BOOK REVIEW

THE CONSPIRACY THEORY OF THE ELEVENTH AMENDMENT


Reviewed by Michael G. Collins†

The Supreme Court's treatment of the eleventh amendment has few fans, and John Orth is not one of them. Although the language of the 1798 amendment may not say as much, the Court has read it to embody a general principle of sovereign immunity that ordinarily prevents private parties from suing a state in federal court without its consent. The price of this immunity from suit is frequently the loss of effective governmental accountability for violations of federal law. In response to the Court's reinvigoration of the amendment's bar in the early 1970s, there has been a steady stream of scholarship suggesting alternative approaches to the amendment to make states fully accountable in federal court. So far, the Court has not budged, although four of its members, and possibly a fifth, may now be prepared to consider wholesale changes to the immunity doctrine that has survived, more or less intact, for the last hundred years.

Orth's slender volume is vastly different from the usual run of eleventh amendment scholarship. He has not offered an internal critique of the development of Supreme Court doctrine, nor has he tried simply to divine the original intent of the amendment's eighteenth-century framers. Instead, Orth has told a lively and original story: how historical

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1. U.S. Const. amend. XI. The amendment provides:
   The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.
events following the Civil War and Reconstruction helped to shape permanently the Court’s interpretation of the eleventh amendment, and with it, the present scope of federal judicial power over the states (pp. 7-11).

His thesis is both powerful and provocative. He argues that the current state of eleventh amendment law is directly linked to the so-called “Compromise of 1877”—the notorious deal struck between the Republican party and the South to end Reconstruction in exchange for political support of the party’s presidential candidate. How those century-old electoral maneuverings, the subject of historical scholarship and even a best-selling novel, could affect the eleventh amendment is puzzling indeed. Yet Orth finds a connection in the lurid world of the post-Reconstruction southern bond market. He believes that in keeping with the spirit of the Compromise and the passing of Reconstruction, the Supreme Court helped the South out of its staggering, multi-million dollar post-Civil War debt crisis (pp. 3-6). According to Orth, the Court effectuated this goal by manipulating existing eleventh amendment doctrine to make it nearly impossible to enforce the states’ financial obligations. Previous judicial construction of the amendment, insists Orth, had never imposed such a barrier to accountability. He concludes that only after the debt crisis died down, sometime after 1890, did the Court soften its rigid approach to sovereign immunity to accommodate enforcement of economic rights under the fourteenth amendment’s due process clause.

The evidence that he marshals provides a plausible explanation for the Court’s willingness, immediately following Reconstruction, to erect barriers to the suability of southern states and their officials in federal court. Nevertheless, even though federal jurisdiction was denied in most of the post-1877 southern bond cases that reached the Court, these rulings may not have marked as radical a break with tradition as Orth believes. In addition, there were other contemporaneous events,


7. See also 3 C. Warren, The Supreme Court in United States History 385 (1922) (noting that one writer in 1883 estimated southern debt to be in excess of $200,000,000, including interest); C. Woodward, Origins of the New South, 1887-1913, at 86-87 (1971) (estimating that southern debt plus interest was in the neighborhood of $274,578,000).
such as the denial of immunity for cities and counties, and the State of Virginia's inability to escape accountability, that are hard to explain in terms of Orth's basic thesis. These "exceptions" to the hands-off treatment of the South tend to suggest that there was a strong element of continuity in the application of the eleventh amendment during this period. To that extent, a causal connection between the historical events on which Orth focuses and the development of eleventh amendment doctrine becomes harder to draw. This Review will therefore explore other possible explanations for the pattern of immunity rulings in the post-Reconstruction era, and will reconsider the extent to which the Compromise of 1877 may fairly be said to have influenced the Supreme Court's development of jurisdictional doctrine.

I. THE ELEVENTH AMENDMENT—THE COURT AND ITS CRITICS

A. The Amendment in the Court

The eleventh amendment bars federal court jurisdiction over "any suit in law or equity, commenced... against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The story of its enactment is by now a familiar one. It was proposed in response to *Chisholm v. Georgia*, in which the Supreme Court upheld federal jurisdiction over a contract action brought by citizens of South Carolina to compel Georgia to pay them for goods sold and delivered. Article III of the Constitution had expressly conferred federal jurisdiction over cases "between a State and Citizens of another State." The *Chisholm* Court understandably concluded that this "diversity" provision of article III allowed suits to which a state was a party whether brought by out-of-staters or against them. The enactment of the eleventh amendment on the heels of *Chisholm* meant, at the very least, that the diversity provision was a one way street: suits could be brought by states against out-of-staters, but not the other way around.

The Court later concluded in *Hans v. Louisiana*, that the federal judicial power did not extend to federal question suits against a state by private parties, no matter what state the plaintiff was from. That the words of the eleventh amendment fell short of prohibiting suits in federal court by citizens against their own states did not matter. The Court apparently concluded that the amendment was simply illustrative of a sovereign immunity principle implicitly embodied in article III. *Hans'* logic later compelled the Court also to conclude that admiralty

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8. For a detailed account, see C. Jacobs, The Eleventh Amendment and Sovereign Immunity 46-74 (1972); Gibbons, supra note 5, at 1895-1941.
9. 2 U.S. (2 Dall.) 419 (1793).
11. 134 U.S. 1 (1890).
suits could not be brought against states, even though they are not either "suit[s] in law or equity" to which the amendment speaks.\textsuperscript{13}

Nevertheless, despite Hans' prohibition of federal question suits against states, the Court later affirmed in \textit{Ex parte Young}\textsuperscript{14} that federal courts had the power to enjoin a state officer's judicial enforcement of an unconstitutional statute. It did so on the theory that the officer was individually liable for any actionable injuries that he might cause and was not himself shielded by the cloak of sovereign immunity when acting under such a statute. Finally, after the Warren Court broadly construed congressional power to abrogate state sovereign immunity,\textsuperscript{15} federal courts were also able to make states pay damages for their violations of federal statutory law.

Within that framework, the eleventh amendment might just have been a minor nuisance and not a serious obstacle to relief against the states. The amendment, however, has undergone a renaissance in the last fifteen years. In 1974, in \textit{Edelman v. Jordan},\textsuperscript{16} the Court rejected jurisdiction over a suit to compel a state officer to pay benefits that the state withheld in violation of federal law from a class of welfare recipients. Because the funds would have to come from the state treasury, the Court concluded that the suit was really against the state, even though the state had not been named as a party. The Court also concluded that Congress had not abrogated the states' immunity from federal suits in its welfare statutes. Relying on a decision from the previous term that made it harder for federal courts to find such constructive waivers of immunity,\textsuperscript{17} \textit{Edelman} concluded that Congress had not spoken with sufficient clarity in its welfare statutes about putting states on the hook financially for their violations of federal law.

\textit{Edelman}, however, distinguished the injunctive relief that compelled state officers to comply with federal law prospectively. The eleventh amendment prohibited only "retrospective" relief against the state, such as disgorgement of funds from the treasury to compensate for past harms.\textsuperscript{18} The Court backtracked from its no-raid-on-the-treasury approach, however, when it recognized that monetary payments were permissible if they were merely "ancillary" to compliance with

\textsuperscript{13} See Ex parte New York, 256 U.S. 490 (1921).
\textsuperscript{14} 209 U.S. 123 (1908).
\textsuperscript{16} 415 U.S. 651 (1974).
\textsuperscript{18} \textit{Edelman} did not interfere with the availability of damages under 42 U.S.C. § 1983 (1982) in suits against state officials in their personal capacity for their own violations of the Constitution or federal law. See 415 U.S. at 664. Individual immunities, however, may thwart recovery against officers in their personal capacity. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982).
prospective relief.\textsuperscript{19} \textit{Edelman} also confirmed the modern power of the federal judiciary to compel the states through an order of affirmative relief against state officers to carry out federal law—relief that Orth's work demonstrates had historically not always been available.\textsuperscript{20}

Of course, neither the eleventh amendment nor article III distinguished between monetary and injunctive relief. Nor did they contain an exception for "ancillary" monetary relief or draw any distinction between prospective and retrospective relief.\textsuperscript{21} And the possibility that a constitutionally based limit on the subject matter jurisdiction of the federal courts could be "waived" or abrogated was curious indeed.\textsuperscript{22} \textit{Edelman} thus highlighted the confusing and sometimes anomalous rules surrounding interpretation of the eleventh amendment, many of which were developed in order to mitigate the harshness of cases such as \textit{Hans} that had made it impossible to sue the states directly for their violations of the Constitution. Post-\textit{Edelman} developments have seen a strengthening of the role played by the eleventh amendment and a narrowing of the circumstances in which the Court will find a congressional abrogation of state sovereign immunity.\textsuperscript{23}

B. The Amendment Among the Critics

This reinvigoration of sovereign immunity has generated an avalanche of scholarship seeking to make states more fully accountable in federal court for their violations of federal law. The theories have been as numerous as the critics.

Some have argued that the eleventh amendment should be taken literally: to bar only suits against states by out-of-staters, but not to bar suits against states by their own citizens.\textsuperscript{24} Thus, for example, a federal question suit would be allowed against a state in federal court when prosecuted by its own citizens, but not when prosecuted by citizens from another state. Others have concluded that because the eleventh

\textsuperscript{19} 415 U.S. at 667; cf. Milliken v. Bradley, 433 U.S. 267 (1977) (state's monetary expenditure to comply with prospective injunction to remedy past racial discrimination in school system held "ancillary").

\textsuperscript{20} See infra text accompanying notes 99-106.


