ARTICLE

SOVEREIGN IMMUNITY AS A DOCTRINE
OF PERSONAL JURISDICTION

Caleb Nelson

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Article III of the Constitution explicitly extends the federal government’s judicial power to various categories of “Cases” and “Controversies” between individuals and states. During the ratification debates, however, prominent supporters of the Constitution denied that this language would let individuals hale unconsenting states into court. What could these people have been thinking? How could they have reconciled their position with the text of the Constitution? The answer, Professor Nelson argues, lies in Founding-era views about the prerequisites for the exercise of judicial authority. The very existence of a “Case” or “Controversy” required adverse parties who could be brought before the court, either actually or constructively. Under the general law of nations, however, sovereign states enjoyed exemptions from compulsory process. If they did not appear voluntarily, they could not be commanded to appear (at least at the behest of an individual), and no “Case” or “Controversy” could form.

The modern Supreme Court’s efforts to reconstruct the “original understanding” of sovereign immunity have been influenced by the Eleventh Amendment, which is cast in terms of subject matter jurisdiction. But Professor Nelson’s research suggests that before the Eleventh Amendment was adopted, the key issues were more about personal jurisdiction — about the courts’ ability to acquire power over defendants’ persons. The Eleventh Amendment is best viewed as giving states a new and different kind of immunity, not as simply codifying (in a strangely incomplete way) the type of immunity that supporters of the Constitution had talked about during the original ratification debates. The modern Court’s failure to distinguish between these different kinds of immunity has resulted in what Justice Kennedy describes as a “hybrid” doctrine, which indiscriminately combines some ideas that sound in personal jurisdiction and other ideas that sound in subject matter jurisdiction. Professor Nelson makes a case for separating these two sets of ideas, and he sketches out some of the possible implications of doing so.

INTRODUCTION

In 1777, when a South Carolinian named Robert Farquhar contracted to supply goods to the State of Georgia, he could not have known that he was laying the groundwork for one of the most enduring debates in American constitutional law. Farquhar delivered the merchandise, and Georgia apparently gave its agents money to pay him. But the state’s agents never passed the money along to Farquhar.1 After Farquhar died, his executor — another South Carolinian

* Associate Professor, University of Virginia School of Law. For helpful comments at various stages of this project, I thank Curt Bradley, Ed Cheng, John Harrison, John Jeffries, Mike Klarman, Jim Pfander, Jim Ryan, Ann Woolhandler, participants in the 2000 Virginia Constitutional Law Conference, and participants in a workshop sponsored by Virginia’s Program on Legal and Constitutional History.

named Alexander Chisholm — became responsible for collecting the debt.² Taking advantage of the intervening ratification of the federal Constitution, Chisholm eventually sued Georgia in the original jurisdiction of the newly established United States Supreme Court. In its first major decision,³ the Court concluded that it could entertain Chisholm’s suit whether or not Georgia consented. If Georgia would not appear to defend itself, the Court threatened to enter a default judgment against the state.⁴ At first glance, this aspect of the Court’s decision in Chisholm v. Georgia seems plainly correct. Article III of the Constitution explicitly said that the federal government’s judicial power “shall extend . . . to Controversies . . . between a State and Citizens of another State,” and it added that “the supreme Court shall have original Jurisdiction” over all such controversies.⁵ Justice James Wilson — who, as a delegate to the Philadelphia Convention, had been on the five-member committee that introduced this language into the Constitution⁶ — thought it difficult to imagine words that would “describe, with more precise accuracy, the cause now depending before the tribunal,”⁷ and three of the other four Justices agreed that Article III permitted Chisholm’s suit to proceed.⁸ Most modern scholars share this view: while they acknowledge that Georgia may have had some defenses on the merits of Chisholm’s claims, they see nothing wrong with the Court’s decision to entertain Chisholm’s lawsuit in the first place and to order Georgia to respond. According to the conventional academic wisdom, “the plain meaning of the language used [in Article III]” supported the Court’s decision on this point.⁹

² Id. at 127–28.
⁴ Chisholm, 2 U.S. (2 Dall.) at 480.
⁵ U.S. Const. art. III, § 2.
⁶ See 2 The Records of the Federal Convention of 1787, at 106, 147, 186 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand]. Edmund Randolph, the lawyer who represented Chisholm in his litigation against Georgia, had also been a member of the committee. See id. at 106.
⁷ Chisholm, 2 U.S. (2 Dall.) at 466.
⁸ See id. at 450 (Blair, J.) (noting that the Constitution “expressly extend[s]” the judicial authority of the United States “to controversies between a State and citizens of another State,” and indicating that the present dispute “[u]ndoubtedly” is “one of that description”); id. at 467 (Cushing, J.) (“The case . . . seems clearly to fall within the letter of the Constitution.”); id. at 477 (Jay, C.J.) (suggesting that the dispute between Chisholm and the state of Georgia “clearly falls not only within the spirit, but the very words of the Constitution”).
⁹ Orth, supra note 3, at 28–29; see also, e.g., Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L.J. 1425, 1469 (1987) (arguing that although members of the Chisholm majority erred on the substantive question of whether Chisholm had a cause of action, the Court’s interpretation of Article III was “impeccable”); John J. Gibbons, The Eleventh Amendment and State
The Supreme Court itself, however, no longer follows *Chisholm*. Part of the change can be attributed to the Eleventh Amendment, which overruled *Chisholm*'s specific holding. But the Amendment is quite limited, and it does not address all of the provisions in Article III to which *Chisholm*'s logic can be extended. For more than a century, the Court nonetheless has been holding that federal courts cannot entertain suits against states in a variety of contexts that apparently are covered by Article III's grants of subject matter jurisdiction and are not covered by any plausible reading of the Eleventh Amendment.

As the Court has recently acknowledged, these decisions have little to do with the Eleventh Amendment; they rest instead on the premise that *Chisholm* was wrong. According to the Court's current view, the original Constitution did not subject unconsenting states to suits by individuals (or, indeed, by anyone other than the federal government or another state).

The Court has recently gone a step further. In addition to concluding that the original Constitution did not itself abrogate the states' immunity from being sued by individuals, the Court has held that the

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*Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1895 (1983) (asserting that "from a textual standpoint, the suggestion that states were immune from suit in federal court seems preposterous on its face"); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 49 (1988) (asserting that "*Chisholm* was in all likelihood correctly decided as to the question of jurisdiction"); cf. 5 DHSC, *supra* note 1, at 127 (suggesting that "the plain meaning of the text" supported *Chisholm*, although the Court's decision arguably conflicted with "the intent of [the text's] authors and ratifiers").

10 See U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

11 Because the Eleventh Amendment specifically tracks the Constitution's provisions for diversity jurisdiction, many scholars and commentators have argued that it should not be read to restrict the other heads of jurisdiction. On this "diversity" reading, the Amendment does not cover any federal question suits. See, e.g., Amar, *supra* note 9, at 1473–84; William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1069–87 (1983); Gibbons, *supra* note 9, at 1894, 1934–38; Jackson, *supra* note 9, at 44–51. Other scholars have argued that the Amendment protects states against federal question suits that happen to be brought by citizens of another state or of a foreign country. See, e.g., Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1351–71 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 97–142 (1989). Even on this "literal" reading, however, the Amendment says nothing about any suits that are brought against a state by its own citizens.

12 See, e.g., Blatchford v. Natve Vill. of Noatak, 501 U.S. 775, 779–82 (1991) (rejecting a suit brought by an Indian tribe); Monaco v. Mississippi, 292 U.S. 313, 331–32 (1934) (rejecting a suit brought by a foreign country); *Ex parte New York*, 256 U.S. 490, 497–503 (1921) (rejecting an admiralty suit); Hans v. Louisiana, 134 U.S. 1, 20–21 (1890) (rejecting a federal question suit brought against a state by one of its own citizens).


15 See, e.g., Kansas v. Colorado, 206 U.S. 46, 83–84 (1907).
original Constitution did not empower Congress to abrogate that immunity either. The upshot is that Congress cannot use its Article I powers to let individuals sue unconsenting states, whether in state or federal court.\textsuperscript{16}

These decisions have generated an outcry in the academy,\textsuperscript{17} and impassioned dissents have echoed the conventional academic wisdom.\textsuperscript{18} In response to all such criticism, the Court has invoked what it calls the "original understanding" of the Constitution.\textsuperscript{19} The Court never tires of reminding its critics that during the ratification debates, prominent supporters of the proposed Constitution — including both James Madison and John Marshall — explicitly asserted that Article III would not expose unconsenting states to suit by individuals.\textsuperscript{20} When \textit{Chisholm v. Georgia} took the contrary view, moreover, many contemporary observers lambasted the decision as illogical and unlavnerly.\textsuperscript{21}

Yet despite trumpeting this evidence, the modern Court has made little effort to connect the early criticisms of \textit{Chisholm} to the text of the Constitution, or to understand how anyone could have interpreted Article III as Madison and Marshall apparently did. As a result, even while the Court purports to embrace the conclusions of Madison and Marshall, it has overlooked potential limitations on those conclusions. Some of the Court’s critics, for their part, have been too quick to suggest that Madison and Marshall had no textual basis at all for their

\begin{footnotes}
\item[16] See \textit{Alden}, 527 U.S. at 741-57; \textit{Seminole Tribe v. Florida}, 517 U.S. 44, 59-73 (1996). The question of what qualifies as a suit against a state has itself generated an intricate body of case law. See, \textit{e.g.}, \textit{Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle}, 429 U.S. 274, 280 (1977) (noting that suits against counties and cities are not treated like suits against states, and concluding that under Ohio law "a local school board . . . is more like a county or city than it is like an arm of the State"); \textit{Ex parte Young}, 209 U.S. 123, 149-68 (1908) (holding that suits seeking certain kinds of injunctive relief against individual state officials are not suits against the state); \textit{cf.} \textit{Idaho v. Coeur d'Alene Tribe}, 521 U.S. 261, 270-80 (1997) (Kennedy, J., joined by Rehnquist, C.J.) (discussing possible limits on \textit{Ex parte Young}).
\item[17] See generally James E. Pfander, \textit{Once More unto the Breach: Eleventh Amendment Scholarship and the Court}, 75 NOTRE DAME L. REV. 817, 819 & n.8 (2000) (noting the extensive scholarly criticism prompted by the Court’s recent sovereign immunity decisions, and expressing the hope “that responsible professional comment and criticism may yet . . . restrain judicial arbitrariness at the highest level”). Law review symposia on the Court's decisions show no signs of abating. See, \textit{e.g.}, \textit{Symposium, Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity}, 53 STAN. L. REV. 1115 (2001).
\item[18] See \textit{Alden}, 527 U.S. at 762-814 (Souter, J., dissenting); \textit{Seminole Tribe}, 517 U.S. at 100-85 (Souter, J., dissenting); \textit{cf.} \textit{Seminole Tribe}, 517 U.S. at 68 (criticizing Justice Souter’s dissent for advancing “a theory cobbled together from law review articles”).
\item[19] See \textit{Alden}, 527 U.S. at 726.
\item[20] See, \textit{e.g.}, id. at 716-18; \textit{Seminole Tribe}, 517 U.S. at 70-71 & n.13; \textit{Hans v. Louisiana}, 134 U.S. 1, 12-14 (1890).
\item[21] See infra note 97 and accompanying text.
\end{footnotes}
conclusions and were simply trying to deceive people about the Constitution’s likely effects.\footnote{See, e.g., Gibbons, supra note 9, at 1906–08 (raising the possibility that “Madison was merely dissembling” and asserting that “the Madison-Marshall interpretation of article III was not taken seriously at the Virginia convention”); Jackson, supra note 9, at 47–48 (describing the comments of Madison and Marshall as “disingenuous”).}

Part I of this Article steps back from the current debate and tries to explain the logic behind Madison and Marshall’s position. Although Article III of the Constitution extends the federal government’s judicial power to various “Cases” and “Controversies,” many members of the Founding generation thought that a “Case” or “Controversy” did not exist unless both sides either voluntarily appeared or could be haled before the court. Traditionally, courts could not command unconsenting states to appear at the behest of an individual. For many members of the Founding generation, Article III did nothing to change this system: if a state did not consent to suit, there would be no “Case” or “Controversy” over which the federal government could exercise judicial power.

This analysis clears up some enduring puzzles about the Founders’ framework for sovereign immunity. In particular, it explains the sense in which sovereign immunity was considered “jurisdictional” and yet could be waived by the state. For members of the Founding generation who believed in sovereign immunity, the concept was relevant to personal jurisdiction rather than subject matter jurisdiction.\footnote{Of course, lawyers in the early Republic did not always use these modern terms. Then as now, “jurisdiction” was “the right of administering justice through the laws”; a court had jurisdiction over a dispute between two parties if it had the power to adjudicate the dispute and decide how the law applied to it. PETER S. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 21 (Philadelphia, Abraham Small 1824). To have this power, a court needed both what we call “subject matter jurisdiction” and what we call “personal jurisdiction.” But lawyers did not always break down the concept of “jurisdiction” in precisely the same way we do. The terminology that they used, moreover, was not entirely uniform. The label “jurisdiction of the person” sometimes referred to personal jurisdiction in the modern sense, but it was also sometimes used to refer to party-based categories of what modern lawyers would call subject matter jurisdiction. Compare Bigelow v. Stearns, 19 Johns. 39, 40 (N.Y. Sup. Ct. 1821) (using the term in its modern sense), with Grumon v. Raymond, 1 Conn. 40, 45 (1814) (indicating that the Court of the Marshalsea, whose jurisdiction extended to disputes involving members of the king’s household, had lacked “jurisdiction over the persons” in a matter that did not involve any members of that household); cf. DU PONCEAU, supra, at 24–25 (referring to the federal courts’ diversity jurisdiction under the heading of “[j]urisdiction in personam”). Courts sometimes also talked about “jurisdiction over the process,” a term that is not in common currency today. See, e.g., Grumon, 1 Conn. at 45.

