History and State Suability: An Explanatory Account of the Eleventh Amendment

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HISTORY AND STATE SUABILITY: AN "EXPLANATORY" ACCOUNT OF THE ELEVENTH AMENDMENT

James E. Pfander†

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INTRODUCTION

At the heart of debates over the meaning of the Eleventh Amendment to the United States Constitution lies the question what role history should play in the interpretation of the constitutional text. The relevant text itself is not in dispute: the Amendment provides that 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." 

A few salient historical points also appear relatively free from doubt: President John Adams proclaimed the Amendment to be a “Part of the Constitution” on January 8, 1798.

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2 U.S. Const. amend. XI.
five years after the Supreme Court decided, in *Chisholm v. Georgia*, that its original jurisdiction over State-party cases extended to suits brought against a state in its corporate capacity. But apart from a consensus that the Eleventh Amendment overturned the "state suability" determination in *Chisholm*, scholars and judges disagree about what, if anything, the history of the Amendment can tell us about its proper interpretation some two hundred years later.

The Supreme Court, of course, bears primary responsibility for this fascination with history because it has offered a historical justification for its decision to ignore the limited terms of the text of the Amendment and to create a broader doctrine of state sovereign immunity. The Court's history has become known as the "profound shock" account—one that sees the *Chisholm* decision as profoundly unexpected and unsettling, and that portrays the Eleventh Amendment as a sweeping rejection of state suability by individual plaintiffs. The Court first tendered this broad view of the Eleventh Amendment in *Hans v. Louisiana*, holding that the Amendment precludes even those federal court suits "commenced or prosecuted" by in-state plaintiffs who fall outside the Amendment's literal terms. Although the

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4 2 U.S. (2 Dall.) 419 (1793).
5 Technically, one might argue today that the legally effective date of the Eleventh Amendment arrived well before the Adams proclamation. Under *Dillon v. Gloss*, 256 U.S. 368, 376 (1921), a constitutional amendment takes effect on the date when three-fourths of the states have ratified it, not on the date of its proclaimed effectiveness. North Carolina ratified the Eleventh Amendment on February 7, 1795, and thus provided the twelfth vote for ratification in a union then consisting of fifteen states. See 5 DHSC, supra note 3, at 601. At the time, however, the states had no agreed-upon mode of informing the federal government of their ratification decisions. Therefore, the Amendment slumbered for a few years before Congress initiated an inquiry into its status in January 1797. That inquiry led to the Adams proclamation. See id. at 601-04.
6 *See* *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (describing the decision in *Chisholm* as creating a "shock of surprise throughout the country" by departing from an original consensus on state immunity from suit in federal court). *See generally* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893-94 (1983) (criticizing the "profound shock" theory of the Eleventh Amendment as the Court developed in *Hans* and as Professor Charles Warren popularized in subsequent writing).
7 134 U.S. 1 (1890).
8 *Id.* at 9-12, 19-21. For instances in which the Court has held that the Eleventh Amendment applies as a flat ban on state suability by individual plaintiffs, see *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472-74 (1987) (plurality opinion) (recognizing that admiralty suits are not "suits in law or equity," but concluding that the principle of sovereign immunity, if not the language of the Eleventh Amendment, bars such claims); *Monaco v. Mississippi*, 292 U.S. 313, 330 (1934) (concluding that the principle of state immunity embodied in the Eleventh Amendment precludes suits by foreign states, despite the fact that such plaintiffs are nowhere mentioned in the text of the Amendment); *Ex parte New York*, 256 U.S. 490, 497-500 (1921) (holding that general Eleventh Amendment immunity bars suits in admiralty as well as those in law and equity).
Court has countenanced a variety of exceptions to *Hans*, but it has continued to view its rule of sweeping immunity, rather than the text of the Eleventh Amendment, as the starting point for any analysis of state suability.

Scholars have developed more nuanced accounts of the Eleventh Amendment that attempt to make sense of its text in light of a richer and more complex understanding of the history surrounding its ratification in the 1790s. These scholars emphasize that the text of the Amendment precludes suit by only two kinds of plaintiffs—citizens of other states and citizens or subjects of foreign nations. These scholars emphasize that the text of the Amendment precludes suit by only two kinds of plaintiffs—citizens of other states and citizens or subjects of foreign nations. Four important exceptions to the rule of state sovereign immunity enable the Court to preserve a measure of state accountability to the rule of law. First, individuals may challenge the legality of state action by suing state officials to secure injunctive and declaratory relief against threatened violations of federal statutory and constitutional rights. See Edelman v. Jordan, 415 U.S. 651, 677 (1974) (holding that individuals may obtain prospective relief from continuing violations of federal statutory rights by state officials); *Ex parte Young*, 209 U.S. 123, 155-57 (1908) (holding that the Eleventh Amendment does not bar a suit seeking injunctive relief from a threatened violation of constitutional limits on state ratemaking authority). Second, individuals may seek compensation for past violations of federal rights from the responsible state officer under 42 U.S.C. § 1983. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 25-31 (1991) (reaffirming state officers' amenability to suits for damages, and specifically rejecting Eleventh Amendment immunity for such officers). Third, another governmental body, the United States itself or another state, may sue a state by invoking the Court's original jurisdiction. See *United States v. Texas*, 143 U.S. 621, 644 (1892) (asserting original jurisdiction over federal question claims brought by the United States); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) (asserting jurisdiction over a border contest between two states). Fourth, the Eleventh Amendment does not apply to proceedings on appeal from the state courts to the Supreme Court. See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26-27 (1990) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821)). The Supreme Court in *Seminole Tribe v. Florida* reaffirmed these established modes of securing state accountability. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14, 73-76 (1996) (reaffirming the exceptions for U.S.-party litigation and appellate jurisdiction under *Cohens*, and distinguishing but not overruling *Ex parte Young*).

See, e.g., *Seminole Tribe*, 517 U.S. at 54 (admitting that "the text of the [Eleventh] Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts," but reaffirming that the Amendment stands less for what it says than for the presupposition of sovereign immunity that it confirms).


See, e.g., Fletcher, supra note 11, at 1060-61 (noting the failure of the text to mention in-state citizens and concluding that such selectivity reveals an intention to retain jurisdiction over federal question suits); Marshall, supra note 11, at 1946-47 (noting that the
ars also note that the decision in *Chisholm* did not depart quite as radically from settled expectations as the profound shock account would have it; in truth, many Americans from the Federalist ranks supported state suability, and many understood Article III to have subjected states to suit in federal court to some degree.\(^\text{13}\) According to this account, the adoption of the Eleventh Amendment by a Congress that Federalists controlled represented a compromise between those who sought to eliminate all state suability and those who sought to ensure state accountability as to matters of federal law.\(^\text{14}\) Two leading revisionist accounts—the so-called diversity and literal explanations of the Eleventh Amendment—both believe that the *Hans* Court erred in rejecting suits by in-state plaintiffs to enforce federal-law restrictions against the states.\(^\text{15}\)

*Hans* Court abandoned the Eleventh Amendment's limited text and sought a principle of immunity in the body of the Constitution).

\(^\text{13}\) Detailed reviews of the ratification debates on the issue of state suability appear in Field, *supra* note 11, at 527-36; Gibbons, *supra* note 6, at 1902-14. Although Field and Gibbons find some evidence of a desire to subject the states to suit, others have viewed the ratification debates as ambiguous. See Jacobs, *supra* note 11, at 39 (noting the ambiguities surrounding the suability implications of the diversity head of jurisdiction); Massey, *supra* note 11, at 97 (characterizing the historical evidence as providing support for a range of views). My own work suggests that Article III effected a relatively clear waiver of state sovereign immunity by declaring that the Supreme Court of the United States shall exercise original jurisdiction in all State-party cases. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 581-97 (1994) (arguing that sovereign immunity would have barred state suability in the federal courts absent the Supreme Court's original jurisdiction over claims against the states).

\(^\text{14}\) Like other aspects of the debate over the Eleventh Amendment, scholars disagree about the nature of the political compromise entailed in its adoption by Congress. Compare Gibbons, *supra* note 6, at 1934-39 (portraying the Eleventh Amendment as "a tub thrown to the whale" of anti-federalism to prevent the calling of a new constitutional convention, and emphasizing the Federalists' desire to preserve state suability in matters affecting the Treaty of 1783), and John E. 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, 1436-41 (1975) (tabulating the Federalists' broad support for the Eleventh Amendment and explaining that support as reflecting the Federalists' desire to appear tough on Great Britain and on the Tories who were pressing claims based on the Treaty of 1783), with Marshall, *supra* note 11, at 1367-68 (characterizing the Eleventh Amendment as a compromise between securing state immunity and preserving state accountability in federal question matters).

\(^\text{15}\) Diversity theorists believe that the Eleventh Amendment narrows the grant of jurisdiction in Article III over "Controversies ... between a State and Citizens of another State" and "between a State ... and foreign ... Citizens or Subjects," U.S. Const. art. III, § 2, cl. 1, to preclude state suability based on the alignment of the parties; the diversity account sees the Amendment as leaving intact the provision in Article III for the assertion of jurisdiction over claims against the states that invoke federal question or admiralty jurisdiction. See Amar, *supra* note 11, at 1473-92; Fletcher, *supra* note 11, at 1060-68; Gibbons, *supra* note 6, at 1934-38. Literal theorists, by contrast, treat the language of the Eleventh Amendment as an absolute bar to the assertion of jurisdiction over claims by the two disfavored plaintiffs: out-of-state citizens and foreign nationals. See Marshall, *supra* note 11, at 1346-49; Massey, *supra* note 11, at 65. Under the literal account, only in-state plaintiffs may invoke federal question jurisdiction in suits against the state.
Despite their broad agreement that some measure of state accountability survived the ratification of the Eleventh Amendment, revisionist scholars have failed to persuade a majority of the Justices to abandon the sweeping immunity rule of *Hans*.\(^1\) Only two Terms ago in *Seminole Tribe v. Florida*,\(^17\) the Court reaffirmed *Hans* and, by a narrow 5-4 majority, refused to permit Congress to abrogate the *Hans* immunity through the exercise of its Article I powers.\(^18\) This recent rejection may have taken some of the life out of the revisionist enterprise. The last spirited debate between the diversity and the literal accounts of the Amendment took place in 1990,\(^19\) and recent Eleventh Amendment scholarship takes *Hans* as its starting point and focuses on other modes of securing state compliance with rules of federal law.\(^20\)

The Court's dismissal on Eleventh Amendment grounds of two separate actions aimed at collecting the value of bonds issued by the State of Louisiana brings the distinction between the two accounts into sharp relief. In *Louisiana v. Jumel*, 107 U.S. 711 (1883), out-of-state citizens brought suit against Louisiana, invoking the Contracts Clause of the Constitution and seeking mandamus relief that would have ordered officers of the state to honor its obligations. *Id.* at 712-18. In *Hans v. Louisiana*, 134 U.S. 1 (1890), an in-state plaintiff sought damages for the same bond repudiation. *Id.* at 1-3. However, because this plaintiff was a citizen of Louisiana, *Hans* fell outside the literal terms of the Eleventh Amendment. *Id.* at 10-15. According to diversity theorists, both claims presented federal questions to which the Eleventh Amendment should not apply; for literalists, the Court rightly decided *Jumel* but took a wrong turn in *Hans* by extending the principle of immunity beyond the literal words of the text to block claims by in-state citizens.

Forming a third important school of revisionist thought, abrogation theorists portray the Eleventh Amendment as a limitation on the judicial power that may leave Congress free to impose suit upon the states through the exercise of its legislative authority. *See* Nowak, *supra* note 14, at 1469; Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 Harv. L. Rev. 682, 693-99 (1976). The Court has accepted this theory so long as Congress acts pursuant to its enforcement powers under the Fourteenth Amendment, *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), and so long as Congress effects such abrogation in clear statutory text, *see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985).

The Court had previously accepted the idea that Congress may subject states to suit in federal court to enforce rights conferred under the Fourteenth Amendment, *see* supra note 16, but ultimately rejected the possibility of abrogation in the exercise of congressional powers conferred by Article I. *Seminole Tribe*, 517 U.S. at 72-73 (holding that Congress lacks power to abrogate state sovereign immunity in the exercise of its Article I powers) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)). In effect, the Court followed *Hans* in viewing the Eleventh Amendment as having restored the Framers' understanding that states enjoyed constitutionally implicit sovereign immunity from suit that qualified all grants of power in Article I.

*See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. Chi. L. Rev. 1261 (1989); *Exchange on the Eleventh Amendment*, 57 U. Chi. L. Rev. 118 (1990) (collection of letters critical of Professor Fletcher's article, and Professor Fletcher's rebuttal); *see also* Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. Cal. L. Rev. 51 (1990) (arguing that the current confusion in Eleventh Amendment jurisprudence stems from *Hans*).

*See, e.g.*, John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47 (1998) (contending that the Eleventh Amendment almost never matters in light of the possibility that individuals may sue state officers under § 1983); Kit Kinports,
This Article attempts to revive the revisionist enterprise by offering a new synthesis of the history of the Eleventh Amendment. My account, which draws on new compilations of primary source materials, seeks to situate the state suability discussions of the 1790s in the broader context of an ongoing national debate over fiscal policy that had helped to shape the new federal Constitution. This debate began under the Articles of Confederation and raised two questions: how to allocate responsibility for the management of the nation’s fiscal policy between the central government and the several states, and how to dispose of the substantial debts that the old (Continental) Congress and the several states had incurred in fighting the Revolutionary War. As we shall see, the Framers of the Constitution resolved the first question in favor of broad national competence. The Constitution not only confers broad fiscal powers on the federal government, but also contains provisions in Article I, Section 10 that explicitly prohibit the states from emitting bills of credit (paper money), enforcing tender laws, and impairing the obligation of contracts. Together, these provisions transfer fiscal responsibility to the national government and do much to prohibit the states from contin-

Implied Waiver After Seminole Tribe, 82 MINN. L. REV. 793 (1998) (arguing that Congress may still secure express and implied waivers of state immunity to suit, notwithstanding the Seminole Tribe ban on abrogation); Henry Paul Monaghan, The Sovereign Immunity “Exception,” 110 HARV. L. REV. 102, 127-28 (1996) (suggesting that the availability of officer suits in federal court and state suability in state court substantially reduces the impact of Seminole Tribe); Jonathan R. Siegel, The Hidden Source of Congress’s Power to Abrogate State Sovereign Immunity, 75 TEX. L. REV. 589 (1995) (arguing that Congress may authorize individual plaintiffs to bring suit against the states as delegates of the federal government’s authority to sue them); Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity?, 106 YALE L.J. 1683 (1997) (arguing that the Eleventh Amendment may do more than allocate litigation to state courts—it may create absolute immunity from liability—and, exploring the implications of such an immunity, concluding that officer suits provide an effective substitute for entity liability); cf. Vicki C. Jackson, Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex parte Young, 72 N.Y.U. L. REV. 495, 544 (1997) (arguing for the continuing vitality of the diversity explanation and urging the Court to abandon Seminole Tribe); Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity, 1996 SUP. CT. REV. 1, 19 (arguing that the diversity explanation remains the most attractive interpretation of the Eleventh Amendment).

21 In the course of this Article, I have made extensive use of the state suability volume of the Documentary History of the Supreme Court of the United States series, supra note 3. This work, published in 1994, includes both an extensive collection of primary source materials and a wonderful set of editorial notes that explore in some detail the origins of the various State-party disputes that appeared on the Court’s docket in the 1790s.

22 Today, economists distinguish sharply between fiscal policy—the government’s management of the national economy through the running of budget surpluses and deficits—and monetary policy—the government’s manipulation of interest rates and the money supply. In this Article, I do not incorporate this modern distinction but use the term fiscal policy as a general description of issues relating to the issuance of paper money and the payment and funding of public debts.

23 See infra Part I.A-B.

uening to engage in what historians of the period describe as "agrarian" or "currency" finance.\textsuperscript{25}

Although the Constitution sought to make the states fiscally responsible prospectively, the Framers do not appear to have intended to apply these new fiscal constraints to state debts incurred under the Articles of Confederation. While the Engagements Clause of the Constitution empowers the federal government to assume existing state debts from the old regime,\textsuperscript{26} the Constitution does not otherwise address the manner in which the states were to deal with their existing creditors. The absence of any relevant constitutional constraint, coupled with the absence of any express grant of legislative power to Congress, suggests that (as Alexander Hamilton observed in his guise as Publius) the states were to remain "free from every constraint but that which flows from the obligations of good faith."\textsuperscript{27} The Framers of the Constitution appear to have adopted a temporal compromise; in short, they imposed federal limits on future state fiscal policy, but left the states free to manage existing obligations as they saw fit, subject to federal debt assumption.

I find support for such a temporal compromise in the Framers' general preference for prospectivity, in the specific transitional terms of the Constitution itself, and in the terms of the ratification debates.\textsuperscript{28} I focus first on the terms of the Ratification Clause of Article VII, which declares that the triggering event for the "Establishment" of the Constitution was to be the ratification of the instrument by the conventions of nine states.\textsuperscript{29} The Clause clearly declares the effectiveness of the Constitution as running not from the date of its completion (in September 1787), but from the date of its approval by the requisite number of states (in June 1788). It also leaves open the possibility that states might join the Union after the Constitution's effectiveness (as did Rhode Island and North Carolina) and subject themselves to the federal restrictions of Article I as of the date of their

\textsuperscript{25} For an overview of the tenets of agrarian or currency finance, see infra note 49.

\textsuperscript{26} U.S. Const. art. VI, cl. 1 ("All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.").

\textsuperscript{27} The Federalist No. 81, at 549 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

\textsuperscript{28} For evidence of the Framers' general concern with securing legislative prospectivity, see infra text accompanying notes 345-57. For evidence that the Founding Generation regarded the Constitution as prospective in application, see infra text accompanying notes 163-98. On the concern with the political viability of retrospective limits on the states, see infra text accompanying notes 169-72 (quoting William Davie, delegate from North Carolina to the Philadelphia convention).

\textsuperscript{29} U.S. Const. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.").
The Supremacy Clause lends further support to my prospective interpretation of the federal limits on state action. While it provides for the supremacy of the new Constitution itself and of any laws passed "in Pursuance thereof," the Clause notably refrains from making the provisions of the old Articles of Confederation and the acts of the old Congress supreme and binding upon the states. The Supremacy Clause thus confirms that the Framers meant to preserve the status quo with respect to existing state obligations. As those obligations had been under the Articles of Confederation, they were enforceable, if at all, only as a matter of state (or general common) law.

Article III complicates the story by vesting the Supreme Court of the United States with original jurisdiction over a variety of State-party cases and controversies. To the extent that this jurisdiction encompasses cases arising under the Constitution, laws, and treaties of the United States in which a state appears as a party defendant, Article III seems to perfect the Court's judicial negative on improper state laws. Indeed, many Federalists explicitly defended Article III's provision for state suability on the ground that it would secure judicial enforcement of these federal restrictions on state authority. Inasmuch as such federal-law limits were not to apply retrospectively to existing state obligations, jurisdiction over federal questions posed little threat of judicial enforcement of existing state obligations. But such a threat did appear in Article III's provision for federal jurisdiction over controversies between a state and the citizens of another state, as well as those between a state and the citizens or subjects of a foreign nation. These grants of party-based jurisdiction raised a distinct threat of retrospective state liability because they appeared to authorize the federal courts to take cognizance of all disputes between states and nonresidents. It was precisely this threat of judicially imposed liability that Hamilton and many other Federalist defenders of the Constitution disavowed, that the Chisholm Court nonetheless threatened to impose, and that the Eleventh Amendment sought to overturn.

This distinction, between federal question jurisdiction as a mode for the future enforcement of the new federal restrictions in Article I, Section 10, and party-based jurisdiction as a potential vehicle for the

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30 For a history of the ratification debates in North Carolina and Rhode Island, see Forrest McDonald, We the People: The Economic Origins of the Constitution 310-40 (1958).
31 U.S. Const. art. VI, cl. 2.
32 See infra Part I.C (discussing the Ratification Clause and the Supremacy Clause in more detail).
33 U.S. Const. art. III, § 2, cl. 1.
34 See infra text accompanying notes 162, 191-93.
judicial enforcement of old state debts, helps to explain much of the discordant evidence in the historical accounts of the Eleventh Amendment. The *Chisholm* decision does appear to have fallen upon the country with a profound shock, and does appear to have touched off a widespread political reaction leading to the ratification of the Eleventh Amendment. But *Chisholm* was shocking (at least among the Federalists whose support of the Eleventh Amendment was crucial to its proposal and ratification) less because it contemplated the suability of the states as corporate bodies than because it threatened to require the states to honor old obligations to individual suitors in specie, without regard to the states’ traditional freedom to adopt strategies of agrarian finance. In the campaign to ratify the Constitution, many Federalists had denied that Article III would threaten the states with suits to enforce existing obligations, following the line taken in Alexander Hamilton’s carefully qualified denial of retrospective state liability in *Federalist No. 81*. Federalists such as Senator Caleb Strong of Massachusetts, who proposed the language that became the Eleventh Amendment, could thus join avowed Anti-Federalists in supporting nonsuability in claims based upon obligations incurred before the Constitution took effect. My emphasis on the retrospective feature of *Chisholm* thus helps to explain how the Eleventh Amendment could have simultaneously served to reaffirm a form of state nonsuability (in suits in federal court to enforce obligations incurred under the Articles of Confederation) and also to have left intact the federal courts’ power to enforce the Constitution against the states prospectively.

My emphasis on the contrast between the Constitution’s prospective focus and the retrospective features of *Chisholm* also helps to explain what for modern readers has surely been the Eleventh Amendment’s most puzzling feature: its declaration that the judicial power shall not “be construed to” extend to certain disfavored plaintiffs. As initially proposed in February 1793, the Amendment would have simply curtailed the judicial power; Senator Strong of Massachusetts added the words of construction “be construed to” in 1794, one

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35 See infra notes 158-62 and accompanying text.
36 See 5 DHSC, supra note 3, at 597-600 (identifying Caleb Strong of Massachusetts as the author of the preliminary draft of the Eleventh Amendment introduced in the Senate on February 20, 1793, and of the draft later reintroduced on January 2, 1794).
37 I have found only a single, tentative suggestion in the literature to support my proposed distinction between the prospective application of constitutional restrictions and the retrospective enforcement of past debts that the *Chisholm* decision threatened. In an effort to explain the failure in *Chisholm* of both the parties and the Court to address the implications of the Contracts Clause, Professor Amar offers the following: “One possible explanation is that the clause was not intended to have any retroactive effect on contracts with states made before ratification. To give state creditors a legally enforceable claim when they had only bargained for a moral obligation might have been viewed as unjust enrichment.” Amar, supra note 11, at 1470 n.188.
year after Chisholm. Modern scholars have offered a host of conflicting explanations for these words of construction, ranging from the claim that they served to soften the rebuke to the Court, to the claim that they were meant to emphasize the Amendment’s focus on the judicial power and to leave open the possibility of congressional abrogation. In contrast to these accounts, my research suggests that the words indicate that the framers regarded the Eleventh Amendment as an “explanatory” or “declaratory” amendment. Although they have now largely disappeared from the legislative scene, explanatory amendments were more common in the eighteenth century. Typically, they sought to clarify the meaning of a law that a court had interpreted (perhaps erroneously), and were often applied retroactively. By establishing an explanatory rule of construction to govern the scope of the judicial power, the Eleventh Amendment swept away all of the claims within its description, not just those filed after its effective date. The framers’ concern with the retroactive feature of Chisholm thus helps to account for the final contours of an Amendment that itself was designed to explain the meaning of Article III and to operate retroactively.

Viewed in this manner, the Eleventh Amendment represents a rather technical solution to the problem of “state suability” that emerged from Chisholm’s interpretation of Article III’s grants of party-based jurisdiction. By treating the problem as one of state suability, I have consciously chosen to adopt the usage of the generation that framed and ratified the Eleventh Amendment, and to abandon the language of state sovereign immunity that modern courts and commentators frequently use to characterize the Eleventh Amendment. Although many contemporary observers spoke of Chisholm’s impact in terms of its challenge to state sovereignty, the Eleventh Amendment was drafted in terms of jurisdiction and suability under Article III, and was so characterized by the Founding Generation. This modern talk

38 Scholars have long noted the change in the language of Strong’s two drafts of the Eleventh Amendment. See, e.g., Nowak, supra note 14, at 1436-37.
39 See infra Part III.A.5.
40 See infra Part II.A.
41 See infra Part II.B.3.
42 Today, we tend to discuss Eleventh Amendment issues in terms of “sovereign immunity,” despite the fact that the Constitution never mentions the word “sovereign” and does not by its terms confer immunity on any government body. See, e.g., Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (addressing the question whether the “State’s sovereign immunity” barred the plaintiff’s suit); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (describing the Eleventh Amendment as “rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity”).
43 The generation that framed and ratified the Eleventh Amendment spoke of the issue as one of “state suability,” at least in their formal communications. See, e.g., Resolution of the United States Congress (Mar. 2, 1797), in 5 DHSC, supra note 3, at 628, 628
of sovereign immunity suggests that the Eleventh Amendment marked a complete Anti-Federalist victory in the battle over state suability; in truth, the two parties appear to have reached a compromise.\textsuperscript{44} In any event, once the Court begins to conceptualize the problem of state suability in terms of a free-standing principle of “sovereign immunity,” rather than as a technical problem in the parsing of the language of judicial power, it unleashes a dangerous and unwieldy restriction on the federal courts’ power to enforce federal-law restrictions against the states. By returning to the language of state suability, I hope to cabin the influence of this spurious principle of sovereign immunity.

This Article proceeds in three parts. Part I looks back at the framing of the Constitution, paying special attention to the role Revolutionary War debts played in the drafting of prospective rules of government accountability. Part II reviews the history of the Eleventh Amendment, and places special emphasis on evidence that sheds light on my interpretation of the Amendment as explanatory of Article III.\textsuperscript{44}

(resolving that the President should ascertain whether the states had ratified the amendment proposed by Congress “concerning the suability of States”); Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), \textit{in 5 DHSC, supra note 3}, at 618, 618 (discussing the proposed alteration of the Constitution “respecting the suability of a State”); Proceedings of the Delaware Senate (Jan. 10, 1794), \textit{in 5 DHSC, supra note 3}, at 614, 614 (expressing opposition to any “Plan that might tend to prevent the suability of a State”); Letter from John Adams, President of the United States, to the United States Congress (Jan. 8, 1798), \textit{in 5 DHSC, supra note 3}, at 637, 637-38 (proclaiming the Eleventh Amendment to be legally effective and describing the Amendment as one relating to “the Suability of States”). Members of Congress described the amendment in similar terms in letters to their constituents and friends. \textit{See, e.g.}, Letter from Theodorus Bailey, U.S. Representative, to his Constituents (Jan. 22, 1794), \textit{in 5 DHSC, supra note 3}, at 618, 618 (reporting the consideration of amendments designed to prevent federal courts from extending the Constitution’s construction “to the suability of States by individuals”); Letter from James Hillhouse, U.S. Representative, to Samuel Huntington, Governor of Connecticut (Mar. 5, 1794), \textit{in 5 DHSC, supra note 3}, at 623, 623 (reporting the vote on the resolution to amend the Constitution “so far as respects the suability of States”); Letter from Zephaniah Swift, U.S. Representative, to David Daggett, Speaker of the Connecticut House of Representatives (Mar. 5, 1794), \textit{in 5 DHSC, supra note 3}, at 624, 624 (discussing the amendment “in respect of the Suability of States”). These usages followed those that had appeared in the argument and opinions in the \textit{Chisholm} case. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 469 (1793) (Jay, C.J.) (stating the question for decision as follows: “Is a State suable by individual citizens of another State?”); \textit{id.} at 428 (argument of Edmund Randolph for the plaintiff) (admitting that a state might be “suable in some actions” but not in all).

Admittedly, the suability usage was not universal. Newspaper dispatches from the Federalists tended to speak more in terms of suability; those from the Anti-Federalists, in terms of sovereignty. \textit{Compare} “Veritas,” \textit{Essay, COLUMBIAN CENLINEL} (Boston), July 17, 1793, \textit{reprinted in 5 DHSC, supra note 3}, at 390, 390 (noting that the question “whether a State is \textit{suable} or not, will speedily arrest the attention of the public”), \textit{with Essay, INDEP. CHRON.} (Boston), Sept. 16, 1793, \textit{reprinted in 5 DHSC, supra note 3}, at 415, 415 (describing the issue of the suability of the state as relating to the “sovereignty, not only of this, but of every State in the Union”), \textit{and} “Democrat,” \textit{Essay, MASS. MERCURY}, July 23, 1795, \textit{reprinted in 5 DHSC, supra note 3}, at 393, 393 (stating that Article III of the Constitution “destroys the sovereignty of the states, and renders them no more than corporate towns”).

\textsuperscript{44} \textit{See infra} notes 293, 452 and accompanying text.
Part III considers the implications of this new explanatory account of the Eleventh Amendment in light of recent scholarly and judicial developments. In the final analysis, this Article's explanatory account of the state suability provisions of the Eleventh Amendment strongly supports revisionist challenges to the sweeping immunity of *Hans* and *Seminole Tribe*.

I

THE ROLE OF PUBLIC DEBTS AND GOVERNMENT SUABILITY IN THE FRAMING OF THE CONSTITUTION

In this Part, I first review the origins of the debts that so concerned the Founding Generation—debts that arose when the government(s) of the United States used the printing press to finance the war for independence from Great Britain. Next, I consider the text and structure of the Constitution in light of the government accountability issues that these accumulated obligations raise. In brief, the Framers shifted responsibility for this debt from the states to the federal government and, with that shift, adopted rules meant to secure state fiscal responsibility. Not surprisingly, the rules of government suability in Article III track these substantive decisions regarding the locus of responsibility for public debts. Thus, Article III mandates a federal forum for federal-law claims against State parties, but leaves Congress a measure of discretion as to controversies involving the United States. Moreover, the Framers did nothing to secure the enforceability of state obligations that predated the Constitution.

A. Public Debts and Nationalist Financial Policy

When Alexander Hamilton became Secretary of the Treasury, his first job was to prepare a report on public credit.\(^{45}\) The resulting document, issued in January 1790, represented less a novel disquisition on public finance than a refinement of the fiscal policies that he and others had pursued on behalf of the Nationalist Party throughout the 1780s. Nationalists had long viewed the public debt as a potential source of national adhesion. They cited its existence to justify a national taxing authority, they sought to fund it through the issuance of new securities that would provide a circulating medium, and they intended to provide for its eventual retirement at or near par in order to attract the support of the wealthy public securities holders to the new

federal government. All these policies appeared as part of the financial policy that Robert Morris developed in 1782 as the nation’s first financial officer, and all reappeared in Hamilton’s report in 1790.

These policies had created controversy under the Articles of Confederation for a variety of reasons. Many worried that “high” or “specie” finance in the Morris model would expand the size and influence of the national government at the expense of the states. These agrarian finance supporters preferred inflationary policies that simplified the payment of their private debts and their taxes; agrarians saw full repayment of public debts as likely to impose a stiff tax burden on the yeomanry, and to benefit the speculators and “bloodsuckers” who had paid less than par for their public securities and who would reap

46 Until 1780, the United States and the states themselves had attempted to finance the Revolutionary War through the issuance of paper money, or “bills of credit” as they were then known, and by borrowing from France, Spain, and Holland. When the paper currency (including the infamous “continental”) collapsed, Congress asked the states to refrain from any further emissions, and issued assorted promissory notes to finance the remainder of the war effort. See William G. Anderson, The Price of Liberty: The Public Debt of the American Revolution 3-12 (1983).

Robert Morris, the nation’s first Superintendent of Finance, took office in 1781 and immediately began to pursue what historians describe as “nationalist” financial policy. One feature of Morris’s policy was to secure a national tax or impost to provide a more reliable source of funds for the national government. See id. at 15-18. That measure failed in 1782, under the then-prevailing requirement of unanimity for amendments to the Articles of Confederation, when Rhode Island refused to consent to its adoption. See id. at 20. A second feature of nationalist financial policy was the creation of a funded debt, one that the government created through the issuance of interest-bearing securities that were circulated as a medium of exchange. See id. at 15. A third feature of the plan was to shift responsibility for the public debt off the accounts of the states and onto the accounts of the national government, in keeping with the notion that these debts would justify higher national tax rates, and would encourage public creditors and other wealthy members of society to support the central government. See id. at 15-16. Fourth, the nationalists believed that Congress should “liquidate” its accounts with individuals by inspecting claims, verifying amounts, ascribing a specie value to them, and recording them as interest-bearing obligations. See id. at 17.

47 For an overview of Hamilton’s report, with its provision for a funded debt, see McDonald, supra note 45, at 152-71 (acknowledging Morris’s influence and the example of Great Britain in Hamilton’s thinking about a funded public debt). For an account that links Hamilton’s vision to evolving federalist financial policy of the 1780s, see Janet A. Riesman, Money, Credit, and Federalist Political Economy, in Beyond Confederation: Origins of the Constitution and American National Identity 128, 154 (Richard Beeman et al. eds., 1987) (characterizing Hamilton as “very much a man of the late eighteenth century” in creating his Report on Public Credit).

48 Public discourse frequently included references to “bloodsuckers”—speculators in public securities who were portrayed as having bought up the debt instruments at a deep discount from the (more deserving) original owners. Cf. Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution, at xi-xii (1985) (characterizing the term “bloodsuckers,” used to describe traders in public securities, as a stock phrase of the eighteenth century that revealed the Anti-Federalist political leanings of its users).
profits from redemption at par.49 Thus, financial policy split the new Republic along the same fault line that would divide the Federalists and the Anti-Federalists in the debate over whether to ratify the Constitution.

The debts themselves were staggering in size and fell into a variety of categories. First were the bills of credit or paper money that Congress and the states had issued throughout the 1770s. Estimates vary, but historians agree that the Continental Congress alone emitted roughly $240 million in eleven different emissions between 1775 and 1780.50 The states added another $210 million in emissions, bringing the total to approximately $450 million by 1779.51 This paper money depreciated rapidly and eventually became virtually worthless. Congress itself scaled back its "continentals" in 1780 at a 40:1 rate, but even that massive devaluation failed to reflect the true value of the paper.52 Moreover, Congress never regarded these bills of credit as creating a binding obligation, and thus never took steps to reestablish the value of the currency; in fact, Hamilton's funding plan rated the currency at 100:1—a devaluation tantamount to ultimate repudiation.53

49 One can briefly summarize the tenets of agrarian or currency finance as relying upon the issuance of a paper currency or bills of credit, backed by a pledge of the public faith. Redemption of paper money posed a problem for the states. One strategy was to accept paper currency in payment of taxes, often at a "scaled" or sub-par value that reflected its (devalued) market value. Another was to accept this currency in the purchase of public lands and property seized from British loyalists, again at reduced values. These "agrarian" strategies relied upon the public domain to sink the emission; politicians were loath to levy heavy taxes on the yeomanry to support specie redemption at par value. The low-tax, sub-par repayment features of "agrarian" finance differ sharply from the high-tax, at-par redemption that nationalist financial policies contemplated. For an overview of the tenets of agrarian finance, see Ferguson, supra note 45, at 3-24; Merrill Jensen, The New Nation: A History of the United States During the Confederation, 1781-1789, at 37-43 (1950).

Habitual debtors preferred a paper currency because it had a tendency to depreciate and thereby lessen the cost of repaying their debts. Creditors had an obvious reason to oppose agrarian finance because they lost money when debtors repaid obligations with (devalued) paper currency. Many states responded to the predictable refusal of creditors to accept this money by promulgating tender laws, which made the currency legal tender not only for the payment of taxes but also for the payment of all debts public and private, and force laws, which threatened creditors with criminal sanctions for failure to accept the tender of a paper currency. See generally Jensen, supra, at 41 (describing the end of paper currency as a circulating medium and Congress's recommendation circa 1781 that the states end their legal tender laws and retire their emissions of paper).

