Florida State University Law Review

Volume 28 | Issue 3 Article 2

2001

Chisholm, The Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles

Mark Strasser
ms1@ms1.com

FLORIDA STATE UNIVERSITY
LAW REVIEW

CHISHOLM, THE ELEVENTH AMENDMENT, AND SOVEREIGN IMMUNITY: ON *ALDEN*'S RETURN TO CONFEDERATION PRINCIPLES

Mark Strasser

VOLUME 28 SPRING 2001 NUMBER 3

Recommended citation: Mark Strasser, Chisholm, *The Eleventh Amendment, and Sovereign Immunity: On* Alden*'s Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605 (2001).

CHISHOLM, THE ELEVENTH AMENDMENT, AND SOVEREIGN IMMUNITY: ON *ALDEN*'S RETURN TO CONFEDERATION PRINCIPLES

MARK STRASSER*

I. INTRODUCTION

Over the past several years, the relationship between the federal and state governments has changed, at least in part, because the U.S. Supreme Court has begun to take federalism concerns quite seriously and has treated the Eleventh Amendment[1] as offering much more protection to the states than it ever before had been thought to offer. One of the most interesting facets of the Court's recent discovery of the breadth and depth of the Eleventh Amendment lies in the explanation offered for that interpretation, which cannot be grounded in its text, original intent, or even good public policy, but nonetheless has gained the allegiance of a majority of the Court.[2]

Alden v. Maine[3] is a good example both of the Court's new-found jurisprudential method and of the seemingly unbridgeable chasm between the majority and minority positions on federalism issues. The *Alden* majority misconstrued history to contradict the Framers' stated intentions and to provide an understanding of the constitutional structure that the Framers almost certainly would have rejected. The *Alden* minority, while more plausibly characterizing the

* Professor of Law, Capital University Law School. B.A., Harvard College; M.A., Ph.D., University of Chicago; J.D., Stanford Law School. I would like to thank Professor Susan Gilles for her insightful comments on an earlier draft of this Article.

1. U.S. CONST. amend. XI ("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.").

2. *See, e.g.*, Alden v. Maine, 527 U.S. 706 (1999).

3. *Id.*

historical views of the Framers, nonetheless failed to establish why those same Framers relied on by the majority would have rejected the majority's position. This Article shows why Madison, Marshall, and Hamilton all would have rejected the Court's current Eleventh Amendment jurisprudence and why the arguments offered in *Alden* are at best unpersuasive.

Part II of this Article discusses *Chisholm v. Georgia*,[4] suggesting that the decision's content and mode of analysis undercut the *Alden* Court's characterization of it. Part III discusses the different interpretations of the Eleventh Amendment, suggesting that the Court's interpretation is one of the least plausible and ill-founded of those that have been offered. Part IV discusses the Framers' intentions, suggesting that the Court's current jurisprudence contradicts any plausible interpretation of either the Framers' views or of the arguments they made to convince others to ratify the Constitution. The Article concludes that the current Eleventh Amendment jurisprudence articulated by the Court is more consonant with the status of the states under the Articles of Confederation than under the Constitution and that the understanding of the relationship between the federal and state governments currently favored by the Court is precisely what the Framers were attempting to displace when arguing for the ratification of the Constitution.

II. THE *CHISHOLM* DECISION

The current federalism controversy dividing the Court can best be understood after a discussion of *Chisholm* and the nation's reaction to that decision. *Chisholm*'s holding, that states were subject to suits by citizens of other states,[5] was so unpopular[6] that it was quickly overruled[7] by the Eleventh Amendment to the Constitu-

---

4. 2 U.S. (2 Dall.) 419 (1793), *superseded by* U.S. CONST. amend. XI.

5. The opinions of the Justices, in a four-to-one decision, were rendered seriatim. *See id.* at 429. Chief Justice Jay held with the majority, *see id.* at 476, 479, as did Justice Blair, *see id.* at 451, Justice Wilson, *see id.* at 463, and Justice Cushing, *see id.* at 469. Justice Iredell was the sole dissenter. *See id.* at 430.

6. *See e.g.*, RAOUL BERGER, CONGRESS V. THE SUPREME COURT 326 (1969) (discussing "the passions aroused by the *Chisholm* decision"); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1278 (1998) ("The *Chisholm* decision does appear to have fallen upon the country with a profound shock . . . ."). *But 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, 1440 (1975) ("[A]t least some Federalists reacted positively to *Chisholm* immediately following the decision . . . .").

7. *Chisholm* was decided in 1793, *see Chisholm*, 2 U.S. at 429, and the Eleventh Amendment was proposed to the state legislatures by the Third Congress on September 5, 1794. *See* RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW lvi (5th ed. 1997). In a message from the President to Congress on January 8, 1798, it was declared to have been ratified by the legislatures of three-fourths of the states. *See id.*

tion.[8] Courts and commentators disagree about whether[9] and why[10] *Chisholm* was wrongly decided and even about the content of the *Chisholm* dissent.[11] An examination of the different issues discussed in *Chisholm* will help illustrate why the Court's current federalism position neither captures the historical views of the Constitution's Framers nor promotes the interests of the nation as a whole.

A. Doing Justice

In *Chisholm*, the state of Georgia was sued by a citizen of South Carolina.[12] The state refused to appear in court, contending that it could not be sued by the plaintiff because it had sovereign immunity.[13] The Court disagreed,[14] pointing to the specific provisions in the

---

8. *See* Pennhurst State School v. Halderman, 465 U.S. 89, 98 (1983) ("The Amendment's language overruled the particular result in *Chisholm*."); Nevada v. Hall, 440 U.S. 410, 431 (1979) (Blackmun, J., dissenting) (discussing the "prompt passage of the Eleventh Amendment nullifying the decision in [*Chisholm v. Georgia*]"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 45 (1988) ("*Chisholm v. Georgia* . . . provoked enactment of the amendment . . . ."); James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 651 (1994) ("Everyone appears to agree that the Eleventh Amendment was passed in response to *Chisholm*."); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1696 (1997) ("Most scholars agree . . . that the Amendment's purpose was to reverse *Chisholm*.").

9. *See e.g.*, Alden v. Maine, 527 U.S. 706, 721 (1999) ("It might be argued that the *Chisholm* decision was a correct interpretation of the constitutional design and that the Eleventh Amendment represented a deviation from the original understanding. This, however, seems unsupportable."). *But see* Hans v. Louisiana, 134 U.S. 1, 21 (1890) (Harlan, J., concurring) ("I am of opinion that the decision in [*Chisholm*] was based upon a sound interpretation of the Constitution as that instrument then was.").

10. *See e.g.*, William Burnham, *Taming the Eleventh Amendment Without Overruling* Hans v. Louisiana, 40 CASE W. RES. L. REV. 931, 936 (1989/1990). Burnham states:

> According to the common law immunity theorists, the sin of the *Chisholm* majority was that it incorrectly mixed two questions: (1) whether the Court had subject matter jurisdiction over the case under article III and its implementing statutes, and (2) whether an assumpsit cause of action for the state's breach of contract existed in the face of Georgia's defense of sovereign immunity.

Id.; Vazquez, *supra* note 8, at 1696 ("[S]cholars stress that *Chisholm* was an action in assumpsit involving an ordinary commercial dispute between an individual and a state. They argue that the Eleventh Amendment merely reversed the *Chisholm* Court's holding that the states could be sued in federal court by individuals on nonfederal causes of action.").

11. *Compare, for example, Alden*, 527 U.S. at 715 (suggesting that the dissent argued that a sovereign state could not be sued without its consent) *with Alden*, 527 U.S. at 787 (Souter, J., dissenting) (describing the core of the dissent as that "the Court could not assume a waiver of the State's common-law sovereign immunity where Congress had not expressly passed such a waiver").

12. *See Chisholm*, 2 U.S. at 420 (reporting the U.S. Attorney General's motion on behalf of Georgia, which described the parties); *see also* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 484 (1987) ("*Chisholm* was an original action in assumpsit, filed by the South Carolina executor of a South Carolina estate, to recover money owed to the estate by Georgia.").

13. *See Chisholm*, 2 U.S. at 469 (Jay, C.J.) ("It is said, that *Georgia* refuses to appear and answer to the Plaintiff in this action, because she is a *sovereign* State, and therefore not *liable* to such actions.").

Constitution specifying that the Court would have jurisdiction in cases involving states as parties,[15] and holding that if the state refused to appear in court before the beginning of the next term either to present its case or to establish why it did not need to do so, it would be subject to a default judgment.[16]

Chisholm implicated a number of different issues: whether states could ever be sued without their consent[17] and, if so, under what conditions;[18] whether, and to what extent, states had surrendered their sovereign immunity when becoming part of the Union;[19] and, among other issues, what kind of sovereign immunity, if any, was enjoyed by the states once they became part of the Union.[20] *Chisholm* did not answer these questions directly, although the different positions articulated by the Justices made clear that sovereign immunity was not the bulwark against suits that some had believed.

Chisholm was a case in assumpsit[21] in which the plaintiff was suing the state of Georgia for money damages,[22] and one issue was whether states were subject to those kinds of suits in particular.[23]

---

14. *See id.* at 480 (Jay, C.J.) ("Ordered, that unless the said State shall either in due form appear, or show cause to the contrary in this Court, by the first day of next Term, judgment by default shall be entered against the said State."); *see also* Edelman v. Jordan, 415 U.S. 651, 662 (1974) (noting that the *Chisholm* decision allowed a state to be sued by a citizen of another state).

15. *See id.* 450 (Blair, J.) ("What then do we find there [in the Constitution] requiring the submission of individual States to the judicial authority of the *United States*? This is expressly extended, among other things, to controversies between a State and citizens of another State.").

16. *See id.* at 480 (Jay, C.J.); *see also supra* note 14 and accompanying text.

17. *See id.* at 430 (Iredell, J., dissenting) (implying that it was important to focus on the "particular question (abstracted from the general one, viz. Whether, a State can in any instance be sued?)").

18. *See id.* (Iredell, J., dissenting) (pointing out that "in England, certain judicial proceedings, not inconsistent with the sovereignty, may take place against the Crown, but that an action of *assumpsit* will not lie").

19. *See id.* at 435 (Iredell, J., dissenting) ("Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered."); *id.* at 457 (Wilson, J.) ("*As to the purposes of the Union*, therefore, Georgia is not a sovereign State. If the judicial decision of this case forms one of those purposes; the allegation, that Georgia is a sovereign State, is unsupported by the fact."); *id.* at 468 (Cushing, J.) ("Whatever power is deposited with the Union by the people, for their own necessary security, is so far a curtailing of the power and prerogatives of states.").

20. *See* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 540 (1977) (discussing whether the sovereign immunity enjoyed by the states is of common law versus constitutional dimension).

21. *See* BLACK'S LAW DICTIONARY 122 (6th ed. 1990) ("A common law form of action which lies for the recovery of damages for the non-performance of a parol or simple contract; or a contract that is neither of record nor under seal.").

22. *See* Vazquez, *supra* note 8, at 1696 (1997) (pointing out that some "scholars stress that *Chisholm* was an action in assumpsit involving an ordinary commercial dispute between an individual and a state").

23. *See Chisholm*, 2 U.S. (2 Dall.) at 469 (Jay, C.J.) ("A second question made in the case was, whether the particular action of *assumpsit* could lie against a State?").

Justice Iredell pointed out in his *Chisholm* dissent that in "*England*, certain judicial proceedings not inconsistent with the sovereignty, may take place against the Crown, but . . . an action of *assumpsit* will not lie."[24] However, other members of the Court believed that an action in assumpsit would be paradigmatic of the type of action that might be brought against a state by a citizen of another state. For example, Justice Cushing suggested that "*assumpsit* will lie, if any suit; provided a State is capable of contracting."[25] Thus, *Alden* claims to the contrary notwithstanding,[26] the disagreement between the members of the *Chisholm* Court was not about whether a nonconsenting state could ever be sued but instead about whether such a state could be subjected to an action in assumpsit.[27]

Certainly, Justice Cushing's position that an action in assumpsit must lie was not the only reasonable position that might have been offered. It could have been suggested that states would be subject to suit if, for example, a federal claim were at issue[28] but not if a mere

---

24. *Id.* at 430 (Iredell, J., dissenting). *But see id.* at 458 (Wilson, J.) (suggesting that the British position "is only a branch of a much more extensive principle, on which a plan of systematic despotism has been lately formed in *England*, and prosecuted with unwearied assiduity and care" and that the system in the United States is rather different). Justice Wilson stated that "all human law must be prescribed by a *superior*," but he also stated:

> [A]nother principle, very different in its nature and operations forms . . . the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require. The *Sovereign*, when traced to his source, must be found in the *man*.

Id.

25. *Id.* at 469 (Cushing, J.).

