Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise

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Since its decision in Hans v. Louisiana, *the Supreme Court has generally read the Eleventh Amendment as barring federal court jurisdiction over damage claims by private citizens against states for violations of federal law. The Court, however, has developed an exception to this broad jurisdictional bar: an "unmistakably clear" statement in the text of a federal statute of Congress' intent to abrogate the states' Eleventh Amendment immunity will do so with regard to claims brought under that statute. This Comment argues that, in most cases, the Court's Eleventh Amendment clear statement rule has been an effective "subconstitutional" compromise between adherents to the state sovereign immunity principle first announced in* Hans *and scholars who have advocated the adoption of a narrower interpretation of the Eleventh Amendment that would bar only those cases based on the diversity clause of Article III. The author contends, however, that this compromise fails to address one significant class of claims: damage claims brought against states for violation of federal law where, under the terms of the statute, the federal courts exercise exclusive jurisdiction over the claim. The author considers the effect of the Eleventh Amendment clear statement rule in such cases, and concludes that neither the advocates of the* Hans *decision nor those who support a more limited reading of the Eleventh Amendment have considered the application of the rule to cases involving statutory grants of exclusive federal jurisdiction. The author suggests an exception to the clear statement rule in this limited class of cases. Such an exception, the author reasons, is an appropriate addition to the Court's current Eleventh Amendment doctrine and is consistent with Supreme Court precedent.*

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INTRODUCTION

In March 1993, in *Thiokol Corp. v. Department of Treasury,*[1] the Sixth Circuit held that the U.S. Congress failed to abrogate the states' Eleventh Amendment immunity when it enacted the Employee Retirement Income Security Act (ERISA).[2] The *Thiokol* court consequently determined that it had no jurisdiction to consider the plaintiffs' claims for the recovery of tax payments that Michigan had allegedly collected in violation of ERISA,[3] Federal courts, however, have exclusive jurisdiction over most ERISA cases,[4] including the type of action brought by the *Thiokol* plaintiffs.[5] The *Thiokol* court's conclusion therefore did not simply bar the plaintiffs from recovering the illegally obtained funds in federal court; it barred them from recoveriug the funds in *any* court, federal *or* state.

While there is an apparent split among the circuit courts regarding whether Congress abrogated the Eleventh Amendment when it enacted ERISA,[6] the *Thiokol* court's approach has a reasonable foundation in Supreme Court precedent.[7] The Supreme Court's current doctrine requires Congress to make its intention to abrogate the Eleventh Amendment's prin-

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1. 987 F.2d 376 (6th Cir. 1993).

2. *Id.* at 382; *see* Employee Retirement Income Security Act of 1974 (ERISA), Pub, L. No. 93-406, 88 Stat. 832 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992)).

3. 987 F.2d at 382.

4. Under 29 U.S.C. § 1132(e)(1), the federal courts have exclusive jurisdiction over all civil actions brought under ERISA except for actions under § 1132(a)(1)(B). Section 1132(a)(1)(B) governs actions brought by an ERISA participant or beneficiary to recover benefits due under the terms of an ERISA plan, to enforce rights due under the terms of the plan, or to clarify rights to future benefits under the terms of the plan.

5. The *Thiokol* plaintiffs were suing to enforce ERISA's preemption provisions for the recovery of tax payments. *See* 29 U.S.C. § 1144(b)(5)(B)(i) (preempting all state tax laws relating to employee benefit plans). Because this action does not fall within the scope of 29 U.S.C. § 1132(a)(1)(B), it is subject to ERISA's exclusive jurisdiction provision. *See* 29 U.S.C. § 1132(e)(1).

6. In E-Systems, Inc. v. Pogue, 929 F.2d 1100 (5th Cir. 1991), the Fifth Circuit upheld a ruling by the district court that directed a return of monies that were collected by Texas in violation of ERISA. Although Texas raised an Eleventh Amendment objection on appeal, *id.* at 1101, the Fifth Circuit did not mention the Amendment in its opinion—it merely upheld the award of monies to the plaintiffs. *Id.* Texas subsequently appealed for a stay of execution pending a grant of certiorari by the Supreme Court. In granting the stay upon a reasonable probability of a grant of certiorari, Justice Scalia noted that the Fifth Circuit's position "presumably rests upon the proposition that ERISA has impliedly authorized suit against states for monetary (as well as injunctive) relief, thus abrogating sovereign immunity." Barnes v. E-Systems, Inc. Group Hosp. Ins. Plan, 112 S. Ct. 1, 3 (Scalia, J.). Certiorari was later denied. 112 S. Ct. 585 (1991). Consequently, the Fifth Circuit's award of monies to the plaintiffs and its implicit position regarding ERISA and the Eleventh Amendment technically remains good law in that circuit. *But see* Travelers Ins. Co. v. Cuomo, 1992 WL 350772 (S.D.N.Y. 1992) (granting a preliminary injunction blocking the state from collecting funds because, in part, the plaintiffs would be "irreparably harmed" as the Eleventh Amendment would bar the plaintiffs from recovering the funds later by filing an ERISA claim in federal court).

7. Justice Scalia suggested that there was a substantial possibility that the Fifth Circuit's position in *E-Systems* would be reversed, noting that "ERISA makes no mention of monetary relief, and in any event our cases do not favor implicit abrogation of Eleventh Amendment immunity." *Barnes,* 112 S. Ct. at 2-3.

ciple of sovereign immunity "unmistakably clear in the text of the statute."[8] ERISA does not contain such "unmistakably clear" language.[9] Thus, under the current doctrine, ERISA does not abrogate states' sovereign immunity under the Eleventh Amendment. Accordingly, any suit against a state seeking damages for a violation of ERISA is barred from federal court.

This Comment focuses on the unique effect of statutory clauses granting exclusive federal jurisdiction in Eleventh Amendment cases. It argues that the Supreme Court's doctrine should permit federal courts to look beyond the simple text of federal statutes containing exclusive jurisdiction provisions when determining whether to dismiss a case for lack of jurisdiction pursuant to the Eleventh Amendment. More specifically, Congress' explicit grant of exclusive jurisdiction to the federal courts in the text of a statute like ERISA should be sufficient to justify a narrow exception to the clear statement rule. Under this approach, the *Thiokol* court could have considered the legislative history and overall structure of ERISA in determining whether a damage remedy against a state is necessary to ensure the fulfillment of the statute's goals. Such an approach might have led to a different result in *Thiokol.* This Comment argues that such an exception is consistent with the reasoning employed by the Supreme Court when it introduced the clear statement rule. More importantly, such an exception may properly be viewed as being consistent with the Court's contemporary Eleventh Amendment abrogation doctrine, which has shifted to accommodate the extensive historical critiques produced by legal scholars during the 1970s and 1980s.[10]

Part I of this Comment focuses on the historical origins and development of the Supreme Court's Eleventh Amendment jurisprudence.[11] This Part introduces the Amendment and discusses *Hans v. Louisiana,*[12] in which the Court first announced the broad theory of sovereign immunity that has become the basis for its modern Eleventh Amendment doctrine. Part I also discusses the post-*Hans* complexities that have developed in the

8. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

9. *Thiokol,* 987 F.2d at 382. Of course, when enacting ERISA in 1974, Congress could not have known that such a clear statement would be required. The Supreme Court has imposed the clear statement obligation on similar pre-*Atascadero* statutes, however. *See* Dellmuth v. Muth, 491 U.S. 223, 232 (1989) (holding that the Education of the Handicapped Act of 1975 did not abrogate the Eleventh Amendment).

10. Unlike many revisionist critiques of the Supreme Court's Eleventh Amendment jurisprudence, this Comment's argument is not based on a need for the Supreme Court to undertake a comprehensive reinterpretation of the Eleventh Amendment. Instead, this Comment focuses on the Court's use and development of the *Atascadero* clear statement rule in a manner that achieves many of the same practical results sought by revisionist scholars without upsetting over 100 years of judicial precedent. *See generally* George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity,* 68 N.C. L. REV. 867, 891 (1990) (arguing that "[w]hile the revisionists may not have won [the battle to overrule *Hans*], they largely have won the war for national supremacy over state immunity").

11. *See infra* text accompanying notes 18-74.

12. 134 U.S. 1 (1890).

Court's Eleventh Amendment jurisprudence. These complexities are a product of the Court's efforts to resolve the inherent conflict between the broad declaration of state sovereign immunity announced in *Hans* and the Supremacy Clause's goal of ensuring state compliance with federal law.

Part II then considers the extensive critiques of the Court's Eleventh Amendment jurisprudence that have been advanced by legal scholars in recent years.[13] Most of these critiques have argued for a reversal of *Hans* in light of compelling textual and historical evidence surrounding the meaning of the Amendment.[14] In particular, scholars have argued that the Eleventh Amendment should be read as limiting federal court jurisdiction in suits against states only when the federal court's jurisdiction is based on Article III's grant of diversity jurisdiction.

Part III argues that the Court has responded to these academic critiques by introducing and subsequently modifying the doctrine of congressional abrogation.[15] By permitting Congress to abrogate the Eleventh Amendment, the Court severely limited the constitutional scope of the *Hans* decision. Part III also reasons that the Court's development of the abrogation doctrine has been an appropriate compromise between the Court's traditional Eleventh Amendment jurisprudence and the extensive legal critiques of that jurisprudence. In addition, while the abrogation compromise is the result of the intersection of certain constitutional principles, the compromise necessarily exists at something less than a constitutional level. Thus, the clear statement rule, which is the functional component of the Court's modern Eleventh Amendment abrogation doctrine, should not be viewed as a constitutionally-based rule of statutory interpretation.

Part IV then considers instances where Congress has granted exclusive subject matter jurisdiction to the federal courts.[16] In such cases, the clear statement compromise leaves some plaintiffs without a forum in which to present their federal claims. Part IV suggests that this awkward outcome may be the product of a legal assumption which informs much of modern jurisdictional jurisprudence: the availability of state courts to hear federal claims. A review of the history surrounding the adoption of the Eleventh Amendment and the Court's major modern decisions in Eleventh

13. *See infra* text accompanying notes 75-110.

14. *See, e.g.*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-519 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I*, 126 U. PA. L. REV. 515 (1978) [hereinafter Field, *Part One*]; William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989) [hereinafter Fletcher, *A Reply to Critics*]; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983) [hereinafter Fletcher, *A Historical Interpretation*]; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988).

15. *See infra* text accompanying notes 111-58.

16. *See infra* text accompanying notes 159-226.

Amendment cases suggests that an assumption regarding the availability of state courts may have been present throughout the development of the Court's jurisprudence in this area. More importantly, it appears that the Court has never addressed the unique circumstances that arise when an exclusive jurisdiction provision intersects with an Eleventh Amendment defense.

Finally, Part V considers the effect of exclusive jurisdiction provisions on the policy choices embodied in the clear statement rule.[17] The unique nature of exclusive jurisdiction provisions is sufficient to justify a narrow exception to the clear statement rule. This exception would permit federal courts to look beyond the strict statutory language to consider whether federal jurisdiction is necessary in suits against a state in order to fulfill the statute's goals. If granting federal court jurisdiction would further those goals, then courts should hold that the exclusive jurisdiction clause of a statute abrogates the Eleventh Amendment, and that federal court jurisdiction is therefore permissible. Part V also demonstrates how the proposal would work in practice and notes that cases involving *both* exclusive jurisdiction *and* federal preemption provisions, such as *Thiokol,* might be prime candidates for findings of implied abrogation.

I

HISTORICAL ORIGINS OF ELEVENTH AMENDMENT DOCTRINE

A. Chisholm v. Georgia *and the Passage of the Eleventh Amendment*

The Eleventh Amendment traces its origins to a 1793 Supreme Court decision, *Chisholm v. Georgia.*[18] In *Chisholm,* a South Carolina citizen sued the state of Georgia *in assumpsit* for breach of contract in the United States Supreme Court.[19] Georgia refused to respond to the case, claiming that an unconsenting state was immune to suit brought by a private citizen in the federal courts.[20] The Supreme Court rejected this contention, however, and held that the clear language of Article III of the Constitution gave the Court original jurisdiction over the case.[21]

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17. *See infra* text accompanying notes 227-85.

18. 2 U.S. (2 Dall.) 419 (1793).

19. A suit *in assumpsit* is a "common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal." BLACK'S LAW DICTIONARY 122 (6th Ed. Deluxe 1990). The case was *not* brought under the Contracts Clause of the Federal Constitution, thus there was no federal question in the case. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1055 n.97 (arguing that even under later approaches to the Contracts Clause, "the Court probably still would not have considered Georgia's action to be a violation of the contracts clause").

20. *Chisholm,* 2 U.S. (2 Dall.) at 419.

21. *Id.* at 451, 464, 469, 478. Article III, Section 2 of the Federal Constitution grants the Supreme Court original jurisdiction over controversies "between a State and Citizens of another State." U.S. CONST. art. III, § 2.

State legislatures around the nation reacted with hostility to the decision.[22] While legal scholars have debated the extent of this outrage,[23] there is little question that the *Chisholm* decision was the motivating factor behind the adoption of the Eleventh Amendment.[24] Within two days of the *Chisholm* decision, a constitutional amendment to overrule the case was introduced in the Senate.[25] The final version of the Amendment was formally adopted in early 1794.[26] It reads:

> 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.[27]

Within one year of the Amendment's passage in Congress, the required number of states had ratified it.[28] Thus, in a mere two years after the *Chisholm* decision, the U.S. Constitution had been amended in order to counteract the ruling of the Supreme Court.[29]

B. Supreme Court Interpretation of the Eleventh Amendment

1. Hans v. Louisiana *and the Doctrine of Sovereign Immunity*

The scope of the Eleventh Amendment was not immediately apparent upon its passage. The first significant case involving the Eleventh Amendment did not arise until 1821.[30] Moreover, while the Supreme Court

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22. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1058 (arguing that the alarm at the decision was inspired not only by "the symbolic affront to [the states'] sovereignty, but also because of their considerable indebtedness in the postwar period").

23. For a close examination of the historical evidence regarding the degree of "shock" inspired by the *Chisholm* decision, see Gibbons, *supra* note 14, at 1926-39.

24. PAUL M. BATOR ET AL, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1160 (3rd ed. 1988) [hereinafter HART & WECHSLER].

25. *Id.*

26. 4 ANNALS OF CONG. 25 (1794).

27. U.S. CONST. amend. XI.

28. Fletcher, *A Historical Interpretation, supra* note 14, at 1059.

29. *Id.*

30. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). In *Cohens,* several defendants appealed their convictions by the Virginia Supreme Court to the United States Supreme Court on the grounds that the convictions violated federal law. *Id.* at 375-76. In affirming the convictions of the defendants, the Supreme Court rejected Virginia's argument that the Eleventh Amendment deprived the Supreme Court of jurisdiction over the case. *Id.* at 405-12. In a now-famous passage from *Cohens,* Chief Justice John Marshall invoked the principal that "a well-constituted government" requires that the powers of the judiciary be "co-extensive" with that of the legislature. *Id.* at 384-85; *see also* HART & WECHSLER, *supra* note 24, at 1160.