50 See Anderson, supra note 46, at 3.
51 See Riesman, supra note 47, at 130.
52 According to leading historians, the real value of the continentals was closer to 75:1 than to the 40:1 figure that Congress chose. See Ferguson, supra note 45, at 39-40; Jensen, supra note 49, at 40.
53 See Anderson, supra note 46, at 50-51 (summarizing the classes of federal debt instruments that could be exchanged for new federal securities under the terms of the 1790 funding bill, and noting an exchange rate of 100:1 for bills of credit issued by Congress).
Apart from issuing fiat money, Congress borrowed both at home and abroad to finance the war effort. Congress treated these relatively formal loans more seriously than its paper money, and thus strove to make the interest payments that would uphold its continuing ability to borrow. The primary foreign lenders—Holland, France, and Spain—provided roughly $11 million to the United States. Several of the states borrowed from foreign sources as well. On the home front, the United States borrowed by issuing loan office certificates—relatively formal instruments of indebtedness made payable to a specified lender and bearing interest at a specified rate. When it became impossible to service the interest on these certificates, Congress began to issue interest-bearing “indents”—notes reflecting an obligation to pay the value of interest due. Because of the devaluation of the paper money and the certificates, the Continental Army found it difficult to purchase supplies in the field. In response, Congress experimented briefly with in-kind collections; however, it soon authorized the Quartermaster and other federal officers to impress supplies from the local citizenry and to “pay” with such assorted promissory notes as Quartermaster certificates and Commissary notes.

As the war wound down, Congress began to assess the extent of its accumulated indebtedness. In addition to the loan office certificates, which amounted to roughly $11 million, Congress moved in 1782 to settle its accounts with individuals. Claims of all sorts against the United States were either liquidated or reduced to a specie value and recorded as interest-bearing debts, provided, of course, that the expenditures had been duly authorized by Congress and authenticated to the satisfaction of inspectors. Commissioners serving as claims inspectors issued $3.7 million in interest-bearing “final settlement certificates.” Coupled with substantial settlements by the major government departments, the total consolidated debt settlement amounted to roughly $16 million.

54 See id. at 57 (noting that Hamilton estimated the size of foreign debt at $11,710,378.62 as of 1789).
55 For an overview of the issuance of loan office certificates as evidence of the United States’ indebtedness to individual creditors, see FERGUSON, supra note 45, at 35-40.
56 On the treatment of indents in Hamilton’s funding plan, see McDonald, supra note 45, at 147, 156.
57 On the use of impressment to finance the war and the issuance of Quartermaster certificates and Commissary notes to “pay” for the goods taken, see FERGUSON, supra note 45, at 59-69.
58 For a description of the congressional decision in February 1782 to issue final settlement certificates in recognition of the “liquidated” (specie) value of the debts that the nation owed to individuals, see FERGUSON, supra note 45, at 179-93.
59 See ANDERSON, supra note 46, at 17; FERGUSON, supra note 45, at 179, 184-86.
60 ANDERSON, supra note 46, at 17; see FERGUSON, supra note 45, at 186.
61 See ANDERSON, supra note 46, at 17.
How Congress planned to pay this debt was far from clear. By 1782, after failing to secure amendments to the Articles of Confederation that would have authorized it to collect imposts on imported goods, Congress limped along powerless to tax and dependent upon the states to finance its operations through requisitions.62 The states, however, were generally reluctant to furnish supplies of hard money to Congress; instead, they paid their requisitions through the submission of paper currency and by crediting themselves for the payment of their citizens' individual claims against the federal government. For example, many states chose to pay their own Continental Army soldiers directly instead of furnishing the requisitions that would have enabled Congress to pay.63 Similarly, many States began in the mid-1780s to assume responsibility for retiring the national debt, thus threatening to undermine the nationalist plan for using public debts to join the nation more closely together.64 If state assumption took hold, creditors would look to the states (or so the Federalists feared) as the primary taxing authority and the primary source of government debt service. State primacy in fiscal matters would leave little for the national Congress to do but disband.

Like Congress, the states had engaged in a variety of borrowing tactics to finance their own operations during the war. In addition to the emission of paper money, states borrowed both at home and abroad and by issuing certificates. The largest portion of the state debts consisted of certificates issued to the state regiments, or "lines," in the Continental Army.65 In theory, all of these state accounts (which Hamilton later estimated at $25 million) were to be settled at the conclusion of the war on a system of apportionment.66 Congress was expected to calculate the total cost of the war and apportion that cost among the states in accordance with the rules prevailing under the Articles of Confederation.67 States would receive a credit against

62 For the classic critique of reliance upon requisitions, see The Federalist No. 30 (Alexander Hamilton). See also James Madison, Preface to Debates in the Convention of 1787, in 3 The Records of the Federal Convention of 1787, at 539, 547 (Max Farrand ed., 1911) [hereinafter Farrand] (noting that "ordinary requisitions of Congress had only displayed the inefficiency of the [authority] making them; none of the States having duly complied with them, some having failed altogether or nearly so").

63 See Anderson, supra note 46, at 19 (noting Morris's efforts to prevent the states from paying their soldiers directly, and to require them to send in their requisitions to the central Treasury for payment of the continental line).

64 For accounts of state assumption of the national debt in the 1780s, see Ferguson, supra note 45, at 220-41 (concluding that a plan for distribution of the debt to the states would have resulted in creditors attaching themselves to state governments and would have left "little reason" for Congress to claim enlarged powers).

65 See Anderson, supra note 46, at 26.

66 See id. at 23-36.

67 The Articles of Confederation specified a rule of apportionment in accordance with the "value of all land [including buildings and improvements] within each State."
their apportioned share in the amount of their own payments toward the war effort. At the end of the day, some states would owe the general treasury and others would receive a rebate. This system of final settlement created obvious incentives for the states to be relatively generous in approving their own citizens' claims, so long as the state would receive credit for the resulting payments.

States responded in dramatically different ways to the pressures to reduce or retire their debts. Massachusetts took the high, hard road of specie finance, enacting high taxes on the yeomanry to pay off state securities in full, and thereby benefiting the monied interests in Boston at the expense of agrarian interests in the western part of the state. The result—Shays's Rebellion and the accompanying demand for lower taxes by those in western Massachusetts—provided an im-

ARTS. OF CONFED. art. VIII. For a description of the congressional decision to switch from this land-based apportionment scheme to one based on population, see JENSEN, supra note 49, at 74-75 (describing the adoption of the rule that called for the exclusion of two-fifths of all "other persons" from the population count). The Constitution would follow the old Congress in adopting a population-based apportionment system and in counting slaves as three-fifths of a person. U.S. CONST. art. I, § 2, cl. 3.

Under the Articles of Confederation, states were to receive credit at the general treasury for "[a]ll charges of war" and "all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled." ARTS. OF CONFED. art. VIII. Thus, to claim a credit, the states' expenditures had to meet both the "general welfare" test and be "allowed" by Congress.

Ferguson reports that not all state expenditures met this dual test. Massachusetts offered unauthorized bounties to raise troops and spent money on naval defense and coastal fortifications; Virginia sent campaigns into the old Northwest Territory under the leadership of George Rogers Clark without first obtaining congressional authority; and several southern states incurred costs without preserving records adequate to support a credit at the treasury. Ferguson, supra note 45, at 204-07.

Virginia, for example, sought a liberalization of the rules of evidence to broaden the prospect that its expenditures would be credited at the general treasury. See Ferguson, supra note 45, at 206-08, 211-12. The rules of equity (including the possibility of supporting recovery on the basis of sworn testimony rather than documentary evidence) for which Virginia argued corresponded, interestingly, to the rules of equity that apparently governed individual money claims against the Commonwealth pursuant to its codification of a proceeding known as the "petition of right." Virginia's "petition of right" provision permitted any person aggrieved by the administrative denial of a public claim to petition for redress, either to the high court of chancery or to the general court, and directed that "such court shall proceed to do right thereon." James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 Nw. U. L. Rev. 899, 939-40 (1997) (quoting the relevant statute, which appears in 9 WILLLM WALLER HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF THE LAWS OF VIRGINIA 536-40 (1821)). See generally JENSEN, supra note 49, at 378 (describing the manner in which Virginia entrusted the settlement of public claims to the state courts, and noting that Virginia succeeded in persuading Congress to empower a board to approve such public claims without supporting documentary evidence and in accordance with "the principles of general equity") (quoting 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 262-66 (Roscoe R. Hill ed., 1936) (records of May 7, 1787)).
portant impetus for the Philadelphia convention of 1787. Rhode Island, by contrast, adopted an agrarian financial policy to retire its debts. It emitted a large sum of paper money in 1786, which merchants and other creditors refused to accept following its inevitable loss of value. The legislature responded by enacting force and tender laws, compelling merchants to sell their wares for paper money, and requiring creditors to accept the paper as legal tender. Southern states used similar agrarian finance strategies to reduce their existing debts.

Nationalists made much of these repudiations of state indebtedness and urged the creation of a more perfect union to address the problem. As we shall see, the Framers of the Constitution responded to these concerns by denying states the power to follow agrarian fiscal policies in the future. In addition, the Framers conferred broad fiscal powers on the federal government, enabling it to secure the repayment of the public debt on a national basis. Following the rejected Morris plan of 1782, the Framers empowered the national government to impose a tax on imports and to collect revenue from other sources. The transfer of broad taxing powers from the states to the federal government raised (as it had in 1782) the possibility of federal assumption of state debts. Thus, we shall see that Hamilton’s propo-


Among other targets of debtor anger, Shays’s Rebellion sought to close down the court system, which was perceived as an instrument of debt-collection that served the interests of creditors and tax collectors. See Szatmary, supra, at 33-36 (chronicling the court-ordered sale of property and jailing of debtors that occurred during the credit squeeze of the mid-1780s).


73 The emission of paper money in Rhode Island in 1786 differed from that of other states both in its scope and with respect to the measures the legislature adopted to secure the acceptance of devalued currency. See Morris, supra note 71, at 157-59 (noting these distinctions and linking the Framers’ view of the Rhode Island emission to the constitutional prohibitions against paper money and to Madison’s famous disquisition on factional strife in Federalist No. 10).

74 See Ferguson, supra note 45, at 245; Jensen, supra note 49, at 319-23.

75 See infra Part I.B.

76 See infra text accompanying notes 102-04.

77 The debate over the national impost (or tax) that Congress proposed again in 1783 was linked in the minds of many in Congress to the plan by Robert Morris to have the national government assume responsibility for state debts. See Ferguson, supra note 45, at 209-10 (sketching Morris’s plan for Congress to assume all state debts and to pay their cost through the impost); Jensen, supra note 49, at 74-75 (connecting the assumption of state debts to the debate over the national impost). As we shall see, a similar linkage of taxation and debt-management appeared in the debates at the Constitutional Convention of 1787. See infra Part I.B.
sal to assume state debts as part of his plan to fund national debts in 1790 was a predictable outgrowth of the Constitution’s adoption of nationalist fiscal policies.\textsuperscript{78}

\section*{B. Fiscal Policy at the Philadelphia Convention}

To see the importance of public debts in the Framers’ thinking about the federal government’s fiscal powers, one need look no further than Article I, which empowers Congress “To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”\textsuperscript{79} Although common defense and general welfare were important, an equally important purpose of a national power to tax was to pay off the accumulated debts of the United States. This recognition of priorities simply conformed to the fiscal reality confronting a nation with an accumulated debt of some $40 million.\textsuperscript{80} With the war over, the size of the government’s bureaucracy remained at a relatively constant level during the last years of the Articles of Confederation and the first few years of the Washington administration. The bulk of national tax revenues under the new Constitution went to pay interest on the debt.\textsuperscript{81}

The provision authorizing Congress to enact a national tax to pay off the public debts did not stand alone, however, in the Framers’ thinking about fiscal policy. Article I expressly vests Congress with the power “To borrow Money on the credit of the United States” and “To coin Money [and] regulate the Value thereof.”\textsuperscript{82} Article I then proceeds to deprive the states of any power over national fiscal policy. Section 10 specifically declares that the states shall not “coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto...”\textsuperscript{83}

\begin{itemize}
  \item \textsuperscript{78} See Riesman, \textit{supra} note 47, at 154-55 (linking Hamilton’s financial plan of 1790 to those that Gouverneur Morris and Robert Morris had circulated earlier).
  \item \textsuperscript{79} U.S. Const. art. I, § 8, cl. 1. For useful summaries of the origins of this provision, see Edward Dumbauld, \textit{The Constitution of the United States} 106-08 (1964); 2 The Founders’ Constitution 407-70 (Philip B. Kurland & Ralph Lerner eds., 1987) (reprinting various commentaries on, and interpretations of, Article I, Section 8, Clause 1).
  \item \textsuperscript{80} See Anderson, \textit{supra} note 46, at 41 (reporting that the domestic debt confronting Hamilton amounted to $40 million, consisting of $27 million in principal and $13 million in interest as represented by indents); McDonald, \textit{supra} note 45, at 147-48 (same). In addition, Hamilton figured that the country owed over $11 million in foreign debts. See Anderson, \textit{supra} note 46, at 57.
  \item \textsuperscript{81} See Pfander, \textit{supra} note 69, at 951 n.189 (contrasting annual expenditures of approximately $380,000 during the period 1785-1788, the last four years under the Articles of Confederation, with annual expenditures that rose to $4-5 million under the first four years of the Washington administration, and concluding that the cost of administration remained roughly constant and that the major component of the increase in the size of the budget went to service the debt).
  \item \textsuperscript{82} U.S. Const. art. I, § 8, cl. 2, 5.
\end{itemize}
Law, or Law impairing the Obligation of Contracts." In these provisions, the Framers denied the states the power to follow agrarian financial policies of the kind that Rhode Island had recently adopted. But, similar prohibitions against federal tender laws, federal bills of credit, and federal impairment of contracts were notably absent. In keeping with the notion that future crises and necessities might impinge on the federal government's ability to honor its financial obligations in specie, the Constitution gives the federal government more freedom than the states to both issue paper money and scale back its debts.

These provisions (except the reference to debts in the taxing power) were forward-looking; they had no relevance to the accumulated debts Congress and the states had incurred during the war. For insight into the Convention's attitude toward existing debts, we must examine the Engagements Clause of Article VI. As ultimately adopted, the Clause declares that "[a]ll Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation." Modern readers see this provision as one of mere historical importance, inasmuch as it does no more than "leave the [public] Creditors in statu quo." Still, the evolution of this provision sheds light on the Framers' attitude toward the enforceability of ex-

83 U.S. CONST. art. I, § 10, cl. 1. See generally DUMBAULD, supra note 79, at 218-23 (providing a history and interpretation of this clause).
84 On the desire of the Framers to suppress state emissions of paper money, see, THE FEDERALIST No. 44, at 300 (James Madison) (Jacob E. Cooke ed., 1961) (noting that the prohibition of bills of credit must "give pleasure to every citizen in proportion to his love of justice," and recalling the "pestilent effects of paper money" under the Articles); Charles Pinckney, Address to the South Carolina Ratifying Convention (May 20, 1788), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 333, 333 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1876) [hereinafter ELLiot's DEBATES] (characterizing Article I, Section 10 as the "soul of the Constitution").
85 The absence of such provisions may reflect in part the Framers' perception that the regulation of private contracts lay within the scope of the states' retained police power over internal matters, and that restrictions on the power of the federal government were unnecessary. I am indebted to Forrest McDonald for this suggestion.
86 Drafting history may undermine this argument. The Committee of Detail draft of Article I would have explicitly empowered Congress to "borrow money, and emit bills on the credit of the United States." 2 FARRAND, supra note 62, at 182. Some who participated in the debate believed that the Convention's decision to remove this provision effectively foreclosed the possibility for a national paper currency. See 2 id. at 303, 308-10 (recounting the debate on Gouverneur Morris's motion to strike the emission of bills of credit from Article I). Ultimately, the Supreme Court upheld the issuance of paper currency. Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1870), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869); see DUMBAULD, supra note 79, at 109.
87 U.S. CONST. art. VI, cl. 1.
88 DUMBAULD, supra note 79, at 441 (quoting 2 FARRAND, supra note 62, at 413 (remarks of Mr. Langdon)).
isting obligations and toward the judicial role in any such enforcement.

On the motion of John Rutledge (seconded by Elbridge Gerry, the largest public security holder at the Philadelphia convention),89 a Grand Committee was appointed on August 18 to "consider the necessity and expediency of the U[nited] States assuming all the State debts."90 The Committee responded three days later with a provision that would have empowered, but not required, the federal government to deal with existing obligations:

"The Legislature of the United-States shall have power to fulfil the engagements which have been entered into by Congress, and to discharge as well the debts of the United States, as the debts incurred by the several States during the late war, for the common defence and general welfare."91

This provision would have permitted the national government to discharge the debts of both the United States and the several states, suggesting the drafters' concern with federal assumption of state debts. In addition, the provision would have carefully limited the scope of federal assumption to debts incurred for the common defense and general welfare. This limitation tracked contemporary congressional policy and the language of the Articles of Confederation in its refusal to honor claims for selfish, unapproved expenditures the states had undertaken during the war.92

Over the next four days, the Convention first adopted and then abandoned a provision for mandatory payment of public debts. Appearing on August 22 on a motion by Gouverneur Morris, a vigorous advocate of creditor interests, this provision declared that the "Legislature shall discharge the debts [and] fulfil the engagements (of the U[nited] States)."93 Three days later, on August 25, George Mason objected to the mandatory character of the provision, noting that the term "shall" might impose an obligation on the United States with which it would be "impossible to comply."94 Mason also feared that the provision would "beget speculation," as stock jobbers bought securities from the "ignorant and distressed."95 Anticipating the 1790 debate over "discrimination," Mason observed that it might prove inexpedient to provide full payment to speculators, who "did not stand on the same footing with the first Holders" of the securities.96

89 See McDonald, supra note 30, at 105.
90 2 FARRAND, supra note 62, at 327.
91 2 id. at 352 (Aug. 21) (quoting the Grand Committee report).
92 See supra note 68.
93 2 FARRAND, supra note 62, at 377.
94 2 id. at 412.
95 2 id. at 413.
96 2 id.
Finally, Mason argued that the mandatory term "shall" might preclude the government from retiring the debt through open market purchases, and might revive the (previously devalued) "old continental paper." These arguments proved quite persuasive, and ultimately led to the adoption of language preserving the status quo.

The final version of the Engagements Clause, as quoted above, incorporates both this permissive approach to debt repayment and two important changes that the Committee of Style made. The first change involved the placement of the Clause in the Constitution. Initially, the drafters grouped the Engagements Clause with the powers of Congress in what later became Article I. Later, the Committee of Style shifted the Engagements Clause into a new Article VI—a shift that obscures but does not eliminate the connection between its broad validation of past debts and Congress's power to pay them.

A second, more subtle change expanded the scope of valid existing debts, and thus broadened Congress's authority to assume all the existing obligations of the state governments. As initially adopted, the Engagements Clause referred to debts contracted "by or under the authority of Cong[ress]." The reference to the authority of Congress limited the scope of debt validity by making it clear that only

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97 2 id.
98 See supra text accompanying note 87.
99 The Committee of Style, which was selected by ballot on September 8, included William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King. See 2 FARRAND, supra note 62, at 547, 553. The Committee reported a draft Constitution on September 12. See 2 id. at 590-603.
100 See DUMBAULD, supra note 79, at 106-07 & n.3, 440 n.5 (linking the Engagements Clause to the taxing power).
101 The Committee of Style changes tend to obscure the connection by breaking the direct, clause-specific linkage between the reference to "debts" in the Taxation Clause of Article I and that in the Engagements Clause of Article VI. But the drafting history and the language of the two provisions reestablish the link. Additional evidence of the connection appears in Madison's subsequent arguments on the scope of the spending power:

September 4, the committee of eleven reported the following modification [quoting text of Article I, Section 8, Clause 1] thus retaining the terms of the Article of Confederation, and covering, by the general term "debts," those of the old Congress.

A special provision in this mode could not have been necessary for the debts of the new Congress; for a power to provide money, and a power to perform certain acts, of which money is the ordinary and appropriate means, must of course carry with them a power to pay the expense of performing the acts. . . . [I]t is a fair presumption, from the course of the varied propositions which have been noticed, that but for the old debts, and their association with the terms "common defence and general welfare," the clause would have remained as reported in the first draught. . . .

Letter from James Madison to Andrew Stevenson (Nov. 27, 1830), in 2 THE FOUNDERS' CONSTITUTION, supra note 79, at 453, 454. Madison thus clearly saw the reference to "debts" in the Taxation Clause as encompassing the existing debts from the then-recently concluded war.
authorized state debts were "as valid" against the United States. The Committee of Style neatly broadened the federal power to assume state debts by changing the language to include all debts contracted "before the adoption of this Constitution"—thereby capturing all state and federal debts that the new Congress chose to recognize as valid.\footnote{2 id. at 603 (Sept. 12). Initially, it may seem implausible that the Committee of Style made substantive changes to the text of the Constitution, but scholars generally agree that that is precisely what happened. See McDonald, supra note 48, at 272 (describing the Committee of Style's role in adding the Contracts Clause to the list of federal restrictions on state action in Article I, Section 10); see also 3 Farrand, supra note 62, at 879 (reporting Albert Gallatin's charge that Gouverneur Morris changed the punctuation of the General Welfare Clause in the Committee of Style, and would have succeeded in broadening Congress's powers but for the fact that Roger Sherman discovered the artifice and made the necessary corrections). On the power of Congress to deal effectively with the accumulated debts of the nation, see Alexander Hamilton, Conjectures About the New Constitution (Sept. 1787), in 4 The Papers of Alexander Hamilton 275, 275 (Harold C. Syrett ed., 1962) (noting that the Constitution would draw support from "the Creditors of the United States" on the theory that "a general government possessing the means of doing it will pay the debt of the Union").}

In the end, the Committee of Style (which included two ardent supporters of nationalist fiscal policy—Gouverneur Morris and Alexander Hamilton) laid a sound constitutional foundation for the free assertion of congressional policy on the issue of state debt assumption. To summarize, the Framers chose to give Congress broad powers to deal with future fiscal crises and with the existing burdens of war-related debts, both state and national. This congressional authority included the power to collect taxes, to decide how and when to retire federal debts, and to determine whether to assume state debts. With these powers, coupled with the power to coin and borrow money, Congress enjoyed broad control over fiscal policy as well as broad authority to repudiate or scale its debts free from constraints such as the Contracts Clause.\footnote{The Convention's handling of a late motion by Elbridge Gerry further underscores its reluctance to compel the new federal government to assume state debts or to fully pay the existing debts of the United States. Madison's journal records the event as follows: "[Mr.] Gerry entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts—Alleging that Congress ought to be laid under the like prohibitions. [H]e made a motion to that effect. He was not [seconded.]" 2 Farrand, supra note 62, at 619 (Sept. 14). Oliver Ellsworth later supplied the context in which Gerry's motion appeared and described the Convention's reaction. Letter from "The Landholder" (Oliver Ellsworth) to Elbridge Gerry (Dec. 24, 1787), in 3 id. at 170. Ellsworth described the motion as one respecting the redemption of the old Continental Money—that it should be placed upon a footing with other liquidated securities of the United States. As Mr. Gerry was supposed to be possessed of large quantities of this species of paper, his motion appeared to be founded in . . . barefaced selfishness and injustice . . . .

3 id. at 171. Ellsworth also accused Gerry of refusing to sign and opposing ratification of the Constitution out of rage at the Convention's rejection of his motion. 3 id. at 171-72.} In contrast, the states found themselves more closely circumscribed. Their power to issue paper money had been
curtailed, as was their power to enact tender laws and laws impairing the obligation of contracts. Importantly, though, these restrictions would take effect only upon ratification of the Constitution, and would control the states' actions only after that date. Even though the Convention briefly considered mandating the payment of existing debts, the proposed language would have required Congress, and not the states, to make the payments. In effect, the Constitution left the states free to deal with their existing obligations in accordance with local perceptions of political expediency.


The Constitution's two transitional provisions—the Ratification Clause of Article VII and the Supremacy Clause of Article VI—help to confirm that the Framers did not intend to impose new federal restrictions on the states' ability to deal with their own creditors in their own way, at least with respect to existing obligations. Together, the two provisions clearly illustrate that the new federal restrictions on the states' power would not become effective until after the states had ratified the Constitution by a vote at the convention.

First, the Ratification Clause sets out the rule governing the effective date of the new Constitution. It provides that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."\textsuperscript{105} By its terms, then, the Ratification Clause makes clear that the constitutional limits in Article I, Section 10 were to take effect on the date of the ninth ratification (or, for such subsequent ratifiers as North Carolina and Rhode Island, on the date of their accession).\textsuperscript{106} Congress adopted exactly that interpretation of the Clause. Following its receipt on July 2, 1788, of the news that New Hampshire had become the ninth state to ratify, the old Congress immediately created a committee to "report an Act to Congress for putting the said constitution into operation in pursuance of the resolutions of the late federal Convention."\textsuperscript{107} Subsequent acts of Congress called upon the states to choose their electors for the presidency, and specified the date of the President's election, and the date and place for the meeting of the new federal Congress—March 4, 1789, in New York, New York.\textsuperscript{108}

\textsuperscript{105} U.S. Const. art. VII.
\textsuperscript{106} For an exceptionally rich account of the "bandwagon" process of ratification that this nine-state rule touched off, see Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475, 525-37 (1995). On the initial refusal of North Carolina and Rhode Island to ratify, see id. at 537-39.
\textsuperscript{107} 2 Documentary History of the Constitution of the United States of America, 1786-1870, at 161 (Washington, Department of State 1894).
\textsuperscript{108} For a summary of this legislation, see Stanley Elkins & Eric McKitrick, The Age of Federalism 32-35 (1993) (noting the importance of the old Congress in lending legiti-
Thus, the new system took effect only after completion of ratification and organization of a new government.

The Supremacy Clause of Article VI confirms the message of the Ratification Clause, that the new constitutional restrictions would bind the states only after ratification:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.\(^\text{109}\)

The Supremacy Clause accomplishes the important and celebrated goals of defining the scope of the "supreme Law," and of declaring that law binding upon state judges, who were expected to hear federal cases under the terms of the Madisonian compromise. Less obviously, the Clause addresses in technical and carefully chosen terms the extent to which the old laws of the Articles of Confederation regime were to bind the states and the federal government under the new Constitution. The Clause's function in governing the transition between the old and the new systems offers important insight into the nature of the Framers' attitude toward the enforceability in federal court of the states' existing obligations to public creditors.

We can best appreciate the transitional function of the Supremacy Clause by recalling the nature of the constitutional regime that preceded the Constitution. Under the Articles of Confederation, the states "enter[ed] into a firm league of friendship with each other" for purposes of common defense,\(^\text{110}\) but only after declaring that each state was to retain its "sovereignty, freedom and independence," except to the extent of any powers "expressly delegated to the United States."\(^\text{111}\) States were obliged, by the terms of the "supremacy clause"

\(^{\text{109}}\) U.S. CONST. art. VI, cl. 2. Shortly after the delegates agreed to shift from a congressional to a judicial negative on state laws, they adopted the Supremacy Clause as a vehicle for securing the enforcement of federal rights in state courts. For accounts linking the Supremacy Clause to the adoption of a judicial negative, see DUMBAULD, supra note 79, at 443-44; Lawrence Gene Sager, The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 HARV. L. REV. 17, 46-49 (1981). See also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 173 (1996) (concluding that, after July 17, the Framers had decided that the authority of the national government would depend upon judicial enforcement against the states).

\(^{\text{110}}\) ARTS. OF CONFED. art. III.

\(^{\text{111}}\) Id. art. II.
of the Articles, to "abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them."

But as a practical matter, the confederation submitted few items to Congress for determination, and the determinations made were not judicially enforceable. Courts of the union did not exist (except to hear appeals in prize cases and to settle boundary disputes), and Congress's legislative initiatives often took effect only upon the passage of local laws. Congress did have power over war and peace, and the explicit power to enter into treaties and alliances. But many of the Framers expressed frustration with the states' failure to abide by and give effect to the admittedly binding terms of these alliances, particularly the 1783 Treaty with Great Britain.

Read against this backdrop, the Supremacy Clause of 1787 defines in relatively clear terms which federal laws were to be enforced following ratification of the new Constitution. First in the descrip-

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113 See Arts. of Confed. art. IX ("The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, . . . of sending and receiving ambassadors—[and of] entering into treaties and alliances . . . .").

114 For an account of the Framers' concern with infractions of the Treaty of 1783, see Gibbons, supra note 6, at 1899-902.

115 My discussion here recalls an old debate between Professors William Crosskey and Raoul Berger over what might be called the temporal or transitional character of the Supremacy Clause. Crosskey sought to refute the claim that the Supremacy Clause lent support to the doctrine of judicial review by declaring "supreme" only those laws "made in pursuance" of the Constitution; he argued that the "in pursuance" phrasing conveyed a temporal meaning to distinguish laws enacted under the Articles of Confederation from those enacted under the new Constitution. 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 990-1002 (1953) (arguing from text and drafting history that the Supremacy Clause was carefully framed to define the "temporal cleavages" between federal laws on the one hand, which were binding only if enacted after the Constitution took effect, and federal treaties on the other hand, which had been binding under the Articles and would remain so under the new Constitution). Berger disagreed, arguing that the "in pursuance" phrasing meant "within" the limits or bounds of the new Constitution, and thus supported federal judges' power to ignore unconstitutional acts of Congress. Raoul Berger, Congress v. The Supreme Court 234-35 (1969) (agreeing that the Clause sought to secure "the 'desired retrospective application . . . of treaties,'" but arguing that no such contingency existed with respect to laws, which Congress was free to re-enact or not as it deemed expedient (quoting Crosskey, supra, at 998)).

For purposes of this Article, I am less concerned with the implications of this debate for judicial review than with the apparent agreement between Crosskey and Berger that issues of temporality informed the phrasing of the Supremacy Clause, and in particular that the Framers must have intended old treaties but not old laws to remain binding under the new regime. I make no claim that either Crosskey or Berger would subscribe to my thesis, although Berger's assessment of the Eleventh Amendment parallels my own in some
tion of the "supreme Law" comes "[t]his Constitution," a usage sufficiently definite to exclude any claim of supremacy for the old Articles of Confederation. Next come the "Laws of the United States which shall be made in Pursuance thereof." This description includes all statutes that the new post-ratification Congress might choose to enact (within constitutional limits), but it excludes laws that the old Congress had enacted under the aegis of the Articles of Confederation. Finally, the Clause includes "all Treaties made, or which shall be made, under the Authority of the United States." The evident purpose of this provision was to include as "supreme Law" not only any treaties adopted and ratified in the future, but also the existing Treaty of 1783, which had been adopted not in pursuance of "[t]his Constitution," but "under the Authority of the United States" pursuant to the old "constitution." The phrasing of the Supremacy Clause thus confirms the Framers' expectation that the constitutional limitations placed upon the states in Article I would take effect, if at all, only following ratification of the document by the requisite nine states, and would apply prospectively to state actions taken after that date. The Clause makes its prospective operation clear by ruling out supremacy for the old Articles of Confederation and for any laws that the old Congress had passed; the continuity of these old rules of law would require either their translation into binding law of the states themselves, or their re-enactment by the post-ratification Congress. The one exception that proves the rule of prospectivity relates to the Treaty of 1783. Even there, the Supremacy Clause affirms the principle that new rules of

e.g., id. at 326-28 (criticizing the Court's expansive interpretation of the Eleventh Amendment along lines the diversity critics later adopted).

For examples of instances in which contemporaries referred to the Articles of Confederation as a "constitution," see DUMBAULD, supra note 79, at 26-27.

The Supreme Court eventually adopted this view, holding that the retrospective language of the treaty provision of the Supremacy Clause gave binding effect to treaties concluded before the Constitution took effect, and thus rendered the Treaty of 1783 binding and enforceable. Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

In light of its temporal function, the language of the treaty provision of the Supremacy Clause may not bear the meaning ascribed to it by Justice Holmes in the famous case Missouri v. Holland, 252 U.S. 416 (1920). Holmes distinguished the (relatively broad) treaty power of the national government from the (more narrow) lawmaking power of Congress in part on the ground that the Supremacy Clause distinguished between treaties—supreme if "made under the authority of the United States"—and laws—"supreme . . . only when made in pursuance of the Constitution." Id. at 433. To the extent that the Framers used this language (authority vs. pursuance) to clarify a temporal distinction, they may not have meant to distinguish the breadth of the two powers along the lines Holmes suggested. See Reid v. Covert, 354 U.S. 1 (1957) (making this point).

See 2 FARRAND, supra note 62, at 417 (reporting Madison's opinion that the addition of the words, "or which shall be made" to the treaty provision of the Supremacy Clause was meant "to obviate all doubt concerning the force of treaties preexisting, . . . as the words inserted would refer to future treaties").
law ought generally to apply prospectively. As we have seen, the 
Treaty already had binding effect under the terms of the Articles of 
Confederation; the Supremacy Clause simply carried that binding fea-
ture into the new regime.120

Support for this temporal or transitional interpretation of the 
Supremacy Clause appears in a variety of sources. First, the Articles of 
Confederation had themselves defined the binding quality of obliga-
tions undertaken before the Articles became effective, and had 
grouped those transitional assurances at the end of the document, 
along with the Confederation's version of the Supremacy Clause.121

The Constitution followed this arrangement by placing the Engage-
ments Clause and the Supremacy Clause in succeeding clauses of Arti-
cle VI, also near the end of the document. The textual and structural 
similarity of the two sets of provisions lends further support to the 
transitional interpretation of the Supremacy Clause. Second, James 
Iredell's remarks to the North Carolina ratifying convention portrayed 
the Supremacy Clause as simply securing the execution of the powers 
conferred on the new federal government.122 He continued: "It is say-
ing no more than that, when we adopt the government, we will main-
tain and obey it."123 Iredell's comments clearly reflect his expectation 
that the Constitution would become effective only upon its adoption,

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120 The same continuity appears to have been contemplated in connection with mat-
ters of admiralty and maritime jurisdiction. Under the Articles, Congress instituted a court 
of appeals in cases of prize and capture that enjoyed final appellate jurisdiction over such 
matters coming to it from state admiralty courts. See Bourguignon, supra note 113, at 112- 
16. The Supreme Court later ruled in the case of Gideon Olmstead that decisions of the 
prize court established the rights of the parties and remained valid and enforceable under 
the new Constitution. United States v. Peters, 9 U.S. (5 Cranch) 115 (1809); see also 
Penhallow v. Doane's Administrators, 3 U.S. (3 Dall.) 54 (1795) (enforcing an admiralty 
judgment against the State of New Hampshire rendered by the national prize court under 
the Articles of Confederation).

121 Article XII of the Articles of Confederation declared that "[a]ll bills of credit emit-
ted, monies borrowed and debts contracted by, or under the authority of Congress, before 
the assembling of the United States, in pursuance of the present confederation, shall be 
deemed and considered as a charge against the United States." Arts. of Confed. art. XII. 
Article XIII declared that "[e]very State shall abide by the determinations of the United 
States in Congress assembled, on all questions which by this confederation are submitted 
to them." Id. art. XIII. The two provisions apparently seek to accomplish much the same 
goal as their successors, the Engagements Clause and Supremacy Clause of Article VI of 
the Constitution. Like the Engagements Clause, Article XII addresses the viability of debts 
contracted "under the authority" of Congress "before" the effectiveness of the Confeder-
ation. Like the Supremacy Clause, Article XIII renders decisions of Congress taken within 
the limits of its authority binding upon the states. That the two-step treatment in the Arti-
cles of Confederation evidently sought to provide transitional rules to govern the effective-
ness of old obligations helps to confirm the transitional function of Article VI of the 
Constitution.

