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THE MISUNDERSTOOD ELEVENTH AMENDMENT

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*The Eleventh Amendment might be the most misunderstood amendment to the Constitution. Both its friends and enemies have treated the Amendment's written*

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We are grateful for comments and suggestions from Sam Bray, Tom Colby, Scott Dodson, Jonathan Gienapp, Tara Grove, Julian Davis Mortenson, Caleb Nelson, Jim Pfander, Richard Re, Amanda Schwoerke, Eric Segall, Jonathan Urick, Ingrid Wuerth, and from participants in the Fall Speaker Series of the Georgetown Center for the Constitution, the Hugh & Hazel Darling Foundation Originalism Works-in-Progress Conference at the University of San Diego Law School, and Advanced Topics in Federal Courts at the University of Virginia School of Law. Thanks as well to Brendan Anderson, Kurtis Michael, and Scotty Schenck for research assistance, and to the SNR Denton Fund and Alumni Faculty Fund at Chicago for research support.

*text, and the unwritten doctrines of state sovereign immunity, as one and the same—reading broad principles into its precise words, or treating the written Amendment as merely illustrative of unwritten doctrines. The result is a bewildering forest of case law, which takes neither the words nor the doctrines seriously.*

*The truth is simpler: the Eleventh Amendment means what it says. It strips the federal government of judicial power over suits against states, in law or equity, brought by diverse plaintiffs. It denies subject-matter jurisdiction in all such cases, to federal claims as well as state ones, and in only such cases. It can't be waived. It can't be abrogated. It applies on appeal. It means what it says. Likewise, the Amendment does not mean what it does not say: it neither abridges nor enlarges other, similar rules of sovereign immunity, derived from the common law and the law of nations, that limit the federal courts' personal jurisdiction over unconsenting states.*

*Current case law runs roughshod over these distinctions, exposing sound doctrines to needless criticism and sometimes leading the Court off track. Understanding the Amendment's text lets us correct these errors and respect the unwritten law the Amendment left in place.*

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## INTRODUCTION

The competition is tough, but the Eleventh Amendment still might be the most misunderstood amendment to the Constitution. Adopted in 1795, the Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.<sup>1</sup>

Ever since, the Amendment's friends and enemies have competed with each other to misconstrue it. Despite their differences, they've often made the same mistake: treating the written text of the Amendment, and the unwritten doctrines of state sovereign immunity, as one and the same. The result is a bewildering forest of case law, which takes neither the words nor the doctrines seriously. This Article tries to mark a more straightforward path.

Past understandings have usually gone wrong in one of two ways. The first is to treat the entire doctrine of state sovereign immunity as somehow inscribed within the Eleventh Amendment's words. Some make this mistake by adopting a broad view of immunity, and by reading the Amendment for more than it's worth. Though the text refers only to plaintiffs from "another State" or a "Foreign State," this broad theory concludes that a penumbral "Eleventh Amendment immunity" extends even to in-state suits.<sup>2</sup> Others, who take a narrower view of sovereign immunity, have read the Amendment for less than it's worth. What might be called a "compromise theory" of the Amendment holds that its enactors, having named a precise set of cases in the text, deprived the states of any other immunity in any other federal cases.<sup>3</sup> And under the "diversity theory," which is narrower still, there is no immunity

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

<sup>2</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 247 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (holding that a suit by a Pennsylvania citizen against an arm of the state "contravenes the Eleventh Amendment"); cf. William P. Marshall, Commentary, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1389 (1989) (arguing that both *Hans v. Louisiana*, 134 U.S. 1 (1890), and its critics "ultimately rest on non-textual assumptions").

<sup>3</sup> See, e.g., Andrew B. Coan, Essay, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2527-39 (2006); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1722-25 (2004); Lawrence C. Marshall, Commentary, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1356-71 (1989); cf. Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 66 (1989) (taking this position with respect to the Eleventh Amendment but suggesting that there may be Tenth Amendment immunities as well).

even for some cases falling *within* the Amendment's text, if they also fall within some other head of federal jurisdiction.<sup>4</sup>

A second wrong turn treats the Amendment as merely illustrative of sovereign-immunity doctrines writ large.<sup>5</sup> For example, common-law sovereign immunity can be waived by the sovereign, and maybe it can also be abrogated by certain federal statutes.<sup>6</sup> Modern interpreters have mistakenly inferred that the Eleventh Amendment can be waived or abrogated too.<sup>7</sup> Likewise, common-law sovereign immunity lets a state consent to suit in its own courts, sometimes exposing it to Supreme Court review on appeal.<sup>8</sup> But the Court has mistakenly concluded that its appellate jurisdiction is generally exempt from the Amendment's terms.<sup>9</sup>

The truth is simpler. The Eleventh Amendment means what it says. It eliminates federal judicial power over one set of cases: suits filed against states, in law or equity, by diverse plaintiffs. It strips subject-matter jurisdiction in *all* such cases, regardless of why or how the plaintiffs are in

4 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 109-16, 153 (1996) (Souter, J., dissenting); *see, e.g., Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 509-10 (1987) (Brennan, J., dissenting); *Atascadero*, 473 U.S. at 259 (Brennan, J., dissenting); Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 490-98 (1989) [hereinafter Amar, Marbury]; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1474-75 (1987) [hereinafter Amar, *Sovereignty*]; Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 443 (2002); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1263-64 (1989) [hereinafter Fletcher, *Reply*]; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1035 (1983) [hereinafter Fletcher, *Interpretation*]; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1893-94 (1983); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 45 (1988); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 10-13; James E. Pfander, *History and State Suability: An 'Explanatory' Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1279-80 (1998); Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts"*, 81 N.C. L. REV. 1927, 1943 (2003); Thomas D. Rowe, Jr., *Exhuming the "Diversity Explanation" of the Eleventh Amendment*, 65 ALA. L. REV. 457, 459 (2013).

5 *See, e.g., Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (reading the Amendment "not so much for what it says" as for the broader "presupposition of our constitutional structure which it confirms" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))).

6 *See Curran v. Arkansas*, 56 U.S. (15 How.) 304, 309 (1853) (consent); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (abrogation).

7 *See, e.g., Lapidus v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002) (contending that a state is "free to waive its Eleventh Amendment immunity"); *Fitzpatrick*, 427 U.S. at 456 (describing "the Eleventh Amendment" as "necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

8 *See, e.g., Curran*, 56 U.S. at 309.

9 *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990).

federal court, and in *only* such cases. It can't be waived. It can't be abrogated. It applies in the Supreme Court. It means what it says.

By the same token, the Eleventh Amendment *does not* mean what it *does not* say. The Amendment doesn't implicitly repeal any other, similar rules of sovereign immunity—including any limits on the federal courts' personal jurisdiction, properly derived from the common law and the law of nations. The general law of sovereign immunity existed before the Constitution; it remained mostly intact after the Constitution; and it survived the Eleventh Amendment, too.

Despite this confusion, the Supreme Court has arrived at mostly right answers in its sovereign immunity cases, most of the time.<sup>10</sup> But many of those right answers were wrongly defended, with the Court carelessly mashing the written and unwritten rules into a formless “hybrid” theory.<sup>11</sup> This carelessness exposed sound doctrines to needless criticism, and occasionally it caused the Court to veer off track. Distinguishing the unwritten rules of sovereign immunity from the written rules of the Eleventh Amendment lets us deal with each set of rules on its own terms, and lets us respect the text as meaning what it says.<sup>12</sup>

In this piece we try to set things right, by putting the Eleventh Amendment in its historical context. As understood when enacted, the Amendment's words made sense in light of the common-law principles that preceded them. In so arguing, we draw on insights from previous scholarship,<sup>13</sup> together with previously overlooked aspects of the historical materials—both of which we believe haven't yet been properly assembled, and which become far more persuasive when properly aligned. In sum:

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<sup>10</sup> See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 3 (2017); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1868-75 (2012); Brief of Professors William Baude & Stephen E. Sachs as Amici Curiae in Support of Neither Party at 12-15, *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019) (No. 17-1299) [hereinafter *Hyatt* Brief].

<sup>11</sup> *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring); see also *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 310-11 (1973) (Brennan, J., dissenting); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1609-11 (2002) (describing the “hybrid nature” of the Court's Eleventh Amendment jurisprudence).

<sup>12</sup> Compare, e.g., Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 516 (1978) (arguing that the Amendment does not “mean what it says”), with Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817, 1819 (2010) (suggesting that it does).

<sup>13</sup> See generally Nelson, *supra* note 11. See, e.g., Clark, *supra* note 12; Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 WM. & MARY L. REV. 1577 (2009); Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 NOTRE DAME L. REV. 1135 (2009).

- States are protected by *two* forms of sovereign immunity.
- *The first* is a common-law immunity from compulsory process, one that prevents states from being forced into court without their consent. This immunity existed before the Constitution; it wasn't eliminated by Article III; and it largely can't be abrogated by Congress under Article I. Its limits derive from the common law itself.
- *The second* is the Eleventh Amendment. The Amendment supplements the traditional immunity, limiting the subject-matter jurisdiction of the federal courts when certain kinds of plaintiffs sue a state in law or equity. Its limits apply across-the-board, whatever the head of federal jurisdiction. They can't be waived. They can't be abrogated. They apply to the Supreme Court. They protect states, and states alone.

### I. "POSTULATES WHICH LIMIT AND CONTROL"

Sovereign immunity has a troubled relationship with text. Recall the confident declaration of *Monaco v. Mississippi*: "Behind the words of the constitutional provisions are postulates which limit and control."<sup>14</sup> This claim has come in for some ribbing,<sup>15</sup> and for good reason: when the text is clear, background "postulates" are the last refuge of scoundrels.

So *Monaco's* claims are easy to dismiss—too easy. Read carefully, they reflect anything but indifference to text. On the contrary, they recognize the need to read enactments for what they actually say, in light of their unwritten antecedents, and with an eye to the preexisting *corpus juris*.<sup>16</sup> If anything, ignoring the "postulates" behind the Eleventh Amendment is what's gotten our textual analysis into trouble.

#### A. Beyond "Eleventh Amendment Immunity"

The usual story of the Eleventh Amendment is well-known. In 1793, the Court in *Chisholm v. Georgia* let a South Carolina citizen use its original

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<sup>14</sup> 292 U.S. 313, 322 (1934).

<sup>15</sup> See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 n.13 (1996) (Souter, J., dissenting) (arguing that such reasoning "stray[s] beyond the boundaries of traditional constitutional analysis"); Henry Paul Monaghan, Comment, *The Sovereign Immunity 'Exception'*, 110 HARV. L. REV. 102, 121 (1996) (arguing that "the power of symbolism" swayed the Court to "reject[] clear constitutional text in preference to unarticulated and debatable historical explanations"); cf. Brannon P. Denning & Glenn Harlan Reynolds, Essay, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1101 (1997) ("penumbral reasoning"); Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CALIF. L. REV. 429, 440 (1998) ("lively constitutional adjudication"); Ernest A. Young, Alden v. Maine and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601, 1619 (2000) ("amorphous").

<sup>16</sup> William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1099 (2017) ("The Constitution was a legal document, adopted in a world with legal rules of interpretation already in place, and those unwritten rules may well have shaped its legal content.").

jurisdiction to sue the State of Georgia for debt.<sup>17</sup> The ensuing “shock of surprise”<sup>18</sup> prompted Congress to propose, and the states to ratify, the Eleventh Amendment. That Amendment reversed *Chisholm*, forbidding suits “against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>19</sup> In time, the Court came to read the Amendment as “confirm[ing]” a broader “presupposition of our constitutional structure,”<sup>20</sup> and to apply its terms to a much broader range of circumstances: suits by citizens of the same state,<sup>21</sup> suits by other unenumerated plaintiffs,<sup>22</sup> suits in admiralty (and not just “law or equity”),<sup>23</sup> and so on. Through a sort of synecdoche, all questions of state sovereign immunity have now come to touch on the Eleventh Amendment; the phrase “Eleventh Amendment immunity” thus serves as appropriate shorthand for state sovereign immunity in general.<sup>24</sup>

So goes the usual story. But at the risk of stating the obvious, it isn’t a true story, at least where the Constitution is concerned. Neither the Eleventh Amendment nor any “Eleventh Amendment immunity” extends to suits not described in the Amendment’s text. Reading the words “another State” as if they included “the same State,” or the phrase “law or equity” as if it included “admiralty,” and so on, is the most risible kind of purposivism—and would indeed be funny, if it weren’t sometimes done seriously.

But. The Court has generally been *right* to hold the states immune to suits by in-state citizens, suits in personam in admiralty, and the like. It’s merely that *this* immunity has nothing to do with the Eleventh Amendment.

Long before the Eleventh Amendment was ratified, indeed even before the Constitution was written, the states were protected by doctrines of sovereign immunity. These doctrines were drawn from the law of nations and

<sup>17</sup> 2 U.S. (2 Dall.) 419, 420 (1793).

<sup>18</sup> *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). Compare *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco*, 292 U.S. at 325), *with id.* at 106 n.5 (Souter, J., dissenting) (“[T]he contentions in some of our earlier opinions that *Chisholm* created a great ‘shock of surprise’ misread the history.”).

<sup>19</sup> U.S. CONST. amend. XI.

<sup>20</sup> *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (internal quotation marks and citation omitted).

<sup>21</sup> *Hans*, 134 U.S. at 1.

<sup>22</sup> *Monaco*, 292 U.S. at 330-32 (foreign principality); *Smith v. Reeves*, 178 U.S. 436, 440-41 (1900) (federally chartered railroad).

<sup>23</sup> *In re New York*, 256 U.S. 490, 497, 500 (1921).

<sup>24</sup> *E.g.*, *Coleman v. Ct. of Appeals*, 566 U.S. 30, 43 (2012) (plurality opinion) (describing Maryland’s “Eleventh Amendment immunity from suits”); *Pense v. Md. Dep’t of Pub. Safety & Corr. Servs.*, 926 F.3d 97, 100-02 (4th Cir. 2019) (referring to state sovereign immunity as “Eleventh Amendment immunity”); *cf.* *Kanuszewski v. Mich. Dep’t of Health & Hum. Servs.*, 927 F.3d 396, 413 n.7 (6th Cir. 2019) (“State sovereign immunity is sometimes called ‘Eleventh Amendment’ immunity because that amendment reaffirmed the doctrine after it was thrown into doubt; however, this immunity emanates from our overall constitutional framework rather than existing in any one amendment.”).

from the common law of which it was a part, and they exempted an unconsenting sovereign from what we today call a court's personal jurisdiction.<sup>25</sup> (We sometimes give these unwritten doctrines the label of "common law," but "general law" might be more precise:<sup>26</sup> this law was often shared by multiple jurisdictions, and it included rules of equity or admiralty more properly excluded from the "common law" label.)

As Caleb Nelson has persuasively shown, under these doctrines a sovereign state wasn't amenable to suit and couldn't be haled into court as a defendant.<sup>27</sup> Pennsylvania's attorney general explained in 1781 that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void."<sup>28</sup> While these doctrines were only rarely codified in statute or constitutional text, that was no cause for surprise: the states were already accustomed to applying a general law of personal jurisdiction.<sup>29</sup>

As is argued in more detail elsewhere,<sup>30</sup> there's very good reason to think the Constitution left these general doctrines alone. Article III expressly extended the federal judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"—and, even more pointedly, to controversies "between a State and Citizens of another State," or "between a State . . . and foreign States, Citizens or Subjects."<sup>31</sup> One could read these

<sup>25</sup> Nelson, *supra* note 11, at 1574-79; *see also* *Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n., 78 n. (Pa. C.P. Phila. Cnty. 1781) (applying the international law of immunity); *cf.* 4 WILLIAM BLACKSTONE, COMMENTARIES \*67 (describing the law of nations as part of the common law).

<sup>26</sup> *See* William A. Fletcher, *General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517-21 (1984); Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505-07 (2006).

<sup>27</sup> *See generally* Nelson, *supra* note 11.

<sup>28</sup> *Nathan*, 1 U.S. at 78 n. (argument of counsel); *see also* 3 THE PAPERS OF JAMES MADISON, CONGRESSIONAL SERIES 187 n.2 (William T. Hutchinson & William M.E. Rachal eds., 1963) (describing a 1781 message regarding *Nathan* from Pennsylvania's attorney general, chief justice, and one associate justice, stating that "all process directed against the person of a Sovereign or against his Goods is absolutely void; that the Sheriff cannot be compelled to serve or return it: and that all concerned in issuing or serving such process are guilty of a violation of the laws of nations," and could be committed "to Gaol to answer for the offence").

<sup>29</sup> *See, e.g.*, *Kibbe v. Kibbe*, 1 Kirby 119, 125-26 (Conn. Super. Ct. 1786) (rejecting a Massachusetts judgment, though "conformable to the laws and customs of the said commonwealth of Massachusetts," because that court "had no legal jurisdiction of the cause"); *Jenkins v. Putnam*, 1 S.C.L. (1 Bay) 8, 10 (1784) (stating that "the law of nations" required respecting foreign judgments, but only if they were issued by "a court of competent jurisdiction," for otherwise "the whole circumstances of the case would have been open for a full investigation, agreeable to the principles of the common law"); *cf. Rose v. Himely*, 8 U.S. (4 Cranch) 241, 276-77 (1808) (noting that a foreign court's judgments "are not regarded" by other courts "if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer").

<sup>30</sup> *See* Baude, *supra* note 10, at 4-12; Nelson, *supra* note 11, at 1580-1601; Clark, *supra* note 12, at 1863-75; Lash, *supra* note 13, at 1599-1603, 1618-27, 1641-50, 1653-76; Menashi, *supra* note 13, at 1155-75.

<sup>31</sup> U.S. CONST. art. III, § 2, cl. 1.



categories of subject-matter jurisdiction as abrogating the states' personal immunities, the way the provision for "Controversies between two or more States" presupposed that states could be sued against their will.<sup>32</sup> Indeed, some people did read Article III that way.<sup>33</sup> But when the issue came up during Ratification, most of the Constitution's defenders took the opposite view—including folks like Alexander Hamilton in New York,<sup>34</sup> James Madison and John Marshall in Virginia,<sup>35</sup> and Rufus King in Massachusetts.<sup>36</sup> They contended that the background principles of immunity remained in force, and that Article III had to be understood in their light.<sup>37</sup> As Madison pointed out, Article III's citizen-diversity clauses hadn't erased the disabilities of alien enemies or married women to sue and be sued; neither had the state-diversity clauses erased the states' immunity to judicial process.<sup>38</sup>

It was natural for Madison's audience to expect the new courts of the United States, hearing cases "in Law and Equity" or "of admiralty and maritime Jurisdiction,"<sup>39</sup> to continue to apply principles of general law that courts of law, equity, or admiralty had traditionally applied.<sup>40</sup> (Such principles were also needed to explain the sovereign immunity of the United States itself—which is less controversial, but no less unwritten.) In any case, in the view of the majority of Founding-era commentators, as well as most Supreme Court decisions of the past 130 years, the Constitution's defenders had the better of the argument.<sup>41</sup>

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<sup>32</sup> *Id.*; see *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838) (holding that, under this clause, "[t]he states waived their exemption from judicial power").