Some scholars have read Justice Marshall's opinion in *Cohens* as indicating that the Eleventh Amendment has no applicability to cases involving federal questions. *See, e.g.,* Fletcher, *A Historical Interpretation, supra* note 14, at 1060. Others have suggested that the opinion could be read more narrowly, as "recognizing an exception to the Eleventh Amendment limited to appellate review of state court judgments—an exception demanded by the need to ensure the supremacy of federal law." HART & WECHSLER, *supra* note 24, at 1161 (citing Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism,* 89 HARV. L. REV. 682, 685 (1976)).

addressed the Eleventh Amendment in a number of early cases, those cases do not present a comprehensive jurisprudential approach to the Amendment.[31] Indeed, it appears that the Eleventh Amendment existed in relative obscurity during most of the first century of its existence.[32] In 1890, however, the Supreme Court issued a decision that was "a major turning point" in modern Eleventh Amendment doctrine.[33] That decision, *Hans v. Louisiana,*[34] became the touchstone for the Supreme Court's Eleventh Amendment jurisprndence for most of the twentieth century. Indeed, the modern debate regarding the proper interpretation of the Eleventh Amendment has focused its attention on the *Hans* decision.[35]

In *Hans,* a Louisiana citizen sued the State of Louisiana in federal court for a violation of the Contracts Clause of the Federal Constitution.[36] The Supreme Court held that the Eleventh Amendment immunized the State of Louisiana from suit in federal court.[37] In reaching this conclusion, the Court interpreted the Amendment in a manner that has become the basis of modern Eleventh Amendment doctrine. First, the *Hans* Court invoked a broad principle of sovereign immunity for the states. It argued that, due to the nature of state sovereignty, a state is "not . . . amenable to the suit of an individual *without its consent.*"[38] The Eleventh Amendment, the Court concluded, was passed in recognition of this fundamental principle.[39] In support of this proposition, the Court noted that the Amendment was passed in direct response to the *Chisholm* Court's refusal to acknowledge this sovereign right of the states.[40] Second, the Court reasoned that, despite the language of the Amendment, this basic principle of sovereign immunity must necessarily extend to suits by in-state residents.[41] To allow in-state citizens to sue unconsenting states in federal court for claims that would be barred if they were brought by out-of-state parties would undermine the very purpose of the Amendment.[42] The Court reasoned that the states

31. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1083-87 & n.217 (describing the Supreme Court's pre-Civil War Eleventh Amendment cases, and noting that those opinions are "not free from ambiguity").

32. *See* HART & WECHSLER, *supra* note 24, at 1160 (noting that, "[b]efore the Civil War, the Supreme Court faced relatively few cases involving the Eleventh Amendment").

33. *Id.* at 1162.

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

35. *See infra* text accompanying notes 75-110 (discussing the modern debate between the proponents of the *Hans* decision and the anti-*Hans* scholars).

36. *Hans,* 134 U.S. at 3.

37. *Id.* at 20-21.

38. *Id.* at 13 (quoting THE FEDERALIST No. 81, at 248 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981)).

39. *Hans,* 134 U.S. at 18-19.

40. *Id.* at 11-14, 18-19. By denying jurisdiction, the *Hans* Court implicitly rejected the federal question distinction made by Justice Marshall in *Cohens. See supra* note 30.

41. *Hans,* 134 U.S. at 15.

42. *Id.*

would never have ratified the Amendment if its language had been understood to permit such a result.[43]

Since the *Hans* decision, the Supreme Court has consistently read the Amendment as barring citizens' suits against unconsenting states in federal court.[44] Thus, the broad principle of sovereign immunity that the *Hans* Court read into the Eleventh Amendment has remained the basis of the Court's Eleventh Amendment jurisprudence for over a century. Consequently, while Eleventh Amendment doctrine has grown increasingly complex,[45] the Court's focal point in all Eleventh Amendment cases has been on "sovereign immunity."[46]

2. *The Modern Era: Doctrinal Complexities*

While the Supreme Court's Eleventh Amendment jurisprudence focuses on states' sovereign immunity to suit, an absolute bar on lawsuits brought against states would render the federal system unworkable.[47] The constitutional structure of the federal system assumes that, at times, it is necessary to control "state behavior by federal law in order to protect private individuals."[48] As a result, the Supreme Court has occasionally modified the general principle of sovereign immunity announced in *Hans* with rules that permit a limited set of claims to be brought against states in federal court.[49]

a. *The Fiction of Ex parte* Young

Soon after the *Hans* decision, the Supreme Court recognized that if the *Hans* principle of state sovereign immunity were fully realized, citizens would be left without federal court relief against states that had violated their federal rights, and the states would be essentially immune from all federal obligations. Consequently, in *Ex parte Young*,[50] the Court created a convenient legal fiction that permits citizens to obtain injunctive relief against states by suing state officials rather than the state itself. According

43. *Id.*

44. Of course, this broad principle has been modified by the judicially created doctrines of state waiver, the *Ex parte Young* fiction, the *Edelman* prospective/retrospective distinction, and congressional abrogation. *See infra* text accompanying notes 50-74, 123-45.

45. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1044.

46. *See, e.g.*, Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 689 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity.").

47. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1040-41.

48. *Id.* at 1041.

49. The limiting doctrines discussed here are state waiver and the fictions of *Ex parte Young* and *Edelman v. Jordan*. *See infra* text accompanying notes 50-74. The fourth major limitation on immunity, the doctrine of congressional abrogation, is discussed *infra* text accompanying notes 111-45. Abrogation doctrine differs significantly from the other three limiting doctrines because, I will argue, it embodies an implicit compromise between the Court and the critics of the *Hans* decision. *See infra* text accompanying notes 146-58.

50. 209 U.S. 123 (1908).

to the *Young* doctrine, a suit against a state officer is not a suit against the state for the purposes of the Eleventh Amendment if the remedy sought is an injunction against illegal action taken by a state officer. According to the fiction, a state officer is not acting on behalf of the state when he or she acts in violation of federal law.[51] Thus, the Eleventh Amendment does not bar an injunctive suit against the official.

The *Young* fiction has permitted a broad array of lawsuits against state officials that otherwise might have been barred by the sovereign immunity language of *Hans*.[52] Application of the fiction therefore partially undermines the sweeping principle of sovereign immunity announced by the *Hans* Court.[53] The Court, however, has apparently reconciled itself to the use of this fiction "as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' "[54]

b. Consent to Suit/State Waiver Doctrine

The sovereign immunity principle announced in *Hans* relied heavily on the affront to state sovereignty that is caused when an *unconsenting* state is sued in federal court.[55] Thus, the *Hans* principle of sovereign immunity does not apply to states that *consent* to federal court jurisdiction. Indeed, in several instances, the Court has found that the Eleventh Amendment did not apply because states had explicitly consented to suit in federal court.[56]

Building on this concept of state consent to suit, the Court developed a doctrine under which courts imply consent by determining that a state has "waived" its Eleventh Amendment immunity by actions other than explicit

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51. *Id.* at 159-60. The principle of *Ex parte Young* has been limited to cases where the state officer has violated federal law; the *Young* fiction may not be used to obtain federal court jurisdiction when a suit is brought against a state official for violating *state* law. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 117-21 (1984).

52. *See, e.g.*, David E. Engdahl, *Immunity And Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1 (1972).

53. The fiction of *Ex parte Young* is also fundamentally inconsistent with the definition of state action under the Fourteenth Amendment. Because the *Young* fiction permits injunctive relief against a state actor for violations of the Fourteenth Amendment, the Court's vision of "state action" for the purposes of the Eleventh Amendment is necessarily different from its view of "state action" under the Fourteenth Amendment. *See* Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 685 (1982) (plurality opinion) (noting the "well-recognized irony in *Ex parte Young*" with regard to the Fourteenth Amendment).

54. *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160).

55. *See* Hans v. Louisiana, 134 U.S. 1, 12-18 (1890); *see also* THE FEDERALIST No. 81, *supra* note 38, at 248 ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*").

56. *See, e.g.*, Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 279-82 (1959) (finding that a state's assent to a "sue-and-be-sued" clause in an interstate compact operated to waive its Eleventh Amendment immunity); Clark v. Barnard, 108 U.S. 436, 447-48 (1883) (finding that the state's voluntary appearance in federal court operated to waive immunity).

consent.[57] In 1964, the development of state waiver doctrine peaked with the holding of *Parden v. Terminal Railway.*[58] In *Parden,* the Court concluded that Alabama had "constructively waived" its immunity to federal suits under the Federal Employees Liability Act (FELA) "when it began operation of an interstate railroad approximately 20 years after enactment of the FELA."[59] That conclusion was based on the notion that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce."[60]

The rationale of the *Parden* decision threatened to allow a wide range of lawsuits against states in federal court by implying waiver in many cases and thereby eliminating the legacy of *Hans.* The Court, however, subsequently retreated from *Parden*'s expansive approach to state waiver and limited the case to its specific facts.[61] Ultimately in 1987, *Parden*'s waiver approach to the Eleventh Amendment was overruled directly.[62]

While the *Parden* Court's reasoning has been characterized as "schizophrenic,"[63] the decision was an early indication that the *Hans* approach to the Eleventh Amendment was in serious trouble. Moreover, the Court's expansive reading of state waiver in *Parden* foreshadowed the current state of the law by using a legal construct that claimed to adhere to the core principle of *Hans* but, in reality, subverted that principle.[64]

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57. The Eleventh Amendment waiver doctrine that developed during the 100 years after *Hans* required the Court to make very subtle distinctions. *See, e.g.,* Smith v. Reeves, 178 U.S. 436, 441 (1900) (holding that a state does not waive its Eleventh Amendment immunity by permitting suits in state courts).

58. 377 U.S. 184 (1964).

59. *Id.* at 192.

60. *Id.* at 191.

61. *See* Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) ("The dramatic circumstances of the *Parden* case, which involved a rather isolated state activity[,] can be put to one side.").

62. Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987).

63. *See* HART & WECHSLER, *supra* note 24, at 1215 (citing Tribe, *supra* note 30, at 688).

64. It is ironic that, in order to preserve the principles of the *Hans* decision, the Court chose to abandon the *Parden* state waiver approach and replace it with the abrogation doctrine, which is far less consistent with the logic of *Hans. See infra* text accompanying notes 143-58. The waiver doctrine, at least, is consistent with a formal reading of *Hans,* as it focuses on actions taken by the states to surrender their constitutionally protected rights. In this way, the *Parden* approach is remarkably similar to the Court's jurisprudence regarding the Tenth Amendment. *See* Garcia v. San Antonio Metro. Trans. Auth., 469 U.S. 528, 552 (1985) (concluding that "[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."); *see also* George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363, 365 (1985) (examining the relationship of the Court's jurisprudence regarding the Eleventh Amendment with its approach to the Tenth Amendment and arguing that the *Atascadero* decision gives the Eleventh Amendment more "bite" than the Tenth).

Presumably, the Court's preference for the abrogation doctrine stems both from the Court's ability to control the scope of the doctrine and from the fact that the doctrine allows the Court to avoid engaging in the subtle calculations regarding state functions that were required under the now-defunct "traditional governmental functions" analysis of its decision in National League of Cities v. Usury, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

c. Edelman v. Jordan *and the Prospective/Retrospective Distinction*

The Court added a further twist to its already-complicated Eleventh Amendment jurisprudence with its 1974 decision, *Edelman v. Jordan.*[65] In *Edelman,* the Court held that the Eleventh Amendment permitted prospective injunctive relief against state officials, but ruled that retroactive monetary relief that requires payment of funds from the state treasury is barred by the Eleventh Amendment.[66] The Court reached this conclusion despite its acknowledgement that some forms of prospective relief may have a greater effect on state treasuries than certain types of retroactive payments.[67] The prospective/retrospective distinction announced by the *Edelman* Court has been difficult to apply,[68] and the Court has occasionally carved out narrow exceptions to the rule.[69] In general, however, the *Edelman* Court's focus on the protection of the state treasury against retroactive liability has become a significant prong of modern Eleventh Amendment doctrine.[70]

3. Summary

The broad principle of sovereign immunity announced in *Hans* has evolved into a complex set of doctrines that rely on the judicial characterization of the state action as well as the nature of the relief sought by the plaintiff. As one prominent scholar has noted, "[a]ll we are left with is an *ad hoc* mish-mash of *Young* and *Edelman,* of full remedy and state sovereignty, of supremacy and immunity, of law and lawlessness."[71] The confusing result has been called "a doctrinal obstacle course,"[72] an "elaborate structure of fiction and artifice,"[73] and even "a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field."[74]

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65. 415 U.S. 651 (1974).

66. *Id.* at 663-71.

67. *Id.* at 667; *see also* Milliken v. Bradley, 433 U.S. 267, 288-90 (1977) (allowing prospective relief even though it would have "a direct and substantial impact on the state treasury").

68. HART & WECHSLER, *supra* note 24, at 1191-92 (discussing the Court's efforts to apply the *Edelman* standard in *Milliken*).

69. *See, e.g.,* Hutto v. Finney, 437 U.S. 678, 691-93 (1978) (permitting an award of attorney's fees against the state).

70. Professor Amar notes that, under the *Edelman* doctrine, "[p]erversely, a state government that spends money to avoid violating the Constitution ends up financially worse off than one that cynically flouts higher law until ordered into prospective compliance." Amar, *supra* note 14, at 1479.

71. *Id.* at 1480.

72. *Id.*

73. Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations,* 69 CALIF. L. REV. 189, 197 (1981).

74. Fletcher, *A Historical Interpretation, supra* note 14, at 1044.

II

REVISIONIST THEORY—THE ANTI-*HANS* SCHOLARS AND THE REINTERPRETATION OF THE ELEVENTH AMENDMENT

In recent years, the *Hans* decision and the Court's focus on sovereign immunity in Eleventh Amendment inquiries have been subject to severe scholarly criticism. In particular, academics have presented persuasive arguments that the *Hans* Court incorrectly grafted the principle of state sovereign immunity onto the Eleventh Amendment.[75] These scholars suggest that the Court give the Amendment a much narrower reading: barring only federal suits against states in federal court where jurisdiction is based on the identity of the parties.[76] To support their points, the scholars look to the text of the Amendment, the historical evidence regarding its passage, and the overall structure of the Constitution.

In the 1970s, a series of academic articles raised new questions about the historical accuracy of the Supreme Court's traditional approach to the Eleventh Amendment.[77] While not all of this scholarship was well-received,[78] this rush of articles, coupled with a series of Supreme Court decisions,[79] sparked a new academic interest in the Eleventh Amendment. In particular, scholars began to examine closely the history surrounding the Amendment's passage in order to determine whether the Court's Eleventh Amendment doctrine was consistent with the original intent of the Amendment's drafters.[80]

This renewed scholarly focus on the original intent of the drafters of the Eleventh Amendment led certain scholars to reexamine the textual role of the Amendment in the Constitution. In 1978, Professor Field considered the interplay between Article III and the wording of the Eleventh

75. *See, e.g.*, Fletcher, *A Reply to Critics, supra* note 14; Amar, *supra* note 14, at 1475-81; Fletcher, *A Historical Interpretation, supra* note 14; Gibbons, *supra* note 14; Jackson, *supra* note 14; Field, *Part One, supra* note 14.

76. *See, e.g.*, Fletcher, *A Historical Interpretation, supra* note 14, at 1061-62.

77. *See, e.g.*, CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972); Field, *Part One, supra* note 14; Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States,* 126 U. PA. L. REV. 1203 (1978) [hereinafter Field, *Part Two*]; John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 COLUM. L. REV. 1413 (1975); Tribe, *supra* note 30.

78. *See, e.g.*, HART & WECHSLER, *supra* note 24, at 1167 (suggesting that certain positions taken by Professor Field "rest[ ] upon a strained reading of Hans and of the constitutional text").

79. In the 1970s and early 1980s, the Supreme Court rendered decisions in a series of Eleventh Amendment cases. *See* Fletcher, *A Historical Interpretation, supra* note 14, at 1033-34 n.2 (citing Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1982); Cory v. White, 457 U.S. 85, 91 (1982); Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

80. *See, e.g.*, Field, *Part One, supra* note 14, at 527-38 (searching for the historical source of state sovereign immunity); Fletcher, *A Historical Interpretation, supra* note 14, at 1035 (seeking to interpret the Amendment in a manner that is "congruent with the available evidence concerning the circumstances surrounding the amendment and its passage"); Gibbons, *supra* note 14, at 1893 (considering the Supreme Court's Eleventh Amendment doctrine in light of "[a] study of the historical background of the amendment").