122 See 4 Elliot's Debates, supra note 84, at 178 ("This clause is supposed to give too 
much power, when, in fact, it only provides for the execution of those powers which are 
already given in the foregoing articles.").

123 4 id. at 179.
and apparently he was understood in those terms. Mr. Bloodworth, the first speaker to respond, characterized the Supremacy Clause as likely to destroy the state's existing tender laws and paper money. He squarely presented the question of retrospectivity, which the convention debated at length.\(^{124}\) I summarize those debates in Part I.E below; for now, I simply note that they arose from Iredell's characterization of the Clause's prospective effect.

In the end, the rules of prospective applicability in the Supremacy Clause point toward the same conclusion as that contemplated by the Engagements Clause, with which the Committee of Style grouped it in Article VI of the Constitution.\(^{125}\) By limiting supremacy to "[t]his Constitution, and the Laws . . . made in Pursuance thereof," the Supremacy Clause omits any binding effect for any of the laws of Congress passed in the Articles of Confederation era.\(^{126}\) This result would prove inconvenient in some respects, and would require the post-ratification Congress to reenact some laws that needed no repair, such as those governing the Post Office.\(^{127}\) But the Clause adroitly sidestepped any argument that public creditors might make to enforce obligations of the United States in the new federal courts following ratification. The Supremacy Clause did not validate the laws that supported those obligations, and the Engagements Clause declared the obligations to be only "as valid . . . under this Constitution, as under the Confederation." The Convention's decision to refrain from mandating congressional payment of existing debts thus appears to have left public creditors without any enforceable legal rights against the post-ratification Congress.

The same conclusion would appear to follow, at least as a matter of supreme federal law, with respect to the states' creditors. Under the Articles, the states had been left free to emit bills of credit and to borrow money on their own public faith. When Congress proposed to limit the emission of paper money by the states in 1781, it could not rely upon any constitutional authority of its own; instead, it passed a resolution that sought to persuade the states to sink existing emissions

\(^{124}\) See 4 id. at 179-91.

\(^{125}\) Indeed, the Framers of Article VI appear to have followed the structure of the Articles of Confederation in grouping a provision governing the validity of existing debts with a provision governing the supremacy and binding effect of the Articles themselves. See supra note 121.

\(^{126}\) By remaining silent as to the effect of congressional adjudications under the Articles, the Supremacy Clause leaves open the possibility that a future federal court might give binding effect to the decisions of the old court of appeals in cases of prize and capture, and to those of Congress in boundary disputes between the states.

\(^{127}\) See Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 (enacting that the regulations of the post office "shall be the same as they last were under the resolutions and ordinances of the late Congress").
and to refrain from future ones. Similarly, the Articles left the states free to follow their own policies with respect to the payment of public creditors; not surprisingly, those policies varied widely. Finally, the machinery of collection varied, with each state relying to a greater or lesser degree on judicial and legislative modes of claims determination. Although the Supreme Court would eventually construe the Constitution as depriving the states of this control, it did not threaten them with federally enforceable liability on their existing obligations; the prospective operation of the constitutional restrictions preserved state control of those matters. The only threat to state control would come from the diverse-party provisions of Article III.

D. Fiscal Policy and Article III's Provisions for Government Suability

Sandwiched between the debate over payment of the war debts and the debate over limitations on the states' power to emit bills of credit, the Convention considered the judiciary provisions of Article III. Not surprisingly, the terms of Article III that emerged from the August 27-28 debates provide a mechanism for the judicial enforcement of State action limitations to which the delegates had agreed. This mechanism was the provision in Article III declaring that the Supreme Court shall have original jurisdiction over all cases "in which a State shall be Party." By contrast, Article III contains no mandatory provision for the adjudication of proceedings against the United States. This distinction between the mandatory suability of the states and the permissive suability of the United States (effectuated through enabling legislation) parallels the Framers' decision to place few constitutional restraints on Congress's fiscal authority.

Before examining the debates of August 27, we must first recall the Convention's decisions about the nature of the judiciary power. First, the Convention agreed without much dissension that the new government should include a judicial branch with at least one

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128 See Jensen, supra note 49, at 41.
129 See supra text accompanying notes 70-73 (describing the reaction to these policies in Massachusetts and Rhode Island).
130 See, e.g., supra note 69 (discussing Virginia).
131 See infra notes 334-37 and accompanying text.
132 U.S. Const. art. III, § 2, cl. 2; see Pfander, supra note 13, at 598-640 (arguing that the Court's original jurisdiction lay at the center of the Framers' plan to secure the judicial enforcement of the prohibitions on state action in Article I, Section 10).
133 See Pfander, supra note 69, at 950-52 (suggesting the outlines of this linkage between the suability provisions of Article III and the Framers' handling of war-related debts).
Second, in the Madisonian compromise, the Framers agreed to refrain from mandating lower federal courts. This compromise meant that Congress could, if it chose, leave original jurisdiction over many federal matters to the state courts, subject only to appellate review by the Supreme Court of the United States. Third, the reliance upon state courts entailed in the Madisonian compromise gave rise to the adoption of the Supremacy Clause, which required state judges to give effect to the paramount authority of the Constitution and the laws and treaties of the United States whenever they conflicted with state law. Fourth, the Framers decided to give the judiciary the responsibility for policing state compliance with federal restrictions. This judicial negative took the place of Madison's proposed congressional negative, and it necessitated a provision for federal jurisdiction over "all Cases . . . arising under [the] Constitution, the Laws . . ., and Treaties [of the United States]"—tracking the language of the Supremacy Clause. Finally, the completion of the judicial negative required an effective source of original jurisdiction over suits brought against the states. Such a grant appeared in the Article III provision mandating that the Supreme Court shall have original jurisdiction in all cases in which a state shall be a party. The structure finally agreed upon thus secures an original docket on which an individual could sue a state for overreaching the limits defined in Article I, Section 10, and elsewhere in the Constitution, laws, and treaties of the United States.

Apart from the provisions empowering the Court to hear State-party cases arising under federal law, Article III contains a variety of jurisdictional provisions that authorize federal courts to hear "controversies" involving State parties. The final Committee of Detail draft included three such heads of jurisdiction: "controversies between two or more States," those "between a State and Citizens of another State," and those "between a State . . . and foreign States, citizens or subjects." All these heads of jurisdiction appear in the final version of

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134 See Pfander, supra note 13, at 591 n.149 (noting widespread acceptance of the need for a federal judiciary with one supreme court).
135 See id. at 592-94 (noting that the Madisonian compromise allowed Congress to decide whether to create inferior federal courts and so prevented the Framers from relying upon the Court's appellate jurisdiction to secure state compliance with federal law).
136 See id. at 590-91 (collecting evidence that establishes a link between the Framers' rejection of the congressional negative on state laws and the adoption of the Supremacy Clause, requiring state courts to give effect to supreme federal law).
137 U.S. Const. art. III, § 2, cl. 1; see Pfander, supra note 13, at 590 n.141, 591 (noting Madison's support for a congressional negative on state laws and the Framers' eventual adoption of the judicial negative as an alternative).
138 See id. at 598-617 (arguing that the text of Article III provides for the Court to exercise original jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States in which a state appears as a party defendant).
139 2 Farrand, supra note 62, at 186.
Article III, together with a provision authorizing jurisdiction over disputes "to which the United States shall be a Party." Although their purpose remains somewhat obscure, the Framers may have intended these "controversy" heads of jurisdiction to facilitate debt-collection proceedings. For example, today, the provision for jurisdiction over disputes between "two or more States" appears to be designed primarily for the resolution of boundary disputes between the states; indeed, that has proven to be its most durable function throughout our history. But at the time of its framing by the Committee of Detail, the draft Constitution did not contemplate judicial cognizance of border disputes, and thus must have had other kinds of controversies in mind. The contemplated disputes may have included the settlement of state accounts following the final accounting of Revolutionary War costs. Other State-party heads of "controversy" jurisdiction, such as those between the states and foreign nations and foreign citizens, might also have been intended to facilitate the resolution of existing debt claims.

The Framers' attitude toward the suability of the federal government appears to have differed materially from that toward the suabil-

140 U.S. Const. art. III, § 2, cl. 1.
142 The Committee of Detail draft assigned to Congress authority over boundary disputes between states (as had the Articles of Confederation), and specifically barred the federal courts from hearing interstate disputes "regard[ing] Territory or Jurisdiction." See Pfander, supra note 13, at 615 & n.232 (tracing the evolution of the interstate dispute jurisdictional grant, and concluding that something other than boundary disputes must have led to its initial inclusion in Article III's predecessor).
143 Under the Articles of Confederation, the debts incurred in fighting the Revolutionary War were to be totaled and allocated to the states for payment according to an apportionment scheme based on the value of real property in each state. Arts. of Confed. art. VIII. The resulting balances were to be defrayed not through any payment to or from the United States itself, but through payments from debtor states directly to creditor states. See Ferguson, supra note 45, at 211 n.16 (noting that settlement of state accounts originally had nothing to do with federal debts, and that interstate payments were to cancel final balances). Only later, when Hamilton proposed both the federal assumption of state debts and the final settlement of state accounts did the two issues of assumption and settlement become linked in the politics of the 1790s. See id. at 306-25 (discussing the manner in which Hamilton's report on public credit in 1790 triggered a political debate over assumption of state debts and settlement of state accounts, but emphasizing the distinction between the two questions).
144 States had borrowed a good deal of money from both foreign nations and foreign nationals. In addition to the loans procured by the Continental Congress, Virginia borrowed from Caron de Beaumarchais of France; Maryland borrowed from the Dutch banking family Van Staphorst; and South Carolina borrowed from the Chevalier of Luxembourg. Dating from the Revolutionary War, these debts were still in existence at the time of the framing and later resulted in litigation against the states in question. Beaumarchais brought suit against Virginia in the state's own courts, see Commonwealth v. Beaumarchais, 7 Va. (3 Call) 107 (1801), and the Van Staphorsts and the Chevalier sued Maryland and South Carolina, respectively, on the Supreme Court's original docket, see sources cited infra notes 246, 251.
ity of the states. Unlike the State-party matters that appeared in early drafts of Article III, the provision for federal courts to hear “Controversies to which the United States shall be a Party” did not become a part of Article III until August 27. As enacted, the provision differed significantly from Charles Pinckney’s original proposal that the federal courts should hear “all” controversies involving the United States, and it appears likely that the Convention’s modification of the Engagements Clause helps to explain this change in terminology. As noted above, George Mason had persuaded the Convention on August 25 to abandon a provision mandating federal payment of the debts of the United States. Having decided to preserve legislative authority to manage the claims of public creditors, it made sense for the Convention to authorize the judiciary to hear suits against the United States as Congress might direct, but to refrain from inflexibly mandating the exercise of such jurisdiction over every conceivable claim. This desire to preserve congressional control over federal government suability may also have underlain the Convention’s decision to omit U.S.-party cases from the Supreme Court’s original jurisdiction.

145 Included in the final Committee of Detail draft were controversies between two or more states, those between a state and the citizens of another state, and those between a state and a foreign citizen or subject, framed in terms essentially identical to those in the final version of Article III. See 2 Farrand, supra note 62, at 186.

146 See Pfander, supra note 69, at 949-50 & n.185 (tracing the U.S.-party controversy provision to a proposal Charles Pinckney made to the Convention on August 20, several days after the Committee of Detail presented its final draft of Article III).

147 See id. at 950 (noting the distinction between the “all” controversies phrasing Pinckney proposed and the omission of “all” from the final version of Article III).

148 See supra text accompanying notes 94-97.

149 The Convention briefly considered the addition of U.S.-party cases to the Court’s mandatory original jurisdiction, but ultimately abandoned the idea and returned to an original jurisdiction clause that included only State-party (and ambassador) cases. See Pfander, supra note 13, at 626-27. It may be that the decision (on August 27) to abandon this mandatory source of jurisdiction over claims involving the United States reflected the Convention’s desire to preserve some measure of congressional control over the suability of the federal government. Perhaps the Convention abandoned the mandatory language of the Engagements Clause in order to adhere to the Framers’ decision (on August 25) to leave Congress to manage existing debts. See Pfander, supra note 69, at 952-53; cf. Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 333-36 (1816) (suggesting a two-tiered account of Article III that posited mandatory jurisdiction over all cases arising under the Constitution, laws, and treaties, and permissive jurisdiction over the controversies defined in Article III by reference to the parties; and suggesting that the permissive phrasing of the U.S.-party controversy grant may have been meant to avoid the implication of a power “to take cognizance of original suits brought against the United States as defendants in their own courts”); Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205 (1985) (distinguishing between federal question and admiralty cases and diverse-party controversies, and arguing that Article III requires Congress to vest the federal courts with jurisdiction over the former but gives Congress discretion over the latter).
In the end, the Convention gave the Court original jurisdiction over State-party cases but excluded a similar grant for U.S.-party matters. As a consequence, the Court enjoyed jurisdiction over all cases arising under the Constitution, laws, and treaties of the United States brought by or against a state, and permissive jurisdiction over any claim involving the United States as a party. This distinction in treatment did not mean that the Framers left the federal government free of legal constraints. To the contrary, it was assumed that the federal government would invoke the jurisdiction of the federal courts in the course of executing federal laws, and that the targets of these proceedings would challenge the legality of federal action as a defense to such enforcement. Similarly, suits against federal officers were expected to provide a method of securing a judicial determination of the legality of much executive action. All such matters would come within the ultimate authority of the Supreme Court, but would not necessarily appear as coercive suits brought against the United States as a party defendant on the Court's original docket.

Although federal jurisdiction over State-party proceedings looks broad in comparison to that over U.S.-party proceedings, state suability did not necessarily entail a judicial power to impose liability for actions previously taken by a state in its capacity as an independent sovereign under the Articles of Confederation. Unlike debt claims between private parties, which were routinely enforceable in debt or assumpsit actions, claims arising from contracts with the states had not previously been thought to give rise to an ordinary right of action. English practice recognized no original or routine right of action against the Crown, but relied instead upon a series of extraordinary proceedings, such as the petition of right, the monstrans de droit, and the traverse of office. Although the newly independent states had codified some of the English procedure, many still required government contractors and other public claimants to submit petitions for a legislative adjustment of their demands on the fisc. In addition, the

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150 See Berger, supra note 116, at 49-81 (collecting statements the Framers made in support of the existence of judicial review).
151 For a summary of the modes by which individuals might litigate a claim against the federal government—by asserting a defense to government enforcement proceedings, by instituting an affirmative claim against a government officer, and by instituting an application for one of the prerogative writs—see Pfander, supra note 69, at 948-49, 966-70.
152 For an overview of the modes of securing government accountability in Blackstone's England, see Pfander, supra note 69, at 909-26 (describing practice upon the petition of right, the monstrans de droit, the traverse of office, scire facias, and the prerogative writs of mandamus, habeas corpus, prohibition, certiorari, and quo warranto; and distinguishing the Crown's immunity in ordinary tort and contract proceedings from its routine suability through extraordinary remedies available upon petition).
153 For an overview of the evolution of American practice, from colonial reliance upon legislative determination of public claims to greater reliance by the newly independent states upon judicial modes of claims determination, see id. at 934-45 (describing the influ-
actual payment of funds from a state treasury typically required a formal appropriation.  

The traditional inability of individuals to make routine debt and property claims against the states, and the difficulties associated with the execution of a money judgment against a recalcitrant state legislature, created profound uncertainties about the meaning of state suability under Article III. One could argue (as did Edmund Randolph before both the Virginia ratifying convention and the Supreme Court in *Chisholm*) that Article III empowered federal judges to fashion any mode of proceeding necessary to protect the natural-law right of every (diverse) plaintiff against the debtor states. Alternatively, one could argue that the grants of jurisdiction authorized the federal courts to exercise a kind of arbitral jurisdiction over any claims that the governmental entities chose to submit for resolution. Public creditors often agreed to arbitrate their disputes with debtor states both before and after the framing of the Constitution, and at least some Federalists explained the “controversy” heads of State-party jurisdiction as contemplating this type of dispute resolution upon consent of the government entity. In the absence of a definitive resolution of this question in the Convention, the ratification debates would leave a decisive mark on the country’s understanding of the function of these diverse-party state suability provisions.

E. The Anti-Federalist Attack on Jurisdiction over Retrospective Claims Against the States

The possibility that the diverse-party heads of jurisdiction might effect a retrospective change in the rules governing the states’ ability to manage their own fiscal operations first appeared in New York. There, the arguments of “Brutus” on the retrospective enforcement of public debts led to Alexander Hamilton’s detailed and well-known response in *Federalist No. 81*. Similar arguments on related matters arose in the Virginia and North Carolina debates. In this Section, I will trace their outlines and show that the basis on which the Framers rejected the Anti-Federalist argument of retrospective liability strongly supports the thesis of this Article.

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154 See *id.* at 940 n.144 (noting that both the English Parliament and the Virginia Assembly retained control over the appropriation of funds to pay judgments rendered by way of petitions of right). But see *id.* at 1013 (reporting that four states at one time or another “treated . . . judicial decrees as a sufficient warrant for the payment of money from the treasury”).

155 See infra text accompanying notes 197-98.

156 See infra notes 477-81.
Brutus's argument is significant both because it offers perhaps the most cogent theory of retrospective liability and because it inspired a passage in *The Federalist Papers* that has become a central text in modern debates over the meaning of the Eleventh Amendment. Writing in February 1788, Brutus made several important points. First, he identified the state-citizen grant as the vehicle by which a nonresident was likely to invoke federal court jurisdiction, suggesting that he believed that suits to enforce existing state obligations would present no federal question. Second, he assumed that the state contracts were legally binding instruments that would become enforceable merely through the creation of a court of competent jurisdiction. Finally, noting that Article III confers original jurisdiction on the Supreme Court in State-party matters, Brutus described individuals commencing the actions he fears in the supreme court of the general government.

Hamilton responded by attacking Brutus's assumption that the grant of jurisdiction over matters of pre-existing obligation would nec-

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157 Brutus's thirteenth essay appeared in the *New York Journal* on February 21, 1788:

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.

The states are now subject to no such actions. All contracts entered into by individuals with states, were made upon the faith and credit of the states; and the individuals never had in contemplation any compulsory mode of obliging the government to fulfill its engagements.

The evil consequences that will flow from the exercise of this power, will best appear by tracing it in its operation. The constitution does not direct the mode in which an individual shall commence a suit against a state or the manner in which the judgement of the court shall be carried into execution, but it gives the legislature full power to pass all laws which shall be proper and necessary for the purpose. . . . We must, therefore, conclude, that the legislature will pass laws which will be effectual in this head. An individual of one state will then have a legal remedy against a state for any demand he may have against a state to which he does not belong. 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. . . .

And when the citizens of other states possess them, they may bring suits against the state for them, and by this means, judgments and executions may be obtained against the state for the whole amount of the state debt. 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 . . . .

essarily confer federal judicial power to enforce existing contracts against the states.\textsuperscript{158} Hamilton agreed with Brutus that the Court's original docket provides a vehicle for the assertion of judicial claims against the states; his digression began with a discussion of the original jurisdiction.\textsuperscript{159} He claimed, in essence, that the states enjoyed immunity from suit as an incident of their sovereignty under the Articles of Confederation, and that the "plan of the convention" did not purport to waive that immunity.\textsuperscript{160} He wrote that contracts between a "nation" and an individual create "no right of action independent of the sovereign will."\textsuperscript{161} He refrained from explicitly discussing that which Brutus himself had ignored: the possible impact of federal limitations on the states' power to retain these incidents of nationhood into the future. Yet Hamilton's reference to the possible waiver of state immunity in the "plan of the convention" reflected his explicit recognition that the federal courts would have the authority to enter-

\textsuperscript{158} Hamilton wrote:

\begin{quotation}
Though it may rather be a digression from the immediate subject of this paper, 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 \textit{without its consent}. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. \ldots A recurrence to the principles [of implied waiver of sovereign power discussed in an earlier paper] will satisfy us, that there is no colour to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will.
\end{quotation}

\textsuperscript{159} See Pfander, \textit{supra} note 13, at 629-30.

\textsuperscript{160} \textbf{The Federalist} No. 81, \textit{supra} note 27, at 549.

\textsuperscript{161} \textit{Id.} In arguing that contracts between "a nation" and individuals have no compulsive force, Hamilton used language that may have temporal significance. He began his discussion, after all, as a response to concern about the disposition of debts the states had incurred under the Articles of Confederation. Because the states then enjoyed the status of independent sovereigns, at least with respect to the disposition of their debts, his reference to national public faith fairly applies. Similarly, to the extent Hamilton stated a principle of enduring significance under the new Constitution, his affirmation of the immunity of the "nation" seems appropriate in light of the broad fiscal powers that Article I confers on the federal government. His reference to contracts with a "nation" does not clearly apply to the situation the states were to occupy under the new Constitution.
tain suits against the states to enforce the federal limits in Article I. On the whole, Hamilton responded to Brutus in terms that suggest, if they do not explicitly adopt, a view that existing state debts lie beyond the scope of the federal courts' role in enforcing the state restrictions in the new Constitution.

A more explicit discussion of temporal and retroactivity issues arose in ratification debates further to the south. North Carolina had just floated a new emission of paper money; delegates to the Hillsborough Convention worried that a decision to ratify the Constitution would threaten both the legality of the emission and their constituents' right to tender existing paper currency in payment of their debts and taxes. These concerns first arose in discussions over the creation of a federal judiciary, which the Federalists had lauded as a bulwark against the dishonest laws that had impeded debt collection during the 1780s. Matthew Locke, an Anti-Federalist who voted against ratification, urged that paper money and tender laws, though

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162 Id. Hamilton's reference to the waiver of immunity flowing from the "plan of the convention" has earned an enduring place in modern Eleventh Amendment jurisprudence. See, e.g., Monaco v. Mississippi, 292 U.S. 313, 322-23 (1934) (holding that foreign nations may not sue states, notwithstanding the absence of any textual provision to that effect in the Eleventh Amendment; describing the existence of certain "postulates which limit and control," including the postulate that the states enjoy immunity from suit without consent, absent a "'surrender of this immunity in the plan of the convention'") (quoting Hamilton in Federalist No. 81).

The Court's use of this quotation to bolster its idea of an enduring principle of sovereign immunity takes Hamilton's terms out of context. In Federalist No. 80, Hamilton had expressly admitted the possibility of state suability:

The states, by the plan of the convention are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, and others with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union. . . . The latter appears to have been thought preferable to the former, and I presume will be most agreeable to the states.

The Federalist No. 80, at 535 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Here, Hamilton argued that the Framers chose a judicial negative on unlawful state action as the mode of securing enforcement of the limits that appear in Article I, Section 10 (i.e., import duties and paper emissions). He specifically described these judicially enforceable limits as part of the "plan of the convention." One can best understand Federalist No. 81 as a reference to Hamilton's admission in Federalist No. 80 that the Constitution and Article III contemplated state suability to enforce federal restrictions on the states as part of the plan of the convention.


164 See 4 Elliot's Debates, supra note 84, at 169 (remarks of Mr. Locke); 4 id. at 173-74 (remarks of Mr. MacLaine); 4 id. at 183 (remarks of Mr. Davie).
regrettable, were nonetheless justified by necessity. In response, the Federalists acknowledged Locke's claim of necessity but denied that the Constitution would affect existing currency. All the provisions of the Constitution that Locke feared were to have no retrospective effect.

Archibald MacLaine was the first to sound themes that would recur as the Federalists scrambled to allay popular fears that ratification would undermine the recent emission of paper money:

With respect to our public security and paper money, the apprehensions of gentlemen are groundless. I believe this Constitution cannot affect them at all. In the 10th section of the 1st article, it is provided, among other restrictions, "that no state shall emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts." Now, sir, this has no retrospective view. It looks to futurity. . . . But it is said that, on adoption, all debts contracted heretofore must then be paid in gold or silver coin. I believe that, if any gentleman will attend to the clause above recited, he will find that it has no retrospective, but a prospective view. It does not look back, but forward. It does not destroy the paper money which is now actually made, but prevents us from making any more.

MacLaine thus made the claim that the prospective operation of the new federal restrictions would leave all existing emissions and related state laws intact.

This argument did not persuade the Anti-Federalists, however. In the course of a discussion of the Supremacy Clause, Mr. Bloodworth argued that supremacy would destroy all state laws in "competition" with federal law, and would therefore restrict the force of North Carolina's tender laws. MacLaine rejoined with his claim that any clause limiting the states "cannot possibly have a retrospective view." Retrospectivity, he urged, would be "contrary to the universal principles of jurisprudence, . . . unless [the constitutional provision] expressly provided that it shall." William Davie, a North Carolina delegate to the Philadelphia Convention, also reaffirmed the prospective character of the prohibitions. Davie explained that the members of the Convention knew of the existence of paper money and knew that any provisions threatening a circulating medium would preclude ratification.

Since the events of the past could not be repaired, he said, the Fram-
ers decided to "form some limitation to this great political evil" by placing "bounds to this growing mischief." Because the Framers "could not put an immediate end to it, [they] were content with prohibiting its future increase, looking forward to its entire extin-
guishment" through future actions of the state. Davie closed with the now-familiar claim that the limits contemplated were to have no "retrospective operation."

The Federalists also claimed that the Ex Post Facto Clause guaranteed the prospective character of all new federal restrictions by prohibiting the new Congress from enacting retrospective laws. However, as the Anti-Federalists were quick to point out, although such a claim tended to bolster the argument of general prospectivity for acts of Congress, it did little to address the meaning of the constitutional provisions themselves. One opponent of ratification wondered whether executions in federal court litigation were payable in paper or specie; another wondered whether citizens of North Carolina could tender its paper in payment of any direct taxes that Congress imposed. James Iredell joined his Federalist colleagues in arguing for a purely prospective interpretation of all relevant restrictions on state authority.

In Virginia, the opponents of ratification relied upon the Ex Post Facto Clause to argue that the federal government would have to levy exorbitant taxes to retire the continental debt. Patrick Henry argued that the new Congress would have to pay all existing debts and obligations on a shilling-for-shilling basis because Congress lacked power under the Ex Post Facto Clause to scale back the debt in light of depreciation. George Mason urged that the taxes necessary to pay the nominal value of the debts would "ruin our people." Mason and Henry both characterized northern speculators, who were said to have

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170 4 id. (remarks of Mr. Davie).
171 4 id. at 183 (remarks of Mr. Davie).
172 4 id. at 184 (remarks of Mr. Davie).
174 See, e.g., 4 ELLiot's DEBATES, supra note 84, at 185 (remarks of Mr. Iredell); 4 id. at 184 (remarks of Mr. Cabarrus).
175 4 id. 184-85 (remarks of Mr. Bloodworth).
176 4 id. at 188 (remarks of Mr. M'Dowall).
177 Iredell argued:
There is nothing in the Constitution which affects our present paper money. It prohibits, for the future, the emitting of any, but it does not interfere with the paper money now actually in circulation in several states. There is an express clause which protects it. It provides that there shall be no ex post facto law. This would be ex post facto, if the construction contended for were right . . . .
178 3 id. at 471, 473-76 (remarks of Mr. Henry).
179 3 id. at 472-73 (remarks of Mr. Mason).
purchased devalued continental paper, as the primary beneficiaries of this scheme of high taxation and specie redemption. Mason’s claims were somewhat disingenuous, for it was he who had successfully urged (on similar grounds) a loosening of the language of the Engagements Clause to leave the new Congress with some freedom to decide how to pay off existing debts.

Federalists met these arguments with a variety of responses. Madison characterized the Engagements Clause (but not Mason’s role in its drafting) as preserving the status quo of the United States’s obligations on its existing debts. He argued that, to the extent the debt had lost value and had previously been scaled back, a rule preserving the status quo would not in itself “increase the demands on the public.” Edmund Randolph attacked Henry’s reliance upon the Ex Post Facto Clause, arguing that it applied only to criminal cases—a conclusion the Supreme Court later adopted in Calder v. Bull. Whatever the merits of the technical question, Randolph’s comments appear to be consistent with the spirit of the Convention’s decision to refrain from imposing new federal limits on Congress’s power to deal with the problem of the continental debts.

At the heart of the Federalist reply was the claim that the new Article III courts would lack the power to enforce government obligations issued under the Articles of Confederation, because those obligations had been created without the expectation of legal enforceability. George Nicholas made this point first, noting that contracts were only to be as valid under the new system as under the old: “There is no law under the existing system which gives power to any tribunal to enforce the payment of such claims. On the will of Congress alone the payment depends. The Constitution expressly says that they shall be only as binding as under the present Confederation.” Randolph echoed this claim, emphasizing that “[t]here is no tribunal to recur to by the old government. There is none in the new for that purpose.” Evidently, Randolph and Nicholas both saw a

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180 3 id. at 471-72 (remarks of Messrs. Henry and Mason).
181 See supra text accompanying notes 94-97.
182 3 Elliot’s Debates, supra note 84, at 472 (remarks of Mr. Madison).
183 3 id. at 477-78 (remarks of Gov. Randolph).
184 3 U.S. (3 Dall.) 386, 390-91, 397, 399 (1798).
185 Although the rule of Calder v. Bull remains good law—that the prohibition against the central government’s passage of ex post facto laws applies only to laws of a criminal, not civil, character—that legal conclusion has been debated as a matter of history. Justice William Johnson announced his dissent from Calder in 1827 and Professor William Crosskey joined Johnson’s opinion 130 years later. Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286 (1827) (Johnson, J.); Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 415-16 (1829) (Johnson, J.); 1 Crosskey, supra note 116, at 351.
186 See supra notes 92-97, 104.
187 3 Elliot’s Debates, supra note 84, at 476 (remarks of Mr. Nicholas).
188 3 id. at 478 (remarks of Gov. Randolph).
connection between the power of the new Congress to deal with the existing debts as a matter of public faith under the Engagements Clause, and the absence from Article III of a mandatory grant of jurisdiction over U.S.-party claims. As Randolph concluded, the federal judiciary would lack power to "intermeddle with those public claims without violating the letter of the Constitution." In effect, Randolph denied that the federal government was subject to suit in federal court for any of its existing obligations. The absence of an existing right of action, and the generally prospective character of the constitutional restrictions on Congress, meant that "[t] hose who have this money must make application to Congress for payment."

The same logic would seemingly apply to all suits and proceedings against the states to collect existing obligations. To understand the debate on this issue, we must first recognize that the leading antagonists in Virginia agreed that the states were subject to suit as defendants on the Supreme Court's original docket. Federalists such as Madison, Pendleton, and Randolph freely admitted this in their comments on Article III and in their explanation of the function of the Court's original jurisdiction; Patrick Henry made similar arguments. In addition, the debate in Virginia left little doubt that federal restrictions on the states were enforceable in suits brought against the states as such. Madison conceded such suability in Federalist No.

189 3 id. (remarks of Gov. Randolph).
190 3 id. at 476 (remarks of Mr. Nicholas). As they would later do in connection with the discussion of the suability of the states, Henry and Mason accused Randolph of perverting the clear meaning of the Ex Post Facto Clause and of the U.S.-party provision of Article III.

The worthy gentleman has told you that the United States can be plaintiffs, but never defendants. If so, it stands on very unjust grounds. The United States cannot be come at for anything they may owe, but may get what is due to them. There is therefore no reciprocity.

3 id. at 480 (remarks of Mr. Mason). Although Mason's argument of reciprocity may have some superficial plausibility, Randolph ultimately has the better of the debate as it relates to Article III. As to future obligations undertaken by the United States, federal jurisdiction would attach to any action arising under the laws of the United States to enforce the obligations in accordance with their terms in federal court; Randolph later contended that Congress should authorize suits against the federal government in such circumstances. See Pfander, supra note 13, at 639 (quoting Randolph's report to Congress to this effect). But as Nicholas and Randolph observed, no such judicially enforceable federal law applied to existing continental debts, and as to them, the federal courts would have no law to enforce. See supra notes 187-90 and accompanying text. The lack of reciprocity thus flowed from the nature of the underlying legal regime and not from the terms of the jurisdictional provision.

191 For a summary of the Virginia debate on the subject of the enforceability of federal restrictions in suits brought against the states on the Court's original docket, see Pfander, supra note 13, at 653-36 (citing comments by Madison, Pendleton, Randolph, and Henry).
39, and he reiterated the point in his opening remarks to the Convention. Pendleton held similar views.

Although the Virginia delegates accepted that Article III established a regime of state suability to secure prospective enforcement of federal restrictions, there was no consensus about the suability implications that flowed from Article III's grant of jurisdiction over controversies between a state and the citizens of another state or the citizens or subjects of a foreign country. The Anti-Federalists, following the line Brutus had taken in New York, argued that this grant of jurisdiction threatened the states with new federal liability on their existing obligations. Henry echoed these themes in noting that Article III referred to the states as parties and not as plaintiffs.

The Federalists responded in two ways. Madison and John Marshall took the absolute view that the state-citizen diversity head of jurisdiction was meant to authorize states to sue individuals and not the other way around. Randolph, meanwhile, took the position that

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192 The Federalist No. 39 (James Madison); 3 Elliot's Debates, supra note 84, at 532 (remarks of Mr. Madison) (affirming that cases arising under the Constitution would embrace "causes of a federal nature" brought against the states to enforce constitutional prohibitions in Article I, Section 10).

193 3 Elliot's Debates, supra note 84, at 549 (remarks of Mr. Pendleton) (noting the necessity of a tribunal to hear claims against the states as party defendants; arguing that states may emit paper money or enact tender laws in violation of the federal principles of the Constitution and thereby necessitate a recourse to the "jurisdiction in the federal judiciary, to stop its pernicious effects").

194 For instance, George Mason said:

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?

3 Id. at 526-27 (remarks of Mr. Mason).

195 3 Id. at 543 (remarks of Mr. Henry).

196 Madison argued: "It is not in the power of individuals to call any state into court. The only operation [the state-citizen jurisdiction grant] can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court." 3 Id. at 533 (remarks of Mr. Madison). Marshall argued:

It is not rational to suppose that the sovereign power should be dragged before a court. . . . I see a difficulty in making a state defendant, which does not prevent its being plaintiff. . . . If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction?

3 Id. at 555-56 (remarks of Mr. Marshall).

The comments of both Madison and Marshall reveal a certain ambiguity as to whether the speakers really believed that the federal courts would lack jurisdiction over such matters or that the courts would enjoy jurisdiction but lack any coercive law to apply to claims against the states. The simple fact that states were not routinely suable in such matters at the time Madison and Marshall spoke, coupled with the fact that the federal government lacked constitutional authority over the extent of state suability on state-law matters in the future, suggests that they could flatly deny state suability without clarifying whether they based their view on the absence of jurisdiction or on the absence of any federal law limit on state immunity.
the states were freely suable by diverse parties as a matter of natural law, and were thus subject to suits to enforce pre-constitutional obligations—a position he would later successfully advocate as counsel to Alexander Chisholm in the suit against the State of Georgia. However, Randolph was the only Federalist in the Virginia debate to assert that Article III's simple grant of jurisdiction would confer power on the federal courts to entertain suits against the states on their existing obligations.

The ratification debates thus tend to confirm several broad themes of this Article. First, the debate in North Carolina clearly reveals the Federalist attitude toward the prospective character of the federal restrictions on state action in Article I, Section 10. Second, the debate in Virginia reveals that these federal restrictions were to be enforceable in suits brought against the states as such on the Supreme Court's original docket. As a consequence, much of the controversy centered on state suability as it related to existing obligations. In New York, Hamilton argued that the state-citizen diversity grant would not create a new federal right of action against the states, and in Virginia, the Federalists may have relied upon similar arguments in denying suability. Only Randolph and the Anti-Federalists Brutus, Mason, and Henry believed or feared that the diversity grant created a right to enforce existing obligations against the states.

