Taming the Eleventh Amendment without Overruling Hans v. Louisiana

William Burnham

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev
Part of the Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol40/iss4/6
TAMING THE ELEVENTH AMENDMENT WITHOUT OVERRULING HANS v. LOUISIANA

William Burnham*

Traditional eleventh amendment jurisprudence has it that in 1890, in Hans v. Louisiana, the Supreme Court held that the amendment, though its terms prohibit only suits against a state by citizens of other states, applied to bar federal constitutional claims as well. The Author argues that this is a flawed reading of Hans because Hans did not involve a federal constitutional claim. Instead, the plaintiff in Hans asserted only a common law claim against the state — which claim the Court held was barred by common law sovereign immunity. For this reason, the author argues that neither Hans nor the eleventh amendment need be read to bar federal claims against the states in federal court.

THE YEAR 1990 marks the one-hundredth anniversary of one of the Supreme Court of the United States’ most important decisions. Hans v. Louisiana1 is said to stand for the proposition that the eleventh amendment, despite its more narrow wording,2 applies not only to bar claims in citizen-state diversity cases, but to bar “even federal claims that otherwise would be within the jurisdiction of the federal courts,”3 including claims seeking redress for violations of federal constitutional rights. The difficulties Hans has caused for those seeking redress for state violations of the Constitution are obvious. Consequently, a substantial number of com-

* Professor of Law, Wayne State University. A.B., B.S., Indiana University (Bloomington) (1968); J.D., Indiana University (Bloomington) (1973).

1. 134 U.S. 1 (1890).
2. The eleventh amendment provides that: “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.” U.S. Const. amend. XI.

931
mentators and a growing number of justices of the Court have argued that *Hans* should be overruled on this issue. So far, how-


For other commentary criticizing the *Hans* court's interpretation of eleventh amendment immunity, see C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972) (the eleventh amendment does not require state immunity from federal claims); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1476 (1987) (calling the Court's premise in *Hans* — that the eleventh amendment concerns sovereign immunity — "clear error"); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 32 (1972) ("the Court in *Hans* veered far from the course"); 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, 1039-41 (1983) [hereinafter Fletcher, *Eleventh Amendment*] (state immunity from federal claims in federal court is unworkable in a system that values civil rights); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1899, 2000-01 (1983) (characterizing *Hans* as a judicial reaction to post-Reconstruction Southern bond defaults); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 44-51 (1988) (the *Hans* court should have equalized in-stater's and out-of-stater's status in suits against states by allowing both groups to bring federal claims); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61, 70 (1984) (*Hans* was "an unforced error . . . neither required nor fruitful").


The most recent defection to the anti-*Hans* camp was Justice Stevens. Compare Florida Dep't of Health and Rehabilitative Serv. v. Florida Nursing Home Assoc., 450 U.S. 147, 151-55 (1981) (Stevens, J., concurring) (declining to vote to overrule *Hans* — though believing that it was incorrectly decided) with *Atascadero*, 473 U.S. at 304 (Stevens, J., dissenting) (the benefits of re-examining *Hans* would outweigh the consequences of departing from *stare decisis*).
ever, the Court has declined to do so — twice this past term.6

Much of the reason for declining to overrule *Hans* has been a

fear that to reverse such a longstanding precedent would "further unravel[] the doctrine of *stare decisis.*,"7 However, *Hans*, properly understood, need not be overruled in order for the Court to allow constitutional and other federal-law claims to be asserted against the states in federal court. This Article asserts that *Hans*, properly understood, cannot stand for the proposition that federal claims are barred, because *Hans* neither involved a claim based on federal law, nor stated that federal claims were barred. The Court understood the claim made in *Hans* to be nothing more than a common-law contract claim and simply applied common-law sovereign immunity to bar that claim.8 So understood, *Hans* is irrelevant to any claims for violations of constitutional rights.

I. THE COMMON-LAW THEORY OF ELEVENTH AMENDMENT IMMUNITY AND *HANS*

Essential to the idea that the eleventh amendment renders states immune from constitutional claims is the notion that it is a

---


The Court was split four to four on the issue in *Welch*, with Justice Scalia declining to take a position in that case. However, Justice Scalia weighed in on the side of not overruling *Hans* in *Union Gas*, though not without some misgivings. *Union Gas*, 109 S. Ct. at 2296-99 (Scalia, J., concurring in part and dissenting in part). See also infra note 7.

The defection of Justice Stevens in *Atascadero* and Justice Scalia’s equivocation in *Welch* led many to believe that the demise of *Hans* was imminent. One commentator went so far as to outline what life would be like after *Hans*. See Jackson, supra note 4, at 72-104 (speculating on the type of federal claims which could be brought in the absence of *Hans*).

7. *Florida Dep’t of Health and Rehabilitative Serv.*, 450 U.S. at 151 (Stevens, J., concurring).

When Justice Stevens changed his mind and joined the Brennan camp in *Atascadero*, 473 U.S. at 304, he did so because it had become clear to him that the defenders of *stare decisis* (versus overruling *Hans*) had no problem departing from that principle to expand eleventh amendment immunity. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 165 & n.50 (Stevens, J., dissenting) (listing "at least 28 cases" the Court had rejected to widen the scope of the eleventh amendment).

Justice Scalia, while recently stating that *Hans* should not be overruled, did express some doubt as to the correctness of some of the assumptions made with regard to history and federalism which underlay this conclusion. Nonetheless, he believed that it was enough that the question "is at least close," since the added weight of *stare decisis* militated against the invitation to overrule a century-old precedent. *Union Gas*, 109 S. Ct. at 2298-99 (Scalia, J., concurring in part and dissenting in part).

8. See infra text accompanying notes 34-125.
constitutionally-based jurisdictional bar to suit. 9 Difficulties with this theory have led Professor Field and others to search for a better explanation. Though they differ in some respects on the particulars, these commentators have concluded that the eleventh amendment does not establish or affirm an immunity of constitutional proportions, but simply resurrects common-law sovereign immunity. 10 This insight is important because if the immunity in-

9. Even assuming that *Hans* held that federal claims were barred, it did not hold that it was the eleventh amendment which barred the claim in that case. *See id.* at 10 (discussed *infra* text at note 94). It would be more accurate to characterize *Hans* as holding that the eleventh amendment bars only citizen-state diversity cases covered by its terms, and as holding that there is some underlying constitutionally-based sovereign immunity of states (of which the eleventh amendment is only an example) that operates to bar other claims, such as constitutional claims brought by citizens of the same state. *Cf.* Shapiro, *supra* note 4, at 71 n.56 (noting claims of Justice Brennan, among others, that *Hans* did not constitutionalize sovereign immunity).

Nonetheless, it is common practice for the Court and others to say that in *Hans* "the Court held that the [eleventh] amendment barred a citizen from bringing a suit against his own state in federal court, even though the express terms of the [a]mendment do not so provide." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985).

10. *See Cullison, Interpretation of the Eleventh Amendment* (A Case of the White Knight's Green Whiskers), 5 HOUSTON L. REV. 1, 16-19 (1967) (arguing that the eleventh amendment was merely intended to reinstate the common law immunity that existed before Chisholm); Field, *Part I, supra* note 4, at 536-46 (the best explanation of sovereign immunity within and outside the eleventh amendment is that it is a common law doctrine); Fletcher, *Eleventh Amendment, supra* note 4, at 1069-71 (eleventh amendment simply affirms the traditional common law principle of immunity from suit under the own state's law); *see also* Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare, 411 U.S. 279, 313 (1973) (Brennan, J., dissenting) ("*Hans* accords to non-consenting states only a nonconstitutional immunity from suit by its own citizens"); *cf.* Amar, *supra* note 4, at 1473-75 (eleventh amendment does not create a constitutionally-based sovereign immunity).

Among the characteristics of eleventh amendment immunity that do not fit well with a constitutional prohibition are the fact that a state may consent to suit and the fact that the prohibition is read to apply to suits by citizens against their own state. *See Field, Part I, supra* note 4, at 544 ("the omission of suits by a state's own citizens from the language of the eleventh amendment makes sense under [the common law] interpretation").

Another phenomenon that is hard to explain is the fact that Congress apparently has the power to abrogate the constitutional prohibition by statute, at least so long as it makes clear its intent to do so. *See Atascadero, 473 U.S.* at 238 (Congress can abrogate the eleventh amendment when acting pursuant to section 5 of the fourteenth amendment); *cf.* *Union Gas*, 109 S. Ct. at 2286 (Stevens, J., concurring) (expressing puzzlement over how Congress could override a constitutional limitation on jurisdiction by statute). This intent can be expressed either in the statutory language, whether through authorization of a claim against the states as states, see Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (section 5 of Title VII of the Civil Rights Act authorized actions for back pay against the states), or through other language directly expressing such intent, see 42 U.S.C. § 2000d-7(a)(1) (1982 & Supp. V 1987) ("a state shall not be immune under the eleventh amendment . . . from suit in [federal court for a violation of section 504 of the Rehabilitation Act"); or it may even be clearly expressed in the legislative history of the statute. *See Hutto v. Finney,
volved has only common-law status, then it should bar claims seeking to enforce common-law duties, but should not bar federal statutory or constitutional claims.\textsuperscript{11}

This common-law immunity theory of the eleventh amendment is based on the debates regarding the ratification of article III of the Constitution and a close reading of the majority and dissenting opinions in \textit{Chisholm v. Georgia}.\textsuperscript{12} According to this view, the framers debated whether article III's grant of jurisdiction over categories of cases in which a state was a party operated to abolish any sovereign immunity the states had at common law. Some argued that abolition was necessarily implied, while others saw article III as establishing jurisdiction, but not affecting the issue of sovereign immunity.\textsuperscript{13} In \textit{Chisholm}, the majority construed article III as abolishing sovereign immunity and the eleventh amendment was passed and ratified to correct that reading of article III.\textsuperscript{14}


Other counterintuitive oddities of eleventh amendment law are collected by Justice Stevens in his \textit{Union Gas} concurrence. \textit{Union Gas}, 109 S. Ct. at 2287-88 (Stevens, J., concurring).

11. There are two reasons that a common-law immunity would not bar federal constitutional and statutory claims. The first is the fact that federal law prevails over all other forms of law. \textit{U.S. CONST. art. VI, cl. 2} ("This Constitution, and the Laws of the United States . . . shall be the supreme law of the Land; . . . any . . . Laws of any state to the contrary notwithstanding."). The second is the axiom that common-law doctrines are subject to legislative change, including change wrought by constitutions. \textit{See also} Jackson, \textit{supra} note 4, at 78-82, 114-18 (supremacy of constitutional law requires that common-law sovereign immunity give way in the face of a federal constitutional claim); \textit{cf.} Field, \textit{Part II, supra} note 4, at 1264 n.272 (suggesting that even if the eleventh amendment "freezes" common-law sovereign immunity in its 1789 form, such immunity would extend only to common-law claims).

12. 2 U.S. (2 Dall.) 419 (1793).

\textit{Chisholm} arose when Georgia failed to pay for supplies that a South Carolina merchant had provided during the Revolutionary War under a contract with the state. The merchant had died, so it was his executor, Chisholm, who sued in assumpsit to recover on the contract. The action was an original one in the Supreme Court of the United States and it was argued for Chisholm by the United States Attorney General, John Randolph. Georgia declined to argue in response and simply entered a written objection to jurisdiction. \textit{See} Fletcher, \textit{Eleventh Amendment, supra} note 4, at 1054-58.


According to the common law immunity theorists, the sin of the *Chisholm* majority was that it incorrectly mixed two questions: (1) whether the Court had subject matter jurisdiction over the case under article III and its implementing statutes, and (2) whether an assumpsit cause of action for the state’s breach of contract existed in the face of Georgia’s defense of sovereign immunity. Instead, in one step the majority found jurisdiction in article III and construed the grant thereof to abolish Georgia’s common law sovereign immunity—which would have normally barred an assumpsit claim against it. The *Chisholm* Court should have separated the issues and decided that it had jurisdiction under article III, but that such a grant of jurisdiction did nothing to affect the law to be applied in the case. The substantive law, which governed both the plaintiff’s claim and Georgia’s defense, was the general common law, which provided that an assumpsit claim would not lie against a state in the absence of its consent to suit.

This was Justice Iredell’s argument in dissent. The eleventh
amendment adopted Justice Iredell's position: The eleventh amendment made it clear that, while article III might properly authorize subject matter jurisdiction over some suits against the states, "[t]he [j]udicial power of the United States shall not be construed" to authorize the Court to change the common law or to ignore common law sovereign immunity when handling those suits. The eleventh amendment, then, by restoring article III to its proper position of neutrality with regard to the common law, had the effect of restoring to the states the common law doctrine of sovereign immunity from suit.

This view of Chisholm and the eleventh amendment is supported by the fact that Justice Iredell admitted that his resolution of the case had nothing to do with the possibility of suing states based on federal constitutional claims. By contrast, the argument made by Attorney General Randolph, Chisholm's lawyer, explicitly relied on the premise that there were limitations placed upon state action in the Constitution, some of which must contemplate suits against states if they were to have any meaning at all. Because states must be subject to suit in those instances, Attorney General Randolph argued, there was no reason to treat assumpsit claims differently. It is significant that Justice Iredell did not deny Attorney General Randolph's basic premise that states were subject to suit for constitutional violations; he simply separated it

Id. at 449 (Iredell, J., dissenting).
20. U.S. Const. amend. XI.
21. See Field, Part I, supra note 4, at 536-44 (arguing that the view advocated by Madison, Marshall and Hamilton — that article III had no effect on common law immunity — was vindicated by the passage of the eleventh amendment).

The common law sovereign immunity proponents follow the notion that, consistent with the intent of its framers, the eleventh amendment should be interpreted as overruling the majority holding in Chisholm and enshrining Justice Iredell's dissenting position in that case. See Hans v. Louisiana, 134 U.S. 1, 12 (1890) (after adoption of the eleventh amendment, "the highest authority of this country was in accord rather with the minority than with the majority of the court in the case of Chisholm v. Georgia; and this fact lends additional interest to the able opinion of . . . Justice Iredell on that occasion."); see also H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 807 (tentative ed. 1958) (The Court has "treat[ed] the eleventh amendment as if it were a precedent to the opposite of Chisholm v. Georgia.").
22. He explained that, in this regard, the common law did not apply "[s]o far as States under the Constitution can be made legally liable to [superior federal] authority." Chisholm, 2 U.S. (2 Dall.) at 436 (Iredell, J., dissenting).
23. Id. at 421-23 (argument of Randolph for the Plaintiff).
24. Id. at 428 (argument of Randolph for the Plaintiff) (admitting "it does not follow from a State being suable in some actions, that she is liable in every action. But that of assumpsit is of all others most free from cavil.").
from the issue at hand. He regarded it as one of the "arguments offered by the Attorney General, which certainly w[as] very proper, as to his extended view of the case, but [which] do[es] not affect mine." Justice Iredell could only have said this if his position was nothing more than that stated above — that the common law failed to provide an assumpsit cause of action against a state and that article III was no basis for expanding the common law to create such a remedy.

If it is true that the eleventh amendment simply amends article III to return it to its original position of neutrality with regard to common-law sovereign immunity, then it should bar common-law claims, but not federal law claims. However, for those who

25. "The particular question then before the Court, [wa]s, will an action of assumpsit lie against a State? This particular question [must be] abstracted from the general one, viz. Whether, a State can in any instance be sued?" Id. at 430 (Iredell, J., dissenting).
26. Id. at 449 (Iredell, J., dissenting).
27. Justice Iredell ultimately expressed his views on the suability of states on constitutional claims, and he described it as a "delicate topic," while making it clear that his views were strictly dictum. Id. at 450 (Iredell, J., dissenting) In addition to stating that the issue was "unnecessary . . . to decide," id. at 449 (Iredell, J., dissenting), he observed:
This opinion I hold . . . with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial. With regard to the policy of maintaining such suits [on federal constitutional claims], that is not for this Court to consider, unless the point in all other respects was very doubtful.

Id. at 450 (Iredell, J., dissenting). On the merits of the issue, his view was that states could not be sued unless Congress created a right to sue them: "[E]ven if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies." Id. at 449 (Iredell, J., dissenting). Without that legislative boost, Justice Iredell was "strongly against any construction of [the Constitution], which [would] admit, under any circumstances, a compulsive suit against a State for the recovery of money." Id. at 449 (Iredell, J., dissenting).

Justice Iredell's views correspond roughly with the Court's current view of congressional power to abrogate such immunity — except for the Court's additional requirement that there be some "super-intent" accompanying the legislation. See supra note 10.
28. See supra note 11.

