

A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction

William A. Fletcher*

INTRODUCTION

The eleventh amendment is one of the Constitution's most baffling provisions and, for its importance, one of the least analyzed. Its full text provides,

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.¹

In a number of decisions, the Supreme Court has treated the amendment as prohibiting federal courts from taking jurisdiction over suits brought in federal court against a state by private citizens.² The

* Acting Professor of Law, Boalt Hall School of Law, University of California, Berkeley. B.A. 1968, Harvard College; B.A. 1970, Oxford University; J.D. 1975, Yale Law School.

I wish to thank the Boalt Hall School of Law for its generous financial assistance through the Walter Perry Johnson Fund. I also wish to thank my colleagues and friends Stephen R. Barnett, John E. Coons, Ronan E. Degnan, David E. Feller, Dennis J. Hutchinson, Thomas M. Jorde, James H. Kettner, Jean C. Love, Paul J. Mishkin, Stefan A. Riesenfeld, David B. Roe, Harry N. Scheiber, Martin Shapiro, Michael E. Smith, Therese M. Stewart, Preble Stolz, and Jan Vetter, and my father, Robert L. Fletcher, for their valuable criticism and suggestions. Finally, I wish to thank Kevin James for his excellent research assistance.

1. U.S. CONST. amend. XI.

2. *See, e.g.*, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 682 (1982) (characterizing the issue before the Court as a "determination of whether the Eleventh Amendment in fact barred an exercise of jurisdiction by the federal court"); Cory v. White, 457 U.S. 85, 91 (1982) (holding that "the Eleventh Amendment bars the statutory interpleader sought"); Edelman v. Jordan, 415 U.S. 651, 663 (1974) (referring to the rule "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment").

After a long period of quiescence, the Supreme Court's interest in the amendment has revived in recent years. The most important cases are Quern v. Jordan, 440 U.S. 332 (1979);

Court apparently views the amendment as a form of jurisdictional bar that specifically limits the power of federal courts to hear private citizens' suits against unconsenting states. This article contends that as a historical matter this view of the amendment is mistaken. It contends that the amendment merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction and that the amendment did nothing to prohibit federal court jurisdiction.

The eleventh amendment was passed in the 1790's³ in order to overrule a particular case—*Chisholm v. Georgia*.⁴ In order to understand *Chisholm* and the amendment, one must have in mind that article III of the Constitution gives jurisdiction to the federal courts essentially on two grounds. First, article III confers jurisdiction where the parties to a case or controversy possess particular characteristics. Such party-based jurisdiction is conferred irrespective of the subject matter of the case. Today, the most prominent example of such jurisdiction is diversity jurisdiction.⁵ Second, article III confers jurisdiction where a dispute involves certain subject matters. This type of jurisdiction is granted without regard to the characteristics of the parties involved. Today, the most important example is federal

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); Edelman v. Jordan, 415 U.S. 651 (1974); Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry., 377 U.S. 184 (1964). The Court decided three cases involving eleventh amendment issues during October Term, 1981, see *Treasure Salvors*, 458 U.S. at 670; *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Cory v. White*, 457 U.S. 85 (1982), and it decided one case peripherally involving the amendment during October Term, 1982, see *Colorado v. New Mexico*, 103 S. Ct. 539 (1982). It has scheduled one case for argument this Term. See *Halderman v. Pennhurst State School & Hosp.*, 673 F.2d 647 (3d Cir.), cert. granted, 457 U.S. 1131 (1982), restored to calendar for reargument, 103 S. Ct. 3568 (1983).

The recent Supreme Court decisions have rekindled academic interest in the subject. See, e.g., Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1978) [hereinafter cited as Field, *Part One*]; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203 (1978) [hereinafter cited as Field, *Part Two*]; Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976); see also C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972); Liberman, *State Sovereign Immunity in Suits to Enforce Federal Rights*, 1977 WASH. U.L.Q. 195.

3. For discussion of the legislative history and ratification of the amendment, see notes 116–29 *infra* and accompanying text.

4. 2 U.S. (2 Dall.) 419 (1793).

5. See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . ."); see also 28 U.S.C. § 1332 (1976).

question jurisdiction.⁶

Chisholm involved a form of party-based jurisdiction. A South Carolina citizen brought suit against the state of Georgia under a constitutional grant of federal judicial power over “controversies . . . between a State and Citizens of another State”⁷ For ease of reference, we may call this form of party-based jurisdiction “state-citizen diversity” in order to distinguish it from the more familiar citizen-citizen diversity jurisdiction. In *Chisholm*, the Court held that this state-citizen diversity clause conferred jurisdiction to hear Chisholm’s damage action against Georgia and that the clause abrogated any sovereign immunity defense to the suit that Georgia might otherwise have had. The eleventh amendment was passed immediately thereafter in order to overturn this result.

The conventional modern view of the eleventh amendment is that it prohibits federal courts from exercising both party-based and subject matter-based jurisdiction over private citizens’ suits against the states. This article suggests that the amendment originally had a more modest purpose: It 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. So construed, the clause was a more limited grant of jurisdiction than the Court in *Chisholm* had construed it to be. And so understood, the eleventh amendment forbade nothing, but merely required this limiting construction on the jurisdiction granted by the state-citizen diversity clause.

This interpretation of the amendment is both strikingly simple and remarkably congruent with the available evidence concerning the circumstances surrounding the amendment and its passage. But the interpretation does not indicate whether state sovereign immunity to private suit in federal court exists under the Constitution viewed as a whole. Indeed, the interpretation eliminates what the Court has traditionally thought to be a partial answer provided by the amendment—that the amendment explicitly forbids suits brought against the states by out-of-state citizens. Thus, if the interpretation of the amendment suggested here is correct, it makes the question of state sovereign immunity to private suit more subtle, for

6. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Law of the United States, and Treaties made, or which shall be made, under their authority”); see also 28 U.S.C. § 1331 (Supp. V 1981).

7. U.S. CONST. art. III, § 2, cl. 1.

at least as a historical matter it requires us to put to one side the one part of the Constitution previously thought to speak directly to the issue.

This interpretation of the amendment suggests that the question of state sovereign immunity under the party-based provision conferring jurisdiction over disputes between a state and an out-of-state citizen is a fundamentally different inquiry from the question of state sovereign immunity from private suit under federal question and admiralty jurisdiction. In cases decided under the state-citizen head of jurisdiction at the time the eleventh amendment was passed, the applicable law generally was thought to be common law or state law. But under the latter two heads of jurisdiction, the applicable law was either specifically federal (as in federal question jurisdiction) or strongly affected with a federal interest (as in admiralty jurisdiction).⁸ Even if the eleventh amendment made it clear that unconsenting states could not be sued by out-of-state citizens under article III's party-based jurisdiction, the amendment said nothing about a private citizen's ability to sue an unconsenting state under federal question jurisdiction or in admiralty.

This article concludes that the adopters of the eleventh amendment did not specifically intend to forbid the exercise of federal question or admiralty jurisdiction over private suits against the states.⁹ It

8. Admiralty is today considered to be largely governed by substantive federal law, which has given rise to the question whether a case in admiralty may come into federal court under the federal question jurisdiction as well as under the admiralty jurisdiction. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (holding that it may not). In the 1790's, however, admiralty law was considered to be part of the general law of nations rather than part of federal law *per se*. See notes 196-97 *infra* and accompanying text.

9. A number of articles have suggested that a federal question exception be found to the supposed prohibition of the amendment. See, e.g., Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 180-88 (1977); Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 19 (1967); Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183 (1908) (injunctive relief); Le Clercq, *State Immunity and Federal Judicial Power—Retreat from National Supremacy*, 27 U. FLA. L. REV. 361, 369-70 (1975); Liberman, *supra* note 2, at 252-55; McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C.L. REV. 485, 515-16 (1973); Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293, 337-48 (1980); Note, *A Practical View of the Eleventh Amendment—Lower Court Interpretations and the Supreme Court's Reaction*, 61 GEO. L.J. 1473, 1498-99 (1973); Comment, *Monetary Remedies Against the State in Federal Question Cases*, 68 NW. U.L. REV. 544, 556-65 (1973); see also Note, *State Monetary Accountability for Civil Rights Violations: Reconciling the Eleventh and Fourteenth Amendments*, 43 ALB. L. REV. 708, 722 (1979) (states should not be immune to suits based on federal civil rights law). Professors Nowak and Tribe both advocate a form of federal question exception, but limited to federal causes of action enacted by Congress. Nowak, *supra* note 2, at 1468-69; Tribe, *supra* note 2, at 693-99.

Only Professor Field, in a pair of thoughtful articles, has argued that the amendment

also concludes that when the amendment was adopted 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. These conclusions will permit a natural and unforced reading of the amendment and may help clear away some of the confusion that now exists about the relationship between the eleventh amendment and state sovereign immunity. By directing attention away from the eleventh amendment, they may also permit us to perceive with less distortion the issues of national power and federal structure that are necessarily implicated by questions of state sovereign immunity to private causes of action under federal law.

Before going further, I should say a word about my methodological assumptions. History and law frequently make an awkward marriage, for legal analysis typically selects and molds historical facts to serve its own purposes to a degree that is unknown to conventional history. Whether legal analysis suffers as a result may be an open question, but it is clear that history frequently does. I have attempted in this article to preserve the integrity of both disciplines. My historical analysis of the eleventh amendment demonstrates nothing more than that we have generally misunderstood the amendment and that state sovereign immunity to causes of action under federal law presented a much more open question in the 1780's and 1790's than is now generally thought. To some, newly discovered historical facts about the eleventh amendment may be close to irrelevant;¹⁰ to others, these facts may be crucial.¹¹ On this point (at least

has no prohibiting force of its own. See Field, *Part One*, *supra* note 2; Field, *Part Two*, *supra* note 2. Professor Field's thesis has not been well received. See, e.g., P. BATOR, P. MISHKIN, P. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 231 (2d ed. Supp. 1981) [hereinafter cited as *HART & WECHSLER*] (criticizing Field's "revisionist" thesis); D. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 581-82 (3d ed. 1982); M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 147-49 (1980). I agree with Professor Field's important perception that the amendment was directed only at the clause in article III that authorized jurisdiction over controversies between a state and a citizen of another state. Field, *Part One*, *supra* note 2, at 538-40; see note 134 *infra* and accompanying text. I disagree, however, with Professor Field's conclusion that after the passage of the amendment, the sovereign immunity doctrine had "no constitutional sanction" and the common law controlled. Field, *Part One*, *supra* note 2, at 549; see note 303 *infra* and accompanying text.

10. See, e.g., Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

11. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Berger, *A Study of Youthful Omniscience: Gerald Lynch on Judicial Review*, 36 ARK. L. REV. 215 (1982).

I am not sure how to categorize Professor Crosskey. He urges vigorously that we return

for the purposes of this article), I am agnostic. I am content to show what I think is the proper historical understanding of the amendment, to describe the ambiguous nature of state sovereign immunity to private causes of action under federal law, to suggest what insights into the problems of modern eleventh amendment law this historical perspective provides, and, finally, to suggest what these historical conclusions might mean to those whose prescriptions for modern law are premised in important part on the accuracy of their understanding of the amendment's original meaning.

Part I of the article briefly summarizes the state of modern eleventh amendment law so that uninitiated readers—a description that fits virtually everyone—may understand its general contours. Part II analyzes the evidence supporting the conclusion that the eleventh amendment was originally intended to require nothing more than that the state-citizen diversity clause in article III be construed to confer party-based jurisdiction only when a state sued an out-of-state citizen. Part III analyzes the available evidence concerning the original understanding about state sovereign immunity to private suit under admiralty and federal question jurisdiction. Finally, Part IV suggests the consequences that these historical conclusions might have today for federal court jurisdiction and for the relationship between the national government and the states.

I. AN OVERVIEW OF ELEVENTH AMENDMENT LAW

The eleventh amendment is now generally understood as forbidding federal courts from taking jurisdiction of suits against states brought by out-of-state citizens rather than as narrowing the state-citizen diversity clause of article III so that the clause affirmatively authorizes only suits brought by states. The distinction between forbidding the exercise of jurisdiction and failing to authorize jurisdiction under a particular provision may not have had great practical significance in the 1790's because at that time only a few federal questions could have supported private suits against the states.¹²

to what he contends was the original meaning of the Constitution, but his historical Constitution bears so little resemblance to the generally accepted historical Constitution that his loyalty to the "original understanding" must be considered a special variety. *See generally* 1-2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953); 3 W. CROSSKEY & W. JEFFREY, JR., *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1980).

12. Attorney General Randolph listed the possible constitutional claims during oral argument in *Chisholm v. Georgia*. *See* note 98 *infra* and accompanying text.

Further, the Judiciary Act of 1789¹³ did not, in any event, vest original federal question jurisdiction in the federal courts.¹⁴ Today, however, the Civil War amendments to the Constitution and many statutory provisions protect private citizens from wrongful state behavior. And Congress has now conferred on the federal courts a broad original federal question jurisdiction that makes the distinction between *prohibiting* and merely *not authorizing* federal court suits against the states under the state-citizen diversity clause much more significant.

The Supreme Court did not directly address the issues of whether the eleventh amendment forbade private suits against states by all private citizens, out-of-state or in-state, and whether private suits could be brought under another head of jurisdiction, until after the first general original federal question jurisdictional statute was adopted in 1875.¹⁵ In 1890, almost 100 years after the adoption of the amendment, the Court in *Hans v. Louisiana*¹⁶ held that a Louisiana citizen could not sue Louisiana in federal court for failing to pay off state bonds in violation of the federal contracts clause.¹⁷ The Court was careful to say that the eleventh amendment itself did not require this result. Rather, the Court concluded that if the amendment forbade suits by out-of-state citizens, it was unthinkable that the adopters of the amendment should have intended that in-state citizens be left free to sue.¹⁸ Later courts have not been as careful in

13. Ch. 20, 1 Stat. 73 (1789).

14. See notes 201-04 *infra* and accompanying text.

15. Act of March 3, 1875, ch. 137, 18 Stat. 470. Technically, the Judiciary Act of 1801 conferred the first original general federal question jurisdiction on the federal courts, see Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, but it was repealed a year after its enactment, see Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

The Marshall Court discussed the eleventh amendment in several cases, including *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405-12 (1821), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 846-59 (1824), but the Court never clearly determined the impact of the amendment on either original federal question or admiralty jurisdiction. See notes 181-217 *infra* and accompanying text.

16. 134 U.S. 1 (1890); see also *North Carolina v. Temple*, 134 U.S. 22 (1890). Disagreement among commentators in 1884 on the status of in-state citizens suggests that the result in *Hans* was more than the pronouncement of a principle that had long been assumed to be valid. Compare Tucker, *Can a State Be Sued in the Federal Courts by Its Own Citizens?*, 8 VA. L.J. 641 (1884) (arguing against suits by in-state citizens) with Hughes, *Can a State Be Sued in a Federal Circuit Court by Its Own Citizen?*, 8 VA. L.J. 385 (1884) (arguing for such suits).

17. U.S. CONST. art. 1, § 10, cl. 1.

18. The Court stated,

The letter [of the amendment] is appealed to now [to support an argument that the state is liable to suit]. . . . It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of

their analysis, and *Hans* is generally used today as the standard citation for the proposition that the eleventh amendment forbids citizens from suing states in federal court.¹⁹ *Hans*, or the general principle prohibiting federal court jurisdiction perceived to lie behind it, was later expanded. In 1921, in *Ex parte New York, No. 1*,²⁰ the Court held that the prohibition extended to private suits against the states in admiralty as well as in law and equity.²¹ And in 1934, in *Principality of Monaco v. Mississippi*,²² the Court held that the prohibition extended to federal court suits by foreign countries against the states.²³

But a broad constitutional prohibition against suing states in fed-

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? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.

Hans, 134 U.S. at 15.

19. See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982); *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 280 (1973); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 304 n.13 (1952).

20. 256 U.S. 490 (1921).

21. In holding that states are immune from private citizens' suits in admiralty, the Court stated, "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification." *Id.* at 497. Like *Hans*, *Ex parte New York, No. 1* is generally cited today without qualification as an eleventh amendment case. See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683 n.17 (1982). For further discussion of *Ex parte New York, No. 1*, see note 194 *infra*.

22. 292 U.S. 313 (1934). Monaco had received Civil War-era Mississippi bonds as an unconditional gift from private citizens who were unable to sue Mississippi because of the holding in *Hans v. Louisiana*. *Id.* at 317-18.

23. This holding reversed the clear presumption that had existed before the Civil War. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15-17 (1831) (inquiring whether the Cherokee Nation was a "foreign nation" and only after finding that it was not holding that it did not have jurisdiction); *Cohens v. Virginia*, 19 U.S. (5 Wheat.) 264, 406 (1821) (stating that the amendment "does not comprehend controversies . . . between a state and a foreign state").

The eleventh amendment has been held not to extend to suits brought against a state by another state. See *Kansas v. Colorado*, 206 U.S. 46, 83 (1907); see also *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-59 (1972). A state may sue on its own behalf if it owns the bonds of another state, *South Dakota v. North Carolina*, 192 U.S. 286 (1904), although it cannot sue on behalf of a group of its citizens who hold bonds, *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). The litigation in *South Dakota* arose after private bondholders gave a few North Carolina bonds to South Dakota with the understanding that South Dakota would then bring suit. The donors of the bonds hoped that the Court's holding would induce North Carolina to settle on favorable terms with them for the large number of bonds they continued to hold. See R. DURDEN, RECONSTRUCTION BONDS & TWENTIETH-CENTURY POLITICS; *SOUTH DAKOTA V. NORTH CAROLINA* 31-32, 51 (1962). The result in *South Dakota* stands in sharp contrast to the later result in *Principality of Monaco v.*

eral court is unworkable in a federal system premised in important part on controlling state behavior by federal law in order to protect private individuals. As a result, the Court has developed a complex set of fictions and exceptions in order to avoid the full effect of the broad prohibition it created under *Hans*. The most important of these fictions is that commonly traced to *Ex parte Young*,²⁴ in which the Court held that a federal court could enjoin the Attorney General of Minnesota from enforcing a state railroad rate regulation statute on the theory that since the acts were illegal, they were merely the acts of individuals acting without authority from the state.²⁵

The *Ex parte Young* fiction, however, has proved somewhat unsatisfactory. For a time, when the dominant form of relief against state officers was the negative injunction, it was generally feasible to distinguish between permitted injunctions that merely required cessation of certain official behavior and forbidden damage awards against state officers that constituted, in effect, damage awards against the state.²⁶ In the last thirty years, however, when affirmative injunctions against state officers have become relatively com-

Mississippi, where Monaco had also received bonds as a gift but was not allowed to bring suit. See note 22 *supra*.

The eleventh amendment has also been held not to extend to suits brought against the states by the United States. See *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965); *United States v. Texas*, 143 U.S. 621, 642-46 (1882).

24. 209 U.S. 123 (1908). Professor Wright has described the fiction as "indispensable to the establishment of constitutional government and the rule of law." C. WRIGHT, *LAW OF FEDERAL COURTS* 292 (4th ed. 1983). When it was decided, however, *Ex parte Young* was not greeted with unqualified enthusiasm. Judge Henry Friendly, who graduated from Harvard Law School in 1927, remembers *Young* as "the *bête noire* of liberals in [my] law school days." H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 3 n.7 (1973); see also Duker, *Mr. Justice Rufus W. Peckham and the Case of Ex parte Young: Lochnerizing Munn v. Illinois*, 1980 B.Y.U. L. REV. 539.

25. The fiction was in fact firmly established well before *Ex parte Young*. See, e.g., *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 283-84 (1906) (suit against state attorney general to enjoin the collection of unconstitutional taxes); *Prout v. Starr*, 188 U.S. 537 (1903) (suit to enjoin, *inter alia*, the state attorney general from seeking to enforce an unconstitutional state railroad rate regulation statute in state court); *Smyth v. Ames*, 169 U.S. 466, 518-19 (1898) (suit to enjoin, *inter alia*, state officials from seeking to enforce an unconstitutional state railroad rate regulation statute); cases cited in note 222 *infra*.

The novelty of *Ex parte Young* lay not in the ability to enjoin a state officer *simpliciter*, but rather in the ability to enjoin him from bringing suit in state court when that court was competent to decide the issues adjudicated in the federal injunctive suit. In other words, the significance of *Young* in 1908 was its consequence for what one today would call equitable abstention. For an interesting discussion, see Soifer & Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141 (1977).

26. There were a few troublesome exceptions. See, e.g., *In re Ayers*, 123 U.S. 443 (1887) (injunction against suit by state attorney general against those seeking to pay their state taxes with tax coupons denied, although it was conceded that his action was intended to permit the

mon²⁷ and when damage awards against state officers are available under certain circumstances,²⁸ the Court has expanded considerably the potential range of application of the *Ex parte Young* fiction. In 1974, the Court tried to reformulate the *Ex parte Young* principle to take these developments into account, when, in *Edelman v. Jordan*,²⁹ it distinguished between permissible prospective relief and impermissible retroactive relief "which requires the payment of funds from the state treasury."³⁰ The *Edelman* formulation, however, has only partially succeeded in ordering and rationalizing the results reached in eleventh amendment cases.³¹

Although the doctrinal structure is untidy, one may say that the *Ex parte Young* principle today permits considerable federal judicial control over state behavior and permits generally effective remedies against wrongful acts of state officers. The obvious exceptions are suits under the contracts clause to enforce payment of state bonds³² and damage suits against state officers when the damage award will require payment from the state treasury or when the officer can assert some form of official immunity.³³ The *Ex parte Young* fiction, however, by no means exhausts the means by which a state may be sued in federal court.

First, a state may consent to be sued. Consent may be found from a variety of state actions. A state's voluntary appearance in court and defense on the merits constitutes consent,³⁴ although a state may later object to the court's jurisdiction, even if the first time it objects to such jurisdiction is on appeal after a loss on the merits at trial.³⁵ A state statute also may confer consent, although such statutes are narrowly construed: If the statute does not unambiguously grant consent to federal court suit, a state will be held to have con-

state to avoid its obligations under the federal contracts clause). For further discussion, see notes 269-72, 339-42 *infra* and accompanying texts.

27. *See, e.g.*, *Milliken v. Bradley* (II), 433 U.S. 267 (1977); *Griffin v. County School Bd.*, 377 U.S. 218 (1964).

28. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

29. 415 U.S. 651 (1974).

30. *Id.* at 677; *see* notes 323-26 *infra* and accompanying text.

31. *See* notes 327-53 *infra* and accompanying text.

32. *See* *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934); *Hans v. Louisiana*, 134 U.S. 1 (1890); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883).

33. *See* note 331 *infra*.

34. *Gunter v. Atlantic Coast Line R.R.*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883).

35. *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974); *see* notes 226-35 *infra* and accompanying text.

sented to suit only in state court.³⁶ Finally, it is possible that a state may consent by voluntarily engaging in activity regulated by the federal government. In 1964, in *Parden v. Terminal Railway*,³⁷ the Supreme Court held that Alabama gave its consent to suit under the Federal Employers' Liability Act by operating a small port railroad. The vitality of *Parden*, however, is now open to question, for the Court in recent years has been reluctant to find that a state has consented to suit in federal court merely by engaging in activity regulated by the federal government.³⁸

Second, Congress may abrogate a state's immunity to suit when it acts pursuant to certain of its enumerated powers. In 1976, the Supreme Court held in *Fitzpatrick v. Bitzer*³⁹ that Congress had validly authorized private damage suits brought in federal court against the states for violation of the Civil Rights Act of 1964 since the Act was enacted pursuant to Congress' power to enforce the fourteenth amendment. In *City of Rome v. United States*,⁴⁰ the Court in 1980 apparently extended the *Fitzpatrick* principle to at least the fifteenth amendment as well.⁴¹ The Court has not decided, however, whether private causes of action in federal court against states may be inferred directly from the fourteenth or fifteenth amendments.⁴² And the practical reach of the *Fitzpatrick* principle is uncertain: While it is clear the Congress must intend that a statute abrogate a state's sovereign immunity in order for the statute to accomplish this result,⁴³ it is unclear how close a link there must be between the provisions of the amendment or amendments and the statute under which Congress intends to impose liability.⁴⁴

36. *See, e.g.*, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 578-80 (1946) (state statutory consent to be sued in state court does not confer consent to be sued in federal court); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464-66 (1945) (same); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944) (same); *Smith v. Reeves*, 178 U.S. 436, 441 (1900) (same).

37. 377 U.S. 184 (1964); *see also* *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959) (consent found, but possibly dictum).

38. *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (per curiam) (consent not found); *Edelman v. Jordan*, 415 U.S. 651 (1974) (same); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (same); *see* notes 343-53 *infra* and accompanying text.

39. 427 U.S. 445 (1976); *see also* *Maher v. Gagne*, 448 U.S. 122 (1980); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980); *Hutto v. Finney*, 437 U.S. 678 (1978).

40. 446 U.S. 156 (1980).

41. *Id.* at 179-80.

42. *See* *Milliken v. Bradley (II)*, 433 U.S. 267, 290 n.23 (1977).

43. *Quern v. Jordan*, 440 U.S. 332 (1979).

44. *See* notes 317-20 *infra* and accompanying text.

Third, the eleventh amendment's prohibition of suits against the states has never been extended to subdivisions of the state such as cities, counties, and local school boards.⁴⁵ For most of this century, the limited reach of the amendment made little practical difference because no federal statute imposed liability directly upon these state subdivisions.⁴⁶ As a consequence, suits against both a state and its subdivisions were brought against state and local officials under an *Ex parte Young* rationale. But the Supreme Court changed this in 1978 when, in *Monell v. Department of Social Services*,⁴⁷ it held that Section 1983 of the Civil Rights Act⁴⁸ creates private causes of action directly against the states' subdivisions. Thus, while the eleventh amendment currently protects the states from direct suits and from certain damage suits against their officers, it provides no comparable protection for their subdivisions.

Finally, it is possible that a state could be required to defend a private suit in its own state courts even though the eleventh amendment protects it against such a suit in federal court.⁴⁹ To date, however, Supreme Court opinions contain only scattered hints that the protection of the amendment would ever be reduced to a constitutionally determined forum choice for plaintiffs seeking remedies that are forbidden by the amendment.⁵⁰

The result of the Court's expansive reading of the scope of the eleventh amendment's prohibition and of the Court's use of fictions and exceptions to limit the impact of that prohibition is a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field. Moreover, the issues inherent in state

45. *Workman v. New York*, 179 U.S. 552 (1900) (cities); *Moor v. County of Alameda*, 411 U.S. 693, 717-21 (1973) (counties); *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (school boards); see notes 255-89 *infra* and accompanying text.

46. See notes 273-75 *infra* and accompanying text.

47. 436 U.S. 658 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961)).

48. 42 U.S.C. § 1983 (1976).

49. See notes 236-54 *infra* and accompanying text.

50. See *Maher v. Gagne*, 448 U.S. 122, 130 n.12 (1980) (eleventh amendment issue not before the court in *Maine v. Thiboutot* when attorneys' fees were awarded against a state by a state court); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980) ("No Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'"); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 287 (1973) (plaintiffs may "arguably" have a federal cause of action against the state in state court); *id.* at 298 (Marshall, J., concurring) ("[S]ince federal law stands as the supreme law of the land, the State's courts are obliged to enforce it, even if it conflicts with state policy."); see notes 236-54 *infra* and accompanying text.

sovereign immunity are important and complex in ways that the present understanding of the amendment tends to obscure. Under these circumstances, it may be helpful to understand what the eleventh amendment meant to those who adopted it and to understand what state sovereign immunity appears to have meant to those who adopted the Constitution.

II. THE ORIGINAL MEANING OF THE ELEVENTH AMENDMENT

The eleventh amendment was enacted to overturn the result in *Chisholm v. Georgia*,⁵¹ in which the Supreme Court held in 1793 that a South Carolina citizen could bring a contract claim for damages against the state of Georgia in federal court. The manner in which this overruling took place is as important as the fact itself. This section of the article attempts to put *Chisholm* and the amendment in their historical context. First, it reviews the available evidence concerning the origin and probable original understanding of the clause of article III that led to *Chisholm*. Second, it describes the Court's decision in *Chisholm* and its overruling by the eleventh amendment.