26. The *Alden* Court implied that Justice Iredell was claiming that states could not be sued without their consent. *See* Alden v. Maine, 527 U.S. 706, 715 (1999) ("[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified."). However, Justice Iredell was in fact suggesting that because Congress had not authorized the Court to hear the suit in question, common law practices dictated whether the suit was permissible. *See Chisholm*, 2 U.S. at 435-47 (Iredell, J., dissenting) (discussing various acts of Congress and relevant common law practices). Justice Iredell explained that the only remedy against one's own sovereign at English common law was the petition of right: "[O]f whatever nature is the demand, . . . *there must be some indorsement or order of the King himself to warrant any further proceedings*. The remedy, . . . being a *matter of grace*, and not *on compulsion*." *Id.* at 444 (Iredell, J., dissenting) (internal citations omitted).

27. *See* John V. Orth, The Truth about Justice Iredell's Dissent in *Chisholm v. Georgia* (1793), Lecture delivered at North Carolina School of Law (Apr. 14, 1994), *in* 73 N.C. L. REV. 255, 263 (1994). Orth stated:

> With a care that could be mistaken for pedantry, Justice Iredell framed the question: 'Will an action of *assumpsit* lie against a State?'—by which he meant literally to confine the case to the narrow question of whether a state could be sued *in that particular form of action*, not whether a state could be sued generally.

Id. (footnote omitted).

28. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .").

contract claim were involved.[29] However, rejecting that states would be liable for breach of contract claims[30] would have some unwelcome implications, since a state might then enter into a contract, refuse to pay what was owed, and the other contracting party would have to bear the loss because no court could hear the cause of action.[31] In the words of Chief Justice Jay, "The exception contended for, would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all . . . ."[32]

Justice Wilson argued that states, like ordinary citizens, should not be permitted to avoid responsibility for their actions. He suggested that a dishonest merchant who had made and willfully refused to discharge a contract would be "amenable to a Court of Justice."[33] He then asked rhetorically whether a state that had made and willfully refused to discharge a contract should, "when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult . . . justice, by declaring *I am a* SOVEREIGN *State*?"[34] Thus, because an individual could not make a contract, willfully refuse to discharge it, and nonetheless be immune from liability, a state should not be able to do so either.

Arguably, one of the purposes of the Constitution is "to establish justice,"[35] and it would be unjust to permit states to refuse to honor their agreements. Suppose, however, that a state had a good reason to justify its refusal to pay and was acting justly in so refusing. Even so, the reason for refusal would go to the merits of the case and should not preclude the Court from hearing argument.

Two additional points should be made about Justice Wilson's argument. First, although he was suggesting that the Court had a duty to see that justice was done, he was not suggesting that the Court

---

29. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 21-22 (1963) (discussing "*Chisholm v. Georgia*, where a state sought perhaps to avoid its contract, [or] possibly to defy the contract clause, but not to defy the national government"); *see also* Jackson, *supra* note 8, at 45 (pointing out that *Chisholm* "was a state law claim, presenting no substantive federal issues").

30. *See* Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1192 (1988) (mentioning "the breach of contract action in *Chisholm*").

31. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 465 (1793) (Wilson, J.) ("What good purpose could this Constitutional provision *secure*, if a State might pass a law impairing the obligation of *its own* contracts; and be amenable, for such a violation of right, to no controuling judiciary power?"). *Cf.* Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1143 (2000) ("To put it less delicately, the Union was composed of would-be deadbeats who wished to maintain the option of defaulting on their debts.").

32. *Chisholm*, 2 U.S. (2 Dall.) at 477 (Jay, C.J.).

33. *Id.* at 456 (Wilson, J.).

34. *Id.* (Wilson, J.).

35. *Id.* at 465 (Wilson, J.); U.S. CONST., Preamble ("We the People of the United States, in Order to form a more perfect Union, establish Justice . . . .").

could hear any case in which a state failed to live up to its commitments. He, like the other Justices, tied the Court's basis for jurisdiction to the fact that *Chisholm* involved a controversy between one state and the citizen of another.[36] Had a Georgia citizen brought the suit against his own state in *Chisholm*, the Court would not have had jurisdiction even if the alleged injustice had been no less significant.[37] Second, while Justice Wilson's analysis is not without merit, it may be less persuasive than it first appears. Arguably, even assuming that no there were no extenuating circumstances justifying a merchant's or a state's refusal to pay, the cases would nonetheless be dissimilar in one important respect. Justice Iredell suggested that the cases were not comparable, precisely because of the different understandings regarding recourse for nonpayment that would have existed at the time the original agreements would have been made.[38] He pointed out that everyone "must know that no suit can lie against a Legislative body."[39] Anyone contracting with the state must hope that the "Legislature on principles of public duty, will make a provision for the execution of their own contracts . . . ."[40] If the legislature does not, however, "the case is certainly without remedy in any of the Courts of the State."[41] Thus, Justice Iredell suggested, the would-be creditor would know prospectively that there would be no other recourse if the legislature could not be convinced to pay the debt.

Justice Iredell was not suggesting that the legislature would be blameless for failing to fulfill the contract, since he discussed the "reproach the Legislature may incur."[42] However, he was suggesting that the *courts* could provide no remedy and, further, that everyone would be aware that no such recourse would be available when they had originally contracted with the state. Thus, the cases are readily distinguishable because *prospectively* there would be no expectation that a state could be brought to court for having failed to pay a debt, but there would be such an expectation regarding a merchant who had failed to do so. The cases differ not in whether the creditor

---

36. *See infra* notes 67 and 70 and accompanying text.

37. The Justices never stated as much outright. Instead, they discussed the Court's jurisdiction relative to suits by a citizen against another state, a state against another state, foreign states against a state, and suits where the United States would be a party. Article III, section 2, of the Constitution established federal jurisdiction over all of these, but did not provide for suits by a citizen against his own state. *See* U.S. CONST. art. III, § 2, cl. 1. Thus, because there would be neither diversity jurisdiction nor federal question jurisdiction, the Court could not have heard such a case. *See, e.g.*, Byers v. McAuley, 149 U.S. 608, 618 (1893) ("The jurisdiction of the Federal courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties.").

38. *See Chisholm*, 2 U.S. (2 Dall.) at 445 (Iredell, J., dissenting).

39. *Id.*

40. *Id.* at 446.

41. *Id.*

42. *Id.*

should be paid, or even in whether it would be unjust not to make the payment, but in the avenues that might be pursued in the event of nonpayment.

B. Becoming Part of the Union

Whether a state is subject to suit for an action in assumpsit depends, at least in part, upon whether states should be characterized as sovereigns in their own right or whether, instead, they are more akin to other non-natural persons like corporations, which would be subject to such a suit.[43] Which characterization is proper depends upon what the states gave up to become part of the United States, for example, whether by entering the Union, Georgia implicitly or explicitly agreed to be subject to such suits.[44]

Justice Iredell did not address what the states had implicitly surrendered by becoming members of the United States. Instead, he focused on the conditions under which the Supreme Court would have jurisdiction to hear the case before it. He reasoned that if the Court could hear such an action against a state, "it must be in virtue of the Constitution of the *United States*, and of some law of *Congress* conformable thereto."[45] He thus suggested that a two-part inquiry would be necessary to determine whether the Court would have jurisdiction to hear such a case: (1) whether the Constitution even permitted nonconsented-to suits against states for money damages, and (2) whether, even if constitutionally permitted, Congress had in addition granted the Court jurisdiction over such a suit. While suggesting that the answer to (1) was "[n]o,"[46] Justice Iredell made clear that his

---

43. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 756 (1999) (pointing out that sovereign immunity does not extend to municipal corporations). *But cf. Chisholm*, 2 U.S. (2 Dall.) at 448 (Iredell, J., dissenting) (discussing the differences between states and corporations).

44. Justice Iredell stated that "[e]very State in the *Union* in every instance where its sovereignty has not been delegated to the *United States*, I consider to be as completely sovereign, as the *United States* are in respect to the powers surrendered." *Chisholm*, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting). Justice Blair's approach differed slightly:

> The Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal. Whatever be the true language of that, it is obligatory upon every member of the *Union*; for, no State could have become a member, but by an adoption of it by the people of that State.

Id. at 450. Chief Justice Jay made clear that the relevant issue was "whether *Georgia* has not, by being a party to the national compact, consented to be suable by individual citizens of another State." *Id.* at 473.

45. *Id.* at 430 (Iredell, J., dissenting).

46. *See id.* at 449 ("So much, however, has been said on the constitution, that it may not be improper to intimate, that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a state for the recovery of money."). Justice Blair did not agree:

> It is, however, a sufficient answer to say, that our constitution most certainly contemplates, in another branch of the cases enumerated, the maintaining a jurisdiction against a state, as defendant; this is unequivocally asserted when

dissent was not predicated on that position,[47] but on Congress's not having authorized the Court to hear such a suit.[48]

The Constitution specifies that the "Judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State,"[49] and, at least arguably, permits such suits.[50] However, Justice Iredell argued that the Court's jurisdiction was subject to the dictates of Congress[51] and that the necessary congressional authorization was lacking.[52] Not only had Congress *not* specifically authorized the Court to hear suits against the states for money damages, but it had specified that the Court was limited in that the exercise of its jurisdiction must be *"agreeable to the principles and usages of law."*[53]

Justice Iredell pointed out that no state had a law "authorizing a compulsory suit for the recovery of money against a State . . . either when the Constitution was adopted, or at the time the judicial act was passed."[54] Thus, because the Court's jurisdiction was based on whatever was agreeable to the principles and usages of law, and because no state had yet passed the relevant legislation at the time the Judiciary Act of 1789[55] was passed, Justice Iredell argued that the Court's jurisdiction could not be grounded in the principles and usages of law as reflected in the then-existing statutes. He referred to the laws of the time, *not* to establish that the state would have sovereign immunity even if Congress had specifically granted the Court

---

> the judicial power of the United States is extended to controversies between two or more States . . . .

Id. at 451 (Blair, J.).

47. *See id.* at 450 (Iredell, J., dissenting) ("This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial."); *see also Alden*, 527 U.S. at 787 (Souter, J., dissenting) ("Justice Iredell added, in what he clearly identified as dictum, that he was 'strongly against' any construction of the Constitution 'which will admit, under any circumstances, a compulsive suit against a State for the recovery of money' . . . .").

48. *See infra* notes 49-63 and accompanying text.

49. U.S. CONST. art. III, § 2, cl. 1.

50. *See Chisholm*, 2 U.S.(2 Dall.) at 450 (Blair, J.) (noting that the Constitution expressly includes controversies between a state and citizens of another state within the Court's jurisdiction).

51. *See id*. at 432 (Iredell, J., dissenting) ("I conceive, that all the Courts of the *United States* must receive, not merely their *organization* as to the number of Judges of which they are to consist; but all their authority, as to the manner of their proceeding, from the Legislature only.").

52. *See* New Jersey v. New York, 30 U.S. 284, 289 (1831) ("Mr. Justice Iredell thought an act of congress necessary to enable the court to exercise its jurisdiction.").

> Justice Iredell was the only Member of the Court to hold that the suit could not lie; but if his discussion was far-reaching, his reasoning was cautious. Its core was that the Court could not assume a waiver of the State's commonlaw sovereign immunity where Congress had not expressly passed such a waiver.

Alden, 527 U.S. at 787 (Souter, J., dissenting).

53. *Chisholm*, 2 U.S. (2 Dall.) at 434 (Iredell, J., dissenting).

54. *Id*. at 434-35 (Iredell, J., dissenting).

55. 1 STAT. 73.

jurisdiction over the action at issue (as one might have inferred from reading the *Alden* interpretation of Justice Iredell's dissent),[56] but as a kind of default reference precisely because Congress had not specifically authorized the Court to hear a suit like the one at issue in *Chisholm*.[57]

Even if not reflected in existing statutory law, however, the principles and usages of the common law might be thought to have provided the basis for the *Chisholm* Court's jurisdiction to hear the case. To determine whether that was so, it was necessary to examine whether, prior to the adoption of the Constitution, "an action . . . like this before the Court could have been maintained against one of the States in the *Union* upon the principles of the common law . . . ."[58] Justice Iredell concluded that such a case could not have been maintained at common law prior to the Constitution's adoption and thus could not be maintained even after its adoption, precisely because there had been no congressional or statutory authorization that would have superseded the common law.[59]

When stating that the Court could only exercise jurisdiction if doing so would be in accord with the principles and usages of law, Congress might have meant that the principles and usages of law *at the time the Judiciary Act was passed* would be the relevant criterion,[60] or that the Court's exercise of jurisdiction would have to be in accord with the principles and usages of law *at the time the jurisdiction was challenged*.[61] That difference could be important, since the principles and usages might have changed in the intervening years. For example, between the time that the Judiciary Act was passed and the time that *Chisholm* was decided, an act had been passed in Georgia that would have allowed suits against the state.[62] A separate issue is whether a change in state law should have any import for whether

---

56. *See Alden*, 527 U.S. at 715.

57. Or, precisely because Congress had specifically authorized the Court to hear the action, if doing so was in accord with the existing practices and usages of law.