II

The Eleventh Amendment as an Explanation of Article III

Despite the Federalists' protestations, suits to enforce obligations that the states had incurred before the ratification of the Constitution

197 Randolph made the following argument in favor of the suability of the states: [A]ny 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 id. at 573 (remarks of Gov. Randolph). Randolph thus admits the suability of states in ordinary debt claims, and addresses the issue of retrospectivity by arguing that existing claims against the states ought to be rendered valid and enforceable in accordance with the provisions of natural justice. Justice Wilson relied on similar natural-law reasoning in his opinion upholding state suability in Chisholm, 2 U.S. (2 Dall.) 419, 453-66 (1793) (Wilson, J.). See William R. Casto, The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth 192-95 (1995) (describing Wilson's opinion in Chisholm as based on natural law and the "principles of general jurisprudence").

198 At least, no one did in Virginia. James Wilson took a position quite similar to Randolph's in the Pennsylvania ratifying convention. See 2 Elliot's Debates, supra note 84, at 491 (remarks of Mr. Wilson) (applauding the impartiality of the diversity grant in allowing individual citizens to stand "on a just and equal footing" with the states with which they have a controversy).
soon appeared on the Supreme Court's original docket under section 13 of the Judiciary Act of 1789. In *Chisholm v. Georgia*, the Court famously affirmed its authority to assert jurisdiction over such matters, and the Eleventh Amendment followed in due course. In this Part, I contend that we can best understand the Eleventh Amendment as a constitutional analogue to a relatively common form of eighteenth century legislation known as the "explanatory" or "declaratory" statute. Like an explanatory statute, the explanatory Eleventh Amendment sought to clarify the meaning of Article III and to make that meaning applicable to pending claims.

This Part first defines the explanatory statute by reference to nineteenth century treatises on legislative interpretation, and then explores the checkered career of the explanatory statute in American constitutional history. After showing that the explanatory statute remained a vital part of the American legislative arsenal at the time of *Chisholm*, this Part considers a wide range of evidence that the Eleventh Amendment was intended to explain the true meaning of Article III.

A. An Introduction to the Use of Explanatory Statutes in the Eighteenth Century

Although explanatory statutes thrived in the early American world of legislative supremacy that predated the ratification of the Constitution in 1788, they have largely disappeared from the repertoire of the modern American legislative assembly. Modern treatises mention them in passing, if at all, and modern legislatures rarely enact them, at least in such terms. To find a working definition, we must turn to leading nineteenth century treatises on legislative interpretation. One treatise writer gave the following account:

A declaratory or expository statute is one passed with the purpose of removing a doubt or ambiguity as to the state of the law, or to correct a construction deemed by the legislature to be erroneous. It either declares what is, and has been, the rule of the common law.

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199 Section 13 provided that the 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 other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction." Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80 (Judiciary Act of 1789). Although the precise scope of this grant of original jurisdiction has been widely debated, scholars and judges generally agree that the provision at least confers jurisdiction on the Court to hear controversies between states and out-of-state citizens and aliens. For a summary of the ambiguities, see Pfander, supra note 13, at 640-42.

200 2 U.S. (2 Dall.) 419 (1793).

201 See supra text accompanying notes 3-5.

202 See, e.g., Reed Dickerson, *The Interpretation and Application of Statutes* (1975) (omitting any discussion of declaratory or explanatory statutes).
on a given point, or expounds the true meaning and intention of a prior legislative act.\textsuperscript{203}

Other treatise writers of the period agree that expository or declaratory statutes provide one vehicle that legislative bodies may use to correct or clarify ambiguities in the law.\textsuperscript{204}

Explanatory or declaratory statutes look odd to modern eyes because they claim a role for legislative assemblies in the business of interpreting or expounding upon the law. It was precisely this task of exposition—of saying "what the law is"—that Chief Justice Marshall famously claimed for the judicial branch in \textit{Marbury v. Madison},\textsuperscript{205} and few today would dispute that claim. By Marshall's account, and under the American doctrine of separation of powers on which it rests, the legislature makes general laws for future application and the judiciary applies and interprets those laws in the context of a concrete dis-

\begin{footnotesize}
\textsuperscript{203} Henry Campbell Black, \textit{Handbook on the Construction and Interpretation of the Laws} 370 (St. Paul, West 1896). After so defining the "declaratory or expository" statute, the writer explained the operation of such statutes in the following terms:

"It is a matter of frequent occurrence that the common law, or previous statute law, on a particular subject, is found to be ambiguous and uncertain, and that the legislature passes an act declaring what the common law is and has been on that topic, or explaining the meaning of the language employed in the former act, and the inferences to be drawn from its terms. A declaratory statute in effect promulgates a rule of construction or interpretation. Such laws are usually enacted in consequence of the establishment, by the judicial department, of a settled doctrine in regard to an ambiguous law. But the legislative exposition is not always in affirmance of the view taken by the courts."

\textit{Id.} (quoting Henry Campbell Black, \textit{An Essay on the Constitutional Prohibitions Against Legislation Impairing the Obligation of Contracts, and Against Retroactive and Ex Post Facto Laws} § 194, at 246-47 (Boston, Little, Brown, & Co. 1887)).

\textsuperscript{204} See Thomas M. Cooley, \textit{A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union} 110 (Boston, Little, Brown, & Co. 6th ed. 1890) ("'A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law, or the meaning of another statute, and which declares what it is and ever has been.'") (quoting Bouvier's \textit{Law Dictionary}); 1 James Kent, \textit{Commentaries on American Law} [517] (*456) n.(c) (photo. reprint 1989) (O.W. Holmes, Jr. ed., 12th ed. 1873) (defining a declaratory act as an "act declaratory of what the law was before its passage"); Theodore Sedgwick, \textit{A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law} 253 (New York, John S. Voorhies 1857) (defining a "declaratory act" as "an act declaring the true intent of a previous act").

For definitions that treat the "curative" and "declaratory" act as synonymous, see G.A. Endlich, \textit{A Commentary on the Interpretation of Statutes} § 291, at 395 (Jersey City, Frederick D. Linn & Co. 1888) (defining curative or declaratory laws as "acts declaratory of former statutes or rules of law").

\textsuperscript{205} 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). In describing the judicial function in terms of defining the meaning of the law as applied to a particular case, Marshall doubtless meant to distinguish between the forward-looking function of the legislature and the backward-looking function of the judiciary.
\end{footnotesize}
COURT S following this conception of the separation of powers will ordinarily refuse to give effect to laws of a retrospective character, and will resist attempts by legislative bodies to interfere with the final disposition of judicial proceedings between private parties. Only two Terms ago, in *Plaut v. Spendthrift Farm, Inc.*, the Supreme Court reaffirmed these principles, refusing to give effect to Congress's proposed creation of an equitable jurisdiction to reopen final judgments.

These familiar principles of separation of powers help to explain why state and federal courts in the late eighteenth and early nineteenth centuries mounted a sustained and largely successful attack on explanatory statutes. Where the statutes purported to explain away or repeal existing law, American courts viewed them as improperly retrospective and simply irrelevant to the determination of which law applies to a particular case. In *Ogden v. Blackledge*, the Supreme Court followed that course in refusing to give effect to an explanatory act the State of North Carolina adopted in 1799. By its terms, the 1799 act proposed to "explain an act passed in [1789]"; it recited that "doubts have been entertained" as to the meaning of the 1789 act, and declared that the 1789 act "shall not be considered" a repeal of a previously existing statute of limitations. The Court studiously ignored the proffered explanatory act and held that the 1789 statute had indeed removed the bar of limitations. The report of the case, if not the Court's opinion, makes clear that separation of powers principles informed its decision to ignore the legislative explanation. Following (and in many instances anticipating) the Court's approach, state courts around the country based their refusal to give effect to explanatory statutes on the ground that legislative interpretation invaded the province of the judiciary.

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207 514 U.S. 211, 219-25 (1995) (noting that the Framers abandoned the regime of "legislative equity" that had characterized practice during the colonial period in favor of a system of separation of powers that precludes Congress from exercising judicial power).

208 6 U.S. (2 Cranch) 272 (1804).

209 Id. at 276 n.

210 Id.

211 Id.

212 During oral argument, counsel argued against giving effect to the explanatory act of 1799 in the following terms: "To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separated from the judicial." *Id.* at 277. According to the reporter's note, "[t]he court stopped the counsel, observing that it was unnecessary to argue that point." *Id.* The one-paragraph opinion of Justice Cushing studiously avoids reference to the Act of 1799, apparently on the ground that such a retrospective explanatory act could not affect the decision of the case. *Id.* at 279.

213 See *Brunswick v. Litchfield*, 2 Me. 28, 32-33 (1822) (refusing to adopt a retrospective view of a curative act, citing concerns that a retrospective application of the law would
In deciding to challenge explanatory statutes, American judges self-consciously abandoned the principles of English jurisprudence on which such statutes were based. 214 Eighteenth century English decisions by Lord Mansfield and others created a presumption of legislative prospectivity, 215 and treatises such as Viner’s Abridgment recounted a studied reluctance to give broad effect to retrospective explanatory statutes. 216 European thinkers, such as Locke and Montesquieu, gen-

“sanction an interference of one department of the government with another and expose the citizens to dangers”); Merrill v. Sherburne, 1 N.H. 199, 217 (1818) (describing a legislative act that granted a new trial to plaintiff as “retrospective” and “judicial” and refusing to give it effect); Dash v. Van Kleeck, 7 Johns. 477, 501, 508 (N.Y. Sup. Ct. 1811) (Kent, C.J.) (noting that the act in question had been adopted after the events in litigation took place, and after suit had been filed; considering whether the act could apply “as declaring the interpretation of the former statutes for the direction of the courts;” and rejecting any possibility that the legislature intended to provide “an exposition of the former acts for the information and government of the courts” on the ground that it would “take[e] cognizance of a judicial question”); Osborne v. Huger, 1 S.C.L. (1 Bay) 179, 196-206 (1791) (refusing on constitutional grounds to give retrospective effect to an act of the legislature); Ward v. Barnard, 1 Aik. 121, 128 (Vt. 1825) (reviewing the limited characters of the legislative powers conferred in the state constitution, and concluding that “[s]o far as an act of the legislature is retrospective, or ex post facto, it is not a prescribed rule of conduct” and thus exceeds the legislative power); Turner v. Turner’s Ex‘x, 8 Va. (4 Call) 234, 237 (Ct. App. 1792) (Pendleton, P.J.) (“It is the business of legislators to make the laws; and of the judges to expound them. [Although legislators may amend the law prospectively,] they cannot prescribe a rule of construction, as to the past. For a legislative interpretation, changing titles founded upon existing statutes, would be . . . ex post facto . . . , oppressive and contrary to the principles of the constitution.”); cf. Den v. Goldtrap, 1 N.J.L. 315, 319 (1795) (refusing to give effect to a retrospective law on the ground that such an interpretation would be “highly penal,” but containing no discussion of separation of powers).

One New York judge explained the disparate approaches of the English and American authorities:

In England, where there is no constitutional limit to the powers of Parliament, a declaratory law forms a new rule of decision, and is valid and binding upon the courts, not only as to cases which may subsequently occur, but also as to pre-existing and vested rights. But even there the courts will not give a statute a retrospective operation, so as to deprive a party of a vested right, unless the language of the law is so plain and explicit as to render it impossible to put any other construction upon it. In this country, where the legislative power is limited by written constitutions, declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights, or to change the rule of construction as to a pre-existing law. Courts will treat such laws with all the respect which is due to them as an expression of the opinions of the individual members of the Legislature as to what the rule of law previously was. But beyond that they can have no binding effect; and if the judge is satisfied the legislative construction is wrong, he is bound to disregard it.

Salters v. Tobias, 3 Paige Ch. 338, 344-45 (N.Y. Ch. 1832). As the judge’s comment reveals, the rise of the written constitution largely explains the American rejection of explanatory statutes on separation of powers grounds; this development represented a dramatic departure from the attitude that had developed across the Atlantic.


216 See 9 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 256 (Philadelphia, T. & J.W. Johnson 1852) (“An explanatory statute should be construed strictly and literally.”);
erally agreed that the legislature should adopt only prospective laws. But the English authorities nonetheless recognized the “absolute [and] despotic” power of Parliament (borrowing Blackstone’s phrase), and held that Parliament could alter the law retrospectively if it chose to do so. A clearly phrased statement of the law by Parliament thus disposed of the matter, even in circumstances where the retrospective application of a newly crafted rule would offend the widespread regard for legislative prospectivity. To illustrate Parliamentary supremacy, Lord Coke, for example, identified a series of retrospective statutes, ranging from those that transferred real property to those that legitimated an otherwise illegitimate child. Blackstone seemingly accepted Coke’s account on this point, emphasizing the supremacy of Parliamentary authority not only in the making of laws, but also in the confirming and expounding of laws.

Others have traced the origins of Parliamentary supremacy to the status of Parliament as the highest court in England, and have shown that similar ideas made their way into the practice of the British colonies of North America. These ideas of legislative supremacy flourished in the years following 1776, as state legislatures claimed the fruits of their independence from the Crown. But the leaning of

19 Charles Viner, A General Abridgment of Law and Equity 517 (London, G.G.J. & J. Robinson 1793) (“Statutes of explanation shall be construed only according to the words, and not with any equity or intendment.”).
217 For a summary of their views, see Pushaw, supra note 206, at 400-07 (tracing the influence of Locke’s and Montesquieu’s ideas on Americans of the founding generation).
218 1 William Blackstone, Commentaries *156.
219 See Charles Howard McIlwain, The High Court of Parliament and its Supremacy 140-41 (Archon Books 1962) (1910) (quoting Coke’s description of Parliament as a court with power to “adjudge an Infant, or Minor of full age”; “[t]o attain a man of Treason after his death”; “[t]o naturalize a meer Alien and make him a Subject born”; “[t]o bastard a child that by Law is legitimate”; “[t]o legitimate one that is illegitimate, and born before marriage absolutely”). In all these instances, Parliament exercised a power of lawmaking in particular cases that would come to offend American notions of separation of powers.
220 1 Blackstone, supra note 218, at *156 (describing Parliament as possessing “sovereign and uncontrollable [sic] authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws”).
221 See McIlwain, supra note 219, at 109-256.
222 On the tendency of the colonial assemblies to model themselves on the precedents of Parliament, see Mary Patterson Clarke, Parliamentary Privilege in the American Colonies 265 (1943) (noting “that parliament was a court and that the [colonial] assembly, being modelled on parliament, was to some degree a court also”). On legislative supremacy in the early Republic, see Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 132-43 (1969) (describing the tendency of the first American state constitutions to place both the executive and judicial branches in positions of dependency on the legislature).
223 For an account of the manner in which the legislative excesses of the period following the Declaration of Independence helped to prepare the way for separation of powers and an independent judiciary, see Pfander, supra note 69, at 934-45 (tracing the evolution of the right to petition from a right to seek redress from legislatures to a right to seek a
state governments in the direction of legislative supremacy did not long appeal to the Founding Generation; they instituted reforms with a series of new constitutions that recognized the sovereignty of the people,\textsuperscript{224} separated the powers of government, and sought to exclude the legislative assemblies from the exercise of judicial powers. This distrust of legislative retrospectivity underlies a range of constitutional provisions, including those banning bills of attainder and ex post facto laws, and those that empower Congress to enact uniform rules of naturalization and bankruptcy.\textsuperscript{225}

Ultimately, the constitutional rejection of legislative retrospectivity led to the extinction of the baldest sorts of explanatory statutes. But in the 1780s and 1790s, and well into the nineteenth century, these statutes remained relatively common features of the legislative landscape. Like that which the Court studiously ignored in \textit{Ogden}, many of these explanatory statutes shared a series of common elements. First, they frequently included titles or descriptions containing language of explanation, declaration, or construction.\textsuperscript{226} Second, they often recited in a preamble or elsewhere that the existence of doubt or confusion in the current state of the law necessitated a legislative fix.\textsuperscript{227} Third, they almost invariably proposed to operate retrospectively by providing a rule of judicial construction in the resolution of past or pending cases. In many instances, the statutes declared that a previous law shall (or shall not) be construed in a particular manner.\textsuperscript{228} Such statutes were relatively common during the 1770s and

\textsuperscript{224} See Amar, \textit{supra} note 11, at 1448-62 (describing the theory of popular sovereignty that underlies the Preamble’s reference to the “People of the United States”).

\textsuperscript{225} See Pfander, \textit{supra} note 69, at 946.


\textsuperscript{227} See, e.g., \textit{Ogden}, 6 U.S. (2 Cranch) at 276 n. (reciting that “doubts have been entertained” as to the proper interpretation of an earlier statute); \textit{Turner}, 8 Va. (4 Call) at 234 (noting that an act of 1787 recites passage of an act in 1758 and asserts that “decisions made conformably to it . . . will multiply the mischiefs it was intended to remedy”).

\textsuperscript{228} See, e.g., \textit{Ogden}, 6 U.S. (2 Cranch) at 276 n. (declaring that an act “shall not be considered” a repeal of one enacted earlier); Dash v. Van Kleeck, 7 Johns. 477, 484 (N.Y. Sup. Ct. 1811) (quoting the statute at issue as one declaring that “nothing contained [in earlier statutes] shall be so construed” to prevent the defendant from raising a particular defense); \textit{Turner}, 8 Va. (4 Call) at 234-35 (quoting a statute enacting that an earlier act “shall, from and after the passing of this act, be construed” as restricted); \textit{cf. Brunswick v. Litchfield}, 2 Me. 28, 29 (1822) (curative act declared that certain marriages, previously celebrated, “shall be deemed and taken, and are hereby declared to be good and valid in law”).
1780s, and appeared on the books of the States of Georgia, New Jersey, Maryland, and Virginia, among others.

See, e.g., An Act to amend, explain and continue the “Act for regulating the judiciary departments of this State,” No. 438 (Dec. 9, 1790), reprinted in 2 The First Laws of the State of Georgia 422 (Michael Glazier, Inc., photo. reprint 1981) (1800) [hereinafter First Laws of Georgia]; An Act to explain an act, entitled, “An act to establish an academy in the county of Chatham, and for vesting certain property in Selina countess dowager of Huntingdon,” No. 453 (Dec. 20, 1791), reprinted in 2 First Laws of Georgia, supra, at 434, 435 (“Be it enacted . . . That the true intent and meaning of the said act was, and the same shall be construed to have been, a vesting of the said Bethesda college . . . in the said Selina, in trust for benevolent and literary purposes, only during her natural life, and no longer.”). The Georgia legislature also passed a number of statutes explanatory of the meaning of the state constitution. See, e.g., An Act to carry into effect the sixth section of the fourth article of the constitution, touching the distribution of the intestate estates, directing the manner of granting letters of administration, letters testamentary, and marriage licenses, No. 429 (Dec. 23, 1789), reprinted in 1 First Laws of Georgia, supra, at 414 (enacting into law what the legislature considered to be the “true construction” of a particular constitutional provision); An Act to explain the fifty-first article of the constitution, respecting intestate estates; and also concerning marriages, No. 307 (Feb. 22, 1785), reprinted in 1 First Laws of Georgia, supra, at 313 (employing similar language).

New Jersey sought to suppress intercourse between its own citizens and the subjects and troops of the British Crown, and enacted several statutes to specify exactly the kind of regulation it sought. See An ACT to prevent the Subjects of this State from going into, or coming out of, the Enemy’s Lines, without Permissions or Passports, and for other Purposes therein mentioned (Oct. 8, 1778), reprinted in The First Laws of the State of New Jersey app. at 8 (Michael Glazier, Inc., photo. reprint 1981) (1784) [hereinafter First Laws of New Jersey]; An ACT to explain and amend an ACT, intitled An Act to prevent the Subjects of this State from going into, or coming out of, the Enemy’s Lines, without Permissions or Passports, and for other Purposes therein mentioned (Dec. 11, 1778), reprinted in First Laws of New Jersey, supra, app. at 11 (seeking to clarify the scope of the permission granted in the prior act to those acting under “passports”); A Supplement to the ACT, intitled, An ACT to explain and amend an ACT, intitled, An ACT to prevent the Subjects of this State from going into, or coming out of, the Enemy’s Lines, without Permissions or Passports, and for other Purposes therein mentioned (Dec. 25, 1779), reprinted in First Laws of New Jersey, supra, app. at 13 (further broadening and clarifying the scope of the prohibition).

See, e.g., An Act directing the manner of suing public bonds, and to aid proceedings in the several courts upon such bonds (session of Oct. 26, 1778, ch. 20), reprinted in The First Laws of the State of Maryland (unpaginated) (Michael Glazier, Inc., photo. reprint 1981) (1787) [hereinafter First Laws of Maryland] (reciting that “it is doubted whether suits can be maintained upon administration, testamentary, sheriff’s, and other public bonds, in the name of the late proprietary, and it is also doubted whether suits now depending on such bonds can be prosecuted to judgment;” and enacting “That all suits now depending upon such bonds, shall and may be proceeded on to judgment and execution, in the name or names of the plaintiff or plaintiffs in the original writs mentioned”); A Supplementary ACT to an act, entitled, An act for the amendment of the law (session of Oct. 26, 1778, ch. 22), reprinted in First Laws of Maryland, supra (reciting that “doubts have been conceived . . . whether persons under the age of twenty-one years are intended to be bound by any deed or conveyance made and executed by the guardian or guardians only of such persons under age;” and enacting that “persons under the age of twenty-one years . . . shall [by order of the court of chancery upon petition,] be bound and concluded by any deed . . . made . . . by the guardian;” and further enacting “That all conveyances and deeds, heretofore made by the guardian or guardians of any infant . . . shall and they are hereby declared to be valid and effectual”); An ACT to explain and amend the act to settle and adjust the accounts of the troops of this state in the service of the United States, and for other purposes therein mentioned (session of May 10, 1781, ch. 20), reprinted in First
Despite these common features, explanatory statutes varied in terms of how grossly they invaded existing rights and how badly they offended the rule of law. At one extreme were statutes aimed less at explaining existing law than at altering its application retrospectively. The North Carolina "explanation" at issue in Ogden offers a good illustration of such extreme retrospectivity.\(^{234}\) At the other extreme were explanatory statutes that applied to situations of genuine uncertainty or ambiguity, where legal rights had not become "vested" in the parlance of the day, either through the passage of time, the issuance of a final judicial determination, or the creation of contract or property interests in reliance on the existing order. In Maryland, for example, the legislature explained that its creation of a "six-month" limitation

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\(^{232}\) See, e.g., An act for explaining and amending an act entitled An act for adjusting and settling the titles of claimers to unpatented lands, under the present and former governments, previous to the establishment of the commonwealth's Land Office (session of Oct. 4, 1779, ch. 27), reprinted in The First Laws of the State of Virginia 113 (Michael Glazier, Inc., photo. reprint 1982) (1785) [hereinafter First Laws of Virginia] (reciting that "doubts have arisen concerning the manner of proving rights for military service, under the proclamation of the King of Great Britain, in [1763], whereby great frauds may be committed," and declaring that no person may obtain a warrant for military service unless they produce to the land office a certificate with evidence of actual service or residence); An act to explain and amend the act for calling in and redeeming the money now in circulation, and for emitting and funding new bills of credit according to the resolutions of Congress of the 18th of March last (session of Oct. 16, 1780, ch. 1), reprinted in First Laws of Virginia, supra, at 130 (reciting that "Whereas various constructions have been made, and doubts have arisen, on several parts of the act... and it is necessary that the same should be explained and amended;" further reciting that "whereas the money emitted by an act of the last session... hath not been declared a legal tender, and it is politic and expedient that the money so emitted should receive all due credit among the good people of this commonwealth;" and enacting "that the money emitted by virtue of the said act, shall be received and passed as a legal tender in discharge of all debts and contracts whatsoever, so long as the same shall continue in circulation, except specific contracts expressing the contrary").

\(^{233}\) North Carolina and South Carolina also passed similar acts of an explanatory nature. See, e.g., An Act to explain, amend and supply the Deficiencies of an Act passed last Assembly at Hillsborough, entitled, An Act to regulate the Descent of real Estates, to do away Entails, to make Provision for Widows and to prevent Frauds in the Execution of last Wills and Testaments, as for directing how Deeds of Gifts and Bills of Sales of Slaves shall be executed, authenticated and perpetuated (session of Oct. 22, 1784, ch. 10), reprinted in 2 The First Laws of the State of North Carolina 529 (Michael Glazier, Inc., photo. reprint 1984) (1791) (reciting that "[d]oubts have been suggested that the Law... leaves it at least uncertain whether Brothers of the Half-Blood shall be entitled to succeed to the Inheritance in the same Manner as Sisters do where there is no Brother, nor the Issue of any such"); An Act to explain and amend and Act, entitled, "an Act to incorporate Charleston, and to enlarge the Powers of the City Council," No. 1342 (Mar. 26, 1784), reprinted in 2 The First Laws of the State of South Carolina 446-47 (Michael Glazier, Inc. photo. reprint 1981) (1790) (reciting that "doubts have arisen... so far as relates to the power of the Court of Wardens to commit for penalties and forfeitures").

\(^{234}\) See supra notes 208-12 and accompanying text.
period meant six calendar months, rather than six lunar months, and so helped to settle property rights that an unpredictable interpretation may have threatened.\textsuperscript{235}

Viewed from a modern perspective, the latter type of explanatory statute does not appear to present troubling retrospectivity problems. The Maryland calendar-month explanation appears especially benign, particularly if one sets aside any cases that had produced a final judgment on the merits, and focuses on pending claims that seek to rely upon the "lunar" theory. The plaintiffs in such pending cases do not appear especially deserving, and probably do not enjoy any vested rights.\textsuperscript{236} Rather, their rights may have been viewed as inchoate and therefore subject to legislative alteration until such time as they vested. The same can be said of claimants who would attempt to take advantage of other parties' technical failures in the registration, conveyance, or recordation of their property interests. Legislative confirmation of technically defective instruments through the passage of explanatory acts may appear to undermine the "rights" of sharp practitioners, but such claimants have few equities on which to draw in arguing for the application of black letter law.\textsuperscript{237}

\textsuperscript{235} See An ACT to explain the several acts of assembly heretofore made relative to the enrollment of deeds (session of Nov. 8, 1779, ch. 10), \textit{reprinted in First Laws of Maryland, supra} note 231 (reciting that "Whereas doubts have arisen in some of the courts of justice of this state, whether the time limited by laws heretofore made for the enrollment of deeds and conveyances should be computed by lunar or calendar months;" and enacting "That in all cases where the enrollment of deeds is directed by law to be made within six months from the day of the date of the same deeds, the said months shall be deemed and taken, and are hereby declared to be calendar months").

\textsuperscript{236} On the distinction between retrospective invasion of vested rights and permissible curative statutes, James Kent wrote:

\begin{quote}
A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy, by curing defects, and adding to the means of enforcing existing obligations.
\end{quote}


\textsuperscript{237} Nineteenth century decisions upholding retrospective legislation tend to emphasize the absence of an invasion of a vested right and the absence of equities favoring those who would propose to benefit from the law as interpreted before its retroactive alteration. See, e.g., Randall v. Kreiger, 90 U.S. (23 Wall.) 137, 149-50 (1874) (refusing to permit a woman who had participated in the sale of real property later to challenge the sale as a violation of her right of dower; emphasizing that a retrospective curative act had eliminated any defect in the woman's surrender of her rights of dower; noting that the only right taken away by the curative statute "is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party;" concluding that the "vested right is usually unattended with the slightest equity;" and upholding the curative act as accomplishing only "what a court of equity, if called upon, would have decreed").
These examples reveal that explanatory statutes may have performed a legitimate function in cases of genuine uncertainty in the state of the law, or where the legislature’s definitive answer might help to settle, rather than unsettle, the rights of many parties. State judges would of course remain free, under evolving notions of judicial independence, to ignore explanatory statutes that were simply a guise for improper legislative retrospection. Even today, legislatures occasionally rely upon retrospective statutes to explain the law, or to clarify or cure problems that have arisen from unanticipated or troubling interpretations of the law. Indeed, the modern-day curative statute is a direct descendant of the explanatory acts of the eighteenth and nineteenth centuries.

B. The Eleventh Amendment as an “Explanatory” Amendment to Article III

For a variety of reasons, I believe that the Eleventh Amendment can best be understood as an amendment explanatory of the meaning of Article III. This interpretation helps to account for the addition of the words of construction “be construed to” to the text of the Amendment; words of construction were a hallmark of the explanatory statutes of the day. Moreover, many accounts from the 1790s acknowledge that the ambiguity of Article III lent some support to the Supreme Court’s decision upholding state suability in Chisholm, the decision that triggered the movement toward an Amendment. Explanatory amendments frequently sought to clarify such ambiguities before the judiciary entered a final judgment. Finally, a review of

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238 For a discussion of more recent instances of curative or remedial legislation, see W. David Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Cal. L. Rev. 216, 258-44 (1960).


240 See supra note 228.

241 The drafters of the Eleventh Amendment succeeded to a large degree in preventing many of the docketed claims against the states from proceeding to a final judgment. Although New York eventually paid the judgment obtained against it on behalf of John Holt in the Oswald case, see 5 DHSC, supra note 3, at 66-67, other states secured the dismissal of the claims against them on the basis of the Eleventh Amendment. See id. at 136 (describing the dismissal of Chisholm v. Georgia immediately after ratification); id. at 289 (describing the dismissal of Hollingsworth v. Virginia); id. at 369 (noting that the Supreme Court “never did hear” the case of Vassall v. Massachusetts); cf. id. at 459 (reporting on the jury verdict rendered in Cutting v. South Carolina, but noting that final judgment was never entered on the verdict); David J. Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935, 958 (1997) (contending that the Court dismissed the case of Cutting v. South Carolina on the authority of the Eleventh Amendment).
the historical record reveals that many of the leading figures in the framing and ratification of the Amendment described the provision as explanatory, as did the attorneys who contested its retrospective application in *Hollingsworth v. Virginia.*

1. Retrospective Liability and the Impetus for a Constitutional Response to Chisholm

In considering the threat that the *Chisholm* decision posed, we should recall the nature of Hamilton’s solution to the problem of the accumulated Revolutionary War debts. Although Hamilton’s plan encompassed all “liquidated” state debts, it did not provide for the assumption of debts that the states had not yet paid or agreed to pay, or of those they had disavowed. Suits against the states on the Court’s original docket to enforce these disputed obligations thus threatened the shaky equilibrium that Hamilton’s funding and assumption plan had achieved. In *Van Staphorst v. Maryland,* Dutch banking brothers brought suit in 1791 to recover the interest and principal due on a 1782 loan to the State of Maryland. In *Oswald v. New York,* the heirs of John Holt brought suit in 1791 to recover unpaid salary that the decedent had earned as the official printer of the State of New York between 1777 and 1784. Similar state obligations were at issue in the following cases: *Chisholm,* an action brought in 1792 to enforce Georgia’s promise to pay for goods purchased during the war; *Hollingsworth,* an action in equity brought in 1792 to recover compensation for Virginia’s refusal in 1779 to recognize the Indiana Company’s title to a large tract of land in what is now West Virginia; *Vassall v. Massachusetts,* a bill in equity brought in 1793 to obtain an accounting of the proceeds of property Massachusetts had seized in 1782 from an absentee British loyalist; *Cutting v. South Car-

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242 3 U.S. (3 Dall.) 378 (1798).
243 See supra Part I.A-B.
244 See infra note 253.
245 This equilibrium was shaky because the citizens who owned few federal securities, primarily those in the southern states, would face the burden of high taxation to pay the benefits to relatively wealthy public creditors in the north and east. See FERGUSON, supra note 45, at 183 (noting that the South had 38% of the population but owned substantially less than that proportion of the debt).
246 *Van Staphorst v. Maryland* is unreported. A good account, along with a collection of pleadings and occasional commentary, appears in 5 DHSC, *supra* note 3, at 7-56. See also GOEBEL, *supra* note 108, at 723-24 (discussing *Van Staphorst*).
247 *Oswald v. New York* is unreported. A good account, along with a collection of pleadings, newspaper commentary, and legislative reactions, appears in 5 DHSC, *supra* note 3, at 57-126. See also GOEBEL, *supra* note 108, at 724-25 (discussing *Oswald*).
248 For a good overview of the *Chisholm* litigation, see 5 DHSC, *supra* note 3, at 127-273.
249 A thorough account of the *Hollingsworth* litigation appears in 5 DHSC, *supra* note 3, at 274-351.
250 *Vassall v. Massachusetts* is unreported. An account appears in 5 DHSC, *supra* note 3, at 352-449.
olina, an action brought in 1795 to enforce the state’s agreement to pay for the use of a vessel chartered in 1780 from the Prince of Luxembourg for use in cruising against British shipping; and Moultrie v. Georgia, a bill in equity filed in 1796 seeking specific performance of a 1789 Georgia statute providing for the sale of the infamous Yazoo lands to the South Carolina Yazoo Company.

These proceedings resembled one another in three respects: they apparently invoked the Court’s jurisdiction over controversies between a State and diverse parties; with the exception of Moultrie, they arose from state action that predated the Constitution; and they involved debts for which the states would receive no credit in the final accounting at the central treasury. They thus presented questions similar to those with which the constitutional conventions of New York, North Carolina, and Virginia had struggled in considering whether the federal courts would have authority to impose liability on the states for the wide variety of their pre-constitutional obligations. As we have seen, the Anti-Federalists had expressed their fears about this new federal liability, and the Federalists had attempted to deny

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251 Cutting v. South Carolina is unreported. An account appears in 5 DHSC, supra note 3, at 450-95.
252 Moultrie v. Georgia is unreported. An account appears in 5 DHSC, supra note 3, at 496-596.
253 Under the terms of Hamilton’s plan for the assumption of state debts, creditors were entitled to swap their state certificates of indebtedness for federal securities, but only if the state security bore a date prior to January 1, 1790. See infra text accompanying notes 365-67. State indebtedness established after 1790 in litigation with the states would not have been subject to federal assumption. Such obligations might conceivably have resulted in a credit in the final settlement of state accounts, which was not completed until June 29, 1793, when the General Board of the Treasury rendered its final report. See Ferguson, supra note 45, at 332-33 (describing the final report). But the Court’s only final disposition of State-party indebtedness—the judgment entered on the jury’s verdict in Oswald v. New York—came on February 5, 1795, too late to receive a credit in the settlement of accounts. See 5 DHSC, supra note 3, at 119 (setting forth the jury verdict against the State of New York in Oswald).

A variety of examples illustrate the linkage Americans drew between the funding and assumption of state debts and the new, unsettling threat of judicially enforced liability. See Edward Telfair, Address to the Georgia General Assembly, Augusta Chron., Nov. 9, 1793, reprinted in 5 DHSC, supra note 3, at 234, 235 (expressing concern in the wake of Chisholm that creditors would bring suit in federal court to collect old emissions of paper money, “which in good faith and upon constitutional principles is the debt of the United States”); The Rights of Man, N.Y.J., Aug. 10, 1793, reprinted in 5 DHSC, supra note 3, at 234 (noting Georgia’s possible inability to pay its just debts in light of the burdensome federal impost and proposing, rhetorically, payment of the debt out of the federal treasury and the subsequent abrogation of the state governments); Petition of Peter Trezevant, Executor of Robert Farquhar, to the United States Senate (Feb. 8, 1794), in 5 DHSC, supra note 3, at 258, 261 (seeking payment from Congress of Georgia’s debt to Farquhar, and noting in support of the petition that the State of Georgia, if it had paid its debt to Farquhar, “would undoubtedly have charged to the United States the Amount of this Debt” for assumption in accordance with Hamilton’s plan).
that diversity jurisdiction alone would suffice to impose it.254 Now the specter of this new liability was closing in on the states.