<sup>33</sup> See, e.g., *Brutus*, XIII, N.Y.J., Feb. 21, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 172, 172 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter DHRC]; Debates of the Virginia Convention (June 19, 1788), in 10 DHRC, *supra*, at 1387, 1406 (statement of George Mason); see also, e.g., Debates of the Virginia Convention (June 21, 1788), in 10 DHRC, *supra*, at 1441, 1453-56 (statement of Edmund Randolph) (arguing that Article III abrogated sovereign immunity and was right to do so).

<sup>34</sup> See THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>35</sup> See Debates of the Virginia Convention (June 20, 1788), in 10 DHRC, *supra* note 33, at 1412, 1414, 1433.

<sup>36</sup> See *Marcus*, MASS. MERCURY (Salem, Mass.), July 13, 1793, reprinted in 5 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 389, 389-90 (Maeva Marcus ed., 1994) [hereinafter DHSC] (noting that the Massachusetts convention assented to Article III on King's guarantee that state sovereign immunity would not be infringed); *Brutus*, INDEP. CHRON. (Bos.), July 18, 1793, reprinted in 5 DHSC, *supra*, at 392, 392; *Democrat*, Mass. Mercury (Bos.), July 23, 1793, reprinted in 5 DHSC, *supra*, at 393-94, 395 nn.3-4.

<sup>37</sup> Nelson, *supra* note 11, at 1580-92.

<sup>38</sup> Debates of the Virginia Convention, *supra* note 35, at 1414.

<sup>39</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>40</sup> See Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1254-1300 (1985) (describing the Founding-era role of general law).

<sup>41</sup> See Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. SUP. CT. HIST. 73, 73, 84 (describing the "relatively small but vocal group of pro-*Chisholm* commentators," and indicating that this group was "in the minority"); Nelson, *supra* note 11, at 1564 ("The Court never tires of reminding its critics that during the ratification debates, prominent

### B. The “Postulates” and the Amendment

Nonetheless, four Justices in *Chisholm* ruled against the common-law immunity, allowing a number of pending suits against states to proceed. The Eleventh Amendment was surely written to change the result in *Chisholm* and in these other suits.<sup>42</sup> In so doing, however, the Amendment neither codified nor repealed the preexisting law of sovereign immunity.

This followed from two basic features of our legal system. The first is that we have several kinds of law that layer on top of one another. An ordinary debt case might be governed by unwritten common law, state legislation, a state constitution, a federal treaty, federal legislation, the federal Constitution, or some combination of these. When one kind of law conflicts with another, the “superior” law naturally governs, as in *Marbury v. Madison*.<sup>43</sup> But when the superior law fails to speak to a particular question, that question is answered by some other type of law, lower down.<sup>44</sup>

The second feature is that, while any of these laws can be changed, we have a general presumption against implied repeal.<sup>45</sup> Whenever a legislature enacts a new statute, it changes certain rules, but it leaves most of the law alone. This presumption frees up lawmakers to codify a field one provision at a time—and it lets them solve today’s problems as they arise, without having to reinvent all of yesterday’s solutions.

So too with a constitutional amendment. When the Eleventh Amendment was adopted, it made new constitutional law, altering some of the rules about federal subject-matter jurisdiction over suits against states. But the Amendment did nothing to repeal or alter the preexisting, lower-down, *personal*-jurisdictional rules of state sovereign immunity that *Chisholm* had failed to apply. *Contra Chisholm*, these “backdrop” rules simply continued to govern, unless and until some *other* source of law interrupted them.<sup>46</sup>

This “backdrop” may seem strange to those who see common-law rules as resembling administrative agency regulations. On that view, the Amendment’s precise words might have “occupied the field”;<sup>47</sup> the courts had lost their

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supporters of the proposed Constitution—including both James Madison and John Marshall—explicitly asserted that Article III would *not* expose unconsenting states to suit by individuals.”).

<sup>42</sup> See generally Lash, *supra* note 13 (emphasizing the importance of suits other than *Chisholm*).

<sup>43</sup> 5 U.S. (1 Cranch) 137, 178 (1803).

<sup>44</sup> See Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1267 (2017) (describing how different legal issues might “fall[] through the holes of one type of law to be answered by another—and sometimes slipping all the way through, falling outside the laws of any one state to be caught at the bottom by general law”).

<sup>45</sup> Baude & Sachs, *supra* note 16, at 1110, 1118-20.

<sup>46</sup> See Sachs, *supra* note 10, at 1872 (“*Chisholm* was wrong because Article III really left the states’ preexisting immunity in force.”).

<sup>47</sup> ONEOK, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015) (citation and internal quotation marks omitted).

“authority . . . to craft additional law on the same question,” like agencies foreclosed from regulating pollutants that Congress had already addressed.<sup>48</sup> But the Eleventh Amendment’s adopters saw the preexisting rules of sovereign immunity as *law*, not as a vague delegation to the courts to *go make law*.<sup>49</sup> The constitutional choice to create one type of protection for states neither erased, nor would have been understood to erase, other types of protections.

So our system is left with two distinct principles of state sovereign immunity. One is the common-law principle against forcing states into court—neither created by the Constitution, nor abolished by Article III, nor supplanted by the Eleventh Amendment. The other is the Eleventh Amendment itself, which bars federal jurisdiction over particular suits by particular plaintiffs. If the Amendment applies, it governs; if not, the general immunity governs instead. So principles of sovereign immunity do indeed protect states from many suits by their own citizens, or in their own courts, or in admiralty cases, or the like. But we shouldn’t call those principles “Eleventh Amendment immunity,” presuppositions of our constitutional structure, and so on. They come from a common-law immunity that predates and outlasts the Eleventh Amendment itself.

And though Supreme Court decisions like *Hans v. Louisiana*<sup>50</sup> wouldn’t win any prizes for draftsmanship, on a careful reading they may have understood this distinction. After its references to the Eleventh Amendment, *Hans* went on to note the preratification arguments made by Hamilton, Madison, and Marshall (calling them “most sensible and just”);<sup>51</sup> to argue that “the suability of a State without its consent was a thing unknown to the law”;<sup>52</sup> and to speak of a “presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution.”<sup>53</sup> In other words, *Hans* can be read as an Article III case, rather than an Eleventh Amendment case.

The subsequent decision in *Monaco v. Mississippi*<sup>54</sup> was even more careful to distinguish the Amendment’s text from the unwritten law. The Court acknowledged that the Amendment “contains no reference to a suit brought by a foreign State”; it then explained why this fact was “inconclusive,” for the same thing might be said about *federal* sovereign immunity.<sup>55</sup> Article III

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<sup>48</sup> Manning, *supra* note 3, at 1669, 1735 n.281.

<sup>49</sup> See *supra* Section I.A. See generally Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019) (defending such views of unwritten law).

<sup>50</sup> 134 U.S. 1 (1890).

<sup>51</sup> *Id.* at 13-14.

<sup>52</sup> *Id.* at 16.

<sup>53</sup> *Id.* at 18.

<sup>54</sup> 292 U.S. 313 (1934).

<sup>55</sup> *Id.* at 321.

extends the judicial power “to Controversies to which the United States shall be a Party,” and “there is no express provision that the United States may not be sued.”<sup>56</sup> Yet the federal government is universally seen as protected by “the established doctrine of the immunity of the sovereign from suit except upon consent.”<sup>57</sup> The same reasoning, argued the Court, had to apply to the states: “Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States. Behind the words of the constitutional provisions are postulates which limit and control.”<sup>58</sup>

To identify these postulates, the Court relied in part on contemporary statements of the law of jurisdiction—for example, Madison’s understanding that a foreign state couldn’t sue “an American state . . . without the consent of the parties,” or Marshall’s questioning whether a foreign-state defendant would “be bound by the decision” otherwise.<sup>59</sup> In other words, whether or not *Monaco* was rightly decided, the *form* of its reasoning appears to be correct. The relevant postulates included the law of nations and the general doctrines of sovereign immunity, which predated Article III and the Eleventh Amendment, and which continue to lie behind them even now. Indeed, the loose reasoning of which *Hans* and *Monaco* are accused may actually be that of the Burger Court.<sup>60</sup>

### C. The “Postulates” and the Modern Court

Much of the time, the modern Supreme Court’s confusion between the constitutional law of the Eleventh Amendment and the general law of sovereign immunity is harmless error: the opinion gets to the right place in the end. But not always.

Consider the Court’s recent decision in *Franchise Tax Board v. Hyatt*.<sup>61</sup> The Court took the case to decide, for the third time, whether a state’s sovereign immunity must be recognized in the courts of another state. The Court answered “yes,” overturning prior precedent from 1979.<sup>62</sup> But it conflated different aspects of the two immunity doctrines along the way, ignoring important aspects of the Eleventh Amendment’s text.

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<sup>56</sup> *Id.* (quoting U.S. CONST. art. III, § 2, cl. 1).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 322.

<sup>59</sup> *Id.* at 323-24 (citations omitted).

<sup>60</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 247 (1985) (conflating the doctrine and the text); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 103 n.12 (1984) (same).

<sup>61</sup> 139 S. Ct. 1485 (2019).

<sup>62</sup> *Id.* at 1490 (overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

*What was conflated.* Most of the modern Court’s sovereign immunity cases involved the federal government’s power to hold states to answer. Some cases, such as *Hans* and *Monaco*, asked whether Article III eliminated a preexisting immunity. Others, such as *Seminole Tribe v. Florida*<sup>63</sup> and *Alden v. Maine*,<sup>64</sup> asked whether Congress could abrogate whatever immunity had remained. For the most part, in these cases, the Court said no.

This answer still makes sense even after one realizes that these cases involved the common-law immunity, not the Eleventh Amendment. The general law of immunity is in theory abrogable by statute, just like any other rule of common law or equity; but it’s also a topic over which the federal government has quite limited power. Article III left the immunity in place, and a congressional power to force states into court may have been a “great substantive and independent” power—the kind that would have been mentioned explicitly, and not left out as “incidental to those powers . . . expressly given” in Article I.<sup>65</sup> (Congress can abrogate international law, but not necessarily to the states’ disadvantage; it might have an easier time, say, redrawing the Northwest Territory’s border with Canada than redrawing Maryland’s border with the District of Columbia.<sup>66</sup>) Even the discrepancy between *Seminole Tribe* and earlier cases like *Fitzpatrick v. Bitzer*<sup>67</sup> was mostly comprehensible; abrogating immunity might turn out to be “incidental” to enforcing the Fourteenth Amendment’s limits on states, but not (say) to the Patent Clause.<sup>68</sup>

*Hyatt* was more complicated, for the original action involved no federal power at all. The Nevada plaintiff had filed suit in Nevada court, under Nevada law, against what the parties took to be an arm of the state of California.<sup>69</sup> Whether Nevada had to respect the general law of immunity depended on its judicial and legislative powers. Nothing in the Constitution relevantly restricts those powers, and unlike federal powers, state powers don’t have to be conferred by the Constitution. Had Nevada been one of the

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<sup>63</sup> 517 U.S. 44 (1996).

<sup>64</sup> 527 U.S. 706 (1999).

<sup>65</sup> *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819); see also Baude, *supra* note 10, at 9-22; Nelson, *supra* note 11, at 1639-43; Sachs, *supra* note 10, at 1874-75.

<sup>66</sup> For a broader treatment of courts’ jurisdictional limits and Congress’s potential power to abrogate them, see generally Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 VA. L. REV. 1703 (2020); see also *id.* at 1722, 1730-31, 1732 & n.180 (noting that Congress has power to abrogate international law, but that it might not extend to state sovereign immunity); cf. *infra* Section II.C. (discussing abrogation and the Eleventh Amendment).

<sup>67</sup> 427 U.S. 445 (1976).

<sup>68</sup> See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (finding no abrogation power for patents). But see John Harrison, *State Sovereign Immunity and Congress’s Enforcement Powers*, 2006 SUP. CT. REV. 353 (questioning this power as to the Fourteenth Amendment).

<sup>69</sup> Cf. *Hyatt* Brief, *supra* note 10, at 27 n.6 (noting that the parties might have been wrong about this). One of us may discuss this issue in future work.

original thirteen states, it arguably would have had the power before Ratification to abrogate the common-law immunity (at least within its own courts).<sup>70</sup> So, under the equal-footing doctrine,<sup>71</sup> it might seem that the Silver State retains this power today.

The Supreme Court disagreed, but in so doing it made a mush of sovereign immunity. For example, it correctly acknowledged that the “sovereign immunity of the States . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment.”<sup>72</sup> But rather than recognizing this broader form of immunity as a form of persistent common law, the Court described it as coming from the Constitution itself—something “preserved in the constitutional design,” and perhaps even reflected in “[t]he Constitution’s use of the term ‘States.’”<sup>73</sup>

Here the Court subtly departed from the Constitution’s design as understood for nearly a century after its enactment. The Constitution did offer states some security against the judgments of sister-state courts: by failing to make those judgments *enforceable*, not by imposing an affirmative constitutional ban on rendering them.<sup>74</sup> The Court was right to sense that an important safeguard of immunity had been lost, but the safeguard it resurrected wasn’t the one that had been part of the law.

*What was ignored.* Having over-constitutionalized sovereign immunity in one respect, the Court then proceeded to undervalue the constitutional text in another. When a Nevada citizen files suit against California, that suit is one “commenced or prosecuted against one of the United States by [a] Citizen[] of another State.”<sup>75</sup> Of course, Gilbert Hyatt’s Nevada lawsuit wasn’t barred by the Eleventh Amendment, because the Amendment doesn’t affect state courts. (That’s why the Court’s opinion had to talk about airier stuff.) But when the Court took jurisdiction over the Board’s appeal, that *did* call the Eleventh Amendment into play. The Supreme Court, unlike the Nevada courts, exercises only “the judicial Power of the United States.”<sup>76</sup> That power is constrained by the Eleventh Amendment, and it “shall not be construed to extend to any suit in law or equity, commenced or prosecuted

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<sup>70</sup> See *The Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (“Without doubt, the sovereign of the place is capable of destroying this [immunity].”).

<sup>71</sup> See *PPL Mont., LLC v. Montana*, 565 U.S. 576, 590-91 (2012) (describing the doctrine).

<sup>72</sup> *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019) (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

<sup>73</sup> *Id.* at 1494, 1496; see also Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 873-74 (1999) (advancing this reading of “States” decades before *Hyatt*).

<sup>74</sup> See *Hyatt* Brief, *supra* note 10, at 19-22 (describing the details of this arrangement, which we don’t rehash here).

<sup>75</sup> U.S. CONST. amend. XI.

<sup>76</sup> *Id.* art. III, § 1.

against one of the United States by Citizens of another State.”<sup>77</sup> Hyatt was a citizen of Nevada when he filed suit, and both sides took him to have sued the State of California. As the matter was framed on appeal, the Supreme Court shouldn’t have been able to hear the case at all.

To be sure, older precedents said that the Eleventh Amendment could be waived,<sup>78</sup> and that it didn’t apply at all on review of state judgments.<sup>79</sup> But the *Hyatt* Court was obviously willing to overrule cases it saw as incorrect,<sup>80</sup> and these other precedents were incorrect too—indeed, far more obviously incorrect than the one the Court had before it. Issues of subject-matter jurisdiction being nonwaivable,<sup>81</sup> the Court shouldn’t have allowed the parties’ inattention to these questions to foreclose its own reconsideration.

So the Justices in *Hyatt* exercised a jurisdiction explicitly forbidden by the Eleventh Amendment but blessed by the Supreme Court, in order to overrule a *different* doctrine blessed by the Supreme Court but not actually in conflict with the Eleventh Amendment. The resulting mess suggests that the Eleventh Amendment ought to be better understood.

## II. THE ELEVENTH AMENDMENT

Once we stop misreading the Amendment as the only font of state sovereign immunity, we’re free to read its text to mean just what it says. A straightforward reading of the Amendment has important consequences for modern doctrine. Consider each phrase in turn:<sup>82</sup>

- *The Judicial power of the United States*—The Amendment is a limit on the federal courts’ subject-matter jurisdiction. Subject-matter jurisdiction is nonwaivable, and the Amendment is nonwaivable too. A diverse federal plaintiff may not sue a state in law or equity, even with that state’s consent.
- *shall not be construed to extend*—The Amendment is a cross-cutting limit on the judicial power. It forbids federal courts, in specified cases, to exercise their subject-matter jurisdiction. That means the Amendment bars federal-question cases with the right alignment of parties, just as it bars all other suits within its terms.

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<sup>77</sup> *Id.* amend. XI.

<sup>78</sup> See *infra* Section II.A.

<sup>79</sup> See *infra* Section II.E.

<sup>80</sup> *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019); see also *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) (confirming that the author of *Hyatt* felt obligated not to adhere to “a decision that is demonstrably erroneous—i.e., one that is not a permissible interpretation of the text”).

<sup>81</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998).

<sup>82</sup> We borrow this organizational framework from Coan, *supra* note 3, at 2528.

- *to any suit*—The Amendment is mandatory and exceptionless. As a result, it may not be abrogated by Congress. Neither Article I nor the Fourteenth Amendment let Congress override express constitutional limits on the judicial power.
- *in law or equity*—The Amendment applies only to suits in law or equity. It leaves cases of admiralty and maritime jurisdiction alone. The unwritten immunity may apply in admiralty, but the differences between the Amendment and the common law make the limits of admiralty jurisdiction especially important.
- *commenced or prosecuted*—The Amendment limits the scope of federal subject-matter jurisdiction, whether original or appellate, in actions by diverse plaintiffs against states. It thus forbids the Supreme Court to hear such cases on appeal from state court, regardless of who is appealing.
- *against one of the United States*—The Amendment protects states, and only states. Its terms fail to shield Native American tribes, federal territories, the District of Columbia, Compact Clause entities, and so on. These entities may turn out to enjoy a common-law immunity, but not one under the Amendment.
- *by Citizens of another State, or by Citizens or Subjects of any Foreign State*—The Amendment restricts suits by diverse plaintiffs, and only by diverse plaintiffs. If a state is sued by a Native American tribe, a federal corporation, a Compact Clause entity, a sister state as an assignee-for-collection-only, and so on, the common-law immunity might apply, but the Eleventh Amendment might not.

