent with the antebellum ones. Though the doctrine was the same, the stage was quite different: post-bellum courts were flooded with suits by bondholders trying to hold Southern states to the obligations they signed during the Reconstruction. These were called:

E. *The Bondholder Cases*

After the Civil War, many of the Southern states faced heavy debts on outstanding bonds.[187] Significantly, these bonds were issued by Reconstruction governments; the Southern states harbored growing resentment to these governments and their seemingly reckless fiscal policies.[188] Consequently, the debts resulting from the bonds were more than onerous fiscal burdens: they symbolized corrupt Northern domination.[189] In the 1870s, as Democrats recaptured local governments, states began rigorously pursuing avenues to repudiate these debts.[190] And thus were born the bondholder cases.

These cases were brought in federal courts by bondholders who were quite understandably upset that their notes were suddenly valueless. In response,

184. *Davis*, 83 U.S. at 220.

185. *Id*.

186. *See supra* text accompanying note 63.

187. *See generally* Purcell, *supra* note 19, at 1944-49.

188. *See* ORTH, *supra* note 12.

189. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 382-88 (1988).

190. Alabama, Arkansas, Florida, Georgia, Louisiana, North Carolina, South Carolina, Tennessee, and Virginia adopted policies reducing their bond obligations by an amount possibly exceeding $150 million. *See* C. Vann Woodward, *Origins of the New South: 1877-1913*, *in* 9 A HISTORY OF THE SOUTH 86-87 (Wendell Holmes Stephenson & E. Merter Coulter eds., 1951).

states—particularly in the South—amped up the rhetoric about sovereignty and the dignity of states. Of course, such rhetoric raises suspicions among progressives, as it was the same rhetoric employed in justifying the Jim Crow regimes. However, as we will see, behind the rhetoric there was a point, and a whole lot of precedent: the legal theories propounded by the bondholder-plaintiffs were often novel assertions of federal judicial power. Despite the variety of strategies employed in bringing these claims, the Court handled them with remarkable consistency.

Take, for example, the situation in Louisiana. In the Funding Act of 1874, the state renegotiated with reluctant bondholders and issued them consolidated bonds.[191] Louisiana created a Board of Liquidation specifically authorized to hold these consolidated bonds in trust.[192] However, Louisiana then passed the Funding Act of 1875, which allowed the Board to issue a portion of these consolidated bonds to the Louisiana Levee Company, in liquidation of a contractually incurred debt.[193] Basically, the Act took some of the bond money, supposedly held in trust for the plaintiffs, and used it to service another one of the state's debts.[194] A Delaware citizen who held one of these bonds sued, claiming Louisiana's actions impaired the contract made between Louisiana and those who accepted the consolidated bonds according to the terms of the Funding Act of 1874.[195] In *Board of Liquidation v. McComb*, the Court affirmed an injunction "so far as it prohibit[ed] the funding of the debt due to the Louisiana Levee Company in the consolidated bonds issued . . . under the Funding Act of . . . 1874" but reversed the decree for all other bonds issued to the company in liquidation of that debt (because those other bonds were irrelevant; they were not part of the plaintiff's contract).[196]

The citizen of Delaware who brought the suit filed his bill in equity against several Louisiana state officers: Governor William Kellogg, Lieutenant-Governor C.C. Antonie, Treasurer Antoine Dubuclet, Auditor of Public Accounts Charles Clinton, Secretary of State P.G. Desloude, and Speaker of the Louisiana House of Representatives Michael Habn.[197] Regardless of diversity jurisdiction, the Court did not once mention the Eleventh Amendment. Independent of the Eleventh, the Court admitted that a state "cannot be sued by an individual" without its consent, nor should courts substitute their discretion for that of state officers[198]—nothing new.[199] But just as courts can issue writs

191. *See* Bd. of Liquidation v. McComb, 92 U.S. 531, 531 (1875).

192. *See id.*

193. *See id.*

194. For a more detailed layout of this complaint, see *id*. at 531-34.

195. *See id.* at 531.

196. *See id.* at 541.

197. *See id.* He also sued the Levee Company. *See* Transcript of Record at 1, *McComb*, 92 U.S. 531.

198. *McComb*, 92 U.S. at 541.

199. Just as during the Marshall era, the Court asserted these as obvious truisms—both

of mandamus to compel performance of nondiscretionary duty,[200] they can also issue injunctions to prevent positive official actions that violate the officers' nondiscretionary duty.[201] Here the lineup of defendants made the suit seem like one against the state, but these individuals constituted the Board of Liquidation,[202] which according to the Funding Act of 1874 held the plaintiff's bonds in trust.[203] In other words, the bonds belonged to the plaintiff, and the state had no claim to them. But the crucial point here is this: the trust relationship created a cause of action against the officers individually (a standard action brought against a trustee for breach of trust).[204]

This meant that the plaintiff could indeed sue the officers without suing the state. The trust relationship was critical because it meant that state officers were holding property (bonds) on behalf of the plaintiff, not on behalf of the state. So when the officers were instructed by statute to violate this duty, the plaintiff had a cause of action. And because the authorization violated the contract, it was null and void for violating the Contracts Clause. This is why the Court affirmed for the bonds issued under the Funding Act of 1874, but reversed the decree for all other bonds issued to the Levee Company[205]—the latter belonged to the state (thus no cause of action against the officers), and the former were explicitly held in trust.