At the risk of sounding anachronistic, I will use the label “personal jurisdiction” to refer to concepts that modern lawyers would describe under that heading. As we shall see, those concepts were well established in the early Republic, although the term “personal jurisdiction” was not universally assigned to them until well into the nineteenth century.}
background rules of general law, a state could not be compelled to answer an individual's complaint. But if the state voluntarily appeared and submitted its dispute with the plaintiff to the court, it created a "Case" or "Controversy" and subjected itself to the federal government's judicial power.

Instead of applying this framework, however, Chisholm v. Georgia read Article III to expose even unconsenting states to suit by individuals. The Eleventh Amendment, in turn, responded to Chisholm in the Court's own terms. As Part II of this Article argues, the result is different from what Madison and Marshall envisioned. When given its most natural reading, the Eleventh Amendment creates a second type of sovereign immunity, which sounds in subject matter jurisdiction and which therefore cannot be waived. Meanwhile, the original "personal jurisdiction" type of sovereign immunity — resurrected by the Court's eventual repudiation of Chisholm — arguably should govern situations that the Eleventh Amendment does not cover.

This two-track system of jurisdictional immunities is complicated enough. But because the Supreme Court has not understood the legal basis for the Founding-era comments that it frequently quotes, it has failed to keep the two tracks separate. Instead, the Court has created a single doctrine of "sovereign immunity" that reflects a strange cross between ideas of subject matter jurisdiction and ideas of personal jurisdiction. Part II tries to sort out these different strands.

Part III turns to the difficult question of whether Congress can abrogate the states' protections against suit. With respect to suits covered by the Eleventh Amendment itself, the analysis in Part II suggests a ready answer: the Eleventh Amendment deprives the federal courts of subject matter jurisdiction over such suits, and Congress cannot let the federal courts hear such suits any more than Congress can let the federal courts hear other matters to which the judicial power of the United States does not extend. Many suits against states, however, are not covered by the terms of the Eleventh Amendment, and hence implicate only the "personal jurisdiction" type of immunity.

The Supreme Court sometimes suggests that the original Constitution gave states a "constitutional privilege" to assert sovereign immunity even in situations not covered by the terms of the Eleventh Amendment, and that this privilege imposes an "implied constitutional limit[] on the power of the Federal Government." Although this limit

25 Alden, 527 U.S. at 754, 739; see also Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 682 (1999) (speaking of sovereign immunity as a "constitutional right" akin to "the right to trial by jury in criminal cases").
does not apply when Congress is exercising powers conferred by the Civil War Amendments, the Court maintains that it does restrict what Congress can do under Article I of the original Constitution.\textsuperscript{26} Scholars have already criticized this claim,\textsuperscript{27} and my analysis of the Founders’ framework for sovereign immunity tends to confirm that the original Constitution was not thought to confer such an affirmative privilege on states. The notion that Congress cannot use its Article I powers to abrogate the “personal jurisdiction” type of immunity therefore stands on shakier ground than the Court acknowledges. But Part III explains why the critics’ assault on that notion is also overstated. Although the original Constitution did not affirmatively enshrine the states’ traditional protections against suit, one need not conclude that it authorized Congress to abrogate those protections. As we shall see, that issue boils down to a question about the scope of Congress’s enumerated powers.\textsuperscript{28}

I. THE FOUNDERS’ FRAMEWORK FOR SOVEREIGN IMMUNITY

Suppose you would like to sue someone. You can file papers informing a court of your dispute with the defendant and submitting yourself to the court’s jurisdiction. But the court will not actually adjudicate the dispute unless it can acquire jurisdiction over the defendant too. As every first-year law student learns, a court needs jurisdiction over both parties before it can proceed to judgment against them.

Section I.A notes that the basic requirements for acquiring this sort of jurisdiction were not very different at the time of the Founding than they are today. In general, if the defendant did not voluntarily submit himself to the court’s jurisdiction, then the court’s ability to adjudicate depended upon its ability to command the defendant to appear and answer the plaintiff’s allegations. Before the Constitution was adopted, however, individuals could not get courts to issue such commands against unconsenting states. As section I.B explains, individuals therefore could not bring unconsenting states into litigation.

When the Constitution was proposed, people who wanted to defeat its ratification argued that it would change this situation and expose unconsenting states to suit. Section I.C explains how the Constitution’s language permitted supporters of ratification to deny this claim and to insist that courts would remain unable to acquire jurisdiction over unconsenting states at the behest of individuals. The essence of the argument was that Article III does not address the formation of

\begin{itemize}
\item \textsuperscript{26} See Alden, 527 U.S. at 754, 756.
\item \textsuperscript{28} This conclusion is anticipated by Fletcher, supra note 11, at 1108–13.
\end{itemize}
“Cases” and “Controversies,” and that background principles of general law would continue to protect states from being haled into court without their consent. Section I.D argues that this framework not only helps us make sense of the comments of Madison and Marshall, but also fits the rest of the historical evidence remarkably well. When members of the Founding generation considered whether the Constitution exposed unconsenting states to suit, they consistently focused on states’ amenability to compulsory process, and they thought in terms that modern lawyers would associate with personal rather than subject matter jurisdiction.

A. Personal Jurisdiction and the Importance of Commanding Defendants To Appear

For centuries, Anglo-American lawyers have thought that the very existence of most kinds of judicial proceedings depends upon the presence (actual or constructive) of adverse parties. As Blackstone put it, “[i]n every court there must be at least three constituent parts . . . : the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power.”

Blackstone’s opening preposition should not be taken too literally. By the time he wrote, defendants did not really have to appear “in” the court if they could be brought within the court’s power in other ways. But those other ways of acquiring jurisdiction over a defendant all depended upon the issuance of some sort of command ordering the defendant to appear. Then as now, such commands were critical to the exercise of judicial power over defendants who did not voluntarily submit themselves to the court’s jurisdiction.

1. The English Background. — There was a time when England’s superior courts at common law would not proceed to judgment in any “personal” action (that is, an action seeking damages or other relief that was deemed “personal” rather than “real”) unless the defendant actually appeared before the court. The early practice of the court of

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29 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 25 (photo. reprint, Univ. of Chi. Press 1979) (1768). A century and a half earlier, Coke had said much the same thing. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND 39a (London 1628) (noting that “in everie Judgement there ought to be three persons, Actor, Reus, and Iudex”).


31 See Nathan Levy, Jr., Mesne Process in Personal Actions at Common Law and the Power Doctrine, 78 YALE L.J. 52, 58 (1968); see also, e.g., Pennsylvania v. Lehigh Valley R.R. Co., 30 A. 836, 837 (Pa. 1895) (“By the common law of England, prior to the settlement of this country, an
common pleas at Westminster, which was once the primary royal court for the adjudication of civil actions, is instructive. To bring an action in this court, the plaintiff would first need to buy from the chancery an appropriate "original writ" that recited the plaintiff's form of action and directed the sheriff to summon the defendant to respond. On an appointed day, the sheriff would return this writ to the court of common pleas with an endorsement indicating whether his messengers had been able to serve the summons. If the defendant appeared as commanded, then the action could proceed to judgment. But if the defendant failed to appear despite being properly served, the court would not adjudicate the plaintiff's claims or enter judgment by default. Instead, it would use increasingly severe forms of "mesne process" to try to coerce the defendant's appearance.

Over time, the means of compelling the defendant's appearance became less fine-tuned. Both of England's other superior courts at law — the court of king's bench and the plea side of the court of exchequer — let plaintiffs routinely use legal fictions to secure the arrest of the defendant, and the court of common pleas eventually followed suit. In practice, indeed, arrest became the initial form of process to compel the defendant's appearance in all three of the superior courts. Still, the basic principle remained constant: some mechanism for secur-

appearance by the defendant was indispensable, both in civil and criminal cases."

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32 3 BLACKSTONE, supra note 29, at 271.
34 See 1 CROMPTON, supra note 33, at 46.
35 "Mesne" or intermediate process was so named because it came between the "original" process of summons and the "final" process of execution after judgment. See, e.g., 3 BLACKSTONE, supra note 29, at 279; Levy, supra note 31, at 57 n.21. For discussions of various types of mesne process that were used early on, see 3 BLACKSTONE, supra note 29, at 280-82; 1 CROMPTON, supra note 33, at 46-47; and Levy, supra note 31, at 60.
37 This development was driven largely by the three courts' competition for plaintiffs' business. For the story, see Levy, supra note 31, at 61-63.
38 See 1 CROMPTON, supra note 33, at 55-56; Levy, supra note 31, at 63. Artificial entities like corporations were not subject to arrest, and so their appearances continued to be compelled by other means. See 2 CROMPTON, supra note 33, at 77; 1 TIDD, supra note 36, at 116; WILLIAM WYCHE, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK IN CIVIL ACTIONS 217-18 (New York, Swords 1794); see also Lynch v. Mechs.' Bank, 13 Johns. 127 (N.Y. Sup. Ct. 1816) (discussing process against corporations).
ing the defendant’s appearance in court was necessary, because courts could not adjudicate a personal action until the defendant had actually appeared.

In the early eighteenth century, Parliament finally permitted courts to enter what amounted to default judgments in personal actions. Under a 1725 statute, if the defendant failed to appear after being properly served with a summons, the plaintiff could enter the defendant’s appearance for him, and the court could proceed to judgment as if the defendant had really appeared. But the service of a valid summons was crucial to this procedure. In personal actions, then, a common-law court could proceed to judgment against a defendant only if the defendant either actually appeared or at least was given a valid command to appear, and was thereby brought within the court’s power.

The same had long been true of “real” actions, in which the plaintiff or “demandant” claimed some sort of right to real property that the defendant or “tenant” was holding. Such actions were launched by an original writ directing the sheriff “to summon the tenant to answer the demandant at a certain day” in the court of common pleas. The sheriff could make this summons “either to the person of the tenant, or upon the land demanded,” but in either case the summons was directed at the tenant himself and told him “to appear and answer” on the appointed day. If the tenant failed to do so after being properly summoned, the court could eventually enter judgment by default for the demandant. But the court’s ability to proceed to judgment was

39 See An Act to Prevent Frivolous and Vexatious Arrests, 1725, 12 Geo., c. 29, § 1 (Eng.). Nathan Levy has traced default judgments in personal actions to this statute. See Levy, supra note 31, at 57, 60–79 (discussing how the statute changed prior law).
40 See BOOTH, supra note 30, at ii, 3.
41 Id. at 4; see also 1 CROMPTON, supra note 33, at 38 (noting that only the court of common pleas could entertain real actions).
42 BOOTH, supra note 30, at 4; see also 3 BLACKSTONE, supra note 29, at 279–80 (describing how summonses made upon the land were denoted “by erecting a white stick or wand on the defendant’s grounds”).
43 BOOTH, supra note 30, at 5. By statute, if the summons was made upon the land rather than upon the tenant in person, then it also had to be proclaimed on a Sunday “after Divine Service and Sermon” outside “the most usuall Doore of the Churches or Chappell of that Towne or Parish” in which the land lay. An Acte for the Avoydinge of Privie and Secrete Outlaries of Her Majesties Subjects, 1589, 31 Eliz., c. 3 (Eng.); see also 3 BLACKSTONE, supra note 29, at 280; BOOTH, supra note 30, at 5.
44 The court would first issue process called a cape magnum, directing the sheriff to “take the [disputed] land into the king’s hand” and to summon the tenant anew (this time to explain his default as well as to answer the demandant). See BOOTH, supra note 30, at 20. If the tenant still failed to appear, and if “due process” had been returned showing that the necessary summonses had been made, then the court could enter a judgment depriving the tenant of the property and awarding it to the demandant. See id. at 6, 73.
premised on the fact that the tenant had "be[en] legally summoned" and had not obeyed a valid command to appear.45

These basic ideas applied to suits in equity no less than to actions at law. To begin a suit in either of England’s two main courts of equity,46 the plaintiff would need to file a bill of complaint reciting his allegations and asking the court to issue “process of subpoena against the defendant, to compel him to answer upon oath to all the matter charged in the bill.”47 If the defendant was properly served with the court’s subpoena but failed to appear as commanded, he was in contempt, and the court could issue a writ directing the sheriff to arrest the defendant and “bring him into court.”48 If the sheriff was unable to find the defendant, and if further process failed to produce his appearance, the court might ultimately be able to enter a decree deeming the defendant to have confessed the truth of the plaintiff’s claims.49 Again, however, the court’s ability to proceed against an absent defendant in this way hinged on the issuance and proper service of a valid subpoena commanding the defendant to appear.50

Even what we think of as quasi in rem or “attachment” jurisdiction51 — which was “unknown to the common law,” but which had

45 See id. at 6. In fact, when tenants attempted to save their defaults in response to the cape magnum, their “most usual” excuse was “non summons” — the claim that they had “never [been] summoned according to the law of the land” on the original writ. See id. at 24–25.