\textsuperscript{23} Compare, e.g., Atascadero State Hosp. v. Scanlon, 473 U.S. 294, 242 (1985) (requiring that evidence of congressional abrogation of state immunity be "unmistakably clear in the language of the statute") with, e.g., Hutto v. Finney, 437 U.S. 678 (1978) (immunity abrogated although only legislative history, not statute, was explicit). See also, e.g., Green v. Mansour, 474 U.S. 64 (1985) (court's order of "notice" of lost welfare benefits was retrospective); Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) (Young's authority-stripping rule held inapplicable to pendent state law claim for prospective relief).

amendment is a limit only on the *judicial* power of the federal courts, it poses no limit to congressional legislative power to make states suable on federal law claims in state courts.\(^{25}\)

Still others have looked beyond the words of the amendment and made the argument from history and framers' intent. Martha Field, for example, has argued that article III does not, contrary to the usual reading of *Hans*, embody a constitutional principle of sovereign immunity at all.\(^{26}\) Instead, both prior to the Constitution and after its ratification, there existed an ancient, nonconstitutional "common law" of sovereign immunity that barred suits against unconsenting states on common-law or state-law causes of action. Article III neither abrogated nor constitutionalized this common-law immunity. The *Chisholm* Court's mistake, which the eleventh amendment was designed to correct, was in thinking that article III's language permitting suits "between a State and Citizens of another State" had abrogated this immunity. Under Field's approach, the only constitutional limitation on suing states is the eleventh amendment's prohibition on suits by out-of-staters based on state law or common law (such as *Chisholm*). Federal question suits based on congressionally created causes of action could be brought against the states in federal court because, to the extent that Congress was given enumerated powers in the Constitution, the states waived their common-law immunity.\(^{27}\)

A related theory put forward recently by William Fletcher, but founded more on considerations of the Constitution's structure, maintains that the eleventh amendment only deals with the nonsuability of states by out-of-staters when the sole basis for invoking federal jurisdiction is the "status" of the parties.\(^{28}\) In some cases, article III confers jurisdiction solely because of the status of the parties regardless of the

\(^{25}\) See id. at 297-98 (Marshall, J., concurring).


\(^{27}\) See Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States, 126 U. Pa. L. Rev. 1203, 1205, 1212-40 (1978); see also The Federalist No. 81, at 549 (A. Hamilton) (J. Cooke ed. 1961) (noting that waiver of states' immunity from suit might be found in "the plan of the convention"); Gibbons, supra note 5, at 1934 (the intent and history of the eleventh amendment confine its application to diversity suits). Others, focusing more on federalism and separation of powers concerns, have reached conclusions offering results similar to Field's—that when Congress acts under its constitutionally granted powers, it can abrogate state immunity to suit in federal court. See, e.g., Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 Colum. L. Rev. 1413 (1975); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682 (1976).

subject matter of the litigation (for example, diversity of citizenship suits; suits between States and out-of-staters; suits where the United States is a party); while in other cases it confers jurisdiction based on the subject matter of the litigation without regard to the parties’ status (for example, admiralty and federal question suits). According to Fletcher, the eleventh amendment was written only to elucidate the party-status grant of jurisdiction in article III over suits “[b]etween a State and Citizens of another State” by making clear that this language meant that states could sue out-of-staters in federal court, but not vice-versa. Under Fletcher’s theory, the eleventh amendment has no application whatsoever to cases where the basis of jurisdiction is the subject matter of the litigation rather than the identity of the parties. Thus, a federal question suit could be brought against a state in federal court, either by that state’s citizens or by citizens of other states, despite the amendment’s flat prohibition of “any” suit in law or equity against a state by an out-of-stater.29

II. Orth’s Thesis Considered: Compromise or Continuity?
A. The Ambivalent Legacy of the Southern States

One thing that most eleventh amendment critics share is a dissatisfaction with the nineteenth-century precedents that curtailed suits against states and produced a crazy quilt of jurisdictional rules.30 Orth agrees. For him, however, the wrong turns were not simply cases of doctrine gone astray; they were deliberate actions taken by the Supreme Court in response to the southern states’ desire to escape their debts and the post-Reconstruction Court’s desire to bail them out.

To establish his case, Orth focuses primarily on three of the most notorious debt repudiators: Louisiana, North Carolina and Virginia. These, like other southern states, faced severe indebtedness in the 1870s and 1880s, much of which had been incurred or refinanced by unpopular Reconstruction state governments (pp. 3–6). Most of the indebtedness had taken the form of state obligation bonds, with detachable coupons representing yearly interest, that were issued to creditors to obtain money necessary to pay state expenses. Both the southern states’ indebtedness and their inability to pay the ever-accumulating interest were direct consequences of the devastation suffered in the Civil

29. See Fletcher, supra note 28, at 1060–61. Suits in admiralty, which are neither suits at law nor in equity, could also be brought against states under this theory. But see supra note 13.

War—a situation exacerbated by bouts of governmental mismanagement, corruption and national financial “panics” (p. 53).

Orth explains that, as Reconstruction drew to a close in the mid-1870s, political battle lines were drawn in the South over the issue of whether the states’ creditors—many if not most of whom lived elsewhere (p. 59)—should be paid. Those who opposed continuation of Republican Reconstruction and who looked to the return of “home rule” in the South were typically in the vanguard of the repudiation movement. Calling themselves “Readjusters” or, in one state, “Coupon Killers,” they expressly advocated reducing or eliminating the bonded indebtedness and the interest on it. In general, the advocates of repudiation fared well politically against their opponents and succeeded in their goal of enacting debt adjustment legislation.

Repudiation of the southern debt would have been no more than a political gesture, however, without the aid of the courts. A combination of unrelated events made a federal court confrontation between states and the bondholders inevitable. Before the Civil War, the Supreme Court had concluded that the contract clause prohibited a state’s repudiation of its own contracts. In addition, in 1875, Congress finally provided for federal trial court jurisdiction over all cases arising under the Constitution and federal law. Also, despite the eleventh amendment’s ban on suits by out-of-staters in federal court, precedent as far back as Osborn v. Bank of the United States suggested that some forms of relief might nevertheless be sought against a state’s officers. In theory, southern state courts were also available, but, concludes Orth, they were not about to do the dirty work of enforcing state debts (pp. 45, 155). The stage was therefore set, and plausible arguments existed, for federal court challenges to state debt repudiation. The obvious expedient for the debtor states was somehow to bar the federal courthouse doors.

31. Reconstruction ended earlier in some states than others (pp. 58–59, 63–64, 91). In some states, Reconstruction hardly ever got off the ground. See generally J. Franklin, Reconstruction: After the Civil War 194–217 (1961) (discussing obstacles to achievement of Reconstruction goals).

32. See also C. Jacobs, supra note 8, at 114, 119.

33. Orth gives a vivid account of their rise to power. In his discussion of D.W. Griffith’s silent movie, Birth of a Nation (1915), and Margaret Mitchell’s novel, Gone With the Wind (1936), Orth provides two convincing examples of how regionalism and racism mixed well with the glorification of the repudiationists’ cause in the popular imagination of even this century (pp. 85, 87–88).

34. See, e.g., Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); see also U.S. Const. art. I, § 10, cl. 1 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ”).


36. 22 U.S. (9 Wheat.) 738 (1824). In Osborn, the Court held that sovereign immunity did not bar a suit against a state officer to recover money he had seized while collecting an unconstitutional state tax and was keeping in a trust. See id. at 741–44.
Orth believes that the Compromise of 1877 showed the way. A dispute over the electoral vote count in the 1876 presidential election triggered a congressional investigation to see whether the Democrat, Samuel Tilden, or the Republican, Rutherford Hayes, had been elected. Votes from three “unredeemed” states—ones that had yet to cast off the last remnants of Reconstruction government and return to home rule—were in dispute (pp. 53–54, 65).37

A congressionally appointed electoral commission eventually gave the election to Hayes even though Tilden had won the popular vote and needed but one of the twenty disputed electoral votes to secure the election. The commission, which voted along party lines, consisted of five Republicans and five Democrats from Congress, plus five members of the Supreme Court. From the Court were two Democrats (Justices Clifford and Field), two Republicans (Justices Strong and Miller), and, after another member dropped out, Justice Joseph Bradley, the tie-breaking Republican. Bradley, as the “Fifth Judge,” wrote the decisions of the electoral commission and gave the election to Hayes. When northern Democrats in Congress tried to challenge the results of the commission, they were deserted by many southern Democrats who had suddenly become strange bedfellows with the Republicans.38

The usual story surrounding Hayes’ remarkable good fortune is that a deal had been struck between influential Republicans and southern congressional Democrats to secure support for the commission’s decision and the Republican candidate in exchange for the removal of the few remaining federal troops from the South. As C. Vann Woodward has noted, however, the importance of that particular agreement has been overestimated.39 Rather, Woodward asserts, the pivotal bargain of 1877 that guaranteed Democratic support for Hayes was a less well-publicized agreement by Republicans (which they eventually abandoned) to obtain various forms of federal subsidies for internal improvements, especially railroad construction, to get the South back on its feet.40

In Orth’s view, the Compromise affected the eleventh amendment’s development in an indirect but decisive way. Prior to the time of the Compromise, the eleventh amendment had not been an appreciable barrier to relief against the states in federal court. But after the Compromise, according to Orth, when cases arose concerning the repudiation of the South’s debt, the Court changed its tune. By finding a way to close the federal courthouse doors to bondholders, the Court stuck to the spirit of the Compromise and preserved home rule. Had the Court done otherwise and ordered the southern states to pay up, it would have confronted, says Orth, the spectre of sending in federal

37. There was also one electoral vote in question from the State of Oregon (p. 53).
38. See C. Woodward, supra note 6, at 148–49.
39. See id. at 11–12.
40. Id.
troops to enforce its order—the most visible badge and incident of Reconstruction (pp. 103–04).41

The protagonist of the Court’s dramatic doctrinal shift and its turn away from the promise of Reconstruction was none other than Justice Bradley, the political kingmaker of the electoral commission. Orth pulls out all the stops in his criticism of Bradley, whom he describes here as a “chameleon” caught changing his colors in an effort to bring an end to Reconstruction (p. 79).42 For Orth, the bond cases comprise a significant chapter in the high Court’s more general43 and more familiar retreat from the promise of Reconstruction in the latter part of the nineteenth century.

The story surrounding the efforts at debt repudiation in Orth’s three chosen states, as well as in other southern states, paints a clear and unflattering picture of the post-Reconstruction South scrambling to return as far as possible to the antebellum status quo. It is also clear that the Court’s eleventh amendment decisions in the immediate post-Reconstruction period had the effect of enabling the South to escape much of its indebtedness. However, whether the story of repudiation also provides an equally unflattering portrayal of the Supreme Court manipulating eleventh amendment doctrine to the end of emancipating the South from Reconstruction is far less certain.

B. Shifts in Doctrine and Repudiation of the Southern Debt

Orth’s approach is to bring much needed historical light to the development of Supreme Court doctrine. His conclusion about the influence of historical events, however, itself rests upon a doctrinal premise—that eleventh amendment decisions following the Compromise reflected a major break with prior tradition. The premise is debatable. Most commentators agree that the amendment underwent significant development during the last quarter of the nineteenth century.44 Yet it is not nearly so clear how much of a break with tradi-

41. But cf. C. Woodward, supra note 6, at 9–11 (questioning the central role of troop withdrawal in securing 1877 deal). See also infra notes 102–03 and accompanying text.


