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# RESTORING CONGRESS'S AUTHORITY UNDER ARTICLE I TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY: A REMEDY THAT IS LONG OVERDUE

Howard L. Zwickel\* and Evelyn M. Tenenbaum\*\*

## ABSTRACT

For over two centuries, Congress had the authority to enact laws that provided meaningful monetary relief for individuals who were injured by states due to discrimination, violations of intellectual property rights, and other state actions that were within Congress's power to legislate. That authority did not change until 1996, when the Supreme Court held in *Seminole Tribe of Florida v. Florida* that the Eleventh Amendment established a constitutional right to state sovereign immunity that trumped Congress's authority under Article I of the Constitution.

The Eleventh Amendment was ratified in 1795 to protect the states' common-law immunity from suit and, in numerous decisions over the next two hundred years, the Supreme Court recognized sovereign immunity as a common-law privilege. This recognition was based on the intent of Hamilton-Madison-Marshall and several other key supporters of the Constitution as well as the Framers of the Eleventh Amendment. Not until the Supreme Court's decision in *Seminole Tribe* did the Court hold that the Eleventh Amendment established an immutable constitutional right to state sovereign immunity that overrode Congress's authority under Article I. As this Article will show, *Seminole Tribe* rested on a flawed interpretation not only of the

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history of the Eleventh Amendment and the sovereign immunity principle, but also the text of both Article III of the Constitution and the Eleventh Amendment itself.

While Congress still has the authority under the post-Civil War Amendments to protect injured parties from state action through “appropriate legislation,” the Court has placed restrictions on laws passed under the authority of these Amendments if they abrogate state immunity from suit. These restrictions have caused landmark legislation, including the Americans with Disabilities Act and the Age Discrimination in Employment Act, to be struck down. As a result, injured parties must seek recourse under state laws that often fail to provide adequate relief. These major federal laws would likely have been sustained if sovereign immunity were recognized as a common-law principle, rather than a constitutional limit on Congress’s authority.

In the past two years, the Supreme Court has retreated from *Seminole Tribe* by creating exceptions to the limitations on the federal government’s power to abrogate state immunity. Those rulings raise serious doubt about the Court’s willingness to adhere to the reasoning in *Seminole Tribe*. We advocate overruling *Seminole Tribe* with some workable safeguards on Congress’s Article I authority to protect the federal-state balance of power.

## INTRODUCTION

The Eleventh Amendment to the U.S. Constitution, the foundational source of the immunity enjoyed by states against lawsuits in federal court, sets forth no substantive constitutional right or defense. It 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>

Indeed, the Eleventh Amendment was founded on the common-law principle of state immunity from suit (“sovereign immunity principle”).<sup>2</sup> Despite this historical foundation, and the language of the Eleventh Amendment itself, the Supreme Court currently views state immunity as a fundamental constitutional principle that overrides much of Congress’s Article I authority.<sup>3</sup> As this Article will show, the Supreme Court’s position—as set forth in its 1996 decision in *Seminole Tribe of Florida v. Florida*<sup>4</sup> (“*Seminole Tribe*”)—rests on skewed interpretations of the history of the Eleventh Amendment, the sovereign immunity principle, and the text of both Article III and the Eleventh Amendment itself. While state sovereign immunity has always been a feature of American common law and the Framers *may* have intended sovereign immunity to be an implicit limitation on federal jurisdiction, it was never intended to be an explicitly recognized, constitutionally-based defense that trumps Congress’s authority under Article I.<sup>5</sup>

The Supreme Court’s seminal 5:4 decision in *Seminole Tribe* was based on the questionable premise that, because sovereign immunity was an implicit limitation on federal judicial power under Article III, it was also a constitutional limitation on Congress’s authority under Article I.<sup>6</sup> Not only did this reasoning face vigorous dissents by Justices Stevens and Souter,<sup>7</sup> but it is contrary to the plain meaning of

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

<sup>2</sup> See discussion *infra* Part II.

<sup>3</sup> See discussion *infra* Sections VII.B–VII.F.

<sup>4</sup> 517 U.S. 44 (1996).

<sup>5</sup> See discussion *infra* Parts II and V.

<sup>6</sup> See discussion *infra* Section VII.F.

<sup>7</sup> See, e.g., *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting) (“The importance of the majority’s decision . . . cannot be overstated. . . . [I]t prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy.”).

the Eleventh Amendment and the Framers' intent. Through analysis of the role that state sovereign immunity played in the drafting and adoption of the Constitution and the Eleventh Amendment, we will show that the Framers granted Congress the power to override the common-law privilege of state sovereign immunity when it explicitly expresses this intent in legislation enacted under Article I.

This historical analysis has enormous implications for the constantly developing law regarding state sovereign immunity.<sup>8</sup> A majority of the Supreme Court today subscribes to the view that interpretation of constitutional provisions requires closely adhering to the Framers' intent at the time of adoption.<sup>9</sup> With respect to state sovereign immunity, adhering to the Framers' intent should lead the Court to conclude that *Seminole Tribe* was wrongly decided and that Congress retains its Article I authority to enact a law that unequivocally abrogates state immunity from suit.<sup>10</sup>

This conclusion also has enormous practical implications. Although Congress still has the authority to abrogate state sovereign immunity when exercising its enforcement powers under the Civil War Amendments,<sup>11</sup> the Supreme Court has placed strict limits on Congress's authority to adopt legislation that would abrogate the states' sovereign immunity under the Thirteenth, Fourteenth, and Fifteenth Amendments.<sup>12</sup> These limits have particularly affected major federal laws that provide damages remedies against states for discrimination<sup>13</sup> and for infringement

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<sup>8</sup> See, e.g., discussion *infra* Part IX (analyzing alternative remedies for persons injured by state action seeking monetary relief for claims of age discrimination and infringement of intellectual property).

<sup>9</sup> See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2324 (2022) (Breyer, J., dissenting) ("The majority's core legal postulate, then, is that we in the 21st century must read the Fourteenth Amendment just as its ratifiers did. And that is indeed what the majority emphasizes over and over again.").

<sup>10</sup> See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 81 (1988) [hereinafter Jackson, *Supreme Court and State Sovereign Immunity*] ("[A]lthough debated during ratification, the doctrine of sovereign immunity was not discussed in terms of a principle provided and mandated by the Constitution—but rather as a pre-existing common law doctrine whose survival was at issue.").

<sup>11</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976).

<sup>12</sup> See discussion *infra* Part VIII.

<sup>13</sup> See discussion *infra* Part IX.

of intellectual property rights.<sup>14</sup> Because these strict limits on Congress's enforcement powers do not apply to legislation approved by Congress under Article I and because Congress retains broad authority under Article I, the damages remedies contained in these major federal laws would most likely be sustained if sovereign immunity were recognized as a common-law principle, rather than a constitutional limit on Congress's authority.<sup>15</sup> Moreover, although equitable remedies may still be available in the federal courts against state officials for discrimination and violation of intellectual property rights,<sup>16</sup> those remedies often do not provide adequate relief.<sup>17</sup> Instead, those aggrieved by state action in these cases must look to the states and common law for monetary relief and often discover that meaningful remedies do not exist there either.<sup>18</sup>

Interestingly, in the past two years, the Supreme Court has retreated from *Seminole Tribe's* broad curtailment of congressional authority. In two separate

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<sup>14</sup> See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 1006–07 (2020) (holding that Congress lacked the authority under Article I to abrogate the states' sovereign immunity from copyright infringement and had failed to provide a sufficient legislative record to support abrogation under § 5 of the Fourteenth Amendment).

<sup>15</sup> See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (“The extension of the [Age Discrimination in Employment Act] to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress' powers under the Commerce Clause.”).

<sup>16</sup> Under *Ex parte Young*, a suit against a government official seeking prospective injunctive relief to prevent a continuing violation of federal law or the federal Constitution is not considered to be a suit against a State. *Ex parte Young*, 209 U.S. 123 (1908); see generally SARAH E. RICKS & EVELYN M. TENENBAUM, CURRENT ISSUES IN CONSTITUTIONAL LITIGATION: A CONTEXT AND PRACTICE CASEBOOK 900, 900–13 (3d ed. 2020) (discussing *Young* as well as three exceptions to *Young* that the Court has carved out “to ‘ensure that the doctrine of sovereign immunity remains meaningful’”) (citation omitted); Ivan E. Bodensteiner & Rosalie Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New “Federalism” Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 108 (2001) (“[T]he Court has made it clear that the *Ex parte Young* “fiction” allows only prospective injunctive relief designed to end the illegal action, not retroactive relief that results in a raid on the state treasury. Damages may not be awarded by the federal courts against the governmental officials, in their official capacity, because such suits are, in effect, suits against the government.”).

<sup>17</sup> See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 691–92 (1974) (Marshall, J., dissenting) (“No other remedy [besides restitution of wrongfully withheld welfare benefits] can effectively deter States from the strong temptation to cut welfare budgets by circumventing the stringent requirements of federal law.”); Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1125 n.19 (2000) (noting that while the remedy of prospective equitable relief under *Ex parte Young* “might put an end to an ongoing violation, it does not provide a remedy for those who have been damaged”); Michael Wells, *Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid*, 31 RUTGERS L. REV. 771, 774–75 (2000) (noting that a suit against a state official may not provide full relief “because the officer is judgment proof, or because the Court may declare that the case is ‘really’ against the state”).

<sup>18</sup> See discussion *infra* Part IX.

decisions, the Court concluded that, when the states ratified the Constitution, they implicitly waived their sovereign immunity with respect to the federal government's power of eminent domain and the national power to raise and support the Armed Forces.<sup>19</sup> As a result, in each of these areas, Congress has the power to enact legislation that would allow private parties to sue states for damages.<sup>20</sup> But this result is inconsistent with the Supreme Court's assumption that state sovereign immunity is constitutionally-based.<sup>21</sup> If sovereign immunity were a fundamental constitutional principle,<sup>22</sup> rather than a common law privilege, Congress, under its eminent domain authority at issue in *PennEast*, should also lack the authority to enact a law allowing private parties to sue states to condemn state property, or under its authority to support the Armed Forces at issue in *Torres*, to authorize returning veterans to sue state employers if they refuse to accommodate the veterans' right to reclaim their prior jobs. Thus, these two recent Supreme Court decisions also support a more detailed analysis of the scope of sovereign immunity based on the history of the Constitution and the Eleventh Amendment.

In Parts I to V, this Article explores (1) the history of state sovereign immunity as it relates to the development of federal court jurisdiction in Article III of the Constitution; (2) the role state sovereign immunity played in the constitutional conventions; (3) the importance of the Judiciary Act of 1789<sup>23</sup> in understanding state sovereign immunity; (4) the landmark decision from 1793 in *Chisholm v. State of Georgia*<sup>24</sup> and the role it played in the Supreme Court's current construction of state sovereign immunity; and (5) the legislative history of the Eleventh Amendment.<sup>25</sup> Parts VI to VIII follow the evolution of the sovereign immunity principle in the

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<sup>19</sup> See *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021) (discussing eminent domain); *Torres v. Tex. Dep't of Pub. Safety*, 142 S. Ct. 2455 (2022) (discussing national power to raise and support the Armed Forces).

<sup>20</sup> See *PennEast*, 141 S. Ct. at 2263 (noting that the "States consented to the exercise of [the federal eminent domain] power—in its entirety—in the plan of the Convention"); *Torres*, 142 S. Ct. at 2463 ("By committing not to 'thwart' or frustrate federal policy [to raise and support the Armed Forces], the States accepted upon ratification that their 'consent,' including to suit, could 'never be a condition precedent to Congress' chosen exercise of its authority.>").

<sup>21</sup> See *PennEast*, 141 S. Ct. at 2262.

<sup>22</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996).

<sup>23</sup> Judiciary Act of 1789, ch. 20, §§ 1–35, 1 Stat. 73–92 (1789).

<sup>24</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>25</sup> See discussion *infra* Parts I–V.

Supreme Court's major Eleventh Amendment decisions from *Cohens v. Virginia*<sup>26</sup> to *Seminole Tribe*<sup>27</sup> and conclude with the Court's decisions striking down portions of federal laws that abrogate sovereign immunity for failure to comply with the Fourteenth Amendment.<sup>28</sup> Finally, Part IX compares the damages remedies currently available to injured parties under state law to the damages that could have been recovered if the Eleventh Amendment had not been construed to bar damages for age discrimination under the Age Discrimination in Employment Act and for violation of federal intellectual property laws.<sup>29</sup>

### I. THE CONSTITUTIONAL CONVENTION APPROVES ARTICLE III, WHICH TEXTUALLY ALLOWS PRIVATE PARTIES TO SUE STATES IN THE SUPREME COURT

Because the Framers' intent plays a particularly important role in the development of Eleventh Amendment jurisprudence, this Article begins with an analysis of the intended role of state sovereign immunity in the original Constitution.<sup>30</sup> As will be shown, during the drafting of the Constitution and the states' constitutional conventions, there was no common understanding of how the sovereign immunity principle would interface with the new federal courts' jurisdiction under Article III. Moreover, this history shows that, although the Framers had divergent views, there is no support for the Court's modern view that state sovereign immunity was intended to be embedded in the Constitution as a fundamental constitutional principle that trumps Congress's ultimate authority under Article I.

At the time of the Constitutional Convention, both the states and the national government were heavily in debt.<sup>31</sup> Government securities had been issued to obtain

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<sup>26</sup> 19 U.S. (6 Wheat.) 264 (1821).

<sup>27</sup> 517 U.S. 44 (1996).

<sup>28</sup> See discussion *infra* Parts VI–VIII.

<sup>29</sup> See discussion *infra* Part IX.

<sup>30</sup> See discussion *infra* Sections IV.A, V.A (discussing the Supreme Court's decision in *Chisholm* and the response to that ruling resulting in the ratification of the Eleventh Amendment).

<sup>31</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406–07 (1821) (“It is a part of our history that, at the adoption of the Constitution, all the states were greatly indebted.”); Maeva Marcus, *Introduction to 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 2 (Maeva Marcus ed., 1994) [hereinafter *DOCUMENTARY HISTORY*] (“A number of states had passed statutes expropriating these debts, or authorizing payment in paper currency, but under Article IV of the 1783 Treaty of Peace, British creditors were entitled to recover these debts in ‘sterling money.’”).



needed cash to fight the Revolutionary War and some British loyalists had their property confiscated.<sup>32</sup> In addition, there were prewar debts owed to British creditors.<sup>33</sup> To protect themselves from bankruptcy, a number of states passed statutes expropriating those debts or authorizing payment in paper currency, rather than in “sterling money.”<sup>34</sup>

Although injured parties could sometimes obtain relief from a state government by consent or by bringing a petition,<sup>35</sup> when the Constitutional Convention convened, every state also enjoyed some form of sovereign immunity.<sup>36</sup> Due to the states’ precarious financial situation, they had a strong interest in protecting this immunity from suit, especially in any federal court created by the new national government.<sup>37</sup> However, despite the importance of this issue to the states, the text of the Constitution, as it was drafted during the Constitutional Convention, extended

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<sup>32</sup> See DOCUMENTARY HISTORY, *supra* note 31, at 2 (“Holders of public securities that had been issued during the war in lieu of cash were now likely to sue. Loyalists whose property had been confiscated by the states during the war were also possible plaintiffs.”).

<sup>33</sup> See *id.* (“Perhaps most politically sensitive were the prewar debts owed to British creditors.”). Payment of these debts and the return of confiscated property were promised in the 1783 Treaty of Paris that ended the Revolutionary War. Treaty of Paris, Gr. Brit.-U.S., art. IV–V, Sept. 3, 1783, 8 Stat. 80.

<sup>34</sup> See DOCUMENTARY HISTORY, *supra* note 31, at 2.

<sup>35</sup> See Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3 (1963) (“We can conclude on the basis of this history that the King, or the Government, or the State, as you will, has been suable throughout the whole range of the law, sometimes with its consent, sometimes without, and that whether consent was necessary was determined by expediency rather than by abstract theory as to whether the action was really against the state.”); *id.* at 1 (“Long before 1789 it was true that sovereign immunity was not a bar to relief. Where the doctrine was in form applicable the subject had to proceed by petition of right, a cumbersome, dilatory remedy to be sure, but nevertheless a remedy.”); John J. Gibbons, *The Eleventh Amendment and State Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1896 (1983) (“[B]y the eighteenth century, the petition of right, the writ by which suit could be brought against the monarch, was entertained routinely, and thus had become for all practical purposes nondiscretionary.”); DOCUMENTARY HISTORY, *supra* note 31, at 1–2 (“A few colonial charters—those of Massachusetts, Connecticut, and Rhode Island—expressly allowed lawsuits against the government but even those authorities that were not covered by such explicit provisions were subject to ordinary common law actions as individuals or corporations.”).

<sup>36</sup> See discussion *infra* Section II.B (discussing writings of Anti-Federalists *Federal Farmer* and *Brutus* and Alexander Hamilton’s reference in Federalist No. 81); see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434–35 (1793) (opinion of Iredell, J.) (“I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular legislative mode authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the [Judiciary Act of 1789] was passed.”).

<sup>37</sup> See *supra* note 31 and accompanying text.

the federal government's jurisdiction to the states without any reference to their sovereign immunity.<sup>38</sup> Moreover, based on the limited records that exist on the Convention's proceedings,<sup>39</sup> there is no evidence that any member objected to the new national government's jurisdiction over the states.

Leaving state sovereign immunity out of the Constitution helped accomplish one of the main objectives at the Constitutional Convention: establishing the national courts as the neutral forum that would maintain "national peace and harmony."<sup>40</sup> It was unlikely that states could both be sued in the new national courts to preserve "peace and harmony," but also retain their sovereign immunity which, when asserted, would deprive the federal courts of jurisdiction. Indeed, among the list of Resolutions approved by the Convention in late July 1787 was a Resolution addressing the national court system's scope of jurisdiction.<sup>41</sup> The Resolution stated "[t]hat the Jurisdiction of the national Judiciary shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony."<sup>42</sup> The general principles in Resolutions such as

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<sup>38</sup> See generally U.S. CONST. art. III.

<sup>39</sup> PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 28 (2010) ("Once it settled down to work on May 25, [1787,] the Convention . . . adopted rules of proceeding, including one that forbade delegates to print, publish, or in any way communicate anything said during the debates to the outside world 'without leave.'").

<sup>40</sup> See 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, 1073 (1983) [hereinafter Fletcher, *Historical Interpretation*] ("[I]t was accepted as part of the jurisdiction necessary for the federal judiciary to serve one of the general purposes enumerated during the Constitutional Convention—the preservation of the national peace and harmony."); see also James Madison, Federal Convention Notes (May 29, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 15, 21–22 (Max Farrand ed., 1966) [hereinafter THE RECORDS] (showing that Madison's notes indicate that one of the resolutions proposed by Edmund Randolph on May 9, 1787, was for "a National Judiciary" whose jurisdiction would include "cases to which foreigners or citizens of other States applying to such jurisdictions may be interested . . . and questions which may involve the national peace and harmony"). The Resolution as agreed to in the Committee of the Whole House was split into three separate Resolutions: 11–13. *Id.* at 230–31. The third of these Resolutions (No. 13) provided that the "jurisdiction of the national Judiciary shall extend to . . . questions which involve the national peace and harmony." *Id.* at 231.

<sup>41</sup> These Resolutions were provided to the Committee of Detail ("the Committee"), which was charged with drafting the Constitution and reporting back on August 6, 1787. See James Madison, Federal Convention Notes (July 26, 1787), in 2 THE RECORDS, *supra* note 40, at 116, 128.

<sup>42</sup> John Rutledge et al., Committee of Detail I (June 19–July 23, 1787), in 2 THE RECORDS, *supra* note 40, at 129, 129 n.1, 132–33; James Madison et al., Federal Convention Journal (July 18, 1787), in 2 THE RECORDS, *supra* note 40, at 37, 39 (passing the resolution unanimously); see also Madison, *supra* note 41, at 46; CLYDE EDWARD JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 22–23

these were then turned over to the five-member Committee of Detail, which was given the responsibility of preparing a draft of the Constitution.<sup>43</sup>

Edmund Randolph and John Rutledge were members of the Committee of Detail.<sup>44</sup> Edmund Randolph created a working draft of the Judiciary article, which contained amendments by John Rutledge.<sup>45</sup> Their draft followed the framework set out in the Resolution and provided for jurisdiction “of the supreme tribunal” in six situations, including suits between a state and citizens of other states.<sup>46</sup>

The document that the Committee of Detail submitted to the Convention on August 6th<sup>47</sup> contained the predecessor to the Judiciary Article, which was labeled Article XI.<sup>48</sup> Article XI followed, in part, Randolph’s draft and vested the “Judicial Power of the United States” in one “Supreme Court” and “in such inferior Courts as” the Legislature shall constitute.<sup>49</sup> Although Article XI removed the phrase “national peace and harmony” that was contained in Randolph’s draft and in the Convention’s

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(1972) [hereinafter JACOBS, SOVEREIGN IMMUNITY] (“In subsequent debates, there were recurrent references to a judicial power encompassing cases affecting the national peace and harmony, and . . . the delegates approved a generalized resolution to this effect and referred it to the Committee of Detail, where it served as a guideline. It was this committee that drafted the detailed assignments of judicial power, presumably to implement this general objective.”).

<sup>43</sup> THE RECORDS, *supra* note 40, at xxii.

<sup>44</sup> JACOBS, SOVEREIGN IMMUNITY, *supra* note 42, at 17 (noting that the members of the Committee were John Rutledge, Edmund Randolph, Oliver Ellsworth, Nathaniel Gorham, and James Wilson).

<sup>45</sup> See Edmund Randolph, Committee of Detail IV, in 2 THE RECORDS, *supra* note 40, at 137, 137 n.6, 146–47; see also James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 618 n.244 (1994) [hereinafter Pfander, *Rethinking*] (“[S]cholars agree that the two most important drafts of Article III were those prepared by Edmund Randolph . . . and by James Wilson.”).

<sup>46</sup> Randolph, *supra* note 45, at 146–47 (noting that the specific areas in which the national courts would exercise jurisdiction involving the “national peace and harmony” included “the collection of the revenue . . . disputes between citizens of different states . . . disputes between a State & a Citizen or Citizens of another State . . . disputes, in which subjects or citizens of other countries are concerned,” and “Cases of Admiralty Jurisd[ictio]n”). “[D]isputes between a State & a Citizen or Citizens of another State” was an addition made by Rutledge. *Id.* at 137 n.6, 147.

<sup>47</sup> James Madison, Federal Convention Notes (Aug. 6, 1787), in 2 THE RECORDS, *supra* note 40, at 176, 177.

<sup>48</sup> *Id.* at 186–87 (draft of Article XI).

<sup>49</sup> *Id.* at 186 (draft of Article XI, Section 1).

Resolution,<sup>50</sup> it left intact jurisdiction by the Supreme Court over lawsuits between a state and citizens of another state.<sup>51</sup>

More specifically, the Judiciary Article explicitly gave the federal courts judicial power over lawsuits involving the states in three situations: “Controversies” (1) “between two or more States;” (2) “between a State and Citizens of another State” [“state-citizen clause”]; and (3) “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects” [“state-foreign subject clause”].<sup>52</sup> As the Supreme Court would later conclude,<sup>53</sup> the use of the word “between” in these provisions was intended to mean that a state would be considered a party whether it was a plaintiff or a defendant in the lawsuit.<sup>54</sup>

States were also logical defendants in three other categories of “cases” or “[c]ontroversies” included in the Judiciary Article:<sup>55</sup> (1) “all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority (“arising under clause”); (2) “all Cases of admiralty and maritime Jurisdiction;”<sup>56</sup> and (3) “Controversies to which the United States shall be a Party.”<sup>57</sup> In addition, the Judiciary Article provided that the

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<sup>50</sup> See *infra* note 46.

<sup>51</sup> *Id.* at 186 (draft of Article XI, Section 3). The Supreme Court’s jurisdiction extended to the state-citizen, state-foreign subject, citizen-citizen, and state-state (except as it involves territory or jurisdiction) clauses that had been part of the list of clauses under the “national peace and harmony” heading. *Id.*

<sup>52</sup> U.S. CONST. art. III, § 2, cl. 1; see Pfander, *Rethinking*, *supra* note 45, at 605–06 (“[J]urisdiction over ‘controversies’ depends entirely on the identity and status of the parties.”).