46 See 3 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND; AS TREATED OF IN A COURSE OF VINERIAN LECTURES, READ AT OXFORD, DURING A SERIES OF YEARS, COMMENCING IN MICHAELMAS TERM, 1777, at 366 (London, Thomas Payne 1793) (referring to the chancery and the exchequer).

47 See 3 BLACKSTONE, supra note 29, at 442; accord, e.g., D.T. BLAKE, AN HISTORICAL TREATISE ON THE PRACTICE OF THE COURT OF CHANCERY OF THE STATE OF NEW-YORK 19–31 (New York, J.T. Murden 1818) (echoing Blackstone’s discussion and providing a sample bill); 3 WOODDESON, supra note 46, at 380 (describing the subpoena as “a writ prayed by the bill, and the ordinary process to compel the defendant to appear and answer”).

48 See 3 BLACKSTONE, supra note 29, at 443–44. Again, only natural people were subject to arrest. “The process against a body corporate [was] by distringas, to distress them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court.” Id. at 445; cf. supra note 38.

49 By statute, there was one situation in which the subpoena merely had to be issued and did not have to be successfully served. If the defendant “could not be found [at his usual place of abode] so as to be served with such Process,” and if the plaintiff swore to the court’s satisfaction that “there is just Ground to believe that such Defendant . . . is . . . abscond[ed] to avoid being served with the Process of [the] Court,” then the court could cause the publication of a further “Order directing and appointing such Defendant . . . to appear.” If the defendant still failed to appear, the court could “order the Plaintiff’s Bill to be taken pro confesso, and make such Decree thereupon as shall be thought just.” An Act for Making Process in Courts of Equity Effectual Against Persons Who Abscond, and Cannot Be Served Therewith, or Who Refuse To Appear, 1732, 5 Geo. 2, c. 25, § 1 (Eng.). Even this procedure, though, hinged on the issuance (albeit not the successful personal delivery) of a valid command to appear and answer the plaintiff’s bill.

50 In such proceedings, a plaintiff who asserts a claim against an absent defendant (that is, a defendant who has not otherwise been brought within the court’s jurisdiction) gets the court to
long been exercised by the Mayor's Court of London and other local mercantile courts—was at least theoretically premised on a similar command. As early as the fifteenth century, the Mayor's Court of London allowed plaintiffs to use a procedure called "foreign attachment" to recover alleged debts out of the goods of absent defendants who had not received actual notice of the proceedings. This procedure began normally enough: the plaintiff would file a bill or plaint alleging that the defendant owed him a debt, and the court would direct its sergeant to "summon the defendant . . . to answer the plaintiff's plaint." But if the sergeant returned this process with a nihil indicating that service had been unsuccessful, and if the plaintiff alleged that some third party within the court's jurisdiction held goods belonging to the defendant or owed the defendant a debt, then the court would direct the sergeant to attach the goods or to garnish the debt. After a series of days in which the defendant was again "supposed to be called upon" to appear and answer the plaint, the court would direct the sergeant to summon the third party, and proceedings could ensue in which the third party's obligation to the defendant would be used to satisfy the defendant's alleged debt to the plaintiff.

All of these steps, however, were premised on the initial issuance of a summons commanding the defendant to appear and answer the plaintiff's allegations. As the procedure developed, this summons was not actually delivered in a way that the defendant would learn of it. Still, the purported issuance and attempted service of a summons remained vital to the procedure. Even in the mid-nineteenth century, attachments in the Mayor's Court would be "erroneous and void" unless the record included the sergeant's "return of nihil."
2. The Bottom Line in America. — The court systems of the young American states tended to be more streamlined than their English counterparts,60 and their procedures frequently mixed together those used in different English courts. The basic prerequisites for the exercise of judicial power, however, remained constant. In order to enter any judgment in personam, the court had to "get hold of the defendants."61 A court could do so either actually (as when the defendants voluntarily appeared before it) or constructively (as when the defendants "are so within the jurisdiction of the court . . . that they can be commanded . . . to appear and answer . . . , and . . . they are so commanded").62 Even if the defendants did not actually appear, then, the court would be deemed to have "proper parties before it" if the plaintiff "has a right to call the defendants before the court to answer his claim, and they are properly called."63 But if the defendants were not present even constructively, the court could not proceed to judgment against them. As one New York jurist put it, "if a Court . . . undertakes to hold cognizance of a cause, without having gained jurisdiction of the person [of the defendant], by having him before them, in the manner required by law, the proceedings are void."64

Building on the procedure of the Mayor's Court of London, many American states did make attachment jurisdiction available against defendants who owned property within the state but were otherwise beyond the reach of the state's process. Both "foreign attachment" (which many states made available against out-of-state residents who "cannot personally be served with process")65 and "domestic attach-

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60 See, e.g., WYCHE, supra note 38, at 1 ("The various powers exercised by the three great courts for the administration of justice in England, viz. the king's bench, the common pleas, and the plea side of the court of exchequer, are all, in this state, united together, and reposed in one tribunal . . .").

61 See Hart v. Granger, 1 Conn. 154, 168 (1814).

62 Id. at 169.

63 Id. at 167 (emphasis omitted).

64 Bigelow v. Stearns, 15 Johns. 39, 40–41 (N.Y. Sup. Ct. 1821); accord, e.g., Borden v. Fitch, 15 Johns. 121, 141 (N.Y. Sup. Ct. 1818) ("To give any binding effect to a judgment, it is essential that the Court should have jurisdiction of the person, and of the subject matter . . . . The cases in the English Courts, and in those of our sister states, as well as in this Court, are very strong to show that judicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the Court, and not appearing, in person, or by attorney, are null and void."); cf. Kirk v. Williams' Ex'x, 18 Ky. (2 T.B. Mon.) 135, 136 (1825) (observing that unless parties either voluntarily appear or are brought before the court by writ or other process, "it does not seem to us that the courts of our country can exercise their judicial functions, and determine upon the rights of the citizen"), disavowed on other grounds, Smith v. Overstreet's Adm'r, 81 S.W. 571, 573 (Ky. 1905).

65 See, e.g., An Act for Establishing Courts of Law, and for Regulating the Proceedings Therein, ch. 2, § 27(2), 1777 N.C. Laws 8, 15 (Nov. 15 Sess.).
ment" (which states made available when their own inhabitants were allegedly concealing themselves in order to avoid the service of process66) routinely generated judgments against absent defendants who had not received actual notice of the proceedings. But even these proceedings were premised upon the issuance of some sort of command to appear. According to one nineteenth-century author who canvassed the practice in different states, "the writ of attachment is always accompanied or preceded by a summons."67 Writs of attachment were treated as means of compelling the defendant's appearance,68 and they could not validly be directed against the property of defendants who were privileged against being commanded to appear.69

The bottom line is straightforward. For a court to proceed to judgment against a defendant (whether through regular in personam jurisdiction or through attachment jurisdiction), it needed power over the defendant. The court acquired such power if the defendant voluntarily appeared before it. But if the defendant did not do so, the court's ability to proceed to judgment depended upon its ability to command the defendant's appearance.

B. States and Compulsory Process Before the Constitution

This background clarifies the primary legal mechanism through which sovereign immunity operated. Under the general law of nations, sovereigns were thought to enjoy a broad exemption from command. In particular, they could not be haled into court, at least at the behest of individuals.70 When one combines this exemption from

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66 See THOMAS SERGEANT, A TREATISE UPON THE LAW OF PENNSYLVANIA RELATIVE TO THE PROCEEDING BY FOREIGN ATTACHMENT 1-2 (Philadelphia, Farrand & Nicholas 1811); cf. supra note 50.
67 DRAKE, supra note 53, at 8. State judiciary acts from the 1770s tend to confirm that the goods of an unserved defendant would be attached only in conjunction with a command to appear. See, e.g., An Act for Establishing a General Court, § 22, 1777 Va. Acts 25, 27 (Oct. 20 Sess.) (authorizing attachment of an unserved defendant's goods, and use of those goods for the satisfaction of the plaintiff's claim, only "[w]here the sheriff, or other proper officer, shall return on any writ of capias to answer in any civil action, that the defendant is not found within his bailiwick"); An Act for Establishing Courts of Law, and for Regulating the Proceedings Therein, ch. 2, § 23, 1777 N.C. Laws 8, 14 (Nov. 15 Sess.) (similar).
68 See, e.g., SERGEANT, supra note 66, at 202-03 (presenting sample writs of foreign and domestic attachment, both of which command the county sheriff to "attach [the defendant] by all and singular his goods and chattels ... so that he be and appear before our judges at Philadelphia . . . to answer [the plaintiff] of a plea of trespass on the case, &c.").
69 See infra pp. 1578-79 (discussing Nathan v. Virginia, 1 Dall. 77 n. (Pa. C.P. 1781)); cf. Act of Apr. 30, 1790, ch. 9, §§ 25-26, 1 Stat. 112, 117-18 (recognizing the protections afforded to ambassadors and other public ministers under the law of nations, and providing criminal punishments for suing forth any writ or process either to arrest their persons or to attach their goods).
70 James Pfander has distinguished between the immunity that sovereigns enjoyed in the courts of other sovereigns (which he calls "law-of-nations sovereign immunity") and the immunity that sovereigns enjoyed in their own courts (which he calls "common law sovereign immunity").
command with the accepted limitations on proceedings against absent defendants, one gets "sovereign immunity": courts could not adjudicate plaintiffs' claims against a sovereign unless the sovereign voluntarily appeared or otherwise consented to suit, because there was no other way to bring the sovereign within a court's power and because a court could not proceed to judgment against defendants who were not at least constructively before it.

Alexander Hamilton summed up this principle in The Federalist No. 81, when he declared that "[t] is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."\(^7\) Despite the frequency with which this statement is quoted,\(^7\) we tend to ignore the overtones of the word "amenable," which derives from the Latin minare (to drive) and the French mener (to lead).\(^7\) The oldest meaning of the word, which can still be used in this sense today, is "[l]iable to be brought before any jurisdiction."\(^7\) Early American lawyers routinely used the word in connection with the courts' power over defendants' persons.\(^7\) When Hamilton declared

James E. Pfander, Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases, 82 CAL. L. REV. 555, 581-88 (1994). For present purposes, though, we can ignore this distinction: in America, sovereign immunity operated through the same mechanism in both contexts.

\(^7\) The FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).


\(^7\) See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 78 (1987).

\(^7\) See OXFORD ENGLISH DICTIONARY 394 (2d ed. 1989); see also, e.g., BLACK'S LAW DICTIONARY 80 (6th ed. 1990) (defining "amenable" as "[s]ubject to answer to the law").

\(^7\) See, e.g., Flower v. Parker, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823) (No. 4891) (Story, J.) ("The judgments of no state courts can bind, conclusively, any persons who are not served with process, or amenable to their jurisdiction. No legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals."); Joy v. Wirtz, 13 F. Cas. 1172, 1173 (C.C.D. Pa. 1806) (No. 7554) ("[T]he court cannot proceed without [the mortgagor]; and his being a party cannot be dispensed with, though he is not amenable to the process of the court."); Ex parte Cabrera, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2278) (Washington, J.) ("[An adjoint secretary of the Spanish legation to the United States is under the protection of the law of nations; and is not amenable to the tribunals of this country, upon a civil or criminal charge."); Harrison v. Sterry, 11 F. Cas. 669, 670 (D.S.C. 1807) (No. 6144) ("It is objected that these bankrupts resided abroad .... Their persons, indeed, were not amenable to process from our courts, but their property in the United States was certainly liable."); Brinley v. Avery, 1 Kirby 25, 27 (Conn. Super. Ct. 1786) (argument of counsel) (arguing that because the defendant is a resident of Connecticut, "both his person and estate are amenable to the laws and courts of the same"); Overall v. Overall, 16 Ky. (1 Litt. Sel. Cas.) 501, 502 (1821) (noting that one of the subscribing witnesses to a will is "now a resident of Indiana, and not amenable to the process of this court"); Schlater v. Broaddus, 3 Mart. (n.s.) 321, 323 (La. 1832) ("The ordinary jurisdiction of our courts is limited to our own citizens and strangers found within the state. Persons residing in other coun-
that an unconsenting sovereign was not "amenable" to suit, he was pointing out that sovereigns could not be commanded to appear or otherwise brought within a court's power.