58. *Chisholm*, 2 U.S. at 437 (Iredell, J., dissenting); *see also* Jaffe, *supra* note 29, at 20 ("Justice Iredell, dissenting, argued that in exercising its jurisdiction under the Constitution, the Court must look to the common law . . . .").

59. *See Chisholm*, 2 U.S. (2 Dall.) at 434-35 (Iredell, J., dissenting).

60. *See* Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 190 (1867) ("Usages of law . . . are the words of the provision, which, doubtless, refers to the principles and usages of law as known and understood in the State courts at the date of that enactment.").

61. *But see id.* at 191, where the Court in *Riggs* stated:

> Adopted as [writs, executions, and the modes of process] were, by an act of Congress, they became the permanent forms and modes of proceeding, and continue in force wholly unaffected by any subsequent State legislation. Alterations can only be made by Congress, or by the Federal courts, acting under the authority of an act of Congress.

62. *See Chisholm*, 2 U.S. (2 Dall.) at 435 (Iredell, J., dissenting) ("Since that time an act of Assembly for such a purpose has been passed in Georgia. But that surely could have no influence in the construction of an act of the Legislature of the *United States* passed before [it].").

federal jurisdiction can be asserted.[63] However, this issue was not addressed by the *Chisholm* Court. Indeed, the majority and dissent addressed very different issues.

Justice Iredell framed the issues narrowly—had Congress authorized the Court to hear an action in assumpsit?—to provide a way for the Court to avoid what would likely be a very unpopular decision.[64] The other Justices did not address whether the principles and usages of law were fixed at the time the Judiciary Act was adopted or instead should be thought to evolve through time. Rather, they focused on the language in the Constitution specifying the Court's jurisdiction. For example, Justice Blair pointed out that the Constitution "gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a *party*,"[65] and then asked rhetorically: "[B]ut is not a State a party as well in the condition of a Defendant, as in that of a Plaintiff?"[66]

Each of the Justices in the majority framed the issue as whether the state had general immunity from suit as a defendant,[67] although Chief Justice Jay's analysis of sovereign immunity had an additional component. First, he addressed "whether suability is compatible with State sovereignty"[68] as a general matter. Like the other Justices, he pointed out that "any one State in the *Union* may sue another State, in this Court,"[69] and then concluded that "*suability* and *state sovereignty* are not incompatible."[70]

---

63. *See id.* (Iredell, J., dissenting) ("But [the passing of the act] surely could have no influence in the construction of an act of the Legislature of the United States passed before."). For a similar view, see *Riggs*, 73 U.S. at 191 (discussing the irrelevance of subsequent state action to whether federal courts would have jurisdiction).

64. *See* Alden v. Maine, 527 U.S. 706, 721 (1999). ("[E]ven a casual reading of the opinions suggests the majority suspected the decision would be unpopular and surprising."); *see also* Orth, *supra* note 27, at 267 (noting "the risks the Court ran by deciding against Georgia (or any other recalcitrant state)").

65. *Chisholm*, 2 U.S. (2 Dall.) at 451 (Blair, J.); *see also* Pfander, *supra* note 8, at 588 (suggesting that the "grant of Supreme Court original jurisdiction effectuates . . . a waiver [of immunity by the states]").

66. *Chisholm*, 2 U.S. (2 Dall.) at 451 (Blair, J.).

67. Justice Blair pointed out that the Constitution "contemplates . . . the maintaining a jurisdiction against a state, as defendant; this is unequivocally asserted, when the judicial power of the United States is extended to controversies between two or more states." *Id.* at 451 (Blair, J.). Justice Wilson asked rhetorically whether the "most consummate degree of professional ingenuity [could] devise a mode by which this 'controversy between two States' [could] be brought before a court of law; and yet neither of those states be a defendant." *Id.* at 466 (Wilson, J.). Justice Cushing rejected the suggestion that the Constitution "could not be intended to subject a state to be a defendant, because it would effect the sovereignty of states," by pointing out that in "'controversies between two or more States,' . . . a state must of necessity be defendant." *Id.* at 467 (Cushing, J.).

68. *Id.* at 472 (Jay, C.J.).

69. *Id.* at 473.

70. *Id.* The *Cohens* Court suggested that the amendment was not designed "to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation," since the amendment "does not comprehend

Chief Justice Jay understood that even if states are suable by other states, it might nonetheless be argued that "the State is not bound to appear and answer as a *Defendant*, at the suit of an individual."[71] However, he pointed out: "That rule is said to be a bad one, which does not work both ways; the citizens of *Georgia* are content with a right of suing citizens of other States; but are not content that citizens of other States should have a right to sue them."[72] This latter argument—that fairness requires that those capable of suing should be subject to suit, and vice versa, was addressed and implicitly supported by John Marshall in the Virginia debates concerning whether the Constitution should be ratified.[73] When holding that sovereignty was compatible with being sued by individuals, the *Chisholm* Court did not distinguish between federal and nonfederal causes of action—it suggested that a citizen of another state might bring either kind of action. Arguably, that was a mistake,[74] and the failure to so distinguish caused the Court to misrepresent (at least some of) the Framers' intentions.[75]

The issue before the *Chisholm* Court was whether the Court had jurisdiction to hear an action in assumpsit. A separate issue involved whether the debt was enforceable even if it had been contracted before the Constitution had been ratified. Even if a state were suable for debts contracted *after* it had become part of the United States,

---

controversies between two or more States, or between a State and a foreign State." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821).

71. *Chisholm*, 2 U.S. at 473 (Jay, C.J.).

72. *Id.*

73. *See infra* notes 217-230 and accompanying text. The only way to make sense of Marshall's comments is to ascribe this view to him, although the transcribed comments do not say this literally. The point here is *not* that fairness is the only, or even the weightiest, consideration when assessing whether states should have sovereign immunity in these matters, but merely that this at the very least, is an argument that Marshall thought sufficiently compelling that it needed to be addressed.

74. *See* Pfander, *supra* note 8, at 599 (suggesting, contrary to the majority in *Chisholm*, that states' immunity was waived on federal questions but that the states' common law immunity had to be respected on nonfederal questions); *see also* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1210 (1978) (arguing for federal question jurisdiction: "There is no place for a sovereign immunity claim in a suit by a state's own citizens when Congress, acting within its regulatory powers, has authorized the suit; by ratifying the Constitution, with its grants of power to Congress, the state consented to such suits."). William Burnham made a similar argument:

> The *Chisholm* Court should have separated the issues and decided that it had jurisdiction under article III, but that such a grant of jurisdiction did nothing to affect the law to be applied in the case. The substantive law, which governed both the plaintiff's claim and Georgia's defense, was the general common law, which provided that an assumpsit claim would not lie against a state in the absence of its consent to suit.

Burnham, *supra* note 10, at 936.

75. *See* Pfander, *supra* note 8, at 561 (suggesting that the Framers' intent was that they would lose their immunity with respect to federal causes of action but not for nonfederal causes of action).

that would not mean that it would also be suable for debts acquired before becoming part of the Union. Chief Justice Jay made quite clear that the *Chisholm* Court was not deciding whether, for example, an individual could "sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated."[76] Nonetheless, the very possibility that states would be responsible for such debts provided great impetus to amend the Constitution to overrule *Chisholm*.

III. THE PASSAGE OF THE ELEVENTH AMENDMENT

Courts and commentators agree that the Eleventh Amendment was designed to overrule *Chisholm* and that a major impetus for its passage was that judicial enforcement of debts acquired prior to and during the war would impose potentially crushing burdens on the states.[77] However, there is agreement about little else, except perhaps that current Eleventh Amendment jurisprudence is something of a "doctrinal mess,"[78] and the unresolved issues are not only dividing the Court, but have significant implications for what kind of country the United States is and will become.

A. The Eleventh Amendment

The Eleventh Amendment states, "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."[79] The language of the Amendment seems rather straightforward and to require relatively little interpretation.[80] Appearances notwithstanding, however, it is not immediately clear how to construe the Amendment, and current commentators not only engage in

---

76. *Chisholm*, 2 U.S. at 479 (Jay, C.J.).

77. *See infra* notes 99-124.

78. James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After* Seminole Tribe, 46 UCLA L. REV. 161, 167 (1998).

79. U.S. CONST. amend. XI.

80. *See* Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 609 (1989). Shreve wrote:

> The manner in which the eleventh amendment deals with state immunity may be arbitrary, but the text is no less clear for that. It does not protect states from suit by their own citizens. It applies without reference to the remedy sought. It restricts all of the judicial power, not merely that exercised under diversity jurisdiction.

Id.

extratextual analysis,[81] but also seem to ignore or radically alter the text.[82]

There is general agreement that the Eleventh Amendment precludes a suit like *Chisholm*, although that might be for a number of different reasons. For example, the only reason that the Court had jurisdiction to hear *Chisholm* was because the Constitution says that the federal judicial power shall extend to controversies "between a State and Citizens of another State."[83] If the purpose of the Eleventh Amendment was *merely* to overrule *Chisholm*, then the Amendment (1) would make clear that *Chisholm* was wrongly decided or, at any rate, that the Constitution would no longer permit suits like *Chisholm* to be heard in federal court, and (2) would *not* change anything else in the Constitution. As the *Alden* Court recognized, "[b]y its terms, . . . the Eleventh Amendment did not redefine the federal judicial power but instead overruled the Court,"[84] and thus even the *Alden* Court should be sympathetic to the suggestion that *Chisholm* should be read narrowly.

Someone tempted to interpret the Eleventh Amendment as merely overturning *Chisholm*—as only precluding diversity jurisdiction in federal court where a state is one of the parties[85]—might seem to have an insurmountable hurdle. The Eleventh Amendment appears not merely to preclude diversity jurisdiction where a state is a party, but it precludes *any* federal jurisdiction where a state is a party and a citizen or subject of a foreign state is the other party. Thus, the Amendment's language suggests that *no* suit in law or equity may be brought by a foreign citizen,[86] and the claim that the

---

81. *See* Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1347 (1989) (discussing Professor William Marshall's claim that diversity theorists must also engage in substantial extratextual analysis).

82. *Cf. id.* at 1345 (suggesting that it is "difficult to think of any other facet of the Constitution with respect to which the Court has reached results so obviously inconsistent with the words used by the framers"). The same might be said of the other interpretations.

83. U.S. CONST. art. III, § 2, cl. 1. In fact, all of the Justices in the *Chisholm* majority pointed to this provision to justify the Court's jurisdiction to hear the case. *See supra* notes 67-70 and accompanying text.

84. Alden v. Maine, 527 U.S. 706, 722 (1999).

85. *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1894 (1983) ("The amendment did nothing more than amend article III, section 2 of the Constitution to eliminate the power of federal courts to hear suits against states in which the sole basis for jurisdiction was the status of the parties."); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61, 68 (1984) (suggesting "that the eleventh amendment is addressed only to the question of party identity as a basis of jurisdiction"); Vazquez, *supra* note 8, at 1697 ("[D]iversity scholars agree that the Amendment should not be understood to bar Congress from conferring jurisdiction on the federal courts over cases arising under federal law but should instead be read to preclude only federal jurisdiction over suits against states predicated solely on diversity.").

86. *See* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 484-85 (1987). The Court stated:

Amendment was merely restoring the common law immunity to the states would seem to be belied by the text.[87] An additional difficulty posed by the text is that it only addresses suits between states and foreign citizens. In other words, in reading the Amendment on its face, a state's own citizens are not precluded from suing their state in federal court, even though the citizens of other states are so precluded.[88] Some commentators have suggested that the Amendment makes no sense precisely because it has this seemingly irrational feature.[89]

In *Blatchford v. Noatak*,[90] the Court suggested that it understands the "Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty."[91] The *Alden* Court spoke approvingly of the *Blatchford* view[92] and implied that the *Blatchford* understanding was reflected in the constitutional design.[93] As the *Alden* Court explained, although the Court sometimes refers to the "State's immunity from suit as 'Eleventh Amendment immunity,' [t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."[94] Yet, if the Eleventh Amendment merely confirms the original constitutional structure, it will be important to understand the conditions under which state sovereign immunity could be asserted within the original constitutional design. Once that

---

> The dissent, observing that jurisdiction in *Chisholm* itself was based solely on the fact that Chisholm was not a citizen of Georgia, argues that the Eleventh Amendment does not apply to cases presenting a federal question. . . . Federal-question actions unquestionably are suits "in law or equity"; thus the plain language of the Amendment refutes this argument.

Id.; *see also* Marshall, *supra* note 81, at 1347 ("[T]he diversity theory goes on completely to ignore the operative words of the amendment, which provide that '[t]he judicial power shall not be construed to extend to *any* suit in law or equity' that meets the criteria set forth in the amendment.").

87. *See* Burnham, *supra* note 10, at 937 ("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.").

88. *See* U.S. CONST. amend. XI.

89. *See* Allen K. Easley, *The Supreme Court and the Eleventh Amendment: Mourning the Lost Opportunity to Synthesize Conflicting Precedents*, 64 DENV. U. L. REV. 485, 487 (1988) (suggesting that the Amendment "makes no sense").