The Court took this distinction seriously. In *Louisiana v. Jumel*, the bondholders had sued to enjoin the state treasury officers from using tax receipts for any purpose other than fulfilling their bond obligations.[206] In *McComb*, the bonds were specifically held in trust for the bondholders, thus creating specific duties.[207] Here, however, the plaintiffs were asserting a much broader claim: the state could not spend its tax money on anything until the bondholders were paid. Unlike *McComb*, there was no trust relationship between the bondholders and officers,[208] nor did the bondholders have any claim to any particular property. Rather, they were making a claim to a portion of tax receipts in the treasury and, in the words of Chief Justice Waite, "money in the treasury is the property of the state, and not in any legal sense the

---

for federal and state courts. *See, e.g.*, R.R. Co. v. Tennessee, 101 U.S. 337, 339 (1880) (asserting the "elementary" principle that a state cannot be sued in its own courts without its consent).

200. *McComb*, 92 U.S. at 541.

201. *See id.*

202. *See id.* at 531.

203. The fact that this was a trust relationship was clearly implied from the facts—the board held property on behalf of the plaintiffs with a specific, mandatory duty—but it was first made explicit in *Louisiana v. Jumel*, 107 U.S. 711, 725-26 (1883). *See also* Collins, *supra* note 42, at 226-28 (1988).

204. *See Jumel*, 107 U.S. at 725.

205. *See McComb*, 92 U.S. at 541.

206. *See Jumel*, 107 U.S. at 718.

207. *See id.* at 726.

208. *See id.*

property of the bond or coupon holders."[209] Thus, there was no possible legal claim against the officers as individuals.[210] They could not trespass, for there was no specific property interest, nor could they violate any obligation, when the only obligation was contractual and owed by the state, not by third parties. In other words, the suit was seeking nothing other than the specific performance of a contract.[211]

The Court perceived the lawsuit as inviting federal courts to govern state fiscal policies.[212] This was a valid concern, as the remedy sought basically would have required the treasurer to levy new taxes to pay the bond interests.[213] Nonetheless, there was no cause of action against individuals, and the suit was merely an attempt to compel Louisiana to abide by its contracts. Adjudicating such a claim would quintessentially violate long-standing principles of sovereign immunity. Because citizens of another state brought it, the suit also violated the Eleventh Amendment.[214]

At the same time as *Jumel*, bondholders tried a different strategy: assigning their claims to their home states to prosecute.[215] The theory was rather simple: the Eleventh surely did not bar states from suing other states. The fact that this strategy was even tried demonstrates the plaintiffs' knowledge that the case law did not favor a friendly result in *Jumel*. Nonetheless, the Court rejected the argument and held the suit was barred by the Eleventh.[216] While the decision wasn't necessarily inevitable, it was also not atextual. Chief Justice Waite stressed that the suits were still commenced and prosecuted by the out-of-state citizen: the citizens paid all of the expenses and made all of the decisions relating to the suit.[217] Despite the formal signature of the attorney general, these were unequivocally suits commenced and prosecuted by citizens of one state against another state. One might validly highlight the tension between the refusal to look beyond the parties pleaded in the earlier cases, and this rule, where the Court discerns who exactly is the "real" party in interest.

The difference can be explained, again, by looking at the declaration. As we've discussed, the declaration has two components: the right and the wrong.

---

209. *Id*. at 720.

210. *See id.* at 723 ("If there is any trust, the state is the trustee, and unless the state can be sued the trustee cannot be enjoined. The officers owe duty to the state alone, and have no contract relations with the bondholders.").

211. *Id*. at 722.

212. [T]he remedy sought implies power in the judiciary to compel the state to abide by . . . its contracts for the payment of money, not by rendering and enforcing a judgment in the ordinary form of judicial procedure, but by assuming the control of the administration of the fiscal affairs of the state to the extent that may be necessary to accomplish the end in view.

Id. at 722.

213. *See id.* at 727-28.

214. *See id.* at 720.

215. *See, e.g.*, New Hampshire v. Louisiana, 108 U.S. 76 (1883).

216. *See id*. at 91.

217. *See id*. at 89.

When an officer committed the wrong, we've seen that he can be held liable, notwithstanding good faith reliance on unconstitutional or otherwise invalid authorization. By contrast, when there was no cause of action except for one against the state, immunity was triggered. This analysis was reciprocally applied in *New Hampshire v. Louisiana* to the "right" component of the declaration. When considering the wrong, the relevant party is the party who did the wrong (even if he was acting on behalf of someone else, an employer, or the state—these were all issues for later stages in the pleadings). When considering the right, the relevant party was the party whose right was being violated.[218] After making this inquiry in *New Hampshire v. Louisiana*, the Court concluded that the litigation was clearly adjudicating the rights of out-of-state citizens, not the state of New Hampshire.[219] While it's not impossible for a would-be plaintiff to sign away this right to a third-party state (or other third party, for that matter), the Eleventh Amendment prohibits the would-be plaintiff from being the one who commences or prosecutes the action. When the would-be plaintiff goes through all of the motions of prosecuting his action including but not limited to funding that prosecution, the Court could not pretend that he was the one prosecuting the claim; that is, the Court could not pretend the Eleventh did not apply.

The plaintiffs could have been more careful in arranging their facts. Such a shallow intervention by the state made it difficult for a judge to seriously assert that the rights at issue in the declaration were not the rights of the out-of-state citizens. Careful readers of the Court's opinion employed the same strategy with more circumspection and, sure enough, when the Supreme Court did hear a case where it was not so obvious that the state was suing on behalf of its citizens, the Court accepted jurisdiction.[220]

Despite the increasing volume and varying legal tactics of bondholder suits, the Court continued to ask, sometimes implicitly but often explicitly, the same question: can this plaintiff sue this defendant without suing the state?[221] If the answer was no, the suit was barred by sovereign immunity and, for suits brought in diversity, by the Eleventh Amendment. If a plaintiff did have a legal claim against the officer, the officer could not rest his defense on the bare assertion that he was authorized by the state. He was "bound to establish [his defense]."[222]

---

218. Hence the Court's statement: "No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced and are now prosecuted solely by the owners of the bonds and coupons." *Id.*

219. *Id.*

220. *See* South Dakota v. North Carolina, 192 U.S. 286 (1904).