An advantage of the common law theory of the eleventh amendment is its ability to differentiate between claims based on whether they are federal or state claims. This avoids the problem which the diversity theorists have: they insist on applying the literal words of the amendment, but have trouble explaining why it still makes sense that the eleventh amendment would bar federal law claims if they happened to be asserted against a state by a citizen of another state. See Marshall, Diversity Theory, supra note 4, at 1378 (an evaluation of diversity theory shows "there is no persuasive reason why suits based on federal law should be allowed in federal court when brought by an in-stater, but should not be allowed in federal court when brought by an out-stater"). But cf. Marshall, Fighting the Words, supra note 4, at 1345 (offering a number of justifications for distinguishing between in-state and out-of-state citizens "by considering the dual objectives of removing the jurisdiction that must have offended and threatened the states, while preserving the jurisdiction considered most essential to the constitutional system of government").
would follow the common law status of eleventh amendment immunity this far, *Hans* presents a problem. This is because it is said that *Hans*, unlike *Chisholm*, did involve a federal constitutional claim under the contracts clause.

In response to this traditional reading of *Hans*, some proponents of the common-law status of sovereign immunity retreat to a fall-back position. They assert that, while the common-law sovereign immunity resurrected by the eleventh amendment prevents the federal courts from implying a right of action contrary to common law sovereign immunity as it existed before article III was ratified, Congress is under no such disability in legislating such claims into existence. Other proponents of the common law sovereign immunity theory of the eleventh amendment similarly accept that *Hans* involved a constitutional claim, but argue simply that it was wrongly decided.

---

The common law immunity theorists have a similar problem in that they, like the current Court, are necessarily arguing that the immunity which the eleventh amendment secures goes beyond that amendment's wording when they argue that all common law-based claims are barred — even if they are properly a part of a suit against a state based on federal question jurisdiction.

29. In *Hans*, a citizen of Louisiana sued the state in federal court to recover interest due on his bonds, and he alleged in the process that the state refused to pay based on its constitution's provisions abrogating all previous bond issues, and that that provision violated the contracts clause. *Hans* v. Louisiana, 134 U.S. 1, 1-3 (1890).

30. See *Amar*, supra note 4, at 1476-78; *Field, Part II*, supra note 4, at 1255; *Fletcher, Eleventh Amendment*, supra note 4, at 1122-24.

For the text of the contracts clause, see infra note 39.

In *Chisholm*, Attorney General Randolph alluded obliquely to the possibility that state contracts came within the contracts clause, see *Chisholm* v. Georgia; 2 U.S. (2 Dall.) 419, 422 (1793), thus perhaps presaging a somewhat surprising decision 17 years later. See *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (contracts clause prohibited Georgia from passing a law which would void a grant of land from the state). However, he did not allege, nor could he have alleged, that Georgia had legislatively impaired its contracts, since all that was involved was a simple breach of contract. See *Fletcher*, supra note 4, at 1055 n.97 (Attorney General Randolph did not treat *Chisholm* as a contracts clause case and the Court probably would not have found a violation of the contracts clause, even though at that time, it was not clear whether a breach of contract would come under that clause).

31. That is, courts may not “construe[]” the “judicial power” to authorize such a claim. U.S. Const. amend. XI.

32. *See* *Nowak*, supra note 4, at 1422 (eleventh amendment does not “necessarily limit congressional power . . . to the same extent as . . . judicial power.”); *Tribe*, supra note 10, at 693-94 (impact of the eleventh amendment on judicial power must be distinguished from its impact on congressional power). But see *Field, Part II*, supra note 4, at 1260 (there is “nothing in either the language or history of the amendment that affirmatively supports or even suggests” that the eleventh amendment does not constrict congressional power).

33. *See* *Engdahl*, supra note 4, at 31; *Fletcher, Eleventh Amendment*, supra note 4,
This Article asserts that both groups have uncritically accepted *Hans* for much more than it is worth. This Article argues that *Hans*, like *Chisholm*, was properly decided, but that *Hans* did not hold that sovereign immunity or the eleventh amendment operated to bar a federal constitutional claim, because *Hans* asserted no such constitutional claim. Rather, *Hans* asserted a common law claim to enforce his contract with the state—the identical assumpsit cause of action that was involved in *Chisholm*. Consequently, *Hans*’ claim failed for the very same reason that Justice Iredell gave in his *Chisholm* dissent: applying the appropriate common law rule of decision, there was no basis for a federal court to entertain an assumpsit cause of action against a state in the face of common law sovereign immunity.\(^3\) So understood, the *Hans* holding is irrelevant to the question of whether a federal constitutional claim should be barred by the eleventh amendment. Moreover, the *Hans* opinion implied in dictum that, had a constitutional claim been asserted, there would have been no sovereign immunity shield.\(^5\)

---

\(^3\) at 1080-81.

This is also Justice Brennan’s primary position on *Hans*. See supra note 5.

\(^4\) Federal courts at that time would have applied the general common law despite the Rules of Decision Act. Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92, codified as amended at 28 U.S.C. § 1652 (1982) (state law shall be regarded as rules of decision in trials at common law). See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18-19 (1842). It was not until 1938 that the Court held that there was no “federal general common law” and that the Rules of Decision Act required that federal courts follow state decisional as well as statutory law. Erie R.R. v. Tompkins, 304 U.S. 68, 78 (1938). Instead, federal courts would have followed the general common law because it was deemed the applicable rule of decision without any need for statutory direction. See generally P. Dupaoneau, Dissertatation on the Nature and Extent of the Jurisdiction of the Courts of the United States 101 (1824 & photo. reprint 1972) (federal courts “are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable.”); Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1516-27 (1984) [hereinafter Fletcher, The General Common Law] (where “local law” did not apply, it was widely understood that federal courts were to disdain state common law in favor of general common law; thus, Swift was merely the judicial recognition of what was generally thought to be so obvious).

\(^5\) Justice Brennan suggested a similar theory of *Hans* in dictum in his majority opinion in Parden v. Terminal Ry., 377 U.S. 184, 186-87 (1964) (distinguishing *Hans* on the ground that it dealt with a state rather than a federal law claim), overruled, Welch v. Texas Dep’t of Highways and Pub. Transp., 483 U.S. 468 (1987), in his dissent in Employees of the Dept of Pub. Health and Welfare v. Dept of Pub. Health and Welfare, 411 U.S. 279, 313, 319 n.7 (1973) (Brennan, J., dissenting) (“*Hans* held that the Eleventh Amendment was inapplicable [in a suit against a state by its own citizens] . . . but that the state nevertheless enjoyed the protection of the ancient doctrine, inherent in the nature of sovereignty, that a state is not amenable to the suit of an individual without its con-
II. HANS REEXAMINED: A COMMON LAW ASSUMPSIT CLAIM MET BY COMMON LAW SOVEREIGN IMMUNITY

The evidence that Hans involved only a common law claim is found in what the Court said and what it did not say in Hans itself. This theory also finds support in the Court’s overall understanding of the nature of the claims being asserted against the states in the “Bond Wars” following the Civil War, as reflected in other cases.36

A. Judicial Characterizations of State Bondholder Suits at the Time of Hans

As for what the Court did not say in Hans, foremost is the fact that it never characterized Hans’ claim as a federal constitutional one. In his petition, Hans first alleged that he had a bond contract, that he was in possession of coupons representing interest on those bonds, and that, “notwithstanding said solemn compact with the holders of said bonds, said State hath refused and still refuses to pay said coupons held by petitioner.”37 The petition further alleged that the “provisions of [the Louisiana Constitution abrogating the bonds were] in contravention of said contract, and their adoption was an active violation thereof, and that said State thereby sought to impair the validity thereof with [Hans] in violation of [the contracts clause].”38

The petition is ambiguous and it is perhaps difficult today to understand why Hans’ claim was not one for violation of a right

36. For accounts of the Bond Wars, see generally McGahey v. Virginia, 135 U.S. 662, 665-83 (1890) (outlining the history of Virginia’s bonds and its efforts to evade payment on them); and Gibbons, supra note 4, at 1973-2003 (to avoid repudiation of its judgments by state governments engaged in the “Bond Wars,” the federal courts constitutionalized sovereign immunity).

As these sources illustrate, the Court was under considerable political pressure, because it was likely that the states would defy any decision by the Court upholding the validity of state bonds. Perhaps as a result of this, the Court’s decisions in this period are contradictory and difficult to harmonize. See McGahey, 135 U.S. at 684 (Court arrived at its conclusions in this case “[w]ithout committing . . . to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the [C]ourt on the subject”).

38. Id. at 2 (quoting petition).
secured by the Constitution. To understand, one must look at the claim with then-contemporary eyes. Such a view reveals that Hans' claim could only have been seen as one for a common-law breach of contract, which Hans anticipated would be met with the defense of the state constitutional provision, to which he had the rejoinder that that defense was invalid under the contracts clause.\(^9\)

Support for this proposition can be found in the holding of *Carter v. Greenhow*,\(^4\) decided just five years before *Hans*, where a state bondholder tried to assert a constitutional claim under the contracts clause and was rebuffed. Carter, a Virginia citizen, held bonds issued by the state of Virginia. The bonds provided that they could be redeemed for cash or used to pay state taxes.\(^4\) The defendant, a state tax collector, acting pursuant to a statute altering the terms of the bonds, refused to accept Carter's bond coupons in payment of state taxes and seized his property for nonpayment. In response, Carter filed suit relying on section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983),\(^4\) alleging that the Virginia statutes altering the terms of the bonds were "repugnant to the constitution of the United States, and are therefore void" such that, in collecting taxes pursuant to those statutes "the defendant deprived the plaintiff of a right secured to him by the

---


Originally, this clause had the narrow purpose of nullifying state laws relieving private debtors of their obligations on loans — thus stabilizing credit markets and spurring foreign investment. See J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 372, 373 (3d ed. 1986). However, despite this narrow purpose, the Court extended it to govern contracts to which states were parties. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810).

One could argue that Hans' claim must have been a federal one, because the only basis for jurisdiction would have been that the case arose under federal law; however, this is not true. See infra notes 61-95 and accompanying text.

40. 114 U.S. 317 (1885).

41. Id. at 318-19.

42. This statute provided at the time:

    Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State shall subject or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

constitution of the United States . . . .43

The Court characterized the constitutional rights that the plaintiff alleged were violated as "the right to pay taxes in coupons instead of money, and, after, tender of coupons, the immunity from further proceeding to collect such taxes as though they were delinquent."44 The Court disagreed that these were federal constitutional rights, stating that:

[These rights the plaintiff derives from the contract with the State, . . . and the bonds and coupons issued under its authority.]

How and in what sense are these rights secured to him by the Constitution of the United States? The answer is, by that provision, Art. I., Sec. 10, which forbids any State to pass laws impairing the obligation of contracts. That constitutional provision, so far as it can be said to confer upon, or secure to, any person, any individual rights, does so 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 . . . . The right to pay his taxes in coupons, and the immunity from further proceedings, in case of a rejected tender, are not rights directly secured to him by the Constitution, and only so indirectly as they happen in this case to be the rights of contract which he holds under the laws of Virginia. And the only mode in which that constitutional security takes effect is by judicial process to invalidate the unconstitutional legislation of the State, when it is set up against the enforcement of his rights under his contract.45

43. Carter, 114 U.S. at 321 (quoting plaintiff's declaration).
44. Id. at 322.
45. Id. at 322 (emphasis added).

The Court went on to note that the only mode in which Congress has legislated in aid of the rights secured by [the contracts] clause of the Constitution, is . . . by providing for a review on writ of error to the judgments of the State courts, in cases where they have failed properly to give it effect, and by conferring jurisdiction upon the [federal] Circuit Courts . . . of all cases arising under the Constitution and laws of the United States, where the sum or value in dispute exceeds $500. Congress has provided no other remedy for the enforcement of this right.
Id. at 322-23 (citing The Civil Rights Cases, 109 U.S. 3, 12-13 (1885)).
Noting that Carter had "chosen not to resort to" a direct suit on the contract, the Court felt compelled to dismiss the complaint because "the facts stated in the plaintiff's declaration [did not] constitute a cause of action [for a violation of the contracts clause] within the terms of" the Civil Rights Act of 1871.

*Carter* was one of several of the Virginia Coupon Cases that the Court decided together. Justice Bradley, the author of *Hans*, did not write the *Carter* opinion. However, he dissented along with three other justices in *Marye v. Parsons*, in an opinion which was applicable to *Carter* and the other Virginia Coupon Cases. The majority had allowed bondholders to sue the state in

---

46. *Id.* at 322.

Had Carter resorted to such a suit, he would have had to have filed it in state court, since he lacked the $500 in controversy then needed for federal jurisdiction. Act of March 3, 1875, ch. 137, 18 Stat. 470, *repealed in part by* Act of Mar. 3, 1911, ch. 231, 36 Stat. 1168 (current version at 28 U.S.C. § 1331 (1982)); 114 U.S. at 320 (alleging damage to the plaintiff of $200). The other requirement for federal jurisdiction, however, would have been met. Though Carter was a citizen of Virginia, his non-federal common law claim to enforce the contract would have "arisen under" the contracts clause so long as he anticipated and pled a contracts clause rejoinder to the state's defense in his complaint. See infra notes 61-76 and accompanying text.

47. *Carter*, 114 U.S. at 321; *see also* Pleasants v. Greenhow, 114 U.S. 323 (1885) (decided with, and on authority of, *Carter*, where the plaintiff unsuccessfully tried to sue for an injunction restraining the tax collector from collecting taxes by distraint of his property). The Court, in *In re Ayres*, 123 U.S. 443 (1887), cited in *Hans*, reiterated that *Carter* stood for the proposition that "no direct action for the denial of the right secured by a contract . . . would lie." *Id.* at 504.

The holding in *Carter* became garbled in *Hague v. Committee For Industrial Organization*, 307 U.S. 496 (1939). The Court observed that *Carter* "held as a matter of pleading that the particular cause of action set up in the plaintiff's pleading was in contract and was not to redress deprivation of the 'right secured to him by that clause of the Constitution' [the contracts clause], to which he had 'chosen not to resort.'" *Id.* at 527 (quoting *Carter* v. Greenhow, 114 U.S. 317, 322 (1885)); *cf.* Lynch v. Household Finance Corp., 405 U.S. 538, 542 n.6 (1972) (the Court viewed *Carter* as "consistent with congressional restriction of federal jurisdiction" in cases involving "constitutional challenges to the collection of state taxes.").

In *Note, Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right To Be Free of Protectionist State Action*, 86 Mich. L. Rev. 157 (1987), the author argued that *Carter* was wrongly decided because "it fail[ed] to distinguish the contracts clause from any other constitutional provision." *Id.* at 178. However, there are plenty of reasons to view the contracts clause as operating differently from other constitutional provisions. See infra notes 53-60 and accompanying text. The point here, of course, is not whether *Carter* was correct, but whether the way the Court viewed bondholders' claims in *Carter* was the way the Court viewed them five years later in *Hans*.


49. *Id.* at 330-338 (Bradley, J., dissenting).

*Carter* and *Marye* were two of the eight Virginia Coupon Cases decided as a group by the Court. The Court dismissed these two cases, as well as the suits in Pleasants v. Greenhow, 114 U.S. 323 (1885), and Moore v. Greenhow, 114 U.S. 338 (1885). Justice Brad-
one of the cases and Justice Bradley believed that all of the claims in the cases before the Court should have been dismissed on eleventh amendment grounds. However, Justice Bradley's dissent in Marye agreed with the majority's analysis in Carter:

Now, what is the object of all this litigation which fills our courts in reference to the Virginia bonds and coupons, but an attempt, through the medium of the federal courts, to coerce the State of Virginia into a fulfillment of her contract? . . . . Injunctions are sought, mandamuses are sought, damages are sought, for the sole purpose of enforcing a specific performance of the engagement made by the State . . . to receive the coupons of its bonds issued . . . in payment of taxes and other dues to the State . . . . [The tax-payer-plaintiff] stands on the agreement and seeks to enforce it. All suits undertaken for this end are, in truth and reality, suits against the State, to compel a compliance with its agreement.

Under this view, then, the Court understood claims made by state bondholders, such as Hans, to be common-law claims to enforce the contract. The contracts clause would only arise by way of the plaintiff anticipating the state's defense that it had repudiated its bonds. The plaintiff would not be able to recover, however, because the common law applicable to the claim would include sovereign immunity, which would render the normal common law of contract obligations and remedies inapplicable when the state was the defendant. The plaintiff would lose because, in the

ley's position in all of these cases was that the eleventh amendment barred such suits. See, e.g., Marye, 114 U.S. at 331 (Bradley, J., dissenting).

50. Marye, 114 U.S. at 331 (Bradley, J., dissenting).

51. Id. at 332-33 (Bradley, J., dissenting) (emphasis added); see also Hagood v. Southern, 117 U.S. 52, 67 (1886) ("[t]he suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it").

Hagood was cited in Hans v. Louisiana, 134 U.S. 1, 10 (1890), as support for the proposition that a state cannot be sued by a citizen of another state merely on the ground that the case arises under the Constitution or the laws of the United States.

52. Hans, 134 U.S. at 16. Today, after Erie Railroad v. Tompkins, 304 U.S. 64 (1938), the claim would be governed by state common law. That would not have been the understanding of the Court in 1890, when the Court was still operating under the regime of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842). Then, assumpsit claims would have been thought of as claims authorized by the general common law, whose source was more transcendental than the mere authority of a state.

