

However difficult the distinctions may be December 5, 1988
matter, they are sufficiently important that I imagine they will
Mr. Justice:

Re: Will: Yale Article
problem by overruling Hans. Pennsylvania v. Union Gas has yet to
be circulated, let alone announced. Who knows what might result

I have looked briefly at Jackson, The Supreme Court, the
Eleventh Amendment, and State Sovereign Immunity, 98 Yale L. J. 1
(Nov. 1988). On the question raised at argument today, the arti-
cle expresses dissatisfaction with the ways of distinguishing
appellate vs. district court jurisdiction, and suggests that the
best way to deal with the situation would be to overrule Hans.

The article cites Smith v. Reeves (discussed in my last
memo), and also cites General Oil v. Crane, 209 U.S. 211, 233
(1908), which recasts Cohens as follows: "it was long ago set-
tled that a writ of error to review the final judgment of a state
court, even when a State is a formal party and is successful in
the inferior court, is not a suit within the meaning of the
Amendment." The article then goes on to examine possible ration-
ales for that result. One rationale, that an "appeal" is not
properly a "suit" within the meaning of the eleventh amendment,
is criticized as "only barely plausible" (32). The rationale
that once a state consents to suit in its own courts, it consents
to Supreme Court review of federal questions raised in the case
is criticized (a) in part on the ground that if the eleventh
amendment is jurisdictional, it should be non-waivable, but (b)
more fundamentally because state courts are understood to have
the right to decide where they will be sued (35-37).

However difficult the distinctions may be as an academic matter, they are sufficiently important that I imagine they will be drawn. But, then again, it may not be too late to solve the problem by overruling Hans. Pennsylvania v. Union Gas has yet to be circulated, let alone announced.^(*) Who knows what might result from Justice Kennedy's question today?

Deborah

(*) ANK was the 5th vote not to overrule Hans.