

HARVARD LAW REVIEW

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ARTICLES

THE ELEVENTH AMENDMENT AND  
THE NATURE OF THE UNION

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TABLE OF CONTENTS

I. INTRODUCTION.....1819

II. CURRENT THEORIES OF THE ELEVENTH AMENDMENT .....1825

    A. *The Immunity Theory* .....1826

    B. *The Diversity Theory*.....1830

    C. *The Compromise Theory* .....1832

    D. *The Inadequacy of Current Theories*.....1835

III. THE LOST HISTORICAL CONTEXT OF THE ELEVENTH AMENDMENT .....1838

    A. *The Articles of Confederation*.....1839

    B. *The Constitutional Convention* .....1843

    C. *The Ratification Debates* .....1853

    D. *Article III and State Suability*.....1862

        1. State-Citizen Diversity Jurisdiction .....1863

        2. Federal Question Jurisdiction .....1870

        3. Suits Between a State and Another State or a Foreign State .....1873

IV. THE ADOPTION OF THE ELEVENTH AMENDMENT .....1875

    A. *The Chisholm Decision* .....1876

    B. *The Aftermath of Chisholm*.....1886

    C. *The Adoption of the Eleventh Amendment*.....1891

V. THE TEXT IN HISTORICAL CONTEXT .....1894

    A. *An Explanatory Amendment* .....1896

    B. *Reassessing the Article III Anomaly*.....1899

        1. Article III and the Eleventh Amendment in Historical Context. ....1900

        2. The Constitution. ....1903

        3. The Laws of the United States. ....1908

        4. Treaties. ....1909

VI. IMPLICATIONS FOR MODERN JURISPRUDENCE .....1911

VII. CONCLUSION.....1917

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## THE ELEVENTH AMENDMENT AND THE NATURE OF THE UNION

Bradford R. Clark\*

*Leading theories of the Eleventh Amendment start from the premise that its text makes no sense. These theories regard the Amendment as either underinclusive, overinclusive, or an incoherent compromise because it prohibits federal courts from hearing “any suit” against a state by out-of-state citizens, but does not prohibit suits against a state by its own citizens. Two of these theories would either expand or contract the immunity conferred by the text of the Amendment in order to avoid this absurd or anomalous result. This Article suggests that the Eleventh Amendment made sense as written when understood in its full historical context. In particular, the Articles of Confederation empowered Congress to require states to supply men, money, and supplies, but gave Congress no power to enforce its own commands. Prominent Founders initially argued that the only way to fix the Articles was to give Congress coercive power over states. But the Convention and the ratifiers ultimately rejected this idea because they feared that the introduction of such power would lead to a civil war.*

*To avoid this danger, the Founders designed the Constitution to give Congress legislative power over individuals rather than states. This novel approach eliminated the need for coercive power over states, and provided Federalists with a key argument for adopting the Constitution rather than amending the Articles. Antifederalists threatened to undermine this case for the Constitution by arguing that the state-citizen diversity provisions of Article III — authorizing suits “between” states and out-of-state citizens — could be construed to permit suits against states (and thus imply federal power to enforce any resulting judgments against states). Although Federalists denied this construction, the Supreme Court proceeded to read Article III to permit out-of-state citizens to sue states. Federalists and Antifederalists quickly joined forces to restore their preferred construction of Article III. In adopting the Eleventh Amendment, they saw no anomaly in prohibiting “any suit” against a state by out-of-state citizens because they did not understand the Constitution to authorize any suits against states by in-state citizens. Federal question jurisdiction did not expressly authorize such suits, and the Founders likely would not have perceived any real need for such jurisdiction given their understanding that the Constitution conferred neither legislative nor coercive power over states. Because the Eleventh Amendment, as written, made sense in light of the nature of the Union, the absurdity doctrine cannot justify departing from the terms of the Amendment.*

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*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.*<sup>1</sup>

## I. INTRODUCTION

Leading theories of the Eleventh Amendment place surprisingly little emphasis on the words of the Amendment. In fact, according to one prominent observer, “the [E]leventh [A]mendment is universally taken *not* to mean what it says.”<sup>2</sup> The reason is that most courts and commentators regard the Amendment as either grossly under- or over-inclusive. In their view, the best way to understand and apply the Amendment is to look past its terms to its underlying purpose (as they define it). Modern theorists feel justified in expanding or contracting the immunity conferred by the text because they believe that following the Amendment as written would produce the anomalous — or even absurd — result of barring out-of-state citizens from suing states in federal court while leaving in-state citizens free to do so. As a result, leading theories of the Amendment tend to focus on why the Amendment cannot mean what it says.

This Article offers a novel account of why the Eleventh Amendment made sense at the time it was adopted and simultaneously provides insight into the Founders’ understanding of the nature of the Union. The Articles of Confederation authorized Congress to exercise legislative power over states rather than individuals, but provided no means of enforcement. The Founders concluded that the Articles could be made effective only by authorizing Congress to employ coercive military force against states who refused to comply with its affirmative commands. The Founders rejected proposals to introduce coercive force, however, because they feared that the use of such power would lead to a civil war. They abandoned the Articles in favor of a Constitution specifically designed to authorize Congress to exercise legislative power solely over individuals rather than states. This approach obviated the need for the introduction of coercive power over states. To be sure, the Constitution imposed important negative prohibitions on states, but these provisions could be enforced in suits between individuals or as federal defenses to enforcement actions brought by states. Thus, enforcing these prohibitions did not necessitate either suits by individuals against states or the use of coercive power against states.

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<sup>1</sup> U.S. CONST. amend. XI.

<sup>2</sup> Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1977).

This background helps to make sense of the Eleventh Amendment. The Amendment was adopted to overturn a construction of Article III that permitted out-of-state citizens to sue states in federal court, resulting in judgments that implied federal coercive power of the very kind the Constitution was designed to avoid. During ratification, Antifederalists had warned that the state-citizen diversity provisions of Article III could be construed to permit such suits. The Amendment did not attempt to bar in-state citizens from suing their own states because no one had suggested that Article III would permit such suits. Moreover, if the Founders were correct in assuming that the Constitution neither imposed nor permitted Congress to impose affirmative obligations on states, then there would never be any suits against states to enforce such obligations. On this understanding, the Amendment's ban on all suits by out-of-state citizens was a complete solution to the problem of suits by individuals against states, and thus created no anomaly.

Current theories of the Eleventh Amendment — the immunity theory, the diversity theory, and the compromise theory — all presuppose that the Amendment was poorly drafted and would produce anomalous or absurd results if applied as written. The traditional “immunity” theory, currently embraced by a majority of the Supreme Court (but few academics), argues that states enjoy broad constitutional sovereign immunity beyond the terms of the Amendment. Proponents of broad immunity regard the Amendment's text as unacceptably *underinclusive* because it bars suits only by out-of-state citizens. In *Hans v. Louisiana*,<sup>3</sup> the Court famously characterized a citizen's suggestion that “[t]he letter” of the Amendment left him free to sue his own state as “an attempt to strain the Constitution and the law to a construction never imagined or dreamed of.”<sup>4</sup> In the Court's view, the purpose of the Amendment was to bar *all* suits by individuals against states. According to the Court, the supposition that the states would have adopted an amendment permitting their own citizens to sue them in cases arising under the Constitution or laws of the United States “is almost an absurdity on its face.”<sup>5</sup>

By contrast, the more recent “diversity” theory, endorsed by a minority of the Court (but many academics), regards the text of the Eleventh Amendment as unacceptably *overinclusive*.<sup>6</sup> Diversity theorists insist that the Amendment's prohibition against “any suit” cannot be applied literally because it would lead to the anomalous conclusion

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<sup>3</sup> 134 U.S. 1 (1890).

<sup>4</sup> *Id.* at 15.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., 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).

that in-state citizens can invoke federal question jurisdiction to sue a state but out-of-state citizens cannot. The purpose of the Amendment, they say, was merely to prohibit those suits in which jurisdiction rests solely on the state-citizen diversity clauses of Article III, not to curtail jurisdiction over suits against states supported by any of Article III's other heads of jurisdiction.

Ironically, both groups criticize each other for ignoring aspects of the constitutional text. For example, proponents of broad immunity argue that the diversity theory contradicts the Amendment's express prohibition against extending the judicial power to "any suit" by an out-of-state citizen against a state because the theory would allow just such suits under federal question jurisdiction. Conversely, diversity theorists charge that broad immunity disregards the Eleventh Amendment's precise terms, which preclude jurisdiction over suits by out-of-state citizens but say nothing to bar suits brought by citizens against their own states.

The "compromise" theory of the Eleventh Amendment attempts to avoid these criticisms by accepting the Amendment as written. This theory suggests that the Amendment reflects an unrecorded, and less than fully coherent, compromise.<sup>7</sup> On this view, courts should simply follow the text and ignore any resulting anomalies.<sup>8</sup> According to the proponents of this theory, it is simply not possible to discover the original meaning of the Amendment or to identify its precise purpose.<sup>9</sup>

Understood in light of the shift from the Articles of Confederation to the Constitution, however, the terms of the Eleventh Amendment were neither underinclusive, overinclusive, nor an incoherent compromise. Rather, they were a carefully crafted response to widespread demands following *Chisholm v. Georgia*<sup>10</sup> for an amendment that would remove or explain any provision of the Constitution that could be construed to permit individuals to sue states in federal court. The only provisions that anyone had ever suggested might authorize such suits were the state-citizen diversity provisions of Article III. Although the utility of original meaning as a guide to interpretation remains contested, this Article starts from the assumption that the original meaning is relevant both because the Supreme Court and leading

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<sup>7</sup> See, e.g., Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 113 (1989) ("The amendment was a product of Federalist political prudence and congressional compromise.").

<sup>8</sup> See Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

<sup>9</sup> See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1722 (2004); cf. Andrew B. Coan, Essay, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511 (2006).

<sup>10</sup> 2 U.S. (2 Dall.) 419 (1793).

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scholars have examined the Amendment in these terms, and because the original meaning confirms the most natural reading of the text. The keys to deciphering the Amendment are the Founders' understandings that the new Constitution (1) did not authorize Congress to exercise legislative power over states (as opposed to individuals), (2) did not guarantee individuals affirmative relief against states, and (3) did not grant the federal government coercive power to enforce federal commands directly against states.

Given these assumptions (and the tradition of sovereign immunity), the Founders appear to have assumed that only an express constitutional authorization could empower federal courts to hear suits against states. The Founders publicly debated whether the state-citizen diversity provisions of Article III constituted such authorization. Antifederalists charged that the power to hear suits *between* a state and out-of-state citizens included the power to hear suits *against* states. Leading Federalists responded that these provisions should be construed to permit jurisdiction only over suits *by* states against individuals. No similar debate took place over whether federal question jurisdiction permitted suits against states, perhaps because this provision did not mention states and because the Founders may not have regarded suits against states as necessary to enforce federal law. This background helps to explain why the drafters of the Eleventh Amendment saw their task as simply to close a loophole created by the state-citizen diversity provisions of Article III. Given their assumptions about the nature of the Union, the Founders would not have understood the Constitution to authorize federal question suits against states. Thus, they would not have understood the Eleventh Amendment to create the anomaly between in-state and out-of-state citizens that modern theorists perceive.

The Articles of Confederation authorized Congress to command states to provide money, troops, and supplies to the central government, but provided no means of enforcement. The Founders concluded that the only way to make the Articles effective was to empower Congress to use military force to coerce state compliance with its commands. The Founders rejected reliance on coercive force, however, because they believed it would lead to a civil war.<sup>11</sup> The Constitutional Convention consciously drafted the Constitution to avoid the need for coercive power by granting Congress legislative power over individuals rather than states and by giving individuals only negative rights against states. During the ratification debates, one of the Fed-

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<sup>11</sup> See Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1780 (1997) ("The Founders rejected the prevalent system because they believed that duties could be enforced against political bodies only through military force.")

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eralists' most powerful arguments against the Articles and in favor of the Constitution was that only the Constitution avoided the need to introduce coercive power against states. The argument was so powerful that Antifederalists largely abandoned the Articles as beyond repair and focused on ways to improve the Constitution (by, for example, proposing a Bill of Rights).

During ratification, however, Antifederalists threatened to undermine the Federalists' structural case for the Constitution by pointing out that Article III could be construed as an express authorization for federal courts to hear suits against states by citizens of another state or a foreign state. Such suits, they pointed out, would create the very enforcement problems that Federalists insisted the Constitution was designed to avoid. Leading Federalists responded by denying that Article III would be construed to permit suits *against* states by individuals. Rather, they argued that it should be construed to confer jurisdiction only over cases in which a state was a plaintiff. A broader construction, they argued, would serve no purpose, because any recovery against a state for its debts could not be enforced "without waging war against the contracting State."<sup>12</sup> They maintained that to ascribe, by implication, "a power which would involve such a consequence, would be altogether forced and unwarrantable."<sup>13</sup>

Notwithstanding such Federalist assurances, the Supreme Court in *Chisholm* construed Article III to encompass a suit against a state by a citizen of another state. Federalists and Antifederalists immediately united to amend the Constitution to preclude Article III from being construed in this fashion. There was widespread sentiment that the Constitution should neither permit individuals to sue states nor empower the federal government to coerce state compliance with any resulting judgments. The Founders adopted the Eleventh Amendment to "explain" Article III and restore their preferred construction of the judicial power. Framing the Amendment as an explanatory amendment had several distinct advantages. It restored the construction of Article III that Federalists had promised during the ratification debates; it rebuked the Supreme Court for its contrary construction; and it applied retroactively to deny jurisdiction over all pending suits against states.

Viewed from the Founders' perspective, the Eleventh Amendment would have provided a fully coherent, even elegant, solution to the problem posed by *Chisholm's* interpretation of Article III. The Amendment cuts across all jurisdictional categories in Article III by denying federal courts judicial power to hear "any suit" against a state

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<sup>12</sup> THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>13</sup> *Id.* (emphasis omitted).

brought by a prohibited plaintiff. Modern commentators find this anomalous because the text — read literally — would prohibit out-of-state citizens from bringing *federal question suits* against states, but leave in-state citizens free to do so. This anomaly disappears, however, if one assumes (as the Founders did) that the original Constitution does not give individuals affirmative rights against states and does not repeat the “great and radical vice” of authorizing “legislation for states or governments, in their corporate or collective capacities.”<sup>14</sup> Accordingly, not even the most alarmist Antifederalists suggested during ratification that in-state citizens could sue states using federal question jurisdiction. Rather, the Founders assumed that individuals could never bring *any* federal question suits against states. This forgotten context regarding the nature of the Union explains why no one at the time saw any anomaly in the Eleventh Amendment’s text.

By the same token, the Eleventh Amendment itself provides important evidence regarding the Founders’ understanding of the nature of the Union under the Constitution. During the ratification debates, no one suggested that federal question jurisdiction could be construed to authorize individuals to sue states because the Founders assumed that the Constitution neither imposed — nor empowered Congress to impose — obligations on states that would require coercive enforcement. Indeed, an error by one Federalist writer forced him to acknowledge publicly that “[t]here is no expression in the proposed plan to warrant” the conclusion “that the original jurisdiction of the federal court extends to cases between a state and its own citizens.”<sup>15</sup> Given this assumption, the debate between Federalists and Antifederalists over state suability focused exclusively on whether out-of-state citizens could sue states using the state-citizen diversity provisions of Article III. The terms of the Eleventh Amendment reflect this understanding of the Constitution. By barring out-of-state citizens from bringing “any suit” against a state in federal court, the Founders understood the Amendment to restore parity — not introduce disparity — between these groups. In this sense, the terms of the Amendment reflect the Founders’ original conception of the Union created by the Constitution.

Part I examines three current theories of the Eleventh Amendment — the immunity theory, the diversity theory, and the compromise theory — and explains that all three start from the questionable premise that the Amendment created an anomalous or absurd distinction between in-state and out-of-state citizens. Part II examines the draft-

<sup>14</sup> THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 12, at 108.

<sup>15</sup> Aristides, Letter to the People of Maryland, MD. J. & BALT. ADVERTISER, April 1, 1788, at 1.

ing and ratification of the Constitution, and the fundamental decision to abandon legislative power over states under the Articles of Confederation in favor of exclusive reliance on legislative power over individuals. This shift allowed the Constitution to enforce federal commands without introducing coercive force against states. Part III describes the Supreme Court's decision in *Chisholm v. Georgia* and subsequent efforts to adopt a constitutional amendment to remove or explain any clause in the Constitution that could be construed to permit individuals to sue states. Part IV argues that the Eleventh Amendment was designed to overturn *Chisholm* and to restore the Founders' preferred construction of Article III. In historical context, the Amendment would not have been understood to create anomalous results because the Founders did not expect federal question jurisdiction to generate any suits by any citizens against any states. Finally, Part V considers several potential implications of the historical understanding of the Eleventh Amendment. Because the Amendment makes sense in historical context, the absurdity doctrine provides no justification for ignoring its precise terms. This context also helps to explain why the Court prohibits Congress from abrogating state sovereign immunity under its Article I, Section 8 powers, but allows abrogation when Congress invokes its power to enforce the Civil War Amendments. The former powers were designed to avoid a civil war, whereas the latter powers were granted in response to the Civil War.

## II. CURRENT THEORIES OF THE ELEVENTH AMENDMENT

The leading theories of the Eleventh Amendment go beyond the words of the Amendment without a fully convincing theoretical basis. On the one hand, for more than a century the Supreme Court has treated the Amendment as merely indicative of a broader underlying constitutional immunity. This "immunity" theory maintains that the Amendment is not the exclusive, or even the primary, source of state sovereign immunity. On the other hand, beginning in the 1980s, several prominent academics and a minority of the Court embraced the "diversity" theory of the Eleventh Amendment. This theory "contends that the amendment merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction [between a state and citizens of another state or a foreign state] and that the amendment did nothing to prohibit federal court jurisdiction [in federal question cases]."<sup>16</sup> Both theories have recently received increased scrutiny from textualists who claim that neither is consistent with the terms of the Eleventh Amendment. They hypothesize a third possibility — namely, that the text of the Amendment reflects an unre-

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<sup>16</sup> Fletcher, *supra* note 6, at 1034.

corded and perhaps incoherent compromise. Under this “compromise” theory, courts should follow the text of the Amendment without regard to any resulting anomalies. Each of these theories rests on the premise that the text of the Eleventh Amendment creates an illogical distinction between in-state and out-of-state citizens. The perceived anomaly disappears, however, when the Amendment is placed in the broader historical context of the shift from the Articles of Confederation to the Constitution.

#### A. *The Immunity Theory*

The immunity theory — the Supreme Court’s dominant approach since 1890 — regards the text of the Eleventh Amendment as underinclusive, and therefore recognizes more state sovereign immunity than the text provides. On this view, the Amendment is simply a partial confirmation of the states’ broader, preexisting immunity under the Constitution. According to its adherents, this understanding is necessary to avoid the absurd result that out-of-state citizens are barred from suing states in federal courts in all cases, but in-state citizens are free to bring such suits if otherwise permitted by Article III. Thus, under this approach, the Supreme Court has come to understand “the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms.”<sup>17</sup>

Some background is useful to understand the emergence of the immunity theory. In *Chisholm v. Georgia*, the Supreme Court interpreted Article III (and the Judiciary Act of 1789) to permit a citizen of South Carolina to sue Georgia without its consent. As Professor (now Judge) William Fletcher has noted, “[t]he reaction to *Chisholm* was immediate and hostile.”<sup>18</sup> Constitutional amendments were introduced in both the House and Senate within two days of the decision,<sup>19</sup> and numerous states, led by Massachusetts, urged Congress to adopt “such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.”<sup>20</sup>

<sup>17</sup> *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

<sup>18</sup> Fletcher, *supra* note 6, at 1058.

<sup>19</sup> See *infra* notes 439–442 and accompanying text.

<sup>20</sup> Resolution of the Massachusetts General Court, Sept. 27, 1793, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 440 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC]; see *infra* notes 431–437 and accompanying text.

Congress responded by approving the Eleventh Amendment and sending it to the states for ratification in March 1794.<sup>21</sup> By February 1795, three-quarters of the states had approved the Amendment.<sup>22</sup> In response, the Supreme Court dismissed all pending suits against states from its docket on the ground “that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.”<sup>23</sup> The Supreme Court had few occasions to apply the Eleventh Amendment prior to the Civil War, presumably because out-of-state and foreign citizens recognized that federal courts lacked jurisdiction to hear their suits against states and because Congress had not yet granted lower federal courts general federal question jurisdiction.<sup>24</sup>

More extensive consideration came after Congress extended general federal question jurisdiction to lower federal courts in 1875. Just as the states’ efforts to avoid their debts following the Revolutionary War led individuals to sue states in the 1790s, similar state efforts following the Civil War led individuals to sue states at the end of the nineteenth century. On this occasion, however, plaintiffs were armed with the Contracts Clause, which the Supreme Court had since interpreted to apply to public as well as private contracts.<sup>25</sup> For example, following Reconstruction, Louisiana effectively repudiated its debts by amending its constitution and laws to impede repayment.<sup>26</sup> These actions produced several important decisions.

Until 1890, the Supreme Court’s decisions were consistent with the text of the Eleventh Amendment: federal courts could not entertain any suit — whether based on a federal question or diversity — brought against a state by a citizen of another state or of a foreign state.<sup>27</sup> In *Hans v. Louisiana*,<sup>28</sup> however, the Court looked beyond the

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<sup>21</sup> See CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 66–67 (1972).

<sup>22</sup> *Id.* at 67.

<sup>23</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798).

<sup>24</sup> The Supreme Court did have appellate jurisdiction in federal question cases, but this led to only limited consideration of the Amendment. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (holding that the Eleventh Amendment does not prevent the Supreme Court from hearing a federal question appeal in a criminal case brought by a state against its own citizen in state court).

<sup>25</sup> See *infra* note 547 and accompanying text.

<sup>26</sup> See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 63–66 (1987).

<sup>27</sup> See *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711, 720 (1883) (holding that the Eleventh Amendment barred a federal question suit by out-of-state bondholders against state officers in their official capacity because it amounted to a suit against the state); see also *New Hampshire v. Louisiana*, 108 U.S. 76, 88–89 (1883) (dismissing a suit between states under the Eleventh Amendment because an individual was the real party in interest).

<sup>28</sup> 134 U.S. 1 (1890).

terms of the Amendment and dismissed a citizen's suit against his own state. Hans, a citizen of Louisiana, sued Louisiana in federal court for repudiating its bonds in violation of the Contracts Clause. Hans argued that he was "not embarrassed by the obstacle of the Eleventh Amendment, inasmuch as that amendment only prohibits suits against a State which are brought by the citizens of another State."<sup>29</sup> The Court acknowledged that "the amendment does so read," but suggested that there was another "reason or ground for abating his suit."<sup>30</sup> According to the Court, the Eleventh Amendment "shows that, on this question of the suability of the States by individuals, the highest authority of this country was in accord rather with the minority than with the majority of the court in the decision of the case of *Chisholm v. Georgia*."<sup>31</sup> Invoking the Founding-era "views of those great advocates and defenders of the Constitution" (Alexander Hamilton, James Madison, and John Marshall),<sup>32</sup> the Court concluded that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States."<sup>33</sup> The Court read the Eleventh Amendment to confirm this understanding: "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled?"<sup>34</sup> The Court viewed this supposition as "almost an absurdity on its face."<sup>35</sup>

Since *Hans*, the Supreme Court has largely adhered to, and even expanded, its broad view of state sovereign immunity beyond the terms of the Eleventh Amendment. For example, in *Monaco v. Mississippi*,<sup>36</sup> the Court held that it lacks "jurisdiction to entertain a suit brought by a foreign State against a State without her consent,"<sup>37</sup> notwithstanding Article III's extension of the judicial power to controversies "between a State . . . and foreign States,"<sup>38</sup> and the Eleventh Amendment's conspicuous failure to restrict this jurisdiction. The Court refused to "rest with a mere literal application of the words" of Article III or to "assume that the letter of the Eleventh Amendment

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<sup>29</sup> *Id.* at 10.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 12.

<sup>32</sup> *Id.* at 14.

<sup>33</sup> *Id.* at 15.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 292 U.S. 313 (1934).

<sup>37</sup> *Id.* at 320.

<sup>38</sup> U.S. CONST. art. III, § 2, cl. 1.

exhausts the restrictions upon suits against non-consenting States.”<sup>39</sup> According to the Court, states are “immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.”<sup>40</sup> Although the Court found that states surrendered their immunity with respect to suits brought by sister states and by the United States,<sup>41</sup> it concluded that Article III does not authorize federal courts to adjudicate disputes between a state and a foreign state without the “previous consent of the parties.”<sup>42</sup>

In the twentieth century, Congress began the novel practice of regulating states as part of its broader legislative agenda, and eventually authorized suits by individuals against states to enforce congressional commands. The Supreme Court has generally prevented congressional abrogation of state sovereign immunity, first by imposing clear statement rules<sup>43</sup> and ultimately by holding in *Seminole Tribe of Florida v. Florida*<sup>44</sup> that Congress lacks power to do so under Article I, Section 8.<sup>45</sup> Adhering to the purposive approach of *Hans*, the Court stated that the “dissent’s lengthy analysis of the text of the Eleventh Amendment is directed at a straw man.”<sup>46</sup> According to the Court, “we long have recognized that blind reliance upon the text of the Eleventh Amendment is ‘to strain the Constitution and the law to a construction never imagined or dreamed of.’”<sup>47</sup>

*Alden v. Maine*<sup>48</sup> demonstrates the depth of the Supreme Court’s commitment to the proposition that state sovereign immunity does not rest solely on the Eleventh Amendment.<sup>49</sup> *Alden* invalidated a congressional attempt to subject states to suit in *state* court to enforce

<sup>39</sup> *Monaco*, 292 U.S. at 322.

<sup>40</sup> *Id.* at 322–23 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 487) (internal quotation marks omitted).

<sup>41</sup> *Id.* at 330.

<sup>42</sup> *Id.* at 324 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557 (Jonathan Elliot ed., 2d ed. 1901) [hereinafter ELLIOT’S DEBATES]).

<sup>43</sup> See, e.g., *Green v. Mansour*, 474 U.S. 64, 68 (1985).

<sup>44</sup> 517 U.S. 44 (1996).

<sup>45</sup> At the same time, the Court has permitted Congress to abrogate state sovereign immunity under its power to enforce the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

<sup>46</sup> *Seminole Tribe*, 517 U.S. at 69.

<sup>47</sup> *Id.* (quoting *Monaco*, 292 U.S. at 326 (internal quotation marks omitted)). Despite the Court’s strong rhetoric, Professor Henry Monaghan points out that *Seminole Tribe* “in fact left firmly in place the fundamental reality of state accountability in federal court for violation of federal law” because of the continuing availability of suits against state officers. Henry Paul Monaghan, *The Sovereign Immunity “Exception,”* 110 HARV. L. REV. 102, 103 (1996).

<sup>48</sup> 527 U.S. 706 (1999).

<sup>49</sup> The decision has drawn criticism because it goes well beyond the text. See, e.g., Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1047 (2000); Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1664–75 (2000).

claims arising under a federal statute. Because the Eleventh Amendment concerns only the “[j]udicial power of the United States,”<sup>50</sup> the plaintiffs argued that the Amendment was inapplicable. The Court stressed that “sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself.”<sup>51</sup> According to the Court, the Amendment “confirmed, rather than established, sovereign immunity as a constitutional principle.”<sup>52</sup> On this view, “the bare text of the Amendment is not an exhaustive description of the States’ constitutional immunity from suit.”<sup>53</sup> Relying on “fundamental postulates implicit in the constitutional design,”<sup>54</sup> the Court concluded that “the States retain immunity from private suit in their own courts,”<sup>55</sup> and that Congress lacks “authority under Article I to abrogate” such immunity.<sup>56</sup>

### B. *The Diversity Theory*

While the immunity theory regards the text of the Eleventh Amendment as clearly underinclusive, the diversity theory views it as unacceptably overinclusive. The diversity theory would narrow the Amendment’s express prohibition by permitting out-of-state citizens and aliens to sue states whenever they can invoke a category of Article III jurisdiction other than state-citizen diversity. On this view, the Eleventh Amendment merely prevents federal courts from hearing suits against states when jurisdiction is based *solely* on the presence of a diverse citizen or an alien. Like immunity theorists, diversity theorists use their approach to avoid what they perceive to be the Amendment’s anomalous distinction between in-state and out-of-state citizens. Applying the Amendment “literally,” they point out, would lead to the “unlikely result” that “[a]ll suits brought against a state by an out-of-state citizen are prohibited regardless of the existence of a federal question, but at the same time any suit brought against a state by a citizen of that state is permitted, provided a federal question exists.”<sup>57</sup> In their view, the Founders could not have intended this distinction, so diversity theorists would narrow the Amendment to avoid this result.

Professor William Fletcher and Judge John Gibbons each articulated versions of this theory in 1983, and Justice Brennan (joined by a

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<sup>50</sup> U.S. CONST. amend. XI.

<sup>51</sup> *Alden*, 527 U.S. at 728.

<sup>52</sup> *Id.* at 728–29.

<sup>53</sup> *Id.* at 736.

<sup>54</sup> *Id.* at 729.

<sup>55</sup> *Id.* at 754.

<sup>56</sup> *Id.* at 741; *see also id.* at 754.

<sup>57</sup> Fletcher, *supra* note 6, at 1060–61.

minority of the Supreme Court) adopted it two years later.<sup>58</sup> Fletcher explicitly characterized his project as an attempt to recover the original intent of those who drafted and ratified the Eleventh Amendment.<sup>59</sup> He argued that the Eleventh Amendment “was intended to require that the state-citizen diversity clause of article III be construed to confer federal jurisdiction only over disputes in which the state was a plaintiff.”<sup>60</sup> In other words, “the eleventh amendment forbade nothing, but merely required this limiting construction on the jurisdiction granted by the state-citizen diversity clause.”<sup>61</sup> On this view, “the amendment said nothing about a private citizen’s ability to sue an unconsenting state under federal question jurisdiction or in admiralty.”<sup>62</sup>

Like Professor Fletcher, Judge Gibbons rejected strict application of the Eleventh Amendment’s text as contrary to “the probable intention of its drafters.”<sup>63</sup> While acknowledging that “the amendment might be read literally to reach all suits by a citizen of one state or foreign nation against another state, including federal question claims,”<sup>64</sup> he thought that “a literal reading of the amendment as qualifying article III, § 2 in its entirety would be illogical” because it would mean that “a state’s own citizens could sue it although the citizens of other states could not.”<sup>65</sup> Accordingly, he argued that the Amendment “did nothing more than amend article III, section 2 of the Constitution to eliminate the power of federal courts to hear suits against states in which the sole basis for jurisdiction was the status of the parties.”<sup>66</sup> On this view, the Amendment was little more than “a clever maneuver by the Federalists to deflect republican opposition to *Chisholm*, while preserving the power of federal courts to hear claims arising under the 1783 peace treaty.”<sup>67</sup>

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<sup>58</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–61, 286–87 (1985) (Brennan, J., dissenting). Prior to 1985, Justice Brennan adhered to the “literal wording” of the Amendment, which he regarded as “a flat prohibition against the federal judiciary’s entertainment of suits against even a consenting State brought by citizens of another State or by aliens.” *Employees v. Mo. Pub. Health Dept.*, 411 U.S. 279, 310 (1973) (Brennan, J., dissenting).