It does not matter here whether it was state or general common law that applied to the claims of Hans and the other bondholders. Only two characteristics of whichever common law of contracts federal courts applied are important; and both characteristics are as important to the state common law in the post-1938 era as they were to the general com-
words of *Hans*, “[t]he suability of a State without its consent was a thing unknown to the [general common] law.”

B. Support from the Structure of the Contracts Clause

This reasoning may seem rather quaint today in an age of broadly construed constitutional rights and even broader remedies for their violation, but it finds justification in the unique nature of the contracts clause as a constitutional prohibition against impairing an obligation secured by an independent non-constitutional source of law. The contracts clause *prohibits interference* with a *common law* obligation — it does not compel performance of that obligation. Though a court would generally be empowered to order contract performance if the impairing law was void, it could do so only if the common law applicable to the obligation required such performance.

Support for this view of the contracts clause can be garnered from the fact that it tracks precisely the way the constitutional

---

mon law applied in the eighteenth and nineteenth centuries. The first was that the federal courts were required to apply the common law when applicable, at least when state and federal courts agreed on its content and applicability. See supra note 34. The proposition that states could not be sued on their contracts without their consent was a common law doctrine about which there was no disagreement. See *Louisiana v. Jumel*, 107 U.S. 711, 720 (1882) (“[n]either was there then when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434 (1793) (Iredell, J., dissenting) (concluding that neither the law of Georgia nor the general common law “authoriz[ed] a compulsory suit for recovery of money against a state”). The second characteristic was that the law to be applied was non-federal, unwritten common law. This would necessarily mean that it must, under the supremacy clause, give way to contrary federal law when there was a direct conflict, and that it was subject to revision through statutory and constitutional measures. See supra note 11.

53. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (eighth amendment violation in prison case remedied by remedial order setting such particulars as cell size, sanitation standards, and ratio of guards to inmates); *Milliken v. Bradley*, 433 U.S. 267 (1977) (equal protection clause violation remedied by broad order requiring student busing and compensatory education programs); cf. *Monaghan, Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1 (1975) (suggesting that certain of the Court's remedial doctrines, which are not directly compelled by the Constitution, could be thought of as "constitutional common law").


55. Federal courts are authorized to decide state law or general common law issues that come before them in the course of any case over which they otherwise have jurisdiction. *Siler v. Louisville and Nashville R.R.*, 213 U.S. 175, 191 (1909) (federal courts can base their decision solely on state or local law — once federal question jurisdiction is established); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 820-23 (1824) (Congress has the power to create federal jurisdiction for pendent state law claims).
issue would arise in litigation involving contracts between private parties, which were the original focus of the contracts clause. One would certainly not say that a creditor's suit against a private debtor is an implied right of action under the contracts clause. For example, assume that a state passed a law retroactively voiding all loan contracts charging more than six percent interest, and a private debtor whose loan contract charged a higher rate refused to pay back a loan on that basis. In the normal course of events, the creditor would sue the debtor on the contract in order to collect the debt, the debtor would then interpose the retroactive usury statute as a defense, and the creditor would respond with the contracts clause to invalidate that defense. But even if the creditor could strip the debtor of this defense with a contracts clause rejoinder, the creditor's success would still depend on whether the creditor could recover on the contract as a matter of the common law. If the creditor's cause of action failed because of some problem other than the retroactive usury law, then the creditor would lose for that independent reason. Thus, there are double pitfalls to the creditor's recovery against the private debtor. The creditor must show (1) that the retroactive usury defense does not relieve the debtor of its obligation, and (2) that the contract, as unimpaired, is otherwise enforceable according to the existing common law of contracts.

The Court in Carter referred to this double burden when it said that the contracts clause did not secure the contract rights the plaintiff sought to enforce. The contracts clause operates in all circumstances to void any state law that impairs contract obligations, but it does not constitutionalize such obligations; they draw any legal force they may have from the common law, which may itself pose obstacles to recovery. Where the state is the debtor and party defendant, the common law poses an insurmountable obstacle to recovery because, regardless of what obligations the state has assumed, the common law provides that the

56. See supra note 39.
57. This example is taken from Chief Justice Marshall's opinion in Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 207 (1819), wherein the Court finally put the contracts clause to its intended use: nullifying state laws relieving debtors of their obligations on loans. See infra text accompanying notes 162-65.
58. For example, these reasons could include nonperformance by the creditor, payment not due, statute of limitations, or failure to make proper demand for payment.
59. Carter v. Greenhow, 114 U.S. 317, 322 (1885); see supra text accompanying note 45.
state may not be sued without its consent.60

C. Subject Matter Jurisdiction and Hans

In order to shed additional light on the precise nature of state bondholder claims, it is helpful to explore the subject matter jurisdictional basis for citizens like Hans asserting common law contract claims against their own states in federal court. Because diversity was absent, jurisdiction would have existed only if those cases were ones “arising under” federal law.61 Understanding this jurisdictional issue is important because the principal reason virtually everyone today assumes that Hans asserted a constitutional claim is the fact that the only basis for jurisdiction of that non-diverse suit would have been federal question jurisdiction. In fact, this assumption is incorrect.62

The Hans Court did not say exactly how and where the fed-

60. Hans v. Louisiana, 134 U.S. 1, 16 (1890); see supra text accompanying note 52.

One might assert that, even if a suit for coercive relief could only be based on common law contract rights, the plaintiff could turn a defensive rejoinder into a constitutional claim by seeking a declaratory judgment that the state's law impairing the contract was invalid. However, this would not have been possible under notions of justiciability and standing prevailing in the nineteenth century. Not only was there no provision for declaratory relief, the Court declined in a similar situation to hold the state's impairing law void. See Marye v. Parsons, 114 U.S. 325 (1885). In Marye, holders of state bonds, who wished to sell them, sought a judgment that the Virginia law revoking the right to use coupons to pay taxes was void, claiming that the law impaired the value of the bonds. The Court dismissed the claim on the ground that it “call[ed] for a declaration of an abstract character.” Id. at 329.


62. Justice Brennan suggested in Parden v. Terminal Ry., 377 U.S. 184, 186-87 (1964), that Hans had made only a common law contract claim. He was taken to task on this point by Professor Field, on the ground that the fact of federal question jurisdiction necessarily meant that Hans had made a federal claim. See Field, Part II, supra note 4, at 1254-56 (asserting that Hans involved a federal constitutional claim to enforce the contracts clause); and infra text accompanying notes 155-57 (criticizing Professor Field’s reasoning).

Most other commentators have simply assumed that Hans’ claim was constitutional. See, e.g., Amar, supra note 4, at 1476; Fletcher, Eleventh Amendment, supra note 4, at 1122-23.

One commentator has argued that Hans is all dictum, because the Court should have dismissed Hans’ claim for lack of either diversity or federal question jurisdiction. See McCormack, Intergovernmental Immunity and the Eleventh Amendment, 51 N.C.L. REV. 485, 506-07 (1973).
eral question arose in that case. The Court did say, with reference to Hans’ claim, that “a case is within the jurisdiction of the federal courts, without regard to the character of the parties, if it arises under the Constitution or laws of the United States, or, which is the same thing, if it necessarily involves a question under said Constitution or laws.” This statement is ambiguous because it could well include cases raising the contracts clause issue in the way that Carter suggested — as a rejoinder to a defense which the state was certain to raise. Placed in the context of the then-prevailing views on the nature of federal question jurisdiction, this is most likely what the Hans Court had in mind.

Hans was decided some eighteen years before the well-pledged complaint rule articulated by Louisville & Nashville R.R. v. Mottley. Mottley held that a case does not arise under federal law when the plaintiff presents solely a state law claim and “alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States.” Before Mottley, however, cases of this description regularly qualified as ones “arising under” federal law.

63. See supra text accompanying note 37.
64. Hans v. Louisiana, 134 U.S. 1, 9 (1890).
65. 211 U.S. 149 (1908).

In Mottley, the plaintiffs anticipated both a federal defense and a federal rejoinder to that defense. The Mottleys’ claim was that they were entitled to perpetual free passage on the defendant railroad because they had a pass to that effect, which the railroad had given them in partial settlement of claims they had asserted against the railroad. The railroad defended that the pass was void because a recent federal statute outlawed them, and the plaintiffs’ rejoinder was that the federal statute violated the due process clause. Id. at 150-51. According to the Court, however, only if the basis of the plaintiffs’ claim was federal law did the case qualify as one arising under federal law. Id. at 152. Mottley presented a common-law contract claim, to which it was expected that a federal statutory defense would be asserted, and to which it was expected that there would be a constitutional rejoinder by the plaintiffs. But this was held insufficient for jurisdiction, even though the plaintiffs alleged federal issues in their complaint. See id.
66. Id. at 152.

The Mottley opinion stated that the rule set forth therein was first announced much earlier, in Metcalf v. Waterton, 128 U.S. 586 (1888). Mottley, 211 U.S. at 154. This incorrect description of the state of the law before Mottley is perhaps the main reason why no one questions the assertion that Hans’ claim was a constitutional one. In fact, as discussed later, not only did Metcalf not presage the Mottley rule, it was contrary to it. See infra notes 78-82 and accompanying text.

Good evidence that the Mottley Court completely misread Metcalf is found in a case
Specifically, in *Smith v. Greenhow*, a state bondholder case decided one year before *Carter* and six years before *Hans*, the Court found federal question jurisdiction, in the process characterizing the claim, defenses and responses the same way it did in *Carter*. *Smith* was a removal case involving bonds issued by the state of Virginia to a Virginia citizen. The plaintiff had sued a tax collector in a Virginia state court for seizing his belongings for non-payment of state taxes which the plaintiff had sought to pay in coupons clipped from his state bonds. The Court described the pleading sequence as it searched for a federal question that would have justified removing the case to federal court. The plaintiff filed a "declaration in trespass" alleging the seizure:

[...]

Had the trespass claim made out a federal constitutional claim,
the Court would have stopped at that point. Instead, the Court held that the case was properly removed to federal court as one arising under federal law because, according to the Court,

[t]he [plaintiff's] demurrer in effect denies the validity of [the new law [prohibiting payment of taxes with coupons]], and upon the record no ground of its invalidity can be inferred, except that it is avoided by the operation of [the contracts clause of the Constitution]. It therefore sufficiently appears upon the record that the plaintiff's case arises under the Constitution of the United States.76

_Smith_, then, confirms two points. First, it confirms the way that both the majority in _Carter_ and the dissent in _Marye_ viewed state bondholder suits: as common law claims accompanied by a contracts clause rejoinder to the state's defense to those claims. Second, it confirms that suits involving state bonds and the contracts clause would have been understood to "arise under" federal law despite the fact that such plaintiffs asserted only non-federal claims.76

Of course, _Smith_ was a removal case — not an original jurisdiction case. However, had it been an original case, federal question jurisdiction would have been sustained so long as the plaintiff alleged in his complaint the federal issue that would arise — something that _Hans_ clearly did.77 This is confirmed by an original jurisdiction case, _Metcalf v. Watertown_,78 decided two years earlier.

---

75. _Smith_, 109 U.S. at 670-71 (citing _Bridge Proprietors v. Hoboken Co._, 68 U.S. (1 Wall.) 116 (1864)).

In _Bridge Proprietors_, the Court held that it had appellate jurisdiction under section 25 of the Judiciary Act of 1789, because the validity of a state statute had been called into question as repugnant to the Constitution, even though this was not mentioned in any of the pleadings in the courts below. The Court held that it could take judicial notice of the existence of the federal issue. _Bridge Proprietors_, 168 U.S. (1 Wall.) at 142. If the _Smith_ Court's reliance on _Bridge Proprietors_ indicates that it intended to equate the federal issue tests of the 1789 Act and the 1875 Act, then it demonstrates just how loosely the Court was treating parties' attempts to allege federal questions.

76. Presaging _Smith_, the Court observed in _The Civil Rights Cases_, 109 U.S. 3, 12 (1883), decided just three months before _Smith_, that Congress generally would not have had the power to "draw into the United States courts the litigation of contracts generally," but "under the broad provisions of" the 1875 federal question statute, federal courts probably have "direct jurisdiction over contracts alleged to be impaired by a State law." _Id._

77. _See_ _Hans v. Louisiana_, 134 U.S. 1, 1-3 (1890) (quoted in part, _supra_ text accompanying note 38).

It would make no difference that the contracts clause issue was never reached in _Hans_, since it is well-established that the issue is whether the case involved federal issues and not whether it was determined by them. _See supra_ note 56.

78. 128 U.S. 586 (1888).
before *Hans*.

In *Metcalf*, the plaintiff sued to collect on a federal court judgment, which the Court observed “s[ought] to enforce an ordinary right of property” and thus presented no federal claim.\(^7\) This non-federal claim was met by a state law defense that the suit was too late, running afoul of a state statute of limitations setting a ten year life for such judgments. The plaintiff argued — without pleading it in his complaint — that this statute violated the federal Constitution. Though the Court dismissed the plaintiff’s case, Justice Harlan’s opinion noted that the problem was that “the case, as presented by the record,” was not one arising under the Constitution because the constitutional issue was nowhere mentioned in the pleadings.\(^8\) The Court suggested that there might have been federal question jurisdiction if the plaintiff had indicated, “by proper averment, how the determination of any question of [a federal] character is involved in the case.”\(^9\) Consequently, the Court reversed and remanded to the circuit court “to determine whether the pleadings [could] be so amended as to present a case within its jurisdiction.”\(^10\)

---

79. *Id.* at 588.
80. *Id.* at 590.
81. *Id.* at 588.
82. *Id.* at 590. See also Doernberg, *supra* note 67, at 612-14 (discussing *Metcalf*).

*Metcalf* was one of only three original jurisdiction cases decided by the Court before the era of *Planters’ Bank* and *Mottley*. Though both of the other two cases denied jurisdiction, they are not inconsistent with the notion that a plaintiff’s case would arise under federal law if he or she pleaded a rejoinder to an anticipated defense.

For instance, in Robinson v. Anderson, 121 U.S. 522 (1887), the plaintiff sued to recover land granted to him under a federal patent. However, his claim depended on clarifying the description in the patent rather than construing any federal law. The plaintiff alleged that the defendant would contest his claim based on a different federal patent. However, the defendant did not do so. The Court held that the case did not arise under federal law, because, even if the complaint’s anticipation of the defense and rejoinder were sufficient for jurisdiction,

it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defences against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defences were relied on.

*Id.* at 524.

Likewise, in City of Shreveport v. Cole, 129 U.S. 36 (1889), the plaintiffs incorrectly anticipated a defense (a state statute impairing their contract) and alleged a federal rejoinder to that defense (the contracts clause). However, the defendants admitted that the statute would not apply and the plaintiffs won their contract claim. The Court dismissed, observing that jurisdiction could not be based on a potential rejoinder to a defense that proved irrelevant to the case. *Id.* at 43-44. See generally Doernberg, *supra* note 67, at 611-612, 614-15. Had the anticipated defense been applicable in either of these cases, it can be
Not only did non-federal claims with federal rejoinders present cases arising under federal law, the Court implied in 1887 that plaintiffs alleging purely state law claims presented cases arising under federal law so long as the defendant's defense raised a federal issue. Moreover, by 1890, the Court had not yet de-

implied that a federal question would have been raised — despite the presence of clearly non-federal claims.

These cases are perhaps explainable as sub silentio applications of the provisions of the 1875 Act that provided for dismissal if "it shall appear ... at any time after [a] suit has been brought or removed ... that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of [the] circuit court." Act of March 3, 1875, ch. 127, § 5, 18 Stat. 472 (codified as amended at 28 U.S.C. § 1447(c) (1982)).

83. See Doernberg, supra note 67, at 611-12 (discussing Robinson and the implication that a plaintiff's anticipation of a federal defense could establish federal jurisdiction).

For original jurisdiction, the plaintiff would have to anticipate a federal defense in its pleading. The Court did not put a stop to this practice until 1894. See Tennessee v. Union & Planters' Bank, 152 U.S. 454 (1894) (discussed supra note 67).

The removal cases most clearly show how a case arises under federal law where a federal defense is raised against a state-law claim. For cases where one possible ground for federal jurisdiction was a contingent federal defense, see Pacific R.R. Removal Cases, 115 U.S. 1, 11 (1885); Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 462 (1884); Railroad Co. v. Mississippi, 102 U.S. 135, 140-41 (1880). The wide-open jurisdiction days for removal did not come to an end until Chappell v. Waterworth, 155 U.S. 102 (1894).

One might argue that Smith and other removal cases are irrelevant to an original jurisdiction case such as Hans, because the standards for removal were more liberal. Indeed the Court in Metcalf, five years after Smith, drew a distinction between removal and original "arising under" jurisdiction that implied as much. See Metcalf, 128 U.S. at 589. However, this is not a correct reading of Metcalf. As discussed earlier, supra notes 78-82 and accompanying text, the problem in Metcalf was that the plaintiff had not alleged that a federal issue would arise in defense. The same test of "arising under" jurisdiction was applied in both original and removal cases: was a federal issue disclosed in any of the pleadings? Any difference in result arose out of the practical difference between original and removal cases. In original cases, the plaintiff's complaint was the only pleading at the time jurisdiction was questioned and, unless the plaintiff with a non-federal claim anticipated a federal defense in its complaint, there would be no arising under jurisdiction. In the removal cases though, "the grounds of [federal jurisdiction were disclosed either in the [defendant's] pleadings, or in the petition or affidavit for removal." Metcalf, 128 U.S. at 589 (emphasis deleted).