The result is an Amendment significantly narrower than the general doctrine of immunity—but one that, where it applies, applies with drastic force.

Indeed, this force may seem so drastic as to call the straightforward reading into question. Why should states be able to consent to federal suits by their own citizens, but not to suits by some other state's citizens? Why should a plaintiff's residence affect Congress's abrogation power (if it has one), or the Court's ability to hear federal-question appeals? Why put a bar to some suits into the Constitution itself, but leave so many others (admiralty, foreign states, etc.) to the vagaries of the common law? What sense does any of this make?

Stark as they are, these consequences flow from rough-cut decisions that made sense in the context of the Eleventh Amendment's enactment. The Amendment was drafted to solve a pressing problem: a flawed inference that Article III's heads of subject-matter jurisdiction—particularly the state-diversity provision—had repealed the states' personal immunities. Attorney General Charles Lee, arguing the very first case to construe the new Amendment, described it as “the policy of the people to cut off that branch of the judicial power, which had been supposed to authorize suits by



individuals against states.”<sup>83</sup> The Amendment solved the problem, all right: it cut off that branch with a chainsaw.

The Amendment’s supporters had sought, as they repeated over and over again, 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 to answer in *any* suit by an individual or individuals in *any* Court of the United States.”<sup>84</sup> We will see in a moment why they thought the proposed text would achieve this, notwithstanding its limited reach. But their broad opposition to suits against states suggests that they weren’t *trying* to draft an Amendment whose language cut too carefully, and especially not one that might generate any negative inference *supporting* federal jurisdiction in other individual suits against states. If the Amendment extended its constitutional bar to a few more suits against states than was absolutely necessary, so much the better. The urgent circumstances to which the Eleventh Amendment responded made it logical to write it in a particular way. This choice still has consequences for modern law, even if its logic is now obsolete.

#### A. “*The Judicial power of the United States*”: Waiver

##### 1. Text and History

The general law of sovereign immunity involves an immunity from compulsory process. Because it limits a court’s *process*, it affects whether a sovereign may be haled into court. And because it concerns *compulsory* process, it can be waived by consent, as part of the doctrine we now call “personal jurisdiction.”<sup>85</sup>

The Eleventh Amendment is different. It restricts “[t]he Judicial power of the United States”—a reference to subject-matter jurisdiction, not personal jurisdiction.<sup>86</sup> It creates a categorical rule limiting the federal courts’ power to adjudicate certain cases, even if the parties were ready and willing to appear. Eleventh Amendment cases lie outside “[t]he Judicial power of the

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<sup>83</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798) (argument of Charles Lee).

<sup>84</sup> Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 DHSC, *supra* note 36, at 440, 440 (emphasis added); *see also* Resolution of the Connecticut General Assembly (Oct. 29, 1793), in 5 DHSC, *supra* note 36, at 609, 609; Proceedings of the South Carolina Senate (Dec. 17, 1793), in 5 DHSC, *supra* note 36, at 610, 611; Proceedings of the Maryland House of Delegates (Dec. 27, 1793), in 5 DHSC, *supra* note 36, at 611, 611; Proceedings of the Pennsylvania House of Representatives (Dec. 30, 1793), in 5 DHSC, *supra* note 36, at 612, 613; Resolution of North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, *supra* note 36, at 615, 615; Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), in 5 DHSC, *supra* note 36, at 618, 618.

<sup>85</sup> Nelson, *supra* note 11, at 1565.

<sup>86</sup> U.S. CONST. amend. XI; *accord* Nelson, *supra* note 11, at 1610.

United States,” so they can’t be tried by consent, any more than two citizens of Pennsylvania can agree to bring their fender-bender into federal court.

This choice of language was consequential. Historically, if a court lacked power to compel a party’s attendance, that problem was cured by the party’s voluntary appearance.<sup>87</sup> The same doctrine applied to sovereign immunity. For example, in his dissent in *Chisholm*, Justice Iredell noted that an earlier case against Maryland hadn’t presented the issue, “because the Attorney-General of the State voluntarily appeared.”<sup>88</sup> And the first post-*Chisholm* amendment proposal, offered by Representative Sedgwick of Massachusetts the day after the decision was announced, was designed to protect the states from compulsory federal process, providing that “no state shall be liable to be made a party defendant” in private federal suits.<sup>89</sup>

But the actual Amendment grew out of a different proposal. Introduced the next day by Senator Strong of Massachusetts, this draft restricted federal subject-matter jurisdiction and the extent of “The Judicial Power.”<sup>90</sup> While we can’t read its drafters’ minds, we do know that a number of federal suits were already pending against states; one case against New York eventually went to trial and final judgment while the Amendment was out for ratification.<sup>91</sup> Even if a new amendment eventually restored an immunity from compulsory process, there were still plausible arguments that the states dragged into court under *Chisholm* had lost their immunity in the interim. Designing the Eleventh Amendment as a limit on subject-matter jurisdiction eliminated this problem, making it clear that suits would have to be wiped off the docket without any question of waiver or forfeiture.<sup>92</sup>

The Amendment’s contemporaries recognized the difference. Although the requisite number of states had ratified the Amendment by 1795, the news from the state legislatures didn’t reach Philadelphia until 1798, when ratification was finally declared.<sup>93</sup> As soon as this happened, the Supreme Court scheduled argument in *Hollingsworth v. Virginia*, and it confirmed that the Amendment had uncompromisingly eradicated all pending suits.<sup>94</sup> Plaintiffs’ counsel had argued that applying the Amendment to pending cases

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<sup>87</sup> See, e.g., *Mayhew v. Thatcher*, 19 U.S. (6 Wheat.) 129, 130 (1821); *Pollard v. Dwight*, 8 U.S. (4 Cranch) 421, 428-29 (1808).

<sup>88</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793).

<sup>89</sup> Proceedings of the United States House of Representatives (Feb. 19, 1793), *GAZETTE OF THE U.S.* (Phila.), Feb. 20, 1793, reprinted in 5 DHSC, *supra* note 36, at 605, 605-06.

<sup>90</sup> Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, *supra* note 36, at 607, 607.

<sup>91</sup> For descriptions of these suits, see 5 DHSC, *supra* note 36, at 61-66 (New York); *id.* at 282-85 (Virginia); *id.* at 364-65 (Massachusetts).

<sup>92</sup> See Nelson, *supra* note 11, at 1604-05 (“By using the language of subject matter jurisdiction, the Eleventh Amendment kept the Supreme Court from proceeding to judgment in these pending cases . . .”).

<sup>93</sup> 5 DHSC, *supra* note 36, at 289 & n.97.

<sup>94</sup> *Id.* at 289; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798).

would be a “great hardship” and contrary to “[t]he spirit of the constitution,” permitting “the mischief of an *ex post facto* Constitution” (as well as arguing, more famously, that the Amendment hadn’t been validly adopted).<sup>95</sup> To the contrary, said Attorney General Lee, the Amendment had been written to “cut off” or “annihilate[] a part, of the judicial authority of the United States”; it was “equally operative in all the cases against states, where there has been an appearance, or even where there have been a trial and judgment.”<sup>96</sup> Lee won in a rout. As Dallas’s report puts it:

The Court, on the day succeeding the argument, delivered an unanimous opinion, that the amendment being constitutionally adopted, there could not be exercised any jurisdiction, *in any case, past or future*, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.<sup>97</sup>

As a subject-matter companion to the states’ personal immunities, the Eleventh Amendment’s limited restrictions made a good deal of sense. Consider the basis for the erroneous decision in *Chisholm*. Some provisions of Article III *do* seem to effect a waiver of immunity: the “judicial Power” over “Controversies between two or more States,” for example, suggests that at least one state will always have to be a defendant, and it would be implausible to provide for such cases if the defendant state didn’t need to show up.<sup>98</sup> *Chisholm*’s supporters thought the same was true of the power to hear controversies “between a State and Citizens of another State,” or foreign “Citizens or Subjects”; *Chisholm*’s many critics thought this inference unwarranted.<sup>99</sup> But an amendment wiping out federal subject-matter jurisdiction in diverse-plaintiff cases against states would eliminate the only plausible grounds for such an inference: none of the *other* heads of subject-matter jurisdiction posed any similar threat of being misconstrued. (Maybe some, like Justice Wilson, might have found a similar waiver in a general grant

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<sup>95</sup> 3 U.S. at 378-80 (arguments of counsel).

<sup>96</sup> *Id.* at 380-81 (emphasis omitted).

<sup>97</sup> *Id.* at 382 (emphasis added).

<sup>98</sup> U.S. CONST. art. III, § 2, cl. 1; *cf.* Debates of the Virginia Convention (June 20, 1788) in 10 DHRC, *supra* note 33, at 1412, 1414 (statement of James Madison) (footnote omitted) (“The next case, where two or more States are the parties, is not objected to. Provision is made for this by the existing articles of Confederation; and there can be no impropriety in referring such disputes to this tribunal.”).

<sup>99</sup> Compare *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 473 (1793) (opinion of Jay, C.J.), *with id.* at 449-50 (Iredell, J., dissenting) (suggesting that “every word in the Constitution may have its full effect without involving this consequence”); *see also* Letter from Edmund Pendleton to Nathaniel Pendleton (Aug. 10, 1793), in 5 DHSC, *supra* note 36, at 232, 233 (admitting that Article III’s words “will extend to the case,” but doubting whether, “when they may be satisfied by an Application to one which is common & Ordinary, & the other is new & extraordinary . . . sound construction would confine the General words to the first case”).

of federal-question jurisdiction; very few others would have joined him.<sup>100</sup>) That's why an Eleventh Amendment focused only on state-diversity suits reassured those who feared "any suit by an individual" against a state;<sup>101</sup> the Amendment eliminated subject-matter jurisdiction over some suits, the better to preserve a personal-jurisdiction immunity against the rest.

That's also why one ought to be careful with modern claims "that Congress," in proposing the Eleventh Amendment, "acted not to change but to restore the original constitutional design."<sup>102</sup> By and large, the Amendment *had* restored the original design; private federal suits against states were barred, one way or another. But the Amendment didn't quite reestablish the *status quo ante Chisholmum*, because the new system of immunity was slightly more complicated than the old. Maybe the Amendment could have been drafted differently, reasserting the states' pre-*Chisholm* immunity from compulsory process (with special language to address waivers in pending cases, and so on). Instead, the drafters found it simpler to supplement one immunity with another. In so doing, they adopted a nonwaivable limit on federal judicial power.<sup>103</sup>

## 2. Judicial Misconstruction

This understanding of the Amendment survived for nearly a century, until the Supreme Court botched it in 1883. *Clark v. Barnard* was a complicated equity suit about a disputed sum of money arising out of the bankruptcy of a railroad company.<sup>104</sup> The company's officers deposited \$100,000 with the treasurer of Boston, and then they used that deposit as

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<sup>100</sup> Compare *Chisholm*, 2 U.S. at 457 (opinion of Wilson, J.) (arguing that, "[a]s to the purposes of the Union . . . Georgia is NOT a sovereign state," because "the Supreme Power resides in the body of the people"), with Letter from John Wereat to Edward Telfair (Feb. 21, 1793), in 5 DHSC, *supra* note 36, at 222, 223 (repeating Rep. Sedgwick's statement doubting that "any professional Gentleman would have risked his reputation on such a forced construction of the clause in the Constitution"), Nelson, *supra* note 11, at 1580 n.97 (noting contemporary "astonishment" at Wilson's opinion), and *id.* at 1584 ("Suits against a state need not be regarded as suits against an impersonal (and therefore nonsovereign) government, but can instead be seen as suits against the sovereign people of the state in their collective capacity.").

<sup>101</sup> See sources cited *supra* note 84.

<sup>102</sup> *Alden v. Maine*, 527 U.S. 706, 722 (1999).

<sup>103</sup> Modern caselaw has extended state sovereign immunity to include limits on federal executive power, when that power is exercised in the form of an administrative-agency adjudication initiated by a private party. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). Thankfully, the Court didn't attribute those limits to the Eleventh Amendment, as opposed to background principles of immunity. See *id.* at 754. While the breadth of the common-law immunity is outside this Article's scope, we note that the Court partly rested its decision on the agency's purported ability to bind private rights, *id.* at 763, traditionally something that only judicial power could do. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1541-47, 1577-78 (2020).

<sup>104</sup> *Clark v. Barnard*, 108 U.S. 436, 436-37 (1883).

surety for a \$100,000 bond from the treasurer of Rhode Island. After bankruptcy, the railroad's assignees filed a suit in federal court trying to get the money back from the Boston treasurer and to stop the Rhode Island treasurer from collecting it.<sup>105</sup>

Clark, the Rhode Island treasurer, tried to have the suit dismissed on Eleventh Amendment grounds. He argued that the real party in interest was his employer, the State of Rhode Island, and that the plaintiffs were citizens of Connecticut and Massachusetts.<sup>106</sup> But Clark had been sued "as a wrongdoer in his individual capacity," so the Amendment may not have applied.<sup>107</sup>

The plot, such as it was, thickened. The Boston treasurer paid the disputed sum into court, and the State of Rhode Island itself intervened in the case and filed a claim for the funds. But the lower court awarded the money to the railroad, at which point the state and its treasurer both appealed to the Supreme Court.<sup>108</sup> The Court concluded that the Eleventh Amendment question was resolved by the state's choice to file a claim:

We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. *The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure*; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. *It became an actor as well as defendant,*

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<sup>105</sup> *Id.* at 442-45.

<sup>106</sup> *Id.* The assignees—George Barnard, Charles Bradley, and Charles Chapman—didn't state their own personal citizenship in the bill of complaint, and the Supreme Court record sheds no light on the question. (Having been appointed by a federal court, they may not have needed to establish diversity jurisdiction.) The Rhode Island treasurer relied on the railroad's having been chartered in Connecticut and Massachusetts. See Transcript of Rec. at 6, *Clark*, 108 U.S. 436 (No. 266) ("[T]he complainants in said bill have commenced and do prosecute the same in their capacity of assignees in bankruptcy of a corporation which is a citizen of other States of the United States than the said State of Rhode Island and Providence Plantations . . ."); accord *id.* at 12. The Supreme Court had by that time adopted the doctrine that a corporation, for Article III purposes, is a citizen of its state of incorporation. See *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844). But see *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809) (holding that a corporation's citizenship depends on that of "the real persons who come into court, in this case, under their corporate name").

<sup>107</sup> *Clark*, 108 U.S. at 448; see also *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857-58 (1824) (limiting the Eleventh Amendment's scope to suits in which a state is a party of record).

<sup>108</sup> *Clark*, 108 U.S. at 445-46.

as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title.<sup>109</sup>

So far as we can tell, this is the first time the Supreme Court actually held the Eleventh Amendment to be waivable. Several decades earlier, it had heard an appeal in a state-court suit to which Arkansas had consented; but the plaintiff was an Arkansas citizen, and so the Amendment wasn't involved.<sup>110</sup> Two months before *Clark*, in *New Hampshire v. Louisiana*, the Court discussed in dicta the Amendment's "evident purpose" of "prohibit[ing] all suits against a State by or for citizens of other States, or aliens, *without the consent of the State to be sued.*"<sup>111</sup> But the Court's confusion here might be forgivable: the states' preexisting personal immunity could indeed be waived by consent, and as consent wasn't at issue in *New Hampshire*, there was no reason for the Court to think carefully about it.

In any event, *Clark* did reach a holding on waiver: the wrong holding. The Eleventh Amendment allows states to prosecute claims in federal court; it speaks only of suits "commenced or prosecuted *against*" a state.<sup>112</sup> This was enough to resolve the controversy in *Clark*, in which the state had filed its own claim to the funds, becoming "actor as well as defendant."<sup>113</sup> But it doesn't follow that a state, contrary to the Amendment's text, can let a suit be commenced or prosecuted *against it*—i.e., that a state can become a defendant, even voluntarily. Having conflated a state's choice to initiate a claim with a state's choice to defend one, the Court gave no explanation of how the latter complied with the Eleventh Amendment, nor (of course) did it discuss any of the history mentioned above.

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<sup>109</sup> *Id.* at 447-48 (emphasis added).

<sup>110</sup> *Curran v. Arkansas*, 56 U.S. (15 How.) 304, 309 (1853); Transcript of Rec. at 3, *Curran*, 56 U.S. 304 (No. 205); *cf.* *Bank of the U.S. v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907-08 (1824) (suggesting that "[t]he State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all the privileges of that character," but resolving the Eleventh Amendment argument on the ground that "[t]he State does not, by becoming a corporator, identify itself with the corporation," and that "[t]he Planters' Bank of Georgia is not the State of Georgia" for purposes of subject-matter jurisdiction).

<sup>111</sup> 108 U.S. 76, 91 (1883) (emphasis added).

<sup>112</sup> U.S. CONST. amend. XI (emphasis added).

<sup>113</sup> *Clark*, 108 U.S. at 448; *accord* Paul Horton, *Lapides v. Board of Regents and the Untrustworthiness of Unanimous Supreme Court Decisions*, 41 SAN DIEGO L. REV. 1057, 1081 (2004) ("The Eleventh Amendment was irrelevant to this issue because the Amendment had nothing to say about litigation initiated by a State in federal court . . ."); *cf.* 3 BLACKSTONE, *supra* note 25, at \*25 (differentiating among "*actor, reus, and judex*," in which "the *actor*, or plaintiff, . . . complains of an injury done").