Amendment.[81] Her analysis suggested that the Amendment was targeted specifically at the clause in Article III that authorized jurisdiction over controversies between a state and citizens of another state.[82] While Professor Field's conclusions are not now widely accepted,[83] her textual analysis set the stage for a series of scholarly attacks on *Hans* in the mid-1980s.

In 1983, Professor Fletcher launched a powerful attack on the Court's traditional approach to the Eleventh Amendment. Building on Professor Field's textual analysis, Fletcher examined the development of the text of the Eleventh Amendment during the Congressional debates. He suggested that the addition of the words "shall not be construed" during the drafting process "indicates that the amendment focused on a problem of construction."[84] That problem, Fletcher argued, was the state-citizen diversity clause of Article III, "which the Supreme Court in *Chisholm* had *construed* to include cases where the state was a defendant."[85] Thus, according to Fletcher's analysis, the Eleventh Amendment limits the citizen-state diversity clause of Article III "to authorize federal court jurisdiction only when the state was a plaintiff."[86] The Amendment has no effect on suits against states that are based on federal question jurisdiction.

Fletcher supported his position with additional evidence regarding the Founders' drafting of Article III during the Constitutional Convention.[87] He noted that the citizen-state diversity clause was added to the text of Article III with virtually no discussion.[88] He also demonstrated that the clause:

> did not occupy as prominent a place in the debates over the Constitution or the deliberations on the Judiciary Act as one would expect if it had been widely understood, or feared, that by its own force the clause would have permitted private citizens to sue unconsenting states on their outstanding debts.[89]

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81. *See* Field, *Part One, supra* note 14, at 538-46.

82. *Id.* at 539.

83. Professor Field argued that Article III neither imposes nor abrogates state sovereign immunity. Rather, she argued that state sovereign immunity survived the Constitution, but only as "a common law requirement." *Id.* at 538. According to Field, the Eleventh Amendment was designed to restore sovereign immunity as a common law doctrine after the *Chisholm* decision. *Id.* at 540. The Amendment need not be read to impose sovereign immunity as a constitutional requirement. *Id.* Field read *Hans* in a similar light, argning that *Hans* only recoguizes a common law immunity. *Id.* at 541-43. Other scholars have noted that Field's analysis rests on a highly questionable reading of the wording of the Eleventh Amendment. *See* HART & WECHSLER, *supra* note 24, at 1167 & n.11; *see also* Fletcher, *A Historical Interpretation, supra* note 14, at 1037 n.9 (disagreeing with Field's "common law" reading of the Eleventh Amendment, but agreeing with her pereeption that the Eleventh Amendment was directed only at Article III's authorized diversity jnrisdiction).

84. Fletcher, *A Historical Interpretation, supra* note 14, at 1061.

85. *Id.* (emphasis added).

86. *Id.* at 1061-62.

87. *Id.* at 1045-54.

88. *Id.* at 1046.

89. *Id.* at 1054.

Fletcher inferred from this evidence that the Eleventh Amendment was designed merely to clarify the original meaning of the state-citizen diversity clause in light of the erroneous construction given the clause by the *Chisholm* Court.[90]

The same year that Professor Fletcher's article appeared, Judge Gibbons published a powerful historical critique of the Supreme Court's Eleventh Amendment jurisprudence.[91] Judge Gibbons focused his attention on the lack of historical evidence regarding "an original understanding about general and absolute state sovereign immunity."[92] He used an array of historical facts to raise serious questions about the *Hans* Court's assertion regarding the degree of "shock" inspired by the *Chisholm* decision. He argued, rather, that the *Hans* Court's assertion of the sovereign immunity principle was shaped primarily by the "political exigencies" created by the post-Civil War bond crisis.[93] Based on this historical analysis, Judge Gibbons concluded that "the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status."[94]

The articles by Professor Fletcher and Judge Gibbons were followed by additional critiques. In 1987, Professor Amar provided an additional textual and historical critique of the *Hans* decision and the Supreme Court's traditional approach to the Eleventh Amendment.[95] Amar noted that "[n]ot only does the text nowhere mention 'state sovereign immunity,' but the limitations in the text itself are inexplicable if we assume (as does the Court) that the Amendment's purpose was to secure general immunity."[96] Amar argued persuasively that if sovereign immunity were the motive behind the Eleventh Amendment, the Amendment's failure to refer to admiralty and in-state citizen suits makes little sense.[97]

In 1988, Professor Jackson supplemented these arguments by offering a broader critique of the relevance of "sovereign immunity" to an analysis of Article III and the Federal Constitution. She contended that an important "premise of a constitutional system of government was that for a violation of a right, the laws should provide a remedy . . . ."[98] This premise, Jackson argued, is undermined by the doctrine of sovereign immunity, which

90. *Id.* at 1062-63.

91. Gibbons, *supra* note 14.

92. *Id.* at 1936.

93. *Id.* at 2003-04.

94. *Id.* at 2004.

95. Amar, *supra* note 14.

96. *Id.* at 1475.

97. *Id.* at 1476; *see also* Fletcher, *A Historical Interpretation, supra* note 14, at 1060-61 ("The eleventh amendment's failure to mention in-state citizens suggests that its drafters did not intend it to reach federal question suits, for if they intended the amendment to forbid them, their drafting was extraordinarily inept. . . . [I]t is therefore unlikely that the failure to mention admiralty was inadvertent.").

98. Jackson, *supra* note 14, at 50.

"insists on the absence of a judicial remedy for wrongs committed by the government."[99] Jackson also reasoned that the doctrine of sovereign immunity undermines the basic requirement for a judicial power that is "coextensive with the powers of the national government."[100] She concluded, therefore, that an interpretation of the Eleventh Amendment that limits its effects to only party-based jurisdiction is more consistent than present doctrine with "the general principles of government accountability and full judicial power."[101]

Thus, by the late 1980s, a substantial number of legal scholars had adopted a theory of the Eleventh Amendment that was distinctly opposed to the traditional approach taken by the Supreme Court. These scholars argued that by interpreting the Eleventh Amendment to bar federal court jurisdiction in cases involving federal questions, the *Hans* Court seriously misread the textual language and historical purpose of the Amendment. The Amendment does not incorporate a broad conception of state sovereign immunity from federal law. Rather, the Amendment bars only federal jurisdiction over suits against states when that jurisdiction is based solely upon the status of the parties. This new view has come to be known as the "diversity theory" of the Eleventh Amendment.[102]

While the anti-*Hans* scholars have convinced the majority of academics at American law schools,[103] they have encountered one serious source of

99. *Id.* While the premise argued by Jackson here is clearly correct, her conclusion oversimplifies the doctrine of sovereigu immunity by ignoring the potential for the provision of a remedy for a federal violation in the state courts. *See infra* text accompanying notes 162-91.

100. Jackson, *supra* note 14, at 50.

101. *Id.* at 51.

102. *See* Fletcher, *A Reply to Critics, supra* note 14, at 1262.

103. *See* PAUL M. BATOR ET AL, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (3d ed. Supp. 1993) (noting that "a number of commentators now agree that the Eleventh Amendment should not reach a suit by a citizen against his own state"); *see also* Fletcher, *A Reply to Critics, supra* note 14, at 1262 & nn.8 & 9 (1989) (citing a substantial number of commentators within the academic community who have accepted the anti-*Hans* view of the Eleventh Amendment); *id., passim* (persuasively refuting those scholars who question the historical interpretation presented by the anti-*Hans* scholars). *But see* Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment,* 40 HASTINGS L.J. 1123, 1183-85 (1989) (rejecting the approach taken by the anti-*Hans* scholars and arguing that the *Hans* decision may help ensure that Congress had fulfilled its obligation of considering state interests); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment,* 102 HARV. L. REV. 1342 (1989) (contending that, in their quest for a single unified principle, the diversity theorists depart from the plain text of the Eleventh Amendment and that the text of the Amendment itself is the best source to determine the intent of the Amendment's drafters); William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 HARV. L. REV. 1372 (1989) (concluding that the diversity theorists have not supported their contentions regarding the proper historical understanding of the Eleventh Amendment to a degree sufficient to override the presumption in favor of adherence to Supreme Court precedent); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments,* 56 U. CHI. L. REV. 61 (1989) (reasoning that the Eleventh Amendment is intended to create a jurisdictional bar that trumps all of Article III's jurisdictional heads, and concluding that the theoretical difficulties created by this interpretation are best addressed through a reinvigoration of the Tenth Amendment and, perhaps, the repeal of the Eleventh Amendment); *see also* William Burnham, *Taming the Eleventh Amendment Without Overruling* Hans v. Louisiana, 40 CASE W. RES. L. REV. 931, 995 (1990) (presenting an alternative approach to the *Hans*

opposition: the United States Supreme Court. The Court came closest to siding with the scholars in 1985, when four members of the Court acknowledged and largely adopted the approach of the anti-*Hans* academics. In *Atascadero State Hospital v. Scanlon,*[104] Justice Brennan wrote a vigorous dissent—joined by Justices Marshall, Blackmun, and Stevens—in which he argued the position advanced by these scholars: that the Eleventh Amendment addresses only party-based jurisdiction, and that the decision in *Hans* should therefore be overruled.[105] In a series of subsequent dissents in Eleventh Amendment cases, Justice Brennan took the same position.[106] In each of those cases, however, the majority of the Court explicitly rejected the anti-*Hans* position. Indeed, Justice Brennan's strong advocacy of the revisionist position in each of these cases makes the Court's rejection of that position strikingly clear.[107]

In 1989, Justice Brennan finally seemed to yield to the Court's rejection of the anti-*Hans* approach. In his plurality opinion in *Pennsylvania v. Union Gas Co.,*[108] Justice Brennan, champion of the anti-*Hans* scholars, invoked *Hans* as controlling authority while exploring the scope of Congress' abrogation power.[109] One week later, Justice Brennan signed on to a dissent which focused exclusively on Congress' ability to abrogate the Eleventh Amendment, rather than the constitutionality of the *Hans* decision.[110]

With Justice Brennan's retirement from the Court, it appears that the chances of the Court overruling *Hans* in the near future have declined substantially. Thus, despite the compelling historical and textual arguments presented by the anti-*Hans* scholars, it is unlikely that their position will become the basis of the Court's Eleventh Amendment jurisprudence anytime soon.

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controversy and arguing that the Supreme Court need not overrule *Hans* because *Hans* "does not stand for the proposition that the eleventh amendment bars federal law claims").

104. 473 U.S. 234 (1985).

105. *Id.* at 258-59 (Brennan, J., dissenting) (noting that recent research suggests that the Court's Eleventh Amendment doctrine "has rested on a mistaken historical premise").

106. *See* Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Brennan, J., dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496-97 (1987) (Brennan, J., dissenting); Green v. Mansour, 474 U.S. 64, 74 (1985) (Brennan, J., dissenting).

107. *See, e.g., Welch,* 483 U.S. at 478 (noting that Justice Brennan, together with three other justices, had urged the Court to overrule *Hans* "for the fourth time in little more than two years").

108. 491 U.S. 1 (1989).

109. *Id.* at 7.

110. Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 106 (1989) (Marshall, J., dissenting). As explained below, I argue that this shift was less a result of a change in Justice Brennan's view of the Eleventh Amendment than a part of a practical compromise between the pro-*Hans* and anti-*Hans* factions of the Court. *See infra* text accompanying notes 146-58. Indeed, Justice Brennan's shift from being the Court's strongest advocate of an anti-*Hans* position to being a participant in the abrogation debate is the most palpable evidence of the "compromise" embodied in the Court's abrogation doctrine.

III

THE ABROGATION DOCTRINE AND THE SUBCONSTITUTIONAL COMPROMISE

A. The Development of the Abrogation Doctrine

1. The Tribe/Nowak Approach: The Theoretical Bases of Congressional Abrogation

The Court's Eleventh Amendment jurisprudence has not been wholly immune to the influences of academia, however. In its current approach to the Amendment, the Court appears to have accepted the abrogation theory initially advanced by Professors Tribe[111] and Nowak[112] during the mid-1970s.[113]

Professor Tribe focused on the "shall not be construed" language of the Amendment as the key to understanding its meaning. Because federal courts "construe" the judicial power granted in Article III, Tribe read the Eleventh Amendment as creating an immunity only "against the federal judiciary" and not against Congress.[114] Thus, according to Tribe, Congress may exercise its constitutional powers in order to remove any jurisdictional barrier created by the Amendment.

While Professor Nowak took a less textual approach, he reached a similar conclusion. Nowak undertook an historical analysis to argue that the drafters of the Eleventh Amendment were responding, in particular, to "the *judicial* assumption of jurisdiction" over the states.[115] According to Nowak, "[n]o evidence exists that the states had the same fear of congressional authorization of suits against states."[116] Indeed, Nowak argues, it is likely that the drafters of the Eleventh Amendment had an "implicit faith in the congressional ability to balance the interests of the state and federal governments."[117]

Both Nowak and Tribe justified their theories by emphasizing the unique role of Congress as the protector of state interests in the constitutional scheme.[118] As such, they argued, Congress is the appropriate place to address the issue of state immunity from lawsuits in federal court.[119]

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111. Tribe, *supra* note 30.

112. Nowak, *supra* note 77.

113. *See* Brown, *supra* note 10, at 875 (noting that "the Court appears to have accepted abrogation theory as its starting point").

114. Tribe, *supra* note 30, at 693-94. Of course, this conclusion is also supported by the fact that the impetus behind the Amendment was a court case, *Chisholm*, in which the judiciary "construed" Article III as conferring jurisdiction. *See supra* text accompanying notes 18-29.

115. Nowak, *supra* note 77, at 1440 (emphasis added).

116. *Id.* at 1440-41.

117. *Id.* at 1441.

118. *See* Nowak, *supra* note 77, at 1441 ("Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels."); Tribe, *supra* note 30, at 695 ("[I]t has generally been recognized that the states are represented in Congress and that Congress will be attentive to concerns of state governments as separate sovereigns.").

119. *See* Tribe, *supra* note 30, at 695-96; Nowak, *supra* note 77, at 1440-41.

Thus, under the Tribe/Nowak approach, Congress is free to abrogate the state sovereign immunity that is protected by the Eleventh Amendment. When Congress acts in this manner, it is not infringing on any constitutionally-based immunity because no such immunity exists with respect to congressional action.

The abrogation theory suffers from significant theoretical problems. First, the approach appears to grant Congress the power to expand federal court jurisdiction beyond the limitations imposed by Article III, as modified by the Eleventh Amendment. Thus, as Professor Jackson points out, the theory seems to violate the principle of *Marbury v. Madison:*[120] "that Congress cannot extend the jurisdiction of the federal courts beyond the boundaries provided by the Constitution, as construed by the courts."[121] Second, the theory creates a theoretical imbalance between Congress and the federal courts by suggesting that Congress may legislate in areas where the courts may not assume jurisdiction. This imbalance appears to violate the principle of "coextensiveness" that underlies the basic relationship between Congress and the federal courts.[122] Despite these flaws, however, the Supreme Court has gravitated toward the Tribe/Nowak abrogation theory over the past few decades.

2. *Abrogation and the Supreme Court: Early Developments*

In retrospect, the Supreme Court's decision in *Parden* may actually have been the first version of abrogation doctrine, hiding behind a fiction of state acquiescence or waiver.[123] Under the *Parden* doctrine, a state was deemed to have "constructively waived" its immunity to suit in a federal court by participating in an activity governed by federal law.[124] Thus, under *Parden,* Congress could essentially abrogate a state's sovereign immunity by passing any federal legislation that implicated certain state activities.[125]

The Court soon realized, however, that the *Parden* doctrine would quickly eviscerate the *Hans* principle of state sovereign immunity. In *Employees v. Department of Public Health and Welfare,*[126] the Court began to back away from the *Parden* approach, and turned toward a more direct evaluation of the scope of Congress' power to abrogate state sovereign immunity. *Employees* involved a suit by state employees against the state of Missouri for back pay and damages under the Fair Labor Standards Act

120. 5 U.S. (1 Cranch) 137 (1803).