<sup>59</sup> See Fletcher, *supra* note 6, at 1037–38.

<sup>60</sup> *Id.* at 1035. This argument is in tension with the text of the Eleventh Amendment, which limits the “Judicial power of the United States,” U.S. CONST. amend. XI, not merely “the state-citizen diversity clause of article III.” Fletcher, *supra* note 6, at 1035.

<sup>61</sup> Fletcher, *supra* note 6, at 1035.

<sup>62</sup> *Id.* at 1036. On the underlying question, Fletcher concluded that “it was unclear whether, under the constitutional structure considered as a whole, the states were otherwise immune from private suit under federal question and admiralty jurisdiction.” *Id.* at 1037; see *id.* at 1071–72.

<sup>63</sup> John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1937 n.257 (1983).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1894.

<sup>67</sup> *Id.* at 2004.

Two years later, Justice Brennan abandoned his literal approach to the Eleventh Amendment and embraced the diversity theory.<sup>68</sup> In his view, scholars had “discovered and collated substantial evidence that the Court’s constitutional doctrine of state sovereign immunity has rested on a mistaken historical premise.”<sup>69</sup> Accordingly, Justice Brennan concluded that “the Eleventh Amendment has no relevance” when “federal jurisdiction is based on the existence of a federal question.”<sup>70</sup> Three additional Justices signed Justice Brennan’s opinion, and (notwithstanding changes on the Court) at least three Justices have continued to advocate the diversity theory in dissent.<sup>71</sup>

### C. *The Compromise Theory*

A third group of commentators has more recently suggested that courts should simply accept the text of the Eleventh Amendment as an unrecorded compromise rather than try to implement its elusive purpose. They argue that both the immunity and diversity theories contradict the text of the Amendment in several important respects. Like immunity and diversity theorists, compromise theorists regard the Amendment as poorly drafted. Compromise theorists nonetheless favor adhering closely to the text in order to uphold whatever compromise is embedded therein. Accordingly, they take issue with both the immunity theory and the diversity theory.

Compromise theorists like Professor John Manning stress that the immunity theory justifies going beyond the text on the ground that “the Eleventh Amendment’s purpose was not merely to limit the federal judicial power in cases involving the party alignments described by the Amendment’s precise text, but also to repudiate *Chisholm* and all that it stood for.”<sup>72</sup> Using this approach, “the Court has extended state sovereign immunity to include federal lawsuits filed by a state’s own citizens, by federal corporations, by tribal sovereigns, and by foreign nations.”<sup>73</sup> Similarly, although the Amendment refers to “any suit

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<sup>68</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258–61, 286–87 (1985) (Brennan, J., dissenting).

<sup>69</sup> *Id.* at 258–59.

<sup>70</sup> *Id.* at 301.

<sup>71</sup> See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 109–12 (1996) (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Justice Stevens is at least skeptical of the diversity theory. See *id.* at 78 (Stevens, J., dissenting) (“There may be room for debate over whether, in light of the Eleventh Amendment, Congress has the power to ensure that [a federal] cause of action may be enforced in federal court by a citizen of another State or a foreign citizen.”).

<sup>72</sup> Manning, *supra* note 9, at 1682.

<sup>73</sup> *Id.* at 1666 (footnotes omitted) (citing *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781–82 (1991) (upholding sovereign immunity in a suit brought by a tribe against a state); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934) (holding that sovereign immunity bars a suit by a foreign nation against an unconsenting state); *Smith v. Reeves*, 178 U.S. 436, 449 (1900) (recognizing sovereign immunity in a suit by a federal corporation against a state); *Hans v.*

in law or equity,” the Court recognizes sovereign immunity in suits in admiralty as well.<sup>74</sup> Finally, although the Amendment is written as a limitation on the “Judicial power of the United States,” the Court has recently ruled that sovereign immunity bars suits against states both in state courts<sup>75</sup> and before federal administrative agencies.<sup>76</sup>

Compromise theorists point out that the diversity theory also looks beyond the text by elevating the perceived purpose of the Eleventh Amendment over its terms. At first glance, the diversity theory appears to be more consistent with the text than the immunity theory because the former focuses on the parallel language of Article III and the Eleventh Amendment. Indeed, Professor Akhil Amar has gone so far as to say that the diversity theory “makes perfect sense of all the words of the Amendment itself.”<sup>77</sup> Professor Lawrence Marshall points out, however, that this purported “allegiance to the text” is at best “partial” and therefore “deceptive.”<sup>78</sup> In his view, “the diversity theory goes on completely to ignore the operative words of the amendment, which provide that ‘[t]he judicial power shall not be construed to extend to *any* suit in law or equity’ that meets the criteria set forth in the amendment.”<sup>79</sup> The reference to “any suit” signals a more comprehensive prohibition than diversity theorists would allow. Similarly, the Amendment is framed as a restriction on “[t]he Judicial power” and therefore limits all forms of jurisdiction recognized by Article III.<sup>80</sup> Thus, by permitting federal courts to hear federal question suits against a state by citizens of another state, “the diversity theory does precisely what the amendment forbids.”<sup>81</sup>

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Louisiana, 134 U.S. 1, 18–19 (1890) (extending sovereign immunity to a suit by a Louisiana citizen against Louisiana).

<sup>74</sup> *Id.*; see, e.g., *Ex parte New York*, 256 U.S. 490 (1921).

<sup>75</sup> Manning, *supra* note 9, at 1666; see *Alden v. Maine*, 527 U.S. 706, 754 (1999).

<sup>76</sup> Manning, *supra* note 9, at 1666; see *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760–61 (2002). Textualists like Manning object to these developments because “the specific text of the Eleventh Amendment, read in context, appears to convey a negative implication that should preclude the derivation of further classes of state sovereign immunity from suit in federal court.” Manning, *supra* note 9, at 1671; see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L. J. 1425, 1476 (1987) (arguing that the result in *Hans* “contradict[s] the unambiguous limitations of the Eleventh Amendment’s text”).

<sup>77</sup> Amar, *supra* note 76, at 1481; see also *id.* at 1482 (“[I]t would have been difficult to come up with wording that expressed better than does the Amendment’s final text a simple desire to effect a partial repeal of two technical diverse party grants.”).

<sup>78</sup> See Marshall, *supra* note 8, at 1347.

<sup>79</sup> *Id.* (alteration in original).

<sup>80</sup> See Massey, *supra* note 7, at 65 (concluding that the Eleventh Amendment “sought to create a party based *denial* of jurisdiction to the federal courts that sweeps across all the jurisdictional heads of Article III”).

<sup>81</sup> Marshall, *supra* note 8, at 1347; see also William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1380 (1989) (“The text of the eleventh amendment does not limit its protection to suits based upon diversity; its language applies to all suits, whether based on diversity or federal question jurisdiction.”). For Fletcher’s

Because they agree with immunity and diversity theorists that the Eleventh Amendment does not make perfect sense, compromise theorists conclude that the Amendment must reflect an unrecorded compromise rather than a coherent approach to state suability. For example, Marshall argues that “the distinctions that the amendment so clearly draws can be understood as efforts to accommodate the competing values of state immunity from federal suit and state accountability within the constitutional system.”<sup>82</sup> He hypothesizes that states were most concerned with suits by out-of-state citizens (rather than their own citizens) because out-of-state speculators had purchased disputed western lands and state war debts at deep discounts.<sup>83</sup> Although Marshall acknowledges that at least some in-state citizens had similar claims, he suggests that states may have found compensating their own citizens less objectionable.<sup>84</sup>

Manning also believes that the Supreme Court should enforce “the Eleventh Amendment as written.”<sup>85</sup> He argues that even if one assumes that there was a broad consensus in favor of comprehensive state sovereign immunity, “the mere existence of a social or political consensus contrary to the text cannot carry the heavy burden required to justify deviating from such a text, especially in constitutional law.”<sup>86</sup> The reason is that “the Article V amendment process does not seamlessly translate . . . even widespread social sentiment into law.”<sup>87</sup> Thus, “it is conceivable that one-third of either house (or, less likely, one-quarter of the state legislatures) might have preferred the narrower immunity embedded in the text.”<sup>88</sup> In other words, the Amendment

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response, see William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989).

<sup>82</sup> Marshall, *supra* note 8, at 1345.

<sup>83</sup> *Id.* at 1362–66.

<sup>84</sup> See *id.* at 1366. Marshall recognizes that his defense of the text does pose at least one “perplexing problem” — namely, assignment of claims to in-state citizens. *Id.* at 1367 n.113. Marshall acknowledges that the Supreme Court would likely uphold such assignments. See *id.* He suggests that the ratifiers of the Eleventh Amendment may have either considered this a “small loophole[]” or assumed that courts would not “allow plaintiffs to circumvent the amendment by assigning debts to eligible plaintiffs.” *Id.* This suggestion seems implausible given that the prospect of suits by out-of-state citizens against states arose because in-state citizens sold their bonds to out-of-state speculators. *Id.* at 1365–66. If these initial assignments were valid, there is little reason to think that courts would disallow reassignments to in-state citizens.

<sup>85</sup> Manning, *supra* note 9, at 1722.

<sup>86</sup> *Id.* at 1720. But see Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135 (2009) (arguing that textualists should honor the inherent compromise contained in Article III by upholding a background principle of state sovereign immunity).

<sup>87</sup> Manning, *supra* note 9, at 1720.

<sup>88</sup> *Id.*

may represent “the fruits of a (potentially unrecorded) compromise.”<sup>89</sup> Indeed, Manning does not “think it possible ever to know the true reason, if one exists, for the final shape of the Amendment’s text.”<sup>90</sup> As explained in Part II, however, there is a largely forgotten historical context that helps to explain why the text of the Amendment would have made sense to those who adopted it.<sup>91</sup>

#### D. *The Inadequacy of Current Theories*

All major theories of the Eleventh Amendment — the immunity theory, the diversity theory, and the compromise theory — start from the assumption that the Amendment is either poorly drafted or represents an awkward compromise. Given the history of the Amendment’s adoption, neither proposition rings true. The *Hans* Court considered the Amendment to be underinclusive in relation to its apparent background purpose of restoring comprehensive state sovereign immunity. The diversity theory similarly builds on the presupposition that the text of the Amendment is overinclusive in relation to its assumed purpose of eliminating only state-citizen diversity jurisdiction under Article III. Thus, both theories draw on the doctrine of strong purposivism to make a claim of inadvertent drafting.<sup>92</sup> Even the leading textualist theories do not regard the Amendment as reflecting the considered expression of a coherent policy, but assume that it

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<sup>89</sup> *Id.* at 1721. Professor Andrew Coan also advocates following the text of the Eleventh Amendment. Because there is no “perfectly satisfying explanation” for the text’s distinction between out-of-state and in-state citizens, he believes that courts should follow the text in order to end the costly war between the immunity and diversity theories. Coan, *supra* note 9, at 2532.

<sup>90</sup> Manning, *supra* note 9, at 1722. Professor Thomas Lee has recently suggested that a literal reading of the Eleventh Amendment makes sense in light of principles of international law known to the Founders. See Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027 (2002). Specifically, he argues that the Amendment “is essentially just a negative formulation of the affirmative international law rule” that “only states have rights against other states.” *Id.* at 1028.

<sup>91</sup> Professor Caleb Nelson has recently argued that “many members of the Founding generation thought that a ‘Case’ or ‘Controversy’ did not exist unless both sides either voluntarily appeared or could be haled before the court.” Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002). Because traditionally “courts could not command unconsenting states to appear at the behest of an individual,” a state’s failure to consent meant that “there would be no ‘Case’ or ‘Controversy’” under Article III. *Id.* In effect, Nelson maintains that there was no “Case” because federal courts lacked *personal jurisdiction* over unconsenting states. *Id.* The Eleventh Amendment took a different approach by withdrawing *subject matter jurisdiction* over cases brought by prohibited plaintiffs against states. *Id.* at 1566. Nelson suggests that the Supreme Court’s failure to distinguish between these two types of immunity has contributed to doctrinal confusion. *Id.*

<sup>92</sup> Cf. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 454–55 (1989); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892).

represents the fruits of an awkward compromise, which must be enforced as written even if it does not make much sense.<sup>93</sup>

Immunity and diversity theorists implicitly rely on the idea that the Eleventh Amendment as written produces “absurd results” that the Supreme Court is justified in rectifying. The absurdity doctrine permits courts to ignore a legal text when its application leads to absurd results. The doctrine is based on the idea that lawmakers often draft in haste, act with imperfect foresight, and write laws in unavoidably imprecise language.<sup>94</sup> Hence, where a law’s conventional meaning is dramatically at odds with some broadly and deeply held social value (such as the immunity of the states from suit or the enforcement of federal law), an interpreter presumes that the result was an unintended failure of expression by the lawmaker. On this view, it serves rather than disservices legislative supremacy for courts to approximate what the lawmaker would have done if the offending application had come to its attention.<sup>95</sup> In this vein, immunity and diversity theorists would expand or contract the immunity conveyed by the text of the Eleventh Amendment in order to bring it into line with their views of its true purpose. Textualists would enforce the Amendment as written, but only on the assumption that the text represents an awkward compromise.

None of these presuppositions seems persuasive in this context. First, the Eleventh Amendment does not fit the usual profile for absurdity. Typically, absurdity involves an overgeneralization that produces results that the drafters could not have anticipated.<sup>96</sup> While absurdity might also include an omitted case,<sup>97</sup> it seems unlikely that the Amendment was the product of inadvertent drafting. The question of

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<sup>93</sup> Cf. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671 (7th Cir. 1992) (“Compromises draw unprincipled lines between situations that strike an outside observer as all but identical. The limitation is part of the price of the victory achieved, a concession to opponents who might have been able to delay or block a bill even slightly more favorable to the proponents.”).

<sup>94</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2400–02 (2003).

<sup>95</sup> See, e.g., *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 172 (1896) (holding that “an absurdity cannot be imputed to the legislature”); *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868) (noting that courts have authority to correct “absurdity, which the legislature ought not to be presumed to have intended”); see also E. Russell Hopkins, *The Literal Canon and the Golden Rule*, 15 CANADIAN B. REV. 689, 692 (1937) (describing absurdity as an “extreme departure from commonly accepted principles of morality, philosophy, politics, or convenience”).

<sup>96</sup> See, e.g., *Church of the Holy Trinity*, 143 U.S. 457 (finding it absurd to apply a broad prohibition against importation of persons to perform “labor or service of any kind” to a pastor hired to minister to a congregation); *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868) (finding a prohibition on obstruction of the mail absurd as applied to a local law enforcement officer who arrested a mail carrier for murder while the latter was delivering mail).

<sup>97</sup> See, e.g., *Clinton v. City of N.Y.*, 524 U.S. 417, 429 (1998) (finding it absurd to permit individuals, but not corporations, to take advantage of expedited review provisions governing challenges to the Line Item Veto Act).

sovereign immunity had been much debated by a sophisticated political community both before and after ratification. In the view of many, an amendment was necessitated by the Convention's careless drafting of Article III. Although the *Hans* Court described the Amendment as reflecting the swift reaction to a shock of surprise that swept the nation, in fact the final version of the Amendment was not adopted until the next session of Congress, after several alternatives had been considered.<sup>98</sup>

Second, although in some sense all laws represent a compromise of sorts,<sup>99</sup> it seems odd to suggest that the Eleventh Amendment represented the awkward compromise typically associated with sharply divided forces. The commentary and debates surrounding the Amendment show no sign of real disagreement concerning either the goal of the Amendment or its scope. Indeed, it is undisputed that Federalists — whose express representations about Article III were overridden by the Court in *Chisholm* — joined Antifederalists in both calling for an amendment and passing it by overwhelming margins in both the House and the Senate.<sup>100</sup> Of course, it is true that compromises often occur outside the glare of public view and that “[i]t is not the law that [an adopted text] can have no effects which are not explicitly mentioned in its legislative history.”<sup>101</sup> It seems telling, however, that on an issue as important and contentious as this one, there is no evidence of major divisions of political opinion as to how far the Amendment should go.

The impetus behind all three theories is that the Eleventh Amendment does not give a satisfactory account of federal question jurisdiction. The problem, however, does not stem from our understanding of the Amendment, but rather from the faulty assumption that the nature of the Union permitted individuals to sue states using federal question jurisdiction. My hypothesis is that the Eleventh Amendment, in fact, did what everyone expected it to do — to reaffirm the absence of judicial power to hear suits by individuals against states — when understood in light of widely shared beliefs about the limits of federal power and the proper means of enforcing constitutional prohibitions against states. That understanding may have been lost even by the time the Court decided *Hans* in 1890. At the time the Amendment was adopted, however, no one suggested that it was over- or underinclusive in relation to the apparent goal of restoring the preferred pre-*Chisholm*

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<sup>98</sup> See *infra* section IV.C, pp. 1891–94.

<sup>99</sup> See JEREMY WALDRON, *LAW AND DISAGREEMENT* 125 (1999).

<sup>100</sup> For example, Massachusetts Federalists Theodore Sedgwick and Caleb Strong played key roles in the drafting and congressional passage of the Amendment. See *infra* sections IV.B and C, pp. 1886–94.

<sup>101</sup> *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988).

understanding of Article III. The reason appears to be that virtually all participants in framing and adopting the Amendment shared the same background assumptions — that the Constitution conferred no power on the federal government to regulate or coerce states, and that the Constitution imposed no affirmative obligations on states necessitating suits by individuals against states. Only an express constitutional provision authorizing suits against states would suffice to override these assumptions. The Founders debated whether the state-citizen diversity clauses of Article III expressly authorized such suits, and the *Chisholm* Court subsequently construed them to do so. There was no similar debate regarding federal question jurisdiction. In light of this background, the Eleventh Amendment as written offered a complete and coherent solution to the problem posed by the state-citizen diversity provisions of Article III — the only provisions of the Constitution that anyone ever suggested might expressly authorize individuals to sue states.

### III. THE LOST HISTORICAL CONTEXT OF THE ELEVENTH AMENDMENT

Taken in historical context, the Eleventh Amendment should not be understood as the product of an incoherent compromise or faulty drafting. Rather, one can make sense of the Amendment as written if it is read against the backdrop of the Founders' deeply and widely held understanding that the Constitution did not authorize Congress either to enact legislation for states or to coerce state compliance with federal commands. This understanding emerged from the difficulties that the Founders experienced under the Articles of Confederation, and was offered repeatedly during the Philadelphia Convention and the ratification debates as one of the Constitution's primary advantages over competing proposals to amend the Articles.

In drafting and ratifying the Constitution, prominent Founders consistently maintained that the nature of the Union was such that federal commands could be enforced only against individuals, but not against states. To understand this, one must revisit the central debate over whether to revise the Articles or adopt an entirely new Constitution. The Articles, of course, authorized Congress to requisition money, supplies, and personnel from the states, but provided no means of enforcement. The Founders considered, but did not adopt, proposals to amend the Articles to give Congress express power to use military force to coerce delinquent states to comply with requisitions. Similar proposals were made at the Constitutional Convention, but were rejected because the delegates feared that the use of such a power would lead to a civil war. The Convention avoided this danger by making the fundamental decision — which some regard as the genius of the

Constitution — to substitute individuals for states as the objects of congressional power.

During the ratification debates, leading Federalists emphasized this feature of the Constitution as its primary advantage over proposals to retain the Articles of Confederation. Federalists and Antifederalists alike ultimately agreed that the Articles could not be salvaged without introducing coercive power against states — a power that the Founders widely regarded as impracticable, cruel, and unjust. Accordingly, they decided to abandon the Articles and adopt a constitution in its place that could be enforced solely against individuals. This background helps to make sense of the Eleventh Amendment because it suggests (a) that the Founders did not understand federal question jurisdiction to encompass coercive suits by individuals against states, and (b) that the Founders regarded the Amendment as sufficient to implement the widely held view that individuals should not be able to sue states in federal court.

#### A. *The Articles of Confederation*

On June 12, 1776, the Continental Congress authorized a committee to prepare a plan of confederation.<sup>102</sup> Serious problems arose under the Articles of Confederation even before they were approved by all thirteen states. A crucial issue was how Congress would raise sufficient revenue to pay for national defense and the general welfare. On paper, the Articles obligated the states to supply whatever requisitions Congress demanded.<sup>103</sup> According to Article XIII, “Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them.”<sup>104</sup> In practice, however, the lack of any enforcement mechanism left states free both to second guess the necessity of requisitions and to pay less than their full quota.<sup>105</sup> The states’ inability or refusal to comply

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<sup>102</sup> See 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 53 (Merrill Jensen ed., 1976) [hereinafter 1 DHRC].

<sup>103</sup> Article VIII provided that federal expenses “shall be defrayed out of a common treasury, which shall be supplied by the several states, in proportion to the value of all land within each state.” Draft of the Articles of Confederation (July 12, 1776), in 1 DHRC, *supra* note 102, at 79, 89. Article VIII also specified that the “taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.” *Id.*

<sup>104</sup> ACT OF CONFEDERATION OF THE UNITED STATES OF AMERICA (Nov. 15, 1777), *reprinted in* 1 DHRC, *supra* note 102, at 86, 93.

<sup>105</sup> As Alexander Hamilton remarked, the states’ “jealousy of all power not in their own hands . . . has led them to exercise a right of judging in the last resort of the measures recommended by Congress, and of acting according to their own opinions of their propriety or necessity.” Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), in 2 THE PAPERS OF ALEXANDER HAMILTON 1779–1781, at 400, 401 (Harold C. Syrett ed., 1961) [hereinafter

fully with federal requisitions was notorious during the Confederation era.<sup>106</sup>

By 1780, Congress recognized the need to amend the Articles to confer additional powers, particularly with respect to raising revenue. Congress considered two basic approaches: empower Congress to bypass the states by imposing taxes directly or empower Congress to coerce states to comply with requisitions. Congress proposed the first approach on February 3, 1781,<sup>107</sup> but this proposal died in 1782 when Rhode Island refused to ratify the amendment and Virginia rescinded its earlier approval.<sup>108</sup> More importantly for present purposes, Congress also considered several proposals to use military force to coerce state compliance with requisitions.

The movement began in 1780 in response to a notorious incident. General Washington petitioned Congress for resources to launch an offensive to recapture New York City from the British.<sup>109</sup> Congress requisitioned money from the states, but failed to receive sufficient funds.<sup>110</sup> Washington cancelled the offensive, and Governor Clinton responded by seeking an amendment to the Articles that would empower Congress to coerce state compliance with requisitions. The New York General Assembly proposed amending the Articles by providing:

[W]henever it shall appear to [Congress], that any State is deficient in furnishing the Quota of Men, Money, Provisions or other Supplies, required of such State, that Congress direct the Commander in Chief, without Delay, to march the Army or such Part of it as may be requisite, into such State, and by a Military Force, compel it to furnish its Deficiency.<sup>111</sup>

The New York Assembly sent its proposal not only to Congress, but also to the upcoming Hartford Convention of five northeastern states, which met on November 8, 1780 to consider defects in the

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HAMILTON PAPERS]. See also THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 12, at 111.

<sup>106</sup> George Washington observed: "One State will comply with a requisition of Congress; another neglects to do it; a third executes it by halves; and all differ either in the manner, the matter, or so much in point of time, that we are always working up hill, and ever shall be. . ." Letter from George Washington to Fielding Lewis (July 6, 1780), in WRITINGS OF GEORGE WASHINGTON 154, 157 n.1 (Lawrence B. Evans ed., 1908) (quoting Letter from George Washington to Joseph Jones, in Congress (May 31, 1780)).

<sup>107</sup> See Grant of Power to Collect Import Duties (Feb. 3, 1781), *reprinted in* 1 DHRC, *supra* note 102, at 140, 140.

<sup>108</sup> See *id.*

<sup>109</sup> See KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 66 (2001).

<sup>110</sup> *Id.* at 67–68.

<sup>111</sup> JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK, 1780, at 43 (New York, Oct. 10, 1780); see 18 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 1032 (Gaillard Hunt ed., 1912) [hereinafter JCC].

Union.<sup>112</sup> The convention endorsed a variation of the New York proposal, which would have authorized the Commander in Chief to initiate military action to enforce state compliance with requisitions, but only during the years 1780 and 1781.<sup>113</sup> Even this proposal was met with alarm in some quarters.<sup>114</sup> The speaker of the Massachusetts assembly remarked that military coercion ran contrary to “the Principles on which our Opposition to Britain rests.”<sup>115</sup> Although he regarded General Washington as “a Good and a Great Man,” he cautioned that “he is only a Man and therefore should not be vested with such powers.”<sup>116</sup>

The proceedings of the Hartford Convention were presented to Congress on December 12, 1780, and assigned to a five member committee that included James Madison.<sup>117</sup> Although Madison favored empowering Congress to coerce the states, he was outvoted.<sup>118</sup> One of the prevailing members of the committee wrote to the Governor of New Jersey that the “resolution is of such a nature that I should never give my voice for it.”<sup>119</sup> He also predicted that General Washington would not “accept or act in consequence of such powers.”<sup>120</sup>

Congress appointed Madison to another committee on March 6, 1781 “to prepare a plan to invest the United States in Congress assembled with full and explicit powers for effectually carrying into execution in the several states all acts or resolutions passed agreeably to the Articles of Confederation.”<sup>121</sup> This time, Madison’s views prevailed.<sup>122</sup> On March 16, 1781, the committee proposed that Congress be given authority to compel state compliance with requisitions through military force.<sup>123</sup> The report (written largely by Madison) initially suggested that Congress might already have implied power under the Ar-

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<sup>112</sup> See DOUGHERTY, *supra* note 109, at 133 & n.7.

<sup>113</sup> *See id.*

<sup>114</sup> *See generally id.* at 133–34.

<sup>115</sup> Letter from James Warren to Samuel Adams (Dec. 4, 1780), in 2 WARREN-ADAMS LETTERS 1778–1814, at 151, 152 (photo. reprint 1994) (1925).

<sup>116</sup> *Id.* Even New York withdrew its support for a coercive power amendment after the British left New York City. *See* DOUGHERTY, *supra* note 109, at 69.

<sup>117</sup> *See* DOUGHERTY, *supra* note 109, at 134 n.10.

<sup>118</sup> *See id.*

<sup>119</sup> Letter from John Witherspoon to William Livingston, Governor of N.J. (Dec. 16, 1780), in 5 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 487 (Edmund C. Burnett ed., 1931).

<sup>120</sup> *Id.*

<sup>121</sup> 19 JCC, *supra* note 111, at 236.

<sup>122</sup> *See* DOUGHERTY, *supra* note 109, at 135.

<sup>123</sup> *See* JACK N. RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 25 (2d ed. 2002) (explaining that Madison’s report proposed amending the Articles of Confederation to “give the Union the power literally to coerce delinquent states into doing their duty, either by marching the Continental army within their borders or by stationing armed ships outside their harbors”).

ticles to coerce states,<sup>124</sup> but concluded that it is “most consonant to the spirit of a free constitution that on the one hand all exercise of power should be explicitly and precisely warranted, and on the other that the penal consequences of a violation of duty should be clearly promulgated and understood.”<sup>125</sup> Accordingly, the report proposed amending the Articles of Confederation as follows:

It is understood & hereby declared that in case any one or more of the Confederated States shall refuse or neglect to abide by the determinations of the United States in Congress assembled or to observe all the Articles of Confederation as required in the 13th. Article, the said United States in Congress assembled are fully authorised to employ the force of the United States as well by sea as by land to compel such State or States to fulfill their federal engagements, and particularly to make distraint on any of the effects Vessels and Merchandizes of such State or States of any of the Citizens thereof wherever found, and to prohibit and prevent their trade and intercourse as well with any other of the United States and the Citizens thereof, as with any foreign State, and as well by land as by sea, until full compensation or compliance be obtained with respect to all Requisitions made by the United States in Congress assembled in pursuance of the Articles of Confederation.<sup>126</sup>

Despite Madison’s endorsement,<sup>127</sup> Congress never proposed an amendment of this kind to the states.<sup>128</sup>

Alexander Hamilton may have reflected the general unease over recommending coercive power against the states when he warned in 1782 that the grant of such authority might lead to a civil war:

A mere regard to the interests of the confederacy will never be a principle sufficiently active to curb the ambition and intrigues of different members. Force cannot effect it: A contest of arms will seldom be between the com-

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<sup>124</sup> Amendment To Give Congress Coercive Power over the States and Their Citizens (Mar. 16, 1781), reprinted in 1 DHRC, *supra* note 102, at 141, 142 (stating that Article XIII of the Articles vests “a general and implied power . . . in the United States in Congress assembled to enforce and carry into effect all the Articles of the said Confederation against any of the States which shall refuse or neglect to abide by such their determinations, or shall otherwise violate any of the said Articles, but no determinate and particular provision is made for that purpose”).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 142–43.

<sup>127</sup> Madison wrote to Thomas Jefferson and explained that the “situation of most of the States is such, that two or three vessels of force employed against their trade will make it their interest to yield prompt obedience to all just requisitions on them.” Letter from James Madison to Thomas Jefferson (Apr. 16, 1781), in 1 THE WRITINGS OF JAMES MADISON 131–32 (Gaillard Hunt ed., 1900) [hereinafter MADISON WRITINGS]. Although Madison sought his views on the proposal, Jefferson apparently never replied.

<sup>128</sup> See Amendment to Give Congress Coercive Power Over the States and Their Citizens (Mar. 16, 1781), reprinted in 1 DHRC, *supra* note 102, at 141, 141; Committee Report on Carrying the Confederation into Effect and on Additional Powers Needed by Congress (Aug. 22, 1781), reprinted in 1 DHRC, *supra* note 102, at 143, 145 (discussing the more modest ideas ultimately proposed).

mon sovereign and a single refractory member; but between distinct combinations of the several parts against each other.<sup>129</sup>

Congress entertained no further proposals of this kind during the Confederation, and none was ever submitted to the states for ratification.

### B. *The Constitutional Convention*

Although the Constitutional Convention considered conferring federal power to coerce states, the idea was quickly put aside. The delegates regarded the introduction of such power to be dangerous to the Union (because it could cause a civil war) and unjust (because it would punish innocent citizens along with the guilty). The Convention avoided the need to authorize coercive power against states by designing a Constitution that conferred legislative power over individuals rather than states, and thus avoided the need for coercive power over states.