A. *The State-Citizen Diversity Clause of Article III*

A historical understanding of the eleventh amendment and of the holding the amendment was designed to overrule must begin with the constitutional provision upon which the Court based its decision in *Chisholm v. Georgia*. Article III of the Constitution contains both subject matter-based and party-based heads of jurisdiction. *Chisholm* was brought under a party-based head of jurisdiction providing that the federal judicial power should extend to controversies "between a State and Citizens of another State."⁵²

The state-citizen diversity clause was added in a marginal note to the draft of article III submitted by the Committee of Detail⁵³ to the Constitutional Convention on August 27, 1787.⁵⁴ The Committee wrote the draft to satisfy its charge to specify in detail the jurisdiction

51. 2 U.S. (2 Dall.) 419 (1793).

52. U.S. CONST. art. III, § 2, cl. 6. The discussion in the text is for the most part limited to this provision. A later provision authorizing a closely related jurisdiction over "controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects," was also affected by the eleventh amendment, perhaps in part because it was thought by some that the suit in *Chisholm* had been brought by a British subject rather than a citizen of South Carolina. See note 94 *infra*.

53. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 147 (M. Farrand ed. 1937) [hereinafter cited as RECORDS].

54. *Id.* at 423-25.

of the federal courts described in a general resolution of the full Convention as extending "to all cases under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony."⁵⁵ The five members of the committee included two men who later played significant roles in *Chisholm v. Georgia*—Edmund Randolph of Virginia and James Wilson of Pennsylvania.⁵⁶ The draft was in Randolph's handwriting, but the marginal note was written by another member of the committee—John Rutledge of South Carolina. The fact that a different person wrote the note may suggest that the clause was an afterthought, but the fact that Rutledge also added (though not in the margin) a clause providing for admiralty jurisdiction undermines the strength of this suggestion.⁵⁷ Admiralty almost certainly was not an afterthought, for it was widely seen as essential to the new federal court system.⁵⁸ There was apparently no discussion of the state-citizen diversity clause during the Constitutional Convention, and the Convention adopted the clause in virtually the same form as it was drafted by the Committee of Detail.⁵⁹

55. *Id.* at 46 (Madison's notes) (Motion proposed by Madison on July 18, 1787). Madison offered this proposal as a replacement to a similar motion previously proposed by Edmund Randolph. Randolph had proposed, "That the jurisdiction of the national Judiciary shall extend to cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony." 1 *id.* at 223-24 (June 13, 1787). In his original resolution, Randolph had offered a more detailed plan for individual heads of jurisdiction, including a provision for "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested . . ." *Id.* at 22 (May 29, 1787).

56. Randolph later argued on behalf of *Chisholm* as United States Attorney General. Wilson later wrote one of the majority opinions in *Chisholm*. The other members of the Committee of Detail were John Rutledge of South Carolina, Nathaniel Gorham of Massachusetts, and Oliver Ellsworth of Connecticut. 2 *id.* at 106.

57. *Id.* at 147. A facsimile of the manuscript is contained in Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 467 (1925).

58. Charles Warren commented on the late addition of admiralty to the draft: It is singular that admiralty jurisdiction was not contained in Randolph's original draft, for Madison had written to Randolph, April 8, 1787: "It seems at least essential that an appeal should be to some National tribunal in all cases which concern foreigners or inhabitants of other States. The admiralty jurisdiction may be fully submitted to the National Government"; and to Washington, Madison had written, April 16, 1787: "The admiralty jurisdiction seems to fall entirely within the purview of the National Government."

C. WARREN, *THE MAKING OF THE CONSTITUTION* 535 n.1 (1928); see also *THE FEDERALIST* No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961) ("The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.")

59. The Committee of Detail draft provided for jurisdiction "in disputes between a State & a Citizen or Citizens of another State." 2 RECORDS, *supra* note 53, at 147. As finally adopted, article III provides for jurisdiction over "Controversies . . . between a State and Citizens of another State."

Several pamphlets designed to influence the state ratifying conventions mentioned the clause. An anonymous anti-Federalist pamphlet,⁶⁰ published as *Letters from the Federal Farmer*, objected to the clause on the ground that it would "humble" the states by subjecting them to undesirable liability.⁶¹ A series of anti-Federalist essays published in the *New York Journal* under the pseudonym "Brutus"⁶² objected sharply to the clause on the same ground.⁶³ Alexander Hamilton responded to "Brutus" in *Federalist 81*, contending that the

60. The pamphlet has traditionally been attributed to Richard Henry Lee of Virginia, but Professor Storing concludes that Lee's authorship is open to question. 2 THE COMPLETE ANTI-FEDERALIST 215-16 (H. Storing ed. 1981).

61. 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 performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to oblige 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 citizens of different states, citizens and foreigners, states and foreigners; and 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.

Id. at 245.

62. The authorship of these essays is uncertain. Paul Leicester Ford has suggested Robert Yates, a New York delegate to the Constitutional Convention. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 424 (P. Ford ed. 1888) [hereinafter cited as PAMPHLETS]. Professor Jeffrey has suggested Melancton Smith, an anti-federalist lawyer "who spoke effectively in opposition to Alexander Hamilton." Jeffrey, *The Letters of 'Brutus'—A Neglected Element in the Ratification Campaign of 1787-88*, 40 U. CIN. L. REV. 643, 645 (1971).

63. I conceive the clause which extends the power of the judicial to controversies arising between a state and citizens of another state, 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, and, what I believe, the supreme authority of no state ever submitted to.

. . . Every state in the union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering. It is easy to see, that when this once happens, the notes of the state will pass rapidly from the hands of citizens of the state to those of other states.

. . . It is certain the state, with the utmost exertions it can make, will not be able to discharge the debt she owes, under a considerable number of years, perhaps with the best management, it will require twenty or thirty years to discharge it. This new system will protract the time in which the ability of the state will enable them to pay off their debt, because all the funds of the state will be transferred to the general government, except those which arise from internal taxes.

The situation of the states will be deplorable. By this system, they will surrender to the general government, all the means of raising money, and at the same

clause was not designed to force states to pay their debts by means of federal court judgments,⁶⁴ and argued in *Federalist 80* that the clause was designed, instead, merely to provide a neutral forum.⁶⁵ Tench Coxe, the author of a series of proratification letters, also defended the clause, but his brief discussion did not mention the possible abrogation of state sovereign immunity. Coxe emphasized, rather, the advantage of impartiality in the federal forum⁶⁶ as Hamilton had

time, will subject themselves to suits at law, for the recovery of the debts they have contracted in effecting the revolution.

. . .
 If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress, will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning. . .

Essays of Brutus, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 60, at 429-31; Jeffrey, *supra* note 62, at 754-57. The *Essays of Brutus* were not reprinted in their entirety until Professor Jeffrey undertook the task in 1971.

The passage quoted here, referring to the anticipated consequence of the state-citizen diversity clause, has never been cited in scholarship on the eleventh amendment. Hamilton's *Federalist 81* is routinely cited in the literature on the eleventh amendment, but the import of Hamilton's remarks is more apparent when one reads the *Essays of Brutus* to which Hamilton was responding. See Jeffrey, *supra* note 62, at 755 n.62.

64. I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. 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, a suggestion which the following considerations prove to be without foundation.

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. . . . [T]here is no color to pretend that the State governments would, by the adoption of [the plan of the convention], 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 pretension to a compulsive force. They confer no right of action independent of the sovereign will.

THE FEDERALIST No. 81, at 487-88 (A. Hamilton) (C. Rossiter ed. 1961).

65. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.

THE FEDERALIST No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

66. [W]hen a dispute arises between the citizens of any state about lands lying out of the bounds thereof, or when a trial is to be had between the citizens of any state and those of another, or the government of another, the private citizen will not be obliged to go into a court constituted by the state, with which, or with the citizens of which, his dispute is. He can appeal to a disinterested federal court. This is surely a great advantage, and promises a fair trial, and an impartial judgment.

T. COXE, AN EXAMINATION OF THE CONSTITUTION FOR THE UNITED STATES OF AMERICA (NUMBER IV) 19, reprinted in PAMPHLETS, *supra* note 62, at 149.

done in *Federalist 80*.

There was some discussion of the clause during the state ratifying conventions. It received the most careful attention in Virginia. George Mason, who had attended the constitutional convention but who opposed ratification, criticized the clause as demeaning to and unenforceable against the states as defendants.⁶⁷ Both James Madison and John Marshall argued in response that the clause conferred jurisdiction only when the state was a plaintiff⁶⁸ and that Mason's concerns were therefore groundless.⁶⁹ Edmund Randolph—

67. "To controversies between a state and the citizens of another state." How will their jurisdiction in this case do? Let gentlemen look at the westward. Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? 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 farther. What is to be done if a judgment be obtained against a state? Will you issue a *fiery 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.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526-27 (J. Elliot ed. 1881) [hereinafter cited as ELLIOT'S DEBATES]. Patrick Henry was also very critical of the clause. *Id.* at 543.

68. Madison responded,

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 a suit against a citizen, it must be brought before the federal court.* This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts.

Id. at 533 (emphasis added).

Marshall responded,

I hope that no gentleman 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 should 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 the words. But, say they, 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.

Id. at 555-56 (emphasis added).

69. Professor Field suggests that the argument may have disingenuously "discounted the possibility that article III abrogated immunity, in order to assuage states-rightists' fears." Field, *Part One, supra* note 2, at 534. The argument need not be so regarded. Article III also extended jurisdiction to controversies to which the United States "shall be a Party," U.S. CONST. art. III, § 2, cl. 4, but it was not seriously contended that the United States could be compelled to appear as a defendant merely because the clause used the term "party" rather than "plaintiff." Chief Justice Jay noted the difficulty in his opinion in *Chisholm*:

who had been a member of the Committee of Detail and who was later to argue on behalf of Chisholm before the Supreme Court—also responded to Mason. Unlike Madison and Marshall, Randolph defended the clause on the twin assumptions that the state could be either a plaintiff or a defendant and that the clause would indeed subject the states to liability.⁷⁰

In the Pennsylvania debates, James Wilson—who had been a member of the Committee of Detail with Randolph, and who was

[T]he same section of the constitution which extends the judicial power to controversies “between a state and the citizens of another state,” does also extend that power to controversies to which the United States are a party. Now, it may be said, if the word party comprehends both plaintiff and defendant, it follows, that the United States may be sued by any citizen, between whom and them there may be a controversy.

2 U.S. (2 Dall.) 419, 478 (1793). But Jay concluded that the clause did not abrogate the sovereign immunity of the United States, although it did not necessarily exclude jurisdiction when the United States consented to be sued. *Id. Cf. Williams v. United States*, 289 U.S. 553 (1933) (a heavily criticized modern decision holding article III federal courts not capable of taking jurisdiction over suits in which the United States is a party defendant).

70. An honorable gentleman has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred? Suppose justice was refused to be done by a particular state to another. . . . I think, whatever the law of nations may say, 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*. But it is objected that this is retrospective in its nature. If thoroughly considered, this objection will vanish. It is only to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government.

3 ELLIOT'S DEBATES, *supra* note 67, at 573.

Randolph had stated earlier, “I admire that part which forces Virginia to pay her debts.” *Id.* at 207. This statement has been cited as evidence that he interpreted the state-citizen diversity clause as abrogating state immunity from suit. *See C. JACOBS, supra* note 2, at 33; Field, *Part One, supra* note 2, at 531; Nowak, *supra* note 2, at 1426. But the chain of argument is more complex than these citations suggest. In context, Randolph appears to have directed his statement to article I, section 10, clause 1, providing that “No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin as Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts” Opponents of the Constitution had objected that these provisions would require Virginia to pay her debts in full; Patrick Henry particularly objected to them because they would prevent payment in depreciated currency and would instead require payment by Virginia “pound for pound” and “shilling for shilling.” 3 ELLIOT'S DEBATES, *supra* note 67, at 319; *see also id.* at 471. This clause was linked by Henry to the state-citizen diversity clause, for he contended that the states could, by virtue of the state-citizen diversity jurisdiction, be brought into federal court and there compelled to pay their debts at full value. In the exchange with Henry, Randolph defended the clause of article I, calling it a “great favorite of mine.” *Id.* at 477. When Randolph's later explicit reference to the state-citizen clause of article III is read in conjunction with the discussions of article I, section 10, clause 1, it appears that Randolph contemplated the availability of suit under the state-citizen diversity clause to enforce payment by the states.

later to write one of the majority opinions in *Chisholm*—praised the clause. But his words are probably best understood as referring only to the neutrality of the federal forum, for he made no reference to the clause imposing liability on an unwilling state.⁷¹ In the North Carolina ratification debates, William Davie—a member of the Constitutional Convention—praised the clause as providing a neutral forum.⁷² James Iredell, an active participant in the North Carolina debates and the author of the only dissenting opinion in *Chisholm*, did not comment on the clause.⁷³ Although the clause is known to have been a matter of concern in other states, it is not mentioned in the records of the ratifying debates that have been preserved.⁷⁴

At the conclusion of their ratifying debates, several states proposed constitutional amendments that would have eliminated the clause or limited its effect. Virginia proposed an amendment that, among other things, would have eliminated state-citizen and citizen-citizen jurisdiction as well as general federal question jurisdiction.⁷⁵ North Carolina proposed an amendment virtually identical to that proposed by Virginia.⁷⁶ Rhode Island proposed an amendment that would have eliminated state-citizen jurisdiction and, in addition, stated explicitly that suits concerning payment of the state's public

71. When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. 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 67, at 491.

72. It has been equally ceded, by the strongest opposers to this government, that the federal courts should have cognizance of controversies between two or more states, between a state and the citizens of another state, and between the citizens of the same state claiming lands under the grant of different states. Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge.

4 ELLIOT'S DEBATES, *supra* note 67, at 159.

73. Nor does Iredell's pamphlet, *Answers to Mr. Mason's objections to the new Constitution, recommended by the late Convention*, in PAMPHLETS, *supra* note 62, at 333, reprinted in 2 G. MCREE, LIFE OF JAMES IREDELL 186-215 (1857), mention the clause. The objections to which Iredell was responding in his pamphlet were contained in a short written piece which Mason circulated among his friends at the end of the Constitutional Convention, and published in newspapers and as a broadside in November, 1787. 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 60, at 9-14. These objections did not mention the state-citizen diversity clause, to which Mason later objected in the Virginia debates. See note 67 *supra*. Except in connection with the actual decision in *Chisholm*, there is no mention of the clause in any of the Iredell correspondence published in McRee's two volumes. See G. MCREE, *supra*.

74. See C. JACOBS, *supra* note 2, at 27-40.

75. For the complete text of the Virginia amendment, see 3 ELLIOT'S DEBATES, *supra* note 67, at 660-61.

76. See 4 *id.* at 246.

securities could not be entertained.⁷⁷ Massachusetts and New Hampshire also proposed amendments objecting to “the states [being] made subject to the action of an individual.”⁷⁸ At the New York ratifying convention, Samuel Jones⁷⁹ proposed an amendment providing “that nothing in the Constitution now under consideration . . . is to be construed to authorize any suit to be brought against any state, in any manner whatever.”⁸⁰ But this language was not adopted by the New York Convention, and the amendments actually proposed by New York left the state-citizen diversity clause intact.

Prompted by various resolutions and proposed amendments submitted by the state ratifying conventions, Congress adopted what became the first ten amendments to the Constitution during its first session. On August 18, 1789, while Congress debated these amendments, and while what was to become the Judiciary Act of 1789 awaited action by the House, Thomas Tudor Tucker of South Carolina⁸¹ proposed an amendment that would have stricken the state-citizen diversity clause from article III, section 2.⁸² But Tucker’s pro-

77. 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 317 (United States State Dep’t ed. 1894).

78. 1 S. TUCKER, BLACKSTONE’S COMMENTARIES WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 352 & n.* (1803) [hereinafter cited as TUCKER’S BLACKSTONE]. Tucker does not give the text of the proposals.

79. 2 ELLIOT’S DEBATES, *supra* note 67, at 207.

80. *Id.* at 409.

81. Tucker is identified as Representative Thomas Tudor Tucker of South Carolina at 1 ANNALS OF CONG. 99 (Mar. 4, 1789). Charles Warren erroneously identifies him as “Tucker of Virginia.” Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 119 (1923). Warren possibly confused Thomas Tucker with his more famous contemporary, St. George Tucker of Virginia, editor of a 5-volume edition of Blackstone, the first volume of which contains a valuable appendix on the American Constitution. See TUCKER’S BLACKSTONE, *supra* note 78.

Thomas Tudor Tucker did not participate in the South Carolina debates on the ratification of the Constitution, see 4 ELLIOT’S DEBATES, *supra* note 67, at viii–ix, 253–342, although he had written what Professor Wood calls “one of the most prescient and remarkable pamphlets written in the Confederation period, entitled ‘Conciliatory hints, Attempting by a Fair State of Matters, to Remove Party Prejudice.’” G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 280 (1969).

82. 1 ANNALS OF CONG. 791 (Aug. 19, 1789). Tucker’s proposed amendment would have eliminated citizen-citizen jurisdiction as well, and the only inferior federal courts it would have permitted Congress to establish were admiralty courts. Professor Mathis, in his generally admirable historical account of *Chisholm v. Georgia*, erroneously states that “no amendment on the suability of the states was ever introduced in the First Congress.” Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 214 (1968). Professor Jacobs mentions Tucker’s proposed amendment in a footnote without comment or interpretation. C. JACOBS, *supra* note 2, at 179 n.85. Professors Field, Nowak, and Tribe do not mention Tucker’s proposed amendment. See Field, *supra* note 2; Nowak, *supra* note 2; Tribe, *supra*

posal died when it was not referred to the consideration of the full House of Representatives.⁸³

On September 24, 1789, slightly more than a month after Tucker proposed his amendment, Congress passed the Judiciary Act of 1789.⁸⁴ Section 13 of the Act conferred original jurisdiction⁸⁵ on the United States Supreme Court in state-citizen diversity cases.⁸⁶ The most striking thing about section 13 is the ease with which it was enacted. The Judiciary Act originated in a Senate committee appointed on April 7, 1789. On May 24, a member of the committee, Caleb Strong of Massachusetts,⁸⁷ wrote to Massachusetts Attorney General Robert Paine about its progress. Strong reported that the state-citizen diversity jurisdiction of the Supreme Court had already been settled and described it in virtually the same words that were eventually enacted.⁸⁸ As the bill made its way through Congress—first through the Senate, then through the House, and finally through the Senate again after the first ten amendments to the Constitution had been passed and after the House had amended the bill—the state-citizen diversity clause was never challenged. Indeed,

note 2. Professor Goebel states that Tucker's proposed amendment was "fractioned out of the Amendment 14 offered at the Virginia Convention." J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801*, at 439 n.145 (1971) (Vol. I of the Holmes Devise). Tucker's proposals bears a strong resemblance to the amendments proposed by both Virginia and North Carolina, but I have been unable to discover any direct evidence that either was its source.

83. 1 ANNALS OF CONG. 792 (Aug. 19, 1789).

84. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

85. Although an argument could have been made in 1789 that the Supreme Court's original jurisdiction was self-executing, the Judiciary Act nevertheless purported to confer that jurisdiction by statute. The self-executing nature of the jurisdiction was not established until some time later. *See Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1855); *see also Durosseau v. United States*, 10 U.S. (6 Cranch) 307, 313-14 (1810).

86. [T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens, and except also between a state and citizens of others states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

87. Strong was a Massachusetts delegate to the Constitutional Convention, but he apparently did not take any significant role in the deliberations on the judiciary article.

88. The Sup. Court to have exclusive Jurisdiction of all Causes of a civil nature where any of the United States or a foreign State is a party except between a State and its Citizens and except also between a State and the Citizens of other States or Foreigners in which latter Case it shall have original but not exclusive Jurisdiction

. . . .

Letter from Caleb Strong to Robert T. Paine (May 24, 1789), *quoted in* J. GOEBEL, *supra* note 82, at 462 n.19. For the text of section 13 as enacted, see note 86 *supra*.

so far as the record discloses, it was never discussed.⁸⁹ Even Tucker—who had sought earlier to eliminate the state-citizen clause of article III by constitutional amendment—did not challenge the clause when it appeared in the bill.⁹⁰

In sum, one may conclude that the state-citizen diversity clause did not occupy as prominent a place in the debates over the Constitution or the deliberations on the Judiciary Act as one would expect if it had been widely understood, or feared, that by its own force the clause would have permitted private citizens to sue unconsenting states on their outstanding debts.⁹¹ Yet the issue had been raised, and several men, most of them opponents of the new Constitution, had contended that this was, in fact, precisely the effect of the clause.

B. *Chisholm v. Georgia and its Overruling by the Eleventh Amendment*

*Chisholm v. Georgia*⁹² was the first case decided under the new United States Constitution.⁹³ It arose when Georgia failed to pay for supplies that a South Carolina merchant,⁹⁴ Robert Farquhar, had

89. For good narratives of the passage of the Act, see J. GOEBEL, *supra* note 82; Warren, *supra* note 81.

90. Tucker did seek to amend the bill to restrict the jurisdiction of the lower federal courts to admiralty, 1 ANNALS OF CONG. 813 (Aug. 24, 1789), but he never attempted to amend the bill to eliminate the state-citizen diversity jurisdiction of the Supreme Court.

91. Professor Field's conclusion is stronger. She contends that "in weight of numbers, the anti-immunity comments clearly prevail"; that there was, "at least, a lack of consensus concerning the status of sovereign immunity when the Constitution was ratified"; and that the Supreme Court's decision in *Chisholm v. Georgia* "was not . . . the clear contravention of a general understanding that it has long been said to be." Field, *Part One, supra* note 2, at 531, 534, 536.

92. 2 U.S. (2 Dall.) 419 (1793).

93. *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), came before the Court during August Term, 1792, but it is probably not properly described as a constitutional decision. Hayburn had filed a petition for a pension under an Act of Congress passed in 1792. The United States Attorney General moved to seek *ex officio* a writ of mandamus requiring the circuit court for the district of Pennsylvania to proceed with the petition, but the Court denied the motion. Subsequently, the Attorney General declared himself to be acting on behalf of Hayburn. The Court then took his motion for mandamus under advisement, but was spared the necessity for a decision when Congress changed the statute. *Id.* at 409-10. For accounts of early constitutional litigation in the Supreme Court, see Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981); Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982).

94. Relying on an erroneous newspaper report, Charles Warren recounts that the suit was brought by South Carolina executors of a British creditor. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 93 n.1 (1922). Professor Mathis traces the source of this error in Mathis, *supra* note 82, at 217 n.38 (1968). The United States Supreme Court recently relied on Warren's account, apparently not realizing that it had been corrected in this respect. *See Edelman v. Jordan*, 415 U.S. 651, 662 (1974).

provided during the Revolution under a contract with the state.⁹⁵ Farquhar's executor, Chisholm, brought suit in a federal circuit court in Georgia in 1790, but the suit was dismissed in 1791.⁹⁶ Chisholm then brought an original suit in the Supreme Court in *assumpsit*⁹⁷ under Section 13 of the Judiciary Act, asking the Court to award a damage judgment. United States Attorney General Randolph argued the case for Chisholm. He first sought to establish that the Constitution authorized jurisdiction over private suits brought against states by pointing to constitutional guarantees that would be deprived of much of their effectiveness if states could not be made defendants.⁹⁸ Randolph then argued, but very briefly, that a state should be subject to suit on other causes of action not based on constitutional guarantees: "The next question is, whether an action of *assumpsit* will lie against a state? I acknowledge, that it does not follow from a state being suable in some actions, that she be liable in every action."⁹⁹ But he concluded, despite his concession of a *non sequitur*, that an action of *assumpsit* was "of all others most free from cavil."¹⁰⁰ Georgia declined to argue the case in response, having al-

95. For a good historical account of the litigation, see Mathis, *Chisholm v. Georgia: Background and Settlement*, 54 J. AM. HIST. 19 (1967); see also J. GOEBEL, *supra* note 82, at 722-36; C. JACOBS, *supra* note 2, at 41-55; Mathis, *supra* note 82.

96. Mathis, *supra* note 95, at 23.

97. *Chisholm* was treated by neither the Justices nor by Randolph as a contracts clause case. The contracts clause may have been intended originally to protect only contracts between private parties from impairment by acts of the states. B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 15-21 (1938). The first case holding that the clause included within its scope an agreement between a state and a private party was *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), in which the Court held that an executed contract under which the state had granted land could not be revoked legislatively by the state. But even if the facts of *Chisholm* had arisen after *Fletcher v. Peck*, the Court probably still would not have considered Georgia's action to be a violation of the contracts clause. Although the doctrine in its early stages of development was not entirely clear, it was eventually established that a mere breach of contract did not come within the scope of the clause. See, e.g., *Shawnee Sewerage & Drainage Co. v. Stearns*, 220 U.S. 462, 471 (1911) (breach of contract by a municipality a "simple breach of contract" not amounting to a "law impairing the obligation of the contract"); *Brown v. Colorado*, 106 U.S. 95, 98 (1882) ("[The state's action] may violate the contract, but it does not in any way impair its obligation.").

98. What is to be done, if, in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a state? What, if a state should adulterate or coin money below the congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a state should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected, without a suit against a state.

Chisholm, 2 U.S. (2 Dall.) at 422.

99. *Id.* at 428.

100. *Id.*

ready entered a written objection to the exercise of jurisdiction.¹⁰¹

Four of the five¹⁰² Justices found that the state-citizen diversity clause of article III and the implementing Judiciary Act conferred jurisdiction on the Court to grant a damage judgment against a state in an *assumpsit* action brought by a private citizen. Justice Wilson, the most theoretically inclined of the Justices, treated the case as posing the question of whether the ancient principle of sovereign immunity was consistent with the principles of general jurisprudence and with those of the new American government. Without distinguishing between claims based on federal law and other, non-federal claims, he concluded that since the state was the creation of man, it should be no more entitled to assert the defense of sovereign immunity than a man.¹⁰³ In a lengthy opinion, Chief Justice Jay also concluded that Georgia was liable to private suit in *assumpsit* without distinguishing between federal and nonfederal causes of action.¹⁰⁴ Justices Blair and Cushing each delivered short opinions, neither of which discussed the nature of the particular cause of action in the case.

Only Justice Iredell dissented. He began his opinion by saying that he had asked Attorney General Randolph to speak to the particular question of whether an action of *assumpsit* should lie against the state "because I have often found a great deal of confusion to arise from taking too large a view at once."¹⁰⁵ But he noted that Randolph "spoke to this particular question [of *assumpsit*] slightly, conceiving it to be involved in the general one."¹⁰⁶ Unlike Randolph and his fellow Justices, Iredell distinguished between two kinds of private suits against states. The first, of which *assumpsit* was an ex-

101. *Id.* at 419.

102. The Justices were Chief Justice Jay and Associate Justices Blair, Cushing, Iredell, and Wilson. At the time, the Supreme Court normally was composed of six Justices, *see* Judiciary Act of 1789, Ch. 20, § 1, 1 stat. 73, but when *Chisholm* was decided, on February 18, 1793, Justice Thomas Johnson had recently resigned. Justice Paterson was not appointed to take his place until March 4, 1793. 2 U.S. (2 Dall.) at 480.

103. A state, like a merchant, makes a contract. A dishonest state, like a dishonest merchant, willfully refuses to discharge it: the latter is amenable to a court of justice: upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a *sovereign* state? Surely not.

Chisholm, 2 U.S. (2 Dall.) at 456.

104. After noting that Georgia was "at this moment suing two citizens of South Carolina" in another suit, *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792), Justice Jay wrote, "[T]hat that rule is said to be a bad one, which does not work both ways; the citizens of Georgia are content with a right of suing citizens of other states; but are not content that citizens of other states should have a right to sue them." *Id.* at 473.

105. *Id.* at 430.

