not."[30] An *in rem* admiralty action may be brought, however, if the state is not in possession of the *res*.[31]

And in extending protection against suits brought by foreign governments, the Court made clear the immunity flowed not from the Eleventh Amendment but from concepts of state sovereign immunity generally. "Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81."[32]

In the 1980s, four Justices, led by Justice Brennan, argued that *Hans* was incorrectly decided, that the Amendment was intended only to deny jurisdiction against the states in diversity cases, and that *Hans* and its progeny should be overruled.[33] But the remaining five Justices adhered to *Hans* and in fact stiffened it with a rule of construction quite severe in its effect.[34] The *Hans* interpretation was further solidified with the Court's ruling in *Seminole Tribe*

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[30] 256 U.S. at 498. *See also* Florida Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982); Welch v. Texas Dep't of Highways and Transp., 483 U.S. 468 (1987).

[31] California v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (application of the Abandoned Shipwreck Act) (distinguishing *Ex parte* New York and *Treasure Salvors* as involving *in rem* actions against property actually in possession of the state).

[32] Principality of Monaco v. Mississippi, 292 U.S. 313, 322–23 (1934) (footnote omitted); Breard v. Greene, 523 U.S. 371, 377 (1998) (foreign nation may not contest validity of criminal conviction after state's failure at time of arrest to comply with notice requirements of Vienna Convention on Consular Relations). Similarly, relying on *Monaco*, the Court held that the Amendment bars suits by Indian tribes against non-consenting states. Blatchford v. Native Village of Noatak, 501 U.S. 775 (1991).

[33] *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (dissenting); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 496 (1987) (dissenting); Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (dissenting); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 309 (1990) (concurring). Joining Justice Brennan were Justices Marshall, Blackmun, and Stevens. *See also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

[34] *E.g.*, Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Powell); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Powell); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Powell); Pennsylvania v. Union Gas Co., 491 U.S. 1, 29 (1989) (Justice Scalia concurring in part and dissenting in part); Dellmuth v. Muth, 491 U.S. 223, 227–32 (opinion of the Court by Justice Kennedy); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989) (plurality opinion of Justice White); id. at 105 (concurring opinions of Justices O'Connor and Scalia); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice O'Connor).