Prior to the Convention, Madison described the lack of coercive power over states as one of the primary vices of the existing system:

A sanction is essential to the idea of law, as coercion is to that of Government. The federal system being destitute of both, wants the great vital principles of a Political Constitution. Under the form of such a Constitution, it is in fact nothing more than a treaty of amity of commerce and of alliance, between independent and Sovereign States.<sup>130</sup>

Madison lamented that because acts of Congress depend “for their execution on the will of the State legislatures,” they are “nominally authoritative, [but] in fact recommendatory only.”<sup>131</sup>

On April 16, 1787, Madison wrote to George Washington to share some “outlines of a new system.”<sup>132</sup> In addition to proposing federal power to regulate trade, tax imports and exports, and negative state laws,<sup>133</sup> Madison stated that “the right of coercion should be expressly declared” and could be exerted “either by sea or land.”<sup>134</sup> For the first time, however, Madison acknowledged the potential dangers of conferring coercive power over states. He observed that “the difficulty & awkwardness of operating by force on the collective will of a State, render it particularly desirable that the necessity of it might be pre-

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<sup>129</sup> Alexander Hamilton, *The Continentalist No. VI* (July 4, 1782), reprinted in 3 HAMILTON PAPERS, *supra* note 105, at 105; see also DOUGHERTY, *supra* note 109, at 136 (explaining that Hamilton’s point was that “the coercive powers amendment might lead to civil war”).

<sup>130</sup> James Madison, Vices of the Political System of the United States (Apr. 1787), in 2 MADISON WRITINGS, *supra* note 127, at 361, 363.

<sup>131</sup> *Id.* at 364.

<sup>132</sup> Letter from James Madison to George Washington (Apr. 16, 1787), in 2 MADISON WRITINGS, *supra* note 127, at 344, 344.

<sup>133</sup> *Id.* at 346.

<sup>134</sup> *Id.* at 348.

cluded.”<sup>135</sup> He speculated that “[p]erhaps the negative on the laws [of the states] might . . . answer this purpose.”<sup>136</sup> More importantly, he suggested that permitting the central government to raise revenue directly by giving it “defined objects of taxation” might avoid the need to rely on coercive power.<sup>137</sup>

Notwithstanding these reservations, Madison included power to regulate and coerce states in the Virginia Plan. As introduced at the Convention, the Plan provided that “the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation.”<sup>138</sup> In Madison’s view (formed throughout the 1780s), transferring Congress’s existing power to impose affirmative obligations on the states would necessitate vesting the Legislature with an express power of coercion. Accordingly, the Virginia Plan proposed that the National Legislature be empowered “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof.”<sup>139</sup>

George Mason immediately objected to such power. According to Madison, Mason admitted that the present confederation was “deficient in not providing for coercion & punishment agst. delinquent States; but he argued very cogently that punishment could not <in the nature of things be executed on> the States collectively, and therefore that such a Govt. was necessary as could directly operate on individuals, and would punish those only whose guilt required it.”<sup>140</sup> These arguments caused Madison to reconsider his position:

Mr. M[adison], observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and the efficacy of it when applied to people collectively and not individually. — , A Union of States <containing such an ingredient> seemed to provide for its own de-

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (“[O]r perhaps some defined objects of taxation might be submitted along with commerce, to the general authority.”).

<sup>138</sup> James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 17, 21 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND’S RECORDS].

<sup>139</sup> *Id.* Charles Pinckney also initially endorsed coercive power over states. See Charles Pinckney, Observations on the Plan of Government submitted to the Federal Convention, in Philadelphia (May 28, 1787), in 3 FARRAND’S RECORDS, *supra* note 138, at 106, 119. Pinckney observed that “the present Confederation” lacked such power, and warned that “[u]nless this power of coercion is infused, and exercised when necessary, the States will most assuredly neglect their duties.” *Id.*

<sup>140</sup> James Madison, Notes on the Constitutional Convention (May 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 33, 34 (triangular brackets in original).

struction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. *He hoped that such a system would be framed as might render this recourse unnecessary*, and moved that the clause be postponed.<sup>141</sup>

The Convention granted the postponement and proceeded to consider abandoning the Articles of Confederation in favor of an entirely new system. As Mason explained: “Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt.”<sup>142</sup> Based on this early exchange, the Convention assumed that the “national government had to be reconstituted with power to enact, execute, and adjudicate its own laws, acting directly on the American people, without having to rely on the cooperation of the states.”<sup>143</sup> Giving Congress legislative power over individuals rather than states eliminated the need to give the new government power to coerce states.<sup>144</sup>

On June 15, 1787, William Paterson proposed the New Jersey Plan as a complete alternative to the Virginia Plan.<sup>145</sup> Paterson’s Plan sought only to “revise[], correct[] & enlarge[]” the Articles of Confederation rather than to discard them for an entirely new system.<sup>146</sup> In addition to giving Congress more power, the New Jersey Plan expressly empowered the federal executive to enforce the Articles against states by military force.<sup>147</sup> In the Committee of the Whole, Paterson argued that abandoning the Articles of Confederation went beyond “the pow-

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<sup>141</sup> James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 47, 54 (triangular brackets in original) (emphasis added) (footnote omitted).

<sup>142</sup> James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 132, 133; see also Robert Yates, Notes on the Constitutional Convention (June 6, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 140, 141 (“Mr. Mason observed that the national legislature, as to one branch, ought to be elected by the people; because the objects of their legislation will not be on states, but on individual persons”).

<sup>143</sup> RAKOVE, *supra* note 123, at 53.

<sup>144</sup> Madison also believed that congressional power to negative state law would render coercion unnecessary. See James Madison, Notes on the Constitutional Convention (June 8, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 164, 164. He was now convinced that coercion was simply not possible: “Any Govt. for the U. States formed on the supposed practicability of using force agst. the <unconstitutional proceedings> of the States, wd. prove as visionary & fallacious as the Govt. of Congs. [under the Articles of Confederation].” *Id.* at 165 (triangular brackets in original) (footnote omitted).

<sup>145</sup> James Madison, Notes on the Constitutional Convention (June 15, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 242, 242–45.

<sup>146</sup> *Id.* at 242.

<sup>147</sup> *Id.* at 245.

ers of the Convention,"<sup>148</sup> and that drawing representatives "immediately from the States, not from the people" was necessary to maintain "the sovereignty of the States."<sup>149</sup> Edmund Randolph responded by defending the Virginia Plan and by painting "in strong colours, the imbecility of the existing confederacy, & the danger of delaying a substantial reform":<sup>150</sup>

The true question is whether we shall adhere to the federal plan, or introduce the national plan. The insufficiency of the former has been fully displayed by the trial already made. There are but two modes, by which the end of a Genl. Govt. can be attained: the 1st. is by coercion as proposed by Mr. Ps. plan. 2. by real legislation as propd. by the other plan. Coercion he pronounced to be *impracticable, expensive, cruel to individuals*. It tended also to habituate the instruments of it to shed the blood & riot in the spoils of their fellow Citizens, and consequently trained them up for the service of Ambition. We must resort therefore to a national *Legislation over individuals*, for which [the existing] Congs. are unfit.<sup>151</sup>

The introduction of the New Jersey Plan presented the Convention with a stark choice: retain and amend the Articles of Confederation (by authorizing coercive power over states) or abandon them in favor of an entirely new system (that would coerce individuals rather than states). At the next session, Alexander Hamilton acknowledged that the Virginia Plan "departs itself from the *federal* idea, as understood by some, since it is to operate eventually on individuals."<sup>152</sup> Nonetheless, he agreed with Randolph "that we owed it to our Country, to do on this emergency whatever we should deem essential to its happiness."<sup>153</sup> Hamilton distinguished between "*coertion of laws*" and "*coertion of arms*,"<sup>154</sup> and denied that force could ever be used against states: "But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue."<sup>155</sup>

Now firmly opposed to coercive power, Madison offered a similar critique. He asked the smaller states most attached to the New Jersey

<sup>148</sup> James Madison, Notes on the Constitutional Convention (June 16, 1787), in 1 FARRAND'S RECORDS, *supra* note 138, at 249, 250.

<sup>149</sup> *Id.* at 251.

<sup>150</sup> *Id.* at 255.

<sup>151</sup> *Id.* at 255-56.

<sup>152</sup> James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra* note 138, at 282, 283.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 284.

<sup>155</sup> *Id.* at 285; *see also id.* ("[The Amphycyonic Council] had in particular the power of fining and using force agst. delinquent members. What was the consequence. Their decrees were mere signals of war.")

Plan “to consider the situation in which it would leave them.”<sup>156</sup> Madison explained: “The coercion, on which the efficacy of the plan depends, can never be exerted but on themselves. The larger States will be impregnable, the smaller only can feel the vengeance of it.”<sup>157</sup> After Madison spoke, the Convention rejected the New Jersey Plan (and coercive power) and re-reported the Virginia Plan (without coercive power).<sup>158</sup>

Dissatisfied with this result, John Lansing urged adherence to “the foundation of the present Confederacy”<sup>159</sup> by vesting “the powers of Legislation . . . <in the U. States> in Congress.”<sup>160</sup> Mason responded by expanding upon his original objections to coercive power:

It was acknowledged by (Mr. Patterson) that his plan could not be enforced without military coercion. Does he consider the force of this concession. The most jarring elements of nature; fire & water themselves are not more incompatible than such a mixture of civil liberty and military execution. Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the citizens of the invaded State assist one another till they rise as one Man, and shake off the Union altogether. . . . In one point of view he was struck with horror at the prospect of recurring to this expedient. To punish the non-payment of taxes with death, was a severity not yet adopted by despotism itself: yet this unexampled cruelty would be mercy compared to a military collection of revenue, in which the bayonet could make no discrimination between the innocent and the guilty.<sup>161</sup>

Following Mason’s impassioned speech, the Convention rejected Lansing’s proposal.<sup>162</sup>

With the Convention firmly against any plan that would introduce coercive power against states, the debate turned to one of the most contentious issues of the Convention: the basis for representation in the Senate. Some delegates thought this issue should be determined in accordance with the Convention’s decision to replace Congress’s existing power over states with novel power over individuals. The states had equal representation in Congress under the Articles, and the Articles acted only on states. Delegates like James Madison now argued that because the proposed Constitution would give Congress legislative power over individuals rather than states, Congress should be appor-

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<sup>156</sup> James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 313, 319.

<sup>157</sup> *Id.* at 320.

<sup>158</sup> *Id.* at 322.

<sup>159</sup> James Madison, Notes on the Constitutional Convention (June 20, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 335, 336.

<sup>160</sup> *Id.* (internal quotation mark omitted).

<sup>161</sup> *Id.* at 339–40 (footnote omitted).

<sup>162</sup> *Id.* at 344.

tioned by population. In the end, the delegates compromised by adopting proportional representation in the House and giving states equal suffrage in the Senate.<sup>163</sup>

Not surprisingly, delegates from large states favored proportional representation in the Senate, while small state delegates favored equal suffrage. In the course of a protracted and heated debate, a few delegates suggested that equal suffrage was appropriate because the government would sometimes act on states. For example, William Davie remarked that “We were partly federal, partly national in our Union. And he did not see why the Govt. might (not) in some respects operate on the States, in others on the people.”<sup>164</sup> Madison denied that the “Govrnt. would (in its operation) be partly federal, partly national.”<sup>165</sup> If true, the observation would favor the following compromise:

In all cases where the Genl. Govrnt. is to act on the people, let the people be represented and the votes be proportional. In all cases where the Govrnt. is to act on the States as such, in like manner as Congs. now act on them, let the States be represented & the votes be equal.<sup>166</sup>

Madison, however, denied the premise underlying such a compromise. “He called for a single instance in which the Genl. Govt. was not to operate on the people individually.”<sup>167</sup> In addition, he stressed that “[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”<sup>168</sup>

The Convention ultimately broke the deadlock over representation in the Senate by appointing a committee to devise a compromise.<sup>169</sup>

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<sup>163</sup> See generally Bradford R. Clark, *Constitutional Compromise and the Supremacy Clause*, 83 NOTRE DAME L. REV. 1421 (2008).

<sup>164</sup> James Madison, Notes on the Constitutional Convention (June 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 481, 488.

<sup>165</sup> James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 2, 8.

<sup>166</sup> *Id.* at 8–9.

<sup>167</sup> *Id.* at 9. Only Roger Sherman responded by stating his expectation “that the Genl. Legislature would in some cases act on the *federal principle*, of requiring quotas.” *Id.* at 11 (emphasis in original). Even Sherman did not contemplate coercive enforcement, but merely proposed that the general legislature “ought to be empowered to carry their own plans into execution, if the States should fail to supply their respective quotas.” *Id.*

<sup>168</sup> *Id.* at 9. During ratification, Madison acknowledged that there are “some instances” in which “the powers of the new government will act on the States in their collective characters.” THE FEDERALIST NO. 40 (James Madison), *supra* note 12, at 250. The example he gave in *The Federalist No. 39*, however, suggests that “Madison was not referring to the federal government’s legislative powers,” Nelson, *supra* note 91, at 1644 n.363, but to controversies between states (such as boundary disputes) brought “in their collective and political capacities” in the original jurisdiction of the Supreme Court. THE FEDERALIST NO. 39 (James Madison), *supra* note 12, at 245. Madison thought such jurisdiction “essential to prevent an appeal to the sword,” *id.* at 246, and thus distinguished suits between states from suits against states by individuals. See *infra* notes 300–301 and accompanying text.

<sup>169</sup> See James Madison, Notes on the Constitutional Convention (July 2, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 510, 510.

After resolving this issue, the Convention rejected congressional power to negative state laws.<sup>170</sup> In its place, the Convention adopted the Supremacy Clause, which obligated courts to recognize federal laws and treaties as “supreme law” notwithstanding contrary state law.<sup>171</sup> Unlike the original Virginia Plan, the plan that emerged from the Committee of Detail did not transfer and expand “the Legislative Rights vested in Congress by the Confederation.”<sup>172</sup> Rather, it gave the “Legislature of the United States” novel powers to act directly on individuals.<sup>173</sup> Thus, in place of the power to requisition funds from states, the plan gave Congress “the power to lay *and collect* taxes, duties, imposts and excises.”<sup>174</sup> The remainder of the proposed powers closely tracked those ultimately granted by Article I, Section 8. Absent from this enumeration was any legislative power to regulate states or any power to use force against states to coerce their compliance with feder-

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<sup>170</sup> James Madison, Notes on the Constitutional Convention (July 17, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 25, 28.

<sup>171</sup> *Id.* at 28–29.

<sup>172</sup> James Madison, Notes on the Constitutional Convention (May 29, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 17, 21. The Committee consisted of Oliver Ellsworth, Nathaniel Gorham, Edmund Randolph, John Rutledge, and James Wilson.

<sup>173</sup> James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 177, 181.

<sup>174</sup> *Id.* (emphasis added). Given the Founders’ rejection of coercive power, it seems safe to assume that they understood the federal taxing power — like all federal legislative powers — to operate on individuals rather than states. Some Founders nonetheless raised concerns regarding Congress’s ability to collect direct taxes, as opposed to duties, imposts, and excises. The Constitution requires “direct Taxes” to “be apportioned among the several States . . . according to their respective Numbers.” U.S. CONST. art. I, § 2, cl. 3. By contrast, the Constitution provides that “all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl. 1. Elbridge Gerry initially objected that the principle of direct taxation “could not be carried into execution as the States were not to be taxed as States.” See James Madison, Notes on the Constitutional Convention (July 12, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 591, 597. Oliver Ellsworth replied that “[t]he sum allotted to a State may be levied without difficulty according to the plan used by the State in raising its own supplies.” *Id.* Luther Martin later proposed requiring Congress to proceed initially by requisitions whenever it sought to raise revenue by direct taxes. See James Madison, Notes on the Constitutional Convention (Aug. 21, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 355, 359. Martin did not, however, propose giving Congress power to coerce delinquent states. Rather, he proposed that if states failed to comply with requisitions, “then and then only” could Congress bypass the states and “devise and pass acts directing the mode, and authorizing the collection of the same.” *Id.* The Convention rejected Martin’s proposal without debate by a vote of 8 to 1. *Id.* During ratification, Antifederalists raised objections to direct taxes, and Madison sought to reassure them by suggesting that whenever Congress imposed such taxes, it would probably give states the option “to supply their quotas by previous collections of their own” before proceeding to collect the tax directly. THE FEDERALIST NO. 45 (James Madison), *supra* note 12, at 292. In practice, Congress rarely imposed direct taxes (because of the difficulty of apportionment) and relied almost exclusively on duties, imposts, and excises to raise federal revenue until the adoption of the Sixteenth Amendment and the introduction of the income tax.

al commands.<sup>175</sup> As Madison had hoped, the fundamental decision to give Congress legislative power over individuals rather than states had rendered the introduction of coercive power against states unnecessary.<sup>176</sup>

The Constitution does, of course, contain several important prohibitions both on the United States<sup>177</sup> and on the states.<sup>178</sup> For example, the Committee of Detail proposed that “No state shall coin money; nor grant letters of marque and reprisals; nor enter into any treaty, alliance, or confederation; nor grant any title of Nobility.”<sup>179</sup> The Convention added several more restrictions, including prohibitions on issuing bills of credit, making anything but gold and silver a tender in payment of debts, and impairing the obligations of contracts. These various restrictions eventually became Article I, Section 10 of the Constitution.

If these prohibitions could be enforced only through coercive suits against states, then Article I, Section 10 would contradict Madison’s repeated assertions that the Constitution neither conferred nor required coercive power over states. This apparent contradiction disappears, however, if these prohibitions could be effectively enforced either by suits between individuals (including suits against state officers) or through the assertion of federal defenses in suits initiated by states.

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<sup>175</sup> Although Randolph did not sign the Constitution, he agreed with the fundamental decision to replace regulation of states with regulation of individuals: “But although coercion is an indispensable ingredient, it ought not to be directed against a state, as a state; it being impossible to attempt it except by blockading the trade of the delinquent, or carrying war into its bowels. . . . Let us rather substitute the same process, by which individuals are compelled to contribute to the government of their own states. Instead of making requisitions to the [state] legislatures, it would appear more proper, that taxes should be imposed by the federal head [on the citizens themselves].” Edmund Randolph, *Reasons for Not Signing the Constitution (1787)*, in 8 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 260, 266 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter 8 DHRC].

<sup>176</sup> The Convention did expressly authorize the use of coercive federal power within — rather than against — states in order to subdue a rebellion. This extraordinary power, however, was conditioned “on Application of the [State] Legislature, or of the Executive (when the Legislature cannot be convened).” U.S. CONST. art. IV, § 4. Given the Founders’ desire to avoid a civil war, it is not surprising that the Constitution contains no express authorization for the federal government to use coercive force against states. Even the Guaranty Clause, which appears in the same section of the Constitution, does not expressly authorize the use of coercive force, although such power might be implied in this narrow context. *See id.* (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”). To be sure, the Constitution authorizes Congress “To provide for calling forth the Militia to execute the Laws of the Union.” U.S. CONST. art. I, § 8, cl. 15. Given the Founders’ desire to avoid civil war, however, this power was almost certainly limited to enforcing federal statutes against individuals (as opposed to states).

<sup>177</sup> *See* U.S. CONST. art. I, § 9.

<sup>178</sup> *See* U.S. CONST. art. I, § 10.

<sup>179</sup> James Madison, *Notes on the Constitutional Convention (Aug. 28, 1787)*, in 2 *FARRAND’S RECORDS*, *supra* note 138, at 439 n.14.

The Founders were familiar with these mechanisms, and reliance on such indirect means of enforcement was consistent with background notions of sovereign immunity and the Founders' decision to avoid reliance on federal power to coerce states.

Thus, contrary to modern assumptions, the Founders did not necessarily assume that an individual could sue a state in federal court to enforce constitutional prohibitions against states. Rather, they may well have assumed that such prohibitions would be enforced in the same way as Article I, Section 9's similar prohibitions on the United States — in suits against individuals (including government officials) or as a defense in suits brought by the government.<sup>180</sup> For example, if Congress enacted a "Tax or Duty . . . on Articles exported from any State,"<sup>181</sup> the Founders would not have necessarily assumed that individuals could sue the United States directly. Rather, they may have assumed that an individual could challenge the tax either by suing the collector in his individual capacity, or by refusing to pay the tax and invoking the Constitution as a defense in any enforcement action.<sup>182</sup>

Similarly, if a state made paper money a legal tender in violation of Article I, Section 10, individuals could have enforced their rights without resort to suits against states. In particular, a creditor presumably could have refused the tender and sued the debtor to recover the debt. If the debtor invoked the (unconstitutional) state law as a defense, the creditor could prevail by invoking the Constitution. The Supremacy Clause obligated state judges to disregard state law in such cases, and the Supreme Court's appellate jurisdiction allowed it to enforce the supremacy of federal law. This method avoided federal enforcement of constitutional prohibitions directly against states. Whatever one thinks of these enforcement methods today, Federalists maintained throughout ratification that the Constitution could be enforced without permitting individuals to sue states and, even more emphatically, without giving the federal government coercive power over states.

The Committee of Detail, however, did produce at least one proposal that threatened to undermine the Federalists' core argument for preferring the Constitution to the Articles of Confederation. In what would become part of Article III, the Committee proposed that the federal judicial power extend to controversies "between a State and

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<sup>180</sup> See *infra* notes 497–528 and accompanying text. Although there is no direct evidence of how the Founders expected Article I, Section 10 to be enforced, it suffices for present purposes to observe that these restrictions could be enforced in ordinary common law actions between individuals. The availability of such suits might explain why — despite Article I, Section 10 — the Founders continued to state publicly that the proposed Constitution could be enforced against individuals rather than states. See *infra* section III.C, pp. 1853–62.

<sup>181</sup> U.S. CONST. art. I, § 9, cl. 5.

<sup>182</sup> See *infra* section V.B, pp. 1899–1911.

Citizens of another State,” and “between a State . . . and foreign . . . citizens or subjects.”<sup>183</sup> This language was adopted relatively late in the Convention without objection or discussion.<sup>184</sup> Madison later remarked that this part of the Constitution might have been “better expressed,”<sup>185</sup> but at the time the ambiguity apparently went unnoticed. During the ratification debates, Antifederalists charged that the citizen-state diversity provisions of Article III expressly authorized individuals to sue states in federal court and necessarily implied federal power to coerce state compliance with any resulting judgments. These suggestions contradicted the Federalists’ principal argument for abandoning the Articles in favor of the Constitution. To quiet fears about suits against states and maintain the integrity of their case for the Constitution, leading Federalists (including Hamilton, Madison, and Marshall) denied the Antifederalists’ construction of Article III, and argued that it should be construed to extend federal judicial power only to suits in which a state was the plaintiff.<sup>186</sup>

Following the Convention, Madison forwarded the proposed Constitution to Thomas Jefferson. Madison went out of his way to explain that the Constitution empowered Congress to regulate individuals rather than states, and thus did not authorize coercive power against states:

It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. A *voluntary* observance of the federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent & the guilty, the necessity of a military force both obnoxious & dangerous, and in general a scene resembling much more a civil war than the administration of a regular Government.

Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation.<sup>187</sup>

Madison’s thinking had fundamentally changed over the course of the Convention. He arrived in Philadelphia favoring legislative power

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<sup>183</sup> James Madison, Notes on the Constitutional Convention (Aug. 6, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 176, 186.

<sup>184</sup> See Journal of the Constitutional Convention (Aug. 28, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 422, 423–25, 434–35.

<sup>185</sup> James Madison, Debate Address to the Virginia Ratifying Convention (June 19, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1387, 1409 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DHRC].

<sup>186</sup> See *infra* notes 256–279 and accompanying text.

<sup>187</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND’S RECORDS, *supra* note 138, at 131, 131–32.

over states and the introduction of coercive power to ensure their compliance with federal commands. He left the Convention in favor of a central government with legislative power over individuals rather than states, and opposed to coercive power over states. In the end, he regarded the Constitution's novel approach as the only viable plan of government. Prominent Federalists in the state ratifying conventions shared his view. They defended the Constitution's novel approach, and denounced as dangerous and unworkable any plan that would introduce coercive force against states.<sup>188</sup>

### C. *The Ratification Debates*

A threshold issue during ratification was whether the Articles of Confederation could be salvaged or whether an entirely new system was needed. Some Antifederalists argued that the Articles could be repaired and that a new Constitution was unnecessary. Federalists generally responded by arguing that the Articles could not be retained without authorizing coercive force against states, and that this approach would lead to civil war. The Constitution, they explained, authorized Congress to impose obligations on individuals rather than states, and therefore relied solely on enforcement against individuals. Antifederalists had no response and eventually accepted the need to abandon the Articles; however, because the Constitution conferred legislative power over individuals, they now demanded a Bill of Rights. The important point for our purposes is that both Federalists and Antifederalists understood the choice between amending the Articles and adopting the Constitution to be a choice between legislative power over states (enforced against states) and legislative power over individuals (enforced against individuals). Like the delegates at Philadelphia before them, the ratifiers came to regard the Constitution as the only viable option.

Just three weeks after the Constitutional Convention, Alexander Hamilton began writing the *Federalist Papers*.<sup>189</sup> Hamilton enlisted

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<sup>188</sup> Professor Carlos Vázquez was the first modern commentator to recognize the link between state sovereign immunity and the Founders' decision to reject "the notion of enforcing federal obligations against the states as collective political bodies." Vázquez, *supra* note 11, at 1781. Vázquez assumed that the Constitution gives Congress power to impose obligations on states, *id.* at 1782, but concluded that these and other "federal obligations of the states . . . are, as a constitutional matter, to be enforced in suits against the individual state officials who violate federal law" rather than in suits against states, *id.* at 1781–82. I agree that the Founders understood the Constitution to withhold coercive power to enforce federal obligations against states, but believe they also understood the Constitution not to grant Congress legislative power over states.

<sup>189</sup> Gregory E. Maggs, *A Concise Guide to the Federalist Papers as a Source of the Original Meaning of the United States Constitution*, 87 B.U. L. REV. 801, 807, 842 (2007). For illuminating discussions on the role of the *Federalist Papers*, see generally William N. Eskridge, Jr., *Should the Supreme Court Read The Federalist but Not Statutory Legislative History?*, 66 GEO. WASH. L.

John Jay and James Madison to write under the collective name “Publius.”<sup>190</sup> Two of these early essays built on Hamilton’s arguments at the Constitutional Convention, and are important for understanding the Eleventh Amendment.

In *The Federalist No. 15*, first published on December 1, 1787, Hamilton examined “the insufficiency of the present Confederation to the preservation of the Union.”<sup>191</sup> Responding to those who favored retaining the Confederation, he argued that there were “fundamental errors in the structure of the building, which cannot be amended otherwise than by an alteration in the first principles and main pillars of the fabric.”<sup>192</sup> According to Hamilton:

The great and radical vice in the construction of the existing Confederation is in the principle of legislation for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. . . . Except as to the rule of apportionment, the United States have an indefinite discretion to make requisitions for men and money; but they have no authority to raise either by regulations extending to the individual citizens of America. The consequence of this is that though in theory their resolutions concerning those objects are laws constitutionally binding on the members of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option.<sup>193</sup>

Hamilton explained that this type of compact is “subject to the usual vicissitudes of peace and war, of observance and nonobservance, as the interests or passions of the contracting powers dictate.”<sup>194</sup> He stressed that if the United States wished to avoid this “perilous situation,” then “we must extend the authority of the Union to the persons of the citizens — the only proper objects of government.”<sup>195</sup>

Hamilton maintained that a shift from legislation for states (under the Articles) to legislation for individuals (under the Constitution) was necessary in order to enforce federal law and avoid civil war. As he explained, “the idea of a law” requires that there be “a penalty or punishment for disobedience.”<sup>196</sup> This penalty “can only be inflicted in

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REV. 1301 (1998); John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337 (1998).

<sup>190</sup> Maggs, *supra* note 189, at 811. The first seventeen essays were published before any state had ratified the Constitution. *Id.* at 826 tbl.2. Many essays were republished in other states. In addition, the first thirty-six essays were reprinted as a book during ratification. *Id.* at 812–13, 826. The remaining essays were later published in a second volume. *Id.* at 812–13.

<sup>191</sup> THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 12, at 105 (internal quotation marks omitted).

<sup>192</sup> *Id.* at 108.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 109.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 110.

two ways: by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms.”<sup>197</sup> “The first kind,” Hamilton explained, “can evidently apply only to men; the last kind must of necessity be employed against bodies politic, or communities, or States.”<sup>198</sup> Thus, in a confederation (exercising legislative power over its constituent states), “every breach of the laws must involve a state of war.”<sup>199</sup>

In *The Federalist No. 16*, published on December 4, 1787, Hamilton posed a stark choice between retaining the Articles of Confederation (and introducing coercive force against states) or adopting a new Constitution (and avoiding coercive force). In his view, coercive force against states was impracticable and likely to cause the “violent death of the Confederacy.”<sup>200</sup> On the first point, he observed:

Whoever considers the populousness and strength of several of these States singly at the present juncture, and looks forward to what they will become even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws to operate upon them in their collective capacities and to be executed by a coercion applicable to them in the same capacities.<sup>201</sup>

Even if coercive force were practicable, Hamilton thought it was too dangerous to confer: “When the sword is once drawn, the passions of men observe no bounds of moderation. . . . The first war of this kind would probably terminate in a dissolution of the Union.”<sup>202</sup>

To avoid these difficulties, Hamilton thought that the federal government “must be founded, as to the objects committed to its care, upon the reverse of the principle contended for by the opponents of the proposed Constitution. It must carry the agency to the persons of the citizens.”<sup>203</sup> By imposing obligations on individuals rather than states, the federal government could “employ the arm of the ordinary magistrate to execute its own resolutions.”<sup>204</sup> In other words, regulating individuals and enforcing such regulations through “the courts of justice”<sup>205</sup> would avoid the need either to rely on the “exceptionable principle” of “legislation for States”<sup>206</sup> or to enforce such legislation

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 12, at 114.

<sup>201</sup> *Id.* at 115.

<sup>202</sup> *Id.* at 114.