The Court's decision in *Chisholm* accentuated this prospect of retrospective liability. In *Chisholm*, the Court initially faced a jurisdictional question—whether it could entertain a proceeding against one of the United States. Presenting their opinions *seriatim*, four of the five sitting Justices agreed that the Court had jurisdiction.255 The Court also faced the question whether the law recognized an action in assumpsit against the State, although fewer Justices addressed this issue. Edmund Randolph, arguing for the plaintiff, had not addressed the question at any length, recognizing that it would remain open throughout the proceeding, and only Justices Wilson and Cushing voted to affirm the State's suability in such an action.256 Chief Justice Jay expressed a willingness to entertain further argument on the point, as did Justice Blair.257 In the end, a majority of the Court suggested an evident willingness to entertain suits against the states and a (perhaps more diffident) willingness to consider the possibility that state suability entailed liability in assumpsit on obligations that predated the Constitution.

Justice Iredell; remaining silent on the jurisdictional question, focused instead on what he saw as the doubtful power of the federal courts to fashion a rule of liability for pre-constitutional state obligations. Iredell, of course, had assured his colleagues at the North Carolina ratifying convention that the new Constitution would have no retrospective effect.258 The prospect of suits against the states for actions taken before ratification cast doubt on that assurance, and led Iredell to highlight his concerns with retrospectivity in his dissenting opinion.259 After noting the absence of any congressional means for

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254 See supra Part I.E.
255 2 U.S. (2 Dall.) at 452-53 (Blair, J.); id. at 465 (Wilson, J.); id. at 469 (Cushing, J.); id. at 472-74 (Jay, C.J.).
256 Id. at 466 (Wilson, J.) (holding that assumpsit would lie); id. at 469 (Cushing, J.) (same).
257 Id. at 452-53 (Blair, J.) (stating that the issue of assumpsit would remain open); id. at 479 (Jay, C.J.) (holding that assumpsit would lie but suggesting openness on the question whether state suability would necessarily "extend to all the demands, and to every kind of action," and suggesting possible nonsuability in actions to enforce states' paper money and debt instruments).
258 See supra note 177.
259 *Chisholm*, 2 U.S. (2 Dall.) at 429-50 (Iredell, J.). Iredell had expressed the same concern with retrospectivity in reflecting on Oswald's suit against the State of New York. In notes that he prepared in February 1792 for use in the *Oswald case*, Iredell made the following point:

No one will presume that either the Constitution or the act of Congress intended that the Judges of their Courts should do more than apply former principles of law to new cases where such application could naturally be made; nor certainly, that they should devise new modes of suit unheard of or unrecognized before to carry a part of the Constitution into
asserting claims against the states, Iredell posed the following question:

If therefore, no new remedy be provided [by section 14, the all-writs provision of the Judiciary Act of 1789] (as plainly is the case), and consequently we have no other rule to govern us but the principles of the pre-existent laws, which must remain in force till superceded [sic] by others, then it is incumbent upon us to enquire, whether previous to the adoption of the Constitution (which period, or the period of passing [the Judiciary Act], in respect to the object of this enquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law

Iredell then undertook an elaborate inquiry into the English law governing petitions of right and monstrans de droit, concluding that all such proceedings required leave of the Crown. Finally, regarding the question of a debt due from a state under the Articles of Confederation, Iredell observed what everyone already knew—that contracts made with state legislative bodies were made on public faith alone, and that the appropriate remedy lay in a petition to the legislature
rather than in an action at law.\textsuperscript{262} In the end, Iredell believed that the Court's assertion of jurisdiction over an assumpsit action represented the unwarranted creation of a new remedy for existing state contracts. No part of the Constitution, he noted, authorizes the Court to "mak[e] new laws for new cases; or, which I take to be [the] same thing, apply[ ] old principles to new cases materially different from those to which they were applied before."\textsuperscript{263}

Many of Chisholm's most articulate critics shared Iredell's concern with the Court's apparent willingness to enforce these old state debts. Of particular concern was the fact that the creditors in question had contracted at a time when the state legislatures had complete control over the payment of state obligations.\textsuperscript{264} This was the reaction of Edmund Pendleton, the able Justice of the Virginia Court of Appeals and the former president of the Virginia ratifying convention. Pendleton acknowledged that the language of the Judiciary Act could bear the Chisholm Court's interpretation in asserting jurisdiction over state defendants.\textsuperscript{265} But Pendleton thought the Court went beyond congressional guidance in creating a "mode of Proceeding in so new a case, to which no former process would apply."\textsuperscript{266} In effect, the Court had created "Parties defend[ant], not made liable by any existing law or Contract."\textsuperscript{267}

Pendleton's criticism of Chisholm's retrospective operation was echoed by a host of commentators, including the pamphleteer "True Federalist," who published a series of essays in the Boston newspaper \textit{Independent Chronicle}.

There is no controversy now in existence, between an individual and state, excepting in that importunate speculation upon Georgia lands [(i.e., Moultrie)], but what is founded in a contract, which originated before the general government had an existence. . . .

\textsuperscript{262} \textit{Chisholm}, 2 U.S. (2 Dall.) at 444-49 (Iredell, J.).
\textsuperscript{263} \textit{Id.} at 433 (Iredell, J.).
\textsuperscript{264} In modern terms, we might articulate this concern as follows: State contractors who depended on relatively unreliable state legislatures for payment of their contractual obligations would normally charge a premium to reflect the possibility of legislative disavowal. Recognition of the routine suability of the states on the Court's original docket would create an unanticipated regime of full and guaranteed payment of contract prices that would provide a windfall to a state's creditors. Such windfalls would have been most obvious in connection with judicial decisions that required specie payment of the states' obligations on their old (depreciated) paper money; that concern, predictably enough, animated the country's reactions to \textit{Chisholm}.
\textsuperscript{265} Letter from Edmund Pendleton, Presiding Judge of the Virginia Court of Appeals, to Nathaniel Pendleton, United States Judge for the District of Georgia (Aug. 10, 1793), \textit{in} 5 DHSC, \textit{supra} note 3, at 232, 233.
\textsuperscript{266} \textit{Id.} Pendleton also criticized the "Policy" of the decision by noting its tendency to "convulse the States." \textit{Id.}
\textsuperscript{267} Letter from Edmund Pendleton to Nathaniel Pendleton, \textit{supra} note 261, at 250.
As to those contracts, which were made before the establishment of the general government, there is no person on earth, who can believe, that when the people of the United America adopted the general government, they expected, that each state would be liable to be sued on each negotiable note, and public security, which had been given by it.  

Similar concerns with the imposition of retrospective liability appear in the remarks of a variety of observers, including the members of the Georgia House of Representatives (anticipating the decision in *Chisholm*), Governor Edward Telfair in his address to the Georgia legislature following *Chisholm*, Governor John Hancock in his prepared statement to the Massachusetts General Court, and the members of the Virginia House of Delegates, among others.  

2. The Debate over State Suability in Federal Question Cases  

Although *Chisholm*’s assertion of jurisdiction over diverse-party claims triggered an outcry against its retrospective impact on state treasuries, the reaction toward the prospect of state suability in other matters was decidedly more mixed. A sizable body of opinion held that the federal courts had no power to entertain suits or proceedings...
of any kind against the states. A second group accepted state suability in proceedings the United States or sibling states brought, but objected to the prospect of individual plaintiffs' suits. A third group continued to support the idea that individuals could institute claims against the states to enforce the federal-law restrictions embedded in Article I, Section 10.

Pamphlets and speeches in Massachusetts, in particular, express this range of opinion regarding *Chisholm* and *Vassall*. Much of the newspaper commentary lacked nuance; it either decried state suability as an invasion of sovereignty or defended suability as an appropriate remedy for occasional state injustices. Other writers, such as the author of *The Crisis* in the Anti-Federalist newspaper *Independent Chronicle*, offered accounts that distinguished between the rule of non-suability that governed ordinary disputes and the necessity of suability to enforce federal law:

Suppose then (for arguments sake) it is admitted, that an individual can sue a State, it cannot be in any other case, than where the United States, have an exclusive right of judging.

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274 For example, Governor John Hancock of Massachusetts asked whether the provision in the Federal Constitution for the extension of the judiciary power to States, is intended to be exercised in matters of civil contract, ... or whether it is intended only to give a remedy for such injuries as may take place by force, and may therefore have a tendency to destroy the peace of the Union .... Hancock, *supra* note 271, at 418.

275 As we have seen, the Framers of the Constitution appear to have deliberately structured provisions for state suability in federal question cases to secure state compliance with the restrictions in Article I, Section 10. Madison, Randolph, and Pendleton defended the Original Jurisdiction Clause on this basis in the Virginia ratifying convention, and Randolph's more elaborate 1790 report on the Judiciary Act of 1789 specified in some detail his understanding of state suability in both State-party controversies as well as in federal question cases. See *Pfander*, *supra* note 13, at 633-40. Randolph reiterated these themes in his argument in *Chisholm*, explicitly calling the Court's attention to the need to secure state compliance with the constitutional restrictions in Article I as support for the Court's assertion of jurisdiction over the diverse-party claim involved in that proceeding. *Chisholm*, 2 U.S. (2 Dall.) 419, 421-23 (1793) (argument of Edmund Randolph).

276 See, e.g., "Brutus," *Essay, Indep. Chron.* (Boston), July 18, 1793, *reprinted in 5 DHSC, supra* note 3, at 392 (urging that *Chisholm* threatened state sovereignty and independence); "Democrat," *supra* note 43, at 393 (decrying *Chisholm* and the issuance of process in *Vassall* as an invitation to "DIRTY TORY TRAITOR[s]" to file suit against the state); "Marcus," *Essay, Mass. Mercury*, July 13, 1793, *reprinted in 5 DHSC, supra* note 3, at 389, 390 (calling upon citizens of Massachusetts to "rouse" to fight the demon of despotism implicit in the threat to state sovereignty).

277 See, e.g., "&," *Essay, Columbian Centinel* (Boston), Aug. 17, 1793, *reprinted in 5 DHSC, supra* note 3, at 409, 410-11 (criticizing Anti-Federalist denials of suability as internally incoherent); "Crito," *Essay, Salem Gazette*, July 29, 1793, *reprinted in 5 DHSC, supra* note 3, at 403, 404 (defending the issuance of process in *Vassall* as appropriate to secure "Justice and common honesty" from the state); "Crito," *Crito to Sydney, Salem Gazette*, Aug. 27, 1793, *reprinted in 5 DHSC, supra* note 3, at 413, 415 (noting the suability of the King in England by petition of right); "Veritas," *supra* note 43, at 390 (defending the decision in *Chisholm*).
For example, each State is forbid by the Constitution "from coining money;" "emitting bills of credit;" "passing ex post facto laws," [etc.]—Should a State presume to pay a creditor in a paper currency, of its own issuing, or pass an ex post facto law, in all such cases the individual has his remedy in the Federal Judiciary.²⁷⁸

Anti-Federalists were quick to disavow this recognition of possible state suability in federal question cases. For instance, "Hampden" took the absolutist view that any admission of state suability, enforced through compulsory process, would leave the state "no share of sovereignty."²⁷⁹

Despite these disavowals, however, the argument for state suability to enforce federal restrictions did not disappear. In a speech before the Massachusetts House of Representatives, John Davis joined the general call for a constitutional amendment, but refused to condemn the Chisholm Court's decision.²⁸⁰ Davis rejected the appeal to the historical immunity of nations from compulsory process, noting that the Constitution established a new and unprecedented regime.²⁸¹ Had any sovereign state in history, he wondered, "bound itself not to coin money, emit bills of credit or lay duties on imports or exports?"²⁸² Whatever the historical record of other nations, Davis thought it clear that such surrenders of state sovereignty had occurred with the ratification of the Constitution.²⁸³ In light of these federal restrictions, it followed that the states' historical immunity from suit could not provide a complete answer to the question whether the Constitution authorized state suability. Although he ultimately argued for an amendment to curtail state suability, Davis's speech makes it clear that he regarded the existence of federal restrictions as important to an original understanding of the matter.²⁸⁴

Other evidence reveals that the issue of state suability to enforce federal restrictions was a matter of public dispute both before and after Chisholm. A pamphlet issued under the name "Hortensius" ap-

²⁷⁸ "A Republican," The Crisis, No. XIII, INDEP. CHRON. (Boston), July 25, 1793, reprinted in 5 DHSC, supra note 3, at 395, 397-98.

²⁷⁹ "Hampden," Essay, INDEP. CHRON. (Boston), July 25, 1793, reprinted in 5 DHSC, supra note 3, at 399, 400. Editorial notes indicate that Massachusetts Attorney General James Sullivan may have been the author of the Hampden essay. 5 DHSC, supra note 3, at 401.

²⁸⁰ Account of John Davis's Speech in the Massachusetts House of Representatives (Sept. 23, 1793), reprinted in 5 DHSC, supra note 3, at 431, 431.

²⁸¹ Id.

²⁸² Id.

²⁸³ Id.

²⁸⁴ Id. at 433. In rejecting state suability on grounds of expediency, Davis noted that tort claims could go forward against responsible state officers, and that contract claims would require an excessively cumbersome mode of execution. Id. Davis specifically noted, moreover, that the judicial power could apply only to contracts formed after the adoption of the Constitution. Id.
peared early in the debate and expressly argued in favor of suability in federal question cases. Thought to be written by Timothy Ford, a Federalist from South Carolina, the pamphlet noted the federal constitutional prohibitions on the states in Article I, Section 10, and then argued that the Framers must have contemplated some effective mode of enforcement. Turning to the words of Article III, “Hortensius” identified that mode in the provision that extends the judicial power to all cases arising under the Constitution, laws, and treaties of the United States, as well as in that which confers original jurisdiction on the Supreme Court in State-party cases. Specifically, he argued that states were suable to enforce both constitutional and statutory restrictions.

The idea of state suability in federal question cases was far less controversial than the prospect of state suability in matters that predated the Constitution. The concluding remarks of the author of The Crisis, whose defense of federal question suability appears above, read as follows:

But admitting still, (for argument sake) that the Constitution does allow an individual to sue a State, in all cases, it will not follow that he can in those cases that originated between him and the State previous to the adoption of the Constitution—For the words are, “that the judicial power shall extend to all cases in law and equity, arising under this Constitution.”—Admitting then, that an individual may sue a State it must be only in such instances, as took place after the adoption of the Constitution; for this is the period when the States entered into this political situation. No rational man can suppose, that the States have made themselves liable to answer before the Federal Court, for transactions they did, before they had surrendered this right.

Between this condemnation of the retrospective features of Chisholm and the grudging acceptance of state suability in federal question cases lay the seeds of a compromise. Federalists might join an amendment that curtailed state suability in suits over matters that predated the Constitution. This curtailment would provide them with needed political cover from the charges of the other party, and would pre-

285 See “Hortensius,” An Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States, in Their Political Capacity (Charleston, W.P. Young 1792), reprinted in 5 DHSC, supra note 3, at 36. Professor Fletcher first identified this pamphlet, believed by most scholars to have been written by Federalist Timothy Ford, as contemporary evidence of an argument for state suability in federal question cases. Exchange on the Eleventh Amendment, supra note 19, at 138 (submission of William A. Fletcher).

286 “Hortensius,” supra note 285, at 39 (denying that the Framers meant to secure these federal restrictions by remedying injured individuals to “the pitable remedy of petitioning to the courtesy of the state governments”).

287 Id. at 44.

288 “A Republican,” supra note 278, at 398 (footnote omitted).
serve the essence of the Constitution's judicial negative in federal question cases. In this way, Federalists might cede federal control over matters of modest federal interest, but maintain a leading element of their victory in the ratification struggle of 1788. The Eleventh Amendment adopts this strategy of compromise by explaining away the provisions of Article III that gave rise to *Chisholm*.

3. *Evidence That the Eleventh Amendment Was Explanatory of Article III*

What we know about the politics of state suability and the drafting of the Eleventh Amendment helps to confirm its status as an explanatory amendment. Shortly after *Chisholm* came down in February 1793, two members of the Massachusetts congressional delegation—Theodore Sedgwick in the House and Caleb Strong in the Senate—introduced resolutions proposing the adoption of a constitutional amendment to deal with the issue of state suability.289 The speed with which they introduced these resolutions reflects the fact that both Sedgwick and Strong had publicly stated their common view (in the Massachusetts ratifying convention of 1788) that Article III of the Constitution would not lead to debt collection suits against the states.290 One can glimpse Sedgwick and Strong's view of the political

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289 See 5 DHSC, *supra* note 3, at 597.

290 Although a standard work on the Massachusetts ratifying convention does not include a discussion of state suability, *see* DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS (Boston, William White 1856), the debates in that state triggered by *Chisholm* and *Vassall* leave little doubt that Rufus King, Caleb Strong, and Theodore Sedgwick had all denied the state's suability in supporting the ratification of the Constitution. For example, William Martin stated:

> [II]f the article did convey the meaning as determined by part of the Judiciary [in *Chisholm*], it was not the intention of the [Massachusetts ratifying] Convention, nor was it understood to be so construed—nay, there were several gentlemen then present, who signified their remembrance, that Mr. SEDGWICK and Mr. STRONG, both in Convention, and now in the Senate and House of the United States, had declared their minds to that purpose, and that they disapproved of it, and would endeavour to bring on the question, and get it altered if possible . . . .

Account of William Martin's Speech in the Massachusetts House of Representatives, INDEP. CHRON. (Boston), Sept. 28, 1793, *reprinted in* 5 DHSC, *supra* note 3, at 434, 434 (footnotes omitted). Essayist Marcus wrote: "This power in the Federal Government, would not have been consented to by this Commonwealth, but for Rufus King, Esq. who 'pledged his honour,' in the State Convention, 'that the Convention at Philadelphia never discovered a disposition to infringe on the Government of an individual State . . .'" "Marcus," *supra* note 276, at 389. Essayist Brutus wrote:

> Will you tamely yield to what is conceived to be an usurpation, and which was apprehended by many of the Members of the Massachusetts Convention, . . . but which apprehensions were said to be groundless by the advocates of the Constitution, and the jealousies of the Members on that subject, were laughed at, and treated as ridiculous by King and others.

"Brutus," *supra* note 276, at 392. Other evidence of this apparent consensus at the Massachusetts convention appears in "A Republican," *supra* note 278, at 396 (stating that the
threat that Chisholm posed in a letter that describes Mr. Sedgwick as expressing support for an “explanation” of the Constitution to reject the Chisholm Court’s construction of Article III—a construction he thought was so contrived as to have “risqued the reputation” of its defenders.\(^2\)

Despite the speed with which they were introduced, neither Strong’s nor Sedgwick’s more sweeping resolution was acted upon during 1793. One year later, Strong reintroduced his resolution in virtually identical terms; the only change was the addition of the words “be construed to” that appear in the Eleventh Amendment’s final text.\(^2\)\(^9\)\(^2\) Meanwhile, Sedgwick did not reintroduce his more sweeping resolution, apparently having decided to accede to the more limited terms of the Strong proposal. On January 14, 1794, the Senate adopted the Eleventh Amendment with only two negative votes and sent it to the House, where it passed by an equally large margin on March 4, 1794.\(^2\)\(^9\)\(^3\) Eleventh Amendment scholars have long sought to explain why the Senate added words of construction to the Amendment in 1794, and why the Amendment sailed through a Congress dominated by Federalists. The answer to both questions lies in the states’ political response to the Chisholm decision—a response that featured wide-ranging condemnation of its retrospective features and broad support for the promulgation of an amendment explanatory of Article III.

Although its actions were ultimately far less influential than those of the Massachusetts legislature, the Georgia House of Representatives was the first to announce clear support for the adoption of an explana-
atory amendment. Meeting in December 1792, shortly after the State had been served with process in *Chisholm*, the Georgia House adopted a series of resolutions that clearly announced the perceived need for an “explanation” of Article III. In the course of its debate, the House admitted to some need for state suability, but argued that the diversity grant should be construed as embracing only those causes “commenced by a state as plaintiff against a citizen as defendant.” To clarify this construction of Article III, the Georgia House explicitly called for an explanatory amendment of Article III. The House obviously expected that the “explanation” was to operate retrospectively and declared that, in the meantime, it would regard the proceedings of the Court as void.

Subsequent proceedings in Georgia were consistent with the understanding that the ratification of an explanatory amendment was to address the problem of state suability. After the language of the Eleventh Amendment emerged from Congress in 1794 and went to the states, Georgia ratified it by passing what it styled “An Act to ratify the resolution of congress, explanatory of the judicial power of the United States,” that included the following terms:

> Whereas congress . . . have . . . deemed it expedient to propose to the legislatures of the several States, an explanatory amendment of the said constitution, in the words following: [quoting the Eleventh Amendment].

> And whereas, this legislature doth entirely concur therewith, deeming the same to be the only just and true construction of the

294 The two most important resolutions read as follows:

> [T]hat [the assembly] do not consider the 2d section of the 3d article of the federal constitution to extend to the granting power to the supreme court of the United States, or to any other court having jurisdiction under their authority . . . to compel states to answer to any process the said courts or either of them may sue out the said constitution agreeably to the construction thereof by this legislature only giving a power to the said supreme court to hear and determine all causes commenced by a state as plaintiff against a citizen as defendant, or in cases where two states are parties or between the United States and an individual state: The contrary construction thereof submitting the territory of the states and the treasuries thereof to the distresses or levies of a Federal Marshal, which is totally repugnant to the smallest idea of sovereignty.

> . . . [T]hat this legislature are of opinion, that the state of Georgia will not be bound by any decree or judgment of the said supreme court subjecting the said state to any process, judgment or execution it may issue, award, pronounce or decree against the same, except in the cases herein before recited, but will consider the same until an explanatory amendment of the said constitution takes place as unconstitutional and extrajudicial, and that the same will and ought to be *ipso facto* void, and to be holden for none.

Proceedings of the Georgia House of Representatives, supra note 269, at 161-62 (first emphasis added). The failure to influence other states probably resulted from the refusal of the Senate to accede to their terms.

295 *Id.* at 162.

296 *See id.*
said judicial power, by which the rights and dignity of the several States can be effectually secured:

I. Be it therefore enacted . . . That this legislature . . . by these presents, do . . . assent to, ratify and adopt the aforesaid proposed explanatory amendment in terms thereof.297

The text and title of the act leave little doubt that Georgia, at least, viewed the Eleventh Amendment as an explanatory amendment and ratified it on that basis.298

As did the House in Georgia, the state legislature in Massachusetts responded to Chisholm by expressing support for the adoption of an explanatory amendment. In June 1793, a joint committee of the Massachusetts General Court issued a report critical of Chisholm. The report identified the State-citizen diversity clause as the provision at issue and declared that the clause should either be "wholly expunged from the Constitution, or so far modified and explained as to give the fullest security to the States respectively."299 Following service of process upon the State of Massachusetts in Vassall, Governor Hancock called into session a special meeting of the General Court, which then adopted a modified version of that report.300 Despite modifica-

297 An Act to ratify the resolution of congress, explanatory of the judicial power of the United States (Nov. 29, 1794), reprinted in 2 First Laws of Georgia, supra note 229, at 537-38.
298 In contrast to Georgia's, other state ratifying resolutions do not contain language that describes the Eleventh Amendment as explanatory of the Constitution. See 1 The Documentary History of the Ratification of the Constitution 232-60 (Merrill Jensen ed., 1976) (reproducing the ratifying resolutions of various states).
299 The report included the following resolutions:

5. Resolved, That the article in the Constitution which extends the Judicial Power to controversies between a State and the Citizens of another State as applied by the Judges of the Supreme Judicial Court in [Chisholm], is in its principle subversive of the State Governments, inconsistent with the [ease] and safety of the body of Free Citizens; and repugnant to every idea of a Federal Government, and therefore it is

6. Resolved, That the Senators of this Commonwealth in the Congress of the United States, be, and they hereby are instructed, and the Representatives requested, to use their utmost influence that the article in the Federal Constitution, which refers to controversies between a State and the Citizens of other States, be either wholly expunged from the Constitution, or so far modified and explained as to give the fullest security to the States respectively against the evils complained of, and to remove their apprehensions on this highly interesting and important subject; more especially as this Legislature have the fullest assurance, that the late decision of the Supreme Judicial Court of the United States, hath given a construction to the Constitution, very different from the ideas which the Citizens of this Commonwealth entertained of it at the time it was adopted.]

300 Interestingly, Hancock's proclamation does not rule out state suability altogether, but instead admits the possibility of state suability except as to existing liability on civil contracts. See Hancock, supra note 271, at 418. Hancock's address reads:
tions, the final report ultimately called for an amendment that would "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." After Hancock's death, his lieutenant governor sent the Massachusetts resolution to the governors of the other states. In Virginia, Governor Henry Lee presented the action of Massachusetts to the assembly in a letter that spoke of the need for a resolution instructing the Virginia delegation to "press the passage of a law explaining and detailing the power granted by the constitution to the Judiciary So far as States are affected." The Virginia General Assembly responded by adopting a resolution that affirmed state immunity from suits by individuals and urged the adoption of such amendments in the constitution of the United States, as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States.

Similar language of instruction and explanation appeared in a resolution adopted by the State of North Carolina. Other states, includ-

Yet in order to preserve the peace and safety of the Union, and to establish in the bosom of other nations, a confidence in the rectitude of this, it is very proper that there should be a tribunal of justice, independent of the particular States, which may be resorted to in certain cases. . . . Whether the provision in the Federal Constitution for the extention [sic] of the Judiciary power to States, is intended to be exercised in matters of civil contract, or in other matters which took place before the Government was formed; or whether it is intended only to give a remedy for such injuries as may take place by force, and may therefore have a tendency to destroy the peace of the Union . . . is of consequence enough to demand a consideration.

Id. For an account of the debate in the Massachusetts House, which featured an able defense of Chisholm by Rep. John Davis, see 5 DHSC, supra note 3, at 366-69 (describing Davis as supporting a constitutional amendment but opposing a statement about what the legislators “assumed” at the 1788 ratifying convention).

Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 DHSC, supra note 3, at 440, 440.

Letter from Henry Lee, Governor of Virginia, to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), in 5 DHSC, supra note 3, at 334, 337. Although Governor Lee called for an explanatory law, the House of Delegates recommended “amendments in the constitution” to “remove or explain” clauses construed to authorize suits against the state by individuals. See infra text accompanying note 304.

Proceedings of the Virginia House of Delegates (Nov. 28, 1793), in 5 DHSC, supra note 3, at 338, 338-39. The Senate accepted the resolution and forwarded it to the Virginia delegation and to the governors of the several states in early December. See 5 DHSC, supra note 3, at 339 nn.2-3.

The North Carolina General Assembly instructed its state delegation to obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify . . . a decision that a State is compellable to
ing Connecticut, Maryland, South Carolina, and New Hampshire adopted language that appears to track the Massachusetts resolution.

Resolution of the North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, supra note 3, at 615, 615.

The Connecticut General Assembly instructed its state delegation to secure an alteration of the Clause or Article in the Constitution of the United States on which the decision of the said Supreme Court, is supposed to be founded so that in future no State can on any Construction be held liable to any such Suit, or to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever.

Resolution of the Connecticut General Assembly (Oct. 29, 1793), in 5 DHSC, supra note 3, at 609, 609.

See Proceedings of the Maryland House of Delegates (Dec. 27, 1793), in 5 DHSC, supra note 3, at 611, 611 (instructing the state's senatorial delegation to obtain amendments “as will remove any part of the said constitution which can be construed to 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”).

See Proceedings of the South Carolina Senate (Dec. 17, 1793), in 5 DHSC, supra note 3, at 610, 611 (instructing the state's senatorial delegation to procure an amendment to “remove any clause or Article of the said Constitution, which can be construed to imply, or justify a decision that a State is compellable [sic] to answer in any suit, by an individual, or individuals in any Court of the United States”). The South Carolina House failed to act upon the measure. See 5 DHSC, supra note 3, at 611 n.3.

See Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), in 5 DHSC, supra note 3, at 618, 618 (instructing the state's senatorial delegation to obtain "such amendments in the Constitution of the United States, as to prevent the possibility of a construction which may justify a decision that a State is compellable to the suit of an individual or individuals in the Courts of the United States").

It is possible that the states that adopted explanatory resolutions (Georgia, Virginia, and North Carolina) intended to communicate a sharper rebuke to the Chisholm Court than those simply proposed to remove the clauses that gave rise to the suability interpretation in Chisholm (Massachusetts, Connecticut, South Carolina, Maryland, and New Hampshire). An explanatory amendment may have suggested that the Court clearly erred in adopting its suability interpretation; a removal amendment may have been a concession that the Court had a sufficient basis for its finding of suability in the original terms of Article III.

Evidence to support this theory appears in the records of Pennsylvania's response to Chisholm. Instead of adopting language to support an amendment explanatory of the meaning of Article III, the Pennsylvania House of Representatives recognized the United States to be "vested with a power to compel a state to appear at the suit of an individual citizen or foreigner," and resolved that "it would be conducive to the happiness and tranquility of the states, if such alterations and amendments were made in the Constitution of the United States, as would abridge the general government of that power." Proceedings of the Pennsylvania House of Representatives (Dec. 30, 1793), in 5 DHSC, supra note 3, at 612, 612. This amendatory resolution appears to admit the accuracy of the Chisholm determination and seeks to curtail the power in question. Even that resolution did not emerge from the Pennsylvania House, see 5 DHSC, supra note 3, at 613 n.3, and the state (which had itself included language in its own constitution of 1790 that authorized suits against the state in its own courts) ultimately declined to ratify the Eleventh Amendment. See id. at 603 & n.31; Jacobs, supra note 11, at 181 n.99; see also Proceedings of the Virginia Senate (Dec. 4, 1793), in 5 DHSC, supra note 3, at 339, 339 (criticizing the House's proposal for an amendment to remove or explain clauses of Article III on the ground that it "goes to
This outpouring of state resolutions provides the background against which Congress acted in adopting the Eleventh Amendment in 1794. By the time Congress reconvened in January 1794, eight states had expressed support for the adoption of a constitutional amendment, and had done so in terms that suggested the need to remove or explain any provision of the Constitution that could "be construed" to make states subject to suits by individuals. Strikingly, the lineup of state support appears to correspond closely to each state's indebtedness following Hamilton's assumption plan. States that remained heavily in debt tended to support the proposal for a constitutional amendment, and states that had managed to reduce their indebtedness were less enthusiastic. It thus appears that, in proposing a version of the Eleventh Amendment modified to declare that the judicial power of Article III was not to "be construed to" extend to suits and proceedings brought by diverse party plaintiffs, Senator Strong acted to further both his state legislature's instructions and its clear financial interest.

Post-ratification evidence confirms that leading members of the legal profession regarded the Eleventh Amendment as an explanatory amendment. Following President Adams's issuance of a report dated deny what the Constitution expressly warrants, that foreigners have a right to sue a state in the federal court").

These resolutions instructed the state's Senators to obtain the relevant amendment, but refrained from issuing similar instructions to members of the House of Representatives. This fact may help to explain why the Senate took the first action on the amendment.

As the following table reveals, many states remained deeply in debt following the implementation of Hamilton's plan to assume state debts, while others had managed to pay off or retire a substantial portion of their debts:

<table>
<thead>
<tr>
<th>State</th>
<th>Debt</th>
<th>State</th>
<th>Debt</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Carolina</td>
<td>$1,960,000</td>
<td>Georgia</td>
<td>$400,000</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$1,840,000</td>
<td>Rhode Island</td>
<td>$349,000</td>
</tr>
<tr>
<td>Virginia</td>
<td>$1,170,000</td>
<td>New Jersey</td>
<td>$208,000</td>
</tr>
<tr>
<td>North Carolina</td>
<td>$ 713,000</td>
<td>New York</td>
<td>$196,000</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>$ 500,000</td>
<td>New Hampshire</td>
<td>$100,000</td>
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<tr>
<td>Connecticut</td>
<td>$ 458,000</td>
<td>Delaware</td>
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<tr>
<td>Maryland</td>
<td>$ 430,000</td>
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</tbody>
</table>

See B.U. RATCHFORD, AMERICAN STATE DEBTS 60 (1941) (setting forth the amount of state indebtedness that remained circa September 1791). All the heavily indebted states (South Carolina, Massachusetts, Virginia, and North Carolina) supported a constitutional amendment. In contrast, four of the five states that refrained from issuing resolutions in support of a constitutional amendment (Rhode Island, New Jersey, New York, and Delaware) had relatively low state indebtedness. The remaining nonsupporter, Pennsylvania, had a large quantity of state debt but also had a substantial capacity to service that debt. Not only was Pennsylvania the richest state in the union, but it also owned a substantial amount of federal securities. Professor Ferguson reports that, in the two year period beginning in 1789, Pennsylvania succeeded in persuading its citizens to exchange nearly $5 million in state securities for federal interest-bearing instruments. FERGUSON, supra note 45, at 330-31. Even after that swap, in 1792 Pennsylvania retained $800,000 in federal securities—more than enough to retire what little debt remained on its books following assumption. See id. at 331.
January 8, 1798, proclaiming the Amendment to be “a Part of the Constitution,” the Supreme Court heard argument in *Hollingsworth v. Virginia,* a case concerning the Amendment’s impact on pending cases. Counsel for the plaintiff, William Tilghman, argued that, in keeping with a general rule of constitutional prospectivity, the Amendment did not apply to suits instituted before its effective date. Tilghman made this argument despite his admission that the words “be construed” would normally tend to indicate retrospective operation. Commonwealth’s counsel, Charles Lee, met this contention head on, noting that the Amendment was intended to operate as an explanatory provision and, as such, was meant to apply retrospectively to bar pending claims. The Court resolved the argument in favor of the Commonwealth, holding that the Amendment applied to bar pending claims. It thus appears that those who debated its

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314 3 U.S. (3 Dall.) 378 (1798).

315 See id. at 378 (argument of plaintiff’s counsel). Although this argument appears far-fetched to modern eyes, it apparently enjoyed more plausibility at the time. Counsel for the Commonwealth, Attorney General Charles Lee, recommended in 1797 that Virginia refrain from entering a formal appearance in the *Hollingsworth* litigation until after the Eleventh Amendment had been finally ratified and declared effective. Letter from Charles Lee, Attorney General of the United States, to James Wood, Governor of Virginia (Feb. 18, 1797), in 5 DHSC, supra note 3, at 347, 347-48. Lee proposed the delay on the ground that an objection to cognizance of the suit after ratification “will be made with more efficacy, if the Amendment takes place before an Appearance is entered than Afterwards.” Id. at 348. Lee evidently believed that the Court might refuse to read the Eleventh Amendment as a bar to suits instituted before its effectiveness. Others shared that view. See, e.g., Letter from Alexander Moultrie to John Nicholson (Nov. 3, 1796), in 5 DHSC, supra note 3, at 557, 557 (suggesting that even if the “Resolve about Suability shou[l]d be adopted,” Georgia’s adoption of that resolve “can’t by retrospect affect us”).

316 See *Hollingsworth,* 3 U.S. (3 Dall.) at 378 (argument of plaintiff’s counsel) (arguing against retrospective application of the Amendment to bar pending claims, and noting “that the jurisdiction being before regularly established, the amendment notwithstanding the words ‘shall not be construed,’ . . . must be considered, in fact, as introductory of a new system of judicial authority”). This argument plainly sees the words “be construed” as indicative of a legislative desire to secure a retrospective application of an explanatory amendment.

317 Lee contended that

[i]the amendment, in the present instance, is merely explanatory, in substance, as well as language. From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised, else where.

*Id.* at 381 (argument of Charles Lee).