221. *See, e.g.*, Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 456-57 (1883) (asserting that "no one sued has any personal interest in the matter" and that Georgia was the only proper defendant); Clark v. Barnard, 108 U.S. 436 (1883).

222. Poindexter v. Greenhow, 114 U.S. 270, 286-89 (1885). The Court in *Poindexter* goes on to discuss a familiar principle. When Virginia passes an unconstitutional law, that law "is a legislative act of the government of Virginia, but it is not a law of the state of

However, the bondholder cases gave rise to a different type of case, one that highlights just how formalistic the sovereign immunity principle actually was. In *Lincoln County v. Luning*, the Court unanimously decided that cities and counties are not protected by sovereign immunity.[223] In doing this, they rejected the argument that cities and counties were parts of states, authorized to help administer local government.[224] While this may offend a sense of legal realism, the formal principle was actually consistent. Sovereign immunity and, for that matter, the Eleventh Amendment only barred suits against states. The mere fact that local governments were authorized to act and use discretion (the same way an officer is authorized to act and use discretion) does not make it equivalent to a sovereign state.[225] Otherwise, even corporations (chartered and authorized by states, albeit in more limited ways than local governments) would enjoy sovereign immunity. These cases, though enigmatic at first, fit quite well into the sovereign immunity framework outlined thus far.[226]

If this framework is accurate, then we would expect to see bondholders successfully suing only in cases in which they had legal claims against officers. This was exactly what happened. In all of the *Virginia Coupon Cases*,[227] the plaintiff won when suing for trespass against an officer claiming unconstitutional authorization,[228] and lost when their claims lacked a claim against the officer.[229] For example, the State of Virginia had allowed

---

Virginia. The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done." *Id.* at 288.

223. Lincoln County v. Luning, 133 U.S. 529 (1890).

224. *See id.* at 530.

225. *See id.* at 530-31.

226. It's interesting to note that on a decision like this, which could come out either way, the Court came out on the side of enforcing the contract (unanimously). In fact, it seems that the Court enforces the contract whenever possible, only declining when it plainly violates principles of sovereign immunity. As the dissents in *Jumel* indicate, some Justices were willing to contract the sovereign immunity principle even further. *Louisiana v. Jumel*, 107 U.S. 711, 728-69 (1883). At least one scholar argues that, contrary to general understanding, the Court went out of its way to protect contracts. *See* MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA (2003).

227. 114 U.S. 269 (1885).

228. Chaffin v. Taylor, 116 U.S. 567 (1886) (granting plaintiff's action for trespass de bonis asportatis); Allen v. Baltimore & Ohio R.R. Co., 114 U.S. 311 (1885) (issuing an injunction against selling railroad's property to satisfy its tax obligations, and issuing mandamus to compel the officer to accept the tax coupons); White v. Greenhow, 114 U.S. 307 (1885) (granting action against an officer who refused to accept tax coupons and who in lieu of said coupons seized personal property in order to satisfy the plaintiff's tax obligations); Poindexter v. Greenhow, 114 U.S. 270 (1885) (granting action for detinue after an officer, who refused to accept tax coupons, seized the plaintiff's desk).

229. Marye v. Parsons, 114 U.S. 325 (1885) (denying that a citizen of New York had a cause of action against a Virginia tax officer because he did not have to pay Virginia taxes); Moore v. Greenhow, 114 U.S. 338 (1885) (denying mandamus because tax collector had already agreed to receive coupon as soon as it had been legally ascertained to be genuine); Antoni v. Greenhow, 107 U.S. 769 (1883) (same); *see also* Hagood v. Southern, 117 U.S. 52

bondholders to pay their taxes with bond coupons.[230] In some cases, however, tax collectors refused to receive these coupons and instead seized property belonging to the bondholder.[231] Consequently, the bondholder had a cause of action (detinue) against the tax collector (whose authorization was invalid because it violated the contract underlying the bond).

In all of these cases, including the ones where a citizen was suing his own state, the plaintiffs argued that they were actually suing the officers as individuals.[232] If state immunity was based only on the Eleventh Amendment, there would be no reason for in-state citizens to make this argument. But it wasn't, and they conceded that it wasn't, arguing vehemently that they were only suing officers, not the state.[233] One oddball case, seemingly the result of poor lawyering, actually clarified an important point. In *Carter v. Greenhow*, the plaintiff had an actionable injury, but rather than suing under the traditional framework, he argued that he had a constitutional right to have his coupon accepted[234]—in abstract terms, Article I, Section 10, Clause 1 gave him a constitutional right to have his contract with the state enforced. The Court disagreed.[235] If there was any room for doubt, this case demonstrated that constitutional guarantees did not translate into actionable rights capable of piercing immunity.[236]

The bondholder cases persuasively demonstrated the consistency with which the courts applied the immunity doctrine. The political accounts[237] are so busy in search for political motives that they overlook these consistencies. While the political context probably facilitated or encouraged the outcomes of these decisions, understanding the politics cannot substitute for understanding the doctrine.