<sup>203</sup> *Id.* at 116.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 113. Hamilton responded to the potential objection that a state “disaffected to the authority of the Union . . . could at any time obstruct the execution of its laws, and bring the matter to the same issue of force, with the necessity of which the opposite scheme is reproached.” *Id.* at 116. He stressed “the essential difference between a mere NONCOMPLIANCE and a DIRECT

by military coercion. In Hamilton's view, these considerations prevented revision of the Articles and necessitated adoption of the Constitution.<sup>207</sup>

Hamilton's arguments against the Articles of Confederation and in favor of the Constitution were repeated in state ratifying conventions, usually by Federalists who — like Hamilton — had attended the Constitutional Convention. For example, in Connecticut, William Samuel Johnson explained why the Convention abandoned the Articles in favor of an entirely new system:

The Convention saw this imperfection in attempting to legislate for states in their political capacity; that the coercion of law can be exercised by nothing but a military force. They have therefore gone upon entirely new ground. They have formed one new nation out of the individual states. The Constitution vests in the general legislature a power to make laws in matters of national concern, to appoint judges to decide upon these laws, and to appoint officers to carry them into execution. This excludes the idea of an armed force. The power which is to enforce these laws is to be a legal power vested in proper magistrates. The force which is to be employed is the energy of law; and this force is to operate only upon individuals who fail in their duty to their country.<sup>208</sup>

In response to renewed Antifederalist objections, Oliver Ellsworth reiterated the necessity of enforcing congressional commands against individuals rather than states:

Hence we see, how necessary for the Union is a coercive principle. No man pretends the contrary. We all see and feel this necessity. The only question is, shall it be a coercion of law or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the states, one against the other. I am for coercion by law, that coercion which acts only upon delinquent individuals. This

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and ACTIVE RESISTANCE." *Id.* If affirmative state action is necessary to give effect to a federal measure, then states "have only NOT TO ACT, or TO ACT EVASIVELY, and the measure is defeated." *Id.* Federal officials would be reluctant to use force in such cases because this "neglect of duty may be disguised." *Id.* If, by contrast, the laws of the national government "were to pass into immediate operation upon the citizens themselves, the particular governments could not interrupt their progress without an open and violent exertion of an unconstitutional power." *Id.* at 117.

<sup>207</sup> Hamilton reiterated these themes in later essays. In *The Federalist No. 20*, he stressed that "a legislation for communities, as contradistinguished from individuals, . . . is subversive of the order and ends of civil polity, by substituting *violence* in place of the mild and salutary *coercion* of the *magistracy*." THE FEDERALIST NO. 20 (Alexander Hamilton), *supra* note 12, at 138. Similarly, in *The Federalist No. 23*, he wrote "that if we are in earnest about giving the Union energy and duration we must abandon the vain project of legislating upon the States in their collective capacities." THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 12, at 154.

<sup>208</sup> The Connecticut Convention (Jan. 4, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 541, 546 (Merrill Jensen ed., 1978) [hereinafter 3 DHRC].

Constitution does not attempt to coerce sovereign bodies, states in their political capacity. No coercion is applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent state, it would involve the good and bad, the innocent and guilty, in the same calamity.<sup>209</sup>

Members of the Massachusetts ratifying convention also stressed the Constitution's grant of legislative power over individuals rather than states as its primary advantage over the Articles.<sup>210</sup> Rufus King explained that "[l]aws to be effective . . . must not be laid on states, but upon individuals."<sup>211</sup> Similarly, Samuel Stillman observed that the "absolute deficiency of the articles of Confederation, is allowed by all."<sup>212</sup> In support, he quoted Randolph's public assessment that "the powers, by which alone the blessings of a general government can be accomplished, cannot be interwoven in the Confederation, without a change of its very essence; or in other words, that that Confederation must be thrown aside."<sup>213</sup>

During the debate in the South Carolina House of Representatives over whether to call a ratifying convention, Charles Pinckney — who had attended the Constitutional Convention — explained "that the states [at the Convention] were unanimous in preferring a change" from the Articles of Confederation.<sup>214</sup> The reason for this preference was that the delegates understood that the Confederation was "nothing

<sup>209</sup> *Id.* at 553–54. Samuel Holden Parsons similarly explained that consent to be governed "would be of little avail unless a coercive power to compel obedience was not also granted." Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 DHRC, *supra* note 208, at 569, 572. In his view, however, "it must appear much more eligible to carry home the punishment of the offense to the person of the transgressor by legal decrees, than to exercise the power of the sword against states and communities and involve the innocent and guilty in one indiscriminate scene of distress." *Id.*

<sup>210</sup> Massachusetts Convention Debates (Jan. 21, 1788), in 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1282, 1285 (John P. Kaminski & Gaspare J. Saladino eds., 2000) [hereinafter 6 DHRC].

<sup>211</sup> *Id.* at 1287. Several delegates discussed the advantages of the Constitution over the Articles in terms of raising revenue. For example, Thomas Dawes observed that "surely a whole state, a whole community, can be compelled only by an army; but taxes upon an individual, implies only the use of a *collector of taxes*." *Id.* at 1289. Similarly, Christopher Gore argued that "it is not only safe, but indispensibly necessary to our peace and dignity" to vest the proposed government with authority to lay and collect taxes. Massachusetts Convention Debates (Jan. 22, 1788), *reprinted* in 6 DHRC, *supra* note 210, at 1297, 1300. The alternative was unacceptable because "collections from states are at all times slow and uncertain — and in case of refusal, the non-complying state must be coerced by arms, which in its consequences would involve the innocent with the guilty, and introduce all the horrors of a civil war." *Id.* at 1301. *See also* Massachusetts Convention Debates (Jan. 23, 1788), in 6 DHRC, *supra* note 210, at 1312, 1317–19 (remarks of James Bowdoin).

<sup>212</sup> Massachusetts Convention Debates (Feb. 6, 1788), in 6 DHRC, *supra* note 210, at 1454, 1455.

<sup>213</sup> *Id.* (quoting Letter of Edmund Randolph to Speaker of the Virginia House of Delegates (Oct. 10, 1787), in AM. HERALD, Jan. 21, 1787).

<sup>214</sup> 4 ELLIOT'S DEBATES, *supra* note 42, at 255.

more than a federal Union . . . where the members might, or might not, comply with their federal engagements, as they thought proper.”<sup>215</sup> According to Pinckney, “the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present.”<sup>216</sup>

At the Virginia ratifying convention, Francis Corbin recounted the defects of the Articles of Confederation, especially the inability to raise money, and saw only two alternatives: either adopt the Constitution and permit direct taxation of individuals or amend the Articles of Confederation and vest Congress with a superintending coercive power over the states. Referring to coercive force, Corbin said:

Is this cruel mode of compulsion eligible? Is it consistent with the spirit of republicanism? This savage mode, which could be made use of under the confederation, leads directly to civil war and destruction. How different is this from the genius of the proposed Constitution? By this proposed plan, the public money is to be collected by mild and gentle means; by a peaceable and friendly application to the individuals of the community. Whereas by the other scheme, the public treasury must be supplied through the medium of the sword — by desolation and murder — by the blood of the citizens.<sup>217</sup>

In his view, amending the Articles was not an option.<sup>218</sup> Edmund Randolph agreed. “If an army be . . . once marched into Virginia,” he asserted, “[t]he most lamentable civil war must ensue.”<sup>219</sup>

James Madison also spoke in the Virginia convention against coercive power over states. In place of requisitions, he favored giving “the General Government, the power of laying and collecting taxes.”<sup>220</sup> He characterized this power as “indispensable and essential to the existence of any efficient, or well organized system of Government.”<sup>221</sup> John Marshall agreed. “By direct taxation, the necessities of the Gov-

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 256. The South Carolina House called a ratifying convention, which met on May 12, 1788, and ratified the Constitution on May 23, 1788.

<sup>217</sup> Francis Corbin, Speech in the Virginia Ratifying Convention (June 7, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1007, 1009 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DHRC].

<sup>218</sup> *Id.* at 1010 (“Our state-vessel has sprung a-leak — We must embark in a new bottom, or sink into perdition.”).

<sup>219</sup> *Id.* at 1018. Antifederalist George Mason stated that the “power of laying direct taxes, does of itself, entirely change the confederation of the States into one consolidated Government.” George Mason, Speech in the Virginia Ratifying Convention (June 4, 1788), in 9 DHRC, *supra* note 217, at 936, 936. Patrick Henry stated that if the Constitution had used the phrase “we the States” rather than the phrase, “*We, the people*,” then “this would be a confederation: It is otherwise most clearly a consolidated government.” Patrick Henry, Speech in the Virginia Ratifying Convention (June 5, 1788), in 9 DHRC, *supra* note 217, at 951, 951.

<sup>220</sup> James Madison, Speech in the Virginia Ratifying Convention (June 7, 1788), in 9 DHRC, *supra* note 217, at 1028, 1028.

<sup>221</sup> *Id.*

ernment will be supplied in a peaceable manner without irritating the minds of the people.”<sup>222</sup> Requisitions, he said, “cannot be rendered efficient without a civil war.”<sup>223</sup>

In the New York ratifying convention, Robert Livingston opened the debate by pointing out that, under the Articles, congressional commands were directed only to states and could not be enforced except by military force. He “deduced from [such] observations that the old confederation was defective in its principle, and impeachable in its execution, as it operated upon States in their political capacity, and not upon individuals; and that it carried with it the seeds of domestic violence, and tended ultimately to its own dissolution.”<sup>224</sup> He concluded that “we were driven to the necessity of creating a new constitution.”<sup>225</sup>

After Antifederalist Melancton Smith warned against adopting a new form of government,<sup>226</sup> Alexander Hamilton lamented “that there is still some lurking favorite imagination, that this system, with corrections, might become a safe and permanent one.”<sup>227</sup> Hamilton stressed that “the radical vice in the old confederation is, that the laws of the Union apply only to States in their corporate capacity.”<sup>228</sup> He reminded the convention how ineffective requisitions had been in 1780 when New York was “weak, distressed and forlorn” from “the ravages of war.”<sup>229</sup> Hamilton argued that there was no effective way to remedy the want of vigor in the Confederation:

<sup>222</sup> John Marshall, Speech in the Virginia Ratifying Convention (June 10, 1788), *in* 9 DHRC, *supra* note 217, at 1115, 1121.

<sup>223</sup> *Id.* Some delegates, like Patrick Henry, continued to defend requisitions, but George Nicholas responded that “[t]hey are fruitless without the coercion of arms,” which he considered “a dreadful alternative.” George Nicholas, Speech in the Virginia Ratifying Convention (June 10, 1788), *in* 9 DHRC, *supra* note 217, at 1127, 1133. William Grayson offered a last-ditch defense of the Confederation by arguing that it was more honorable to coerce states than individuals. He admitted that “coercion is necessary in every Government in some degree, [and] that it is manifestly wanting in our present Government.” William Grayson, Speech in the Virginia Ratifying Convention (June 11, 1788), *in* 9 DHRC, *supra* note 217, at 1164, 1169. In his view, however, adopting the Constitution would not avoid coercion, but merely introduce coercion of a different kind. “The difference is this, that by this Constitution the sword is employed against individuals, by the other it is employed against the States, which is more honorable.” *Id.*

<sup>224</sup> Robert R. Livingston, Speech in the New York Ratifying Convention (June 19, 1788), *in* 22 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1682, 1686 (John P. Kaminski & Gaspare J. Saladino eds., 2008) [hereinafter 22 DHRC].

<sup>225</sup> *Id.* at 1687. Livingston later clarified that he was contending “that the laws of the general legislature must act, and be enforced upon individuals.” Robert R. Livingston, Speech in the New York Ratifying Convention (June 23, 1788), *in* 22 DHRC, *supra* note 224, at 1809, 1809.

<sup>226</sup> Melancton Smith, Speech in the New York Ratifying Convention (June 20, 1788), *in* 22 DHRC, *supra* note 224, at 1712, 1712–13.

<sup>227</sup> Alexander Hamilton, Speech in the New York Ratifying Convention (June 20, 1788), *in* 22 DHRC, *supra* note 224, at 1722, 1723.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

If you make requisitions and they are not complied with, what is to be done? It has been well observed, that to coerce the States is one of the maddest projects that was ever devised. A failure of compliance will never be confined to a single State: This being the case, can we suppose it wise to hazard a civil war? . . . Every such war must involve the innocent with the guilty — This single consideration should be sufficient to dispose every peaceable citizen against such a government.

What, Sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the states do.<sup>230</sup>

Hamilton concluded that these considerations foreclosed taking “the Old Confederation, as the basis of a new system.”<sup>231</sup> Instead, “a government totally different must be instituted,” and we “must totally eradicate and discard [the fundamental principle of the Old Confederation] before we can expect an efficient government.”<sup>232</sup>

The next day, Smith responded by conceding Hamilton’s point and then shifting ground:

He has taken up much time by endeavouring to prove that the great defect in the old confederation was, that it operated upon states instead of individuals. It is needless to dispute concerning points on which we do not disagree: It is admitted that the powers of the general government ought to operate upon individuals to a certain degree. How far the powers should extend, and in what cases to individuals is the question.<sup>233</sup>

By the time North Carolina considered the Constitution, there was apparent consensus that the Confederation was defective beyond repair. William Davie, who had been a delegate to the Constitutional Convention, began by defending the Convention’s decision to abandon the Articles:

Another radical vice in the old system, which was necessary to be corrected, and which will be understood without a long deduction of reasoning, was, that it legislated on states, instead of individuals; and that its powers could not be executed but by fire or by the sword — by military force, and not by the intervention of the civil magistrate. . . . It was therefore absolutely necessary that . . . the laws should be carried home to individuals themselves.<sup>234</sup>

Davie stressed that “[e]very member [of the Convention] saw that the existing system would ever be ineffectual, unless its laws operated on individuals, as military coercion was neither eligible nor practica-

<sup>230</sup> *Id.* at 1724–25.

<sup>231</sup> *Id.* at 1725.

<sup>232</sup> *Id.*

<sup>233</sup> Melancton Smith, Address to New York Convention (June 21, 1788), in 22 DHRC, *supra* note 224, at 1748, 1748.

<sup>234</sup> William Davie, Address to North Carolina Convention (July 24, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 21–22.

ble.”<sup>235</sup> These considerations, he explained, convinced “the Convention to depart from that solecism in politics — the principle of legislation for states in their political capacities.”<sup>236</sup>

James Iredell — a former delegate to the Constitutional Convention and a future Supreme Court Justice — stressed the impossibility of enforcing requisitions against states:

Suppose . . . Congress had proceeded to enforce their requisitions, by sending an army to collect them; what would have been the consequence? *Civil war*, in which the innocent must have suffered with the guilty. Those who were willing to pay would have been equally distressed with those who were unwilling. Requisitions thus having failed of their purpose, it is proposed, by this Constitution, that, instead of collecting taxes by the sword, application shall be made by the government to the individual citizens. If any individual disobeys, the courts of justice can give immediate relief. This is the only natural and effective method of enforcing laws.<sup>237</sup>

These arguments ultimately persuaded Antifederalists to embrace the idea that “the government was not to operate against states, but against individuals.”<sup>238</sup>

This recognition led some Antifederalists to shift ground and stress the need for a Bill of Rights.<sup>239</sup> For example, Samuel Spencer highlighted the fact that the government was proposed for individuals:

The very caption of the Constitution shows that this is the case. The expression, “We, the people of the United States,” shows that this government is intended for individuals; there ought, therefore, to be a bill of rights. I am ready to acknowledge that the Congress ought to have the power of executing its laws. Heretofore, because all the laws of the Confederation were binding on the states in their political capacities, courts had nothing to do with them; but now the thing is entirely different. The

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<sup>235</sup> *Id.* at 22.

<sup>236</sup> *Id.* Antifederalists accepted the premise that the new system would enforce legislation against individuals rather than states. For example, Samuel Spencer acknowledged that requisitions could not be enforced through military force, but proposed that Congress be empowered to tax individuals only “if the states fail to pay those taxes in a convenient time.” Samuel Spencer, Address to North Carolina Convention (July 26, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 76. Federalists responded that Spencer’s “expedient of applying to the states in the first instance will be productive of delay, and will certainly terminate in a disappointment to Congress.” Richard Spaight, Address to North Carolina Convention (July 26, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 82.

<sup>237</sup> James Iredell, Address to North Carolina Convention (July 28, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 146.

<sup>238</sup> Samuel Spencer, Address to North Carolina Convention (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 163.

<sup>239</sup> For Spencer, the goal of this Bill of Rights was “securing the great rights of the states and people.” *Id.*

laws of Congress will be binding on individuals, and those things which concern individuals will be brought properly before the courts.<sup>240</sup>

Antifederalists and Federalists now agreed that this shift in the nature of the Union was necessary because “laws could not be put in execution against states without the agency of the sword, which, instead of answering the ends of government, would destroy it.”<sup>241</sup>

#### D. Article III and State Suability

Once Antifederalists agreed that the Articles of Confederation were flawed beyond repair, they began to scrutinize the new plan. They identified two provisions that seemed to undercut the Federalists’ case for the Constitution. Article III expressly extended the judicial power to controversies “between a State and Citizens of another State” and “between a State . . . and foreign . . . Citizens or Subjects.”<sup>242</sup> These provisions, of course, have been central in the debates about the Eleventh Amendment and state sovereign immunity, but are properly understood as part of the broader debate over the nature of the Union. Although the Constitutional Convention approved these provisions without debate, Antifederalists became concerned that courts would construe them as express authorization for individuals to sue states in federal court. This construction would suggest that the federal government had implied power to coerce states to comply with any resulting judgments.

Prominent Federalists — such as Alexander Hamilton, James Madison, and John Marshall — responded that Article III should not be construed to authorize suits *against* states. Rather, they maintained that it should be construed narrowly to extend only to suits in which a state was the plaintiff. Modern commentators tend to view these comments as puzzling or even disingenuous. In fact, this reading of Article III — whatever its intrinsic merit — necessarily followed from the Federalists’ understanding that the proposed Constitution did not empower the federal government to coerce state compliance with federal commands. From their perspective, any attempt to coerce state compliance with judicial decrees under the Constitution would have been just as likely to provoke a civil war as an attempt to coerce state compliance with congressional requisitions under the Articles of Confederation. Thus, Federalists argued quite sincerely that Article III should not be construed to bring about “such a consequence.”<sup>243</sup>

<sup>240</sup> *Id.* at 153; *see also id.* at 163 (arguing that because the Constitution would act on individuals, “the rights of individuals ought to be properly secured”).

<sup>241</sup> *Id.* at 163.

<sup>242</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>243</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488.

It is also worth noting that Antifederalists raised no similar objections to Article III's federal question jurisdiction. Unlike the state-citizen diversity provisions, this portion of Article III made no express reference to suits against states. In addition, suits by individuals against states were not necessary to enforce the proposed Constitution, especially since the Founders did not understand the document to confer either legislative or coercive power over states. Although it is difficult to draw firm conclusions from silence, there are several indications that neither Federalists nor Antifederalists understood federal question jurisdiction to authorize individuals to sue states in federal court. During the ratification debates, two individuals mistakenly suggested that Article III would permit suits against states by their own citizens. When these suggestions were challenged, no one raised federal question jurisdiction — or any other provision of Article III — as a basis for such suits. Rather, those who considered the question concluded that “[t]here is no expression in the proposed plan to warrant this construction.”<sup>244</sup> The state-citizen diversity provisions of Article III drew the attention of both Antifederalists and Federalists because they were the only provisions that the Founders thought might be construed as expressly authorizing individuals to sue states.

1. *State-Citizen Diversity Jurisdiction.* — Some background is necessary to understand the problem posed by the state-citizen diversity provisions of Article III. The original thirteen states were deeply in debt when they met in 1787 to draft a new Constitution. To fund the Revolutionary War, they had borrowed over \$200 million.<sup>245</sup> Much of this debt was no longer in the hands of the original purchasers, having been sold at steep discounts to out-of-state speculators.<sup>246</sup> Honoring this debt would have imposed enormous burdens on state taxpayers and threatened some states with financial ruin. Prior to the Constitution's adoption, states were immune from suit without their consent and thus free to repay their debts in whatever manner they saw fit.<sup>247</sup> Article III raised concerns during ratification because it arguably authorized out-of-state creditors to sue states in federal court.

Soon after the Constitution was proposed, the Federal Farmer objected to the state-citizen clauses of Article III:

How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in per-

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<sup>244</sup> Aristides, Letter, MD. J. & BALT. ADVERTISER, April 1, 1788.

<sup>245</sup> See Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128, 130 (Richard Beeman et al. eds., 1987).

<sup>246</sup> See *id.* at 131.

<sup>247</sup> Some states consented to suit in their own courts; others did not. See Nelson, *supra* note 91, at 1574–79.

forming so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to bring it to answer to an individual in a court of law, is worthy of consideration; the states are now subject to no such actions, and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between . . . states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states — and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever.<sup>248</sup>

In Article III, Antifederalists had found an issue of concern to the citizens of every state. If out-of-state creditors could sue states to recover their debts, taxpayers would have to pay enormous sums, often to out-of-state speculators. In addition, enforcement of any resulting judgments would require the federal government to use coercive force against states.

Brutus objected to the state-citizen provisions of Article III in just these terms. He thought that such jurisdiction was “improper in itself, and will, in its exercise, prove most pernicious and destructive. It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government . . . .”<sup>249</sup> Brutus also thought that federal enforcement of judgments against states would be “pernicious and destructive.” All outstanding debts, he argued, could eventually be recovered under Article III. Once a state is sued by a citizen of a different state, “the notes of the state will pass rapidly from the hands of citizens of the state to those of other states,” meaning that “judgments and executions may be obtained against the state for the whole amount of the state debt.”<sup>250</sup>

Brutus anticipated two important Federalist responses: first, that the state-citizen provisions of Article III do not clearly authorize suits against states by individuals; and second, that any judgments rendered would be impossible to enforce. On the first point, Brutus stated that

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<sup>248</sup> Federal Farmer, Letters to the Republican III (Oct. 10, 1787), *reprinted in* 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 30, 41–42 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DHRC].

<sup>249</sup> Brutus, Letter XIII, N.Y. J., Feb. 21, 1788, *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 795, 796 (John P. Kaminski & Gaspare J. Saladino eds., 2004) [hereinafter 20 DHRC]. Brutus also thought that the creation of retroactive federal remedies would be unfair because the individuals who purchased state obligations “never had in contemplation any compulsory mode of obliging the government to fulfil its engagements.” *Id.* For a summary of the Antifederalist objections to retrospective claims against states, see James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1304–13 (1998).

<sup>250</sup> Brutus, Letter XIII, N.Y. J., Feb. 21, 1788, *reprinted in* 20 DHRC, *supra* note 249, at 795, 796.

if the judicial power “does not extend to these cases, I confess myself utterly at a loss to give it any meaning.”<sup>251</sup> On the second point, he argued that if jurisdiction is proper, then Congress will be able to “provide for levying an execution on a state” pursuant to its necessary and proper power.<sup>252</sup> Thus, “[e]xecution may be levied on any property of the state, either real or personal.”<sup>253</sup> He even raised the possibility that “the estate of any individual citizen may . . . be made answerable for the discharge of judgments against the state.”<sup>254</sup> He concluded that the judicial power, if not altered, “will crush the states beneath its weight.”<sup>255</sup>

These objections moved Alexander Hamilton to respond in *The Federalist No. 81*.<sup>256</sup> He observed that it “has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities.”<sup>257</sup> In his view, this suggestion had “excited some alarm upon very mistaken grounds,” and was “without foundation.”<sup>258</sup> In Hamilton’s view, Article III did not unambiguously authorize individuals to sue states or empower the federal government to enforce any resulting judgments against states:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . A recurrence to the principles [governing alienation of state sovereignty] will satisfy us that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.<sup>259</sup>

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<sup>251</sup> *Id.* at 798.

<sup>252</sup> *Id.* at 797.

<sup>253</sup> *Id.* at 798.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> This essay was first published on May 28, 1788, and was subsequently republished in several newspapers. Maggs, *supra* note 189, at 813.

<sup>257</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 487.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 487–88. Hamilton was apparently relying, in part, on the law of nations. See Nelson, *supra* note 91, at 1574 (“Under the general law of nations, sovereigns were thought to enjoy a broad exemption from command.”).

For Hamilton, background notions of sovereign immunity meant that only an express surrender of such immunity would suffice to subject states to suits by individuals. The Constitution not only lacked such an express surrender, but it also failed to grant express federal power to enforce any resulting judgments against states:

To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.<sup>260</sup>

Hamilton's rejection of both state suability and implied enforcement power was fully consistent with — if not compelled by — his earlier assurances in *The Federalist Nos. 15* and *16* that the Constitution did not give the federal government power to enact legislation for states or coerce them in their collective capacities.<sup>261</sup>

The debate over Article III was not confined to New York.<sup>262</sup> In Massachusetts, Antifederalists expressed fears that Article III authorized out-of-state citizens to sue states in federal court, but were again assured by Federalists that this construction was wrong. After *Chisholm* was decided, Antifederalists reminded the public of these assurances. Writing in 1793, Marcus recounted that the power of the federal government “to call into *their* Courts, a *Commonwealth* or a State, to answer to the demand of a foreigner (perhaps a tory) was *powerfully opposed* in the Convention of this and other . . . States.”<sup>263</sup> According to Marcus, “[t]his power in the Federal Government, would not have been consented to by this *commonwealth*, but for Rufus King[,] Esq.

<sup>260</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488.

<sup>261</sup> Some commentators suggest that Hamilton's disclaimer of state suability in *The Federalist No. 81* is inconsistent with his discussion of federal question jurisdiction in *The Federalist No. 80*. See Pfander, *supra* note 249, at 1306–07. In *The Federalist No. 80*, however, Hamilton merely points out that the restrictions on state action found in Article I, Section 10 can be enforced in suits arising under the Constitution. See THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 12, at 479. He does not say that such suits will be against states, and given his unequivocal rejection of such suits in *The Federalist No. 81*, it seems more likely that he had in mind suits between individuals (including state officers). See *infra* notes 497–500 and accompanying text.

<sup>262</sup> Commentators have construed James Wilson's remarks in the Pennsylvania ratifying convention as endorsing state suability. See Gibbons, *supra* note 63, at 1902–03; Pfander, *supra* note 249, at 1313 & n.198. Wilson's remarks, however, are ambiguous in this regard because he does not clearly specify that a state may be made a defendant without its consent. Referring to jurisdiction over controversies between a state and citizens of another state, Wilson praised the provision for ensuring “[i]mpartiality,” and stated: “When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.” 2 ELLIOT'S DEBATES, *supra* note 42, at 491. Professor Fletcher believed that Wilson's “words are probably best understood as referring only to the neutrality of the federal forum.” Fletcher, *supra* note 6, at 1051.

<sup>263</sup> Marcus, MASS. MERCURY, July 13, 1793, *reprinted in* 5 DHSC *supra* note 20, at 389, 389.

who ‘pledged his honour,’ in the *State* Convention, ‘that the Convention at Philadelphia never discovered a disposition to infringe on the Government of an individual State.’<sup>264</sup> Marcus reported that “[o]n the strength of this gentleman’s opinion, the Article in the Constitution was assented to but by a small majority.”<sup>265</sup>

William Martin, speaking in the Massachusetts House of Representatives, also recalled such assurances:

He observed it was agreed on most sides of the House, that if the article did convey the meaning as determined by part of the Judiciary, it was not the intention of the [Massachusetts] Convention, nor was it understood to be so construed — nay, there were several gentlemen then present, who signified their remembrance, that Mr. Sedgwick and Mr. Strong, both in Convention, and now in the Senate and House of the United States, had declared their minds to that purpose, and that they disapproved of it, and would endeavour to bring on the question, and get it altered if possible.<sup>266</sup>

Given these assurances, it is not surprising that Sedgwick and Strong took the lead in Congress to secure adoption of the Eleventh Amendment.<sup>267</sup>

Antifederalists in Virginia raised the same concerns about Article III as Antifederalists in New York and Massachusetts, and they were likewise reassured by leading Federalists that the provisions would be construed narrowly. For example, Antifederalist George Mason objected to the state-citizen diversity provisions, and asked how judgments in such cases could be enforced:

Is this State to be brought to the bar of justice like a delinquent individual? — Is the sovereignty of the State to be arraigned like a culprit, or private offender? — Will the States undergo this mortification? I think this power perfectly unnecessary. But let us pursue this subject further. What is to be done if a judgment be obtained against a State? — Will you issue a *fieri facias*? It would be ludicrous to say, that you could put the State’s body in jail. How is the judgment then to be enforced? A power which cannot be executed, ought not to be granted.<sup>268</sup>

James Madison responded to Mason’s objections by candidly acknowledging “that this part [of the Constitution] does not stand in that form, which would be freest from objection. It might be better ex-

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 389–90. Referring to Rufus King’s remarks at the state ratifying convention, a Democrat likewise recalled: “A great civilian rose; and, in an harangue, of two hours length, endeavoured to prove that, the article in debate, could not possibly bear the construction put upon it by gentlemen.” *Democrat*, MASS. MERCURY, July 23, 1793, reprinted in 5 DHSC, *supra* note 20, at 393, 393.

<sup>266</sup> Account of William Martin’s Speech in the Massachusetts House of Representatives, *INDEP. CHRON.*, Sept. 23, 1793, in 5 DHSC, *supra* note 20, at 434, 434.

<sup>267</sup> See *infra* notes 439–448 and accompanying text.

<sup>268</sup> George Mason, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 185, at 1403, 1406 (footnote omitted).

pressed.”<sup>269</sup> He insisted, however, that “a fair and liberal interpretation upon the words” would not authorize the general government “to commit the oppressions [Mason] dreads.”<sup>270</sup>

The next day, Madison tried to defuse the objections by construing Article III to permit suits by — but not *against* — states:

Its jurisdiction in controversies between a State and citizens of another State, is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into Court. The only operation it can have, is, that if a State should wish to bring suit against a citizen, it must be brought before the Federal Court. . . . It is a case which cannot often happen, and if it should be found improper, it will be altered.<sup>271</sup>

This response did not satisfy Antifederalists like Patrick Henry who decried the prospect of “incarcerating a State.”<sup>272</sup> Henry said that it would ease his mind “if the Honorable Gentleman would tell me the manner in which money should be paid, if in a suit between a State and individuals, the State were cast.”<sup>273</sup> Referring to Madison’s earlier stance against giving Congress coercive power over states, Henry mockingly remarked that “[t]he Honorable Gentleman perhaps does not mean to use coercion, but some gentle caution.”<sup>274</sup> He next criticized Madison’s narrow reading of the text to mean “that the State may be the plaintiff only.”<sup>275</sup> Henry said that this construction was “perfectly incomprehensible,”<sup>276</sup> and objected that “[i]f Gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument.”<sup>277</sup>

John Marshall answered Henry by construing Article III narrowly in light of background principles of sovereign immunity:

With respect to disputes between a State, and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope no Gentlemen will think that a State will be called at the bar of the Federal Court. Is there no such case at present? Are there not many cases in which the Legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose, that the sovereign power shall be dragged before a Court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by

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<sup>269</sup> James Madison, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 185, at 1409, 1409.

<sup>270</sup> *Id.*

<sup>271</sup> James Madison, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1412, 1414.