<sup>53</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

<sup>54</sup> See *id.* at 476–77 (Jay, C.J., concurring) (“If the Constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution.”); *id.* at 450 (Blair, J., concurring) (“A dispute between A. and B. as surely a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named. . . .”).

<sup>55</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>56</sup> See Pfander, *Rethinking*, *supra* note 45, at 604 (“[T]he framers surely expected that federal admiralty courts would adjudicate claims involving the states. States had appeared as interested parties in capture and prize litigation under the Articles of Confederation.”).

<sup>57</sup> U.S. CONST. art. III, § 2, cl. 1.

Supreme Court had original jurisdiction “[i]n all Cases . . . in which a State shall be Party.”<sup>58</sup>

The only reasonable construction of the Judiciary Article’s text is that the Framers intended that states could be sued in the federal courts in lawsuits based on federal, state, common, and admiralty law causes of action.<sup>59</sup> In addition, since the arising under clause included “Treaties made,” it appeared that states could be sued to collect on debts owed to British creditors and by British loyalists seeking to recover for confiscated property.<sup>60</sup> These lawsuits would be based on promises contained in the 1783 Treaty of Paris, which ended the Revolutionary War.<sup>61</sup>

Since “national peace and harmony” was a motivating factor in establishing federal court jurisdiction, the text made a great deal of sense. As James Wilson later stated at the Pennsylvania ratification convention, “[i]mpartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.”<sup>62</sup> On August 27, 1787, the Convention voted on motions to amend the draft document offered by the Committee.<sup>63</sup> The final version of the

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<sup>58</sup> U.S. CONST. art. III, § 2, cl. 2.

<sup>59</sup> See Pfander, *Rethinking*, *supra* note 45, at 562 (“[W]e should refine the current understanding of the scope and function of the Court’s original jurisdiction. . . . [T]he Court’s original jurisdiction was meant to extend to all cases involving state-parties, including both those that arise under federal law and those that satisfy the current party-alignment, diversity test.”).

<sup>60</sup> See discussion *supra* notes 31–34 and accompanying text.

<sup>61</sup> Treaty of Paris, *supra* note 33; see also James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1361 (1998) [hereinafter Pfander, *State Suability*] (“The Treaty of 1783 was the one body of law dating from the Articles of Confederation period that was both binding on the states as such and clearly meant to remain so under the retrospective language of the Supremacy Clause.”); Ratification Convention of Virginia (June 15, 1788), in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 478 (Phila., Jonathan Elliot ed., J.B. Lippincott & Co. 1891) [hereinafter DEBATES ON THE FEDERAL CONSTITUTION] (statement of Edmund Randolph) (“The British debts, which are withheld contrary to treaty, ought to be paid. Not only the law of nations, but justice and honor, require that they be punctually discharged.”).

<sup>62</sup> See Ratification Convention of Pennsylvania (Dec. 7, 1787), in 2 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 415, 491 (1876).

<sup>63</sup> James Madison et al., Federal Convention Journal (Aug. 1787), in 2 THE RECORDS, *supra* note 40, at 422, 422–32.

Constitution, agreed to on September 17, 1787,<sup>64</sup> retained all the clauses in the Judiciary Article pertaining to the states.<sup>65</sup>

When the Constitution was sent to the states for ratification, two fundamental questions with respect to the federal courts' judicial power over states were likely to be at issue. First, did the Framers intend that the states would be compelled to relinquish their existing defense of sovereign immunity in the lawsuits that, based on the text of the Judiciary Article, could be brought against them in the federal courts?<sup>66</sup> Second, would the requisite number of states ratify the Constitution if, in fact, the Framers' intent was that the sovereign immunity principle would not operate in the federal courts to defeat lawsuits brought against the states?<sup>67</sup>

## II. THE RATIFICATION DEBATES REVEAL THAT, IN THE FEDERAL COURTS, STATES RETAINED, AT MOST, A COMMON LAW IMMUNITY FROM SUIT

During the debates at the states' ratifying conventions, the Framers were divided on whether Article III abrogated the states' common-law sovereign immunity from suit in the new national courts.<sup>68</sup> The most ardent federalist proponents of abrogating state immunity were James Wilson and Edmund Randolph; the strongest anti-federalist opponents were George Mason and Patrick Henry and two individuals writing under the pseudonyms The Federal Farmer and Brutus.<sup>69</sup> Other important and, by some accounts, determinative statements on state suability are contained in the writings of Alexander Hamilton that appeared in *The Federalist Papers* and in arguments made by James Madison and John Marshall at the Virginia ratification convention in response to objections raised by the anti-federalists.<sup>70</sup>

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<sup>64</sup> MAIER, *supra* note 39, at 29.

<sup>65</sup> See U.S. CONST. art. III, § 2.

<sup>66</sup> See discussion *infra* Sections II.A–C.

<sup>67</sup> See discussion *infra* Section II.C.

<sup>68</sup> See discussion *infra* Sections II.A–C.

<sup>69</sup> See discussion *infra* Sections II.A–B.

<sup>70</sup> See *Alden v. Maine*, 527 U.S. 706, 743 (1999) (“In light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.”); 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 91 (1922) (“[T]he existence of any such right [to summon a State as defendant and adjudicate its rights and liabilities] had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to [the Hamilton-Madison-Marshall] successful dissipation of the

However, there is no evidence that the Framers, focused as they were on individual creditors suing states, considered Congress's power under Article I in relation to the state's sovereign immunity.<sup>71</sup> The discussions on sovereign immunity were confined to the jurisdiction of the federal courts under Article III.<sup>72</sup>

A. *The Federalist Proponents of Unrestricted State Suability*

James Wilson and Edmund Randolph were the most prominent advocates of an expansive construction of the federal courts' jurisdiction over the states<sup>73</sup> and advocated following the plain language in the state-citizen and state-foreign subject clauses ("diversity clauses").<sup>74</sup> Wilson was "a stalwart supporter of the Constitution"<sup>75</sup> who, as a member of the Committee of Detail, was intimately

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fear of the existence of such Federal power that the Constitution was finally adopted."). *But see* JACOBS, SOVEREIGN IMMUNITY, *supra* note 42, at 40 ("On balance, the weight of expressed opinion seems to have been with those who believed . . . that the states might be impleaded as defendants without their consent in suits instituted by citizens of other states and by foreign subjects in the federal courts. Whether the Constitution would have been ratified, in the absence of assurances that the states would not be suable, cannot be ascertained.").

<sup>71</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44, 104–05 (1996) (Souter, J., dissenting) ("[T]he discussion [during ratification of sovereign immunity] gave no attention to congressional power under the proposed Article I but focused entirely on the limits of the judicial power provided in Article III."); *see also* Pfander, *Rethinking*, *supra* note 45, at 602 ("[T]he framers may well have intended to subject states to suit in cases arising under properly enacted laws of the United States Congress. . . . Such, certainly, was the accepted interpretation of the enumeration of legislative powers in Article I, Section 8, and of the provision in the Supremacy Clause that duly enacted federal legislation was to be the supreme law of the land.").

<sup>72</sup> See sources cited *supra* note 71 and *infra* notes 75–124 and accompanying text.

<sup>73</sup> See JACOBS, SOVEREIGN IMMUNITY, *supra* note 42, at 25 ("Wilson, probably the leading legal theorist at the Philadelphia Convention, took a similar position [as Edmund Randolph] before the ratifying convention in Pennsylvania."); Pfander, *Rethinking*, *supra* note 45, at 619, 619 n.248 (detailing Wilson's views on national sovereignty and his stature at the Constitutional Convention).

<sup>74</sup> At the time, lawsuits brought by foreign and U.S. citizens against a state would usually be based on common law or state law, so these clauses have been called the "diversity clauses." That characterization is also meant to distinguish these heads of jurisdiction from the subject matter heads of jurisdiction, such as the arising under clause and the clause providing for Admiralty and Maritime jurisdiction.

<sup>75</sup> See *Alden*, 527 U.S. at 772 n.12 (Souter, J., dissenting) ("The Court says, 'the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip States of the[ir sovereign] immunity.' In fact, a stalwart supporter of the Constitution, James Wilson, laid the groundwork for just such a view at the Pennsylvania Convention." (citations omitted)).

involved in drafting the provisions in Article III.<sup>76</sup> During the Pennsylvania ratification convention, Wilson made clear that the “arising under” provision would apply to Treaties for “the payment of British debts” that had predated the Constitution, and that state laws that “infringed the [1783 Paris] treaty” would not be followed by “judges of the United States.”<sup>77</sup> Wilson also made clear that the reason for including the diversity clauses within the Article III jurisdiction of the Supreme Court was to ensure an impartial forum to adjudicate disputes between citizens, states, and foreign governments as a matter of justice and to preserve peace.<sup>78</sup> Wilson understood that allowing states to retain their common-law sovereign immunity from suit would conflict with one of the main objectives of the state-citizen clause, i.e., having a “tribunal where both parties . . . stand on a just and equal footing.”<sup>79</sup> It seems unlikely that Wilson would have propounded these views regarding the scope of Article III’s diversity clauses if he believed that the members of the Committee of Detail and a majority of the members of the Constitutional Convention held a sharply different point of view.<sup>80</sup>

Edmund Randolph, a Virginia delegate and another member of the Committee of Detail,<sup>81</sup> also repeatedly opposed having states retain their sovereign immunity in

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<sup>76</sup> See, e.g., James Wilson, Committee of Detail IX, in 2 THE RECORDS, *supra* note 40, at 163, 163 n.17, 172–73; see also Pfander, *Rethinking*, *supra* note 45, at 618 (stating that Wilson drafted the Original Jurisdiction Clause).

<sup>77</sup> Ratification Convention of Pennsylvania (Dec. 7, 1787), in 2 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 415, 490 (1876) (statement of James Wilson) (“This [arising under] clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different states do what they may.”).

<sup>78</sup> Ratification Convention of Pennsylvania (Dec. 7, 1787), in 2 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 486, 491 (1876) (statement of James Wilson discussing the state-citizen diversity provision) (“[I]t will be found to be a necessary one. . . . When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.”); *id.* at 492–93 (statement of James Wilson discussing the state-foreign subjects clause) (“[T]hey ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other. Further, it is necessary in order to preserve peace with foreign nations.”).

<sup>79</sup> *Id.* at 491 (statement of James Wilson).

<sup>80</sup> See *Alden v. Maine*, 527 U.S. 706, 776–77 n.16 (1999) (Souter, J., dissenting) (“[T]he Court calls Wilson’s view ‘a radical nationalist vision of the constitutional design’ . . . apparently in an attempt to discount it. But while Wilson’s view of sovereignty was indeed radical in its deviation from older conceptions, this hardly distanced him from the American mainstream. . . .”).

<sup>81</sup> See *supra* note 44 and accompanying text; see also *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 482 n.12 (1987) (plurality opinion) (“Randolph had served on the Committee of Detail.”).



federal court.<sup>82</sup> Randolph considered the diversity clauses in the Judiciary Article imperative to serving the interests of justice and preserving peace and harmony.<sup>83</sup> He challenged the anti-federalists' position, eloquently arguing:

If a government refuses to do justice to individuals, war is the consequence. Is this the bloody alternative to which we are referred. Suppose justice was refused to be done by a particular state to another. . . . It is only to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government. [Requiring sovereign states to appear in federal court] is said to be disgraceful. What would be the disgrace?<sup>84</sup>

Wilson and Randolph had the support of other delegates, who spoke at their respective state ratification conventions or wrote letters to support the Judiciary Article.<sup>85</sup> These proponents similarly argued that not recognizing state immunity in the federal courts served the interests of justice by preserving impartiality in decision-making and maintaining peace and harmony.<sup>86</sup>

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<sup>82</sup> See JACOBS, SOVEREIGN IMMUNITY, *supra* note 42, at 25 (“Randolph, as a delegate to the Virginia ratification convention, argued repeatedly against the immunity of the states from suit by individuals.”); Pfander, *State Suability*, *supra* note 61, at 1312–13 (“Randolph . . . took the position that the states were freely suable by diverse parties as a matter of natural law, and were thus subject to suits to enforce pre-constitutional obligations . . .”).

<sup>83</sup> Ratification Convention of Virginia (June 21, 1788), in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 562, 573–75.

<sup>84</sup> *Id.* at 573. Five years later, as U.S. Attorney General and the attorney for plaintiff in *Chisholm*, Randolph argued that state sovereignty was no impediment to federal jurisdiction over states. See *Alden*, 527 U.S. at 781–82 (Souter, J., dissenting).

<sup>85</sup> See sources cited *infra* note 86.

<sup>86</sup> See, e.g., Ratification Convention of North Carolina (July 29, 1788), in 4 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 152, 158–59 (statement of William Davie, N.C. delegate to the Constitutional Convention) (“It is another principle, which I imagine will not be controverted, that the general judiciary ought to be competent to the decision of all questions which involve the general welfare or peace of the Union. It was necessary that treaties should operate as laws upon individuals. . . . If our courts of justice did not decide in favor of foreign citizens and subjects when they ought, it might involve the whole Union in a war: there ought, therefore, to be a paramount tribunal, which should have ample power to carry them into effect. . . . It has been equally ceded, by the strongest opposers to this government, that the federal courts should have cognizance of controversies between two or more states, between a state and the citizens of another state, and between the citizens of the same state claiming lands under the grant of different states. Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states.”); see also *Alden*, 527 U.S. at 777 n.17 (Souter, J., dissenting) (“At the South Carolina Convention, General Charles Cotesworth Pinckney, who had attended

### B. *The Leading Anti-Federalists*

By contrast, the leading anti-federalists argued passionately in favor of maintaining state sovereignty by claiming that lawsuits brought against states by foreign subjects and by citizens of other states would be financially ruinous. They advocated for rejection of the new Constitution to protect state sovereignty and based on other concerns they had with the document.<sup>87</sup> The anti-federalists' arguments were explained in greater detail by The Federal Farmer<sup>88</sup> and Brutus,<sup>89</sup> two leading anti-federalists. Their views were published beginning in October 1787, soon after the Constitutional Convention.<sup>90</sup> The Federal Farmer rejected the argument that there

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the Philadelphia Convention, took the position that the States never enjoyed individual and unfettered sovereignty, because the Declaration of Independence was an act of the Union, not of the particular States.”); Tench Coxe, *An Examination of the Constitution for the United States of America, Submitted to the People by the General Convention, at Philadelphia, the 17th Day of September, 1787, and Since Adopted and Ratified by the Conventions of Eleven States, Chosen for the Purpose of Considering It, Being All That Have Yet Decided on the Subject*, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787–1788, at 133, 149 (N.Y. City, Paul Leicester Ford ed., Unknown Publisher 1888) (“[W]hen a dispute arises between the citizens of any state . . . and those of another, or the government of another, the private citizen will not be obliged to go into a court constituted by the state, with which, or with the citizens of which, his dispute is. He can appeal to a disinterested federal court. This is surely a great advantage, and promises a fair trial, and an impartial judgment.”); Fletcher, *Historical Interpretation*, *supra* note 40, at 1048–49 (explaining that Alexander Hamilton and Tench Coxe, a delegate for Pennsylvania to the Continental Congress who wrote a series of pro-ratification letters, had emphasized that the state-citizen diversity clause was intended to provide an impartial forum).

<sup>87</sup> See Herbert J. Storing, *Introduction* to THE ANTI-FEDERALIST: WRITINGS BY THE OPPONENTS OF THE CONSTITUTION 3 (Murray Dry & Herbert J. Storing eds., 1985) [hereinafter THE ANTI-FEDERALIST] (“The Anti-Federalists were primarily *against* the Constitution.”).

<sup>88</sup> See Herbert J. Storing, *Introduction* to Federal Farmer, *Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; And to Several Essential and Necessary Alterations in It. In a Number of Letters from the Federal Farmer to the Republican*, reprinted in THE ANTI-FEDERALIST, *supra* note 87, at 23, 23 (“The Observations of The Federal Farmer are generally, and correctly, considered to be one of the ablest Anti-Federalist pieces . . . . [T]hey enjoyed wide popularity in pamphlet form.”).

<sup>89</sup> See Herbert J. Storing, *Introduction* to Brutus, *Essays of Brutus*, reprinted in THE ANTI-FEDERALIST, *supra* note 87, at 103, 103 (“The essays of Brutus are among the most important Anti-Federalist writings. . . . He provides an extended and excellent discussion—the best in the Anti-Federalist literature—of the judiciary to be established under the Constitution and its far-reaching implications. . . . [T]he Brutus essays are the most direct Anti-Federal confrontation of the arguments of The Federalist.”).

<sup>90</sup> See Federal Farmer, *Letters I–V*, Oct. 8–13, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 87, at 32, 32–65; Storing, *supra* note 89, at 103, 103 (noting that the Brutus essays appeared in the *New York Journal* between October 1787 and April 1788).

were legitimate national interests that supported holding states accountable in federal court:

[T]he states are now subject to no such actions; and this new jurisdiction will subject the states . . . to actions and processes, which were not in the contemplation of the parties . . . and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever.<sup>91</sup>

Brutus directed his essays to the citizens of New York,<sup>92</sup> supporting arguments opposing the state-citizen clause, the Article III provision that would give the Supreme Court jurisdiction over suits between a state and citizens of another state.<sup>93</sup> Brutus reasoned that requiring states to appear in the Supreme Court and be subject to court orders for outstanding debts would be “humiliating” and contrary to what was contemplated when the states entered into these contractual arrangements:

[I] conceive the [state-citizen] clause . . . improper in itself, and will, in its exercise, prove most pernicious and destructive. It is improper, because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted to. The states are now subject to no such actions. All contracts entered into by individuals with states, were made upon the faith and credit of the states; and the individuals never had in contemplation any compulsory mode of obliging the government to fulfil its engagements. . . . For the payment of these debts they have given notes payable to the bearer. . . . Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering.<sup>94</sup>

At the Virginia ratification convention, anti-federalists’ George Mason and Patrick Henry raised additional objections to the state-citizen and state-foreign subject clauses. First, Mason argued—as Brutus did—that subjecting states to

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<sup>91</sup> See Federal Farmer, *Letter III*, Oct. 10, 1787, reprinted in *THE ANTI-FEDERALIST*, *supra* note 87, at 43, 54.

<sup>92</sup> See, e.g., Storing, *supra* note 89, at 108.

<sup>93</sup> *Id.* at 103–08.

<sup>94</sup> See *id.* at 174 (quoting Brutus Letter XIII, Feb. 21, 1788).

lawsuits brought in federal court by individual creditors seeking to enforce outstanding debts was disrespectful of, and violated, state sovereignty.<sup>95</sup> Second, Mason asserted that the federal courts would not have the power to enforce a money judgment because a state cannot be placed in jail or otherwise forced to comply.<sup>96</sup> Mason concluded that, since the judgment could not be enforced, there should be no authority to proceed in the first place to adjudicate the claim.<sup>97</sup> Third, Mason opined that in controversies between a state and a foreign government, there would be no reciprocity because there could be no guarantee that the foreign state would be bound by the decision.<sup>98</sup>

On the other hand, these leading anti-federalists appeared to recognize that states would be proper defendants in the new federal courts with respect to some subject matter areas. Thus, even the anti-federalists agreed that there were circumstances where the state's immunity from suit should not apply. For example, Mason conceded that the federal courts should have jurisdiction to hear disputes

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<sup>95</sup> See Ratification Convention of Virginia (June 18, 1788), in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 526–27 (statement of George Mason) (“Let gentlemen look at the westward. Claims respecting those lands, every liquidated account, or other claim against this state, will be tried before the federal court. Is not this disgraceful? Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender?”). Mason was referring to claims of investors in the Indiana Land Company, the subject of *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796) (opinion of Ellsworth, J.), *dismissed sub nom. Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). A thorough account of the litigation appears in 5 DOCUMENTARY HISTORY, *supra* note 31, at 274–351. See also Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, in 1 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 756, 756–57 (Stanley N. Katz ed., 1971).

<sup>96</sup> See Ratification Convention of Virginia (June 18, 1788), in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 505, 526–27 (statement of George Mason) (“What is to be done if a judgment be obtained against a state? . . . It would be ludicrous to say that you could put the state's body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.”).

<sup>97</sup> See *id.* Brutus, on the other hand, believed that the federal court could enforce its judgment against the states. See Brutus, *Essay XIII*, Feb. 21, 1788, reprinted in THE ANTI-FEDERALIST, *supra* note 87, at 173, 175 (“[T]hese [debts of the individual states] will be left upon them, with power in the judicial of the general government, to enforce their payment. . . .”).

<sup>98</sup> See Ratification Convention of Virginia (June 18, 1788), in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 505, 527 (statement of George Mason) (“[T]hat a suit will be brought against Virginia. She may be sued by a foreign state. . . . In a suit between Virginia and a foreign state, is the foreign state to be bound by the decision? Is there a similar privilege given to us in foreign states?”).

between states<sup>99</sup> involving maritime matters<sup>100</sup> and with respect to treaties “made, or which shall be made.”<sup>101</sup> Brutus also did not object to jurisdiction over the states in several subject matter areas, including those falling within the arising under clause.<sup>102</sup>

### C. *The Leading Advocates of the Constitution Respond*

Alexander Hamilton, James Madison, and John Marshall were leading advocates for adoption of the Constitution and together, they presented a skillful response to the anti-federalists’ main contentions. Their objective was to ensure ratification of the Constitution.<sup>103</sup> To accomplish this, they endeavored to convince their respective state ratification conventions that, contrary to the plain meaning of the diversity clauses, the states would not relinquish their common-law sovereign immunity if they adopted the Constitution with the diversity clauses intact.<sup>104</sup> They claimed that even though the term sovereign immunity was not explicitly mentioned in the diversity clauses, the sovereign immunity principle was retained and would continue to operate as a limitation on the federal courts’ jurisdiction because it was a historic, well-recognized principle.<sup>105</sup>

Hamilton, Madison, and Marshall set out three main points to support their position. Hamilton first responded to the assertion by the anti-federalists<sup>106</sup> that “an assignment of the public securities of one State to the citizens of another would enable [the latter] to prosecute that State in the federal courts for the amount of those

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<sup>99</sup> See *id.* at 523.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> Brutus wrote with respect to judicial power over cases brought under the arising under clause: “This power, as I understand it, is a proper one.” See Brutus, *supra* note 97, at 173; *id.* at 173–74 (stating, with respect to cases involving ambassadors and consuls, involving admiralty and maritime jurisdiction, to which the United States is a party, and between states: “[I]t is proper [and] should be under the cognizance of the courts of the union, because none but the general government, can, or ought to pass laws on their subjects.”).

<sup>103</sup> See *The Ratification Debate on the Constitution*, BILL OF RTS. INST., <https://billofrightsinstitute.org/grass-roots-essays/the-ratification-debate-on-the-constitution> [<https://perma.cc/L6QE-JCE5>] (last visited Jan. 5, 2023).

<sup>104</sup> See *infra* notes 107–15 and accompanying text.

<sup>105</sup> See *infra* notes 107–15 and accompanying text.

<sup>106</sup> See Fletcher, *Historical Interpretation*, *supra* note 40, at 1047–48 (noting that Alexander Hamilton responded to “Brutus” in THE FEDERALIST NO. 81).

securities . . . .”<sup>107</sup> Hamilton wrote in *The Federalist* No. 81 that the states would not relinquish that portion of their sovereignty that protected them from unconsented lawsuits brought by individuals unless the relinquishment was clearly expressed:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal.<sup>108</sup>

In making this argument, Hamilton made clear that, in his opinion, if the states ratified the Constitution as written, they would retain their common-law immunity from suit, the historic immunity they enjoyed before the Constitution, unless they gave it up in the “plan of the convention,” a phrase he did not explain.<sup>109</sup> Hamilton never indicated that there was any new fundamental right to state sovereign immunity embedded in the Constitution itself.<sup>110</sup>

Second, Hamilton argued that there would be no purpose in suing states for debts they owe because “[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign” and enforcement would not be possible “without waging war against the contracting State . . . .”<sup>111</sup> Third, Madison and

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<sup>107</sup> THE FEDERALIST NO. 81, at 486, 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>108</sup> *Id.* at 486–87; *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 144–45 (1996) (Souter, J., dissenting) (“Hamilton is plainly talking about a suit subject to a federal court’s jurisdiction under the Citizen-State Diversity Clauses of Article III. . . . No general theory of federal-question immunity can be inferred from Hamilton’s discussion of immunity in contract suits.”).