(1886) (holding that because New York citizens did not pay South Carolina taxes, they had no actionable injury against South Carolina tax collectors after South Carolina passed a law prohibiting the acceptance of revenue bond scrip as tax money).

230. This was provided for by the act of the General Assembly of Virginia, passed March 30, 1871, entitled "'An act to provide for the funding and payment of the public debt.'" *Poindexter*, 114 U.S. at 273.

231. *E.g.*, *id.*

232. See the *Virginia Coupon Cases*, 114 U.S. 269 (1885), for a sampling of these cases.

233. This point was made in Hans, and has typically gone unnoticed. Hans v. Louisiana, 134 U.S. 1, 16 (1890).

234. Carter v. Greenhow, 114 U.S. 317, 322 (1885).

235. *Id.*

236. This, of course, would have implications for how we might approach other rights conferred by the Constitution.

237. *See supra* text accompanying notes 9-27.

F. *Federal Sovereign Immunity: The Same Thing*

It is worth briefly noting that federal sovereign immunity functioned much the same way as state sovereign immunity. This is probative of the fact that sovereign immunity was a body of doctrine separate and distinct from the Eleventh Amendment. The Eleventh, of course, did not apply to the federal government, and the Court didn't pretend it did. Rather, it was "a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent."[238] Just like the states, the federal government could not be "subjected to legal proceedings at law or in equity" without consent.[239] And again, a major exception hinged on whether or not the plaintiff had a cause of action against an officer individually, one that did not require him to sue the state.[240]

G. Hans v. Louisiana*: A No-brainer*

With this understanding of sovereign immunity, we can turn to our villain, *Hans v. Louisiana*, and understand why the Court went the way it did (unanimously). Until 1875, federal courts did not have federal question jurisdiction. The only implementation of Article III's federal question power was Section 25 of the Judiciary Act of 1789, which granted the Supreme Court appellate jurisdiction.[241] The Jurisdiction and Removal Act of 1875 changed this, giving federal courts jurisdiction to hear all federal question cases, as long as the matter in dispute was worth more than $500.[242] This newfound jurisdiction made a case like *Hans*—where a citizen sued his own state under federal question jurisdiction—inevitable.

Hans was peculiar in that, unlike many of the cases discussed thus far, the plaintiff sued the state directly.[243] Louisiana owed Bernard B. Hans $87,500 plus interest, and from this debt arose a simple question: can citizens sue their own states in federal courts under federal question jurisdiction?[244] Hans argued that, being a citizen of Louisiana, his action was not embarrassed by the Eleventh Amendment. Justice Bradley agreed with this reading of the

238. The Siren, 74 U.S. (7 Wall.) 152, 153 (1868); *see also* Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868).

239. *Id.* at 154.

240. The most famous case, no doubt because of its facts, is *United States v. Lee*, 106 U.S. 196, 222-23 (1882) (affirming a suit in favor of General Lee's estate brought to eject U.S. officers from the improperly seized land of the late general).

241. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

242. Jurisdiction and Removal Act of 1875, ch. 137, §1, 18 Stat. 470. *See generally* STANLEY I. KUTLER, JUDICIAL POWER AND RECONSTRUCTION POLITICS 143-60 (1968); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1875*, 13 AM. J. LEGAL HIST. 333 (1969).

243. Transcript of Record at 1, Hans v. Louisiana, 134 U.S. 1 (1890) (No. 257).

244. Hans v. Louisiana, 134 U.S. 1, 10 (1890).

Amendment,[245] and conceded the Court would have to decide that way "if there were no other reason or ground for abating his suit."[246] After stating why this would be "anomalous"—a citizen could sue his own state under federal question jurisdiction, but a citizen of another state could not—he famously asserted that such a conclusion would be a "startling and unexpected" consequence of the "[C]onstitution and of the [law]."[247] It was no mistake that he did not assert such a result would be a startling reading of the Eleventh Amendment. To judges of the time, the case clearly involved more than the Eleventh Amendment; after all, there were almost 100 years of cases discussing sovereign immunity as an independent doctrine denying courts personal jurisdiction over states.

To make this point, Justice Bradley cited the major immunity cases, most of them not directly dealing with the Eleventh Amendment.[248] In light of this precedent, *Hans* was an easy case and not surprisingly, a unanimous decision. Of course a citizen could not sue his state or any state. This was barred by long-established principles of sovereign immunity.

The Court provided an even narrower holding. The Jurisdiction and Removal Act of 1875 provided that "the circuit courts of the United States shall have original cognizance, *concurrent with the courts of the several States*, of all suits of a civil nature at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties."[249] The qualification that jurisdiction be concurrent was persuasive evidence (to the Court) that the Act did not intend to "raise[] up" any "anomalous and unheard-of proceedings or suits" such as suits by individuals against states. In other words, Congress did not intend for the statute to invest the federal courts with "new and strange jurisdictions"—that is, new and strange in relation to how state courts had been operating.[250] This argument interprets the general federal question statute to conclude that the "concurrent" language did not confer previously unknown personal jurisdiction over states to the federal courts[251]—at the time, the only thing more obvious than state immunity in federal courts was state immunity in state courts. While this does not comport with our general understandings about "concurrent jurisdiction,"[252] the Court in 1890 did unanimously sign on to this

245. *Id.* (asserting that "[i]t is true the amendment does so read").

246. *Id.*

247. *Id.* at 10-11.

248. *Id.* at 16.

249. Jurisdiction and Removal Act of 1875, ch. 137, §1, 18 Stat. 470 (emphasis added).

250. *Hans*, 134 U.S. at 18.