Once the Court had openly stated that the Eleventh Amendment was a “personal privilege which [the state] may waive at pleasure,”<sup>114</sup> the seeds of confusion were sown. The Court repeated the point in *Hans v. Louisiana*,<sup>115</sup> a case which famously fell outside the Amendment’s terms, and one which is regularly accused of conflating the Eleventh Amendment with the common-law immunity. Sure enough, the Court kept repeating its consent claim in actual Eleventh Amendment cases such as *Gunter v. Atlantic Coast Line Railroad Co.*<sup>116</sup> and *Missouri v. Fiske*.<sup>117</sup> And it reiterated the statement in other, more apt, cases such as *Smith v. Reeves*, brought by a federally chartered railroad,<sup>118</sup> and *Georgia v. City of Chattanooga*, which discussed a prospective suit in *state* court.<sup>119</sup>

A few Justices in the 1970s and 1980s briefly attempted to disentangle the issues of consent in real Eleventh Amendment cases from those in other cases involving immunity.<sup>120</sup> But the attempt failed quickly. By the time its modern cases addressed questions of constructive waiver<sup>121</sup> or removal,<sup>122</sup> the Court was describing consent as a “long recognized”<sup>123</sup> and “long accepted”<sup>124</sup> principle of sovereign immunity doctrine, paying no attention to whether the cases actually involved the Eleventh Amendment.<sup>125</sup> Some lower courts today

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<sup>114</sup> *Clark*, 108 U.S. at 447.

<sup>115</sup> 134 U.S. 1, 17 (1890).

<sup>116</sup> 200 U.S. 273, 284 (1906) (out-of-state shareholders).

<sup>117</sup> 290 U.S. 18, 24-25 (1933) (diversity litigation over a trust).

<sup>118</sup> 178 U.S. 436, 440-41 (1900). On whether this case should have been seen to fall within the Eleventh Amendment, see *infra* Section II.G.

<sup>119</sup> 264 U.S. 472, 483 (1924).

<sup>120</sup> As Justice Brennan wrote,

[t]he literal wording is thus a flat prohibition against the federal judiciary’s entertainment of suits against even a consenting State brought by citizens of another State or by aliens . . . . It is true that cases since decided have said that federal courts do have power to entertain suits against consenting States. None has yet offered, however, a persuasively principled explanation for that conclusion in the face of the wording of the Amendment.

Emps. of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare, 411 U.S. 279, 310 (1973) (Brennan, J., dissenting); see also *id.* at 295 n.10 (Marshall, J., concurring) (relying heavily on *Clark v. Barnard* to reply to Justice Brennan); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23-24 (1989) (Stevens, J., concurring) (making a similar point regarding congressional abrogation).

<sup>121</sup> See *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999).

<sup>122</sup> See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002).

<sup>123</sup> *Fla. Prepaid*, 527 U.S. at 675.

<sup>124</sup> *Lapides*, 535 U.S. at 619.

<sup>125</sup> Compare, e.g., *Fla. Prepaid*, 527 U.S. at 670-71 (a “New Jersey chartered bank” suing “an arm of the State of Florida”), with *Lapides*, 535 U.S. at 616 (Georgia professor suing the state university).

even suggest that the Eleventh Amendment immunity is *more easily waived* than its common-law predecessor.<sup>126</sup>

All of this is wrong. The Eleventh Amendment restricts the courts' subject-matter jurisdiction; it can't be waived. That was a costly choice on its drafters' part, but one made for good reason. No amount of contrary judicial assertion, especially without reasoning or explanation, alters the Amendment's original meaning.

B. "*shall not be construed to extend*": *Federal Questions*

As a textual matter, the Eleventh Amendment provides a rule of construction ("shall not be construed") for how far "[t]he Judicial power of the United States" may "extend."<sup>127</sup> It thus refers to all of Article III, not just to a few heads of jurisdiction. For more than thirty-five years, however, a group of scholars and judges have argued that the Amendment was understood to have a more restrictive scope.<sup>128</sup> On this "diversity theory," the Amendment doesn't actually apply to the judicial power as a whole. Rather, it only reconstrues the state-diversity provisions in particular, insisting that "Controversies . . . between a State" and a private party be read to refer to states as potential plaintiffs but not as potential defendants.<sup>129</sup> That leaves every other head of jurisdiction in Article III wide open for private suits—in particular, the jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."<sup>130</sup>

Other scholars, in response, found the evidence inconclusive or unpersuasive.<sup>131</sup> For a time, the issue seemed to recede in importance. The sovereign immunity caselaw of the 1990s made the battles over diversity theory seem like sideshows: by enforcing "Eleventh Amendment immunity" well outside the Amendment's terms, the Court made the precise scope of those terms less relevant. Whether those cases were rightly decided (if wrongly reasoned) turns on the states' common-law immunity from process. But if the Amendment is of a different character than the common-law immunity, then the diversity question becomes important again.

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<sup>126</sup> See, e.g., *Church v. Missouri*, 913 F.3d 736, 742–43 (8th Cir. 2019) (holding that removal by a state waives Eleventh Amendment immunity but not "general state sovereign immunity"); *Beaulieu v. Vermont*, 807 F.3d 478, 485–87 (2d Cir. 2015) (same).

<sup>127</sup> U.S. CONST. amend. XI.

<sup>128</sup> See sources cited *supra* note 4; see also Nelson, *supra* note 11, at 1615 ("There is much to be said for the view that the Eleventh Amendment targets only Article III's grants of diversity jurisdiction . . .").

<sup>129</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>130</sup> *Id.*

<sup>131</sup> See sources cited *supra* note 3.



On balance, we find the diversity theory unpersuasive. It isn't the most natural reading of the text. It has weaker historical support than the more categorical reading. And the modern rationales for the diversity theory are quite distant from the concerns actually motivating the Amendment. On this point we find ourselves in agreement with prevailing doctrine.

### 1. Text

Here is the best textual account of the diversity theory, as we understand it. The Eleventh Amendment was designed to reverse *Chisholm*. Madison and Marshall had warned against reading Article III's heads of state-diversity jurisdiction to authorize individual suits against states, but *Chisholm* did so anyway. So the Amendment's rule of construction corrected this particular misreading. It may have used broad language, but its words mirrored the phrasing of the state-diversity provisions, and it was implicitly restricted to that specific set of cases.<sup>132</sup> Just as the original-jurisdiction clauses included "those [cases] in which a State shall be Party," meaning only cases filed under state-party heads of jurisdiction,<sup>133</sup> and just as the Judiciary Act of 1789 spoke of suits "where . . . an alien is a party," meaning only cases of alienage jurisdiction,<sup>134</sup> so the Amendment's reference to diverse-plaintiff suits against states meant only those suits specifically relying on state-diversity jurisdiction. In other words, we should read the Amendment as providing that the judicial power "shall not be construed to extend to any suit in law or equity, [by reason of its having been] commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

This is surely a possible reading. But we don't consider it the best reading, for at least three reasons.

First, as noted above, the diversity reading isn't quite at ease with the text, which addresses "[t]he Judicial power" as a whole, rather than any particular heads of jurisdiction. As above, the Eleventh Amendment didn't just reverse *Chisholm*; it supplemented the personal immunity that shielded the states with a subject-matter restriction, which among other things the states could

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<sup>132</sup> Cf. Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 DUKE J. CONST. L. & PUB. POL'Y 167, 171-74 (2017) (discussing tacit restrictions).

<sup>133</sup> U.S. CONST. art. III, § 2, cl. 2; see Amar, *Marbury*, *supra* note 4, at 444; Nelson, *supra* note 11, at 1616 n.259. *But see* *United States v. Texas*, 143 U.S. 621, 644 (1892) (holding that the Court's original jurisdiction in state-party cases extends to "all cases mentioned in the preceding clause in which a State may, of right, be made a party defendant," or "may, of right, institute a suit in a court of the United States").

<sup>134</sup> Ch. 20, § 11, 1 Stat. 73, 78; see also *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) ("[A]s the legislative power of conferring jurisdiction on the federal Courts, is . . . confined to suits between citizens and foreigners, we must so expound the terms of the law . . .").

no longer waive. So we already know that Amendment wasn't narrowly tailored to do the minimum necessary to undo *Chisholm's* damage. (Some scholars read "shall not be construed to extend," added in place of the simpler "shall not extend,"<sup>135</sup> to limit the Amendment to a *Chisholm* fix.<sup>136</sup> But in the nineteenth century, this language was read as necessary to apply the Amendment to previous cases.<sup>137</sup> And in the eighteenth century, the phrase was used not only to resolve interpretive uncertainties,<sup>138</sup> but also to carve out statutory exceptions irrespective of any interpretive disputes.<sup>139</sup>)

Second, we should be especially wary of reading tacit restrictions into the text of an "explanatory" provision like the Eleventh Amendment.<sup>140</sup> As an "authoritative declaration" of the proper construction of another text,<sup>141</sup> the Amendment had the status of "an explanatory law," which is how Attorney General Lee described it in *Hollingsworth v. Virginia*.<sup>142</sup> Courts were traditionally expected to "confine the construction" of explanatory statutes "strictly to the letter," for "[o]therwise there should be an explanation upon

<sup>135</sup> Compare Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, *supra* note 36, at 607, 607 ("shall not extend"), with Resolution in the United States Senate (Jan. 2, 1794), in 5 DHSC, *supra* note 36, at 613, 613 ("shall not be construed to extend").

<sup>136</sup> E.g., Amar, *Sovereignty*, *supra* note 4, at 1482; Fletcher, *Reply*, *supra* note 4, at 1270-74.

<sup>137</sup> See *Ex parte Poulson*, 19 F. Cas. 1205, 1207 (C.C.E.D. Pa. 1835) (No. 11,350) (Baldwin, Circuit Justice) (taking the Eleventh Amendment phrase to "refer[] to the past, the present, and the future"); accord *Dudley's Case*, 7 F. Cas. 1150, 1151 (C.C.E.D. Pa. 1842) (No. 4,114) (Baldwin, Circuit Justice) ("[I]t annulled all jurisdiction of such cases then pending . . ."); Nelson, *supra* note 11, at 1604 n.222 (citing *Dudley's Case*).

<sup>138</sup> See, e.g., An Act Concerning Consuls and Vice-Consuls, ch. 24, § 9, 1 Stat. 254, 257 (1792) (providing that a statutory "specification of certain powers and duties" of U.S. consuls "shall not be construed to the exclusion of others"); Act of Aug. 4, 1790, ch. 35, § 46, 1 Stat. 145, 169 (providing that a statutory means of appraising imported goods "shall not be construed to exclude other proof" at trial of the goods' actual cost).

<sup>139</sup> See, e.g., Act of June 5, 1794, ch. 50, § 2, 1 Stat. 381, 383 (providing that a statute forbidding "any person" within the United States to enlist in a foreign military "shall not be construed to extend to" enlistment taking place on foreign warships, fitted as warships at the time they entered the United States, if the enlistee is a citizen or subject of the foreign state, with which the United States is then at peace); accord An Act to Establish Certain Impost Duties on Various Foreign Articles Imported into this State, ch. 40 (N.H. Mar. 4, 1786), reprinted in 5 LAWS OF NEW HAMPSHIRE 146, 146, 148 (Henry Harrison Metcalf ed., 1916) (providing that an import duty "upon all other Goods, Wares and Merchandize" "shall not be construed to extend . . . to the Article of Salt"); An Act for the Support of Government, ch. 63, 1792 N.Y. Laws 369, 369 (restricting the number of judges by providing that the provision for their £750 salary "shall not be construed to extend to any judges of the said court, that may be appointed after their number shall amount to five"); 1780 N.C. Sess. Laws, ch. 7, § 3, reprinted in 24 STATE RECORDS OF NORTH CAROLINA 324, 325 (Walter Clark ed., 1905) (providing that a flat prohibition on lotteries "shall not be construed to extend to any lottery established . . . for the encouragement of any school or schools").

<sup>140</sup> See Pfander, *supra* note 4, at 1323 (describing the Amendment as explanatory); Clark, *supra* note 12, at 1896-97 (same).

<sup>141</sup> *Respublica v. Cobbett*, 3 U.S. (3 Dall.) 467, 472, 2 Yeates 352 (Pa. 1798) (argument of counsel).

<sup>142</sup> 3 U.S. (3 Dall.) 378, 381 (1798).

an explanation.”<sup>143</sup> Thus, Lee argued, the Amendment couldn’t “be expounded by foreign matter”;<sup>144</sup> it had to be taken to mean what it says. If we’re to read the Amendment under the prevailing law of interpretation,<sup>145</sup> then we should do as the Court did in *Hollingsworth*, and read “any suit” as if it meant “any suit”—including “any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.”<sup>146</sup>

Third, the diversity theory has trouble explaining the Amendment’s limitation to “any suit *in law or equity*.”<sup>147</sup> The only apparent function of this phrase is to exempt admiralty cases. As noted below, on the straightforward reading of the Amendment this isn’t too strange; no one had read anything about compulsory process against states into the phrase “Cases of admiralty and maritime jurisdiction,” so no changes were required.<sup>148</sup> (Justice Washington offered a related explanation: admiralty could be safely excluded from the Amendment, because admiralty courts generally acted *in rem*, rather than directly upon defendants *in personam*.<sup>149</sup>) But the basic idea of the diversity theory is that the Amendment only amended “the state-citizen diversity clause,” and that it “was not intended to eliminate or restrict other heads of jurisdiction,” such as “admiralty jurisdiction or the federal question jurisdiction.”<sup>150</sup> If a diversity-theory Amendment wouldn’t have reached admiralty anyway, then the reference to “law or equity” was mere surplusage,<sup>151</sup> and especially puzzling surplusage at that: “Law and Equity” are paired in only one other part of the Constitution, namely Article III’s

<sup>143</sup> *Sawyer v. Shannon*, 21 F. Cas. 579, 582 (C.C.D. Tenn. 1809) (No. 12,405) (Todd, Circuit Justice); see also 4 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW \*650 (“The Sense of Words used in an Explanatory Statute ought not to be extended by an equitable Constructio[n]: but their Meaning, the Explanatory Statute being a legislative Construction of the Words used in a former Statute, ought to be strictly adhered to.”).

<sup>144</sup> *Hollingsworth*, 3 U.S. at 381.

<sup>145</sup> See Baude & Sachs, *supra* note 16, at 1118-20; see also John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 752 (2009).

<sup>146</sup> *Hollingsworth*, 3 U.S. at 382.

<sup>147</sup> U.S. CONST. amend. XI (emphasis added).

<sup>148</sup> See *infra* Section II.D.

<sup>149</sup> *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647) (Washington, Circuit Justice); see also *Ex parte Madrazzo*, 32 U.S. (7 Pet.) 627, 627 (1833) (argument of counsel); *id.* at 632 (opinion of the Court) (holding that because the suit wasn’t really *in rem*, it was “a mere personal suit against a state,” which “no private person has a right to commence”); David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935, 936 (1997); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1073-74 (2002); Fletcher, *Reply*, *supra* note 4, at 1274 & n.70.

<sup>150</sup> Fletcher, *Reply*, *supra* note 4, at 1264.

<sup>151</sup> Justice Washington’s gesture toward the diversity theory shows the same hesitation: he suggested in *Bright* that the Amendment’s rule of construction applies specifically to the “above provision” (on state-diversity cases), but still went on to consider at great length its potential application to admiralty cases. See *Bright*, 24 F. Cas. at 1236.

head of federal-question jurisdiction.<sup>152</sup> This pairing suggests that the Amendment still applies to federal-question cases—and that it’s more than a mere commentary on the state-diversity provisions alone.

## 2. History

Sometimes a reading that seems odd today was nonetheless the better reading when a text became law. But so far as we can tell, that wasn’t the case with the Eleventh Amendment. If anything, the historical record seems to favor the categorical reading. Without rehearsing the extensive historical debate over the diversity theory,<sup>153</sup> we highlight a few pieces of contemporary evidence that we find especially persuasive, and we offer some observations on subsequent developments in the nineteenth century.

*The Gallatin proposal.* While the Eleventh Amendment was under debate in the Senate, future Treasury Secretary Albert Gallatin unsuccessfully proposed to exempt any cases arising under U.S. treaties. His draft would have read:

The judicial power of the United States, *except in cases arising under treaties, made under the authority of the United States*, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state.<sup>154</sup>

Gallatin’s proposal was voted down.<sup>155</sup> But because cases arising under treaties already fell under Article III’s head of federal-question jurisdiction, the fact that he thought the exemption necessary—and that the rest of the Senate rejected it—seems to confirm that the final draft of the Amendment, which lacks this phrase, applied to federal-question cases.

To be sure, as with all rejected proposals, it’s possible that Gallatin’s proposed exemption was thought unnecessary, rather than objectionable; maybe the other senators thought treaty cases were already exempt.<sup>156</sup> But after Gallatin’s proposal was rejected, he was one of only two senators to vote

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<sup>152</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .”).

<sup>153</sup> For a more complete history of this debate, see sources cited *supra* notes 3–4, 13.

<sup>154</sup> Proceedings of the United States Senate (Jan. 14, 1794), in 5 DHSC, *supra* note 36, at 617, 617 (emphasis added).

<sup>155</sup> *Id.*

<sup>156</sup> See James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 178 n.96 (2016) (suggesting that “others in the chamber may have quietly persuaded Gallatin and his supporters that the change was unnecessary, given the failure of the Eleventh Amendment to threaten treaty-based claims”).

against the Amendment, with twenty-three voting in favor.<sup>157</sup> So he, at least, seemed to think the proposal necessary.

That's also the more natural inference, given the circumstances.<sup>158</sup> The Commonwealth of Massachusetts had been outspoken in seeking a constitutional amendment in response to *Chisholm*,<sup>159</sup> and the pending suit against the Commonwealth (*Vassall v. Massachusetts*) involved a claim under the Treaty of Paris.<sup>160</sup> Yet the Massachusetts delegation all voted for the Eleventh Amendment as written,<sup>161</sup> apparently without expressing any concern that it might let in future treaty claims. We're therefore inclined to agree with the late David Currie that "the historical context belies any attempt at wishful thinking: as the prompt rejection of all ameliorating alterations shows, Congress was in no mood to permit *any* federal suit against a state by a citizen of another state or of a foreign country."<sup>162</sup>

At the time, of course, there was no statutory provision for general federal-question jurisdiction; that would arrive (albeit briefly) seven years later.<sup>163</sup> So it's theoretically conceivable, as some scholars have suggested, that the senators who roundly rejected Gallatin's proposal *only* wanted to forbid those treaty cases, such as *Vassall*, which *also* relied on the constitutional grant of original state-party jurisdiction—while still hoarding the possibility of granting *statutory* federal-question jurisdiction over such cases in the future.<sup>164</sup> But given the expressed views of the Amendment's supporters,<sup>165</sup> that strikes us as by far the less natural reading of the available record. The more natural reading of these events is that Gallatin wanted diverse plaintiffs to be able to bring treaty claims, that the Eleventh Amendment as written would bar them, and that twenty-three other senators thought this was fine.