Further, a more liberal test for removal jurisdiction under the statute at the time of Metcalf and Smith would have made no sense, because both plaintiffs and defendants could remove until the amendments of 1887. See Act of March 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-471, amended by Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. Thus, prior to 1877, a plaintiff, worried that a stricter "arising under" test would apply if he filed his case originally in federal court, could simply file it in state court and immediately file for removal in order to take advantage of the more liberal test applied to removal cases. See Doernberg, supra note 67, at 605 (explaining the apparent anomaly created by the 1887 Act that "permitted plaintiff's access to a federal court if they anticipated a federal defense and therefore proceeded in the federal court in the first instance, but denied them such access if they sued in state court originally, were met with a federal defense, and attempted to remove.")
cided that statutory "arising under" jurisdiction was any narrower than article III "arising under" jurisdiction as construed expansively in Osborn v. Bank of the United States.84

The legislative history of the 1875 Act certainly provided little basis for making the statute any narrower than article III, since it indicated unambiguously that Congress intended them to be the same,85 and the Court so stated in 1884.86 As late as 1893, the unanimous Court was prepared to state, in reference to the 1875 Act, that the "intention of Congress [was] manifest . . . to vest in the Circuit Courts of the United States full and effectual jurisdiction, as contemplated by the Constitution, over each of the classes of controversies . . . mentioned."87

As the Court has noted in more recent times, "Osborn . . . reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 492 (1983). Article III uses the same "arising under" language, but it is now conceded that article III is much broader than the statute. Id. at 494-95.

85. Senator Carpenter, the president pro tempore of the Senate, and apparently the only member of Congress to discuss the bill on the floor of the Senate, observed that the 1815 act "gives precisely the power which the Constitution confers — nothing more, nothing less." Doernberg, supra note 67, at 603 (quoting 2 CONG. REC. 4986-87 (1874)); see also Our Federal Judiciary, 2 CENT. L.J. 551, 553 (1875) (with the 1875 Act, "Congress has exhausted its power; and has conferred upon the federal courts all the jurisdiction authorized by the Constitution").

86. Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 469-72 (1884) (the Court believed that Congress intended the constitutional language to define the scope of the statute).

Osborn's view of "arising under" jurisdiction still held sway in construing the scope of the Act in 1885, when the Court, in the Pacific R.R. Removal Cases, relied on Osborn to construe the statute to cover an even more strained situation than that presented by Osborn: suits on non-federal causes of action against federally chartered corporations. Pacific R.R. Removal Cases, 115 U.S. at 11-19. Interestingly, Justice Bradley, the author of Hans, wrote the majority opinion in the Pacific R.R. Removal Cases, over a dissent objecting that "Congress did not intend to give the words 'arising under . . . ' in the Act of 1875, the broad meaning they have when used" in Osborn. Id. at 24 (Waite, C.J., dissenting).


Beyond the influence of Osborn, the Court had set the stage for a rather expansive view of the 1875 Act in Tennessee v. Davis, 100 U.S. 257 (1879). Davis involved a different removal statute than the 1875 Act, one that allowed a federal official to remove a case brought against him in state court on the ground that it involved acts done under authority of the federal revenue laws. See Act of July 13, 1866, ch. 184, §67, 14 Stat. 98, 171.

In Railroad Co. v. Mississippi, 102 U.S. 135 (1880), the Court repeated language from Davis, although Railroad Co. involved the construction of the 1875 Act, observing: "[c]ases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted." Railroad Co., 102 U.S.
In light of *Carter, Smith*, Justice Bradley's dissent in *Marye*, and the cases concerning subject matter jurisdiction, the Court in *Hans* could only have assumed that Hans' cause of action was one for common-law breach of contract. Moreover, the Court must have assumed that the fact that he pleaded a contracts clause rejoinder to the state's anticipated defense made the case one "arising under" federal law. 88

D. Reading *Hans* in Context

Turning to an examination of the *Hans* opinion itself, that opinion implicitly embodies this contemporary understanding of the scope of the contracts clause and federal jurisdiction. Further, the insights gained from reading *Carter, Smith*, and the *Marye* dissent, give meaning to certain aspects of the *Hans* opinion that might otherwise seem superfluous, contradictory, or cryptic.

In *Hans*, Justice Bradley began his discussion of Hans' claim and the eleventh amendment in the following terms:

In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign State. It is true, the amendment does so read: and if there were no other reason or ground for abating his suit, it might be maintainable; and then we should have this anomalous result, that in cases arising under the Constitution or laws of the United States, a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by the citizens of other States, or of a foreign state; and may be thus sued

---

at 141 (quoting *Davis*, 100 U.S. at 264); cf. *Mesa v. California*, 109 S. Ct. 959 (1989) (removal based on status as federal employee proper under statute only if a federal defense is interposed).

88. It is unlikely that Justice Bradley, the author of *Hans*, would have been strict about finding a federal question since he was also the author of the *Pacific R.R. Removal Cases*, see supra note 85, the "high-water mark" of expansive views of "arising under" jurisdiction. Doernberg, supra note 67, at 623.

Justice Frankfurter once quoted Professor Mishkin for the proposition that the *Pacific R.R. Removal Cases* were so overly broad in their view of arising under jurisdiction as to be considered by the modern Court as a "sport." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 481 (1957) (Frankfurter, J., dissenting) (citing Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160 n.24 (1953)); see also *Gully v. First Nat'l Bank*, 299 U.S. 109, 113 (1936) ("[l]ooking backward we can see that the early cases [testing when there was federal question jurisdiction] were less exacting than the recent ones in respect of some of these conditions").
in the federal courts, although not allowing itself to be sued in its own courts.\textsuperscript{89}.

If the point of \textit{Hans} is that the eleventh amendment bars federal law claims against states to the same extent as non-federal claims, the Court stated the proposition obliquely — given that many cases “arising under” federal law involved solely non-federal law claims\textsuperscript{90} and that suits involving state bonds were considered suits to enforce the terms of the contract.\textsuperscript{91} The opinion does not differentiate according to the source of law authorizing the claim. It does differentiate according to the citizenship of the plaintiffs and it underscores the similarity between a suit brought by a citizen of the state and one brought by a foreign citizen, observing that in both situations the state is “sued for a like cause of action.”\textsuperscript{92} It is just this assumption, that drawing a distinction between diversity and non-diversity bond cases would produce a “anomalous result”, which is reflected in the reasoning the Court used later: that given this lack of difference, the framers of the eleventh amendment would have intended to bar actions against a state by its own citizens as well as by citizens of another state.\textsuperscript{93}

It is, of course, still possible that Justice Bradley meant that the claims in the two categories of cases were equally barred by a sovereign immunity doctrine of constitutional dimensions. However, he did not say so and, in any event, he failed to identify any constitutional source for the immunity which he later found barred Hans’ claim. If he viewed Hans’ claim as a constitutional one, he would have justified the immunity defense in constitutional terms. Instead, he eliminated the eleventh amendment as a source, and he stated that the case should be dismissed only if

\textsuperscript{89} Hans v. Louisiana, 134 U.S. 1, 10 (1890).

Immediately before the quoted passage, the Court pointed out that some of its prior cases, which involved out-of-state bondholders suing states, also involved allegations that the states' laws repudiating the bonds violated the contracts clause. According to the Court, this indicated that a state could not be sued by out-of-staters “on the mere ground that the case [was] one arising under the Constitution or laws of the United States.” \textit{Id.}; see also \textit{id.} at 9-10 (given that out-of-state citizens could not sue, the issue in the case was “whether it is true where one of the parties is a State, and is sued as a defendant by one of its own citizens”).

\textsuperscript{90} \textit{See supra} notes 61-83 and accompanying text.

\textsuperscript{91} \textit{See supra} notes 40-60 and accompanying text.

\textsuperscript{92} \textit{Hans}, 134 U.S. at 10.

\textsuperscript{93} \textit{See id.} at 15 (“Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?”).
there was some "other reason or ground for abating his suit." Whatever "other reason or ground" Justice Bradley had in mind, he failed to support it by reference to any part of the Constitution or its overall structure.

Even more telling than what Justice Bradley did not do is what he did do in seeking to identify the nature of that ground: he adopted and applied Justice Iredell's reasoning from his dissenting opinion in Chisholm. This is crucial, because Justice Iredell clearly pointed to common-law sovereign immunity as the basis for his conclusion that Chisholm's claim was barred. Justice Bradley's adoption of Justice Iredell's reasoning succeeds only if Hans' claim, like Chisholm's, was a common-law claim that was barred by common-law sovereign immunity.

Justice Bradley's careful reading and understanding of Justice Iredell's opinion is evidenced by the fact that his analysis virtually tracks that given by the proponents of the common law immunity theory of the eleventh amendment. Like them, Justice Bradley separated the two issues which the majority in Chisholm commingled: (1) whether there was subject matter jurisdiction, and (2) whether there was a common law remedy. He pointed out that the vice of the Chisholm majority opinion was not the failure to affirm some constitutionally based immunity, but the argument that article III authorized the Court to ignore common law sovereign immunity and thus create a common law assumpsit remedy against a state. The eleventh amendment, he explained, was neutral on the issue of immunity: "[i]t did not in terms prohibit suits by individuals against the States, but declared that [article III of] the Constitution should not be construed to import any power to authorize the bringing of such suits." Thus, he believed that the Chisholm majority had disregarded the "former experience and usage" of the general common law.

[T]hey [the majority] felt constrained to see in this language [of
article III] a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in the federal courts. Justice Iredell, on the contrary, contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign States to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.\textsuperscript{101}

Since "[t]he suability of a [s]tate without its consent was a thing unknown to the [general common] law,"\textsuperscript{102} Chisholm's claim was thus not "properly susceptible of litigation in courts,"\textsuperscript{103} notwithstanding the grant of subject matter jurisdiction over suits against states. By drawing the parallel to Chisholm, Justice Bradley could only have been implying that Hans' claim, like Chisholm's, was an assumpsit claim that failed for the same reasons: the common-law doctrine of sovereign immunity.

Justice Bradley's selectivity in drawing on Justice Iredell's Chisholm dissent supports this view as well. After all, Justice Iredell did mention the question of suing states on constitutional claims, opining in dictum that such claims would also be barred, unless Congress had authorized them by statute.\textsuperscript{104} Yet, despite the fact that these views on constitutional claims were the only parts of Justice Iredell's opinion that were relevant to a constitutional claim, Justice Bradley failed to mention them. Clearly, Justice Bradley was fully conversant with Justice Iredell's opinion and felt "at liberty to prefer Justice Iredell's views" over those of the Chisholm majority.\textsuperscript{105} Surely he would have referenced that part of the opinion had he believed that Hans had asserted a constitutional claim.\textsuperscript{106}

\textsuperscript{101} Id. at 12 (emphasis added); see also id. at 18 ("no anomalous and unheard-of proceedings or suits were intended to be raised up by [article III]"); Field, Part I, supra note 4, at 536-38 (review of contemporary sources supports the view that article III left common-law immunity unchanged, rather than creating a new source of immunity).

\textsuperscript{102} Hans, 134 U.S. at 16.

\textsuperscript{103} Id. at 12.

\textsuperscript{104} See supra note 27.

\textsuperscript{105} Hans, 134 U.S. at 19.

The *Hans* Court’s use of Hamilton’s *Federalist No. 81* supports this view of the type of claim asserted. At the same time, the insights gained from the revised view of Hans’ claim argued here clear up what has always seemed like a contradiction in Hamilton’s views on sovereign immunity. In his essay, Hamilton asserted on the one hand that states gave up such sovereignty as was conceded in the “plan of the convention”; yet, he maintained in the same passage that “there [wa]s no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.”

No conflict exists if one reads further and considers the *Hans* Court’s quotation of Hamilton’s reason for that statement was that, “[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.” If this statement is taken as a description of the then-established common law, Hamilton was arguing that the contracts clause portion of the “plan of the convention” voided any state statute which impaired contract obligations, but that there would still be no recovery against the state because the common law conferred no such right.

The Court’s “additional reason” in refusing to maintain Hans’ suit is also consistent with this view: Justice Bradley found it significant that the jurisdiction bestowed by the 1875 statute provided that circuit courts would have original jurisdiction for all suits of a civil nature arising under federal law “[c]oncurrent with

concurring in part and dissenting in part) (arguing that the federal question statute is sufficient to abrogate state immunity if it is only common law immunity). However, it is not likely that a statute granting subject matter jurisdiction is what Justice Iredell had in mind when he mentioned “new laws.” More likely he envisioned a statute creating such claims or giving the federal courts the power to create them. This is the only position that would have been consistent with the major argument of his dissent — that a grant of subject matter jurisdiction did not authorize any new common law claims.

It is equally unlikely that that is what the *Hans* Court would have had in mind, since it tracks Justice Iredell’s reasoning on this point. *Hans* contrasted Justice Iredell’s view that article III grants power “only, by proper legislation, to invest the federal courts with jurisdiction to hear” suits against states that “were properly susceptible of litigation in courts” with the view that article III also authorized the federal courts “to create new and unheard of remedies.” *Hans*, 134 U.S. at 12.


the courts of the several States."

After quoting the statute, he asked rhetorically:

Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? The state courts have no power to entertain suits by individuals against a State without its consent. Then how does the circuit court, having only concurrent jurisdiction, acquire any such power?

Using the scope of relief permitted in state courts as the gauge for the federal courts' power supports the idea that neither the claim nor the immunity involved in *Hans* was founded on the Constitution. First, if the immunity involved was a constitutional one, then it would directly bar claims in federal court, and thus there would be no need to filter the claim through the experience of state courts. Moreover, state court decisions would be a strange place to look for authority if the Court viewed the case as involving a federal constitutional claim and immunity. However, it was the consistent practice of the Court to rely on state court cases when determining questions of general common law. It is, of course, true that state courts would be as qualified to determine the scope of federal constitutional claims and immunities as the federal courts. However, the cases referred to in *Hans*, regarding the nature and extent of state immunity, were not referenced for their contributions to the law of the contracts clause or any other part of the Constitution. Instead, like *Chisholm*, those cases discussed sovereign immunity in general common law terms. For example, the Court cited *Beers v. Arkansas*, which held that the state could not be sued on its contract, and which was based on "an established principle of jurisprudence in all civilized na-


110. Id. (emphasis added).


In *Beers*, an Arkansas bond law was amended, after a suit was filed, to require that the bonds be filed with the court. *Beers*, 61 U.S. at 528. The suit was dismissed for failure of the plaintiffs to do so, and the state supreme court affirmed. The Supreme Court of the United States dismissed the appeal on grounds of sovereign immunity. *Id.* at 529.
The Hans Court also relied on Briscoe v. Bank of Kentucky. The Hans Court interpreted Briscoe as holding that no suit would lie, based on the fact that it "believed that there [wa]s no case where a suit has been brought, at any time, on bills of credit against a State; and it is certain that no suit could have been maintained on this ground prior to the Constitution." These references are clearly to common law claims and common-law sovereign immunity — not to claims or immunities of constitutional stature.

The Hans Court's use of the federal question statute, which required that the federal courts look to the law applied in state courts, directly paralleled similar "rule of decision" aspects of Chisholm, upon which the proponents of a common law sovereign immunity theory of the eleventh amendment rely. Justice Iredell based his Chisholm dissent in part on section 14 of the Judiciary Act of 1789, which provided that the courts of the United States "shall have [the] power to issue [various specified writs] . . . and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Justice Iredell read this last phrase as a further indication that article III and its implementing statute were not to be construed


One could argue that the citation of state cases was simply an indication that the immunity from suit in federal court should be as broad as it was in state court, thereby barring all claims. This assumes, however, that state courts could refuse to handle federal claims, a proposition that is clearly untrue today and was probably untrue then. See Mondou v. New York, N.H. & H. R.R. Co., 223 U.S. 1 (1912) (causes of actions created by federal regulations may be enforced in state courts); Claffin v. Houseman, 93 U.S. 130 (1876) (if exclusive jurisdiction is not conferred on the federal courts, the state courts may be resorted to if they would otherwise have jurisdiction).

116. The Hans Court also quoted from another bondholder case, Cunningham v. Macon & B. R.R., 109 U.S. 446 (1883), where the Court observed that "[i]t may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent." Hans, 134 U.S. at 17 (alternations added) (quoting Cunningham, 109 U.S. at 451). Cunningham likewise failed to identify any constitutional source for this statement, so it should be taken as dealing only with a common law contract claim.

117. See supra note 19 and text accompanying notes 15-21.
as empowering federal courts to change common-law rules. Section 14 was thus "calculated to guard against that innovating spirit of courts of justice," and it thus directed federal courts handling common law claims, such as Chisholm's, to follow "principles and usages of law already well known" — the existing common law. After reviewing the law of Georgia and the several states, and after determining that it uniformly failed to authorize an assumpsit action against a state, Justice Iredell determined that that common-law deficit was enough to support the dismissal of Chisholm's claim.