90. 501 U.S. 775 (1991).

91. *Id.* at 779 (citing Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 472 (1987) (plurality opinion)).

92. *See* Alden v. Maine, 527 U.S. 706, 728 (1999).

93. *See id.* at 710-11 ("[A]s the Constitution's structure . . . make[s] clear, the State's 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.").

94. *Id.* at 710.

is understood, *Alden* claims notwithstanding, it will be clearer why the Amendment should be interpreted narrowly and why it is best understood as merely precluding federal diversity jurisdiction when a state and a foreign citizen are the parties.

B. Why Only Preclude Citizens of Other States and Countries from Suing?

When the *Chisholm* decision was issued, it was greeted with "profound shock,"[95] and the Eleventh Amendment was adopted soon thereafter.[96] However, it is important to establish what caused the shock. It was not, for example, the idea that a state might be sued by a mere citizen, since states had already adopted their own laws permitting such suits by the time *Chisholm* was issued[97] and, in fact, as Justice Iredell pointed out in his *Chisholm* dissent, *Georgia* permitted such suits.[98] Rather, it seems plausible to suggest that the shock resulted from a consideration of who would benefit if such suits were permitted—speculators[99] who had bought state debts at a mere fraction of their face value,[100] Tories/British sympathizers,[101] and the

95. Pfander, *supra* note 8, at 578 (discussing "the 'profound shock' school of Eleventh Amendment thought"); *see also* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 484 (1987) ("The reaction to *Chisholm* was swift and hostile. The Eleventh Amendment passed both Houses of Congress by large majorities in 1794."); Hans v. Louisiana, 134 U.S. 1, 11 (1890) (suggesting *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States."); Jaffe, *supra* note 29, at 20 ("*Chisholm v. Georgia* in the words of Mr. Justice Bradley created 'such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed . . . .'").

96. *See* Pfander, *supra* note 8, at 651 ("Everyone appears to agree that the Eleventh Amendment was passed in response to *Chisholm*.").

97. *See id.* at 580 ("Americans had substituted the sovereignty of the people for the sovereignty of the crown and had secured limitations on governmental power through adoption of written constitutions. Judge Gibbons notes that the charters of many American colonies included provisions that authorized suit against the governing body.").

98. *See supra* note 62 and accompanying text.

99. *See* Marshall, *supra* note 81, at 1366 ("The class of out-of-state creditors appears predominantly to have been the speculators whom many states had a strong aversion to paying.").

100. *See* BERGER, *supra* note 6, at 325 ("The citizenry was up in arms against taxation that would only serve to enrich Tories and speculators who had bought State obligations for a few cents on the dollar."); CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 33 (1972) (discussing the fear that Virginia "could be sued in federal court by northern holders of depreciated currency, who had purchased the notes for a tiny fraction of their face value"); Pfander, *supra* note 6, at 1282-83 ("[A]grarians saw full repayment of public debts as likely to impose a stiff tax burden on the yeomanry, and to benefit the speculators and 'bloodsuckers' who had paid less than par for their public securities and who would reap profits from redemption at par.").

101. *See* BERGER, *supra* note 6, at 326 (discussing "the bitter resentment against suits by speculators and Loyalists"); *see also* Nowak, *supra* note 6, at 1440 (explaining that Federalists voted for the Amendment to show that they were against "Tory suits"). Further, there might have been the separate worry that if Congress did not support an amendment,

British themselves.[102] Thus, while at first blush it might seem unlikely that an amendment would be adopted solely to ensure that out-of-staters could not sue for debt collection,[103] it becomes more understandable when one considers who in particular those individuals might be—either out-of-state speculators[104] or those whose sympathies lay with those against whom the Revolutionary War had recently been fought.

John Gibbons points out that at the beginning of the Revolutionary War, "American debtors, mostly southern planters, owed about $28 million to British merchants,"[105] and that none of that debt had been paid by the end of 1782.[106] The Peace Treaty of 1783 signed with the British guaranteed both that debts would be paid in sterling, rather than in paper money, and that British and Loyalist property would receive increased protection.[107] If these provisions could be enforced in federal court, many southerners stood to lose huge sums of money.[108] As if this were not enough reason for southern planters to be upset about being forced to pay those against whom they had recently been at war, there was further reason, since the evacuating British army had emancipated thousands of slaves, notwithstanding an explicit treaty provision that they would do no such thing.[109] The southerners viewed themselves as doubly harmed by this British army action because they not only had lost their "property," but in

---

states might have called for a constitutional convention. *See* Marshall, *supra* note 81, at 1359 ("If Congress had not proposed an amendment to protect the states, the states might have tried to invoke the alternative method for securing constitutional change—calling a constitutional convention.").

102. *See* JACOBS, supra note 100, at 70 ("[I]n Congress, as well as in the state legislatures, there was strong opposition to recognition of any liability to reimburse British creditors or to make restitution for the seizure of Loyalist property."); Gibbons, *supra* note 85, at 1900 ("At the outset of the war, American debtors, mostly southern planters, owed about $28 million to British merchants, an amount equal in value to two years' worth of imports."). Further, the expectation that such suits would be brought was not unreasonable. *See* Marshall, *supra* note 81, at 1357 ("The fear that the decision in *Chisholm* would give rise to loyalists and British creditors bringing suits in federal court was far from speculative.").

103. *See* Pfander, *supra* note 6, at 1357 ("Yet it is doubtful that the framers would have drafted an amendment to deal with so modest a threat to the state treasuries as that posed by out-of-state plaintiffs.").

104. *See* JACOBS, *supra* note 100, at 24 (stating that the "holders of state obligations were concentrated in a few states"); Marshall, *supra* note 81, at 1365 ("[I]t appears that a large portion of the state debt was held by out-of-staters. Specifically, southern states' debt was held by northern merchants."); *id.* at 1366 ("The class of out-of-state creditors appears predominantly to have been the speculators whom many states had a strong aversion to paying. The class of in-state creditors, on the other hand, was a mixed bag and included many original holders of the debt.").

105. Gibbons, *supra* note 85, at 1900.

106. *See id.* at 1901.

107. *See id.* at 1900-01.

108. *See id.* at 1900 (suggesting that the debt amounted to about two and a half years worth of imports).

109. *See id.* at 1900-01.

addition, a source of inexpensive labor whereby they might have been able to earn money to pay their debts.[110]

When the ratification debates were taking place, it was widely known that not all of the Southern states were complying with the Peace Treaty with Great Britain.[111] The issue of honoring that treaty was itself a burning issue during the ratification debates,[112] and ratification of the Constitution (unless amended) might have required treaty compliance. For this reason, changes in the language of the Constitution were proposed; for example, there was a proposal that federal courts would have no jurisdiction over treaty-based causes of action that originated before the ratification of the Constitution.[113]

The failure of some states to honor the provisions of the treaty gave Great Britain an excuse not to honor some of its provisions, for example, to cease occupying forts that the British had promised to abandon.[114] Without credible assurances that Southern states would honor the Treaty, the British had no incentive to fulfill their part of the bargain. Many believed that it was essential that the treaty provisions be honored—indeed, John Gibbons discussed a "pervasive belief that the fate of the nation . . . hinge[d] on its ability to enforce the 1783 treaty."[115] Nonetheless, many southerners were not anxious to pay debts to the British, especially without receiving compensation for their losses.[116]

Given the context in which the Eleventh Amendment was passed, it does not seem surprising that the Amendment does not preclude a citizen from suing her own state in federal court[117] but only precludes citizens from other states or countries from doing so,[118] commentators

---

110. *See id.* at 1918 (discussing Jefferson's claim that "by carrying off so many slaves, Great Britain had impoverished the planters and left them in no position to pay").

111. *See id.* at 1906 (discussing the general knowledge of "Virginia's ongoing violations of the peace treaty").

112. *See id.* at 1907 (mentioning the "burning issue of the power of British creditors to redress their claims under the treaty in court").

113. *See id.* at 1906 (discussing George Mason's suggestion).

114. *See id.* at 1900.

115. *Id.* at 1902.

116. *See id.* at 1923.

> Justice Iredell . . . was more sensitive than any of his colleagues to the depth of southern antagonism aroused by the thought that debts dating from 1774 and earlier would have to be paid with interest, and land titles disturbed, while no one would be compensated for the loss of slaves carried off in 1783.

Id.

117. The Court has held that the Eleventh Amendment precludes citizens from suing their own states, although not because of anything in the text. *See* Edelman v. Jordan, 415 U.S. 651, 662-63 (1973) ("While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State."); *see also* Field, *supra* note 20 (discussing "the extension [of the Eleventh Amendment] to suits by a state's own citizens").

118. *See* William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1378 (1989) ("While the wording of the

claims to the contrary notwithstanding.[119] A possible implication of *Chisholm* had been that foreign creditors would be able to sue in federal court to have their debts paid in sterling, but the Eleventh Amendment removed that possibility.

The Eleventh Amendment did not need to address the ability of in-staters to sue in federal court because there would have been no diversity jurisdiction to allow in-stater suits in federal court to force the states to pay their contract debts. Not only would in-staters have been less likely to have been speculators, but such citizens, if permitted to sue at all, would have been suing in state court. Thus, although the fact that the Constitution did not preclude in-staters from suing might have induced out-of-staters to sell the debts they owned to in-staters,[120] the in-staters would either have been precluded from suing because of common law sovereign immunity,[121] or, in any event, would be suing in state court where the court would be more likely to uphold[122] a state law requiring payment in paper money[123] or in notes that were virtually worthless because of inflation.[124]

The Court explained in *Cohens v. Virginia*[125] that "at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to [the Constitution]."[126] When the *Chisholm* Court held that it had jurisdiction over the case at issue, the "alarm was general; and, to quiet the apprehensions that were so extensively entertained, [the Eleventh] amendment was proposed in Congress, and adopted by the State legislatures."[127]

It may well be that states did not expect that those obligations incurred before becoming members of the United States would have to be met, especially not at face value or in sterling,[128] and thus that

---

amendment purportedly prohibits all suits, including federal claims, brought against states by out-of-staters, it does not prohibit federal claims brought by in-staters.").

119. *See* Easley, *supra* note 89, at 487-88.

120. Pfander, *supra* note 6, at 1358 (noting that "a constitutional amendment that barred disfavored plaintiffs from bringing federal claims but permitted eligible in-state plaintiffs to do so would have invited the sale of notes, indents, and certificates from (ineligible) out-of-staters to (eligible) in-staters").

121. *See id.*

122. *Cf.* Gibbons, *supra* note 85, at 1922 (discussing a defense against foreign creditors that would likely be upheld by state courts).

123. *See id.* at 1901 (discussing paper-money legal tender laws).

124. *See id.* at 1911.

125. 19 U.S.(6 Wheat) 264 (1821).

126. *Id.* at 406.

127. *Id.*; *see also*, Jackson, *supra* note 8, at 23 ("Motivated by a fear that pre-existing debts would be enforced by out-of-state creditors, the amendment was, in Marshall's view, narrowly drafted to extend only to those suits commenced by 'persons who might probably be its creditors.'") (quoting *Cohens*, 19 U.S. (6 Wheat) at 406).

128. *See* Pfander, *supra* note 6, at 1278 ("*Chisholm* was shocking . . . less because it contemplated the suability of the states as corporate bodies than because it threatened to require the states to honor old obligations to individual suitors in specie."); *see also id.* at

Chisholm was contrary to the expectations of the time. However, its being contrary to some expectations or understandings does not establish that it was incorrect and certainly does not establish that there was a general understanding that the states had constitutional immunity from suit.

The *Alden* Court considered and rejected the idea that "the *Chisholm* decision was a correct interpretation of the constitutional design and that the Eleventh Amendment represented a deviation from the original understanding."[129] The *Alden* Court gave two reasons: (1) The *Chisholm* majority allegedly "failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted," and (2) the "majority suspected the decision would be unpopular and surprising."[130] Yet, as Justice Iredell made clear in his dissent, the first failing was significant only because Congress had not specifically granted the federal courts jurisdiction over cases like *Chisholm*,[131] and the latter "failing" may speak as much to the Court's willingness to make difficult decisions as to anything else.[132]

Even if *Chisholm* in fact "shocked the Nation,"[133] it is important to know whether that shock was due to an undermining of existing notions of sovereign immunity[134] or, instead, to the expectation that out-of-state creditors would now unfairly benefit because, for example, the debts incurred before states joined the Union were not even thought to be enforceable or because the speculators would receive exorbitant windfalls if paid in specie.[135] One interpretation of the

---

1286-87 (describing various states that required creditors to accept paper money as legal tender).

129. Alden v. Maine, 527 U.S. 706, 720 (1999).

130. *Id.*

131. *See supra* notes 51-59 and accompanying text.

132. *Cf. Alden*, 527 U.S. at 790 (Souter, J., dissenting) ("[I]t is a remarkable doctrine that would hold anticipation of unpopularity the benchmark of constitutional error.").