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<sup>157</sup> Proceedings of the United States Senate, *supra* note 154, at 617. The two "nays," Sens. Gallatin and Rutherford, were from Pennsylvania and New Jersey respectively. *Id.* at 600; *John Rutherford*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=R000550> [<https://perma.cc/9SNS-HT5C>].

<sup>158</sup> See DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 197–98 (1997) ("One can imagine a scenario in which a motion to exempt treaty cases is voted down as unnecessary because the amendment itself is inapplicable to cases arising under federal law. But the language of the actual amendment is not conducive to such an interpretation . . .").

<sup>159</sup> See Resolution of the Massachusetts General Court, *supra* note 84, at 440.

<sup>160</sup> See 5 DHSC, *supra* note 36, at 354–55.

<sup>161</sup> Proceedings of the United States Senate, *supra* note 154, at 617; *Caleb Strong*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=S001009> [<https://perma.cc/7Y6X-TQ38>]; *George Cabot*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=C000009> [<https://perma.cc/S4P7-XHNE>].

<sup>162</sup> CURRIE, *supra* note 158, at 198.

<sup>163</sup> Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92 (repealed 1802).

<sup>164</sup> See Fletcher, *Reply*, *supra* note 4, at 1285–87; Gibbons, *supra* note 4, at 1935–36.

<sup>165</sup> See, e.g., *supra* note 84 and accompanying text.

*The Hollingsworth oral argument.* Once the Eleventh Amendment was declared ratified, the Supreme Court heard argument in *Hollingsworth*, where the plaintiffs gamely asserted that the Amendment exempted pending cases.<sup>166</sup> The plaintiffs faced an uphill battle for several reasons, among them the words “commenced or prosecuted”: a case *commenced* before ratification might still be *prosecuted* afterwards, and so caught in the Amendment’s net. In response, the plaintiffs read “prosecuted” to refer specifically to a set of *federal-question* cases—namely, those initiated against a state in its own courts (by consent), and then brought to the Supreme Court on appeal:

It may be said, however, that the word “commenced” is used in relation to future suits, and that the word “prosecuted” is applied to suits previously instituted. But it will be sufficient to answer, in favor of the benign construction, for which the Plaintiffs contend, that the word “commencing” [sic] may, on this ground, be confined to actions originally instituted here, and the word “prosecuted” to suits brought hither by writ of error, or appeal. For, it is to be shewn, that a state may be sued originally, and yet not in the Supreme Court, though the Supreme Court will have an appellate jurisdiction; as where the laws of a state authorize such suits in her own courts, and there is drawn in question the validity of a treaty, or statute of, or authority exercised under, the *United States*, and the decision is against their validity.<sup>167</sup>

The plaintiffs’ reading of “prosecuted” isn’t very persuasive, and as far as we can tell, it has gone largely unnoticed by scholars.<sup>168</sup> But its importance lies in its explicit suggestion, made within weeks after the Amendment’s ratification was announced, that the text applied fully to appellate cases arising under federal law. (Attorney General Lee rejected the plaintiffs’ reading on other grounds, without mentioning the federal-question issue.<sup>169</sup>) That the Amendment’s application to federal questions was explicitly argued before the Justices gives particular relevance to the Court’s forceful declaration, the day after argument concluded, that “the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a state was sued by the citizens of another state, or by citizens, or subjects, of any foreign state.”<sup>170</sup>

*The Breckenridge proposal.* In our view these two contemporaneous events solidly buttress the more natural reading, to show that the Eleventh

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<sup>166</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 378 (1798) (arguments of counsel).

<sup>167</sup> *Id.* at 380 (citing Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85).

<sup>168</sup> As of September 27, 2020, the Westlaw JLR database records not a single reference to a number of phrases from this passage, e.g., “suits brought hither by writ of error, or appeal,” or “sued originally, and yet not in the Supreme Court.”

<sup>169</sup> *Hollingsworth*, 378 U.S. at 380-82 (argument of counsel).

<sup>170</sup> *Id.* at 382 (opinion of the Court).

Amendment originally meant an across-the-board denial of subject-matter jurisdiction in the cases it lists. Perhaps that's all that need be said. Still, supporters and opponents of the diversity theory have taken hold of various nineteenth-century comments and events as secondary evidence. In our view, those subsequent events are at worst equivocal, and at best they lend additional support to the more natural reading. There's some evidence of later interpreters who may have held the diversity view, though it's far from clear. And this evidence is matched, if not bested, by evidence that others held the categorical view.

One piece of pro-diversity evidence is the so-called Breckenridge Proposal. In December 1804, the Kentucky legislature began a campaign to abolish diversity jurisdiction.<sup>171</sup> Pennsylvania and Vermont's legislatures eventually endorsed the idea, while Massachusetts and Rhode Island were opposed.<sup>172</sup> In the meantime, in February 1805, Senator Breckenridge of Kentucky duly introduced a draft:

The judicial power of the United States shall not be construed to extend to controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States; and between a State or the citizens thereof and foreign States, citizens, or subjects.<sup>173</sup>

The amendment was reintroduced during the next two years by Senators from Kentucky and Pennsylvania,<sup>174</sup> though it doesn't seem to have been debated. In any case, the wording of Breckenridge's amendment tends to favor the diversity theory. As others have discussed, Breckenridge apparently believed that the phrase "shall not be construed to extend" would strike out particular heads of jurisdiction, rather than act as a cross-cutting prohibition applicable to all of Article III.<sup>175</sup>

On the other hand, this episode has limited probative value about the Eleventh Amendment. On its own terms, the amendment never went anywhere. It's hard to know how many people shared Breckenridge's view of what his proposed language would accomplish. Indeed, his formulation wasn't

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<sup>171</sup> See Resolution of Dec. 19, 1804, 1804 KY. ACTS 147, 148.

<sup>172</sup> See 16 ANNALS OF CONG. 216 (1806) (statement of Rep. Elliott) (reporting Vermont's endorsement); 15 ANNALS OF CONG. 826-27 (1805) (statement of Rep. Stanton) (reporting Rhode Island's disagreement); Resolve of June 13, 1805, ch. 28, 1804-1805 MASS. ACTS 612, 614-15 (calling the measure "inexpedient," and noting Pennsylvania's assent).

<sup>173</sup> 14 ANNALS OF CONG. 53 (1805).

<sup>174</sup> 16 ANNALS OF CONG. 76 (1807) (proposal by Sen. Clay) (Kentucky); 15 ANNALS OF CONG. 68 (1806) (proposal by Sen. Maclay) (Pennsylvania).

<sup>175</sup> See Amar, *Sovereignty*, *supra* note 4, at 1482 n.233; Massey, *supra* note 3, at 118; Fletcher, *Reply*, *supra* note 4, at 1276-79. *But see* Lee, *supra* note 149, at 1076 (highlighting linguistic differences between the Eleventh Amendment and the Breckenridge amendment); Lawrence C. Marshall, *Exchange on the Eleventh Amendment*, 57 U. CHI. L. REV. 127, 129-30 (1990) (same).

universal, as the state legislative resolutions used different language that had no implications for the Eleventh Amendment.<sup>176</sup>

To be sure, one might say much the same of the Gallatin amendment: with little debate, competing interpretations are possible. But between the two of them, the Breckenridge amendment deserves less weight. While the Gallatin episode was a contemporaneous attempt to amend the Eleventh Amendment itself, the Breckenridge episode was a decade-later discussion of a different proposal. However one resolves the uncertainty, it doesn't carry much weight against other evidence from the text and the times.

*Judicial application.* The Breckenridge episode was followed two decades later by a pair of cases in which the Supreme Court appeared to reject the diversity theory. The first of the two was the decision in *Osborn v. Bank of the United States*.<sup>177</sup> *Osborn* was a federal-question case, and controversially so; it remains famous today for the breadth of its holding on federal-question jurisdiction.<sup>178</sup> Yet when Ralph Osborn (Ohio's state auditor) argued that the suit against him was barred by the Eleventh Amendment,<sup>179</sup> and when the Bank offered the diversity theory in response,<sup>180</sup> the Court refused to adopt it.

Indeed, as the arguments played out, the Court actually needed to *reject* the diversity theory for Osborn to lose—and it did so. Osborn argued to the Court that the suit violated the rules of joinder, which would have required the Bank to join the State of Ohio as a necessary party.<sup>181</sup> The Court “admitted” the state’s “direct interest . . . in the suit, as brought,” and it reasoned that, “had it been in the power of the Bank to make [Ohio] a party, perhaps no decree ought to have been pronounced in the cause, until the State was before the Court.”<sup>182</sup> But, reasoned the Court, the Eleventh Amendment got in the way: it “was not in the power of the Bank”—whose membership

<sup>176</sup> See sources cited *supra* notes 171–74; see, e.g., 16 ANNALS OF CONG. 216 (1806) (statement of Rep. Elliott) (reporting Vermont's desire to confine “the judiciary power of the Courts of the United States to cases in law and equity, arising under the Constitution and laws of the United States,” and so on).

<sup>177</sup> 22 U.S. (9 Wheat.) 738 (1824). The Court had also been presented a diversity-theory argument three years earlier in *Cohens v. Virginia*, and had neither rejected it nor adopted it, though it adopted multiple other theories of jurisdiction in the case. See 19 U.S. (6 Wheat.) 264, 305–06, 315, 348–49 (1821) (arguments of counsel); *id.* at 407–12 (opinion of the Court).

<sup>178</sup> See, e.g., Anthony J. Bellia Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 266–67 (2007).

<sup>179</sup> *Osborn*, 22 U.S. at 756, 803–04 (argument of counsel).

<sup>180</sup> *Id.* at 798.

<sup>181</sup> Osborn's counsel argued that

[i]n all ordinary cases, if the Court sees from the face of the bill, that the actual and principal party in interest is not before them, it will either dismiss the bill, or stay the proceedings until proper parties are made. A decree, vitally affecting the interests of a principal, will never be pronounced, where his agent is the only party to the bill.

*Id.* at 755–56.

<sup>182</sup> *Id.* at 846–47 (opinion of the Court).



included citizens of many different states—to “make [Ohio] a party,” as “[t]he eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens.”<sup>183</sup> The state didn’t have to be joined because it couldn’t be joined, and because the case could proceed without it. And the reason the state couldn’t be joined was that the Eleventh Amendment limited the judicial power over states, even in what the Court famously decided was a federal-question case.

This helps put a later passage of *Osborn* in context. The Court went on to resolve the case on the ground that the Amendment didn’t apply to personal suits against individual state officers, and that it was “limited to those suits in which a State is a party on the record.”<sup>184</sup> In the next sentence, the Court added that “[t]he amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.”<sup>185</sup> This sentence has been taken to affirm the diversity theory, but that seems less likely in context. First, the Court had already said that the Amendment prevented the state from being sued in this federal-question case. Second, sandwiched between references to a state’s “being a party on the record,”<sup>186</sup> the Court appears to be trying to illustrate a distinction between the defendant Ralph Osborn and the State of Ohio. Just as Osborn couldn’t stand in for the state to *establish* jurisdiction under Article III, he also couldn’t stand in for the state to *restrict* jurisdiction under the Eleventh Amendment. If he could, of course, this federal-question suit would fail.

Along with *Osborn*, the Court decided *Bank of the United States v. Planters’ Bank of Georgia*, in which the State of Georgia was one of the members composing the defendant corporation.<sup>187</sup> At the time, under *Bank of United States v. Deveaux*, a federal civil suit involving corporations was understood to be a controversy between “the real persons who come into court, in this case, under their corporate name,” letting corporations sue or be sued in diversity if their members had the requisite citizenship.<sup>188</sup> But because the Bank of the United States had shareholders from various states, and because Georgia held shares in the defendant, the Eleventh Amendment was

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<sup>183</sup> *Id.*; *see also id.* at 813 (argument of counsel) (noting the diverse citizenship of the Bank’s membership).

<sup>184</sup> *Id.* at 851-57. The Court of course went on to resolve the case on the ground that the Amendment didn’t apply to personal suits against individual state officers, and that it was “limited to those suits in which a State is a party on the record.” *Id.*

<sup>185</sup> *Id.* at 857-58.

<sup>186</sup> *Id.* at 858.

<sup>187</sup> 22 U.S. (9 Wheat.) 904, 905 (1824).

<sup>188</sup> 9 U.S. (5 Cranch) 61, 91 (1809).

potentially implicated: the controversy was between a state and the citizens of another state, with the latter as plaintiffs.<sup>189</sup>

The Court found jurisdiction nonetheless. But it didn't take what would have been the easy way out for a diversity theorist, holding the Eleventh Amendment inapplicable to a federal-question case (which the Bank's cases always were, as the Court had just held in *Osborn*). Instead, the Court discussed at length the differences between a suit against a state and one against a corporation, considering the Planters' Bank a separate legal person from the State of Georgia. A suit seeking relief against the bank alone, to be satisfied from the bank's property alone, was a suit "against a corporation," not "against" the state: "The State does not, by becoming a corporator, identify itself with the corporation."<sup>190</sup> Thus, "[t]he Planters' Bank of Georgia is not the State of Georgia" for Eleventh Amendment purposes<sup>191</sup>—just as the United States wasn't an Article III "Party" to suits involving the First Bank of the United States, in which the federal government had held shares.<sup>192</sup> The "Controvers[y]" at issue in *Planters' Bank* may have been "between" the Bank's shareholders and Georgia, but the "suit" wasn't actually "against" Georgia.

This may seem like slicing the baloney rather thin. Justice Johnson dissented in *Planters' Bank* (as he had in *Osborn*), arguing that Georgia really was a party under *Deveaux*, which brought the case "strictly within the letter of the 11th amendment."<sup>193</sup> Yet *still* the Court failed to invoke the diversity theory, even to respond to Johnson's dissent. Given that the case was argued together with *Osborn*, this seems to confirm that *Osborn* didn't endorse—and indeed rejected—the diversity theory of the Amendment.

*Planters' Bank* also undermines the diversity theory in a different way. The Court's understanding of the term "against" suggests that the Eleventh Amendment didn't actually revise the state-diversity heads of jurisdiction, as the diversity theorists would have it. To see this, suppose that some private citizens had sued Planters' Bank in diversity, with no federal questions involved. For Article III purposes, under *Deveaux*, the defendant would be made up of the State of Georgia and some individual corporators: the suit would be a "Controvers[y] . . . between a State and Citizens of another State," as well as "between Citizens of different States."<sup>194</sup> No common law immunity would apply, because compulsory process would issue only to the

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<sup>189</sup> *Planters' Bank*, 22 U.S. at 906.

<sup>190</sup> *Id.* at 907.

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

<sup>192</sup> *See id.* at 908; U.S. CONST. art. III, § 2, cl. 1 (addressing "Controversies to which the United States shall be a Party").

<sup>193</sup> *Id.* at 913 (Johnson, J., dissenting).

<sup>194</sup> U.S. CONST. art. III, § 2, cl. 1.

corporation, not the state. And under *Planters' Bank*, the Eleventh Amendment wouldn't apply either, because Georgia wouldn't be a party on the record, and so the suit wouldn't be "against" the state. By contrast, if the diversity theorists were right, and if the Amendment had specifically revised the state-diversity provisions in Article III to exclude private plaintiffs, then there ought to be no jurisdiction: part of the controversy would be between private citizens and Georgia, and that part would fall outside Article III's revised scope.<sup>195</sup>

The discussion of the Eleventh Amendment in both cases is complex; perhaps not all of the Justices fully understood or endorsed the logic of Chief Justice Marshall's opinions. At a minimum, however, these cases dispel any impression that the diversity theory was a widely-shared consensus reading of the Amendment in the early nineteenth century.

*The Madison letter.* Finally, it's worth noting one other reliable source who rejected the diversity theory: ex-President James Madison. Madison discussed the Amendment's effect on federal questions in an 1821 letter to Spencer Roane.<sup>196</sup> Madison was reacting to the Court's recent decision in *Cohens*, which correctly held that a state-court defendant wasn't prevented by state immunity from invoking the appellate jurisdiction of the U.S. Supreme Court.<sup>197</sup> While the facts of *Cohens* didn't obviously implicate the Amendment, Chief Justice Marshall's *dicta* about the common-law principle of immunity was inconsistent with much of what had been said at the founding, including by Marshall himself. For example, Marshall had argued in the Virginia ratification convention against the suability of states,<sup>198</sup> but now he seemed to contend that *Chisholm* was correctly decided—and, more startlingly, that the states had consented to all federal-question suits by ratifying Article III.<sup>199</sup> And he suggested that the collection of state debts, and not the "dignity of a state," was the sole basis of the opposition to *Chisholm*<sup>200</sup>—

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<sup>195</sup> We don't know what the Court would have made of such a suit. In the diversity case of *Bank of Kentucky v. Wister*, the state was the sole shareholder of the bank, but *Deveaux's* application was complicated by a state statute under which "the president and directors' alone constitute the body corporate, the metaphysical person liable to suit." 27 U.S. (2 Pet.) 318, 323 (1829). Under modern doctrine, the question never arises: a corporation is taken to be an Article III citizen of its state of incorporation only (regardless of its shareholders), see *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 558-59 (1844), though Congress has seen fit to confer additional citizenships, see 28 U.S.C. § 1332(c).

<sup>196</sup> Letter from James Madison to Spencer Roane (May 6, 1821) [hereinafter Madison Letter], in 2 THE PAPERS OF JAMES MADISON: RETIREMENT SERIES 317 (David B. Mattern et al. eds., 2013); see also Nelson, *supra* note 11, at 1616 n.259 (citing this source, though apparently unpersuaded by it).

<sup>197</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405-07 (1821).

<sup>198</sup> See *supra* note 35 and accompanying text.

<sup>199</sup> See *Cohens*, 19 U.S. at 380-83.

<sup>200</sup> *Id.* at 406.

disregarding the widespread and furious arguments of the 1780s and '90s that states were generally not amenable to private suit or judicial coercion.<sup>201</sup>

In response, Madison expressed disappointment that “the Court seems not to have adverted at all to the expository language held when the Constitution was adopted.”<sup>202</sup> Back then, he and Marshall had both expected that the common-law immunity would survive Article III.<sup>203</sup> So had Hamilton in *The Federalist*<sup>204</sup>—a work which the *Cohens* Court quoted, Madison thought, when doing so served its purposes, but not as carefully “when against the federal authority, as when agst. that of the States.”<sup>205</sup> Nor had the *Cohens* Court paid enough attention to the nation’s open rejection of *Chisholm*: “[T]o the expository language . . . of the 11th. amendment[,] which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text.”<sup>206</sup>

In the next paragraph, Madison expressed his understanding of this language:

The Judicial power of the U.S. over cases arising under the Constitution, must be admitted to be a vital part of the System. But that there are limitations and exceptions to its efficient character is among the admissions of the Court itself.