This observation was completely consistent with the received wisdom of the day. As Edmund Pendleton noted in a 1792 letter to his nephew, "I have been taught by all writers on the Subject, that there is no Earthly Tribunal before whom Sovereign & independent Nations can be called & compelled to do justice . . . ."76 According to Pendleton, indeed, the received wisdom went even further than Hamilton had suggested. While Hamilton said only that unconsenting sovereigns were not amenable to suit by individuals, Pendleton asserted that they could not be sued by other sovereigns either.77

When the United States broke from Great Britain, it was not a foregone conclusion that the immunity enjoyed by sovereign nations should be accorded to each of the states. After independence, the United States as a whole was certainly a sovereign nation, and so it presumably enjoyed a sovereign's exemption from command. But the individual states were not exactly thirteen separate countries. From the start, they recognized some form of central authority; when the members of the Continental Congress issued the Declaration of Independence in 1776, they did so as "Representatives of the united States
of America, in General Congress, Assembled." When the Articles of Confederation became effective in 1781, moreover, many important powers — such as "entering into treaties and alliances" with foreign nations, "determining on peace and war," and "fixing the standard of weights and measures throughout the United States" — were explicitly committed to "the United States in Congress assembled" and not to the individual states.79

Still, the Articles specifically declared that each individual state "retains its sovereignty, freedom, and independence," as well as "every power, jurisdiction, and right, which is not by this confederation[] expressly delegated to the United States, in Congress assembled." A leading writer on the law of nations had already made clear that "sovereign and independent States" could "unite to form a . . . confederate republic" without thereby losing their individual sovereignty or "ceasing to be perfect States."81 As Gordon Wood notes, this was the sort of arrangement that the Articles of Confederation contemplated.82

Because the form of confederation contemplated by the Articles was familiar to the political science of the day, and because the individual members of such confederations were generally acknowledged to retain their own perfect sovereignty despite their voluntary agreement to unite for certain purposes, there was broad consensus about the states' immunity from suit under the Articles. The Articles did provide a central mechanism for resolving "disputes and differences . . . between two or more States concerning boundary, jurisdiction, or any other cause whatever," and this mechanism permitted one state to proceed against another in a court appointed for that purpose.83 But people of widely varying perspectives agreed that unconsenting states were not amenable to suit by individuals. As Alexander Hamilton observed in The Federalist No. 81, "th[is] exemption, as one of the attrib-

78 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
79 ARTICLES OF CONFEDERATION art. IX, cls. 1, 4 (U.S. 1781) (specifying that "[the United States in Congress assembled] shall have the sole and exclusive right and power" to do various important things).
80 Id. art. II.
83 ARTICLES OF CONFEDERATION art. IX, cl. 2 (U.S. 1781). This provision paid careful attention to the means of bringing the states before the court. The Articles specifically gave the central Congress power to assign "a day . . . for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question." Id. After specifying how the court would be constituted if the parties themselves could not come up with mutually agreeable names, the Articles added that "if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall . . . be final and decisive." Id.
utes of sovereignty, is now enjoyed by the government of every State in the Union. 84 The Antifederalist Brutus, who differed with Hamilton on many issues, fully concurred on this point: under the Articles, a state was not "subject[... to answer in a court of law, to the suit of an individual." 85

The consensus on this fact continued in later years. "Before th[e] Constitution was passed," James Iredell noted on the occasion of Chisholm v. Georgia, "a State was no more liable to be sued in this manner than the U.S." 86 Justice Iredell, who dissented in Chisholm, tended to think that the Constitution left this exemption intact. 87 But even people who thought that the Constitution exposed unconsenting states to suit agreed that "previously to [the Constitution's] existence ... a state was not compelled in any Court whatever to answer upon civil process." 88

This principle had been tested in 1781, when a man named Simon Nathan tried to use Pennsylvania's "foreign attachment" procedure to recover a debt that the Commonwealth of Virginia allegedly owed him. Aware that some imported military uniforms belonging to Virginia happened to be in Philadelphia, Nathan secured a writ directing the local sheriff to attach the goods. 89 Upon orders from Pennsylvania's supreme executive council, however, the sheriff did not return

84 THE FEDERALIST NO. 81, supra note 71, at 487.
86 James Iredell, Observations on "This Great Constitutional Question" (Feb. 18, 1793), in 5 DHSC, supra note 1, at 186, 189 (emphasis omitted). For further statements to the same effect, see infra notes 196–197 and accompanying text.
87 See Iredell, supra note 86, at 187 (noting that the Constitution did not expressly say "that an Individual shall maintain an action against a State," and "[i]t does not appear to me at present that such a Suit can be authorised by a fair & proper implication" (emphasis omitted)); see also Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 449 (1793) (Iredell, J., dissenting) (asserting that while it was unnecessary to decide the constitutional question, "my present opinion is strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money").
88 COLUMBIAN CENTINEL, Sept. 7, 1791, reprinted in 5 DHSC, supra note 1, at 32, 33; see also Christopher T. Graebe, The Federalism of James Iredell in Historical Context, 69 N.C. L. REV. 251, 256 (1990) ("Whatever the framers' understanding of Article III, there seems to have been general agreement among participants in the ratification debates that the states had enjoyed sovereign immunity under the Articles."). At oral argument in Chisholm v. Georgia, even Edmund Randolph — who was representing Chisholm — conceded that under the Articles of Confederation "the States retained their exemption from the forensic jurisdiction of each other, and, except under a peculiar modification, of the United States themselves." Chisholm, 2 U.S. (2 Dall.) at 423 (argument of counsel); cf. supra note 83 and accompanying text (describing the "modification" to which Randolph was referring).
this writ to the court of common pleas. Nathan asked the court to order the sheriff to return the writ, and argument was heard on Nathan’s motion.90

In the argument, the attorney general for Pennsylvania conceded that a sovereign’s goods might be attached as part of certain proceedings that were truly in rem. For instance, if the goods were imported and were “liable for freight, or duties,” there would be “a lien on the goods,” and the goods themselves would be “answerable” if the charges went unpaid. In such cases, however, “the process was in rem” and the proceedings were against the goods rather than against the sovereign. “[I]n this case,” by contrast, “[the process] was in personam; and the goods were attached merely to compel the party’s appearance to answer the plaintiff’s demand.” This, the attorney general observed, was unacceptable.91

Lawyers for Nathan asserted that even if the writ of foreign attachment was erroneous, the sheriff was still bound to execute and return it rather than “to stifle the proceedings in their birth.”92 But the attorney general responded that the writ was “void” and “a mere nullity” because “the court had no jurisdiction.”93 The court agreed; as Edmund Pendleton later recalled, the court quashed the proceeding “[o]n the General principle of a suit against a Sovereign State.”94

According to Alexander Dallas, “the principle of this adjudication[] met with the approbation of all the judges” of the state’s supreme court, although it did not reach them in a judicial capacity.95

90 See Nathan v. Virginia, 1 Dall. 77 n. (Pa. C.P. 1781).
91 Id. at 79 n. After investigating the history of sovereign immunity in admiralty, David Bederman has distinguished between admiralty cases “actuated by in rem libels” and those actuated “through common law in personam process.” See David J. Bederman, Admiralty and the Eleventh Amendment, 72 Notre Dame L. Rev. 935, 948–49 (1997); see also California v. Deep Sea Research, Inc., 523 U.S. 491, 494–95 (1998) (affirming the federal courts’ exercise of in rem admiralty jurisdiction, notwithstanding a state’s claim to the disputed res, “where the res is not within the State’s possession”). The argument of counsel in Nathan tends to support some such distinction and to suggest that it extends beyond the admiralty context. See also infra note 144 (discussing The Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116 (1812)); cf. United States v. Peters, 9 U.S. (5 Cranch) 115, 139–40 (1809) (suggesting that even in rem libels might not be able to proceed against property in the state’s possession).
92 Nathan, 1 Dall. at 80 n.; see also Pfander, supra note 70, at 586 (identifying Nathan’s lawyer as future Supreme Court Justice James Wilson).
93 Nathan, 1 Dall. at 79 n.
94 Letter from Edmund Pendleton to Nathaniel Pendleton, supra note 76, at 158; see also Sergeant, supra note 66, at 62 (associating Nathan with “the principle of a state being a sovereign; and therefore, from reasons of general policy, not suable in the courts of another state”). Although the Pennsylvania court apparently did not issue a written opinion, Professor Pfander agrees that Nathan “deserves to be viewed as a decisive rejection of state suability in the courts of other states.” Pfander, supra note 70, at 587.
95 Nathan, 1 Dall. at 77 n.; see also 3 The Papers of James Madison, supra note 89, at 187 n.2 (excerpting a letter from Pennsylvania’s attorney general to the president of the state’s executive council, in which the attorney general reports that he has consulted with two members
C. Did the Constitution Make States Amenable to Individuals' Suits?

The ratification of the Constitution threw matters back into doubt. This was so for two reasons. First, the Constitution arguably deprived the states of their preexisting sovereignty and the exemptions that went with it; under the form of government that the Constitution erected, one could plausibly argue that the general law of nations no longer applied to the states as individual entities. Second, even if states retained the exemptions of sovereignty, those exemptions protected only unconsenting sovereigns, and one could argue that the states had prospectively consented to certain kinds of suits by ratifying the Constitution: whatever exemptions the states might continue to enjoy in their own courts or in the courts of their sister states, the second section of Article III arguably made them amenable to various suits brought by individuals in the new federal courts.

This section considers both of these arguments in turn, and concludes that members of the Founding generation could reasonably have rejected them. In particular, the second argument — despite being embraced by a majority of the Justices in *Chisholm v. Georgia* 96 — is weaker than it might seem. With the general law's rules about compulsory process in mind, we will be able to understand the legal argument against *Chisholm*, and why even high Federalists could express surprise "that any professional Gentleman would have risked his reputation on such a forced construction of the clause in the Constitution." 97

1. The States as Sovereigns After the Constitution. — The first argument draws not on the specific language of Article III but rather on the overall structure of the governmental system that the Constitution established. Unlike the "confederate republic" suggested by the Arti-

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96 See *supra* notes 7-8 and accompanying text.
97 Letter from John Wereat to Edward Telfair (Feb. 21, 1793), in 5 DHSC, *supra* note 1, at 222, 223 (internal quotation marks omitted) (reporting a remark by Rep. Theodore Sedgwick of Massachusetts); see also Letter from William Davie to James Iredell (June 12, 1793), excerpted in 2 *GRiffith J. McRee, Life and Correspondence of James Iredell* 382 (New York, D. Appleton & Co. 1858) (expressing "astonishment" at Justice Wilson's opinion, and asserting that "we look in vain for legal principles or logical conclusions" in it); Letter from Edmund Pendleton to Nathaniel Pendleton, *supra* note 76, at 157 ("The question brought before your Circuit Court, whether a State can be sued by a Citizen of another State, is an Important one, but I confess I should not have thought it difficult, if I had not heard some respectable Opinions were in the Affirmative."); cf. Maeva Marcus & Natalie Wexler, *Suits Against States: Diversity of Opinion in the 1790s*, 1993 J. SUP. CT. HIST. 73, 84 (acknowledging that supporters of *Chisholm*'s position "were in the minority").
icles of Confederation.\textsuperscript{98} the governmental framework contemplated by the Constitution did not fit comfortably into any of the preexisting categories familiar to political scientists. It was, instead, an “unprecedented” mixture of “federal” and “national” elements,\textsuperscript{99} and the novelty of the arrangement left room for doubt about the extent to which states would continue to enjoy the attributes of sovereignty.

During the ratification debates, many Antifederalists opposed the Constitution on the ground that it would transfer all sovereignty to the national level and reduce the states to mere “corporation[s].”\textsuperscript{100} Even in domestic matters, the new central government would enjoy a direct relationship with the people and could exercise sovereign powers without the intermediation of the states. Many of the Constitution’s opponents, especially in the early period of the debates, thought it automatically followed that “the Idea of Sovereignty in these States must be lost”; in their view, to claim that the states would remain sovereign was to embrace the concept of “Imperia in Imperio” (sovereignties within a sovereignty), which the existing dogmas of political science deemed a “Solecism.”\textsuperscript{101}

\textsuperscript{98} See supra p.1577.

\textsuperscript{99} See Debates of the Virginia Convention (June 6, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 970, 995 (John P. Kaminski & Gaspare J. Saladino eds., 1990) [hereinafter 9 DHRC] (reporting Madison’s remarks that the “mixed nature” of the government contemplated by the Constitution “is in a manner unprecedented: We cannot find one express example in the experience of the world: — It stands by itself”); THE FEDERALIST NO. 39, at 243-46 (James Madison) (Clinton Rossiter ed., 1961) (listing both “federal” and “national” features of the proposed Constitution); see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 168 (1996) (“[N]o single vector neatly charted the course the framers took in allocating power between the Union and the states. To evoke Madison’s favored image, the new federal system would occupy a middle ground between a confederation of sovereign states and a consolidated nation.”); JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1791), reprinted in 5 DHSC, supra note 1, at 21, 27 (“We have a kind of government, including that of the United States as a nation, and those of the several states as separate sovereignties, which is perhaps without example in the world.”).