121. Jackson, *supra* note 14, at 43.

122. *See id.* at 50.

123. *See supra* text accompanying notes 54-64.

124. *See supra* text accompanying notes 57-59.

125. *See* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 142 (1980) (suggesting that the *Parden* doctrine confuses the distinction between state waiver of immunity from suit and congressional power to abrogate without state consent).

126. 411 U.S. 279 (1973).

(FLSA). In holding that the case was barred from federal court by the Eleventh Amendment, the Supreme Court apparently rejected the *Parden* view and refused to "assume that Congress, in passing a complex regulatory scheme, intended to make the states suable in federal court."[127] Instead, the *Employees* Court reached the opposite conclusion, holding that Congress did not intend to make the states suable in federal court under the FLSA.[128] But while the *Employees* decision found in favor of state sovereign immunity, its focus on congressional intent left the door open for the development of modern abrogation doctrine. According to the Court's reasoning in *Employees,* Congress presumably could subject a state to suit in a federal court by demonstrating the necessary intent to do so.

In *Fitzpatrick v. Bitzer,*[129] the Supreme Court formally addressed the issue of Congress' power to abrogate the states' Eleventh Amendment sovereign immunity. In holding that the 1972 amendments to the Civil Rights Act of 1964 authorized suits against states in federal court, the Court noted that "Congress may, . . . for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[130] Thus, modern abrogation doctrine was born.

3. *The Modern Approach:* Atascadero *and the Clear Statement Rule*

In the late 1970s and the early 1980s, the Court adopted a flexible approach to abrogation doctrine. When a state raised an Eleventh Amendment defense to a suit brought under a federal statute, the Court would consider the language of the statute as well as its legislative history in order to determine whether Congress intended to abrogate state sovereign immunity when it enacted the relevant provision.[131] The Court's flexible approach to congressional abrogation of the Eleventh Amendment changed abruptly in 1985, however, with its decision in *Atascadero State Hospital v. Scanlon.*[132] In *Atascadero,* the Court held that in order to abrogate a state's "constitutionally secured immunity from suit in federal court [Congress must make] its intention *unmistakably clear* in the language of the statute."[133] The Court reasoned that this clear statement rule was necessary to ensure that federal courts did not subject states to suits when Congress did not intend that the states' immunity be abrogated.[134] Several years later, in

127. Thomas M. Clark, Note, *More Plenary Than Thou: A Post-*Welch *Compromise Theory of Congressional Power to Abrogate State Sovereign Immunity,* 88 COLUM. L. REV. 1022, 1027-28 (1988).

128. 411 U.S. at 285.

129. 427 U.S. 445 (1976).

130. *Id.* at 456.

131. *See, e.g.,* Hutto v. Finney, 437 U.S. 678, 693-94 (1978) (holding that the House and Senate reports concerning the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, indicate a congressional intent to make states liable for attorneys' fees in § 1983 actions).

132. 473 U.S. 234 (1985).

133. *Id.* at 242 (emphasis added).

134. *Id.* at 243.

Dellmuth v. Muth,[135] the Court emphasized that the clear statement rule rendered irrelevant any evidence in favor of abrogation contained in the legislative history of the federal statute.[136]

The *Atascadero* clear statement rule immediately shifted the balance in Eleventh Amendment cases heavily in favor of the sovereign immunity principles underlying *Hans.* After *Atascadero,* Congress could only abrogate sovereign immunity through explicit language in the text of a statute. Moreover, many statutes passed by Congress prior to *Atascadero* have been found to lack the explicit statement in the text necessary under this test, despite significant evidence that Congress intended to subject states to suits in federal court.[137] Indeed, in *Atascadero* itself, the Court applied the clear statement rule to immunize states from federal suits under a statute enacted at a time when the Court took a more flexible approach to abrogation.[138]

Since the introduction of the *Atascadero* clear statement rule, the major focus of controversy regarding abrogation doctrine has been the scope of Congress' power to enact abrogating legislation.[139] For many years, that power was limited to congressional actions governed by the Fourteenth Amendment. This limitation appeared to be consistent with the Court's reasoning in *Fitzpatrick,*[140] and some commentators have argued that the unique nature of the Fourteenth Amendment justified this limitation.[141]

In *Pennsylvania v. Union Gas Co.,*[142] however, the Court apparently resolved the conflict regarding the scope of Congress' power to abrogate state immunity. In that case, five members of the Court agreed that Congress has the power under the Commerce Clause to abrogate state immunity to suit in federal court.[143] As it is difficult to establish a valid basis for distinguishing the Commerce Clause from Congress' other Article

135. 491 U.S. 223 (1989).

136. *Id.* at 230 ("[E]vidence of congressional intent must be both unequivocal and textual. . . . Legislative history generally will be irrelevant . . . .").

137. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Decisions,* 101 YALE L.J. 331, 409 (1991) (noting that the "bait and switch" effect of the *Atascadero* decision has "carve[d] the states out of several important statutory schemes," making them immune to suit despite evidence of Congressional intent to the contrary).

138. *See id.* at 389 n.176 (noting that Congress responded to the *Atascadero* decision by amending the Rehabilitation Act to include a clear statement, thus indicating that Congress believed it had abrogated states' immunity when it originally wrote the statute).

139. *See* HART & WECHSLER, *supra* note 24, at 1218.

140. *Fitzpatrick,* 427 U.S. at 456 (suggesting that Congress has the power to abrogate states' Eleventh Amendment immunity when acting under § 5 of the Fourteenth Amendment in ways that would be impermissible in other contexts).

141. *See, e.g.,* Note, *Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments,* 68 VA. L. REV. 865, 867, 885-86 (1982). The limitation also may resolve the theoretical conflict between the abrogation doctrine and the constitutional basis of sovereign immunity under *Hans* by emphasizing that the Fourteenth Amendment was passed after the Eleventh. *See infra* note 148.

142. 491 U.S. 1 (1989).

143. *Id.* at 13-16 (plurality opinion), 57 (White, J., concurring).

I powers, the Court's post-*Union Gas* doctrine may permit Congress to abrogate state immunity when it acts under any of its enumerated powers.[144] As discussed above, however, that abrogation must take the form required by the strict rule of *Atascadero:* an intention to abrogate that is "unmistakably clear in the language of the statute."[145]

B. The Conflict Between Abrogation Theory and Hans: *The Political Compromise Within the Clear Statement Rule*

The Court's formal acknowledgement that Congress may abrogate the states' Eleventh Amendment sovereign immunity raises some troubling constitutional questions. If the *Hans* principle of sovereign immunity is actually rooted in the Eleventh Amendment, Congress' power to override that immunity is highly questionable. As one commentator has noted: "how can a legislature strip a constitutionally based right?"[146] Congress cannot, after all, override other portions of the Constitution simply by passing properly worded legislation.[147] The Court's acceptance of the abrogation doctrine therefore appears to be an acknowledgement that the *Hans* principle of sovereign immunity is not a right granted directly to the states by the Eleventh Amendment. Indeed, whatever one thinks of the *Hans* principle of sovereign immunity, in light of the Court's acceptance of the abrogation doctrine, that principle must necessarily exist at something less than a constitutional level.[148]

The *Atascadero* clear statement rule, then, is necessarily a *subconstitutional* judicial compromise. This compromise accommodates most of the scholarly critiques of the Court's Eleventh Amendment jurisprudence while retaining the spirit of *Hans* through the creation of a presumption in favor of sovereign immunity. Through this compromise, the Court has minimized disruption of its precedent. The Court can now honor the principle of sovereign immunity expressed in *Hans* while still permitting Congress to override that immunity when doing so is necessary to achieve important

144. Of course, even if congressional power to abrogate states' Eleventh Amendment immunity is limited to its powers under the Commerce Clause and does not extend to Congress' other Article I powers, the reach of the Commerce Clause is so great that, as a practical matter, there are relatively few limits on Congress' abrogation power.

145. *Atascadero,* 473 U.S. at 242.

146. Clark, *supra* note 127, at 1029.

147. For example, the principles of free speech embodied in the First Amendment may not be overridden by a simple legislative act.

148. The Court's reasoning in *Fitzpatrick* contained a plausible temporal distinction for limiting Congress' power to abrogate to statutes passed under the powers granted to Congress by § 5 of the Fourteenth Amendment. One might argue that the Fourteenth Amendment, which was passed over sixty years after the Eleventh Amendment, created an exception to the broad principles that the *Hans* Court identified in the Eleventh Amendment. *See* HART & WECHSLER, *supra* note 24, at 1218-19. The *Union Gas* decision, however, eliminated this line of argument by upholding Congress' power to abrogate the states' Eleventh Amendment immunity under its Article I Commerce Clause powers. *See supra* text accompanying notes 142-44. The Commerce Clause, of course, predates the Eleventh Amendment.

federal policy goals.[149] In addition, the clear statement rule has a functional component: it ensures that Congress considers federalism concerns directly when it enacts legislation.[150] The rule therefore becomes "a practical way for the Court to focus legislative attention on [structural federalism] values."[151]

Professor Althouse has described the Court's debate with the anti-*Hans* theorists as focusing on a battle of presumptions regarding congressional intent, rather than on the true meaning of the Eleventh Amendment.[152] The compromise of the clear statement rule creates a presumption in favor of state immunity.[153] Thus, absent a clear statement of abrogation, a state is immune from suit under a federal statute. Professor Althouse argues that "[t]o overrule *Hans* now would be to embrace the presumption that Congress intends to make the states suable whenever it enacts a statute creating a right that might be asserted against a state."[154] The Court's choice of a presumption of immunity has the advantage of *assuring* states that Congress has fulfilled its proper function as the protector of state interests.[155] By choosing the opposite presumption, the Court would have to *assume* that Congress had done so. According to Althouse, the Court has chosen the safer presumption.[156]

While the clear statement rule is not without its critics,[157] the rule operates as an effective compromise in most cases. The rule permits the Court to acknowledge the one hundred years of post-*Hans* precedent that

149. In many ways, such a compromise is a necessary and appropriate form of judicial decisionmaking. Courts are designed to make such practical judgments, balancing a deference for judicial precedent against the beneficial influence of innovative scholarship. The clear statement rule ensures legal stability while permitting the development of new approaches to jurisprudence.

150. *See* Eskridge, *supra* note 137, at 389 (noting that "the apparent goal of the clear statement rule is to force Congress to decide the issue of state immunity before the Court will find abrogation of Eleventh Amendment interests").

151. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

152. Althouse, *supra* note 103, at 1180-85.

153. In *Welch*, Justice Scalia defended this presumption by arguing that "for nearly a century . . . Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals." 483 U.S. at 496 (Scalia, J., concurring). Professor Althouse notes, however, that congressional action in the wake of the *Atascadero* decision indicates that Congress may not have been as aware of the state immunity presumption as Justice Scalia suggests. *See* Althouse, *supra* note 103, at 1162-63, 1182-83.

154. Althouse, *supra* note 103, at 1183. Under such a regime, if serious arguments in favor of state immunity under the statute were raised, Congress "would need only to remedy the relevant statutory silences with explicit provisions excluding states from federal jurisdiction." *Id.*

155. *Id.* at 1184-85.

156. *Id.*

157. Professors Eskridge and Frickey argue that the *Atascadero* clear statement rule has the disturbing countermajoritarian effect of forcing Congress to act more than once to achieve its desired end. Eskridge & Frickey, *supra* note 151, at 638-39 ("What is most striking to us is that it took Congress three statutes and fifteen years to accomplish what Congress probably thought it had done in 1975 [when it enacted the Education of the Handicapped Act (EHA)]. That is extraordinarily countermajoritarian.").

views the Eleventh Amendment as a symbol of state sovereign immunity. At the same time, the rule appeases most proponents of the anti-*Hans* position by recognizing that Congress has the power to abrogate state sovereign immunity in federal statutes.

Unfortunately, however, the compromise fails to address directly one group of statutes that can be affected by the Eleventh Amendment: statutes that grant exclusive jurisdiction over their subject matter to the federal courts.[158] As discussed below, the application of the *Atascadero* clear statement rule to cases involving exclusive jurisdiction statutes may have consequences not envisioned by either the pro-*Hans* or anti-*Hans* parties to the abrogation compromise. The result may be the complete denial of a forum to parties who have valid federal claims, and who were intended by Congress to have a judicially enforceable cause of action against a state.

IV

THE *THIOKOL* PROBLEM: EXCLUSIVE JURISDICTION AND THE CLEAR STATEMENT RULE

While the clear statement rule may produce satisfactory results in most instances, it creates awkward results for a unique set of cases: those cases involving statutes in which Congress has granted exclusive jurisdiction to the federal courts but has not explicitly abrogated state sovereign immunity in the text of the statutes. Under the *Atascadero* clear statement rule, plaintiffs who seek to sue states for damages under such statutes have *no* forum in which to raise their damage claims. Thus, the *Thiokol* plaintiffs, who are barred from raising their damage claims in state court because of ERISA's exclusive federal jurisdiction provisions,[159] have no forum in which to present their claim to recover funds allegedly taken by the state in violation of federal law.[160]

This Part addresses the intersection of the clear statement rule and exclusive jurisdiction provisions. First, I will argue that neither the drafters of the Eleventh Amendment nor the *Hans* Court appear to have considered the effect of exclusive jurisdiction on the states' Eleventh Amendment immunity to suit in federal court. Thus, it is possible that the Court's sovereign immunity doctrine developed in conjunction with the assumption that state courts would be available to hear federal claims. Second, I will suggest that the modern Court's development of the clear statement compromise may have adopted the same assumption regarding the availability of

158. This Comment argues that the *Atascadero* Court did address this issue *indirectly* through its explicit assumption regarding the availability of state courts to provide federal remedies. *See infra* text accompanying notes 193-201.

159. 29 U.S.C. § 1132(e)(1).

160. *See Thiokol*, 987 F.2d at 382 (noting that the exclusive jurisdiction provision in ERISA requires the plaintiffs to bring their suit in federal court, but holding that the Eleventh Amendment bars all of the plaintiffs' claims for monetary relief).

state court jurisdiction. More importantly, I argue that the Court has never grappled directly with the exclusive jurisdiction problem. Thus, the federal courts should not automatically apply the *Atascadero* clear statement doctrine to exclusive jurisdiction cases without first carefully considering the unique structure of the statutes containing exclusive jurisdiction provisions.[161]

A. The Eleventh Amendment and the State Court Assumption

Because the weight of historical evidence suggests that the drafters of the Eleventh Amendment did not intend to deprive the federal courts of jurisdiction over federal question cases,[162] it is difficult to argue that the drafters explicitly decided that federal statutory claims barred by the Amendment would still be heard by state courts. A more reasonable approach argues that the drafters never debated the issue because they had already adopted the Constitution's general assumption regarding the availability of state courts to hear federal claims.

The text and structure of the Constitution presuppose the existence of state courts as courts of general jurisdiction.[163] In his now-famous dialogue, Professor Henry Hart argued that "[i]n the scheme of the Constitution, [the state courts] are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones."[164] Thus, while

161. Only one major article focuses on the effect of the modern Court's Eleventh Amendment doctrine on cases involving causes of action over which the federal courts have exclusive jurisdiction. *See* H. Stephen Harris, Jr. and Michael P. Kenny, *Eleventh Amendment Jurisprudence After* Atascadero: *The Coming Clash With Antitrust, Copyright, and Other Causes of Action Over Which the Federal Courts Have Exclusive Jurisdiction,* 37 EMORY L.J. 645 (1988). That article, however, uses the problems created by the exclusive jurisdiction/clear statement rule intersection to support the position of the anti-*Hans* scholars. *Id.* at 680-704 (summarizing recent scholarship regarding the Eleventh Amendment and concluding that the Eleventh Amendment, "properly understood, does not immunize states from suit in federal court which are based on federal question jurisdiction"). Indeed, the article concludes by arguing for a reversal of the Court's modern doctrine.