133. Edelman v. Jordan, 415 U.S. 651, 662 (1973).

134. *See* Welch v. Texas Dep't of Highways and Pub. Transp., 483 U.S. 468, 505 (1987) (Brennan, J., dissenting) ("The majority of the delegates who spoke at the Virginia Convention, including Mason, Henry, Pendleton, and Randolph, did *not* believe that state sovereign immunity provided protection against suits initiated by citizens of other States."); Gibbons, *supra* note 85, at 1899 ("[E]vidence of a contemporaneous belief in state sovereign immunity from suit in the federal courts is extraordinarily weak.").

135. *See* Pfander, *supra* note 6, at 1310 (discussing the claim that "the new Article III courts would lack the power to enforce government obligations issued under the Articles of Confederation, because those obligations had been created without the expectation of legal enforceability"); *see also* JACOBS, *supra* note 100, at 36 (discussing an influential anti-federalist tract written by Richard Henry Lee in which he noted that the states "had defaulted upon many promises made during the war, and they had not been subject to suit for such delinquencies. Such remedies were not contemplated by either the states or their creditors at the time the contracts were made.").

Eleventh Amendment is that it simply reinstated the state of affairs where pre-War debts were once again unenforceable.[136]

An additional consideration militates in favor of a narrow interpretation of the Eleventh Amendment, insofar as one wishes to capture the understanding of those voting for it. The Amendment's passage required Federalist support. While the Federalists may well have felt compelled to support the Amendment because of political pressures,[137] they nonetheless would likely have framed the Amendment in the narrowest terms possible that would still withstand the political pressures of the time.[138]

C. Does the Amendment Preclude Federal Question Jurisdiction?

Suppose one accepts that the Framers of the Eleventh Amendment were not making a mistake, but actually intended to withdraw federal court jurisdiction from cases involving states and foreign citizens, and that the narrowest interpretation would capture the Framers' intent, because the Amendment could not have passed without Federalist support. Still, even a narrow interpretation of the Amendment—"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"[139]—suggests that federal courts are precluded from hearing *all* cases where a state and foreign citizen or subject are parties, even if a *federal question* is implicated.

In *Missouri v. Fiske*,[140] the Court pointed out that the "fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of state debts in the federal courts cannot be regarded . . . as restricting the scope of the Amendment to suits to obtain money judgments."[141] After all, the Court suggested, the "terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited."[142] However, requiring that one pay close atten-

136. Pfander, *supra* note 6, at 1343 (suggesting that the Eleventh Amendment "placed pre-constitutional debts beyond the reach of the federal courts").

137. *See supra* notes 104-110 and accompanying text (suggesting that those who might benefit from *Chisholm* would have been very politically unpopular).

138. *See* Gibbons, *supra* note 85, at 1934 ("But the Federalists sought to draft the amendment in the narrowest possible form that would serve to quiet the rapidly mobilizing reaction to *Chisholm*, while leaving intact the rest of article III."); *see also* Jackson, *supra* note 8, 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.").

139. U.S. CONST. amend. XI (emphasis added).

140. 290 U.S. 18 (1933).

141. *Id.* at 27.

142. *Id.*

tion to the text is double-edged, since that would mean that a citizen was not barred from suing her own state in federal court. In part because of this implication regarding whether citizens could sue their own states in federal court,[143] the *Alden* Court has suggested that it is not necessary to pay close attention to the Amendment's wording. The Court stated that the "Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle," and that the "scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."[144]

The *Alden* Court's explanation for why state sovereign immunity should *exceed* the limits imposed by the Eleventh Amendment is somewhat surprising. The Court suggested that "[g]iven the outraged reaction to *Chisholm*, as well as Congress' repeated refusal to otherwise qualify the text of the Amendment, it is doubtful that if Congress meant to write a new immunity into the Constitution it would have limited that immunity to the narrow text of the Eleventh Amendment."[145] Yet, this argument runs counter to common experience, since it suggests that individuals in shock and rage *understated* the protections that they meant to enact. One would normally expect that anger would lead to an *overstatement* that would be toned down when calmer heads could prevail.[146]

Diversity theorists agree with the Court that Congress was not attempting to write a new immunity into the Constitution; they claim that Congress was, instead, merely trying to prevent the federal court from having diversity jurisdiction over a state on a matter of *state* law.[147] As a variety of theorists have remarked, the terms of the Amendment do not preclude citizens from suing their *own* states in federal court if a federal question is at issue and it would seem strange that in-state citizens would be allowed to do so and out-of-state citizens would not,[148] since the latter group would seem more

---

143. *See infra* notes 148-152 and accompanying text (discussing whether the Eleventh Amendment precludes citizens from suing their own states in federal court).

144. Alden v. Maine, 527 U.S. 706, 727 (1999).

145. *Id.* at 723.

146. The claim here is not that the Amendment should be interpreted in terms of how it would have been written had there been time for more deliberation, but that the literal language of the Amendment supports a diversity interpretation. *See infra* notes 170-174 and accompanying text.

147. *See* Pfander, *supra* note 6, at 1351 ("[T]he Amendment explains or clarifies that the nominally reciprocal terms of the Article III diversity grant were not to 'be construed to' extend to suits and proceedings in which a State was a party defendant. This account of theAmendment leaves other sources of jurisdiction over suits against the states intact and unaffected, including the provision for the exercise of jurisdiction over federal question claims against the states."); *see also infra* note 161.

148. *See* Marshall, *supra* note 118, at 1378 ("[T]here is no persuasive reason why suits based upon federal law should be allowed in federal court when brought by an in-stater, but should not be allowed in federal court when brought by an out-of-stater.").

likely to need the allegedly greater objectivity of the federal courts.[149] Further, it is not plausible to explain the noninclusion of in-staters in the Eleventh Amendment as a mere oversight,[150] since it is quite conceivable that in-staters would need to bring an action for a violation arising under the Constitution or federal law.[151] It is thus surprising that in-staters would not have been excluded if that had been the desire.[152]

Justice Antonin Scalia has suggested that the wording of the Eleventh Amendment itself suggests that it was designed to remove diversity jurisdiction from the federal courts:

> [T]here is no plausible reason why one would wish to protect a State from being sued in federal court for violation of federal law . . . when the plaintiff is a citizen of another State or country, but to permit a State to be sued there when the plaintiff is citizen of the State itself.[153]

Most commentators agree that it makes no sense to distinguish between in-staters and out-of-staters in this way; however, they disagree about what conclusion should be drawn from that fact. Some argue that out-of-staters were only intended to be precluded from doing what in-staters were precluded from doing,[154] which is why out-of-staters should not be precluded from filing in federal court if a federal question is at issue, whereas others suggest that this is why in-staters should also be precluded from filing in federal court even if a federal question is at issue.[155]

---

149. *See* Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 390 (1821) ("State tribunals might be suspected of partiality in cases between itself . . . and aliens, or the citizens of another State."); *see also* Ableman v. Booth, 62 U.S. (21 How.) 506, 517-18 (1858) (suggesting that "the local tribunals could hardly be expected to be always free from . . . local influences").

150. *See* Marshall, *supra* note 118, at 1381 (discussing the claim that "the concern motivating the framers of the eleventh amendment were the *Chisholm*-type suits brought for the collection of debts, not suits against states based on some imagined federal grounds").

151. *See infra* note 191 and accompanying text (discussing the importance of protecting all citizens' constitutional rights).

152. *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, 1060 (1983) ("The eleventh amendment's failure to mention in-state citizens suggests that its drafters did not intend it to reach federal question suits, for if they intended the amendment to forbid them, their drafting was extraordinarily inept.").

153. Pennsylvania v. Union Gas Co., 491 U.S. 1, 31 (1989) (Scalia, J., concurring in part and dissenting in part) ("If this text were intended as a comprehensive description of state sovereign immunity in federal courts . . . then it would unquestionably be most reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is the diversity of citizenship that it describes . . . ."), *overruled by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

154. *See* Jackson, *supra* note 8, at 50 ("Instead, the Eleventh Amendment can best be interpreted to mean that out-of-staters were deprived of a federal forum only as to those cases in which in-staters lacked a federal forum as well.").

155. *See* Hans v. Louisiana, 134 U.S. 1 (1890) (holding that federal courts do not have jurisdiction over federal questions involving states and their own citizens); Martha A.

Justice Scalia argues that a robust version of state sovereign immunity protections can be justified only if another constitutional principle is at work in addition to that which is provided by the Eleventh Amendment. Otherwise, "even if the parties to a suit fell within its precise terms (for example, a State and the citizen of another State) sovereign immunity would not exist so long as one of the other, *nondiversity* grounds of jurisdiction existed."[156] Yet, if one of the five members of the *Alden* majority believes that the best interpretation of the Eleventh Amendment is that it only precludes federal diversity jurisdiction unless evidence or argument can be offered to establish that some other constitutional principle is at work, one might expect the *Alden* opinion to offer impressive evidence and argument to establish that thesis. One with such an expectation would be gravely disappointed.

The *Alden* Court tried to bolster its claim that the Eleventh Amendment should not be read merely to preclude federal court diversity jurisdiction by stating: "Congress' refusal to modify the text of the Eleventh Amendment to create an exception to sovereign immunity for cases arising under treaties . . . suggests the States' sovereign immunity was understood to extend beyond state-law causes of action."[157] Here, the Court was referring to a failed motion[158] made by Albert Gallatin[159] that the Eleventh Amendment read: "The Judicial power of the United States [*except in cases arising under treaties made under the authority of the United States*] shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state."[160]

A few points should be made about the failure to adopt this modification to the proposed amendment. First, insofar as the Eleventh Amendment was understood merely to bar federal diversity jurisdiction, the amendment would be unnecessary.[161] Second, there would have been an important reason to reject such a modification, at least

---

Field, *The* Seminole *Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 6 (1997) ("[I]t has been established law for more than a hundred years that the Amendment's prohibition applies to citizen as well as non-citizen suits.").

156. *Union Gas*, 491 U.S. at 31 (Scalia, J., concurring in part and dissenting in part).

157. *Alden*, 527 U.S. at 734.

158. *See* 4 ANNALS OF CONG. 30 (1794).

159. *See* Gibbons, *supra* note 85, at 1932 (discussing Gallatin and why he proposed the amendment).

160. 4 ANNALS OF CONG. 30 (1794) (emphasis added).

161. *See* Gibbons, *supra* note 85, at 1936 ("The Gallatin proposal . . . was not needed, since the eleventh amendment in its final form excluded from federal courts *only* suits against states where jurisdiction was based exclusively on article III's grant of party-status jurisdiction.").

for purposes here, since its adoption would have *undercut* the diversity interpretation.[162]

Consider the *Alden* Court's argument: Since there was a proposal to make actions under the treaty subject to federal jurisdiction, it must have been understood that without it there would be no such jurisdiction. Yet, there is another explanation which supports the opposite conclusion. Although Gallatin was not a Federalist,[163] he nonetheless wanted the treaty with Britain enforced because it was a vital interest of his Western Pennsylvania constituents.[164] By having his modification adopted, he might have been able to achieve two goals at once: (1) to make the treaty enforceable in federal court, and (2) *not* to make federal laws enforceable in federal court if a state was being sued by a citizen of another state.

Article III of the Constitution states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[165] Suppose that Gallatin's proposed amendment had been approved and a federal court using the rule of interpretation "inclusio unius est exclusio alterius"[166] had to decide whether it had jurisdiction to hear a case involving a state and a foreign citizen. That court would hold that it would have jurisdiction if the matter involved a treaty obligation but would not have jurisdiction if, for example, the matter involved the laws of the United States. By rejecting Gallatin's amendment, the *misperception* that federal courts would lack jurisdiction over cases with states as parties seeking enforcement of federal law could be avoided. Thus, *Alden* analysis notwithstanding, the consideration of the Gallatin modification, coupled with the failure to adopt it, speaks as strongly in favor of the diversity interpretation as against it.

D. On Construing the Eleventh Amendment

In *United States v. Sprague*,[167] the Court suggested, "The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning; where the intention is clear there is no room

---

162. It is impossible to tell whether this was actually one of the reasons, since one of the difficulties in interpreting the Eleventh Amendment is that while there are records of proposed amendments to it there are no accompanying records of why those amendments were rejected. *See* 4 ANNALS OF CONG. 30 (1794).

163. *See* Gibbons, *supra* note 85, at 1932.

164. *See id.* at 1933.

165. U.S. CONST. art. III, § 2, cl. 1.

166. BLACKS LAW DICTIONARY 763 (6th ed. 1990) ("The inclusion of one is the exclusion of another.").

167. 282 U.S. 716 (1931).

for construction and no excuse for interpolation or addition."[168] The question at hand is how that rule of interpretation should be used when analyzing the meaning of the Eleventh Amendment.