Justice Bradley's opinion in *Hans* read the 1875 Act's concurrent jurisdiction clause as having a similar effect as section 14 of the 1789 Act. By directing federal courts to follow the law applied in state courts in a contract dispute, the statute directed the Court to the same source of law: the general common law. Justice Bradley surveyed that law and reached the same conclusion that Justice Iredell did. Justice Bradley also explicitly recognized this parallel to Justice Iredell's opinion. Immediately after making his point with the rhetorical question that concluded the concurrent jurisdiction quotation mentioned earlier, he observed:

> It is true that the same qualification existed in the [J]udiciary [A]ct of 1789, which was before the court in *Chisholm* . . ., and the majority of the court did not think that it was sufficient to limit the jurisdiction of the Circuit Court. Justice Iredell thought differently. In view of the manner in which that decision was received by the country, the adoption of the Eleventh

---

120. *Id.* at 434.
121. *Id.*
122. *Id.* at 434-35 (quote in relevant part, *supra* note 19).
123. *See supra* notes 111-16 and accompanying text. The "rule of decision" aspects of the *Hans* Court's use of the 1875 Act, and Justice Iredell's use of the 1789 Act, differed from that of the real Rules of Decision Act then in effect under the regime of *Swift* v. *Tyson*. The 1875 act operated to bind the federal courts, not only to state statutory law, but also to state decisional law applying the general common law — at least on the question of the scope of common law claims. *See supra* note 34. This is Professor Amar's point about *Chisholm*: that the *Chisholm* majority made — and the eleventh amendment corrected — a rule-of-decision mistake — not a mistake about constitutionally secured immunity or subject matter jurisdiction. *Amar, supra* note 4, at 1467-73; *see supra* text accompanying notes 15-21.

Professor Amar's point, as it relates to *Chisholm*, is misunderstood and criticized in Marshall, *Diversity Theory, supra* note 4, at 1390-92 (Amar's view conflicts with the regime of *Swift* v. *Tyson* which would have been the Framers' view of what law applied in federal courts).

124. *See supra* text accompanying note 110.
Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard.\textsuperscript{128}

This additional link between \textit{Hans} and Justice Iredell's \textit{Chisholm} dissent makes it difficult to read them as inconsistent on the question of what type of claim and immunity were involved.

E. Contemporary State Bond Cases Relied Upon in \textit{Hans}

This notion — that the problem was applying the common law rather than the Constitution — explains the holding in a case upon which \textit{Hans} relied, \textit{Louisiana v. Jumel}.\textsuperscript{128} \textit{Jumel} involved the very same bond issuance and repudiation by the state as those which formed the basis for Hans' claim. The majority held that the suit to force state officers to set aside and apply an appropriation to payment of interest on state bonds could not be maintained. Without mentioning the federal question statute, the Court observed that the remedy that the plaintiffs sought in federal court was not available in the Louisiana courts:

Neither was there when the bonds were issued, nor is there now, any statute or judicial decision giving the bondholders a remedy in the State courts or elsewhere, either by mandamus or injunction, against the State in its political capacity, to compel it to do what it has agreed should be done, but which it refuses to do.\textsuperscript{127}

Justice Harlan's dissent was devoted almost exclusively to proving the opposite proposition, relying not only on Louisiana case law, but also on English precedent regarding the scope of relief available at common law against the Crown.\textsuperscript{128}

The previous quotation suggests an alternative formulation of the common-law sovereign immunity theory of \textit{Hans} that amounts to the same thing: since contracts incorporate existing law and since the law provides that the state cannot be sued on its contracts without its consent, this is enough reason in-and-of-itself to deny recovery according to the implied terms of the contract.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{125} Hans v. Louisiana, 134 U.S. 1, 18-19 (1890).
\item \textsuperscript{126} 107 U.S. 711 (1882), cited in id., at 10.
\item \textsuperscript{127} Jumel, 107 U.S. at 720.
\item \textsuperscript{128} Id. at 746-69 (Harlan, J., dissenting).
\item \textsuperscript{129} See McCracken v. Hayward, 43 U.S.(2 How.) 608, 612 (1844) (the “binding force [of a contract] depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other”); Ogden v. Saunders, 25 U.S.(12 Wheat.) 213, 259 (1827) (Washington, J.,) (the law governing the contract, is
This idea underlies the Court’s rationale in *In re Ayres,* upon which *Hans* relied. This is also the thrust of *Beers v. Arkansas,* from which the *Hans* Court quoted extensively. In its discussion of *Beers,* the *Hans* Court described the law setting up the state bonds as “not a contract,” and it stated that “‘[i]n exercising [its] power [to insulate itself from suit] the State violated no contract with the parties.’” Thus, the state law in *Beers* making redemption of coupons more difficult impaired no contractual obligation, since the state was never subject to judicial compulsion regarding the contract. Though this theory seems far-reaching,
it demonstrates another manner in which the *Hans* Court analyzed the suit and state immunity as presenting a common law rather than a constitutional problem.\(^{135}\)

F. Evidence from *Hans* That Constitutional Claims Would Not Be Barred by State Immunity

The analysis so far indicates how the claim made in *Hans* could only have been understood by the Court to be a non-federal claim to recover on the contract itself, which was barred by common law sovereign immunity. There is also evidence in *Hans* that, had a proper constitutional claim been made, common law sovereign immunity would not have been a bar.\(^{136}\) The *Hans* Court recognized this in the penultimate paragraph of Justice Bradley's majority opinion:

To avoid misapprehension it may be proper to add that, although the obligations of a State rest for their performance

provision for the execution of their own contracts, and if that fails, what ever reproach the legislature may incur, the case is certainly without remedy in any of the Courts of the State.


135. One might argue that this theory, that a state's immunity to suit is an implied term of the contract, cannot be valid because it is inconsistent with the Court's holding in Fletcher v. Peck, 10 U.S. (6 Cranch.) 87 (1810), that the contracts clause applied to contracts to which the state was a party when the state reneged on its obligations. See id. at 139; Gibbons, *supra* note 4, at 1997-98 (suggesting this inconsistency). This objection fails to take into account that there were numerous cases where the validity of state contracts was drawn into question, but where sovereign immunity was irrelevant because the parties to the lawsuit were private persons or entities. See, e.g., Dartmouth College v. Woodward, 17 U.S.(4 Wheat.) 518 (1819) (action in trover by private college against an individual); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (breach of covenant action arising from land conveyance between private individuals).

This theory is more hardpressed to explain why municipalities may be sued, since at common law they customarily shared the immunity of the state. See Owen v. City of Independence, 445 U.S. 622, 644-45 (1980) (at common law, a municipality was an "arm of the [s]tate," that could only be sued with its consent or that of the state); 18 E. McQuillin, Municipal Corporations 279 (3d ed. 1984) (common law immunity for municipalities was based on the idea that the municipality acted for the public benefit as an agent of the state). Nonetheless, suits against them do not violate the eleventh amendment. See Lincoln County v. Luning, 133 U.S. 529, 530 (1890) ("The [e]leventh [a]mendment limits . . . jurisdiction only as to suits against a [s]tate"); Gibbons, *supra* note 4, at 2001-02 (suggesting that the Court in *Lincoln County* held that municipalities could be amenable to suit, because it feared the Court's fear that a failure to so hold would cause a panic in the municipal bond markets).

136. It was in this way that the *Hans* opinion explained the "plan of the convention" exception to which Hamilton referred in *The Federalist* No. 81 in a manner consistent with the theory here. See Hans v. Louisiana, 134 U.S. 1, 12-14 (1890); *supra* notes 107-08 and accompanying text.
upon its honor and good faith, and cannot be made the subject of judicial cognizance unless the State consents to be sued, or comes itself into court; yet where property or rights are enjoyed under a grant or contract made by a State, they cannot wantonly be invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts, may be judicially resisted; and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to affect their enjoyment.\textsuperscript{137}

Justice Bradley made it clear in his dissent in \textit{Marye v. Parsons}\textsuperscript{138} that such "judicial resistance" could entail affirmative suits against the state. Justice Bradley's \textit{Marye} dissent is important because his position there was exactly the same as his majority position five years later in \textit{Hans}: he believed that the state bondholders' claims were barred by sovereign immunity but wished to make it clear that sovereign immunity would not bar constitutional claims. In the process, he distinguished true constitutional contract clause claims from the common-law contract enforcement claims involved in the bond cases. Specifically, after explaining that the bondholder's claims in the \textit{Virginia Coupon Cases} were only claims to enforce the contract with the state that should be barred, he observed:

But, then, it will be asked, has the citizen no redress against the unconstitutional acts or laws of the State? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed or invaded by unconstitutional acts . . . he may defend himself, in every proper way, by \textit{habeas corpus}, by defence of prosecutions, by actions brought on his own behalf, by injunction, by mandamus. Any one of these modes of redress, suitable to his case, is open to him. \textit{A citizen cannot, in any way, be harassed, injured or destroyed by unconstitutional laws without having some legal means of resistance or redress.} But this is where the State or its officers moves against him. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the State into a fulfillment of its contracts.\textsuperscript{139}

\begin{itemize}
\item 137. \textit{Hans}, 134 U.S. at 20-21 (emphasis added).
\item 138. 114 U.S. 325, 335-36 (1884) (Bradley, J., dissenting); see also supra notes 48-49 and accompanying text (reference to the historical and procedural context of \textit{Marye}).
\item 139. \textit{Marye}, 114 U.S. at 335-336 (Bradley, J., dissenting) (emphasis added).
\end{itemize}
Unfortunately, Justice Bradley was not specific in identifying the precise constitutional bases for the claims he had in mind. The reference in *Hans* was to violating "property or rights acquired under [the state's] contract,"¹⁴⁰ which suggests that, despite the contracts clause's limited defensive role in the standard bondholder suits,¹⁴¹ a creditor would still have a "true" contracts clause claim if property passed under the contract to the creditor and the state sought to get it back.¹⁴² In his *Marye* dissent, he referred to "life, liberty, or property [that] is threatened, assailed or invaded by unconstitutional acts," thereby suggesting the viability of due process clause claims; and, more broadly, any claim brought against "the unconstitutional acts or laws of the [s]tate" and all manner of "unconstitutional oppression and exaction."¹⁴³

One might argue that, in these passages, Justice Bradley really had in mind the officer-suit fiction ultimately adopted by the Court eighteen years later in *Ex parte Young*.¹⁴⁴ Under this doctrine, suits against state officers were held not barred by the eleventh amendment, because they were not against the state — since state officers acting unconstitutionally cannot be representatives of the state.¹⁴⁵ However, in the very same section of the dissent in *Marye* as that quoted, Justice Bradley explicitly rejected such a theory:

¹⁴¹. See supra notes 40-60 and accompanying text.
¹⁴². See *Pennoyer v. McConnaughy*, 140 U.S. 1 (1891), discussed infra notes 228-37 and accompanying text. In *Marye*, Justice Bradley distinguished several earlier cases where recovery was had against states or their officers because

[i]n all [those] cases, the State [had] attempted to do some unconstitutional act injurious to the party, or some act which it had entered into a contract not to do; and redress was sought against such aggressive act; they, none of them, exhibit the case of a State declining to pay a debt or to-perform an obligation, and the party seeking to enforce its performance by judicial process.

*Id.* at 336 (Bradley, J., dissenting).

For cases which Justice Bradley felt fell into this category, see *id.* (listing Board of Liquidation v. McComb, 92 U.S. 531 (1875); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872); Osborn v. Bank of the United States, 22 U.S.(9 Wheat.) 738 (1824); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); New Jersey v. Wilson, 11 U.S. (7 Cranch.) 164 (1812)). All but *Osborn* were claims involving state contracts in which recovery was allowed by the Court.

¹⁴⁵. *Id.* at 159-60 ("[i]f the act which the state [official] seeks to enforce be a violation of the federal Constitution . . . he is in that case stripped of his official or representative character"). For a more thorough discussion of *Ex parte Young*, see infra notes 238-47 and the accompanying text.
It is said that the government does not represent the State when it does an unconstitutional act, or passes an unconstitutional law. . . . A State can only act by and through its constituted authorities, and it is represented by them in all the ordinary exhibitions of sovereign power. It may act wrongly; it may act unconstitutionally; but to say that it is not the State that acts is to make a misuse of terms, and tends to confound all just distinctions.146

He also observed that "regarding the individual officers as the real parties proceeded against, and ignoring the fact that . . . the officers only represent the State [is a] technical device [that] is not a sound or fair interpretation of the [eleventh amendment]."147

In view of the precedent and context to this point, the Court's decision in *Hans* cannot be read as interpreting the eleventh amendment to bar contracts clause claims against the states. The Court's view was that the contracts clause did not constitutionalize the creditors' contract rights, thus leaving those creditors with only the duties imposed by the common law — claims that would by all accounts be barred by common-law sovereign immunity if they were asserted against a state. However, the Court believed that where the scope of the contracts clause *did* extend to protect citizens against state action taking away property or rights which they had already acquired under a contract with the state, sovereign immunity would not bar a suit brought against that state seeking judicial "means of protection and redress against unconstitutional oppression and exaction."148

Generalizing slightly, as Justice Bradley did in *Marye*, "some legal means of resistance or redress" must be available "[w]henever . . . life, liberty, or property [are] threatened, assailed or invaded by unconstitutional acts"149 — despite the exis-
tence of sovereign immunity. Thus stated, the law of the eleventh amendment as then-understood in *Hans* is no different than what it would be today if the generally accepted view of *Hans* were overruled: while common law sovereign immunity would operate to bar common law claims against a state, it cannot constitute a bar to a federal constitutional claim against a state, whether for injunctive relief or for damages.150

III. CRITICISMS OF THE NEW READING OF *HANS*

Some objections to this Article's new reading of *Hans* are implicit in Professor Field's criticism of Justice Brennan's majority opinion in *Parden v. Terminal Railway.*151 *Parden* outlined, but did not develop, a view of *Hans* that is somewhat similar to the new reading posited here.152 The analysis of *Hans* in Justice Brennan's *Parden* opinion was as follows:

This case is distinctly unlike *Hans* . . . where the action was a contractual one based on state bond coupons, and the plaintiff sought to invoke the federal-question jurisdiction by alleging an impairment of the obligation of contract.[153] Such a suit on state debt obligations without the States's consent was precisely the "evil" against which both the Eleventh Amendment and the expanded immunity doctrine of the *Hans* case were directed. Here, for the first time in this Court, a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress.154

150. See supra note 11.
152. See supra note 35 for other cases where Justice Brennan has asserted this theory.
153. Justice Brennan further explained in a footnote that:
Of the other cases cited in which federal-question jurisdiction was asserted, *Smith v. Reeves*, 178 U.S. 436 [(1900)], and *Ex parte New York*, [No. 1] 256 U.S. 490 [(1921)], were also commonplace suits in which the federal question did not itself give rise to the alleged cause of action against the State but merely lurked in the background. The former case was a tax-refund suit brought by receivers of a corporation created by Congress, and the latter was an admiralty suit for property damage due to negligence. *Duhne v. New Jersey*, 251 U.S. 311, [(1920)] was a suit against the State to restrain it from enforcing the Eighteenth Amendment to the Federal Constitution, on the ground that the Amendment was invalid.
For a discussion of *Smith, Ex parte New York*, and *Duhne*, see infra notes 197-200, 188-91 and 210-12 and accompanying text.
*Parden* did not involve a federal constitutional claim, but a personal injury claim against Alabama's state railway under the Federal Employers Liability Act. *Id.*
Professor Field made two objections to this analysis. Her first objection was that Justice Brennan’s suggestion “that Hans was not a federal question case at all — is erroneous. While one might deem suits based upon the contract[s] clause of the Constitution to ‘arise under’ state contract law rather than under the Federal Constitution, the . . . Court has not adopted this position.”

Professor Field is wrong in regard to her first objection for two reasons. First, Justice Brennan did not say that Hans was not a federal question case; rather he said it did not involve a federal law claim. Before the Mottley decision in 1908, federal question jurisdiction existed over many cases where the plaintiff asserted solely non-federal claims, particularly where the plaintiff pleaded a non-federal claim and a federal rejoinder to an anticipated defense. Professor Field’s error was that she interpreted Hans and Justice Brennan’s analysis through post-Mottley eyes. Second, just five years before Hans, the Court did adopt the position that the rights asserted by state bondholders were “rights the plaintiff derives from the contract with the State” and were not “rights secured to him by the Constitution of the United States.”

Professor Field’s second objection is more complicated. She suggested that Justice Brennan’s other basis for distinguishing Hans — that Parden involved a clash between state sovereign immunity and a claim authorized by Congress — is fallacious (1) because there is no reason to treat federal claims authorized by statute any differently than those implied directly from the Constitution, and (2) because implied constitutional claims under the contracts clause are clearly barred by the eleventh amendment.

One can agree with the first proposition, but dispute the second.