318 *Id.* at 389 (holding unanimously that “there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state”). In addition to dismissing the pending claim in *Hollingsworth,* the Court dismissed two other pending State-party claims. See 1 DHSC, supra note 3, at 305 (reproducing minutes of the Court’s session of February 14, 1798, in which it dismissed *Moultrie v. Georgia* and *Brailsford v. Georgia,* concluding that “on Consideration of the Amendment of the Constitution respecting Suits against States, it has no jurisdiction of
effectiveness before the Court in Hollingsworth took for granted that the Amendment was intended to be explanatory and, consequently, would ordinarily apply to pending claims.\textsuperscript{319}

The same conclusion appears to flow, albeit indirectly, from comments that appear in James Madison's defense of the Virginia Resolutions of 1798. Like the Kentucky Resolutions of the same year, the Virginia Resolutions declared the Alien and Sedition Acts of 1798 unconstitutional, and proclaimed the Virginia legislature's power to "interpose" against usurpations by the federal government.\textsuperscript{320} Upon circulation to the other states, the Virginia and Kentucky Resolutions triggered some negative responses from eastern states. Many of these states argued that the meaning of the Constitution was a question for federal judicial (not state legislative) determination, and many doubted the constitutional propriety of Virginia's doctrine of interposition.\textsuperscript{321} Madison responded to these and other criticisms in a report of a committee of the Virginia House of Delegates in early 1800.\textsuperscript{322} One part of his response sought to show that the Commonwealth of Virginia was within its constitutional powers in declaring the statutes unconstitutional and in communicating that conclusion to the other states. To sustain this claim, Madison first sketched a variety of appropriate actions that the states might have taken to accomplish the goal

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\textsuperscript{319} Cf. Castro, supra note 197, at 199-200 (noting that advocates of the Eleventh Amendment occasionally suggested that it "does not import an alteration of the Constitution, but an authoritative declaration of its true construction") (quoting the Commonwealth's argument in Respublica v. Cobbe, 3 Dall. 467, 472 (Pa. 1798)).


\textsuperscript{321} For the negative responses of Massachusetts, Rhode Island, and other eastern states, see 4 Elliot's Debates, supra note 84, at 532-39.

\textsuperscript{322} For the text of the Virginia House committee's report, and its attribution to Madison, see 4 id. at 546-80.
of “maintain[ing] what the Constitution has ordained.” He then made the following comment:

It is no less certain that other means might have been employed which are strictly within the limits of the Constitution. The legislatures of the states might have made a direct representation to Congress, . . . or they might have represented to their respective senators in Congress their wish that two thirds thereof would propose an explanatory amendment to the Constitution . . . .

At the least, Madison’s comment reveals his understanding that the states might propose constitutional amendments meant to explain the meaning of certain provisions that federal courts had interpreted erroneously. Specifically, it appears that Madison meant to remind the eastern states that they had just completed a process of constitutional interpretation and communication in the course of coordinating their call for an amendment to deal with the problem of state suability in the wake of Chisholm. Of the eleven amendments in existence when Madison wrote, only the Eleventh had emerged from a process—coordinated state legislative instructions to United States Senators followed by an amendment proposed in the Senate—that Madison here characterized as resulting in the proposal of an “explanatory amendment.” In short, Madison appears to have viewed the Eleventh Amendment as explanatory of Article III, and to have invoked that widely held perspective in defending Virginia’s actions.

Finally, Chief Justice Marshall’s well-known account of the Eleventh Amendment in Cohens v. Virginia provides additional support to the explanatory account offered here. In the course of affirming the Court’s power of appellate review under section 25 of the Judiciary Act, Marshall gave the following account:

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and

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323 4 id. at 579.
324 4 id.
325 Madison had himself proposed what ultimately became the first ten amendments during the First Congress in 1789. For a summary of Madison’s role in originating and introducing before the House of Representatives the amendments that ultimately became the Bill of Rights, see EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 33-44 (1957).
326 Madison also described certain of the first ten amendments to the Constitution as explanatory in his argument against the proposed Bank of the United States. See Speech to the House of Representatives (Feb. 23, 1791), in ANNALS OF CONG., 1st Cong., 2d Sess. 1894, 1901 (Feb. 1791) (remarks of Mr. Madison) (referring to the “explanatory amendments proposed by Congress themselves” in distinction to the “explanatory declarations and amendments” that the several state ratifying conventions had proposed).
327 19 U.S. (6 Wheat.) 264 (1821).
the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress . . . .

In identifying state debts existing "at the adoption of the constitution" as the concern that motivated the authors of the Eleventh Amendment, Marshall does much to confirm the thesis of this Article. Indeed, Marshall's account offers a nice précis of my thesis—that Article III's suability provisions posed a threat of federal judicial enforcement of state debts, that the Framers of the Constitution offered assurances against such debt collection, that the Court in Chisholm proceeded nonetheless, and that the ensuing amendment placed pre-constitutional debts beyond the reach of the federal courts.

4. **The Eleventh Amendment's Effectiveness in Protecting States from Debts Incurred Under the Articles of Confederation**

Understood as an explanatory amendment that swept existing and future diverse-party claims off the federal court docket, the Eleventh Amendment offered the states a virtually ironclad guarantee of immunity from federally imposed liability on claims predating the Constitution. Without a grant of jurisdiction over ordinary "controversies" brought against State parties, the federal courts would have no mechanism through which to enforce existing state obligations. These obligations, after all, had been incurred before the Constitution took effect, and did not implicate the body of supreme federal law. The refusal of a state legislative body to pass an appropriations bill to pay a debt contracted before the Constitution took effect may have violated public faith, but it did not violate federal law.

Many scholars have missed this point. Based on the Supreme Court's decision in Fletcher v. Peck,\textsuperscript{329} and on the subsequent discussion in Hans v. Louisiana,\textsuperscript{330} many scholars have assumed that the Amendment simply placed claims like those in Chisholm and Hollingsworth "on hold."\textsuperscript{331} Such claims might return to active litigation in federal court once Congress chose to provide a general grant of federal question jurisdiction. According to this argument, the plaintiffs could simply have recast their breach of contract claims as claims for violation of the constitutional prohibition against the passage of state laws "im-

\textsuperscript{328} Id. at 406.

\textsuperscript{329} 10 U.S. (6 Cranch) 87 (1810).

\textsuperscript{330} 134 U.S. 1 (1890).

\textsuperscript{331} See Massey, supra note 11, at 115 (stating that the Amendment placed these claims "in hibernation"); cf. William F. Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372, 1382 (1989) (suggesting that actions brought in diversity to collect state debts might be recast as federal question claims, and suggesting that such an easy way around the Eleventh Amendment represents a serious challenge to the diversity explanation).
pairing the Obligation of Contracts." If it were widely assumed that the states would violate the Contracts Clause by refusing to honor their own contracts, then the framers of the Eleventh Amendment would doubtless have worried about the prospect that the assumpsit claim in Chisholm might one day return to federal court under a general grant of federal question jurisdiction, such as that provided in the short-lived Judiciary Act of 1801.

In contrast to these scholars, I do not believe that the framers of the Eleventh Amendment perceived this revivification as a real prospect. First, as Professors Fletcher and Field have observed, it was far from clear that the Contracts Clause was understood to apply to a state legislature's impairment of its own contracts with individuals. In fact, until the Court held in Fletcher, that a state could not legislatively revoke an executed contract by which it had granted land, it was believed that the Contracts Clause applied only to agreements between private parties. But Fletcher was not decided until 1810, and recent scholarship suggests that the Framers of the Constitution regarded the Contracts Clause as inapplicable to a state legislature's mere breach of its own public contracts. Under such an interpretation, the plaintiffs in Chisholm could not have successfully recast their claims for breach of contract as claims arising under the Constitution.

Even granting that they conceived of the Contracts Clause as potentially applicable to a state's own breach of contract—a position that Hamilton himself espoused as counsel to the South Carolina Yazoo

332 U.S. CONST. art. 1, § 10, cl. 1.

333 Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132. For emphasis on the real, if short-lived, possibility of a general grant of federal question jurisdiction in the 1801 act, see Marshall, supra note 11, at 1369; Massey, supra note 11, at 115 n.280.

334 See Martha A. Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States, 126 U. Pa. L. Rev. 1203, 1265-66 (1978) (suggesting that Hans may have been rightly decided on the theory that the Contracts Clause does not apply to mere breaches of a state's own contracts); Fletcher, supra note 11, at 1055 n.97 (questioning whether, if the facts of Chisholm had arisen after Fletcher v. Peck, the contract claim in Chisholm could be recast as one arising under the Contracts Clause).

335 10 U.S. (6 Cranch) 87, 137-39 (1810).

336 Today, the Contracts Clause represents a much less significant limitation on states' legislative power than it once did. Even before the Court relaxed the strictures of the Clause in Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425-44 (1934), it was clear that a state's mere breach of its own contract did not come within the scope of the Clause. See Fletcher, supra note 11, at 1055 n.97.

337 See McDonald, supra note 48, at 270-75 (tracing the origins of the Contracts Clause to a motion by Rufus King modeled upon language in the Northwest Ordinance that applied only to impairment of private contracts; noting the subsequent adoption of that language by the Committee of Style; and suggesting that the interpretation that Hamilton advanced in the Yazoo matter and Marshall later adopted in Fletcher v. Peck departed from the publicly understood meaning of the Clause).
Company in anticipation of the Court's decision in *Fletcher*—the framers of the Eleventh Amendment had no reason to fear the revival of diverse-party contract claims such as those in *Chisholm*. In *Chisholm* and other similar public claims cases, the State had incurred its obligations before the Constitution became effective. If the states were to become liable as a matter of federal law for the impairment of their own contracts, such a rule of liability would seemingly apply only to contracts entered into after the effective date of the Constitution. In *Fletcher*, for example, the impairments Hamilton and Marshall addressed as plaintiff's counsel and Chief Justice, respectively, were of a series of contracts by the State of Georgia to sell lands under the terms of a statute enacted after the Constitution had been ratified by the requisite number of states and declared effective by the old Congress.

This understanding of the inapplicability of the Contracts Clause (and other constitutional limits in Article I, Section 10) finds direct support not only in the representations the Federalists made to the ratifying convention in North Carolina, but also in the decisional law from the period in the 1790s during which the Eleventh Amendment was framed and ratified. In *Vanhorne v. Dorrance*, Justice Patterson, riding the Pennsylvania Circuit, considered the legality of a series of enactments by the Pennsylvania legislature concerning land rights. In the course of his opinion, Justice Patterson considered two statutes—one dated March 29, 1788, and another, April 1, 1790. Although he admitted that the constitutional prohibitions against ex post facto laws and laws impairing the obligation of contracts might conceivably apply to the latter act, as one "made after the adoption of the constitution of the United States," he held that the 1788 statute "was passed before the adoption of the constitution of the United

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338 On the circumstances surrounding the issuance of Hamilton's opinion on the unconstitutionality of the Georgia legislature's action in passing laws impairing the obligation of contracts they had formed with prior purchasers of the Yazoo lands, see 4 *The Law Practice of Alexander Hamilton; Documents and Commentary* 377-84 (Julius Goebel, Jr. & Joseph H. Smith eds., 1980) [hereinafter *Law Practice of Hamilton*] (noting that Hamilton's opinion foreshadowed Marshall's reasoning in *Fletcher* and that Hamilton's views were widely circulated in the form of a pamphlet). For the text of the opinion, see *id.* at 430-31.


340 See 5 DHSC, *supra* note 3, at 496-508. The sales of the Yazoo lands occurred pursuant to legislative action taken by Georgia on December 21, 1789 and January 7, 1795. The latter act was repealed a year later, *see id.* at 507, and Hamilton's opinion focused upon the legality of that repeal, *see Law Practice of Hamilton*, *supra* note 338, at 430-31.

341 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16,857).

342 *Id.* at 1019-20.

343 *Id.* at 1019.
States, and therefore is not affected by it.\textsuperscript{344} Patterson thus evidently believed that the Constitution applied only to state laws adopted after its effective date.

His view was widely shared. In the Maryland case, \textit{Donaldson v. Harvey},\textsuperscript{345} counsel for the creditors mounted a federal constitutional attack on a Maryland statute passed in 1716 that authorized a debtor to tender certain property, appraised at a value equal to or greater than the debt, in full satisfaction of a judgment.\textsuperscript{346} The creditors based their argument on the provision of Article I, Section 10 that prohibits a state from making "any Thing but gold and silver Coin a Tender in Payment of Debts."\textsuperscript{347} Counsel for the debtor argued in reply that the constitutional limits could apply only to debts contracted after the effective date of the Constitution.\textsuperscript{348} In rejecting the creditors' argument, the court went even further than the debtor's argument had, ruling that Section 10's restrictions were in the "future tense" and applied only to state laws made after its effective date.\textsuperscript{349} Similarly, in \textit{Elliott's Executor v. Lyell},\textsuperscript{350} the Virginia Court of Appeals generally agreed with the presumption of legislative prospectivity and held a 1786 act inapplicable to a bond executed in 1782. President Edmund Pendleton concurred, noting that laws impairing the obligation of contracts and other forms of retrospective lawmaking were generally contrary to the principles of natural justice.\textsuperscript{351} Pendleton also noted in passing that "[t]he Federal Constitution has prohibited the State Legislatures from passing any such laws," but clearly regarded Section 10 as inapplicable on the ground that it took effect "subsequent to the present act" of 1786.\textsuperscript{352}

\textsuperscript{344} Id.
\textsuperscript{345} 3 H. & McH. 12 (Md. 1790).
\textsuperscript{346} Id. at 18-19.
\textsuperscript{347} U.S. CONST. art. I, § 10, cl. 1; see Donaldson, 3 H. & McH. at 14 (argument of Johnston, for plaintiff).
\textsuperscript{348} See Donaldson, 3 H. & McH. at 17 (argument of Potts, for defendant).
\textsuperscript{349} Id. at 19. In effect, the court ruled that the Maryland statute of 1716 could continue to operate as to debts incurred after the effective date of the Constitution because the provision in question applied to new "tender" laws rather than existing ones.
\textsuperscript{350} 7 Va. (3 Call) 234 (1802).
\textsuperscript{351} Id. at 241-47 (seriatim opinions of Roane, Fleming, and Lyons, JJ.).
\textsuperscript{352} Id. at 248 (Pendleton, P.J.).
\textsuperscript{353} Id. (Pendleton, P.J.); see also Osborne v. Huger, 1 S.C.L. (1 Bay) 179, 187, 190 (1791) (arguments of counsel) (noting that certain laws of South Carolina were enacted "since the federal constitution" or "before the ratification of the federal government by this state;" suggesting that states had "done wrong" in the past by interfering with private contracts; and describing the ban on ex post facto laws as included in the Constitution "to prevent it in future").

For additional evidence that the Constitution's restrictions were understood to apply only to state action taken after its effective date, see \textit{Cooper v. Telfair}, 4 U.S. (4 Dall.) 14 (1800). In \textit{Cooper}, the Court considered whether the State of Georgia had violated its own constitution in confiscating property from a British loyalist in a bill of attainder passed in 1782, well before the Constitution's effective date. Id. at 16-17 (arguments of Tilghman,
Pendleton’s recognition in *Elliott’s Executor* that the Constitution’s prohibitions applied prospectively to state action taken after its effective date connects nicely with his criticism of the retrospective features of *Chisholm*. To Pendleton’s way of thinking, the Supreme Court, by interfering with state action taken prior to the adoption of the Constitution, had exceeded its authority. The vice of *Chisholm*, according to Pendleton, lay in its creation of a mode of proceeding against the states as parties defendant that had not been a part of the bargain between the states and their contracting creditors at the time the obligations were incurred.\(^{354}\) With neither a constitutional basis for regulating these relationships nor specific congressional action to provide political support for its creation of new forms of liability, the Court had intervened in an area outside the realm of any federal interest. The Eleventh Amendment reversed the *Chisholm* decision by withdrawing the jurisdictional basis for the Court’s interference.

Pendleton’s attitude about the prospective nature of the Constitution and the inappropriately retrospective features of *Chisholm* suggest that well-informed participants in the framing and ratification of the Eleventh Amendment would have had little reason to worry that claims such as those in *Chisholm* would reappear in federal court following Congress’s creation of federal question jurisdiction. The prospective nature of the relevant constitutional restrictions would have been thought to preclude such a revival. A state law that proposed to abrogate an existing property right or state obligation, if enacted after the Constitution’s effective date, might have been challenged as an impairment of a pre-constitutional contract.\(^{355}\) But so long as the

\(^{354}\) See supra notes 265-67 and accompanying text.

\(^{355}\) Decisions such as *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812), appear to confirm this conclusion. In both cases, the Court held that the states in question had impaired the obligation of contracts in violation of the Constitution, *Dartmouth College*, 17 U.S. (4 Wheat.) at 650-54; *Wilson*, 11 U.S. (7 Cranch) at 167, and in both cases the contract at issue had been created by legislative action that predated the Constitution, *Dartmouth College*, 17 U.S. (4 Wheat.) at 626, 641-44; *Wilson*, 11 U.S. (7 Cranch) at 165. See also *Vanhorne v. Dorrance*, 28 F. Cas. 1012, 1019-20 (C.C.D. Pa. 1795) (No. 16,857) (implying that, in a case
state viewed its creditors' claims as matters for adjustment through the legislative claims process, it is difficult to see how the plaintiffs could have recast claims like those in *Chisholm* or *Hollingsworth* in federal question terms.\(^3\) The notion of public faith that Hamilton invoked in *Federalist No. 81* entailed an acceptance of the legislature's authority over the appropriation of funds to pay public creditors.\(^3\)

The claim in *Vassall* stood on a different footing because it implicated rights under the Treaty of 1783.\(^3\) There, the plaintiff, a subject of Great Britain, claimed that the compelled forfeiture of his property pursuant to an act of the Massachusetts legislature had taken effect after the Treaty proclaimed an end to such confiscations.\(^3\) The Framers of the Constitution understood that the state courts had underenforced the Treaty, and explicitly provided for its federal judicial enforcement in Articles III and VI.\(^3\) Therefore, it was reasonable to expect Vassall to initiate a new claim in federal court following the passage of appropriate enabling legislation.

But consider how difficult it would have been for Vassall to have obtained the requisite legislation. Massachusetts did not then authorize suits against the Commonwealth, but instead handled public claims through legislative petitioning. In the absence of a state court of first instance, the Supreme Court's appellate jurisdiction under section 25 of the Judiciary Act of 1789 would simply have been unavailable.\(^3\) Moreover, it is questionable whether Vassall's equitable claim

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3\(^3\) Both *Chisholm* and *Hollingsworth* involved plaintiffs seeking the payment of money from the state's treasury. In contrast, *Dartmouth College* involved rights in a corporate charter, 17 U.S. (4 Wheat.) at 626, *Wilson* involved rights to a tax exemption, 11 U.S. (7 Cranch) at 165, and *Vanhorne* involved title to land in Pennsylvania, 28 F. Cas. at 1012-13. Of course, it is far easier to portray private parties as enjoying vested rights in suits involving the judicial determination of record ownership than in suits seeking the payment of public funds to a contracting party.

3\(^5\) *Federalist No. 81*, supra note 27, at 548-49.

3\(^5\) One might argue that the claims in *Moultrie* might also have reappeared following the creation of federal question jurisdiction and notwithstanding the generally prospective character of the Constitution, because those claims challenged action the Georgia legislature took after the Constitution's effective date. See supra text accompanying note 253. But *Moultrie* did not appear on the Court's original docket until 1795, well after the politics of the Eleventh Amendment had largely run their course.

3\(^5\) See 5 DHSC, supra note 3, at 352-55.

3\(^6\) U.S. CONST. art. III, § 2, cl. 1; id. art. VI, cl. 2.

3\(^6\) On the reluctance of the Massachusetts legislature to divest itself of control over the determination of public claims, see Pfander, supra note 69, at 1009 (describing Massachusetts's "exceedingly strong" tradition of legislative control over the determination of money claims against the state). Even if the Commonwealth of Massachusetts had recognized the justiciability of public claims and had provided a court for their determination, that court may have taken the position that claims sounding in tort (such as Vassall's, which sought to recover damages for a tortious invasion of his property rights) were not judicially cognizable. In general, claims sounding in tort could go forward against a re-
STATE SUABILITY

for an accounting would have been seen as one “arising under” the Treaty, if that document failed to explicitly create any such right of action. For Vassall’s claim to succeed may have required both a grant of original federal question jurisdiction and, perhaps, a statute authorizing suits against the states to enforce the treaty rights of British subjects. The political salience of the opposition to the claims of “traitors” and “dirty tories”—terms that were used in the popular press to describe Vassall—suggests that Massachusetts and other states that feared the claims of British loyalists could safely rely upon Congress to take no steps to facilitate such litigation. It is therefore no surprise that Vassall responded to the congressional proposal of the Eleventh Amendment by saying, “my Action falls of Course.”

As a practical matter, the Eleventh Amendment’s explanatory elimination of diverse-party claims against state defendants provided virtually airtight protection against further federal judicial interference with the state debts incurred in fighting the Revolutionary War. Indeed, the political decision to end judicial interference operated in tandem with the emerging political solution to the problem of existing state debts. Hamilton’s financial plans for the country entailed both the funding of the national debts and the assumption of the state debts. Under the assumption law that eventually resulted from the famous deal between Jefferson and Madison to place the nation’s capital on the Potomac, all individuals who owned evidence of state debt bearing a date prior to January 1, 1790 were entitled to exchange their instruments at par for new federal securities. In January 1792,
Hamilton reported to Congress that over $18 million in state debt had been transferred to federal accounts in this manner; ultimately, this amount reached roughly $22.5 million. According to Hamilton's calculations in 1792, this latter subscription figure would leave only about $4 million in outstanding state debts as of 1795.

Hamilton's assumption plan thus substantially reduced the threat to the states associated with Revolutionary War debts. The debtor states retired the debt remaining after assumption using the kind of currency or agrarian financial methods that had been common under the Articles of Confederation. North Carolina, for example, bought some of its paper money back at 15 shillings on the pound, and accepted more in payment for land sales. South Carolina, Massachusetts, and Rhode Island retired debt throughout the 1790s at prices substantially below par. Although these agrarian financial tactics may have violated a strict reading of the Contracts Clause (if it had been construed to apply to legislative action directed at obligations issued before the Constitution's effective date), I have found no indication that claims challenging the implicit repudiation of state debts involved in these below-par redemption strategies ever made their way into the federal courts.

Seen from the perspective of Federalist financial policy, the combination of the Eleventh Amendment and the Hamiltonian assumption plan had a certain political appeal, even to supporters of specie finance. The Eleventh Amendment ended the federal courts' role in diverse-party litigation over Revolutionary War debts, but left intact the federal judicial negative that the Federalists had secured in Article III. The elimination of the federal judicial role left public creditors of the states looking either to the federal government under its assumption plan—indeed, most eligible creditors took advantage of that option—or to the states themselves, for payment of their just obligations. In retiring the debts remaining after assumption, the states did what most observers expected—they returned to the agra-

366 See Ratchford, supra note 312, at 59, 62.
367 See id. at 68.
368 See id.
369 See id. at 70 (noting that South Carolina paid $449,000 to retire debts worth $668,000; that Massachusetts paid $112,000 to retire debts worth $147,000; and that Rhode Island purchased its obligations at prices ranging from 75 cents to 57.5 cents on the dollar).
370 Apparently, one intrepid Rhode Island citizen tried to obtain a judicial determination of the legality of repudiation. However, after he "purposely became indebted to the state" and offered repudiated bonds as payment, the State refused to accept the bonds and sued him for a balance due. The legislature then ordered the attorney general to discontinue the action. See id. at 71 (recounting the tale of John W. Richmond, whose tombstone records his protest against the Rhode Island repudiation).
371 Although the Federalists may have preferred full specie payment of all just state debts, as contemplated in the Chisholm decision, the Hamilton assumption program accom-
rian financial strategies of the pre-constitutional period. Although the Eleventh Amendment permitted the states to achieve this repudiation, that result was no more than the Federalists had promised them during the struggle over the ratification of the Constitution.372

To summarize, explanatory amendments in the eighteenth century often identified a provision in existing law that had given rise to an unexpected or unsettling judicial interpretation. These amendments typically offered a new construction of the relevant law in terms that were meant to apply retrospectively to pending cases. This model of lawmaking helps to clarify that the framers of the Eleventh Amendment intended to explain and amend the diversity grant and to leave other provisions of Article III untouched. Indeed, it was the diversity grant that the *Chisholm* Court had relied upon in asserting jurisdiction over the State of Georgia, and the diversity grant that the state legislatures had identified as having been "construed" to provide for state suability. In effect, the Amendment explains or clarifies that the nominally reciprocal terms of the Article III diversity grant were not to "be construed to" extend to suits and proceedings in which a State was a party defendant. This account of the Amendment leaves other sources of jurisdiction over suits against the states intact and unaffected, including the provision for the exercise of jurisdiction over federal question claims against the states.

This explanatory account of the Eleventh Amendment properly situates the debate over state suability within the larger context of the public debate over the disposition of state debts from the war. We can probably best understand the Constitution’s treatment of state debts as reflecting a decision to preserve the status quo of state control over the treatment of public creditors, subject to a grant of legislative authority allowing Congress to assume and pay off the debts. If that compromise emerged from the Philadelphia Convention and from the ratification debates, as I suggest in Part I of this Article, then it confers power on Congress to commit the nation to the repayment of

plished much of that goal by transferring all but $4 million of such debts to federal accounts. See supra text accompanying notes 366-67.

372 A similar strategy was used for the claims of the subjects of Great Britain whose property the states had seized during and shortly after the war. Although the Eleventh Amendment eliminated the only secure original federal tribunal for these suits, British subjects had other modes available to them under the Treaty of 1783. One such mode was deployed in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), where a British plaintiff sued to recover a debt from a Virginia defendant who claimed to have discharged the obligation by payment of paper money into the state treasury. *Id.* at 220-21. For an account of the plaintiff’s ultimate success in *Ware v. Hylton*, see DWIGHT F. HENDERSON, COURTS FOR A NEW NATION 81-82 (1971) (reporting that the plaintiffs eventually recovered nearly £3000). British claimants eventually demanded the creation of a nonjudicial forum for their claims, and they ultimately succeeded with the ratification of Jay’s Treaty in 1795. As Professor Gibbons reports, Jay’s Treaty effectively assured that the Supreme Court would face few cases implicating the Treaty of 1783. Gibbons, *supra* note 6, at 1939-40.
state debts in specie (through the Engagements Clause), but does not empower the federal government to oblige the states themselves to pay their existing debts in specie. To the contrary, the Constitution leaves the states free to address their existing debts by engaging in the kinds of agrarian financial tactics that had been common under the Articles of Confederation. The vice of *Chisholm* was its attempt to impose a specie-repayment obligation on the states in contradiction of the Federalists' assurances on that precise point. In overturning *Chisholm*, the Eleventh Amendment restored state control over existing state debts by removing the two sources of diversity jurisdiction that had threatened that control.

III

ON THE IMPLICATIONS OF AN EXPLANATORY INTERPRETATION OF THE ELEVENTH AMENDMENT

My explanatory account of the Eleventh Amendment sheds new light both on the terms of the current scholarly debate over the meaning of the Amendment and on its proper judicial interpretation. In this final Part, I first examine the cluster of subsidiary questions that have arisen in the scholarly writing about the Eleventh Amendment. Then I consider afresh certain implications of my study for the judicial application of the Amendment in the current constitutional milieu.

A. The Explanatory Account and the Current Scholarly Debate

1. *The Omission of Suits by In-State Citizens: Federal Cognizance*

At the center of the debate over the meaning of the Eleventh Amendment lies the question why its framers failed to proscribe suits brought against one of the states by citizens of that state. Article III contemplates suits by in-state citizens only where the plaintiff's case arises under the Constitution, laws, or treaties of the United States, or in admiralty; the alignment of the parties alone will not support jurisdiction. Some scholars have suggested that the framers of the Eleventh Amendment may have simply overlooked in-state citizens as a potential class of plaintiffs. In any event, the Supreme Court's desire to close this loophole explains both the decision in *Hans* and the ---

373 See Marshall, *supra* note 11, at 1352-53 (identifying the omission of in-state plaintiffs as the central anomaly of the Eleventh Amendment, and expressing doubt that any historical theory can fully explain the discordant evidence).

374 For an overview of the now well-known distinction between the subject-matter heads of jurisdiction (cases arising under the Constitution, laws, and treaties of the United States, and admiralty matters) and the party-alignment heads of jurisdiction (controversies involving an array of opposed parties), see Pfander, *supra* note 13, at 598-617.

375 See, e.g., Field, *supra* note 11, at 540 n.88.
subsequent decisions that ignore the text of the Amendment and ascribe to it a broad sovereign immunity purpose.\textsuperscript{376} As a consequence, the Court now takes the position that the Eleventh Amendment forecloses both federal question and admiralty claims by in-state citizens, despite the fact that the Amendment does not specifically address such claims.\textsuperscript{377}

On the other hand, the diversity explanation views the omission of in-state plaintiffs as confirming that the Amendment restricts suability in claims based on party-alignment jurisdiction, and leaves federal question and admiralty jurisdiction unaffected.\textsuperscript{378} Under the diversity account, the question of state suability had been a closely contested question in the ratification era—Congress had supplied a limited jurisdictional grant for diversity claims against State parties, but had failed to address the extent of state suability in federal question and admiralty proceedings.\textsuperscript{379} Furthermore, the framers of the Eleventh Amendment worried primarily about the direct threat to the state treasuries that party-based jurisdiction posed, but were less concerned about what some diversity theorists have characterized as the then-hypothetical possibility that Congress might confer general federal question jurisdiction on the federal courts, thus enabling them to hear claims brought against a state by one of its own citizens.\textsuperscript{380} The Eleventh Amendment, therefore, addresses two instances of party-based jurisdiction, narrowing them to curtail proceedings against the states, but does not otherwise address state suability in federal question and admiralty matters.

Literalists, as they have become known, reject the diversity account for a variety of reasons, and instead argue that the two disfavored or ineligible plaintiffs may not sue the state at all, even by

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{376} *Hans*, 134 U.S. at 10 (observing that literal adherence to the Eleventh Amendment would produce an anomalous distinction between in-state and out-of-state plaintiffs, and rejecting the text on that basis).
\item\textsuperscript{377} See cases cited supra note 8.
\item\textsuperscript{378} See Fletcher, *supra* note 11, at 1060-63; Fletcher, *supra* note 19, at 1274; Gibbons, *supra* note 6, at 1936-37.
\item\textsuperscript{379} Diversity theorists differ in their thinking about the clarity with which Article III subjects the states to suit in federal question, treaty, and admiralty matters. See Fletcher, *supra* note 11, at 1286-87, 1992 (expressing an unwillingness to press the evidence of state suability in treaty matters as far as Judge Gibbons had, and arguing that the framers of the Eleventh Amendment may have postponed the issue of state suability in federal question matters generally).
\item\textsuperscript{380} We can trace the trajectory of the diversity account in the work of Professor' Fletcher. He began with a relatively vigorous argument that the framers of the Eleventh Amendment had no reason to fear federal question suits, and thus likely addressed only diversity-based proceedings grounded in general common law. Fletcher, *supra* note 11, at 1077-78. Later, in response to critics and friends who had noted the existence of potential federal question claims based upon the Treaty of 1783, Fletcher modified his views. Fletcher, *supra* note 19, at 1291-93 (conceding that the framers may have been aware of the possibility of federal question claims).
\end{enumerate}
\end{footnotesize}
invoking federal question jurisdiction. For literalists, the threat of state suability was quite real, both in federal question and in party-alignment proceedings. To support their account, literalists point to evidence from the Article III ratification debates to the possibly self-executing grant of original jurisdiction (a point emphasized by Edmund Randolph in Chisholm), to the threat of federal treaty liability in party-alignment suits such as Vassall, and to the short-lived grant of jurisdiction over federal questions in the 1801 Judiciary Act. To the literalists, these factors suggest that the elimination of diverse-party jurisdiction would have sent existing claims into "hibernation," but would not have prevented enterprising plaintiffs from reasserting the claims as federal questions. They conclude that the Eleventh Amendment must have been intended to curtail the possibility of all such suits, at least by the two classes of ineligible plaintiffs. Otherwise, the Court might simply have nodded at the Amendment and reaffirmed state suability. The omission of in-state citizens, on this account, simply represents a compromise, barring all suits by those ineligible plaintiffs and preserving federal question claims by in-state plaintiffs, the group most likely to have suffered an invasion of their federal rights by a state.

The literalist school takes its name from the claim that the Eleventh Amendment clearly and unambiguously bars all suits brought by the two disfavored classes of plaintiffs. See Marshall, supra note 11, at 1343 (speaking of the "essentially unambiguous dictates of the amendment's language"); Massey, supra note 11, at 65 (commenting on the "face value" of the text). In effect, literalists argue that the Amendment precludes the assertion of jurisdiction over all claims by disfavored plaintiffs, including those claims based upon federal questions. See Marshall, supra note 11, at 1346; Massey, supra note 11, at 65.

See Massey, supra note 11, at 87-96 (tracing the history of government suability and showing that it emerged as a distinct possibility from the framing and ratification of Article III).

See id. at 93-96 (contrasting Gibbons's view of the clarity of the evidence supporting state suability with that of other observers, and concluding that a robust debate existed on the issue).

See id. at 101 n.209, 107, 117 n.288 (linking debates about the nature of the Court's original jurisdiction to those about state suability).

See Marshall, supra note 11, at 1356-60.

See Massey, supra note 11, at 115 n.280; Exchange on the Eleventh Amendment, supra note 19, at 120 n.12 (submission of Calvin R. Massey).

Massey, supra note 11, at 115 (arguing that an Amendment along the lines suggested by the diversity account would have placed diversity-based federal question claims in "hibernation," and that a grant of federal question jurisdiction would have permitted them to "emerge from their slumbers"); accord Marshall, supra note 331, at 1381-82 (noting the possibility that claims to collect state debts might be brought as federal questions and suggesting that this easy way around the Eleventh Amendment, if understood only as a curtailment of party-alignment jurisdiction, represents a serious obstacle to scholarly acceptance of the diversity account).

See Exchange on the Eleventh Amendment, supra note 19, at 120 (submission of Calvin R. Massey) (describing the text of the Eleventh Amendment as badly drafted, and attributing this shortcoming to a political compromise); Marshall, supra note 11, at 1355 (describ-
The debate over "federal cognizance," and over the extent to which the framers of Article III and the Eleventh Amendment contemplated state suability in federal question matters lies at the center of the literalist challenge to the diversity account. The Framers of the Constitution may have contemplated state suability in federal question cases to enforce the constitutional restrictions on state action in Article I, Section 10. Indeed, many of the Framers, and particularly Hamilton, Madison, and Randolph, appear to have regarded the Original Jurisdiction Clause as a grant of authority specifically designed to perfect the federal judicial enforceability of limits on the states. In addition, state suability was hardly the unthinkable prospect portrayed by the defenders of the "profound shock" thesis; by 1790, at least three different states had created means for the assertion of contract claims and other entity-based proceedings, and other states had at least experimented with judicial determination of public claims. To the extent that this evidence suggests a less remote prospect of state suability in federal question proceedings, it tends to support the literal account and undermine the diversity view.

The explanatory account of the Eleventh Amendment can help rehabilitate the diversity view by focusing attention on the effective date of the federal limitations on the states. If I am correct that the Framers maintained that the constitutional limits were to apply only to state action taken subsequent to the ratification of the Constitution, then the limits in Article I, Section 10 simply did not apply to the kinds of suits and proceedings with which the framers of the Eleventh

ing the Amendment as a compromise between the dual purposes of immunity and accountability that conformed to the political and fiscal realities of the day).