<sup>272</sup> Patrick Henry, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1419, 1422.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1423.

<sup>276</sup> *Id.* at 1422.

<sup>277</sup> *Id.* at 1423.

the words. But, they say, there will be partiality in it if a State cannot be defendant — if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff.<sup>278</sup>

Madison's and Marshall's narrow construction of Article III was consistent with their general understanding that the Constitution gave the federal government neither legislative nor coercive power over states.<sup>279</sup> In essence, they agreed with Hamilton that reading Article III broadly to authorize suits against states — and therefore imply coercive power over states — “would be altogether forced and unwarrantable.”<sup>280</sup>

Modern commentators sometimes suggest that Federalists like Hamilton, Madison, and Marshall were either “disingenuous” or “dissembling” when they argued that Article III should not be construed to permit individuals to sue states because these men otherwise favored enhanced federal powers.<sup>281</sup> Whatever one thinks of their construction, their position on state suability is not surprising given their understanding that the Constitution did not authorize the use of coercive force against states. All three thought that the use of such power would provoke a civil war, and that the lack of such power in the Constitution was one of its crucial advantages over proposals to amend the Articles of Confederation. On the central issues of taxation, raising armies, and regulating commerce, the Constitution solved pre-

<sup>278</sup> John Marshall, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1430, 1433.

<sup>279</sup> See *supra* notes 220–223 and accompanying text. Randolph disagreed with Madison's and Marshall's construction. See Governor Edmund Randolph, Address to the Virginia Convention (June 21, 1788), in 10 DHRC, *supra* note 185, at 1450, 1453 (stating that “any doubt respecting the construction that a State may be plaintiff, and not defendant, is taken away by the words, where a State shall be a party”). Based on the surviving record, Randolph was “the only advocate of ratification publicly to contemplate Article III as authorizing compulsive suits by individuals against states.” Menashi, *supra* note 86, at 1175 n.186. Because Article III was at least ambiguous, the Virginia ratifying convention favored a constitutional amendment to remove all of the diversity provisions of Article III, including the state-citizen diversity clause. See Virginia Ratifying Convention Proposed Amendments to the Constitution (June 27, 1788), reprinted in 10 DHRC, *supra* note 185, at 1553, 1555. The North Carolina ratifying convention proposed a similar amendment. See 4 ELLIOT'S DEBATES, *supra* note 42, at 246.

<sup>280</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488.

<sup>281</sup> See Gibbons, *supra* note 63, at 1906–08 (suggesting that “Madison was merely dissembling,” *id.* at 1906, and concluding that “the Madison-Marshall interpretation of article III was not taken seriously at the Virginia convention,” *id.* at 1908); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 47–48 (1988) (characterizing Madison's and Marshall's remarks as a “disingenuous defense of the state-citizen clauses” of Article III); Marshall, *supra* note 8, at 1371 (referring to “Madison's probably disingenuous attempt to convince the Virginia convention that sovereign immunity was not affected by certain portions of article III”); Massey, *supra* note 7, at 93 (stating that a “few proponents, such as James Madison, may have dissembled by suggesting that a state could not be sued without its consent”).

viously intractable enforcement problems by authorizing Congress to legislate for individuals rather than states. The Antifederalists' suggestion that the state-citizen provisions of Article III empowered federal courts to hear suits against states reintroduced the specter of coercive power, and thus threatened to undermine a key reason for adopting the Constitution. From this perspective, Hamilton, Madison, and Marshall had genuine and compelling reasons for construing these provisions narrowly.

2. *Federal Question Jurisdiction.* — One might wonder why Antifederalists did not also object to federal question jurisdiction under Article III on the ground that it could be construed to permit suits against states by individuals. If — as modern theories of the Eleventh Amendment assume — federal question jurisdiction authorizes federal courts to hear suits by citizens against their own states, then one would have expected Antifederalists at least to have questioned the propriety of such jurisdiction. In the debates over state-citizen diversity jurisdiction, the Founders generally seem to have assumed that the states would retain their preexisting immunity unless they expressly surrendered it in the Constitution.<sup>282</sup> The fight over the state-citizen provisions of Article III centered on whether they should be construed as an express surrender. Federalists insisted that an ambiguous surrender (merely extending judicial power to controversies “between” states and out-of-state citizens) would not suffice. Antifederalists, on the other hand, feared (correctly) that judges would construe the relevant language as an express surrender. Unlike the state-citizen diversity provisions, however, federal question jurisdiction contains no reference — clear or ambiguous — to suits against states. Perhaps for this reason, there was no real debate during the ratification era over whether federal question jurisdiction could be construed as a surrender of state sovereign immunity.

Moreover, there is reason to believe that the Founders would not have regarded suits against states as a necessary means of enforcing the Constitution, laws, and treaties of the United States. There was a long tradition among English and early American courts of permitting aggrieved individuals to sue government officers in tort.<sup>283</sup> Officers could shield themselves from liability by showing that their conduct was authorized by law, but were left defenseless if the law they in-

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<sup>282</sup> See THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488. Professor Kurt Lash has recently made an analogous argument that the Founders understood Congress to have only expressly enumerated powers under the original Constitution. See Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and “Expressly” Delegated Power*, 83 NOTRE DAME L. REV. 1889 (2008).

<sup>283</sup> See David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 14 (1972).

voked was unconstitutional.<sup>284</sup> The Founders may have expected, therefore, that the Constitution's original prohibitions on states would be enforced in suits between individuals or in cases brought by the state.<sup>285</sup> In addition, Federalists and Antifederalists generally agreed that the Constitution did not give Congress either legislative or coercive power over states. Given these background assumptions, it is not surprising that Antifederalists did not perceive federal question jurisdiction as a potential waiver of state sovereign immunity. The only provisions that plausibly could have been read as an express authorization to hear suits by individuals against states were the state-citizen diversity provisions of Article III.

Indeed, the only direct evidence relating to federal question jurisdiction undermines the modern assumption that the Founders must have understood such jurisdiction to permit in-state citizens to be able to sue their own states. That evidence arose from two inadvertent mistakes. Writing as "Aristides," Alexander Contee Hanson — a Federalist delegate to the Maryland ratifying convention — published a pamphlet on January 31, 1788 defending the proposed Constitution. In describing the judicial power, Hanson stated that the original jurisdiction of the Supreme Court extends to "Cases between a state, and its own citizens."<sup>286</sup> Tench Coxe, a prominent Pennsylvania Federalist,<sup>287</sup> informed Hanson that the pamphlet mistakenly described the judicial power as extending to cases between a state and its own citizens. Hanson immediately acknowledged his mistake and explained the actions he had taken to correct it:

You are quite right with respect to my misconception of the judiciary; and how I came to blunder so very grossly, after bestowing great attention, to that article more particularly, I am entirely at a loss to account. I thank you for your hints. I examined the pamphlet with the constitution immediately after I read your letter. I have already sent Goddard my apology, which you will perhaps see in his paper. The mistake being favorable to the antifederalists they did not think proper to expose it, altho[ugh] they asserted generally, that I was entirely mistaken . . . .<sup>288</sup>

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<sup>284</sup> See *id.*

<sup>285</sup> See *infra* notes 503–15 and accompanying text.

<sup>286</sup> Aristides, *Remarks on the Proposed Plan of a Federal Government*, MD. GAZETTE, Jan. 31, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 533 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter 15 DHRC].

<sup>287</sup> Coxe played a significant role in ratification by shaping public understanding of the Constitution. See JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 111 (1978).

<sup>288</sup> Letter from Alexander Contee Hanson to Tench Coxe (Mar. 27, 1788), in 15 DHRC, *supra* note 286, at 553.

On April 1, 1788, Hanson's letter "To the People of Maryland" appeared in William Goddard's *Maryland Journal*.<sup>289</sup> In pertinent part, Hanson's letter states:

On a review of my late Pamphlet, I perceive that I have erred with respect to the federal judiciary. I have stated, that the original jurisdiction of the federal court extends to cases between a state and its own citizens. — *There is no expression in the proposed plan to warrant this construction;* and I am at a loss to account for the mistake, which is pointed out in a private letter, I have just received from Philadelphia.

As my exposition may probably have communicated the error to others, it was my duty to make this public acknowledgment. I am happy that the mistake cannot be supposed willful — My purpose was to defend the constitution; but to increase the jurisdiction of the federal courts, could have no other tendency than to increase the number of its enemies.<sup>290</sup>

Hanson's and Coxe's statements indicate that they did not believe that there was any "expression in the proposed plan to warrant" the conclusion that the judicial power extended to cases between a state and its own citizens. We know that Hanson considered federal question jurisdiction because he describes it in his original pamphlet, and he "examined the pamphlet with the constitution immediately after" receiving Coxe's letter. Although modern theorists assume that federal question jurisdiction encompasses suits by citizens against their own states, Coxe and Hanson apparently thought that only an express authorization to hear suits against states could suffice to confer such jurisdiction. Moreover, Antifederalists did not challenge Hanson's correction or suggest that federal question jurisdiction would support suits by individuals against states, even though it would have provided them with additional ammunition against the proposed Constitution.

A few months later, George Mason, a leading Antifederalist, made a similar mistake at the Virginia ratifying convention. After objecting to the various grants of diversity jurisdiction set forth in Article III, Mason stated: "The last clause is still more improper. To give [federal courts] cognizance in disputes between a State and the citizens thereof, is utterly inconsistent with reason or good policy."<sup>291</sup> George Nicholas interrupted Mason to inform him "that his interpretation of this part was not warranted by the words."<sup>292</sup> Mason replied that his description was based on his recollection, but acknowledged "that as his memory had never been good, and was now much impaired from his

<sup>289</sup> Aristides, *To the People of Maryland*, MD. J. & BALT. ADVERTISER, Apr. 1, 1788 (emphasis omitted).

<sup>290</sup> *Id.* (emphasis added).

<sup>291</sup> George Mason, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 185, at 1401, 1403.

<sup>292</sup> *Id.*

age, he would not insist on that interpretation.”<sup>293</sup> No one invoked federal question jurisdiction in support of Mason’s description.

Although these incidents involve statements by only four Founders, their remarks are consistent with the broader understanding of the nature of the Union under the proposed Constitution. Coxe, Hanson, Mason, and Nicholas were sophisticated participants in the drafting and ratification of the Constitution. As these incidents reveal, none of these individuals understood the judicial power to reach suits between states and their own citizens. Antifederalists were not shy about highlighting provisions of the Constitution to which they objected and had every incentive to exploit Hanson’s and Mason’s mistakes if they had represented a plausible construction of Article III.<sup>294</sup>

3. *Suits Between a State and Another State or a Foreign State.* — During ratification, Antifederalists objected most strenuously to federal jurisdiction over suits against states by individuals. There was no corresponding alarm regarding suits between two or more states, or suits between a state and a foreign state. Article III expressly authorizes suits between (and therefore against) states. By ratifying the Constitution, states essentially agreed to such jurisdiction as a kind of binding arbitration. Although judgments in such cases might be hard to enforce, establishing a means of resolving such disputes arguably furthered — rather than threatened — national peace and harmony. If a defendant state refused to comply with a federal judgment, then the preexisting dispute would continue and the parties would be no worse off. By contrast, if a defendant state complied with the judgment, then the states’ decision to submit to such jurisdiction would have succeeded in defusing the dispute. In other words, federal jurisdiction over suits between states (and perhaps between a state and a foreign state) might frequently provide the very means of avoiding a war between states, whereas federal jurisdiction over suits by individuals against states might actually provoke a civil war.

The Constitution enables states to resolve their differences voluntarily by making compacts with the consent of Congress.<sup>295</sup> When they are unable to do so, the Constitution provides an alternative to war by expressly authorizing suits “between two or more States” in the

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<sup>293</sup> *Id.* Mason was sixty-two years old at the time.

<sup>294</sup> Of course, it is difficult to draw conclusions based solely on “the dog that did not bark.” Compare *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (“Congress’ silence in this regard can be likened to the dog that did not bark.”), with *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.”).

<sup>295</sup> See U.S. CONST. art. I, § 10, cl. 3.

original jurisdiction of the Supreme Court.<sup>296</sup> The Articles of Confederation employed similar jurisdiction as a way to prevent, rather than provoke, war between states.<sup>297</sup> When the Constitution was adopted, “there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters, and had continued from the first settlement of the colonies.”<sup>298</sup> Prominent Founders regarded territorial disputes as likely to create hostility among states and established the Supreme Court as an “umpire or common judge to interpose between the contending parties.”<sup>299</sup> In discussing this jurisdiction, Madison reiterated that the national government “in its ordinary and most essential proceedings” would operate “on the individual citizens composing the nation, in their individual capacities,” rather than “on the political bodies composing the Confederacy, in their political capacities.”<sup>300</sup> Madison acknowledged that in boundary disputes between states “the tribunal which is ultimately to decide . . . is to be established under the general government,” but in his view, “[s]ome such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact.”<sup>301</sup> In other words, the Founders recognized that the underlying dispute between states — rather than any federal judgment attempting to resolve it — posed the greater risk of sparking hostilities.

There was no similar consensus regarding jurisdiction over suits between a state and a foreign state.<sup>302</sup> This jurisdiction is found in the

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<sup>296</sup> U.S. CONST. art. III, § 2, cls. 1–2; *see* *Louisiana v. Texas*, 176 U.S. 1, 17 (1900) (“Controversies between [states] arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement.”).

<sup>297</sup> *See* James Madison, Address to the Virginia Ratifying Convention (June 20, 1788), *in* 10 DHRC, *supra* note 185, at 1412, 1414.

<sup>298</sup> *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838).

<sup>299</sup> THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 12, at 60–61. In the Virginia ratifying convention, Madison observed that jurisdiction over suits between states “is not objected to,” and was already provided for “by the existing [A]rticles of Confederation.” James Madison, Address to the Virginia Convention (June 20, 1788), *in* 10 DHRC, *supra* note 185, at 1414. Under these circumstances, he thought “there [ould] be no impropriety in referring such disputes to this tribunal.” *Id.*

<sup>300</sup> THE FEDERALIST NO. 39 (James Madison), *supra* note 12, at 245.

<sup>301</sup> *Id.* at 246. It is unclear whether Madison contemplated federal enforcement of judgments against states in this context. It is possible — at least in boundary disputes — that the Supreme Court’s judgment ascertaining the border would be more or less self-executing. Once the Court ruled, most questions regarding title and jurisdiction could readily be resolved in suits between individuals or in suits brought by states against individuals.

<sup>302</sup> The Constitution does not expressly authorize suits between the United States and a state. Article III extends the judicial power “to Controversies to which the United States shall be a party.” U.S. CONST. art. III, § 2, cl. 1. The Supreme Court first upheld its jurisdiction to adjudicate a suit by the United States against a state in 1892. *See* *United States v. Texas*, 143 U.S. 621, 631 (1892). The Court regards the states’ ratification of the Constitution as consent to such suits. *See* Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 93–94 (1999).

same clause that confers state–foreign citizen diversity jurisdiction, and authorizes the federal judiciary to hear suits “between a State . . . and foreign States.”<sup>303</sup> Some Antifederalists objected to this jurisdiction because it could be construed to give foreign states an asymmetrical right to sue states without their consent.<sup>304</sup> Under the law of nations, a state could not sue a foreign state without its consent, but it was unclear whether the same restriction prevented a foreign state from suing one of the United States. Some Federalists opined that the jurisdiction would only apply when both parties consented to suit,<sup>305</sup> but some Antifederalists remained unconvinced and read Article III to allow foreign states to sue American states without their consent.<sup>306</sup> In the end, however, the provision generated much less controversy than the state-citizen diversity provisions of Article III.<sup>307</sup>

#### IV. THE ADOPTION OF THE ELEVENTH AMENDMENT

The Eleventh Amendment was drafted to reinstate the narrow construction of Article III promised by Federalists during the ratification debates, and to avoid the enforcement problems created by permitting individuals to sue states in federal court. Although prominent Federalists had assured skeptics that the state-citizen diversity provisions of Article III would not be construed to permit individuals to sue states, the constitutional text was at best ambiguous. After the Constitution was ratified, out-of-state citizens filed suits against six different states in the 1790s. These suits, particularly *Chisholm v. Georgia* and *Vassall v. Massachusetts*, triggered the adoption of the Eleventh Amendment. The Amendment eliminated any ambiguity in the state-citizen diversity provisions by specifying that “[t]he Judicial power of the United

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<sup>303</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>304</sup> For example, George Mason observed that Virginia “may be sued by a foreign State. — What reciprocity is there in it? — In a suit between Virginia and a foreign State, is the foreign State to be bound by the decision?” George Mason, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 185, at 1403, 1406.

<sup>305</sup> For example, Madison remarked: “I do not conceive that any controversy can ever be decided in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made.” James Madison, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1412, 1414. Similarly, Marshall stated that the “previous consent of the parties is necessary” in suits between a state and a foreign state. John Marshall, Address to the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1430, 1435.

<sup>306</sup> For example, William Grayson responded to Madison by stating: “I agree that the consent of foreign States must be had before they become parties: But it is not so with our States. It is fixed in the Constitution that they shall become parties.” William Grayson, Address to the Virginia Convention (June 21, 1788), in 10 DHRC, *supra* note 185, at 1444, 1448.

<sup>307</sup> Following *Chisholm*, Representative Sedgwick proposed an amendment prohibiting foreign states (as well as sister states and individuals) from suing states, but his proposal was never seriously considered. See *infra* notes 439–441 and accompanying text.

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.”<sup>308</sup> Modern commentators believe that this language — applied literally — creates an unacceptable anomaly by prohibiting all suits by out-of-state citizens while leaving in-state citizens free to sue using federal question jurisdiction. Given their widely expressed understanding that the Constitution gave the federal government neither legislative nor coercive power over states, however, those who drafted and ratified the Amendment simply may not have perceived any such anomaly. The Founders apparently did not understand federal question jurisdiction to constitute an express authorization for *any* individual to sue *any* state in federal court. In addition, the Founders may not have regarded such jurisdiction as necessary to enforce federal law. On these assumptions, the Amendment created no anomaly and provided a complete solution to the problems created by suits like *Chisholm* and *Vassall*.

#### A. *The Chisholm Decision*

Three cases are central to understanding the Eleventh Amendment: *Hollingsworth v. Virginia*,<sup>309</sup> *Vassall v. Massachusetts*, and *Chisholm v. Georgia*. *Hollingsworth* arose out of a dispute between the Indiana Company and Virginia over title to 1.8 million acres of land in what would become West Virginia.<sup>310</sup> The Indiana Company — composed of wealthy Pennsylvania and New Jersey merchants and land speculators — obtained a deed to the land from Indian tribes in 1768 as compensation for the earlier theft of property from merchants and traders in the Ohio Valley.<sup>311</sup> Virginia claimed the same land under its 1609 charter and two Indian treaties predating the 1768 grant.<sup>312</sup> Counsel for the Company, including Edmund Randolph, presented the Company’s case to the Virginia legislature in 1779, but Virginia refused to compromise.<sup>313</sup> In 1781, James Wilson — future delegate to the Constitutional Convention and Supreme Court Justice — obtained 300 shares in the Company.<sup>314</sup> Subsequent efforts in Congress to resolve the dispute failed.<sup>315</sup>

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<sup>308</sup> U.S. CONST. amend. XI.

<sup>309</sup> 3 U.S. (3 Dall.) 378 (1798).

<sup>310</sup> See 5 DHSC, *supra* note 20, at 274.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 277–78.

<sup>314</sup> *Id.* at 282 n.50.

<sup>315</sup> *Id.* at 279–80.

Notwithstanding their interest in the Indiana Company's dispute with Virginia, Randolph and Wilson went on to play leading roles in drafting Article III, establishing state suability in *Chisholm*, and provoking the adoption of the Eleventh Amendment. Both men were members of the Committee of Detail that drafted the ambiguous language of Article III at issue in *Chisholm*, and they may have had cases like the Indiana Company's dispute with Virginia in mind when they concluded that the judicial power extended to controversies "between a State and Citizens of another State."<sup>316</sup> The Company used this very jurisdiction to sue Virginia in 1792.<sup>317</sup> While the Virginia legislature considered the suit, Governor Henry Lee traveled to Philadelphia to attend the arguments in *Chisholm v. Georgia*.<sup>318</sup> He described the case as a suit "now pending before the court which involves the principle on which rests the constitutional question whether a state can be brought into court at the suit of individuals."<sup>319</sup>

Shortly before *Chisholm* came down, Randolph filed another suit in the Supreme Court, this time on behalf of William Vassall against Massachusetts. Vassall had lived in Boston, but fled to London in 1775 to avoid the Revolutionary War.<sup>320</sup> Massachusetts designated him as a Loyalist, barred him from returning, seized his personal property, and mortgaged his house. Following the Treaty of Peace of 1783, Vassall sought the return of his property.<sup>321</sup> Article VI of the treaty provided that "there shall be no future confiscations made . . . against any person or persons for, or by reason of the part which he or they may have taken in the present war."<sup>322</sup> After the treaty took effect, Massachusetts passed a statute providing that all real property mortgaged by the state and all personal property seized by the state would be considered confiscated.<sup>323</sup> Vassall regarded the statute as "a direct contravention of the Definitive Treaty."<sup>324</sup> Nonetheless, his efforts to obtain compensation from the state failed. When the Constitution was ratified, he decided to sue Massachusetts. He informed his counsel that he would argue that his property was confiscated in violation of the treaty.<sup>325</sup> He retained Edmund Randolph to

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<sup>316</sup> See *supra* note 183 and accompanying text.

<sup>317</sup> 5 DHSC, *supra* note 20, at 282. The Court approved subpoenas that same year to be served on Governor Henry Lee and Attorney General James Innes. *Id.*

<sup>318</sup> *Id.* at 283–84.

<sup>319</sup> Letter from Henry Lee to James Wood (Feb. 7, 1793), in 5 DHSC, *supra* note 20, at 326, 326.

<sup>320</sup> See 5 DHSC, *supra* note 20, at 352.

<sup>321</sup> *Id.* at 353–54.

<sup>322</sup> Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, art. VI, 8 Stat. 80.

<sup>323</sup> See 5 DHSC, *supra* note 20, at 355.

<sup>324</sup> *Id.* at 355–56.

<sup>325</sup> *Id.* at 361.

file suit, and the Supreme Court authorized process to be served just one week before it decided *Chisholm v. Georgia*.

*Chisholm* was the first decision to construe Article III to permit an individual to sue a state in federal court.<sup>326</sup> Edmund Randolph (as an advocate) and James Wilson (as a Justice) played key roles in bringing about the decision. The case arose out of a 1777 contract between the state of Georgia and Robert Farquhar, of South Carolina, for the purchase of supplies.<sup>327</sup> Farquhar delivered the goods, but was never paid.<sup>328</sup> Alexander Chisholm, also of South Carolina, served as an executor of Farquhar's estate.<sup>329</sup> After the Constitution was ratified, Chisholm sued Georgia in the Supreme Court.<sup>330</sup>

Attorney General Edmund Randolph, acting as Chisholm's attorney, moved to compel Georgia to appear.<sup>331</sup> The Georgia House of Representatives passed a resolution on December 14, 1792, denying that Article III of the Constitution gave the Supreme Court jurisdiction to hear the case, and declaring that Georgia would regard any judgment as unconstitutional.<sup>332</sup> The House also called for the adoption of an "explanatory amendment" to the Constitution to clarify that Article III should not be construed to permit individuals to bring actions against states in federal court.<sup>333</sup> The Court heard argument on the motion in early February 1793. Randolph argued unopposed because Georgia declined to appear.<sup>334</sup>

Randolph relied on "the letter of the Constitution" to support his position that the "judicial power is extended to controversies between a State and citizens of another State."<sup>335</sup> This express provision, he said, "in no respect indicat[ed] who is to be Plaintiff or who Defendant."<sup>336</sup> Randolph also argued that "the spirit of the Constitution" supported his position because a suit against a state may be the only

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<sup>326</sup> See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429–30 (1793) (opinion of Iredell, J.); 5 DHSC, *supra* note 20, at 127.

<sup>327</sup> See 5 DHSC, *supra* note 20, at 127.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 127–28.

<sup>330</sup> See WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 189 (1995). The case was initially filed in the Circuit Court for the District of Georgia. 5 DHSC, *supra* note 20, at 128. Justice Iredell, sitting as a circuit judge with District Judge Nathaniel Pendleton, dismissed the suit on the ground that the circuit court lacked statutory jurisdiction. See *id.* at 129–31; see also CASTO, *supra*, at 188–89.

<sup>331</sup> 5 DHSC, *supra* note 20, at 127.

<sup>332</sup> *Id.* at 131–32.

<sup>333</sup> *Id.* at 597.

<sup>334</sup> Members of the Supreme Court Bar, however, did submit the resolution of the Georgia House of Representatives to the Court. See *id.* at 132.

<sup>335</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 420 (1793).

<sup>336</sup> *Id.*

way for an individual to vindicate his rights.<sup>337</sup> He next addressed the “master-objection that . . . the law has prescribed no execution against a State; that none can be formed with propriety; and that, therefore, a judgment against a State must be abortive.”<sup>338</sup> Randolph suggested that execution may “spring from the will of the Supreme Court” in the exercise of its “incidental authority.”<sup>339</sup> He acknowledged that devising a method of execution was “a difficult task,” but suggested three possibilities.<sup>340</sup> First, “if the judgment be for the specific thing, it may be seized.”<sup>341</sup> Second, if the judgment is “for damages, such property may be taken” as would establish “jurisdiction over a sovereign Prince” under the law of nations.<sup>342</sup> Finally, the Court could simply enter judgment and “leave their opinions to be enforced by the Executive.”<sup>343</sup>

On February 18, 1793, all five Justices delivered separate opinions. *Chisholm* was arguably the Supreme Court’s first major textualist decision.<sup>344</sup> Chief Justice Jay and Justices Wilson, Blair, and Cushing relied on the text of Article III to permit suits against a state by citizens of another state. Justice Iredell, by contrast, construed Article III narrowly in light of the Constitution’s failure to grant Congress coercive power over states and its broader purpose to avoid a civil war. The *Chisholm* opinions reveal a fundamental disagreement regarding the existence of federal power to coerce states. Justice Wilson and Chief Justice Jay explicitly assumed that jurisdiction to hear suits against states implied coercive power to enforce any resulting judgments.<sup>345</sup> Justice Iredell, by contrast, reasoned that because the Constitution conferred no federal power to coerce states, Article III should not be construed to grant jurisdiction over suits by individuals against states.<sup>346</sup>

Justice Blair’s opinion stressed that the text of Article III expressly extended “to controversies between a State and citizens of another

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<sup>337</sup> *Id.* at 421–23 (emphasis omitted).

<sup>338</sup> *Id.* at 426.

<sup>339</sup> *Id.* at 427.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *See id.* (emphasis omitted) (referencing Bynkershoek, the Dutch international law theorist).

<sup>343</sup> *Id.* at 427–28.

<sup>344</sup> *But see* William N. Eskridge, Jr., *All About Words: Early Understandings of the Judicial Power in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1063 (2001) (“The *Chisholm* opinions were a clear signal that the Federalist Justices intended to follow equitable constructions and to consider fundamental law in appropriate statutory cases, including those which could have easily been decided by simple application of the ordinary understanding of the letter of the law.”).

<sup>345</sup> *See Chisholm*, 2 U.S. at 464–65 (opinion of Wilson, J.); *id.* at 478 (opinion of Jay, C.J.).

<sup>346</sup> *Id.* at 448–50 (opinion of Iredell, J.).

State.”<sup>347</sup> He saw no basis for distinguishing between cases in which a state is the plaintiff and those in which it is the defendant. “Both cases,” he thought, “were intended.”<sup>348</sup> Accordingly, he concluded “that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution.”<sup>349</sup> With respect to inducing Georgia’s appearance, Justice Blair thought the Court should give the state extra time “for more deliberate consideration.”<sup>350</sup> If after such consideration the state should refuse to appear, then he would enter judgment against the state.<sup>351</sup>

Justice Wilson framed the question as whether a state “is amenable to the jurisdiction of the Supreme Court of the United States,”<sup>352</sup> but suggested that the question “may, perhaps, be ultimately resolved into one, no less radical than this — ‘do the people of the United States form a Nation?’”<sup>353</sup> Justice Wilson began his constitutional analysis by observing that, under the Articles of Confederation, the confederacy was “totally inadequate” because its legislative authority consisted solely of requisitions on states and because it had no executive or judicial power.<sup>354</sup> “[T]o form a more perfect Union,” the Constitution vested legislative, executive, and judicial power in the new government.<sup>355</sup> The question, as Justice Wilson saw it, was whether the people who ratified the Constitution could “bind those States, and Georgia among the others, by the Legislative, Executive, and Judicial power so vested?”<sup>356</sup> Justice Wilson thought that “this question must unavoidably receive an affirmative answer” because the people of the states and “the people of Georgia, in particular, could alter, as they pleased, their former work.”<sup>357</sup> The only question, therefore, was: “Has the Constitution done so?”<sup>358</sup>

Before turning to the “direct and explicit declarations” of Article III, Justice Wilson addressed “a previous enquiry” from which the

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<sup>347</sup> *Id.* at 450 (opinion of Blair, J.).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 451.

<sup>350</sup> *Id.* at 453.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 453 (opinion of Wilson, J.) (emphasis omitted).

<sup>353</sup> *Id.* (emphasis omitted). Professor Casto recounts that “Wilson had become a shareholder of the Indiana Company in 1781, and according to the original complaint in *Hollingsworth*, he was still a shareholder.” CASTO, *supra* note 330, at 195. Thus, Wilson “had a direct and significant financial interest in the Court’s jurisdiction to provide a remedy against a state.” *Id.*

<sup>354</sup> *Chisholm*, 2 U.S. at 463 (opinion of Wilson, J.).

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

<sup>357</sup> *Id.* at 463–64 (emphasis omitted).