*The Eleventh amendment introduces exceptions if there were none before.*<sup>207</sup>

In other words, even if Article III had rendered the states amenable to federal-question suits, the Eleventh Amendment *still* deprived the federal courts of some portion of their judicial power to hear “cases arising under the Constitution,” not just diversity cases.

On its own, a stray letter from an aging Founder proves little. But in combination with other evidence from this period, it confirms that there was no subsequent consensus in favor of the diversity reading, and a sizeable amount of evidence against it. This leads us to fall back on the natural meaning of the text and the contemporaneous evidence against the diversity theory.

### 3. Purpose

The core argument for the diversity theory is grounded in purpose. The theory gained force when it seemed to be the only candidate that could explain why the constitutional immunity might be limited to *diverse* plaintiffs. If the Eleventh Amendment were the only game in town, why would it have

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201 See, e.g., Lash, *supra* note 13, at 1635-76; Clark, *supra* note 12, at 1862-75, 1886-99.

202 Madison Letter, *supra* note 196, at 320.

203 See *supra* note 35 and accompanying text.

204 See THE FEDERALIST NO. 81, *supra* note 34, at 487.

205 Madison Letter, *supra* note 196, at 319 & n.2.

206 *Id.* at 320.

207 *Id.* (emphasis added) (footnote omitted).

left in-state citizens free to sue their own states?<sup>208</sup> If the problem posed by *Chisholm* were really the collection of state debts, couldn't out-of-state bondholders have sold their debt claims to in-staters?<sup>209</sup> The answer must have had something to do with the cause of action, and not merely the arrangement of the parties. If the debt claims arose under state law, not federal law, then the diversity theory would leave the bondholders with neither diversity nor federal-question jurisdiction, and the states would be secure. But if federal questions were involved, all bets were off.

That, however, is not how many prominent supporters of the Amendment understood what they were doing. As we read the evidence, their demands for an amendment weren't calls for a sort of proto-*Erie*, protecting states against state-law claims that might be heard in federal court.<sup>210</sup> Indeed, they don't seem to have worried very much about the *source of law* in suits against states at all. At most, it was a secondary concern—assuming, “for argument[']s sake,” that “an individual can sue a State” in the first place.<sup>211</sup> The overriding concern expressed in the historical sources was that federal courts might call states to answer at the instance of private plaintiffs, period—and that these courts might issue judgments against states, not individual officials, which would have to be collectively and coercively enforced.<sup>212</sup>

Seeing the Eleventh Amendment against the backdrop of common-law sovereign immunity makes this understanding more plausible. Sovereign immunity wasn't limited to state debts or to the citizens of other states; it extended to any suit against a state without its consent. The Eleventh Amendment was more limited as to parties, just as its limit on subject-matter jurisdiction was more categorical: it “cut off” whatever part of the judicial

<sup>208</sup> See, e.g., Amar, *Marbury*, *supra* note 4, at 499; Fletcher, *Reply*, *supra* note 4, at 1277-78, 1281-82. *But see* Nelson, *supra* note 11, at 1615-16, 1616 n.259 (concluding that there's “much to be said” for the diversity theory, despite also advocating the persistence of common-law sovereign immunity in same-state cases).

<sup>209</sup> See, e.g., *Lycurgus*, BOS. GAZETTE, Nov. 19, 1787, *reprinted in* 4 DHRC, *supra* note 33, at 276, 277 (raising this possibility even before Ratification); *To the Convention of Massachusetts*, AM. HERALD (Bos.), Jan. 14, 1788, *reprinted in* 5 DHRC, *supra* note 33, at 709, 712 (same).

<sup>210</sup> See, e.g., Amar, *Sovereignty*, *supra* note 4, at 1469-73 (presenting such a view). *But see generally* Jay, *supra* note 40 (identifying stark differences between post-*Erie* and Founding-era views of general law).

<sup>211</sup> A Republican, *The Crisis*, No. XIII, INDEP. CHRON. (Bos.), July 25, 1793, *reprinted in* 5 DHSC, *supra* note 36, at 395, 397 (emphasis omitted); *see also id.* at 395-96 (disparaging such a possibility); “*Hampden*,” INDEP. CHRON. (Bos.), July 25, 1793, *reprinted in* 5 DHSC, *supra* note 36, at 399, 400-01 (criticizing *The Crisis* for giving too much ground on this point); *cf. Account of John Davis's Speech in the Massachusetts House of Representatives*, INDEP. CHRON. (Bos.), Sept. 23, 1793, *reprinted in* 5 DHSC, *supra* note 36, at 431, 431 (emphasizing federal limitations on state power, in the course of *disagreeing* with most of the Amendment's supporters).

<sup>212</sup> See, e.g., Clark, *supra* note 12, at 1886-90 (discussing the “hostile” aftermath to *Chisholm* and the push for the Eleventh Amendment); Lash, *supra* note 13, at 1649-76 (explaining how the strong negative reaction to *Chisholm* developed into a movement in favor of amendment, starting in Massachusetts); Nelson, *supra* note 11, at 1574-79, 1592-1601; *see also* sources cited *supra* note 84 (expressing official state opposition to suability).

power might extend “to any suit” within its terms. This was rough justice, and it may have been overinclusive. But to the Amendment’s supporters, language that removed too many individual suits against states was better than language that removed too few.

C. “to any suit”: Abrogation

Congress can’t abrogate a state’s sovereign immunity, most of the time. But since at least 1976, the Supreme Court has held that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [Section Five] of the Fourteenth Amendment.”<sup>213</sup> Once again, this statement conflates a plausible account of the general law of sovereign immunity with an implausible account of the Eleventh Amendment’s text.

Common-law doctrines can be abrogated by statute. But before that can happen, Congress needs authority to *pass* the statute. In general, there’s good reason to think that Congress lacks this abrogation power.<sup>214</sup> It may well be that the Fourteenth Amendment is different—that it provides a special kind of enumerated power, one with a greater ability to abrogate these common-law doctrines.<sup>215</sup> It may even be conceivable, as the Supreme Court has held, that some other clauses might do so as well.<sup>216</sup> But none of these powers could have any effect on the Eleventh Amendment.

The Amendment, as we’ve seen, is more than a restatement of the general law of sovereign immunity: it restricts the subject-matter jurisdiction of the federal courts, in “any suit in law or equity.”<sup>217</sup> Even if Section Five of the Fourteenth Amendment had special force against common-law principles of sovereignty, that section makes no particular mention of the judicial power of the United States. So Section Five can’t plausibly be read as implicitly repealing the jurisdictional restrictions in the Eleventh Amendment, just as it can’t plausibly be read as implicitly repealing the Fifth Amendment requirement of due process, the Sixth Amendment right to jury trial, or the Eighth Amendment ban on cruel and unusual punishments. Otherwise Congress could “abrogate” all of these, demanding the torture and summary

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<sup>213</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citation omitted); *cf.* 42 U.S.C. § 12202 (“A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter.” (footnote omitted)), *invalidated on other grounds by* *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

<sup>214</sup> *See supra* notes 65–68 and accompanying text.

<sup>215</sup> *See* Baude, *supra* note 10, at 18–21. *But see* Harrison, *supra* note 68 (arguing that Section Five doesn’t confer such power).

<sup>216</sup> *Cf.* Baude, *supra* note 10, at 21–22 (discussing the Bankruptcy Clause).

<sup>217</sup> U.S. CONST. amend. XI (emphasis added).

execution of civil rights violators (and their families). More to the point, the Fourteenth Amendment can't plausibly be read to let Congress dispense with other jurisdictional rules, allowing plaintiffs to file federal suits that fall outside the judicial power.<sup>218</sup> The Eleventh Amendment, unlike the common law, can't be abrogated by statute.

That said, it isn't clear how many Supreme Court cases actually turn on the point. The Court has recognized three successful instances of Fourteenth Amendment abrogation in the twenty-odd years since it set forth the current doctrine in *Boerne v. Flores*.<sup>219</sup> But none of these obviously implicated the Eleventh Amendment. In the successful abrogation case of *Tennessee v. Lane*, the two named respondents, George Lane and Beverly Jones, were citizens of Tennessee.<sup>220</sup> The suit permitted by the Court in *Nevada Department of Human Resources v. Hibbs* was brought by a resident of Nevada.<sup>221</sup> And the suit allowed in *Goodman v. Georgia* was brought by a prisoner of the Georgia prison system who was likely a citizen of that state.<sup>222</sup>

Earlier cases are a little muddier. In *Fitzpatrick* itself, the suit was brought against the State of Connecticut “on behalf of all present and retired male employees of the State.”<sup>223</sup> Justice Brennan presumed the plaintiffs to be Connecticut citizens, and thought this meant that the suit fell outside the Eleventh Amendment.<sup>224</sup> But at least some people who retired from working in Connecticut might well have moved to warmer or cheaper places—a jurisdictional fact that the lower courts don't seem to have discussed, perhaps because nobody realized it mattered. A couple of subsequent abrogation cases featured attorney's fee awards to state prisoners or recipients of state benefits—who might well be state residents too, though again the Court failed to assure itself of this fact.<sup>225</sup>

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<sup>218</sup> Cf. Nelson, *supra* note 11, at 1626 (“The conclusion that Section 5 lets Congress expose states to private suits does not mean that Congress can abrogate the ‘subject matter jurisdiction’ type of immunity conferred by the Eleventh Amendment, but only that Congress has some power to abrogate the ‘personal jurisdiction’ type of immunity contemplated by Madison and Marshall.”).

<sup>219</sup> 521 U.S. 507 (1997). See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 958-62 (7th ed. 2015) (summarizing abrogation cases).

<sup>220</sup> See Appellee's Brief on Rehearing at 16-18, *Lane v. Tennessee*, 315 F.3d 680, 681 (6th Cir. 2003) (No. 98-6730), 2002 WL 34347577, *aff'd*, 541 U.S. 509 (2004).

<sup>221</sup> 538 U.S. 721 (2003); see also Kurt Hildebrand, *State Could Reduce Settlement with Phone Call, Victor Says*, NEV. APPEAL (June 22, 2003), <https://www.nevadaappeal.com/news/local/state-could-reduce-settlement-with-phone-call-victor-says/> [<https://perma.cc/HGX9-USSR>] (“I'm not looking to bankrupt the state,' he said. 'I live here, too.'”).

<sup>222</sup> No. 04-1236 (U.S.), *decided sub nom.* *United States v. Georgia*, 546 U.S. 151 (2006).

<sup>223</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976).

<sup>224</sup> *Id.* at 457 (Brennan, J., concurring in the judgment).

<sup>225</sup> E.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (prisoners); *Maher v. Gagne*, 448 U.S. 122 (1980) (benefits).

The Court's carelessness in Fourteenth Amendment cases infected its other abrogation decisions too. In *Tennessee Student Assistance Corp. v. Hood*, it permitted a debtor's action to discharge a debt owed to a state, on the argument that an in rem bankruptcy proceeding "does not implicate a State's Eleventh Amendment immunity."<sup>226</sup> But the debtor in *Hood* was "a resident of Tennessee," so the Amendment was inapplicable by its terms.<sup>227</sup> The right question in the case was whether the bankruptcy court could issue compulsory process against the state, given its undisputed in rem jurisdiction over the debtor's assets: the power to dispose of a private estate, denying a creditor state the right to bring a future claim, as plaintiff,<sup>228</sup> doesn't confer any power to call a state to answer today, as a defendant.<sup>229</sup>

In *Central Virginia Community College v. Katz*, the Court went further, holding that bankruptcy proceedings generally "operate[] free and clear of the State's claim of sovereign immunity,"<sup>230</sup> on the theory that the states had "agreed in the plan of the Convention not to assert [their] immunity" in bankruptcy cases.<sup>231</sup> But this was the wrong question. The right question in *Katz* was whether the Eleventh Amendment took the choice of waiving their immunity away from them. Bernard Katz hailed from New Jersey,<sup>232</sup> so the federal courts were flatly forbidden by the Amendment from hearing any suit he filed against the State of Virginia, even to recover an allegedly preferential transfer. This result may not be "uniform," in the language of the Bankruptcy Clause,<sup>233</sup> but neither is the Eleventh Amendment: it carves out a particular exception to the federal judicial power, one that neither Congress nor the bankruptcy courts may evade.

#### D. "in law or equity": Admiralty Jurisdiction

The Eleventh Amendment only applies to a "suit in law or equity." That means that it exempts any proceeding other than a suit in law or equity—say, a case "of admiralty and maritime jurisdiction."<sup>234</sup>

<sup>226</sup> 541 U.S. 440, 445 (2004).

<sup>227</sup> *Id.* at 444.

<sup>228</sup> *Id.* at 446-47 (citing *California v. Deep Sea Rsch., Inc.*, 523 U.S. 491 (1998)).

<sup>229</sup> See *id.* at 458-59 (Thomas, J., dissenting); cf. *Allen v. Cooper*, 140 S. Ct. 994, 1000-01 (2020) (holding that Congress lacks power to abrogate state sovereign immunity under the Copyright Clause, regardless of the plaintiff's citizenship).

<sup>230</sup> 546 U.S. 356, 373 (2006).

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

<sup>232</sup> See Docket, *In re Wallace's Bookstores, Inc.*, No. 5:01-bk-50545 (Bankr. E.D. Ky. Feb. 28, 2001); Second Plan Supplement at 4, *In re EOGH Liquidation, Inc.*, No. 15-31232 (VFP) (Bankr. D.N.J. July 11, 2016).

<sup>233</sup> U.S. CONST. art. I, § 8, cl. 4; *Katz*, 546 U.S. at 369 (emphasizing "the importance of authorizing a uniform federal response").

<sup>234</sup> U.S. CONST. art. III, § 2, cl. 1.



As mentioned above, leaving admiralty out of the Amendment made sense at the time. Admiralty typically works *in rem*, not *in personam*, so it usually poses no threat to the states' personal immunity from compulsory process. Similar doctrines also stopped litigants from attaching state property, a prerequisite to a court's *in rem* jurisdiction.<sup>235</sup> Before the Constitution, for example, a Pennsylvania admiralty court had disclaimed jurisdiction over some sailors' attempt to recover their lost wages by libeling a South Carolina ship, because "mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due."<sup>236</sup> In 1812, the U.S. Supreme Court confirmed a similar common-law immunity for foreign nations in federal court.<sup>237</sup> The exact boundaries of this immunity were and are disputed—does it extend to all sovereign-owned property, or only to certain sovereign uses?<sup>238</sup> But as this *in rem* immunity was unthreatened by *Chisholm*, there was less need for the Eleventh Amendment to supplement it. Thus, in admiralty suits, even if filed *in personam*, only the common-law immunity applies.

The Court wiggled its way to more or less this resolution in *Ex parte New York*, a twentieth-century admiralty suit brought against two city-chartered tugboats.<sup>239</sup> The Court's opinion began with a near-conflation of the Eleventh Amendment and the unwritten general-law immunity—describing the latter as a "fundamental rule of which the Amendment is but an exemplification."<sup>240</sup> But the Court then got to the right place, concluding that the case was controlled by the general-law principle of "immunity of a State from suit *in personam* in the admiralty brought by a private person without its consent."<sup>241</sup>

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<sup>235</sup> See sources cited *supra* note 28 (explaining why traditional sovereign immunity doctrine covers the sovereign and its property).

<sup>236</sup> *Moitez v. The South Carolina*, 17 F. Cas. 574, 574 (Adm. Pa. 1781) (No. 9,697).

<sup>237</sup> *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 146 (1812).

<sup>238</sup> Compare James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 587 n.127 (1994) (explaining the *Moitez* court's theory that mere ownership of a ship by the sovereign necessitates dismissal), with Bederman, *supra* note 149, at 942, 984-85 (examining decisions in which courts required a sovereign to use property for a public or governmental purpose); see also *Ellison v. The Bellona*, 8 F. Cas. 559, 559 (D.S.C. 1798) (No. 4,407) (distinguishing privateers from the *Moitez* case); *Schooner Exch.*, 11 U.S. at 145 (noting potential exceptions to immunity for "the private property of the person who happens to be a prince" as well as for "[a] prince . . . acquiring private property in a foreign country," though "[w]ithout indicating any opinion on this question"); cf. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1653-54 (2018) (detailing the common law immovable property exception to sovereign immunity); *id.* at 1657-61 (Thomas, J., dissenting) (same).

<sup>239</sup> *In re State of New York*, 256 U.S. 490, 497 (1921).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 500. The proceeding against the state was *in personam*, because "the charters had expired according to their terms, and the tugs were in possession of the claimants, neither the State nor Walsh having any claim upon or interest in them." *Id.* at 496. That made it even easier to see

The general law, not the more unforgiving rule of the Eleventh Amendment, controls admiralty cases.

Understanding the relationship between the Eleventh Amendment and admiralty gives us additional reason to be careful about the scope of admiralty jurisdiction. Admiralty's reach has expanded quite a bit over time. The Taney Court held that the doctrine had been expanded from the "ebb and flow of the tide" (as it was in England) to include all "navigable waters" (such as America's Great Lakes).<sup>242</sup> Modern doctrine extends it even to some injuries on land, if they were originally caused by a vessel on navigable waters (such as the flooding of a skyscraper in the Chicago Loop, caused by pilings inserted by a crane that sat on a river barge).<sup>243</sup> Those expansions affect federal judicial power generally, but they also affect power over *states* specifically. A broader scope for admiralty means a broader range of cases to which the Eleventh Amendment is inapplicable. If those expansions were inconsistent with constitutional principles,<sup>244</sup> a question on which we take no position here, the Amendment cautions us to be even more chary of them.

E. "commenced or prosecuted": *Appellate jurisdiction*

The Supreme Court may occupy a special place in our constitutional system, but the Court isn't above the law. Rather, it's bound by the same principles that bind the other federal courts, which equally exercise "the judicial Power of the United States."<sup>245</sup> The Eleventh Amendment restricts that "Judicial power" by preventing any federal court from hearing any case, in law or equity, "commenced or prosecuted" against one state by the citizens of another.<sup>246</sup> But because the Supreme Court, by statute, is the only one that hears cases on appeal from state courts, it has gotten rather confused about the scope of its authority.