251. *Id.*

252. The Court's interpretation of concurrent jurisdiction is probably limited to its specific context: reading the 1875 Act in a sovereign immunity case. Generally, concurrent jurisdiction simply means the state and federal courts both have jurisdiction over certain claims. In other words, federal jurisdiction does not, barring explicit intent to do so, oust state court jurisdiction. *See, e.g.*, Claflin v. Houseman, 93 U.S. 130, 136-37 (1876) (rejecting

argument. For purposes of this Note, it's irrelevant whether or not this argument is "good" or "true." It's only relevant that the Court believed it and thus could have ended its opinion there.

If the Court had stopped after making these arguments, it would have been an uncontroversial, rather obvious case. However, the Court went on to adopt a historical argument articulated by Justice Bradley's dissent in the *Virginia Coupon Cases*.[253] He argued that *Chisholm* was wrong when originally decided and that the Eleventh was intended to restore the Constitution's original meaning.[254] The point of this argument was to assert that Article III had never given federal courts personal jurisdiction over states in cases brought by out-of-state individuals. Therefore, the Eleventh signaled that this jurisdiction had never existed to begin with.[255]

Much ink has been spilled over the validity of this argument.[256] Scholars seem to agree on one thing: the historical analysis was an integral part of the reasoning.[257] However, this argument is dicta and unnecessary to the Court's conclusion.[258] The correctness of *Chisholm* had little relevance to the question of whether or not a citizen could sue her own state under federal question jurisdiction. Seven years before *Hans*, the Court had provided a completely different history. In *New Hampshire v. Louisiana*, the Court argued that Chisholm was correctly decided (and Article III had given up on common law immunity), but that the Eleventh Amendment changed all of that.[259] While the Court in *Hans* changed the historical narrative, it applied the same framework and arrived at the same outcome as any court would have arrived at in the past hundred years—which is why all nine Justices had no trouble signing on.

The Court could have simply left the history argument out. Alternatively, it could have argued that Article III assumed that federal courts did not have personal jurisdiction over states, except as provided by the citizen and state

---

the contention that federal causes of action can only be pursued in federal court, arguing "[t]he laws of the United States are laws in the several states, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitute [sic] the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other . . . .").

253. The Virginia Coupon Cases, 114 U.S. 269, 337-38 (1885).

254. *Hans*, 134 U.S. at 11-19.

255. This contrasted with the Court's unanimous decision in *New Hampshire v. Louisiana*, which agreed that Chisholm was correct when decided—a decision joined by Bradley without opinion. Nonetheless, this history was not important to the decision in *New Hampshire*. 108 U.S. 76, 91 (1883).

256. *See, e.g.*, Fletcher, *supra* note 23, at 1089; Gibbons, *supra* note 18, at 2001.

257. *See, e.g.*, Massey, *supra* note 9, at 135 (understanding *Hans* in terms of its history).

258. *See, e.g.*, Collins, *supra* note 42, at 231 (explicitly arguing that the history here did not matter to the outcome).

259. 108 U.S. at 87-88.

diversity clause.[260] When that clause was overturned by the Eleventh, states enjoyed an even broader grant of immunity.[261]

To say Justice Bradley's history was unnecessary is not to say it was insignificant. The Eleventh Amendment has subsequently transmogrified into a symbol of Article III's original meaning. In its penumbras lay the proposition that Article III had never conferred jurisdiction to the federal courts in cases where an individual made a state a defendant. Thus, such a history made it possible for the Court to later say: "Despite the narrowness of its terms, since *Hans v. Louisiana*, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . ."[262] In other words, this history rendered the Eleventh Amendment a kind of shorthand for the principles of sovereign immunity long taken for granted.

At first, the Court kept the two doctrines separate, even in its discussion of *Hans*.[263] However, as time went on, courts began to treat the Eleventh as an embodiment of sovereign immunity and, before long, began asserting that the Eleventh prohibited suits against states brought by its own citizens.[264] Once the Eleventh Amendment had wings, it flew. Courts soon after pronounced that the Eleventh barred suits against states in admiralty proceedings,[265] as well as suits against states by foreign nations.[266] Of course, these had always been barred by the principles of sovereign immunity thus far discussed, but now the Court was attributing them to the Eleventh.

H. Ex Parte Young

Ex parte Young[267] is no doubt one of the most cited and discussed officer immunity cases in American law. The case has commanded and continues to

---

260. Without espousing any one particular historical view, this Note is simply suggesting that these are plausible historical narratives. *See, e.g.*, Nelson, *supra* note 29.

261. The author of this Note probably agrees with the history in *Hans*, but this has no implication for the historical narrative the Note is otherwise tracing. After all, the entire methodology of this Note is to examine the actual opinions of the nineteenth century, and from them extrapolate the doctrinal and constitutional understandings necessary to comprehend how sovereign immunity was employed. What matters, ultimately, is the framework that the courts applied, and here this framework applies consistently no matter what history we pick.

262. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) (citations omitted).

263. Smith v. Reeves, 178 U.S. 436, 447-48 (1900) (discussing Justice Bradley's history in *Hans* as something independent of the Eleventh); Fitts v. McGhee, 172 U.S. 516, 524 (1899) (stating that a state cannot be sued by its own citizens without connecting the principle to the Eleventh).

264. *See, e.g.*, *Ex parte* Young, 209 U.S. 123, 150 (1908).

265. *In re* New York, 256 U.S. 490, 497 (1921).