This Comment, by contrast, acknowledges that the position of the anti-*Hans* scholars has been soundly rejected by the Court. *See supra* text accompanying notes 103-10. It argues, however, that the Court's Eleventh Amendment jurisprudence has never considered the effect of exclusive jurisdiction provisions on the states' Eleventh Amendment immunity. Thus, the *Atascadero* clear statement rule does not necessarily apply to causes of action over which the federal courts have exclusive jurisdiction. By recognizing the assumptions regarding state court availability in the clear statement compromise, the Court can effectively address the problems present in cases involving exclusive jurisdiction provisions without overruling *Hans.*

162. *See* Fletcher, *A Historical Interpretation, supra* note 14. Fletcher argues that the vulnerability of the states to suit under federal law was an unsettled question both before and after the passage of the Amendment. *Id.* at 1063-78. According to this view, then, the drafters of the Eleventh Amendment made no decision regarding the ability of citizens to subject states to suit in federal court on federal questions.

163. The Full Faith and Credit Clause refers to the "judicial Proceedings" of the states. U.S. CONST. art. IV, § 1. In addition, the Judiciary Act of 1789 notes that the "final judgment or decree in any suit, in the highest court of law or equity of a State" may be appealed to the Supreme Court under certain circumstances. Judiciary Act of 1789, 1 Stat. 73, 85, § 25.

164. HART & WECHSLER, *supra* note 24, at 423.

Article III empowers Congress to limit the jurisdiction of Article III courts, it does not deprive plaintiffs of a forum for vindicating their federal rights. Scholars have argued that any argument to the contrary rests on a misguided belief in the "inherent inadequacy of the state courts."[165]

Ample evidence indicates that the founders shared this basic assumption of state court availability. In *Federalist* No. 82, Alexander Hamilton argued that the constitutional structure presumes the availability of state courts to hear cases involving federal questions. Considering the language of Article III, he reasoned that "the inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited."[166] This inference is particularly significant when one considers that Hamilton alluded to this same argument in *Federalist* No. 81,[167] the paper that has been the source of much of the modern Court's argument in favor of sovereign immunity.[168]

The actions of the early Congress also suggest that the availability of state courts to hear federal claims was generally assumed. The First Judiciary Act embraced the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims."[169] Indeed, for the first eighty-one years of U.S. history, Congress provided for only limited federal jurisdiction over cases "arising under" federal law.[170]

Based on the foregoing evidence, it is quite plausible that the drafters of the Eleventh Amendment adopted the same assumption regarding the availability of state courts to hear federal claims. The fact that *Chisholm* did not involve a federal claim lends further support to this thesis.[171] Moreover, the text of the Amendment focuses exclusively on the jurisdictional power of the *federal* courts.[172] Even if the text is read to incorporate a recognition of sovereign immunity of the states from suit in federal court, an *additional* inference is required to conclude that the Amendment bars plaintiffs from having *any forum* in which they may raise their federal claims.

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165. Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143, 157 (1982).

166. THE FEDERALIST No. 82, at 253 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

167. THE FEDERALIST No. 81, *supra* note 38, at 250, 304 n.113.

168. *See, e.g.*, Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 n.1 (1991); *Welch*, 483 U.S. at 480 & n.10 (1987) (plurality opinion); *Edelman*, 415 U.S. at 660-62 n.9; Monaco v. Mississippi, 292 U.S. 313, 324-25 (1934); *Hans*, 134 U.S. at 12-13.

169. HART & WECHSLER, *supra* note 24, at 960.

170. *Id.* at 961-62.

171. Recall that *Chisholm* involved a suit *in assumpsit* at common law. *See supra* text accompanying notes 18-21; *see also* Fletcher, *A Historical Interpretation*, *supra* note 14, at 1054-63 (noting that the Supreme Court's jurisdiction in *Chisholm* arose from the state-citizen diversity clause of Article III).

172. Indeed, the failure of the text of the Eleventh Amendment to mention in-state citizens may indicate that the drafters assumed that state courts would be available to hear the claims, as in-state citizens would be expected to sue in state courts.

There is, however, a lingering problem with the argument that the drafters of the Eleventh Amendment assumed the availability of state courts to hear federal causes of action. During the debate regarding the adoption of the Eleventh Amendment, a proposal was made in the House of Representatives to alter the text of the Amendment so that it would bar federal jurisdiction "[w]here such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect."[173] The proposal was defeated by a vote of 77-8.[174] The advancement of this proposal might indicate that Congress did not presume state court availability in the absence of federal court jurisdiction. Thus, its sound defeat would suggest that Congress wanted the Eleventh Amendment to apply *regardless* of whether state courts were available to hear the claim. If this interpretation is correct, the claim made in this Comment collapses, and federal jurisdiction may be barred even in cases where the grant of jurisdiction is exclusive to the federal courts.

Several compelling arguments, however, may refute this conclusion. First, as many scholars have acknowledged, the records of the debates and passage of the Eleventh Amendment are remarkably inconclusive regarding the intentions of the drafters.[175] Thus, a view that relies upon the defeat of a "last-minute proposal"[176] to support a conclusion that is contrary to a fundamental presumption embodied in Article III is highly questionable.[177] Second, in the debate between the anti-*Hans* scholars and the Court, the weight of historical evidence appears to tip in favor of the scholars.[178] The Court's strongest arguments in favor of *Hans* focus on problems associated with overturning one hundred years of precedent recognizing sovereign immunity as a core element of the Eleventh Amendment.[179] If one accepts the scholars' view of history, the defeat of the proposal has no impact on the thesis of this Comment. According to this view, because the Amendment focused solely on party-based jurisdiction, the defeated proposal must have focused solely on the effectiveness of the state courts to hear cases involving only *state* law questions. To impose *any* burden on state courts regarding their prosecution of their own laws would have undermined the very distinction that the scholars argue the Amendment was designed to create. Federal jurisdiction would have been permissible if a state did not somehow prosecute its own laws "to effect." Viewed in this light, the huge defeat of the proposal is remarkably sensible. In addition,

173. 3 ANNALS OF CONG. 476 (1794).

174. *Id.*

175. *See, e.g.*, Althouse, *supra* note 103, at 1130-31.

176. Fletcher, *A Historical Interpretation*, *supra* note 14, at 1059.

177. *See supra* text accompanying notes 163-65.

178. *See supra* text accompanying notes 75-102. One observer of the debate has noted that "[i]t is precisely on the field of history that the revisionists have waged their most extensive battle against *Hans* and the current Court." Brown, *supra* note 10, at 872.

179. *See Welch*, 483 U.S. at 493-95; *see also id.* at 496 (Scalia, J., concurring).

the proposal's defeat does not undermine the argument that the Eleventh Amendment incorporates Article III's presumption about the obligation of state courts to enforce federal law.

The *Hans* Court, then, may have adopted this same assumption: that state courts are always available for federal claims that might be barred by the Eleventh Amendment. In that case, the Court never addressed the issue of whether the plaintiff's claim could be heard in Louisiana state courts. It merely held that the Eleventh Amendment barred the suit from federal court.[180] The Court therefore may have assumed that the plaintiff had an adequate remedy available in state court.[181] More significantly, however, it seems clear that the *Hans* Court never considered this issue. The strong "sovereign immunity" approach to the Eleventh Amendment that is embodied in *Hans* therefore does not resolve the exclusive jurisdiction problem in favor of a blanket jurisdictional bar.

Thus, both the drafters of the Eleventh Amendment and the *Hans* Court may have incorporated an assumption of state court jurisdiction over federal claims into their views of the Eleventh Amendment. More importantly, however, the exclusive jurisdiction issue was never directly raised during the first one hundred years of the Amendment's existence, suggesting that neither the views of the drafters of the Amendment nor the opinion of the *Hans* Court are dispositive regarding the Eleventh Amendment's treatment of exclusive jurisdiction cases.

B. The Affirmative Obligation of State Courts to Enforce Federal Law

State courts are obligated to hear claims of federal statutory rights when Congress requires them to do so. Article VI of the Constitution notes that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."[182] In *Testa v. Katt*,[183] the Supreme Court interpreted this clause and the actions of the first Congress as "confer[ring] jurisdiction on the state courts to enforce important federal civil laws."[184] *Testa* involved a federal statute in which Congress explicitly provided that federal courts should exercise jurisdiction

180. *See supra* text accompanying notes 34-46.

181. Of course, the "federal" nature of the claim brought in *Hans* has been the subject of a great deal of scholarly debate. Some scholars argue that the claim was really rooted in the common law of contracts, not in the rarely invoked Contracts Clause of the Federal Constitution. *See* Burnham, *supra* note 103, *passim*. Applying this approach, one might argue that the true basis of the *Hans* decision was the absence of a federal question, and not the broad "sovereign immunity" principle invoked in the language of the decision. *See id.* Obviously, this interpretation of the *Hans* decision only adds further support to the conclusion that the *Hans* Court may have assumed that the state court had jurisdiction over the plaintiff's claim.

182. U.S. CONST. art. VI.

183. 330 U.S. 386 (1947).

184. *Id.* at 389-90.

"concurrently with State and Territorial courts."[185] The Court concluded that a state court may not avoid its obligation to enforce a federal statutory right by declining to assume jurisdiction over the case.[186]

The scope of a state court's obligation to assume jurisdiction in cases involving a violation of a federal right when that suit is barred from federal court, however, is somewhat less clear. In *General Oil Co. v. Crain,*[187] the Tennessee Supreme Court held that it lacked jurisdiction to hear a case arising under the U.S. Constitution because it was brought against the state and therefore implicated the state doctrine of sovereign immunity. In concluding that the Tennessee Supreme Court had jurisdiction (and therefore implicitly reversing the jurisdictional ruling of that court), the United States Supreme Court noted that:

> If a suit against state officers is precluded in the national courts by the Eleventh Amendment to the Constitution, and may be forbidden by a State to its courts, as it is contended in the case at the bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution . . . .[188]

Crain, then, may stand for the proposition that state courts cannot avoid their obligation within the federal system to consider federal claims by declining jurisdiction when jurisdiction in the federal courts is unavailable.[189] Indeed, several scholars have reached this very conclusion.[190]

The relevance of the *Crain* doctrine to the thesis proposed in this Comment is clear. If the *Crain* doctrine is correct, and state courts do, in fact, have an affirmative obligation to hear federal claims, the Supreme Court's assumption regarding the availability of state courts to hear claims barred by the Eleventh Amendment is quite logical.[191] More significantly, however, the fact that the *Crain* doctrine has not been clearly refuted lends

185. Emergency Price Control Act of 1942, § 205(c), Pub. L. No. 77-421, 56 Stat. 23 (repealed 1966).

186. *Testa,* 330 U.S. at 394.

187. 209 U.S. 211 (1908).

188. *Id.* at 226.

189. *But see* Amar, *supra* note 14, at 1477 n.209 (referring to the "slender dicta" of *Crain*); Fletcher, *A Historical Interpretation, supra* note 14, at 1096 (arguing that this reading of *Crain* should "be advanced only tentatively today" because the relevant language is mere dicta and appears to be inconsistent with *Ex parte Young*).

190. Nicole A. Gordon & Douglas Gross, *Justiciability of Federal Claims in State Court,* 59 NOTRE DAME L. REV. 1145, 1171-77 (1977); Wolcher, *supra* note 73, at 198-200, 243-44; *see also* William L. Taylor, Note, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation,* 95 YALE L.J. 414 (1985) (relying on *Testa* to argue that state courts should be required to hear cases involving state tax section 1983 claims).

191. The Court has rendered some decisions suggesting that state courts may have an affirmative obligation to hear claims barred from federal courts by the Eleventh Amendment. *See, e.g., Employees,* 411 U.S. at 287 (noting that the plaintiffs might "[a]rguably" have a private cause of action in state court); Maine v. Thiboutot, 448 U.S. 1, 9 n.7 (1980) (holding that an award of attorney fees against a state under 42 U.S.C. § 1988 is permissible where the action is brought in state court); Maher v. Gagne, 448 U.S. 122, 130 n.12 (1980) (reaffirming this reading of *Thiboutot*). *But see* Fletcher, *A Historical*

support to the proposition that the Court has simply not considered the possibility that, in cases involving exclusive jurisdiction provisions, the Court's Eleventh Amendment jurisprudence may leave certain parties without *any* forum for their potentially valid federal claims.

C. *The Adoption of the State Court Assumption in the Context of Congressional Abrogation Doctrine*

The suggestion that the Supreme Court may have assumed that state courts are always available for the enforcement of federal rights is hardly revolutionary. Oddly, however, little attention has been paid to the presence of this assumption in the body of cases in which the Court developed the clear statement compromise. A brief review of those cases indicates that the state court assumption persists in the modern Court's Eleventh Amendment doctrine. Thus, while the modern Court's clear statement doctrine appears to be applicable to a case involving an exclusive jurisdiction provision, such a case may, in fact, present a unique set of circumstances that the Court has not yet addressed.

Evidence that the Court assumed that state courts were available for the enforcement of federal rights appears in *Employees v. Department of Public Health and Welfare,*[192] the first Supreme Court decision to suggest that a "clear" intention of Congress could abrogate Eleventh Amendment immunity. In *Employees*, Justice Marshall acknowledged the availability of state courts for the enforcement of federal rights. In his concurrence, Justice Marshall noted that in Eleventh Amendment cases the "issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*"[193] Marshall, then, saw the Eleventh Amendment only as a bar to a *federal forum,* not as an overall bar to the claim. His concurring opinion clearly assumes that, regardless of the applicability of the Eleventh Amendment, plaintiffs could bring their suits to enforce federally created rights in state court.

In the years between the *Employees* decision and the *Atascadero* decision, the Court rendered several decisions suggesting that it assumed that state courts were available to hear federal claims barred by the Eleventh Amendment. In *Martinez v. California,*[194] the Supreme Court reviewed a Section 1983 claim against California that had been brought in the California state courts. In noting that the California courts had accepted jurisdiction over the claim, the Supreme Court cited *Testa* for the proposition that " 'there is no reason why [a federal claim] should not be enforced

Interpretation, supra note 14, at 1098 (suggesting that this reading of *Employees* and *Thiboutot* is "imperfect," as it "would permit Congress to authorize some suits, if at all, solely in the state courts").

192. 411 U.S. 279 (1973); *see also supra* text accompanying notes 126-28.

193. *Employees,* 411 U.S. at 294 (Marshall, J., concurring) (emphasis added).

194. 444 U.S. 277 (1980).

. . . by a proper action in State court.' "[195] In *Maine v. Thiboutot*,[196] the Court again noted that a Section 1983 claim brought against a state could be heard in state court.[197] The Court also concluded that the Eleventh Amendment does not bar an award of attorneys' fees in state court.[198] The Court stated that "[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.' "[199]

While neither the *Martinez* decision nor the *Thiboutot* decision held that state courts are obligated to hear federal claims barred by the Eleventh Amendment, the decisions do suggest that the Supreme Court may have assumed that state courts were available to hear such claims. Indeed, both decisions appear to follow the approach taken by Justice Marshall in *Employees*. The decisions view the Eleventh Amendment solely as a bar to a federal forum; the amendment does not limit the availability of state courts to hear federal claims.

When the *Atascadero* Court announced the "unmistakably clear" statement rule, it relied, in part, on Marshall's concurrence in *Employees*. Indeed, the *Atascadero* Court specifically adopted Marshall's view of the Eleventh Amendment as only a bar to a federal forum. In footnote two of the majority opinion, the Court responded to one portion of Justice Brennan's fierce dissent in the following manner:

> Justice Brennan's dissent . . . argues that in the absence of jurisdiction in the federal courts, the States are "exemp[t] . . . from compliance with laws that bind every other legal actor in our Nation." *This claim wholly misconceives our federal system.* As Justice Marshall has noted, "the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*" It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land.[200]

The *Atascadero* Court, then, openly acknowledged that its conception of the Eleventh Amendment assumed a significant role for state courts in the adjudication of federal law. This point is particularly significant when one considers the nature of the right at issue in *Atascadero:* a right created by congressional statute. The *Atascadero* majority, therefore, may have assumed that the state courts were obligated to enforce those rights.[201]

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195. *Id.* at 283 n.7 (quoting *Testa*, 330 U.S. at 391).