44. See, e.g., C. Jacobs, supra note 8, at 121–22; Gibbons, supra note 5, at 1982–2003. But cf. Currie, supra note 21, at 152–54 (noting relative consistency of
tion was revealed by the southern bond cases.

The possibility that the Court's eleventh amendment doctrine did not undergo a major shift in the bond cases would not invalidate the thesis that the Court was quietly enforcing the Compromise or remaining true to its spirit when it ruled on the suability of the states after 1877. But to the extent that the decisions reflect no clear break in the doctrinal tradition of the eleventh amendment, it weakens the case that the Compromise of 1877 transformed the amendment's development. To a considerable degree, therefore, the persuasiveness of Orth's historical thesis turns on a close reading of the Court's often complex eleventh amendment cases decided during this formative period. His primary targets are the Court's development of restrictions on suits against state officers and restrictions on federal question suits against states themselves.

1. Restrictions on Suits Against State Officers.—The first signs of the doctrinal shift sketched by Orth were the Court's decisions that certain actions against state officers were really impermissible suits against the state. For Orth, the states' victories in these cases, led by Louisiana, marked a break with tradition because of the Court's decision to renounce the implication of Osborn and to treat the eleventh amendment as something more than a pleading rule that simply required litigants to avoid naming the state itself as a defendant (pp. 58, 61).

During Reconstruction, in an effort to scale down its debt, Louisiana passed a “Funding Act” to encourage existing bondholders to swap their old securities for new but less valuable “consolidated” ones. To make the exchange desirable, the state fixed a high rate of interest on the consolidated bonds, enacted a special tax dedicated solely to paying off the debt and interest, and agreed to offer the new securities only to those who already held old ones. Two years after the withdrawal of the last Union troops in 1877, however, the state reneged by eliminating the current interest payment altogether and drastically lowering the interest payable for future years. It also directed that the taxes already gathered for interest payments be used for other state expenses (pp. 63–67).

Bondholders tried a variety of tactics to collect on their debt and redress the violation of the contract clause. In *Louisiana v. Jumel*, out-of-state bondholders sued the state auditor and other officials to prevent them from using the collected tax receipts for any purpose other than paying the interest due on the bonds. Attempting to avoid the eleventh amendment bar, the plaintiffs named only state officers as defendants, not the state. In coordination with the *Jumel* action, two northern states also brought suit on behalf of their resident bondhold-
ers in New Hampshire v. Louisiana. The plaintiff states figured that they could avoid the eleventh amendment because it did not mention suits between states and because article III expressly allowed them.

The Supreme Court, however, concluded that the eleventh amendment barred all of the suits. The Court characterized Jumel as being in effect a suit against the state because, even though brought against state officers, it sought to compel the state to perform its contracts. The Court threw out the New Hampshire suit because the state was not suing on its own behalf, but only as a surrogate for private investors who would have been barred from federal court by the express terms of the eleventh amendment.

Although precedent hardly foreordained the result in Jumel, the decision did not mark as radical a break with the past as Orth assumes. For example, he slights the opinion for its abandonment of Osborn’s party-of-record rule—the notion that the eleventh amendment was not a barrier to jurisdiction in suits against state officers so long as the state was not formally named as a party (pp. 58, 61). To be sure, Chief Justice Marshall had set up such a rule in Osborn. But in Governor of Georgia v. Madrazo, Marshall himself had indicated that a suit would not be allowed to go forward against an officer just because the plaintiff avoided the crude pleading error of naming the state as a defendant. The Court noted that, even were the state not named, the defendant officer still had to have a real interest in the controversy familiar to the common law—enough to “justif[y] a decree against him personally.”

46. 108 U.S. 76 (1883). The other plaintiff was the State of New York. Counsel for New Hampshire included the same attorney who represented the plaintiffs in the Jumel litigation. See id. at 78.
47. See 107 U.S. at 720-22.
48. See 108 U.S. at 91.
49. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), Chief Justice Marshall drew a distinction between cases in which the state was merely interested, and those in which the state was a formal party of record. See id. at 852-54. He concluded:

[T]he 11th amendment . . . is, of necessity, limited to those suits in which a State is a party on the record . . . . The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

Id. at 857-58.
51. Id. at 124. In Madrazo, the plaintiff sought possession of slaves who had been illegally imported into the country and lawfully seized pursuant to statute, and who were being held by Georgia officials. Plaintiff also sought to recover proceeds paid into the state’s treasury and “mixed up with its general funds” from the sale of other seized slaves. Id. at 123. Although it is possible to minimize Madrazo as a case of bad pleading—the defendant Governor was named in his official rather than his individual capacity, thus joining the state—the case seems to have turned on the nonavailability of relief against the Governor in his individual capacity. See id. at 124 (“But were it to be admit-
If this private law model of individual liability could not be satisfied for some reason—if, for example, there was no cause of action at common law on which the officer could be personally accountable—there could be no relief against the officer, quite apart from the question of jurisdiction and sovereign immunity.\(^5\)

It is true that the few sovereign immunity cases decided immediately before *Jumel* seemed to forget about the qualifying language in *Madrazo*.\(^5\)\(^3\) But those, like *Osborn* itself, were cases in which officials had been asked to return or not alienate specific property in which the plaintiff had an ownership interest and which officers had taken or were threatening to dispose of in violation of federal law.\(^5\)\(^4\) Relief was therefore possible in those cases because agents had historically been personally liable for their own torts or breaches of personal duty at common law even when acting on a principal's behalf. Although officers might escape individual liability if their act of seizing or disposing of the plaintiff's property had been authorized by a valid state statute, an unconstitutional statute would not help them. If the statute was invalid, the officers stood personally liable and suable at common law in tort for their wrongful and "unauthorized" trespass against the plaintiff.\(^5\)\(^5\)

However, as David Currie has recently reminded us, the rules at common law in actions on a contract were different from the rules in tort actions: in contract actions agents could not properly be sued because the principal alone was a party to the contract.\(^5\)\(^6\) Accordingly, the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally . . . . [N]or could a decree against him, in that character, be supported.\(^5\)\(^2\); see also Currie, supra note 21, at 151 (noting that Marshall's language in *Madrazo* "suggest[ed] that the flaw was not merely one of pleading"). Orth treats *Madrazo* as a pleading case (p. 41).

\(^5\)\(^2\) *Osborn*, in fact, had expressed similar sentiments. See 22 U.S. (9 Wheat.) at 858; see also supra note 49.

\(^5\)\(^3\) See, e.g., United States v. Lee, 106 U.S. 196 (1882) (ejectment action allowed against federal officers); Board of Liquidation v. McComb, 92 U.S. 531 (1875) (injunction allowed against state officers to prevent transfer to third parties of bonds that were held in trust for plaintiffs) (discussed infra text accompanying notes 60–66); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872) (injunction allowed against governor to prevent transfer to third parties of property in which plaintiffs had an equitable interest under state law).

\(^5\)\(^4\) Neither Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872), nor *McComb* was strictly a trespass, see Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 26 (1963), but state law had imposed a personal duty on the officers not to transfer property to third parties in which plaintiffs had a proprietary (or equitable) interest.

\(^5\)\(^5\) Thus, the Constitution seemed to enter the picture primarily to test the validity of the statute under color of which the agent had acted. See Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1119–39 (1969) (discussing pleading of constitutional cases in nineteenth century).

\(^5\)\(^6\) See Currie, supra note 21, at 153–54; see also Engdahl, supra note 44, at 20 (discussing tort/contract distinction). The simple tort/contract distinction may have
officers, as mere agents of the state, could not be sued for breach of the state’s contracts even if the breach violated the Constitution. Although Orth does not say so, this distinction probably explains Jumel’s outcome. In Jumel, the wrongfully withheld tax revenues had come lawfully, not tortiously, into the possession of the state.\textsuperscript{57} There was, therefore, no trespassory activity of state officers that the Jumel bondholders were seeking to redress. The officers’ failure to pay interest out of the state’s funds had injured the bondholders, but that injury arose from a breach of the state’s contract for which it alone could be sued. The distinction respecting contractual recovery against a sovereign, moreover, had been a familiar one in suits against federal officers.\textsuperscript{58}

Yet, just because officers could not personally be sued for contractual relief did not mean, as Jumel seemed to indicate, that a contract action against them was therefore a suit against the state.\textsuperscript{59} But Jumel’s refinement—turning a barrier to personal relief against the officer into a jurisdictional bar—would have made no difference to the bondholders, who would have lost in either event. Thus, Orth’s suggestion that compliance with the party-of-record rule ought to have guaranteed the bondholders a victory underestimates the complexity of the doctrinal universe at the time Jumel was decided.

Moreover, the likelihood that the Court was implicitly but faithfully driven by some such private law tort/contract distinction in assessing officer liability for constitutional injuries may also explain southern

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\textsuperscript{57} See Jaffe, supra note 54, at 21–23, 29 (distinguishing Madrazo from Osborn and noting that sovereign’s consent to suit had traditionally been required where property came “unsullied into the bosom of government”); see also Engdahl, supra note 44, at 22–23 (noting state’s ownership of property as fair basis for distinction between McComb and Jumel).

\textsuperscript{58} Compare, e.g., Reeside v. Walker, 52 U.S. (11 How.) 272, 290 (1850) (Secretary of Treasury could not be liable for debt where liabilities and interests of the United States were at issue) and Hodgson v. Dexter, 5 U.S. (1 Cranch) 345, 363 (1809) (federal officer who contracted for government not personally liable for breach) with, e.g., United States v. Lee, 106 U.S. 196 (1882) (allowing tort action to eject federal officers from plaintiff’s land, wrongfully seized and held for United States) and Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (allowing action for trespass against collector of military fines for wrongful seizure of goods). There was, however, a tradition of contract-like assumpsit actions against federal and state officers to recover taxes and duties paid under protest. See Woolhandler, supra note 56, at 414–15 & n.87.