\textsuperscript{101} Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 333, 333 (John P. Kaminski & Gaspare J. Saladino eds., 1983) [hereinafter 14 DHRC]; see also, e.g., Cincinnatus V, N.Y. J., Nov. 29, 1787, reprinted in 14 DHRC, supra, at 303, 307-08 (noting the various “attributes of sovereignty” that the Constitution proposed to vest in the federal government, and suggesting that it is “a mockery of common sense” for Federalists “to tell us[,] the state sovereignties..."
Most supporters of the Constitution, however, insisted that sovereignty would continue to exist at the state level even while it existed at the national level. In response to the objection about *imperia in imperio*, Federalists made two basic points. First, they emphasized that the federal government would be granted only limited and enumerated powers, and that the people of each state — acting through their state governments and state constitutions — would have exclusive control of all other matters. As James Madison put it, "[the federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." This line of argument suggested that the federal government and the state governments could each exercise sovereign powers because they would occupy separate spheres and their sovereignties would not clash.

Modern advocates of state sovereign immunity cannot take much comfort from this "separate spheres" model of federalism. For one thing, the model leaves open the possibility that states are sovereign only within their own spheres of exclusive power, and hence do not enjoy a sovereign's exemptions from suit in areas of law over which the

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*Note*:

102 *The Federalist No. 39*, supra note 99, at 245; *see also*, e.g., Report of Roger Sherman and Oliver Ellsworth to Governor Samuel Huntington (Sept. 26, 1787), in 13 DHRC, supra note 100, at 471, 471 (observing that while the proposed Constitution would give Congress some much-needed additional powers, "the particular states retain their *sovereignty* in all other matters"); *The Federalist No. 9*, at 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Constitution "leaves in [the states'] possession certain exclusive and very important portions of sovereign power," and indeed arguing that the United States would still be able to meet the definition of a "confederate republic"); *The Federalist No. 32*, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States."); Letter from Pierce Butler to Weeden Butler (Oct. 8, 1787), in 13 DHRC, supra note 100, at 351, 352 ("The powers of the General Government are so defined, as not to destroy the Sovereignty of the Individual States.").


federal government has authority.\textsuperscript{105} The federal "sphere," moreover, has grown so much that it has all but crowded out any separate areas of exclusive state control.\textsuperscript{106} As Antifederalists predicted during the ratification debates, we now understand the federal government's powers to be extraordinarily far-reaching,\textsuperscript{107} and valid federal law is supreme over state enactments.\textsuperscript{108} As a result, the "separate spheres" model is not a very apt description of American federalism: most state legislation now survives only at the sufferance of Congress.

The fact that modern lawyers continue to refer to "the separate, yet coordinate, federal and state sovereignties"\textsuperscript{109} is a testament to the second point that people made around the time of the Founding. Writing in 1791, James Sullivan—who was then attorney general of Massachusetts and who later served both as the state's chief justice and as its governor—conceded that the states and the federal government "exercis[e] legislative, judicial and executive authority over the same persons, at the same time, and in the same place."\textsuperscript{110} But Sullivan still spoke of sovereignty as existing at both the state and the national levels because the states and the federal government were "independent of each other in their political capacities."\textsuperscript{111} In Sullivan's words, "[t]he several states . . . hold nothing under [the general government], but derive their authority immediately from the same source with that;

\textsuperscript{105} See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793) (Wilson, J.) ("As to the purposes of the Union, . . . Georgia is NOT a sovereign State." (capitalization in original; other forms of emphasis omitted)).


\textsuperscript{107} Cf. Debates of the Virginia Convention (June 9, 1788), in 9 DHRC, supra note 99, at 1050, 1068 (remarks of Patrick Henry) (suggesting that the Constitution left only a "trivial" sphere of legislative authority exclusively to the states); Brutus XI, N.Y. J., Jan. 31, 1788, reprinted in 15 DHRC, supra note 101, at 512, 515 (complaining that the Constitution conveyed powers "in general and indefinite terms," and predicting that "the judicial power of the United States[] will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction"); Brutus I, N.Y. J., Oct. 18, 1787, reprinted in 13 DHRC, supra note 100, at 411, 414 (acknowledging the Federalists' argument that the federal legislature could exercise only its enumerated powers, but asserting that "[t]he powers of the general legislature extend to every case that is of the least importance").

\textsuperscript{108} See U.S. CONST. art VI, cl. 2; Caleb Nelson, Preemption, 86 Va. L. Rev. 225 (2000).

\textsuperscript{109} Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973); see also, e.g., Printz v. United States, 521 U.S. 898, 918 (1997) (referring to our constitutional system of "dual sovereignty"); Heath v. Alabama, 474 U.S. 82, 89 (1985) (noting, in the context of the Double Jeopardy Clause, that "the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government").

\textsuperscript{110} Sullivan, supra note 99, at 28.

\textsuperscript{111} Id.
no[t] one drop of the stream of power, issuing from the people to them, commixes itself with that of the general government in its course."\(^{112}\)

Modern discussions of state sovereignty echo this point: despite the enormous overlaps between state and federal authority, the states remain separate bodies politic in our constitutional system.\(^{113}\)

This formulation obviously concedes that sovereignty rests ultimately in the people and not in any government (whether state or federal). But contrary to some common claims,\(^{114}\) this fact does not compel the conclusion that governments must be amenable to suit by individuals. Under the theory of popular sovereignty, after all, individuals who sue a state are not really seeking the government's money or resources; instead, they are seeking money or resources that the people as a whole have gathered for use in carrying out the people's business. Suits against a state need not be regarded as suits against an impersonal (and therefore nonsovereign) government, but can instead be seen as suits against the sovereign people of the state in their collective capacity.\(^{115}\)

At the time of Chisholm, even supporters of the decision tacitly acknowledged this point. Many of Chisholm's supporters indicated that the federal government could not be haled into court by individuals.\(^{116}\) But the federal government was no less based on popular sovereignty

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\(^{112}\) Id. at 29.

\(^{113}\) See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.").

\(^{114}\) See, e.g., Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 454–58 (1793) (Wilson, J.) (suggesting that the theory of popular sovereignty is inconsistent with governmental immunity from suit); Amar, supra note 9, at 1466–92 (elaborating upon this theme).

\(^{115}\) See, e.g., Respublica v. Sparhawk, 1 Dall. 357, 361 (Pa. 1788) (argument of counsel) (referring to individuals' claims against the Commonwealth as "claims against the public"); Commonwealth v. Beaumarchais, 7 Va. (3 Call) 122, 169 (1801) (Pendleton, P.J.) (same); see also Act of July 29, 1783, § 14, in ROBERT & GEORGE WATKINS, A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 272, 277 (Philadelphia, R. Aitken 1800) (restricting the ability of claimants "to sue or implead the public, or State, as such, in any court of law or justice within the same"). I am indebted to James E. Pfander, Sovereign Immunity and the Right To Petition: Toward a First Amendment Right To Pursue Judicial Claims Against the Government, 91 W. L. Rev. 899, 1003 nn.416–17 (1997), for pointing me to this Georgia statute.

\(^{116}\) See, e.g., Chisholm, 2 U.S. (2 Dall.) at 425 (argument of Edmund Randolph, representing Chisholm); accord HORTENSius, An Enquiry Into the Constitutional Authority of the Supreme Federal Court, Over the Several States, in Their Political Capacity (1792), reprinted in 5 DHSC, supra note 1, at 36, 44; cf. Chisholm, 2 U.S. (2 Dall.) at 469 (Cushing, J.) (agreeing that Article III permitted individuals to sue states but doubting that it permitted individuals to sue the federal government); id. at 478 (Jay, C.J.) (reserving judgment on this issue, but distinguishing suits against states from suits against the United States). But see AM. MINERVA, Feb. 10, 1794, reprinted in 5 DHSC, supra note 1, at 262, 263 (condemning sovereign immunity even for the federal government).
than the state governments. The theory of popular sovereignty, then, did not automatically imply the rejection of sovereign immunity.

2. The Language of Article III. — We have yet to consider the second argument for understanding the Constitution itself to abrogate the states’ exemptions from suit. Even if the Constitution’s general framework for government permitted sovereignty to reside at both the state and the national levels, so that states could continue to claim the exemptions that the general law of nations accorded to sovereigns, the specific language of Article III might seem to curtail some of those exemptions. Article III specifies that the federal government’s judicial power “shall extend” to various categories of “Cases” and “Controversies.” Virtually without exception, the categories are worded broadly enough to include cases brought by individuals against states as well as other cases. Some of the categories, moreover, specifically mention suits between individuals and states: we are told that the federal government’s judicial power “shall extend” to “Controversies . . . between a State and Citizens of another State” or “between a State . . . and foreign . . . Citizens or Subjects.” Indeed, Article III goes on to give the federal Supreme Court original jurisdiction over all such “Cases . . . in which a State shall be Party,” and this jurisdiction is not even subject to congressional diminution.

Before we conclude that this language exposes otherwise consenting states to suit by individuals, however, we need to take a closer look at the meaning of the key terms. In particular, we need to understand some of the concepts built into the words “Cases” and “Controversies.”

For our purposes, the distinction between these two words does not matter. Although a few modern scholars have made imaginative arguments along other lines, the consensus holds that the two words

117 See, e.g., 10 ANNALS OF CONG. 128 (1800) (remarks of Sen. Pinckney) (“I suppose it will hardly yet be denied, that the people are the common fountain of authority to both the Federal and State Governments . . . .”); see also supra note 112 and accompanying text.
118 See, e.g., U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .”).
119 Id.
120 See id. cl. 2 (permitting Congress to make “Exceptions” to the Supreme Court’s appellate jurisdiction, but apparently making the Supreme Court’s original jurisdiction irreducible); cf. Pfander, supra note 70, at 558–62, 598–617 (reading the Original Jurisdiction Clause broadly, and understanding it as a self-executing abrogation of protections that the states would otherwise have enjoyed under the law of nations).
reflect the difference between civil and criminal matters: the Constitution uses "Cases" to include both sorts of proceedings, while it uses "Controversies" to refer specifically to civil proceedings. 122 A "Controversy," then, is simply a civil "Case."

The fact that two people disagreed about some legal issue did not automatically create a "Case" within the meaning of the Constitution. "To come within this description," John Marshall noted in 1800, "a question must assume a legal form, for forensic litigation, and judicial decision"; it must have "taken a shape for judicial decision." 123 As Marshall reiterated after his appointment to the Supreme Court, "[the judicial power] is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case...." 124 But "[i]f the question cannot be brought into a Court, then there is no case." 125

One of the longstanding prerequisites for bringing a question into court was "the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." 126 As we

122 See, e.g., William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 CAL. L. REV. 263, 266 (1990); John Harrison, The Power of Congress To Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. CHI. L. REV. 203, 221–30 (1997); see also Pfander, supra note 70, at 607 & n.207 (indicating that "most observers" accept this view). Edmund Pendleton's opinion in Commonwealth v. Caton, 8 Va. (4 Call) 5 (1782), tends to confirm the consensus view. See id. at 14–15 (noting that at least as used in the statute conferring jurisdiction upon Virginia's Court of Appeals, "the terms suits and controversies ... would seem to exclude criminal cases," while the term "cases" is "more general" and can "comprehend criminal as well as civil cases"); cf. Edmund Pendleton, Annotated Copy of the Constitution (Library of Congress, Andrew Jackson Donelson papers), microformed on Microfilm Supplement to the Documentary History of the Ratification of the Constitution: Virginia 980, 983 (John P. Kaminski & Gaspare J. Saladino eds., 1993) (glossing the first two clauses in Article III, Section 2, as follows: "I suppose in both these Clauses where a State is a Party agn. a Citizen, it is meant to be confined to civil disputes of Property & not those of a criml. nature"). For further evidence indicating that Article III's reference to "Controversies ... between a State and Citizens of another State" did not cover criminal matters, see infra note 171 and accompanying text.


124 Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 819 (1834); see also, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1640 (Boston, Hilliard Gray 1833) (noting that when a question "shall assume such a form, that the judicial power is capable of acting upon it," it "then becomes a case; and then, and not till then, the judicial power attaches to it"); id. ("[A] case is a suit ... instituted according to the regular course of judicial proceedings."). The Supreme Court continues to embrace this understanding. See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 705, 744 (2000) ("Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" (quoting Steel Co. v. Citizens for a Better Environment, 532 U.S. 83, 102 (1998))).