266. Principality of Monaco v. Mississippi, 292 U.S. 313, 323-30 (1934).

267. *Young*, 209 U.S. 123.

command a major presence in federal courts,[268] so it's especially important that we understand it correctly. In *Ex parte Young*, the State of Minnesota substantially reduced the rates that railroads could charge for their services. The penalty for transgression was severe, including substantial fines and possible jail time.[269] In turn, the railroad's shareholders brought suit seeking an injunction to prevent Edward T. Young, the Attorney General of Minnesota, from enforcing the new rate laws. The Court granted the injunction, notwithstanding Young's argument that the Eleventh Amendment prohibited such a suit.[270]

Such injunctions posed tricky sovereign immunity questions. Scholars, in trying to explain the intersection of sovereign immunity and equitable relief, have come up with some pretty creative results. Until recently, the consensus was that *Ex parte Young* created an exception to sovereign immunity, an exception that was founded on a paradox and legal fiction that treated state officers as state actors for one purpose and private citizens for another.[271] Against this general consensus, John Harrison insightfully argues that antisuit injunctions—a tool of equity used to restrain proceedings at law—did not offend principles of sovereign immunity because they placed the plaintiff in equity in a defensive posture.[272] In other words, they were a tool by which potential defendants could assert their defenses offensively in hopes of preventing future lawsuits. While this seems logically convincing, there are two reasons to be skeptical that antisuit injunctions played a role in the Court's sovereign immunity thinking. First, even if antisuit injunctions were not obnoxious to principles of sovereign immunity, they did violate the Eleventh Amendment when brought by citizens of another state or a foreign nation. The Eleventh Amendment prohibits suits in equity and law, so even if a plaintiff brings a suit in equity that makes him analogous to a defendant in law, the suit would still be banned by the Eleventh. Second, antisuit injunctions did not alter the basic immunity analysis that the Court applied to every case leading up to *Ex parte Young*. The Court still asked the same question: can this plaintiff sue this defendant without suing the State?

For example, in *Ex parte Ayers*, the Court reversed an antisuit injunction prohibiting government officers from bringing suits for the recovery of taxes for which taxpayers had previously tendered tax-receivable coupons.[273] There was no way to sue the tax collector without suing the state; a possible lawsuit in the future did not by itself constitute a trespass or any wrong by the state.[274]

---

268. *See, e.g.*, Karlan, *supra* note 9.

269. RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION 145 (1993).

270. *Young*, 209 U.S. 123.

271. Harrison, *supra* note 8, at 989.

272. *Id.*

273. *Ex parte* Ayers, 123 U.S. 443 (1887).

274. [The bill] does not charge against [the officers] in their individual character anything done or threatened which constitutes, in contemplation of law, a violation of personal or

Nor did the simple bringing of such an action constitute a breach of any contract between Virginia and the complainants.[275] This made it a suit in equity against the state commenced by citizens of Great Britain,[276] a scenario plainly barred by the Eleventh Amendment.[277] The analysis was not affected by the antisuit nature of the injunction.[278]

Harrison's argument, devised to explain *Ex parte Young* without the use of legal fictions, overlooks the fact that officer liability is not a legal fiction in the first place, at least not as commonly understood. In *Ex parte Young*, the officer had been enjoined from enforcing an unconstitutional rate-fixing statute with stiff penalties.[279] It may seem as though the officer has no personal interest in this matter and that the real party of interest is the sovereign. But this analysis avoids the central question in immunity analysis, the same question that courts had been asking for over a hundred years: can this plaintiff sue this defendant without suing the state? It's important to note how this case differs from *Ex parte Ayers*. *Ex parte Ayers* involved an 1887 statute by the state of Virginia, which provided that when coupons were tendered, the tax collector could bring a suit for taxes so that a court could discern whether or not the coupons were genuine.[280] Therefore, there was no possible suit to stop a trespass, because there was no looming threat of trespass. If the citizen had legitimate coupons, then he could offer them in court when sued and walk away unscathed. If his coupons were illegitimate, then he simply had to pay his taxes.

Ex parte Young presented a different set of facts; there was a potential trespass, which created the possibility for a suit to stop that trespass. There, the Minnesota legislature adopted a reduction in railroad rates.[281] Most importantly, the legislature worried that the railroads would violate the rates and then litigate their cases as defendants.[282] To address this concern, they imposed harsh penalties, even criminal punishments, for violations.[283] As a result, unlike in the relatively benign *Ex parte Ayers* proceedings, the plaintiffs

---

> property rights, or a breach of contract to which they are parties. The relief sought is against the defendants, not in their individual but in their representative capacity, as officers of the state of Virginia. The acts sought to be restrained are the bringing of suits by the state of Virginia in its own name, and for its own use.

Id. at 497.

275. *Id.* at 496. Nonetheless, the injunction indirectly compelled specific performance of the contract. *Id.* at 502.

276. *Id.* at 446; *see also* Transcript of Record at 2, *Ayers*, 123 U.S. 443 (No. 4).

277. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

278. *See Ayers*, 123 U.S. 443; *see also* Fitts v. McGhee, 172 U.S. 516 (1899) (reversing an antisuit injunction because there was no claim against the officer individually).

279. 209 U.S. 123, 127-46 (1908).

280. *Ayers*, 123 U.S. at 447-48.

281. *Young*, 209 U.S. at 127.

282. *See* Harrison, *supra* note 8, at 991.

283. *Young*, 209 U.S. at 127-29.

in *Ex parte Young* were confronted with the possibility of harsh fines and even incarceration. In *Ayers*, the officer was not threatening to do anything that would constitute a common law wrong. He was simply bringing a lawsuit to collect taxes owed to the state; in turn, state law allowed the defendant to present his tax coupons as tender.