389 See Pfander, supra note 13, at 588-604.

390 See Pfander, supra note 69, at 939-42, 1003-06 (describing the provisions for the judicial determination of public claims against the States of New York, Pennsylvania, and Virginia; and describing the experiences of the States of Georgia, New Jersey, and Delaware with judicial determination of certain kinds of claims against the state). Georgia's statute for the determination of public claims read as follows:

[Adapted text from Georgia's statute]

An Act to amend, explain and continue the "Act for regulating the judiciary departments of this State," No. 438 (Dec. 9, 1790), reprinted in 2 First Laws of Georgia, supra note 229, at 422-23.
Amendment were concerned. Certainly, the claims in *Chisholm* and *Hollingsworth* involved state liability for obligations incurred and action taken before the Constitution took effect. As a consequence, the Federalists who authored and supported the Eleventh Amendment could have agreed to curtail state suability in diverse-party matters and simultaneously meant to preserve the full range of state suability in federal question proceedings. Put in other terms, *Chisholm* simply did not present a case of potential federal liability, and so did not call for a solution that curtailed a source of federal question jurisdiction.

Several features of this explanatory account of the federal cognizance debate fit neatly with what we know about the debate over *Chisholm*. That debate featured wide-ranging condemnation of the retrospective features of the Court's decision; elimination of the jurisdictional basis for such retrospective judicial intervention effectively cut off any source of (federal) judicially imposed liability. Thus, the cure to *Chisholm*, as understood in the explanatory account, fits the mischief seen in that decision. Moreover, we can now better understand why the framers of the Eleventh Amendment chose to ignore state suability in federal question cases. Such noncognizance of federal matters stemmed, in all likelihood, from the framers' perception that plaintiffs simply could not recast their *Chisholm*-like claims in federal terms. In short, we can accept the diversity account without denying that the popular debate (both before and after *Chisholm*) did include a recognition of the possibility of state suability in federal question cases.

2. The Debate over the Plausibility of Creating Two Classes of Ineligible Plaintiffs

The evidence underlying the explanatory account of the Eleventh Amendment also raises serious doubts about the plausibility of the literalist account of the threat these "hibernating" state debt claims posed to the state treasuries of the day. In accounting for the policy underlying the literal explanation of the Amendment, Professor Lawrence Marshall contends that it would have made sense for the framers of the Amendment to have foreclosed both federal question and diverse party suits by nonresidents and aliens, and to have left federal question state suability intact with respect to in-state citizens.\(^{391}\) Professor Marshall argues that the nonresidents who held claims against the states were probably speculators, and were therefore likely to have been thought undeserving of a federal forum.\(^{392}\) Moreover, Marshall argues that alien claimants were likely to be loyalists whose property was confiscated either before or shortly after the effective date of the

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\(^{392}\) *Id.* at 1366.
Treaty of 1783. Barring all federal question and common law claims by such "disfavored" plaintiffs would have closed the courts to both speculators and tories—a result compatible with the politics of the day.

Yet it is doubtful that the framers would have drafted an amendment to deal with so modest a threat to the state treasuries as that posed by out-of-state plaintiffs. In the only study I have found that explores the residency of state debt holders in the 1790s, historian James Ferguson disclosed information from which one can conclude that the securities evidencing state debts, including those large blocks of securities that speculators purchased, were overwhelmingly owned by in-state citizens.

Although Ferguson focused primarily on the size of the speculative holdings, he also set forth data from which one can surmise that residents of at least two of the states that had issued them owned as much as 80-90% of the state securities outstanding as of the date of Hamilton's funding plan. Unfortunately, Ferguson was unable to study the lost or damaged records of the southern

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393 Id. at 1356-60.
394 In his study, Ferguson consulted records from Massachusetts and Rhode Island and determined the residency of those who owned state securities and chose to swap them for federal securities under the terms of Hamilton's assumption plan. Ferguson, supra note 45, at 273-75. The state debt instruments involved in Ferguson's study were exchanged for federal instruments and were therefore unlikely to have been the subject of suits brought against the states in federal court. Yet the distribution of these debts sheds some light on the likely distribution of other state debts (which Hamilton estimated at $4 million) that remained outstanding after assumption.

395 Ferguson notes that Boston residents held 61% of the Massachusetts state securities exchanged in Hamilton's 1790 funding plan. Id. at 274. He also sets forth textual and tabular information from which one can determine that 93 of the 107 largest holders of public securities, or roughly 87%, were residents of Boston. Id. at 273-74. Since Ferguson does not specify the residency of the non-Boston holders of securities, we can only guess whether they lived in other cities within the state of Massachusetts or in some other state. In placing the overall figure for in-state ownership at approximately 80-90%, I have assumed that Massachusetts issued the bulk of its securities to its own citizens in the first instance; that many of these citizens still held these relatively modest blocks of securities; that the speculators tended to hold the largest blocks, and that most out-of-state holdings appear within the category of the 107 largest speculative holders noted above. If one makes the conservative assumption that all of the non-Boston owners of these large blocks (13%) actually lived outside the state of Massachusetts (rather than in other eastern cities within Massachusetts), one might conservatively conclude that out-of-state holdings made up no more than 10-20% of the total.

The same conclusion emerges from a review of Ferguson's data regarding security ownership in Rhode Island. Id. at 280-81. Ferguson reports that 71% of the total was held in Providence and Newport, the two mercantile centers of the state. Id. at 281. Ferguson further reports that, aside from one speculative owner who lived in Boston, all of the nine largest holders lived in one of those two Rhode Island cities. Id. By consulting tabular information, id. at 280, one can thus conclude that out-of-state owners held $10,144 of the $229,429 held in the largest speculative blocks, or less than 5%. In sum, it appears that the speculative purchasers of Massachusetts and Rhode Island state securities tended to live in the mercantile centers of the issuing states, rather than outside the states.
Still, existing records strongly suggest that in-state citizens owned the bulk of state debt. If the framers knew this fact, then the literal account collapses. The literalists posit a concern with state suability on federal question claims that were held predominantly by the in-state citizens that they themselves view as eligible to bring such claims.

In short, this distribution of debt primarily among in-state citizens (and only secondarily among out-of-state citizens) tends to confirm that the framers of the Eleventh Amendment did not share the literalists' concern with the assertion of federal question claims. Instead, they probably believed that the Constitution left the issue of state debts in the hands of the states themselves, subject to congressional assumption. If the framers felt that repudiation or scaling by the states violated neither federal law nor constitutional prohibition, then the in-state debt holders posed no threat to state control; these plaintiffs simply could not reassert their "hibernating" claims by invoking federal question jurisdiction.

3. Suability Issues That the Assignment of State Debt Raises

Literalists make a similar mistake with respect to the assignment of state debt. The literalist account perceives in-state citizens as potentially eligible to bring federal claims against the states to enforce state indebtedness. Diversity theorists have rightly noted that a constitutional amendment that barred disfavored plaintiffs from bringing federal claims but permitted eligible in-state plaintiffs to do so would have invited the sale of notes, indents, and certificates from (ineligible) out-of-staters to (eligible) in-staters. Under this view, all out-of-

396 Id. at 272 (making this disclaimer).
397 Information about the distribution of debts should have been readily available to the state officials responsible for servicing the interest on the debt. During the 1780s and 1790s, most states paid interest on their certificate debt either in specie or paper currency, or by issuing "indents" as evidence of further indebtedness. Owners claiming interest had to register their claims with the states; the process of registration offered the states a mode of determining who owned state securities. Similarly, Pennsylvania, Maryland, New York, and New Jersey had recently begun to assume the federal debts of their own citizens; such an assumption would have produced a state debt dominated by the claims of in-state citizens. See id. at 221-32 (linking state assumption of the debt to the use of currency finance methods).

For confirmation that contemporary opinion understood that in-staters held most of the state securities, see The True Federalist, Essay, INDEP. CHRON. (Boston), Feb. 6, 1794, reprinted in 5 DHSC, supra note 3, at 253, 255 (noting that the "greater part of the State securities are in the hands of citizens of the States which have severally issued the notes").
398 See, e.g., supra note 381.
399 See Exchange on the Eleventh Amendment, supra note 19, at 134-35 (submission of William A. Fletcher) (describing the framers of the Eleventh Amendment as inept to have permitted an end run around the rule of nonsuability through assignment to in-state plaintiffs); Fletcher, supra note 19, at 1281 (noting that the possibility of assignment raises a difficulty for the literal account).
state debt would flow back to in-state owners, who would value the
debt nearly at the specie value they could collect in (hypothetically
available federal question) claims against the states.400

Literal theorists admit that assignment presents a "perplexing
problem,"401 and their answers strike me as clearly inadequate. Pro-
fessor Massey contends that the Supreme Court may have refused to
assert jurisdiction over debt claims brought by subsequent in-state pur-
chasers, on the theory that these in-state purchasers had engaged in a
"sham" transaction for the purpose of manufacturing jurisdiction.402
Professor Fletcher rightly characterizes this contention as a "daring"
assertion;403 sales of government securities were genuine transactions
in which the purchaser bought the right to repayment of principal
and interest that the instrument evidenced.404 It is difficult to liken
such purchases to the sham transaction exception to federal diversity
jurisdiction; in fact, that exception was a creature of statute.405 More-
ever, a judge-made rule of jurisdictional ouster would have established
a regime of discrimination in favor of original in-state holders and
against subsequent in-state purchasers. Such a rule of discrimination
had been rejected as a matter of Hamiltonian finance, and would have
been an extremely controversial judicial maneuver.406

400 Diversity theorists have criticized this account on two grounds. First, they argue
that the framers were unlikely to have introduced a distinction between in-state and out-of
state citizens with respect to the enforceability of federal limits on state action. Such dis-
crimination was precisely the kind that the Constitution sought to suppress with the Privi-
leges or Immunities Clause of Article IV. See, e.g., Fletcher, supra note 19, at 1283 & n.111.
Second, the diversity theorists argue that the ineligible plaintiffs might have avoided the
jurisdictional problem by transferring or assigning their claims against the states to eligible
plaintiffs. See, e.g., Exchange on the Eleventh Amendment, supra note 19, at 134-35 (submission
of William A. Fletcher).

401 Marshall, supra note 11, at 1367 n.113.
402 Exchange on the Eleventh Amendment, supra note 19, at 120 (submission of Calvin R.
Massey).
403 Id. at 134 (submission of William A. Fletcher).
404 Hamilton's funding plan sought to create a market in federal debt instruments. See
McDonald, supra note 45, at 192-93. The purpose for creating such a market, at least in
part, was to assure the public debt holders that they could cash out by selling their instru-
ments and obtain a price at or near par value. Hamilton thus proposed to use open mar-
ket purchases to support the price of the debt and to assure the value of the investment.
See id. at 194.
405 Professor Massey argues, by analogy to section 11 of the Judiciary Act of 1789, that
the bar to the creation of diversity jurisdiction through the assignment of choses in action
would have been applied to the quite different problem arising from an assignment inten-
tended to create federal question jurisdiction. Exchange on the Eleventh Amendment, supra
note 19, at 120 (submission of Calvin R. Massey). For a decisive argument against Massey's
view, see id. at 134-35 (submission of William A. Fletcher).
406 On Hamilton's proposal to avoid discrimination between original holders and sub-
sequent purchasers, and on Madison's support for such discrimination and the eventual
decision of Congress to refrain from discriminating, see FERGUSON, supra note 45, at 293-
94, 297-305.
Professor Lawrence Marshall has defended against this problem by pointing to the prospect of assigning claims to the United States or to another state, which then might sue the debtor state; Marshall suggests that such assignments would raise problems for diversity theorists. But the debate *Chisholm* triggered suggests that the generation that framed the Eleventh Amendment saw a fundamental difference between claims brought against the states by individuals and those brought by jural equals or superiors. In Massachusetts, Virginia, and Georgia, the public debate over *Chisholm* distinguished sharply between state suability in claims brought by individuals and that in proceedings brought by other governments. Jurisdiction over claims by government plaintiffs was defended on the ground of its necessity to secure peace and harmony; if states lacked the power to sue one another, they might rely upon the sword to settle their disputes. Therefore, there is good reason to believe that any problem of assignment to "eligible" government-entity plaintiffs would have been seen as raising an issue distinct from that addressed by an amendment that focused on suits by individual plaintiffs.

At the end of the day, the problem of assignment offers strong support for the diversity account. The absence of diversity over the claims by in-state plaintiffs meant that these citizens looked primarily to the state courts and state legislatures for debt service, or to the federal government under Hamilton's assumption plan. *Chisholm* created a serious threat to the regime of state control by enabling out-of-staters to enforce their debt claims in specie; an assignment problem may also have developed after *Chisholm*, resulting in the flow of certifi-

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408 For evidence that the framers of the Eleventh Amendment regarded suability by individuals as different in kind from suability by jural equals or superiors, consider the resolutions of the state legislatures that emphasize a concern with suits by "any individual," but refrain from mentioning suability by other government bodies. See *supra* notes 301-10 and accompanying text; see also *Proceedings of the Georgia House of Representatives, supra* note 269, at 161-62 (arguing against suits by individuals against the states but accepting the suability of states "in cases where two states are parties or between the United States and an individual state"); Hancock, *supra* note 271, at 418 (admitting the need for a tribunal independent of the states, doubting the availability of such a tribunal in suits against the states in matters of civil contract, but admitting its application to "such injuries as may take place by force, and may therefore have a tendency to destroy the peace of the Union, or involve the nation in a war with a foreign power").

409 Letter from Henry Lee to the Speaker of the Virginia House of Delegates, *supra* note 303, at 336 (deprecating state suability by individuals as a "prostitution of State Sovereignty" but admitting that states may have had boundary disputes with one another or debts payable to foreign powers, and that such causes "might be productive of Serious quarrels between States, and between States and foreign States"); see also *The True Federalist, Essay, Indep. Chron.* (Boston), Feb. 11, 1794, *reprinted in 5 DHSC, supra* note 3, at 264-65 (distinguishing controversies between states from those between a state and an individual).
cates out of state and into the hands of speculators. The Eleventh Amendment eliminated this possibility of assignment by curtailing suits against the states by the two classes of plaintiffs that Chisholm had made eligible to receive and enforce assigned debt claims. The Amendment thus closed an assignment loophole that had threatened the Federalist compromise on state control over existing debts.

4. The Gallatin Amendment and State Suability in Treaty Cases

The problem that the Vassall litigation poses does not undermine the diversity explanation of the Amendment. Vassall, a British subject, brought a claim in diversity against the State of Massachusetts seeking compensation for a confiscation alleged to have been perfected after the effective date of the Treaty of 1783. Literalists rightly point to Vassall and other claims to enforce the Treaty as evidence that the framers of the Eleventh Amendment must have contemplated the possibility that at least some disfavored plaintiffs—those whose claims were based on violations of treaties—might recast their claims to invoke federal question jurisdiction. The Treaty of 1783 was the one body of law dating from the Articles of Confederation period that was both binding on the states as such and clearly meant to remain so under the retrospective language of the Supremacy Clause. But the Eleventh Amendment swept these diversity-based claims from the Court's docket, and refiling would have required unpopular enabling legislation from Congress.

Contemporary opinion viewed in-state plaintiffs as having no right to judicially enforce existing securities against the states and thus saw the Chisholm decision as creating an incentive to assign the securities to eligible out-of-state plaintiffs. Commenting on Chisholm in a Boston newspaper, The True Federalist noted that the greater part of the securities were "in the hands of citizens of the States which have severally issued the notes." The True Federalist, supra note 397, at 256. He further noted that these in-state plaintiffs "cannot by the Constitution sue in any Court." Id. It followed that Chisholm would lead to fraudulent transfers: "[b]y a piece of artifice, the Securities may be nominally transferred out of the State, for the purpose of supporting an action in the Federal Court." Id. at 256-57; cf. Essays of Brutus, No. XIII, supra note 157, at 174 (arguing that the bills of credit, which were made payable to bearer and had been issued by the states to finance the Revolutionary War, would flow to nonresident holders for enforcement at par in federal court).

Vassall himself stated the nature of his dispute quite clearly in correspondence with his American lawyers. See Letter from William Vassall to John Lowell, Jr. (Nov. 2, 1791), in 5 DHSC, supra note 3, at 381. In particular, Vassall understood that the legality of the confiscation turned on the questions of whether it had been perfected before the effective date of the Treaty of 1783, and whether a statute the Commonwealth of Massachusetts passed in November 1784 to confirm the confiscation was to have retroactive effect. From Vassall's correspondence, it appears that the Massachusetts law of 1784 was structured as a declaratory or explanatory act and was intended by the legislature to operate retrospectively. See id. (arguing that the act of November 1784 would not be "a declaratory Act, but would be a New Act to Confiscate de novo My personal Estate").

See Marshall, supra note 11, at 1357-60; Massey, supra note 11, at 114.
See supra notes 118-20 and accompanying text.
See supra text accompanying notes 358-64.
The historical record reveals that the framers of the Amendment deliberately rejected earlier proposals that would have preserved suability in cases like Vassall. The first proposal, which Senator Albert Gallatin sponsored, would have made the Eleventh Amendment inapplicable to "cases arising under treaties, made under the authority of the United States." Diversity theorists maintain, correctly in my view, that this language would have preserved party-based jurisdiction in treaty cases; its rejection by the Senate reveals a preference for a total repeal of the diversity clause of Article III. Immediately after the Gallatin amendment failed, another Senator anonymously proposed a substitute for the Strong language that reflects both an awareness of state suability in federal question cases and a desire to protect

415 The lone House proposal would have included a proviso limiting the rule of nonsuability to situations "[w]here such State shall have previously made provision in their own courts, whereby such suit may be prosecuted to effect." Proceedings of the United States House of Representatives (Mar. 4, 1794), in 5 DHSC, supra note 3, at 620, 620. The House's resounding rejection of that proposal tells us little about the meaning of the Eleventh Amendment; but whatever its intention, the House was clearly unwilling to countenance a provision that imposed suability on the states in their own courts.

Professor Vázquez has emphasized this history in arguing against the prevailing forum-allocation understanding of the Eleventh Amendment. Vázquez, supra note 20, at 1725-26. Although I agree with Professor Vázquez that the framers did not intend to impose suability upon the states in their own courts, I disagree with his claim that this history may be "most reasonabl[y]" interpreted to suggest that the framers of the Eleventh Amendment meant to give the states the same protection from suit in state court as in federal court. Id. Many states during the Federalist era made no provision for the judicial disposition of money claims against them, and treated the matter instead as one for resolution upon petition to the legislature. See Pfander, supra note 69, at 939-42 (noting that many states, including those in New England, were slow to adopt judicial modes for the determination of claims against the state). Adoption of the House provision would have required the states to adopt a judicial mode of claim disposition to avoid suit in federal court, and would have made federal jurisdiction depend on state law. Many may have rejected such an approach, either from a desire to protect the state legislative role in the management of public claims or a desire to refrain from making federal suability dependent upon state judicial modes. Both accounts strike me as more plausible than a desire to establish parallel protections for the states in the state and federal courts.

416 Proceedings of the United States Senate (Jan. 14, 1794), in 5 DHSC, supra note 3, at 617, 617. Senator Gallatin moved to amend Strong's proposal to read as follows:

The judicial power of the United States, except in cases arising under treaties, made under the authority of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.

Id.

417 See Exchange on the Eleventh Amendment, supra note 19, at 135 (submission of William A. Fletcher).

418 Rejection of the proposed Gallatin amendment thus suggests that the framers of the Eleventh Amendment were aware that aliens might enjoy greater success in prosecuting claims against the states on the Court's original docket than out-of-state citizens. The Chisholm decision suggests that plaintiffs might have had a better chance of succeeding on the merits in circumstances where they were invoking party-based jurisdiction to secure the adjudication of claims ultimately based upon federal law. See Pfander, supra note 13, at 649.
that suability in the future while foreclosing state liability on pre-existing claims.\textsuperscript{419} Although the substitute was also defeated, its evident concern with the curtailment of existing claims suggests that issues of retrospectivity informed the Senate's debate over state suability.\textsuperscript{420}

5. \textit{The Addition of the Words of Construction, “Be Construed To”}

Of the many subjects of academic speculation, Senator Strong's decision to add the words of construction, “be construed to,” to the text of the Eleventh Amendment has been among the most fruitful. Advocates of the profound-shock view see the addition of these words as a confirmation that the Eleventh Amendment looked backward toward some supposedly broad-based constitutional consensus that the states were immune from suit.\textsuperscript{421} Alternative accounts abound. Professor Nowak, who has argued that the Eleventh Amendment leaves Congress free to abrogate state immunity in areas within its legislative competence, suggests that the addition of these words of construction may have highlighted the framers’ concern with the judicial assump-

\textsuperscript{419} The proposed substitute language read as follows:

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

Proceedings of the United States Senate, \textit{supra} note 416, at 617.

The first sentence of the substitute appears to confirm state suability in federal question cases by restating the relevant language of Article III; indeed, the substitute borrows the language of the Original Jurisdiction Clause. Next, the substitute forecloses party-based suits where the cause of action accrued before the Amendment's ratification. The substitute's appearance in the Senate records thus offers some support for the notion that issues of suability in federal question proceedings and issues of retrospectivity informed the Senate's deliberations on the final language of the Eleventh Amendment.

Moreover, rejection of the substitute does not necessarily mean that the Senate meant to reject the substitute's evident desire to reaffirm suability in federal question cases. Some Senators may have regarded a reaffirmation as unnecessary or impolitic. Others may have opposed the limitation in the second part of the substitute, which leaves open the possibility of state suability in diverse-party controversies arising after ratification of the amendment. Such a limitation would have left the states subject to suit to enforce their public obligations incurred after ratification, and would have threatened the states with the sort of federal judicial enforcement of state law matters that had made \textit{Chisholm} controversial.

We can perhaps best understand the rejection of the substitute as reflecting a desire to end all federal judicial enforcement of state contracts, at least in the absence of a violation of federal law.

\textsuperscript{420} The substitute proposed to modify the Eleventh Amendment by dropping the words of construction, “be construed to.” Elimination of the words “be construed to” may reflect the drafter’s recognition that the substitute was limited by its terms to claims in which the cause of action accrued before ratification and thus would not apply to any pending claims.

\textsuperscript{421} See \textit{Hans v. Louisiana}, 134 U.S. 1, 9-21 (1890).
tion of jurisdiction.\textsuperscript{422} Professor Tribe has made a similar claim.\textsuperscript{423} Professor Amar sees the language as designed to clarify that the judicial power did not extend to diverse-party claims as such, but might extend to them on the basis of an alternative (federal question) jurisdictional grant.\textsuperscript{424} Professor Jacobs has suggested that the language may have been "a gesture toward those state legislatures that . . . had called for an explanatory amendment" with retrospective operation.\textsuperscript{425}

Like that of Professor Jacobs, my explanatory account of the Eleventh Amendment views the addition of these words of construction as designed to clarify the intention of its framers that the Amendment would operate as an explanation or clarification of the meaning of Article III. Explanatory amendments were common devices during the eighteenth century by which lawmakers attempted to place a legislative gloss on the meaning of existing law and to give their new interpretation or explanation retrospective effect.\textsuperscript{426} Many of the explanatory statutes included the words "be construed"; the historical record suggests that these words may have been terms of art that signaled a legislature's desire to secure a retrospective application.\textsuperscript{427} Moreover, many state legislatures responded to Chisholm by calling for an amendment explanatory of Article III to clarify the scope of state suability.\textsuperscript{428} Finally, the attorneys in Hollingsworth apparently regarded the words "be construed" as designed to secure the Amendment's retrospective operation.\textsuperscript{429}

This explanatory account of the words of construction ties together a number of threads in the alternative accounts. As the profound-shock theorists suppose, the words of the Amendment look back to a fairly broad consensus that predated the Constitution. But rather than a consensus on full state nonsuability, the Eleventh

\textsuperscript{422} Nowak, \textit{supra} note 14, at 1437.

\textsuperscript{423} Tribe, \textit{supra} note 16, at 687 (portraying the words of construction in the Eleventh Amendment as an admonition to the federal courts).

\textsuperscript{424} Amar, \textit{supra} note 11, at 1482.

\textsuperscript{425} Jacobs, \textit{supra} note 11, at 68; see \textit{id.} at 68-69 (suggesting that the words may have been added "to correct an erroneous judicial interpretation;" or "to ensure retrospective application of the amendment to suits already filed;" or "to soften any supposed rebuke to the Court, by indicating that the Court's interpretation of Article III allowing suits against the states, while tenable, was to be abandoned in favor of the opposite construction"). Although I agree with most of Professor Jacobs's interpretations, I doubt that the addition of the words would have been seen as softening the rebuke. A direct amendment may have been viewed as an admission of the accuracy of the Court's ruling and as a change in the law for the future. An explanatory amendment, by contrast, may have tended to convey the belief that the Court erred in adopting its construction. For evidence that this may have been the understanding of the day, see \textit{supra} note 310.

\textsuperscript{426} See \textit{supra} Part II.A.

\textsuperscript{427} See \textit{supra} note 228 and accompanying text.

\textsuperscript{428} See \textit{supra} Part II.B.3.

\textsuperscript{429} See \textit{supra} notes 314-19 and accompanying text.
Amendment sought to restore a world in which there were no federal tribunals in which litigants could enforce pre-constitutional state obligations. Thus, the explanatory account tends to confirm the diversity thesis. The diversity account sees the Eleventh Amendment as offering a rule of construction for Article III that overrules Chisholm and establishes the diverse-party immunity interpretation that Madison and Marshall proposed in the Virginia ratification debates. Professor Fletcher offered exactly that explanation when he suggested that the Eleventh Amendment required a narrow interpretation of the diverse-party grant rather than a strict prohibition against the assertion of jurisdiction in federal question proceedings brought by disfavored parties. The words of construction confirm Professor Fletcher’s astute observation.

6. On the Need for a Constitutional Amendment

Scholarly opinion divides on the question whether the framers of the Eleventh Amendment could have accomplished their goals by way of statutory, rather than constitutional, amendment. As the literalists have noted, the framers of the Eleventh Amendment could have eliminated diversity jurisdiction and its threat of state suability by simply amending the text of section 13 of the 1789 Judiciary Act. Instead, they went further and constitutionalized a rule of state

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430 See supra note 196.
431 Fletcher, supra note 11, at 1061-62.
432 By the same token, the appearance of the words “be construed” in the Breckenridge amendment tends to suggest an intention on the part of its drafters and supporters to eliminate both pending and future claims. Supporters of the curtailment of diversity jurisdiction introduced the Breckenridge amendment in 1805, 1806, and 1807. See Amar, supra note 11, at 1482-83; Massey, supra note 11, at 118 & n.294. Scholars agree that, although it did not pass, the amendment clearly meant to curtail only the federal courts’ diversity jurisdiction by constitutional amendment, leaving its federal question jurisdiction intact. That the framers of the Breckenridge amendment used the words “be construed” in their proposed amendment of Article III has been seen by some as support for a diversity reading of the Eleventh Amendment, which uses similar language. See Amar, supra note 11, at 1482; Fletcher, supra note 19, at 1276-79. But see Exchange on the Eleventh Amendment, supra note 19, at 129-30 (submission of Lawrence C. Marshall) (cogently noting that the distinction between the Eleventh Amendment’s reference to suits and proceedings and the Breckenridge amendment’s reference to “controversies” makes the latter more clearly restricted to diverse-party claims). I do not see the Breckenridge amendment as adding much to our knowledge of the Eleventh Amendment, aside from its confirmation that legislative drafters in the early nineteenth century may have sought to ensure retrospective application of their jurisdictional curtailments by framing them as explanatory amendments and including the words “be construed” to confirm their intention in this respect.
433 See Massey, supra note 11, at 115-16.
434 Section 13 provided that the 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 other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.” Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80 (Judiciary Act of 1789). Although the Court now regards its own original jurisdiction as mandatory and self-executing, see Pfander, supra note 13, at 563, it is less
nonsuability. Literalists argue that the constitutional language represents an effort to "permanently inter" the prospect of state suability and to place it beyond the power of future Congresses to restore.\textsuperscript{435} Without a constitutional amendment, the prospect of federal question suability in actions brought by disfavored plaintiffs would remain capable of overcoming mere statutory prohibitions against diverse-party claims.\textsuperscript{436}

Diversity supporters have answered this point in a number of ways, perhaps most cogently by noting that the puzzle of constitutional amendment exists for all accounts, not just for the diversity account.\textsuperscript{437} Professor Fletcher has also noted that the possibility that the Court would regard its original jurisdiction as mandatory and self-executing may have necessitated a constitutional amendment. Under such a view, the Court might simply reaffirm \textit{Chisholm} if section 13 were repealed.\textsuperscript{438} Professor Gibbons has noted that a constitutional amendment may have quieted the outcries of the Anti-Federalists and staved off a constitutional convention.\textsuperscript{439} Professor Nowak, though not strictly a diversity theorist, sees the constitutional response as one designed to curtail further judicial innovation and to preserve congressional primacy in issues of state suability.\textsuperscript{440}

We should also consider the possibility that a constitutional amendment was necessary to eliminate the federal judicial role with respect to existing claims. The explanatory account sees the Eleventh Amendment as driven by the retrospective features of \textit{Chisholm} and the need to foreclose state suability as to all claims arising from preconstitutional debts. Once the Court agreed to hear the claim in \textit{Chisholm} and others like it, there was at least some prospect that it would refuse to give effect to a mere statutory change; such a statute might have been viewed as improperly retrospective itself. During this period, courts often ignored explanatory statutes with retrospective

\textsuperscript{435} Massey, \textit{supra} note 11, at 117.
\textsuperscript{436} See Exchange on the Eleventh Amendment, \textit{supra} note 19, at 122 (submission of Calvin R. Massey) (referring to federal question jurisdiction as "the joker" that could trump the mere repeal of diversity jurisdiction).
\textsuperscript{437} See Fletcher, \textit{supra} note 19, at 1288.
\textsuperscript{438} \textit{Id.} at 1288-89 (posing that merely repealing section 13 of the Judiciary Act may have invited a reaffirmance of \textit{Chisholm}); see also Jackson, \textit{supra} note 11, at 45 & n.184 (concluding that a constitutional amendment may have been necessary to overcome the mandatory language of the Original Jurisdiction Clause).
\textsuperscript{439} Gibbons, \textit{supra} note 6, at 1931-32, 1938 (characterizing the Eleventh Amendment, which was adopted in the midst of calls for a new constitutional convention, as a "tub thrown to the whale of republicanism").
\textsuperscript{440} Nowak, \textit{supra} note 14, at 1440 (expressing doubt that Federalists would have supported a flat ban on state suability, but noting that they may have supported an amendment that left Congress free to grant jurisdiction over state defendants in the future).
effect, and the framers of the Eleventh Amendment may have feared that the statutory repeal of section 13 would have been so regarded. After all, the Constitution itself foreclosed Congress from passing ex post facto laws, and the Eleventh Amendment was framed before Calder v. Bull limited application of this prohibition to criminal and penal statutes. The constitutional force of the Amendment's curtailment of the judicial power made it far more difficult for the Court to sustain its jurisdiction over existing claims.

B. The Explanatory Account and Recent Developments in Constitutional Federalism

Just as it calls for a reassessment of historical scholarship, the explanatory account raises serious questions about recent Supreme Court action taken in the name of the Eleventh Amendment. This Section highlights the areas in which the Court's work appears least faithful to the framers' conception of the Amendment's function.

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441 See supra text accompanying notes 208-13 (discussing Ogden v. Blackledge and its siblings).
442 For evidence that the debate over the proper response to Chisholm included a discussion of the possibility that the Court might ignore a retrospective federal statute, see Essay, General Advertiser (Boston), July 17, 1793, reprinted in 5 DHSC, supra note 3, at 391, 391 (criticizing the decision of the Massachusetts governor to call a special session in response to Chisholm, noting that "it has been determined by the first judicial tribunal in the country, that a state is liable to be sued;" arguing that the "only way to get rid of the difficulty is by an amendment to the constitution of the United States—no act of this free commonwealth, no act of congress—no alteration of the constitution can affect an action already commenced;" and concluding that "ex post facto laws are prohibited"). A similar suggestion appears in the records of Virginia. There, Governor Henry Lee initially proposed to the Virginia House of Delegates that they send a memorial to Congress urging its members "to press the passage of a law explaining and detailing the power granted by the constitution to the Judiciary [in Article III]." Letter from Henry Lee to the Speaker of the Virginia House of Delegates, supra note 303, at 337. The apparent purpose of proposing the passage of a law, rather than a constitutional amendment, was to secure a judicial test of the dispositive nature of such legislation. Governor Lee put the matter as follows:

I consider the eligibility of the plan [to seek passage of an explanatory law] very much enhanced, because . . . the sooner it is known to the people whether an Act passed by Congress be a law when passed, or only be a law when affirmed by a Judiciary decree made under its authority, the better.

Id. at 337-38. Lee here appears to have contemplated the possibility that the Court might refuse to give effect to an explanatory statute; he welcomed a test of that possibility. But calmer heads prevailed and the Virginia General Assembly enacted and published a resolution calling for an explanatory amendment of the Constitution instead of an explanatory law. See supra text accompanying note 304 (quoting the language of the Virginia resolution calling for "amendments in the constitution").
443 3 U.S. (3 Dall.) 386 (1798).
444 Id. at 390-91 (opinion of Chase, J.); id. at 397 (opinion of Paterson, J.); id. at 399 (opinion of Iredell, J.).
1. Seminole Tribe and the "Principle" of Sovereign Immunity

According to the Court, the Eleventh Amendment operates less as a technical explanation of one aspect of the jurisdictional menu of Article III than as a constitutional affirmation of the principle of sovereign immunity. Through the development of this "principle" of immunity in a series of cases beginning with *Hans*, the Court has moved steadily away from any sense that the text of the Amendment limits its operation. In *Hans*, the Court refused on Eleventh Amendment grounds to assert jurisdiction over a claim arising under federal law brought by an in-state citizen against the State of Louisiana—a claim clearly outside the restrictive language in the text.445 The Court has since extended the sovereign immunity principle of *Hans* to bar both suits brought by foreign states and proceedings in federal admiralty jurisdiction, notwithstanding the text's inapplicability to these matters.446 As the Court explained most recently, these decisions see the importance of the Eleventh Amendment "'not so much for what it says, but for the presupposition [of sovereign immunity] which it confirms.'"447

Yet the history of the Eleventh Amendment casts serious doubt on the historical synthesis that underlies the Court's claim that the Amendment embodies a "principle" of sovereign immunity. Rather than reaching an agreement about the states' immunity from suit under the Constitution, the Founding Generation appears to have recognized that state suability would result from Article III. What the Framers debated was not the question of suability generally; as discussed above, the Original Jurisdiction Clause plainly provides for the states' appearance as parties defendant.448 Instead, they debated the scope of state suability with respect to the identity of proper plaintiffs. Entity suits—those initiated by the United States or by another state—were the least controversial; suits by individuals to enforce federal law were perhaps more controversial but regarded as regrettably necessary; and actions by individuals to enforce existing state obligations were the most controversial of all. Indeed, many Federalists, and particularly Hamilton, Madison, and Marshall, disavowed suability as to existing obligations based on their understanding that federal-law limits on state action would operate prospectively.449 When *Chisholm* placed these assurances in doubt, the framers restored the principle of state nonsuability in party-based matters and thereby "immunized"

445 Hans v. Louisiana 134 U.S. 1, 10 (1890).
446 See cases cited supra note 8.
448 See supra text accompanying note 138.
449 See supra Part I.E.
the states from the threat of federal judicial liability for any existing (or future) nonfederal obligations. No broader "principle" of sovereign immunity was entailed.\textsuperscript{450}

Although one driving force behind the Eleventh Amendment appears to have been the desire of its framers to restore the states' power to manage their Revolutionary War debts in accordance with agrarian financial methods, the Federalists did not abandon their goal of making the states fiscally responsible for the future.\textsuperscript{451} The constitutional prohibitions against the emission of bills of credit, the impairment of contracts, and the passage of tender laws remained enforceable against the states pursuant to the Article III grants of federal question jurisdiction. From all appearances, the Federalists were temporizing, overcoming the difficulty \textit{Chisholm} posed by the means least likely to inflict lasting injury on the judiciary's ability to enforce the constitutional limits on state power.\textsuperscript{452} Most issues of state accountability were left for resolution in light of the politics of another day and in accordance with the portion of Article III that the Eleventh Amendment left unaffected.