<sup>109</sup> *See* THE FEDERALIST NO. 81, *supra* note 107; *see also* *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258 (2021) (noting that “a State may be sued if it has agreed to suit in the ‘plan of the Convention,’ which is shorthand for ‘the structure of the original Constitution itself.’” (citations omitted)).

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

<sup>111</sup> *Id.* at 488 (“[T]o ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the state governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.”); *see also* 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 476 (statement of George Nicholas) (“[C]ontracts will be as valid, and only as valid [under the Constitution], as under the [Articles of] Confederation. . . . There is no law under the existing system which gives power to any tribunal to enforce the payment of such claims.”); Pfander, *State Suability*, *supra* note 61, at 1310–11 (noting that “[a]t the heart” of the federalist reply that the diversity clauses would allow for retrospective state liability of outstanding financial obligations was “that the new Article III courts would

Marshall argued at the Virginia ratification convention that the state-citizen clause was not intended to mean that an individual could compel a state to defend itself in federal court; instead, the clause should be read as applying only when a state is the plaintiff in a lawsuit.<sup>112</sup> The Massachusetts delegates were persuaded by similar arguments that the Judiciary Article was not intended to remove the states' historic immunity from suit.<sup>113</sup>

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lack the power to enforce government obligations issued under the Articles of Confederation, because those obligations had been created without the expectation of legal enforceability.”).

<sup>112</sup> See Ratification Convention of Virginia (June 20, 1788), in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 531, 533 (statement of James Madison) (“[I]ts jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . It appears to me that this [clause] can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.”); *id.* at 555–56 (statement of John Marshall) (“With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope no gentleman will think that a state will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant. . . . It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.”). *But see id.* at 543 (statement of Patrick Henry) (“[H]is construction of it is to me perfectly incomprehensible. . . . [H]e says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discrimination between plaintiff and defendant.”).

<sup>113</sup> In Massachusetts, after three days of debate, a majority voted in favor of adopting the language in the Constitution after hearing arguments that Massachusetts would retain its sovereign immunity. See Ratification Convention of Massachusetts (Jan. 28, 1788), in 2 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 109, 109; see also James Sullivan, *Observations upon the Government of the United States of America*, July 7, 1791, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 31, at 21, 22 (Massachusetts Attorney General James Sullivan referring to the “great difficulties” that “many” people had with the scope of judicial power in the judiciary article) (“There were, however, men of learning and ingenuity, who gave that part of the Constitution a construction which made many easy with it, and which I believe to be quite consistent with truth and fairness.”); *Marcus*, MASS. MERCURY, July 13, 1793, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 31, at 389, 389–90 (“The power which the Federal Government has, to call into their Courts, a Commonwealth or a State, to answer to the demand of a foreigner (perhaps a tory) was powerfully opposed in the Convention of this and other Commonwealths and States in the Union. . . . This power in the Federal Government, would not have been consented to by this commonwealth, but for Rufus King Esq. who ‘pledged his honour,’ in the State Convention, ‘that the Convention at Philadelphia never discovered a disposition to infringe on the Government of an individual State; and that in his opinion no Congress on earth would dare to invade the SOVEREIGNTY OF THIS COMMONWEALTH.’ On the strength of this gentleman’s opinion, the Article in the Constitution was assented to but by a small majority.”); 1 WARREN, *supra* note 70, at 97 n.1

The arguments advanced by Hamilton, Madison, and Marshall were limited to common and state law claims that were likely to be brought against states under the diversity clauses.<sup>114</sup> They did not argue that Congress would lack the authority to abrogate or limit the reach of state sovereign immunity,<sup>115</sup> and they appeared to support federal jurisdiction over states under the arising under clause.<sup>116</sup> Under the plain language of the arising under clause, the federal courts had jurisdiction over “all Cases in Law and Equity arising under . . . the laws of the United States.”<sup>117</sup> It

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(“It was also said that this ‘usurpation’ [of state sovereignty] was ‘apprehended by many of the members of the Massachusetts [Ratification] Convention when deliberating on that very clause of the Federal Constitution, respecting the Judiciary power, but which apprehensions were said to be groundless by the advocates of the Constitution.”).

<sup>114</sup> Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 94 (1989) (“[T]his passage [by Hamilton in *The Federalist* No. 81] does not suggest that the federal courts lack jurisdiction over a private claim against a state, but rather that no substantive right of action against a state for its pre-Constitution public debt could exist absent a state’s consent to grant such a right. While the Constitution would vest the federal courts with jurisdiction to hear claims made against a state by foreigners or the citizens of another state, it would not displace state law as the rule of decision.”); Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 81.

<sup>115</sup> See John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1429 (1975) (“Hamilton first contended that it is inherent in state sovereignty that states are not amenable to individual suits without their consent. From the Federalist perspective, however, this argument would have no application to an exercise of congressional power under one of the enumerated powers of Article I, for the Federalists believed that the states in fact must consent to the exercise of such powers.”) (citing THE FEDERALIST NO. 31 (Alexander Hamilton), NOS. 41, 42, 43, 44 (James Madison)).

<sup>116</sup> See Ratification Convention of Virginia, *supra* note 112, at 532 (statement of James Madison) (“The first class of cases to which its jurisdiction extends are those which may arise under the Constitution; and this is to extend to equity as well as law. . . . There is a new policy in submitting it to the judiciary of the United States. That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions. . . . With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the judiciary’s expounding them.”); *id.* at 554 (statement of John Marshall) (“Is it not necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here?”). In THE FEDERALIST NO. 80, Hamilton detailed why it was essential that the federal court’s jurisdiction in federal question cases include “equity” as well as law. See THE FEDERALIST NO. 80, at 478–79 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Pfander, *Rethinking*, *supra* note 45, at 601 (“Hamilton presumed that the federal courts, by virtue of their authority to hear ‘cases’ in law and equity, would enjoy the power to ‘restrain’ or enjoin state infractions of the Constitution and to ‘correct’ such infractions in appropriate cases by awarding damages against the state.”).

<sup>117</sup> U.S. CONST. art. III, § 2, cl. 1.



also appears that, under the Treaty language in the arising under clause, these leading advocates would have supported enforcement in the federal courts of claims brought by creditors and British loyalists under the Treaty of Paris.<sup>118</sup>

While the Hamilton-Madison-Marshall arguments regarding common-law sovereign immunity were influential, they were not considered dispositive. If they had been considered dispositive, there would have been little reason for some state ratifying conventions to propose amendments to modify, or in some instances, delete, the state suability and/or arising under clauses.<sup>119</sup> Some states included with their ratification of the Constitution, proposed amendments that would have retained federal judicial power over the states with respect to treaties made “under the authority of the United States,” but otherwise would have eliminated arising under clause jurisdiction and eliminated or modified the diversity clauses.<sup>120</sup> Other state conventions included a declaration explaining their understanding that states were

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<sup>118</sup> See Pfander, *Rethinking*, *supra* note 45, at 603 (“[T]he framers contemplated that states were to appear as parties in federal court ‘cases’ that implicated treaties.”); Pfander, *State Suability*, *supra* note 61, at 1348 (“The Framers of the Constitution understood that the state courts had underenforced the Treaty [of 1783], and explicitly provided for its federal judicial enforcement in Articles III and VI.”); Gibbons, *supra* note 35, at 1901–02 (“[M]any of the states, especially those in the South, had passed laws providing for expropriation of debts due British creditors, or making Continental or state bills of credit legal tender. Article IV of the treaty prohibited both. . . . As to incomplete escheats, however, [A]rticle VI prohibited all future confiscations. . . . The unenforceability of the peace treaty—and the consequent threat to the nation’s security—thus became a significant factor that both suggested the need for a national judiciary and provided a major impetus for the Philadelphia Convention. A pervasive belief that the fate of the nation might well hinge on its ability to enforce the 1783 treaty colored the ratification debates.”).

<sup>119</sup> See Clyde E. Jacobs, *Prelude to Amendment: The States Before the Court*, 12 AM. J. LEGAL HIST. 19, 21 (1968) [hereinafter Jacobs, *Prelude*] (“[T]he fact that four state conventions proposed amendments which would have withdrawn or circumscribed the federal judicial power over controversies between a state and non-citizens . . . may suggest . . . that the fears expressed by opponents of ratification had not been quieted by the statements of Hamilton, Madison, and Marshall.”); Gibbons, *supra* note 35, at 1908 (“That the Madison-Marshall interpretation of article III was not taken seriously at the Virginia convention is best confirmed by the proposal made by their peers to amend section 2 of the judiciary article.”).

<sup>120</sup> Ratification Convention of Virginia: Amendments to the Constitution, in 3 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 660–61 (14th Amendment); Ratification Convention of North Carolina: Amendments to the Constitution, in 4 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 244, 246 (15th Amendment). The Amendments also stated that “the judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of the Constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.” Ratification Convention of Virginia: Amendments to the Constitution, *supra*, at 120; Ratification Convention of North Carolina: Amendments to the Constitution, *supra*, at 120; see also Ratification Convention of Rhode Island: Amendments to the Constitution, in 1 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 336, 336 (Amendment V).

not suable.<sup>121</sup> For example, New York's ratification of the Constitution was preceded by a "declaration" which stated, *inter alia*, "[t]hat the judicial power of the United States, in cases in which a state may be a party, does not . . . authorize any suit by any person against a state."<sup>122</sup>

Eventually, the Constitution was ratified by all thirteen states. However, the declarations and proposed amendments provided by some state ratification conventions demonstrated what was evident from the debates at these conventions: there was no consensus on the role that state immunity would play when the federal judiciary decided cases brought against a state. Moreover, even if the construction of the Judiciary Article advanced by Hamilton-Madison-Marshall was considered dispositive, their position was limited to preserving the states' *common-law immunity* from suit in order to provide an implicit limitation on federal judicial power.<sup>123</sup> Hamilton-Madison-Marshall never intended for state sovereign immunity to become an immutable constitutional principle embedded in the Constitution and paramount to Congress's authority under Article I.<sup>124</sup> As a common law defense, Congress retains the authority to enact legislation to abrogate or otherwise limit such immunity.<sup>125</sup> If sovereign immunity became embedded in the Constitution as a

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<sup>121</sup> See *infra* note 122; see also text accompanying *supra* note 105.

<sup>122</sup> Ratification of the Constitution: New York, in 1 DEBATES ON THE FEDERAL CONSTITUTION, *supra* note 61, at 327, 329; see also Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1594 n.171 (2002) (noting that "New York's form of ratification was preceded by a declaration of rights and a set of 'explanations' that, according to the [ratifying] convention, were 'consistent with the said Constitution.'"). *But see* Alden v. Maine, 527 U.S. 706, 718–19 (1999) ("Although the state conventions which addressed the issue of sovereign immunity in their formal ratification documents sought to clarify the point by constitutional amendment, they made clear that they, like Hamilton, Madison, and Marshall, understood the Constitution as drafted to preserve the States' immunity from private suits.").

<sup>123</sup> See discussion *supra* Section II.C.

<sup>124</sup> See discussion *supra* Section II.C.

<sup>125</sup> See, e.g., *McKinstry v. Valley Obstetrics-Gynecology Clinic, P.C.*, 405 N.W.2d 88, 99 (Mich. 1987) ("[T]he common law can be modified or abrogated by statute."); *McVey Trucking Inc. v. Sec'y of State (In re McVey Trucking, Inc.)*, 812 F.2d 311, 320 (7th Cir. 1987) ("Just as state sovereignty does not preclude Congress, acting under its plenary powers, from imposing a monetary obligation directly on a state, state sovereignty does not prevent Congress, when acting under its plenary powers, from imposing a monetary burden on a state by creating a cause of action enforceable against it.").

constitutional right, then Congress arguably would lack the authority under Article I to do so, except where the states waived their immunity in the Constitution.<sup>126</sup>

### III. FOLLOWING RATIFICATION, THE FIRST CONGRESS ENACTS A LAW IMPLEMENTING ARTICLE III AND THE STATE SUABILITY DEBATE CONTINUES

After the Constitution was ratified, the First Congress implemented Article III by passing the Judiciary Act of 1789. The Judiciary Act established the inferior federal courts and set their jurisdictional limits.<sup>127</sup> However, rather than expressly addressing whether the federal courts had jurisdiction over lawsuits against a state, Congress closely tracked the language in the diversity clauses, even using the words “party” and “between” that are set forth in the state-citizen, state-foreign subject, and original jurisdiction clauses.<sup>128</sup> By tracking the language in the diversity clauses—instead of adopting alternative language that might have narrowed the scope of the Supreme Court’s jurisdiction—the First Congress avoided resolving the dispute about state suability in the federal courts.

The Bill of Rights was approved by Congress on September 25, 1789, and ratified on December 15, 1791.<sup>129</sup> These first ten amendments did not include any of the state suability amendments recommended by the state ratification conventions and similarly failed to resolve the issue of state immunity from suit.<sup>130</sup> Due to Congress’s failure to resolve the issue of state suability in the Judiciary Act of 1789, the lack of consensus on the issue of state suability during the ratification debates, and the fact that states were heavily in debt and creditors were likely to commence

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<sup>126</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2258–59 (2021); *Torres v. Tex. Dep’t Pub. Safety*, 142 S. Ct. 2455, 2460 (2022).

<sup>127</sup> Judiciary Act of 1789, ch. 20, §§ 1–35, 1 Stat. 73–92 (1789).

<sup>128</sup> See, e.g., Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80 (1789) (“And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.”). See Pfander, *Rethinking*, *supra* note 45, at 565 n.29 (“Since the remainder of the [Judiciary] Act fails to vest the lower federal courts with any power over state-party cases, the drafters must have contemplated that at least some such suits (presumably those initiated by the states themselves) would go forward in the state courts.”).

<sup>129</sup> *The Bill of Rights: How Did It Happen?*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights/how-did-it-happen> [<https://perma.cc/K87N-5J4U>] (Oct. 7, 2021).

<sup>130</sup> THE CONSTITUTION OF THE UNITED STATES, S. DOC. NO. 105-11 (1st sess. 1997), <https://www.govinfo.gov/content/pkg/CDOC-105sdoc11/html/CDOC-105sdoc11.html>.

lawsuits against one or more states in the new national courts, it was very likely that the issue of state suability would come before the Supreme Court.

#### IV. BEGINNING IN 1791, CREDITORS COMMENCE SEVERAL LAWSUITS AGAINST STATES IN THE SUPREME COURT CULMINATING IN THE COURT DECIDING THAT STATES ARE NOT IMMUNE FROM SUIT BASED ON A COMMON-LAW CLAIM IN FEDERAL COURT

In the 1790s, eight cases were filed in the Supreme Court by private individuals against states.<sup>131</sup> While most of these lawsuits involved grievances which pre-dated the Constitution,<sup>132</sup> they ensured that the issue of state suability would continue to be hotly debated.<sup>133</sup>

##### A. *The Supreme Court Decides Chisholm v. Georgia*

*Chisholm v. Georgia*<sup>134</sup> was the first important decision addressing “the issue of whether the Constitution’s jurisdictional grant [to federal courts] abrogated state sovereign immunity.”<sup>135</sup> The case was filed as an original action in the Supreme Court in 1792<sup>136</sup> by Alexander Chisholm, a South Carolina executor for Robert

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<sup>131</sup> See generally 5 DOCUMENTARY HISTORY, *supra* note 31, at 7–638 (collecting, documenting, and explaining the background of each case except *Brailsford v. Georgia*); see also 1 WARREN, *supra* note 70, at 103–04 (discussing *Brailsford*).

<sup>132</sup> See generally 5 DOCUMENTARY HISTORY, *supra* note 31.

<sup>133</sup> See Sullivan, *supra* note 113, at 27 (pamphlet by Massachusetts Attorney General James Sullivan [July 7, 1791] in response to the *Van Staphorst* lawsuit pending in the Supreme Court seeking to demonstrate that a state “by any fair construction of the judiciary powers . . . cannot be compelled to answer on a civil process”). For a complete background and analysis on *Van Staphorst*, see generally 5 DOCUMENTARY HISTORY, *supra* note 31, at 7–56. Several citizens responded to Sullivan in letters to newspapers, with one, Hortensius, offering a spirited defense of state suability in both “arising under” and “diversity” lawsuits. Hortensius, *An Enquiry into the Constitutional Authority of the Supreme Federal Court, Over the Several States, in Their Political Capacity*, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 31, at 36; see also Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 215 (1968) [hereinafter Mathis, *Adoption and Interpretation*] (noting the “considerable condemnation of the [*Van Staphorst*] suit”).

<sup>134</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>135</sup> Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1563 (1986).

<sup>136</sup> According to Dallas, who wrote the reports for the Supreme Court’s first years, a summons to command Georgia to appear before the Court was issued on February 8, 1792, and copies were served on the governor and attorney general on July 11, 1792. See Doyle Mathis, *Chisholm v. Georgia: Background*

Farquhar, a South Carolina merchant. Chisholm claimed jurisdiction under the state-citizen clause.<sup>137</sup> In his lawsuit, Chisholm sought to recover a substantial amount of money<sup>138</sup> owed to Farquhar's estate by the State of Georgia for supplies furnished during the Revolutionary War.<sup>139</sup> The claim was based on the common law of assumpsit or breach of contract.<sup>140</sup>

On February 18, 1793, four of the five Supreme Court Justices decided in favor of Chisholm.<sup>141</sup> In separate opinions, the Justices in the majority based their decisions that Georgia was not immunized from suit on: (1) the plain language of both the state-citizen and original jurisdiction clauses of Article III, Section 2;<sup>142</sup> (2) the principle of popular sovereignty that the state is subordinate to the will and authority of its people;<sup>143</sup> (3) the fact that exercising jurisdiction over the states was

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*and Settlement*, 54 J. AM. HIST. 19, 19 & n.3, 23 & nn.24–25 (1967) [hereinafter Mathis, Chisholm Background].

<sup>137</sup> See Fletcher, *Historical Interpretation*, *supra* note 40, at 1035 (“*Chisholm* involved a form of party-based jurisdiction. A South Carolina citizen brought suit against the state of Georgia under a constitutional grant of federal judicial power over ‘controversies . . . between a State and Citizens of another State.’” (quoting U.S. CONST. art. III, § 2, cl. 1)).

<sup>138</sup> The Supreme Court petition sought \$500,000 for payment of the claim and other damages. See Mathis, *Chisholm Background*, *supra* note 136, at 23 & n.23.

<sup>139</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 281 n.32 (1985) (Brennan, J., dissenting) (“The precise facts of *Chisholm* have been the subject of some scholarly dispute. . . . The traditional account, in which the plaintiff was identified as acting on behalf of a British citizen, may explain why the Eleventh Amendment modified the state-alien diversity clause as well as the state-citizen diversity clause.”).

<sup>140</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 430 (1793) (opinion of Iredell, J.) (“The action is an action of assumpsit.”).

<sup>141</sup> Chief Justice John Jay joined with Justices John Blair, William Cushing, and James Wilson to constitute a majority in favor of Chisholm; Justice James Iredell wrote a dissenting opinion. See *id.*

<sup>142</sup> See *id.* at 450–51 (opinion of Blair, J.) (“[S]hould any man be asked whether it was not a controversy between a State and citizen of another State, must not the answer be in the affirmative? A dispute between A. and B. as surely a dispute between B. and A. Both cases, I have no doubt, were intended. . . . It seems to me, that if this Court should refuse to hold jurisdiction of a case where a *State is Defendant*, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a *State is a party*.”); *id.* at 467 (opinion of Cushing, J.) (“When a citizen makes a demand against a State, of which he is not a citizen, it is as really a controversy between a State and a citizen of another State, as if such State made a demand against such citizen. The case, then, seems clearly to fall within the letter of the Constitution.”).

<sup>143</sup> See *Alden v. Maine*, 527 U.S. 706, 719 (1999) (“Two Justices [Wilson and Jay] also argued that sovereign immunity was inconsistent with the principle of popular sovereignty established by the Constitution.” (citing 2 U.S. (2 Dall.) at 454–58 (opinion of Wilson, J.); *id.* at 470–72 (opinion of Jay, C.J.))).

“necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union;”<sup>144</sup> (4) the premise that the states had, in adopting the Constitution, given up a portion of their sovereignty with respect to their immunity from suit;<sup>145</sup> and (5) the importance of maintaining peace and harmony.<sup>146</sup> To further support their determination that state sovereign immunity did not apply in the Supreme Court to bar Chisholm’s lawsuit, two of the justices in the majority relied on the fact that the Judiciary Act of 1789 tracks the language of Article III with respect to jurisdiction involving states but fails to go further to clarify the disputed issue of state suability.<sup>147</sup>

Presumably, the strongest case for sovereign immunity to apply in federal court would have been a lawsuit, like Chisholm’s, under the state-citizen clause based upon a common-law cause of action.<sup>148</sup> If the suit had been brought in the Georgia state courts, Georgia would undoubtedly have successfully moved to dismiss it on

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<sup>144</sup> *Chisholm*, 2 U.S. (2 Dall.) at 468 (opinion of Cushing, J.) (“[T]he restrictions upon States . . . are important restrictions of the power of States, and were thought necessary to maintain the Union; and to establish some fundamental uniform principles of public justice, throughout the whole Union.”); *see id.* at 465 (opinion of Wilson, J.) (“Another declared object is, ‘to establish justice.’ This points . . . to the judicial authority.”).

<sup>145</sup> *See id.* at 452 (opinion of Blair, J.) (“[I]t follows that when a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty.”).

<sup>146</sup> *See id.* at 474 (opinion of Jay, C.J.) (“[The people designed the Constitution so that controversies could be resolved] not by violence and force, but in a stable, sedate, and regular course of judicial procedure.”); *id.* at 468 (opinion of Cushing, J.) (“As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship.”); *id.* at 451 (opinion of Blair, J.) (“[N]o state in the Union should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature.”).

<sup>147</sup> *See id.* at 477 (opinion of Jay, C.J.) (“We find the Legislature of the United States expressing themselves in the like general and comprehensive manner; they speak in the thirteenth section of the [Judiciary Act of 1789], of controversies where a State is a party, and as they do not impliedly or expressly apply that term to either of the litigants, in particular, we are to understand them as speaking of both.”); *id.* at 451 (opinion of Blair, J.) (“Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual; the argument . . . can have no force, I think, against the clear and positive directions of an act of Congress and of the Constitution.”).

<sup>148</sup> *See Pfander, Rethinking, supra* note 45, at 599 (“In the absence of some controlling federal law . . . federal courts could not justifiably ignore the states’ established common law immunity or recognize the existence of a right of action against them.”).

sovereign immunity grounds.<sup>149</sup> However, the *Chisholm* majority flatly rejected the argument, advanced by Hamilton-Madison-Marshall during the ratification conventions, that the sovereign immunity principle was implicit in the Constitution and therefore should be applied in diversity cases.<sup>150</sup>

In *Chisholm*'s only dissenting opinion, Justice Iredell wrote that Georgia should not be subject to suit in federal court under the state-citizen clause because Congress had failed to enact a law to abrogate the states' common-law immunity.<sup>151</sup> Instead, Congress had, in Section 14 of the Judiciary Act of 1789, provided that the federal courts have ancillary power to issue common-law writs "agreeable to the principles and usages of law" to aid in the exercise of their jurisdiction.<sup>152</sup> Justice Iredell understood "principles and usages of law" to mean "the principles of the common law."<sup>153</sup> In his dissent, he explored common-law principles at length with respect to the sovereign's exemption from suit, found that the sovereign immunity principle was well-established in the common law, determined that it had been adopted as governing law by all the states prior to the ratification of the Constitution, and concluded that because Congress had not acted to abrogate or modify it, issuing a writ compelling a state to defend itself in federal court on the merits of a common-law cause of action would *not* be agreeable to the principles of the common law.<sup>154</sup>

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<sup>149</sup> See Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1469 (1987) ("Having established the Court's power to entertain the case (and the suability of Georgia in a *jurisdictional* sense), the majority proceeded to opine that a cause of action in assumpsit would properly lie (and that the state was properly suable in this *substantive* sense) notwithstanding any immunity from assumpsit liability under state law. Under the common law of Georgia and, apparently, every other state, no cause of action lay for a breach of contract by the state itself.").