One confusing issue is why the Eleventh Amendment states that the judicial power shall not be *construed* to extend to certain cases rather than stating quite simply that the judicial power shall not extend to those cases. One plain reading of the Amendment would be that the extant Constitution should no longer be so *construed*,[169] especially given that the *Chisholm* opinion had just been issued and the Court had *construed* the Constitution to grant the federal courts jurisdiction over an action in assumpsit.[170] That is, following the line of argument offered in Justice Iredell's *Chisholm* dissent, the Constitution should not be construed to authorize the federal courts to hear such cases because an act of Congress would also be required for the federal courts to exercise that jurisdiction.

If the desire had been to preclude the federal courts from hearing cases between states and foreign citizens even when federal questions were at issue, then the Amendment should have stated either that the judicial power simply would *not* extend to those cases (and not merely that the judicial power should not be "construed" to extend to those cases) or, perhaps, that Congress was not authorized[171] to grant the federal courts jurisdiction to hear those cases.[172] If indeed there was a general understanding at the time that federal courts could hear federal issues, and that states were subject to suit

---

168. *Id.* at 731 (citing Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816)).

169. *See* Pfander, *supra* note 6, at 1339. Pfander states:

> By the time Congress reconvened in January 1794, eight states had expressed support for the adoption of a constitutional amendment, and had done so in terms that suggested the need to remove or explain any provision of the Constitution that could 'be construed' to make states subject to suits by individuals.

Id.

170. *See* Vazquez, *supra* note 8, at 1696. Vazquez explains:

> [T]he Eleventh Amendment does not give constitutional status to the states' sovereign immunity; it merely reversed *Chisholm*'s holding that the Constitution *itself* did away with this immunity [and] . . . state sovereign immunity remains as a common law immunity . . . that, as such, . . . is subject to plenary abrogation by Congress.

Id.

171. *See Alden*, 527 U.S. at 789 (Souter, J., dissenting) ("[T]he testimony of five eminent legal minds of the day confirmed that virtually everyone who understood immunity to be legitimate saw it as a common-law prerogative (from which it follows that it was subject to abrogation by Congress as to a matter within Congress's Article I authority)."); Vazquez, *supra* note 8, at 1696 (discussing the view that "state sovereign immunity remains as a common law immunity, but they maintain that, as such, it is subject to plenary abrogation by Congress").

172. *But see* Hans v. Louisiana, 134 U.S. 1, 11 (1890) ("It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import *any power to authorize* the bringing of such suits.") (emphasis added).

in federal court if federal questions were implicated,[173] then the most sensible reading of the *text* of the Amendment is that the jurisdiction of the federal courts should not be construed beyond what it was already understood to be.[174]

When discussing the Eleventh Amendment, the Court in *Cohens v. Virginia* recognized that a state has an interest in having "the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it."[175] However, the Court pointed out that the state does not have an interest "in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation."[176] Precisely because states are members of a union, they cannot be permitted to thwart with impunity either federal law or the rights of citizens granted under the federal Constitution. Thus, the *Cohens* Court suggested that *Chisholm* was wrongly decided but that the Constitution, *even with the Eleventh Amendment*, does not preclude the federal courts from having jurisdiction if federal questions are at issue, even if a state is one of the parties.[177]

In *Alden*, the Court suggested that the "Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits."[178] Of course, this traditional immunity was from private suits under state law and such an understanding would not speak to what would happen were Congress to have entered the picture. Indeed, Justice Iredell's *Chisholm* dissent emphasized this very point.[179] In any event, given all of the interpretations floating around at the time and the express claims made by many of those debating ratification that states would be subject to suit involving federal law, the failure of the Eleventh Amendment to read any differently counsels against the interpretation offered by the *Alden* Court of the original understanding of sovereign immunity.

---

173. *See* Marshall, *supra* note 81, at 1350 ("[T]he majority of those who commented on the issue concluded that the Constitution did subject states to suits in federal courts.").

174. *See* John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147, 1148 (2000) ("By far the most attention . . . has been paid to the words 'shall not be construed.' This phrase is often taken to indicate that the Amendment was not intended to change the meaning of the Constitution, but only to instruct the Court as to its correct reading.").

175. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 407 (1821).

176. *Id; see also* Gibbons, *supra* note 85, at 1951 ("[E]ven antinationalist state court judges did not regard the amendment as a confirmation of state sovereign immunity.").

177. *See infra* notes 179-185 and accompanying text.

178. *Alden*, 527 U.S. at 724.

179. *See supra* notes 51-53 and accompanying text.

The *Cohens* Court analyzed the effect of the Eleventh Amendment on federal jurisdiction,[180] recognizing that the "States are constituent parts of the United States . . . [and are] for some purposes sovereign, for some purposes subordinate."[181] Yet, if the states are sovereign for some purposes and subordinate for others, and if the states can neither have laws nor constitutions that are repugnant to federal law,[182] then there must be a judiciary to "give efficacy to the constitutional laws of the legislature" and to "decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States."[183] Since the "exercise of the appellate power over those judgments of the State tribunals which may contravene the constitution or laws of the United States, is . . . essential to the attainment of those objects [which are of vital interest to the nation],"[184] the Court suggested that the Constitution, even with the Eleventh Amendment, must be construed to "give to the Supreme Court appellate jurisdiction in all cases arising under the constitution, laws, and treaties of the United States."[185]

In *Cohens*, the Court explained the rationale behind allowing the federal courts to have diversity jurisdiction, that is, "jurisdiction [which] depends on the character of the parties."[186] Because the "State tribunals might be suspected of partiality in cases between itself or its citizens and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens,"[187] it makes sense to allow a federal court to have jurisdiction in the former case but not in the latter. However, that argument was "not entitled to the same force when urged to prove that this Court cannot inquire whether the constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State."[188] The Court explained that granting jurisdiction to the federal courts was not merely intended to circumvent the possible "partiality of the State tribunals."[189] Rather, a more important reason "was the preservation of the constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the Courts of the Union was expressly extended to all cases arising

180. *See Cohens*, 19 U.S. (6 Wheat) at 405 ("This leads to a consideration of the 11th amendment.").

181. *Id.* at 414.

182. *See id.* The "constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void." *Id.*

183. *Id.*

184. *Id.* at 415.

185. *Id.* at 416. *But see* Marshall, *supra* note 81, at 1359-60 (suggesting that the Eleventh Amendment should not be so construed).

186. *Cohens*, 19 U.S. (6 Wheat) at 391.

187. *Id.* at 390.

188. *Id.* at 391.

189. *Id.*

under that constitution and those laws."[190] He asked rhetorically, "If the constitution or laws may be violated by proceedings instituted by a State against its own citizens, . . . why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the constitution and laws?"[191]

The *Cohens* Court's analysis is important to consider. It helps explain why the *Chisholm* Court believed it important that a suit between a state and a citizen of another state be heard in federal court—so that the partiality of state tribunals might be avoided. It also makes clear that one of the most important functions of the federal courts is to protect the Constitution and the laws of the United States. Thus, a reason that might justify removing diversity jurisdiction from the federal courts over certain kinds of cases might not suffice to justify removing federal question jurisdiction over those same kinds of cases.

The *Alden* Court suggested as follows:

> The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution.[192]

What is most confusing about this analysis is that it does not lead to the robust interpretation of state sovereign immunity offered by the *Alden* Court.

Suppose that Justice Iredell had convinced his *Chisholm* colleagues that the Court did not have jurisdiction to hear that case due to the lack of congressional authorization.[193] Suppose further that the Eleventh Amendment had never been adopted. It seems most unlikely that the Court's current state sovereign immunity position would have been adopted, at least if the idea was to reflect the intentions of the Framers,[194] even though this is exactly what the current

---

190. *Id.*

191. *Id.* at 391-92; *see also* Fallon, *supra* note 30, at 1144 (criticizing the federalist model because "it fails to explain doctrines that reflect a divergent theory of federalism that minimizes the significance of state sovereignty in comparison with national interests and that posits a constitutional and statutory preference for federal over state courts as the guarantors of federal rights").

192. Alden v. Maine, 527 U.S. 706, 727 (1999) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 69 (1996)) (internal citation omitted).

193. *See supra* notes 51-53 and accompanying text.

194. *See Alden*, 527 U.S. at 761 (Souter, J., dissenting) ("Had the question been posed, state sovereign immunity could not have been thought to shield a State from suit under federal law on a subject committed to national jurisdiction by Article I of the Constitution.

Court says would have happened.[195] To see why this is implausible, it will be important to examine the Framers' intent.

IV. THE INTENT OF THE CONSTITUTION'S FRAMERS

When discussing sovereign immunity, the *Alden* Court relied on its understanding of the Framers' view of sovereign immunity. While admitting that some members of the founding generation had a different view,[196] the Court was confident that its position was shared by Hamilton, Madison, and Marshall, at least as their views were reflected in the ratification debates.[197] Yet, there are reasons to doubt that these individuals in particular or that the Framers in general shared the Court's view.

A. John Marshall

It might seem surprising to suggest that John Marshall subscribed to the robust view of sovereign immunity currently articulated by the Court. Justice Marshall wrote the opinion in *Cohens v. Virginia*, in which the Court made clear that the Eleventh Amendment merely precluded the federal courts from having diversity jurisdiction when a state was a party, and thus on its face the *Alden* Court's attribution to him of its own position is counter-intuitive.

In *Cohens*, Justice Marshall writing for the Court considered the "general proposition, that a sovereign independent State is not suable, except by its own consent."[198] While admitting that this "general proposition will not be controverted," he pointed out that "consent is not requisite in each particular case."[199] Instead consent "may be given in a general law."[200] For example, consent may be given by agreeing to become part of the Union.

To determine whether states had consented to suit by ratifying the Constitution, Justice Marshall suggested that an examination of "the instrument by which the surrender is made" would be required.[201] Because the American states and people had been taught

---

Congress exercising its conceded Article I power may unquestionably abrogate such immunity.").

195. *See* Field, *supra* note 155, at 5-6. Field explains:

> One oddity of this interpretational approach is that the Court is essentially saying the rule would be the same if the Eleventh Amendment were not there. The redundancy is not because the Amendment is unimportant, but because the principle it reflects lies at the root of the constitutional system.

Id.

196. *See Alden*, 527 U.S. at 725.

197. *See id.*

198. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 380 (1821).

199. *Id.*

200. *Id.*

201. *Id.*

by experience that the "government would be a mere shadow . . . unless invested with large portions of that sovereignty which belongs to independent States," the "American people, in the conventions of their respective States, adopted the present constitution."[202] Thus, Justice Marshall explained, the Framers had written the Constitution while cognizant of the need for the federal government to be ceded large portions of the states' sovereignty and, by virtue of becoming members of the Union under that constitution, the states had surrendered much of their sovereignty.[203]

That surrender of sovereignty might have been limited to issues of federal concern or might, in addition, have involved a general surrender of sovereign immunity in cases involving foreign citizens. Justice Marshall focused on the former, pointing out that the "general government, though limited as to its objects, is supreme with respect to those objects,"[204] and that the "ample powers confided to this supreme government . . . are connected many express and important limitations on the sovereignty of the States."[205] Thus, Justice Marshall in *Cohens* suggests that *Chisholm* was wrongly decided in that states have the power of deciding how to adjust their debts,[206] but that federal courts would have jurisdiction over a case involving a state and a foreign citizen were a federal question implicated.[207]

Justice Marshall considered whether "the nature of our constitution; the subordination of the State governments to that constitution; [and] the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department"[208] would nonetheless permit a jurisdictional "exception of those cases in which a State may be a party."[209] He suggested that the "spirit of the constitution" would not permit such an exception, and that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."[210] Thus, Justice Marshall made very clear that he would not subscribe to the analysis of sovereign immunity later offered by the *Alden* Court.

Lest one misunderstand his view, Justice Marshall considered the implications of a ruling to the contrary.[211] Specifically, he considered a case holding as follows: notwithstanding that the "constitution gave

---

202. *Id.* at 380-81.
203. *See id.*
204. *Id.* at 381.
205. *Id.* at 382.
206. *See id.* at 407.
207. *See infra* text accompanying notes 208-215.
208. *Cohens*, 19 U.S. (6 Wheat) at 382.
209. *Id.* at 382-83.
210. *Id.* at 383.
211. *See id.* at 383-84.

to every person having a [federal] claim upon a State, a right to submit his case to the Court of the nation,"[212] the Court nonetheless could not hear the case "because the State is a party."[213] He believed such a holding would have "mischievous consequences," and that these consequences could not be countenanced, since such a holding "would prostrate . . . the government and its laws at the feet of every State in the Union."[214] Thus, Justice Marshall made clear that "as the constitution originally stood, the appellate jurisdiction of this Court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party."[215]

In *Cohens*, Justice Marshall argued that states had surrendered much of their sovereignty under the original Constitution.[216] This is directly contrary to the *Alden* Court's claims about Justice Marshall's position. However, it might be argued, Justice Marshall wrote the majority position in *Cohens* years after the Constitution had been adopted, and it would be more accurate to consult what he said at the time of its adoption to ascertain his view or, perhaps, the views of those voting for ratification. Indeed, Marshall's argument in the ratification debates is cited as establishing that states would not be subject to suit in federal court, since he suggested that "[i]t is not rational to suppose that the sovereign power should be dragged before a court."[217] Yet, that statement may be misleading unless consideration is given to the context in which it was made.