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that no arguable in rem exceptions to sovereign immunity applied. *Id.* at 501-02; Bederman, *supra* note 149, at 979-80.

<sup>242</sup> *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 454-58 (1851).

<sup>243</sup> *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995). Justice Thomas would have expanded it still further, eliminating the current requirement that the incident have a maritime character. *Id.* at 549-56 (Thomas, J., concurring in the judgment).

<sup>244</sup> *See, e.g., The Genesee Chief*, 53 U.S. at 465 (Daniel, J., dissenting) (concluding that the Court had impermissibly "enlarged" the Constitution "not by amendment in the modes provided, but according to the opinions of the judiciary"); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924) (deeming it "well recognized" at the time that "there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation").

<sup>245</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>246</sup> *Id.* amend. XI.

### 1. Text and History

The Supreme Court can exercise two forms of jurisdiction: “original” and “appellate.”<sup>247</sup> Its original jurisdiction is limited to cases “affecting Ambassadors” and other diplomats, as well as “those in which a State shall be Party”; its appellate jurisdiction includes “the other Cases before mentioned” in the first clause of Article III, Section Two.<sup>248</sup> As a result, the Court’s appellate jurisdiction is a strict subset of “[t]he judicial Power” described in Section Two<sup>249</sup>—precisely the power limited by the Eleventh Amendment.

Whether the Court can hear a state-court appeal thus turns on whether the appeal falls within the Amendment’s terms. Chief Justice Marshall first confronted this problem in *Cohens*. As noted above, the case involved an appeal from a state criminal prosecution: two brothers had been prosecuted in Virginia court for a violation of Virginia law (the illegal sale of D.C. lottery tickets).<sup>250</sup> The state court upheld the defendants’ conviction, and the defendants sought a writ of error in the Supreme Court, arguing that the Virginia law was preempted by federal statute.

The Supreme Court correctly determined that the Eleventh Amendment didn’t create any problems for its jurisdiction. The Amendment only applies to a suit “commenced or prosecuted *against* one of the United States.”<sup>251</sup> As the Court elaborated, “[t]o commence a suit, is to demand something by the institution of process in a Court of justice, and to prosecute the suit, is, according to the common acceptation of language, to continue that demand.”<sup>252</sup> Thus, “[w]hatever may be the stages of its progress, the actor is still the same.”<sup>253</sup> On appeal, then, everything depends on how the parties had been arranged below, and which ones were asking the courts for relief. In *Cohens*, the plaintiff was the state, so the Amendment didn’t apply.<sup>254</sup> And because Virginia wasn’t the original target of compulsory process, the common-law immunity didn’t apply either: private defendants had routinely sought writs of error after the United States prevailed against them below, and no one thought this infringed the *federal* government’s common-law immunity.<sup>255</sup>

What happens when an individual is the one who originally brought the suit? If an in-state plaintiff sues a state in its own courts, the Eleventh Amendment is of course out of the picture, and the suit proceeds if and only

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<sup>247</sup> *Id.* art. III, § 2, cl. 2.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* art. III, § 2, cl. 1.

<sup>250</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 265-66 (1821).

<sup>251</sup> U.S. CONST. amend. XI (emphasis added).

<sup>252</sup> *Cohens*, 19 U.S. at 408.

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

<sup>254</sup> *Id.* at 409.

<sup>255</sup> *Id.* at 412.

if the state lets it. Should a federal issue arise, the case might well be appealed to the Supreme Court. The Amendment doesn't bar federal jurisdiction over suits by in-staters, and no new compulsory process would be needed on appeal.

When the plaintiff is from out of state, however, the Eleventh Amendment prevents federal courts from taking *any* jurisdiction over that suit. A state's own courts might be able to hear the case; they aren't bound by the Eleventh Amendment. But under the *Cohens* logic, it's plain what should happen next: *nothing*. The case should be heard in the state court system, and then stop. The Supreme Court is forbidden to review it. Just as *Cohens* retained its defensive character when it reached the Supreme Court, these suits retain their offensive character when *they* reach the Supreme Court—as suits “commenced or prosecuted against” the state, with an out-of-stater as plaintiff. It follows that “the judicial power of the United States” doesn't reach these suits, and so the Supreme Court can't hear them.

## 2. Precedent

In practice, however, the Court has said and done otherwise. It has granted review of state-court cases filed against states by out-of-state plaintiffs with little apparent concern for the Eleventh Amendment. In at least some of these cases, it seems likely that the Amendment barred the appeal.<sup>256</sup> As Professor Vicki Jackson observed in 1988, *Cohens* has become “popularly cited for the proposition that the Eleventh Amendment does not preclude Supreme Court review of state court judgments, whether in favor of or against the state as a formal party.”<sup>257</sup> But this popular view is wrong. As noted above, *Cohens* requires something else.

The Supreme Court didn't fully confront this problem until its 1990 decision in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, a Commerce Clause challenge to Florida's liquor taxes.<sup>258</sup> The case was brought against Florida in state court under the state's own tax refund statute, and the state supreme court decided the case unimpeded by the Eleventh Amendment. But when the taxpayer sought review in the U.S. Supreme Court, the state argued that the case was barred by the Eleventh Amendment,<sup>259</sup> which indeed it seemed to be. The suit was commenced by an out-of-state corporation against the state;<sup>260</sup> it thus fell outside of the

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<sup>256</sup> See *infra* notes 268–274 and accompanying text (surveying the run of Eleventh Amendment and adjacent cases cited by *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)).

<sup>257</sup> Jackson, *supra* note 4, at 15.

<sup>258</sup> 496 U.S. 18, 22 (1990).

<sup>259</sup> *Id.* at 26.

<sup>260</sup> This assumes that the Division and the Comptroller could stand in for the state itself, which the parties indeed assumed. *E.g.*, Petition for Writ of Certiorari at 3, *McKesson*, 496 U.S. 18 (No. 88-192).

“judicial power of the United States,” and a fortiori outside of the Supreme Court’s appellate jurisdiction.

The Court’s reasons for hearing the case anyway can be disaggregated into three:

*Consent.* Florida had allowed the suit to proceed in its own courts. This meant, the Court suggested, that “the State assents to appellate review by this Court of the federal issues raised in the case.”<sup>261</sup> As noted above, that’s not quite right. Whether or not allowing a suit in state court waives the common-law immunity from process in federal court, the common-law immunity isn’t the one at issue. The Eleventh Amendment, as we have seen, is a restriction on subject-matter jurisdiction—and that can’t be bestowed by consent.<sup>262</sup>

*The Constitutional Plan.* Alternatively, offered the Court, its jurisdiction was “inherent in the constitutional plan.”<sup>263</sup> The Court noted, correctly, that it may review cases arising from state courts, a principle established as long ago as *Martin v. Hunter’s Lessee*.<sup>264</sup> And it concluded, without much evidence, that this review wasn’t just a power but a universal condition:

To secure state-court compliance with, and national uniformity of, federal law, the exercise of jurisdiction by state courts over cases encompassing issues of federal law is subject to two conditions: State courts must interpret and enforce faithfully the “supreme Law of the Land,” and their decisions are subject to review by this Court.<sup>265</sup>

Again, the Court’s logic is faulty on its own terms. If appellate review is available *most* of the time, then we can enjoy a good deal of uniformity without demanding that state judgments be subject to review *in every case*. Indeed, the Court acknowledged that other jurisdictional bars, such as the adequate-and-independent-state-ground rule, sometimes preclude its review of state decisions about federal law.<sup>266</sup> So it was far from clear why the Eleventh Amendment was so contrary to the constitutional plan.

More fundamentally, though, the Court’s opinion reflected the most nefarious form of structural reasoning, inferring a “constitutional plan” apart from any actual provisions in the Constitution or any actual plans of those who enacted it. The Eleventh Amendment is a *part* of the constitutional plan. Indeed, it was enacted by those dissatisfied with a previous reading of the constitutional plan, who insisted on changing the constitutional plan to (what they thought was) a better plan. And within weeks of the announcement of

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<sup>261</sup> *McKesson*, 496 U.S. at 30.

<sup>262</sup> See *supra* Section II.A.

<sup>263</sup> *McKesson*, 496 U.S. at 30 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 329 (1934)).

<sup>264</sup> *Id.* at 28 (citing *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816)).

<sup>265</sup> *Id.* at 28-29 (footnote omitted) (quoting U.S. CONST. art. VI, cl. 2).

<sup>266</sup> *Id.* at 29 n.12 (citing *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983)).

ratification, lawyers suggested that the Amendment applied to cases brought to the Supreme Court on appeal from state courts.<sup>267</sup> To reject the straightforward reading of a constitutional amendment because of one's own view of a supposedly paramount "plan" is to make great mischief, and also to nullify the power of the people to make their own law.

*Practice.* That left the fact that most favored the Court, which is that "consistent practice" seemed to favor the exercise of jurisdiction:

We have repeatedly and without question accepted jurisdiction to review issues of federal law arising in suits brought against States in state court; indeed, we frequently have entertained cases analogous to this one, where a taxpayer who had brought a refund action in state court against the State asked us to reverse an adverse state judicial decision premised upon federal law.<sup>268</sup>

Here, too, the Court overclaimed. There was no judicial holding to cite. The Court's opinion in *Cohens* provided no support. The two reasoned opinions the Court could cite were a 1908 concurrence by Justice Harlan and an 1837 dissent by Justice Story, both of which assumed that *Cohens* settled the issue.<sup>269</sup> What's more, these weren't even Eleventh Amendment cases. The 1908 case, *General Oil v. Crain*, was a suit by a Tennessee corporation in Tennessee court against a Tennessee oil inspector;<sup>270</sup> the 1837 case, *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, was a suit between two Massachusetts corporations.<sup>271</sup>

True, the Court had heard some appeals that were in fact forbidden by the Eleventh Amendment. But the Court usually places little stock in "drive-

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<sup>267</sup> *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 380 (1798) (arguments of counsel) (discussed *supra* text accompanying note 167).

<sup>268</sup> *McKesson*, 496 U.S. at 27; *see also id.* at 27 n.8 (citing *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803 (1989); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Williams v. Vermont*, 472 U.S. 14 (1985); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984); *Aloha Airlines, Inc. v. Dir. of Tax'n of Haw.*, 464 U.S. 7 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983); *Thomas v. Rev. Bd. of the Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981); *Cent. Mach. Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160 (1980); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Laurens Fed. Sav. & Loan Ass'n v. S.C. Tax Comm'n*, 365 U.S. 517 (1961); *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952); *Best & Co. v. Maxwell*, 311 U.S. 454 (1940); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931); *Int'l Paper Co. v. Massachusetts*, 246 U.S. 135 (1918); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1871); *McKesson*, 496 U.S. at 28 n.9 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 n.5 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420 (1979)).

<sup>269</sup> *Id.* at 27 (citing *General Oil Co. v. Crain*, 209 U.S. 211, 233 (1908) (Harlan, J., concurring); *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420, 585 (1837) (Story, J., dissenting)).

<sup>270</sup> 209 U.S. at 212-13.

<sup>271</sup> 36 U.S. at 536-37.

by jurisdictional rulings.”<sup>272</sup> In any case, its count was wrong. *McKesson* string-cited twenty-two cases. Of these, only eight would normally be taken to trigger the Eleventh Amendment: seven involved foreign corporations,<sup>273</sup> and one, *Nevada v. Hall*, involved California residents suing the State of Nevada.<sup>274</sup> The others involved in-state corporations or residents, or other entities such as a Native American tribe or a federal savings-and-loan.<sup>275</sup> In rejecting the applicability of the Eleventh Amendment, the Court still merrily conflated in-state and out-of-state plaintiffs.

Judge John Gibbons and others have made a similar mistake in citing the Marshall Court’s decision in *Worcester v. Georgia* as supporting federal jurisdiction over these appeals.<sup>276</sup> Gibbons finds it “especially telling” that “[i]n *Worcester v. Georgia* the party alignment was exactly that proscribed by the eleventh amendment, but the Court found no eleventh amendment bar to the issuance of a writ of error; indeed, it did not even discuss the issue.”<sup>277</sup> But again, this critique demonstrates inattention to the Eleventh Amendment’s text. The suit had been commenced when *the State of Georgia* prosecuted Worcester for a violation of Georgia law, sentencing him “to hard labour, in the penitentiary, for the term of four years.”<sup>278</sup> Worcester appealed his criminal conviction.<sup>279</sup> Under the *Cohens* rule, the Eleventh Amendment was inapplicable because Georgia, not Worcester, had “commenced or prosecuted” the suit. Little wonder that the Court didn’t discuss the Eleventh Amendment.

Putting aside such overstatements of the historical record, it’s still true that before *McKesson* the Court sometimes exercised a jurisdiction forbidden by the Eleventh Amendment. But without any reasoning, and in conflict with the Amendment itself, these exercises should have been grounds for

<sup>272</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998); *accord* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006).

<sup>273</sup> *See Tyler Pipe*, 483 U.S. at 232 (identifying appellant as “an out-of-state manufacturer”); *Exxon*, 462 U.S. at 179 n.2 (noting that appellants included Louisiana and California corporations); Brief for Petitioners (cover), *Bonelli*, 414 U.S. 413 (No. 72-397) (“Bonelli Cattle Company, a California corporation”); *Halliburton*, 373 U.S. at 66 (concerning an Oklahoma corporation’s oil production in Louisiana); *Memphis Steam Laundry Cleaner*, 342 U.S. at 389 (identifying appellant as “a foreign corporation operating . . . in Tennessee”); *Best & Co.*, 311 U.S. at 454-55 (describing Appellant as a New York establishment bringing suit against North Carolina); *Int’l Paper*, 246 U.S. at 138-39 (noting that the suit was brought by a New York corporation against Massachusetts).

<sup>274</sup> 440 U.S. 410, 411 (1979), *overruled by* *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019).

<sup>275</sup> This discussion assumes, perhaps contrary to fact, the correctness of modern doctrines on corporate citizenship. *See supra* notes 106, 195.

<sup>276</sup> Gibbons, *supra* note 4, at 1953-54 (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)); *see also* Lee, *supra* note 149, at 1073 (making the same mistake). Gibbons makes the argument as a point in favor of the diversity theory, in an article that predates *McKesson*.

<sup>277</sup> Gibbons, *supra* note 4, at 1953 (footnote omitted).

<sup>278</sup> *Worcester*, 31 U.S. at 537-40.

<sup>279</sup> *Id.* at 515.

embarrassment and apology by the Court, not for embracing the error and repeating it out loud.

Less than a decade after *McKesson*, another state tried to sway the Court in *South Central Bell Telephone Co. v. Alabama*.<sup>280</sup> Again the plaintiffs were out-of-state corporations who had sued the state under the Commerce Clause in state court.<sup>281</sup> Again the plaintiffs appealed to the Supreme Court, and again the state pointed out “that th[e] Amendment’s literal language applies here.”<sup>282</sup> But the Court simply responded that it had “recently considered and rejected the very argument that the State now makes”; that *McKesson* “confirmed a long-established and uniform practice”; and that there was no “convincing reason why we should revisit that relatively recent precedent.”<sup>283</sup> So much for the Constitution.

*McKesson* and *South Central Bell Telephone* may have been entangled with the broader sovereign immunity debates aired in *Seminole Tribe* and subsequent cases. Justice Brennan, the author of *McKesson*, was no fan of sovereign immunity, and he was especially committed to the Supreme Court’s ability to police state misconstructions of federal rights.<sup>284</sup> Yet Justice Souter, in his subsequent dissent in *Seminole Tribe*, correctly called *McKesson*’s rule “specious” and declared that it “makes no sense.”<sup>285</sup> This wasn’t because Justice Souter disagreed with the result: he thought it axiomatic that the Court must have power to review state-court holdings on federal law, and if *McKesson* wasn’t the reason why, then the diversity theory of the Eleventh Amendment must be.<sup>286</sup> In any event, these statements made it plausible for Alabama (represented by Chuck Cooper and now-Judge William Pryor<sup>287</sup>) to think that the issue could be reconsidered in 1999. Five Justices had expanded sovereign immunity in *Seminole Tribe*; the other four had stated explicitly that

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<sup>280</sup> 526 U.S. 160 (1999).

<sup>281</sup> *Id.* at 160, 162-63.

<sup>282</sup> *Id.* at 165. The petitioners replied that even if *McKesson* were overruled, the tax refund claim at issue was “not a suit against the State.” Reply Brief for Petitioners at 13, *S. Cent. Bell Tel.*, 526 U.S. 160 (No. 97-2045) (quoting *State v. Norman Tobacco Co.*, 273 Ala. 420, 421 (1962)).

<sup>283</sup> *S. Cent. Bell Tel.*, 526 U.S. at 166 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992)).

<sup>284</sup> Laura Krugman Ray, *Justice Brennan and the Jurisprudence of Dissent*, 61 TEMP. L. REV. 307, 321-22 (1988); Robert C. Post, *Remembering Justice Brennan: A Eulogy*, 37 WASHBURN L.J., at xix, xix-xx (1997).

<sup>285</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 113 n.10 (1996) (Souter, J., dissenting).

<sup>286</sup> *Id.* at 113-14; see also Gibbons, *supra* note 4, at 1953-55 (taking a similar view); Jackson, *supra* note 4, at 25-39 (describing the thin historical rationales for Supreme Court review of controversies that cannot otherwise be decided by federal courts); Nelson, *supra* note 11, at 1625 n.287 (arguing that *McKesson* reflects “[t]he Supreme Court’s tacit acceptance of the ‘diversity’ reading of the Eleventh Amendment”).

<sup>287</sup> *S. Cent. Bell Tel.*, 526 U.S. at 162.



*McKesson's* rule made no sense.<sup>288</sup> The court's unanimous refusal to rethink the question papered all this over.

One might have hoped that twenty years after *South Central Bell Telephone*, the Court would finally be prepared to come to terms with its mistake, or at least to offer a better explanation. The issue was gamely raised by amici in *Hyatt*,<sup>289</sup> but alas, the Court declined to discuss it at all.

#### F. "against one of the United States": Defendants

Sovereign immunity is for sovereigns, and the Eleventh Amendment is for states specifically. In identifying the parties whom the Amendment protects, the Supreme Court has gotten things mostly right—but with no shortage of confusing terminology that may lead others astray.