125 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 405 (1821). The

126 Muskrat v. United States, 219 U.S. 346, 357 (1911) (quoting In re Pacific Railway Commission, 32 F. 241, 255 (C.C.N.D. Cal. 1887)).
have seen, every court needed both *actor* and *reus;*127 if no defendant could be brought even constructively before the court, then the court could not proceed to adjudicate.128 Again, John Marshall explicitly linked this concept to the language of Article III. For something to qualify as a "Case," he told his fellow members of Congress in 1800, "[t]here must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit."129

People who held this view could reasonably conclude that the language of Article III did not itself expose unconsenting states to suit by individuals. Unless a defendant voluntarily appeared, after all, a justiciable "Case" or "Controversy" would exist only if the defendant could legitimately be commanded to appear. But the Constitution did not seem to address (let alone change) the preexisting rule that states could not be haled into court at the behest of an individual. Thus, while Article III extended the federal government's judicial power to various categories of "Cases" and "Controversies," background rules of law kept individuals from making an unconsenting state party to a "Case" or "Controversy" in the first place. As Charles Jarvis of Massachusetts put it in 1793, "the Constitution was not intended to create occasions upon which its power was to be exerted, but to operate simply upon those which had an actual existence."130

To appreciate the respectability of this argument, we can begin with Chief Justice Marshall's famous opinion in *Cohens v. Virginia.*131 Virginia had prosecuted Philip and Mendes Cohen for violating a state law against selling lottery tickets. The Cohens claimed that a federal statute gave them a defense, but the Virginia courts disagreed and convicted them. When the Cohens secured a writ of error to bring the

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127 See supra note 29 and accompanying text.
128 See supra notes 61-64 and accompanying text. It was often said that proceedings under these circumstances would be *coram non judice* — not really in court at all. See, e.g., Bigelow v. Stearns, 19 Johns. 39, 41 (N.Y. Sup. Ct. 1821) ("Take the case of a person convicted by a Justice of the Peace, who never had been summoned, and who never appeared before him; would it admit of a doubt that this fact might be shown, and if proved, that the whole proceeding would be *coram non judice* and void?"); Nathan v. Virginia, 1 Dall. 77 n., 78 n. (Pa. C.P. 1781) (argument of counsel) ("[T]he court having no jurisdiction over Virginia, all its process against that state, must be *coram non judice*, and consequently void."); see also Hart v. Granger, 1 Conn. 154, 168-70 (1814) (concluding that whether or not a prior court could validly have commanded the defendants to appear, the defendants had indeed appeared before that court, and its proceedings therefore were "not coram non judice").
129 Marshall, supra note 123, at 96; cf. 2 T. CUNNINGHAM, A NEW AND COMPLETE LAWDICTIONARY (2d ed., London, W. Flexney 1771) (unpaginated, definition of "Writ") (noting that the writs by which defendants were summoned into court issued "before the suit begins, or rather to begin the suit").
130 Charles Jarvis, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), in 5 DHSC, supra note 1, at 436, 437.
131 19 U.S. (6 Wheat.) 264 (1821).
record to the federal Supreme Court for review, Virginia argued that the matter would not qualify as a "Case[...]
arising under th[e] Constitution [or] the Laws of the United States" within the meaning of Article III. "[B]efore there can be a case," one of Virginia's lawyers explained, "there must be parties over whom the Court can take jurisdiction..." But "[i]t is an axiom in politics, that a sovereign and independent State is not liable to the suit of any individual, nor amenable to any judicial power, without its own consent."133

Virginia's lawyer offered various illustrations of his argument. He maintained, for instance, that even if a state violated the Constitution by extracting a tonnage duty from someone,134 Article III did not enable the aggrieved individual to sue the state for redress (unless the state consented). As the lawyer explained to the Court, "although a question has arisen under the constitution, &c., a case has not arisen, inasmuch as you cannot bring one of the parties before you."135

Chief Justice Marshall's opinion for the Court did not reject this understanding of what Article III means by "Cases." To the contrary, Marshall conceded that the lawyer's examples "show that there may be violations of the constitution, of which the Courts can take no cognizance."136 Here, however, there unquestionably had been a "Case" in the state courts: this was not a situation in which an individual had sought to sue an unconsenting state, but rather one in which the state had voluntarily gone to court to prosecute an individual defendant. Because a "Case" existed, and because it was a "Case[...]
arising under th[e] Constitution [or] the Laws of the United States," it was within the Supreme Court's appellate jurisdiction.137

Arguments of counsel in The Schooner Exchange v. M'Faddon138 reinforce the link between a sovereign's exemptions from suit and the terms "Case" and "Controversy." In The Schooner Exchange, individual citizens of Maryland claimed that they were a ship's rightful owners, but that French agents had unlawfully taken the ship from them on the high seas. When the ship — now sailing as a public vessel of France — put into port at Philadelphia, the claimants filed a libel asking a federal court to attach the ship and to restore it to them. Upon the suggestion of the federal government, however, the district court quashed the process of attachment and dismissed the proceedings on
the ground that "a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel."139 When the matter reached the Supreme Court, lawyers for the individual claimants pointed out that Article III expressly authorizes the federal government to exercise judicial power over "Controversies . . . between . . . the Citizens [of a State] . . . and foreign States" like France.140 But the Attorney General of the United States responded that the Constitution "decides nothing — it only provides[] a tribunal, if a case can by possibility exist."141 Because of the exemptions of sovereignty, no such case could exist in the absence of the sovereign's consent.142

In an opinion by Chief Justice Marshall, the Supreme Court agreed that the claimants' libel should have been dismissed. While private vessels that entered American ports for purposes of trade were "amenable to the local jurisdiction," the rules were different for "a public armed ship, in the service of a foreign sovereign."143 Drawing upon his understanding of the general law of nations, Marshall held that the Exchange was "exempt from the jurisdiction of the country."144 To be sure, "the sovereign of the [United States]" could destroy this exemption, and could let it be known that warships entering American ports would be subject to attachment at the behest of individuals. But Marshall did not read either the Constitution or any valid federal statute to do so. Although his opinion did not parse the language of Article III, the fact that the federal government's judicial power extended to "Controversies" between individual citizens and foreign countries, as well as to "all Cases of admiralty and maritime Jurisdiction,"145 plainly did not make France amenable to suit.

139 See id. at 119-20.
140 U.S. CONST. art. III, § 2, cl. 1; see The Schooner Exchange, 11 U.S. (7 Cranch) at 130 (argument of counsel).
141 The Schooner Exchange, 11 U.S. (7 Cranch) at 133 (argument of counsel).
142 See id. at 132-33.
143 The Schooner Exchange, 11 U.S. (7 Cranch) at 142, 147.
144 See id. at 147. As in Nathan v. Virginia, lawyers for the individual claimants had sought to distinguish "between a suit against a sovereign, and a process against a thing claimed by a sovereign." Id. at 130 (argument of counsel). Under the circumstances, however, Chief Justice Marshall was not persuaded that process could be directed against the vessel. He may have based this conclusion on the fact that the vessel had been in France's possession when it was attached. Cf. supra note 91. Alternatively, he may have agreed with the executive branch's position that "[t]he present process against the vessel is to compel an appearance." The Schooner Exchange, 11 U.S. (7 Cranch) at 124 (argument of Alexander Dallas, the United States Attorney for the relevant district); see also id. at 133 (argument of the Attorney General) ("The jurisdiction over things and persons, is the same in substance. The arrest of the thing is to obtain jurisdiction over the person.").
By the same token, consider how the Judiciary Act of 1789 handled proceedings against ambassadors and other foreign ministers. The Constitution extends the federal government's judicial power to "all Cases affecting Ambassadors, other public Ministers and Consuls," and it goes on to specify that the Supreme Court "shall have original Jurisdiction" over all such "Cases." Under the law of nations, however, ambassadors and other public ministers (though not consuls) enjoyed broad privileges against being haled into court. The Judiciary Act of 1789 reflects that understanding. Congress recognized the Supreme Court's original jurisdiction over all suits "in which a consul . . . shall be a party," and also over all suits brought by ambassadors or other public ministers. But Congress purported to give the Court only "such jurisdiction of suits or proceedings against ambassadors, or other public ministers, . . . as a court of law can have or exercise consistently with the law of nations." The First Congress evidently deemed this restriction consistent with the Original Jurisdiction Clause of Article III. One possible explanation is that purported proceedings against ambassadors and other ministers, under circumstances in which the applicable legal rules protected them from being haled into court, were not thought to be "Cases" within the meaning of Article III.

146 Id.
148 Of course, other explanations are also possible. For instance, members of the First Congress may simply have believed that they could cut back on the original jurisdiction that Article I gives the Supreme Court. Even with respect to consuls, after all, the statutory language about suits in which consuls are parties is arguably narrower than the constitutional language about cases affecting consuls. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 294 & n.1 (4th ed. 1996) [hereinafter HART AND WECHSLER].
149 Even if one accepts the explanation suggested in the text, I do not mean to imply that diplomatic immunity was hard-wired into Article III, or that Congress could have no power to abrogate the law of nations and subject ambassadors to suit in federal courts. I am merely suggesting that the concept of "Cases" and "Controversies" required the existence of adverse parties who could be brought within the court's power. When the applicable legal rules kept that from happening, there was no "Case."

It is important to emphasize that the legal rules that governed who could be brought within the court's power were not found in the Constitution itself. For the most part, they came instead from statutes or from the general law. My point here is not that the Constitution froze those rules in place, but simply that the Constitution did not itself override them. The extent to which the Constitution empowers Congress to override such rules is the subject of Part III.
The same sort of argument has long informed interpretations of the Constitution’s Full Faith and Credit Clause, which obliges each state to give “Full Faith and Credit” to the “judicial Proceedings” of every other state. From the start, this language has been understood to require respect for judgments only if the rendering court “had jurisdiction, not only of the cause, but of the parties.” One textual basis for this conclusion is that proceedings against a defendant who did not appear before the rendering court, and who was not otherwise brought within that court’s jurisdiction, are not really “judicial Proceedings” within the meaning of the Constitution. A court, after all, needs a proper reus or party defendant. And a defendant who was merely named by the plaintiff, but was not really within the court’s authority, “was . . . never a party, but by forced construction.”

Early courts applied similar ideas to the interpretation of state statutes. In one example from Virginia, a man named Brander had asked a county court to exercise its power to arrange for the repair of a bridge on a road near his mill. When the county court denied this request, Brander sought a writ of mandamus. The members of the county court contended that mandamus was the wrong remedy; they asserted that Brander should simply have appealed their decision under a state statute authorizing appeals from “the judgment, or sentence, of any county court, in any action, suit or contest . . . concerning mills [or] roads.” But Virginia’s Supreme Court of Appeals rejected this assertion. Judge St. George Tucker explained that in the absence

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150 See U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”); see also ARTICLES OF CONFEDERATION art. IV, cl. 3 (U.S. 1781) (“Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.”).

151 Bissell v. Briggs, 9 Mass. (8 Tyng) 462, 468 (1813); see also, e.g., Kibble v. Kibble, 1 Kirby 119, 126 (Conn. Super. Ct. 1786) (holding that the parallel clause in the Articles of Confederation did not cover a Massachusetts court’s judgment because the defendant had not been served with process in Massachusetts and the rendering court had therefore lacked jurisdiction over him).

152 See Bissell, 9 Mass. (8 Tyng) at 467 (“The . . . judicial proceedings[] contemplated, and to which full faith and credit are to be given, are such as were within the jurisdiction of the state whence they shall be taken.”); see also 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 261 n.b (2d ed., New York, O. Halsted 1832) (“It is only when the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person, that the record of the judgment is entitled to full faith and credit . . . .”); cf., e.g., Starbuck v. Murray, 5 Wend. 148, 158 (N.Y. Sup. Ct. 1830) (indicating that the “record” produced by a court that lacks jurisdiction over the defendant’s person “is not in truth a record”).

153 See supra note 29 and accompanying text.

154 Rogers v. Coleman, 3 Ky. (Hard.) 413, 419 (1808); see also Bernard v. Vignaud, 1 Mart. (n.s.) 1, 8–9 (La. 1833) (indicating that the very existence of a “judgment” depends upon “the agency and presence of . . . actor et reus”); cf. supra note 128 (indicating that proceedings without a defendant were coram non judice, or not really in court).
of a "party defendant," there could be no "action, suit or contest" within the meaning of the statute.\textsuperscript{155}

\section*{D. Compulsory Process and the Original Debate}

The notion that it takes two to have a "Case" or "Controversy," and that principles of general law protected states against being haled into court at the behest of individuals, helps explain the historical evidence that the modern Supreme Court and its critics have been debating. When we revisit discussions from the Founding era, we will be struck by how many people thought about sovereign immunity in terms of compulsory process.

\subsection*{1. Evidence from the Ratification Debates. —} We can start with the Virginia Ratifying Convention, where James Madison and John Marshall made the comments that have played such a prominent role in the modern Supreme Court’s sovereign immunity cases. These comments were explicitly based upon the established mechanisms for haling people into court.