<sup>150</sup> See *Alden v. Maine*, 527 U.S. 706, 781 (Souter, J., dissenting) ("Not even Justice Iredell, who alone among the Justices thought that a State could not be sued in federal court, echoed Hamilton or hinted at a constitutionally immutable immunity doctrine.").

<sup>151</sup> See *Chisholm*, 2 U.S. (2 Dall.) at 432–33 (opinion of Iredell, J.) ("I conceive that all the courts of the United States must receive . . . all their authority as to the manner of their proceeding, from the Legislature only. This appears to me to be one of those cases, with many others, in which an article of the Constitution cannot be effectuated without the intervention of the Legislative authority.").

<sup>152</sup> Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81–82 (1789).

<sup>153</sup> *Chisholm*, 2 U.S. (2 Dall.) at 433–36 (opinion of Iredell, J.).

<sup>154</sup> See *id.* at 434 (opinion of Iredell, J.) ("Whatever writs we issue, that are necessary for the exercise of our jurisdiction, must be agreeable to the principles and usages of law. This is a direction, I apprehend, we cannot supercede because it may appear to us not sufficiently extensive. If it be not, we must wait till other remedies are provided by the same authority. From this it is plain that the legislature did not ch[oo]se to leave to our own discretion the path to justice, but has prescribed one of its own."). But see David P. Currie, *The Constitution in the Supreme Court: 1789–1801*, 48 U. CHI. L. REV. 819, 835–36 (1981) ("Iredell was unconvincing. . . . [L]egislation confirming the constitutional provision seems unnecessary.



Based on this reasoning, Justice Iredell concluded that the sovereign immunity principle did not “authori[z]e the present suit.”<sup>155</sup>

Although the Supreme Court would later adopt Justice Iredell’s *Chisholm* dissent as the correct interpretation of the relationship between state immunity and the Judiciary Article,<sup>156</sup> Justice Iredell’s reasoning is very much at odds with the Court’s current interpretation of state sovereign immunity as an immutable part of the Constitution.<sup>157</sup> While the current Court has determined that Congress lacks the authority under Article I to abrogate the states’ exemption from suit, Justice Iredell did not challenge Congress’s authority under Article I, but rather concluded that Georgia’s sovereign exemption applied because Congress had failed to act.

## V. THE ELEVENTH AMENDMENT IS ADOPTED

### A. *Massachusetts Representative Theodore Sedgwick and Senator Caleb Strong Promptly Introduce a Proposed Constitutional Amendment to Reverse the Chisholm Decision*

Although some state officials were allegedly shocked by the *Chisholm* decision, for those who had followed the debate over state suability, the decision would not have come as a great shock or surprise.<sup>158</sup> “At least part of the anti-

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In any event, section 13 [of The Judiciary Act of 1789] flatly provided that the Court should have original jurisdiction of suits ‘between a state and citizens of other states’; it should not have been necessary to seek an independent source of jurisdiction in section 14, which provided ancillary powers ‘necessary for the exercise of . . . jurisdiction [i]’ elsewhere conferred.”)

<sup>155</sup> See *Chisholm*, 2 U.S. (2 Dall.) at 449 (opinion of Iredell, J.).

<sup>156</sup> See *Hans v. Louisiana*, 134 U.S. 1, 12–19 (1890).

<sup>157</sup> Justice Iredell found that the states retained their common-law sovereign immunity from suit, but even his reasoning differed substantially from that put forth by Hamilton-Madison-Marshall. See discussion *supra* at Section IV.A.

<sup>158</sup> See Pfander, *State Suability*, *supra* note 61, at 1355 (“[S]tate suability was hardly the unthinkable prospect portrayed by the defenders of the ‘profound shock’ thesis; by 1790, at least three different states had created means for the assertion of contract claims and other entity-based proceedings, and other states had at least experimented with judicial determination of public claims.”). Compare Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 536 n.78 (1978) [hereinafter Field, *Other Sovereign Immunity Doctrines*] (“Historians are divided concerning the strength of the reaction to *Chisholm v. Georgia*.”), with Mathis, *Chisholm Background*, *supra* note 136, at 25 & n.33 (“There was an immediate and strong reaction against the *Chisholm* decision from all parts of the United States, due in large measure to the filing of suits against other states.”).



*Chisholm* clamor sounded in self-interest: the states feared ruinous suits on Revolutionary War debts.”<sup>159</sup>

Congress’s response to *Chisholm* was immediate. A constitutional amendment was proposed to reverse the decision’s impact and ensure that federal jurisdiction would not extend to out-of-state citizens and foreign subjects who sue a state.<sup>160</sup> Massachusetts congressional legislators took the lead in proposing language for what was intended to be approved as the Eleventh Amendment.<sup>161</sup> Those legislators were very likely aware of the arguments at the Massachusetts ratifying convention that the Judiciary Article was not meant to allow private individuals to sue a state to collect outstanding debts.<sup>162</sup>

Just one day after the *Chisholm* decision was announced, Massachusetts Representative Theodore Sedgwick offered a Resolution in the House to amend the Constitution so that states were not “liable to be made a party defendant” in any of the federal courts “at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States . . . .”<sup>163</sup> Because Sedgwick’s Resolution appeared to be

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<sup>159</sup> Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 683 (1976); see also 1 WARREN, *supra* note 70, at 99 (“In the crucial condition of the finances of most of the States at that time, only disaster was to be expected if suits could be successfully maintained by holders of State issues of paper and other credits, or by Loyalist refugees to recover property confiscated or sequestered by the States; and that this was no theoretical danger was shown by the immediate institution of such suits against the States in South Carolina, Georgia, Virginia and Massachusetts.”).

<sup>160</sup> See *New Hampshire v. Louisiana*, 108 U.S. 76, 88 (1883) (“As soon as the decision was announced, steps were taken to obtain an amendment of the Constitution withdrawing jurisdiction.”). Compare Fletcher, *Historical Interpretation*, *supra* note 40, at 1063 (noting that the “most plausible interpretation” of the amendment was that “it was designed simply and narrowly to overturn the result the Supreme Court had reached in *Chisholm v. Georgia*”), with William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1378 n.41 (1989) (“There is some disagreement as to whether the reaction to *Chisholm* rested primarily on state financial concerns or on the attacks on state sovereignty in the *Chisholm* decision. . . . Probably there is some merit to both sides of the dispute.”).

<sup>161</sup> See Mathis, *Adoption and Interpretation*, *supra* note 133, at 224 (“The reason for the great interest in Massachusetts was that in 1793 a bill in equity was filed in the United States Supreme Court against that state. The suit was brought by William Vassall, a British subject whose property had been confiscated by Massachusetts.”).

<sup>162</sup> See Ratification Convention of Massachusetts, *supra* note 113.

<sup>163</sup> See *Proceedings of the United States House of Representatives*, GAZETTE U.S. (Phila.), Feb. 19, 1793, reprinted in 5 DOCUMENTARY HISTORY, *supra* note 31, at 605, 605–06 (reporting Sedgwick motion with an accompanying Resolution to Amend the Constitution).

written from a procedural vantage point—“no state shall be liable to be made a party defendant, in any of the judicial courts . . . under the authority of the United States”<sup>164</sup>—it would have denied the federal courts personal jurisdiction over states without regard to the basis of the underlying legal claim.<sup>165</sup> However, Sedgwick’s proposed language was *not* submitted for a vote and apparently was not considered further.<sup>166</sup>

Instead, the following day, February 20, 1793, Senator Caleb Strong of Massachusetts introduced a different Resolution in the Senate to amend the Constitution:

The Judicial Power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.<sup>167</sup>

Strong’s Resolution was focused on the Court’s subject matter jurisdiction and on the diversity clauses in Article III.<sup>168</sup> If included in the Constitution, it would have negated the federal court’s judicial authority over states under Article III, Section 2 of the Judiciary Act in lawsuits “by Citizens of another State or by Citizens or Subjects of any foreign State.”<sup>169</sup> Because the sovereign immunity principle would have been the underlying basis for the withdrawal of jurisdiction, Strong’s Resolution would have made the states’ common-law immunity a limitation on the scope of the federal court’s jurisdiction under Article III.

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<sup>164</sup> See *id.* at 605.

<sup>165</sup> See Nelson, *supra* note 122, at 1602 (arguing that Sedgwick’s proposal was “consistent with the ‘personal jurisdiction’ view of sovereign immunity”); Massey, *supra* note 114, at 112 (“At the very least, the presence of the [Sedgwick] proposal is a vivid reminder that the Eleventh Amendment’s framers considered and apparently rejected a broad constitutional immunity.”).

<sup>166</sup> See *Proceedings of the United States House of Representatives*, *supra* note 163, at 606 n.2 (noting that “Sedgwick’s motion is not recorded in either the House Legislative Journal or the *Annals of Congress*, and apparently no further action was taken [on Sedgwick’s motion] during th[e] session”).

<sup>167</sup> See Resolution in the United States Senate (Feb. 20, 1793), in 5 DOCUMENTARY HISTORY, *supra* note 31, at 607–08; 3 ANNALS OF CONG. 651–52 (1793).

<sup>168</sup> See Nelson, *supra* note 122, at 1603 (“Unlike the House version, Senator Strong’s proposal was cast in terms that we associate with subject matter jurisdiction.”); *id.* at 1614 (“Rather than focusing on the federal courts’ ability to hale unconsenting states before them, the Eleventh Amendment is cast instead as a withdrawal of subject matter jurisdiction.”).

<sup>169</sup> See *supra* text accompanying note 168.

However, Strong's February 1793 Resolution did not become law. For unknown reasons, after debate in the Senate on February 25, 1793, consideration of Strong's proposal was postponed, and no further action was taken on it during the legislative session.<sup>170</sup>

*B. The Eleventh Amendment Is Adopted by Congress in March 1794 and Ratified by the States in 1795*

Newspaper commentary, both in support of and in opposition to, state suability continued through the end of 1793.<sup>171</sup> While the newspapers were actively commenting on state suability, *Vassall v. Massachusetts*, a lawsuit by a British loyalist against Massachusetts, was brought in the Supreme Court.<sup>172</sup> The Massachusetts Legislature responded by quickly passing a Resolution calling for:

[T]he most speedy and effectual measures in their power, to obtain such amendments in the Constitution of the United States as will remove any clause or

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<sup>170</sup> See Letter from James Monroe and John Taylor to Henry Lee (Mar. 2, 1793), in 5 DOCUMENTARY HISTORY, *supra* note 31, at 608 & n.1.

<sup>171</sup> Some commentators vigorously defended state suability. See, e.g., *Veritas*, COLUMBIAN CENTINEL (Bos.), July 17, 1793, *reprinted* in 5 DOCUMENTARY HISTORY, *supra* note 31, at 390, 390 (“THE question, whether a State is *suable* or not, will speedily arrest the attention of the public. . . . The rant of *school-boy* declamation, and the thunder of parti[s]an champions, will doubtless be palmed on the public for argument and fact. To meet them then, early in the field, and to oppose to their bombast, real argument, issuing from a Man, whose abilities, integrity, republican virtue, and unshaken independence are known and acknowledged by every citizen, I send you a copy of the opinion of Judge CUSHING, late Chief Justice of this Commonwealth, on the subject—with a request that it may appear in the CENTINEL.”); *Crito*, SALEM GAZETTE, July 29, 1793, *reprinted* in 5 DOCUMENTARY HISTORY, *supra* note 31, at 403, 404 (“It is said, *that individual is a Tory*—I do not know, or care, what he is—if the people of Massachusetts, on a fair trial, shall be found to owe him, it is right he should be paid; it would be more agreeable to me, to appropriate the money which will be spent in calling this special session, to the payment of that individual.”); &, COLUMBIAN CENTINEL (Bos.), Aug. 17, 1793, *reprinted* in 5 DOCUMENTARY HISTORY, *supra* note 31, at 409, 409 (“THE *Question* whether a State can be sued, is so thoroughly considered by Chief Justice JAY, and others of the Federal Judges, that I should think it time lost, to attempt to throw the subject into any other light, than that in which it so clearly and fully appears in the pamphlet, containing the CASE OF THE STATE OF GEORGIA.”). Other commentators vigorously opposed state suability. See, e.g., *Brutus*, INDEP. CHRON. (Bos.), July 18, 1793, in 5 DOCUMENTARY HISTORY, *supra* note 31, at 392, 393 (“If the States are thus answerable for their conduct to a Federal Judge, where is their sovereignty, where is their dignity and importance as a State?”); *Marcus*, *supra* note 113, at 390 (stating that citizens of Massachusetts should challenge “the Governor and Attorney General taken by the *Marshal* to appear and answer to the demand of a *Tory* in the *Federal Court* to be holden at Philadelphia, 300 miles distance from where the precept was served, and under the penalty of 400 dollars”).

<sup>172</sup> See generally 5 DOCUMENTARY HISTORY, *supra* note 31, at 352–449 (collecting, documenting, and explaining the background of *Vassall v. Massachusetts*).

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>173</sup>

When Congress reconvened in December 1793, this Massachusetts Resolution had already been enacted.<sup>174</sup> On January 2, 1794, Senator Strong introduced a modified version of the Resolution he had proposed in February 1793, the text of which would become the Eleventh Amendment.<sup>175</sup> The modification included the addition of the phrase “*be construed to*” between the words “shall not” and “extend” so that the revised version now read:

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>176</sup>

By adding the phrase “*be construed to*,” Strong’s January 2, 1794, Resolution became an instruction to the federal courts as to how they were to interpret the

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<sup>173</sup> See Resolution of the Massachusetts General Court, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 31, at 440, 440 (emphasis added) (Resolves of the General Court of the Commonwealth of Massachusetts from Sept. 27, 1793); *see also* *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 284 (1985) (Brennan, J., dissenting) (“By the time Congress reconvened in December 1793, a suit had been brought against Massachusetts in the Supreme Court by a British Loyalist whose properties had been confiscated. . . . [T]he Massachusetts Legislature reacted to the [Vassall] suit against it by enacting a resolution calling for ‘the most speedy and effectual measures’ to obtain a constitutional amendment, including a constitutional convention.” (citation omitted)). The Massachusetts Resolution was also sent to the other states for their consideration. *See* Samuel Adams to the Governors of the States, *in* 5 DOCUMENTARY HISTORY, *supra* note 31, at 442, 442–44; Mathis, *Adoption and Interpretation*, *supra* note 133, at 225 (noting that Virginia also passed a similar Resolution); Gibbons, *supra* note 35, at 1931 (“[T]he Massachusetts and Virginia resolutions, vehicles that might be used to call an open-ended constitutional convention, were circulating with strong support in eight states and some support in Pennsylvania.”).

<sup>174</sup> *See Atascadero*, 473 U.S. at 284 (Brennan, J., dissenting).

<sup>175</sup> *See* 5 DOCUMENTARY HISTORY, *supra* note 31, at 597 & n.5 (identifying Strong as the author of the Resolution introduced on January 2, 1794); *see also* Pfander, *State Suability*, *supra* note 61, at 1278–79 & n.38 (discussing Strong’s two drafts of the Eleventh Amendment).

<sup>176</sup> Words added to Strong’s February 20, 1793, Resolution are *italicized*, and words or letters deleted are bracketed. *See* William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1270 & n.47 (1989) [hereinafter Fletcher, *A Reply to Critics*] (citing 4 ANNALS OF CONG. 25–26 (1794)).

diversity clauses whenever a state was sued.<sup>177</sup> The construction urged by Strong's second Resolution, and adopted as the language in the Eleventh Amendment, is contrary to the plain language interpretation of Article III, Section 2 that the *Chisholm* majority adopted.<sup>178</sup>

The January 2, 1794, Resolution, once adopted as a constitutional amendment, had the effect of mandating that the federal courts read the diversity clauses as including the common-law sovereign immunity principle as an implicit component, and limitation, of the federal judicial power under Article III.<sup>179</sup> The Supreme Court later concluded that the Eleventh Amendment was intended to restore the Hamilton-Madison-Marshall interpretation of Article III.<sup>180</sup> This conclusion was based on the

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<sup>177</sup> See *Construed*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/construed> [<https://perma.cc/FN9C-UE4Z>] (last visited Mar. 25, 2023) (defining “construed” as: (1) “to analyze the arrangement and connection of words in (a sentence or sentence part)”; (2) “to understand or explain the sense or intention of usually in a particular way or with respect to a given set of circumstances”); see also Pfander, *State Suability*, *supra* note 61, at 1279 (arguing that the Eleventh Amendment provided “an explanatory rule of construction to govern the scope of judicial power” that “swept away *all* of the claims within its description, not just those filed after its effective date”); *id.* at 1340 & n.317 (noting that counsel for Virginia in *Hollingsworth* argued that “[t]he [Eleventh] [A]mendment, in the present instance, is merely explanatory, in substance, as well as language” (citing *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 (1798))); JACOBS, SOVEREIGN IMMUNITY, *supra* note 42, at 68–69 (noting that while “it is plausible to infer” that the words “be construed to” in the final version of the amendment were “intended to correct an erroneous judicial interpretation, other inferences are possible. The words may have been added as a gesture toward those state legislatures that, in the wake of *Chisholm*, had called for an explanatory amendment. Or they may have been inserted as a way to ensure retrospective application of the amendment to suits already filed. Finally, in inserting these words, Congress may have sought to soften any supposed rebuke to the Court, by indicating that the Court’s interpretation of Article III allowing suits against the states, while tenable, was to be abandoned in favor of the opposite construction.”); Alan D. Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight’s Green Whiskers)*, 5 HOUS. L. REV. 1, 16 (1967) (“The reason for adding those three words was evidently to ensure that the original posture of things would be restored by the new amendment—restored for the past, the present, and the future.”).

<sup>178</sup> See Marcus, *supra* note 31, at 1 (“The Eleventh Amendment was proposed and ratified in order to overturn [*Chisholm*]. That much scholars agree on.”).

<sup>179</sup> See William Burnham, *Taming the Eleventh Amendment Without Overruling Hans v. Louisiana*, 40 CASE W. RES. L. REV. 931, 937 (1989) (“The eleventh amendment, then, by restoring article III to its proper position of neutrality with regard to the common law, had the effect of restoring to the states the common law doctrine of sovereign immunity from suit.”).

<sup>180</sup> See *Alden v. Maine*, 527 U.S. 706, 722 (1999) (“The text and history of the Eleventh Amendment also suggest that Congress acted not to change but to restore the original constitutional design.”); *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 292 (1973) (Marshall, J., concurring) (“The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally, to restore the original understanding.”); see also *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 857–58 (1824) (“The amendment has its full effect, if the constitution be

fact that the construction of the diversity clauses required by the Eleventh Amendment is consistent with the construction given to the state-citizen and state-foreign subject clauses by Hamilton, Madison and Marshall in *The Federalist* and during the Virginia ratification convention, to the extent that, despite the language in Article III of the Constitution, the states retained their common-law sovereign immunity and cannot be sued by citizens of other states or of foreign states without their consent.<sup>181</sup>

It is unclear whether Strong's Resolution, which was broadly worded to apply to "any suit in law and equity," was intended to have the federal courts extend the sovereign immunity principle to all claims, including federal law and treaty-based claims, or only to common-law claims, such as the assumpsit claim in *Chisholm*; this has been the subject of considerable scholarly debate.<sup>182</sup> One noteworthy aspect of this scholarly debate rests on Senator Gallatin's attempt to amend Strong's Resolution to allow just treaty-based claims against states in federal court.<sup>183</sup> His amendment was soundly defeated, which suggests that the Framers of the Eleventh Amendment did not want states exposed to claims by creditors based on the 1783 Treaty of Paris, and, therefore, Congress may have understood that the common-law defense underlying the Amendment would apply to federal and common-law claims.<sup>184</sup> Two other amendments that would have significantly narrowed the scope of the states' sovereign immunity were also rejected,<sup>185</sup> indicating further that Congress may have intended the Eleventh Amendment to apply broadly.

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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>181</sup> See Field, *Other Sovereign Immunity Doctrines*, *supra* note 158, at 540 ("It is perfectly possible for a constitutional amendment not to impose a constitutional requirement, but instead only to overturn a constitutional interpretation that the Supreme Court has rendered. . . . [R]eading the amendment only to restore sovereign immunity as a common law doctrine makes more sense than any of the alternatives, in view of the wording of the amendment and its historical context.").

<sup>182</sup> See Fletcher, *Historical Interpretation*, *supra* note 40; Massey, *supra* note 114; Marshall, *supra* note 160; Fletcher, *A Reply to Critics*, *supra* note 176.

<sup>183</sup> See 4 ANNALS OF CONG. 30 (1794) (Gallatin Amendment).

<sup>184</sup> 4 ANNALS OF CONG. 30 (1794).

<sup>185</sup> See 4 ANNALS OF CONG. 30–31 (1794) (explaining that a proposed modification in the Senate would have restricted the scope of the Amendment to causes of action that arose prior to ratification); Fletcher, *A Reply to Critics*, *supra* note 176, at 1271 & n.51 (explaining that another proposed modification made in the House "would have confined the operation of the amendment to suits brought against states that had already 'made provision in their own Courts, whereby such suit may be prosecuted to effect.' That is, *Chisholm* would have been overridden only when the state courts were opened to the claims that were

Strong's January 2nd Resolution, which became the Eleventh Amendment, was approved by wide margins in both houses of Congress—the Senate in January 1794 and the House in March 1794.<sup>186</sup> By February 1795, the Eleventh Amendment had also been ratified by the necessary twelve states.<sup>187</sup> President Adams, however, did not announce its ratification until January 8, 1798, when the Amendment took effect.<sup>188</sup>

C. *The Sovereign Immunity Principle Becomes an Implicit Limitation on Federal Jurisdiction in Suits Against States by Out-of-State Citizens and Foreign Subjects*

The history of the Eleventh Amendment does not provide any basis for the Court's modern interpretation that the Amendment was intended to transform state sovereign immunity into an immutable constitutional defense whenever a state was sued in federal court.<sup>189</sup> The Amendment was constructed narrowly to expressly negate the ruling in *Chisholm*, cause the dismissal of other pending cases brought by creditors and British loyalists against a state—such as *Vassall v. Massachusetts*—and dissuade other creditors from suing states in the first place.<sup>190</sup> The Amendment

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eliminated by the Eleventh Amendment.” (citing 4 ANNALS OF CONG. 476 (1794)); Cullison, *supra* note 177, at 13 & nn.58–59 (providing revised text of these two other proposed amendments).

<sup>186</sup> See Fletcher, *Historical Interpretation*, *supra* note 40, at 1059 n.121 (“The amendment was passed by overwhelming majorities in both houses.” (citing 4 ANNALS OF CONG. 30–31, 477 (1794))).

<sup>187</sup> See Jacobs, *Prelude*, *supra* note 119, at 19 (pointing out that South Carolina, the thirteenth state, approved the amendment in December 1797, and that three states, Pennsylvania, New Jersey, and Tennessee, failed to ratify the amendment); see also 5 DOCUMENTARY HISTORY, *supra* note 31, at 601 (listing states).

<sup>188</sup> See 5 DOCUMENTARY HISTORY, *supra* note 31, at 601–04 (noting that the Amendment was not proclaimed to be legally effective until January 8, 1798); John Adams Proclamation to the United States Congress (Jan. 8, 1798), in 5 DOCUMENTARY HISTORY, *supra* note 31, at 637–38.

<sup>189</sup> See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1261 (1978) [hereinafter Field, *Congressional Imposition*] (“[H]istorical sources show that neither the eleventh amendment nor article III had the effect of constitutionalizing the established common law doctrine of sovereign immunity.” (citing Field, *Other Sovereign Immunity Doctrines*, *supra* note 158)); David Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 9 (1972) (“[T]he eleventh amendment was not the constitutionalization of a general principle of State ‘sovereign immunity’ . . . .”); Gibbons, *supra* note 35, at 1927 (“Had the draftsman of the [Feb. 20, 1793] resolution intended to provide a rule of absolute sovereign immunity, he would have simply stopped after the words ‘United States.’ . . . Thus the author of this crucial first response to *Chisholm v. Georgia* cannot reasonably be thought to have intended to constitutionalize a general rule of state immunity.”).