<sup>358</sup> *Id.* at 464 (emphasis omitted).

question could be resolved “by fair and conclusive deductions.”<sup>359</sup> To determine the scope of the judicial power, he thought the Court should first ask whether the “people intend[ed] to bind those states by the Legislative power vested by that Constitution.”<sup>360</sup> “The articles of confederation,” he pointed out, “did not operate upon individual citizens; but operated only upon States.”<sup>361</sup> Some, he observed, “seem to think, that the present Constitution operates only on individual citizens, and not on States.”<sup>362</sup> He thought this view was “unfounded” because Article I, Section 10 declared that “certain laws of the States are . . . ‘subject to the revision and controul of the Congress.’”<sup>363</sup> Thus, “it cannot, surely, be contended that the Legislative power of the national Government was meant to have no operation on the several States.”<sup>364</sup> In his view, the fact that the legislative power applies in one instance “proves the principle in all other instances, to which the facts will be found to apply.”<sup>365</sup>

Having found national legislative power over states, Justice Wilson examined whether the national executive and judicial powers also bound the states. In finding that they do, he reasoned that “[i]t would be superfluous to make laws, unless those laws, when made, were to be enforced.”<sup>366</sup> In his view, “[n]othing could be more natural than to intend that this Legislative power should be enforced by powers Executive and Judicial.”<sup>367</sup> He also invoked the Contracts Clause in support of state suability: “What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such a violation of right, to no controuling judiciary power?”<sup>368</sup> Finally, in addition to these deductions, Justice Wilson invoked “the direct and explicit declaration of the Constitution itself.”<sup>369</sup> He stated that by extending the judicial power to “controversies, between a state and citizens of another

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<sup>359</sup> *Id.*

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.* Justice Wilson was referring to the provision of Article I, Section 10, which declares that “[n]o State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws.” U.S. CONST. art. I, § 10. The same provision specifies that “all such Laws shall be subject to the Revision and Controul of the Congress.” *Id.*

<sup>364</sup> *Chisholm*, 2 U.S. at 464 (opinion of Wilson, J.).

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* (quoting Bracton’s maxim) (internal quotation marks omitted).

<sup>367</sup> *Id.* at 465.

<sup>368</sup> *Id.* On the original meaning of the Contracts Clause, see *infra* notes 5176–528 and accompanying text.

<sup>369</sup> *Chisholm*, 2 U.S. at 466 (opinion of Wilson, J.).

er State,”<sup>370</sup> Article III expressly described “the cause now depending before the tribunal.”<sup>371</sup>

Justice Cushing’s opinion also stressed that the judicial power “is expressly extended to ‘controversies between a State and citizens of another State,’”<sup>372</sup> and that “[t]he case, then, seems clearly to fall within the letter of the Constitution.”<sup>373</sup> He refused to construe Article III to limit jurisdiction to cases in which a state is the plaintiff, in part because Article III also confers jurisdiction over controversies between two or more states. In such cases, he observed, one state must be the defendant.<sup>374</sup> He also rejected the argument that asserting jurisdiction over suits by individuals against states would “reduce States to mere corporations, and take away all sovereignty.”<sup>375</sup> In his view, any abridgement of state sovereignty by the Constitution “was thought necessary for the greater indispensable good of the whole.”<sup>376</sup> Justice Cushing found it unnecessary to decide whether the Court also had jurisdiction over suits against the United States, although he suggested that he might not find such jurisdiction.<sup>377</sup> Finally, he foreshadowed the Eleventh Amendment by noting that “[i]f the Constitution is found inconvenient in practice in this or any other particular, it is well that a regular mode is pointed out for amendment.”<sup>378</sup>

Chief Justice Jay upheld the Court’s jurisdiction based on three considerations. First, Chief Justice Jay denied that Georgia was sovereign because sovereignty rested with the people, not the states.<sup>379</sup> Second, he maintained that suability was compatible with state sovereignty. He based this conclusion on the fact that “one State in the Union may sue another State, in this Court.”<sup>380</sup> Thus, he thought “it plainly follows, that suability and state sovereignty are not incompatible.”<sup>381</sup> Third, Jay concluded that “the Constitution (to which Georgia is a party) authorises . . . an action against her” by a citizen of another state.<sup>382</sup> He began by noting that the Preamble to the Constitution lists among its objects “[t]o establish justice.”<sup>383</sup> Article III furthered this goal, he said, by extending the judicial power “to ten descriptions

<sup>370</sup> *Id.* (quoting U.S. CONST. art. III, § 2, cl. 1) (internal quotation marks omitted).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.* at 467 (opinion of Cushing, J.) (quoting U.S. CONST. art. III, § 2, cl. 1).

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 468.

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 469.

<sup>378</sup> *Id.* at 468.

<sup>379</sup> *See id.* at 470–72 (opinion of Jay, C.J.).

<sup>380</sup> *Id.* at 473.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 470.

<sup>383</sup> *Id.* at 474.

of cases.”<sup>384</sup> One of these categories consists of “controversies between a State and citizens of another State.”<sup>385</sup> Chief Justice Jay invoked the “ordinary rules for construction” to reject the suggestion “that this ought to be construed to reach none of these controversies, excepting those in which a State may be Plaintiff.”<sup>386</sup> He said that the “extension of power is remedial,” and ought “therefore, to be construed liberally.”<sup>387</sup> For all of these reasons, Chief Justice Jay found that Article III expressly authorized Chisholm’s suit against Georgia.<sup>388</sup>

Unlike the majority opinions, Justice Iredell’s dissent reflects the concerns about federal coercion of states that animated the framing and ratification of the Constitution. Justice Iredell began by offering a statutory basis for rejecting jurisdiction. He concluded that the Judiciary Act did not authorize the Court to compel a state to appear before it. As support, he stressed the shift from federal power over states under the Articles of Confederation to federal power over individuals under the Constitution:

The powers of the general Government, either of a Legislative or Executive nature, or which particularly concerns Treaties with Foreign Powers, do for the most part (if not wholly) affect individuals, and not States: They require no aid from any State authority. This is the great leading distinction between the old articles of confederation, and the present constitution.<sup>389</sup>

Justice Iredell explained that the judicial power goes beyond the limited nature of federal legislative and executive power because of the inclusion in Article III of party-based jurisdiction — jurisdiction over disputes beyond the reach of federal legislative authority.<sup>390</sup> Assuming that Congress had incidental power to implement such jurisdiction,

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<sup>384</sup> *Id.* at 475.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 476.

<sup>387</sup> *Id.* Jay distinguished jurisdiction over suits by individuals against the United States. He saw “an important difference between the two cases” based on enforcement considerations. *Id.* at 478. In suits against states, “the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid.” *Id.*

<sup>388</sup> Jay, however, did not endorse retroactive liability. He was “far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established.” *Id.* at 479. Such bills, he said, “were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.” *Id.*

<sup>389</sup> *Id.* at 435 (opinion of Iredell, J.). Omitting “minuter distinctions,” Justice Iredell suggested that the only limitation imposed by the Constitution on states is that they “be of the Republican form.” *Id.* at 448.

<sup>390</sup> *Id.* at 435.

Justice Iredell thought that Congress's failure to do so was sufficient to deny Chisholm's motion.<sup>391</sup>

Because the other Justices had reached the constitutional issue, however, Justice Iredell proceeded to discuss whether "upon a fair construction of the Constitution of the United States, the power contended for really exists."<sup>392</sup> He was "strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money."<sup>393</sup> Echoing Hamilton's and Madison's arguments during the ratification debates, Justice Iredell thought that "every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power."<sup>394</sup> He ends with a prayer that the Court's doctrine will result in "none of the evils with which, I have the concern to say, it appears to me to be pregnant."<sup>395</sup>

In addition to his reported dissent, Justice Iredell prepared a separate document, also dated February 18, 1793, containing his observations on "this great Constitutional Question."<sup>396</sup> The document contains passages similar to those in his published opinion, but also elaborates several points. Because there was no official reporter, it is possible that Justice Iredell "may have incorporated [these observations] in his oral presentation in the Supreme Court."<sup>397</sup> He made two important points for our purposes. First, he reiterated that the Constitution was designed to be enforced against individuals rather than states:

A State doing injury to the Citizens of other States or Foreigners is to be sure a supposable case, but it is scarcely supposable, I think, (if at all) but by means of some act of the [state] Legislature, (for no inferior authority I think can bind a State) . . . . If the act be consistent with the Const. of the particular State, & the U.S., it is binding upon all, and this Court hath no means of redressing it. If it be inconsistent with either, the act is utterly void, and can operate as no bar to the Individual right. This, I take it, is the very manner in which the Const. intended all Laws of the U.S. (except in the peculiar instance of a Controversy between 2 or more States & per-

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<sup>391</sup> See *id.* at 449.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at 450.

<sup>395</sup> *Id.*

<sup>396</sup> See James Iredell's Observations on "this great Constitutional Question" (Feb. 18, 1793), in 5 DHSC, *supra* note 20, at 186, 186.

<sup>397</sup> *Id.* at 186 n.AD.

haps one or two other instances) should operate — upon Individuals & not States.<sup>398</sup>

Second, Justice Iredell stressed that the Constitution confers no means of coercing states to comply with judgments in suits brought by individuals. He observed that the Attorney General “seems very much at a loss how our Judgment is to be enforced.”<sup>399</sup> Justice Iredell then suggested that, in the absence of an effective remedy, the Constitution should not be construed to give federal courts jurisdiction to hear such cases in the first place:

The observation “that where there is a Right, there is a Remedy”, may be reversed — “That where no remedy can be found, there is no right.” This, I will be bold to say, is an invariable Criterion, in respect to all compulsory suits, to try whether such a suit can in reality be maintained.<sup>400</sup>

Justice Iredell likened a judgment in a case like *Chisholm* to a recommendation of Congress to the states under the Articles of Confederation. In both cases, if the state thought the debt was just, the state would pay it. “If in their opinion unjust, they would not be better disposed to pay, if left to their option, after Judgment on a compulsory process.”<sup>401</sup> He thought that “this is too much akin to the principle of relying on Recommendations, which we well know were for years altogether inefficacious in the most trying circumstances, to have been seriously contemplated in my opinion as an important Improvement under the new System.”<sup>402</sup> He observed that “it is essential to a Court of J[ustice] that if it has power to pronounce a Judgment, it should likewise have power to carry it into Execution.”<sup>403</sup> Because he believed that the Constitution did not give Congress power to coerce states, he concluded that the ambiguous provisions of Article III should not be construed to authorize suits by individuals against states.

Wilson and Jay’s embrace of federal power to coerce states to comply with federal commands (including adverse judicial judgments) ran counter to the Constitutional Convention’s fundamental decision to construct a system that did not confer coercive power over states.<sup>404</sup> During the ratification debates, Federalists repeatedly pointed to this feature as one of the Constitution’s primary advantages over proposals to revise the Articles of Confederation.<sup>405</sup> Indeed, Federalists went so

<sup>398</sup> *Id.* at 190.

<sup>399</sup> *Id.* at 191.

<sup>400</sup> *Id.* at 191–92.

<sup>401</sup> *Id.* at 192.

<sup>402</sup> *Id.* at 192–93.

<sup>403</sup> *Id.* at 193.

<sup>404</sup> See *supra* section III.B, pp. 1843–53.

<sup>405</sup> See *supra* section III.C, pp. 1853–62.

far as to argue that a “Union of States containing such an ingredient seemed to provide for its own destruction.”<sup>406</sup> Similarly, in defending the Constitution, Hamilton dismissed “as idle and visionary any scheme which aims at regulating [the states’] movements by laws to operate upon them in their collective capacities and to be executed by a coercion applicable to them in the same capacities.”<sup>407</sup> Justice Iredell himself argued at the North Carolina ratifying convention that congressional attempts to enforce requisitions against states would lead to a “[c]ivil war.”<sup>408</sup> In his view, “the only natural and effective way of enforcing laws” was against individuals, not states.<sup>409</sup> Based on arguments like these, the Founders were convinced to abandon the Articles and adopt a Constitution that conferred neither legislative nor coercive power over states.

In retrospect, it is not entirely surprising that the *Chisholm* Court interpreted Article III to encompass the case. Georgia did not appear and thus Randolph’s arguments went unopposed. In addition, as Antifederalists had repeatedly warned, the text of Article III could readily be construed as an express grant of such jurisdiction.<sup>410</sup> Even Madison — who assured Antifederalists that Article III would not be construed to allow suits against states — admitted that this part of the Constitution might have been “better expressed.”<sup>411</sup> Whether the *Chisholm* Court properly construed Article III is an interesting and difficult interpretive question, but is largely beside the point. The agreement among Federalists and Antifederalists during the ratification period against the propriety of such jurisdiction — and against coercive power over states more generally — virtually ensured that the Constitution would be amended to overturn *Chisholm*.

### B. *The Aftermath of Chisholm*

The reaction to *Chisholm* was swift and almost uniformly hostile. The anger seemed to be directed as much against Federalists who had given assurances regarding Article III during ratification as against the Supreme Court itself. Antifederalists — who had originally urged altering Article III to guard against state suability — felt that Federalists had played a game of “bait and switch.” The Federalists’ assurances persuaded at least some Antifederalists to support the Constitution. Now, a Court composed of Federalists had construed the state-citizen

<sup>406</sup> James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND’S RECORDS, *supra* note 138, at 47, 54.

<sup>407</sup> THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 12, at 115.

<sup>408</sup> 4 ELLIOT’S DEBATES, *supra* note 42, at 146.

<sup>409</sup> *Id.*

<sup>410</sup> See *supra* section III.D.1, pp. 1863–70.

<sup>411</sup> See *supra* note 269 and accompanying text.

diversity provisions of Article III to permit individuals to sue states after all. It bears emphasizing, however, that Federalists were equally disappointed with the Court's decision because it contradicted their earlier assurances and created all of the problems associated with coercive power over states that they had designed the Constitution to avoid. Accordingly, Federalists now joined Antifederalists in supporting a constitutional amendment to restore their preferred construction. For example, Theodore Sedgwick and Caleb Strong had both assured Antifederalists during the Massachusetts Convention that Article III would not be construed to permit individuals to sue states, and both now led efforts to amend the Constitution.

Although many assume that Georgia took the lead in amending the Constitution, Massachusetts — faced with its own suit — was actually the first state to take action.<sup>412</sup> Just one day after *Chisholm* came down, Representative Sedgwick of Massachusetts introduced a broadly worded constitutional amendment in the United States House of Representatives to prohibit federal courts from hearing any and all suits against states regardless of the plaintiff's identity.<sup>413</sup> The next day, Senator Strong, also of Massachusetts, introduced a more narrowly tailored amendment in the United States Senate.<sup>414</sup> One observer who spent time with "some of the New-England Delegates" reported that they "were unanimously of opinion that an explanation of that part of the Constitution should be made."<sup>415</sup> Congress took no action before it adjourned two weeks later on March 2, 1793.<sup>416</sup>

With Congress out of session, activity intensified in the states. In Massachusetts, writers reminded the public that prominent Federalists — including Sedgwick and Strong — had assured the ratifying convention that Article III would not be construed to permit suits by individuals against states. Accordingly, they called for a constitutional

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<sup>412</sup> See Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577, 1650–64 (2009).

<sup>413</sup> Proceedings of the United States House of Representatives, *Gazette of the United States*, Feb. 19, 1793, reprinted in 5 DHSC, *supra* note 20, at 605, 606.

<sup>414</sup> Resolution in the United States Senate, Feb. 20, 1793, in 5 DHSC, *supra* note 20, at 607–08.

<sup>415</sup> Letter from John Wereat to Edward Telfair, Feb. 21, 1793, in 5 DHSC, *supra* note 20, at 222–23.

<sup>416</sup> Commentators sometimes suggest that Congress did not regard these proposals as urgent because it failed to act before the end of the legislative session. There were both practical and strategic reasons, however, for Congress's inaction. First, Congress adjourned less than two weeks later, and the new Congress did not convene until December 2, 1793. Second, some members of Congress wanted to consider a broader range of amendments limiting federal power. For example, the members of the Virginia delegation wrote to Governor Lee on March 2, 1793, that they deemed it improper "to commence so important a subject in so late a stage of the session." Letter of James Monroe and John Taylor to Henry Lee, Mar. 2, 1793, in 5 DHSC, *supra* note 20, at 608. They wished to suppress "the doctrine of constructive powers . . . in its infancy," *id.*, and voted for a postponement so "that the subject may be taken up more generally at the next session." *Id.*

amendment to restore that understanding. An “Anonymous Correspondent” recalled that when opponents pointed out that Article III might “comprehend even the State itself, as a party on an action of debt; this was denied perem[p]torily by the Federalists, as an absurdity in terms.”<sup>417</sup>

On July 9, 1793, Governor John Hancock and Attorney General James Sullivan were served with a subpoena commanding them to appear before the Supreme Court in *Vassall v. Massachusetts*. Governor Hancock called a special session of the General Court to consider *Vassall* and the issue of state suability.<sup>418</sup> Commentators applauded the Governor’s action, but stressed that “the only way to get rid of the difficulty is by an amendment to the constitution of the United States.”<sup>419</sup> Leading up to the special session, commentators continued to remind the public of Federalist assurances that the state-citizen diversity provisions of Article III would not be construed to permit suits against states.<sup>420</sup> Accordingly, Federalists and Antifederalists were united in their opposition to state suability.<sup>421</sup>

During the special session, members of the Massachusetts House of Representatives opposed state suability based on the original understanding of the Constitution and the impossibility of coercing states without risking civil war. For example, William Widgery distinguished between enforcing federal judgments against individuals and enforcing them against states. He said that if the Constitutional Convention sought to secure “the good and safety of the Nation,” then “they never meant that execution should issue against a State.”<sup>422</sup> Such enforcement, he warned, would “endanger the public with all the horrors of a civil war.”<sup>423</sup> For these reasons, Widgery was “in favor of

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<sup>417</sup> Letter from an Anonymous Correspondent, INDEP. CHRON., Apr. 4, 1793, reprinted in 5 DHSC, *supra* note 20, at 228.

<sup>418</sup> Proclamation by John Hancock (July 9, 1793), INDEP. CHRON., July 11, 1793, reprinted in 5 DHSC, *supra* note 20, at 387, 388–89.

<sup>419</sup> GEN. ADVERTISER, July 24, 1793, reprinted in 5 DHSC, *supra* note 20, at 391, 391.

<sup>420</sup> Brutus recounted that apprehensions by members of the Massachusetts Convention about the scope of Article III “were said to be groundless by the advocates of the Constitution.” Brutus, INDEP. CHRON., July 18, 1793, reprinted in 5 DHSC, *supra* note 20, at 392, 392. A Republican recalled that both Federalists and Antifederalists “mutually and cordially consented, that the ‘suability’ of the States was not contemplated by the Framers of the Constitution; . . . and in fact could never bear that construction.” The Crisis, No. XIII by “A Republican,” INDEP. CHRON., July 25, 1793, reprinted in 5 DHSC, *supra* note 20, at 395, 396. He therefore urged state legislators to oppose “a construction, in direct opposition to what ‘THE PEOPLE,’ by their Representatives, openly, and expressly declared against.” *Id.* at 397.

<sup>421</sup> See Letter from Fisher Ames to Alexander Hamilton (Aug. 31, 1793), in 5 DHSC, *supra* note 20, at 415 (“I conceive the entire active force of the state politics to be hostile to the [Chisholm] decision.”).

<sup>422</sup> William Widgery’s Speech in the Massachusetts House of Representatives, INDEP. CHRON., Sept. 23, 1793, reprinted in 5 DHSC, *supra* note 20, at 427, 429.

<sup>423</sup> *Id.* at 428.

doing away [with] all the State Suability,” and urged adoption of an amendment specifying “that the Judicial Court may not construe [the Constitution] in a different manner from that which the States intended.”<sup>424</sup>

John Davis also favored an amendment, but defended the Supreme Court’s interpretation of Article III as consistent with “the plain sense and meaning of the words.”<sup>425</sup> He agreed that it was inexpedient to permit a state to be sued by an individual. He also thought that resort to such suits was generally unnecessary because “with respect to many controversies there was other sufficient remedy” against individuals.<sup>426</sup> He admitted that suing a state might be the only way to remedy a state’s breach of contract, but nonetheless opposed this course of action because:

It left the same capital, prominent defect in the Constitution, which prevailed in the old confederation, that it operated upon States and not upon individuals. The difficulties and dangers that might ensue the attempt to execute such a power it was unnecessary to detail. They were so many and so great, that no one had yet suggested a mode, by which execution could be satisfied.<sup>427</sup>

Charles Jarvis responded that even if the Constitution is “equivocal in its meaning in this part of the judiciary article[,] . . . the inference ought to be against the Suability of a State.”<sup>428</sup> Accordingly, he urged his colleagues not to “rest, till either the judiciary article is erased from the Constitution, as it respects the point in question, or, till it is so modified, as not to admit a similar decision in [the] future.”<sup>429</sup>

On September 27, 1793, the Massachusetts General Court advised the Governor that “no answer WILL be made” by the state in *Vassall v. Massachusetts*.<sup>430</sup> On the same day, the General Court resolved that the “power claimed . . . of compelling a State to be made defendant . . . at the suit of an individual . . . is . . . unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States.”<sup>431</sup> The General Court resolved:

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<sup>424</sup> *Id.* at 430.

<sup>425</sup> Account of John Davis’s Speech in the Massachusetts House of Representatives (Sept. 23, 1793), INDEP. CHRON., Oct. 7, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 431, 432.

<sup>426</sup> *Id.* at 433.

<sup>427</sup> *Id.*

<sup>428</sup> Charles Jarvis’s Speech in the Massachusetts House of Representatives (Sept. 23, 1793), INDEP. CHRON., Oct. 17, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 436, 437.

<sup>429</sup> *Id.* at 439.

<sup>430</sup> Reply of the Massachusetts General Court to John Hancock (Sept. 27, 1793), INDEP. CHRON., Sept. 30, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 441.

<sup>431</sup> Resolution of the Massachusetts General Court (Sept. 27, 1793), *in* 5 DHSC, *supra* note 20, at 440.

That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power, to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.<sup>432</sup>

The legislature asked the Governor to send its resolutions to the states, and Lieutenant Governor Samuel Adams did so on October 9, 1793.<sup>433</sup>

Four states responded by adopting their own resolutions, and by implicitly or explicitly criticizing the Supreme Court's construction of Article III.<sup>434</sup> In three more states, one House of the legislature adopted a similar resolution, but the other House failed to act before Congress approved the Eleventh Amendment on March 4, 1794.<sup>435</sup> Although these resolutions differed slightly, all suggested that the Constitution be amended to remove or explain any provision that could be construed to authorize any suit by an individual against a state in federal court.<sup>436</sup> As Professor Pfander has explained, "[t]his outpouring of state resolutions provides the background against which Congress acted in adopting the Eleventh Amendment in 1794."<sup>437</sup>

<sup>432</sup> *Id.*

<sup>433</sup> See Letter from Samuel Adams to the Governors of the States (Oct. 9, 1793), in 5 DHSC, *supra* note 20, at 442, 442. On October 8, 1793, Governor Hancock died and Samuel Adams assumed his duties. *Id.* at 443-44.

<sup>434</sup> See 5 PUBLIC RECORDS OF THE STATE OF CONNECTICUT, 1792-1797, *reprinted in* 5 DHSC, *supra* note 20, at 609; JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA: OCT. 1793, at 99 (1793), *reprinted in* 5 DHSC, *supra* note 20, at 338-39; Resolution of North Carolina General Assembly (Jan. 11, 1794), *reprinted in* 5 DHSC, *supra* note 20, at 615, 615; JOURNAL OF THE PROCEEDINGS OF THE HON. HOUSE OF REPRESENTATIVES, OF THE STATE OF NEW-HAMPSHIRE: DEC. 1793, at 111 (1794), *reprinted in* 5 DHSC, *supra* note 20, at 618, 618.

<sup>435</sup> See JOURNAL OF THE SOUTH CAROLINA SENATE (1793), *reprinted in* 5 DHSC, *supra* note 20, at 610-11; VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND: NOV. 1793, at 115-16 (1794), *reprinted in* 5 DHSC, *supra* note 20, at 611; Proceedings of the Georgia House of Representatives, Nov. 19, 1793, AUGUSTA CHRON., Nov. 23, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 236. Pennsylvania and Delaware appointed special committees, but took no action before Congress acted. JOURNAL OF THE FIRST SESSION OF THE FOURTH HOUSE OF REPRESENTATIVES OF THE COMMONWEALTH OF PENNSYLVANIA 61-62 (1794), *reprinted in* 5 DHSC, *supra* note 20, at 612-13; JOURNAL OF THE SENATE OF THE STATE OF DELAWARE: JAN. 1794, at 9 (1794), *reprinted in* 5 DHSC, *supra* note 20, at 614, 615.

<sup>436</sup> See, e.g., JOURNAL OF THE HOUSE OF DELEGATES OF THE COMMONWEALTH OF VIRGINIA: OCT. 1793, at 99 (1793), *reprinted in* 5 DHSC, *supra* note 20, at 338 (calling on Virginia's Senators and Representatives "to obtain such amendments in the constitution of the United States, as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States").

<sup>437</sup> Pfander, *supra* note 249, at 1339.

### C. *The Adoption of the Eleventh Amendment*

Both Georgia and Massachusetts had refused to appear before the Supreme Court and there was every indication that states would not voluntarily comply with judgments against them.<sup>438</sup> The country never had to find out, however, because opponents of the *Chisholm* decision acted quickly to repudiate it. As noted, within two days of the Court's decision, Representative Sedgwick and Senator Strong introduced proposals to amend the Constitution. Sedgwick's proposed amendment provided:

That no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.<sup>439</sup>

Sedgwick's proposal would have barred not only suits against states by individuals, but also suits against states by other states, the United States, and foreign nations. This sweeping proposal was "laid on the table"<sup>440</sup> without further action.<sup>441</sup>

<sup>438</sup> The reaction to *Vassall* in Massachusetts suggests that it would not have been politically possible for state officials to comply with any resulting judgment against the state. The Georgia legislature went so far as to consider a bill declaring that anyone who attempted to enforce the judgment in *Chisholm* would be "declared to be guilty of a felony, and suffer death, without the benefit of clergy, by being hanged." Proceedings of the Georgia House of Representatives, AUGUSTA CHRON., Nov. 9, 1793, reprinted in 5 DHSC, *supra* note 20, at 236. The Eleventh Amendment rendered these enforcement problems moot.

<sup>439</sup> Proceedings of the United States House of Representatives (Feb. 19, 1793), GAZETTE OF THE UNITED STATES, Feb. 20, 1793, reprinted in 5 DHSC, *supra* note 20, at 605-06. Sedgwick's motion is not recorded in the House Legislative Journal or the *Annals of Congress*. 5 DHSC, *supra* note 20, at 606 n.2.

<sup>440</sup> Proceedings of the United States House of Representatives (Feb. 19, 1793), GAZETTE OF THE UNITED STATES, Feb. 20, 1793, reprinted in 5 DHSC, *supra* note 20, at 606.

<sup>441</sup> See *id.* at 605, 606 n.2. Some commentators suggest that Strong's proposal must have been a compromise because Sedgwick's proposal was broader. See Fletcher, *supra* note 6, at 1060. This argument fails to appreciate the differences between the two proposals. As far as their sponsors were concerned, both proposals would have prevented individuals from suing states in federal court. Sedgwick's proposal went further by prohibiting suits brought by "any body politic or corporate, whether within or without the United States." Proceedings of the United States House of Representatives (Feb. 19, 1793), GAZETTE OF THE UNITED STATES, Feb. 20, 1793, reprinted in 5 DHSC, *supra* note 20, at 605-06. This proposal would have barred suits against states not only by individuals, but also by states, foreign states, and the United States. There was no consensus at the time for such a sweeping amendment. The state resolutions sought only to bar suits by *individuals*, and even many Antifederalists accepted the need for jurisdiction over suits between states, see, e.g., 10 DHRC, *supra* note 185, at 1409 (statement of George Mason), and perhaps suits by foreign states against states. See Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765 (2004). The (over)breadth of Sedgwick's proposal may explain why the House never acted on it and why Sedgwick chose not to reintroduce it in the new Congress. On its face, Senator Strong's proposal addressed only suits against states by out-of-state citizens. Nonetheless, it effectively

Senator Strong introduced a narrower amendment designed to reinstate the Federalists' preferred construction of the state-citizen diversity provisions of Article III, but it also cut across all other categories of subject matter jurisdiction:

The judicial power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.<sup>442</sup>

The Senate considered Strong's proposal on February 25, 1793,<sup>443</sup> but took no other action before adjourning a few weeks later.<sup>444</sup>

It was during this period that many states (led by Massachusetts) called on their Senators and Representatives to amend the Constitution.<sup>445</sup> The new Congress convened on December 2, 1793. Although Representative Sedgwick did not reintroduce his proposal, Senator Strong — under renewed pressure from his state — introduced a slightly modified version of his earlier proposal:

The Judicial Power of the United States shall not *be construed to* extend to any Suit in Law or Equity, commenc[ed] or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.<sup>446</sup>

The only real change from Strong's original proposal was the insertion of the words, "be construed to."<sup>447</sup> This change transformed Strong's proposal from an ordinary amendment (whose object was to *alter* the Constitution) to an explanatory amendment (whose object was to *explain* the Constitution and to *correct* an erroneous judicial interpretation).<sup>448</sup>

The Eleventh Amendment passed overwhelmingly in Congress. Before proceeding to a vote, the Senate rejected a proposed amendment and a substitute. Senator Gallatin sought to limit the broad sweep of Strong's proposal by adding an exception for cases (like *Vassall*) arising under treaties, and moved that the proposal read:

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barred all suits by individuals if one assumes — as the Founders did — that the state-citizen provisions were the only portions of Article III that even arguably authorized suits against states by individuals. On this assumption, an in-state citizen would never have a basis for suing a state in federal court. See *infra* section V.B, pp. 1899–1911.

<sup>442</sup> Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, *supra* note 20, at 607–08.

<sup>443</sup> *Id.* at 608 n.1.

<sup>444</sup> *Id.*

<sup>445</sup> See *supra* section IV.B, pp. 1886–91.

<sup>446</sup> Resolution in the United States Senate (Jan. 2, 1794), in 5 DHSC, *supra* note 20, at 613 (alteration in original) (emphasis added).

<sup>447</sup> The new draft also capitalized "Judicial Power," changed "Suits" to "Suit," and omitted "any" prior to "one of the United States." These changes appear to be stylistic.

<sup>448</sup> See *infra* section V.A, pp. 1896–99; see also *Respublica v. Cobbet*, 3 U.S. (3 Dall.) 467, 472 (1798) (observing that "the amendment . . . does not import an alteration of the Constitution, but an authoritative declaration of its true construction").