\textsuperscript{59} The net effect of Jumel was that if relief were not, as in a contract suit, possible against a defendant officer personally, then the plaintiff was suing the officer only as a representative of the state, and thus impermissibly seeking relief against the state. The distinction was one between no cause of action against the officer versus no subject matter jurisdiction over the suit. See Engdahl, supra note 44, at 23–24; see also Currie, supra note 21, at 154 (discussing post-Jumel cases).
debt cases besides *Jumel* that might otherwise suggest sharp turns in doctrine. In *Board of Liquidation v. McComb*, for example, a pre-Compromise decision that, like *Jumel*, involved an effort by Louisiana to circumvent its 1874 Funding Act, the Court unanimously allowed the suit and affirmed the lower court's order directing officers to cease issuing new consolidated bonds to anyone but prior bondholders. *Orth* sees *McComb* and cases like it as proof that the Court was willing to entertain challenges to the state's repudiation of its contracts prior to 1877, but not afterwards (p. 79).

On the surface, *McComb* appears to weigh in favor of Orth's thesis. Yet neither the *McComb* nor *Jumel* results are inconsistent with the common-law framework within which the Court was operating. In reaching its conclusion that the eleventh amendment barred jurisdiction, *Jumel* had distinguished *McComb* and similar precedents as suits in which specific property in the hands of state officials was not fully owned by the state, but was merely held in trust by its officers. This trust distinction mattered, and *Jumel*'s explanation of *McComb* was fair according to common-law concepts of personal liability. If the bonds in *McComb* were held in trust, the wrongful issuance of them to third-parties would be a tort-like invasion of a proprietary interest in the bondholders. Such a harm could be remedied by a suit against the individual wrongdoers who had breached their trust. By contrast to the bonds in *McComb*, the taxes in *Jumel* had been lawfully collected and were fully owned by the state. Thus, when the officers in *Jumel* refused to preserve revenues in the treasury for interest on the bonds, no similar trust relationship or invasion of a proprietary interest was implicated.

60. 92 U.S. 531 (1875).

61. As part of the incentives to get creditors to exchange their old bonds for the new ones at a 40% loss, Louisiana had promised to issue the new bonds only to the holders of the old ones. Nevertheless, the state began to issue the consolidated bonds to pay off another private creditor's debt, dollar for dollar—a much better deal than the old bondholders were getting. See *McComb*, 92 U.S. at 534-35.


64. Also, unlike *Jumel*, the duty not to offer the newly issued securities to anyone but old bondholders in *McComb* was plainly commanded under then-existing state law. See *McComb*, 92 U.S. at 533, 539-40. That deprived the *Jumel* plaintiffs of the sometimes murky remedy of mandamus—an order to perform a plain "ministerial" act commanded by state law. Mandamus suits had historically been treated as ones against the officer personally, not the state, and thus did not run afoul of the eleventh amendment. See Scalia, "Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases," 68 Mich. L. Rev. 867, 888 (1970) (suggesting that mandamus, because it remedied government illegality, was remedy on behalf of, not against, the government). *Jumel* made clear that mandamus would not be available against state officers if it would not reinforce state law, but would instead tell the officers to do something that state law then prohibited rather than commanded. 107 U.S. at 727-28. It apparently did not matter that the state law was unconstitutional or that the pre-existing duty under prior (constitutional) state law was plain. See Rolston v.
It is easy for modern ears to distrust *Jumel*’s formalistic and rather lame-sounding “trust” distinction and to conclude with Orth that the distinction is a “specious” (p. 67) one, better explained by the politics of the Compromise. As Justices Field and Harlan revealed in their *Jumel* dissent, it would not have distorted *McComb* or the older cases too much to say that funds specially collected by tax officials to pay off annual interest constituted specific, actuarially segregated property in the hands of state officers in which the plaintiffs held an interest akin to that in property held in trust. Justices Field and Harlan, who regularly stuck up for bondholder interests in these cases, would have blurred the implicit tort/contract distinction of the earlier cases and made the contract clause fully enforceable in federal court as long as officers were the named defendants. The two *Jumel* dissenters look so reasonable today because their views are congenial to modern views that unconstitutional state action should ordinarily be remediable in federal court. Nevertheless, that intellectual affinity should not lead critics, especially historically oriented ones, to assume that the Court’s mere invocation of formal common-law strictures inevitably masked the scurrilous intentions of result-oriented judges.

This is not to say that the post-Compromise Court did not read the election returns or that formal common-law categories could not have been manipulated to produce substantive ends. A formalistic Court could easily have influenced outcomes in cases such as these by using a narrow or expansive conception of what constituted “ownership” of property by the state, as opposed to property merely held “in trust” by its officers. Such a Court could also have fudged the line between tort and contract in close cases.

*Jumel*, however, is not a case where a formalistic device was used to paper over a clear outcome-determinative change in substance. Even at the margin, the evidence of change in *Jumel* is less than overwhelming given the tradition of denying relief against officers in actions to enforce the contracts of the federal government. Perhaps politics can explain the Court’s reluctance to embrace the improvement on precedent suggested by the two dissenters, but it is much riskier business to assign purely political motives to the Court when formalism itself reflects a fairly settled tradition and is invoked to inhibit rather than conceal change in the law.

Missouri Fund Comm’rs, 120 U.S. 390, 411 (1887) (*Jumel* distinguished and mandamus upheld in suit “to get a state officer to do what a [state] statute requires of him”).

65. See 107 U.S. at 736–38 (Field, J., joined by Harlan, J., dissenting). Field’s and Harlan’s approach would have been something of a change from *Osborn*, however, in which the Court emphasized the fact that the monies seized by the state officers from the Bank were not commingled with the general funds of the treasury, but were physically separate and apart from them. *Osborn* v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 845–46, 858 (1824); supra note 36.

66. See Woolhandler, supra note 56, at 440 & n.235.
Finally, even apart from precedent, there is evidence that these common-law distinctions to which *Jumel* adhered were settled ones. First of all, the bondholders’ strategy in the case shows that the litigants involved did not think that pre-*Jumel* cases guaranteed them access to nontortiously acquired funds in the state treasury. By not seeking to compel the state officials to pay them all of the interest that was due or to pay out general funds in the treasury, the plaintiffs in *Jumel* made a very narrow argument. They thus attempted to squeeze the case into the mold of *Osborn* and progeny by treating the tax receipts as separate and identifiable property, still in the hands of officials, in which the plaintiffs had a quasi-proprietary interest. Second, the fact that bondholders tried to enlist their home states to sue on their behalf also suggests uncertainty whether the bondholders could enforce southern debts in federal court on their own. Their strategy was formulated in 1879, just after Louisiana’s legislative repudiation of the 1874 Funding Act, and before the new wave of antibondholder eleventh amendment decisions (p. 68 & n.34). If, at the time the strategy was formulated, recovery on the bonds was fairly assured by precedent, there would have been little reason to concoct such a scheme. Finally, contemporary writing also belies the certainty of the bondholders’ chances for recovery even before *Jumel*. Although the law review articles of the day were generally partisan in their treatment of this issue, there was widespread debate as well as fair support for both the debt enforcement and debt repudiation positions.

In short, it could not have come as much of a surprise in terms of precedent that the bondholders were turned away in the *Jumel* litigation. The result in that pivotal case effectively controlled the results in other southern bond cases as well, including those involving North Carolina, Orth’s other primary case-study of repudiation.

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68. See supra text accompanying notes 36, 53.
69. Compare, e.g., Johnson, Can States Be Compelled to Pay Their Debts?, 12 Am. L. Rev. 625 (1878) (arguing states could be forced to pay their debts when sued by other states) with, e.g., Burroughs, Can States Be Compelled to Pay Their Debts?, 3 Va. L.J. 129 (1879) (arguing they could not be). See also, e.g., Martindale, The State and Its Creditors, 7 S.L.J. (n.s.) 544 (1881) (noting general rule of state nonsuability and urging adoption of state waiver statutes to allow suit on debts); Royall, Enforceability of State Contracts, 23 Alb. L.J. 206 (1881) (arguing for state accountability). Orth lists the contemporary literature in his thorough Bibliographic Essay (pp. 195–97).
70. See, e.g., Hagood v. Southern R.R., 117 U.S. 52 (1886) (South Carolina); Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883) (Georgia). Things were more problematic for North Carolina, however. In Christian v. Atlantic & N.C.R.R., 133 U.S. 233 (1890), the state had purchased the stock of a railroad from income produced by the state’s sale of interest-bearing bonds. As security for the bonds, North Carolina pledged the railroad stock and promised that dividends received on the stock would be applied to the interest. Predictably, the state defaulted on the interest payments, and suit was brought seeking payment of past due interest out of the dividends, and sale of the stock if the dividends were insufficient to take care of the interest owed. Id. at...
2. Justice Bradley's "Law Office History" of the Eleventh Amendment. — The second sign of the post-1877 doctrinal shift sketched by Orth was the Court's decision to extend sovereign immunity beyond the narrower immunity accorded by the words of the eleventh amendment, to suits brought against states by their own citizens. Orth's target is Justice Bradley's celebrated and vilified opinion in *Hans v. Louisiana.*

*Hans* was the last-ditch effort of the bondholders who, in an effort to circumvent the amendment's prohibition on suits against states by citizens of other states, had finally hit on the strategy of having a Louisiana citizen sue his own state. This time, they sued under the federal question statute demanding payment of interest and claiming that the state's default violated the contract clause. The Court was unimpressed with the distinction, however, and closed the federal courts once more on behalf of the southern states. Like many critics, Orth starts from the defensible assumption that *Hans* was wrongly decided, then trains his sights on the narrower historical question whether the opinion marked a departure from the Court's own earlier views of the eleventh amendment.

a. The Novelty of *Hans'* History. — The Supreme Court in *Hans* concluded that *Chisholm v. Georgia* was wrong when it held that private parties could sue a nonconsenting state in federal court. *Hans* reached this conclusion apparently to make the point that article III, even as originally ratified, had never given jurisdiction over suits against a state by private persons absent the state's consent. This immunity was not upset by article III's provision for suits between a state and diverse citizens any more than it was by the grants of subject matter jurisdiction. Thus, for *Hans,* nothing turned on the fact that the eleventh amendment did not expressly bar suits against a citizen's own state, because jurisdiction had never been conferred over such suits in the first place.

Orth concludes that that *Hans* Court's view of *Chisholm* and of the contract.