On June 19, 1788, George Mason — an opponent of ratification — complained about the state-citizen diversity clause in Article III, which extends the federal government’s judicial power “to Controversies . . . between a State and Citizens of another State.”\textsuperscript{156} Mason speculated that if the Constitution were ratified, purportedly sovereign states would “be arraigned like a culprit, or private offender,” and “be brought to the bar of justice like a delinquent individual.”\textsuperscript{157} James Madison, however, responded that “[i]t is not in the power of individuals to call any State into Court.” According to Madison, the Constitution’s grant of state-citizen diversity jurisdiction would come into play only when the state “condescend[ed] to be a party,” as when the state was the \textit{plaintiff}.\textsuperscript{158}

The Antifederalist Patrick Henry dubbed Madison’s position “perfectly incomprehensible,” because the words of Article III did not “dis-
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criminal[e] between plaintiff or defendant."\textsuperscript{159} But John Marshall indicated that Henry was missing the point. Marshall emphasized the states’ established protections against compulsory process, and he maintained that the words of Article III left those protections in place. As Marshall put it, “I hope no Gentleman will think that a State will be called at the bar of the Federal Court. . . . It is not rational to suppose, that the sovereign power shall be dragged before a Court."\textsuperscript{160}

Similar debates played out in Massachusetts. We lack much direct evidence of the Massachusetts Ratifying Convention’s discussions of Article III, Section 2.\textsuperscript{161} According to newspaper articles published in the 1790s, however, the Massachusetts convention considered at length the federal government’s “power . . . to call [a state] into their Courts, . . . to answer to the demand of a foreigner."\textsuperscript{162} In response to concerns raised by Antifederalists, supporters of the Constitution “laughed at” and “treated as ridiculous” the idea that Article III might be read to expose unconsenting states to suit by individuals.\textsuperscript{163} More substantively, the prominent Federalist Rufus King allegedly gave a two-hour speech purporting to demonstrate that Article III “could not possibly bear” this construction.\textsuperscript{164} People who were “learned in the Law” assured their colleagues that the Antifederalists’ objection was “erroneous” and that “no prosecution of a State could ever commence on the principle of its own sovereignty.”\textsuperscript{165} As James Sullivan recalled, “[i]t seemed then to be agreed, that the states, as states, were not liable to the civil process of the supreme judicial of the Union.”\textsuperscript{166}

\textsuperscript{159} Id. at 1422–23.
\textsuperscript{160} Id. at 1433.
\textsuperscript{161} See 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1364 n.1 (John P. Kaminski & Gaspare J. Saladino eds., 2000) [hereinafter 6 DHRC] (observing that notes taken by the Antifederalist Justus Dwight are the sole account of the debates for January 29, 1788, when the convention discussed Article III, Section 2); Justus Dwight Journal, Massachusetts Convention (Jan. 29, 1788), in 7 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1815–16 (John P. Kaminski & Gaspare J. Saladino eds., 2001) (reprinting Dwight’s sketchy notes, which include only fleeting references to the possibility that Article III subjected states to suit by individuals).
\textsuperscript{162} Marcus, MASS. MERCURY, July 13, 1793, reprinted in 5 DHSC, supra note 1, at 389, 389 (emphasis omitted).
\textsuperscript{163} Brutus, INDEP. CHRON., July 18, 1793, reprinted in 5 DHSC, supra note 1, at 392, 392.
\textsuperscript{164} Democrat, MASS. MERCURY, July 23, 1793, reprinted in 5 DHSC, supra note 1, at 393, 393.
\textsuperscript{165} A Republican, The Crisis, No. XIII, INDEP. CHRON., July 25, 1793, reprinted in 5 DHSC, supra note 1, at 395, 397 (some emphasis omitted, other emphasis added); see also Hampden, INDEP. CHRON., July 25, 1793, reprinted in 5 DHSC, supra note 1, at 399, 399–400 (recalling that “the great Lawyers in the Convention declared, that no such construction [as the one adopted by the Supreme Court in Chisholm] could ever be made”); James E. Pfander, History and State Su-

ability: An “Explanatory” Account of the Eleventh Amendment, 83 CORNELL L. REV. 1269, 1333 n.290 (1998) (noting that these sources “leave little doubt that Rufus King, Caleb Strong, and Theodore Sedgwick had all denied the state’s suability in supporting the ratification of the Con-

stitution”).
\textsuperscript{166} SULLIVAN, supra note 99, at 22.
In the wake of *Chisholm*, some commentators suggested that people had known all along that this argument was mere "chicanery." But many other writers indicated that the Massachusetts convention had ratified the Constitution on the strength of these arguments. "Every person that attended the debates," one correspondent asserted, "knows that this question was agitated in the Convention, and . . . that both parties mutually and cordially consented, that the ‘suability’ of the States was not contemplated by the framers of the Constitution." According to this correspondent, "all the Members [of the Massachusetts convention] expressly declared themselves opposed to the principle" that the Constitution "admits an individual to sue a State," and "the whole Convention" determined that the Constitution "could never bear that construction." Governor John Hancock likewise thought it inconceivable that the people of Massachusetts, when they ratified the Constitution, when they ratified the Constitution through their representatives, had expected "that each State should be held liable to answer on *compulsory civil process*, to every individual resident in another State or in a foreign kingdom."

The same sort of discussion appears to have occurred in New York. Again, the available records of debates are sketchy. But when the New York convention ultimately voted to ratify the Constitution, it explicitly declared that it was doing so "[u]nder the[] impression[]" that "the judicial power of the United States, in cases in which a State may be a party, does not extend to criminal prosecutions, or to authorise any suit by any person against a State."

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167 See, e.g., Democrat, supra note 164, at 393–94.
168 See, e.g., SULLIVAN, supra note 99, at 22; Brutus, supra note 163, at 392–93; Marcus, supra note 162, at 389–90.
169 A Republican, supra note 165, at 306; see also INDEP. CHRON., Sept. 16, 1793, reprinted in 5 DHSC, supra note 1, at 415, 415–16 ("[E]very real federalist, will be anxious to retain that degree of sovereignty which was unanimously acknowledged among the members of the Convention . . . that the State in no instance could be sued by individuals before the Federal Court."); A Consistent Federalist, INDEP. CHRON., Sept. 23, 1793, reprinted in 5 DHSC, supra note 1, at 425, 425–26 ("[I]t was the unanimous opinion of [the Massachusetts Ratifying Convention] that the State could not be suable before the Federal Court . . . .").
170 John Hancock’s Address to the Massachusetts General Court, INDEP. CHRON., Sept. 19, 1793, reprinted in 5 DHSC, supra note 1, at 416, 416. Hancock had served as president of the Massachusetts Ratifying Convention and had "played a pivotal role," though gout (or political calculations) had kept him from attending most of the convention’s debates. See 6 DHRC, supra note 161, at 1108, 1110, 1117–21.

Some modern scholars have misunderstood exactly what the New York convention did. New York’s form of ratification was preceded by a declaration of rights and a set of “explanations” that, according to the convention, were "consistent with the said Constitution." Id. The convention’s statement about suits against states appeared among these declarations and explanations, where it was grouped with other explanatory statements about the Constitution’s meaning (such as the observation that “the prohibition contained in the said Constitution against ex post..."
2. **Evidence from Post-Ratification Attempts To Sue States.** — After the Constitution was ratified and Congress had set up the new Supreme Court, individual claimants sought to take advantage of the possibility that the Court might hear suits against states. Indeed, the very first case docketed in the Court was initiated by two foreign creditors against the State of Maryland.\(^2\) Maryland chose to consent to this suit; it voluntarily entered its appearance, and it ended up settling the suit.\(^2\)

But the litigation prompted some debate over whether Article III subjected states to suit.

Predictably, this debate was conducted in terms of whether states could be haled into court. Thus, James Sullivan cast the critical question as “whether the separate states, as states, are liable to be called to answer before any tribunal by civil process.”\(^2\)

Sullivan insisted that they were not; he advanced various arguments attempting to show “that a state, by any fair construction of the judiciary powers under consideration, cannot be compelled to answer on a civil process.”\(^2\)

Even people who rejected Sullivan’s conclusion accepted his framing of the issue. As one anonymous essayist wrote in the *Columbian Centinel*, the “real question” was “whether a state is or is not, compellible to answer in this Court upon civil process.”\(^2\)

Another pamphleteer, while agreeing that “a state cannot be called to answer criminally,” maintained that a state “can...be called upon in the supreme federal court, in answer to a plaint preferred against it by another party.”\(^2\)

Writers on both sides of the debate focused on state

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\(^2\) *Facto laws[] extends only to laws concerning crimes*). *See id.; cf. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (agreeing with this interpretation of the Ex Post Facto Clauses).*

\(^2\) On the same day that it approved this document, the New York convention also approved a separate list of “recommendatory amendments,” reflecting its proposals for changes in the Constitution. In keeping with the convention’s stated interpretation of the existing Constitution, none of the proposed amendments focused on the states’ amenability to suit. *See* *Recommendatory Amendments (July 26, 1788), reprinted in 18 DHRC, supra, at 301.*

A volume of the *Documentary History of the Ratification of the Constitution* published in 1995 reprints both documents. Before this volume was published, however, scholars drew their information about the ratification proceedings from Jonathan Elliot’s reports, which did not reprint the relevant documents. Elliot’s presentation misled some scholars into thinking that the New York convention’s comment on state suability, which was part of the convention’s “explanations,” was actually a proposal for a constitutional amendment. *See, e.g., ORTH, supra note 3, at 26 & n.53; Field, supra note 27, at 531; Gibbons, supra note 9, at 1912.* Starting from this faulty premise, scholars have argued that the delegates must have understood the Constitution to expose states to suit; otherwise, they would not have seen the need for an “amendment.” *See* *Field, supra note 27, at 531; Gibbons, supra note 9, at 1912.*

\(^2\) *See 5 DHSC, supra note 1, at 7.*

\(^2\) *See id. at 16-20.*

\(^2\) *See SULLIVAN, supra note 99, at 21.*

\(^2\) *Id. at 27.*

\(^2\) *COLUMBIAN CENTINEL, Sept. 7, 1791, supra note 88, at 33.*

\(^2\) *HORTENSIIUS, supra note 116, at 36, 54 (emphasis omitted).*
"amenability" to suit — a locution that, as we have seen, refers to a court's authority over the defendant's person. Other suits against states prompted similar discussions. In 1791, for instance, a representative of New York's former printer sought to sue the state in the federal Supreme Court for failing to pay a salary that the printer allegedly had been promised. Anticipating that New York would not consent to this suit, the Pennsylvania Gazette noted that the Court would have to decide an "important question," which the newspaper cast as "[w]hether a State can be compelled to appear and answer to a Process issuing from that Court." As predicted, New York initially ignored the summons that the plaintiff had caused to be served on its governor and attorney general. Even after the Court issued its decision in Chisholm v. Georgia and threatened to enter judgment by default against New York, the state protested the Court's (personal) jurisdiction. Being "a free, sovereign, and independent State," New York insisted that it "cannot nor ought to be drawn or compelled against [its] Will . . . to appear to, or answer, before the Justices of the Supreme Court of the United States, or other Judges whatsoever, on any pleas, plaints, or demands wherein . . . any individual Citizen . . . is Plaintiff." Virginia authorities took the same position when shareholders of the Indiana Company, a group of land speculators, sued the state in the federal Supreme Court for a large amount of money. Virginia's

178 See, e.g., id. at 42 (arguing that "the states . . . are and ought to be amenable to the federal judiciary"); SULLIVAN, supra note 99, at 22 (deeming it "absurd and ridiculous . . . to suppose the governments existing as separate governments, and yet to suppose them amenable before a civil tribunal, of any kind, upon me[sne] process"); see also Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 435 (1793) (Wilson, J.) ("The question to be determined is, whether this State . . . is amenable to the jurisdiction of the Supreme Court of the United States?"); Iredell, supra note 86, at 188 ("The question as to all suits is — In what instances can a Sovereign State . . . be amenable at the suit of an Individual?").

179 See supra notes 73-75 and accompanying text.


181 See 5 DHSC, supra note 1, at 60.

182 See Oswald v. New York, 2 U.S. (2 Dall.) 415 (1793).


184 One of the interested shareholders was none other than Supreme Court Justice James Wilson, who owned 300 shares in the Indiana Company — the same stake as the lead plaintiff in the case. See 5 DHSC, supra note 1, at 283 n.50, 284. Contrary to the suggestion of some commentators, therefore, Justice Wilson had a significant financial interest in the legal question that he addressed in Chisholm v. Georgia. Compare ORTH, supra note 3, at 23 (invoking Wilson's opinion in Chisholm as "evidence directly bearing on the original understanding of the Framers" and asserting that there is "no reason" to doubt Wilson's impartiality), with WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND
governor refused to receive process, and the lower house of the state legislature resolved "that the State cannot be made a defendant in the said Court at the suit of any individual or individuals."

Georgia's litigation strategy in *Chisholm* itself is also instructive. Before going to the Supreme Court, Alexander Chisholm first sought to sue the state in a federal circuit court. Georgia's lawyers immediately advised the governor to do nothing that might be taken as a consent to this suit, and Georgia duly entered a plea contesting the court's jurisdiction over a "free, sovereign and independent State" that had not consented to be sued. The plea emphasized that the state of Georgia "cannot be drawn or compelled, nor at any Time past hath been accustomed to be ... drawn or compelled to answer against the will of the said State ... before any Justices of the federal Circuit Court for the District of Georgia or before any Justices of any Court of Law or Equity whatever."

The only surviving opinion rendered in the circuit court did not reach this issue. Written by Justice Iredell, it interpreted Article III's grant of original jurisdiction to the Supreme Court as being exclusive, at least as far as other federal courts were concerned. According to Iredell, if any federal court was authorized to entertain Chisholm's suit, it could only be the Supreme Court. In February 1792, Chisholm therefore initiated proceedings in the Supreme Court.

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**OLIVER ELLSWORTH** 195 (1995) (acknowledging that Wilson "had a direct and significant financial interest"). Wilson could not afford to take his finances lightly: during the 1790s he was "[i]ncreasingly ... overwhelmed by financial distresses," and "[t]wice he was jailed for debt." The *Oxford Companion to the Supreme Court of the United States* 933 (Kermit L. Hall ed., 1992). Ironically, Wilson (or at least his lawyer) sought to defeat his imprisonment by claiming official immunity; as a member of the Supreme Court, Wilson was said to be privileged against being arrested and held to special bail. See *Gratz v. Wilson*, 6 N.J.L. 419, 420 (1798) (argument of counsel).