196. 448 U.S. 1 (1980).

197. *Id.* at 10-11.

198. *Id.* at 9 n.7.

199. *Id.*

200. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.2 (1985) (quoting *Employees*, 411 U.S. at 293-94 (Marshall, J., concurring)) (emphasis added) (citations omitted).

201. Some scholars may argue that this reading of *Atascadero* relies too heavily on a statement in a footnote. *See* Fletcher, *A Historical Interpretation*, *supra* note 14, at 1097 (noting that "footnotes are a

More importantly, the footnote demonstrates that when the *Atascadero* Court adopted the clear statement rule it was not considering the effect of the rule on cases involving exclusive jurisdiction provisions. Indeed, while the footnote provides only questionable legal authority for the proposition that the state courts are, in fact, obligated to hear cases barred by the Eleventh Amendment, it demonstrates clearly that the Supreme Court assumed that state courts were available without considering all of the ramifications of that assumption.

In its 1991 decision, *Hilton v. South Carolina Public Railways Commission*,[202] the Supreme Court again indicated that its modern Eleventh Amendment jurisprudence assumes the availability of state court jurisdiction. In *Hilton*, the state courts of South Carolina refused to hear a FELA claim that had been previously barred from federal court by the Eleventh Amendment. In ordering the state court to hear the claim, the Court emphasized that " 'the Eleventh Amendment does not apply in state courts.' "[203] The Court then concluded that "the Supremacy Clause makes [a federal] statute the law in every State, fully enforceable in state court."[204] The *Hilton* Court, then, appears to have recognized the assumption of state court availability embodied in *Atascadero*.

Thus, in the development and adoption of the *Atascadero* clear statement rule, the Supreme Court appears to have assumed that state courts were available for any claims that the Amendment may have barred from federal court. While the Court's decisions are not clear on the issue of whether state courts are *obligated* to hear such claims, the language of the decisions demonstrates that the Court consistently maintained an assumption of state court availability. The Court therefore may never have considered the problems created by the intersection of the clear statement rule and exclusive jurisdiction provisions.

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dangerous place to seek authoritative statements of the law"). Such an argument, however, misrepresents the emphasis that this Comment gives to footnote 2 in *Atascadero*. This Comment does not read the footnote as legal authority for the proposition that state courts are *necessarily* available for federal claims barred by the Eleventh Amendment. Rather, the footnote is merely evidence that, in fashioning the clear statement rule, the *Atascadero* Court appears to have assumed state court availability without seriously evaluating the issue. Viewed in this light, the fact that the reference to Marshall's concurrence appears in a footnote seems entirely appropriate: the footnote represents an assumption, rather than serious analysis.

202. 112 S. Ct. 560 (1991).

203. *Id.* at 565 (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 63 (1989)).

204. *Id.* at 566. The *Hilton* Court's conclusion, however, was apparently limited to situations where the statute has already been determined to impose liability on the state. In *Hilton*, that determination was derived by relying on the statutory construction portion of *Parden*. *Id.* at 563. The *Hilton* Court therefore limited the holding of *Welch* solely to a jurisdictional bar in federal court, and not to a conclusion regarding the state's general liability. *Id.* at 564-66.

D. Admiralty, Bankruptcy, and the Relevance of a Substantive Federal Claim

Before proceeding with the analysis, it is necessary to consider the few cases in which the Court has partially addressed the intersection of exclusive jurisdiction and the Eleventh Amendment: admiralty cases and bankruptcy cases. In both of these areas, the Court has held that the Eleventh Amendment bars federal jurisdiction even though federal courts have exclusive jurisdiction over the matters. Some observers, including some lower federal courts,[205] have held that these cases resolve the problem presented in this Comment.

A closer look at these cases, however, reveals that the *Atascadero* clear statement rule's applicability to federal question cases involving exclusive jurisdiction provisions is still unresolved. In particular, the admiralty and bankruptcy examples demonstrate that the clear statement/exclusive jurisdiction intersection creates difficulty only when the two doctrines serve to bar recovery for a substantive federal claim. The problem does not arise in cases where the federal claim is primarily procedural.

1. Admiralty Cases

The history of the relationship between federal admiralty jurisdiction and the Eleventh Amendment is more detailed than can be addressed in these pages. At the time of the Amendment's passage, admiralty jurisdiction was a more significant head of federal court jurisdiction than federal question jurisdiction, as "maritime commerce constituted the great bulk of interstate commerce at that time."[206] In light of this fact, some scholars have argued that the Eleventh Amendment's failure to refer to federal court admiralty jurisdiction was intentional.[207] Indeed, in 1809, one federal court held that admiralty jurisdiction was not affected by the Eleventh Amendment.[208]

In 1921, however, the Supreme Court decided *Ex Parte New York No. 1*,[209] holding that the Eleventh Amendment precluded *in rem* admiralty actions against an unconsenting state.[210] In that case, the Court explicitly applied the *Hans* principle of sovereign immunity in the admiralty con-

205. *See, e.g.*, Lane v. First Nat'l Bank of Boston, 871 F.2d 166, 173 (1st Cir. 1989) (relying in part on admiralty cases to hold that the Copyright Act did not abrogate states' Eleventh Amendment immunity); Chew v. California, 893 F.2d 331, 335 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 810 (1990) (relying on a bankruptcy case to hold that the Patent Act did not abrogate states' Eleventh Amendment immunity).

206. Fletcher, *A Historical Interpretation*, *supra* note 14, at 1078.

207. *Id.* at 1079. Professor Fletcher argues that the use of the terms "law and cquity" in the text of the Eleventh Amendment was "a conscious choice" that excluded admiralty jurisdiction. *Id.*

208. *See* United States v. Bright, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647).

209. 256 U.S. 490 (1921).

210. *Id.* at 501-02.

text.[211] Because admiralty cases have long been held to be within the exclusive jurisdiction of the federal courts, one might read *Ex Parte New York No. 1* as resolving the conflict between the Eleventh Amendment and exclusive jurisdiction provisions.[212]

A reliance upon admiralty cases to resolve the problem presented in this Comment, however, is misplaced. First, and most importantly, admiralty cases can be easily distinguished because they arise under a jurisdictional head that is wholly separate from federal question jurisdiction. Thus, the fact that the Court barred cases arising under admiralty jurisdiction does not necessarily require that federal question cases be treated in an identical manner.

In addition, admiralty law is largely a procedural body of law that focuses on the mechanisms employed in providing remedies. The law does not in itself provide a source of any federally-created substantive rights. Indeed, in its earliest form, "admiralty law was seen as essentially part of the law of nations rather than as a state or federal law."[213] Thus, the admiralty action that was barred in *Ex Parte New York No. 1* did not involve a Congressionally-created substantive right, and the Court did not hesitate to bar federal court jurisdiction over the matter.[214] Indeed, when the First Circuit considered the admiralty example in evaluating the intersection of exclusive jurisdiction provisions and the Eleventh Amendment, it noted that the absence of a remedy for a congressionally created substantive right was "more troubling."[215]

The admiralty example therefore does not resolve the problem presented in this Comment. The Court's approach to admiralty cases fails to address the unique circumstances that arise when the Eleventh Amendment is interpreted as barring a plaintiff's efforts to enforce, under a federal court's federal question jurisdiction, a substantive right that was created by Congress. In addition, the admiralty example cannot be read as addressing situations where such a substantive right is coupled with an exclusive jurisdiction provision.

2. *Bankruptcy Cases*

The Supreme Court has heard only one federal question case that involved the application of the Eleventh Amendment to a statutory area involving a grant of exclusive federal jurisdiction. In *Hoffman v. Connecticut Department of Income Maintenance,*[216] the Supreme Court

211. *Id.* at 498.

212. Indeed, in holding that the *Atascadero* clear statement rule applied even in the face of the Copyright Act's exclusive jurisdiction provision, the First Circuit relied in part on the Court's approach to admiralty decisions. *See Lane,* 871 F.2d at 173.

213. Fletcher, *A Historical Interpretation, supra* note 14, at 1082.

214. *Ex parte New York No. 1,* 256 U.S. at 503.

215. *Lane,* 871 F.2d at 173.

216. 492 U.S. 96 (1989).

ruled that the Eleventh Amendment barred a claim for monetary damages against a state under the Bankruptcy Code. In reaching this conclusion, a plurality of the Court employed the clear statement rule.[217] Thus, the *Hoffman* decision arguably *requires* the application of the clear statement rule even in cases involving exclusive jurisdiction.[218] Indeed, the Federal Circuit has read *Hoffman* this way.[219]

A formalistic reading of *Hoffman* therefore could undermine this Comment's argument regarding the Supreme Court's assumption of state court availability in cases involving the Eleventh Amendment. A closer look at *Hoffman,* however, suggests that the clear statement rule's applicability to cases involving exclusive jurisdiction remains unresolved. First, *Hoffman* failed to address the exclusivity issue directly. Thus, the Court simply may have neglected to consider the decision's inconsistency with the assumption of state court availability that is present in its other Eleventh Amendment cases.

Second, and more importantly, *Hoffman* involved an exclusive jurisdiction statute that did not preempt all relevant state law. The Supreme Court has held that federal bankruptcy legislation only preempts state law to the extent that it undermines federal law.[220] Thus, while the *Hoffman* plaintiffs were technically denied a forum for the adjudication of their rights against the state under the Bankruptcy Code, the parties that they represented had an alternative avenue of relief: they could pursue their right to a monetary judgment against the state under the relevant provisions of state debtor/creditor law.[221]

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217. *Id.* at 104.

218. The relevant provision of the Bankruptcy Code specifies that, except when Congress provides otherwise, "the district courts shall have original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a) (1988).

219. *See Chew,* 893 F.2d at 335.

220. *See* Stellwagen v. Clum, 245 U.S. 605, 618 (1918) (permitting "the trustee in bankruptcy to have the benefit of state laws [like the one in question] which do not conflict with the aims and purposes of the federal law").

221. *Hoffman* may be distinguished on several other grounds. First, Congress *explicitly* addressed the issue of sovereign immunity in the text of the statute. *See* 11 U.S.C. § 106 (1988). The plurality noted this textual reference and then used the clear statement rule to conclude that within the context of § 106(c), Congress did not intend to permit plaintiffs to recover monetary judgements against states under the Bankruptcy Code. *Hoffman,* 492 U.S. at 100-04. Because the plurality concluded that a right to recover the funds did not exist under the explicit terms of the statute, it did not need to address the effect of the exclusive jurisdiction provision on the plaintiffs. According to this view, plaintiffs were not actually denied a forum for their claim: they had no federal claim under the terms of the statute, and therefore no right to a forum, state or federal.

In addition, the explicit statutory language regarding sovereign immunity prompted the four *Hoffman* dissenters to employ the clear statement rule as an argument *in favor* of granting jurisdiction. *Hoffman,* 492 U.S. at 106 (Marshall, J., dissenting). The dissenters read the language of the Bankruptcy Code as sufficiently clear to abrogate sovereign immunity. Thus, the dispute between the justices in *Hoffman* focused on the meaning of the congressional intent expressed in the statute. In other words, the *Hoffman* Justices were arguing over whether the plaintiffs had *any* federal claim to recover the money, not over the availability of a forum for the adjudication of that claim.

Furthermore, the procedural nature of the Bankruptcy Code suggests that its provisions are designed merely to ensure a uniform *procedure* for the adjudication of rights that are based on substantive state law.[222] Thus, it is not clear that the *Hoffman* plaintiffs were seeking recovery for a right that was ultimately based on *federal* law. The denial of their claim on Eleventh Amendment grounds therefore did not actually deprive them of a forum for the recovery of damages due to them under federal law. The case therefore may be read merely as a determination that the plaintiffs had no *substantive* federal claim. This view of *Hoffman* is supported by an exception to the exclusive jurisdiction provision in the Bankruptcy Code that permits a federal court to abstain from hearing a case "in the interest of comity with State courts or respect for State law."[223] Thus, when Congress enacted the exclusive jurisdiction provision in the Bankruptcy Code, it seemed to presume that there would be cases where a plaintiff would have an adequate substantive remedy in state court.[224]

The *Hoffman* decision, then, adds a notable twist to this Comment's theory of the assumption of state court availability in the Court's Eleventh Amendment jurisprudence. The Supreme Court's assumption of state court availability does not necessarily mean that it assumes state courts are available to hear the *exact same claim* that has been barred from federal court. Rather, the Court has presumed that the state courts are available to hear all federal claims based on *substantive* federal law. Thus, while *Hoffman* may

222. *See, e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 195 (1953) (arguing that federal jurisdiction in bankruptcy cases raising state law claims is based on a notion of "protective" jurisdiction for the national bankruptcy program).

223. 28 U.S.C. § 1334(c)(1) (1988).

224. While the *Hoffman* decision is directly on point here, the Supreme Court has rendered a second decision that is related to the bankruptcy issue discussed in that case. In United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992), the Court held that exclusive jurisdictional grant of 28 U.S.C. § 1334(d) was insufficient to waive the sovereign immunity of the United States in a bankruptcy action. *Id.* at 1016-17. Because the sovereigu immunity of the United States and the Eleventh Amendment immunity of the statcs are to be treated similarly under the Bankruptcy Code, *see* 11 U.S.C. §§ 101(26), 106 (1988), one might read this case as indicating that the exclusive jurisdiction provision in § 1334 does not affect the Eleventh Amendment immunity of the states. Indeed, some commentators have suggested that the case should be read this way. *See, e.g.*, HART & WESCHLER, *supra* note 24, at Supp. 171.

The *Nordic Village* decision, however, does not undermine the point made in this Comment. First, the case only involved a question of federal sovereign immunity, not the Eleventh Amendment immunity of the states. Second, the *Nordic Village* Court did not consider the exclusivity of the jurisdictional grant at issue. Indeed, in finding no abrogation, the Court relied on an Eleventh Amendment case where the jurisdictional grant was *not* exclusive. *Nordic Village*, 112 S. Ct. at 1016-17 (citing Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2585 (1991)).

Insofar as the *Nordic Village* decision may be read as holding that a jurisdictional grant alone cannot override state sovereigu immunity, the case is consistent with the theory presented in this Comment. As argued with respect to both admiralty cases and *Hoffman*, a simple grant of exclusive jurisdiction will not override a state's Eleventh Amendment immunity in the absence of a congressionally-created federal right. Such a right was not at issue in *Nordic Village*. Moreover, as discussed below, this Comment does not argue that a jurisdictional grant may ever *override* Eleventh Amendment immunity. Rather, it argues that in certain cases a grant of exclusive jurisdiction should alter a federal court's approach in determining whether a state is immune from suit.

suggest that state courts need not be available for all federal claims denied by the Eleventh Amendment,[225] its holding can be limited to situations where the federal claim is primarily procedural rather than substantive. In such circumstances, the Court can remain confident that the plaintiffs have a reasonable alternative in the state court and will not be denied a forum for the adjudication of their substantive rights.