In *Ex parte Young*, the railroad directors were in a tough spot. If they waited to litigate their cases as defendants in enforcement proceedings, then they faced the risk of imprisonment or harsh fines. This coerced them, and indeed was explicitly designed to coerce them, into abiding by the new rate structure.[284] However, that rate structure was arguably unconstitutional—and if it was, then the rates enforced by officers were trespassory and, thus, created a cause of action against those officers. Consequently, so long as the Minnesota railroads met the other requirements of equity proceedings (which they did), the railroads were allowed to sue plaintiffs in equity to prevent future trespasses by the officers—the trespass being, of course, the enforcement of an unconstitutional rate under threat of imprisonment. Attorney General Young, in turn, was entitled to use the authorization granted in the Minnesota statute as his defense. Unfortunately for Young, an unconstitutional statute did not exist, at least not for purposes of providing a legal defense. If there was any legal fiction, it existed in this understanding of unconstitutional statutes.

Harrison's understanding of *Ex parte Young* has implications for how we might deal with other so-called constitutional torts.[285] At its most drastic, his argument implies that we could legitimately deny all causes of action except for antisuit injunctions, which he seems to consider the only baby in the bath.[286] The implication of this Note is otherwise—that whatever the policy merits of such an approach might be, the historical evidence indicates an immunity doctrine somewhat different than what scholars thus far have posited it to be.[287]

III. IMPLICATIONS (BRIEF)

This new understanding of sovereign immunity is more than just interesting; it has implications for what an immunity jurisprudence sensitive to stare decisis and original intent should look like. To begin with, there are Supreme Court cases where both the majority and minority conflate sovereign

284. Harrison, *supra* note 8, at 991.

285. *See id.* at 1018-22.

286. *Id.* at 1021.

287. This is not to say that Harrison's insight has no application. For example, it clears up one issue that has long been cryptic. As Harrison points out, scholars have long struggled to understand why the Court accepted jurisdiction in *Ex parte Young* when there was no federal question in the "well-pleaded complaint"—this means that federal defenses and other federal issues arising during litigation would not give rise to federal jurisdiction. Harrison's account dodges the overly-complex justifications and provides a simpler one: "[e]quity pleading rules . . . required that an issue that would be a defense at law appear in the complaint in equity." *Id.* at 1015.

immunity and the Eleventh Amendment, all the while basing their arguments on inaccurate histories.[288] Moreover, the modern Court treats sovereign immunity as a substantive, policy-oriented doctrine.[289] Just recently, Justice Kennedy argued that the "real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading."[290] Whatever we think about this as constitutional policy, it is undoubtedly a view of sovereign immunity that is both more expansive and more substantive than originally intended. To the extent that modern decisions purport to reflect original intent, the histories of *Hans* and *Ex parte Young* deserve revisiting, as do any implications we've accepted from our former understanding of them.

Some of the implications of this narrative are rather indirect. Take, for example, that now-forgotten provision in Article III, extending the judicial power to controversies "between a state and citizens of another state."[291] The Eleventh Amendment overturned the bulk of this provision's operation. However, as we saw in *Cohens v. Virginia*, a writ of error does not constitute a suit brought against the state, neither in equity nor in law, because writs of errors are simply not "suits."[292] Consequently, if one state brings criminal charges against a citizen of another state, then Article III, Section 2 theoretically authorizes the federal judiciary to hear an appeal on a writ of error (or any analogue). Such a writ falls within the plain language of Article III, Section 2 and is not barred by the Eleventh Amendment. This application of the Court's reasoning in *Cohens* seems overlooked by contemporary scholars. This would be of interest to those convicted outside of their home states and who could not otherwise meet the stringent habeas corpus standards provided by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[293]

Other implications are more direct and perhaps unavoidable. Take, for example, the fascinating tale of how historical dicta in *Hans* inadvertently constitutionalized sovereign immunity over time. Sovereign immunity had its

---

288. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) (centering its analysis on interpreting the Eleventh); *id.* at 84 (Stevens, J., dissenting) (same); Pennsylvania v. Union Gas Co., 491 U.S. 1, 25 (1989) (Stevens, J., concurring); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 519 (1987) (Brennan, J., dissenting); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 140 (1984) (Brennan, J., dissenting) (referring to *Hans* as setting aside the text of the Eleventh).

289. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty, and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the 'plan of the convention.'" (citations omitted)).

290. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997).

291. U.S. CONST. art. III, § 2, cl. 1.

292. 19 U.S. (6 Wheat.) 264, 410 (1821).

293. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (providing statutory requirements for federal habeas petitions).

roots in the general law, and the general law, of course, colored plausible interpretations of Article III. When Antifederalists complained that Article III may be construed to allow individuals to sue states,[294] the Federalists responded with a tone of outrage.[295] As Caleb Nelson persuasively argues, "case" and "controversy" assumed personal jurisdiction over the defendant.[296] This meant that Article III did not embody sovereign immunity; rather, it embodied a requirement for personal jurisdiction, which was never satisfied so long as the general common law denied courts jurisdiction over states.[297]

One interesting, recurring phenomenon in our constitutional history is when the interpretation of text depends on background, contextual cues that then shift over time.[298] This is exactly what happened here. A change in the background assumptions about the "general law" gradually inspired scholars and jurists to start questioning the idea that courts should be denied personal jurisdiction over states. And as the consensus behind this idea shifted, it left sovereign immunity doctrine dangling, unattached from the force that once gave it reason—a doctrine that at its zenith commanded unanimous opinions has withered into reluctant and bitter 5-4 majorities, leaving many academic commentators baffled. This does not mean that the Constitution "changed." Article III still requires a case or controversy, and these terms still require personal jurisdiction. However, the scope of Article III depends on how we define personal jurisdiction (a nonconstitutional set of doctrines), thus leaving it possible for the same Article III to strongly support sovereign immunity in the nineteenth century but nearly abandon it in the twentieth.