<sup>190</sup> See Nelson, *supra* note 122, at 1604 (“By using the language of subject matter jurisdiction, the Eleventh Amendment kept the Supreme Court from proceeding to judgment in these pending cases [where states



does not set forth any substantive constitutional right or defense.<sup>191</sup> Indeed, the Amendment does not even refer to the states' sovereign immunity or exemption from suit.<sup>192</sup>

The Amendment simply instructs the federal courts *to construe* their judicial power as not including a lawsuit where a state is sued by specific parties. If the Eleventh Amendment were meant to transform state immunity, a common-law principle, into an immutable constitutional principle that limits the federal courts' judicial power—so that the judiciary lacks the authority to entertain any lawsuits against states and Congress lacks the authority to abrogate or otherwise limit the states' immunity—the drafters of the Amendment presumably would have conveyed their meaning more precisely.<sup>193</sup> The Framers could have clarified that state sovereign immunity is an immutable constitutional principle, or they could have denied Congress the authority to abrogate it and expressly broadened its scope to include the federal courts' jurisdiction under the arising under clause. For example, the Amendment could have read:

The Judicial power of the United States under Article III, Section 2, shall not extend to any Laws of the United States and Treaties made that abrogate or otherwise limit the states' exemption from suit, or to any federal, state or common law claim in any suit in admiralty, 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.

There were strong reasons why the Framers might not have wanted to transform state immunity into an immutable constitutional right. Federalist proponents of the Constitution, such as Edmund Randolph of Virginia, were opposed to having

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had already been forced to become parties]—which included not only *Chisholm v. Georgia* but also . . . [*Vassall v. Massachusetts*].”); Massey, *supra* note 114, at 114–15 (“The states that were most ardent in advocating the amendment—Massachusetts, Virginia, and Georgia—all faced pending claims in the Supreme Court that posed issues turning upon interpretation of the Constitution or federal treaties.”).

<sup>191</sup> See Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 46 (“[T]he amendment was widely supported in Congress by federalists and non-federalists alike, suggesting that Congress did not intend a broad change in the power of the national government.”).

<sup>192</sup> See U.S. CONST. amend. XI.

<sup>193</sup> See William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 186 (1908) (“The amendment . . . does not purport to amend or alter the Constitution, but to maintain it unchanged, while controlling its scope and effect by authoritatively declaring how it shall not be construed.”).



common law principles become established in the Constitution.<sup>194</sup> Responding to remarks by Patrick Henry, Randolph made clear that the Convention's wisdom "is displayed by [the] omission [of the common law in the Constitution], because the common law ought not to be immutably fixed. . . . Even in England, where the firmest opposition has been made to encroachments upon [the common law], it has been frequently changed."<sup>195</sup> It would therefore seem that before state sovereign immunity became an immutable part of the Constitution, the drafters would have done more than what was proposed and adopted as the Eleventh Amendment.<sup>196</sup>

## VI. IN 1821, CHIEF JUSTICE MARSHALL CONCLUDED THAT THE STATES' SOVEREIGN IMMUNITY DOES NOT APPLY TO FEDERAL QUESTION CASES

During the Virginia ratification debates, John Marshall argued in support of states retaining their common-law sovereign immunity from suit.<sup>197</sup> In 1821, in his role as Chief Justice of the Supreme Court, Marshall also took a narrow view of the scope of state sovereign immunity in the Constitution.<sup>198</sup> In *Cohens*, Marshall concluded that the Eleventh Amendment does not apply when there is an appeal from the highest court of a state to the U.S. Supreme Court based on a federal claim.<sup>199</sup>

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<sup>194</sup> See Ratification Convention of Virginia, *supra* note 61, at 469.

<sup>195</sup> See *id.* (statement of Edmund Randolph) ("[H]e objects that the common law is not established by the Constitution. The wisdom of the Convention is displayed by its omission, because the common law ought not to be immutably fixed. . . . Even in England, where the firmest opposition has been made to encroachments upon it, it has been frequently changed.")

<sup>196</sup> See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 139 (1996) (Souter, J., dissenting) ("[The antifederalists] argued that 'Congress's powers to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain.' While Federalists met this objection by arguing that nothing in the Constitution necessarily excluded the fundamental common-law protections associated with due process, they defended the decision against any general constitutional reception of the common law on the ground that constitutionalizing it would render it 'immutable,' and not subject to revision by Congress."); *id.* at 163 ("Madison was particularly concerned with the necessity for legislative control.")

<sup>197</sup> See discussion *supra* Section II.C.

<sup>198</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408–10 (1821).

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

Moreover, Marshall determined that the states' sovereign immunity would not apply to a federal claim under the "Constitution as originally framed."<sup>200</sup>

The defendants in *Cohens* were convicted of violating a Virginia criminal law that made it illegal to sell lottery tickets.<sup>201</sup> Defendants brought a writ of error to the Supreme Court under Section 25 of the Judiciary Act of 1789,<sup>202</sup> claiming that their convictions were unlawful because Virginia law was in conflict with a federal law that authorized the District of Columbia to establish a National Lottery and the defendants to sell lottery tickets in Virginia.<sup>203</sup> In response to the writ, Virginia claimed that the Supreme Court lacked jurisdiction because the State of Virginia was the respondent.<sup>204</sup>

Marshall rejected this defense, explaining that the states surrendered a portion of their sovereignty when they ratified the Constitution, which included submitting to lawsuits brought against them to enforce federal law.<sup>205</sup> Under Article III, the appeal was not barred because "the judicial power [of the federal courts] was extended to all cases arising under the [C]onstitution or laws of the United States, without respect to parties."<sup>206</sup>

Marshall found that the Eleventh Amendment did not require a different result for a number of reasons, including that the *Cohens*' criminal proceeding was not a lawsuit "commenced or prosecuted against one of the United States" within the meaning of the Amendment;<sup>207</sup> the *Cohens* were citizens of Virginia, not "citizen[s] of another State;"<sup>208</sup> and a writ of error to the Supreme Court was not a "suit in law

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<sup>200</sup> *Id.* at 412 ("It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.").

<sup>201</sup> *Id.* at 268–69.

<sup>202</sup> Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 85–86 (1789).

<sup>203</sup> *Cohens*, 19 U.S. (6 Wheat.) at 289.

<sup>204</sup> *Id.* at 376.

<sup>205</sup> *Id.* at 378, 383.

<sup>206</sup> *Id.* at 412.

<sup>207</sup> *Id.* at 406–07.

<sup>208</sup> *Id.* at 412.

or equity.”<sup>209</sup> He concluded that the Court’s jurisdiction was governed, not by the Eleventh Amendment, but by the “Constitution as originally framed.”<sup>210</sup>

The Supreme Court has made a concerted effort over the years to limit and distinguish Marshall’s reasoning in *Cohens* because it construed the states’ sovereign immunity narrowly to apply only to common or state-law claims under the diversity clauses, and not to federal claims under the arising under clause.<sup>211</sup> If the sovereign immunity principle retained its common-law status within Article III, and if the Eleventh Amendment was intended to restore the Hamilton-Madison-Marshall interpretation of state immunity in Article III as a common-law defense, there would be no basis on which state immunity could be considered an immutable constitutional right.<sup>212</sup> Marshall’s reasoning in *Cohens* meant that, under the Constitution, Congress was empowered to abrogate state immunity.<sup>213</sup>

## VII. BEGINNING IN THE 1880s, THE SUPREME COURT REFRAMES THE ELEVENTH AMENDMENT AS A CONSTITUTIONAL LIMITATION ON THE FEDERAL COURTS’ AUTHORITY

The constitutionalization of sovereign immunity did not begin with the passage and ratification of the Eleventh Amendment in the 1790s, but rather with the Court’s

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<sup>209</sup> *Id.* at 406, 410–11 (“Under the [Judiciary Act of 1789], the effect of a writ of error is simply to bring the record into Court, and submit the judgment of the inferior tribunal to reexamination.”).

<sup>210</sup> *Id.* at 412.

<sup>211</sup> *See, e.g.,* *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 482 & n.11 (1987) (plurality opinion) (“[T]he dissent places too much weight on *Cohens* . . . . In *Cohens*, it was the State that began criminal proceedings against the Cohenses. It had long been understood that sovereign immunity did not prevent persons convicted of crimes from appealing.”).

<sup>212</sup> *See* Ratification Convention of Virginia, *supra* note 61, at 469 (statement of Edmund Randolph).

<sup>213</sup> *See Cohens*, 19 U.S. (6 Wheat.) at 378 (“The second section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the Courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends ‘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.’ This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.”); *see also* *Seminole Tribe v. Florida*, 517 U.S. 44, 112–13 (1996) (Souter, J., dissenting) (“The point of the Eleventh Amendment, according to *Cohens*, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not ‘to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.’”).

decisions in the 1880s.<sup>214</sup> From the mid-1860s through the 1870s, Congress took steps to expand the authority of the federal government. This included the post-Civil War Amendments ratified between 1865 and 1870 and the 1875 Judiciary Act, which added general federal question jurisdiction to the jurisdiction of the federal circuit courts.<sup>215</sup> The 1875 Judiciary Act provided those federal courts with “concurrent jurisdiction” to entertain federal question cases based upon the arising under clause in Article III, Section 2.<sup>216</sup>

By the late 1870s and early 1880s, the Southern states were heavily in debt.<sup>217</sup> Several states withdrew from contractual commitments by repudiating bonds issued during Reconstruction.<sup>218</sup> The Supreme Court was faced with a slew of lawsuits by creditors challenging the states’ actions as an impairment of contract in violation of the Constitution’s Contracts Clause.<sup>219</sup> There was concern that, if the Supreme Court ordered the Southern states to honor their contractual obligations, the states would

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<sup>214</sup> See, e.g., *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711 (1883); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); *Poindexter v. Greenhow*, 114 U.S. 270 (1885); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887).

<sup>215</sup> Judiciary Act of 1875, ch. 137, § 1, 18 Stat. 470 (1875); see Kenneth L. Karst, *Judiciary Act of 1875 18 Stat. 470 (1875)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/judiciary-act-1875-18-stat-470-1875> [https://perma.cc/Y76U-LKNE] (last visited Jan. 8, 2023) (“[I]t was one of Congress’s last pieces of nationalizing legislation during the era of reconstruction; its primary purpose was to provide a federal judicial forum for the assertion of newly created federal rights.”).

<sup>216</sup> See David R. Dow, *Is the “Arising Under” Jurisdiction Grant in Article III Self-Executing?*, 25 WM. & MARY BILL RTS. J. 1, 2 (2016) (“[T]he Judiciary Act of 1875 gave the federal circuit courts, subject to a \$500 amount in controversy requirement, concurrent jurisdiction over ‘all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority’—in other words, ‘arising under’ jurisdiction.”).

<sup>217</sup> See John V. Orth, *The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power*, 1983 U. ILL. L. REV. 423, 433 (1983) [hereinafter Orth, *Interpretation of Eleventh Amendment*] (“During Reconstruction, the debts of [the Southern] states grew by more than one hundred million dollars.”).

<sup>218</sup> See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 58 (1987) [hereinafter ORTH, *ELEVENTH AMENDMENT IN AMERICAN HISTORY*] (“After Reconstruction a growing number of plaintiffs with claims against states were holders of Southern bonds. . . . Between them the two states [Louisiana and North Carolina] repudiated debts totaling twenty-seven million dollars.”). Twenty-seven million dollars is worth approximately \$813 million in 2023. See *Value of \$27,000,000 from 1880 to 2023*, CPS INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1880?amount=27000000> [https://perma.cc/M2W5-2DLM] (last visited Jan. 14, 2023).

<sup>219</sup> See cases cited at *supra* note 214 and *infra* note 238; see also U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

fail to obey the order.<sup>220</sup> At this time, the Contracts Clause was understood to operate in tandem with state immunity.<sup>221</sup> In other words, while the Contracts Clause prohibited states from impairing contractual obligations entered into under state and common law, it did not mandate that the states forego their sovereign immunity and accept a remedy imposed by the federal courts.<sup>222</sup>

In the 1880s, the Supreme Court explicitly extended the Eleventh Amendment to cases challenging state laws that repudiated contracts in violation of the Contracts Clause.<sup>223</sup> Because the plaintiffs in these cases relied on the fact that they were out-of-state citizens to confer jurisdiction on the federal courts, the Court could refer to the broadly-worded language of the Eleventh Amendment, which states, “any suit in law or equity, commenced . . . by citizens of another State,” to support its determination that the Eleventh Amendment should apply to prevent the federal courts from awarding relief to the plaintiffs.<sup>224</sup> None of the plaintiffs in these cases invoked the fact that the lawsuit might also involve a federal constitutional question, which would independently support federal court jurisdiction under the “arising

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<sup>220</sup> See *Gibbons*, *supra* note 35, at 1990 (“In 1883[,] the Court faced the patent reality that a decree requiring affirmative enforcement against state officers would not be enforced.”).

<sup>221</sup> Field, *Congressional Imposition*, *supra* note 189, at 1266–67.

<sup>222</sup> See *Burnham*, *supra* note 179, at 947–48 (“The contracts clause operates in all circumstances to void any state law that impairs contract obligations, but it does not constitutionalize such obligations; they draw any legal force they may have from the common law, which may itself pose obstacles to recovery. Where the state is the debtor and party defendant, the common law poses an insurmountable obstacle to recovery because, regardless of what obligations the state has assumed, the common law provides that the state may not be sued without its consent.”); Field, *Congressional Imposition*, *supra* note 189, at 1266–67 (“[T]he position the Court has consistently taken—that contract clause claims can be raised only defensively—best accords with the Framers’ intent. . . . No one intimated . . . either in the debates on the original Constitution, or at any time prior to passage of the eleventh amendment, that the contract clause of its own force might have the effect of removing states’ immunity.”); *Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885) (“It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign State.”).

<sup>223</sup> See, e.g., Orth, *Interpretation of Eleventh Amendment*, *supra* note 217, at 435 (“In a line of cases dealing with defaults on Southern state bonds, the Court established the general rule that states are immune from suits by their creditors in federal court, despite the contracts clause of the Constitution.”); Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 9 (“By the 1880’s . . . as debt repudiation mounted in southern states, the Court increasingly came to find that suits nominally against state officers, and brought by out-of-state citizens or foreign citizens, were in fact ‘against the state’ and thus barred by the [eleventh] amendment.”).

<sup>224</sup> U.S. CONST. amend XI.

under clause,” nor was federal question jurisdiction explicitly mentioned by the Court.<sup>225</sup> It would seem that if the Supreme Court was also addressing federal question jurisdiction, it would have done so explicitly.<sup>226</sup>

To ensure that its decisions were solidly grounded, the Court, for the first time, characterized the Eleventh Amendment using expansive, constitutionally-based language.<sup>227</sup> The Court also stated that the Eleventh Amendment should be interpreted broadly “to accomplish the substance of its purpose,” language that would endure for almost a century and a half.<sup>228</sup> The Court described the “object and purpose” of the Amendment as protecting a state from the indignity of being compelled to defend itself in federal court.<sup>229</sup> This indignity rationale applies to every claim brought by an individual against a state, including federal question cases,<sup>230</sup> and supported the Court’s later reframing of the sovereign immunity principle as a

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<sup>225</sup> Compare Wayne McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 N.C. L. REV. 485, 506 (1972) (“The astounding point about all of these cases is that their rationale of an [E]leventh [A]mendment bar to federal question cases was wholly unnecessary to the result. In none of these suits was a federal question presented. . . . The suits were simply efforts to collect debts and the pleadings of the plaintiffs anticipated the defenses to be raised by the state (statutory provisions cancelling the debts) and asserted that these defenses were unconstitutional. . . . The claim to debts owed by the state ‘arises’ as a matter of state law and in no way ‘arises’ under federal law.”).

<sup>226</sup> See, e.g., *Burnham*, *supra* note 179, at 963 (“The majority [in *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711 (1883)] held that the suit to force state officers to set aside and apply an appropriation to payment of interest on state bonds could not be maintained. Without mentioning the federal question statute, the Court observed that the remedy that the plaintiffs sought in federal court was not available in the Louisiana courts.”).

<sup>227</sup> See, e.g., *In re Ayers*, 123 U.S. 443, 503 (1887) (explaining that the Amendment “contained” a “constitutional principle . . . which secures to the state an immunity from suit.”); *Hagood v. Southern*, 117 U.S. 52, 71 (1886) (describing the Amendment as providing states with a “constitutional right to insist on its immunity from suit”); see also Massey, *supra* note 114, at 135–36 (“[T]he Court was faced with the unpalatable choice of abandoning accepted Contract Clause doctrine or establishing the potentially crippling precedent of state non-compliance with Supreme Court judgments. The Court’s solution to this dilemma was to read the Eleventh Amendment as establishing, as a constitutional principle, state sovereign immunity from suit in federal court, whatever the asserted jurisdictional basis for the suit.”).

<sup>228</sup> See *In re Ayers*, 123 U.S. at 505–06 (“To secure the manifest purposes of the constitutional exemption guaranteed by the [E]leventh [A]mendment requires that it should be interpreted not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose.”).

<sup>229</sup> *Id.* at 505.

<sup>230</sup> Conversely, it could be argued that if the plaintiff is raising a federal question, the Court’s refusal to entertain the federal question is imposing an indignity on the *national* government.

constitutional principle.<sup>231</sup> This rationale also contradicted Chief Justice Marshall's decision in *Cohens*, in which the Supreme Court retained judicial power over "all cases arising under the Constitution or laws of the United States, without respect to parties."<sup>232</sup>

Thus, the Court's decisions from the 1880s provided the foundation for establishing a "constitutional" principle of sovereign immunity embedded in the Eleventh Amendment different from the intent of the Framers of the Constitution as well as the Framers of the Eleventh Amendment. The Hamilton-Madison-Marshall proponents of the Constitution and the Framers of the Amendment intended sovereign immunity to be a common-law defense implicit in the Constitution. There would be no basis under that interpretation for displacing Congress's power under Article I to abrogate or otherwise limit that common-law immunity in situations where Congress determined, in exercising its constitutional authority for the nation, that individuals should have a right to sue states for monetary relief.<sup>233</sup>

A. *In 1890, in Hans v. Louisiana, the Supreme Court Bars Federal Question Claims Brought by a State's Own Citizens*

The move toward constitutionalizing the sovereign immunity principle continued with the Supreme Court's 1890 decision in *Hans v. Louisiana*.<sup>234</sup> Bernard Hans was a citizen of the State of Louisiana who brought a federal lawsuit against Louisiana under the Contracts Clause<sup>235</sup> to recover on bonds that had been issued, and then repudiated, by the State.<sup>236</sup> Since the suit was brought by a citizen suing his own state in federal court, and the state had raised an objection to the Court's jurisdiction, the Court had to address whether the Eleventh Amendment and its underlying principle of sovereign immunity would apply to bar the lawsuit.<sup>237</sup> Four

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<sup>231</sup> See *infra* Section VII.B.

<sup>232</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821).

<sup>233</sup> See Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 79 n.320 ("The uncertainty over the doctrine of sovereign immunity in the early days of the republic, when questions of state-federal power received great attention, makes it difficult to accept that a broad requirement of state sovereign immunity from suit was embedded in the structure of the Constitution.").

<sup>234</sup> 134 U.S. 1 (1890).

<sup>235</sup> See *Hans v. Louisiana*, 134 U.S. 1, 1 (1890) (syllabus).

<sup>236</sup> *Id.* at 1–3 (syllabus).

<sup>237</sup> *Id.* at 3 (syllabus); see also ORTH, ELEVENTH AMENDMENT IN AMERICAN HISTORY, *supra* note 218, at 73 (discussing *North Carolina v. Temple*, 134 U.S. 22 (1890), decided the same day as *Hans*) ("If in-state plaintiffs could recover in federal court, Southern bonds would regain their value. . . . Since it had been

members of the Court had already telegraphed their willingness to apply state sovereign immunity to in-state bondholders in cases brought under the state-citizen clause.<sup>238</sup> What made *Hans* significant was that it interpreted the Eleventh Amendment to extend to federal questions, not only to common-law and state-law claims under the state-citizen and foreign-citizen clauses.<sup>239</sup> In making explicit that federal question cases, including by a state's own citizens, fall within the Eleventh Amendment, the Court clarified what may have been implicit in its decisions in the 1880s.<sup>240</sup> In those cases, the plaintiffs sought jurisdiction under the state-citizen clause, but their claims were similarly based on the Constitution's Contracts Clause.<sup>241</sup> By directly addressing federal question jurisdiction in *Hans*, the Court put itself in the pathway of having to resolve the relationship between the sovereign immunity principle and Congress's power to enact legislation under Article I.

Hans, a citizen of Louisiana, had purchased "consolidated bonds" pursuant to an 1874 Louisiana law and was entitled to receive interest from the State semiannually, using coupons annexed to the bonds.<sup>242</sup> In 1879, Louisiana repudiated its obligation by amending the State Constitution so that Hans could no longer exchange his coupons for interest payments.<sup>243</sup> In 1884, Hans sued Louisiana in the federal circuit court for impairment of contract; Louisiana took exception to Hans's

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established a century earlier that commercial *choses in action* were transferable, bonds were freely enforceable by subsequent purchasers.").

<sup>238</sup> See *Marye v. Parsons*, 114 U.S. 325, 337–38 (1885) (Bradley, J., joined by Waite, C.J., Miller & Gray, JJ., dissenting) (explaining why a suit by in-state bondholders against Virginia should be decided in the same way as a suit by out-of-state bondholders).

<sup>239</sup> See *Hans*, 134 U.S. at 9 ("The question is presented, whether a State can be sued in a Circuit Court of the United States by one of its own citizens upon a suggestion that the case is one that arises under the Constitution or laws of the United States.").

<sup>240</sup> See, e.g., *id.* at 10 ("That a State cannot be sued by a citizen of another State, or of a foreign state, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases." (citing *Louisiana ex rel. Elliott v. Jumel*, 107 U.S. 711 (1883); *Hagood v. Southern*, 117 U.S. 52 (1886); *In re Ayers*, 123 U.S. 443 (1887))).

<sup>241</sup> See *id.* ("Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case.").

<sup>242</sup> *Hans*, 134 U.S. at 1 (syllabus).

<sup>243</sup> *Id.* at 2–3 (syllabus).



suit based on sovereign immunity, and the circuit court granted the exception and dismissed the lawsuit.<sup>244</sup> *Hans* appealed to the Supreme Court.<sup>245</sup>

Justice Bradley, writing for eight members of the Court, acknowledged that, in a lawsuit brought under the Constitution, the federal circuit courts generally have jurisdiction under Article III, Section 2 of the Constitution and Section 1 of the Judiciary Act of 1875, “without regard to the character of the parties.”<sup>246</sup> However, the Court noted that several of its decisions from the 1880s established that jurisdiction does not lie in cases arising under the Constitution or laws of the United States when a citizen of one state or a foreign state sues another state because the sovereign is exempted from suit.<sup>247</sup> Justice Bradley found that a lawsuit brought by a citizen against his own state should be subject to the same exemption because a suit against a sovereign “was not contemplated by the [C]onstitution when establishing the judicial power of the United States.”<sup>248</sup>

Justice Bradley supported extending Eleventh Amendment protection to federal claims by asserting that the Framers did not intend to alter the states’ historic immunity in suits by individuals<sup>249</sup> and by referencing statements made by Hamilton and later supported at the Virginia ratification convention by Madison and Marshall.<sup>250</sup> The Court further found that *Chisholm* was wrongly decided and that the Eleventh Amendment was proposed and ratified to “declare[ ] that the [C]onstitution should not be construed to import any power to authorize the bringing of such suits [by individuals against the states].”<sup>251</sup> To support this position, Justice Bradley relied on (1) Justice Iredell’s reasoning in his *Chisholm* dissent that “it was

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<sup>244</sup> *Id.* at 3–4 (syllabus); *see also* Gibbons, *supra* note 35, at 2000–01 (discussing background of the *Hans* suit).

<sup>245</sup> *See Hans*, 134 U.S. at 4 (syllabus).

<sup>246</sup> *Id.* at 9.

<sup>247</sup> *Id.* at 10.

<sup>248</sup> *Id.* at 15.

<sup>249</sup> *Id.* at 15–16 (“The truth is that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the [C]onstitution when establishing the judicial power of the United States. . . . The suability of a state, without its consent, was a thing unknown to the law.”).

<sup>250</sup> *Id.* at 12–14.