106. *Id.*

ample, included suits brought under jurisdiction conferred by Congress “not relat[ing] to the execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the Constitution itself), [and] refer[ing] to antecedent laws for the construction of the general words they use.”¹⁰⁷ Section 13 of the Judiciary Act conferred jurisdiction on the Supreme Court concurrent with that of state courts; and, said Iredell, Congress intended in that section to confer on the Supreme Court no more power to grant judgment against the states than the state courts themselves exercised under this concurrent jurisdiction.¹⁰⁸

Iredell described the second category of suits as including causes of action created under laws enacted by Congress pursuant to its power “to pass all such laws as they might deem necessary and proper to carry the purposes of this constitution into full effect.”¹⁰⁹ *Chisholm*, involving a common law *assumpsit* action, was not such a case,¹¹⁰ and Iredell pointedly reserved decision on the extent of Congress’ power to authorize private suits against the states under federal law. He noted that he took a narrower view of this power than Randolph, and he expressed strong doubts about the ability of Congress to authorize suits against a state “for the recovery of money” because, in his opinion, “every word in the constitution may have its full effect, without involving this consequence.”¹¹¹ But he indicated that he would not necessarily find Congress without power to create some private causes of action under federal law: “If, upon a fair construction of the constitution of the United States, the power contended for really exists, it undoubtedly may be exercised, though it be a power of the first impression.”¹¹²

Chisholm thus held that Georgia could be made liable in federal court on a common law action of *assumpsit*. The four Justices in the majority did not distinguish between causes of action based on fed-

107. *Id.* at 432.

108. *Id.* at 436-37.

109. *Id.* at 432.

110. Whatever be the true construction of the constitution in this particular; whether it is to be construed as intending merely a transfer of jurisdiction from one tribunal to another, or as authorizing the legislature to provide laws for the decision of all possible controversies in which a state may be involved with an individual, without regard to any prior exemption; yet it is certain, that the legislature has in fact proceeded upon the former supposition, and not upon the latter.

Id. at 436.

111. *Id.* at 449-50.

112. *Id.* at 449.

eral law and those based on common law, with the clear implication that since they found liability under common law they perform would do so under federal law. Justice Iredell, the lone dissenter, was unwilling to hold that a state was liable in *assumpsit*, but he explicitly reserved judgment on whether a state could be made liable under federal law.

The reaction to *Chisholm* was immediate and hostile. The Georgia House of Representatives passed a bill declaring that any persons attempting to levy a judgment in the case "are hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged."¹¹³ Other states were alarmed by the decision, not only because of the symbolic affront to their sovereignty, but also because of their considerable indebtedness in the postwar period.¹¹⁴ In Massachusetts, for instance, Governor Hancock called the state legislature into special session, where it passed a resolution in September, 1793, urging Congress to adopt "such Amendments to the Constitution 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."¹¹⁵

One day after the Court announced its decision in *Chisholm*, a constitutional amendment was proposed in the House of Representatives:

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, of any body politic or corporate, whether within or without the

113. Augusta Chron., Nov. 23, 1793, quoted in C. JACOBS, *supra* note 2, at 56-57; see also C. WARREN, *supra* note 94, at 100-01.

114. In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.

C. WARREN, *supra* note 94, at 99; see also *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821) (opinion by Marshall, C.J.) (attributing the passage of the eleventh amendment to great state indebtedness); J. GOEBEL, *supra* note 82, at 741-56; Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 8 (1972); Nowak, *supra* note 2, at 1439-41.

115. C. WARREN, *supra* note 94, at 100. The failure of the resolution to specify precisely which clause of the Constitution it wished repealed may have been due to the difficulty in obtaining copies of the Justices' opinions in *Chisholm*. For a description of the scant publicity given the opinions, as distinct from the result, in the case, see *id.* at 98 n.2.

United States.¹¹⁶

The next day another amendment was proposed in the House:

The Judicial power of the United States shall not extend to any suits 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.¹¹⁷

Both resolutions were tabled, and Congress adjourned less than a month later without taking action. In January, 1794, during the next session, the text of what would become the eleventh amendment was proposed in both the House and the Senate:

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.¹¹⁸

On March 4, a last-minute proposal was made in the House of Representatives to amend the text by adding the words: "Where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect."¹¹⁹ The drafters apparently designed these words to provide that the amendment should override *Chisholm* only when the state created a jurisdictional authorization in its own courts parallel to the authorization that the eleventh amendment otherwise would have eliminated for the federal courts. The proposal was soundly defeated,¹²⁰ and the amendment was passed in its present form immediately thereafter.¹²¹ The requisite twelve states ratified the amendment by February, 1795,¹²² two years after *Chisholm*.¹²³

116. *See* Pa. J. & Weekly Advertiser, Feb. 27, 1793, at 1, col. 2. This proposed amendment does not appear in the *Annals of Congress*.

117. 3 ANNALS OF CONG. 651-52 (Feb. 20, 1793).

118. 4 *id.* at 25 (Jun. 2, 1794) (emphasis indicates words added to the previous version; brackets indicate an "s" omitted from the previous version).

119. *Id.* at 476 (Mar. 4, 1794).

120. The vote was 77 to 8. *Id.* Two last-minute amendments had also been proposed in the Senate. The first, by Albert Gallatin—then Senator from Pennsylvania and later Secretary of the Treasury—would have excepted from the operation of the amendment causes of action arising under treaties, almost certainly in order to permit enforcement of state debts to foreign citizens. The second would have confined the operation of the amendment to causes of action arising after the ratification of the amendment. Both were soundly defeated, and the Senate passed the amendment immediately thereafter. *Id.* at 30-31 (Jan. 14, 1794).

121. *Id.* at 477. The amendment was passed by overwhelming majorities in both houses. The vote had been 23 to 2 in the Senate, *id.* at 30-31, and 81 to 9 in the House of Representatives, *id.* at 477.

122. President Adams certified to Congress in 1798 that the requisite number of states had ratified the amendment, but it appears that the ratification process had in fact been completed three years earlier, in February, 1795. C. JACOBS, *supra* note 2, at 67.

123. Professor Morris concludes that the swift passage of the amendment was a major

A close reading of the several versions of the amendment proposed in Congress suggests that the eleventh amendment had a more modest purpose than to forbid private citizens' suits against the states. The first proposal appears so clearly to have been intended to prohibit the exercise of federal jurisdiction in suits brought by private citizens that if it had become the eleventh amendment the interpretation proposed by this article would be impossible. But the second and third proposals are strikingly different. Instead of providing that "no state shall be liable to be made a party defendant [in federal court]," as did the first proposal, they provide, in words echoing article III,¹²⁴ that "the judicial power shall not extend" and "the judicial power . . . shall not be construed to extend" to certain private citizens' suits against the states. This difference suggests that the amendment was intended to modify article III directly by repealing one of its affirmative grants. Further, instead of addressing the amendment to all citizens regardless of their citizenship, as did the first proposal, the second and third proposals address only out-of-state and foreign citizens, paralleling article III's affirmative authorization of federal court jurisdiction in suits "between a state and citizens of another state" and between a state and "foreign . . . Citizens or Subjects." The narrowness of the amendment's coverage and its congruence with the affirmative authorization in article III of state-citizen diversity jurisdiction suggest strongly that rather than intending to create a general state sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of article III's jurisdictional grant—the state-citizen diversity clause—that had led to *Chisholm*.

The eleventh amendment's failure to mention in-state citizens suggests that its drafters did not intend it to reach federal question suits, for if they intended the amendment to forbid them, their drafting was extraordinarily inept. If one reads the amendment literally, and if one assumes it was intended to forbid federal question suits, one is led to the following unlikely result: All suits brought against a

factor in persuading Chief Justice Jay that the Supreme Court "would not have great influence in the national life," and that he should decline reappointment as chief justice. R. MORRIS, *JOHN JAY, THE NATION, AND THE COURT* 69 (1967).

124. Article III provides, in relevant part,

The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

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.¹²⁵ This result appears so unlikely that one must suspect the adopters did not intend the amendment to prohibit federal question suits against the states,¹²⁶ for if this was their intent they would have prohibited suits by *all* private citizens, not merely those by out-of-state citizens.¹²⁷ Further, the amendment mentions only suits in law and equity. Admiralty was at that time an extremely important part of the federal courts' jurisdiction, and it is therefore unlikely that the failure to mention admiralty was inadvertent. This suggests that the adopters did not intend to forbid suits in admiralty, just as their failure to mention in-state citizens suggests that they did not intend to forbid federal question suits.

Finally, the addition of the words "to be construed" in the third version indicates that the amendment focused on a problem of construction. The obvious problem was the state-citizen diversity clause, which the Supreme Court in *Chisholm* had construed to include cases where the state was a defendant. The amendment required that the clause be construed, instead, to authorize federal court jurisdiction

125. Justice Brennan has taken the position that this is precisely the effect of the eleventh amendment. *See* *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 309-11 (1973) (Brennan, J., dissenting).

126. The only possible explanation consistent both with a desire to prohibit federal question suits brought against the states and with the limitation of the amendment to out-of-state citizens is that the drafters intended to prohibit privileges and immunities suits in federal court, for that is the only federal right against the states that operates specifically for the benefit of the out-of-state citizens. That the drafters intended such a limited federal question function for the amendment, however, seems very unlikely, given that the triggering cause of the amendment—*Chisholm*—was entirely unrelated to the privileges and immunities clause. The list of unlawful state activities mentioned by Edmund Randolph as reasons to permit private suit against the states did not mention violation of the clause. *See* note 98 *supra* and accompanying text. Moreover, the scope of the clause was quite uncertain in 1793. The first reported federal court opinion dealing with the privileges and immunities clause was *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230), thirty years after *Chisholm*.

127. Professor Field agrees that the failure of the amendment to mention in-state citizens is critical:

If . . . all the eleventh amendment does is say that article III should not be read *affirmatively to authorize* the suits with which the amendment deals, there is simply no need for a like provision for suits by a state's own citizens, because there is no language in article III that *could* be read affirmatively to authorize those suits. It is only if the result of the eleventh amendment is to forbid, as a constitutional matter, the suits it enumerates that one is hard pressed to find a rationale for so distinguishing between citizen and noncitizen suits.

Field, *Part One, supra* note 2, at 544.

only when the state was a plaintiff.¹²⁸ In other words, the amendment required that the clause be read to mean precisely what Marshall and Madison had contended it meant during the Virginia ratifying convention.¹²⁹

The conclusion that the amendment was designed merely to require a limiting construction of the state-citizen diversity clause is further supported by the amendments that had been proposed by the Virginia and North Carolina ratifying conventions and by the amendment proposed by Thomas Tudor Tucker during the first Congress. Those amendments each sought simply to remove the state-citizen diversity clause from article III in order to remove the threat to the states that the clause was seen to present. The conclusion is also suggested by the resolution adopted by the Massachusetts legislature after the Supreme Court decided *Chisholm*.¹³⁰ What previously had been seen only as a threat now had become a fact; again, Massachusetts' proposed solution was simply to remove the source of the difficulty from the Constitution.

Although the adopters' aim was similar to a repeal of the clause, the actual amendment is less drastic than the striking out of the clause that Virginia, North Carolina, Massachusetts, and Tucker proposed. Their amendments would have removed the entire head of federal jurisdiction over suits between states and out-of-state or foreign citizens. The construction of the clause required by the eleventh amendment, by contrast, eliminated that jurisdiction only when a private citizen was a plaintiff. It said nothing about, and thus left intact, jurisdiction over civil suits in which the state was a plaintiff.¹³¹ The difference between these earlier proposals and the actual amend-

128. The conventional modern reading of the words "be construed to" is that they were intended to "soften the rebuke" to the Supreme Court. See, e.g., C. JACOBS, *supra* note 2, at 68-69; Nowak, *supra* note 2, at 143. But it is hard to see how these words operate to soften the rebuke of the amendment. The surrounding circumstances of the amendment show that Congress was not at all interested in softening its rebuke; rather, it is obvious that the decision in *Chisholm* was extremely unpopular and that it was indignantly rejected by both Congress and the states.

Reading the amendment as requiring a construction of already-existing constitutional language also helps explain the Supreme Court's dismissal of cases then pending on its docket in which out-of-state plaintiffs had sued the states. See, e.g., *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). John Randolph Tucker pointed out in the 1890's the logical connection between the use of the words "be construed to" and the dismissals. See 2 J. TUCKER, *CONSTITUTION OF THE UNITED STATES* 786 (1899).

129. See note 68 *supra*.

130. See note 115 *supra* and accompanying text.

131. For a modern example of a case brought under this jurisdiction, see *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

ment is unlikely to have been accidental. The anti-Federalists had not seriously opposed a constitutional authorization of jurisdiction in which the states were plaintiffs. Indeed, it was precisely in seeking to allay the fears of the anti-Federalists that Marshall and Madison had argued during the Virginia debates that the state-citizen diversity clause was intended to authorize federal jurisdiction only when a state sued an out-of-state or foreign citizen.¹³² Patrick Henry's rebuttal during the debates was that he did not read the clause so narrowly;¹³³ he never argued that the clause would be offensive if it were so limited.

The most plausible interpretation of the eleventh amendment thus appears to be that it was designed simply and narrowly to overturn the result the Supreme Court had reached in *Chisholm v. Georgia*.¹³⁴ Under this interpretation, the adopters of the amendment were following the traditions of common law lawyers in solving only the problem in front of them by requiring a limiting construction of the state-citizen diversity clause. They declined to say whether the states could be made liable to a private citizen under a federal cause of action, just as Justice Iredell had declined to answer that question in his dissenting opinion in *Chisholm*. It therefore appears from the available evidence surrounding the drafting of the clause, from the decision in *Chisholm*, and from the passage of the amendment that the adopters did not intend it to prohibit a broad range of cases with which they had so far had little or no experience and as to many of which they could then have had little clear idea.

III. STATE SOVEREIGN IMMUNITY TO PRIVATE SUIT AFTER THE RATIFICATION OF THE ELEVENTH AMENDMENT

If the eleventh amendment simply required that the state-citizen diversity clause be construed to confer party-based jurisdiction only when the state is a plaintiff, the amendment itself did nothing to forbid private citizens' suits against the states in federal court.

132. See note 68 *supra*.

133. 3 ELLIOT'S DEBATES, *supra* note 67, at 543.

134. Professor Field agrees with this important proposition. She writes, The provision that the "[j]udicial power of the United States shall not be construed to extend to" certain classes of cases may mean simply that the language should not be deemed *affirmatively to allow* the prosecution of those cases, as it had been deemed to do in *Chisholm*. The eleventh amendment then would simply overturn *Chisholm's* abrogation of sovereign immunity. The cases the amendment enumerates would be outside the judicial power only in the sense that the judicial power language of article III does not compel that they be heard.

Field, *Part One*, *supra* note 2, at 543.

Whether the Constitution otherwise permitted private citizens' suits against unconsenting states in federal court, however, was a distinct question. In a general sense, the answer to that question depended on the nature and extent of state sovereignty after the ratification of the Constitution. In a narrower sense, the answer depended on a specific analysis of the nature of state sovereign immunity from suit in a forum of the federal sovereign. It turns out that the question cannot be answered conclusively, but there is sufficient evidence to give us a fair understanding of the way in which the framers probably thought about the issues involved.

A. *State Versus National Sovereignty: A General View*

The general conception of state sovereignty under the new national Constitution derived from the confluence of and contradiction between the European theories of sovereignty and the practical American experience as colonies and newly independent states. Beginning with Bodin in France in the 1500's,¹³⁵ continental European theorists had developed a concept of sovereignty as a centralized, indivisible power;¹³⁶ Hobbes,¹³⁷ Locke,¹³⁸ and Blackstone¹³⁹ had adapted and developed a similar understanding of sovereignty in England.¹⁴⁰ Yet the American colonies—separated from England by temperament, political habit, and, most of all, geography—were a living contradiction to any theory of a unified sovereign.¹⁴¹ And af-

135. J. BODIN, *LES SIX LIVRES DE LA REPUBLIQUE* (Paris 1576).

136. *See, e.g.*, H. GROTIUS, *DE JURE BELLI ET PACIS* (Paris 1625); S. PUFFENDORF, *DE JURE NATURAE ET GENTIUM* (Lund 1672); E. VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* (London 1758).

137. T. HOBBS, *THE LEVIATHAN* (London 1651).

138. J. LOCKE, *TWO TREATISES OF GOVERNMENT* (London 1689).

139. W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (4 vols.) (Cambridge 1765-69); *see also* T. RUTHERFORTH, *INSTITUTES OF NATURAL LAW, BEING THE SUBSTANCE OF A COURSE OF LECTURES ON GROTIUS DE JURE BELLIS ET PACIS* (Cambridge 1754).

140. Professor Merriam's early study on sovereignty theories is still very useful. Merriam, *History of the Theory Sovereignty Since Rousseau*, 12 *STUD. HIST. ECON. & PUB. L.* 355 (1900). For general discussions of American applications of sovereignty theory, see B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198-229 (1967); D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 393-400 (1965); G. WOOD, *supra* note 81, at 344-89.

141. *See* McLaughlin, *The Background of American Federalism*, 12 *AM. POL. SCI. REV.* 215 (1918); B. BAILYN, *supra* note 140, at 209-29. But the incompatibility of the American experience with traditional sovereignty theory did not prevent even astute commentators from maintaining otherwise. *See, e.g.*, Johnson *Taxation No Tyranny*, in *THE POLITICAL WRITINGS OF DR. JOHNSON* 108 (J. Hardy ed. 1968) ("In sovereignty there are no gradations. There may be limited royalty, there may be limited consulship; but there can be no limited govern-

ter the Revolution, the former colonies thought of themselves in what were, even to them, paradoxical terms as both independent states and as parts of a larger state.¹⁴²

The European model of sovereignty clearly influenced the Articles of Confederation in which the states sought to preserve their sovereign status by reciting explicitly that they were entering into a league.¹⁴³ After reciting that the delegates of the states agreed to "Articles of Confederation and perpetual Union between the [individually-named] states," the Articles provided that "[e]ach State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."¹⁴⁴ Even by the late 1780's, when the defects of the Articles of Confederation had become apparent, the idea of states as sovereign constituents of a league or treaty-based government died hard. For instance—as one example of many—Luther Martin argued during the Constitutional Convention that the central government ought to be formed by and for the states rather than by and for individuals, relying on Locke, Rutherford, and Vattel for support.¹⁴⁵

Nevertheless, despite the theoretical difficulties, the Constitution moved away from the model of sovereign states forming a league that permitted them to retain their status as individual sovereigns. The movement was to some degree ambiguous, and many of the proponents of the Constitution tried to obscure its extent.¹⁴⁶ But in fact,

ment."). Indeed, the idea of a unified sovereign in the period immediately before the Revolution was more than an abstract idea; it became as well a political argument in the hands of those who wished to assert the authority of England over the colonies. See J. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* 146-172 (1978).

142. See, e.g., G. WOOD, *supra* note 81, at 306-89.

143. The idea of a league of sovereign states was part of the standard theory of sovereignty:

[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will together constitute a federal republic: their joint deliberations in common will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements.

E. VATTEL, *supra* note 136, bk. I, ch. I, § 10.

144. ARTICLES OF CONFEDERATION preamble, art. II.

145. 1 RECORDS, *supra* note 53, at 437-38 (Madison's notes); *id.* at 440 (Yates' notes).

146. In an interesting example, Professor Diamond suggests that Hamilton misquoted a passage from Montesquieu in *Federalist 9*, with the effect of blurring the distinction between a league of sovereign states and a consolidated government. Diamond, *The Federalists' View of Federalism*, in *ESSAYS IN FEDERALISM* 21, 30-32 (1961); *cf.* THE FEDERALIST NO. 39 (J. Madison) (arguing that the Constitution is neither wholly national nor wholly federal, but partakes of both).

the Constitution went far—as the Federalists desired and as the anti-Federalists feared—in creating a consolidated government in which the states were no longer sovereign in the then-conventional sense of the word.¹⁴⁷ An obvious but by no means unique piece of evidence was the source of legitimation to which the Constitution appealed. Instead of referring to an agreement among the states, as the Articles of Confederation had done, the Constitution referred to “We, the people” as the constituting authority.¹⁴⁸ The choice was conceived at the time to have genuine significance. Madison, in arguing for a consolidated national government during the Convention, had stated that the “true difference between a *league* or *treaty*, and a *Constitution*” is that the former is a “system founded on the Legislatures only, and [the latter is] founded on the people.”¹⁴⁹ Patrick Henry, arguing against the adoption of the Constitution in the Virginia ratifying debates, agreed as to the significance of the phrase, but disagreed strongly as to its desirability:

The fate . . . of America may depend on this. . . . Have they made a proposal of a compact between the states? If they had, this would be a confederation. It is otherwise most clearly a consolidated government. The question turns, sir, on that poor little thing—the expression, We, the *people*, instead of the *states*, of America.¹⁵⁰

Professor Palmer concludes that appealing to the people rather than the states as the essential constituting authority was the central idea that made possible a new kind of federal structure, unique to the

147. The basic fact was obvious, and admitted, from the very beginning: “It is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all.” 33 JOURNALS OF THE CONTINENTAL CONGRESS OF 1774–1789 502 (September 17, 1787) (letter from George Washington, President of the Constitutional Convention, to the Continental Congress, transmitting the draft constitution).

148. U.S. CONST. preamble. Indeed, other evidence of consolidationist tendencies of the new Constitution was so obvious that the debates over the document did not focus on this statement. See J. MAIN, THE ANTI-FEDERALISTS, CRITICS OF THE CONSTITUTION 1781–1788 122–26 (1961). For good studies of the losing battle of the Anti-Federalists in addition to that of Professor Main, see L. DEPAUW, THE ELEVENTH PILLAR, NEW YORK STATE AND THE FEDERAL CONSTITUTION (1966); R. RUTLAND, THE ORDEAL OF THE CONSTITUTION (1965); Storing, *What the Anti-Federalists Were For*, in 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 60, at 3.

149. 2 RECORDS, *supra* note 53, at 93; see also THE FEDERALIST No. 22, at 152 (A. Hamilton) (C. Rossiter ed. 1961) (“The Fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.”).

150. 3 ELLIOT’S DEBATES, *supra* note 67, at 44; see also *id.* at 22.

United States.¹⁵¹ The national government was not conceived as deriving its power and legitimacy from the sovereign states, which in turn derived their legitimacy from the people. Instead, both the national and state governments derived their power under the new Constitution from the same source. The issue was not how much sovereignty the states had ceded to the central government, but rather how the people had allocated sovereign powers between the states and the national government.¹⁵²

The concept of two coexisting sovereignties—the states and the nation—proved very difficult for the framers, Federalists and anti-Federalists alike, to understand. During the debate over ratification, there were recurring pleas for a precise delineation of power and responsibility between the two sovereignties. Many responded that the division of governmental powers under the new Constitution could be made to fit within familiar distinctions such as that between internal affairs (the province of the states) and external affairs (the province of the national government).¹⁵³ And there were repeated Federalist statements that the respective spheres of the two were so

151. 1 R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION, THE CHALLENGE* 228 (1959).

152. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 209 (1913).

[After the war, the revolutionary generation] justified the hitherto unthinkable notion of two governments in the same state by contending that political institutions were simply agents of the people and not in themselves sovereign. Yet this contention did not destroy "*imperium in imperio*" [a state within a state] as a political solecism; the concept was simply transformed to a new kind of problem.

J. KETTNER, *supra* note 141, at 285.

153. For example, Chancellor Livingston argued during the New York ratifying debates:

The sphere in which *the states* moved was of a different nature; the transactions in which they were engaged were of a different complexion[;] the objects which came under their view wore an aspect totally dissimilar. The legislatures of the states, he said, were not elected with a political view, nor for the same purposes as the members of Congress. Their business was to regulate the *civil affairs* of their several states, and therefore they ought not to possess powers, to a proper exercise of which they were not competent. The Senate was to transact all foreign business: of this the states, from the nature of things, must be entirely ignorant.

2 ELLIOT'S DEBATES, *supra* note 67, at 323.

The distinction between internal and external affairs did account satisfactorily for some of the division of responsibility between the state and federal governments, and it formed an important part of the contemporary jurisprudential thinking both before and after ratification of the Constitution. *See, e.g.,* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 232 (1796) (Chase, J.) (referring to the period under the Articles of Confederation, "I entertain this general idea, that the several states retained all internal sovereignty; and that congress properly possessed the great rights of external sovereignty . . .").

distinct that each could coexist easily and without conflict.¹⁵⁴ But the boundary between the authorities of the state and national governments was too indistinct, and the overlap of their authorities too great, for any such tidy delineation to be fully satisfactory. Moreover, the Constitution described a government too dependent on practical needs and experience for theoretical or abstract prescriptions substantially to control the development of the new federal system. In Madison's words, the new government was "a system hitherto without a model," and "a nondescript, to be tested and explained by itself alone."¹⁵⁵

Under the new Constitution, the states were thus not sovereigns in the then-conventional sense of the term. They might once have been true sovereigns in the international law sense.¹⁵⁶ But after 1788,

154. For example, Alexander Hamilton wrote, The propriety of a [federal] law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority . . . , the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt, it had exceeded its jurisdiction and infringed upon that of the State? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which its Constitution plainly supposes to exist in the State governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners who, in the imprudent zeal of their animosity to the plan of the convention, have labored to envelop it in a cloud calculated to obscure the plainest and simplest truths.

THE FEDERALIST No. 33, at 203-04(A. Hamilton) (C. Rossiter ed. 1961).

Oliver Ellsworth argued during the Connecticut ratifying debates that:

Each legislature has its province; their limits may be distinguished. If they will run foul of each other, if they will be trying who has the hardest head, it cannot be helped. The road is broad enough; but if two men will jostle each other, the fault is not in the road.

2 ELLIOT'S DEBATES, *supra* note 67, at 195; *see also* 4 *id.* at 38 (statement of James Iredell during the North Carolina ratifying debates); 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 60, at 291 (pamphlet by James Monroe).

155. J. MADISON, *On Nullification*, in 4 LETTERS AND OTHER WRITING OF JAMES MADISON 420-21 (1865).

156. This is a point on which legal precision is probably impossible, given the nature of the short and tumultuous period between the Declaration of Independence in 1776 and the ratification of the Constitution in 1788. The states did declare themselves to be independent sovereigns when they declared their independence from Great Britain. *See* Ware v. Hylton, 3 U.S. 158, 178, 3 Dall. 199, 224 (1796); Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 AM. HIST. REV. 529 (1906). They also considered themselves sovereign under the Articles of Confederation. *See* M. JENSEN, THE ARTICLES OF CONFEDERATION 107-25, 161-76 (1940). Indeed, a few states went so far as to conduct their own foreign relations under the Articles, despite the apparent prohibition contained in article VI. *See* Van Tyne, *supra*, at 539-40; *cf.* Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 82 (1795) (Paterson, J.) ("[I]t is contended, that New Hampshire was not bound [during the period of the Articles

much of their sovereignty was given up or, perhaps more accurately, was revoked and conferred upon another sovereign. The precise character of the state sovereignty that remained was not, and probably could not have been, made clear when the Constitution was adopted. The question of the extent to which the states could validly be made subject to federal law had been answered only in the most general way; and the subsidiary question of the extent to which the states could be sued by private citizens to enforce federal law was answered only by implication, if it was answered at all.

B. *State Sovereign Immunity from Private Suit Under Federal Law*

An important attribute of an eighteenth century sovereign was its ability legitimately to refuse to submit to any judicial process in which it was made a defendant in its own courts or in the courts of another sovereign. This attribute, generally referred to as "sovereign immunity," had as one of its components the ability of the sovereign to object to any private suit. In the United States, after the adoption of the Constitution, this component could be further divided into subcomponents distinguished from one another by the nature of the cause of action and by the court in which the suit was brought. The component of central concern here is the states' sovereign immunity to private suit brought under federal law in federal court. In order to understand its contours, one must separate it from the subcomponent involved in *Chisholm v. Georgia*.