On the same day that it decided *Hans v. Louisiana*, the Court also decided *Lincoln County v. Luning*,<sup>290</sup> another collection of suits by disappointed bondholders. Lincoln County exercised governmental authority in the state of Nevada, so the county argued that the Eleventh Amendment barred the suit.<sup>291</sup> Indeed, the plaintiffs were citizens of California and Germany,<sup>292</sup> so in some sense the case seemed easier than *Hans*; the plaintiffs were actually from another state! But the Supreme Court rightly found the Eleventh Amendment inapplicable, for a simple and textually sensible reason. "The Eleventh Amendment limits the jurisdiction only as to suits against a State,"<sup>293</sup> and counties aren't states.<sup>294</sup>

By the same logic, and even more obviously, the Eleventh Amendment extends no protection to Indian tribes. Tribes may well have, as current doctrine holds, a form of common-law immunity that counties lack.<sup>295</sup> But they haven't

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<sup>288</sup> See *Seminole Tribe*, 517 U.S. at 100 (Souter, J., dissenting) (noting that Justices Ginsburg and Breyer had joined his opinion); *id.* (Stevens, J., dissenting) (stating that he dissented for his own reasons "as well as those set forth in Justice Souter's opinion").

<sup>289</sup> Namely, *us*. See *Hyatt* Brief, *supra* note 10, at 33-34.

<sup>290</sup> 133 U.S. 529, 530 (1890).

<sup>291</sup> *Id.* at 530-31.

<sup>292</sup> *Vincent v. Lincoln Cnty.*, 30 F. 749, 749 (C.C.D. Nev. 1887).

<sup>293</sup> *Luning*, 133 U.S. at 530.

<sup>294</sup> To be sure, there are a range of more complicated questions about when a suit against a nonstate entity is really against a state. Is the test the party on the record, *e.g.*, *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 838-42, 857-58 (1824), the real party in interest, *e.g.*, *Ex parte Ayers*, 123 U.S. 443, 488 (1887), or the legal capacity of the entity under state law, *e.g.*, *Workman v. New York City*, 179 U.S. 552, 565 (1900); *P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 881-82 (D.C. Cir. 2008) (Williams, J., concurring)? These questions may well apply equally, or similarly, to the common-law rules of sovereign immunity and to the Eleventh Amendment's reference to "one of the United States." As above, one of us may address them in future work. See *supra* note 69.

<sup>295</sup> Compare *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) ("These Indian Nations are exempt from suit without Congressional authorization."), with *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) ("Though the doctrine of tribal immunity is settled law

been held to fall within the Eleventh Amendment, and for good reason. As Chief Justice Marshall confirmed with respect to Article III in *Cherokee Nation v. Georgia*, a tribe isn't "a state of the union."<sup>296</sup> By the same logic, it can't be "one of the United States" to which the Eleventh Amendment applies.<sup>297</sup>

Federal territories have created slightly more confusion. The Supreme Court, per Justice Holmes, attributed sovereign immunity to the then-Territory of Hawaii, "not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."<sup>298</sup> We have doubts about this reasoning, which appears to conflate immunity with the merits.<sup>299</sup> But whether the result was right or wrong obviously depends on the scope of the common-law immunity, not the Eleventh Amendment, for territories also aren't states. Still, some courts can be found saying (for example) that "Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."<sup>300</sup> This is wrong; for all its virtues, the Commonwealth of Puerto Rico currently isn't "one of the United States,"<sup>301</sup> and so any immunity it might possess must come from some other source.<sup>302</sup> Courts confronting claims by Guam and the Northern Mariana Islands, by contrast, have gotten at least that much right.<sup>303</sup>

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and controls this case, we note that it developed almost by accident."). *See also* *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 804 (2014) (Sotomayor, J., concurring) (arguing that tribal immunity is deeply rooted).

<sup>296</sup> 30 U.S. (5 Pet.) 1, 16 (1831). Nor, for that matter, is it "a foreign state in the sense of the constitution"—the more important holding of the case. *Id.*

<sup>297</sup> U.S. CONST. amend. XI.

<sup>298</sup> *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

<sup>299</sup> *See, e.g., id.* ("A suit presupposes that the defendants are subject to the law invoked."); *cf.* *Territory of Wisconsin v. Doty*, 1 Pin. 396, 406-07 (Wis. Terr. July 1844) (simultaneously and contradictorily characterizing the territory as "a municipal corporation" and "a sovereignty . . . entitled to the same immunities" and "a part of the United States").

<sup>300</sup> *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983); *accord* *Torres-Álamo v. Puerto Rico*, 502 F.3d 20, 24 (1st Cir. 2007); *Acevedo López v. Police Dep't*, 247 F.3d 26, 28 (1st Cir. 2001); *De Leon Lopez v. Corporacion Insular de Seguros*, 931 F.2d 116, 121 (1st Cir. 1991); *see also* Adam D. Chandler, Comment, *Puerto Rico's Eleventh Amendment Status Anxiety*, 120 YALE L.J. 2183, 2184-85, 2188-89 (2011).

<sup>301</sup> U.S. CONST. amend. XI.

<sup>302</sup> *See, e.g.,* *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 274 (1913) (following *Kawananakoa* to find common-law immunity). The D.C. Circuit has attributed Puerto Rico's sovereign immunity, at least from federal statutory claims, to 48 U.S.C. § 734, which provides that "[t]he statutory laws of the United States not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States." § 734; *see* *Rodriguez v. P.R. Fed. Affs. Admin.*, 435 F.3d 378, 381-82 (D.C. Cir. 2006).

<sup>303</sup> *E.g.,* *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1234 (9th Cir. 2015) (Guam); *Fleming v. Dep't of Pub. Safety*, 837 F.2d 401, 405 (9th Cir. 1988) (Northern Mariana Islands).

On the other hand, when it comes to multistate entities created by interstate compacts,<sup>304</sup> the Court's caselaw is hopelessly lost. Constitutionally neither fish nor fowl, a Compact Clause entity can't claim to be part of any one of its member state governments. So a suit against the entity can't be "against one of the United States," as the Eleventh Amendment requires—even if, as in *Planters' Bank*, the controversy might be "between" the plaintiffs and the member states.<sup>305</sup> Nonetheless, the Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*<sup>306</sup> and *Hess v. Port Authority Trans-Hudson Corp.*<sup>307</sup> kludged together a different test: one that focuses on whether the member states *wanted* the entity to share in their immunity,<sup>308</sup> or (when all else fails) on the threat posed to state dignity and state treasuries.<sup>309</sup> Maybe these factors might be relevant to the scope of the common-law immunity, or to distinguishing bodies within a state's government from independent municipal corporations (as in *Luning*). But on their own, these policy interests can't expand the terms of the Eleventh Amendment, whose coverage isn't for states to confer.

G. "by Citizens of another State, or by Citizens or Subjects of any Foreign State": Plaintiffs

The other side of the "v." presents a similar need for precision in a range of more complicated circumstances.

*Assignments.* Consider first the relatively obscure sovereign-immunity dispute decided in *New Hampshire v. Louisiana*.<sup>310</sup> In an effort to help its citizens collect on their Louisiana bonds (a recurring theme), the State of New Hampshire by statute let citizens assign their bonds to the state, which would then sue to enforce the bonds and return the proceeds.<sup>311</sup> By having New Hampshire bring the suits in its own name, the idea went, the bondholders could sidestep sovereign immunity as well as the Eleventh Amendment.

The Court didn't buy it. But it took the hard way out. It insisted that the claim was barred by the Eleventh Amendment, even though the Amendment refers only to suits by "citizens" and "subjects," not by states themselves. It squeezed the state's suit into the Amendment's text by holding that it had

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<sup>304</sup> Cf. U.S. CONST. art. I, § 10, cl. 3 (requiring congressional consent for such compacts).

<sup>305</sup> See *supra* notes 194–95 and accompanying text (explaining why a suit against a bank in which Georgia held shares did not implicate the Eleventh Amendment).

<sup>306</sup> 440 U.S. 391 (1979).

<sup>307</sup> 513 U.S. 30 (1994).

<sup>308</sup> *Id.* at 43–44 (citing *Lake Country Estates*, 440 U.S. at 401).

<sup>309</sup> *Id.* at 39–40, 47–48.

<sup>310</sup> 108 U.S. 76 (1883).

<sup>311</sup> *Id.* at 76–78. The state of New York passed a similar one. *Id.* at 78–79.

been truly “commenced” and “prosecuted” by New Hampshire citizens: “No one can look at the pleadings and testimony in these cases without being satisfied, beyond all doubt, that they were in legal effect commenced, and are now prosecuted, solely by the owners of the bonds and coupons.”<sup>312</sup>

That wasn’t actually free from doubt. True, as the Court pointed out, the bondholder deposited money to start the case, paid for the case, got the money back at the end, and could veto settlements.<sup>313</sup> But on the other hand, the attorney general was to rely on his own “opinion” as to whether there was “a valid claim” and whether it “shall be just and equitable to enforce” it, and the statute said the attorney general would “*prosecute* such action or actions to final judgment.”<sup>314</sup> Indeed, the Court itself later described the states as “assuming the prosecution of debts.”<sup>315</sup>

It would have been more straightforward to acknowledge that this was a case to which the Eleventh Amendment failed to apply, but that was instead governed by the common law. Perhaps those common-law principles would still have afforded reason to bar the suit—for instance, by analogy to the statutory rules against manipulation of federal jurisdiction,<sup>316</sup> or by analogy to principles of international law that the Court discussed in its opinion.<sup>317</sup> The Eleventh Amendment didn’t supplant these common-law rules; it simply declared that such suits, whether permitted by the common law or not, couldn’t be brought in federal court by the citizens of another state.

*Foreign states.* As noted earlier, the Court handled this relationship more precisely in *Monaco v. Mississippi*—yet another strategic bond collection suit,

<sup>312</sup> *Id.* at 89.

<sup>313</sup> *Id.* In a subsequent case where the bonds were an outright gift to the state, the Court allowed the suit, *South Dakota v. North Carolina*, 192 U.S. 286, 310, 321 (1904), even though the purpose of the gift may have been to make money off of the state’s successful suit. See 3 J.G. DE ROULHAC HAMILTON, *HISTORY OF NORTH CAROLINA* 326-30 (1919) (describing scheme by the “Carlisle syndicate” to collect and sell repudiated bonds to other states); see also *South Dakota*, 192 U.S. at 310 (“[S]uch action might enure to his benefit as the owner of other like bonds. But the motive with which a gift is made, whether good or bad, does not affect its validity or the question of jurisdiction.”).

<sup>314</sup> *New Hampshire*, 108 U.S. at 77 (emphasis added). Again, the New York statute was similar. *Id.* at 79.

<sup>315</sup> *Id.* at 91.

<sup>316</sup> Indeed, had the case been filed in a lower federal court rather than in the Supreme Court’s original jurisdiction, it could have been blocked by the anti-assignment statute:

[N]or shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange.

Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470; see also *Farmington v. Pillsbury*, 114 U.S. 138, 141-45 (1885) (interpreting this statute); Comment, *Manufactured Diversity*, 117 U. PA. L. REV. 751, 751-54 (1969) (tracing this and similar provisions).

<sup>317</sup> *New Hampshire*, 108 U.S. at 91.

this time brought by a foreign state.<sup>318</sup> Since the foreign state wasn't a "Citizen[] or Subject[]" of itself, the Court rightly accepted that the Eleventh Amendment didn't apply. Yet it also recognized that this failed to exhaust the inquiry. After all, the Court noted, the federal government's sovereign immunity wasn't mentioned in the Eleventh Amendment (or anywhere else in the Constitution), and yet it existed. The same was true for a state's common-law immunity against plaintiffs not named in the Amendment, such as in-staters or foreign states.<sup>319</sup>

*Federal corporations.* A trickier question is posed by federally chartered corporations, such as the federal railroad thrown out of court in *Smith v. Reeves*,<sup>320</sup> or the suits by the Bank of the United States discussed above. Whether these plaintiffs are bound by the Eleventh Amendment depends on the nature of corporate citizenship.

When considering this question for diversity purposes, the Supreme Court first held in *Deveaux* that a corporation's citizenship is determined by the citizenship of its members (often understood as its shareholders).<sup>321</sup> It later changed course, holding in *Louisville, Cincinnati & Charleston Railroad Co. v. Letson* that a state-created corporation is always and only a citizen of the state by which it was incorporated.<sup>322</sup>

Presumably the same principles apply to the Eleventh Amendment, which also makes the federal judicial power depend on the parties' citizenship. If so, then jurisdiction over suits by corporations against states will depend on which of these principles is correct. If jurisdiction is based on the shareholders' citizenship, per *Deveaux*, then a suit by a corporation against a state runs into the Eleventh Amendment whenever there are out-of-state shareholders. If jurisdiction is based on the state of incorporation, per *Letson*—and if federal corporations, not having been incorporated by any state, aren't citizens of any state—then federal corporations fall outside of the Eleventh Amendment entirely, facing only the common-law immunity.

*Indian tribes.* An extension of this problem is posed by Indian tribes as plaintiffs. A tribe is recognized as a sovereign, not a mere corporation, so it's implausible to view it merely as an agglomeration of its own tribal members—and also implausible to view it as the citizen of any particular state. So suits by tribes aren't bound by the Eleventh Amendment. But, like the Principality of Monaco, that doesn't exempt them from the common-law principles of

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<sup>318</sup> 292 U.S. 313, 320-21 (1934). The strategy seemed especially viable after *South Dakota v. North Carolina*, discussed *supra* note 313.

<sup>319</sup> *Monaco*, 292 U.S. at 321; see also *supra* notes 54-58 and accompanying text.

<sup>320</sup> 178 U.S. 436, 446 (1900) (relying on *Hans v. Louisiana* rather than the Eleventh Amendment).

<sup>321</sup> *Bank of the U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 91-92 (1809); see, e.g., *Hertz Corp. v. Friend*, 559 U.S. 77, 84 (2010) (describing the members as shareholders).

<sup>322</sup> 43 U.S. (2 How.) 497, 558 (1844) (overruling *Deveaux*).

immunity, which (according to the Court) protect against suits by foreign states just as much as by domestic tribes.<sup>323</sup>

*Compact Clause entities.* Another extension is posed by Compact Clause entities as plaintiffs. In *Alabama v. North Carolina*, for instance, Chief Justice Roberts objected to letting the Interstate Low-Level Radioactive Waste Management Commission tag along as a plaintiff in an original action among states, partly because of the Eleventh Amendment.<sup>324</sup> This may be right as a matter of Article III, which “does not countenance such ‘no harm, no foul’ jurisdiction”;<sup>325</sup> but the Amendment probably doesn’t decide the issue. If the *Letson* principle applies, and congressional consent under the Compact Clause creates a separate, stateless entity, then the suit falls outside the Eleventh Amendment (and, indeed, outside the Supreme Court’s original jurisdiction). If the *Deveaux* principle applies, and the Compact Clause entity is really just an agglomeration of states, then the suit also falls outside the Eleventh Amendment. (Under that view, the suit would be outside the common-law principles of sovereign immunity too, though other barriers might apply.<sup>326</sup>) In any event, the Eleventh Amendment seems the wrong place to look.<sup>327</sup>

#### CONCLUSION

The picture we’ve proposed is simple, if somewhat counterintuitive. There are two overlapping principles of sovereign immunity. One is a common-law principle against forcing states into court without their consent. The other is the Eleventh Amendment’s cross-cutting restriction on subject-matter jurisdiction, which can’t be waived, abrogated, or ignored.

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<sup>323</sup> See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 780-82 (1991) (relying on *Monaco v. Mississippi*). As to whether the Court was correct in interpreting the common-law immunity to apply to sovereign suits, we aren’t sure. See *id.* at 780 (acknowledging that the tribe’s “conception of the nature of sovereign immunity finds some support both in the apparent understanding of the Founders and in dicta of our own opinions”).

<sup>324</sup> 560 U.S. 330, 360-61 (2010) (Roberts, C.J., concurring in part and dissenting in part).

<sup>325</sup> *Id.* at 360.

<sup>326</sup> Because North Carolina was both the defendant and a member of the compact, this view would raise tricky questions about a state’s ability to sue itself in federal court, *cf.* *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 259 (2011); *id.* at 270-72 (Roberts, C.J., dissenting), and whether the jurisdiction over “Controversies between two or more States,” U.S. CONST. art. III, § 2, cl. 1, requires minimal or complete diversity—questions that the Court hasn’t yet had to confront, because it currently adheres to the *Letson* principle.

<sup>327</sup> A true tag-along Eleventh Amendment issue was briefly raised in 2020 by President Trump’s motion to intervene in an original action: his intervention would have pit Texas and a Florida citizen against Pennsylvania, Georgia, Michigan, and Wisconsin. Motion of Donald J. Trump, President of the U.S., to Intervene in His Pers. Capacity as Candidate for Re-Election, *Texas v. Pennsylvania*, No. 22O155 (U.S. Dec. 11, 2020), 2020 WL 7263246. But the issue was mooted when the Court denied leave to file a bill of complaint. *Texas*, No. 22O155, 2020 WL 7296814.

We acknowledge that at least two of these features might be hard to swallow. Why would the Amendment's drafters have carefully left out suits by citizens of the same state, if they expected those suits to be barred by other principles of sovereign immunity anyway? And why would the drafters have chosen to entrench a constitutional immunity that was so inflexible and unyielding, given how difficult it might be to amend?

As we hope we've shown, the second question has a good answer, which also provides an answer to the first. The Eleventh Amendment was indeed enacted to eliminate cases like *Chisholm*, where the disregard of common-law immunity threatened both the sovereignty and the solvency of the states. But to do this safely and conveniently, the Amendment adopted a principle significantly more forceful and uncompromising than the common-law principle had been.

As a result, it made sense to write the Eleventh Amendment narrowly, while leaving the common-law rule in place. The restriction on subject-matter jurisdiction imposed by the Eleventh Amendment is very different from the common-law immunity: it can't be waived; it can't be abrogated; it interferes with the Supreme Court's review; and so on.

There was good reason for the Eleventh Amendment to do these things, but its blunt textual force renders it a constitutional sledgehammer. It was quite reasonable for the drafters to level that sledgehammer at a smaller class of cases, where its full force might sometimes be needed. For this very reason, however, our courts ought to be more careful about how they wield that sledgehammer today.

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