There is little historical support, therefore, for the Court's controversial assertion in \textit{Seminole Tribe} that the Eleventh Amendment re-

\textsuperscript{450} In portraying the Eleventh Amendment as a fairly limited expedient of the day, I do not mean to suggest that it was to have no prospective effect. Its curtailment of diversity jurisdiction in actions against the states left a lasting mark on the state suability provisions of Article III. Federal courts were no longer able to assert jurisdiction in suits and proceedings against the states solely on the basis of party alignment; instead, they were limited to claims in which some federal question or ingredient made the case one arising under federal law or admiralty. \textit{See supra} text accompanying notes 373-77. We need not diminish the significance of this jurisdictional curtailment to recognize that it had greater force early in the nineteenth century. Today, with the flight away from the common law and the rise of the administrative state, constitutional law and federal statutes now impose more restraints on the states than they once did. In a world inundated with federal law, the Eleventh Amendment has virtually no modern role to play in defining the power of the federal courts to hear claims against the states as parties defendant.

\textsuperscript{451} Recall that the Hamiltonian assumption plan had resulted in the transfer of much state indebtedness to federal accounts, and most of what little remained had been retired early in the nineteenth century. \textit{See supra} text accompanying notes 366-70. Similarly, the \textit{Jay Treaty} created a commission to handle the claims of British creditors. \textit{See supra} note 372. Federalists, in short, sought to protect state creditors from the worst consequences of agrarian finance.

\textsuperscript{452} Similar arguments appear in Amar, \textit{supra} note 11, at 1482 (noting that the Amendment leaves federal-law rights enforceable against the states as such); Fletcher, \textit{supra} note 11, at 1077-78 (noting that the issue of state suability in federal question matters was unresolved at the time of the Eleventh Amendment's ratification and was not addressed by the framers of that Amendment); Gibbons, \textit{supra} note 6, at 1938 (noting that the Amendment "made no real change in the nature of the federal union or the supremacy of federal law"); Marshall, \textit{supra} note 11, at 1367-68 (noting that the Amendment preserves state suability by in-state citizens and thus preserves as much accountability as was politically possible); Nowak, \textit{supra} note 14, at 1440 (noting that the framers of the Eleventh Amendment intended that Congress retain the power to abrogate immunity "to effectuate federal power and goals").
stored a broad principle of state sovereign immunity. Yet precisely that claim lies at the heart of the Seminole Tribe Court’s conclusion that the federal courts may not exercise jurisdiction over rights of action legislated into existence by Congress pursuant to the grants of authority that were in force on the Amendment’s effective date. This temporal synthesis effectively precludes Congress from authorizing original federal court suits against the states to enforce rights under the bankruptcy, copyright, and trademark laws, as well as laws enacted pursuant to the Commerce Clause. It does leave intact the possibility of congressional abrogation pursuant to section 5 of the Fourteenth Amendment, but the Court’s most recent pronouncement on the scope of this congressional power may have narrowed even that possibility. A host of factors may account for the Court’s decision to place these limits on Congress’s power, but the Court simply cannot justify them by reference to the Eleventh Amendment.

2. The Mistaken Equation of U.S.-Party and State-Party Immunity

Although he acknowledges that the text of the Eleventh Amendment provides little support for the approach taken in Hans and Seminole Tribe, Justice Antonin Scalia has nonetheless defended the retention of the doctrine of state sovereign immunity. Building on a distinction he first proposed as an academic, Justice Scalia argued in his separate opinion in Pennsylvania v. Union Gas that state

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453 The majority in Seminole Tribe reaffirms the view of Hans, 134 U.S. at 9-19, that the Constitution implicitly incorporated a principle of sovereign immunity, which the court had improperly ignored in Chisholm, and which the Eleventh Amendment subsequently restored. 517 U.S. at 54. On this account, the restoration of a pre-existing conception of immunity qualifies all grants of legislative power and thus curtails Congress’s power to abrogate state immunity pursuant to Article I. See id. at 73 (reconfirming the rule of Hans that “Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction”).

454 See Seminole Tribe, 517 U.S. at 66, 73-76 (overruling Union Gas and that decision’s affirmation of congressional power to abrogate state immunity pursuant to the Commerce Clause, and treating the congressional abrogation power pursuant to the Fourteenth Amendment as presenting a distinct question); cf. City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (interpreting Congress’s enforcement powers under section 5 of the Fourteenth Amendment as limited to situations in which Congress seeks to define new remedies for existing constitutional rights, and finding no general power in Congress to create new rights binding upon the states).

455 See Pennsylvania v. Union Gas Co., 491 U.S. 1, 30-31 (1989) (Scalia, J., concurring in part and dissenting in part) (admitting that the diversity account offers the best comprehensive explanation of the text of the Eleventh Amendment, assuming that the framers did not intend to recognize immunity outside its express terms).

456 Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases, 68 Mich. L. Rev. 867, 886 (1970) (noting the “regrettable equation” between domestic and foreign sovereign immunity, i.e., the immunity of a state before its own tribunals and that before the tribunals of another sovereign, such as the federal government).

457 491 U.S. at 29-45 (Scalia, J., concurring in part and dissenting in part).
sovereign immunity derives much of its force from its similarity to the well-accepted doctrine of federal sovereign immunity. Justice Scalia admits the necessity of keeping the states honest, but argues that other means will suffice. In particular, he notes that it has long been thought that the states waived their immunity from suits brought by the federal government and by other states in the "plan of the convention," and may be subject to suits for prospective relief aimed at their responsible officials. In view of this array of remedial options, Justice Scalia sees no necessity for the recognition of an individual right to sue a state itself, especially in light of the Constitution’s failure to effect a similar waiver of immunity for the federal government.

Although one cannot deny his influence—after all, he provided the swing vote to retain Hans and overrule Union Gas, stating a position that doubtless coincides with that of the Seminole Tribe majority—one can question the historical accuracy of Justice Scalia’s attempt to equate U.S.-party and State-party immunity. Initially, one can certainly contest his major premise that the United States enjoys constitutional immunity from suit in its own courts. Even granting Justice Scalia’s major premise, however, it does not necessarily follow that a similar immunity extends to the states. The Framers of Article III

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458 Id. at 33-34 (Scalia, J., concurring in part and dissenting in part) (arguing that the absence of a requirement that the federal courts entertain suits that individuals bring against the federal government undermines any similar claim of necessity as to the suability of states).

459 Id. at 33 (Scalia, J., concurring in part and dissenting in part) (noting that the Constitution “[u]ndoubtedly . . . envisions the necessary judicial means to assure compliance with the Constitution and laws”).

460 Id. at 33-34 (Scalia, J., concurring in part and dissenting in part) (stating that the waiver of state immunity in the “plan of the convention” includes waiver of suits the United States brings as a plaintiff and those another state brings as a plaintiff, and noting the existence of suits by individuals to obtain appropriate damages and injunctive relief against state officers responsible for violations of the federal Constitution).

461 Id. at 34 (Scalia, J., concurring in part and dissenting in part) (arguing that the constitutional immunity of the federal government "strongly suggests that state immunity exists as well").

462 The Petition Clause of the First Amendment, U.S. Const. amend. I, appears to provide a constitutional guarantee of the right of individuals to seek judicial redress of their claims against the United States government. See Pfander, supra note 69, at 899-900, 937-40. Although this argument is premised on the language of the First Amendment’s Petition Clause, which apparently did not become an issue during the debates over the Eleventh Amendment, others of the day argued against the federal government’s immunity. See Pfander, supra note 13, at 639-40 (quoting the argument of Edmund Randolph in his report on the Judiciary Act of 1789 in favor of the routine suability of the federal government, as well as of the state governments, in all federal question cases); see also “Crito,” Crito to Sydney, supra note 277, at 413-14 (contending that the principle of equal justice that underlay the Constitution argued for the creation of a lawful mode of enforcing claims against the United States as well as against the states); “Solon,” Essay, INDEP. CHRON. (Boston), Sept. 19, 1793, reprinted in 5 DHSC, supra note 3, at 421, 422 (arguing that the U.S.-party controversies provision authorizes the creation of a judicial remedy against the United States).
drew a careful distinction between the suability of the state and federal governments by making State-party cases a subject of mandatory original cognizance and leaving U.S.-party controversies to the discretion of Congress.\textsuperscript{463} If, as I believe, the Framers deliberately drew this distinction between State- and U.S.-party suability because they worried more about state legislative dishonesty, then a textual predicate justifies different treatment of the two levels of government.

Structural factors help to explain why the Federalists may have believed that the states presented a greater threat of expropriation than the federal government. In working out their restrictions on state authority, the Constitution's Framers built upon their own experience with the passage of unjust state laws. Madison's famous disquisition in \textit{Federalist No. 10} had argued that these unjust laws were the product of gusts of faction that were more likely to sweep through the state legislative councils.\textsuperscript{464} Important recent work by Professor Jack Rakove notes the centrality of Madison's thought in understanding the rise of the doctrine of judicial review.\textsuperscript{465} Professor Rakove concludes, in a work that points largely in the same direction as my argument here, that the Framers were far more willing to contemplate a judicial role in policing state than federal legislative action.\textsuperscript{466} The Framers' distinction in Article III between state and federal suability thus reflects a deep understanding that the state legislatures represented the more significant threat to the rights of the minority and to the principles of good government.

The Framers' plan also appears to place emphasis on the ability of an individual to enforce state obligations on her own initiative, without instead having to persuade the central government to bring suit against the state on her behalf. Most observers regard the Court's original jurisdiction over State-party cases as mandatory and self-executing.\textsuperscript{467} This understanding of the Court's original jurisdiction may have reflected the Framers' desire to secure a constitutionally mandatory forum for the enforcement of the constitutional restric-

\textsuperscript{463} See \textit{supra} text accompanying notes 145-49.

\textsuperscript{464} \textit{The Federalist} No. 10, at 60-61 (James Madison) (Jacob E. Cooke ed., 1961) (famously suggesting that an extension of the sphere of the national government to include more interests and parties would make unified action by a single faction more difficult).

\textsuperscript{465} Jack N. Rakove, \textit{The Origins of Judicial Review: A Plea for New Contexts}, 49 STAN. L. REV. 1031, 1040 (1997) (calling "the constitutional theory of [the Democratic-Republicans'] pre-eminent leader, James Madison," a "central plank in their party platform," i.e., the "need to erect fences around the legislative power").

\textsuperscript{466} \textit{Id.} at 1041-50 (arguing that the Framers constructed a judicial negative primarily as a check on improper state laws, and discussing Madison's worries about the effectiveness of this judicial check).

\textsuperscript{467} See Pfander, \textit{supra} note 13, at 611 n.220.
tions on the states in Article I, Section 10. If I am correct, and the Court's mandatory original docket reflects the Framers' plan to make the enforcement of state obligations independent of decisions that the political branches of the federal government make, then Justice Scalia's argument against state suability carries less weight. Scalia argues that suits which other parties, such as the United States or another state, bring can adequately substitute for suits that an affected individual brings against the states. Scalia's model of U.S.-party enforcement thus posits a dependence on Congress's willingness to authorize, and the executive branch's inclination to commence, actions against the states, a model that is difficult to reconcile with a conception of the original docket as mandatory and self-executing.

3. The Curious Idea of State Consent to Suit

Of the many debatable features of the Court's Eleventh Amendment jurisprudence, perhaps none can match the curious notion that suits against the states, though nominally placed beyond the "judicial power" of the federal courts, may nonetheless be brought back within that power by the state's consent to suit. Classical jurisdictional doctrine views the federal courts as courts of limited jurisdiction, with power to hear cases and controversies that affirmatively come within the defined limits of Article III, but without power to hear matters that extend beyond the scope of that grant. This strong rule

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468 See Pfander, supra note 13, at 599-94 (arguing that the Framers may have created a mandatory original docket for State-party cases to address the possibility that Congress might choose to implement the Madisonian compromise by refraining from authorizing lower federal courts to hear suits against the states).

469 Union Gas, 491 U.S. at 33-34 (Scalia, J., concurring in part and dissenting in part).

470 Ultimately, Justice Scalia and I agree that a provision for state suability did emerge from what Hamilton called the "plan of the convention." The Federalist No. 81, supra note 27, at 544. We disagree only as to the scope of Article III's provision for suability. Scalia sees state suability as limited to suits by the United States and other states, in keeping with the classic understanding of the scope of the Original Jurisdiction Clause as driven by the alignment of the parties. See Union Gas, 491 U.S. at 33-34 (Scalia, J., concurring in part and dissenting in part). He thus apparently views the Original Jurisdiction Clause, as I do, as the vehicle through which the provision for state suability emerged from Article III. I simply disagree with this limited assessment of the scope of the Court's original jurisdiction, seeing it instead as encompassing all State-party "cases" that arise under the Constitution, laws, and treaties of the United States. Pfander, supra note 13, at 577-97 (arguing that the barrier of sovereign immunity required the Framers to create a mandatory original docket to secure the enforcement of federal rights against the states); id. at 598-640 (arguing on textual, structural, and historical grounds that the scope of the Court's original jurisdiction extended to federal question claims against the states).

471 See Jackson, supra note 11, at 37-39 (criticizing the Court's consent doctrine).

472 See Charles Alan Wright, Law of Federal Courts 27-28 (5th ed. 1994) (tracing the existence of a presumption against the exercise of federal jurisdiction to the conception of federal courts as courts of limited jurisdiction, and showing that the presumption emerged in the early Federalist era by citing cases that required the parties to include allegations affirmatively revealing the existence of jurisdiction).
against the expansion of federal judicial authority ordinarily applies even where the parties "consent" to the federal courts' jurisdiction.\footnote{473} But in the realm of the Eleventh Amendment, the Court has taken a different view. Since the nineteenth century, the Supreme Court has held that the states may consent to suit in federal court, and that such consent, if sufficiently unambiguous, can authorize the federal courts to proceed to judgment notwithstanding the jurisdictional bar of the Eleventh Amendment that would otherwise apply.\footnote{474} The history of the Eleventh Amendment raises profound questions about the Court's notion that state consent can empower the federal courts to proceed in the face of a constitutional amendment that clearly sought to curtail the "judicial power." Justice Iredell, whose views the Court otherwise purports to follow in\textit{ Hans} and\textit{ Seminole Tribe}, clearly understood the classical view of federal jurisdiction as limited by Article III, and steadfastly refused to countenance an expansion of that jurisdiction through some form of consent. During pretrial proceedings in\textit{ Oswald v. New York},\footnote{475} Justice Iredell apparently argued to his brethren against the issuance of process to the State, on the ground that the plaintiff's complaint had failed adequately to allege the existence of diverse citizenship. Accordingly, the Court quashed the summons and directed the plaintiff to plead again.\footnote{476} Only after Oswald filed an amended complaint did the

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\item \footnote{473} See id. at 28 (noting that the parties cannot waive lack of jurisdiction, whether by express consent, by conduct, or even by estoppel).
\item \footnote{475} Oswald is unreported. See sources cited supra note 247.
\item \footnote{476} During pretrial proceedings in\textit{ Oswald}, plaintiff's counsel moved for a writ to compel the State's appearance. Justice Iredell questioned whether the pleadings would support the Court's jurisdiction. He noted in particular that the summons failed to identify Oswald as a citizen of "any other State but New York." James Iredell's Observations on State Suability (Feb. 11-14, 1792), in 5 DHSC, supra note 3, at 76, 77. Iredell also suggested the possibility that New York might waive this objection, but expressed his own view (and now the classical view) that plaintiffs wishing to invoke the limited jurisdiction of the federal courts were obliged to show it affirmatively through the pleading of special matters, and the Court itself had an obligation to notice defects in its own jurisdiction and to refrain from proceeding in a cause over which it lacked power. Id. at 79 (describing the Court's jurisdiction as "a special Jurisdiction, grounded on a written Constitution [and]
Court proceed with the issuance of process, and only then did New York agree to enter an appearance to defend on the merits. There is no reason to believe that the Court would have proceeded to judgment on the merits, as it did, solely on the basis of the State’s appearance, and without pleadings adequate to show jurisdiction. The State’s appearance clearly served some function other than resolving jurisdictional issues.477

Clearly, prior to Chisholm, the Founding Generation displayed a measure of uncertainty about the proper role of state consent in the exercise of jurisdiction over matters otherwise within the terms of Article III.478 But this uncertainty stemmed from the debate over the

written Laws” and distinguishing that jurisdiction from “that of a Court having prima facie general Jurisdiction over all Persons”). Iredell’s argument apparently persuaded the Court, which refused to grant the requested writ and called for the submission of a second summons that was identical to the first except that it clearly identified Oswald as a citizen of Pennsylvania. See 5 DHSC, supra note 3, at 61.

477 This apparent distinction between consent and jurisdiction can help to explain the function that the Framers of Article III may have envisioned for the grant of jurisdiction over diverse-party proceedings involving the states. If these provisions did not contemplate coercive proceedings against the states, as Madison and Marshall argued in Virginia’s ratification debates, why did they appear in Article III? A hint may appear in Madison’s suggestion that if the states consent, “provision is here made.” 3 Elliot’s Debates, supra note 84, at 533 (remarks of Mr. Madison) (referring to controversies between a state and a foreign nation). The jurisdictional grant of Article III could not operate coercively on a foreign power in view of the law of nations. Yet such foreign states might consent to suit before an Article III court. Similarly, although federal tribunals might not entertain coercive proceedings against the states to collect existing obligations, the states might consent to the resolution of disputes there, as did the State of Maryland in Van Staphorst. See 5 DHSC, supra note 3, at 7. The States had had some experience in the arbitration of their disputes with private individuals and foreign states, both before and after the Constitution took effect.

478 Consent, of course, has a long history in the world of sovereign immunity. Sir William Blackstone explained the suability of the Crown in England as the product of a (fictional) consent to suit. See Pfander, supra note 69, at 923 & n.87 (noting that obtaining redress from the British Crown was said to depend on the King’s consent to petitions seeking relief as a matter of grace). Similarly, Hamilton spoke of the possibility that a state might waive its sovereign immunity from suit through provisions contained in the “plan of the convention.” See supra notes 158-62 and accompanying text. Finally, it was a recognized feature under the law of nations that a state might waive its immunity from suit and agree to have a particular tribunal adjust its claims. For example, the State of Virginia agreed to arbitrate its dispute with Simon Nathan, following Nathan’s unsuccessful attempt to secure a judicial decree against the state in the courts of Pennsylvania. For an account, see Pfander, supra note 13, at 585-87 & n.126 (describing the law of nations immunity, its invocation to defeat Nathan’s suit in Pennsylvania state court under the Articles of Confederation, and the subsequent submission of the dispute to an arbitral panel in Maryland—a venue chosen for its neutrality). Similarly, the State of Maryland at one time proposed an arbitral resolution of its dispute with the Dutch banking family van Staphorst, and identified neutrals at the nation’s capital to undertake the task. See 5 DHSC, supra note 3, at 14-15 (reporting on the identification of arbitrators in the autumn of 1786, but noting that no decision emerged in light of the Maryland assembly’s decision to seek a negotiated resolution of the dispute).

Concepts such as consent help to explain the commonplace idea that a state legislature ordinarily controls the scope of the state’s suability in its own courts, and may either
function of the Court's jurisdiction and the power of the Court to entertain coercive, rather than consensual or arbitral, proceedings against State-party defendants. Consider the history of Van Staphorst v. Maryland. Following the initiation of suit and service of process on the State, the legislature decided to enter an appearance in the litigation through its attorney general, Luther Martin. Anti-Federalists criticized Maryland's entry of appearance, fearing that it might signify the State's consent to the Court's exercise of jurisdiction and thus set a damaging precedent for the future of states' rights. Other evidence suggests that the states worried about how to enter an appropriately limited appearance in litigation, to preserve their ability to argue that the Court lacked power to hear the claims against them.

consent to such suit or withhold consent. In all these instances, immunity from suit bears some relationship to the government's failure to issue an effective consent. Even where the state legislatures created modes for the judicial determination of claims against the state, they typically retained control over the payment of any specie from the treasury by requiring an appropriations bill to support such a payment and refusing to treat a judicial decree as a sufficient warrant for payment. See Pfander, supra note 69, at 940 n.144.

Van Staphorst is unreported. See sources cited supra note 246.

See 5 DHSC, supra note 3, at 16-17 (describing the decision of the Maryland assembly to "appear" in the action and to direct the state's attorney general, Luther Martin, to effect the appearance).

See James Sullivan, Observations upon the Government of the United States of America, reprinted in 5 DHSC, supra note 3, at 21, 22-23 (noting that Maryland was said to have consented to suit in the Supreme Court; arguing that "the state of Maryland can, by no means, give a jurisdiction to the supreme court of the United States, which that court does not possess by the constitution of their power from the people of all the states," and noting that the state might "refer their dispute, by arbitration, to the [Court,] but they cannot, if they exist as a state, find a power lodged any where, to compel a performance of the award on their part").

James Iredell, sitting as circuit justice in the Federal Circuit Court in Georgia, presided over a petition in equity in 1791 in which Alexander Chisholm set forth the same claims he later refiled in the Supreme Court. See Petition, in 5 DHSC, supra note 3, at 137 (reprinting the original petition). Georgia entered an appearance through counsel and filed a plea to the court's jurisdiction. In doing so, Georgia risked a waiver of its jurisdictional argument, in light of the established rule that a party wishing to challenge jurisdiction was obliged to enter an appearance in propria persona (in one's own proper person) rather than through counsel. See 5 DHSC, supra note 3, at 129-30 & n.22. Iredell's opinion dismissing the action for want of jurisdiction indicates that he had little regard for this rule of waiver through appearance by counsel:

[T]his rigid rule of law, not permitting a Man to plead to the Jurisdiction by an Attorney, with great deference, seems to me to have originated from the Courts eagerly grasping at as much Jurisdiction as they could, a disgraceful disposition which I hope never will appear in any Court of the U. S.

James Iredell's Circuit Court Opinion (Oct. 21, 1791), in 5 DHSC, supra note 3, at 148, 153. When Chisholm refiled the action in the Supreme Court in February 1792, Georgia adopted a different course and refused to appear through counsel. That puzzling refusal may have been grounded in a fear that the Court would invoke this rule of waiver.

Attorneys involved in the litigation in Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798), also worried about the possibility of waiver through entry of an appearance. See Letter from James Wood, Governor of Virginia, to Charles Lee, Attorney General of the United States (Feb. 1, 1797), in 5 DHSC, supra note 3, at 347, 347 (requesting Lee "to take Such Steps as will bring the Suit to trial on these principles, without the Voluntary appear-
Therefore, we can reasonably conclude that the Framers viewed the entry of an appearance as the kind of act that might deprive the state of its ability to question the Court’s power to proceed.

Yet the uncertainty displayed in cases involving the entry of the State’s appearance was short-lived. In 1792, the Justices made clear in opinions issued on circuit that they would not undertake to decide a dispute in circumstances where their action was subject to legislative or executive revision. In 1793, *Chisholm* essentially ended any prospect that the states might retain the power to refrain from consenting to suits within the jurisdictional scope of Article III. The framers of the Eleventh Amendment accepted that aspect of *Chisholm* and decided to clarify the extent of the Court’s jurisdiction to foreclose the possibility of further suability in diverse-party proceedings. The Court’s subsequent decisions drove home that lesson by treating the existence of jurisdiction—over controversies between two or more states, for example—as a sufficient warrant for the exercise of judicial power, notwithstanding a state’s purported refusal to consent. On the whole, the framers of the Eleventh Amendment appear to have regarded state suability in jurisdictional terms, and to have placed a

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483 Prior to *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792), three circuit courts advised President Washington that they could not constitutionally entertain proceedings under provisions of a 1792 statute. The statute in question obliged these courts to determine the pension eligibility of disabled veterans, and authorized review of each decision by both the Secretary of War and Congress. The Circuit Justices viewed the prospect of revision and control of their opinions as inconsistent with the doctrine of separation of powers and the requirement of judicial finality. See id. at 410 n.† (reprinting the circuit opinions). See generally Pushaw, supra note 206, at 438-41 (locating *Hayburn’s Case* in the context of early Federalist judicial thought). This attitude of opposition to nonjudicial revision cannot easily coexist with an arbitral conception of the Court’s jurisdiction, if such a conception would leave the states free to disavow a decision or award and refuse to pay the resulting judgment.

484 After its decision asserting jurisdiction in *Chisholm v. Georgia*, the Court granted a motion to show cause why it should not enter a default judgment against the state for non-appearance. See 5 DHSC, supra note 3, at 134-35. The Court followed a similar strategy in other cases. See 5 id. at 62 (reporting that the Court granted a motion to show cause why it should not enter a default judgment in *Oswald v. New York*).

485 See, e.g., Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 716, 719 (1838) (upholding the power of the Court to entertain coercive proceedings against a state, and following *Chisholm* in allowing service of process on the state's governor and attorney general).
modest portion of state suability in diverse-party matters beyond the reach of the federal courts.

The wide divergence between the framers' understanding and the Court's construct of state consent underscores the point that *Hans* and *Seminole Tribe* extend the doctrine of state sovereign immunity well beyond the Eleventh Amendment's textual limits on the judicial power. State consent can thus be seen as a judicial response to this judge-made expansion of the Eleventh Amendment, one that permits the federal courts (again) to hear those matters that the framers of the Amendment had intended to leave unaffected.

### 4. The Problem of Protecting State Treasuries

Modern cases often characterize the protection of state treasuries from retrospective liability as one of the cornerstones of Eleventh Amendment jurisprudence. In *Edelman v. Jordan*, the Court articulated this concern with retrospective liability in its clearest form by refusing to permit the federal courts to entertain suits—otherwise permitted under the fiction of *Ex parte Young*—that would require state officers to pay state money to remedy past violations of federal law.

Since then, the lower courts have developed an elaborate distinction between prospective and retrospective provisions that shapes the extent to which federal courts may monitor state compliance with federal law. *Seminole Tribe* reinforces this body of law and further limits the availability of officer suits as an alternative to entity suability.

The framers of the Eleventh Amendment were also concerned about retrospective liability in suits for damages payable by the state treasurer, but the similarity ends there. *Chisholm* threatened liability on a series of obligations that states had incurred before the federal limitations of Article I had binding force. The treasury liability threatened in *Edelman*, by contrast, would have made individuals whole for losses they suffered as a result of a state's violation of federal-law limits that were already in place at the time the states took the

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487 209 U.S. 123 (1908); see *Edelman*, 415 U.S. at 663-68.
488 415 U.S. at 662-63.
489 For an overview of the leading cases, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 395-99 (2d ed. 1994).
490 Apart from its decision that Congress lacks power to abrogate the states' sovereign immunity when acting pursuant to its Article I powers, the Court in *Seminole Tribe* held that the plaintiff could not enforce the congressional scheme through a suit aimed at compelling the governor of Florida to comply. *See Seminole Tribe*, 517 U.S. at 73-76. The Court distinguished *Ex parte Young* on the ground that the statutory scheme involved in *Seminole Tribe* evidenced Congress's desire to secure enforcement of the federal rights at issue through some mechanism other than an officer suit. *See id.* at 74 (citing Schweiker v. Chilicky, 487 U.S. 412, 423 (1988)). For comments on this aspect of *Seminole Tribe*, see Meltzer, *supra* note 20, at 33-46.
allegedly unlawful action.\textsuperscript{491} The unanticipated federal judicial liability at issue in \textit{Chisholm} differs significantly the more routine allowance of benefits that the State of Illinois improperly withheld in \textit{Edelman}.

5. \textit{The Absence of a Forum-Allocation Principle}

Many scholars see modern Eleventh Amendment jurisprudence as reflecting a forum-allocation principle.\textsuperscript{492} The Court has long held that the Eleventh Amendment has no application to its exercise of appellate jurisdiction over state-party proceedings first instituted in state court.\textsuperscript{493} As a consequence of the steady expansion of the Court’s scope of review, many questions the Eleventh Amendment presents now have less to do with whether the Court has the ultimate power of review than with which court—state or federal—should operate as the court of first instance.\textsuperscript{494} Recent developments suggest that state courts may owe a positive duty to entertain suits against themselves to enforce federal-law rights, a duty that applies with greater force in situations where the Eleventh Amendment bars the plaintiff from proceeding in a lower federal court.\textsuperscript{495}

The forum allocation principle has no obvious basis in the history of the Eleventh Amendment. First, it is far from clear that the framers of the Amendment intended to preserve the Court’s appellate jurisdiction over matters excepted from the “judicial power” under Article III.\textsuperscript{496} Second, it is equally doubtful that the framers recognized a state court obligation to provide a forum for the assertion of federal

\textsuperscript{491} See \textit{Edelman}, 415 U.S. at 668-74 (refusing to permit the equitable restitution remedy to operate in favor of the plaintiff class on the ground that it would impose a retrospective liability payable by the state in violation of the Eleventh Amendment).

\textsuperscript{492} See \textit{Jackson}, supra note 11, at 73-75; \textit{see also} \textit{Monaghan}, supra note 20, at 125 (contending that the Eleventh Amendment operates in large measure “as a forum selection clause”).

\textsuperscript{493} See \textit{McKesson Corp. v. Division of Alcoholic Beverages & Tobacco}, 496 U.S. 18, 26-27 (1990) (citing \textit{Cohens v. Virginia}, 19 U.S. (6 Wheat.) 264 (1821)) (holding that the Eleventh Amendment does not bar the Supreme Court from asserting appellate jurisdiction over claims that individuals bring against the states in state courts). On the evolution from \textit{Cohens} to the modern view, see \textit{Jackson}, supra note 11, at 25-32.


\textsuperscript{495} See, e.g., \textit{Reich v. Collins}, 513 U.S. 106, 110-14 (1994) (holding that states may not deny individuals a constitutionally compelled remedy in their own courts); \textit{see also} \textit{Monaghan}, supra note 20, at 125 n.161 (describing as “plainly wrong” the suggestion that the states may withhold their consent from suit in their own courts to enforce federal-law claims that the Eleventh Amendment displaces from federal court). \textit{But see Vázquez, supra} note 20, at 1690-91 (noting expressions in a variety of recent decisions that emphasize the idea of state consent to suit, and suggesting that such a requirement of consent might permit the states to refrain from hearing federal claims in their own courts).

\textsuperscript{496} See \textit{Jackson}, supra note 11, at 25-39 (suggesting that the Eleventh Amendment may have been intended to restrict the judicial power in its entirety, as applied both to its original and appellate exercise).
claims against the states themselves. The framers were aware that a handful of states had created a mechanism for the judicial resolution of debt claims, but they were also aware that other states, including Massachusetts, had no such mechanism. The absence of an assured original forum for the adjudication of claims against the states helps to explain why the Framers of Article III included State-party cases within the Court’s mandatory and self-executing grant of original jurisdiction. Federal judicial power existed, at least in part, to secure state accountability to the rules of federal law, on the theory that state courts were inadequate to that task. The notion that the Eleventh Amendment shifts otherwise viable federal law claims into state courts—courts that the framers believed were inadequate—strikes me as one that would have surprised Senator Strong.

**Conclusion**

Like other constitutional amendments that have shrunken in size to matters of essentially historical significance, the Eleventh Amendment was meant to accomplish a limited set of goals. The Constitution established a series of restrictions on the states, and Article III included a mandatory grant of original jurisdiction in State-party cases to facilitate their judicial enforcement. But the Framers of the Constitution did not intend for these constitutional limits to operate retrospectively; instead, they were to apply only to legislative action the state governments took, after the requisite number of states had ratified the Constitution. With the exception of matters controlled by the rules of general common law and the rules of law specified in existing treaties, the Constitution followed the general preference for prospective rulemaking, as the language of the Supremacy Clause makes clear.

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497 See Pfander, supra note 69, at 939-42.

498 See Pfander, supra note 13, at 592-97 (arguing that a grant of original federal jurisdiction was seen as necessary to secure a forum for the adjudication of claims against the states, and noting the absence of assured suability in state courts); Pfander, supra note 69, at 939-42 (summarizing provisions of state law that allowed some, but less than universal, state suability in state courts).

499 Others have expressed doubt that the Court’s current regime of broad immunity in lower federal courts and narrow immunity in state courts makes sense in light of the Framers’ distrust of state judges. See, e.g., Amar, supra note 11, at 1477 (stating that the enforceability of federal restrictions only in state court represents an “inexplicable throwback” to the Articles of Confederation).

500 Senator Strong presumably knew that Massachusetts had no provision for suits against the state in its own courts, and would have been puzzled by the notion that the Commonwealth had an obligation to create such a mode in order to facilitate enforcement of federal rights. Cf. Pfander, supra note 13, at 595-97 (arguing that the Framers of Article III were unlikely to have secured the enforcement of federal law by imposing suit on the states in their own courts).
The diversity grant of jurisdiction, over disputes between states and out-of-state citizens and foreign nationals, threatened this general rule of constitutional prospectivity by empowering the federal courts to entertain suits to enforce obligations that the states had incurred under the Articles of Confederation. This prospect of judge-made retrospectivity became an issue in the ratification debates in New York, North Carolina, and Virginia, and in each instance, the Federalists disavowed any such federal judicial intervention in the states’ management of their own pre-constitutional obligations. Nonetheless, the Supreme Court in *Chisholm* concluded that the scope of its diversity jurisdiction extended to actions in assumpsit to enforce existing state debt obligations. Many Federalists, including Senator Strong of Massachusetts, had difficulty defending the decision because it ran counter to the representations they had made in the ratification conventions a few years earlier. So the Federalists joined forces with the Anti-Federalists on the terms of an amendment designed to explain away the Court’s power to entertain these proceedings.

History has largely eliminated the problem that confronted the framers of the Eleventh Amendment. Few federal judges today would invoke the principles of natural law that Edmund Randolph urged and the Court adopted in *Chisholm*. Furthermore, the *Erie* doctrine teaches that the federal courts, sitting in diversity, must ordinarily apply the rule of decision specified by the law of the state in which they sit.\(^{501}\) Although the doctrine has no obvious analogue in matters initiated on the Supreme Court’s original docket, the underlying logic of *Erie* suggests that federal judges no longer view themselves as competent to fashion new rules of law to govern tort and contract claims against the states of the kind that troubled the Eleventh Amendment’s framers. State liability on such claims, as *Nevada v. Hall* starkly illustrates, has become a matter that state law controls entirely.\(^{502}\)

With the demise of general common law, and the rise of a host of potential sources of federal liability in actions arising under the Constitution, laws, and treaties of the United States, issues of state suability in federal court now focus almost exclusively on suits to enforce rights under federal law. Much else has changed in the intervening two hundred years, not the least of which has been most states’ gradual abandonment of the doctrine of sovereign immunity in their own courts, and the Supreme Court’s willingness to direct the states to make appropriate remedies available in those courts. Whether these changes justify the *Seminole* Court’s shift away from first-instance reli-

\(^{501}\) *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

\(^{502}\) *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979) (holding that California may constitutionally impose tort-based liability on Nevada without regard to the doctrine of sovereign immunity).
ance on federal judges to keep the states honest is a question for another day. It is not, however, one that the Eleventh Amendment answers.