The question in *Chisholm* was essentially a variant on the familiar sovereign immunity question of whether a sovereign could be made judicially liable without its consent under its own law—a question on which writers from Bodin¹⁵⁷ to Blackstone¹⁵⁸ were unanimous that it

of Confederation], nor congress sovereign as to war and peace, and their incidents But I am, notwithstanding, of opinion, that New Hampshire was bound, and congress supreme, for the reasons already assigned, and that she continued to be bound, because she continued in the confederacy.").

157. Si donc le Prince souverain est exempt des loix de ses predecesseurs, beaucoup moins seroit-il tenu aux loix & ordonnances qu'il fait: car on peut bien recevoir loy d'autrui, mais il est impossible par nature de se donner loy. [Thus, if the sovereign prince is exempt from the laws of his predecessors, even less will he be held to the laws and ordinances he makes himself; for one may well be subject to the law of another, but it is inherently impossible to impose law on oneself.]

J. BODIN, *supra* note 135, at 132 (1583 ed.) (my translation).

158. Whenever therefore it happens, that, by misinformation or inadvertence, the crown hath been induced to invade the private rights of any of it's [sic] subjects, though no action will lie against the sovereign, (for who shall command the king?) yet the law hath furnished the subject with a decent and respectful mode of removing that invasion, by informing the king of the true state of the matter in dispute:

could not. The state-citizen diversity clause, as construed by the Supreme Court in *Chisholm*, provided that the Court had the power to hear a suit brought by an out-of-state private citizen against a state, but the clause was silent as to what law applied to such a suit. The relevant categories of substantive noncriminal law that most closely corresponded to the jurisprudential thinking of the time were general common law or state law, on the one hand, and federal law, on the other.

When Congress passed the Judiciary Act of 1789, there was some concern about the nature of the substantive law to be applied in federal court when controlling substantive federal law did not exist.¹⁵⁹ The partial solution adopted in section 34 of the Act was to require that state law be followed in trials at common law where it applied.¹⁶⁰ Although none of the Justices referred to that section in their opinions in *Chisholm*, it is clear from all of the opinions that the Court dealt with the contract on the theory that it provided the basis for an ordinary common law action in *assumpsit* rather than a suit

and, as it presumes that to *know* of any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

3 W. BLACKSTONE, *supra* note 139, at 255 (1768 ed.).

159. St. George Tucker stated the issue clearly:

A question has lately been agitated, whether the common, or, unwritten law of England, has been adopted in America, by the establishment of the constitution of the United States; or, in other words, how far the laws of England, both civil and criminal, make a part of the law of the American States, in their *united* and *national* capacity.

. . . .

This question is of very great importance, not only as it regards the limits of the jurisdiction of the *federal courts*; but also, as it relates to the extent of the powers vested in the *federal government*. For, if it be true that the common law of England has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal courts* must be co-extensive with it; or, in other words, *unlimited*: so also, must be the jurisdiction, and authority of the *other branches* of the federal government; that is to say, their powers respectively must be, likewise, *unlimited*.

1 TUCKER'S BLACKSTONE, *supra* note 78, at 379-80 (1803); *see also* W. DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 54 (1845); P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES xiv-xv (1824).

160. "That the laws of the several states, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, otherwise shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. The primary application of section 34 was to citizen-citizen diversity cases brought in the circuit courts under section 11 of the Judiciary Act of 1789, but it was also applicable to state-citizen diversity cases brought in the Supreme Court under section 13.

based on federal law.¹⁶¹ The only contribution of federal law to the result was the granting of jurisdiction over an unwilling state defendant by the state-citizen diversity clause.

The eleventh amendment, requiring that the state-citizen diversity clause be construed to include states only as plaintiffs, thus denied federal courts the power to find general common law- or state law-based liability against unconsenting states in a suit brought by an out-of-state citizen. It thus affirmed, in the new system in which federal and state court systems coexisted side by side, the traditional principle of sovereign immunity from private suit under the sovereign's own law. Whether the states retained sovereign immunity when the cause of action was created by federal law—and when the cause of action thus implicated matters over which the federal rather than the state government was sovereign—was a distinct question unanswered either by *Chisholm* or by the amendment.

After the eleventh amendment established the restricted scope of the state-citizen diversity clause, there remained two possible heads of jurisdiction under which private citizens might have been able to sue states in federal court—federal question jurisdiction¹⁶² and admiralty.¹⁶³ The question of state immunity from private suit under these two heads of jurisdiction was a new and much more difficult question than the one presented in *Chisholm*. Under these heads of jurisdiction, the question was whether and to what degree the national government could use its courts to subject states to liability to private citizens under the national law itself (as under federal question jurisdiction) or under law substantially affected by the national interest (as in admiralty). While the question presented in *Chisholm* was merely a variant of a familiar formulation, the question of state sovereign immunity to private suit under federal law was necessarily a new question because it arose from the federal system that had just been created.

The strongest evidence that the Constitution was not understood by its adopters to provide for private causes of action against the states in federal court under either federal question or admiralty jurisdiction is the silence on the subject during both the Constitutional Convention and the ratifying debates. Insofar as the issue of state sovereign immunity to private suit was raised at all, the complaints of the anti-Federalists and the reassurances of the Federalists were

161. See notes 97–112 *supra* and accompanying text.

162. U.S. CONST. art. III, § 2.

163. *Id.*

directed at the state-citizen diversity clause. Indeed, they were directed only at the specific problem under the clause that was presented in *Chisholm*: whether unwilling states could be made to pay their then-outstanding debts to out-of-state citizens. It is possible—perhaps even probable—that the framers of the Constitution thought very little about the impact of federal question and admiralty jurisdiction on state sovereign immunity. Indeed, given how little attention the judicial article received during the convention and the ratifying debates,¹⁶⁴ it is not terribly surprising that the specific question of the effect of federal question and admiralty jurisdiction on state sovereign immunity was not discussed.

The silence of the framers and ratifiers, however, is not enough to compel the conclusion that suits against unconsenting states by private citizens were not permissible under federal question and admiralty jurisdiction, for several things suggest the opposite conclusion. As an initial matter, the basic attribute of a true sovereign—the ability to object to the jurisdiction of a foreign court in any suit—was already seriously eroded under the Constitution. Article III explicitly granted federal court jurisdiction over disputes between different states and between a state and a foreign nation¹⁶⁵ and implicitly over disputes between a state and the United States.¹⁶⁶ Although this ju-

164. Professor Farrand, in discussing the attention devoted by the Constitutional Convention to the judiciary, states, “[T]here is surprisingly little on the subject to be found in the records of the convention.” M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 154 (1913); see also J. GOEBEL, *supra* note 82, at 196–250. *The Federalist Papers* were unusually generous, devoting six of eighty-five papers to a discussion of the judicial article. See *THE FEDERALIST* Nos. 78–83 (A. Hamilton).

165. U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies between two or more States; . . . and between a State . . . and foreign States . . .”).

In *Cohens v. Virginia*, Chief Justice Marshall noted that the eleventh amendment failed to limit this jurisdiction and stated that the amendment had a narrower purpose than to create state immunity from all suits:

That [the motive of the amendment] was not to maintain the sovereignty of a state from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more states, or between a state and a foreign state. The jurisdiction of the court still extends to these cases: and in these, a state may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a state.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15–18 (1831).

Federal court jurisdiction over suits between states has survived, but that between a state and foreign states has not. See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

166. U.S. CONST. art. III, § 2 (“The judicial Power shall extend . . . to Controversies to which the United States shall be a party.”). Although it was not clear when the Constitution was adopted, it has since been established that this head of jurisdiction permits the United

risdiction was flatly inconsistent with any pure notion of state sovereign immunity, it never was objected to on that account. Rather, it was accepted as part of the jurisdiction necessary for the federal judiciary to serve one of the general purposes enumerated during the Constitutional Convention—the preservation of the national peace and harmony.¹⁶⁷ These compulsory party-based grants of jurisdiction over the states at least suggest that, to the extent federal court jurisdiction over the states was necessary to serve this general purpose, article III *pro tanto* eroded the traditional sovereign immunity protection of the state.

Further, the Constitution did not address merely the weakness of the central government under the Articles of Confederation. It also was designed in part to provide certain specific protections for private individuals against the abuse of power by the states.¹⁶⁸ The desire to exert national control over the states themselves and not merely over the states' citizens explains such things as the constitutional prohibitions against bills of attainder, *ex post facto* laws, bills of credit, and laws impairing the obligation of contracts. Indeed, Attorney General Randolph, during oral argument in *Chisholm*, mentioned precisely these provisions of the Constitution in support of his argument that states were vulnerable to private suit in federal court.¹⁶⁹ Whether Randolph's opinion that these constitutional prohibitions against the states implied private causes of action for

States to sue states without their consent, *see* *United States v. California*, 332 U.S. 19 (1947); *United States v. North Carolina*, 136 U.S. 211 (1890), but permits states to sue the United States only with its consent, *see* *Minnesota v. United States*, 305 U.S. 382 (1939).

167. The charge from the Constitutional Convention to the Committee of Detail was to specify in detail the federal courts' jurisdiction, described in general terms as "extend[ing] to all cases arising under the Natl. Laws: And to such other questions as may involve the Natl. peace & harmony." 2 RECORDS, *supra* note 53, at 46; *see* note 55 *supra*.

Hamilton, in *Federalist* 80, justified federal jurisdiction over "controversies between two or more States" on two grounds. First, they "involve[d] the PEACE of the CONFEDERACY"; second, they involved, in some measure, cases "in which the State tribunals cannot be supposed to be impartial and unbiased." THE FEDERALIST No. 80, at 475, 480 (A. Hamilton) (C. Rossiter ed. 1961). He justified jurisdiction over controversies between a state and a foreign state [*i.e.*, country] as being "in a peculiar manner, the proper subjects of the national judicature." *Id.* at 475, 481.

168. *See, e.g.*, R. RUTLAND, *supra* note 148, at 26-27; G. WOOD, *supra* note 81, at 467 ("The move for a stronger national government thus became something more than a response to the obvious weaknesses of the Articles of Confederation. It became as well an answer to the problems of the state governments. It was 'the vile State governments,' rather than simply the feebleness of the Confederation, that were the real 'sources of pollution,' preventing America from 'being a nation.'"); Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511 (1925).

169. *See* note 98 *supra* and accompanying text. Randolph added, "Unfledged as America was in the vices of old governments, she had some, incident to her new situation

their enforcement against the states was widely shared is not clear, but the argument had a well-recognized foundation.

Along with the Constitution's direct prohibitions against certain state conduct and its arguable contemplation of private causes of action against the states for their enforcement, there was the further possibility of statutorily-created private causes against the states. If Congress could validly impose federal statutory obligations on the states, it was a reasonable argument that the federal courts were competent to hear private causes of action based on those obligations. A widely repeated maxim of government at the time of the adoption of the Constitution (indeed, up to the time of the Civil War) was that the judicial power was coextensive with the legislative power;¹⁷⁰ that is, to the extent that Congress had the power to create a cause of action against the states, the federal courts had the power to hear it. In one sense, this rephrased the issue rather than resolved it, for one still had to inquire whether Congress had the power to create the cause of action, but that inquiry was not specifically jurisdictional. It concerned, rather, the scope of the enumerated powers of the national government.

Two early sovereign immunity cases suggest that the ability of federal courts to entertain private causes of action against unconsenting states depended not on an inherent limitation on the jurisdictional power of the federal forum but, rather, on the exercise of power by the federal government as a whole. The first case, *Nathan v. Virginia*,¹⁷¹ was decided in a state court in 1781, during the period of

[after the Revolution]: individuals had been victims to the oppression of states." *Chisholm*, 2 U.S. (2 Dall.) at 423.

170. See, e.g., *Cohens v. Virginia*, 19 U.S. 264, 384 (1821) (opinion of Marshall, C.J., for the Court) ("[T]he judicial power of every well-constituted government must be coextensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. If any proposition may be considered as a political axiom, this, we think, may be so considered."); W. DUER, *supra* note 159, at 111 ("The judicial power, in every government, must be coextensive with the power of legislation."); 3 ELLIOT'S DEBATES, *supra* note 67, at 532 (statement of James Madison during the Virginia ratification debates) ("With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to."); THE FEDERALIST No. 80, at 476 (A. Hamilton) (C. Rossiter ed. 1961) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number."); see also 4 ELLIOT'S DEBATES, *supra* note 67, at 158 (statement of William Davie during the North Carolina ratification debate); 1 J. KENT, COMMENTARIES ON AMERICAN LAW 277 (1826); Lee, *Letters of Federal Farmer*, in PAMPHLETS, *supra* note 62, at 306.

171. 1 U.S. (1 Dall.) 77 n.(a) (1781). The case had been decided before the date on which Dallas' regular reports of the proceedings of the Pennsylvania courts began, but he thought the case sufficiently important to justify his reporting it:

the Articles of Confederation. Plaintiff Nathan obtained a writ of attachment against the Commonwealth of Virginia in a Pennsylvania Court of Common Pleas, and the sheriff attached a quantity of clothing belonging to Virginia in Philadelphia. The Virginia delegates in Congress applied to the Supreme Executive Council of Pennsylvania, which ordered the sheriff to give up the goods. Nathan then sought a ruling that the sheriff return the writ (i.e., attach the goods) or show cause why the writ should not be returned. At the direction of the Executive Council, the Pennsylvania Attorney General appeared at the hearing to argue against attachment. The court dismissed Nathan's suit without opinion, but an appended note, probably written by the reporter, Alexander Dallas, suggests the sovereign immunity basis of the decision:

The true ground of this decision is, that a sovereign state is not suable in the municipal courts of another jurisdiction, and a foreign attachment is but a mode of compelling an appearance. Whilst the states have surrendered certain powers to the general government, they have not divested themselves of the attribute of state sovereignty.¹⁷²

The case is of some interest despite its having arisen under the Articles of Confederation when the sovereignty of the states was much greater than it became after the adoption of the Constitution. For even in 1781 the Pennsylvania court upheld state sovereign immunity only after Virginia had appealed to the Supreme Executive Council of Pennsylvania and after the Council had directed the State Attorney General to urge that the case be dismissed. The case falls far short of any statement to this effect, but the role played by the state executive may suggest that the successful assertion of sovereign immunity by Virginia was due in part to the position taken by the forum executive rather than due solely to the inherent jurisdictional limitations of the forum.

The importance of the power of the forum executive in determining the scope of sovereign immunity to private suit, hinted at in *Nathan*, became clearly stated dictum in *The Schooner Exchange v.*

As the following case may give some satisfaction to our sister states, I hope the insertion of it here will not be deemed an improper deviation from my intention to confine the reports of decisions in the common pleas to those which have occurred since the appointment of Mr. President SHIPPEN:—particularly, as I have reason to believe, that the principle of this adjudication, met with the approbation of all the judges of the [Pennsylvania] Supreme Court.

Id.

172. *Id.* at 80 nn.(a) & 1.

McFaddon,¹⁷³ decided by the Marshall Court in 1812. Two men filed a libel in United States District Court against the schooner *Exchange*, claiming that they were the true owners of the vessel. The United States Attorney, Dallas,¹⁷⁴ appeared and argued that the vessel was owned by France and was therefore exempt from the jurisdiction of the court. When the question came before the Supreme Court on appeal, Chief Justice Marshall wrote for the Court that the libel must be dismissed because the property of the sovereign state of France was immune from the jurisdiction of United States courts. In the course of his opinion, however, he stated that the jurisdiction of the courts of the sovereign could be limited only by the sovereign itself.¹⁷⁵ Only after finding that the United States had given an "implied promise" that a vessel owned by a foreign sovereign "should be exempt from the jurisdiction of the country"¹⁷⁶ did Marshall dismiss the libel.

Chief Justice Marshall's opinion in *The Schooner Exchange* thus expands on the point implicitly made in *Nathan*: The scope of a court's jurisdiction may depend upon limitations imposed by the forum government rather than upon any inherent limitation on the forum. Both cases are noteworthy in that the sovereigns involved—Virginia in *Nathan* and France in *The Schooner Exchange*—were treated as true sovereigns, possessing in full their privilege to object to the jurisdiction of the courts of the forum sovereign. In considering the analogous, but not identical, problem of states under the Constitution—entities possessing sovereign attributes of uncertain scope—the principle announced by Marshall would give the power to the United States government, within the limits of its enumerated powers, to subject an unconsenting state to the jurisdiction of a United States court. The force of Marshall's conclusion in the *The Schooner Exchange* is increased when the foreign sovereign is replaced by a domestic

173. 11 U.S. (7 Cranch) 116 (1812).

174. Dallas was appointed to this post in 1801. His last year as Reporter of Decisions for the United States Supreme Court was 1800.

175. "The jurisdiction of the nation . . . is susceptible of no limitation, not imposed by itself." 11 U.S. (7 Cranch) at 136.

176. *Id.* at 147. Marshall's dictum was at variance with the basic rule of international law that foreign sovereigns are exempt from the compulsory judicial process of another sovereign irrespective of any promises by that sovereign. *See, e.g.*, E. VATTEL, *supra* note 136, at 486-87. For a general discussion of his view on jurisdiction in international questions, see B. ZIEGLER, *THE INTERNATIONAL LAW OF JOHN MARSHALL* 63-87 (1939). Marshall's reasoning in *The Schooner Exchange* is congruent with his reasoning in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591-92 (1823) (concluding that the positive substantive law of the forum sovereign controls in determining that Indian interest in land is merely possessory).

state of less-than-full sovereign status and when the law imposing liability upon the state is national rather than international. But the scope of national power to impose liability on the states to private causes of action cannot be determined from cases like *Nathan* and *The Schooner Exchange*, even if they are read in the broadest possible manner.

It is not enough to say, as Marshall did in *The Schooner Exchange*, that the decision of the political branches is conclusive in determining the jurisdiction of the judicial branch, for when the issue is the division of state and national power the Constitution establishes limits on the exercise of that nonjudicial national power. That is, the question of what power has been given to the national government must always remain. This was not only a difficult but an open question. Even Justice Iredell, the sole dissenter in *Chisholm*, whose opinion traditionally has been cited as the key gloss on the meaning of the eleventh amendment,¹⁷⁷ appears not to have fully made up his mind on this point.¹⁷⁸ He found that the Court was without jurisdiction over a common law *assumpsit* action, but he refused to say that Congress had no power to subject states to private suit under those federal laws deemed by Congress to be "necessary and proper to carry the purposes of this constitution into full effect."¹⁷⁹ That, he said, was a "delicate topic"¹⁸⁰ not presented by the case before him.

What *Nathan* and *The Schooner Exchange* do suggest—and the strength of the suggestion is increased when they are read in conjunction with Iredell's dissent in *Chisholm*—is that the critical issue was the legitimate scope of the power of the political branches. None of the opinions in any of the three cases suggests that if a valid substantive law created a cause of action against a state a federal court could not hear a suit based on such a cause of action. It was only on the issue of the extent of Congress' power to create private causes of action that there was doubt.

One may conclude that neither the immunity nor the potential liability of the states to private suit in federal court under federal law was clearly established under the Constitution, for, as the foregoing discussion indicates, the available evidence is in conflict as to

177. See, e.g., C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835, at 138 & n.88 (1944). Note, however, that Professor Haines reads Iredell's opinion very broadly. *Id.* at 134; see also *Hans v. Louisiana*, 134 U.S. 1, 12 (1890) (referring to the "able opinion" of Justice Iredell).

178. See notes 109-12 *supra* and accompanying text.

179. *Chisholm*, 2 U.S. (2 Dall.) at 432.

180. *Id.* at 450.

whether the framers intended such immunity to exist after the creation of a supreme national law. State sovereign immunity to private causes of action under federal law was probably an open question, in part, because it was not fully visible when the Constitution was adopted and probably also in part because, to the extent that it was visible, it presented too many difficult political and theoretical issues to permit explicit resolution. And as the discussion in the following section shows, it appears to have remained an open question for a number of years.

C. *Admiralty and Federal Question Jurisdiction After the Ratification of the Eleventh Amendment*

During John Marshall's Chief Justiceship, the Supreme Court on several occasions considered, with inconclusive results, the relationship between the eleventh amendment and admiralty and federal question jurisdiction. The evidence the cases provide suggests that the Court thought that the amendment did not affect these two heads of jurisdiction. Such evidence may not be ultimately persuasive on the original intent of the amendment, given the strong nationalist bent of the Court under Chief Justice Marshall. Yet the evidence is of some relevance, if for no other reason than that some members of the Court had first-hand familiarity with the debates over the state-citizen diversity clause, with the decision in *Chisholm*, and with its overruling by the eleventh amendment. And the evidence is surely important for what it does not show: The cases give no indication that the Supreme Court thought that the amendment was designed to restrict the jurisdiction of the federal courts to a narrower scope than the power of the federal government to authorize private suits against the states under federal law.

1. *Admiralty jurisdiction.*

As a practical matter, admiralty was a much more significant head of federal court jurisdiction in the 1790's than federal question jurisdiction. Admiralty cases concerned foreign merchants and vessels and therefore necessarily affected relations with foreign powers; moreover, and possibly more important, maritime commerce constituted the great bulk of interstate commerce at that time. The desirability of federal admiralty jurisdiction had never been seriously challenged by even the most strenuous anti-Federalists. As Hamilton wrote in *Federalist 80*, "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary

the cognizance of maritime causes.”¹⁸¹ Section 9 of the Judiciary Act of 1789 gave federal district courts exclusive original jurisdiction of “all civil causes of admiralty and maritime jurisdiction,” except for those cases in which, under the “saving to suitors” clause, a plaintiff could seek a “common law remedy, where the common law [was] competent to give it.”¹⁸²

Given its importance, admiralty jurisdiction was a subject the adopters of the eleventh amendment were likely to have had in mind when considering the federal courts’ constitutionally authorized jurisdiction. The amendment’s narrow focus on suits “in law or equity,” excluding by inference suits in admiralty, was therefore likely to have been a conscious choice. In 1809, Justice Bushrod Washington, riding circuit in *United States v. Bright*,¹⁸³ held that admiralty jurisdiction was not affected by the amendment. Justice Washington’s conclusion was rather diffident because he recognized that the amenability of states to suits by private citizens was a sensitive issue. He justified his holding by referring to the failure of the amendment to mention admiralty, and to the special character of an admiralty in rem proceeding in which the court possesses the physical subject matter of the suit and in which the “delicate” issue of effective execution of a judgment against an unwilling state consequently does not arise.¹⁸⁴

The issue came before the Supreme Court three times during Chief Justice Marshall’s tenure, but the Court avoided it each time. In 1809, in *United States v. Peters*,¹⁸⁵ the Court affirmed a judgment ordering that funds held by the estate of the former treasurer of the State of Pennsylvania be paid to a private citizen pursuant to an award in an admiralty proceeding. But the holding relied on the distinction between a state and its officer rather than on the fact that the dispute had its origins in admiralty. In *Governor of Georgia v. Madrazo*,¹⁸⁶ nineteen years later, the Court refused to order that the Governor of Georgia pay money and deliver slaves to Madrazo on the ground that the circuit court had attempted to exercise an original admiralty jurisdiction that it did not possess,¹⁸⁷ and that, in any event, even “if the 11th amendment to the constitution does not ex-

181. THE FEDERALIST NO. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

182. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

183. 24 Fed. Cas. 1232 (1809) (No. 14, 647).

184. *Id.* at 1236.

185. 9 U.S. (5 Cranch) 115 (1809).

186. 26 U.S. (1 Pet.) 110 (1828).

187. *Id.* at 121.

tend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court."¹⁸⁸ Finally, in *Ex parte Madrazo* [sic],¹⁸⁹ Madrazo tried to file a libel in admiralty in the Supreme Court for recovery of the money and slaves, but the Court rejected the suit on the ground that since there was no property in the custody of the Court the case was not within the admiralty jurisdiction.

Despite the obvious sensitivity of the issue of state liability to private suit, Justice Washington's holding in *United States v. Bright* that the eleventh amendment did not affect admiralty appears not to have aroused much controversy, possibly because there were few admiralty cases in which a state was a defendant and because of the in rem nature of many of the judgments.¹⁹⁰ The first volume of James Kent's *Commentaries*, published in 1826, discussed the eleventh amendment briefly and admiralty jurisdiction extensively, but never mentioned *Bright* or the relationship between the amendment and admiralty.¹⁹¹ Peter Du Ponceau, in his lectures to the Law Academy of Philadelphia published in 1834, regarded the matter as settled and, at least judging from his tone, not a matter of great controversy. He said without elaboration, "It has been held that this restriction [the eleventh amendment] does not extend to cases of admiralty and maritime jurisdiction."¹⁹² Justice Joseph Story's entire comment on the issue in his lengthy *Commentaries on the Constitution*, written in 1833, was similarly limited:

It has been doubted, whether this amendment extends to cases of admiralty and maritime jurisdiction, where the proceeding is *in rem* and not *in personam*. There, the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides the language of the amendment is, that "the judicial power of the United States shall not be

188. *Id.* at 124.

189. 32 U.S. (7 Pet.) 627 (1833).

190. Perhaps because the preservation of full admiralty jurisdiction after the adoption of the eleventh amendment was so obvious to nineteenth century scholars, and perhaps also because it was so practically insignificant, the standard nineteenth century admiralty treatises do not even allude to the issue. See, e.g., E. BENEDICT, *THE AMERICAN ADMIRALTY, ITS JURISDICTION AND PRACTICE* (1850); A. CONKLING, *THE JURISDICTION, LAW AND PRACTICE OF THE COURTS OF THE UNITED STATES IN ADMIRALTY AND MARITIME CAUSES* (1848); see also A. CONKLING, *A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES* 9-11, 128-62 (1831) (discussing the scope of the admiralty jurisdiction at some length and quoting and describing the eleventh amendment but neither discussing the interrelation between the two nor mentioning *United States v. Bright*).

191. 1 J. KENT, *supra* note 170, at 278 (eleventh amendment); *id.* at 331-54 (admiralty).

192. P. DU PONCEAU, *A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES* 37-38 (1834).

construed to extend to any suit *in law or equity*.” But a suit in the admiralty is not, correctly speaking, a suit in law, or in equity; but is often spoken of in contradistinction to both.¹⁹³

The Supreme Court did not overrule *United States v. Bright* until *Ex parte New York, No. 1*¹⁹⁴ in 1921, when the relative importance of the admiralty jurisdiction in federal courts had diminished, when the omission of admiralty from the text of the amendment probably seemed less significant to the Court than it had to Justice Washing-

193. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 560-61 (1833) (citing *United States v. Blight* [sic], Justice Johnson's opinion in *Governor of Georgia v. Madrazo*, and *United States v. Peters*).

194. 256 U.S. 490 (1921). The case involved an attempted attachment of property owned by the state of New York in connection with libels brought in federal district court against three vessels operated but not owned by New York. The Court found that this was “in the nature of an action *in personam*” against the state official in his official capacity, *id.* at 501, and held that the action was therefore barred by the amendment. In *Ex parte New York, No. 2*, 256 U.S. 503 (1921), decided on the same day, the Court held that an *in rem* action against a vessel owned by the state of New York and “employed solely for its governmental uses and purposes,” *id.* at 510, was barred not by the amendment but by the general principle that

property and revenue necessary for the exercise of [governmental] powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city. . . .

The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes.

Id. at 511.

In a 4-person plurality opinion, the Court has recently approved the holding of *Ex parte New York, No. 1* that *in personam* admiralty actions are barred by the amendment. See *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 n.17, 698-99 (1982). The opinion characterized the holding in *Ex parte New York, No. 2* as based on the necessity of giving effect to the eleventh amendment's bar against *in personam* proceedings:

In broad language . . . the Court stated that property owned by a State and employed solely for governmental uses was exempt from seizure by admiralty process *in rem*. . . . The force of the holding in *In re New York (II)*, however, is that an action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State. Otherwise, the Eleventh Amendment could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.

Id. at 699.