Nevertheless, Orth smells a rat because of a pre-Compromise decision of Chief Justice Waite, written on Circuit, in *Swasey v. North Carolina R.R. Co.*, 23 F. Cas. 518 (C.C.E.D.N.C. 1874) (No. 13,679). *Swasey* involved a similar repudiation effort by North Carolina, but sovereign immunity was held not to be a bar. There, however, the facts suggested (as Justice Bradley noted, see *Christian,* 133 U.S. at 245), that the property whose disposition the plaintiffs were trying to affect—the stock certificates—was not owned outright by the state, nor was it even physically in the possession of state officials. Instead, it was in the hands of private parties who could easily be made the proper targets of coercive relief. Id. at 519. By the time of *Christian,* there was no question about the state's outright ownership of the stock, or the dividends that the plaintiffs were demanding. See 133 U.S. at 241, 245–46.

71. 134 U.S. 1 (1890); see also *North Carolina v. Temple,* 134 U.S. 22 (1890) (*Hans* dictated similar result in suits by in-state bondholders against North Carolina).
72. 2 U.S. (2 Dall.) 419 (1793).
73. 134 U.S. at 10.
framers' original understanding of article III marked a change from earlier Supreme Court precedent. The contrary precedent on which Orth focuses is *New Hampshire v. Louisiana*, in which the Court had unanimously rejected the argument that article III permitted suits between two states when brought to enforce the contracts of private citizens. Chief Justice Waite's sometimes difficult opinion in *New Hampshire* noted that under the Constitution as originally ratified, private parties could sue states, as they had in *Chisholm*, under the state/citizen diversity provision. Therefore, because suits to enforce contracts of private citizens were adequately accounted for by the diversity provision, article III's suits-between-states clause must have excluded similar suits when brought by the states on their own citizens' behalf. The eleventh amendment reversed *Chisholm* and withdrew jurisdiction over diversity suits against states by private parties, but it did not change the suits-between-states clause: that clause still excluded suits brought by states to enforce contracts of private citizens.

The Supreme Court in *New Hampshire* therefore unanimously assumed that *Chisholm* had been correctly decided at the time and that under the Constitution as originally ratified, states could be sued on common-law claims by out-of-staters. The eleventh amendment introduced an innovation that changed all that. But *Hans*, itself a 9–0 decision, concluded the opposite just seven years later. According to *Hans*, unconsenting states could not be sued by private citizens at all under the Constitution as originally ratified. The eleventh amendment was therefore a return to the original understanding of the general nonsuitability of states, not an innovation that changed the original understanding. On the shift from *New Hampshire* to *Hans* Orth concludes: "Like a chameleon, [a policy-making judge] is visible only when he moves. With respect to the Eleventh Amendment Justice Bradley was caught in the act of moving" (p. 79).

The Court was clearly trying to have it both ways in the two cases. Justice Bradley himself, however, was not saying anything particularly new. In a dissent that he had filed two years after he joined silently in the Chief Justice's unanimous opinion in *New Hampshire*, Justice Bradley first set out the view he later articulated in *Hans*: that the eleventh amendment was, in fact, a return to the original understanding, and that jurisdiction did not extend to federal question suits brought against the plaintiff's own state.

74. 108 U.S. 76 (1883).
75. See supra note 46 and accompanying text.
77. Id. at 87–88.
78. The Virginia Coupon Cases, 114 U.S. 269, 337–38 (1885) (Bradley, J., dissenting). The majority did not reach the question whether a citizen could sue his own state in these cases because it concluded that they were not, in contrast to *Jumel*, suits against the state. Bradley and three others concluded the opposite, and decided that no such suits could be brought, despite the limited language of the eleventh amendment.
Even apart from the question of Justice Bradley's own consistency, however, it is not clear how much should turn on the incompatibility of the Court's conclusion in *Hans* that *Chisholm* was wrongly decided with its previous assumption in *New Hampshire* that *Chisholm* had been correct. The Court's view of *Chisholm* was anything but critical to its obvious result in *New Hampshire*. In addition, although the view of *Chisholm* taken by the Court in *Hans* was important, it was not strictly necessary to the decision in that case either. The question at issue in *Hans*—the suability of the states under subject matter grants of jurisdiction other than the state/citizen diversity clause—did not require the Court to determine whether *Chisholm* was right or wrong when decided. *Hans* could have concluded that some form of general immunity from private suit was ingrained (or survived) in the Constitution as originally ratified with the sole exception of the state/citizen diversity clause whose positive language seemed to allow certain kinds of suits against states. Alternatively, it could have assumed that even if such sovereign immunity was not part of the original Constitution, the eleventh amendment was a signal that it should be read in retroactively. Justice Harlan, for one, did not find it necessary to conclude that *Chisholm* was wrongly decided as a prerequisite to finding that the federal judicial power could still not constitutionally be extended to suits against unconsenting states by their own citizens.

b. The Correctness of *Hans'* History. — The separate question whether the view of *Chisholm* and the eleventh amendment in *Hans* was

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Others had foreshadowed Bradley's view. See, e.g., Burroughs, supra note 69; Tucker, Can a State Be Sued in the Federal Courts by Its Own Citizens?, 8 Va. L.J. 641, 641–42, 644 (1884) (arguing that federal judicial power did not extend to federal question suits by a citizen of a state against a state, quite apart from eleventh amendment); see also *Hans* v. Louisiana, 24 F. 55, 65–68 (C.C.E.D. La. 1885) (lower court decision in *Hans* reaching similar result).

81. The assumption in *New Hampshire* that the diversity clause allowed suits against states by out-of-staters at the time of *Chisholm* added a certain logical flourish to the Court's decision. But the plaintiffs' argument might have been rejected solely on the ground that *New Hampshire* was, in effect, an impermissible private suit against a state by out-of-staters, despite the fact that a state was the nominal plaintiff. The plaintiffs' proposed construction would have made too obvious an end run around the eleventh amendment and would have left no role for it, even in a suit like *Chisholm*, so long as a state could be persuaded to do for its resident bondholders what they as private citizens clearly could not do for themselves.

Also, the correctness of *Chisholm* was invoked in *New Hampshire* only to address a final and bizarre argument of the suing states. They argued that even if the states had, by joining the Union, given up the sovereign right that they would otherwise have under international law to enforce debts owed to their citizens by extrajudicial means, such as war, the quid pro quo for the lost sovereign prerogative was the right to enforce such debts judicially in federal court under the suits-between-states provision. The Court's effort to find an additional textual and precedential peg for its result was generous in the extreme.

82. *Hans*, 134 U.S. at 21 (Harlan, J., concurring in the judgment).
preferable to that in New Hampshire is a much mooted and more problematic one. To reach his result in Hans, Bradley relied on statements from supporters of the Constitution who had argued that unconsenting states would not be able to be sued by private parties despite the phrasing of article III. Subsequent historical scholarship, however, has shown that there were many others, mostly antifederalist opponents of the Constitution, who disagreed.

But even if this "new" evidence sheds light on the intent of article III's framers in this debate, it is still not clear what the scope of their dispute really was. It may well have been limited to the question of the suability of states under article III's state/citizen diversity provision. Chisholm itself was a diversity case, and one that did not arise under federal law. If the article III debate was in fact limited to the suability of states under the state/citizen diversity provision, it would shed little and very indirect light on what the framers thought about the precise issue pressed in Hans, namely whether states were suable under the subject matter grants of jurisdiction such as that for federal question suits.

On that issue, the historical evidence is more inconclusive. The language of the amendment might itself suggest an answer because it prohibits "any" suit in law or equity against a state. That would seem to bar federal question suits too (at least when brought by an out-of-stater). Current historical criticism, however, also argues that the eleventh amendment may not have spoken to federal question cases at all.

In part, this criticism relies on the fact that at the time of the amendment's adoption, Congress had not yet given general federal question jurisdiction to the lower federal courts. Thus, barring federal question suits may simply not have been on the minds of those who adopted the amendment. In addition, there is some scattered nineteenth-century support for the "novel if not startling" notion that federal question suits against states by their own citizens were not prohibited by the


84. Justice Bradley may well have loaded the dice by ignoring these "other" framers. But caution still attends the uncritical acceptance of either position if only because of the political ends each side may have sought: proponents of the Constitution tried to minimize evidence of the Constitution's inroads into state sovereignty, while opponents tried to emphasize it. But cf. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 263-80 (1985) (Brennan, J., dissenting) (gathering statements suggesting that article III would permit suability of states, including a few from supporters of the Constitution); Field, supra note 26, at 534 (noting that a few supporters of Constitution read article III as allowing suability).

85. See supra notes 27-29 and accompanying text.

86. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 280 (1985) (Brennan, J., dissenting). This new historical criticism also relies on the structural argument that the status grants of jurisdiction, with which Chisholm and the eleventh amendment were concerned, involved a different kettle of fish than did the subject matter grants. See, e.g., Fletcher, supra note 28, at 1045-68.
Constitution.\textsuperscript{87} Hans rightly observed, however, that earlier contract clause cases such as \textit{Jumel}, although brought by out-of-staters, might also have been brought as federal question cases.\textsuperscript{88} Had the Court in \textit{Hans} instead held that there was no constitutional prohibition against federal question suits against states, \textit{Jumel} and its progeny would all have to have been overruled—thus causing a radical \textit{departure} from recent precedent. The only alternative to thus overruling \textit{Jumel} would have been to conclude that although article III had allowed federal question suits when ratified, the literal words of the eleventh amendment imposed an "anomalous"\textsuperscript{89} discrimination among litigants by precluding federal question suits only when brought by out-of-staters. That anomaly was too much for Justice Bradley and the Court.

In sum, despite statements from the framers that contrast with the ones produced by Justice Bradley, and despite persuasive historical and structural arguments that federal questions may not have been included within the scope of the eleventh amendment's ban, the harder question—whether article III itself affirmatively allowed federal question suits against the states—still remains. Modern critics are not much better off than Justice Bradley was when he asked whether the eleventh amendment would have been ratified had an exception been made for federal question suits against states. His readiness to answer that question with a resounding "no," thus implying that article III already prohibited such suits, may very well separate him from modern critics. But Justice Bradley might have agreed in principle with those critics who now argue that the constitutional limits on the suability of states in federal court should be coterminous with the limits, if any, on Congress' legislative power to regulate the states qua states.\textsuperscript{90} It is just that Justice Bradley's and the nineteenth-century Court's view of Congress' legislative powers to regulate the states would have been decidedly nar-

\textsuperscript{87} Hughes, Can a State Be Sued in a Federal Circuit Court by Its Own Citizen?, 8 Va. L.J. 385, 385 (1884) (arguing for suability, but noting novelty of idea); see also Suability of a State, 2 Va. L.J. 457, 457 (1878) (arguing for suability, but conceding that idea "will doubtless meet with an immediate mental negative"). The precise issue, of course, could not have arisen before the 1875 grant of federal question jurisdiction. See supra note 35. For other nineteenth-century support for state suability on federal question grounds, see Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 412 (1821) (allowing review in Supreme Court of state commenced criminal action from state court on alternative ground that amendment was inapplicable to cases arising under federal law); B. Curtis, Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States 14 (1880); see also pp. 76–77 (gathering authority). For advance support of the position later taken in \textit{Hans}, see supra note 78.