<sup>251</sup> *Id.* at 11 (emphasis added). Despite its analytical shortcomings, *Hans* properly recognized that the Eleventh Amendment is declaratory only and does not *prohibit* suits by individuals against states. *See id.*; *see also* Smith v. Reeves, 178 U.S. 436, 446 (1900) (stating that the Amendment “only declares that the judicial power . . . shall not be construed”).

not the intention [of the Framers] to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals,”<sup>252</sup> (2) the purported vindication of the Hamilton-Madison-Marshall-Iredell position by the adoption of the Eleventh Amendment,<sup>253</sup> and (3) *Hollingsworth v. Virginia*,<sup>254</sup> in which the Court, just after the adoption of the Eleventh Amendment, dismissed all pending lawsuits brought against the states.<sup>255</sup>

Justice Bradley acknowledged that the text of the Amendment did not include citizens suing their own state, but reasoned that Congress would have modified the language of the Amendment to include such a case if it had specifically considered Hans's situation.<sup>256</sup> He asserted that the Court's 1880s decisions in *Jumel*, *Hagood*, and *Ayers* had “clearly established” that the Amendment applies to a claim based on the Contracts Clause, and that an “anomalous result” would ensue if the federal courts entertained Hans's lawsuit but refused to entertain the same claim brought by a citizen of another state or a citizen of a foreign state.<sup>257</sup> In addition, Justice Bradley took note that, in the Judiciary Act of 1875, Congress provided that the jurisdiction of the circuit courts of the United States was to be “concurrent with the courts of the several [S]tates . . . .”<sup>258</sup> He contended that this language supported the proposition that Congress “did not intend to invest [the federal] courts with any new and strange jurisdictions[.]”<sup>259</sup> Since the state courts presumably had no power to entertain suits

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<sup>252</sup> *Hans*, 134 U.S. at 12; *see also id.* at 18 (noting the “presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution—anomalous and unheard of when the Constitution was adopted”).

<sup>253</sup> *Id.* at 14–15.

<sup>254</sup> 3 U.S. (3 Dall.) 378 (1798).

<sup>255</sup> *Hans*, 134 U.S. at 11 (noting that the Court concluded in *Hollingsworth* that the federal courts were deprived from “exercis[ing] any jurisdiction, in any case . . . in which a state was sued by the citizens of another state, or by citizens or subjects of any foreign state” (quoting *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798))).

<sup>256</sup> *Id.* at 15 (“Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the federal courts, while the idea of suits by citizens of other States, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face.”).

<sup>257</sup> *Id.* at 10.

<sup>258</sup> *Id.* at 18.

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

by individuals against a state without the state's consent, Justice Bradley asked, "how does the [federal] circuit court, having only concurrent jurisdiction, acquire any such power?"<sup>260</sup> Finally, Justice Bradley addressed Justice Marshall's conclusion in *Cohens* that under Article III, "the judicial power was extended to all cases arising under the Constitution or laws of the United States, without respect to parties."<sup>261</sup> Justice Bradley wrote that "the observation was unnecessary to the decision, and in that sense extrajudicial, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."<sup>262</sup>

Despite the strong language in *Hans*, the decision rested on weak analytical grounds. First, the Court's statement that the decisions in *Jumel*, *Hagood*, and *Ayers* "clearly established" that the Eleventh Amendment applied to federal questions ignored the fact that those cases involved only the Contracts Clause and, instead of addressing whether there was federal question jurisdiction with respect to that clause, rested solely on the federal courts' lack of jurisdiction under the state-citizen clause.<sup>263</sup>

Second, the Court gave undue weight to Justice Iredell's conclusion in *Chisholm*, based on Section 14 of the Judiciary Law of 1789, that no "anomalous and unheard-of proceedings or suits" were intended to be created by the Constitution.<sup>264</sup> Justice Iredell wrote that common law remedies and defenses remained fully intact, *but only until Congress acted otherwise*.<sup>265</sup> Moreover, all that Section 14 provided was that federal courts were authorized to issue writs that were

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<sup>260</sup> *Id.* Justice Bradley's answer was that Congress would not have understood the Circuit Court to have such authority. *Id.* at 18–19; *see also* Burnham, *supra* note 179, at 960 ("Using the scope of relief permitted in state courts as the gauge for the federal courts' power supports the idea that neither the claim nor the immunity involved in *Hans* was founded on the Constitution.").

<sup>261</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382–83, 412 (1821).

<sup>262</sup> *Hans*, 134 U.S. at 20.

<sup>263</sup> *See* McCormack, *supra* note 225, at 506; Burnham, *supra* note 179, at 963.

<sup>264</sup> *Hans*, 134 U.S. at 18.

<sup>265</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434 (1793) (opinion of Iredell, J.). The current Court continues to rely on the *Hans* interpretation of Justice Iredell's finding with respect to "anomalous and unheard-of proceedings." *See* Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1496 (2019) ("The Eleventh Amendment confirmed that the Constitution was not meant to 'rais[e] up' any suits against the States that were 'anomalous and unheard of when the Constitution was adopted.'" (quoting *Hans*, 134 U.S. at 18)).

“agreeable to the principles and usages of law.”<sup>266</sup> It was a leap in logic for the Court to conclude that Congress’s use of this phrase meant that other common law principles, such as state immunity, were retained in the Constitution and barred actions by individuals based on federal law.<sup>267</sup>

Third, Justice Bradley’s attempt to disregard Chief Justice Marshall’s conclusion in *Cohens* that the Constitution, “as originally framed,”<sup>268</sup> did not intend to restrict the federal courts’ power in federal question cases, did not rest on any new historical information.<sup>269</sup> Marshall had participated in the Virginia ratification convention and presumably had a better understanding than Justice Bradley of the Framers’ interpretation of Article III of the Constitution.<sup>270</sup>

Despite these shortcomings, *Hans* did not announce that the Framers of the Constitution and the Eleventh Amendment intended to embed sovereign immunity as an immutable defense in the Constitution.<sup>271</sup> Rather, *Hans* continued to

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<sup>266</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 433–37 (1793) (opinion of Iredell, J.); see John V. Orth, *The Truth About Justice Iredell’s Dissent in Chisholm v. Georgia (1793)*, 73 N.C.L. REV. 255, 263 (1994) (“The truth is that Justice Iredell’s dissent rested solely, as he himself was repeatedly at pains to point out, on his interpretation of the Federal Judiciary Act of 1789.”); see also *id.* at 265 (“The ‘principles and usages of law’ [from the All-Writs section of the Judiciary Act] must, Justice Iredell concluded, refer to the common law. . . .”).

<sup>267</sup> See *Burnham*, *supra* note 179, at 957 (“Justice Bradley’s adoption of Justice Iredell’s reasoning succeeds only if Hans’ claim, like *Chisholm*’s, was a common-law claim that was barred by common-law sovereign immunity.”); see also *Currie*, *supra* note 154, at 835–36.

<sup>268</sup> See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821).

<sup>269</sup> *Hans*, 134 U.S. at 20 (“[Chief Justice Marshall’s observation] extend[s] to all cases ‘arising under the Constitution . . . without respect to parties. . . .’ [It] was unnecessary to the decision, and in that sense extra judicial, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to [in Justice Bradley’s opinion] which lead to a different conclusion.” (citations omitted)); see also ORTH, *ELEVENTH AMENDMENT IN AMERICAN HISTORY*, *supra* note 218, at 74–75 (challenging the basis for Justice Bradley’s “unhedged certitude about the original understanding and the Eleventh Amendment” since “[n]o surprising discoveries about the historical record had been made in the decade of the 1880s”).

<sup>270</sup> See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1354 (1989) (noting that Chief Justice Marshall’s explanation of the purpose for the Eleventh Amendment, “was, at least in part, a firsthand account”); see also *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 313–14 (1973) (Brennan, J., dissenting) (“This Court gives particular weight to pronouncements of Mr. Chief Justice Marshall upon the meaning of his contemporaries in framing the Constitution.”).

<sup>271</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44, 119 (1996) (Souter, J., dissenting) (“Because no federal legislation purporting to pierce state immunity was at issue, it cannot fairly be said that *Hans* held state sovereign immunity to have attained some constitutional status immunizing it from abrogation.”).

characterize sovereign immunity as a common-law-based exemption from federal judicial power within the constitutional scheme.<sup>272</sup> Even though *Hans* made explicit that the Eleventh Amendment defense applies to claims raising a federal question—which would encompass congressional legislation—it did not address Congress’s authority to abrogate or limit sovereign immunity under Article I or hold that the sovereign immunity principle is constitutionally based.<sup>273</sup> In fact, such a holding would have been at odds with the Framers’ intent and the history of the Amendment.<sup>274</sup>

Over the next half century, the Court would reiterate that the original Constitution implicitly, and the Eleventh Amendment explicitly, compel a broad interpretation of common law state immunity that limits the federal courts’ jurisdiction when states are sued without their consent.<sup>275</sup> The states’ common-law

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<sup>272</sup> *Hans*, 134 U.S. at 12–13 (citing THE FEDERALIST NO. 81 (Alexander Hamilton)); *id.* at 9 (stating that sovereign immunity operates as an “exemption from suit”); see Burnham, *supra* note 179, at 957 (“Justice Bradley’s adoption of Justice Iredell’s reasoning succeeds only if Hans’ claim, like Chisholm’s, was a common-law claim that was barred by common-law sovereign immunity.”)

<sup>273</sup> See Fletcher, *A Reply to Critics*, *supra* note 176, at 1299 (“[I]nherent in the Constitution is the congressional power to authorize federal courts to enforce federal law against the states at the instance of private individuals who are supposed to be protected by those laws.”).

<sup>274</sup> Some scholars and justices have read *Hans* as recognizing, outside of the Eleventh Amendment’s text, a non-constitutional, common-law state immunity from suit when a citizen sues their own State in federal court. See, e.g., Burnham, *supra* note 179, at 933 (“The Court understood the claim made in *Hans* to be nothing more than a common-law contract claim and simply applied common-law sovereign immunity to bar that claim.”); Field, *Other Sovereign Immunity Doctrines*, *supra* note 158, at 537 (“[*Hans*] seemingly did not view the immunity as a constitutional requirement. That case is wholly consistent with the view that sovereign immunity survived article III as only a common law doctrine.”); Field, *Congressional Imposition*, *supra* note 189, at 1261–62 (“[U]nder a non-constitutional view of immunity, it is clear that congressional legislation that is otherwise valid could always impose suit upon states . . . .”); *Seminole Tribe*, 517 U.S. at 124 (Souter, J., dissenting) (“The *Hans* Court . . . held the suit barred by a nonconstitutional common-law immunity.”); *Emps. of the Dep’t of Pub. Health & Welfare*, 411 U.S. at 313–14 (Brennan, J., dissenting) (“*Hans* accords to nonconsenting States only a nonconstitutional immunity from suit by its own citizens.”).

<sup>275</sup> See, e.g., *Smith v. Reeves*, 178 U.S. 436, 448 (1900) (extending *Hans* to suit brought by federal public corporation) (“We deem it unnecessary to repeat or enlarge upon the reasons given in *Hans v. Louisiana* why a suit brought against a state by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the State by a corporation created by Congress.”); *Ex parte New York*, 256 U.S. 490, 497 (1921) (extending *Hans* to Court’s admiralty jurisdiction) (noting sovereign immunity is “a fundamental rule of jurisprudence” that was recognized in the original Constitution and operates broadly to exempt the States from the federal courts’ “entire judicial power” and the Eleventh Amendment “exemplifi[es]” sovereign immunity for those specific categories of cases that fit within its text); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934) (extending *Hans* to suit by foreign state) (“Behind the words of the constitutional provisions are postulates which limit and control

immunity, however, could be waived by a state consenting to be sued,<sup>276</sup> or, as a plurality of the Court would later rule in *Pennsylvania v. Union Gas Co.*, it could be abrogated by Congress exercising its authority under Article I.<sup>277</sup>

*B. The Court Reframes State Immunity as an Immutable Constitutional Right that Trumps Congress's Article I Authority*

In the mid-1940s, the Court began to explicitly characterize the Eleventh Amendment as establishing a “constitutional right” to sovereign immunity and a “constitutional limitation” on federal judicial power.<sup>278</sup> In two 1940s cases involving corporations suing state officials to obtain tax refunds, *Great Northern Life Ins. Co. v. Read* and *Ford Motor Co. v. Dep't of Treasury of Indiana*,<sup>279</sup> the Court construed the Amendment as establishing a constitutional principle of state sovereign immunity.<sup>280</sup>

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[federal jurisdiction under Art. III, § 2]. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits without their consent, save where there has been ‘a surrender of this immunity in the plan of the convention.’” (citing THE FEDERALIST NO. 81 (Alexander Hamilton)).

<sup>276</sup> See *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883).

<sup>277</sup> 491 U.S. 1, 22–23 (1989) (plurality opinion).

<sup>278</sup> See *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945) (“This express constitutional limitation denies to the federal courts authority to entertain a suit brought by private parties against a state without its consent.”); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944) (“A state’s freedom from litigation was established as a constitutional right through the Eleventh Amendment.”).

<sup>279</sup> See *Ford Motor Co.*, 323 U.S. at 464; *Great N. Life*, 322 U.S. at 51.

<sup>280</sup> See *Burnham*, *supra* note 179, at 981 (noting that in *Great Northern Life* and *Ford Motor Co.*, where plaintiffs sued for refund of state taxes that were allegedly collected in violation of the U.S. Constitution, the Court “cited *Hans* for the proposition that the [E]leventh [A]mendment was a constitutional right enabling states to bar all suits brought against them by private parties without their consent”).

Starting in 1973, this interpretation of the Amendment gained steam,<sup>281</sup> which eventually culminated in the 5:4 decision in *Seminole Tribe* in 1996.<sup>282</sup> As a result,<sup>283</sup> the Court transformed the common-law defense—propounded by Hamilton-Madison-Marshall, adopted in *Hans*, and recognized by the text and Framers of the Eleventh Amendment—into an immutable constitutional right.<sup>284</sup>

*C. In Determining the Validity of Congress's Efforts to Condition State Participation in Federal Activities and Programs on a Waiver of Sovereign Immunity, the Court Characterizes State Immunity as a Constitutional Right*

The Supreme Court has long recognized that a state's exemption from suit is a "personal privilege" that can be waived.<sup>285</sup> Once a state consents to being sued, the court has the judicial power to adjudicate the case on the merits.<sup>286</sup> Waiver of the

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<sup>281</sup> See *Emps. of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 285–86 (1973) (concluding that because the Eleventh Amendment had constitutionalized the principle of sovereign immunity, Congress was required to, but had not, clearly expressed an intention to allow state employees who were covered by a recent amendment to the Fair Labor Standards Act of 1938 ["FLSA"] to sue their employer for monetary compensation in federal court).

<sup>282</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>283</sup> Eleventh Amendment decisions during this period address three primary issues: (1) What conduct or action constitutes a state's consent to be sued in federal court? (2) Can Congress abrogate the states' sovereign immunity from suit in federal and state court and, if so, what must Congress do to effectuate an abrogation? (3) Can a state be sued in federal court by filing the claim against a state entity and/or state official, rather than the state itself and, if so, what relief can be obtained? In this Article, we consider the first and second issues as most pertinent to the Court's efforts to constitutionalize the sovereign immunity principle.

<sup>284</sup> See Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 991 (2000) [hereinafter Jackson, *Principle and Compromise*] ("[T]he Court's recent cases have elevated the principle of sovereign immunity to a positive value in ways that differ markedly in tone from decisions earlier in this century."); Field, *Other Sovereign Immunity Doctrines*, *supra* note 158, at 537 ("The position that article III imposes a constitutional requirement of immunity surely goes beyond anything argued in the constitutional debates. It has no historical support. Neither constitutional language nor constitutional intent provide any basis for it.").

<sup>285</sup> See *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1858); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883); see also Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 DUKE L.J. 1167, 1219 (2003) ("[A] state may 'waive at pleasure' its immunity defense. How something can be both jurisdictional and waivable is a paradox.").

<sup>286</sup> See, e.g., *Beers*, 61 U.S. (20 How.) at 529 ("Arkansas, by its Constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced.").

sovereign's exemption from suit is more consistent with the states' immunity being considered a common-law defense than an immutable constitutional restraint on federal court jurisdiction.<sup>287</sup>

Beginning in the 1960s, Congress enacted legislation creating programs that would benefit states and other entities, but only if they complied with federal requirements.<sup>288</sup> Further, Congress passed several laws that expressly withdrew states' sovereign immunity as a defense in lawsuits concerning these programs so that aggrieved individuals could obtain relief in the federal courts.<sup>289</sup>

Eventually, lawsuits were commenced for violations of the terms of these programs, and the Supreme Court was faced with deciding whether a particular state's waiver of immunity was "voluntary." The Court applied a high bar for voluntary waiver, setting strict standards for both Congress and the states.<sup>290</sup> These strict standards included requiring that the states, by their conduct, clearly express a willingness to be sued in a particular court; and that Congress explicitly set forth in legislation that states participating in the program agree to (1) be sued in federal, or

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<sup>287</sup> See Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 35 n.147 ("The rule of waiver is, indeed, more consistent with the premise that much existing Eleventh Amendment caselaw stems from a federal common law of state immunity from suit than from a presumed constitutional constraint on the reach of the judicial power.").

<sup>288</sup> See *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 192 (1964) ("By enacting the [Federal Employers' Liability Act,] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.").

<sup>289</sup> See, e.g., Patent and Plant Variety Protection Remedy Clarification Act § 2(a), Pub. L. No. 102-560, 106 Stat. 4230 (1996) (codified at 35 U.S.C. §§ 271(h), 296).

<sup>290</sup> The Court's decisions on the issue of state waiver of sovereign immunity cover a range of sub-issues involving the nature of the conduct that satisfies a waiver. See generally RICKS & TENENBAUM, *supra* note 16, at 926-30 (discussing "Spending Clause" waiver and "Other Circumstances Resulting in a State Waiver of Sovereign Immunity").



in some cases, state court,<sup>291</sup> and (2) the specific relief they would provide if found liable.<sup>292</sup>

From a practical perspective, the Court's stringent test for finding waiver of sovereign immunity makes considerable sense.<sup>293</sup> Waiver of a state's immunity from suit has the potential to adjust the relationship between the federal government and the state.<sup>294</sup> A high bar ensures that both Congress and the states are fully informed on what the state is relinquishing in return for receiving significant federal dollars or some consequential programmatic or policy benefit.<sup>295</sup>

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<sup>291</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) (“[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State’s intention to subject itself to suit in *federal court*.”); *Kennecott Copper Corp. v. State Tax Comm’n*, 327 U.S. 573, 577–79 (1946) (illustrating that a Utah statute, which authorizes taxpayers to bring suit against the taxing official or state in “any court of competent jurisdiction[,]” does not grant consent to suit against the state in federal court).

<sup>292</sup> See *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (concluding that Congress had not waived the states’ immunity from private suits for damages under the Religious Land Use and Institutionalized Persons Act of 2000) (“[O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.’ A State’s consent to suit must be ‘unequivocally expressed’ in the text of the relevant statute. Only by requiring this ‘clear declaration’ by the State can we be ‘certain that the State in fact consents to suit.’” (citations omitted)).

<sup>293</sup> See *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (construing the Individuals with Disabilities Education Act) (“[L]egislation enacted pursuant to the spending power is much in the nature of a contract,’ and therefore, to be bound by ‘federally imposed conditions,’ recipients of federal funds must accept them ‘voluntarily and knowingly.’ States cannot knowingly accept conditions of which they are ‘unaware’ or which they are ‘unable to ascertain.’” (citations omitted)); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (“The whole point of requiring a ‘clear declaration’ by the State of its waiver is to be certain that the State in fact consents to suit.”); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981) (“Congress must express clearly its intent to impose conditions on the grant of federal funds so that the States can knowingly decide whether or not to accept those funds.”).

<sup>294</sup> See Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 509 n.57 (1997) [hereinafter Jackson, *Seminole Tribe*] (“Clear statement rules are sometimes justified in part as designed to assure legislative deliberation on questions deemed particularly sensitive to federal-state relations.”).

<sup>295</sup> See *Sossamon v. Texas*, 563 U.S. 277, 290 (2011) (“The requirement of a clear statement in the text of the statute ensures that Congress has specifically considered state sovereign immunity and has intentionally legislated on the matter.”); see also Jackson, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 110–11 (“A clear evidence rule for liabilities, remedies, and fora may increase the likelihood that Congress will actually focus on these questions and that the states have sufficient notice to permit them to advocate their interests in Congress.”).

The Court justified the use of these strict standards by characterizing the Eleventh Amendment and its underlying principle of state immunity in broad constitutional terms.<sup>296</sup> The Eleventh Amendment and state immunity were described in various cases during the 1980s and 1990s as: (1) a “fundamental principle,”<sup>297</sup> (2) “a fundamental aspect” of state sovereignty,<sup>298</sup> (3) “implicat[ing] the fundamental constitutional balance between the Federal Government and the States,”<sup>299</sup> and (4) “an essential component of our constitutional structure . . . .”<sup>300</sup>

*D. The Court's Efforts to Constitutionalize State Immunity  
Culminate in Judicially Imposed Procedural and Substantive  
Constraints on Congress's Authority to Abrogate State  
Immunity*

During the period when Congress was enacting laws conditioning the states' voluntary participation in certain federal programs on a waiver of sovereign immunity, it was also passing landmark civil rights laws and laws to protect intellectual property rights.<sup>301</sup> Many of these laws applied to state and local

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<sup>296</sup> See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 665–66 (1974) (referring to “the important constitutional principle embodied in the Eleventh Amendment.”).

<sup>297</sup> See *Pennhurst Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (“[T]his Court has recognized that [the Amendment's] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.”); see also Erwin Chemerinsky, *State Sovereignty and Federal Court Power: The Eleventh Amendment After Pennhurst v. Halderman*, 12 HASTINGS CONST. L.Q. 643, 652–54 (1985) (“The Supreme Court's decision in *Pennhurst* is one of the clearest statements yet that a majority of the Supreme Court . . . treats the Eleventh Amendment as a constitutional limit on subject matter jurisdiction.”).

<sup>298</sup> See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (“[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.”).

<sup>299</sup> See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985) (“[T]he Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States . . . .”).

<sup>300</sup> See *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989).

<sup>301</sup> See, e.g., Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) (codified as amended at 20 U.S.C. §§ 1400–1482); Americans with Disabilities Act of 1990 (“ADA”), Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.); Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified as amended in scattered sections of 15 U.S.C.); Patent and Plant Variety Protection Remedy Clarification Act § 2(a), Pub. L. No. 102-560, 106 Stat. 4230 (1996) (codified at 35 U.S.C. §§ 271(h), 296).

governments as well as private parties.<sup>302</sup> To ensure that individuals who were the intended beneficiaries could obtain monetary relief against states when state actors violated the law, Congress included provisions that abrogated the states' sovereign immunity from suit.<sup>303</sup>

Until 1996, Congress imposed these new obligations and responsibilities on states under Article I of the Constitution, which vests Congress with broad lawmaking authority.<sup>304</sup> It is not difficult to discern why some members of the Court decided to place strict limits on Congress's authority in this area. When Congress abrogates state immunity, the balance of power between the federal government and the states generally shifts toward the national government.<sup>305</sup> Abrogating state immunity exposes states to lawsuits, which can result in state liability in the millions

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<sup>302</sup> See, e.g., Trademark Remedy Clarification Act, 15 U.S.C. § 1125(a)(2) ("As used in this subsection, the term 'any person' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this Act in the same manner and to the same extent as any nongovernmental entity."); Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 271(h) ("As used in this section, the term 'whoever' includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.").

<sup>303</sup> See, e.g., Americans with Disabilities Act of 1990, 42 U.S.C. § 12202 ("A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter."); Trademark Remedy Clarification Act, 15 U.S.C. § 1122(b) ("Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this chapter."); Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 296(a) ("Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent under section 271, or for any other violation under this title.").

<sup>304</sup> See McCormack, *supra* note 225, at 497 ("Any activity that comes within the commerce power may legitimately be referred to as falling outside the exclusive sphere of the states. If a state activity falls within the delegated commerce power, then the state is operating in an area in which sovereignty has been transferred to the federal government. The two governments may exercise dual sovereignty over activities within the commerce power, but federal policies within their proper scope are supreme.").