The *Alden* Court quoted much of the following passage,[218] but did not closely analyze it. During the ratification debates, Marshall addressed the issue of suits between states and citizens of other states in the following way:

> With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there

212. *Id.* at 383.
213. *Id.* at 384.
214. *Id.* at 385.
215. *Id.* at 405.
216. *See* JACOBS, *supra* note 100, at 151 (suggesting that "a waiver of the states' immunity was altogether consonant with and even, as then understood, necessary to fulfill the great purposes of those who framed the Constitution").
217. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 555 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (quoting John Marshall); *see also* Christina Bohannan & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of* Seminole Tribe*?*, 67 FORDHAM L. REV. 1435, 1446 n.91 (1999) (discussing this passage).
218. The underlined sections are not quoted by the Court. *See* Alden v. Maine, 527 U.S. 706 (1999).

> not many cases in which the legislature of Virginia is a party, and yet the State is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?[219]

Marshall claimed that the intent of Article III was "to enable states to recover claims of individuals residing in other states."[220] In response to the argument that it would be unfair "if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state,"[221] Marshall said: "It is necessary to be so, and cannot be avoided."[222]

Marshall's response is surprising. One might wonder why "it" was necessarily so, since the discussion assumed the possibility of two different positions (the state's being suable or the state's not being suable) and the question at hand was which possibility it would be. If indeed one or the other position was necessarily so, more argument was required.

What has been underappreciated in the primary and secondary literature discussing Marshall's response is that it is ambiguous. More analysis is required to discern what he was saying. Given the charge that it is unfair to allow states to sue but not be sued, Marshall might be claiming either of the following: (1) because it would be unfair for a state to be able to sue but not be sued, it is necessarily so that *states are also suable*, or (2) even though it is unfair that states can sue but not be sued, that unfairness is acceptable because it would promote the greater good.

Marshall's next sentence is even more confusing. He suggests that he sees a difficulty in making a state a *defendant* but not a *plaintiff*, which at least on its face is a non sequitur because the issue at hand is whether a state can be made a plaintiff but not a defendant. There are at least two ways to explain his response. The first is either that

---

219. ELLIOT'S DEBATES, *supra* note 217, at 555-56 (underlining added).
220. *Id.* at 555.
221. *Id.*
222. *Id.* at 556.

he misspoke or that his comments were transcribed incorrectly and he really said or meant to say that he perceived difficulty in making a state a plaintiff but not a defendant. The second explanation, which is a little more complicated, is that the reporting is accurate, but that he had not yet finished making his argument.

Marshall argues that it should be presumed that an individual who has a *just* claim against a legislature will in fact receive satisfaction. Thus, that individual would have *no need* to go to court, and it would not matter whether the state is suable. "If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction?"[223] However, there is no presumption that the state will be compensated as long as its claim is just; thus, the state may need to go to court to press its suit against an individual. Marshall asked, "[H]ow could a state recover any claim from a citizen of another state, without the establishment of these tribunals?"[224] Thus, a state's suability and its ability to sue will be to the state's advantage because those who would win a judgment against the state would be paid by the legislature anyway, while the state will only be able to receive the monies it is owed if it can avail itself of the courts.

Marshall may have been dissembling when suggesting that it would be irrational to suppose that the sovereign would be dragged into court because, allegedly, the sovereign would always do the right thing.[225] However, his appeal to the difficulty in making a state a defendant but not a plaintiff, while turning the question at hand on its head, nonetheless suggests that Marshall saw the very fairness problem which Chief Justice Jay discussed in *Chisholm*.[226]

Marshall did not specify the difficulty he saw in making a state a defendant and not a plaintiff, although he implied that it was that the state would thereby lose financially. If that was the perceived difficulty, then an analysis is required of four possibilities: (1) the state could be a plaintiff but not a defendant, (2) the state could be a defendant but not a plaintiff, (3) the state could be both a plaintiff and

---

223. *Id.* at 556.

224. *Id.* Others suggest that Marshall was denying that states could be sued and that Marshall's interpretation was "strained." Gibbons, *supra* note 85, at 1907. The view offered here makes Marshall more consistent.

225. *Cf.* Gibbons, *supra* note 85, at 1906 (discussing Patrick Henry's claim that James Madison was "dissembling" in the ratification debates). When one claims that the King or sovereign can do no wrong, one might mean that the King/sovereign is not suable or that the King/sovereign is incapable of acting wrongly. *See* Jaffe, *supra* note 29, at 4 ("[T]he immunity of the sovereign from suit (sovereign immunity) and his capacity to violate or not violate the law ('the King can do no wrong') are distinct and independent concepts . . . ."). Marshall may have been appealing to the notion that the sovereign (legislature) is just and *will* not do wrong.

226. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 473 (1793); *see also supra* text accompanying note 70.

a defendant, and (4) the state could be neither a plaintiff nor a defendant. If the legislature would authorize the payment of all of its just debts anyway and, presumably, the courts would not require anything contrary to justice,[227] then the state would be a potential loser in (2) and (4). Insofar as he was addressing the only apparently financially advantageous position (1), Marshall implicitly was suggesting (a) that it would not in fact be financially preferable because the state would make the same payments whether or not potentially sued, and (b) there are other costs attached to permitting the state to sue but not be sued, for example, perceived unfairness. If he was not in addition arguing (b), then there would be no reason not to adopt (1), since there would be no costs to its adoption. Thus, if he were suggesting that the state should both be able to sue and be sued,[228] then he seems to have been taking unfairness concerns seriously. Otherwise, the answer to the question concerning the partiality of making states plaintiffs but not defendants would have been "Yes, but so what?," with no further discussion about either the presumption that legislatures would pay their debts *or* the implication that states would be losers unless able both to sue and be sued.

A further point about Marshall's discussion is in order. When commenting about the unfairness of allowing individuals to be sued but not to sue, he made it quite clear that he was addressing the issue of diversity jurisdiction in the federal courts. Where the abridgment of a constitutional right was at issue, he stated that the federal judiciary should have jurisdiction. Marshall asked rhetorically: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary?"[229] Further, he had already made quite clear that he was talking about the *federal* judiciary, since he had just been talking about the federal courts. Moments before, he had asked rhetorically: "Is it not necessary that the *federal* courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? . . . [W]here can its jurisdiction be more necessary than here?"[230]

It is debatable what Marshall was saying when addressing the unfairness of allowing states to sue but not be sued on nonfederal questions. However, at least two points must be made: (1) interpreting him to be saying that those who can sue must also be suable makes better sense of the entire discussion, and (2) in any event, that

227. *See supra* notes 30-35 and accompanying text (discussing the obligation to see that justice is done).

228. The proposition that states should be able to sue and be sued is implicit in Marshall's discussion of the difficulty in permitting the state to be defendant but not plaintiff and, presumably, in his suggesting that it would be preferable to permit the state to be plaintiff or defendant.

229. ELLIOT'S DEBATES, *supra* note 217, at 554.

230. *Id.* (emphasis added).

discussion involved a state debt which would be in federal court on diversity grounds. Marshall clearly stated that it was necessary for federal questions to be heard in federal court, *even if a state was a party*, *Alden*'s claims to the contrary notwithstanding.

B. James Madison

Marshall's response was characterized by the *Alden* Court as providing support for Madison's robust state sovereignty view.[231] Yet, Madison's views in the ratification debates were not as supportive of state sovereignty as the *Alden* Court implied.[232] For example, the Court pointed to Madison's response to the suggestion that the federal judicial power extended to controversies between a State and Citizens of another State, namely, that the Supreme Court's "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."[233]

Certainly, it might be thought that this supports a robust state sovereignty view. Yet, here, Madison was discussing federal diversity jurisdiction.[234] Furthermore, the Court neglected to mention that in the *same* address Madison had distinguished between a federal diversity case and a different kind of case that could come up in federal court. Precisely because it was not even an issue as to whether the latter could be heard, he spent relatively little time discussing it.

> 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. They may involve equitable as well as legal controversies. 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.[235]

Madison suggested that with respect to federal laws it was so necessary for the judicial and legislative power to correspond, that is, that the federal courts have jurisdiction to hear challenges involving federal laws, that no one was even questioning it. Thus, insofar as one only looks at the ratification debates, Madison's comments suggest both that *Chisholm* was wrongly decided and that federal courts

---

231. *See* Alden v. Maine, 527 U.S. 706, 755 (1999).

232. *See id.* at 2248 ("The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity.").

233. *Id.* at 2259 (quoting ELLIOT'S DEBATES, *supra* note 217, at 533). A different explanation is that Madison was dissembling here. *See* Gibbons, *supra* note 85, at 1906 ("[W]e are forced to consider a second explanation for his remarks—that, as Patrick Henry implied, Madison was merely dissembling.").

234. *See* ELLIOT'S DEBATES, supra note 217, at 531-34.

235. *Id.* at 532.

should be hearing cases involving federal questions even if states were parties.

Madison offered a similar view in the *Federalist Papers*. He argued that certain matters were appropriately left to the federal government and that certain matters should be left to the states. Thus, the national "jurisdiction extends to certain enumerated objects only, and leaves to the several states a residuary and inviolable sovereignty over all other subjects."[236] Here, Madison was suggesting that the federal courts should have jurisdiction over matters of federal concern.

Of course, there would be some question as to whether a particular matter was of national rather than state concern. Madison suggested that "in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general government."[237] Thus, not only did Madison believe that the federal courts should have jurisdiction over cases involving federal questions even if states were involved, but he argued that federal courts would have to decide whether federal issues were implicated in particular cases.

Madison, among others, recognized that "a right implies a remedy,"[238] and allowing states a robust sovereign immunity would undermine the connection between rights and remedies.[239] Indeed, Madison believed that it was very important that a variety of provisions of the federal constitution be enforced. "Bills of attainder, *ex post facto* laws, and laws impairing the obligations of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation."[240] He suggested that it was therefore quite good that the "convention added this constitutional bulwark in favour of personal security and private rights."[241] Yet, one must wonder about the extent to which personal security and private rights would have advanced if states would have been immune after violating these first principles of the social compact.

If Madison were confident that the states would never violate these rights, then perhaps there would be no need to have the federal courts available to enforce them. However, Madison believed that the states might attempt to violate these principles, suggesting that the

---

236. THE FEDERALIST NO. 39, at 195 (James Madison) (Max Beloff ed., 1987).
237. *Id.*
238. THE FEDERALIST NO. 43, at 221 (James Madison) (Max Beloff ed., 1987).
239. *See* Alden v. Maine, 527 U.S. 706, 810 (1999) (Souter, J., dissenting) ("So there is much irony in the Court's profession that it grounds its opinion on a deeply rooted historical tradition of sovereign immunity, when the Court abandons a principle nearly as inveterate, and much closer to the hearts of the Framers: that where there is a right, there must be a remedy.").
240. THE FEDERALIST NO. 44, at 228 (James Madison) (Max Beloff ed., 1987).
241. *Id.*

"sober people of America are weary of the fluctuating policy which has directed the public councils."[242] Indeed, Madison suggested that Americans "have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community."[243] Thus, states might violate the very important rights that had been safeguarded by the Constitution. If the federal courts were not to have jurisdiction over state violations of federal guarantees, there would be a right without a remedy.

While Madison might have believed that nonconsenting states could not be dragged into federal court for failing to honor contract provisions, he certainly believed that they could be brought into federal court for violations of federal law or constitutional guarantees. Whether one examines his comments during the ratification debates or his writings in the *Federalist Papers*, one sees that Madison was not the staunch states sovereignty advocate that the *Alden* Court makes him out to be.

C. Alexander Hamilton

Of the three, Alexander Hamilton seems to be the clearest example of a Framer who had a robust state sovereignty position. The *Alden* Court quoted Hamilton saying that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*,"[244] and in his dissent Justice Souter seemed to admit that Hamilton provided support for the Court's "absolutist view," although Justice Souter also cautioned that "Hamilton chose his words carefully."[245]

Yet, even Hamilton's views, properly understood, are no more compatible with the Court's than are the views of Marshall or Madison.[246] Hamilton responded to the suggestion that "an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities"[247] by pointing out, "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*."[248] However, lest one misunderstand his point, Hamilton

---

242. *Id.*

243. *Id.*

244. *Alden*, 527 U.S. at 715 (quoting THE FEDERALIST NO. 81, at 416-17 (Alexander Hamilton) (Max Beloff ed., 1987)).

245. *Id.* at 772 (Souter, J., dissenting).

246. Justice Souter seemed to sense this when he noted Hamilton's acknowledgement, the "States might have surrendered sovereign immunity in some circumstances." *See id.* (Souter, J., dissenting). However, Justice Souter did not explore the point.