E. Summary: The Significance of the Assumption of State Court Availability

The Supreme Court's assumption of state court availability is crucial to a basic understanding of the compromise struck during the development of Eleventh Amendment abrogation doctrine. If plaintiffs still have a state forum available to present their claims for damages, the imposition of the clear statement rule as a barrier to congressional abrogation will not prevent their claim from being adjudicated. Thus, the clear statement rule becomes more palatable to anti-*Hans* scholars who are troubled by the denial of a forum for disputes involving federal questions.[226]

The clear statement compromise in the Court's Eleventh Amendment jurisprudence therefore may have been based on the assumption that state courts could exercise jurisdiction over cases that were barred from federal court. More importantly, the development of the compromise suggests that the Court has never directly considered the problems created by the intersection of the clear statement rule and a statute granting exclusive federal jurisdiction. Consequently, a case involving an exclusive jurisdiction provision should not automatically be governed by the strict *Atascadero* clear statement rule. Such a situation is really a case of first impression and requires a consideration of the effectiveness of the clear statement compro-

225. Of course, it is important to note that the fifth and deciding vote in *Hoffman* was cast by Justice Scalia, who did not apply the clear statement rule at all. Rather, he argued that, despite the language of the Bankruptcy Code, Congress did not have the power under the Bankruptcy Clause to abrogate a state's Eleventh Amendment immunity. *Hoffman*, 492 U.S. at 105. Thus, the *Hoffman* case could be read as entirely inconclusive regarding the applicability of the clear statement rule to cases governed by exclusive jurisdiction provisions. Accordingly, *Hoffman* does little to undermine the theory that the clear statement compromise has incorporated an assumption that state courts will be available for any federal claims that are denied by the Eleventh Amendment.

226. *See, e.g.*, Fletcher, *A Historical Interpretation*, *supra* note 14, at 1093-99. Professor Fletcher argues that one problem raised by the *Hans* approach to the Eleventh Amendment is the scope of the federal government's power under *Testa* "to require state courts to hear private causes of action barred from the federal courts by the eleventh amendment." *Id.* at 1094. Fletcher notes that if his party-based view of the Amendment is adopted, the *Testa* problem (whether Congress may require a state court to hear a federal private cause of action against an unconsenting state) disappears, as federal court jurisdiction would be available for all federal questions. *Id.* at 1099. The *Atascadero* Court's suggestion that the Eleventh Amendment assumes that state courts are available for federal claims solves the problem as well, albeit by a different mechanism. Presumably, Professor Fletcher would be less satisfied with a clear statement rule that did not solve the *Testa* problem. Thus, the state court option is a significant part of the compromise embodied in the *Atascadero* abrogation doctrine.

mise in the exclusive jurisdiction context. This issue is addressed in the following Section.

V

EXCLUSIVE JURISDICTION PROVISIONS AND THE CLEAR STATEMENT COMPROMISE: A PROPOSAL FOR AN EXCEPTION TO THE MODERN DOCTRINE

This Part considers the unique circumstances created by exclusive federal jurisdiction provisions. I argue that those circumstances are sufficiently different from those assumed by the clear statement compromise that the strict approach to abrogation announced by the Court in *Atascadero* should not apply. Instead, a federal court considering an Eleventh Amendment defense to a claim governed by an exclusive federal jurisdiction provision should consider the overall structure and policies embodied in the federal statute in order to determine whether the provision of a damage remedy against the state is necessary for the fulfillment of the statute's goals.

A. The Nature of Exclusive Jurisdiction: Basic Policies

Where Congress has explicitly provided for exclusive federal court jurisdiction in the text of a statute, state courts may not assume jurisdiction over the issue.[227] Absent such an explicit statement, however, the Court applies a strong presumption of concurrent jurisdiction.[228] Justice Frankfurter recognized this basic premise in his concurring opinion in *Brown v. Gerdes*.[229] He reasoned that "[s]ince 1789, rights derived from federal law could be enforced in state courts *unless Congress confined their enforcement to the federal courts.*"[230] The exclusivity of federal jurisdiction is thus rarely in dispute, as the provision granting exclusive jurisdiction will appear, except in rare circumstances,[231] in the text of the statute.[232]

The Supreme Court has identified several reasons for providing for exclusive federal jurisdiction. These factors include "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal

227. *See* HART & WECHSLER, *supra* note 24, at 479-81.

228. *See* Tafflin v. Levitt, 493 U.S. 455, 459-60 (1990) (holding that the presumption of concurrent jurisdiction can only be rebutted by " 'an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests' " (quoting Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981)); *see also Tafflin*, 493 U.S. at 469-73 (Scalia, J., concurring).

229. 321 U.S. 178 (1944).

230. *Id.* at 188 (Frankfurter, J., concurring) (emphasis added).

231. *See, e.g.*, General Investment Co. v. Lake Shore & M.S. Ry. Co., 260 U.S. 261, 286-88 (1922) (implying exclusive federal jurisdiction under the Sherman and Clayton Acts).

232. *See* Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 384-86 (1991) (arguing against the judicial power to imply exclusive jurisdiction from federal statutes and in favor of a clear statement rule for exclusive jurisdiction).

claims."[233] When Congress explicitly authorizes exclusive jurisdiction, it is likely to have considered these factors and determined that they argue in favor of exclusive jurisdiction.

B. *The Exclusive Jurisdiction/Clear Statement Intersection: The Complete Denial of a Remedy*

As the *Thiokol* plaintiffs discovered, the intersection of the clear statement rule and an exclusive jurisdiction provision creates a troubling result: the dismissal of their damage claims against the state from federal court and, consequently, the denial of *any forum* in which they can present their claims for the recovery of funds taken by the state in violation of federal law. That complete denial of a forum makes the *Thiokol* Court's reliance upon the clear statement rule extremely harsh. Indeed, as discussed above, the Supreme Court, in designing the clear statement rule, never considered the possibility of the complete denial of any forum for the adjudication of a federal claim.[234]

Recall that the clear statement rule was designed, in part, to ensure that Congress took federalism concerns into account when passing statutes.[235] The rule also reflects a choice to create a presumption of sovereign immunity in circumstances where Congress has been silent on the issue.[236] While these two concerns remain valid in cases involving exclusive federal jurisdiction, they are marginally less significant. The arguments favoring a strict application of the rule in cases involving exclusive jurisdiction provisions are therefore less compelling.

First, in granting exclusive federal jurisdiction over a statutory area, Congress is more likely to have engaged actively in a process that considers the federalism concerns that the clear statement rule is designed to encourage. Professor Martin Redish has suggested that decisions to provide exclusive jurisdiction for particular federal statutes are an "integral element of the jurisprudence of federalism."[237] The decision to make the federal rights embodied by the statute exclusively cognizable in the federal courts suggests that Congress has not ignored its duties as the protector of state interests in the constitutional scheme.[238] Thus, the clear statement rule's policy goal of ensuring that Congress plays that role is less urgent in the exclusive jurisdiction context.[239]

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233. Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 483-84 (1981).

234. *See supra* text accompanying notes 192-204.

235. *See supra* text accompanying notes 149-51.

236. *See supra* text accompanying notes 153-56.

237. Martin H. Redish & John E. Muench, *Adjudication of Federal Causes of Action in State Court*, 75 MICH. L. REV. 311, 313 (1976).

238. *See* Tribe, *supra* note 30, at 693-96.

239. This argument is distinct but analogous to an argument previously made regarding the intrusive nature of the statutory right at issue. *See* Note, *Congressional Abrogation of State Sovereign Immunity*, 86 COLUM. L. REV. 1436, 1450-51 (1986) (arguing that where a statute's impact on state

Second, the possibility that plaintiffs will be barred from all possible forums for their federal claim weakens any argument in favor of a strong presumption of state immunity from suit. Proponents of this presumption argue that if a court misinterprets congressional intent when it applies the clear statement rule to a statute, Congress can always amend the statute by adding a statement of abrogation.[240] While the delay in passage of such an abrogation statement may be tolerable for those plaintiffs who can still have the merits of their claim heard in state court, such delays are substantially more burdensome for plaintiffs who have no alternative forum for their federal claim.[241] Thus, the harm caused by a misinterpretation under a strict approach to the clear statement rule is significantly greater in the exclusive jurisdiction context. This threat of greater harm may provide a legitimate justification for a marginal decrease in the strength of the presumption in favor of sovereign immunity.

The policy goals underlying the *Atascadero* clear statement rule are therefore less compelling in exclusive federal jurisdiction cases. Indeed, the Court may be able to achieve its goals by employing a slightly different mode of analysis: a method that allows the Court to retain its presumption of state immunity from damage suits, but also permits the Court to look beyond the plain text to the overall structure of the statute in order to determine whether a damage remedy against the states is necessary to achieve the statute's goals. As discussed above, the creation of this exception to the clear statement rule is consistent both with the Eleventh Amendment theories presented by the anti-*Hans* scholars and with the abrogation theory that has become the basis of the Supreme Court's modern doctrine. Indeed, the exception focuses on a factual scenario that the Court has not yet addressed. Thus, by adopting this approach, the Court need not overrule any of its current Eleventh Amendment cases. Moreover, the recognition of an exclusive jurisdiction exception leaves the current clear statement compromise intact, while acknowledging the unique circumstances presented by exclusive jurisdiction statutes.

C. *The Proposal in Practice: The Copyright Act, the Exchange Act, and ERISA*

This Section considers the application of the proposed exception to the clear statement rule in three areas where Congress has granted exclusive jurisdiction to the federal courts: copyright law, securities law, and ERISA. In each case, the proposed exception would permit courts to take a more reasoned approach to the application of Eleventh Amendment immunity

sovereignty is less intrusive, the need for a specific showing of congressional intent should logically be diminished).

240. *See* Althouse, *supra* note 103, at 1183.

241. *See* Eskridge, *supra* note 137, at 408-09 (discussing the "irreparable damage" caused when the Court misinterprets the intention of Congress).

than is permitted under a strict clear statement rule. As argued above, this approach is appropriate in light of the unique circumstances presented by the exclusive jurisdiction provisions.

1. Copyright Law

The intersection of the clear statement compromise and exclusive jurisdiction has generated substantial controversy in the field of copyright law. While the issue was ultimately resolved when Congress enacted abrogating legislation in 1990,[242] the controversy might have been addressed more easily if lower federal courts had recognized the unique character of exclusive jurisdiction cases. Instead, by adhering to a strict application of the *Atascadero* clear statement rule, courts denied fora to a large number of plaintiffs with valid federal claims.[243]

Congress has provided the federal courts with original and exclusive jurisdiction over all civil actions arising under the federal copyright laws.[244] In addition, the Copyright Act of 1976 preempts all state copyright laws.[245] Thus, plaintiffs seeking damages for copyright infringement may only recover those damages in federal court. By providing for both exclusive federal jurisdiction and the preemption of all state copyright laws, Congress sought to ensure national uniformity in copyright litigation.[246]

The Copyright Act of 1976 also contains strong indications that Congress had assumed that the states would be subject to infringement suits under the terms of the statute. For example, the law contains several specified exemptions that target "the Government . . . of any State or political subdivision of a State."[247] If Congress had assumed that the states would be immune under the terms of the statute, these exemptions would be superfluous. In addition, the Act's goal of protecting copyright owners would be severely undermined if states were not subject to the terms of the law.

Thus, there is strong evidence that Congress intended to subject the states to suit under the Copyright Act of 1976. Under the exception to the clear statement rule proposed in this Comment, a court evaluating an Eleventh Amendment defense to a copyright infringement suit would have been able to consider this overall statutory structure as evidence of congressional intent to subject states to damage suits under the Act.

242. *See* Copyright Remedy Clarification Act, Pub. L. No. 101-553, 104 Stat. 2749 (1990) (codified in scattered sections of 17 U.S.C. & 29 U.S.C.).

243. The Copyright Remedy Clarification Act applies to violations on or after the date of its enactment. *Id.* § 3. Thus, plaintiffs wishing to sue states for damages arising from violations that occurred prior to the enactment have been left without any forum for their claims.

244. 28 U.S.C. § 1338 (1988).

245. 17 U.S.C. § 301(a) (1988).

246. *See* Patrick McNamara, Note, *Copyright Preemption: Effecting the Analysis Prescribed by Section 301,* 24 B.C. L. REV. 963, 963 (1983) (noting that section 301 (the preemption section) "was designed to achieve Congress' goal of establishing a uniform preemption analysis that would produce clear and consistent results").

247. 17 U.S.C. § 602(a)(1) (1988).

Unfortunately, the courts that addressed this issue did not grasp the significance of the assumption of state court jurisdiction in the clear statement compromise. In 1988, two circuit courts considered suits by private citizens against state agencies for copyright infringement.[248] In both cases, the courts applied the *Atascadero* clear statement rule and concluded that because the Copyright Act contained no "unequivocal and specific" language regarding an intent to subject the states to suit in federal court, the Eleventh Amendment barred the lawsuits.[249] The Ninth Circuit reached this conclusion even though it "recognize[d] that [the] holding will allow states to violate the federal copyright laws with virtual impunity."[250]

Congress ultimately solved the problem created by this application of the clear statement rule by passing the Copyright Remedy Clarification Act of 1990.[251] That act expressly provides that "states, their agencies, and personnel are not immune from infringement liability under the Eleventh Amendment to the United States Constitution or any other doctrine of sovereign immunity, and that they are subject to the same infringement remedies that apply to any non-governmental entities."[252] But while the Copyright Remedy Clarification Act of 1990 resolved the questions surrounding the application of the Eleventh Amendment to actions under the Copyright Act, its passage would have been unneccessary if federal courts had recognized the presence of the state court assumption in the Supreme Court's Eleventh Amendment jurisprudence. Instead, Congress was forced to spend time passing legislation regarding an issue that should have been clear from the text and legislative history of the Copyright Act of 1976.

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248. *See* Richard Anderson Photography v. Brown, 852 F.2d 114 (4th Cir. 1988), *cert. denied,* 489 U.S. 1033 (1989); BV Engineering v. University of California, Los Angeles, 858 F.2d 1394 (9th Cir. 1988), *cert. denied,* 489 U.S. 1090 (1989).

249. *Richard Anderson Photography,* 852 F.2d at 117; *BV Engineering,* 858 F.2d at 1397-99.

250. *BV Engineering,* 858 F.2d at 1400; *see also* Lane v. First Nat'l Bank of Boston, 871 F.2d 166, 172-74 (1st Cir. 1989) (discussing the intersection of the Eleventh Amendment and the exclusive jurisdiction in the Copyright Act and concluding that the Eleventh Amendment barred a copyright suit against a state even if the result left the plaintiff without a remedy in any court).

251. Pub. L. No. 101-553, 104 Stat. 2749 (codified at 17 U.S.C. §§ 501, 511 (1990)).

252. Some commentators might claim that this result demonstrates that Congress can react appropriately if the courts misconstrue its intentions regarding the abrogation of immunity. While these arguments clearly overlook the countermajoritarian effect of forcing Congress to act twice in order to achieve its desired goals, *see* Eskridge & Frickey, *supra* note 151, at 636-40, such claims also erroneously assume that the closure of the loophole caused by the courts' application of the clear statement rule to the Copyright Act was a relatively simple process. In fact, it took Congress two tries to get the abrogating legislation right. *See* Eskridge, *supra* note 137, at 409-10 (discussing the difficulties involved in congressional efforts to abrogate). Furthermore, the delay caused by requiring such passage meant that some plaintiffs lost their infringement claims entirely due to the running of the statute of limitations. Finally, the Copyright Act example is exceptional, as the large potential for state infringement led many powerful interest groups to endorse the abrogating legislation. The Court's Eleventh Amendment jurisprudence, however, should be concerned about *any* plaintiff being denied a forum for adjudication of federal rights. The volume of cases should not matter.

2. The Exchange Act

The Securities and Exchange Act of 1934 (Exchange Act)[253] requires the registration of every security that is listed on a national securities exchange.[254] The Exchange Act also empowers the Securities and Exchange Commission to establish rules governing the filing of reports by issuers of regulated securities.[255] The Exchange Act, however, exempts certain securities issuers from these regulations. Among such exemptions is an exemption for issuers of "securities which are direct obligations of . . . a State or any political subdivision thereof."[256] But while Congress has clearly exempted states from the registration and reporting requirements of the Exchange Act, it has not exempted the states from the antifraud provisions of the Act. In particular, since 1975, the antifraud provisions of section 10(b) and rule 10b-5 have applied to states.[257]

The application of section 10(b) and rule 10b-5 to states is relevant to this Comment because, in addition to actions by the Securities and Exchange Commission (SEC), courts have permitted implied rights of action for private citizens under those provisions.[258] Thus, by adding state governments as possible defendants in 10b-5 SEC actions, it is possible to argue that Congress "intended to subject state and municipal issuers to rule 10b-5 liability" in actions brought by private citizens.[259] The Exchange Act, then, appears to contain a private damage right for citizens to pursue against the states. Moreover, because federal courts have exclusive jurisdiction over all suits brought under the Exchange Act,[260] a private citizen seeking to enforce this right against a state may only do so in a federal forum.