The Court in *Treasure Salvors* permitted an execution of a warrant and transfer of property to plaintiff *Treasure Salvors* in an admiralty proceeding based on an analysis of the principle of *Ex parte Young*, 209 U.S. 123 (1908), rather than on the special nature of admiralty. It specifically avoided pronouncing any special rule for admiralty *in rem* proceedings: “[W]e need not decide the extent to which a federal district court exercising admiralty *in rem* jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res.” *Treasure Salvors*, 458 U.S. at 697.

ton a hundred years earlier, and when the notion that the eleventh amendment prohibited federal court jurisdiction had gained a firm grip on its conception of the Constitution.¹⁹⁵

One is tempted to infer from the conclusion that the adopters of the eleventh amendment did not intend to affect admiralty jurisdiction that they similarly did not intend to affect federal question jurisdiction. The omission of the admiralty jurisdiction provides some support for this proposition, but standing alone it is more suggestive than probative. Influenced by 200 years during which the division of power between the state and federal government lawmaking authorities has been developed with increasing sophistication, and by the positivistic notion that a law should be associated with an identifiable lawgiver, we are today inclined to categorize law as either state or federal. But at the end of the eighteenth and the beginning of the nineteenth centuries, admiralty law was seen as essentially part of the law of nations rather than as state or federal law,¹⁹⁶ and the source of authority for federal courts to decide questions of admiralty law was seen as coming primarily from the jurisdictional grant itself rather than from the enumerated heads of power of the national government.¹⁹⁷ Nevertheless, the possibility that federal statutory law could come to control much of the admiralty jurisdiction exercised by federal courts was probably already apparent. Although such federal statutory law did not become a significant factor until about the middle of the nineteenth century,¹⁹⁸ Congress already had begun to regulate certain aspects of admiralty, such as tonnage charges, as early as 1789.¹⁹⁹

195. The Court in *Ex parte New York, No. 1* referred to earlier doubt about "whether the Amendment extended to cases of admiralty and maritime jurisdiction where the proceeding was *in rem* and not *in personam*," but concluded that "the doubt was based on considerations that were set aside in the reasoning adopted by this court in *Hans v. Louisiana*." *Ex parte New York, No. 1*, 256 U.S. at 498.

196. See, e.g., Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 126-30 (1925); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230 (1954).

197. See, e.g., *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828) (Marshall, C.J.) ("A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.")

198. See, e.g., Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (affecting navigation on the Great Lakes; constitutionality upheld in *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851)). For helpful discussions of the growth of federal legislative power over admiralty during the nineteenth century, see Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 671-99 (1963); Note, *supra* note 196.

199. Act of July 20, 1789, ch. 3, 1 Stat. 27.

Thus, when the eleventh amendment was adopted, the power of the federal government to prescribe substantive rules of decision in admiralty cases through either judge-made or statutory law was relatively clear, although the scope of that power had not yet become wholly apparent. This suggests that in omitting admiralty the adopters of the amendment contemplated (or at the very least had formed no settled intent to forbid) the application of substantive federal law in admiralty courts in suits brought by private citizens against the states. The conclusion that the adopters also intended to leave federal question jurisdiction unaffected by the amendment does not necessarily follow, however, for one must distinguish between federal law a court applies in carrying out a jurisdiction otherwise conferred and federal law that itself serves as the foundation for jurisdiction. That is, a federal court in admiralty deciding issues based on federal law is not on that account hearing a case under the federal question jurisdiction.²⁰⁰

Yet the omission of admiralty from the coverage of the amendment does indicate something of importance: What was conceded by both Federalists and anti-Federalists to have been one of the most important parts of the federal courts' original jurisdiction was apparently left to operate under its own jurisdictional imperatives. The amendment did not expand admiralty jurisdiction; but neither did it diminish admiralty by forbidding its exercise when a suit was brought against a state by an out-of-state citizen. The conceptual framework of the amendment thus appears to have been that while the amendment limited state-citizen diversity jurisdiction to cases in which a state was a plaintiff, it permitted other heads of jurisdiction to operate without hindrance when a state was sued by a private citizen, so long as the federal government possessed the constitutional power to subject the state to such a suit and so long as the requirements of that separate head of jurisdiction were satisfied.

2. *Federal question jurisdiction.*

The available evidence suggests that the Supreme Court under Chief Justice Marshall thought that federal question jurisdiction, like admiralty, was unaffected by the eleventh amendment, but the issue

200. The relative simplicity of this proposition has not always been apparent in this century, as illustrated by the lengthy discussions in the majority and dissenting opinions in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (holding that admiralty suit involving application of federal law not within the "arising under" federal question jurisdiction).

was never presented in clear form. The only significant federal question jurisdiction during the pre-Civil War period was conferred by Section 25 of the Judiciary Act of 1789²⁰¹ over cases coming up from state courts in which the appeal "immediately respect[ed]" a federal issue. With one unimportant exception, no general original federal question statute was passed until 1875,²⁰² and with the exception of *Osborn v. Bank of the United States*,²⁰³ none of the cases that came before the Court involved direct consideration of the extent of original federal question jurisdiction in federal court.²⁰⁴

The cases decided by the Supreme Court before the Civil War are consistent with an interpretation of the eleventh amendment as merely narrowing the jurisdiction authorized by the state-citizen diversity clause. That the amendment was not originally interpreted as affecting federal question suits is suggested initially by the fact that three disputes between states and private citizens came before the Court between 1810 and 1819 without the amendment's even being raised.²⁰⁵ The amendment was first asserted as a defense in 1821 in *Cohens v. Virginia*,²⁰⁶ an appeal of Virginia state court criminal convictions to the United States Supreme Court under section 25. Chief Justice Marshall wrote for the Court that a federal court could constitutionally be given jurisdiction over a private citizen's suit raising a federal claim against a state despite the amendment.²⁰⁷ But his

201. Ch. 20, § 25, 1 Stat. 73, 85-87 (1789).

202. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 was such a federal question statute, but it was repealed almost immediately, *see* Act of Mar. 8, 1802, ch. 9, 2 Stat. 132.

203. 22 U.S. (9 Wheat.) 738 (1824); *see also* *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824).

204. The Supreme Court thus was the only federal court with jurisdiction based on the existence of a federal question until after the Civil War, and that jurisdiction was appellate rather than original under section 25 of the Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

205. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (appeal from Maryland court decision in suit brought on behalf of Maryland to collect penalties from cashier of Bank of the United States involving the constitutionality of the creation of the bank and of its taxation by the State); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812) (appeal from New Jersey court decision in suit brought by private citizen challenging state taxation of land as violating the contracts clause); *Smith v. Maryland*, 10 U.S. (6 Cranch) 286 (1810) (appeal from Maryland state court decision in suit brought by state to compel production of documents relating to forfeiture of land under United States treaty).

206. 19 U.S. (6 Wheat.) 264 (1821).

207. The powers of the Union, on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. . . . One of the instru-

statement was far from a square holding, for the Cohens had not sought to sue the state; rather, they were appealing criminal convictions, and the Court held that the amendment did not apply to appeals.²⁰⁸ Further, as Marshall pointed out, the Cohens were in any event citizens of Virginia and therefore not within the literal terms of the amendment.²⁰⁹

Three years later, in *Osborn v. Bank of the United States*,²¹⁰ Marshall held that the Bank of the United States could sue the Treasurer of the State of Ohio, despite the amendment, because the Bank sought relief against a state officer rather than the state itself.²¹¹ The bulk of Marshall's eleventh amendment discussion established a party of record rule under which a suit against the state's treasurer was not a suit against the state because the treasurer rather than the state had been named in the record as the defendant.²¹² Along the way, Marshall made two suggestive remarks—although neither was necessary to the

ments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. . . . [A]re we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognisable in the courts of the Union, whoever may be the parties to that case.

Id. at 382–83.

208. *Id.* at 405–12. The Court in *Hans v. Louisiana*, 134 U.S. 1, 20 (1890), recognized that Chief Justice Marshall's opinion in *Cohens* did "favor the argument of the plaintiff," but characterized Marshall's "observation [as] unnecessary to the decision, and in that sense *extra judicial*."

209. If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.

Cohens, 19 U.S. (6 Wheat.) at 412.

210. 22 U.S. (9 Wheat.) 738 (1824).

211. Chief Justice Marshall treated the Bank of the United States, for purposes of the eleventh amendment, as if it were a private citizen rather than the United States itself. The Court had previously held, in *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), that a diversity suit by a corporation—specifically the Bank of the United States—was a suit by its individual shareholders for purposes of jurisdiction. *But cf.* *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824) (Georgia's status as a shareholder of Planters' Bank does not confer sovereign immunity on the bank).

212. This was by no means a novel proposition. The distinction between an officer of the government and the government itself in sovereign immunity cases was, if anything, better established in the early nineteenth century than it is today. *See Engdahl, supra* note 114, at 14–21. For example, Chief Justice Marshall had used this analysis to distinguish between the

result, since he found that a suit against Osborn was, in any event, not a suit against the state. First, Marshall wrote, "That the courts of the Union cannot entertain a suit brought against a state, by an alien, or the citizen of another state, is not to be controverted."²¹³ This statement, standing alone, could imply that Marshall read the amendment as actually prohibiting the exercise of federal court jurisdiction whenever the parties were so aligned, although even here Marshall's statement is carefully limited to out-of-state and foreign citizens. But it is possible to read the statement to mean only that federal courts could not entertain such suits without more—that is to say, without some basis for jurisdiction other than the alignment of the parties. Several pages later, Marshall wrote, "The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the court never been extended to suits brought against a state, by the citizens of another state, or by aliens."²¹⁴ This statement implies quite strongly that the amendment itself had no prohibitory effect, but rather required only a limiting construction on the jurisdiction conferred by the state-citizen diversity clause of article III. Under this interpretation of *Osborn*, Marshall employed the party-of-record rule because of some underlying principle of state immunity to liability under substantive federal law, not because of a jurisdictional immunity derived from the eleventh amendment that independently, and more narrowly, limited the power of the federal courts.

Finally, in *Governor of Georgia v. Madrazo*,²¹⁵ the Court in 1828 retreated from the *Osborn* party of record rule and held that a suit against the Governor of Georgia for money and slaves was a suit against the state. Marshall's opinion for the Court is short and uncharacteristically opaque, but he apparently held that since the state-citizen diversity clause did not authorize jurisdiction when the state was a defendant, it did not authorize a suit against the governor that was in effect a suit against the state. But he was careful to note that the Governor had "done nothing in violation of any law of the United States," thus leaving open the possibility that had federal question jurisdiction been invoked, the result would have been

Treasurer of Pennsylvania and the State of Pennsylvania in United States v. Peters, 9 U.S. (5 Cranch) 115, 139-40 (1809).

213. 22 U.S. (9 Wheat.) at 849.

214. *Id.* at 857-58.

215. 26 U.S. (1 Pet.) 110 (1828).

different.²¹⁶

In sum, although its opinions are not free from ambiguity, the Supreme Court in the early 1800's appears to have read the amendment in a way that is consistent with the interpretation suggested by this article.²¹⁷ But both because of the politically sensitive nature of the issue and because there was no general federal question jurisdictional statute until after the Civil War, the Court was able to avoid any square holding on the matter.

IV. A THEORY OF LIMITATIONS ON FEDERAL POWER RATHER THAN A THEORY OF PROHIBITION AGAINST FEDERAL COURT JURISDICTION

Before the Civil War, the practical consequences of interpreting the eleventh amendment either as a narrow construction of part of article III or as a jurisdictional bar were insignificant. After the Civil War, however, this began to change. Immediately after the war, the Constitution was amended to provide for greatly increased rights directly against the states in favor of private citizens. And in 1875 Congress passed a general federal question statute, permitting federal trial courts to hear federal question cases. At about the same time, a number of states, predominantly in the South, began more or less systematically to repudiate their publicly-issued revenue bonds in vi-

216. *Id.* at 124. See notes 186–88 *supra* and accompanying text, indicating that the question was similarly left open in the case as to admiralty jurisdiction.

217. In the years before the Civil War no clear consensus emerged in the treatises about whether the effect of the amendment was to prohibit the exercise of federal court jurisdiction, even in federal question cases, when a private citizen sued a state. Although his words are not free from ambiguity, Alfred Conkling, writing in 1831, appeared to think that the eleventh amendment did not affect either federal question or admiralty jurisdiction:

[The] jurisdiction [of the federal courts] extends to *certain classes of cases*, whoever may be parties—and to controversies between *certain descriptions of parties*, whatever may be the nature of the controversy. In other words, if the case arises under the Constitution, &c. or if it is of admiralty or maritime jurisdiction, it matters not who may be the parties: and if, on the other hand, the controversy is one affecting ambassadors, &c. or if the United States are plaintiffs, or if it is between citizens of different States it matters not what may be the nature of the controversy.

A. CONKLING, *supra* note 190, at 11.

By contrast, James Kent, writing in 1826, described the amendment's origin and its effect as follows:

The judicial power, as it originally stood, extended to suits prosecuted *against* one of the United States by citizens of another state, or by citizens or subjects of any foreign state; but the states were not willing to submit to be arraigned as defendants before the federal courts, at the instance of private persons, be the cause of action what it may.

1 J. KENT, *supra* note 170, at 278.

olation of the contracts clause of the Constitution. In a series of cases, the Supreme Court used the eleventh amendment to protect the states against suits on these bonds.²¹⁸ Their culmination was the Court's holding in 1890, in *Hans v. Louisiana*,²¹⁹ that the state of Louisiana could not be sued on its defaulted bonds by its own citizens. The Court reasoned that the principle of state sovereign immunity, although not the literal words of the eleventh amendment,²²⁰ barred suits against the states by all private citizens, whether or not citizens of the defendant state.²²¹

Hans, in effect, filled in the "missing" term of the amendment if it were read to prohibit federal court jurisdiction over suits brought by out-of-state plaintiffs. Without more, *Hans* would have created a broad-based prohibition against federal court suits in which private citizens sought to redress the states' violation of federal law. But the Civil War amendments had recently created specific constitutional limitations on the power of the states, and implementing those amendments would have been virtually impossible without some way to avoid the effect of a broad reading of *Hans*. To give the federal government some means of controlling the states' activities through private citizens' suits in federal court, the Court adapted to the eleventh amendment the long-standing legal fiction that distinguished between a state and its officers for purposes of sovereign immunity.²²²

218. See, e.g., *In re Ayers*, 123 U.S. 443 (1887); *Hagood v. Southern*, 117 U.S. 52 (1886); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *Louisiana v. Jumel*, 107 U.S. 711 (1882). See generally W. SCOTT, *THE REPUDIATION OF STATE DEBTS: A STUDY IN THE FINANCIAL HISTORY OF MISSISSIPPI, FLORIDA, ALABAMA, NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, LOUISIANA, ARKANSAS, TENNESSEE, MINNESOTA, MICHIGAN, AND VIRGINIA* (1893); Orth, *The Eleventh Amendment and the North Carolina State Debt*, 59 N.C.L. REV. 747 (1981); Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980).

219. 134 U.S. 1 (1890); see also *North Carolina v. Temple*, 134 U.S. 22 (1890) (citizen of North Carolina not permitted to sue his state under the contracts clause to compel payment of state-issued bonds on which the state had defaulted). A federal corporation is similarly barred. *Smith v. Reeves*, 178 U.S. 436 (1900).

220. The Court was careful to say that the words of the amendment did not themselves compel the result it reached. See note 18 *supra*.

221. The *Hans* policy of extending the prohibition beyond the literal words of the eleventh amendment was followed for suits brought by foreign countries in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934). The prohibition of the amendment was extended to suits in admiralty in *Ex parte New York*, No. 1, 256 U.S. 490 (1921).

222. Indeed, beginning as early as the 1870's, the Court had begun to permit suits against state officers despite the eleventh amendment. See, e.g., *Board of Liquidation v. McComb*, 92 U.S. 531 (1875) (suit to prevent issuance of additional bonds by the state that would impair the security of plaintiffs' bond); *Davis v. Gray*, 83 U.S. (16 Wall.) 203 (1872) (suit to enjoin state officers from seizing real property).

After the Civil War, the Supreme Court did not feel confined by the literal words of the eleventh amendment, but appeared, rather, to follow its understanding of the ideas behind the amendment. In the words of Professors Hart and Sacks, the Court, in effect, treated the eleventh amendment "as if it were a precedent to the opposite of *Chisholm v. Georgia*."²²³ As late as the first decades of this century the Court treated the "precedent" of the eleventh amendment in a way that permitted results consistent with many of those that the interpretation proposed by this article would suggest. For example, in 1921, the Court in *Ex parte New York, No. 1* referred to state sovereign immunity from private suits in admiralty as deriving from the "fundamental rule [of state sovereign immunity] of which the Amendment is but an exemplification."²²⁴ So conceived, protection for the states was provided by assumptions about state sovereign immunity inherent in the Constitution rather than by the amendment itself. Similarly, in *Principality of Monaco v. Mississippi*, Chief Justice Hughes wrote for the Court in 1934:

Manifestly, we cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."²²⁵

So long as the Court's holdings in *Hans, Ex parte New York, No. 1*, and *Principality of Monaco* were premised on a general inability of the federal government, under the constitutional plan as a whole, to create private causes of action against unconsenting states, the distinction between a prohibition against the exercise of jurisdiction and a mere failure to authorize jurisdiction was not critical. For even if federal question jurisdiction existed, the constitutional structure in any event prohibited the federal government from imposing substantive liability on the states by means of federal law. But recent Supreme Court decisions characterizing the eleventh amendment as a prohibition directed at the federal courts specifically rather than at the federal government as a whole have given new significance to the distinction between a prohibition and a mere failure to authorize

223. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 807 (tent. ed. 1958).

224. *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921).

225. 292 U.S. 313, 322-23 (1934).

jurisdiction. If the amendment specifically prohibits federal court jurisdiction when a private citizen sues a state, as the Supreme Court now appears to think, the federal courts cannot hear private suits against the states even when based on valid substantive federal law. But if the amendment only requires a narrow construction of the state-citizen diversity clause, and if article III thus merely fails to authorize party-based jurisdiction over private citizens' suits against states, state sovereign immunity comes from the rest of the Constitution rather than from the amendment. If the federal government's power to subject unconsenting states to suit depends on the substantive powers given to the federal government in other parts of the document, it may be confusing as well as unnecessary to look to the eleventh amendment for a further, specifically jurisdictional limitation. Under this interpretation of the amendment, we not only may but must look outside the eleventh amendment to decide the reach of federal law, and the critical question is the one the adopters of the amendment did not attempt to answer: To what extent may federal law create private causes of action against unconsenting states? It is one of the oldest questions of the federal structure; but it is also a perennially fresh question, one that the adopters of the amendment did not—and probably could not—answer for us.

Understanding the eleventh amendment as merely requiring a narrow construction of the state-citizen diversity clause may permit us to assess from a useful perspective four particularly troublesome aspects of present law. They may be arranged in roughly increasing order of importance. First, the jurisdictional bar of the amendment is now treated as analogous to the limitations on the judicial power found in article III, which means that an eleventh amendment defense may be raised at any time, even on appeal. Second, the jurisdictional bar is now seen as directed specifically at the federal courts, which has led to recent suggestions that the eleventh amendment limits federal judicial power to hear causes of action against the states but not federal power to create such causes of action and to require that they be heard in state court. Third, the amendment's bar protects states but not their subdivisions, which means that bodies such as counties, municipalities, and local school boards are now considered part of the state for purposes of the tenth and fourteenth amendments but that these subdivisions do not enjoy the same constitutional protection from private suit as do the states. Fourth, eleventh amendment analysis has focused on the nature of permissible and impermissible remedies sought against a state officer without dif-

ferentiating among the federal causes of action at issue, which has obscured the issues of federal structure that lie behind the amendment.

A. *The Inapplicability of the "First Principle" of Federal Jurisdiction*

If the eleventh amendment is interpreted as requiring a limiting construction of the state-citizen diversity clause, the amendment amounts only to a failure to grant a certain kind of jurisdiction. Under this interpretation, the Supreme Court's 1974 holding in *Edelman v. Jordan*²²⁶ that the amendment amounts to a jurisdictional bar analogous to limitations on the "judicial power" in article III appears to be based on a false premise. In *Edelman*, a public aid claimant sued Illinois officials for monetary and injunctive relief for violating federal regulations under a cooperative state-federal entitlement program. The officials defended, and lost, on the merits in federal district court. They then argued for the first time in the court of appeals that a retroactive award of unpaid benefits violated the eleventh amendment. After the court of appeals affirmed the district court, the officials reiterated their eleventh amendment argument before the Supreme Court. The Court sustained the state's eleventh amendment defense, holding that it could be raised for the first time on appeal, even after the state had defended and lost on the merits in the trial court: "We approve of [the court of appeals' considering the defense] since it has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."²²⁷

The Court's reference to a jurisdictional bar is to the "first princi-

226. 415 U.S. 651 (1974).

227. *Id.* at 677-78. The Court relied on *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), in which the Court permitted the state to raise the eleventh amendment for the first time on appeal. The inquiry in *Ford Motor Co.*, however, was whether state officials, who had voluntarily appeared in federal court, had the authority under state law to waive the state's immunity. The Court was explicit that had the state officials had the power to effect a waiver, "they [had] done so in this proceeding." *Id.* at 467. The *Ford Motor Co.* holding is consistent with the principle that the United States will be permitted to raise the defense of sovereign immunity on appeal when its official did not have the power under federal law to waive the United States' immunity. See *Case v. Terrell*, 78 U.S. (11 Wall.) 199 (1870).

The Court in *Edelman* did not discuss the issue of the power of the state officials, which probably means that under *Edelman* a state official may raise an eleventh amendment defense at any time even if he or she is authorized under state law to waive the state's immunity. The *Edelman* rule has been cited with approval in subsequent cases. See *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975); *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

ple”²²⁸ of federal jurisdiction, sometimes called the *Mansfield* principle.²²⁹ The principle derives from article III limitations on the “judicial power” and requires that a federal court dismiss a suit if at any stage of the proceedings it becomes apparent that subject matter jurisdiction is lacking.²³⁰ The Court appears to have applied the *Mansfield* “first principle” to eleventh amendment cases because it saw the amendment as a specific prohibition against federal court jurisdiction rather than as a narrowing construction of the state-citizen diversity clause. If the amendment is understood in the way proposed by this article, the applicability of the *Mansfield* rule and its supporting rationales becomes much more problematic, for the amendment would not constitute a limitation of federal jurisdiction.

Moreover, it is frequently stated that parties cannot consent to federal jurisdiction that does not, in fact, exist, and under the *Mansfield* principle, a party cannot consent to jurisdiction when it is beyond the parties’ power to confer subject matter jurisdiction.²³¹ But this rationale is obviously inapplicable to the eleventh amendment, for a state can confer jurisdiction on a federal court by consent and has been able to do so since at least 1883.²³² A state might contend that it is unduly harsh to subject it to a liability that it could by hypothesis have avoided if it had asserted a defense in a timely fashion. But it does not seem unreasonable to subject the state in this

228. The phrase appears to have originated in the first edition of the Hart and Wechsler casebook: “The principle declared in the Mansfield case and codified in the Federal Rule can properly be called the first principle of federal jurisdiction.” H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 719 (1st ed. 1953). The second edition is more circumspect: “The principle declared in the Mansfield case . . . has been called the first principle of federal jurisdiction.” HART & WECHSLER, *supra* note 9, at 835.

229. The reference is to *Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379 (1884), in which the Court permitted a challenge to a federal court’s diversity jurisdiction to be asserted for the first time in the Supreme Court. The leading federal question case is *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

230. Professor Dobbs contends that the jurisdictional defect must affirmatively appear before the court’s duty to dismiss is triggered. See Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction before Final Judgment*, 51 MINN. L. REV. 491, 508 (1967). Hart and Wechsler state the *Mansfield* principle more broadly: “If the record fails to disclose a basis for federal jurisdiction, the court not only will but must refuse to proceed further with the determination of the merits of the controversy unless the failure can be cured.” HART & WECHSLER, *supra* note 9, at 835-36.

The *Mansfield* principle has been heavily criticized even within its normal scope of operation. See, e.g., AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 366 (1968); 1 J. MOORE, J. LUCAS, H. FINK, D. WECKSTEIN & J. WICKER, *MOORE’S FEDERAL PRACTICE* § 0.60(4) (2d ed. 1948); Currie, *The Federal Courts and the American Law Institute, Part II*, 36 U. CHI. L. REV. 268, 298 (1969).

231. See, e.g., *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978).

232. *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

context to the ordinary rule that defenses are unavailable on appeal if not raised at trial.²³³

There also appear to be no functional considerations lying behind a state's assertion of sovereign immunity to private suit that support application of the *Mansfield* principle. In its normal application, the principle restricts the exercise of judicial power to that authorized by the Constitution and conferred by statute. The principle thus protects the states and their courts from the expansion of federal jurisdiction into areas either constitutionally reserved to state courts or protected by statute from federal judicial intrusion. But a desire to provide such protection for the state courts does not support the application of the *Mansfield* principle to the state sovereign immunity issues now raised under the eleventh amendment. At the outset, it is not clear that the state courts would take, or could even be forced to take, jurisdiction over a suit brought by a private citizen against the state.²³⁴ If the state closes its courts to suits against it, any argument that the federal courts should not be permitted to take jurisdiction in order to protect the jurisdiction of the state courts from erosion loses much of its force. Further, the *Mansfield* principle, within the scope of its normal operation, protects the jurisdiction of the state courts because the state is not ordinarily a party and therefore cannot defend against a suit by objecting to the jurisdiction of the court. This helps account for that part of the *Mansfield* principle requiring a federal court not merely to permit the parties to raise a jurisdictional objection but to raise it *sua sponte*.²³⁵ But in eleventh amendment cases, where the state is necessarily a defendant, all the state need do if it wishes to protect itself or its courts' jurisdiction is object to the jurisdiction of the federal courts in a timely fashion.

B. *The Disappearance of the Testa v. Katt Problem*

Under the Supreme Court's present assumption that the eleventh

233. A contrary rule invites not merely wasteful litigation but abusive maneuvers as well. A state may wish a favorable adjudication on the merits of the dispute and therefore find it to its advantage to proceed to the merits in federal court; but it would find it particularly, and unfairly, to its advantage to proceed to the merits if it knew it could successfully avoid any unfavorable result by an eleventh amendment defense made for the first time on appeal. See also M. REDISH, *supra* note 9, at 151 n.94.

234. It would be unwise, however, to place too much weight on this argument in light of the doctrinal uncertainties surrounding the point. See notes 242-53 *infra* and accompanying text.

235. See, e.g., *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). Under current case law, the jurisdictional bar of the eleventh amendment need not be raised by a federal court *sua sponte*. See *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982).

amendment prohibits federal courts from taking jurisdiction over certain federal causes of action in which a private individual sues a state, the question arises whether the state courts may be obliged to entertain federal causes of action forbidden to the federal courts by the amendment. One of the fundamental propositions of the federal system is that state courts are required to apply federal law in cases properly before them.²³⁶ As a corollary, it is assumed today that the federal government must have some power to affect the jurisdiction of the state courts through the creation of federal causes of action to be heard in those state courts.²³⁷ Under *Testa v. Katt*,²³⁸ decided in 1947, it is clear that a state court not only can but, in appropriate cases, must hear federal causes of action. The question thus arises under present law whether *Testa* allows the federal government to require state courts to hear private causes of action barred from the federal courts by the eleventh amendment.

The plaintiff in *Testa* brought a private cause of action in state court to recover treble damages for overcharges in violation of the federal Emergency Price Control Act, which provided for suits to enforce its provisions in "any court of competent jurisdiction."²³⁹ The Rhode Island Supreme Court held that the treble damages clause was offensive to Rhode Island policy and that, under principles derived from conflicts of law, its courts were not obliged to enforce a

236. The conventional citation is *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). See, e.g., *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). The proposition predates *Hunter's Lessee*, however, because the issue in that case was the ability of the United States Supreme Court to review on appeal the judgment of a state court on a federal question. The obligation of the state court to apply federal law was assumed. Much earlier, Congress had premised the Judiciary Act of 1789, which did not grant federal question jurisdiction to the federal trial courts, on the state courts' obligation to apply federal law to cases properly before them.