247. THE FEDERALIST NO. 81, at 416 (Alexander Hamilton) (Max Beloff ed., 1987).

248. *Id.* at 416-17.

wrote in the same paragraph, "Unless, therefor, there is a surrender of this immunity in the plan of the convention, it will remain with the states."[249]

The question then becomes whether there is a surrender of that immunity in the plan of the Convention. Hamilton argued that "there is no colour to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith."[250] He further argued that it would be unwise to authorize suits against the states to force them to pay their debts. "To what purpose would it be to authorize suits against states for the debts that they owe?"[251]

Nonetheless, Hamilton clearly believed that by becoming part of the Union states would surrender some of their sovereignty. The only question was the specification of the "circumstances which are necessary to produce an alienation of state sovereignty."[252] Hamilton suggested that "the state governments would clearly retain all the rights of sovereignty which they before had, and which were not by that act, *exclusively* delegated to the United States."[253] He then proceeded to discuss the three cases in which this delegation or alienation of state sovereignty would occur:

---

249. *Id.* at 417; *see also* Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279, 288 (1973) (Marshall, J., concurring) ("The common-law doctrine of sovereign immunity . . . was modified *pro tanto* in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress . . . ."); Fletcher, *supra* note 152, at 1068-69 ("[A]fter 1788, much of their sovereignty was given up or, perhaps more accurately, was revoked and conferred upon another sovereign. The precise character of the state sovereignty that remained was not, and probably could not have been, made clear when the Constitution was adopted."); Jackson, *supra* note 8, at 81-82 (discussing Hamilton's comments); Nowak, *supra* note 6, at 1429 ("In *Federalist 81*, Hamilton only disclaimed the power of the federal judiciary to assume jurisdiction in damage suits against state governments; he did not maintain that Article III also denied Congress the right to grant federal court jurisdiction over suits against states."); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 684-85 (1976) (discussing the original understanding that states surrendered sovereign immunity only to the extent that doing so was inherent in accepting the constitutional plan).

250. THE FEDERALIST NO. 81, at 417 (Alexander Hamilton) (Max Beloff ed., 1987); *see also* John E. Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091, 1100 (2000) ("All of the reasons [Hamilton] expresses in *Federalist No. 81* for arguing against inherent jurisdiction over debt cases against state governments would not apply to the issue of whether Congress could create a regulation enforceable against state governments through court actions.").

251. THE FEDERALIST NO. 81, at 417 (Alexander Hamilton) (Max Beloff ed., 1987).

252. *Id.* However, he discussed the circumstances in which states relinquished sovereignty in his article on taxation and chose not to repeat them in *Federalist* 81.

253. THE FEDERALIST NO. 32, at 151-52 (Alexander Hamilton) (Max Beloff ed., 1987). However, this would not entitle states to violate federal protections with impunity. *See infra* notes 258-64 and accompanying text.

> where the constitution in express terms granted an exclusive authority to the union; where it granted an authority to the union and prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the state would be absolutely and totally contradictory and repugnant.[254]

To illustrate his meaning, Hamilton discussed the "clause which declares, that congress shall have power to 'establish an UNIFORM RULE of naturalization throughout the United States.' This must necessarily be exclusive; because if each state had power to prescribe a DISTINCT RULE, there could be no UNIFORM RULE."[255] Thus, where there was supposed to be one rule, states would neither be allowed to legislate nor to circumvent the federal rule because that would undermine the uniformity which the Constitution had sought to achieve when Congress was given this power exclusively.

Hamilton's claim is important to consider. Under his view, states have given up all sovereignty claims with respect to any of the Article I powers that have been exclusively given to Congress. Consider Congress's power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[256] Hamilton would suggest that the state would not have sovereign immunity with respect to issues implicating this power, *Seminole Tribe v. Florida*'s[257] implications to the contrary notwithstanding,[258] because Congress alone would have been given the power to regulate these areas and states would undermine that authority if they could plead sovereign immunity after having contravened Congress's will.

Hamilton made very clear that he recognized the need for enforcement of federal law against the states.[259] He said quite specifically that the "states, by the plan of the convention, are prohibited from doing a variety of things," and further suggested that no person "of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to re-

254. THE FEDERALIST NO. 32, at 152 (Alexander Hamilton) (Max Beloff ed., 1987).
255. *Id.*
256. U.S. CONST., art. I, § 8, cl. 3.
257. 517 U.S. 44 (1996).
258. *See id.* at 47 ("We hold that notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power, and therefore § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued."). Ironically, the *Seminole Tribe* Court cited Hamilton for support. *See id.* at 54. However, Hamilton would have suggested that the states had given up sovereign immunity with respect to this question when becoming part of the Union.
259. *See* THE FEDERALIST NO. 15, at 71 (Alexander Hamilton) (Max Beloff ed., 1987) ("There was a time when we were told that breaches, by the states, of the regulations of the federal authority were not to be expected; . . . [and that there would be] a full compliance with all the constitutional requisition of the great union. This language, at the present day, would appear . . . wild.").

strain or correct the infractions of them."[260] Thus, Hamilton, like Madison, recognized that states would violate federal law unless some system of effective enforcement were in place.

Hamilton discussed two different ways in which such an enforcement system might be structured. "This power must either be a direct negative on the state laws, or an authority in the federal courts, to over-rule such as might be in manifest contravention of the articles of union."[261] He then explained that the latter was "thought by the convention preferable to the former."[262] Thus, according to Hamilton, who allegedly was a robust state sovereignty theorist and advocate, a state violating federal law would be amenable to suit in the federal courts, even if the aggrieved party was a citizen of a foreign state who had, for example, wrongly been subjected to a tariff on her goods.[263]

Each of the theorists cited by *Alden* as having a robust state sovereignty view seemed at most[264] to believe that while nonconsenting states would not be subject to suit in federal court if state law were at issue, they would be subject to a federal court's jurisdiction if a federal law were at issue. When one further considers that one of the members of the *Chisholm* majority was also one of the writers of the *Federalist Papers* and that two others in the majority participated in the Constitutional Convention,[265] it does not seem plausible to believe that the Framers held the view of state sovereign immunity that has been ascribed to them by the Court.[266]

V. CONCLUSION

Chisholm was a very unpopular decision that eventually led to the adoption of the Eleventh Amendment. However, *Chisholm* did not involve federal question jurisdiction, and the shock that the decision caused cannot be inferred to have involved it, especially since even

---

260. THE FEDERALIST NO. 80, at 406 (Alexander Hamilton) (Max Beloff ed., 1987).

261. *Id.*

262. *Id.*

263. *See* THE FEDERALIST NO. 7, at 28-29 (Alexander Hamilton) (Max Beloff ed., 1987) (discussing tariffs and duties that might be imposed by a state to protect its own citizens).

264. It is unclear how to characterize Marshall, at least from his comments in the ratification debates. *See supra* notes 219-230 and accompanying text.

265. *See* Orth, *supra* note 174, at 1149 (noting that "the majority included two delegates to the Constitutional Convention barely five years earlier (Justices Wilson and Blair) and a co-author of The Federalist Papers (Chief Justice Jay)").

266. The Court does not seem to appreciate this, *see* Edelman v. Jordan, 415 U.S. 651, 660 n.9 (1974) (suggesting that the Framers did accept sovereign immunity even on federal questions), although numerous commentators have suggested a view different from the Court's. *See, e.g.*, Pfander, *supra* note 6, at 1273 ("[I]n truth, many Americans from the Federalist ranks supported state suability, and many understood Article III to have subjected states to suit in federal court to some degree.").

the *Chisholm* dissent did consider that to be the weakness in the majority's decision.

The Eleventh Amendment suggests that the Court should no longer construe the Constitution as it had in *Chisholm*. In other words, the Court should not read the Constitution to grant diversity jurisdiction to the federal courts where a state and foreign citizen are parties and only matters of state law are at issue. The Amendment was not intended, however, to remove federal court jurisdiction when federal questions were implicated, even if a state was one of the parties.

In *Ableman v. Booth*,[267] the Court pointed out that "it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be ceded to the General Government."[268] Not only was this sovereignty surrendered, but those setting up the Union believed that the federal government must be "strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities."[269] If federal courts were not empowered to hear cases involving federal law, then "the Constitution and laws and treaties of the United States, and the powers granted to the Federal Government, would soon receive different interpretations in different States, and the Government of the United States would soon become one thing in one State and another thing in another."[270] The Court noted that it was essential to the Federal Government's very existence that "it should have the power of establishing courts of justice, altogether independent of State power, to carry into effect its own laws."[271]

The need for one effective federal law could not be satisfied if states were able to avoid suits in federal court by pleading sovereign immunity. As the Framers realized, there would be, at most, a confederation of states rather than one Union, if large portions of state sovereign immunity had not been surrendered when states ratified the Constitution; a confederation was exactly what the Framers sought to replace when arguing for the ratification of the Constitution.

The current sovereign immunity interpretation offered by the Court does not represent the intentions of the Framers, claims to the contrary notwithstanding. It may well be that at least some of the Framers did not believe that nonconsenting states should be subject to federal court jurisdiction on diversity grounds; however, a re-

267. 62 U.S. (21 How.) 506 (1858).
268. *Id*. at 517.
269. *Id.*
270. *Id.* at 518.
271. *Id.*

quirement that states must always give permission to be sued by a foreign citizen in federal court would have been too close to the bad experience under the Articles of Confederation ever to have been acceptable

In discussing the defects of the Articles of Confederation, Alexander Hamilton suggested that "[t]he fundamental defect is a want of power in Congress."[272] He cautioned against permitting "an uncontrolable sovereignty in each state . . . [which would] defeat the other powers given to Congress, and make our union feeble and precarious."[273] Hamilton understood that there would be "instances without number, where acts necessary for the general good, and which rise out of the powers given to Congress"[274] would nonetheless be resisted by the states, and that there would be many instances in which states could "effectually though indirectly counteract the arrangements of Congress."[275] Unless the federal courts had jurisdiction to hear cases in which the states were thwarting federal laws or, perhaps, were abridging the rights of citizens guaranteed by the Federal Constitution, the plan of the Convention would effectively be subverted.

James Madison discussed one of the difficulties of the Confederation, namely, a "want of sanction to the laws, and of coercion in the Government of the Confederacy."[276] He suggested, "A sanction is essential to the idea of law, as coercion is to that of Governmment. The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution."[277] He tried to figure out from "what cause so fatal an omission have happened in the articles of Confederation,"[278] and suggested that it was "from a mistaken confidence that the justice, the good faith, the honor, the sound policy, of the several legislative assemblies would render superfluous any appeal to the ordinary motives by which the laws secure the obedience of individuals."[279] He thus made clear his belief that the states would also have to be subject to the courts and to the coercion that might be imposed there if the Constitution and the federal laws were to be the "supreme Law of the land."[280] He, like others, had learned from previous experience under the Articles of Confederation that states

272. 1 THE FOUNDERS' CONSTITUTION 150 (Philip B. Kurland & Ralph Lerner eds., 1987) (Alexander Hamilton to James Duane, September 3, 1780).
273. *Id.* at 151.
274. *Id.*
275. *Id.*
276. *Id.* at 167 (James Madison, Vices of the Political System of the United States, Apr. 1787).
277. *Id.*
278. *Id.*
279. *Id.* at 167-68.
280. U.S. CONST., art. VI, cl. 2.

would likely be tempted to undermine federal law and that the *federal* courts would have to decide when states were overstepping their bounds.[281]

John Marshall argued that federal courts would have to have jurisdiction over issues involving the Constitution and federal laws. He suggested this both in *Cohens* and also in the ratification debates.[282] He, like the other Framers, understood that the consequences of allowing states to plead sovereign immunity when violating federal law or abridging individual rights under the Constitution would be too "mischievous"[283] to be tolerated.

The current Court claims to base its robust state sovereign immunity view on the intentions of the Framers. Yet, the Framers had just experienced the consequences of having a weak central government where states might put their own perceived interests over the interests of the nation as a whole. The Framers understood what the Court apparently does not: unless states can be forced to appear in federal court, they will violate federal law and subvert national interests with impunity, whether directly or indirectly.[284] The Court's current interpretation of state sovereign immunity does not comport with the language of the Constitution, the Framers' intentions, or a policy likely to promote the interests of the nation as a whole, and must be corrected at the first opportunity.

---

281. *See supra* text accompanying note 238.

282. *See supra* notes 198-230 and accompanying text.

283. *See supra* text accompanying note 214.

284. While this is mitigated because of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), that doctrine will not do the trick entirely, as *Seminole Tribe* suggests, *see Seminole Tribe*, 517 U.S. at 47 (holding that *Young* did not allow the instant suit to be brought against a state official), because the Court's current rationale would support restricting *Young* protections. If indeed a state sovereignty is as robust as the current Court suggests, the *Young* exception, which permits suit against state officials for injunctive relief even without the state's consent, would seem difficult to justify.