\textsuperscript{88} See 134 U.S. at 10; supra note 35.

\textsuperscript{89} See \textit{Hans}, 134 U.S. at 10. It was anomalous because those with an arguably greater need for the independent forum would therefore have been denied it.

\textsuperscript{90} See, e.g., Amar, supra note 28, at 1476–78; Fletcher, supra note 28, at 1108–13, 1127–30.
rower than the post-New Deal Court's view of it.91

Thus, the correctness of Hans' history of the eleventh amendment, whatever the ultimate fate of its holding, will remain uncertain. Its view of sovereign immunity from suit may be tied up in other, more historically debatable views of state sovereign immunity from federal legislative power. But Orth's evidence of the Court's vacillation over Chisholm's rightness in two very different post-1877 cases does not go very far in exposing Hans' history as an example of sudden doctrinal change, much less a change sparked by a hidden agenda.

C. "Exceptions" to the Nonenforcement of Southern Debts

Thus, the evidence for sudden doctrinal departures from eleventh amendment law in cases such as Jumel, New Hampshire and Hans is suggestive but hardly overwhelming. In addition, there are other pieces of the historical puzzle discussed by Orth that fit uneasily with his basic conclusion that jurisdictional doctrine was changed to secure the blessings of the Compromise. These pieces include, first, the fact that Virginia—one of the biggest debtors of them all—was successfully sued on its debt, and second, the contemporaneous suability in federal courts of southern municipalities and counties that defaulted on their bonds.

1. Virginia's Repudiation and the Limits of Sovereign Immunity. — As Orth explains, there was a financial anomaly in Virginia's bonds that proved to be the Achilles heel in its defense of debt repudiation. The interest coupons on its Reconstruction bonds could be used in payment of state taxes. Thus, the state could not realize its tax revenues first like other southern states, and then decide whether or not to pay the interest due on its debt. Instead, it ended up every year with stacks of coupons in its coffers rather than tax dollars. Even after Virginia stopped issuing the old tax-coupon bonds, it still faced the thorny question of what to do with the ones that remained in circulation.92

After some initial and not very successful efforts, Virginia enacted

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91. In Hans, moreover, the Court was not dealing with a congressionally created cause of action to enforce the contracts clause, but an action that arose under federal law for the purposes of the general federal question statute; indeed, the Court had earlier held that the ancestor of modern 42 U.S.C. § 1983 (1982) did not reach contract clause suits. See Carter v. Greenhow, 114 U.S. 317, 322 (1885) (discussed at infra note 125). Thus, given separation-of-powers concerns, there was an even less compelling reason for federal courts to enforce liability against the state in the face of congressional silence. Even today, some seem to question the ability of Congress to provide remedies to enforce the contract clause. See Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 319 n.7 (1973) (Brennan, J., dissenting).

92. See pp. 91–98 (noting that coupons crippled the treasury, and Virginia was having a hard time scaling down its debt further because holders of the old tax-coupon bonds had no economic incentive to trade them in for a new issue with coupons that were not good for taxes).
a series of statutes after 1877 that, among other things, prohibited tax collectors from accepting coupons in payment of taxes and authorized them to seize and sell the property of anyone who tried to tender coupons instead of cash. Among the host of suits filed in the 1885 *Virginia Coupon Cases* the couponholders prevailed on three fronts: in their federal court injunction action to prevent seizures in advance, in their federal court damage action to compensate them for past seizures, and also in two state court detinue actions to get back seized property.

There is nothing magical about the reasons why the plaintiffs were able to get around the eleventh amendment in these cases. The acts of the state officers in seizing property of the taxpayers who had clipped their coupons and tendered them was trespassory. As usual under the common-law model, officials drew no protection from the statute on which they based their action, because it violated the contract clause. But it was not a total victory for the couponholders, because bringing suit only in the event of seizure was obviously not as good a remedy as, for example, forcing the state to accept the coupons in the first place or forcing it to pay interest. Those contractual remedies, however, would have been barred because the states would have been the proper defendants.

To be sure, the tort-based relief against the tax collectors made it harder for the state to break its original promise to accept coupons for taxes. For that very reason, the dissent argued that a tort action against officers should be unavailable whenever the practical effect of the suit was to compel performance of the state’s contract. That would have been a giant leap even beyond *Jumel*, because it would have left the contract clause largely unenforceable in federal court even when the plaintiffs could bring their request for relief against officers within the confines of traditional tort law. The dissent’s position was in sharp contrast to that of Justices Field and Harlan, now in the majority, whose...
earlier Jumel dissent would have stretched the common-law tort tradition to make the contract clause almost fully enforceable. The composition of the Court had not changed in the two years since the 1883 decision in Jumel, but three members of the 7–2 majority in that case switched sides to join Justices Field and Harlan in the Virginia Coupon Cases majority, presumably because the officer's acts were so familiar to the trespass tradition.97

It makes sense to see the bondholders' victory as arising out of the fact that the federal judicial power in these cases was invoked against the state "defensively" rather than "offensively," as Orth puts it (p. 104). That is, the plaintiffs had to wait to sue until they were threatened with a trespassory harm at the hands of the tax collector, and could not affirmatively demand in advance that state officers accept the coupons. That, however, was a limitation built into the remedial system of the day that more readily accommodated tort-based wrongs of officers than breaches of the states' contracts. And given Orth's thesis that the Court was adopting a laissez-faire policy toward southern debts, it is not immediately clear how the defensiveness of the plaintiffs' lawsuits should have prompted the Court to hold Virginia to its debt.

Recognizing the problem, Orth suggests that the principles of 1877 were less seriously implicated in Virginia's case because the Court did not compel officials to perform functions contrary to state law, as it was asked to do in Jumel (pp. 103–05). Telling state officers to carry out positive or affirmative acts in violation of state law may sometimes impinge more greatly on the freedom of state officers than a negative command that just tells them to stop whatever it is that they are doing. Indeed, the distinction between "affirmative" and "negative" relief became a theme that was expressly played out later in the cases of the 1890s98 and may reflect an attempt of the Court to grope toward a policy-based rationale that focused on the extent to which particular relief would interfere with state administration. That same set of policies, however, largely recapitulates the contract/tort dichotomy itself. So-called affirmative action would usually be required to obtain specific performance of a contract, whereas relief against trespassory harms could often be worked out by negative or preventive relief against the officer.99

97. See Virginia Coupon Cases, 114 U.S. at 303. At some points Orth hints that the Virginia coupon litigation was different because the taxpayer could "sit back" and wait to be sued in state court (p. 9). See also Orth, The Virginia State Debt, supra note 5, at 114 (describing taxpayers' strategy as one of raising contract clause question by defense). That, of course, was not what happened in the Virginia Coupon Cases, as Orth elsewhere acknowledges. See p. 98 (noting taxpayers themselves brought suits in state and federal courts, some prior to seizure).


99. However, the return of specific property or the recovery of personal damages, which the Virginia Coupon Cases allowed, is hard to pigeonhole as negative. See D. Currie,
More important for Orth was the practical unenforceability of any affirmative order to a state's officers to pay the state's debts outright, or even to compel its officers to receive coupons in lieu of taxes. It would have threatened the return of federal troops, thus undermining "the cardinal principle of the Compromise" (pp. 103–04). Orth assumes that the Virginia Coupon Cases posed no such contradiction to his political thesis, because the limited relief accorded the plaintiffs would have required no troops.

Obviously, considerations of the enforceability of the Court's orders and fears of precipitating a constitutional crisis are important prudential concerns respecting whether the Court should grant relief in any particular case. The Court may therefore well have hesitated over the enforceability of its orders in all of the bondholder cases. Nonetheless, the somewhat melodramatic possibility of the troops' return did not prevent the Court, in the same year that Hans was decided, from litigating the merits of the debt owed by North Carolina on bonds that had come into the hands of the United States nor, a little while later, from enforcing state debts that were acquired outright by another state. Also, at some point, federal muscle might have been necessary to enforce a damage award or an injunction or mandamus issued against an officer in his personal capacity. If the Court was really intent, as Orth insists it was, on saving the repudiationist South in the Virginia Coupon Cases, there was a way for it to do so: the foursome in dissent, led by the redoubtable Justice Bradley, had pointed it out.

It is curious that Orth does not try to get much mileage out of Justice Bradley's dissent. In some ways, it is the best evidence he has that at least some members of the Court were prepared to make major breaks with tradition to thwart the bondholders. Such evidence would support his thesis better than his own attempt to harmonize the probondholder result in the Virginia Coupon Cases with the antibondholder results of earlier cases. On the other hand, the fact that

supra note 63, at 426; see also Woolhandler, supra note 56, at 414 & n.87, 440–41 (noting tradition of quasi-affirmative relief in tax-refund, detinue, and mandamus cases); supra note 64 (discussing mandamus).

100. Although the worry is over "the troops," a compromise-minded Congress, as Orth elsewhere notes (p. 55), had already enacted a statute that forbade the use of federal troops to enforce federal court orders, except in extraordinary circumstances, and only on order from the President. See Act of June 18, 1878, ch. 263, § 15, 20 Stat. 145, 152. Perhaps the point is simply that the Court did not want to issue orders that no one would enforce. See also Gibbons, supra note 5, at 1981–82 & n.511 (enforcement problems lay at heart of bond cases).

101. Even in Osborn, Chief Justice Marshall indicated that where there was no personal liability at common law, enforceability would be problematic. See 22 U.S. (9 Wheat.) at 845–46, 858–59.