237. This was not an established principle in the nineteenth century. Charles Warren recounts,

It is interesting to note that though, in the original enactment of the Judiciary Act, the State-Rights or narrow constructionist party failed in their attempt to leave to the State Courts jurisdiction over Federal questions, they succeeded, during the succeeding twenty years, in passing many statutes vesting in the State Courts such jurisdiction over Federal questions both in civil and criminal cases. This voluntary surrender to the States by Congress of Federal judicial powers granted by the Constitution only ceased when the State Courts themselves proceeded to hold that Congress had no constitutional power to impose such jurisdiction on the State tribunals and officials

Warren, *supra* note 81, at 70 (footnote omitted); see also Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551 (1960).

238. 330 U.S. 386 (1947).

239. *Id.* at 387.

“penal statute in the international sense.”²⁴⁰ The United States Supreme Court reversed, but with qualifications. It noted that Rhode Island courts already heard double damage claims under the federal Fair Labor Standards Act and that the Rhode Island courts had jurisdiction under “established local law” to adjudicate the case. The Court then concluded that “under these circumstances” the Rhode Island courts could not refuse to hear the case.²⁴¹

Testa strongly suggests that the federal government may require state courts to entertain federal causes of action in perhaps all but extraordinary circumstances. Yet difficulties arise in applying *Testa* to suits brought against states by private citizens and in finding in the case the principle that the state courts must hear federal causes of action that are barred in federal court. Since *Testa* involved a cause of action against a private defendant rather than the state, the case itself raised no question of the state’s sovereign immunity. Moreover, the Rhode Island courts already had heard causes of action similar to the one at issue, so the case did not raise the question of whether the state courts could be closed to *all* claims of this sort without discrimination against federal claims.

It has nevertheless been suggested by some academic commentators that Congress could require state courts to hear cases barred from federal courts by the eleventh amendment under a *Testa*-like rationale.²⁴² At the outset, it is clear that the adopters of the amendment did not contemplate such a thing. The question was raised in an analogous form by the proposed, and soundly defeated, addition to what is now the text of the eleventh amendment that would have deprived the federal courts of jurisdiction over state-citizen diversity cases only when the state courts already heard such cases.²⁴³ Further, only *General Oil Co. v. Crain*,²⁴⁴ decided in 1908, can be read to hold that state courts must hear cases denied to the federal courts. In *Crain*, a state taxpayer sought an injunction in Tennessee state court against the collection of an allegedly unconstitutional state tax. The

240. *Id.* at 388.

241. *Id.* at 394.

242. *See, e.g.*, Cullison, *supra* note 9, at 35; Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CALIF. L. REV. 189 (1981); Tribe, *supra* note 2, at 694 n.68; *cf.* Liberman, *supra* note 2, at 195-96 (reading *Testa* more narrowly).

243. *See* notes 119-21 *supra* and accompanying text. The adopters probably did not see the issue in terms of federal question cases, *see* notes 157-76 *supra* and accompanying text, but it is fairly obvious from their rejection of this proposed addition that they did not view the amendment as compelling the choice of a state rather than federal forum.

244. 209 U.S. 211 (1908).

Tennessee Supreme Court held that Tennessee courts were without jurisdiction to entertain such a suit. On appeal, the United States Supreme Court said that the Tennessee courts could not refuse jurisdiction of a suit challenging a state official's action in collecting an allegedly unconstitutional tax:

If a suit against state officers is precluded in the national courts by the Eleventh Amendment . . . and may be forbidden by a state to its courts . . . without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution, and the Fourteenth Amendment, which is directed at state action, could be nullified as to much of its operation.²⁴⁵

This language suggests that the Court had a theory requiring some forum be open for the vindication of federal claims and that where there is a constitutional bar to suit in federal court a state court may have a constitutional obligation to hear the suit. Yet this conclusion must be advanced only tentatively today, for more reasons than just the age and moderate obscurity of the case. First, the Court in *Crain* held on the merits that the challenged state tax was constitutional, so it never had to clarify its jurisdictional theory or to put it to the test by remanding to the Tennessee courts with instructions to take jurisdiction. Second, the Court's basic premise about the unavailability of federal court relief appears to be inconsistent with *Ex parte Young*,²⁴⁶ for the only relief sought in *Crain* was an injunction against a collection of unconstitutional taxes. If the plaintiff had sought a refund of taxes already paid, the jurisdictional theory of *Crain* would have been much more startling and probably of greater importance.

No modern case has held that state courts have an obligation to hear claims barred from the federal courts by the eleventh amendment. In 1973, in *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*,²⁴⁷ the Court held that the amendment barred a private suit for damages in federal court under

245. *Id.* at 226; *see also* *Ward v. Board of County Comm'rs of Love County*, 253 U.S. 17, 24 (1920) ("To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law.").

246. 209 U.S. 123 (1908). That the Court in *Crain* misunderstood *Ex parte Young* itself is improbable, for it decided *Crain* and *Ex parte Young* on the same day. *Crain's* premise (and perhaps the Court intended that it should be only a premise) that federal injunctive relief against an unconstitutional collection of taxes is barred by the amendment is, however, inconsistent with the modern interpretation of *Ex parte Young*.

247. 411 U.S. 279 (1973).

the Fair Labor Standards Act. Justice Douglas' majority opinion suggested that plaintiffs might "arguably" have a private cause of action in a state court.²⁴⁸ More recently, the majority opinions in two 1980 decisions indicated that the reach of a federal statute may be different depending on whether it is enforced in state or federal court. In *Maine v. Thiboutot*,²⁴⁹ the Court held that section 1983 claims could be brought in state as well as federal court.²⁵⁰ But more importantly for our purposes, the Court also held that a section 1988 award of attorneys' fees was available against the state, noting in a footnote that "[n]o Eleventh Amendment question is present, of course, where an action is brought in a state court since the Amendment, by its terms, restrains only '[t]he Judicial power of the United States.'" ²⁵¹ In *Maher v. Gagne*, decided on the same day, the Court stated that the eleventh amendment issue was "not before the Court in *Thiboutot* because that case involved an award of fees by a state court pursuant to § 1988."²⁵²

The language of *Gagne* makes clear the interpretation that the Court attaches to *Thiboutot*: An award of attorneys' fees against the state was appropriate in state court in *Thiboutot* under section 1988 because the eleventh amendment did not act as a restraint in state court, although under comparable circumstances the amendment might prohibit such an award under section 1988 in federal court. But this is a curious reading of the statute, for it would mean that section 1988 imposes a different liability depending on whether it is employed in state or federal court without the text of the statute in any way advertent to this differential operation. Moreover, inferences from *Thiboutot* must be drawn with some caution, for footnotes are a dangerous place to seek authoritative statements of law, particularly in a field as complex as this.

248. *Id.* at 287. Justice Marshall concluded flatly that "since federal law stands as the supreme law of the land, the state's courts are obliged to enforce it, even if it conflicts with state policy." *Id.* at 298 (Marshall, J., concurring).

249. 448 U.S. 1 (1980).

250. Many lower court decisions had anticipated this result. *See, e.g.*, *Spence v. Latting*, 512 F.2d 93, 98 (10th Cir.), *cert. denied*, 423 U.S. 896 (1975); *Brown v. Pitchess*, 13 Cal. 3d 518, 531 P.2d 772, 119 Cal. Rptr. 204 (1975). The American Civil Liberties Union's Supreme Court amicus brief in *Maine v. Thiboutot* cites 22 state court decisions in which concurrent state court jurisdiction over § 1983 suits had been upheld. *See* Amicus Brief for the American Civil Liberties Union at 8-9 n.2, *Maine v. Thiboutot*, 448 U.S. 1 (1980). The United States Supreme Court had already hinted openly at this result. *See* *Martinez v. California*, 444 U.S. 277, 283 n.7 (1980).

251. *Thiboutot*, 448 U.S. at 9 n.7.

252. 448 U.S. 122, 130 n.12 (1980).

Even if the implications of *Employees of the Department of Public Health & Welfare* and of the *Thiboutot* and *Gagne* footnotes should develop into a clear doctrine, the achievement would be imperfect. While the federal system is based in part on the fundamental premise that state courts will apply federal law conscientiously in cases brought before them, the federal government has not always trusted the state courts to do so. Yet a doctrine developed along the lines suggested by *Thiboutot* would permit Congress to authorize some suits, if at all, solely in the state courts. This approach would prevent Congress from striking a balance based on its judgment of the relative capacities and sympathies of the two court systems²⁵³ and of the relative strengths of the state and federal interests involved. Of all places for Congress to be disabled from deciding that federal courts are preferable to state courts for adjudicating federal rights, this is among the worst because the reasons to distrust the quality of state court adjudication are almost certainly the strongest in suits that federal trial courts are powerless to hear and in which the state is itself a defendant.

This article's explanation of the original meaning of eleventh amendment may permit a more satisfactory solution. If the amendment only required a limiting construction on the jurisdiction affirmatively authorized by the state-citizen diversity clause, all other heads of jurisdiction, including federal question jurisdiction, remained. If this view of the amendment is imported into modern law, Congress has the power to authorize a federal court to hear a private suit against a state provided that the substantive federal statute under

253. Professor Stolz has described structural differences influencing the behavior of federal and state judges:

Numerous intangible forces tend to make federal judges loyal to the influence as well as the command of the Supreme Court. For example, federal judges hold lifetime tenure, rotate among each other on panels, meet annually at circuit conferences, and many serve on committees of the Judicial Conference. Furthermore, despite the recent increase in their number, there are still fewer than 100 authorized positions on the courts of appeals. In contrast, there is relatively little beyond the constitutionally required oath that binds the more than 200 state supreme court judges to the United States Supreme Court. Most state judges do not have lifetime tenure and many must rely on local political forces for continuation in office. Their professional contacts focus inward toward their own state court colleagues, although some organizations that bring judges of different states into contact have recently emerged.

Stolz, *Federal Review of State Court Decisions of Federal Questions: The Need for Additional Appellate Capacity*, 64 CALIF. L. REV. 943, 959-60 (1976) (footnotes omitted); see also Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

which the state is sued is itself a valid exercise of federal power. The result is summarized by the axiom routinely recited both before and after passage of the eleventh amendment:²⁵⁴ Whenever something is within the legislative power, the federal judicial power necessarily extends that far.

If the amendment is so understood, the *Testa* problem—whether Congress may require an unwilling state court to hear a federal private cause of action against an unconsenting state—may well disappear. If Congress can authorize the federal courts to hear any suit brought by private citizens under a valid federal statute imposing liability on a state, it would not be required to impose that suit upon the state courts in order to have a forum. Rather, Congress would have the power that it ordinarily possesses to choose the forum to hear cases based on federal law. By the same token, since Congress could authorize the federal courts to hear those suits, much of the unwillingness the state courts might otherwise have had to hearing them will probably disappear, for a state could not protect itself from liability merely by refusing to grant jurisdiction to its courts. Indeed, a state seeking to protect its interests might well want the case heard in its own courts since the choice would be between a state or federal forum rather than between a state court being forced to hear the case and the case not being heard at all.

C. *The Potential Assimilation of the States and Their Subdivisions*

Current eleventh amendment law sharply distinguishes the states and their subdivisions. The amendment protects states, but it does not protect counties,²⁵⁵ municipalities,²⁵⁶ school boards,²⁵⁷ and other local bodies. Such a sharp distinction appears to make little sense today, for the states and their subdivisions perform related governmental functions that seem to deserve similar, though perhaps not identical, protection.²⁵⁸ Moreover, the distinction is not observed elsewhere in the law: For example, for purposes of the fourteenth

254. See note 170 *supra* and accompanying text.

255. See *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Chicot County v. Sherwood*, 148 U.S. 529 (1893); *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Cowles v. Mercer County*, 74 U.S. 118 (1868).

256. See *Workman v. City of New York*, 179 U.S. 552 (1900).

257. See *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

258. A student note has argued that the states and their subdivisions should be treated equally under the eleventh amendment. Note, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustified Strain on Federalism*, 1979 DUKE L.J. 1042. For a summary of local government sovereign immunity under state law, see Note, *Local Government Sovereign Immunity: The Need for Reform*, 18 WAKE FOREST L. REV. 43 (1982).

amendment state action doctrine, it makes no difference whether the wrongful act is performed by a state or a municipal official,²⁵⁹ and for purposes of tenth amendment limitations on the federal government, a state and a municipality are equally protected.²⁶⁰

Unlike other modern doctrines that have grown out of the eleventh amendment, the distinction between a state and its subdivisions has a genuine historical basis. But this distinction existed quite independently of the eleventh amendment. And if we interpret the amendment in the way suggested by this article, it may become easier to attach appropriate significance to the changed relationships between the federal government, on one hand, and the states and their subdivisions, on the other, since the adoption of the Constitution. The common understanding in the 1790's was that the sovereign immunity of the states was not shared by their subdivisions. For instance, in his opinion in *Chisholm v. Georgia*, Chief Justice Jay started from the proposition that a city did not possess the sovereign attributes that Georgia claimed for itself and he used the conceded municipal susceptibility to suit as a ground from which to argue that a state should be treated similarly.²⁶¹ But Jay's argument seems more persuasive today than it probably did to his contemporaries.²⁶² For purposes of legal category and consequence in 1793, a municipal corporation was seen as more closely analogous to a private corporation than to a state.²⁶³ Sovereign immunity derived from a sovereign

259. See *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278 (1913) (fourteenth amendment prevents the City of Los Angeles from fixing telephone rates at an unreasonably low level).

260. See *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding unconstitutional the federal government's attempt to prescribe minimum wages for employees of state and local governments).

261. 2 U.S. (2 Dall.) at 472-73.

262. Indeed, Attorney General Randolph had declined to rely on the analogy between states and municipalities in his argument on behalf of *Chisholm*: "I banish the comparison of states with corporations; and therefore, search for no resemblance in them." *Id.* at 429.

263. An English treatise published in 1702 had treated public and private corporations as merely two variations on a single legal entity designed to promote "better government":

The general Intent and End of all Civil Incorporations is, for better Government; either general or special.

The Corporations for general Government only, are those of Cities and Towns, Mayor and Citizens, Mayor and Burgesses, Mayor and Commonalty, etc.

Special Government is so called, because it is remitted to the Managers of particular things, as Trade, Charity, and the like

THE LAW OF CORPORATIONS: CONTAINING THE LAWS AND CUSTOMS OF ALL THE CORPORATIONS AND INFERIOR COURTS OF RECORDS IN ENGLAND 2 (London 1702).

In 1793, the year *Chisholm* was decided, Stewart Kyd published a second English corporations treatise in which he too treated public and private corporations as merely two branches of the same subject, referring to "civil corporations [that] are established for the

or quasi-sovereign status that only a state was seen to possess, rather than from the governmental functions that both the states and the municipalities performed.

The question of the immunity of a state's subdivisions under the eleventh amendment was not litigated until after the Civil War. When the Court finally declared in *Lincoln County v. Luning*²⁶⁴ in 1890 that a county was given no protection by the amendment, the case reflected what by then had become an obvious strain in the legal concept of a state and its subdivisions. But the Court's opinion was brief and unanimous. It addressed the eleventh amendment issue in a single paragraph, saying only that the "records of this court for the last thirty years are full of suits against counties, and it would seem as though by general consent the jurisdiction of the Federal courts in such suits had become established."²⁶⁵

By 1890, the distinction between a public municipal corporation and a private business corporation had been clearly established. As if to signal the clarity with which lawyers by the late nineteenth and early twentieth centuries had begun to see municipal corporations as a distinct legal form, a number of treatises devoted solely to municipal corporations appeared, beginning with John Dillon's *Municipal Corporations* in 1872.²⁶⁶ The *Luning* Court in 1890 thus was faced with a legal creature whose characteristics had changed substantially

purpose of local government" and other corporations established "for the maintenance and regulation of some particular object of public policy." 1 S. KYD, TREATISE ON THE LAW OF CORPORATIONS 28 (London 1793). Kyd's treatise was a standard reference in the United States during the first three decades of the nineteenth century. See, e.g., 4 AM. JURIST 219 (1830) (listing "Kyd on Corporations" as part of the course of study at Harvard Law School).

James Kent, writing in 1827, also saw public corporations as merely a subdivision of civil corporations: "Civil corporations are established for a variety of purposes, and they are either public or private. Public corporations, are such as exist for public political purposes only, such as counties, cities, towns, and villages." 2 J. KENT, *supra* note 170, at 222.

264. 133 U.S. 529 (1890).

265. *Id.* at 530. In addition to the federal courts' "general acquiescence" in the jurisdiction, the Court gave as a further ground that the words of the amendment referred only to suits against a state, citing Chief Justice Marshall's by then long-abandoned "party of record" rule of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824). But the Court must have considered the precise text of the amendment a weak ground on which to base *Luning*, for on the same day it held in *Hans v. Louisiana*, 134 U.S. 1 (1890), that the policy of the amendment prohibited suits by in-state as well as out-of-state citizens.

266. J. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872); see also H. ABBOTT, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1905); C. BEACH, COMMENTARIES ON THE LAW OF PUBLIC CORPORATIONS INCLUDING MUNICIPAL CORPORATIONS AND POLITICAL OR GOVERNMENTAL CORPORATIONS OF EVERY CLASS (1893); C. ELLIOT, THE PRINCIPLES OF THE LAW OF PUBLIC CORPORATIONS (1898); E. MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1911); J. SMITH, COMMENTARIES ON THE MODERN LAW OF MUNICIPAL CORPORATIONS INCLUDING PUBLIC CORPORATIONS

since the passage of the amendment and, judging from the *Luning* opinion, whose legal history was largely unknown to the Justices. In the almost 100 years between *Chisholm* and *Luning*, what had seemed to Chief Justice Jay and his contemporaries a commonplace of the legal and political structure had become explicable to the nineteenth century Justices only by reference to a long period of judicial acquiescence. When the Court's idea—firmly articulated in *Hans v. Louisiana* on the same day—that the eleventh amendment prohibited suits against the states was combined with the acceptance in *Luning* of the distinction between states and their subdivisions, the result was a doctrine under which the amendment protected the states, but left the states' subdivisions entirely unprotected.²⁶⁷

A striking result of *Luning*, of which the Justices were fully aware when they decided the case, was that counties and municipalities could be sued on their publicly issued securities while the states could not. The importance of this disparity in treatment can hardly be overstated. Professor Fairman recounts that between 1864 and 1888 the Supreme Court had already decided "some 200" municipal bond cases, chiefly involving bonds that had been issued to entice railroads to build tracks to serve the communities raising the money and upon which the municipality or county had defaulted when the railroad failed to appear.²⁶⁸ But during the same period, the Supreme Court gave extraordinary protection to financially hard-pressed southern states that had repudiated their bonds and then asserted the eleventh amendment as a defense when sued in federal court under the contracts clause.

AND POLITICAL CORPORATIONS OF EVERY CLASS (1903) (a "revised, re-written and enlarged edition" of Beach's 1893 treatise).

267. *Luning*, 133 U.S. at 530.

268. C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, PART ONE 918 (Vol. VI of the Holmes Devise) (1971). See generally *id.* at 918-1116. Two cases decided after *Luning* demonstrated how reluctant the Court was to permit the subdivisions of the states to share the states' protection. Three years after *Luning*, in *Chicot County v. Sherwood*, 148 U.S. 529 (1893), the Court dealt with an attempt by Arkansas to shield its counties from federal court suits on their bonds by passing a statute requiring holders of existing bonds to enforce them only in state courts. The Supreme Court unanimously held that the state was without power to restrict the jurisdiction of the federal courts in this fashion. In *Graham v. Folsom*, 200 U.S. 248 (1906), Township 96 in South Carolina had defaulted on bonds, which the United States Supreme Court later held to be valid obligations. See *Folsom v. Ninety Six*, 159 U.S. 611 (1895). The state then abolished Township 96. The bondholders sued officials of the county that included the geographical location where the township used to be, and the officials asserted the eleventh amendment in defense. The Supreme Court quickly disposed of an eleventh amendment defense by citing several cases that it declined to discuss because they would "make [the] opinion too long," *Graham*, 200 U.S. at 255, and held that the federal court had power to order the county officials to levy taxes to pay off the bonds.

In re Ayers,²⁶⁹ decided three years before *Luning* in 1887, demonstrates the extent to which the Court was willing to protect the states. In *Ayers*, several British subjects sued to enjoin Ayers, the Attorney General of Virginia, from prosecuting suits against Virginia citizens who sought to pay their taxes with tax coupons previously sold by the state. The suits required the taxpayers to prove the genuineness of the coupons, but erected such evidentiary barriers that proof was almost impossible. The British plaintiffs alleged that the suits brought by Ayers made their coupons unsalable to Virginia taxpayers and therefore worthless. The relief sought was carefully calculated to take advantage of the distinction between a state and its officers that, even prior to *Ex parte Young*, was clearly recognized.²⁷⁰ The plaintiffs sought neither damages nor a specific performance decree requiring the states to accept the coupons, but only a decree enjoining the attorney general from bringing suits to achieve an unconstitutional purpose.²⁷¹ Nevertheless, the Court held that the suit to enjoin Ayers sought, in effect, to force the state of Virginia to perform its contract and refused to entertain the action.²⁷²

The post-Civil War municipal and state bond cases might be little more than a historical curiosity today if the disparity between the states and municipalities had not suddenly re-emerged in 1978, when the Supreme Court decided *Monell v. Department of Social Services*.²⁷³ In 1961, the Court had held in *Monroe v. Pape*²⁷⁴ that municipal officials could be sued under section 1983, but that the municipalities themselves were not "persons" within the meaning of section 1983 and hence could not be sued. *Monroe* had the predictable consequence of forcing litigants seeking to control the behavior of municipalities to sue their officers on a theory analogous to that of *Ex parte Young*. For almost twenty years, federal courts treated the states and their subdivisions more or less equally in section 1983 litigation, though the sources of this similar treatment were distinct: The states were protected affirmatively by the eleventh amendment, while their subdivisions merely were not reached by any statute.²⁷⁵

269. 123 U.S. 443 (1887).

270. See notes 25, 212 *supra*.

271. *In re Ayers*, 123 U.S. at 450.

272. "Admitting all that is claimed on the part of the complainants as to the breach of its contract on the part of the State of Virginia . . . there is nevertheless no foundation in law for the relief asked." *Id.* at 502.

273. 436 U.S. 658 (1978).

274. 365 U.S. 167 (1961).

275. Impatience with this result led some commentators to suggest, and a few lower courts to hold, that municipal liability be based directly on the fourteenth amendment by

In *Monell*, however, the Court recreated the old split between states and their subdivisions by rereading section 1983 to discover that the statute covers municipalities. The Court's holding permits direct actions and remedies against municipalities, counties, school boards, and other subdivisions of the states without asking the *Ex parte Young* question of whether suits against officers are "in effect" suits against those bodies. It appears that the scope of liability for such bodies will be fairly broad. The Court held in 1980 in *Owen v. City of Independence*²⁷⁶ that the good faith of city officials is not an adequate defense for the municipality in a section 1983 action for damages.²⁷⁷ And in the same Term, the Court held in *Maine v. Thiboutot*²⁷⁸ that section 1983 covers not only violations of federal constitutional rights but violations of all federal statutory rights as well. Many questions remain unanswered, the most prominent of which concern the degree of responsibility that a municipality will have for the acts of its officials²⁷⁹ and the principles that will govern whether a private right of action should be derived from a federal statute that has been made applicable to a municipality through section 1983.²⁸⁰ But it is clear that the Court has once again embarked on a course that treats the subdivisions of the state differently from the state itself.

One can, of course, explain the dilemma in which the present Court finds itself in less esoteric terms than a misunderstanding of the eleventh amendment and an ignorance of the change in the concept of municipal corporations during the almost two hundred years

analogy to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *See, e.g.*, *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975) (remanding with instructions that the District Court "should not overlook" that plaintiff sued directly under the fourteenth amendment); *Brault v. Town of Milton*, 527 F.2d 730 (2d Cir. 1975); *Williams v. Brown*, 398 F. Supp. 155 (N.D. Ill. 1975); *see also* *Hundt, Suing Municipalities Directly Under the Fourteenth Amendment*, 70 NW. U.L. REV. 770 (1975); Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976).

276. 445 U.S. 622 (1980).

277. Punitive damages, however, are not available. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

278. 448 U.S. 1 (1980).

279. It is at least clear that a simple *respondet superior* principle cannot be invoked against a municipality. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) ("In particular, we conclude that . . . a municipality cannot be held liable under § 1983 on a *respondet superior* theory").

280. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13-21 (1981) (holding that Congress, in creating "express remedies" under two environmental statutes, "intended to foreclose private actions [and] . . . to supplant any remedy that otherwise would be available under § 1983"). *See generally* Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

that have elapsed since *Chisholm*. The liberal and conservative wings of the Court have each managed to win a recent victory in what is, in many respects, a single doctrinal area. In *Monell*, Justice Brennan wrote an opinion favoring governmental liability; in *Edelman v. Jordan*, Justice Rehnquist wrote an opinion favoring governmental immunity. Each wing is now trying to take its victory as far as possible,²⁸¹ probably in the hope that the Court as a whole will recognize the incongruity of treating the states and their subdivisions differently and eventually will assimilate the two doctrines. Justice Brennan was very explicit on this point in his concurring opinion in *Hutto v. Finney*,²⁸² suggesting that his opinion in *Monell* had so far undermined the rationale of *Edelman v. Jordan* that *Edelman* should be reconsidered.²⁸³ One year after *Hutto*, Justice Rehnquist just as explicitly rejected the suggestion to assimilate in his opinion in *Quern v. Jordan*,²⁸⁴ affirming *Edelman*²⁸⁵ and holding that Congress did not intend that section 1983 should abrogate state sovereign immunity.

281. Recent antitrust decisions may be an example. See *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982) (Brennan, J., majority opinion) ("home rule" municipality does not share the state's "state action" exemption from liability under the Sherman Antitrust Act); *City of Lafayette v. Louisiana Power & Light*, 435 U.S. 389, 412 & n.42 (1978) (Brennan, J., plurality opinion) (insufficient evidence that Congress intended to grant municipalities the exemption from the Sherman Antitrust Act that the states enjoy, citing *Lincoln County v. Luning*, 133 U.S. 529 (1890)).

282. 437 U.S. 678 (1978).

283. Given our holding in *Monell*, the essential premise of our *Edelman* holding—that no statute involved in *Edelman* authorized suit against "a class of defendants which literally includes States"—would clearly appear to be no longer true. Moreover, given *Fitzpatrick's* holding that Congress has plenary power to make States liable in damages when it acts pursuant to § 5 of the Fourteenth Amendment, it is surely at least an open question whether § 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment. Whether this is in fact so, must of course await consideration in an appropriate case.

Id. at 703-04 (Brennan, J., concurring) (citation omitted). For a discussion of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), see notes 305-22 *infra* and accompanying text.

284. 440 U.S. 332 (1979).

285. This Court's holding in *Monell* was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes," and our eleventh amendment decisions subsequent to *Edelman* and to *Monell* have cast no doubt on our holding in *Edelman*.

• • • •

Mr. Justice Brennan, though joining the opinion of the Court in [*Hutto v. Finney*], wrote separately to suggest that the Court's opinions in *Monell*, and *Fitzpatrick v. Bitzer*, had rendered "the essential premise of our *Edelman* holding . . . no longer true." The Court itself in *Hutto*, however, recognized and applied *Edelman's* distinction between retrospective and prospective relief.

Id. at 338-39, 339 n.8 (Rehnquist, J., opinion for the Court) (citations omitted).

But something deeper and more enduring is at stake than a power struggle between the liberal and conservative wings of the present Court. The eleventh amendment debate over the distinction between the states and their subdivisions is part of the debate over a much larger federalism question: What immunity should the states and their subdivisions have from the exercise of national power? The disparity between the treatment of the states and of their municipalities cannot be traced directly to a historical misunderstanding, for the states and their subdivisions were, in fact, treated differently for purposes of sovereign immunity in the 1790's. But if the amendment did nothing to prohibit federal jurisdiction over private suits against the states, the disparity between the treatment of states and the treatment of municipalities did not stem from the amendment. Rather, it stemmed from what were then seen to be the fundamentally different characters of the two bodies: States were sovereigns; municipal corporations were not.