Since Congress amended the Exchange Act in 1975, a number of federal courts have addressed the issue of whether a private citizen may recover damages from states in an action under section 10(b) of the Exchange Act.[261] Not surprisingly, most states have raised Eleventh

253. Securities and Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78ll (1988 and Supp. IV 1992)).

254. *Id.* § 78l.

255. *Id.* § 78m.

256. *Id.* § 78c(a)(29) (defining "municipal securities"); *see also id.* § 78c(a)(12)(A).

257. In 1975, Congress amended the Exchange Act's definition of "persons" who could be held liable under rule 10b-5 to read as follows: "The term 'person' means a natural person, company, government, or political subdivision, agency, or instrumentality of a government." *See id.* § 78c(a)(9).

258. *See* Basic Inc. v. Levinson, 485 U.S. 224, 230-31 (1988).

259. Roger K. Harris, Comment, *Sovereign and Official Immunity Issues in Securities Litigation*, 27 HOUS. L. REV. 147, 152 (1990).

260. 15 U.S.C. § 78aa (1988) ("The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.").

261. *See, e.g.*, Yeomans v. Kentucky, 514 F.2d 993 (6th Cir.), *cert. denied*, 423 U.S. 983 (1975); Brown v. Kentucky, 513 F.2d 333 (6th Cir.), *cert. denied*, 423 U.S. 839 (1975); Kahn v. Virginia

Amendment defenses.[262] States argue that because Congress has not explicitly abrogated the Eleventh Amendment in the text of the Exchange Act, they are immune from private damage suits brought under rule 10b-5. In the 1970s there was a debate between circuit courts regarding whether, under the *Parden* doctrine, a state waived its Eleventh Amendment immunity by participating in the securities markets.[263] In recent years, however, in light of the Supreme Court's abandonment of *Parden*,[264] federal courts have largely ignored the constructive waiver doctrine and have rigorously applied the *Atascadero* rule.[265] Because the text of the Exchange Act does not explicitly abrogate the Eleventh Amendment, these courts have uniformly held that states are immune from private damage suits under rule 10b-5. Not surprisingly, none of these courts has noted that because the Exchange Act contains an exclusive jurisdiction provision, the plaintiffs have been left without any forum for their federal claims.[266]

If the approach recommended in this Comment were adopted, however, federal courts considering private section 10(b) suits against states would be free to consider far more than the simple text of the statute in order to determine whether the suits are barred under the Eleventh Amendment. Instead, by acknowledging the unique circumstances presented by the intersection of an exclusive jurisdiction provision and the Eleventh Amendment, such courts would be able to look to the legislative history and the overall structure of the statute in order to determine whether a remedy against the state is necessary for the achievement of the statute's goals.

Retirement System, 783 F. Supp. 266 (E.D. Va. 1992), *aff'd*, 13 F.3d 110 (4th Cir. 1993); Mercer v. Jaffe, 730 F. Supp. 74 (W.D. Mich. 1990); Finkielstain v. Seidel, 692 F. Supp. 1497 (S.D.N.Y.), *aff'd in part, rev'd on other grounds*, 857 F.2d 893 (2d Cir. 1988); Charter Oak Fed. Sav. Bank v. Ohio, 666 F. Supp. 1040 (S.D. Ohio 1987). In addition, the issue has been raised in one other court that declined to resolve the question. *See* Durning v. Citibank, N.A., 950 F.2d 1419, 1423 (9th Cir. 1991) (declining to address appellant's arguments regarding whether Congress has affirmatively abrogated state immunity under the federal securities laws).

262. *See, e.g., Brown*, 513 F.2d at 334; *Kahn*, 783 F. Supp. at 272.

263. *Compare* Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974), *rev'd on other grounds sub nom.* United Housing Found., Inc. v. Forman, 421 U.S. 837 (1975) *with Yeomans*, 514 F.2d 993 *and Brown*, 513 F.2d 333.

264. *See* HART & WECHSLER, *supra* note 24, at 1216 (discussing Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 478 (1987)); *see also supra* text accompanying notes 55-64.

265. *See, e.g., Finkielstain*, 692 F. Supp. at 1504-05 (holding that the language of the Exchange Act, as amended in 1975, is insufficiently clear to abrogate Eleventh Amendment immunity); *Charter Oak*, 666 F. Supp at 1046 (noting that the language of the Exchange Act does not have the "requisite specificity" to override Eleventh Amendment immunity); *Mercer*, 730 F. Supp. at 78 (holding that abrogation of Eleventh Amendment immunity is not "*textually* clear" in the Exchange Act); *Kahn*, 783 F. Supp. at 272-73 (holding that in passing the 1975 amendments to the Exchange Act, Congress did not make its intention to abrogate Eleventh Amendment immunity "unmistakably clear in the language of the statute").

266. This point, however, was not lost on the one commentator who has addressed this issue. *See* Harris, *supra* note 259, at 172.

A brief review of the legislative history of the passage of the 1975 amendments to the Exchange Act reveals that, by adding governments to the definition of "persons," Congress clearly intended to ensure that state and local governments who issue securities adhere to the antifraud provisions of section 10(b).[267] The legislative history is less clear, however, on whether, in order to achieve this goal, Congress intended to subject states to civil liability to private citizens suing under section 10(b).[268] Thus, the legislative history does not resolve the question of whether the Eleventh Amendment should bar a private damage suit against a state for violations of the antifraud provisions of the Exchange Act.

A review of the overall structure of the Exchange Act, however, is far more revealing. Under the provisions of the Act, private damage actions are not the sole enforcement mechanism to ensure state compliance with the Exchange Act's antifraud provisions. The Act provides that the SEC may bring a direct action against a state for any fraudulent practices or any misstatements or omissions of material facts made in connection with any securities transaction.[269] Such an action is permissible because the Eleventh Amendment does not bar actions by the United States against states.[270] Thus, even if a private damage action is not available, a state is not free to violate federal law; the antifraud goals of the Exchange Act may be achieved through the alternate enforcement mechanism contained in the statute.

Because a private damage remedy is not necessary for the achievement of the statute's goals, a court following this Comment's approach should hold that a private section 10(b) action is barred by the Eleventh Amendment. An application of this Comment's proposal to the Exchange Act therefore leads to a result identical to the result reached by the federal courts that have employed the *Atascadero* clear statement rule: no damage remedy is available for private 10(b) suits against the state. But while the results are the same, the methods are notably different. By acknowledging the unique circumstances created by the exclusive jurisdiction provision in the Exchange Act, this Comment's approach permits federal courts to ensure that states are not free to ignore or undermine federal law. A mechanistic application of the clear statement rule bars damage suits regardless of the effect on the goals of federal law.

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267. *See* S. Rep. No. 94-75, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S.C.C.A.N. 179, 216-21.

268. *See In re* New York City Municipal Securities Litigation, 507 F. Supp. 169, 183-84 & n.34 (S.D.N.Y. 1980) (discussing the possibility that the 1975 amendments did nothing except "clarify the SEC's authority to investigate municipal issuers"). *But see* Harris, *supra* note 259, at 172-73 (arguing that Congress was "clearly aware that the amendments would result" in civil liability against states because "[a]t the time of the 1975 amendments, private rights of action against corporations had become well established").

269. *See* 15 U.S.C. § 7u(d) (1988); *see also* Harris, *supra* note 259, at 164.

270. United States v. Mississippi, 380 U.S. 128, 140-41 (1965).

3. *ERISA*

In 1974, Congress enacted ERISA[271] in response to concerns regarding the effectiveness of state regulation of pension and benefit plans.[272] Congress believed that a unified federal law governing private pension plans would not only increase the financial security for beneficiaries of existing plans, but would also encourage the creation of more plans.[273] In order to achieve these goals, Congress imposed a complex set of rules governing the relationship between plan fiduciaries and plan beneficiaries.[274]

Congress realized that in order to achieve its goal of uniformity, state law could not be permitted to interfere with pension plan regulation.[275] Thus, Congress drafted ERISA to preempt all state laws governing employee benefit plans,[276] including state tax laws.[277] In enacting these provisions, Congress noted that the principle of preemption would "apply in its broadest sense to all actions of State or local governments . . . which have the force or effect of law."[278] Thus, Congress concluded that the provisions of ERISA "would reach any rule, regulation, practice or decision of any State."[279]

Congress designed the provision of exclusive federal jurisdiction over most ERISA cases for similar purposes.[280] State court interpretation of ERISA could undermine ERISA's uniformity goals by creating inconsistent rules governing the plans. By ensuring that federal courts would interpret most ERISA provisions, Congress sought to "eliminat[e] the threat of conflicting or inconsistent State and local regnlation"[281] of private pension plans.

By providing for exclusive federal jurisdiction under ERISA, however, Congress clearly did not intend to limit the remedies available to plaintiffs bringing ERISA claims. The legislative history indicates that Congress

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271. 29 U.S.C. §§ 1001-1461 (1988 & Supp. IV 1992).

272. *See* Elizabeth A. Di Cola, Comment, *Fairness and Efficiency: Allowing Contribution Under ERISA*, 80 CALIF. L. REV. 1543, 1544 (1992).

273. *See id.* at 1544-45. Note that ERISA only governs *private* employee benefit plans. 29 U.S.C. §§ 1002(32), 1003 (1988). Thus, the law avoids the serious Eleventh Amendment problem that might arise if it governed *public* (i.e. state) plans.

274. *See, e.g.*, 29 U.S.C. § 1104(a)(1) (listing obligations of a plan fiduciary).

275. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, RETIREMENT INCOME SECURITY FOR EMPLOYEES ACT OF 1973, S. Rep. No. 127, 93d Cong., 1st. Sess. 29 (1973), *reprinted in* 1 SUBCOMMITTEE ON LABOR OF THE SENATE COMM. ON LABOR AND PUB. WELFARE, LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, 587, 615 (1976) [hereinafter LEGISLATIVE HISTORY OF ERISA] ("[A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area where decisions under the same set of facts may differ from state to state.").

276. 29 U.S.C. § 1144(a) (1988).

277. *Id.* § 1144(b)(5)(B)(i).

278. 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 275, at 4746.

279. *Id.* at 4670.

280. 29 U.S.C. § 1132(e)(1).

281. 3 LEGISLATIVE HISTORY OF ERISA, *supra* note 275, at 4746.

intended the federal courts to provide a "full range of legal and equitable remedies" for ERISA violations.[282] The exclusive jurisdiction provision was therefore provided to ensure a uniform interpretation of, and maximum compliance with, federal law.

ERISA's preemption rules and exclusive federal jurisdiction provision therefore indicate a strong congressional objective of uniformity in the regulation of private pension plans. The statute also displays a strong presumption in favor of the development of private pension and benefit plans. The denial of a remedy for state appropriation of funds in violation of ERISA, however, appears to be inconsistent with both of these goals. A new wave of health care taxes being enacted by states across the nation would threaten the existence of pension plans by siphoning plan money in order to fund state health care programs, even though such taxes may violate ERISA.[283] In order to avoid paying these taxes, the plans would bear the burden of preemptively suing the state for injunctive relief to block collection of taxes.[284] Denying a damage remedy may also permit states to avoid their reimbursement responsibilities arising out of contracts between private pension plans and state plans.[285]

The complete denial of a damage remedy against the states is therefore inconsistent with both the legislative history and the structural goals of ERISA. By recognizing the unique circumstances created by the statute's exclusive jurisdiction provision, courts could consider this inconsistency when evaluating a state's Eleventh Amendment defense of immunity. The practical compromise of the clear statement rule should not bar the lawsuit.

Thus, the *Thiokol* plaintiffs should have been allowed to argue that an Eleventh Amendment bar is inconsistent with the policy and intent of ERISA. In particular, a bar based solely on Congress' failure to explicitly include states as potential defendants in the text of ERISA, when coupled with an exclusive jurisdiction provision, has the severe effect of a complete denial of a remedy for the plaintiffs. The Court should not use the clear statement rule to enforce such a result. Instead, the Court should address the unique problem created by the exclusive jurisdiction provision by rec-

282. 2 LEGISLATIVE HISTORY OF ERISA, *supra* note 275, at 2364.

283. *See, e.g.*, Travelers Ins. Co. v. Cuomo, 14 F.3d 708, 712 (2d Cir. 1993) (describing New York Public Health Laws §§ 2807-c(1)(b), 2807-c(11)(i), and 2807-c(2-a)(a), which impose various surcharges on health care insurance carriers in New York); E-Systems, Inc. v. Pogue, 929 F.2d 1100, 1101-02 (5th Cir.), *cert. denied*, 112 S. Ct. 585 (1991) (describing the Texas Administrative Services Tax Act, Tex. Ins. code art. 4.11A, which imposes certain taxes upon plans covered by ERISA); Boyle v. Anderson, 849 F. Supp. 1307, 1309-10 (D. Minn. 1994) (describing the Minnesota Health Right Act, Minn. Stat. § 295.582 (Supp. 1993), which permits health care providers to pass certain taxes on to third party insurance carriers).

284. This approach was used by the plaintiffs in *Travelers*, 14 F.3d at 714 (describing the plaintiff's tactics in suing preemptively in federal court).

285. ERISA governs contracts between private pension plans and outside parties. *See supra* note 273. Thus, if a private plan contracts with a state entity (an outside party) for a reimbursement arrangement, ERISA would govern any lawsuit arising from the contract.

ognizing an exception to the clear statement rule which considers the overall structure and policies embodied in the statute.

CONCLUSION

This Comment has argued that the Supreme Court's modern Eleventh Amendment doctrine is based on a subconstitutional compromise between the proponents of the *Hans* theory of broad state sovereign immunity and the *Hans* critics who argue that the Eleventh Amendment should not affect the scope of federal question jurisdiction of the federal courts. The *Atascadero* clear statement rule is a judicial construct that offers benefits to both sides: it permits Congress to abrogate state sovereign immunity, but creates a powerful presumption against such abrogation.

In most cases, the rule has been a practical, effective compromise. It appears, however, that neither side to the compromise recognized the clear statement rule's implications for statutes that create rights exclusively enforceable in federal courts. Thus, in cases involving such statutes, the Court should recognize an exception to the clear statement rule permitting courts to evaluate whether a damage remedy against the state is necessary for the fulfillment of such a statute's goals.

First, this exception would be largely consistent with modern Supreme Court jurisprudence. Second, such an exception would be sufficiently narrow so that the clear statement compromise would survive. Finally, this exception would eliminate the current doctrine's dependence on Congress' ability to enact abrogating legislation. While the delays incurred by such dependence may be tolerable when plaintiffs have an adequate legal remedy in state court, they are not acceptable when they effectively deny plaintiffs from obtaining *any* legal remedy.

Even if the Sixth Circuit had adopted the exception proposed in this Comment, it still might have ruled that the *Thiokol* plaintiffs could not recover any damages from the State of Michigan. The court could have ruled that the challenged state taxation scheme was wholly consistent with ERISA, and thus no damages were due. At a minimum, however, the *Thiokol* plaintiffs deserved to have their claim heard by a court. If Congress has barred them from the state courts of Michigan, the Court should not use its "jerry-built system"[286] of Eleventh Amendment doctrine to bar them from a federal forum as well.

286. Fletcher, *A Historical Interpretation, supra* note 14, at 1044.