Justice Bradley was only in dissent also shows that there was a solid middle on the Court who controlled its destiny, and who took seriously the distinctions drawn by the common-law model within which they were working. That, of course, runs counter to Orth’s thesis that it was the Court, not just a minority of its members, who clearly reflected the goals of the Compromise in the eleventh amendment decisions.

The Coupon Cases involved the same high stakes for Virginia as Jumel did for Louisiana. Even though the Virginia bondholders did not ask for money from the treasury, they could still get the benefit of their bargain by having the tax coupons eventually counted as cash, and by keeping the state from realizing immediate income from the sale of seized property. As Orth candidly notes, the practical impact on the state treasury of the events in the Coupon Cases was no different than if affirmative relief had been ordered. Thus, Virginia was ultimately forced to settle up and pay its debt, losing the repudiation war almost entirely (pp. 105–09).\(^\text{104}\) Surely, if politics dictated sensitivity to southern states’ financial crises, the Coupon Cases show that the Court was not always prepared to bail them out.

2. The Nonextension of Sovereign Immunity to Cities and Counties. — At the same time that state bondholders had such difficulty enforcing their debts, municipal and county bondholders seldom had trouble enforcing theirs. Indeed, as Orth shows, federal court enforcement against such defaults was aggressive (pp. 112–15).\(^\text{105}\) The long-standing tradition of allowing suit directly against local entities without hindrance from the eleventh amendment was expressly reaffirmed by the Court on the same day that Hans was decided.\(^\text{106}\) The problem in terms of Orth’s thesis here is that southern cities defaulted on their bonds, too, and they were held to account just as other cities were.\(^\text{107}\) If the Court was manipulating eleventh amendment doctrine to pull the South’s chestnuts out of the fire, why did it leave southern cities on the hook?

A second problem for Orth’s thesis is presented by the virtual presence of the states themselves in contract clause litigation against local governments although the states were not formal parties in these ac-

\(^{104}\) Virginia did not go out without a fight however. See McGahey v. Virginia, 135 U.S. 662 (1890) (Bradley, J.) (generally reaffirming results of Virginia Coupon Cases).


\(^{106}\) Lincoln County v. Luning, 133 U.S. 529, 530 (1890).

tions. During the nineteenth century, the Court often found it necessary in such cases to tie a municipality's default to some "state action," inasmuch as the contract clause was directed to "state" impairments of the obligation of contract.108 Many contract clause suits would thus be structured as a bondholder suing the city as any other private debtor, and alleging that state legislation had impaired the city-bondholder contract.109 Thus, the potential for federal court confrontation with state financial policy was clear in such cases.

Orth's brief explanation for the apparent political anomaly of the Court's sovereign immunity exception for cities and counties is that local government bonds were not a very big deal outside of the West and Midwest (p. 111). Instead, he says, financing of governmental projects in the South tended to be done by the states rather than local governments. Thus, enforcing local government bond defaults in federal court generally did not implicate the Compromise of 1877.

However, the threat of federal troops to enforce the judgment against a single southern municipality or an order to its officers to levy a tax to pay it,110 would have been no less an affront to the "cardinal principal" of the Compromise than would the similar threats arising from a suit against a state official.111 It would be hard for southerners or their politicians to distinguish between the sight of federal officers in their states enforcing municipal bonds as opposed to state bonds. That possibility alone suggests that the fear of the military's return may not have been an overriding motivation in either the local government or state bond litigation.

III. RETHINKING THE ROLE OF POST-RECONSTRUCTION POLITICS IN THE DEVELOPMENT OF THE ELEVENTH AMENDMENT

A. Return to Normalcy? The 1890s and Beyond

Beginning in the early 1890s, following the detour of the southern

108. See supra note 34.
110. See, e.g., Amy v. Supervisors, 78 U.S. (11 Wall.) 136 (1871) (remanding proceedings for an order directing local officials to levy tax to pay federal court judgment).
111. Indeed, some of the defendants in the state bond cases were at least nominally local rather than state officials. For example, the defendant officer in most of the Virginia Coupon Cases was the "treasurer of the City of Richmond." See 114 U.S. 269, 273 (1885).
bond cases, Orth concludes that the eleventh amendment got back on track. Orth's position is that, with the bond crisis safely behind it, the Court could return to its previous relaxed view of the eleventh amendment. In addition, new political considerations were beginning to enter onto the scene: the protection of regulated industry under the due process clause as the Court entered the "Lochner era."112 The culmination of that reversionary process was Ex parte Young's113 injunction against the judicial enforcement of an unconstitutional state statute. For Orth, the 1908 decision in Young harks back to the pre-1877-1890 universe of individual officer liability, and contrasts with In re Ayers,114 an 1887 bond crisis decision in which a similar injunction was rejected as an impermissible suit against the state.

The conclusion that the eleventh amendment doctrine lurched back after 1890, however, is needed only if it is assumed that it got off the track in the first place. Orth is right to show that there were many historical antecedents to Young's so-called "fiction" that an officer who acted under an unconstitutional statute stood liable as any private party for his trespassory acts. There was certainly nothing new about that; a similar private law approach to enforcement of the Constitution had been well ensconced ever since Osborn.115 But that tradition seems to have stayed pretty much intact during the immediate post-Compromise period as well. Thus, with respect to its underlying theory of individual officer liability for unconstitutional acts, Young was a conservative case.

That Young was backward looking, however, does not mean that it was merely a return to some earlier (pre-1877) golden age of individual officer liability, any more than its specific conflict with Ayers necessarily suggests that something went haywire between 1877 and 1890. It more likely shows that Young, while in some ways a conservative opinion, was also a giant step beyond even the older precedents on which it drew. The Ayers Court had been unwilling to find any actionable injury at common law for which a prosecutor could be held personally liable in bringing lawsuits, even ones based on an unconstitutional statute; Young, by contrast, concluded that bringing such lawsuits could be "equivalent in some cases to a trespass."116 Although Young thus attempted to bring itself within the tradition of suits against individual officers for their own torts, the trespass in that case seemed to be less defined by the common law than by the Constitution's due process

114. 123 U.S. 443 (1887).
115. 22 U.S. (1 Wheat.) 738 (1824).
116. 209 U.S. at 153. In Ayers, Virginia bondholders sued to prevent prosecutions, under a statute violative of the contract clause, against couponholding taxpayers who tried to tender coupons for taxes instead of cash. The plaintiffs' theory was that prosecutions of such taxpayers impaired the plaintiffs' ability to sell coupons to other willing buyers. The bondholders, however, did not complain of any prosecutions against themselves, only against others. See 123 U.S. at 446-50.
Thus, *Young* was more than *Ayers* reversed; it was the end product of a lengthy evolution concerning the eleventh amendment and the Constitution's role in defining actionability that had begun with the early due process rate cases of the mid-1890s. That period (1890–1908) was somewhat more volatile both in terms of doctrinal development and changes in Court personnel than the one that preceded it.¹¹⁻¹ In the fifteen years preceding *Young*, there had been cases suggesting that injunctions against judicial enforcement of state statutes might be possible, but not all of those cases were consistent and their reasoning was not explicit.¹¹⁹ In short, *Young* could not have been decided merely by looking backwards to pre-1877 precedent, as Orth seems to suggest, because in some measure it was not a return to anything. It is a little unfair to conclude that the contrast between *Ayers* and *Young* reflects simply the passing of the southern bond crisis, and a return to an earlier approach to sovereign immunity.

Finally, Orth also suggests that a different political and economic environment responsible for the emerging concept of economic due process and hostility to state regulatory legislation was in turn responsible for the apparent waning of the eleventh amendment after 1890 (pp. 126–28). But individual officer liability flourished in the fourteenth amendment cases partly because it was easier to conceptualize most injuries associated with the due process clause—“deprivation[s]”¹²⁰ of liberty or property, or uncompensated “taking[s]”¹²¹—with a trespass at common law. Even after *Young*, suits against state officers that would have compelled performance of the state’s contracts went nowhere.¹²² To some extent then, it may be right to say, as Orth does, that the bond crisis determined the result in *Ayers* (a contract clause case). But that

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¹¹⁷. See, e.g., P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler’s The Federal Courts and the Federal System 935 (2d ed. 1973). The tortious harm that plaintiffs objected to in *Young* seemed to be the deprivation of or injury to property that would occur in the absence of effective judicial review of the reasonableness of rates; see also Currie, supra note 30, at 385 (discussing *Young*).

¹¹⁸. See G. Gunther, Constitutional Law app. B, at B-3 to B-4 (11th ed. 1985) (delineating years on Court for each Justice). Between *Ayers* and *Young*, there had been a complete turnover in the Court’s membership, with the exception of Justice Harlan.

¹¹⁹. Compare, e.g., Fitts v. McGhee, 172 U.S. 516 (1899) (reversing injunction against state attorney general that barred him from filing suit to enforce allegedly unconstitutional statute) with, e.g., Reagan v. Farmers’ Loan & Trust, 154 U.S. 362 (1894) (allowing injunction against commencement of state proceedings). See generally C. Jacobs, supra note 8, at 130–42 (discussing uncertainty of post-1890, pre-*Young* case law).

¹²⁰. U.S. Const. amend. XIV, § 1.


result was also due in part to remedial limitations imposed by the nineteenth century's common-law model of enforcing the Constitution.

B. The Ambivalent Legacy Revisited

The post-1890 results in the due process cases, and particularly Young, do not suggest that the preceding period was in any sense aberrational with regard to sovereign immunity doctrine. In addition, the results in the eleventh amendment cases decided by the Supreme Court during the earlier 1877–1890 period are too mixed to permit any conclusion that they were consciously or unconsciously driven by any particular vision of what should be done about the South. A number of post-1877 cases decided prior to Jumel held southern states to their promises.\textsuperscript{123} Beginning with Jumel, the South had a string of successes, but it was broken by Virginia's losses only a couple of years later in the Virginia Coupon Cases.\textsuperscript{124} And although Virginia is remembered for its losses in those cases, it won some of them too,\textsuperscript{125} as well as later suits including Ayers.\textsuperscript{126} In addition, although Louisiana and other states escaped accountability after Jumel and Hans, their post-Reconstruction legislation that impaired municipal bonds was struck down.\textsuperscript{127} Finally, throughout this period, parties who raised federal defenses to state-initiated civil enforcement proceedings could hale the state itself into federal court via removal, the eleventh amendment notwithstanding.\textsuperscript{128}

\textsuperscript{123} See, e.g., Hartman v. Greenhow, 102 U.S. 672 (1880) (ordering state officials in early stages of Virginia coupon litigation to accept coupons pursuant to state mandamus remedy then still in place).