In support of her assertion that contracts clause claims are barred, Professor Field asserted that normally “the contract[s]...
clause does contemplate private enforcement suits against states."\textsuperscript{160} Quoting Justice Marshall, she maintained that "[t]he only difference between the Contract[s] Clause and congressionally created causes of action is that the Contract[s] Clause is self-enforcing, it requires no congressional act to make its guarantee enforceable in a judicial suit."\textsuperscript{161} Yet, Professor Field pointed out, that the Court has consistently taken the position "that contract[s] clause claims can be raised only defensively."\textsuperscript{162} With this understanding, "[t]he holding in Hans ... can, and probably should, be maintained; but the holding flows from the contract[s] clause, not from the eleventh amendment."\textsuperscript{163} However, she maintained, the reason that the contracts clause is simply a "defensive" negative on state laws that impair contracts that does not include an affirmative right of action, is because of state sovereign immunity. This view, she says, "best accords with the Framers' intent."\textsuperscript{164}

An initial problem with this position is peculiar to Professor Field as a common-law immunity theorist. Once one maintains that a constitutional protection "normally" authorizes private suits, but is interpreted as not doing so because of common-law sovereign immunity, one has set up a conflict between a federal constitutional provision and common-law sovereign immunity, and resolved it in favor of immunity. If this is Professor Field's theory, then either she has abandoned her view that the eleventh amendment simply resurrects common-law immunity, or she has said that constitutional limitations are powerless to modify the common law when the two conflict.\textsuperscript{165}
Beyond that, however, there are problems with Professor Field's assertion that there is normally an implied right of action under the contracts clause for persons in Mr. Hans' position, because that clause is considered to be "self-enforcing." In support of this assertion, Professor Field cited to *Sturges v. Crowninshield.* But clearly, this is not the meaning that the *Sturges* Court intended. First, *Sturges* involved a suit between private parties, a context in which an implied right of action directly under the contracts clause is irrelevant. Second, the question in *Sturges* was whether states could pass bankruptcy laws which provided for the discharge of debts if Congress had not yet passed any bankruptcy laws. While the Court admitted that states were not preempted from passing laws concerning bankrupts in the absence of bankruptcy legislation by Congress, the contracts clause would operate on its own to invalidate state laws that impaired the obligation of contracts — including state bankruptcy laws providing for the discharge of obligations on antecedent debts. If this is what "self-enforcing" means, it is exactly the same point made in *Carter v. Greenhow:* the contracts clause operates on its own without any assistance from Congress (other than general jurisdictional grants) to void state laws impairing contracts and that is the full scope of its protections. But this does not change the fact that suits brought by creditors are common law contract claims and subject to the applicable common law limitations. It is the limitations inherent in the common law of contract rights and remedies that limit the relief creditors can obtain — not some sovereign immunity limitation on the scope of the contracts clause. Thus, there are ample reasons — having nothing to do with state

the adoption of the eleventh amendment, will be interpreted to alter common law immunity and impose suit on states of its own force." *Id.* at 1268.

But perhaps, she suggested, the effects of the eleventh amendment should be limited to suits "to enforce debts against the states" under other constitutional provisions, or "possibly . . . to any monetary liability." *Id. But see Cory v. White,* 457 U.S. 85 (1981) (to limit the eleventh amendment to suits for monetary relief would ignore its explicit language); *Missouri v. Fiske,* 290 U.S. 18, 27 (1933) ("The fact that the motive for the adoption of the [e]leventh [a]mendment was to quiet grave apprehensions that were extensively entertained with respect to prosecution of State debts in the Federal courts cannot be regarded . . . as restricting the scope of the [a]mendment to suits to obtain money judgments.")

166. Field, *supra* note 4, at 1257 (citing Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819)).
167. See *supra* notes 162-63 and accompanying text.
169. See *supra* note 45 and accompanying text.

sovereign immunity — for the contracts clause to provide only a "defensive" negative on state laws.\textsuperscript{170}

Moreover, if the normal scope of the contracts clause is blunted by sovereign immunity, one would expect that the Court would have noted that fact at some point. Professor Field has offered no evidence from the history of the contracts clause or from case law for her assertion that sovereign immunity is the reason for the contracts clause's limited reach. Instead, she reasoned that: (1) the question of whether states were immune from suit was hotly debated when article III was considered; (2) had the contracts clause allowed a court to reach the same conclusion, surely there would have been an outcry; and (3) therefore, it is because of state sovereign immunity that the contracts clause can only be used "defensively" and does not authorize an affirmative right of action for its enforcement.\textsuperscript{171}

Silence is a difficult record from which to argue even in the best of circumstances. Contrary to what Professor Field suggested, there is a far better explanation for the framers' silence about sovereign immunity when the contracts clause was considered: they saw no conflict between the two. Certainly, Alexander Hamilton saw no conflict between states "surrender[ing]" their sovereign "immunity in the plan of the convention" and their continued "privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."\textsuperscript{172}

There are good reasons why Hamilton's colleagues similarly would have failed to see any clash between the contracts clause and sovereign immunity. It is doubtful that the framers would have understood that common law sovereign immunity qualified as a "Law" that was "pass[ed]" by a "State" that "impair[ed] the Obligation of Contracts."\textsuperscript{173} First, decisional law was not generally understood as a "Law" that was "pass[ed]."\textsuperscript{174} Second, before

\textsuperscript{170} See supra notes 40-60 and accompanying text.

Of course, Justice Bradley's observation in \textit{Hans}, and his dissent in \textit{Marye v. Parsons}, 114 U.S. 325 (1885), made clear that the contracts clause's "defensive" posture allows for affirmative suits whenever the state makes "any attempt . . . to violate property or rights acquired under its contracts," which suits would not be barred by sovereign immunity. \textit{Hans} v. \textit{Louisiana}, 134 U.S. 1, 20, 21 (1890) (quoted more completely \textit{supra} text accompanying note 137).

\textsuperscript{171} Field, \textit{Part II, supra} note 4, at 1266-67.

\textsuperscript{172} \textit{FEDERALIST} No. 81, \textit{supra} note 107, at 529-30 (A. Hamilton).

\textsuperscript{173} \textit{U.S. CONST.} art. I, § IV, cl. 8.

\textsuperscript{174} See Tidal Oil Co. v. Flanagan, 263 U.S. 444, 451 (1924) (contracts clause ap-
1938, general common law doctrines would not have been understood to have been "passed" by a "State" within the meaning of the contracts clause. At the time, the common law was thought of as having a source more transcendental than the authority of a particular state. 175 Third, common-law sovereign immunity would not have been viewed as a law "impairing the Obligation of Contracts." The exclusive focus of the contracts clause was the prohibition of laws that retroactively changed or negated contract obligations that had been assumed before the "impairing" law went into effect. 176 Because the "impairing" effect of common law sovereign immunity would have pre-dated the formation of all relevant state contracts, and would thus operate only prospectively, it would not offend the prohibition against retrospective alteration. 177 Certainly, no contracts clause cases before or since Hans

plies only to legislative acts); see also Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) ("In the ordinary use of language it will hardly be contended that the decisions of [c]ourts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.").

As Professor Fletcher has recently shown, despite severe criticism in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), Justice Story was probably correct in his observation regarding the use of the phrase "laws of the several states" contained in the Rules of Decision Act as not including case law. See Fletcher, The General Common Law, supra note 34, at 1517-28.

175. Compare Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) (representing the traditional view of the common law and holding that federal courts exercising diversity jurisdiction are not bound by state decisional law as opposed to legislative enactments) with Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (overruled Swift). See Fletcher, The General Common Law, supra note 34, at 1517-21 (the "underlying premise" in 1789 was that the general common law "was not attached to any particular sovereign"); see also Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1797) (Iredell, J., dissenting) (concluding that the law applicable to Chisholm's claim against Georgia was the general common law as modified by Georgia statutory law).

176. See supra note 39.


It should be noted that, in addition to the other reasons why the framers would not have seen the contracts clause as being in conflict with sovereign immunity, it would have been necessary for them to have foreseen the Courts somewhat surprising holding that the contract's clause applied to state contracts. See Fletcher v. Peck, 10 U.S. (6 Cranch.) 87, 138-39 (1810).

Equally important, they would have needed to connect coverage of state contracts with suing states. The Fletcher case, itself, and most of the prominent contracts clause cases involving the validity of state contracts, were suits between private parties that did not involve the state as a party in any way. For instance, Fletcher was a simple suit for breach of a covenant of title between private individuals. Id. at 125-28; see also, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (contract between private parties). But
considered the argument that common-law sovereign immunity, or any other general common law doctrine, violated the contracts clause. Nor is it apparent that the otherwise ingenious state bondholders ever thought of it.\textsuperscript{178}

To summarize, sovereign immunity operates to defeat recovery against a state on a contract claim — even one which the state may have unconstitutionally impaired. But it does so only by modifying the common-law remedy that would normally be available were the defendant not a state. It does not do so by limiting the scope of the contracts clause. Sovereign immunity does not clash with the contracts clause, and cases such as \textit{Hans} merely stand for the well-known proposition that sovereign immunity bars a common-law claim for contract enforcement against a state unless the state consents to suit.

\textit{see} New Jersey v. Wilson, 11 U.S. (7 Cranch.) 164 (1812) (contract between a private party and a state).

Attorney General Randolph did presage \textit{Fletcher} in his argument in \textit{Chisholm}, 2 U.S. (2 Dall.) at 427 (it is particularly appropriate to prohibit states from relieving their own contractual obligations), as did Patrick Henry in the Virginia debates. \textit{See 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 474 (J. Elliott, ed., 2d ed. 1901) (contracts clause will apply, though inappropriately, to states as well as to private parties).

178. There is some language in Justice Bradley's dissent in \textit{Marye} v. \textit{Parsons}, 114 U.S. 325 (1885), that might be taken as suggesting a conflict. Justice Bradley observed that, in the bondholder suits, "we have one provision of the Constitution set up against the other." \textit{Id.} at 331 (Bradley, J., dissenting). Also, he noted that "If the contract[s] clause and the Eleventh Amendment come into conflict, the latter has paramount force." \textit{Id.} (Bradley, J., dissenting). This is consistent with a common-law sovereign immunity view of the eleventh amendment, since the common-law immunity which that amendment dictates does have "paramount force," since it operates to defeat a common-law contract claim regardless of any state law impairing that contract. \textit{See supra} notes 53-60 and accompanying text. Justice Bradley effectively set up the same juxtaposition in \textit{McGahey} v. Virginia, 135 U.S. 662 (1890), where he maintained on the one hand "that the various acts of the assembly of Virginia . . . imposing impediments and obstructions to [the use of state bond coupons] do in many respects materially impair the obligation of that contract" and on the other "that no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia." \textit{Id.} at 684.

The portion of Justice Bradley's \textit{Marye} dissent just discussed might also be taken to imply, contrary to the thesis of this Article, that the claim and the sovereign immunity bar were both constitutional. In addition to the point just made above, such an implication is inconsistent with other portions of his dissent, as well as with his assertions in \textit{Hans}. \textit{See supra} notes 89-150 and accompanying text. Moreover, Justice Bradley noted, consistent with the majority holding in \textit{Carter} v. \textit{Greenhow}, 114 U.S. 317 (1885), that the claim was "in truth and reality" one for the enforcement of contractual rights with the states. \textit{Marye}, 114 U.S. at 332-33 (Bradley, J., dissenting); \textit{see supra} notes 40-52 and accompanying text.
IV. STARE DECISIS OBJECTIONS TO THE NEW READING OF HANS

In light of the common law nature of Hans' claim, the careful way that Justice Bradley discussed the immunity issue — and his express exception for constitutional claims — the Hans Court could not have meant that all cases arising under federal law, including federal constitutional claims, would be barred. Yet, there are statements in the opinion that might be read that way, and later cases have cited Hans for this proposition. A legitimate question to ask, then, is whether a revised view of Hans really helps that much. Specifically, the doctrine of stare decisis would argue against even a correct reinterpretation of a case if an entire unbroken line of later cases rests upon it. An examination of

---

179. There are two types of statements that can be interpreted as barring even federal constitutional claims. First, there are those that suggest that all federal question cases are barred. See Hans v. Louisiana, 134 U.S. 1, 15 (1890) (claiming that it would be an “absurdity” to suggest that there would be no outrage if Congress had provided that the eleventh amendment did not immunize a state from suit by its own citizens based on federal question jurisdiction). Second there are those statements to the effect that all suits by private individuals are barred. See id. at 17 ("[i]t is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission") (quoting Beers v. Arkansas, 61 U.S.(20 How.) 527, 529 (1857)).

180. See Florida Dep't of State v. Treasure Salvors, Inc. 458 U.S. 670, 683 n.17 (1982) (citing Hans for the proposition that the eleventh amendment has “long been held” to apply to suits against a state by its own citizens); Edelman v. Jordan, 415 U.S. 651, 662-63 (1974) (claiming that the Court has consistently held, since Hans, that a state cannot be sued “in federal courts by her own citizens” without her consent); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 280 (1973) (citing Hans as support for the idea that it is an “established” principle that a state cannot be sued “in federal courts by her own citizens”); Monaco v. Mississippi, 292 U.S. 313, 322 (1934) (citing Hans as support for the proposition that a state cannot be sued by its own citizens even on claims arising under the federal Constitution or federal law); Ex parte New York, No. 1, 256 U.S. 490, 497 (1921) (a state's immunity from suit by its own citizens outweighs all of the judicial power contained in the federal Constitution as demonstrated “by repeated decisions” of the Court, of which Hans is but one).

181. Justice Scalia made this exact point in his separate concurring and dissenting opinion in Union Gas though his remarks were responsive to the prospect of overruling rather than reinterpretating Hans. Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2298-2299 (1989) (Scalia, J., concurring in part and dissenting in part). Justice Scalia echoed the same concerns raised by Justice Powell in his plurality opinion in Welch v. Texas Dept. of Highways and Pub. Transp., 483 U.S. 468 (1987), where Justice Powell warned that in overruling Hans, “the Court would overrule at least 17 cases, in addition to Hans itself.” Id. at 494 n.27.

Justice Brennan has alluded to the irrelevancy of stare decisis when an erroneous interpretation of the Constitution is at stake: “[w]hether the Court's departure from a sound interpretation of the Eleventh Amendment occurred in Hans or in later cases that misread Hans . . . is relatively unimportant.” Atascadero State Hosp. v. Scanlon, 473 U.S.
cases citing Hans, however, reveals that redefining Hans at this point would principally be an exercise in correcting dictum regarding Hans, rather than overruling holdings based on it.

The stare decisis problem was discussed in Welch v. Texas Department of Highways and Public Transportation, where Justice Powell indicated concern that Hans and seventeen other cases would have to be overruled if the course plotted by Justice Brennan and the other opponents of Hans was followed. A close analysis of those cases indicates that the stare decisis problems involved with a revised reading of Hans, while serious, are not nearly as grave as they would be if the Court overruled Hans.

A. Cases Involving Common-Law or State-Law Claims

First and foremost, Hans itself would not have to be overruled. Reinterpreting rather than overruling Hans would avoid the ultimate evil stare decisis is designed to avoid. Reinterpretation would also advance the cause of understanding the correct nature

---

184. Justice Powell appears to have been overinclusive. See Jackson, supra note 4, at 119-24 (discussing the cases that concerned Justice Powell from the standpoint of overruling Hans). One case can be immediately dropped from Justice Powell's list. Disturbing the Court's holding in Fitts v. McGhee, 172 U.S. 516 (1899), cannot properly be laid at the feet of those who urge overruling — or a revised reading — of Hans. Fitts was effectively overruled long ago in Ex parte Young, 209 U.S. 123 (1908). For a discussion of Young, see infra note 228-47 and accompanying text.

Like Young, Fitts was a suit for injunctive relief brought against the attorney general of a state to enjoin his prosecution of the plaintiffs under a state statute alleged to violate the Constitution. Fitts, 172 U.S. at 517. Justice Harlan, consistent with his dissent in Young, maintained that

As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute . . . [alleged to be unconstitutional], is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record.

Id. at 529 (Harlan, J., dissenting).
of claims against states on their contracts and the scope of the contracts clause.

The principle for which *Hans* should stand — that common law claims are barred by common law sovereign immunity — is completely consistent with several cases on Justice Powell’s list. For example, in *Murray v. Wilson Distilling Company*, liquor sellers, relying on diversity jurisdiction, sought to obtain money from a state fund under the theory that the state statutes relating to the fund created a contract in their favor. Despite the plaintiffs’ attempts to introduce constitutional issues into the case, the Court believed that

the bills of complaint sought to compel the State to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a State cannot, against the objection of the State, be maintained in a court of the United States.

Likewise, *Ex Parte New York, No. 1*, and *Ex parte New York, No. 2*, involved admiralty claims which the Court held were barred by the eleventh amendment — even though the text of that amendment applied only to a suit “in law or equity.” However, this was the proper resolution, because admiralty claims were general common-law claims, which would thus call for the application of common-law immunity.

---

185. 213 U.S. 151 (1909).
186. *Id.* at 163.
187. *Id.* at 168 (citing *Hagood v. Southern*, 117 U.S. 52, 67 (1886)).

