December 5, 1988

Mr. Justice:

Re: Will: Re this Court's jurisdiction

Intrigued by the jurisdiction question raised by Justice Kennedy, I did a bit of post-argument reading. The current version of Tribe, American Constitutional Law, states that "neither sovereign immunity nor the eleventh amendment bars Supreme Court review of state court judgments in suits in which a state is a party, since supremacy of federal law requires review of the federal questions presented by such judgments." Id. at 175. The authority cited for this proposition is Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 379-83, 407 (1821) (which is pre-Hans) and Smith v. Reeves, 178 U.S. 436, 445 (1900). The latter case is helpful. It involved a suit, determined to be a suit against the State, under a California state tax statute which had been interpreted by the California courts as permitting suits to be brought only in California state court. A taxpayer sought to sue in federal circuit court, and this Court held the suit barred by the eleventh amendment, notwithstanding the fact that the taxpayer bringing the suit was a corporation created by Congress. This Court determined that it "does not follow" from this resolution of the case "that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution of laws of the United States and specially set up by him, the case can be

brought here upon writ of error from the highest court of the State." Although this is dictum, I think it helpful.

More fundamentally, I think this Court's eleventh amendment jurisprudence has never been so "plain language" oriented as to require a declaration of lack of jurisdiction here. It could be argued that the eleventh amendment arose out of the need to overrule Chisolm, which was a case involving an original action, and that the Eleventh Amendment should be limited accordingly.

Of course, that narrow a historical reading of the eleventh amendment may itself be foreclosed by Hans: it didn't stop this Court in Hans that Chisolm was not a federal question case. If the narrow reading is foreclosed, that fact becomes another argument in favor of determining that Hans was wrongly decided. It would mean that, because of Hans, suits against states, in state courts, which are permitted under state sovereign immunity law but which raise questions of federal law would present state court decisions on federal law that are unreviewable in this Court. That outcome is so out of line with basic notions of Supreme Court review as central to the enforcement of the Supremacy Clause that something would have to give. It is more likely that the extension of Hans to direct review would give than that Hans itself would give.

Deborah