The judicial power of the United States, *except in cases arising under treaties, made under the authority 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.<sup>449</sup>

The Senate rejected the Gallatin amendment, confirming — contrary to the diversity theory — that the Founders wanted to preclude all suits brought by prohibited plaintiffs against states, notwithstanding the presence or absence of a federal question. The second motion offered a complete substitute:

The judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another state, or by citizens or subjects of a foreign state, where the cause of action shall have arisen before the ratification of this amendment.<sup>450</sup>

The Senate rejected this proposal and then passed the Eleventh Amendment by a vote of 23 to 2.<sup>451</sup>

In the House of Representatives, there was a separate motion to soften the Amendment by limiting its protection to states that consented to suits in their own courts. Specifically, the motion would have added the following language to the Amendment: “Where such State shall have previously made provision in their own courts, whereby such suit may be prosecuted to effect.”<sup>452</sup> The House rejected this proposal by a vote of 77 to 8,<sup>453</sup> and then voted 81 to 9 to approve the Eleventh Amendment.<sup>454</sup>

The Eleventh Amendment was transmitted to the states for ratification on March 17, 1794.<sup>455</sup> By February 7, 1795 — less than a year later — twelve states had ratified the Amendment.<sup>456</sup> Although these actions satisfied Article V,<sup>457</sup> not all states notified Congress of ratification in a timely manner. In 1797, Congress asked the President to “adopt some speedy and effectual means of obtaining information” from the outstanding states as to “whether they have ratified the

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<sup>449</sup> Proceedings of the United States Senate, Jan. 14, 1794, *reprinted in* 5 DHSC, *supra* note 20, at 617 (emphasis added).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.* Only Senators Gallatin and Rutherford voted against the proposal. *Id.*

<sup>452</sup> Proceedings of the United States House of Representatives, Mar. 4, 1794, *reprinted in* 5 DHSC, *supra* note 20, at 620, 620.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* at 621–22.

<sup>455</sup> Letter from Edmund Randolph to the Governors of the States, Mar. 17, 1794, *in* 5 DHSC, *supra* note 20, at 625.

<sup>456</sup> *See* 5 DHSC, *supra* note 20, at 625–27.

<sup>457</sup> Article V provides that an amendment “shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.” U.S. CONST. art. V.

amendment proposed by Congress to the Constitution concerning the suability of States.<sup>458</sup> After receiving proof of ratification by a sufficient number of states, President Adams informed Congress that the Amendment had been adopted.<sup>459</sup>

While the states were in the process of ratifying the Eleventh Amendment, the Supreme Court continued several suits against states on its docket. It continued *Vassall v. Massachusetts* through 1796, but dismissed it in 1797. Massachusetts never appeared, and the plaintiff apparently failed to prosecute the case. After learning that Congress had approved the Eleventh Amendment, Vassall wrote that “my Action falls of Course.”<sup>460</sup> After the the President declared the Amendment to be “a Part of the Constitution,”<sup>461</sup> the Court heard argument in *Hollingsworth v. Virginia* to consider “[w]hether the Amendment did, or did not, supersede all suits depending, as well as prevent the institution of new suits, against any one of the United States, by citizens of another State.”<sup>462</sup> Counsel in pending cases argued that the Amendment should not apply to such cases.<sup>463</sup> Attorney General Charles Lee responded that the Amendment is “explanatory” and that “[i]t was the policy of the people to cut off that branch of the judicial power, which had been supposed to authorize suits by individuals against states.”<sup>464</sup> The Court agreed with Lee and unanimously held “that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.”<sup>465</sup>

## V. THE TEXT IN HISTORICAL CONTEXT

Understood in historical context, the text of the Eleventh Amendment would have made sense to those who adopted it. The Constitution was generally understood to constitute a fundamental conceptual

<sup>458</sup> Resolution of the United States Congress, Mar. 2, 1797, in 5 DHSC, *supra* note 20, at 628.

<sup>459</sup> Message of President John Adams to the United States Congress (Jan. 8, 1798), in 5 DHSC, *supra* note 20, at 637–38.

<sup>460</sup> Letter from William Vassall to James Lloyd (Aug. 7, 1794), in 5 DHSC, *supra* note 20, at 449.

<sup>461</sup> Message of President John Adams to the United States Congress (Jan. 8, 1798), in 5 DHSC, *supra* note 20, at 637–38.

<sup>462</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 378 (1798).

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* at 381.

<sup>465</sup> *Id.* at 382. The adoption of the Eleventh Amendment and the dismissal of the Indiana Company’s suit against Virginia may have contributed to Justice Wilson’s financial ruin. He speculated unsuccessfully in various real estate ventures (including the Indiana Company), and even spent time in debtor’s prison while on the Court. He died impoverished in 1798. See generally CHARLES PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742–1798 (1956).

shift from the Articles of Confederation. The Articles authorized legislation solely over states, while the Constitution authorized legislation solely over individuals. This shift avoided the need to authorize coercive force as a means of enforcing federal commands against states. During the ratification debates, Antifederalists threatened to undermine the case for the Constitution by arguing that the state-citizen diversity provisions of Article III could be construed as express authorization for individuals to sue states in federal court, and thus that the federal government would have implied power to enforce any resulting judgments against states. Leading Federalists denied these claims, based in part on their narrow construction of the text in question, and in part based on their underlying belief that the Constitution did not authorize coercive force against states. When the *Chisholm* Court subsequently construed state-citizen diversity jurisdiction to permit suits against states, Federalists and Antifederalists united to adopt an “explanatory” amendment to restore their preferred construction. This approach had several advantages. First, it allowed Federalists to save face by authoritatively “explaining” Article III to mean exactly what they had said it meant. Second, it ensured that the Amendment would apply retroactively to bar all pending suits brought under the disfavored construction of Article III. Third, understood against the background assumptions that the Constitution neither authorized citizens to sue their own states nor empowered Congress to coerce states, the Amendment satisfied state requests for an amendment that would remove or explain any clause of the Constitution that could be construed to allow suit by an individual against a state in any court of the United States.

Understanding the Eleventh Amendment as an explanatory amendment also reveals why the text was drafted as written. Contrary to the assertions of modern theorists, the text was neither underinclusive, overinclusive, nor an incoherent compromise. The text was designed to accomplish just what the states requested — that is, to prevent courts from construing “[t]he Judicial power of the United States” to allow suits against states by individuals. To modern eyes, the text appears inadequate because it says nothing about suits by in-state citizens arising under federal law. The text bars any suit commenced or prosecuted against a state by citizens of another state or by citizens or subjects of a foreign state. This approach solved the immediate problems posed by *Chisholm* (a suit by a citizen of another state) and *Vassall* (a suit by a subject of a foreign state). By withdrawing judicial power to hear any suit by these plaintiffs, the Amendment cut across all categories of Article III jurisdiction. Thus, whether a suit arises under state law, general law, or federal law, the Amendment — by its terms — prohibits federal courts from hearing any suit brought by a prohibited plaintiff against a state.

To immunity and diversity theorists, the literal meaning of the text creates an unacceptable anomaly: it prevents out-of-state plaintiffs from suing states for any reason, while it places no restriction on the ability of in-state citizens to sue their states using federal question jurisdiction. Those who wrote and ratified the Amendment would not have perceived this anomaly, however, if they did not understand the Constitution to permit citizens to sue their own states under any circumstances. In proposing and ratifying the Constitution, leading Federalists insisted that the new plan would not repeat the great and radical vice of authorizing legislation governing states (as opposed to individuals) and would not grant the federal government coercive power over states. Article III arguably contradicted the Federalists' account of the Constitution because some Founders construed an ambiguity in the state-citizen diversity provisions as express authorization for individuals to sue states in federal court. No one suggested that federal question jurisdiction might also provide express authorization for individuals to sue states because — unlike the state-citizen diversity provisions — the text conferring federal question jurisdiction made no reference (ambiguous or clear) to suits against states.

In addition, given their assumptions at the time, the Founders would not necessarily have perceived the need for suits against states to uphold the supremacy of the Constitution, laws, and treaties. All of the constitutional restrictions on states found in Article I, Section 10 could be enforced in suits between individuals or in suits brought by the states, and thus did not necessarily raise the enforcement problems associated with suits against states. Likewise, if the Founders believed that Congress lacked legislative power over states, then federal statutes would not give rise to suits against states. Finally, treaties gave no rights to citizens against their own states and, in any event, could be fully enforced in suits between individuals. Based on these assumptions, the Founders likely regarded the state-citizen diversity provisions as the only portions of Article III that plausibly could be construed to permit individuals to sue states in federal court. These same assumptions apparently informed the drafting of the Eleventh Amendment, and may explain why the Founders perceived no anomaly in the Amendment's treatment of in-state and out-of-state citizens. If the Founders did not understand the Constitution to authorize in-state citizens to bring federal question suits against states, then they would not have understood the Amendment to impose a distinctive disability on out-of-state citizens.

#### *A. An Explanatory Amendment*

As James Pfander has persuasively shown, the Eleventh Amendment was drafted as an “explanatory” amendment. Explanatory statutes were common in the eighteenth century in both England and the

United States. Legislatures enacted such statutes “to correct or clarify ambiguities in the law.”<sup>466</sup> As one treatise writer explained, “[a] declaratory or expository statute is one passed with the purpose of removing a doubt or ambiguity as to the state of the law, or to correct a construction deemed by the legislature to be erroneous.”<sup>467</sup> In a system of legislative supremacy, declaratory statutes were used to override prior interpretations of the law with which the legislature disagreed.<sup>468</sup> Such statutes typically had retroactive effect.<sup>469</sup> In the United States, declaratory statutes quickly fell into disuse because state and federal constitutional reforms “recognized the sovereignty of the people, separated the powers of government, and sought to exclude the legislative assemblies from the exercise of judicial powers.”<sup>470</sup>

Following *Chisholm*, the Founders assumed that a federal statute (explanatory or otherwise) would not have sufficed to overturn the Supreme Court’s construction of the Constitution.<sup>471</sup> Thus, within two days of the decision, Federalists introduced constitutional amendments in the House and Senate to prevent suits against states, but Congress adjourned without acting on them.<sup>472</sup> Before the next session, state legislatures — led by Massachusetts — adopted a series of resolutions calling on Congress to amend the Constitution.<sup>473</sup> Virginia and North Carolina modified Massachusetts’s proposal slightly by calling for “such amendments in the constitution of the United States, as will remove *or explain* any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States.”<sup>474</sup>

When Senator Strong reintroduced his amendment in the new Congress, he added three words that by usage and tradition transformed his proposal into an explanatory amendment. His revised proposal provided that the judicial power “shall not *be construed to ex-*

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<sup>466</sup> Pfander, *supra* note 249, at 1315.

<sup>467</sup> HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 370 (1896). For additional sources to the same effect, see Pfander, *supra* note 249, at 1315 n.204.

<sup>468</sup> See Pfander, *supra* note 249, at 1318–19.

<sup>469</sup> *Id.* at 1319.

<sup>470</sup> *Id.*

<sup>471</sup> See GEN. ADVERTISER, July 24, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 391, 391 (stating that “the only way to get rid of the difficulty is by an amendment to the constitution of the United States”).

<sup>472</sup> See *supra* p. 1890.

<sup>473</sup> See *supra* p. 1891–92.

<sup>474</sup> Proceedings of the Virginia House of Delegates, Nov. 28, 1793, *reprinted in* 5 DHSC, *supra* note 20, at 338–39 (emphasis added); see Resolution of North Carolina General Assembly, Jan. 11, 1794, *in* 5 DHSC, *supra* note 20, at 615, 615.

tend to any Suit” thereafter described.<sup>475</sup> His proposal was now unquestionably an explanatory amendment designed to correct (what he considered to be) the Supreme Court’s erroneous construction of cle III. This type of amendment had several advantages. It was roactive and would apply to all pending cases, including *Chisholm v. Georgia* and — of particular importance to Senator Strong — *Vassall v. Massachusetts*.<sup>476</sup> It also satisfied the requests of several state legislatures that the Constitution be “explained.” Finally, it enabled Federalists like Strong to rebuke the Supreme Court and vindicate the position they espoused during ratification — that Article III should not be construed to permit out-of-state citizens to sue states in federal court.

Adopting an explanatory amendment to restore their preferred construction of the judicial power was not merely a political maneuver by Federalists to save face. It also prevented the introduction of the intractable enforcement problems that they designed the Constitution to avoid. As discussed above, one of the Federalists’ strongest arguments was that the Constitution — unlike the Articles of Confederation — could be enforced without authorizing the use of coercive force against states.<sup>477</sup> They believed that reliance on such power would lead to civil war, and sought to avoid this danger by replacing legislation for states (under the Articles) with legislation for individuals (under the Constitution). This shift meant that the new Constitution could be enforced solely against individuals rather than states.<sup>478</sup>

The ambiguity that Antifederalists identified in the state-citizen diversity provisions of Article III threatened to introduce the very danger that Federalists had worked so hard to avoid in drafting the new Constitution. If controversies “between a State and citizens of another State” included suits by individuals *against* states, then presumably the federal government had implied power to enforce any resulting judgments against states. It is not surprising, therefore, that prominent Federalists argued against a construction of Article III that would permit this conclusion. When the Supreme Court rejected their preferred construction, Federalists led the charge to amend the Constitution. Given their fundamental opposition to coercive federal power as

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<sup>475</sup> Resolution in the United States Senate, Jan. 2, 1794, in 5 DHSC, *supra* note 20, at 613 (emphasis added).

<sup>476</sup> The Eleventh Amendment also ensured retroactivity by referring to suits “commenced or prosecuted” against a state. U.S. CONST. amend. XI. Thus, even if the Supreme Court thought that the Amendment did not apply to a suit “commenced” before its ratification, the Amendment ensured that the Court could not construe the judicial power to permit any further “prosecution” of that suit.

<sup>477</sup> See *supra* section III.C, pp. 1853–62.

<sup>478</sup> As Hamilton put it, the Constitution substituted “the mild and salutary coercion of the magistracy” for the violent coercion of arms. THE FEDERALIST NO. 20 (James Madison (with Alexander Hamilton)), *supra* note 12, at 138.

a matter of institutional design, Federalists were not just keeping a campaign promise; they were acting on their deepest beliefs about how to construct a Constitution that would preserve the Union.

*B. Reassessing the Article III Anomaly*

A fundamental premise of the current debate over the Eleventh Amendment is that the text creates an anomalous distinction between in-state and out-of-state citizens. Applied literally, the Amendment prevents federal courts from hearing “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.”<sup>479</sup> This prohibition means that out-of-state citizens can never sue states in federal court, but leaves in-state citizens free to do so (assuming they can invoke one of Article III’s other jurisdictional categories, such as federal question jurisdiction). Both immunity and diversity theorists see this distinction as anomalous. To immunity theorists, the Amendment is underinclusive because allowing in-state citizens to sue states would circumvent the broad immunity the Amendment was meant to restore.<sup>480</sup> To diversity theorists, the Amendment is overinclusive because prohibiting out-of-state citizens from invoking federal question jurisdiction would undermine federal supremacy and draw an irrational distinction between in-state and out-of-state citizens.<sup>481</sup> Immunity theorists would remedy the anomaly by recognizing state sovereign immunity beyond the terms of the Amendment (to bar in-state citizens from suing states). Conversely, diversity theorists would remedy the anomaly by narrowing the Amendment (to permit out-of-state citizens to bring federal question suits against states).

Because of the anomaly they perceive in the text of the Eleventh Amendment, modern commentators sometimes suggest that the Amendment either was drafted in haste or reflected an unrecorded compromise between Federalists and Antifederalists. Neither hypothesis rings true in historical context. Although Senator Strong introduced the Amendment just two days after *Chisholm*, he had almost a year to reflect on the language while Congress was out of session. Strong did, in fact, revise his proposal — in light of several state resolutions — to take the form of an explanatory amendment. There is also no evidence that the Amendment was a compromise between Federalists (who, on this account, secretly preferred no amendment or a narrow amendment) and Antifederalists (who favored a broad amendment). During the ratification debates, Federalists took the lead

<sup>479</sup> U.S. CONST. amend. XI.

<sup>480</sup> See *supra* section II.A, pp. 1826–30.

<sup>481</sup> See *supra* section II.B, pp. 1830–32.

in convincing the country that the Constitution — unlike the Articles of Confederation — could be enforced solely against individuals and thus avoided the need to introduce coercive power against states. *Chisholm* construed state-citizen diversity jurisdiction to permit individuals to sue states, raising the specter of federal enforcement of judgments against states. Given the broader historical context, it is not surprising that Federalists led the charge to adopt an explanatory amendment to prevent this result. Antifederalists — who objected to the state-citizen provisions all along — supported these efforts. Neither side viewed the Eleventh Amendment as a compromise; both saw it as vindication of their shared position that the Constitution should not allow any suits by individuals against states in federal court or grant the federal government coercive power to enforce any resulting judgments against states.

1. *Article III and the Eleventh Amendment in Historical Context.* — To understand the Founders' perspective on the Eleventh Amendment and federal question jurisdiction, one must keep in mind their fundamental goal of constructing a Constitution that did not require federal coercion of states in their collective capacities. At the outset of the Constitutional Convention, Madison expressed the hope "that such a system would be framed as might render [the use of force against states] unnecessary."<sup>482</sup> By the end of the Convention, Madison believed that the delegates had succeeded in framing such a system. Writing to Thomas Jefferson, Madison explained that the Constitution "embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them."<sup>483</sup> This approach avoided the need to grant the federal government coercive power to enforce federal law directly against states — an approach that Madison believed "could evidently never be reduced to practice" without producing a "civil war."<sup>484</sup> If Madison was correct about the nature of the Constitution, then there was no clear warrant in the document for concluding that suits by individuals against states would never arise "under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."<sup>485</sup>

There are several indications that the Founders did not understand federal question jurisdiction to permit suits by individuals against states. First, the dispute between Federalists and Antifederalists over

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<sup>482</sup> Notes of James Madison (May 31, 1787), in 1 FARRAND'S RECORDS, *supra* note 138, at 47, 54.

<sup>483</sup> Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND'S RECORDS, *supra* note 138, at 131, 132.

<sup>484</sup> *Id.* at 131–32.

<sup>485</sup> U.S. CONST. art. III, § 2, cl. 1.

the meaning of the state-citizen diversity provisions of Article III suggests that only an express provision would suffice to abrogate the states' pre-existing immunity from suit and contradict the Founders' decision to withhold coercive power over states. Antifederalists argued that the state-citizen diversity provisions contained "the most clear expressions" in favor of jurisdiction over such suits against states.<sup>486</sup> For example, Patrick Henry argued that "the usual meaning of the language" in question is that federal courts "shall have cognizance of controversies between a State, and citizens of another State, without discriminating between plaintiff or defendant."<sup>487</sup> Federalists countered that the word "between" should be read narrowly to permit suits by, but not against, states. In arguing for this construction, they relied on preexisting principles of state sovereign immunity and the lack of federal power in the proposed Constitution to coerce states.<sup>488</sup> Hamilton went so far as to argue that the Antifederalists' reading of the text was "altogether forced and unwarrantable."<sup>489</sup> Whatever one thinks about the contending positions, the participants in this debate were at least arguing over express provisions that could be read to confer jurisdiction over suits against states. By contrast, the federal question provision of Article III contains no express reference to suits between, by, or against states, and not even the most alarmist Antifederalists suggested during ratification that it might authorize suits against states.<sup>490</sup> Indeed, the only Founders who considered whether "the original jurisdiction of the federal court extends to cases between a state and its own citizens" concluded that "[t]here is no expression in the proposed plan to warrant this construction."<sup>491</sup>

Second, the absence of any contemporaneous objection that the Eleventh Amendment was too narrow suggests that the Founders considered it to be a complete solution to the problem of suits by individuals against states. Following the Supreme Court's decision in *Chisholm*, Senator Strong introduced an initial version of the Eleventh Amendment in the Senate. This draft — like the final Amendment —

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<sup>486</sup> Patrick Henry, Debate Address to the Virginia Ratifying Convention (June 20, 1788), in 10 DHRC, *supra* note 185, at 1419, 1423.

<sup>487</sup> *Id.*

<sup>488</sup> See THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488.

<sup>489</sup> *Id.*

<sup>490</sup> Diversity theorists sometimes suggest that because jurisdiction in *Chisholm* was based on the presence of a state as a party, Justice Iredell's dissent might be inapplicable to federal question suits. See Amar, *supra* note 76, at 1472–73; Fletcher, *supra* note 6, at 1058, 1063. Casto views such suggestions as "unwarranted revisionism." CASTO, *supra* note 330, at 196. He stresses Iredell's search for "express words," and concludes: "If the Constitution's express reference to suits in which states were a party was not sufficient, it is difficult to believe that the more general constitutional language extending jurisdiction to suits arising under federal law would have met Iredell's test." *Id.* at 196–97.

<sup>491</sup> Aristides, *supra* note 15.

targeted only suits by out-of-state citizens because the state-citizen diversity provisions were the only portions of Article III that anyone suggested might abrogate state sovereign immunity. When Congress adjourned, several state legislatures passed resolutions calling on their Senators and Representatives to amend the Constitution to prevent any suits by individuals against states. When Congress reconvened, Senator Strong reintroduced essentially the same amendment, altered only to make clear that it was an explanatory amendment.

Senator Strong had particularly compelling incentives to be responsive to the demands of his state. Like all Senators, he was appointed by the state legislature.<sup>492</sup> In addition, after *Chisholm*, Massachusetts Antifederalists singled him out for criticism by recalling that he had assured the state ratifying convention that Article III would not be construed to permit individuals to sue states in federal court.<sup>493</sup> The Supreme Court contradicted his assurances by permitting a British subject to sue Massachusetts and by permitting a citizen of South Carolina to sue Georgia. Strong had every reason to propose an amendment — as requested by Massachusetts and other states — that would remove or explain any clause of the Constitution that could be construed to permit suits by individuals against states. Strong's proposal suggests that he saw the state-citizen diversity provisions as the primary sources of the problem. By cutting across all heads of jurisdiction, however, his amendment also ensured that plaintiffs like Vassall could not invoke any other basis for jurisdiction. Massachusetts Antifederalists apparently regarded Strong's proposal as a complete solution to the problems posed by cases like *Chisholm* and *Vassall*. Although extremely vocal both in criticizing Strong's original assurances regarding Article III and in calling for a corrective amendment, these individuals raised no objections to the scope of Strong's proposed amendment. It seems unlikely that they (and their representatives in Congress) would have remained silent if they had understood the Eleventh Amendment to accomplish less than what the Massachusetts legislature had requested — that is, to bar any suit by an individual against a state in federal court (including Vassall's).<sup>494</sup>

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<sup>492</sup> According to Professor Casto, "the possibility that [Strong] disregarded his home state legislature's desires seems remote." CASTO, *supra* note 330, at 208. Strong was not only sent to the Senate by the legislature, but also later served as governor of his state. *Id.* "Far from opposing his home state's political establishment, he was part and parcel of it." *Id.*

<sup>493</sup> See *supra* note 266 and accompanying text.

<sup>494</sup> Casto points out that Massachusetts, Connecticut, New Hampshire, and Virginia had all passed resolutions calling for a broad amendment. CASTO, *supra* note 330, at 208. These states had more than forty representatives and senators in Congress. *Id.* "If these men thought the Eleventh Amendment was inconsistent with the broad directives from their states, the inconsistency surely would have been challenged." *Id.*

Examination of the Eleventh Amendment in historical context supports this conclusion. By its terms, the Amendment prohibits construing the “Judicial power” to extend to “any suit” brought against a state by an out-of-state citizen. This language was sufficient to overturn *Chisholm* and reinstate the Founders’ preferred construction of the state-citizen diversity provisions of Article III. Senator Strong’s proposal, however, did more. It prevented the judicial power from extending to “any suit” brought by the specified plaintiffs regardless of which category of Article III jurisdiction they invoked. Strong was well aware of the pending case of *Vassall v. Massachusetts*.<sup>495</sup> I assume that this suit was brought under the state-citizen diversity provisions of Article III because federal question jurisdiction did not expressly authorize suits against states. On the other hand, modern readers might assume that Vassall’s suit could have rested on federal question jurisdiction as well. Under either hypothesis, however, the text of the Eleventh Amendment was broad enough to prohibit federal courts from hearing Vassall’s case. Thus, it is both linguistically and historically inaccurate to suggest — as some diversity theorists do — that the Amendment left plaintiffs free to sue states under Article III on any basis other than state-citizen diversity. On this theory, Vassall and other British subjects would have been free to pursue their claims against states using federal question jurisdiction even after the Amendment’s adoption.<sup>496</sup>

2. *The Constitution.* — Apart from federal question jurisdiction’s failure to include express authorization for suits against states, there are several indications that the Founders would not have understood suits against states to be necessary to enforce the Constitution. As Justice Iredell suggested in connection with *Chisholm*, all of the prohibi-

<sup>495</sup> See *supra* notes 320–326 and accompanying text.

<sup>496</sup> Some commentators seek to avoid this difficulty by stressing that Congress had not yet granted lower federal courts general federal question jurisdiction, and therefore foreigners like Vassall could not have litigated their treaty claims after the adoption of the Eleventh Amendment. This argument overlooks the fact that all of the suits against states in the 1790s — including *Vassall* — were brought under section 13 of the Judiciary Act of 1789, which gave the Supreme Court original jurisdiction over “all controversies of a civil nature, where a state is a party, except between a state and its citizens.” An Act to establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73, 80 (1789). This provision did not expressly restrict jurisdiction based on the type of claim presented. Rather, it was broad enough to authorize the Supreme Court to hear any suit involving a state permitted by Article III. Cf. James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) (arguing that the Supreme Court’s original jurisdiction encompasses federal question as well as state-citizen diversity cases). If — as diversity theorists maintain — the Eleventh Amendment merely repealed state-citizen diversity jurisdiction and did not affect federal question jurisdiction, then suits against states arising under treaties (like Vassall’s) could have continued unimpeded under section 13. But see CASTO, *supra* note 330, at 207 (maintaining that “under both the Constitution and the Judiciary Act, the Supreme Court’s trial jurisdiction over suits by an individual against a state was absolutely limited to party-based jurisdiction”).

tions placed on states in the original Constitution could be enforced through ordinary litigation between individuals or suits brought by states.<sup>497</sup> Consider Article I, Section 10's prohibitions against coining money, emitting bills of credit, and making anything but gold and silver a legal tender in payment of debts.<sup>498</sup> If a state violated any of these prohibitions, a creditor could simply refuse to accept improper payment and sue his debtor. If the debtor raised state law as a defense, the creditor could then assert its invalidity under the Constitution. A similar analysis applies to the prohibitions against bills of attainder and ex post facto laws<sup>499</sup> (and, for that matter, to the comparable prohibitions on the United States).<sup>500</sup> If a state initiated an action to enforce such a law against an individual, the Constitution provides a complete defense. A suit against the state would have been unnecessary to enforce these prohibitions.

Justice Wilson cited the prohibition on state imposts and duties as support for state suability in *Chisholm*, noting that the clause renders such state laws "subject to the revision and controul of the Congress."<sup>501</sup> But, again, enforcement of this provision need not entail suits by individuals against states or direct federal coercion of states. Assume that a state passed a prohibited duty and that Congress enacted a law to revise that duty. This federal statute would qualify as "the supreme Law of the Land" under the Supremacy Clause, and thus override contrary state law.<sup>502</sup> If a state attempted to collect a prohibited duty, the owner of the goods could defeat the operation of the duty by simply invoking the Constitution either as a defendant in an enforcement action or as a plaintiff suing the state officer to recover the goods in question or appropriate damages.

These examples highlight an important point about the way in which the Founders may have expected individuals to enforce constitutional prohibitions on government action. Absent a constitutional provision expressly authorizing suits against the sovereign — such as the contested state-citizen diversity provisions of Article III — individuals would have been expected to enforce their rights only by raising the Constitution as a defense to an enforcement action<sup>503</sup> or by

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<sup>497</sup> See James Iredell's Observations on "this great Constitutional Question" (Feb. 18, 1793), in 5 DHSC, *supra* note 20, at 186, 186; see also *infra* p. 1885.

<sup>498</sup> See U.S. CONST. art. I, § 10, cl. 1.

<sup>499</sup> See *id.*

<sup>500</sup> See U.S. CONST. art. I, § 9, cl. 3.

<sup>501</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 453 (1793) (opinion of Wilson, J.) (quoting U.S. CONST. art. I, § 10, cl. 2) (internal quotation marks omitted).

<sup>502</sup> U.S. CONST. art. VI, cl. 2.

<sup>503</sup> Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reviewing state court denial of criminal defendant's federal defense).

suing government officers at common law.<sup>504</sup> Because courts did not yet recognize modern notions of qualified immunity, all of the Article I prohibitions imposed on states and the United States could have been enforced by these traditional means.<sup>505</sup> The Bill of Rights — adopted after the Constitution but before the Eleventh Amendment — illustrates the importance of this enforcement paradigm. The purpose of the Bill of Rights was to impose restrictions on the United States in order to safeguard individual liberty. There is no indication, however, that anyone understood these restrictions to authorize individuals to sue the United States directly, even though one might argue that such suits “arise under” the Constitution for other purposes. The reason is that — at the time — the Bill of Rights could be fully enforced by other, widely accepted means. Some of the prohibitions could be asserted as defenses by defendants prosecuted by the United States. Others could be enforced by individuals against federal officers in suits at common law. If the officer asserted that his conduct was authorized by federal law, the individual could defeat this defense if the law violated the Constitution.<sup>506</sup>

Indeed, one of the primary reasons that Antifederalists sought a Bill of Rights was to guarantee trial by jury in civil cases.<sup>507</sup> This right was considered essential to the enforcement of all other restrictions on government conduct because — even assuming sovereign immunity — it ensured that government officers could be held accounta-

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<sup>504</sup> For an illuminating discussion of state officer suits as a means of enforcing federal law, see *Osborn v. Bank of the United States*, 22 U.S. 738 (1824), which concludes that even if the Eleventh Amendment exempts a state from suit, “the Court may act upon the agents employed by the State, and on the property in their hands.” *Id.* at 847.

<sup>505</sup> The central role played by officer suits may surprise modern readers because today state and federal officials enjoy qualified immunity from suit. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In the eighteenth century, government officers enjoyed no such immunity and were personally liable in tort even for good faith mistakes regarding the scope of their authority. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that a federal officer following a presidential order was personally liable for seizing a vessel without statutory authority).

<sup>506</sup> See Engdahl, *supra* note 283, at 14. As Professor Jerry Mashaw has explained: “Actions were personal, against the individual; damages were a normal remedy; and office-holding carried no special immunity from suit. Officers could plead their statutory authority as a defense, but if the court — or jury — thought them wrong on the law or the facts, liability followed.” Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations 1787–1801*, 115 YALE L.J. 1256, 1334 (2006); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67–68 (1999) (describing analogous suits against officers to enforce just compensation requirements).