Understanding that this disparity in treatment does not come from the eleventh amendment may permit us today more readily to treat as relevant the changes in the relationship between a state and its subdivisions that have occurred since the 1780's and 1790's. Under the historical view of the amendment proposed here, the states' protection against private suits came from limitations on the substantive powers of the national government rather than from the amendment. And to the extent that we think today that there is an inherent limitation on those powers stemming from the existence of the states or of their subdivisions, private suits should be forbidden. But this is quite a different conceptual framework from that under which the Court now operates, for under current doctrine the sources of immunity are different: The states are protected by the eleventh amendment, and their subdivisions are protected by the inherent limitations on the enumerated powers of the national government.

If one sees the fundamental issue for both the states and their subdivisions to be the inherent limitations on the enumerated powers of the federal government, one may more easily take into account two significant changes in the last two hundred years. First, the significance of state sovereignty has declined substantially. The vocabulary of sovereignty persists, but it now refers more to the heading under which we protect the states' governmental functions from being absorbed by the national government than to the sovereignty the states were thought to possess at the time the Constitution was adopted. Second, municipalities have come to be seen unambigu-

ously as creatures of the state, exercising such governmental functions as the state sees fit to delegate or to permit.²⁸⁶ This shift is reflected in present law holding that the action of a municipality is as much state action under the fourteenth amendment as that of the state itself²⁸⁷ and that a municipality is as protected as a state from federal attempts to regulate its employees' wages under the commerce clause.²⁸⁸

If this article's historical interpretation of the amendment is imported into modern law, we would not ask what protection the amendment provides to the states. Rather, we would ask whether the Constitution permits the federal government to create private causes of action against unconsenting states, as one now asks whether the federal government may do so against unconsenting municipalities. This would not be a question of whether the federal courts can hear a suit but rather of whether some substantive power exists that permits the federal government to create a particular private cause of action. If such substantive power exists, Congress may authorize federal court jurisdiction to hear that cause of action. The answer to the question is not entirely clear, in part because our understanding of the eleventh amendment has heretofore prevented the question from being asked in quite this way. And although I shall not attempt the complicated task of providing an answer here, I must say that I suspect that it will turn out that federal power to create private causes of action against the states' subdivisions is much closer to the federal power against the states themselves than is now recognized in the case law.²⁸⁹ What may now remain is to ask the question, unencumbered by a jurisdictional prohibition against hearing suits against the states.

286. The power of the legislature with respect to municipal corporations may be derived from the general theory of the position of the state legislature in American constitutional law. By that theory, the state legislature is possessed of all legislative power except as its exercise is prohibited by the federal or state constitutions. In the absence of express constitutional limitations, consequently, the power of the legislature over municipal corporations is plenary. It has the power to create and the power to destroy; the power to define the form of municipal government and the powers and functions which may—or even must—be exercised.

Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 646 (1964) (footnotes omitted).

287. *See, e.g.*, *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951).

288. *National League of Cities v. Usery*, 426 U.S. 833 (1976).

289. Indeed, Professor Frug may wish to go so far as to protect the states' subdivisions more than the states. *See Frug, The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

D. *A Clause-Specific Analysis of Federal Power to Create Private Causes of Action Against Unconsenting States*

If the eleventh amendment was intended merely to require a narrow construction of the jurisdiction affirmatively granted by the state-citizen diversity clause, and if the extent of state immunity from federally based private causes of action depends not on the amendment itself but on the rest of the Constitution, the power of federal courts to hear causes of action and to grant remedies against the states should be coextensive with the substantive power of the federal government to create those causes of action. Under such an interpretation, the constitutionality of any exercise of federal judicial power would hinge on the validity of the substantive exercise of federal power. If we look at the the eleventh amendment cases decided in this century but disregard the rationales advanced for their holdings, we may suspect that the Supreme Court has frequently been motivated *sub rosa* by such a vision of state sovereign immunity. We may suspect further, however, that the fictions resulting from the Court's view of the eleventh amendment as the source of the state's immunity to private suit have prevented the full realization of that vision.

Since the amendment is now seen as a jurisdictional limitation, the fiction designed to avoid the amendment is to some degree shaped by the jurisdictional character of that limitation. *Ex parte Young*, formulated as a jurisdictional exception, thus purports to operate at a level of undifferentiated generality, excepting certain remedies from the prohibition of the amendment without regard to the underlying source of federal power at issue.²⁹⁰ The distinction between a state and its officers, upon which *Ex parte Young* is built, lies deep in the structure of sovereign immunity and exists independently of the particular problem of state sovereign immunity under federal law. It is present, for example, in cases brought against officers of the federal government, where there is no hint that the eleventh amendment controls the result.²⁹¹ Seeing the amendment in the appropriate historical light therefore should not be expected to eliminate the distinction between a state and its officers. But it may permit us to eliminate the specifically jurisdictional nature of the distinction

290. *Cf.* Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (limiting the "jurisdiction" of federal courts to issue injunctions in labor cases); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938) ("There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States.").

291. *See, e.g.*, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947). *See generally* Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

under *Ex parte Young* and to see the problem of state sovereign immunity free from its influence.

In the discussion that follows, I shall sketch in large outline what the law might look like free from the jurisdictional aspect of the *Ex parte Young* fiction. Along the way I shall point out that, in fact if not in theory, many eleventh amendment cases already conform to that outline. The Supreme Court in those cases appears to have sensed that a jurisdictional prohibition is insufficiently congruent with what the Court feels to be the underlying structural imperatives that should control the shape of state sovereign immunity to private causes of action under federal law. The picture that emerges from these cases is far from complete, but it is enough to provide glimpses of a deep structure that is not apparent from the doctrinal explanation the Court currently provides and to suggest that a historically accurate version of the amendment more closely corresponds to much of what the Court, in fact, is doing.

The discussion that follows is divided into four parts: the significance of *National League of Cities v. Usery*²⁹² and its implications for the limitations on the power of the federal government; the significance of *Fitzpatrick v. Bitzer*²⁹³ and *City of Rome v. United States*,²⁹⁴ and the potential scope of Congress' power to abrogate the protection now seen to come from the eleventh amendment; the implications of *Fitzpatrick v. Bitzer* for a clause-specific analysis of federal power over the states; and the distinction between congressional and judicial creation of federal causes of action against the states.

1. *National League of Cities v. Usery and limitations on federal power over the states.*

If the historical interpretation of the eleventh amendment proposed by this article is seen as having prescriptive force for modern law, the amendment itself will not protect the states against the power of the federal government. One must look elsewhere in the Constitution to find that protection. The Supreme Court's recent decision in *National League of Cities v. Usery*²⁹⁵ may help us perceive an

292. 426 U.S. 833 (1976).

293. 427 U.S. 445 (1976).

294. 446 U.S. 156 (1980).

295. 426 U.S. 833 (1976). *National League of Cities* was prefigured in 1973 in *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973), in which the Court held that there was insufficient evidence that Congress intended under the Fair Labor Standards Act to abrogate the eleventh amendment and to subject the states to private suits for back wages.

analytical structure that can protect the states against unwarranted private causes of action but that can avoid the distortions introduced by the jurisdictional aspects of the *Ex parte Young* fiction. In *National League of Cities*, the Court held that Congress was without power under the commerce clause to regulate the wages of state and local employees under the Fair Labor Standards Act. Whatever one might think of the merits of the decision on its facts,²⁹⁶ *National League of Cities* may have ended the overreading of *United States v. Darby*.²⁹⁷ In *Darby*, the Supreme Court upheld as within the commerce power a federal minimum wage and maximum hour statute for workers producing goods for interstate commerce. The tenth amendment, according to the Court, stated "but a truism that all is retained which has not been surrendered."²⁹⁸ That is, powers not delegated to the federal government were reserved to the states not as an independently defined category, but as a residuum defined only by reference to what had not been delegated to the national government. It is easy to understand why the *Darby* formulation was attractive in 1941, since it ended the state "enclave" theory and gave to the federal government the carte blanche it had needed and had been denied during the early days of the New Deal.²⁹⁹ And the reluctance of some academic commentators and the Court to challenge the *Darby* formulation perhaps can be attributed to a fear of what might happen if a state enclave theory were openly stated and endorsed again.³⁰⁰ But *National League of Cities* has now said what, at some level, has always been obvious—that the states, because they are states, have some power to resist the exercise of countervailing federal power, or, to put

296. *National League of Cities* has been severely criticized. See, e.g., Cox, *Federalism and Individual Rights Under the Burger Court*, 73 NW. U.L. REV. 1, 19 (1978) ("the most dramatic but probably the least important of the Burger Court's expressions of concern for state autonomy and state institutions"); Frug, *supra* note 289, at 1127 n.301 ("supremely unconvincing"). But see Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 97 ("understandable and admirable").

297. 312 U.S. 100 (1941).

298. *Id.* at 124.

299. See Feller, *The Tenth Amendment Retires*, 27 A.B.A. J. 223 (1941) (praising the decision in *Darby*).

300. The Constitution in no way defines the content of any enclave of exclusive state authority—except, of course, by a process of inference from what is not on the checklist of federal powers. And the Tenth Amendment, sometimes, incredibly, cited in support of the state enclave approach, in fact flatly rejects it.

Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-02 (1974); see also Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661 (1978) (arguing that separation of powers concepts should limit the power of the federal courts vis-a-vis the states, reasoning from the perspective of internally derived limitations on the power of the federal courts).

it another way, that there are inherent limitations on the enumerated powers of the national government that are explicable only by the presence of the states as subordinate but to some degree independent and inviolate sovereigns in the federal structure.

But the meaning of *National League of Cities* in specific terms remains largely a mystery. It almost certainly does not undercut *Darby* itself, for *Darby* involved the federal government's ability to regulate private conduct rather than the state's own conduct.³⁰¹ Even the ability of the national government to regulate the states' conduct probably also remains substantially intact.³⁰² In fact, *National League of Cities* can be squarely overruled on its facts without destroying its underlying premise that, so long as the constitutional structure includes states, the national government's power is in some way limited by the fact of their existence. But more importantly for present purposes, *National League of Cities* may help us see that some form of state enclave theory survived in eleventh amendment cases protecting state sovereignty, even while *Darby* overtly denied constitutional protection of state enclaves from federal power.

An analysis of state sovereign immunity focusing on cases decided under the eleventh amendment may capture the idea behind *National League of Cities* better than the case does itself. For if one accepts the historical interpretation of the amendment proposed in this article, the questions one asks about state sovereign immunity may change. Instead of asking what protection is provided by the eleventh amendment, one may ask what protection is provided in the rest of the Constitution.³⁰³ The inquiry may be based on the tenth amendment, as

301. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (federal Surface Mining Control and Reclamation Act requirements for "steep-slope" contour restoration do not violate the tenth amendment).

302. See, e.g., *Equal Employment Opportunity Comm'n v. Wyoming*, 103 S. Ct. 1054 (1983) (upholding application of federal age discrimination statute to a state employee as a valid exercise of the commerce power); *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (upholding federal statutory requirement that state regulatory authorities consider adopting specific federal rate-making standards, that they adopt specified procedures in considering these standards, and that they adopt and implement specific substantive rules concerning electrical co-generation facilities); *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982) (holding Long Island Railroad, owned by New York State's Metropolitan Transportation Authority, subject to federal regulation under the Railway Labor Act).

303. Professor Field disagrees, contending that Congress' ability to abrogate state sovereign immunity is limited by common law rather than by the Constitution:

The eleventh amendment does not confer upon the states a substantive right to enjoy sovereign immunity. Instead, common law controls, together, of course, with any supplementations Congress or state legislatures choose to make. Congress may impose suit upon states in state court, just as it may in federal court . . . because the sovereign immunity doctrine has no constitutional sanction.

the Court seems to have preferred in *National League of Cities* because of its apparent preference for textual exegesis; and, indeed, attaching the inquiry to the tenth amendment does no harm so long as one remembers that it is as much a manner of speaking as a means of analysis. Or one may base the inquiry—as a tenth amendment analysis ultimately must do in any event—on a consideration of the scope of the enumerated powers of the national government and of the nature and strength of claims of state sovereignty.

The assimilation of what previously has been eleventh amendment case law to what one may call, for want of a better term, a *National League of Cities* analysis may eliminate the complexity of those aspects of the present eleventh amendment law that are designed to avoid or to accommodate a specifically jurisdictional prohibition. At the same time, such an analysis is likely to bring fully to the surface a number of difficult and complex problems³⁰⁴ inherent in private causes of action against states under federal law. It is one thing for the federal government to regulate state conduct by creating certain federal obligations, for it tried to do under the Fair Labor Standards Act. It may be another for it to create private causes of action and particular remedies to enforce these obligations, for there may be additional considerations that bear on the ability of the federal government to create private causes of action and associated remedies beyond those that determine whether the federal government has the power to create the underlying obligations. But both share the common question of the states' immunity, as quasi-independent sovereigns, from federal control and both are of inescapably constitutional dimensions.

The questions of the power to create state obligations under federal law and of the power to create private causes of action based on those obligations have heretofore been treated as essentially separate inquiries. The first has been treated as a question of the scope of authority of the federal government under its enumerated powers and the second as a question of the strength of the jurisdictional protection provided by the eleventh amendment. And while they are, indeed, discrete questions, the historical understanding of the amendment proposed here may permit us to see them as closely re-

Field, *Part One*, *supra* note 2, at 549.

304. See Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1166 (1977) ("[I]t is no easy matter . . . to specify the distinctively 'sovereign' attributes that render states resistant to commerce-clause regulation . . .").

lated aspects of the larger problem of the states' immunity from the exercise of national power.

2. *Fitzpatrick v. Bitzer, City of Rome v. United States, and Congress' power to abrogate the eleventh amendment.*

If state sovereign immunity to private causes of action based on federal law depends on the scope of enumerated powers of the national government, the problematic cases of *Fitzpatrick v. Bitzer*³⁰⁵ and *City of Rome v. United States*³⁰⁶ take on new meaning. In *Fitzpatrick*, the Supreme Court in 1976 addressed the question of whether Congress has the power to authorize private damage awards against state governments that discriminate in employment on the basis of sex in violation of Title VII of the Civil Rights Act of 1964. The Court was careful to note that the defendant had not challenged the "substantive provisions" of Title VII.³⁰⁷ The only thing at issue was Congress' ability to "provide for private suits against States or state officials which are constitutionally impermissible in other contexts."³⁰⁸ The Court concluded that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."³⁰⁹

In *City of Rome v. United States*³¹⁰ four years later, the Court suggested that section two of the fifteenth amendment also can serve as a foundation for congressional power to abrogate the protection of the eleventh amendment.³¹¹ The City of Rome had contended, among other things, that the requirement of the Voting Rights Act of 1965

305. 427 U.S. 445 (1976).

306. 446 U.S. 156 (1980).

307. *Fitzpatrick*, 427 U.S. at 456 n.11.

308. *Id.* at 456.

309. *Id.* The Court has explicitly reserved the question whether private suits against the states can be inferred directly from the fourteenth amendment. See *Milliken v. Bradley (II)*, 433 U.S. 267, 290 n.23 (1977); see also *Maucler v. Nyquist*, 406 F. Supp. 1233 (W.D.N.Y. 1976) (refusing to grant money damages under the fourteenth amendment), *appeal dismissed sub nom. Rabinovitch v. Nyquist*, 433 U.S. 901 (1977) (see Appellant's Jurisdictional Statement, at 4, Question Presented No. 4: "Whether, of its own force, the Fourteenth Amendment constitutes a limitation on the sovereign immunity bar of the Eleventh Amendment . . ."); Note, *supra* note 9.

310. 446 U.S. 156 (1980).

311. The Supreme Court had held earlier that the existence of state activity within an area subject to congressional control under the commerce clause was sufficient to trigger state liability in federal court under a federal statute. *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (alternate holding). *Parden* was perceived shortly after it was decided as containing within it the seeds of a complete abrogation of the eleventh amendment. See Note, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966). In 1978, Professor Field appeared to think that *Parden* was still good law, writing that "the Court has left Congress free to impose

that a subdivision of a state “pre-clear” proposed electoral changes, even though that subdivision never had been shown to have engaged in voting discrimination on the basis of race, was an invasion of the reserved powers of the state. The Court concluded, however, that the rationale of *Fitzpatrick* controlled: “*Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments ‘by appropriate legislation.’”³¹²

Within the scope of their operation, both *Fitzpatrick* and *City of Rome* are consistent with the analysis suggested by this article’s historical view of the eleventh amendment because they both appear to rest on the premise that the substantive power of Congress to create a private cause of action against a state is the determinative issue. In *Fitzpatrick*, the Court noted that the substantive power to create the cause of action under Title VII was unchallenged, and it held that under this circumstance there was no superseding jurisdictional bar. In *City of Rome*, where the substantive power of Congress to require preclearance was directly at issue, the Court cited *Fitzpatrick*—a case involving only a question of a jurisdictional bar—as authority for the proposition that Congress has special substantive power under the Civil War amendments. This slipping back and forth between substantive power and jurisdictional authority may be more than mere untidiness; these cases appear to be suggesting that the substantive and jurisdictional issues are governed by identical criteria. That is, if

suit upon states whenever it acts within its regulatory powers” Field, *Part Two, supra* note 2, at 1252.

But it is relatively clear that this aspect of *Parde*n has now been abandoned. Referring to its “dramatic circumstances” and characterizing the state activity at issue—operating a railroad for profit—as one in which “private persons and corporations normally [run] the enterprise,” the Court in *Employees of the Dep’t of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 284, 285 (1973) refused to follow *Parde*n. A year later, the Court in *Edelman v. Jordan*, 415 U.S. 651 (1974), refused to find state liability for damages in federal court under a federal statute, although a generous reading of *Parde*n probably would have permitted it to do so. Professor Currie agrees that *Parde*n is no longer a strong precedent. See D. CURRIE, *FEDERAL JURISDICTION* 167 (2d ed. 1981) (“The lower courts continue to wrestle with the remains of *Parde*n.”); D. CURRIE, *supra* note 9, at 573.

Lower federal courts have found congressional power to abrogate the eleventh amendment elsewhere in the Constitution. See *Peel v. Florida Dep’t of Transp.*, 600 F.2d 1070 (5th Cir. 1979) (war power); *Jennings v. Illinois Office of Educ.*, 589 F.2d 935 (7th Cir.) (same), *cert. denied*, 441 U.S. 967 (1979); see also *Confederated Tribes v. Washington*, 446 F. Supp. 1339, 1350 (E.D. Wash. 1978) (three judge district court) (holding that Congress “in the exercise of its enumerated powers” may subject the states to damage suits brought by Indian tribes and remanding to a single-judge district court for determination of damages), *aff’d in part and rev’d in part on other grounds*, 447 U.S. 134 (1980).

312. *City of Rome*, 446 U.S. at 179.

Congress has the power under the Civil War amendments to create a private cause of action entailing particular remedies against a state, it also, perhaps necessarily, has the power to authorize a federal court to hear that cause of action and grant those remedies.³¹³

There is, of course, an obvious rationale for both *Fitzpatrick* and *City of Rome* based on chronology. Indeed, it is the rationale inherent in the Court's opinion in *Fitzpatrick*: The Civil War amendments were passed after the eleventh amendment and therefore to the extent that the fourteenth amendment is inconsistent with the eleventh, the fourteenth must control. But this rationale turns out to be surprisingly complicated and, in the end, probably unsatisfactory. Indeed, when considered fully this rationale itself may contain a suggestion that *Fitzpatrick* and *City of Rome* are really best explained by a straightforward statement that, to the extent Congress has the substantive power to create private causes of action against the states, it has the power to confer jurisdiction on the federal courts to hear those causes of action.

Hutto v. Finney,³¹⁴ in which the Court in 1978 relied on *Fitzpatrick* to hold that attorneys' fees could be awarded against the state of Arkansas in litigation enforcing the eighth amendment guarantee against cruel and unusual punishment, illustrates an obvious difficulty with a purely chronological explanation for *Fitzpatrick*. To find that Congress may use section 5 of the fourteenth amendment to abrogate the eleventh amendment for rights now protected under the fourteenth amendment requires a conclusion that the adopters of the fourteenth amendment intended to incorporate those earlier amendments in the fourteenth. One may conclude—as the Court has done—that they so intended, but the conclusion is not beyond challenge. But more important for present purposes, the incorporation debate has heretofore involved only the issue of prohibiting certain state action *simpliciter*. A further conclusion that the adopters of the fourteenth amendment also intended to abrogate the states' constitu-

313. The reach of the federal government's power to enforce by substantive law the provisions of the Civil War amendments is a complex problem beyond my present scope. See, e.g., Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 S. CT. REV. 81; Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199 (1971); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). For present purposes, it is sufficient to suggest that the interpretation proposed here permits a conclusion that the jurisdictional power of the federal government may extend as far as its power to enact substantive law, however far that might be.

314. 437 U.S. 678 (1978).

tional protection against private causes of action arising out of prohibited state action may or may not follow.

An additional difficulty, to some degree implicated by the first, is suggested by the problem posed in *Quern v. Jordan* in 1979.³¹⁵ After *Fitzpatrick* established that Congress had the power under section 5 of the fourteenth amendment to abrogate the eleventh amendment, the question remained whether under particular statutes Congress had intended to exercise that power. In *Quern*, the Court found that Congress did not so intend in passing section 1983. As a matter of contemporary federal structure, the holding in *Quern* is problematic because the combination of *Monell*—holding that section 1983 confers a private right of action for damages against a state's subdivisions—and *Quern* insures a continuation of the disparity in treatment between the states and their subdivisions.³¹⁶ But a contrary holding in *Quern* would have been at least as troublesome, for it would have created a problem that very likely would have made a straightforward chronological rationale for *Fitzpatrick* even more unsatisfactory.³¹⁷ In *Quern*, the Court suggested that if Congress had intended to abrogate the eleventh amendment in passing section 1983, it could have accomplished this merely by making its intent clear. But if this is so, one must inquire whether there is any realistic check on Congress' power to abrogate the eleventh amendment under section 5, since section 1983, even in 1979, was tied only loosely to the substan-

315. 440 U.S. 332 (1979).

316. See notes 273–280 *supra* and accompanying text.

317. The problem that faced Congress in passing Title II of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a–2000a-6 (1976), would be presented, but in reverse. In 1964, Congress was uncertain how far and on what theory the Supreme Court would permit federal regulation of racial discrimination in privately owned public accommodations. See *Civil Rights: Public Accommodation: Hearings before the Senate Commerce Comm. on S. 1732*, 88th Cong., 1st Sess., parts 1 and 2 (1963); *Hearings before Subcomm. No. 5 of the House Comm. on the Judiciary on Miscellaneous Proposals Regarding Civil Rights*, 88th Cong., 1st Sess. (1963); *Civil Rights: Hearings before the House Judiciary Comm. on H.R. 7152, as amended*, 88th Cong., 1st Sess. (1963); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). See also G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 195–204 (10th ed. 1980). Because of its doubts about the reach of the fourteenth amendment, Congress decided to rely substantially on the commerce clause, even though the underlying issues were essentially fourteenth amendment concerns. See 42 U.S.C. § 2000a (b) (1976) (“Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter *if its operations affect commerce*, or if discrimination or segregation by it is supported by state action.” (emphasis added)); see also *id.* § 2000a (c) (1976). Under *Fitzpatrick*, however, the issue is how much the Court will insist on a tie to the Civil War amendments—among them, the very amendment on which Congress was afraid to rely too heavily in 1964—to permit abrogation of the protection of the eleventh amendment.

tive provisions of the fourteenth amendment.³¹⁸

Maher v. Gagne,³¹⁹ decided in 1980, reinforces the suggestion implicit in *Quern* that the Court will not insist on a tight link between the fourteenth amendment and a statutory abrogation of the eleventh.³²⁰ The plaintiff in *Gagne* sought relief against the Connecticut Secretary of State on due process and equal protection claims under section 1983 and on a statutory claim under the Social Security Act, but the parties settled the case without trial. The issue before the Court was whether attorneys' fees could be awarded against the state under section 1988 of the Civil Rights Act³²¹ when no violation of the fourteenth amendment had been established. The Court was distinctly uninterested in requiring a close link between the statutory grant of attorneys' fees and an implementation of the fourteenth amendment due process and equal protection clauses, saying,

Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and substantial constitutional claim are settled favorably to the plaintiff without adjudication.³²²

The use of the incorporated provisions of the fourteenth amendment to abrogate the protection of the eleventh amendment, as in *Hutto v. Finney*, and the award of attorneys' fees against the state despite an attenuated connection to the fourteenth, as in *Maher v. Gagne*, suggests that the abrogation of the eleventh amendment may derive from something deeper than a bare chronological argument. It may derive from a fundamental shift, of which the Civil War and its amendments are merely an important part, in the relationship between the federal and state governments. The use of the fourteenth amendment to impose substantive national values on the

318. The problem became even more acute a year after *Quern*, when the Court decided *Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding all federal statutes included within the scope of § 1983). Indeed, the potential scope of § 1983 is so greatly expanded under *Thiboutot* that the Court's underlying premise in *Quern* that Congress can abrogate the eleventh amendment under § 1983 if it intended to do so may no longer hold.

319. 448 U.S. 122 (1980).

320. *Id.* at 132. *Maher v. Gagne*'s relaxed approach is rather typical of attorneys' fees cases. The Court has also permitted attorneys' fees awards against states in *Maine v. Thiboutot*, 448 U.S. 1 (1980) (under 42 U.S.C. § 1988); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (under 42 U.S.C. § 2000e-5(k)); *Hutto v. Finney*, 437 U.S. 678 (1978) (under 42 U.S.C. § 1988 and under a bad faith rationale); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (under 42 U.S.C. § 2000e-5(k)).

321. 42 U.S.C. § 1988 (1976).

322. *Gagne*, 448 U.S. at 132.

states and to authorize the federal courts to enforce these values through private causes of action despite the eleventh amendment suggests that, while the stated doctrinal ground for the abrogation of the eleventh amendment's jurisdictional prohibition might be a post-hoc rationale, the Court's animating impulse cannot be described so neatly. It suggests, further, that the division between national values derived directly from and incorporated into the fourteenth amendment and national values grounded in other parts of the Constitution does not fully correspond to the underlying structural relationships that the Court perceives between the national and state governments.

Fitzpatrick v. Bitzer and *City of Rome v. United States* do not go so far, but their ultimate implication is that the jurisdictional and substantive questions may collapse into one for all exercises of federal power over the states. If this is so, then the only inquiry—albeit a highly complex and multifarious one—would become whether Congress, acting under any of its enumerated powers, has the substantive power to create a private cause of action against the states. If it does, then the jurisdiction of the federal courts to hear a suit based on such a cause of action would follow as a matter of course.

3. *Beyond Fitzpatrick v. Bitzer and City of Rome: a clause-specific analysis of federal power over the states.*

If *Fitzpatrick v. Bitzer* and *City of Rome v. United States* are read in the way encouraged by this article's interpretation of the eleventh amendment, they pose the question of the extent of Congress' power to create substantive obligations against the states, enforceable by private causes of action, under any of its enumerated powers. But even if these cases are read so broadly, they do little more than pose the question, for they contain few hints about how the issue of the states' vulnerability to private suits ought to be resolved outside the context of the Civil War amendments. To say that the Court has not fully described the contours of the substantive power of Congress to create private causes of action against the states is to say in another way what has been said already: The quasi-jurisdictional framework that the Court has felt itself obliged to use under the *ex parte Young* fiction has prevented it from articulating, and perhaps even realizing, the underlying bases for its decisions.

Under these circumstances, it is too much to expect that one can perceive in the decided eleventh amendment cases a relatively complete or even consistent body of law lying behind the facade of *Ex*

parte Young. But one may perceive enough of a framework to conclude that an analysis focusing specifically on the enumerated powers of the federal government is useful in explaining when the Court will permit private remedies against state officers that are intrusive on state governmental functions and when it will not. And one may conclude further that the *Ex parte Young* analysis, purporting to differentiate between permissible and impermissible remedies without regard to the underlying federal power, at best fails to describe accurately what is happening in eleventh amendment cases and at worst may even distort the decisions in those cases by imposing an intellectual framework on a set of problems to which that framework is badly adapted.