Thus, Article III is in some ways what we make of it. States can pass laws affirming their belief that they should not be amenable to suit. However, as far as federal remedies go, there is a strong argument that Congress can abrogate state immunity. Against this idea, Caleb Nelson cites *Hanna v. Plumer*[299] in arguing that granting personal jurisdiction over states "certainly seems 'outcome determinative' in the sense relevant to [the] *Erie* analysis."[300] According to *Guaranty Trust*, if federal procedure follows a set of rules different from those of state courts, then the federal courts have to follow state

---

294. *See, e.g.*, *Brutus XIII*, N.Y. J., Feb. 21, 1788, *reprinted in* 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 172-73 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

295. *See, e.g.*, THE FEDERALIST NO. 81, *supra* note 33, at 420-21 (Alexander Hamilton). For a more in-depth history of the arguments at the time of the framing, see Gibbons, *supra* note 18, at 1899-914. *See also* Nelson, *supra* note 29, at 1567-608.

296. Nelson, *supra* note 29, at 1565.

297. *Id*. at 1566.

298. For an in-depth review of this phenomenon, see Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365 (1997); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995).

299. Hanna v. Plumer, 380 U.S. 460 (1965).

300. Nelson, *supra* note 29, at 1622.

procedure if the decision is "outcome determinative" or if the different sets of rules would influence, a priori, where a plaintiff would want to file his suit.[301]

However, as Nelson acknowledges, this reasoning operates only when Congress is silent. Otherwise, state courts could thwart all sorts of federal laws merely by creating unfavorable procedure. Both *Hanna* and *Guaranty Trust* involved cases brought solely on the basis of diversity, and thus dealt with the issue in the context of state law remedies. With federal remedies, the federal rules can trump. In *Hanna*, the Court asserted that congressional statutes should overcome state rules as long as the enactment of those statutes are a legitimate exercise of Congress.[302] As the Court later explained:

> If the district court determines that a federal statute covers the point in dispute, it proceeds to inquire whether the statute represents a valid exercise of Congress' authority under the Constitution. . . . If Congress intended to reach the issue before the District Court, and if it enacted its intention into law in a manner that abides with the Constitution, that is the end of the matter . . . .[303]

Thus, on its face, sovereign immunity would not be an impediment to congressional abrogation, so long as that abrogation explicitly and validly provides federal remedies in a federal forum.[304] Moreover, this abrogation can only allow citizens to sue their own states, not other states. Because the Eleventh Amendment provides states with a constitutional immunity against suits, Congress cannot abrogate this immunity by merely passing a law.[305]

These are just some of the discussions that rely upon a more accurate understanding of *Hans* and *Ex parte Young*. Changes in the general law no doubt had implications for how we see sovereign immunity. But so too did other developments. Changes in the pleading system, such as the collapse of all causes of action into only one cause of action[306] or the development of the well-pleaded complaint rule, no doubt shifted the nature and character of both immunity and officer liability. Even more important are the expansion of the Commerce Clause and the creation of new, congressionally enacted remedies that are not easily analogized to common law causes of action. These

---

301. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

302. *Hanna*, 380 U.S. 472.

303. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 27 (1988).

304. In fairness to Nelson's piece, he goes on with a thorough and insightful discussion about congressional abrogation. I cannot do justice to that debate in this Note. However, my Note does have implications for that argument. For example, if so much of sovereign immunity is centered on pleading, then Congress may be able to fashion federal pleading rules that create causes of action against officers where the cause of action would otherwise be against the state. Congress can also expressly refuse to recognize certain state authorizations when those authorizations are clearly in conflict with federal remedies (a result consistent with the Supremacy Clause). In any event, this debate might be superseded by modern legislative tools with which Congress can coerce states into results desired by the federal government (e.g., block grants).

305. It makes the most sense to determine the scope of the Eleventh Amendment by simply reading their words, as Professor Marshall has done. *See* Marshall, *supra* note 9.

306. FED. R. CIV. P. 2 ("There is one form of action—the civil action.").

developments deserve their own articles. They are, however, just some of the subject areas that are affected by a more accurate reading of nineteenth century immunity cases.

A thorough discussion of these questions, which would raise complex issues about the role of federal courts, is outside the scope of this Note. However, these questions serve as some examples for why it is important to understand the doctrinal history in a legal system so heavily predicated on tradition and stare decisis. This importance is magnified here, where scholars and jurists have misunderstood the two most important cases in sovereign immunity law.

CONCLUSION

Oliver Wendell Holmes once observed that "whenever we trace a leading doctrine of substantive law far enough back, we are very likely to find some forgotten circumstance of procedure at its source."[307] The contemporary wisdom about *Hans v. Louisiana* and *Ex parte Young* is incomplete, misguided, or worse, mainly because it has forgotten the circumstances of procedure that governed the substantive law of sovereign immunity. This Note seeks to reintroduce those forgotten circumstances. As the old saying goes, we must know where we have been to know where we are going.[308]

307. Oliver Wendell Holmes, Jr., THE COMMON LAW 253 (Courier Dover Publ'ns 1991) (1881).

308. I dedicate the Introduction and Conclusion to Dr. James Hull, my high school English teacher, who told me never to begin or end with a quote or a cliché.