<sup>305</sup> See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 238, 242 (1985) ("Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance between the States and the Federal Government does not obtain.").

of dollars.<sup>306</sup> However, while it may be burdensome and costly for states to have their immunity defense set aside in certain federal laws, congressional legislation often: (1) levels the playing field between states and private entities which are subject to the law, (2) ensures a meaningful remedy for aggrieved individuals who are the intended beneficiaries of these laws, and (3) fails to have a substantial effect on state budgets or state sovereignty.<sup>307</sup>

The Court's efforts to limit the impact of civil rights and intellectual property legislation on the states eventually led to further restrictions on Congress's authority to enact laws that abrogate state immunity in two respects.<sup>308</sup>

### 1. Procedural Constraints on Abrogation

In determining whether Congress properly abrogated the states' sovereign immunity from suit in civil rights and intellectual property legislation, the Supreme Court applies the same procedural standard that it uses to evaluate congressional legislation requiring states to waive sovereign immunity as a condition for participating in federal programs.<sup>309</sup> The Court requires Congress to expressly state, in the text of the statute, that state immunity is abrogated in federal court.<sup>310</sup> The

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<sup>306</sup> See, e.g., *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 22 (1989) (plurality opinion) ("If States, which comprise a significant class of owners and operators of hazardous waste sites . . . need not pay for the costs of cleanup, the overall effect on voluntary cleanups will be substantial. This case thus shows why the space carved out for federal legislation under the commerce power must include the power to hold States financially accountable not only to the Federal Government, but to private citizens as well."), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>307</sup> See *Nowak*, *supra* note 115, at 1442 ("A congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent and that the hardship on the state is not severe. The states may adjust to the congressional enactment or, if the regulation proves onerous, they may exert their influence on Congress to have it changed.").

<sup>308</sup> See discussion *infra* Sections VII.D.1, VII.D.2.

<sup>309</sup> See *Atascadero State Hosp.*, 473 U.S. at 253 n.5 (Brennan, J., dissenting) ("The 'stringent' test that the Court applies to purported state waivers of sovereign immunity is a mirror image of the test it applies to congressional abrogation of state immunity.").

<sup>310</sup> See *Dellmuth v. Muth*, 491 U.S. 223, 227–28 (1989) ("To temper Congress'[s] acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" (quoting *Atascadero*, 473 U.S. at 242)).

Court explained that this strict requirement is similarly necessary because abrogation of state immunity alters the usual constitutional balance.<sup>311</sup>

The Court adopted this strict standard in 1985 in *Atascadero*,<sup>312</sup> and since that time, Congress has had little difficulty drafting language that meets the Court's requirement.<sup>313</sup> This explicit statement of abrogation of immunity in the law puts states on notice so they can plan and make necessary adjustments to their budgets and operations to comply with any new responsibilities and obligations.<sup>314</sup> It also ensures that Congress is aware of any shift in the balance of power between the national government and the states as a result of the law.<sup>315</sup>

## 2. Substantive Constraints on Abrogation

Congress's power under Article I—and especially under the Commerce Clause—is very broad and when exercised properly, displaces state authority.<sup>316</sup>

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<sup>311</sup> See *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (“Because ‘abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States,’ and because States are unable directly to remedy a judicial misapprehension of that abrogation, the Court has adopted a particularly strict standard to evaluate claims that Congress has abrogated the States’ sovereign immunity.” (quoting *Dellmuth*, 491 U.S. at 227)).

<sup>312</sup> *Atascadero*, 473 U.S. at 243–44.

<sup>313</sup> See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 1001 (2020) (“No one here disputes that Congress [in the Copyright Remedy Clarification Act of 1990] used clear enough language to abrogate the States’ immunity from copyright infringement suits.”); *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (construing Title II of the ADA) (“The first question [whether Congress unequivocally expressed its intent to abrogate state sovereign immunity] is easily answered in this case. The Act specifically provides: ‘A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.’” (quoting 42 U.S.C. § 12202)).

<sup>314</sup> See, e.g., *Nowak*, *supra* note 115, at 1444 n.161 (“[W]ith prospective enactments, the states at least have the opportunity to plan their budgets and provide for funds which will enable them to comply with the new federal rule.”).

<sup>315</sup> See *Jackson*, *Supreme Court and State Sovereign Immunity*, *supra* note 10, at 41 (“The ‘clear statement’ rule assures that Congress acts deliberately and with notice to the states when creating monetary liabilities enforceable in federal courts. The rule thereby enhances the ability of Congress to safeguard the federalism interests represented by the amendment.”); *Tribe*, *supra* note 159, at 695 (“[C]ourts should not abrogate state immunity unless they are sure that Congress has considered the federalism interests compromised by suits against states.”).

<sup>316</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20 (1989) (plurality opinion) (“It would be difficult to overstate the breadth and depth of the commerce power. . . . The Commerce Clause, we long have held, displaces state authority even where Congress has chosen not to act and it sometimes precludes state regulation even though existing federal law does not preempt it. Since the States may not legislate at all in these last two situations, a conclusion that Congress may not create a cause of action for money damages

State immunity is a common-law principle that was in place at the time of ratification of the Constitution and, therefore, in the ordinary course, it should be subject to the exercise of congressional power under the Commerce Clause.<sup>317</sup> Indeed, the Supreme Court reached this very conclusion in its plurality decision in *Union Gas*.<sup>318</sup>

*E. The Court Recognizes Congress's Article I Authority to Abrogate State Immunity*

In 1989, in *Union Gas*, four justices held that Congress had the authority under the Commerce Clause to abrogate state immunity.<sup>319</sup> Justice Brennan reasoned that, by virtue of the language in Article I, the states had given implicit consent to Congress to legislate an abrogation of their sovereign immunity when they ratified the Constitution.<sup>320</sup>

But relying on the notion of implied or constructive consent to support Congress's broad authority to legislate an abrogation of state immunity seems misguided.<sup>321</sup> A stronger basis to support this authority under Article I rests on the common-law roots of the sovereign immunity defense. Congress's *express* authority

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against the States would mean that no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause." (citations omitted)), *overruled by Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

<sup>317</sup> See *Tribe*, *supra* note 159, at 693 ("Nothing in the language or the history of the eleventh amendment suggests that it must be construed to limit congressional power under the commerce clause or under any other head of affirmative legislative authority.").

<sup>318</sup> See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

<sup>319</sup> *Id.* at 45, 57. Justice White concurring in the judgment in part, and dissenting in part, provided a fifth vote. *Id.* at 45.

<sup>320</sup> See *id.* at 19–20 ("Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."); *id.* at 22 ("[I]n approving the commerce power, the States consented to suits against them based on congressionally created causes of action.").

<sup>321</sup> The Court has rejected the reasoning of cases such as *Parden v. Terminal Ry. Co. of the Ala. State Docks Dep't*, 377 U.S. 184 (1964), *overruled by Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999); see *Coll. Sav. Bank*, 527 U.S. at 680 ("We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it."); see also *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) ("Waiver may not be implied."); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.").

to enact laws involving interstate commerce and intellectual property under Article I should take precedence over the states' common-law immunity from suit.<sup>322</sup>

*F. The Court Overrules Union Gas and Rejects Congress's Authority to Abrogate Sovereign Immunity Under Article I*

The *Union Gas* plurality's understanding of the relationship between the authority of Congress and state immunity did not survive. Seven years later, a five-justice majority in *Seminole Tribe* overruled *Union Gas*.<sup>323</sup> *Seminole Tribe* encapsulated the sovereign immunity principle as an immutable constitutionally-based limitation upon the federal judicial power in Article III that overrides Congress's authority under Article I.<sup>324</sup>

The Court's opinion reveals the majority's belief that the sovereign immunity principle was intended by the Framers of the Constitution and the Eleventh Amendment to be an immutable constitutional principle.<sup>325</sup> There were five analytical steps that led the Court to this conclusion: (1) state immunity is a "fundamental principle";<sup>326</sup> (2) this "fundamental principle" underlies and is "an essential part of the Eleventh Amendment";<sup>327</sup> (3) the Eleventh Amendment operates as a constitutional limitation on federal jurisdiction under Article III;<sup>328</sup> (4) Congress lacks authority under Article I to expand the scope of the federal courts'

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<sup>322</sup> See *Union Gas*, 491 U.S. at 18 ("[I]t is not the Commerce Clause that came first, but 'the principle embodied in the Eleventh Amendment' that did so."); see also *Tribe*, *supra* note 159, at 694–95 ("Article I envisions that the national government will have exclusive power to regulate certain subjects when, in the clearly expressed opinion of Congress, such regulation would serve the nation's interests. To the extent that sovereign immunity would free a state from such national controls, that immunity is inconsistent with the constitutional plan.").

<sup>323</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996).

<sup>324</sup> See *id.* at 72–73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

<sup>325</sup> See, e.g., *id.* at 64 ("It was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III.").

<sup>326</sup> See *id.* at 64.

<sup>327</sup> See *id.* ("[T]he Eleventh Amendment reflects 'the fundamental principle of sovereign immunity. . .'" (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984))); *id.* at 67 ("For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment.").

<sup>328</sup> See *id.* at 64 ("[T]he Eleventh Amendment st[and]s for the constitutional principle that state sovereign immunity limit[s] the federal courts' jurisdiction under Article III.").

jurisdiction;<sup>329</sup> and (5) abrogating state immunity works as an expansion of federal court jurisdiction and is therefore beyond Congress's Article I authority.<sup>330</sup>

The two dissenting opinions in *Seminole Tribe* detail the major flaws in the majority's reasoning.<sup>331</sup> Justice Stevens explained<sup>332</sup> that both Justice Iredell's dissent in *Chisholm* and the Supreme Court's decision in *Hans* recognized that Congress had the power to alter common-law-based sovereign immunity protections.<sup>333</sup> Noting that Congress already had the authority to alter common-law immunities under the Civil Rights Act of 1871, 42 U.S.C. § 1983,<sup>334</sup> and in *Bivens*

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<sup>329</sup> See *id.* at 65 (“[I]t ha[s] seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))).

<sup>330</sup> See *id.* at 65–66. Three years later, the Court concluded that Congress lacked the authority under Article I to create a federal cause of action that abrogates state immunity in state court. See *Alden v. Maine*, 527 U.S. 706, 752 (1999) (“Congress cannot abrogate the States’ sovereign immunity in federal court; were the rule to be different here, the National Government would wield greater power in the state courts than in its own judicial instrumentalities.”).

<sup>331</sup> See *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996) (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting).

<sup>332</sup> See *id.* at 94 (Stevens, J., dissenting) (explaining that the parties in *Seminole Tribe* were not covered within the Amendment’s text, and further, that *Fitzpatrick v. Bitzer* and *Pennsylvania v. Union Gas Co.* “do unquestionably establish . . . that Congress has the power to deny the States and their officials the right to rely on the nonconstitutional defense of sovereign immunity in an action brought by one of their own citizens.”).

<sup>333</sup> See *id.* at 76 (Stevens, J., dissenting) (“In *Chisholm*[,] . . . the entire Court—including Justice Iredell . . . assumed that Congress had such power [to create a private cause of action against a State].”); *id.* at 84 (Stevens, J., dissenting) (explaining how “*Hans* does not hold . . . that the Eleventh Amendment, or any other constitutional provision, precludes federal courts from entertaining actions brought by citizens against their own States in the face of contrary congressional direction.”); see also *Hans v. Louisiana*, 134 U.S. 1, 12 (1890) (“Justice Iredell . . . contended that it was not the intention to create new and unheard of remedies, by subjecting sovereign states to actions at the suit of individuals, (which he conclusively showed was never done before,) but only, by proper legislation, to invest the federal courts with jurisdiction to hear and determine controversies and cases, between the parties designated, that were properly susceptible of litigation in courts.” (emphasis added)); Burnham, *supra* note 179, at 935 n.11 (explaining that common-law sovereign immunity would not limit Congress’s power to enact federal statutory claims against states for two reasons) (“The first is the fact that federal law prevails over all other forms of law. The second is the axiom that common-law doctrines are subject to legislative change, including change wrought by constitutions.”); Field, *Congressional Imposition*, *supra* note 189, at 1258–59 n.259 (“[U]nder a common law view, sovereign immunity would limit neither congressional nor judicial power (except, of course, for the limitation that the judiciary should not interpret article III to abrogate sovereign immunity).”).

<sup>334</sup> See *Seminole Tribe*, 517 U.S. at 88 (Stevens, J., dissenting) (“Similarly, our cases recognizing qualified officer immunity in 42 U.S.C. § 1983 actions rest on the conclusion that, in passing that statute, Congress



actions,<sup>335</sup> Justice Stevens opined: “There is no reason why Congress’ undoubted power to displace those common-law immunities should be either greater or lesser than its power to displace the common-law sovereign immunity defense.”<sup>336</sup>

Justice Souter’s dissent was focused on the historical background of the Eleventh Amendment and sovereign immunity.<sup>337</sup> He showed that the majority’s position—that Congress lacks the authority to abrogate sovereign immunity under Article I—is “at odds with the Founders’ view that common law . . . [is] always subject to legislative amendment.”<sup>338</sup> Justice Souter stressed that the Framers were insistent that common-law principles *not* be adopted into the Constitution; otherwise, they could become an immutable part of the nation’s governing law and could not be changed based on experience.<sup>339</sup> He further explained that “[t]he Framers’ principal objectives in rejecting English theories of unitary sovereignty<sup>340</sup> . . . would have been . . . substantially thwarted if [sovereign immunity] had been held to be untouchable by any congressional effort to abrogate it.”<sup>341</sup> He pointed out that Madison was “particularly concerned with the necessity for legislative control,”<sup>342</sup>

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did not intend to displace the common-law immunity that officers would have retained under suits premised solely on the general jurisdictional statute.”)

<sup>335</sup> *See id.* at 87–88 (“No one has ever suggested that Congress would be powerless to displace the other common-law immunity doctrines that this Court has recognized as appropriate defenses to certain federal claims such as the judicially fashioned remedy in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).”).

<sup>336</sup> *Seminole Tribe*, 517 U.S. at 88 (Stevens, J., dissenting).

<sup>337</sup> *Id.* at 100–85 (Souter, J., dissenting).

<sup>338</sup> *Id.* at 102 (Souter, J., dissenting).

<sup>339</sup> *Id.* at 139; *see also id.* at 138–39 (“Antifederalists like George Mason went so far as to object that under the proposed Constitution the people would not be ‘secured even in the enjoyment of the benefit of the common law.’” (citation omitted)).

<sup>340</sup> The Framers agreed that there should be a separation of powers among the branches of the federal government and a federalist structure with states retaining their sovereignty except where they waived it in the Constitution. *See generally id.* at 155–59 (outlining the Framers’ views on state sovereign immunity).

<sup>341</sup> *Id.* at 157; *see also id.* at 157 n.52 (citing *Prout v. Starr*, 188 U.S. 537, 543 (1903)).

<sup>342</sup> *Seminole Tribe*, 517 U.S. at 163; *see also id.* at 164 & n.59 (discussing Madison’s concern that if “the common law be admitted as . . . of constitutional obligation, it would confer on the judicial department a discretion little short of a legislative power . . . [which] would be permanent and irremediable by the Legislature.” (alteration in original) (citation omitted)).

and “[h]istory confirms the wisdom of Madison’s abhorrence of constitutionalizing common-law rules to place them beyond the reach of congressional amendment.”<sup>343</sup>

The Court continues to vest the sovereign immunity principle with constitutional status.<sup>344</sup> Just three years ago, in *Allen*, the Court reaffirmed *Seminole Tribe*, even where Article I provides *exclusive* federal jurisdiction as it does under the Copyright Clause—thereby potentially denying any forum for injured intellectual property holders to obtain monetary relief against states.<sup>345</sup>

### VIII. THE COURT STRIKES DOWN PROVISIONS IN LANDMARK FEDERAL CIVIL RIGHTS AND INTELLECTUAL PROPERTY LAWS ABROGATING STATE IMMUNITY UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

Although the Supreme Court held in *Seminole Tribe* that Congress could not abrogate state sovereign immunity by passing legislation under Article I of the Constitution, the Court also made clear that Congress did have authority under Section 5 of the Fourteenth Amendment—as well as under similar provisions in the Thirteenth and Fifteenth Amendments—to override the states’ immunity from suit.<sup>346</sup> The Court based this determination on the fact that these constitutional amendments, by their terms, give Congress the power to override state immunity and “operate[] to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment.”<sup>347</sup> Thus, Congress has *constitutional* authority to legislate under these amendments without the specter of state immunity

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<sup>343</sup> *Id.* at 165.

<sup>344</sup> *See, e.g.*, *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020) (“In our constitutional scheme, a federal court generally may not hear a suit brought by any person against a nonconsenting State.”); *Sossamon v. Texas*, 563 U.S. 277, 284 (2011) (“Sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts.”); *see also* RICKS & TENENBAUM, *supra* note 16, at 890 (“[T]he Court’s most recent pronouncement on the meaning and scope of the Eleventh Amendment also reaffirms that the principle of sovereign immunity is part of the Constitution as it was adopted by the framers and ratified by the states, even though sovereign immunity is not explicitly referred to in the Constitution.”).

<sup>345</sup> *See Allen*, 140 S. Ct. at 1007 (concluding that Congress lacks authority under the Copyright Clause to abrogate the states’ sovereign immunity); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (“*Seminole Tribe* makes clear that Congress may not abrogate state immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause.”).

<sup>346</sup> *Seminole Tribe*, 517 U.S. at 65–66.

<sup>347</sup> *Id.*

from suit.<sup>348</sup> However, despite this authority, the Court has judicially crafted<sup>349</sup> unworkable standards for Congress, making it exceedingly difficult to pass “appropriate” legislation to enforce the post-Civil War Amendments.<sup>350</sup>

The Fourteenth Amendment was ratified in 1868, soon after the Civil War.<sup>351</sup> Section 1 of the Amendment provides that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>352</sup>

Section 5 of this Amendment, also known as the Enforcement Clause, explicitly gave Congress the authority to pass legislation that would enforce the Amendment’s

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<sup>348</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000) (“Section 5 of the Fourteenth Amendment . . . grant[s] Congress the authority to abrogate the States’ sovereign immunity. In [*Fitzpatrick*], we recognized that ‘the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment.’” (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976))).

<sup>349</sup> See *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (“[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees.”); *Kimel*, 528 U.S. at 81 (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (noting that “the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution.”).

<sup>350</sup> Only a few cases have survived judicial scrutiny under the framework created by the Court to interpret the appropriateness of an abrogation of state immunity under § 5. See *Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (“Because we find that Title II [of the ADA, 42 U.S.C. §§ 12131–12165] unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further. . . . Title II’s requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. . . . The remedy Congress chose is . . . a limited one.”); *Hibbs*, 538 U.S. at 738 (“[T]he . . . [family-care leave provision of the Family and Medical Leave Act of 1993 [“FMLA”]] is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. . . . We also find significant the many other limitations that Congress placed on the scope of this measure.”). See generally RICKS & TENENBAUM, *supra* note 16, at 919–20 (“Those laws found not to be ‘appropriate’ legislation under Section 5 could not trump the states’ Eleventh Amendment immunity and, as a result, private parties subject to discrimination on the basis of age, disability, gender, race, or some other characteristic, would be left to seek damages before a state agency or in state court.”).

<sup>351</sup> U.S. CONST. amend. XIV.

<sup>352</sup> U.S. CONST. amend. XIV, § 1.

protections against “state action.”<sup>353</sup> Section 5 provides: “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”<sup>354</sup>

Three years after ratification of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1871, the first section of which became 42 U.S.C. § 1983.<sup>355</sup> This law was passed to enable individuals to bring lawsuits against state officials for violations of their rights under the Constitution<sup>356</sup> and has become “one of the most important weapons for protecting the civil rights of minorities and others injured by state action.”<sup>357</sup>

Beginning in the 1970s, the Supreme Court directly addressed the relationship between the Fourteenth Amendment, Section 1983, and the Eleventh Amendment.<sup>358</sup> Although the Court concluded that Congress can abrogate state immunity under the authority of Section 5, it also found that this expansion of federal power “upsets ‘the fundamental constitutional balance between the Federal Government and the States,’ placing a considerable strain on ‘[t]he principles of federalism that inform Eleventh Amendment doctrine.’”<sup>359</sup> For this reason, the Court placed limits on Congress’s power to pass legislation under the authority of Section 5.<sup>360</sup>

Two of these Section 5 legislative limits provide that (1) there must be a history and pattern of discrimination and the legislation must be targeted to remedy that specific harm,<sup>361</sup> and (2) the legislation must have “a congruence and proportionality

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<sup>353</sup> See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (“Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as ‘state action.’”).

<sup>354</sup> U.S. CONST. amend. XIV, § 5.

<sup>355</sup> Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983).

<sup>356</sup> See *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 545 (1972) (“[T]he 1871 Act was passed for the express purpose of ‘enforc[ing] the Provisions of the Fourteenth Amendment.’ And the rights that Congress sought to protect in the Act of 1871 were described by the chairman of the House Select Committee that drafted the legislation as ‘the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety.’” (alteration in original) (citations omitted)).

<sup>357</sup> See RICKS & TENENBAUM, *supra* note 16, at 916.

<sup>358</sup> See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

<sup>359</sup> *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (alteration in original) (citations omitted).

<sup>360</sup> See RICKS & TENENBAUM, *supra* note 16, at 917–20.

<sup>361</sup> See, e.g., *Coleman v. Ct. of Appeals of Md.*, 566 U.S. 30, 37 (2012) (plurality opinion) (“[What] the self-care provision [of the FMLA] lacks . . . [is] evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations.”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 370 (2001) (“[E]ven if it were to be determined that each incident

between the injury to be prevented or remedied and the means adopted to that end.”<sup>362</sup> Applying these strict limits, the Court has struck down provisions in landmark civil rights and intellectual property laws that abrogate state immunity because the record—usually the legislative record before Congress<sup>363</sup>—is insufficient to show a history and pattern of unconstitutional conduct by states.<sup>364</sup>

The tests fashioned by the Supreme Court to determine whether Congress has passed appropriate enforcement legislation are unworkable because: (1) it is very difficult for Congress to determine how much evidence the Court will consider sufficient to meet its amorphous standards; and (2) support for pressing national issues is often not amenable to being assembled into a clear and formal factual record.<sup>365</sup> Significantly, each of the landmark laws were struck down as a violation of Congress’s authority under Section 5 of the Fourteenth Amendment.<sup>366</sup> They

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[of discrimination against an individual with a disability] upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89 (2000) (“Congress never identified any pattern of age discrimination by the States, much less any discrimination . . . that rose to the level of constitutional violation.”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (“Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.”).

<sup>362</sup> *Tennessee v. Lane*, 541 U.S. 509, 520 (2004) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)); see also *Garrett*, 531 U.S. at 374 (“[I]n order to authorize private individuals to recover money damages against the States[,] . . . the remedy imposed by Congress must be congruent and proportional to the targeted violation.”). The Court has stated that Congress is not limited under its § 5 authority to remedy violations of the Fourteenth Amendment and may enact “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28 (2003).

<sup>363</sup> See, e.g., *Allen v. Cooper*, 140 S. Ct. 994, 1004 (2020) (“That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong.”).

<sup>364</sup> See, e.g., *Coleman*, 566 U.S. at 37; *Garrett*, 531 U.S. at 370.

<sup>365</sup> See Bryan Dearing, *The State of the Nation, Not the State of the Record: Finding Problems with Judicial “Review” of Eleventh Amendment Abrogation Legislation*, 53 *DRAKE L. REV.* 419, 473 (2005) (“The newfound abrogation requirement that Congress physically document massive findings imposes new unconstitutional burdens that handcuff Congress’s ability to respond to pressing public concerns. History and practice demonstrate that these national problems are not reducible to facts, let alone able to be adequately assembled in a formal record for the Court.”); see also *Coleman*, 566 U.S. at 44–45 (Scalia, J., concurring) (“The plurality’s opinion seems to me a faithful application of our ‘congruence and proportionality’ jurisprudence. So does the opinion of the dissent. That is because the varying outcomes we have arrived at under the ‘congruence and proportionality’ test make no sense. . . . This grading of Congress’s homework is a task we are ill suited to perform and ill advised to undertake.”).