The plaintiffs argued that the state's action, which terminated a fund from which liquor sellers previously could claim payment, was a violation of the contracts clause. Although they also argued that this action violated the equal protection and due process clauses, the Court used *Hagood* to dispose of the case. *Murray*, 213 U.S. at 168. This is significant because in *Hagood*, the plaintiffs' claims were described as bills for specific performance of a contract with the state and were dismissed on state law grounds. *Hagood*, 117 U.S. at 67.
188. 256 U.S. 490, 497 (1921) (an admiralty suit cannot be maintained against a state under the eleventh amendment).
189. 256 U.S. 503, 510 (1921) (admiralty suit against the state barred).
190. *Ex parte New York, No. 1*, 256 U.S. at 497.
191. Today, one thinks of the common law of admiralty as federal common law; however, in 1921 (and in 1890), admiralty law would have been simply another branch of the general common law. *See* Fletcher, *The General Common Law, supra* note 34, at 1531 (under the *lex loci* principle, federal admiralty courts relied on local law whenever available); *see also* Fletcher, *Eleventh Amendment, supra* note 4, at 1082 (in the late eighteenth and early nineteenth centuries, admiralty law was not considered state or federal — but the law of nations).
Similarly explainable is *Missouri v. Fiske*.\(^{192}\) *Fiske* was a suit by an heir, based on diversity jurisdiction, seeking to quiet and otherwise secure his remainder interest in an estate over which the federal court had asserted jurisdiction *in rem*.\(^{193}\) When the state of Missouri intervened to claim estate taxes due on stock alleged to be part of the estate, the heir brought an ancillary and supplemental bill seeking to protect the property by enjoining the state from prosecuting its claim in the state probate court.\(^{194}\) Likewise, the injunctive claim against the state was properly barred since it was simply a common-law claim to preserve the *res*.\(^{195}\)

The eleventh amendment cases after *Hans* involving state law claims can be synthesized with the new reading of *Hans*. Whatever the scope of the common-law sovereign immunity secured by the eleventh amendment is, that immunity must encompass a state's right to insulate itself from liability if that liability results from law of its own creation.\(^{196}\)

For example, *Smith v. Reeves*\(^{197}\) sustained an eleventh amendment defense; however, like *Hans*, it was a case that arose under federal law, but presented solely non-federal claims.\(^{198}\) Though there was federal question jurisdiction based on the fact that the plaintiffs were the receivers of a federally chartered railroad, their claim was simply that the state taxing authorities had

---

192. 290 U.S. 18 (1933).
193. *Id.* at 22.
194. *Id.* at 24.
195. It might be argued that *Fiske* involved a federal issue: the *res judicata* effect of the federal court's prior judgment with regard to the property. In dismissing the claim against the state, the Court noted that the plaintiff had the remedy of raising his contentions in state court, with later review by the Supreme Court of the United States if needed. *Id.* at 29; see also Jackson, *supra* note 4, at 122 n.482 ("federal question concerning *res judicata* effect of prior federal judgment could be raised in state court"). However, it is unlikely that this would turn the plaintiff's claim into a federal law claim. A suit on a federal judgment in federal court was not considered to raise a federal question. *See Metcalf v. Waterton*, 128 U.S. 586 (1888) (discussed *supra* notes 78-82 and accompanying text). Moreover, the source of the law of *res judicata* would have been considered — at least in 1933 — to be the general common law. *See supra* note 34 (discussing *Swift* and *Erie*).

196. As Justice Holmes observed in *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907), "[a] sovereign is exempt from suit . . . 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." *Id.* at 353. *See Fletcher, Eleventh Amendment, supra* note 4, at 1069-70 & n.157 (legal scholars have agreed for four hundred years that a sovereign may not be sued under its own laws without its consent).

197. 178 U.S. 436 (1900).
198. *See supra* notes 61-82 and accompanying text.
erroneously charged them taxes on rolling stock owned by a different railroad. The Court sustained the state's claim of sovereign immunity against that claim based on its own law. Penhurst State School and Hospital v. Halderman also involved a claim based solely on state law, which the Court held was barred by the eleventh amendment. And in County of Oneida v. Oneida Indian Nation, counties sued by an Indian tribe filed an indemnity claim against the state. The Court held that the claim was barred by reason of the eleventh amendment (as construed in Penhurst): the Court found “that the counties' cross-claim for indemnity by the State [based on ancillary jurisdiction] raises a question of state law.”

B. Cases Involving Federal-Law Claims

Turning to the more problematic cases involving federal claims, there were relatively few of them until recent times. From 1890 until the current generation of eleventh amendment cases began in 1973, the Court sustained an eleventh amendment defense in the face of a federal constitutional claim only three times: in Duhne v. New Jersey, in Great Northern Life Ins. Co. v. Read, and in Ford Motor Co. v. Department of Treasury. During that same period, there was not a single case where the Court held that the eleventh amendment barred a claim seeking to enforce federal statutory rights.

In Duhne v. New Jersey, New Jersey residents sought leave

---

199. See Smith v. Rackliffe, 87 F. 964, 964-65 (9th Cir. 1898), aff'd sub nom., Smith v. Reeves, 178 U.S. 436 (1900).
200. Reeves, 178 U.S. at 448-49.
202. Id. at 117.
204. Id. at 252.
206. 251 U.S. 311 (1920).
207. 322 U.S. 47 (1944).
208. 323 U.S. 459 (1945).
209. The first suit against a state on federal statutory grounds was heard by the Court in 1964. See Parden v. Terminal Ry., 377 U.S. 184, 187 (1964) ("[h]ere, for the first time in this Court, a State's claim of immunity . . . meets a suit brought upon a cause of action expressly created by Congress"). The Court refused to allow the immunity claim to prevail. Id. at 198.
210. 251 U.S. 311 (1920).
to file an original action in the Supreme Court of the United States seeking an injunction against the enforcement of the eighteenth amendment to the Constitution on the ground that it was illegally ratified. The precise theory of the petitioners' claim was not clearly set out in the two-page memorandum opinion denying leave to file the case as an original action. The opinion was cryptic and cited Hans perfunctorily for the proposition that article III "does not embrace the authority to entertain a suit brought by a citizen against his own State."212

In Great Northern Life Ins. Co. v. Read213 and in Ford Motor Co. v. Department of Treasury,214 the plaintiffs sued in federal court for a refund of taxes allegedly collected in violation of the Constitution.215 The Court found that the suits were against the states — even though individual defendants were named.216 Consequently, the Court held that the eleventh amendment barred those suits, and it even cited Hans for the proposition that the eleventh amendment was a constitutional right enabling states to bar all suits brought against them by private parties without their consent.217

Neither Duhne, Great Northern, nor Ford Motor Co., focused on the argument that federal constitutional claims should be treated differently than common or state law claims, nor did any

211. Id. at 312-13.
212. Id. at 313.
215. Ford Motor Co., 323 U.S. at 460-61 (alleging that the tax collections violated article I, section 8, and the fourteenth amendment); Great Northern, 322 U.S. at 49 (claiming that the taxes violated the fourteenth amendment).
216. See Ford Motor Co., 323 U.S. at 463-64; Great Northern, 322 U.S. at 51-53; cf. Ex parte Young, 209 U.S. 123 (1908) (eleventh amendment does not bar suits against state officials.

A large part of the reason why the suits were deemed to be against the state was because the plaintiffs relied for their causes of action solely upon state statutes providing for refunds, and these statutes authorized suits only against the state itself. These state statutes did not constitute a waiver of eleventh amendment immunity, however, since they limited the forum for such suits to the state courts only. Ford Motor Co., 323 U.S. at 465-66; Great Northern, 322 U.S. at 55.

217. Ford Motor Co., 323 U.S. at 464 (eleventh amendment is an "express constitutional limitation [that] denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent") (citing Hans v. Louisiana, 134 U.S. 1 (1890); Great Northern, 322 U.S. at 51 ("A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment . . . . [It] prevents actions against a state by its own citizens without its consent.") (citing Hans v. Louisiana, 134 U.S. 1 (1890)).
of them explicitly say that *Hans* disposed of that argument. Thus, it seems that there is room to argue that these cases could be reinterpreted rather than directly overruled.

One basis for reinterpreting *Duhne* has been offered by Professor Jackson. She has suggested that *Duhne*, as a suit by private persons against a state, should have been dismissed as not properly within the Court's original jurisdiction over cases in which the state is a party.\(^{218}\) Also, dealing as it did with the issue of whether the eighteenth amendment had properly become part of the Constitution, *Duhne* probably should have been dismissed on political question grounds.\(^{219}\)

Both *Great Northern* and *Ford Motor Co.* can be viewed as cases where there was an independent state law ground for decision. The Court explicitly found that the plaintiffs in each case had relied exclusively on state statutes authorizing an action for a refund of "illegal" taxes in state court and that jurisdiction over the claims authorized by those statutes was legislatively limited solely to the state courts.\(^{220}\) Furthermore, the *Great Northern* Court cited *Smith v. Reeves* for the proposition that "an act of a state is valid which limits to its own courts suits against it to recover taxes."\(^{221}\) The dismissals in *Great Northern* and *Ford Motor Co.* were, therefore, correct because the plaintiffs lacked a valid source in state law for their claims in federal court. Thus, the Court's holdings in these cases should not be taken as specifically excluding the possibility that, had the plaintiffs not relied on the state statutory cause of action, but asserted a claim directly under the fourteenth amendment or the commerce clause, they would have survived dismissal — despite the states' claims of eleventh amendment immunity.\(^{222}\)

---

218. Jackson, *supra* note 4, at 123.

219. See Coleman v. Miller, 307 U.S. 433 (1939) (refusing on political question grounds to decide whether the Child Labor Amendment was properly ratified by the Kansas legislature).


221. *Great Northern*, 322 U.S. at 55 (citing Reeves, 178 U.S. 445); *see supra* text accompanying notes 197-200 for a discussion of the *Reeves* opinion.

222. Moreover, one might argue that the state statutes were forum allocation devices that should have mandated dismissal of the federal claims involving state taxes. *See Jackson, supra* note 4, at 120-22 (explaining that *Ford Motor Co.* and *Great Northern* could
If these reinterpretations of *Duhne*, *Great Northern* and *Ford Motor Co.*, are not accepted, no other alternative would exist but to overrule them. The same would be true of the post-1973 cases relying on the Court's erroneous view of *Hans*, as expressed in *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare.*

Federal claim cases that have restated the broad view of *Hans* in dictum, but have nonetheless held that the requested relief was not barred, are not as problematic from a *stare decisis* standpoint, because their holdings are correct. However, the officer-suit cases, as exemplified by *Ex parte Young*, are of at least

---

have been dismissed, wholly apart from sovereign immunity, on the grounds of the federal judicial policy to avoid state tax disputes where the state provides its own adjudicative mechanism; *see also* Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (holding that the principle of comity prevents a claim asserting the unconstitutional administration of a state tax system from being brought in federal court where the state courts provide an adequate remedy).


The *Employees* Court cited *Hans*, *Duhne* and *Parden* for the proposition that "it is established that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Id.* at 280.

The following post-1973 cases would require overruling due to their reliance on *Hans*: *Dellmuth v. Muth*, 109 S. Ct. 2307, 2401 n.2 (1989) (declining to overrule *Hans* and finding that the eleventh amendment bars federal statutory claims); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 472 (1987) "the Eleventh Amendment bars a citizen from bringing suit against the citizen's own state in federal court"); *Papasan v. Allain*, 478 U.S. 265, 276 (1986) (citing *Hans* in support of the proposition that "this Court long ago held that the [eleventh] Amendment bars suits against a State by citizens of the same State as well"); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (stating that "States may not be sued in federal court unless they consent to it in unequivocal terms," while upholding dismissal of a suit against the Director of the Michigan Department of Social Services for alleged violations of provisions of the Federal Aid to Families with Dependent Children program); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) ("the [eleventh] Amendment bars suits against a state in federal court, even though the express terms of the Amendment do not so provide"); *Quern v. Jordan*, 440 U.S. 332 (1979) (reaffirming prior decisions holding that 42 U.S.C. § 1983 does not abrogate state immunity); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (citing *Employees* to support the claim that "[t]he Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.").

To disclose any possible source of bias, I should say that I was lead counsel for the petitioners (the plaintiffs below) in *Green*.

224. *E.g.*, *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989) (holding that claims against a state under the Comprehensive Environmental Response, Compensation and Liability Act are not barred in federal court). It can be argued that *Union Gas* and other cases upholding statutory claims on the ground that Congress has abrogated eleventh amendment immunity make more sense under the theory argued here, *i.e.* if the immunity involved is seen as only a common law one. This was Justice Stevens' basis for concurring in *Union Gas*. *Id.* at 2286 (Stevens, J., concurring).
passing concern, because the officer-suit fiction is so well-established and could be read as implicitly giving credence to a broad reading of \textit{Hans}.\footnote{225. 209 U.S. 123 (1908).}

C. Some Surprising Lessons from the Officer-Suit Cases

The reason for concern over cases typified by \textit{Ex parte Young} is that the officer-suit fiction is necessary only if it is assumed that eleventh amendment immunity would otherwise prevent the constitutional claims made in those cases from being brought in federal court. Yet, there is evidence that the Court, even while it was engaged in the process of establishing the officer-suit fiction for federal constitutional claims, recognized that the question of whether constitutional claims were barred at all was still an open one. In the early officer-suits, the Court considered the officer-suit fiction to be a more conservative, \textit{alternative} solution; it was only later that the Court came to assume that this alternative solution was the \textit{only possible} solution. It is this \textit{sub silentio} shift from alternative to sole solution — and not \textit{Hans} itself — that is largely responsible for the Court's statements in the officer-suit cases that the eleventh amendment bars "even federal claims that otherwise would be within the jurisdiction of the federal courts."\footnote{226. Since this shift was accomplished without any meaningful consideration of the more direct route suggested by Justice Bradley in \textit{Hans},\footnote{227. \textit{See supra} notes 89-116 and accompanying text.} it is appropriate that the Court now reconsider whether that shift was correct.} Since this shift was accomplished without any meaningful consideration of the more direct route suggested by Justice Bradley in \textit{Hans},\footnote{228. 140 U.S. 1 (1891).} it is appropriate that the Court now reconsider whether that shift was correct.

which the state subsequently attempted to reclaim. Justice Lamar wrote the opinion for a unanimous Court, which held that McConnaughy's claim against Oregon's governor and other high state officials was not barred by the eleventh amendment. In many respects, Pennoyer seems to be a direct application of Hans as reinterpreted here. McConnaughy's claim certainly resembled the kind of "defensive" true constitutional contracts clause claim that should not be barred which Justice Bradley had excepted from the purview of the holding in Hans in the penultimate paragraph quoted earlier. Indeed, Justice Lamar quoted that entire paragraph as a prelude to his holding. He then noted that, though McConnaughy's suit named various state officers as defendants, "this suit is not nominally against the governor, secretary of state, and treasurer, as such officers, but against them collectively, as the board of land commissioners." Justice Lamar nonetheless concluded that the eleventh amendment was not a bar to McConnaughy's suit because his suit sought to enjoin acts "alleged to be unconstitutional, which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights.

Of course, if Justice Lamar had correctly understood Justice Bradley's exception for true constitutional claims, and McConnaughy's claim came within it, there was no need to go beyond the above framework. But he did go further in an attempt to synthesize the meandering line of eleventh amendment cases involving suits against state officers that sought to determine which officer suits were in reality suits against a state and which were not. Justice Lamar's conclusion that McConnaughy's suit against the

229. Id. at 4-6 (statement of the case).
230. Id. at 25.
231. See Hans v. Louisiana, 134 U.S. 1, 20-21 (1890) (quoted and discussed supra text accompanying note 138).
233. Id. at 18; see also supra notes 146-48 and accompanying text (discussing Marye v. Parsons, 114 U.S. 325, 334 (1885) (Bradley, J., dissenting) (suing state officers was tantamount to suing the state); cf. Ex parte Young, 209 U.S. 123 (1908) (holding that offending officials are not the state) (discussed infra notes 229-48 and accompanying text).
234. Pennoyer, 140 U.S. at 18.
235. See Pennoyer, 140 U.S. at 17.

The perilous nature of this course is shown by the fact that no one else has ever been able to synthesize these cases and come up with any consistent rule. See C. JACOBS, supra note 4, at 189 n.22 (no persuasive reconciliation can be made); see also McGahey v. Virginia, 135 U.S. 662, 685 (1890) (advocating a case-by-case adjudication).
state officers was not one against the state would seem to contradict the finding that the suit was against the state board itself. This suggests that perhaps Justice Lamar intended his officer-suit analysis to be an alternative basis for holding that the eleventh amendment did not bar the suit.

Justice Lamar’s alternative officer-suit suggestion was acted upon in Ex parte Young, which relied on Pennoyer and shared several characteristics with it. Young is perhaps the most prominent eleventh amendment case decided after Hans and it is known for establishing the fiction that federal constitutional claims against state officers in their official capacities are not barred by the eleventh amendment, because a suit against a state officer acting contrary to the Constitution is not a suit against the state. However, a closer reading of Young indicates that the Court recognized that the eleventh amendment might well not bar constitutional claims against the state itself, but that the Court chose to dispose of the case on the more narrow officer-suit grounds.