<sup>507</sup> See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 667 (1973); see also THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 12, at 495 (“The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”).

ble by the people in actions at law, whether in state or federal court.<sup>508</sup> Writing in late 1787, one Antifederalist argued that a right to trial by jury was necessary because federal courts sitting without juries might be “ready to protect the officers of government against the weak and helpless citizen.”<sup>509</sup> Indeed, Professor Amar has identified “strong linkages between the Fourth and Seventh Amendments.”<sup>510</sup> In particular, the Seventh Amendment facilitated recoveries against federal officers who violated the Fourth Amendment’s prohibition against unreasonable searches and seizures. Both in England and America, the traditional remedy for such abuse was to sue the offending officer for damages.<sup>511</sup> Antifederalists feared that without civil juries, “every arbitrary act of the general government, and every oppression of [its officers] for the collection of taxes, duties, imposts, excise, and other purposes, must be submitted to by the individual.”<sup>512</sup> The right to trial by jury in civil suits against government officers gave citizens a significant means of checking government misconduct.<sup>513</sup> As Amar has recounted, “[i]n America, both before and after the Revolution, the civil trespass action tried to a jury flourished as the obvious remedy against haughty customs officers, tax collectors, constables, marshals, and the like.”<sup>514</sup>

This background suggests that the Founders may have assumed that common law actions against officers would be the primary means of enforcing the prohibitions against the United States set forth in both the Constitution and the Bill of Rights. No one suggested that Article III granted federal courts jurisdiction to hear suits by individuals against the United States arising under the Constitution or the Bill of

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<sup>508</sup> See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 775–78 (1994). Presumably, common law trespass actions against federal officers would be brought in state court, with a right to trial by jury under state law. If Congress authorized removal of such actions to federal court, the Seventh Amendment ensured that the plaintiff would retain the right to trial by jury.

<sup>509</sup> *Essay of a Democratic Federalist*, PENN. HERALD, Oct. 12, 1787, reprinted in 3 THE COMPLETE ANTIFEDERALIST 58, 61 (Herbert J. Storing ed., 1981).

<sup>510</sup> Amar, *supra* note 508, at 775.

<sup>511</sup> See *id.* at 774–76, 786; Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963) (“If the subject was the victim of illegal official action, in many cases he could sue the King’s officers for damages.”); see also BRADFORD P. WILSON, ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY 9–33 (1986).

<sup>512</sup> Luther Martin, Information to the General Assembly of the State of Maryland, 1788, in 2 THE COMPLETE ANTIFEDERALIST, *supra* note 509, at 27, 71 (emphasis omitted); see also *Essays by Hampden*, MASS. CENTINEL, Feb. 2, 1788, reprinted in 4 THE COMPLETE ANTIFEDERALIST, *supra* note 509, at 198, 200 (“Without [a jury], in civil actions, no relief can be had against the High Officers of State, for abuse of private citizens . . .”).

<sup>513</sup> See Engdahl, *supra* note 283, at 19.

<sup>514</sup> Amar, *supra* note 508, at 786; cf. Jaffe, *supra* note 511, at 14 (“Earlier actions against [English] officers were typically in trespass for taking of goods, interference with land, or laying hands on the person.”).

Rights. The reason was that federal question jurisdiction did not constitute an express waiver of the United States' sovereign immunity. Such jurisdiction, however, did ensure that federal courts could enforce the Constitution in common law actions against government officers who claimed that their (unconstitutional) conduct was authorized by law. If the Founders did not understand federal question jurisdiction to authorize suits against the United States, it would be surprising if they understood it to authorize suits against states. Such jurisdiction played a crucial role in ensuring the supremacy of federal law in suits against state and federal officials, but it was not explicit enough either to override preexisting notions of sovereign immunity or to confer the kind of coercive power over states that the Founders disavowed in drafting and ratifying the Constitution.<sup>515</sup>

There was one constitutional prohibition that at least arguably required enforcement against states. The Contracts Clause provides that no state shall pass any "Law impairing the Obligation of Contracts."<sup>516</sup> Justice Wilson invoked this clause in *Chisholm*<sup>517</sup> to support state suability. He asked: "What good purpose could this Constitutional provision *secure*, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controuling judiciary power?"<sup>518</sup> When adopted, however, the clause was generally understood to apply only to private contracts between individuals, not to a state's own contracts.<sup>519</sup> The clause was modeled on the Northwest Ordinance of 1787, which provided that "no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts."<sup>520</sup> At the Convention, Rufus King "moved to add, in the words used in the Ordinance of Congs establishing new States, a prohibition on the States to interfere in private contracts."<sup>521</sup> The delegates initially thought that the Ex Post Facto Clause would reach laws impairing the obligation of contracts,<sup>522</sup> but later concluded that "the terms 'ex post facto' related to criminal cases only."<sup>523</sup> Accordingly, they added a

<sup>515</sup> Cf. THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 12, at 488.

<sup>516</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>517</sup> See *supra* p. 1881.

<sup>518</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 465 (1793) (opinion of Wilson, J.).

<sup>519</sup> See BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 3-16 (1938).

<sup>520</sup> An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, as adapted by An Act To Provide for the Government of the Territory North-West of the River Ohio, 1 Stat. 50, 51 n.a. (1789); see WRIGHT, *supra* note 519, at 7-8.

<sup>521</sup> James Madison, Notes on the Constitutional Convention (Aug. 28, 1787), in 2 FARRAND'S RECORDS, *supra* note 138, at 439.

<sup>522</sup> *Id.* at 440.

<sup>523</sup> James Madison, Notes on the Constitutional Convention (Aug. 29, 1787), in 2 FARRAND'S RECORDS, *supra* note 138, at 447, 448-49.

prohibition on “laws altering or impairing the obligation of contracts.”<sup>524</sup>

During the ratification debates, only two Antifederalists (neither of whom attended the Constitutional Convention) suggested that the Contracts Clause might apply to public as well as private contracts,<sup>525</sup> and they were quickly corrected by delegates who had attended the Convention.<sup>526</sup> Professor Benjamin Wright, the leading scholar on the clause, concludes that a “careful search has failed to unearth any other statements even suggesting that the contract clause was intended to apply to other than private contracts.”<sup>527</sup> Modern scholars — including those skeptical of sovereign immunity — acknowledge that the Contracts Clause was not clearly understood originally to apply to public contracts.<sup>528</sup> If the Founders understood the clause to apply only to *private* contracts, then they would not have expected the clause to generate suits against states or necessitate coercive enforcement.

3. *The Laws of the United States.* — There is a relatively straightforward reason why the Founders may not have expected suits against states to arise under the laws of the United States. As discussed, the Founders did not understand the Constitution to grant Congress legislative power over states. This was the “great and radical vice” in the existing Confederation,<sup>529</sup> and the Founders were determined not to repeat this mistake. Accordingly, leading Federalists emphasized that the Constitution granted Congress the power to tax and regulate individuals instead of states, and thus did not grant the power to coerce states. This meant that neither the executive branch nor the judicial branch would be in the position of having to enforce federal legislative commands against states. Instead, these branches would simply en-

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<sup>524</sup> Report of Committee of Style (Sept. 12, 1787), in 2 FARRAND’S RECORDS, *supra* note 138, at 590, 597. There was no further discussion of the provision at the Convention.

<sup>525</sup> See Debates of the Virginia Convention (June 17, 1788), in 10 DHRC, *supra* note 185, at 1356 (statement of Patrick Henry) (“The expression includes public contracts, as well as private contracts between individuals.”); Debates of the North Carolina Convention (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 190 (statement of James Galloway) (suggesting that the Contracts Clause “may compel us to make good the nominal value of [our public] securities”).

<sup>526</sup> See Debates of the Virginia Convention (June 17, 1788), in 10 DHRC, *supra* note 185, at 1360 (statement of Edmund Randolph) (explaining that the Contracts Clause was inserted because of the “frequent interferences of the State Legislatures with private contracts,” and that the federal judiciary is “to inforce the performance of private contracts” under the Clause); Debates of the North Carolina Convention (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 42, at 191 (statement of William Davie) (“The clause refers merely to contracts between individuals.”).

<sup>527</sup> WRIGHT, *supra* note 519, at 16.

<sup>528</sup> See, e.g., Fletcher, *supra* note 6, at 1055 n.97 (“The contracts clause may have been intended originally to protect only contracts between private parties from impairment by acts of the states.”); Pfander, *supra* note 249, at 1344 (stating that “it was far from clear that the Contracts Clause was understood to apply to a state legislature’s impairment of its own contracts with individuals”).

<sup>529</sup> THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 12, at 108.

force legislative commands against individuals. This approach avoided the dangerous expedient of military coercion against states by substituting “the mild and salutary *coercion* of the *magistracy*” in place of “*violence*.”<sup>530</sup> It also meant that suits against states would not arise under “the Laws of the United States.”

Modern readers may be puzzled by the Founders’ evident understanding of the Constitution because today’s assumptions about congressional power over states are different. Changed circumstances have contributed to this dichotomy. The original understanding was informed by a desire to avoid a civil war. Our modern understanding, by contrast, developed in the aftermath of the Civil War. The Civil War Amendments expressly prohibit certain state practices — including denials of liberty, due process, equal protection, and voting rights — and give Congress express power to enforce these prohibitions.<sup>531</sup> These constitutional provisions arose out of the Civil War, and their proponents were more than willing to enforce them against states through suits and — if necessary — military force. Examining the original Constitution from the Founders’ perspective, however, reveals why those who drafted and ratified the Eleventh Amendment would not have understood federal question jurisdiction to permit citizens of any state to sue a state to enforce a federal command at the time the Amendment was adopted.

4. *Treaties*. — It appears that the Founders did not expect suits by individuals against states to arise under treaties both because federal question jurisdiction did not expressly authorize such suits, and because of the nature of treaties in the eighteenth century. The most important treaty at the time of the Founding was the 1783 Treaty of Peace with Great Britain. Prior to the adoption of the Constitution, states were notorious for interfering with the operation of the Treaty.<sup>532</sup> Article IV of the Treaty provided that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”<sup>533</sup> Many states enacted and enforced laws that made it difficult, if not impossible, for British creditors to recover their preexisting debts in state court. For example, Virginia enacted a statute during the war discharging British debts if the debtor paid the state instead of the British creditors.<sup>534</sup> Judge Gibbons has suggested that the Founders

<sup>530</sup> THE FEDERALIST NO. 20 (Alexander Hamilton), *supra* note 12, at 138.

<sup>531</sup> See U.S. CONST. amends. XIII, XIV, XV.

<sup>532</sup> See Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1440–44; Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 852–53 (2007).

<sup>533</sup> Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 8 Stat. 80.

<sup>534</sup> See Gibbons, *supra* note 63, at 1903.

expected British creditors to bring suits arising under the Treaty directly against states,<sup>535</sup> but it is more likely that they expected creditors to sue their individual debtors and rely on the Treaty to defeat any state law defenses.<sup>536</sup>

*Ware v. Hylton*<sup>537</sup> demonstrates how the Treaty could be enforced without resort to suits against states. British creditors sued Virginia debtors and the latter argued that their debts had been discharged under the Virginia statute. The creditors invoked the Treaty and the Supreme Court held that it preempted contrary state law under the Supremacy Clause.<sup>538</sup> *Ware* shows that treaties could be fully enforced in suits between individuals; there was no need for an individual to sue the state. Justice Paterson made this point explicitly in *Ware*: “Did this clause make *Virginia* liable to a prosecution for the debt? Is *Virginia* now suable by such *British* creditor? No; he would in such case be totally remediless, unless the nation of which he is a subject, would interpose in his behalf.”<sup>539</sup>

Article VI of the Treaty of Peace could also be enforced through suits between individuals. The Treaty drew an important distinction. With respect to property confiscated before the Treaty, Article V merely “recommend[ed] it to the legislatures of the respective states, to provide for the restitution of all estates, rights, and properties, which have been confiscated.”<sup>540</sup> By contrast, with respect to property not yet confiscated, Article VI declared that “there shall be no future confiscations

<sup>535</sup> See *id.* at 1902.

<sup>536</sup> To this end, the first Congress gave federal courts diversity jurisdiction to hear controversies between foreign citizens and state citizens, but imposed a \$500 amount-in-controversy requirement. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (current version at 28 U.S.C. § 1332(a)(1) (2006)). This required most British creditors to pursue their claims in state court, where they were less likely to prevail. See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 44 (2009). They could raise their rights under the Treaty of Peace, but their only opportunity for federal enforcement of these rights was an appeal to the Supreme Court. See § 25, 1 Stat. at 85–86. British dissatisfaction with U.S. compliance with the Treaty led to the adoption of the Jay Treaty of 1794. See Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 [hereinafter Jay Treaty]. The Jay Treaty “was designed to discharge the unfulfilled promises of the 1783 Treaty of Peace” by creating “a mixed commission to arbitrate claims by British subjects.” Monaghan, *supra* note 532, at 852–53. Professor Lee has suggested that the Founders hoped the Supreme Court would adjudicate disputes between foreign states and states in its original jurisdiction, see Lee, *supra* note 441, at 1868–70, but specifically rejected the notion that the Founders sought to facilitate suits by foreign citizens against states. See Lee, *supra* note 90, at 1028.

<sup>537</sup> 3 U.S. (3 Dall.) 199 (1796).

<sup>538</sup> *Id.* at 235–37.

<sup>539</sup> *Id.* at 250 (Paterson, J., concurring). Justice Paterson is referring to a sovereign’s decision to espouse a claim by one of its citizens, which “rendered it a public claim on the international plane, and the [claimant’s] sovereign could lawfully wage war to vindicate the espoused claim.” Lee, *supra* note 441, at 1856.

<sup>540</sup> Definitive Treaty of Peace, U.S.-Gr. Brit., art. V, Sept. 3, 1783, 8 Stat. 80, 82.

made.”<sup>541</sup> Thus, if a state confiscated real property owned by British subjects after the Treaty was adopted, the original owner could bring an action against the individuals in possession to recover the property in question. If the defendants invoked state law to establish their right of possession, the claimant could simply invoke the Treaty as the supreme law of the land to override such law. Although perhaps less convenient than suing the state directly, this course ordinarily would suffice to uphold the supremacy of the rights conferred by the treaty. More importantly, this course avoided all of the dangers — including the potential for civil war — that might arise from enforcement of federal judgments against states.

Understood in its historical context, the Eleventh Amendment would not have created the anomaly that modern commentators perceive with respect to cases arising under treaties. Although the Amendment is limited to denying judicial power over suits against states by out-of-state and foreign citizens, the Founders did not expect that citizens would ever have occasion to sue *their own* states in cases arising under treaties. The reason is simple. In the eighteenth century, treaties were exclusively concerned with how nations treated each other or how they (or their citizens) treated foreign citizens.<sup>542</sup> The use of treaties to govern how nations treat their own citizens did not begin until well into the twentieth century.<sup>543</sup> The Treaty of Peace exemplifies the eighteenth century paradigm. It expressly restricted the states’ ability to confiscate the property of *British* citizens, but it placed no restrictions on the states’ ability to confiscate the property of their own citizens. Thus, when the Eleventh Amendment was adopted, barring out-of-state citizens from bringing any suits against states would have created no anomaly. As far as the Founders were concerned, after the adoption of the Eleventh Amendment, there was no basis for either in-state or out-of-state citizens to sue states on the basis of a treaty.

## VI. IMPLICATIONS FOR MODERN JURISPRUDENCE

Taken in its historical context, the Eleventh Amendment did not create absurd or anomalous distinctions between in-state and out-of-state citizens. Because the Founders believed that the Constitution neither imposed affirmative obligations on states nor authorized Congress to exercise legislative power over states, they would not have understood federal question jurisdiction to constitute express authoriza-

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<sup>541</sup> *Id.* art. VI, 8 Stat. at 83.

<sup>542</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, introductory n. (1987); EMMERICH DE Vattel, *THE LAW OF NATIONS* Book II, Ch. XII (John Berry & John Rogers trans., 1787) (1758).

<sup>543</sup> See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1177 (1990).

tion for federal courts to hear suits against states by their own citizens. Thus, prohibiting federal courts from hearing any suit against a state by an out-of-state citizen was a coherent and efficient means of both restoring the Founders' preferred construction of Article III and avoiding the enforcement problems posed by judgments against states in favor of individuals. Keeping the Founders' assumptions in mind, they would not have understood the Constitution to provide any basis for individuals to sue states in federal court after the adoption of the Eleventh Amendment. Because the Amendment made sense when adopted, the absurdity doctrine provides no warrant for departing from the text as written. Adhering to the text and dismissing any suit that falls within its terms would avoid the problem of purposive "free-standing federalism" divorced from the constitutional text.<sup>544</sup> If the Supreme Court wishes to continue to shield states from suits brought by their own citizens, then it must rest its decisions on the nature of the Union rather than the Eleventh Amendment.

The text of the Eleventh Amendment provides an incomplete basis for much of the Supreme Court's jurisprudence regarding state sovereign immunity. For example, *Hans v. Louisiana*<sup>545</sup> and its progeny suggest that the purpose of the Amendment was to prevent both in-state and out-of-state citizens from suing states in federal court for breach of contract, but the text is much narrower. It is true that the Founders assumed that suits like *Hans* would not arise because the original understanding of the Contracts Clause appears to have been limited to impairment of private contracts.<sup>546</sup> In 1810, however, the Supreme Court began interpreting the clause to apply to public as well as private contracts.<sup>547</sup> These cases, along with Congress's enactment of general federal question jurisdiction in 1875,<sup>548</sup> paved the way for cases like *Hans* that arose when states began defaulting on their public obligations.

It is important to recognize that expanded interpretations of the Contracts Clause and federal question jurisdiction — rather than the Eleventh Amendment — created the anomaly that the *Hans* Court sought to avoid. In-state citizens could now sue their states for violating the Contracts Clause, while out-of-state citizens were barred by the terms of the Amendment from bringing identical suits against the same

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<sup>544</sup> See generally John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

<sup>545</sup> 134 U.S. 1 (1890).

<sup>546</sup> See *supra* notes 519–528 and accompanying text.

<sup>547</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810); see also *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 513, 518 (1819) (holding that the Contracts Clause prohibits a state from altering a private institution's state-issued charter).

<sup>548</sup> Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

states. The Court considered the supposition that the framers and ratifiers of the Amendment had left citizens free to sue their own states to be “almost an absurdity on its face.”<sup>549</sup> To prevent this anomaly, the Court recognized state sovereign immunity beyond the terms of the Amendment, but failed to ground such immunity firmly in the constitutional text. There were at least two alternative rationales available. First, the Court could have returned to the original understanding of the Contracts Clause rather than expanding immunity beyond the terms of the Eleventh Amendment.<sup>550</sup> Had it chosen this course, the *Hans* Court could have dismissed the case not for lack of subject matter jurisdiction, but for failure to state a claim under federal law.<sup>551</sup> Second, the Court could have dismissed the case on the ground that Article III's grant of federal question jurisdiction, as originally understood, did not provide an express authorization for federal courts to entertain suits by individuals against states.

The Supreme Court has also recognized other kinds of immunity outside the terms of the Eleventh Amendment. In *Principality of Monaco v. Mississippi*,<sup>552</sup> for example, the Court held that a state is immune from suit brought by a foreign state. The authorization for jurisdiction in such cases is found in the same portion of Article III as the state-foreign citizen diversity clause. The entire provision states that the judicial power shall extend to controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>553</sup> Because the Eleventh Amendment prohibits only those constructions of Article III that would permit any suit against a state by “Citizens or Subjects” of a foreign state, one might conclude that the Amendment contains a negative implication that Article III permits foreign states to sue states in federal court.<sup>554</sup> Moreover, the purpose of the Amendment — to avoid risking a civil war by enforcing federal commands against states — is arguably inapplicable when a foreign state sues a state. In the latter case, providing a federal forum to adjudicate

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<sup>549</sup> *Hans*, 134 U.S. at 15.

<sup>550</sup> Cf. Massey, *supra* note 7, at 135 (suggesting that the *Hans* Court expanded Eleventh Amendment immunity in order to avoid “the unpalatable choice of abandoning accepted Contract Clause doctrine”).

<sup>551</sup> For similar reasons, the Supreme Court's sovereign immunity dissenters should abandon the diversity theory and adhere to the text of the Eleventh Amendment. These Justices favor narrowing the text by allowing at least some suits prohibited by the terms of the Amendment. This approach not only contradicts the text, but also undermines one of the central purposes of the Amendment: to deny federal jurisdiction in cases like *Vassall v. Massachusetts*. See *supra* notes 495–496 and accompanying text.

<sup>552</sup> 292 U.S. 313 (1934).

<sup>553</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>554</sup> See Manning, *supra* note 9, at 1740–49.

the dispute might actually help to prevent a war with a foreign state.<sup>555</sup>

The Supreme Court has not only recognized immunity outside the Eleventh Amendment, but also disregarded key portions of the Amendment by permitting some suits barred by its terms. For example, the Court has long held that the Amendment does not prohibit suits against states if the state waives its immunity.<sup>556</sup> The text of the Amendment, however, says nothing about immunity. Rather, it prohibits federal courts from construing the judicial power to extend to any suit against a state by a prohibited plaintiff.<sup>557</sup> Because the Amendment is written as a limitation on “the judicial power,” it deprives federal courts of subject matter jurisdiction — a defect that cannot ordinarily be waived by the parties.<sup>558</sup>

Similarly, because the Eleventh Amendment limits the scope of the judicial power, Congress cannot authorize citizens of another state or of a foreign state to sue states in federal court. To do so would exceed the constitutionally prescribed limits of the judiciary’s subject matter jurisdiction. By contrast, assuming that federal question jurisdiction permits federal courts to hear suits by individuals against states, Congress may create federal causes of action against states by their own citizens so long as Congress acts pursuant to a constitutional power that permits regulation of states. Accordingly, the constitutionality of such legislation would turn not on the Eleventh Amendment, but on the scope of Congress’s powers under both the original Constitution and the Civil War Amendments. Although the Founders understood the original Constitution not to grant Congress power to enact legislation for states in their political capacity or to enforce federal commands against states,<sup>559</sup> the Supreme Court has interpreted Congress’s Article I, Section 8 powers differently in the modern era.<sup>560</sup>

*Seminole Tribe of Florida v. Florida*<sup>561</sup> illustrates these points. The case did not implicate the terms of the Eleventh Amendment because Florida was sued by its own citizens pursuant to a federal statute. The case turned, therefore, on the scope of congressional power.

<sup>555</sup> See Lee, *supra* note 441, at 1809.

<sup>556</sup> See *Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276 (1959); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883).

<sup>557</sup> See *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 310 (1973) (Brennan, J., dissenting) (describing the “literal wording” of the Amendment as “a flat prohibition against the federal judiciary’s entertainment of suits against even a consenting State brought by citizens of another State or by aliens”); see also Nelson, *supra* note 91, at 1614 (explaining that “the Amendment seems to deprive the federal courts of authority to adjudicate the designated categories of suits”).

<sup>558</sup> See, e.g., *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804).

<sup>559</sup> See *supra* Part III, pp. 1838–75.

<sup>560</sup> See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

<sup>561</sup> 517 U.S. 44 (1996).

Nonetheless, the Court concluded that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.”<sup>562</sup> The Court’s reasoning is difficult to square with the Amendment’s terms. The Amendment bars only suits against states by out-of-state citizens. If (as the Court assumed) Congress had constitutional power to authorize the suit in question, then the Amendment was largely beside the point. Assuming that federal question jurisdiction encompasses suits against states, the Court should have decided the case by reference to whether Article I, Section 8 grants Congress legislative power over states. As discussed, the Founders understood the original Constitution not to empower Congress either to exercise legislative power over states or to coerce states.

Modern assumptions about the scope of federal power are very different. For example, in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>563</sup> the Supreme Court held that Congress may subject states, as employers, to the Fair Labor Standards Act. The *Garcia* Court read Article I, Section 8 to authorize Congress to regulate states to the same extent that it authorizes Congress to regulate individuals. The Court refused to recognize any exemption for “States as States.”<sup>564</sup> As others have observed, the Court’s subsequent decisions in *Seminole Tribe* and *Alden v. Maine*<sup>565</sup> make it difficult to enforce such federal commands against states.<sup>566</sup> These cases held that Congress cannot authorize citizens to sue their own states in either federal or state court as a means of enforcing Congress’s regulation of states.<sup>567</sup>

These two lines of cases are difficult to reconcile.<sup>568</sup> The important point for present purposes, however, is that the Eleventh Amendment

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<sup>562</sup> *Id.* at 72.

<sup>563</sup> 469 U.S. 528.

<sup>564</sup> *Id.* at 554 (internal quotation marks omitted).

<sup>565</sup> 527 U.S. 706 (1999).

<sup>566</sup> See, e.g., Vázquez, *supra* note 11, at 1707 (suggesting that the immunity theory of the Eleventh Amendment “would eliminate (or at least place significant obstacles in the way of) perhaps the most effective, and certainly the most straightforward, method of enforcing” the obligations that Congress imposes on states vis-à-vis individuals). *But see* Monaghan, *supra* note 47, at 103 (pointing out that in “suits for prospective relief, states are still accountable in federal court — through their officers — for the violation of federal law”).

<sup>567</sup> Professor Ernest Young has gone so far as to suggest that the Court’s recent sovereign immunity decisions may be “‘payback’ for the *Garcia* decision.” Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 5.

<sup>568</sup> See Nelson, *supra* note 91, at 1652 (suggesting that “Congress’s power to command states to answer private suits seeking the minimum wage should stand or fall with Congress’s power to command states to pay the minimum wage in the first place”). *But see* Vázquez, *supra* note 11, at 1781–82 (suggesting that Congress may impose obligations on states, but those obligations may be enforced only in suits against individual state officers). The Founders’ understanding of the nature of the Union may be relevant not only to *Garcia*, but also to the Court’s subsequent anti-

has little to say about the issue. How one decides these cases depends on one's conception of the scope of Congress's Article I, Section 8 powers, which in turn depends on one's approach to constitutional interpretation.<sup>569</sup> As discussed, the Founders' original *intent* seems to have been that the Constitution withholds power from Congress both to legislate for states (as opposed to individuals) and to coerce state compliance with federal commands.<sup>570</sup> By contrast, the original public *meaning* of the text may or may not reflect this understanding because the Constitution does not expressly grant or deny congressional power over states.<sup>571</sup> A dynamic approach to interpretation might rely on changed circumstances to conclude that — notwithstanding the original understanding — the Constitution should now be construed to give Congress power to regulate both individuals and states.<sup>572</sup> Finally, regardless of how one resolves these complex interpretive questions, *stare decisis* arguably counsels in favor of maintaining the states' long-recognized immunities over more recent decisions that endorse broad congressional power over states.<sup>573</sup> Although these questions are beyond the scope of this article, the important point here is that their

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commandeering decisions. *See* *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress may not require state executive officers to execute federal law); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not require state legislatures to enact specific legislation).

<sup>569</sup> Arguably, the text of the Eleventh Amendment — understood in historical context — tells us something about the limited nature of Congress's Article I, Section 8 powers under the original Constitution. *Cf.* *United States v. Fausto*, 484 U.S. 439, 453 (1988) (explaining that “the implications of a statute may be altered by the implications of a later statute”).

<sup>570</sup> *See supra* Part III, pp. 1838–75. For general discussions of original intent, *see* KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Larry Alexander & Saikrishna Prakash, “*Is that English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 *SAN DIEGO L. REV.* 967 (2004); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U. L. REV.* 226 (1988).

<sup>571</sup> *See* Manning, *supra* note 544, at 2032 (arguing that the Founders who disfavored federal commandeering of states “took no affirmative steps to reduce that purpose to a textual proscription”). For general discussions of original meaning, *see* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113 (2003); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47 (2006); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *NW. U. L. REV.* 751 (2009).

<sup>572</sup> *See generally* BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 *B.U. L. REV.* 204 (1980); Richard A. Primus, *When Should Original Meanings Matter?*, 107 *MICH. L. REV.* 165 (2008) (arguing that the original meaning of enactments should matter more during their enactors’ lifetimes and diminish over time).

<sup>573</sup> *See* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1989) (Scalia, J., concurring in part and dissenting in part).

resolution turns on the scope of congressional power rather than on the precise meaning of the Eleventh Amendment.

The Supreme Court has drawn at least one distinction, however, that appears to make sense in historical context. The Court has held that Congress can abrogate state sovereign immunity when acting pursuant to its power to enforce the Civil War Amendments even though it cannot do so pursuant to Article I, Section 8.<sup>574</sup> The original Constitution was framed to avoid a civil war by denying Congress legislative power over states. The Civil War Amendments, by contrast, were framed in the aftermath of the Civil War to prohibit unacceptable state action and to empower Congress to enforce such prohibitions. This difference suggests — as the Court held in *Fitzpatrick v. Bitzer*<sup>575</sup> — that congressional abrogation of state sovereign immunity is constitutional pursuant to section 5 of the Fourteenth Amendment, even if such abrogation would be unconstitutional pursuant to Article I, Section 8.<sup>576</sup> In other words, federal statutes authorizing suits against states under section 5 rest on express constitutional “authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment.”<sup>577</sup>

Congressional enforcement of the Civil War Amendments is unlikely to contradict the terms of the Eleventh Amendment. The Thirteenth, Fourteenth, and Fifteenth Amendments primarily restrict the way states treat their own citizens. Thus, suits against states to enforce such restrictions will not ordinarily implicate the Eleventh Amendment’s specific withdrawal of federal judicial power to hear suits against states by citizens of other states. In sum, the distinct historical contexts surrounding the adoption of the original Constitution and the Civil War Amendments provide an added justification for the Supreme Court’s distinctive treatment of congressional abrogation of state sovereign immunity under Article I, Section 8 and under section 5 of the Fourteenth Amendment.

## VII. CONCLUSION

Modern theorists tend to discount the precise terms of the Eleventh Amendment. They regard the Amendment as either unacceptably underinclusive or unacceptably overinclusive because it appears to bar

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<sup>574</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)).

<sup>575</sup> 427 U.S. 445.

<sup>576</sup> See *Seminole Tribe*, 517 U.S. at 65–66 (explaining that “the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment”).

<sup>577</sup> *Fitzpatrick*, 427 U.S. at 455 (quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880)).

all suits against states by out-of-state citizens while leaving in-state citizens free to sue under federal question jurisdiction. Textualists agree that the Amendment is less than coherent, but assume that this was the result of an unrecorded compromise necessary to secure its adoption. This Article maintains that the terms of the Amendment made sense in historical context. The key to understanding the Amendment is to read it in light of the Founders' understanding of the nature of the Union. In their view, the Constitution did not authorize Congress to exercise legislative power over states or to use coercive force against states to enforce federal commands. For this reason, only an express constitutional provision would suffice to authorize suits against states in federal court. The Founders publicly debated whether the state-citizen diversity provisions of Article III constituted such authorization. By contrast, the Founders do not appear to have expected federal question jurisdiction to generate any suits by any citizens against any states. Thus, amending the Constitution to bar "any suit" against a state by out-of-state citizens provided a complete solution to the problem of state suability presented by cases like *Chisholm v. Georgia* and *Vassall v. Massachusetts*. This course created no anomaly between the ability of in-state and out-of-state citizens to sue states in federal court because — from the Founders' perspective — neither group of citizens had an express basis for suing a state in federal court after the adoption of the Eleventh Amendment. Because the Amendment made sense in historical context, the anomaly that modern theorists perceive provides an inadequate basis for departing from its precise text.