\textsuperscript{124} 114 U.S. 269 (1885).

\textsuperscript{125} A suit under the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1982)) was dismissed because the Court unanimously construed it not to reach contract clause claims. See Carter v. Greenhow, 114 U.S. 317 (1885). A federal question plus Civil Rights Act suit failed in part because of the inability to raise contract clause claims in an action under the 1871 Act, and in part because of an inadequate amount in controversy for a federal question action. See Pleasants v. Greenhow, 114 U.S. 323 (1885). The federal suit to compel specific performance and the state court suit for mandamus were unsuccessful because of procedural grounds unrelated to the eleventh amendment. See Moore v. Greenhow, 114 U.S. 338 (1885); Marye v. Parsons, 114 U.S. 325 (1885); see also Antoni v. Greenhow, 107 U.S. 769 (1883) (upholding early part of Virginia's repudiation scheme).

\textsuperscript{126} The lower federal court record also shows mixed results. Post-Compromise decisions reaffirmed the availability of relief against state officers like that in pre-Compromise decisions such as McComb. See Chaffraix v. Board of Liquidation, 11 F. 688, 643 (C.C.E.D. La. 1882); see also Harvey v. Virginia, 20 F. 411 (C.C.E.D. Va. 1884) (concluding eleventh amendment not a bar to federal question suits against the states by their own citizens). Also, pre-1877 decisions were willing to find eleventh amendment barriers even where an officer and not the state itself was the named defendant. See, e.g., McCauley v. Kellogg, 15 F. Cas. 1261 (C.C.D. La. 1874) (No. 8,668) (suit to compel state officers to execute state laws to collect tax for payment of bonds was barred by eleventh amendment).

\textsuperscript{127} See supra text accompanying notes 110-11.

\textsuperscript{128} See, e.g., Ames v. Kansas, 111 U.S. 449, 462 (1884); Railroad Co. v. Mississippi, 102 U.S. 135, 141 (1880). See generally Collins, The Unhappy History of
The results respecting governmental liability during this period were sufficiently inconsistent when viewed from either a pro or antibondholder perspective that one commentator was driven to find shifts in doctrine on a term-to-term basis. Probably the best that can be said of the eleventh amendment cases from the 1877–1890 period is that they reveal a “muddling through”—an approach that was reasonably faithful to the common-law tradition within which constitutional rights were then enforced, yet one that struggled with the tensions between state immunity and accountability that still plague the Court today.

The evidence of rough doctrinal continuity does not mean that the Court did not have the Compromise of 1877 or the well being of the South in mind when it went at the question of the suability of the southern states. And Orth has presented a good circumstantial case that the Court or some of its members may have been motivated by it. Although there were no doctrinal shifts of the magnitude that he supposes, most of the major cases from 1877–1890 clearly helped the South out of its bond crisis. In addition, most of the bond decisions were in keeping with the spirit of the times that seemed to welcome the retreat from Reconstruction, even before it was symbolically over in 1877.

It is perfectly conceivable that Compromise-related politics exerted their influence at the margin—in doubtful cases in which the Court might have gone either way. Politics may also have played its part in keeping the Court conservative and not opting for the more radical changes in accountability that had been proposed by Justices Harlan and Field in their dissents. It was not until Young that the Court had begun fully to implement their suggestions by expanding the common-law trespass tradition to reach even more unconstitutional state action. In fact, the Court had come along so far by the time of Young that Justice Harlan, who had himself previously dissented in Ayers and other antibondholder cases, now “frankly admit[ted] embarrassment” and dissented in Young as well, concluding that the majority in Ayers had got it right after all.

The issues of politics and judicial administration that Orth empha-
sizes may also have been a consideration in the southern debt cases because they presented on a massive scale the same sorts of issues raised in Chisholm. The enforceability of a sovereign's debts has always been a matter of special concern, with creditors in the international context ordinarily forced to rely on good faith for their repayment. Contemporary writers knew that such debts were different, and even those who argued for state accountability acknowledged the novelty of their position. It is therefore possible that jurisdictional questions of the late nineteenth century masked broader but unarticulated substantive questions about the Court's role and state sovereignty in general—not just the problems of national reconciliation after the War.

As Orth notes, legal literature has frequently slighted historical context in favor of doctrinal analysis. His book is a success in bringing an historical perspective to help explain how the law of sovereign immunity may have developed. Historical contingencies can obviously influence decisionmaking as much as can the attitudes of the decisionmakers. Doctrinal development, however, may itself have elements of autonomy. And, as is the case with causal factors generally, doctrine and history interrelate in the development of the law. Trying to find even a loose causal connection between events or attitudes and legal development, is, as Orth acknowledges in his thoughtful concluding chapter on the rule of law and legal history, "risky business" (p. 155). But for any suggestion of a causal link to be fully persuasive, it has to take close account of what was going on in the doctrinal trenches. It is no less anachronistic and ahistorical to assume that if judges once drew distinctions that judges could not draw today, they must have been up to no good.

Conclusion

Orth's work places the Court's landmark eleventh amendment decisions in their historical context and shows the economic and political


134. See supra note 87. Liberals on the Court today make the nonjurisdictional argument that a state's impairments of its own contracts should not ordinarily be given rigorous scrutiny and that the market can be relied on to take account of such actions. See United States Trust Co. v. New Jersey, 431 U.S. 1, 33-62 (1977) (Brennan, J., dissenting). The facts of United States Trust, in which the Court found a contract clause violation when specific funds earmarked to pay off state-issued bonds were diverted to other purposes, are hauntingly reminiscent of Jumel.


pressures that faced the Court as it resolved the question of the suability of the southern states on their debts. There were other pressures, too. As Orth notes, the Constitution sent mixed messages by its express limits on state action together with its express or implied recognition of state immunity from certain kinds of federal action. There were also pressures, generally discounted by Orth, arising from the strictures imposed by the common-law model to which the Court and lawyers looked for enforcement of the Constitution.

Many of those same pressures are still around. The tug-of-war between *Hans* and *Ex parte Young* is the tension between the Constitution’s two directions—state immunity and state accountability—partially moderated by the common law’s provision for individual officer liability. *Young* or a similar vehicle was needed precisely because cases such as *Hans* made it impossible to sue the states directly, and *Hans* was made tolerable only because of cases such as *Young* that made it possible to sue them indirectly. Although their coexistence is not wholly peaceful, the two cases are mutually dependent upon each other.

The particular tension between those two cases, however, could soon be resolved, as there are signs that both may be on their way out. The opposition on the Court to *Hans’* view of the eleventh amendment and sovereign immunity has grown steadily. In part, that shift has been produced by the assembly of a fuller historical record, including the arguments made by Orth in this very book. In part, however, the demise of *Hans* has also resulted from the Court majority’s own lingering hostility to *Young*’s use of individual officer liability to circumvent immunity. That hostility stems from the belief that such officer suits, except perhaps where officers are paying damages out of their own pockets, are really suits against the state. The Court, however, has not concluded that the supremacy of federal law should therefore never be enforced against the states, but has instead opted for a model of minimal, prospective relief. In the process, the Court has sanctioned enforcement of federal statutory and constitutional norms against the states through the vehicle of officer suits, some of which have included affirmative and treasury-reaching relief for which, interestingly, officers would not have been personally liable at common law.

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137. Orth’s work was recently cited at some length for its conclusion that Justice Bradley’s history in *Hans* was a departure from previous interpretations of the eleventh amendment. See Welch v. Texas Dep’t of Highways & Pub. Transp., 107 S. Ct. 2941, 2955 n.16, 2970 n.20 (1987) (Brennan, J., joined by Marshall, Blackmun, and Stevens, J.J., dissenting). No reference was made, however, to Orth’s specific argument as to why *Hans* was a departure from *New Hampshire*. See supra text accompanying notes 83–87.

138. Officers may also be individually liable for their own constitutional harms, but they are now protected, as they once apparently were not, by good faith or stronger personal immunities. See generally Woolhandler, supra note 56, at 414–22 (noting that at common law, executive officers once would have been liable for acting under state statutes that they reasonably but erroneously believed were unconstitutional); Amar, supra note 28, at 1486–87 (same).
Thus, even the pro-*Hans* members of the Court have partially undermined the force of *Hans* by silently conceding that some forms of affirmative relief against the state are permissible, including relief beyond the negative or preventive injunctions sought in cases like *Young*. As a practical matter, then, the question for both sides is gradually becoming, not whether the states are suable, but for what?

Recognizing that states should be directly suable in federal question suits, and forcing courts openly to consider whether particular relief makes sense in a given case may be a neat idea to some. But the substitution of nonjurisdictional, judge-made limits on suability may open a different can of worms no less troublesome than the confusing and anomalous rules now in place. In addition, the ancient fears for the integrity of state treasuries—fears spanning three centuries that produced the reaction to *Chisholm*, the southern bond cases and *Edelman*—will probably not be eliminated in the shuffle. The basic problems that beset the Court during the bond crisis will not go away, even if the framework within which they were once litigated disappears. The only thing sure to go if Orth's nineteenth-century precedents are openly abandoned is the common law's model of strict individual officer accountability—the unsung hero that helped the post-Reconstruction Court steer its tortuous and sometimes suspicious course through the maze of the eleventh amendment.


140. See, e.g. Field, supra note 27, at 1261–77; Fletcher, supra note 28, at 1106–07, 1127–30. David Shapiro has suggested that ad hoc application of nonjurisdictional doctrines of judicial restraint and comity could safeguard state interests just as well as *Hans*. See Shapiro, supra note 30, at 62. Justice Scalia echoed similar sentiments when he indicated just last Term that a clear congressional statement might still be needed before finding an abrogation of state immunity under a federal statutory scheme even if *Hans* were overruled. See *Welch v. State Dep't of Highways & Pub. Transp.*, 107 S. Ct. 2941, 2957–58 (1987) (Scalia, J., concurring in judgment).

141. For example, there will be the inevitable questions whether suits to enforce the fourteenth amendment should be treated differently from those under the contract clause; whether cities and counties should always be treated as separate entities from their states; and whether Congress will still have to speak clearly when it seeks to impose liability on the states for their violations of federal law.