---

236. Pennoyer, 140 U.S. at 18-19.
237. Justice Lamar’s officer-suit distinction to some extent restated Justice Bradley’s distinction between common-law claims to enforce contracts and true constitutional claims. Justice Lamar described the two categories of officer-suits as follows:

The first class is where suit is brought against the officers of the State, as representing the State’s action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.

The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State.

Pennoyer v. McConnaughy, 140 U.S. 1, 10 (citations omitted); see also Hans v. Louisiana, 134 U.S. 1, 20-21 (1890) (a state cannot be compelled to perform a contract but it can be prohibited from interfering with another’s contractual rights), quoted in Pennoyer, 140 U.S. at 17-18.
238. 209 U.S. 123 (1908).
239. Id. at 159-61.

In Young, the federal court had enjoined Young, the Minnesota Attorney General, from prosecuting railroad employees for rate regulation violations in state court on the ground that the state regulatory statute violated the due process clause. Young sued for habeas corpus after being held in contempt and jailed for violating the federal court’s injunction. The issue in the Supreme Court of the United States was the validity of the federal court’s injunction in light of the state’s claim of eleventh amendment immunity. Id. at 127-34.
240. Young was decided almost twenty years after Hans and it is entirely possible that as with the modern eleventh amendment cases, the Court in Young had forgotten the original rationale of the Hans opinion. In the intervening years there were substantial changes on the Court, including the death of Justice Bradley in 1892. Of the eight justices who signed Justice Bradley’s Hans opinion, only three remained on the Court at the time
The Court in *Young* did not disclose its reason for resorting to the officer-suit fiction. However, it stands to reason that, even if *Hans* did not hold that a constitutional claim would be barred, and further implied in dictum that it would not, the Court nonetheless would not wish to rush in at the earliest opportunity to turn that dictum into holding. It is more likely that the Court would have preferred to dispose of the specific officer suits that came before it without taking any unnecessary steps. This would be especially true given the political sensitivity of the issue at that time: "[a]s the federal courts became entangled at the turn of the century in the contentious issues of business regulation of the time, the idea kept recurring that this was not a fitting tribunal for the decision of such questions."
The alternative device to which the Court resorted was well known in English law: a suit could not be brought against the King, but one could sue an officer if that officer exceeded his powers or defaulted in his official duties. More relevant than this distant pedigree was the fact that by 1908, it was well-established that the eleventh amendment did not protect state officers from suit for acts, under color of their offices, that were tortious under the common law or violated state law. If the Court applied this well-established fiction to the federal law claims in Young, and suits like it, the Court could maintain that it was doing nothing special for federal constitutional claims against state officers, treating them neither better nor worse than claims based on the state's own law that might be brought against them. Thus, the Court could avoid taking a step that would have placed federal law claims in a special, more favorable category. It would be a much less radical position to hold that claims against state officers were no less barred because the illegality that pierced the officer's normal sovereign immunity defense was of constitutional proportions.

\[\text{§ 2284 (1982).} \]


245. See Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 452 (1883) (if a suit can be maintained in state court to protect property rights invaded by unauthorized acts of state officers, a citizen of another state may invoke federal jurisdiction on that type of claim); Reagan v. Farmers' Loan & Trust, 154 U.S. 362 (1894) (citing Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883)); Poindexter v. Greenhow, 114 U.S. 270 (1885) (citing Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883)).

Indeed, such state and common-law suits continued to be exceptions to eleventh amendment immunity until 1984. See Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984) (eleventh amendment bars state law claims even if asserted only against state officers when the state is the real or substantial party in interest). But see Pennhurst, 465 U.S. at 132 (Stevens, J., dissenting) (citing Reagan, 154 U.S. at 390-91; Poindexter, 114 U.S. at 287; Cunningham, 109 U.S. at 452) (arguing that no basis exists for the majority's assertion that the issue was open, since the court had consistently held that the eleventh amendment does not prohibit federal courts from issuing injunctive relief against state officials to remedy violations of state law).

The same rule had also been adopted for suits against officers of the United States. See Belknap v. Schild, 161 U.S. 10 (1896) (sovereign immunity of the United States does not protect its officers from liability in a tort action by a private plaintiff whose property rights have been wrongfully invaded); Stanley v. Schwalby, 147 U.S. 508 (1893) (where an individual is sued in tort for an act that injured the plaintiff, the defense that the individual acted pursuant to orders of the United States is no bar to jurisdiction); United States v. Lee, 106 U.S. 196 (1882) (doctrine that the United States cannot be sued has no applicability when officers or agents of the same are sued for misuse of private property).
The Young opinion shows how the Court expressly acknowledged the possibility of the broader holding suggested in Hans, but chose to take the safer route. The Court juxtaposed the eleventh amendment and the fourteenth amendment, quoting one and then the other. It then observed:

We think that whatever the rights of complainants may be, they are largely founded upon [the fourteenth] Amendment, but a decision of this case does not require an examination or decision of the question whether [the fourteenth amendment's] adoption in any way altered or limited the effect of the earlier [eleventh] Amendment. We may assume that each exists in full force, and that we must give to the Eleventh Amendment all the effect it naturally would have, without cutting it down or rendering its meaning any more narrow than the language, fairly interpreted, would warrant.246

Thus assuming the eleventh amendment's application to fourteenth amendment claims, the Court found adequate ground for avoiding its effect in the specific case presented — a suit against a state officer — using the traditional exception.247

The Court's conservative approach in Young worked out so well that it was not until the modern round of federal claims,
starting in 1973, that the Court was faced with the full implications of the conflict between federal law claims and the common-law sovereign immunity preserved by the eleventh amendment. When it was, the Court decided the modern question in favor of sovereign immunity. And by misconstruing *Hans*, the Court lost the opportunity for a different solution. Though the true significance of *Hans* was buried very deep, and *Young* came to be understood as the only way to enforce federal claims against states, vestiges of *Young*'s "stop-gap" status have remained. The Court today, even while continuing to misread *Hans*, has continued to describe the question of whether the fourteenth amendment *pro tanto* overrules the eleventh amendment as one that it has not yet decided and has reserved for another day.\(^\text{248}\)

**D. Reliance Interests of Congress**

In addition to *stare decisis* concerns encompassing the Court's reliance on a broad reading of *Hans*, Congress' possible reliance interests should be considered. In explaining his reluctant agreement with the members of the Court who believed that *Hans* should not be overruled, Justice Scalia recently observed that

*Hans* has had a pervasive effect upon statutory law, automatically assuring that private damages actions created by federal law do not extend against the States. Forty-nine Congresses since *Hans* have legislated under that assurance. It is impossible to say how many extant statutes would have included an explicit preclusion of suits against States if it had not been thought that such suits were automatically barred.\(^\text{249}\)

However, Congress' reliance should not give the Court pause

\(^\text{248}\) See, e.g., *Milliken v. Bradley*, 433 U.S. 267, 290 n.23 (1977) (after deciding against the state's claim of eleventh amendment immunity on *Young* grounds, the Court indicated that it does not reach the question of whether "the fourteenth amendment, *ex proprio vigore*, works a *pro tanto* repeal of the eleventh amendment").


Justice Scalia stated that "it is not even possible to say that, without *Hans*, all constitutional amendments would have taken the form they did." *Id.* He suggested, for example, that the seventeenth amendment, which eliminated the election of senators by state legislators, could well have been affected by *Hans*. *Id.* There is absolutely no evidence that *Hans* had any effect in one way or the other on the ratification of the seventeenth amendment. This is especially so since only five years earlier in *Young*, the Court considered it an open issue whether the eleventh amendment was overruled by the fourteenth amendment. *Ex parte Young*, 209 U.S. 123, 150 (1908) (Court merely assumed that both amendments were in force).
in reinterpreting *Hans*. There are two kinds of legislation affecting states that might have been affected by Congress' reliance on *Hans*: (1) statutes creating new statutory liabilities against states, and (2) statutes facilitating suits against states to protect rights secured by existing statutes or the Constitution.

In the first category, one would expect that, if *Hans* was such a source of comfort for members of Congress, some of its members would have mentioned it or the eleventh amendment when debating legislation creating new statutory liabilities. However, there is no evidence of Congress citing or discussing it. Whatever Congress might have thought that *Hans* meant, assuming it was familiar with *Hans* at all, that knowledge did not stop Congress from imposing — or the Court from approving — numerous federal statutory liabilities against states since *Hans*. Moreover, any claim of congressional reliance is undercut by the fact that it was not until 1964 that the Court even suggested *Hans* meant that there might be eleventh amendment problems with any of those statutes; and it was not until 1973 — eighty-three years after *Hans* was decided — that the Court applied *Hans* to limit the reach of a federal statutory claim against a state. Given this record, any reliance interests Congress might have had before the Court's latter-day revelations about the meaning of *Hans* for statutory claims would seem to point in precisely the opposite direction.

If anything, it is the Court's recent imposition of a clear-statement requirement upon Congress that has undercut these longstanding — and precisely opposite — reliance interests. This is so because the Court has imposed the clear-statement rule retro-

---

250. In determining that Alabama was a "common carrier by railroad" within the meaning of the Federal Employers' Liability Act, the Court announced that it would find a state to be in a generic statutory category "in the absence of express provision to the contrary." *Parden v. Terminal Ry.*, 377 U.S. 184, 190 (1964); *see also* *Petty v. Tennessee-Missouri Bridge Comm.*, 359 U.S. 275, 282 (1959) (state is "employer" covered by Jones Act); *California v. Taylor*, 353 U.S. 553, 554 (1957) (states included in Railway Labor Act); *United States v. California*, 297 U.S. 175, 185 (1936) (Federal Appliance Safety Act applies to states); *cf. Jefferson County Pharmaceutical Ass'n v. Abbott Labs.*, 460 U.S. 150, 156 (1983) (Alabama is a "person" suable under the Robinson-Patman Act).

251. *See Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (potential eleventh amendment problem noted, but amendment held inapplicable on theory that the state consented to suit by operating subject to congressional regulation); *supra* text accompanying note 154.

actively — holding Congress' legislation to a standard of clarity that did not exist when the legislation was passed. Indeed that retroactive standard becomes more stringent each time the Court addresses the issue.263

The second area where Congress legislates vis-a-vis the states — supplying federal statutory authority to protect existing statutory or constitutional rights — has a similarly short and newly-discovered history as far as eleventh amendment problems are concerned. It was only recently that there has been any reason for Congress to think that a statutory cause of action was necessary for a person to obtain redress for state action in violation of his or her constitutional rights. Before the Court's 1961 revival of section 1983 civil rights actions,264 what little constitutional litigation there was managed quite well without the statutory remedy.265 Moreover, Congress has had fewer occasions to rely on Hans since its efforts in this second category are largely confined to one statute: section 1983.266


255. By contrast, the idea that the mere existence of a constitutional right carried with it the authority to obtain relief in court was the means by which judicial remedies were made available. See Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 163 (1803) ("it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded") (quoting 3 W. BLACKSTONE, COMMENTARIES 23); see also Middlesex County Sewage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 23-26 (1981) (Stevens, J., concurring in part and dissenting in part) (discussing cases approving and applying Court-created constitutional remedies). The premier model for constitutional claims against state actors — Ex parte Young, 209 U.S. 123 (1908) — succeeded without any need for section 1983.

It is difficult to see how there has been any reliance interest with regard to the passing of section 1983. Whether section 1983 is considered as a vehicle for redressing violations of constitutional or statutory rights, Congress cannot be said to have relied on Hans in passing it, since Congress enacted it almost twenty years before Hans was decided.\(^{257}\) Moreover, section 1983 has a legislative history replete with much anti-state rhetoric,\(^ {258}\) and the debates on section 1983 are devoid of any mention of the eleventh amendment.\(^ {259}\) If Congress had thought about, or researched, the eleventh amendment, it is likely that it would have discovered Chief Justice Marshall’s statements in Cohens v. Virginia,\(^ {260}\) where he stated that the eleventh amendment did not apply at all to federal question cases.\(^ {261}\) These statements were not contra-


\(^{259}\) The Court has viewed Congress’ failure to mention the eleventh amendment as indicating that Congress must have assumed that many of the claims it had authorized by section 1983 would be barred by the eleventh amendment. Quern, 440 U.S. at 343 (concluding that the silence on the eleventh amendment is itself a significant indication of legislative intent).

There are also more neutral explanations. Congress may have been silent on the subject because other parts of the bill were more controversial. Other provisions of the same bill (which passed) included such invasions of state sovereignty as military takeovers of state and local governments and the suspension of the writ of habeas corpus for persons arrested by federal agents. See Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, §§ 3-4, 17 Stat. 13, 14-15. By contrast, section 1, the section that became section 1983, was described as “so very simple” because it was “really reënacting the Constitution.” Cong. Globe, 42d Cong., 1st Sess., 569 (1871) (statement of Sen. Edmunds) (floor manager of the bill who stated his supposition that no one would oppose the portion of the bill that became § 1983). It is significant that the Civil Rights Act was reenacting provisions of the Constitution that stated “[n]o State shall” violate the rights set out in the fourteenth amendment. U.S. Const. amend. XIV, § 1.

\(^{260}\) 19 U.S. (6 Wheat.) 264 (1821).

\(^{261}\) Chief Justice Marshall rejected any notion that states would be immune in federal question cases, because From this general grant of [federal question] jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our constitution; the subordination of the State governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department; are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognisable in the courts of the Union, whoever may be the parties to that case.

Id. at 382-83.
dicted by the Court until nearly seventy years later in *Hans*.\textsuperscript{262} Before *Hans*, no legal scholars approached such a broad reading of eleventh amendment immunity.\textsuperscript{263} Since section 1983 is the primary vehicle for the vindication of federal constitutional and statutory rights against state action, and since it was passed well before *Hans*, it is difficult to see how Congress could have relied on a broad reading of the eleventh amendment as set forth in *Hans*.\textsuperscript{264}

**CONCLUSION**

*Hans v. Louisiana* has been roundly criticized for holding

He also stated that:

If this writ of error be a suit, in the sense of the [eleventh] amendment, it is not a suit commenced or prosecuted 'by a citizen of another state, or by a citizen or subject of any foreign state.' It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

*Id.* at 412.

\textsuperscript{262} *Hans v. Louisiana*, 134 U.S. 1, 19-20 (1890).

The Court in *Hans* believed that it should disregard the statement as dictum, since Chief Justice Marshall also justified the *Cohens* holding on the ground that a writ of error on appeal was not a suit against a state. *Id.*

In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the Court had similarly observed that 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 [s]tate, by the citizens of another [s]tate, or by aliens." *Id.* at 857-58.

\textsuperscript{263} For instance, Justice Story's famous treatise on the Constitution simply cited *Osborn*, quoted *supra* note 261, to explain the import of the eleventh amendment. *See* J. Story, *supra* note 129, at 462. Moreover, Judge Conkling, in his widely respected treatise on federal courts, observed that the eleventh amendment applied to suits against a state by citizens of another state, but that "if the case arises under the Constitution... or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties." A. Conkling, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* 4 (1864); *see also* B. Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States* 14, 18 (1880) (articulating Conkling's understanding of the eleventh amendment).

Most importantly, none of these sources suggested that there might be some broad constitutional immunity that states enjoyed which would defeat even federal constitutional claims against them.

\textsuperscript{264} I am aware that the Court has recently construed section 1983 based on the contrary assumption — that Congress believed that states would be immune from the constitutional claims authorized to be brought under its provisions. *See* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989). If the Court either overrules or reinterprets *Hans*, *Will* would have to be reconsidered.

To disclose any possible source of bias in the matter, I should disclose that I was lead counsel in and argued the *Will* case.
that the eleventh amendment bars suits by citizens against their own state, including federal constitutional claims, despite its more narrow wording limiting its sweep to suits against states by citizens of other states. This interpretation of the eleventh amendment conflicts with the command of the fourteenth amendment that states respect the rights of their citizens. The Court has reacted to this conflict between immunity and accountability by creating fictions instead of considering whether *Hans* should be overruled.

There are *stare decisis* considerations that militate against overruling a one-hundred-year-old precedent — even if it is wrong — and the Court has so far responded to those concerns by declining to overrule *Hans*. However, there is another way to avoid the impact that *Hans* has had on federal law claims without overruling it. Even a cursory reading of *Hans* reveals that it did not specifically consider and hold that federal law claims were barred by the eleventh amendment. A closer reading of *Hans* in its proper historical context reveals that the claim involved in that case was not a federal constitutional claim, but a common law claim to enforce a contract, to which the Court quite properly applied another common law doctrine — state sovereign immunity — to bar it. Moreover, the Court in *Hans* opined in dictum that, had a constitutional claim been presented, neither the eleventh amendment nor state sovereign immunity would have barred it. So understood, *Hans* does not stand for the proposition that the eleventh amendment bars federal law claims, and the Court should promptly reconsider that question and hold that it does not.