The Ex parte Young Analysis. Except for cases falling under the *Fitzpatrick* principle, remedies against state officers of unconsenting states are governed by the legal fiction of *Ex parte Young*. Under the fiction, remedies are permitted against state officers but not against the state itself. The analysis focuses on the nature of particular remedies, asking whether they are in effect remedies against the state, without differentiating among the federal rights upon which they are based. The modern formulation of the *Ex parte Young* principle is contained in *Edelman v. Jordan*,³²³ in which the Court declared in 1974 that prospective relief against state officers was permissible but that retroactive relief was not.³²⁴ The plaintiffs in *Edelman* alleged that

323. 415 U.S. 651 (1974).

324. The necessity to reformulate the *Ex parte Young* principle resulted from the increasing availability during the last twenty-five years of injunctions requiring state officers to take affirmative steps rather than merely to cease illegal behavior. As late as the mid-1950's it was possible for Professor Hart to characterize the *Ex parte Young* principle as applying primarily to prohibitions against acting:

Judicial mandates to non-judicial state officers to enforce either primary or remedial duties requiring the performance of affirmative acts are relatively infrequent. Lower federal courts may *prohibit* state officers, in their individual capacity, from taking action under color of office in violation of law. But an action to compel the performance of an affirmative act would encounter, ordinarily, the bar of the Eleventh Amendment. Whether a writ of mandamus to compel performance of a ministerial duty would be regarded as an action against the state is not altogether clear. But it is significant that a practice of issuing such writs to state officers has never become established.

Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 516 (1954) (footnotes omitted). So long as the only relief available was an order to the state officer not to do something, the issue addressed in *Edelman* did not arise. Only when affirmative injunctions became generally available—the 1954 date of Professor Hart's article is more than simple coincidence—did the necessity to distinguish among various forms of affirmative relief arise. See, e.g., *Griffin v. County School Bd.*, 377 U.S. 218, 228 (1964); see also Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 649–54, 673–83 (1982).

Illinois officials administering a federal assistance program had illegally delayed processing applications and had thereby denied payments to the class of eligible claimants during the delay. The Court held that injunctive relief requiring applications to be processed in a timely fashion was permissible but that an order requiring payment of money wrongfully withheld was barred. The Court said, "The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself . . . than it does the prospective injunctive relief awarded in *Ex parte Young*."³²⁵ *Edelman* thus suggests that the modern version of *Ex parte Young* consists of three interrelated propositions: Prospective prophylactic injunctive relief against individual state officers is permitted; retroactive relief that compensates a plaintiff for harm already done is prohibited; and monetary awards against state officers that "must inevitably come from the state treasury" are prohibited.³²⁶ Yet a number of cases, decided both before and after the Court's decision in *Edelman*, indicate that the availability of remedies against state officers does not correspond tidily to these propositions.

The fourteenth amendment. Two recent cases involving rights derived from the fourteenth amendment have permitted remedies against state officers that, from a straightforward reading of *Edelman v. Jordan*, one would have thought were forbidden by the eleventh amendment. The result in neither case can be explained by the *Fitzpatrick v. Bitzer* doctrine that Congress has the power to abrogate the protection of the eleventh amendment by statutes enacted under section 5 of the fourteenth amendment. The Court decided the first case, *Scheuer v. Rhodes*,³²⁷ two years before *Fitzpatrick*; it decided the second case, *Milliken v. Bradley (II)*,³²⁸ without relying on *Fitzpatrick*.³²⁹ Instead, the cases must be explained, if they can be explained

325. *Edelman*, 415 U.S. at 665.

326. Judicial reluctance to grant damage judgments against state officers apparently has increased rather than decreased during the last 200 years. *See, e.g.*, *White v. Greenhow*, 114 U.S. 307 (1885) (damages recoverable from a state official who has wrongfully seized plaintiff's property for alleged nonpayment of taxes); Engdahl, *supra* note 114 (describing the general availability of damage relief against governmental officials through much of the nineteenth century).

327. 416 U.S. 232 (1974).

328. 433 U.S. 267 (1977).

329. The Court said, "[W]e do not reach [the argument] that the Fourteenth Amendment, *ex proprio vigore*, works a *pro tanto* repeal of the Eleventh Amendment. *Cf.* *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976)." *Id.* at 290 n.23. When the Court decided *Milliken (II)* in 1977, it was an open question whether § 1983 abrogated the eleventh amendment under *Fitzpatrick*.

at all under the doctrinal framework that the Court acknowledges as relevant under *Ex parte Young* and *Edelman v. Jordan*.

In *Scheuer v. Rhodes*, decided less than a month after *Edelman*, the Court held that a damage action under section 1983, arising out of the use of the National Guard during the Kent State incident in 1970, could be maintained against the Governor of Ohio. The Court said only that "damages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office."³³⁰ The Court made no inquiry as to the likelihood that any damage award against the governor might actually be paid out of the state treasury. Even if it was enough for the Court to assume that the damage payment would not "inevitably" come from the state treasury, it is not clear why payment by the Illinois treasury in *Edelman* was assumed to be inevitable while payment by the Ohio treasury in *Scheuer* was not.³³¹

In *Milliken v. Bradley (II)*,³³² decided three years later, the Court held that the Governor of Michigan could be enjoined to pay half the cost of providing compensatory educational programs for Michigan school children as part of the remedy for prior unconstitutional school segregation. That the program was designed to remedy past wrongs rather than to prevent future harm did not appear to trouble the Court: "That the programs are also 'compensatory' in nature

But see *Quern v. Jordan*, 440 U.S. 332 (1979) (holding Congress did not intend that § 1983 should abrogate the eleventh amendment); *see also* *Alabama v. Pugh*, 438 U.S. 781 (1978).

330. *Scheuer*, 416 U.S. at 238.

331. A related question is whether a state official who cannot assert the eleventh amendment as a defense can nevertheless invoke individual official immunity. The Supreme Court remanded *Scheuer* for a determination of the official immunity question. *Id.* at 238-49. Professor Engdahl suggests that early American hostility to official immunity stemmed in significant part from the strength of the principle of sovereign immunity for the United States, so that, to the degree that the sovereign was immune, the injured plaintiff would be able to recover from the sovereign's officer. Engdahl, *supra* note 114; *see also* Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110 (1981); Casto, *Innovations in the Defense of Official Immunity under Section 1983*, 47 TENN. L. REV. 47 (1979); Jaffe, *Suits against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1 (1963); Jaffe, *Suits against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978).

A number of recent Supreme Court decisions have granted official immunity to state officers. *See, e.g.*, *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980) (absolute immunity from damage suit for actions taken in a legislative capacity); *Stump v. Sparkman*, 435 U.S. 349 (1978) (absolute immunity from damage suit for judge acting without malice outside jurisdiction); *Procunier v. Navarette*, 434 U.S. 555 (1978) (qualified immunity from damage suit for prison officials when they knew or should have known they were violating constitutional rights); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity from damage suit for prosecutor knowingly using false testimony).

332. 433 U.S. 267 (1977).

does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system."³³³ The Court's statement, however, seems to be little more than sleight of hand, for in the sense used by the Court even a simple order to pay money damages operates prospectively.

Focusing on the special character of the fourteenth amendment may help explain the availability of damages and retrospective relief in *Scheuer* and *Milliken*, despite their apparent inconsistency with *Edelman*.³³⁴ Both *Scheuer* and *Milliken* depend upon a considerably broader view of the remedies permissible under the eleventh amendment than the view the Court took in *Edelman*. Although the Court has never made the relationship explicit, one may suspect that both *Scheuer* and *Milliken*, decided under the due process and equal protection clauses respectively, are related to *Fitzpatrick v. Bitzer* in the sense that in all three cases the Court seems to have thought that the fourteenth amendment authorized an unusual, perhaps an extraordinary, degree of interference with what would otherwise be the states' sovereign authority. At least where certain types of fourteenth amendment rights are at stake,³³⁵ the Court apparently feels that the *Edelman* formulation is too grudging and that the underlying cause of action is more important than any interest in a consistent application of a quasi-jurisdictional limitation on the availability of remedies against a state in federal court. And in these cases, the Court was willing to award what would be a forbidden remedy in other cases—an award of damages, as in *Scheuer*, or an injunction that was conceded to entail a substantial payment of money out of the state treasury to compensate for past wrongs, as in *Milliken*.

The contracts clause. Although the rationales given in modern eleventh amendment cases do not encourage the perception, it is nevertheless fairly clear that contract cases do not fit the generalizations of *Ex parte Young* and *Edelman* about the availability of remedies against the states.³³⁶ The contractual obligations of the states have been

333. *Id.* at 290.

334. See notes 323-26 *supra* and accompanying text.

335. This is not to say, however, that the state tax cases, in which the Court has consistently refused to order refunds of state taxes despite alleged due process violations, are necessarily in jeopardy under a clause-specific analysis, for the issues in these cases are distinct from those in *Scheuer*. See *Kennecott Copper Co. v. State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co. v. Dep't of Treasury* 323 U.S. 459 (1945); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47 (1944). Yet it may have been significant that in all three of the above cases the state courts were open for the adjudication of the due process claims. See also 28 U.S.C. § 1341 (1976).

336. The interpretation of the eleventh amendment proposed by this article also invites careful attention to distinctions among different contractual obligations and remedies, some

troublesome from the beginning. *Chisholm v. Georgia* itself arose out of a contractual obligation, although one that was not enforceable under the contracts clause.³³⁷ The eleventh amendment cases following the Civil War, including *Hans v. Louisiana*, were also contract cases, but brought—for the most part unsuccessfully—under the contracts clause.³³⁸ One of the most revealing cases is *In re Ayers*,³³⁹ decided in 1887. The case is virtually impossible to explain in a way consistent with the *Ex parte Young* fiction. In *Ayers*, the Court refused to enjoin the Attorney General of Virginia from prosecuting suits against Virginia citizens who sought to pay their state taxes with tax coupons that had been attached to state bonds. The plaintiffs sought only to enjoin the Attorney General from bringing suits to achieve the unconstitutional purpose of violating the contracts clause; but the Court held that the plaintiffs were, in effect, seeking to force the state of Virginia to perform its contract and denied relief. To the same effect as *Ayers* is the much more recent case of *Larson v. Domestic & Foreign Commerce Corp.*,³⁴⁰ in which the Court in 1949 held that the

of which may already exist in the case law in unsystematic form. For instance, the general rule that specific performance of the state contractual obligations will not be awarded, *see* *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949); *Hans v. Louisiana*, 134 U.S. 1 (1890); *In re Ayers*, 125 U.S. 443 (1887), is not always followed, *see* *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299 (1952) (sustaining injunction against Georgia official collecting taxes in violation of corporate charter from the state). The Court has awarded specific performance of contracts for the sale of specific real property, *Pennoyer v. McConaughy*, 140 U.S. 1 (1891) (specific performance of a land sale contract awarded against a state officer), although this practice may not have survived *Oregon v. Hitchcock*, 202 U.S. 60 (1906) (specific performance of land sale contracts not awarded against officers of the United States) and *Minnesota v. Hitchcock*, 185 U.S. 373 (1902). Identifiable property taken by state officers in violation of the contracts clause generally may be recovered. *See* *Tindal v. Wesley*, 167 U.S. 204 (1897); *Poindexter v. Greenhow*, 114 U.S. 270 (1885); *see also* *United States v. Lee*, 106 U.S. 196 (1882); *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824).

337. *Chisholm* would not today raise a cognizable claim under the federal contracts clause because Georgia's action would constitute a mere breach of contract rather than an impairment of the obligation of contract. *See* note 97 *supra*.

338. Other post-Civil War state bond cases include *South Dakota v. North Carolina*, 192 U.S. 286 (1904); *Tindal v. Wesley*, 167 U.S. 204 (1897); *North Carolina v. Temple*, 134 U.S. 22 (1890); *Hagood v. Southern*, 117 U.S. 52 (1886); *The Virginia Coupon Cases*, 114 U.S. 269 (1885); *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446 (1883); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Antoni v. Greenhow*, 107 U.S. 769 (1882); *Louisiana v. Jumel*, 107 U.S. 711 (1882); *Williams v. Hagood*, 98 U.S. 72 (1878). Even *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), was such a case, for the liability in question stemmed from Mississippi bonds due in 1850, 1861, and 1866 on which Mississippi had defaulted. *See also* *Graham v. Folsom*, 200 U.S. 248 (1906); *Chicot County v. Sherwood*, 148 U.S. 529 (1893); *Board of Liquidation v. McComb*, 92 U.S. 531 (1875).

339. 123 U.S. 443 (1887).

340. 337 U.S. 682 (1949).

Administrator of the United States War Assets Administration did not have to deliver coal to the plaintiff on an apparently valid contract, but instead could defend successfully on the ground of sovereign immunity.³⁴¹ *Hans v. Louisiana*, decided in 1890, reinforces the point made three years earlier in *Ayers*: Contractual obligations of the state are fundamentally different from other obligations, and a state will not be made liable to private suit in federal court when the object and more or less predictable result of the relief sought is the payment by the state of money due under a contract. Under this understanding of the cases, it is not necessary to perform the impossible task of reconciling *Ayers* with *Ex parte Young*. Rather, it is only necessary to understand that the critical fact is that a state contractual obligation is at issue and, further, to recall that the public securities of the states were precisely—indeed the only—obligation on which the framers were clear in saying that the states should not be liable.³⁴²

State consent to private suit: the spending clause and the interstate compact clause. Other cases suggesting that the enumerated power under which Congress acts is a more important determinant of the availability of private suit than is conceded by the Court's articulated doctrinal framework involve state consent to suit. It has been established since the late nineteenth century that states may consent to private suit and thereby confer jurisdiction on the federal courts to hear causes of action against them.³⁴³ Two groups of cases, however, indicate that consent to suit may be found more or less easily depending not so much on the indicia of consent surrounding the transactions upon which the consent is supposedly based as on the underlying constitutional power that is being exercised.

In the first group, the Court has refused in two recent cases to

341. *Larson* did not involve the eleventh amendment because suit was brought against the United States rather than a state, but the Court cross-cited to eleventh amendment cases without drawing any distinction. Justice Frankfurter, in his dissenting opinion, disagreed with the result, but not with the Court's reliance on eleventh amendment cases: "As to the States, legal irresponsibility was written into the constitution by the Eleventh Amendment; as to the United States, it is derived by implication. . . . The sources of the immunity are formally different, but they present the same legal issues." *Larson*, 337 U.S. at 708; see also *Philadelphia Co. v. Stimson*, 223 U.S. 605, 619-20 (1912) (citing eleventh amendment cases where the issue was the suability of the United States Secretary of War).

342. See, e.g., THE FEDERALIST No. 80 (A. Hamilton) (quoted *supra* note 64). Even Chief Justice Jay, who found state liability in *Chisholm v. Georgia*, specifically said that he did not regard himself bound by that decision to hold that states were liable in federal court suits on their public securities, at least those issued before the Constitution was adopted. *Chisholm*, 2 U.S. (2 Dall.) at 478.

343. *Clark v. Barnard*, 108 U.S. 436 (1883).

find state consent to suit where the federal spending clause would have provided the basis for imposing liability. In *Edelman v. Jordan*, the Court could have found that the state, by agreeing to participate in a federal assistance program in return for obtaining federal funds, had consented to private damage suits in federal court for violating the federal obligations it had voluntarily assumed under the program. But the Court found, instead, that the lack of any clear indication that the state had consented prevented such a conclusion.³⁴⁴ The Court's reluctance to find consent in a spending clause case was even more apparent seven years later in *Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association*,³⁴⁵ where the Court held in a brief per curiam opinion that no federal private cause of action was available against the Florida Department of Health and Rehabilitative Services for money owed to nursing homes under the federal medicaid program, even though the Department had contracted to be bound by federal law in return for receiving federal medicaid money. The critical failure, according to the Court, was the lack of a clear statement by the state that it had agreed to be sued on the obligations it assumed.³⁴⁶

The Court's unwillingness to find consent to suit in spending clause cases such as *Edelman* and *Florida Department of Health & Rehabilitative Services* stands in stark contrast to its willingness to find consent in interstate compact cases. Just two years before *Florida Department of Health & Rehabilitative Services*, the Court found, in *Lake Country Estates v. Tahoe Regional Planning Agency*,³⁴⁷ that an interstate body entitled to the protection of the eleventh amendment had waived that protection through the consent of California and Nevada in entering into the interstate compact forming the agency. The degree of overt consent required was minimal. In the words of the Court,

Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the [Eleventh]

344. *Edelman*, 415 U.S. at 673 ("In deciding whether a state has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'").

345. 450 U.S. 147 (1981), *reh'g denied*, 451 U.S. 933 (1981).

346. *Id.* at 150 (citing *Edelman*, 415 U.S. at 673-74).

347. 440 U.S. 391 (1979).

Amendment.³⁴⁸

The Court, moreover, was not breaking new ground in *Lake Country Estates*. Twenty years earlier, in *Petty v. Tennessee-Missouri Bridge Commission*,³⁴⁹ it had found consent to suit by a bridge commission when the interstate compact creating the commission provided without elaboration that it "should have the power 'to sue and be sued in its own name.'"³⁵⁰

The reluctance of the Court to find that states participating in cooperative federalism programs have consented to suit in federal court suggests that the Court is, and will continue to be, reluctant to find that a state has agreed to be subject to private damage actions in return for accepting federal funds. The constitutional implications of an unlimited congressional power to induce the states, by conditional grants of federal money, to do things that Congress is otherwise powerless to require are far-reaching and complex.³⁵¹ *Edelman* and *Florida Department of Health & Rehabilitative Services* and the clear statement rule that they invoke should probably be read more as an oblique expression of doubt about the wisdom, and perhaps even constitutionality, of Congress imposing such liability on the states under the spending clause³⁵² than as a free-standing reluctance to find that the state agreed to private suit for damages. *Edelman* and *Florida Department of Health & Rehabilitation Services* are probably better explained as stemming from the Court's discomfort with the potential power of the federal government over the states under the spending clause; and the Court's discomfort is emphasized by the alacrity with which it has found consent when federal power is exercised under the inter-

348. *Id.* at 401.

349. 359 U.S. 275 (1959).

350. *Id.* at 277; *cf.* cases cited in note 335 *supra* (state tax cases in which bare sue-and-be-sued language is uniformly held to grant consent to suit in state courts only).

351. Academic interest in limitations on federal power to control the states' activities under the spending power may be reviving. *See, e.g.,* Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871-83 (1979); Note, *Federal Grants and the Tenth Amendment: "Things as They Are" and Fiscal Federalism*, 50 FORDHAM L. REV. 130 (1981); Note, *Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power*, 126 U. PA. L. REV. 402 (1979); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981); *see also* Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector*, 39 WASH. L. REV. 4, 31 (1964); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977).

352. *See* *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24-25 (1981) ("Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds. . . . Though Congress' power to legislate under the spending power is broad, it does not include surprising participating states with postacceptance or 'retroactive' conditions.").

state compact clause.³⁵³

4. *A comparison of congressional and judicial power.*

If we conclude, as the historical view of the eleventh amendment proposed here would permit us to do, that the states are protected from the enforcement of private causes of action against federal liability only to the extent that the federal government is constitutionally prevented, as a substantive matter, from imposing this liability upon them, there is nothing in this formulation that requires a distinction between the power of Congress to do so by statute and the power of the judiciary to do so by inference directly from the Constitution. And as a matter of power considered in the abstract, there may indeed be no direct prohibition against the judicial creation of private causes of action against the states.³⁵⁴ Yet there may be a number of reasons to consider carefully the relevance of whether it is Congress or the judiciary that is acting.

The differentiation between congressional and judicial power permitted under present law is probably too crude to take into account the sensitive issues involved. The distinction between causes of action enacted by statute and those inferred directly from the Constitution by the judiciary is currently unavailable in cases decided under the *Ex parte Young* and *Edelman v. Jordan* rationale, and the distinction is made in an all-or-nothing fashion under *Fitzpatrick v. Bitzer* for cases under the Civil War amendments. Thus, under current law, what is irrelevant in one category of cases becomes all-important

353. Compare *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (finding no consent to private suit to enforce federal minimum wage for state employees) with *Parden v. Terminal Ry.*, 377 U.S. 184 (1964) (finding consent to private suit under Federal Employers' Liability Act). The analysis in the text, indicating that the most important factor in the consent cases may be the underlying federal power, suggests that *Employees of the Dep't of Pub. Health & Welfare*, involving federal wage regulation of state employees, may appropriately be seen as a precursor to *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating federal wage regulation of state employees).

354. The problems posed by judicial creation of private causes of action against the states are not confined to the historical interpretation of the eleventh amendment proposed by this article. If a state court must entertain a private cause of action against a state under *Testa v. Katt*, 330 U.S. 386 (1947), see notes 239-42 *supra* and accompanying text, the same issue exists, although in a less acute form. If a state court of general jurisdiction must entertain private suits against the state, presumably it must entertain any claims of right under applicable law, including those based directly on the United States Constitution. The Supreme Court sits in review of these decisions and has the power to infer a cause of action directly from the Constitution. Thus, under an expansive reading of *Testa*, the federal judiciary—here, the Supreme Court—may still have the power to create private causes of action against the states even under the current view of the eleventh amendment.

in another. The interpretation of the eleventh amendment proposed by this article, by contrast, would permit questions about which branch of the federal government is attempting to exercise that power in all cases involving private causes of action against the states under federal law. Contract clause cases may provide the most interesting example.

It is a commonplace of contemporary academic analysis that the federal judiciary is on weak ground when it interposes its judgment on behalf of the states against the will of Congress. In theory at least, the courts should be wary of protecting the states against Congress because the states' interests have already been taken into account by that body.³⁵⁵ And for somewhat the same reasons, the judiciary also may be on weak ground if it creates causes of action against the states when Congress has chosen not to do so, since inaction implies a congressional desire to protect the states. That is, under this traditional way of looking at things, Congress is generally the appropriate body to strike the balance between the federal government and the states, whether imposing liability on the states or refraining from doing so.³⁵⁶ But additional reasons may be adduced for conceding to Congress greater power to impose private suits on the states under federal law.

The familiar argument that the federal judiciary should intervene to protect particular individual rights suggests that judicial willingness to create causes of action against the states should be greater or lesser depending on the nature of the right at issue. In one sense, of course, individual rights are always at stake in an eleventh amendment case, for by hypothesis what is at issue is a private cause of action. Yet one may at least ask whether contracts clause cases should be treated as a special category of individual right, since economic well-being rather than political rights or individual autonomy

355. Professor Wechsler has written that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954); see also J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176-93 (1980); Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); Diamond, *The Federalist on Federalism: 'Neither a National Nor a Federal Constitution, but a Composition of Both,'* 86 YALE L.J. 1273 (1977); Stewart, *supra* note 351.

356. Professor Kaden has recently suggested that the decline of the states' influence on the federal government has made this assumption vulnerable. Kaden, *supra* note 351, at 857-68.

is at issue in such cases. Thus, in addition to the historical fact that the courts always have been reluctant to enforce the states' contractual obligations in damage actions, the modern distinction between economic rights and liberty rights may suggest that the judiciary need concern itself less about plaintiffs in contract clause cases than plaintiffs asserting liberty rights. This suggests further that the case for judicial creation of private rights is weakest in the category of case that has always proved the most difficult and that the result in *Hans v. Louisiana* should stand, at least so long as judicial creation of a private cause of action is needed to overturn it.

Moreover, in the traditional core of eleventh amendment protection—the award of money judgments against the states—there are obvious problems with coercing unwilling governmental bodies to comply with unpopular judgments. Examples of problematic cases include municipal bond cases in the late nineteenth century³⁵⁷ and modern cases in which courts have enjoined state officials to take action requiring the expenditure of substantial amounts of money.³⁵⁸ The experience in such cases may counsel against expanding these categories, particularly where the Court acts without the benefit of a statute and without the support of the political branches implied by such a statute. Contract clause claims on publicly issued state debt again present the most obvious case. When states repudiate their own debts, they are likely to be in such difficult economic circumstances that judicial orders based solely on a constitutional command may be widely ignored, and only an unwise court would undertake a task at which it is so likely to fail.

But even if we conclude that the states should not be required to pay off their bonded indebtedness on the strength of the contract clause standing by itself, we may still wish to inquire whether Congress can create a statutory cause of action designed to enforce the clause. A statutory obligation would greatly minimize the practical objection to the enforcement of the states' obligations to pay because the courts no longer would be left alone to enforce a distasteful obligation against the states. To the extent that the political branches of the national government intend their statutory cause of action to be practically enforceable, they have means available that the courts, acting alone, do not. Further, if the objection is based on a suspicion that courts might be insufficiently sensitive to the states' interest in

357. See note 268 *supra*.

358. See Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1976).

nonpayment, the argument that Congress represents and protects the interest of the states is at least a partial rejoinder.

In extreme circumstances, such as those prevailing after the Civil War, the states perhaps should not be forced under the contracts clause to pay their debts. But to conclude, as the current view of the eleventh amendment requires us to do, that Congress is forbidden to exercise its own political judgment to enforce an acknowledged constitutional requirement may be to erect an unnecessary and undesirable general rule. In the end, it may be unwise for Congress statutorily to provide for the enforcement of state debts whose nonpayment would violate the contracts clause, and in some circumstances it is conceivable that it is even unconstitutional for Congress so to require. But where only the wisdom of such a statutory requirement is at issue, it seems appropriate that Congress should be permitted to decide that question. In the end, it does not seem unreasonable that the power of Congress explicitly to create a private cause of action for damages should be broader than the power of the judiciary to infer such a cause of action directly from the contracts clause. And an open inquiry about the appropriate extent of such a broader power should probably be encouraged, rather than discouraged as under the present law.

CONCLUSION

Much of present eleventh amendment law is based on the premise that the amendment bars private suits in federal court even when such suits are based on valid substantive federal law. This article has suggested that the adopters of the amendment originally had the more modest purpose of requiring that the state-citizen diversity clause of article III be construed to confer jurisdiction on the federal courts only when a state sued an out-of-state citizen. So understood, the amendment left both admiralty and federal question jurisdiction to operate according to their own terms, authorizing federal courts to entertain private citizens' suits against the states whenever based on valid substantive federal law. If the amendment were read today to have merely that narrow consequence, the appropriate question in determining whether a federal court may hear a private cause of action against a state would be whether the federal government has the power to create private causes of action and to provide particular remedies against unconsenting states. This question would not be complicated by the additional jurisdictional question of whether fed-

eral courts may enforce obligations and grant remedies based on concededly valid federal law.

Importing this interpretation of the amendment into modern law may have a number of consequences. It may encourage the repudiation of the analogy to the *Mansfield* rule drawn by *Edelman v. Jordan*; it may permit the avoidance of the *Testa v. Katt* question of whether Congress may require the state courts to hear cases now barred from federal courts by the amendment; it may permit the states and their subdivisions to be treated as similar, perhaps even identical, entities for purposes of immunity from private suit under federal law; and it may encourage a clause-specific analysis of federal power to create private causes of action and grant remedies against unconsenting states.

With the probable exception of the *Mansfield* analogy, this historical interpretation of the amendment does not of itself yield quick or uncomplicated solutions to these problems. Moreover, with the probable exception of the *Mansfield* analogy and the possible exception of the different treatment now afforded the states and their subdivisions, the proposed interpretation of the amendment may not significantly change the actual results that are now achieved. But even in those cases where the actual result is not greatly different, the analysis suggested here may permit us to see more clearly what is at issue and to ask directly questions about the extent of federal power to create private causes of action and provide remedies against unconsenting states that are now asked covertly and awkwardly. The achievement in the short run may not be so much practical as intellectual. But what is at stake may be more than that, for in the long run, the integrity and possibly the stability of our legal system depend in important part on the ability of the judiciary to understand and articulate the real grounds for its decisions.