<sup>366</sup> See cases cited *supra* notes 361–62.

likely would have been upheld if *Seminole Tribe* were overruled and the law were reviewed under Congress's broad Article I authority.<sup>367</sup>

## **IX. ALTERNATIVE REMEDIES FOR AGE DISCRIMINATION AND VIOLATION OF INTELLECTUAL PROPERTY RIGHTS FREQUENTLY LEAVE INDIVIDUALS INJURED BY UNLAWFUL STATE CONDUCT WITHOUT AN EFFECTIVE MONETARY REMEDY**

The abrogation of sovereign immunity under the Age Discrimination in Employment Act of 1967 (“ADEA”) is one of the provisions struck down by the Supreme Court.<sup>368</sup> As shown below, the Court's high bar for approving congressional legislation that abrogates state immunity under the Fourteenth Amendment has left those individuals who are subjected to age discrimination with far fewer remedies under state law than they would have had under the ADEA.

### *A. Alternative Remedies for Age Discrimination*

In *Kimel*, the Supreme Court held that the ADEA provision that allows individuals to sue state employers for monetary compensation is invalid.<sup>369</sup> The Court noted that the ADEA provision was enacted under the authority of Section 5 of the Fourteenth Amendment,<sup>370</sup> but held that Congress failed to show a history and pattern of age discrimination.<sup>371</sup> The Court explained that the effect of the decision was not overly harsh because aggrieved individuals could seek alternative remedies

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<sup>367</sup> See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78 (2000) (“In [*EEOC v. Wyoming*, 460 U.S. 226, 243 (1983)], we held that the [Age Discrimination in Employment Act] constitutes a valid exercise of Congress'[s] power '[t]o regulate Commerce . . . among the several States,' Art. I, § 8, cl. 3, and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment.”); Bodensteiner & Levinson, *supra* note 16, at 102 (“Nothing in *Kimel* suggests Congress did not have the authority to pass the ADEA pursuant to its Commerce Clause power.”); see also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647–48 (1999) (“The historical record and the scope of coverage therefore make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment. . . . The statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime. These are proper Article I concerns, but that Article does not give Congress the power to enact such legislation after *Seminole Tribe*.”).

<sup>368</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

<sup>369</sup> *Id.* at 92.

<sup>370</sup> *Id.* at 67.

<sup>371</sup> *Id.* at 89.

under state law “in almost every State.”<sup>372</sup> However, what the Court failed to mention is that the monetary remedies in many states are either nonexistent or provide significantly less relief than the ADEA.

Below is a chart summarizing some of the key distinctions between the ADEA and alternative remedies for age discrimination in state legislation.

<u>ADEA</u>	<u>State Age Discrimination Laws</u>
Individuals can obtain monetary relief in the form of back pay, front pay, and liquidated damages, as well as attorney’s fees and court costs. <sup>373</sup>	In three states, individuals have no damages remedy for age discrimination by the state because (1) the applicable state law does not include “the state” as a covered employer, <sup>374</sup> (2) state law does not include protection for age discrimination, <sup>375</sup> or (3) the state has not waived its sovereign immunity from a suit for damages in state court. <sup>376</sup>
No time limitation for an award of back pay. <sup>377</sup>	Fourteen states impose a time limit on an award of back pay. <sup>378</sup>

<sup>372</sup> *Id.* at 91 (“State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union.”); *id.* at 91–92 n.\* (citing to laws in most states that presumably provide protection against age discrimination).

<sup>373</sup> 29 U.S.C. § 626(b) (incorporating the remedial provisions of the FLSA, 29 U.S.C. § 216(b)).

<sup>374</sup> *See* ALA. CODE § 25-1-20 (2022); *see also* Hillina Taddesse Tamrat, *Sovereign Immunity Under the Eleventh Amendment: Kimel and Garrett, What Next for State Employees?*, 11 ELDER L.J. 171, 184 (2003) (“[J]ust as Eleventh Amendment immunity shielded Alabama from ADEA liability in *Kimel*, so will Alabama’s constitutional sovereign immunity shield it from liability under the Alabama age discrimination statute.”).

<sup>375</sup> *See* S.D. CODIFIED LAWS § 20-13-10 (2022).

<sup>376</sup> *See* *State v. Goss*, 42 S.W.3d 440, 443 (Ark. 2001).

<sup>377</sup> *See* 29 U.S.C. § 626.

<sup>378</sup> *See* ARIZ. REV. STAT. § 41-1481(G) (2022); COLO. REV. STAT. § 24-34-405 (2022); CONN. GEN. STAT. § 46a-86(b) (2022); FLA. STAT. § 760.11(9) (2022); GA. CODE ANN. § 45-19-38 (2022); HAW. REV. STAT. § 378-5(b) (2022); IDAHO CODE § 67-5908(3)(c) (2022); MD. CODE ANN., STATE GOV’T § 20-1009(b)(5)

<u>ADEA</u>	<u>State Age Discrimination Laws</u>
Individuals who lose their jobs and cannot be reinstated are entitled to an award of front pay, which is not limited. <sup>379</sup>	In five states, an award of front pay is unavailable or limited by statute. <sup>380</sup>
An individual who obtains a judgment for monetary compensation can also obtain an award for liquidated damages for a willful violation of the ADEA. <sup>381</sup>	In thirty-two states, individuals are unable to obtain any form of compensatory relief for a state's willful violation of the state's age discrimination protections. <sup>382</sup>

(West 2022); NEV. REV. STAT. § 613.432 (2022); N.D. CENT. CODE § 14-02.4-20 (2022); OR. REV. STAT. § 659A.885(1) (2022); S.C. CODE ANN. § 1-13-90(c)(16) (2022); TEX. LABOR CODE ANN. § 21.258(c) (West 2022); WIS. STAT. § 111.39(4)(c) (2022).

<sup>379</sup> See, e.g., *Miller v. Raytheon Co.*, 716 F.3d 138, 146 (5th Cir. 2013).

<sup>380</sup> See *Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 850 n.10 (Ind. 2009). Mississippi, South Carolina, and Utah have statutes which set forth a detailed list of remedies that do not include front pay. Case law in each state suggests those statutes are meant to be the exclusive remedies in discrimination lawsuits. See MISS. CODE ANN. § 25-9-131(1) (2022), *Miss. Dep't of Hum. Servs. v. McNeel*, 10 So. 3d 444, 461 (Miss. 2009); S.C. CODE ANN. §§ 1-13-90, 100 (2022), *Lorick v. York Tech. Coll.*, No. 93-CP-46-102, 1994 WL 780205, at \*1 (S.C. Ct. Com. Pl. Apr. 13, 1994); UTAH CODE ANN. § 34A-5-107(8) (West 2022); *Graham v. Albertson's LLC*, 462 P.3d 367, 371 (Utah 2020).

<sup>381</sup> See 29 U.S.C. § 626(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985).

<sup>382</sup> In Colorado, Florida, Maine, New York, Oregon, Rhode Island, and Texas, punitive damages are allowed generally under their antidiscrimination laws, but state entities are immune. See COLO. REV. STAT. § 24-34-405(3)(b) (2022); FLA. STAT. § 760.11(5) (2022); ME. STAT. tit. 5, § 4613(2)(B)(8)(i) (2022); N.Y. EXEC. LAW § 297(4)(c) (McKinney 2022); OR. REV. STAT. § 30.269 (2022); 28 R.I. GEN. LAWS § 28-5-29.1 (2022); TEX. LAB. CODE ANN. § 21.2585(b) (West 2022). In the other twenty-six states, punitive damages are not allowed to any party in age discrimination cases. See *Cronin v. Sheldon*, 991 P.2d 231, 237 (Ariz. 1999); *Ware v. State*, 983 A.2d 853, 867-68 (Conn. App. Ct. 2009); GA. CODE ANN. § 45-19-38 (2022); *Page v. City of Chicago*, 701 N.E.2d 218, 228 (Ill. App. Ct. 1998); IND. CODE § 22-9-1-6(j)(1) (2022); *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 689 (Iowa 2013); *Excel Corp. v. Kan. Hum. Rts. Comm'n*, 864 P.2d 220, 227 (Kan. Ct. App. 1993); *Wagher v. Guy's Foods, Inc.*, 885 P.2d 1197, 1211 (Kan. 1994) (implying that no punitive damages are available under Kansas law because the prior statute did not provide for emotional damages or punitive damages but the law has since been amended to include emotional damages); *Ky. Dep't of Corr. v. McCullough*, 123 S.W.3d 130, 138 (Ky. 2003); MD. CODE ANN., STATE GOV'T § 20-1009 (West 2022); *Edgewood Mgmt. Corp. v. Jackson*, 66 A.3d 1152, 1174 (Md. App. 2013); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 400 (Mich. 2004); *Tillmon v. Miss. State Dep't of Health*, 749 So. 2d 1017, 1020 (Miss. 1999); MONT. CODE ANN.



<u>ADEA</u>	<u>State Age Discrimination Laws</u>
There is no cap on damages.	In several states, there is a cap on damages over and above any other limits on back pay, front pay, and attorney's fees that may further limit recovery. <sup>383</sup>
Everyone over the age of forty is protected from age discrimination. <sup>384</sup>	Two states include a maximum age for individuals to qualify. <sup>385</sup>

§ 49-2-506 (2022); NEB. CONST. art. VII, § 5; *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975); *State v. Hynes*, 978 A.2d 264, 273 (N.H. 2009); NEV. REV. STAT. § 613.432 (2022); *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 41 P.3d 333, 344 (N.M. 2001); N.C. GEN. STAT. § 126-34.02(a) (2022); N.D. CENT. CODE § 14-02.4-20 (2022); *MacDonald v. Corp. Integris Health*, 321 P.3d 980, 981 (Okla. 2014); *Hoy v. Angelone*, 720 A.2d 745, 749 (Pa. 1998); S.C. CODE ANN. § 1-13-90, -100 (2022); *Carver v. Citizen Utils. Co.*, 954 S.W.2d 34, 36 (Tenn. 1997); *Gottling v. P.R. Inc.*, 61 P.3d 989, 994 (Utah 2002); WASH. REV. CODE § 49.60.030(2) (2022); *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers*, 87 P.3d 757, 763 (Wash. 2004); *Bachand v. Conn. Gen. Life Ins. Co.*, 305 N.W.2d 149, 154 (Wis. Ct. App. 1981).

<sup>383</sup> In Colorado, Delaware, Maryland, Nevada, and Texas, damages are capped between \$10,000 and \$300,000, depending on how many people are employed by the defendant. *See* COLO. REV. STAT. § 24-34-405 (2022); DEL. CODE ANN. tit. 19, § 715 (2022); MD. CODE ANN., STATE GOV'T § 20-1009 (2022); NEV. REV. STAT. § 613.432 (2022); TEX. LAB. CODE ANN. § 21.2585 (2022). In Tennessee, damages are capped at between \$25,000 and \$300,000 depending on how many people are employed by the defendant. *See* TENN. CODE ANN. § 4-21-313 (2022). In Maine, damages are capped between \$20,000 and \$500,000 depending on the number of people employed by the defendant. *See* ME. REV. STAT. ANN. tit. 5, § 4613(2)(B)(7)–(8) (2022). In Missouri, damages are capped between \$50,000 and \$500,000, depending on the number of people employed by the defendant. *See* MO. ANN. STAT. § 213.111(4) (West 2022). In Florida, damages for one claim from a single plaintiff are capped at \$200,000 and the total cannot exceed \$300,000 for any claims arising out of the same incident or occurrence. *See* FLA. STAT. § 768.28 (2022). In Pennsylvania, “[d]amages arising from the same cause of action or transaction or occurrence . . . shall not exceed \$250,000 in favor of any plaintiff or \$1,000,000 in the aggregate.” *See* 42 PA. CONS. STAT. § 8528(b) (2022). In Washington, emotional damages are capped at \$20,000. *See* WASH. REV. CODE § 49.60.250(5) (2022). In West Virginia, emotional damages are capped at \$2,500 (the court notes this number can be adjusted for inflation). *See* *Bishop Coal Co. v. Salyers*, 380 S.E.2d 238, 247 (W. Va. 1989). In Kansas, emotional damages are capped at \$2,000. *See* KAN. STAT. ANN. § 44-1005(k) (2022); *Excel Corp.*, 864 P.2d at 227. In Virginia, punitive damages are capped at \$350,000. *See* VA. CODE ANN. § 8.01-38.1 (2022). In Minnesota, punitive damages are capped at \$25,000. *See* MINN. STAT. § 363A.29 (2022). In Idaho, punitive damages are capped at \$1,000 per incident. *See* IDAHO CODE § 67-5908 (2022).

<sup>384</sup> *See* 29 U.S.C. § 631.

<sup>385</sup> *See* IND. CODE § 22-9-2-1 (2022) (limiting protection to those under the age of 75); MO. REV. STAT. § 213.010 (2022) (limiting protection to those under the age of 70).

### B. *Alternative Remedies for State Violation of Intellectual Property Rights*

Aggrieved individuals have even fewer options to obtain meaningful relief with respect to state violations of intellectual property rights because federal laws that protect intellectual property rights can only be enforced in federal court.<sup>386</sup> Therefore, individuals seeking monetary damages for infringement of intellectual property rights by states need to reformulate their claims, where possible, under eminent domain, tort law, breach of contract, or state intellectual property laws.<sup>387</sup> Moreover, even if the claims can be successfully reformulated, the remedies available under these alternative causes of action are often inferior to those under federal intellectual property laws.<sup>388</sup>

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<sup>386</sup> See U.S. CONST. art. I, § 8, cl. 8; see also Jackson, *Seminole Tribe*, *supra* note 294, at 502 (“In the enforcement of some statutory schemes, for example, copyright, the award of damages or other comparable relief may be the only effective remedy for the protection of rights for which Congress has an expressly enumerated power to provide.”); Jeffrey W. Childers, *State Sovereign Immunity and the Protection of Intellectual Property: Do Recent Congressional Attempts to Level the Playing Field Run Afoul of Current Eleventh Amendment Jurisprudence and Other Constitutional Doctrines?*, 82 N.C. L. REV. 1067, 1070 (2004) (“[U]niversities entered into more than 4,300 licenses [for intellectual property] in the year 2000 alone. By 2000, nearly 21,000 active licenses existed between universities and private firms.”). There are substantial obstacles to reformulating a federal intellectual property claim and obtaining meaningful monetary relief under alternative causes of action. See Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L.A. L. REV. 1399, 1415–26 (2000); see also *id.* at 1423 n.104 (“[28 U.S.C. § 1338(a)] provides that federal district courts shall have original and exclusive jurisdiction over any civil action arising under any act of Congress relating to patents . . . and copyrights. Therefore, intellectual property owners may not assert claims under these statutes in state court.”); Robert A. Cohen, *Patent Infringement and the Eleventh Amendment: Can the Sovereign Be Held Accountable?*, 49 IDEA: L. REV. FRANKLIN PIERCE CTR. FOR INTEL. PROP. 85, 117–18 (2008); John O’Connor, *Taking TRIPS to the Eleventh Amendment: The Aftermath of the College Savings Cases*, 51 HASTINGS L.J. 1003, 1018 (2000) (emphasizing the benefits of strict liability for federal patent and trademark laws and explaining that alternative remedies lack those benefits).

<sup>387</sup> See, e.g., Daniel P. Valentine, *The Plenary Power of States to Infringe Intellectual Property Under the Cloak of Sovereign Immunity*, 6 J. HIGH TECH. L. 165, 188–191 (2006); Robert C. Wilmoth, *Toward a Congruent and Proportional Patent Law: Redressing State Patent Infringement After Florida Prepaid v. College Savings Bank*, 55 SMU L. REV. 519, 572–75 (2002); Menell, *supra* note 386, at 1414–28.

<sup>388</sup> See Menell, *supra* note 386, at 1416–18; Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to “Fix” Florida Prepaid (and How Not To)*, 79 TEX. L. REV. 1037, 1093 (2001).

## CONCLUSION

In both the Constitution “as originally framed”<sup>389</sup> and the Eleventh Amendment, state sovereign immunity started as a common-law principle and was recognized as such by the Framers of the Constitution and the Eleventh Amendment, as well as by the Supreme Court.<sup>390</sup> Not until the late-20th century, in *Seminole Tribe*, did the Supreme Court explicitly transform state immunity into a fundamental and immutable constitutional principle that overrides Congress’s Article I authority to abrogate it.<sup>391</sup> This transformation is contrary to the Framers’ intent, has upset the balance of power between the federal government and the states, and has negatively impacted those relying on federal antidiscrimination and intellectual property legislation for adequate relief.

When the Constitution was proposed to the states for ratification, there was no mention of state sovereign immunity in the text of the Constitution itself.<sup>392</sup> However, to convince states to ratify the Constitution, Alexander Hamilton, James Madison, and John Marshall argued before their respective state ratifying conventions that the common-law principle of state immunity from suit would be retained as a limitation on the jurisdiction of the federal courts.<sup>393</sup> It is clear that Hamilton’s position, supported by Madison and Marshall, was based on the states retaining their common-law immunity, not on making state immunity a constitutional right. Hamilton’s explicit position was that the states retain the historic immunity they enjoyed prior to the enactment of the Constitution.<sup>394</sup> Hamilton-Madison-Marshall also appeared to support federal court jurisdiction under the arising under clause in Article III of the Constitution, which gave the federal courts jurisdiction over “all cases in law and equity arising under . . . the laws of the U.S.”<sup>395</sup> The Hamilton-Madison-Marshall arguments did not extend to limiting Congress’s

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<sup>389</sup> *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821).

<sup>390</sup> See discussion *supra* Parts II, V.

<sup>391</sup> Beginning in the 1880s—when numerous cases were brought challenging the Southern states’ repudiation of contracts and concern existed that these states would fail to obey an order of the Supreme Court—the Court began referring to state immunity using expansive, constitutionally based language. These cases provided a foundation for later decisions to expand the scope of the Eleventh Amendment. See discussion *supra* Part VII.

<sup>392</sup> See discussion *supra* Part I.

<sup>393</sup> See discussion *supra* Section II.C.

<sup>394</sup> See THE FEDERALIST NO. 81, at 486–87 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>395</sup> See discussion *supra* Section II.C.

power under Article I. Even Justice Iredell, who dissented in *Chisholm*, acknowledged that Congress had the authority to enact laws that superseded the common law.<sup>396</sup> In other words, Congress retained the authority under Article I of the Constitution to abrogate the states' common law immunity from suit.<sup>397</sup> Indeed, the Framers were concerned that common law defenses, such as sovereign immunity, not be adopted into the Constitution so they could be changed based on experience.<sup>398</sup>

The Eleventh Amendment was ratified in 1795, soon after the Supreme Court held in *Chisholm* that sovereign immunity did not apply to bar *Chisholm*'s common-law breach of contract lawsuit against the State of Georgia for money damages.<sup>399</sup> The Supreme Court later recognized that the Eleventh Amendment was intended to reverse the decision in *Chisholm* and restore the Hamilton-Madison-Marshall view that the common-law defense of state sovereign immunity was retained by the states after the Constitution was ratified.<sup>400</sup> There is no indication in the Amendment itself that it was intended to limit Congress's authority to abrogate state immunity from suit.

In 1989, in *Pennsylvania v. Union Gas Co.*, a plurality of the Supreme Court held that Congress had the authority under the Commerce Clause in Article I to abrogate state immunity from suit.<sup>401</sup> But just seven years later, in *Seminole Tribe*, the Court transformed the common-law defense of sovereign immunity—advanced by Hamilton-Madison-Marshall, adopted by the Supreme Court, and recognized by the Framers of the Eleventh Amendment—into an immutable constitutional right that overrides Congress's authority under Article I.<sup>402</sup>

Thus, there are ample textual and historical reasons for overruling *Seminole Tribe*. While the Court professed to base its reasoning in *Seminole Tribe* on its prior rulings broadly construing the Eleventh Amendment, the majority's failure to acknowledge that the states retained only their historic, common-law privilege from suit was a fundamental flaw in the decision. There is also a practical reason for

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<sup>396</sup> See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793) (opinion of Iredell, J.).

<sup>397</sup> See discussion *supra* Section II.C.

<sup>398</sup> See Ratification Convention of Virginia, *supra* note 61, at 469 (statement of Edmund Randolph); *Seminole Tribe v. Florida*, 517 U.S. 44, 139 (1996) (Souter, J., dissenting).

<sup>399</sup> *Chisholm*, 2 U.S. (2 Dall.) at 419.

<sup>400</sup> See *Hans v. Louisiana*, 134 U.S. 1, 14 (1890); see also discussion *supra*, at note 180.

<sup>401</sup> 491 U.S. 1 (1989).

<sup>402</sup> See discussion *supra* Section VII.F.

overruling *Seminole Tribe*. In just the past two years, the Court has carved out two exceptions to *Seminole Tribe*'s broad statement that Congress lacks any authority under Article I to abrogate sovereign immunity.<sup>403</sup> The Court held in *PennEast*<sup>404</sup> and *Torres*<sup>405</sup> that both Congress's power of eminent domain and to raise and support the Armed Forces are areas where Congress can provide private parties with remedies against states because the states implicitly waived their sovereign immunity in those specific areas by ratifying the Constitution.<sup>406</sup> In reaching this conclusion, the Court implicitly acknowledged that the analytical framework that supported *Seminole Tribe*, i.e., that Congress lacks *any authority* under Article I to abrogate the states' sovereign immunity, is overbroad.<sup>407</sup> These decisions, at the very least, show that the Court has moved away from *Seminole Tribe*'s broad statement about the limits on Congress's authority, and suggest that the Court recognizes that it went too far in *Seminole Tribe*.

*Seminole Tribe* has had a substantial adverse effect on the ability of aggrieved individuals to obtain meaningful monetary compensation against states.<sup>408</sup> Overruling *Seminole Tribe* should not mean that Congress would be able to enact laws that authorize individual damage suits against states without constraint. Instead, reasonable and workable safeguards on the exercise of Congress's Article I authority,

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<sup>403</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996) (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”); *id.* at 70 n.13 (“[T]he Framers virtually always were very specific about the exception to state sovereign immunity arising from a State’s consent to suit.” (citing THE FEDERALIST NO. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

<sup>404</sup> *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021) (discussing eminent domain).

<sup>405</sup> *Torres v. Tex. Dep’t of Pub. Safety*, 142 S. Ct. 2455 (2022) (discussing national power to raise and support the Armed Forces).

<sup>406</sup> A decade after *Seminole Tribe*, the Court had concluded that because of its unique history, on ratification of the Constitution, states waived their sovereign immunity with respect to proceedings under the bankruptcy clause in Article I. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006) (“The relevant question is not whether Congress has ‘abrogated’ States’ immunity in proceedings to recover preferential transfers. The question, rather, is whether Congress’ determination that States should be amenable to such proceedings is within the scope of its power to enact ‘Laws on the subject of Bankruptcies.’ We think it beyond peradventure that it is.” (citation omitted)).

<sup>407</sup> *See Seminole Tribe*, 517 U.S. at 72–73.

<sup>408</sup> *See Jackson, Principle and Compromise*, *supra* note 284, at 953 (“[S]cholars who believe the Court is incorrect in its expansion of sovereign immunity into a first order constitutional principle ought to call for the overruling of [the Court’s *Seminole* and *Alden*] decisions.”).

such as the clear statement rule,<sup>409</sup> would help to protect the federal-state balance of power while simultaneously allowing Congress to correct substantial injustices.<sup>410</sup> As Justice Stevens wrote in his *Seminole Tribe* dissent with respect to the majority's analysis of state sovereign immunity: "[T]he better reasoning in Justice Souter's far wiser and far more scholarly [dissenting] opinion will surely be the law one day."<sup>411</sup>

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<sup>409</sup> See discussion *supra* Section VII.D.1.

<sup>410</sup> The Court has identified the five most important factors to consider in determining whether to follow precedent based on principles of stare decisis or to overrule one of its decisions. See *Janus v. Am. Fed'n of State, City & Mun. Emps.*, 138 S. Ct. 2448, 2478–79 (2018) (explaining that “the quality of [*Seminole Tribe*’s] reasoning, the workability of the rule it established, its consistency with other related decisions, its developments since the decision was handed down, and its reliance on the decision” need to be analyzed). This Article has demonstrated that there is little doubt that *Seminole Tribe* can survive scrutiny under each of these factors, particularly given the deficiencies in its reasoning, the patchwork of convoluted rules that have emerged since its pronouncement, and the Court’s efforts to create exceptions to it in order to allow injured plaintiffs to bring litigation against States under federal laws that provide individuals and entities with a congressionally-authorized federal cause of action for damages.

<sup>411</sup> *Seminole Tribe*, 517 U.S. at 99–100 (1996) (Stevens, J., dissenting).