**185** Letter from Henry Lee to David Meade Randolph (Sept. 27, 1792), in 5 DHSC, supra note 1, at 318, 318 (telling the federal marshal "that I do protest in behalf of this Commonwealth against the execution of any process on me in my official character which may in the most remote degree imply a submission of the State to the federal Judiciary without her previous assent").

**186** Proceedings of the Virginia House of Delegates (Dec. 18, 1792), in 5 DHSC, supra note 1, at 322, 322. Later, in response to *Chisholm v. Georgia*, both houses of the state legislature adopted a resolution reiterating this view. See infra p. 1600.

**187** See Letter from Thomas P. Carnes and John Y. Noel to Edward Telfair (Mar. 31, 1791), in 5 DHSC, supra note 1, at 140, 142 (stressing that "nothing ... ought to appear on the records of the executive department which can possibly be construed into a recognition of the jurisdiction of the Federal Courts in Such Cases").

**188** Plea to the Jurisdiction (Oct. 17, 1791), in 5 DHSC, supra note 1, at 143, 143.

**189** See James Iredell's Circuit Court Opinion (Oct. 21, 1791), in 5 DHSC, supra note 1, at 148, 153; accord *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803) (suggesting that Congress cannot give lower federal courts concurrent jurisdiction over cases that are within the original jurisdiction of the Supreme Court). But see *Boos v. Preston*, 111 U.S. 252, 256-60 (1884) (rejecting this suggestion on the strength of practice and precedents both before and after *Marbury*).

**190** See Summons (Feb. 8, 1792), in 5 DHSC, supra note 1, at 155, 155.
house of the Georgia legislature reacted with a resolution denying that Article III gave federal courts the power "to compel states to answer to any process the said courts . . . may sue out" at the behest of an individual. 191

At the Supreme Court level, Georgia again feared doing anything that might be deemed a consent to jurisdiction. This time, indeed, Georgia did not appear in response to Chisholm's suit at all — not even to enter a plea challenging the Court's jurisdiction. 192 At oral argument, the Supreme Court therefore heard only from Chisholm's attorney, Edmund Randolph. A courtroom observer later told Georgia's governor that he "was right in not appearing to this action," since Chief Justice John Jay "said from the Bench that had the State pleaded it would have been an acknowledgement of the jurisdiction of the Court." 193

Georgia's cautious approach ultimately did not matter; according to the Supreme Court, Article III made it irrelevant whether Georgia had consented to Chisholm's suit. But the people who condemned this decision continued to emphasize what they viewed as the established principle that individuals could not hale unconsenting states into court. An anonymous essayist in Boston's Independent Chronicle reminded readers that during the ratification debates in Massachusetts, supporters of the Constitution had "openly and solemnly declared['] that there never could be a construction given to it which would render the States liable to be sued on a common civil process." 194 Pointing out that the Articles of Confederation had contained "no provision

192 Scholars have attributed this change in tactics to an argument that Chisholm had made in the lower court. It was often said that when a person who had been named as a defendant wanted to challenge the court's jurisdiction, he had to do so on his own behalf rather than through an attorney; "pleading by attorney implies leave of the court, which acknowledges its jurisdiction." Wyche, supra note 38, at 109. In the circuit court, Chisholm had caused a copy of the process to be served on Georgia's governor, but the governor's plea to the jurisdiction (asserted "for himself and the Citizens of the said State") had been submitted by the state's attorney and solicitor general. See Plea to the Jurisdiction, supra note 188, at 143. Chisholm's lawyers apparently argued that by "not presenting the plea in person," the governor had waived the state's jurisdictional objection. See James Iredell's Circuit Court Opinion, supra note 189, at 152. At the circuit court level, Justice Iredell — after an extended discussion — declined to apply "this rigid rule of law, not permitting a Man to plead to the Jurisdiction by an Attorney." See id. at 152-53 (questioning the rule's validity, and in any event finding it inapplicable under the circumstances). Still, the matter may have been sufficiently doubtful to persuade Georgia not to have attorneys argue on its behalf in the Supreme Court. See 5 DHSC, supra note 1, at 150 & n.23; Pfander, supra note 165, at 1376 n.482.
193 Letter from John Wereat to Edward Telfair (Feb. 14, 1793), in 5 DHSC, supra note 1, at 163.
194 "The True Federalist" to Edmund Randolph, Number I, INDEP. CHRON., Jan. 16, 1794, reprinted in 5 DHSC, supra note 1, at 238, 242.
for compelling a State to answer an individual Citizen on a civil process," the essayist argued that nothing in the Constitution changed this situation. Other correspondents remarked upon "[t]he novelty of an independent and sovereign State being obliged to respond in a Court of Justice," and claimed that even when the individual states had been mere British colonies (rather than true sovereigns), they could not "be compelled to answer in a court of law on a civil process."

3. Evidence from the States' Reactions to Chisholm. — The states' reactions to Chisholm confirm the link between sovereign immunity and compulsory process. A variety of state legislative bodies advocated amending the Constitution to overrule Chisholm, and each of them focused on the power to command states to appear in court.

The Massachusetts legislature led the way. In a resolution that was circulated to the other states, it condemned "a power . . . of compelling a State to be made defendant in any Court of the United States, at the suit of an individual." The resolution instructed the state's Sena-

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195 "The True Federalist" to Edmund Randolph, Number IV, INDEP. CHRON., Feb. 11, 1794, reprinted in 5 DHSC, supra note 1, at 264, 265.
196 Letter from an Anonymous Correspondent, INDEP. CHRON., Apr. 4, 1793, reprinted in 5 DHSC, supra note 1, at 228, 228.
197 Sydney to Crito, INDEP. CHRON., Aug. 15, 1793, reprinted in 5 DHSC, supra note 1, at 407, 408; see also Jarvis, supra note 130, at 436 ("Before the present Constitution was conceived; and even before the happy emancipation of the country, the respective Provinces and States had often been plaintiffs, but they never had been defendants."); Sullivan, supra note 99, at 29 (asserting that before the Revolution, "[t]here were no pretensions of [any of the provinces and colonies in America] being liable to be sued"); Letter from an Anonymous Correspondent, supra note 196, at 228 (referring to "a power, which even the British Government never yet assumed over a single Colony in her dominions"); "The True Federalist" to Edmund Randolph, Number II, INDEP. CHRON., Jan. 23 & 27, 1794, reprinted in 5 DHSC, supra note 1, at 243, 245 (asserting that "the power of Great-Britain[] did not extend so far, even in claim, as to make a province a party defendant").

These recollections about Britain's relationship with her colonies may not have been entirely accurate. At least some English monarchs apparently had set up quasi-judicial procedures requiring their colonies to answer individuals' claims. In 1634, for instance, Charles I issued a commission for regulating England's colonies throughout the world; the commissioners were authorized "to hear and determine all complaints, at the entrance and suit of the party grieved, whether it be against the whole colonies themselves or any governor or officer of the same, ... and to summon the persons before you, and they or their procurators or agents being on both sides heard, finally to determine thereof, according to justice." Joseph Henry Smith, Appeals to the Privy Council from the American Plantations 44 & n.283 (1950) (internal quotation marks omitted) (citation omitted). Later, the king's Privy Council sometimes entertained petitions by colonial employees who claimed that the colonies owed them money. See, e.g., 2 Acts of the Privy Council of England (Colonial Series) 761 (W.L. Grant & James Munro eds., 1910) (referring to petitions in the late seventeenth and early eighteenth century by John Usher, who had served as Treasurer of colonies in New England). The quotation in the text, then, should not be taken to prove that Britain really did allow its colonies to assert the exemptions of true sovereigns. Rather than trying to make any points about colonial history, I am simply observing that people discussed sovereign immunity in terms of compulsory process.

198 See Letter from Samuel Adams to the Governors of the States (Oct. 9, 1793), in 5 DHSC, supra note 1, at 442, 442.
tors (and requested the state’s Representatives) “to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.”

The Virginia legislature soon adopted a resolution to the same effect. With only a few dissenting voices, the legislature first expressed its view that *Chisholm* had been wrongly decided:

【A】state cannot, under the constitution of the United States, be made a defendant at the suit of any individual or individuals, and . . . the decision of the Supreme Federal Court, that a state may be placed in that situation, is incompatible with, and dangerous to the sovereignty and independence of the individual states, as the same tends to a general consolidation of these confederated republics.

The legislature then unanimously instructed Virginia’s Senators (and requested its Representatives) to seek an amendment that would “remove or explain” anything in the Constitution “which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States.”

Numerous other legislative bodies adopted similar resolutions, all of which were about haling states into court. The Connecticut legislature urged the state’s Senators and Representatives to seek a constitutional amendment “so that in future no State can on any Construction be held liable . . . to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever.” The South Carolina Senate likewise expressed its “decided sense” that “the power of compelling a State to appear, and answer to the plea of an individual, is utterly subversive of the separate dignity and reserved independence

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1 Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 DHSC, supra note 1, at 440, 440.
3 *See* id.; Proceedings of the Virginia Senate (Dec. 4, 1793), in 5 DHSC, supra note 1, at 339, 339.
4 In addition to the resolutions quoted in the text, see Resolution of North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, supra note 1, at 615, 615 (instructing the state’s Senators and requesting the state’s Representatives to seek “such amendments . . . as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States”); Proceedings of the Maryland House of Delegates (Dec. 27, 1793), in 5 DHSC, supra note 1, at 611, 611 (similar).
5 Resolution of the Connecticut General Assembly (Oct. 29, 1793), in 5 DHSC, supra note 1, at 609, 609; *see* also Letter from Chauncey Goodrich to Oliver Wolcott, Jr. (Oct. 30, 1793), in 5 DHSC, supra note 1, at 609, 609 (noting the “great unanimity of sentiment” within the Assembly on this resolution).
of the respective States, and dangerous to the peace and tranquility of their governments." 204 A committee of the Pennsylvania House of Representatives remarked upon "the many inconveniences resulting from the United States being vested with a power to compel a state to appear at the suit of an individual citizen or foreigner, to answer as a defendant in the court of the United States," and proposed asking the state's congressional delegation to seek "such amendments . . . as will abridge the general government of this power." 205 The New Hampshire legislature also advocated constitutional amendments "to prevent the possibility of a construction which may justify a decision that a State is compellable to the suit of an individual or individuals in the Courts of the United States." 206

In a different way, a proposal floated in the Georgia legislature reflects the same link between sovereign immunity and amenability to compulsory process. Toward the end of 1793, the state's House of Representatives approved a bill under which anyone who sought to levy on Georgia's property on behalf of Alexander Chisholm, pursuant to compulsory process issuing out of the federal Supreme Court, would be "guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged." 207 This bill reflects the premise that Georgia was not properly before the Supreme Court and, more generally, that the federal courts lacked jurisdiction to issue compulsory process — including process of execution — against unconsenting states. If such process was indeed coram non judice and void, it arguably provided no justification to people who sought to enforce it. 208

204 Proceedings of the South Carolina Senate (Dec. 17, 1793), in 5 DHSC, supra note 1, at 610, 610-11; see also id. at 611 (resolving that the state's Senators should be instructed, and its Representatives should be requested, to seek "such amendments in the Constitution of the United States, as will remove any clause or Article of the said Constitution, which can be construed to imply, or justify a decision that a State is compellable to answer in any suit, by an individual, or individuals in any Court of the United States").
206 Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), in 5 DHSC, supra note 1, at 618.
207 Proceedings of the Georgia House of Representatives (Nov. 19, 1793), AUGUSTA CHRON., Nov. 23, 1793, reprinted in 5 DHSC, supra note 1, at 236, 236.
208 Cf., e.g., Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) ("[A] court martial has no jurisdiction over a justice of the peace [for the District of Columbia], as a militia-man; . . . and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it."); Allen v. Gray, 11 Conn. 95, 102-03 (1836) (discussing civil liability for constables who arrest defendants pursuant to warrants that were issued coram non judice); Suydam v. Keys, 13 Johns. 444, 446-47 (N.Y. Sup. Ct. 1816) (similar discussion regarding tax collectors).

Of course, none of the cases cited in this footnote involved process issued by a court of record, like the United States Supreme Court. Cf. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 535-36 (1868) (suggesting that this distinction affects the scope of civil liability). In any event, there is an obvious difference between imposing civil liability on officers who execute void process and sub-
4. Does the Eleventh Amendment Provide Counterevidence? —

The wording of the Eleventh Amendment might seem to undermine my claim that members of the Founding generation thought of sovereign immunity in terms of the states’ amenability to compulsory process. Rather than focusing on that issue (which relates to how courts acquire personal jurisdiction over states), the Eleventh Amendment instead tracks the language of Article III, Section 2 (which relates primarily to subject matter jurisdiction). If the legal argument against Chisholm was about the circumstances in which unconsenting states could be haled into court, why wasn’t the amendment that overruled Chisholm worded accordingly?

The records of the federal House of Representatives show how the amendment could have been written. One day after the Supreme Court decided Chisholm, Representative Theodore Sedgwick — a sophisticated Federalist lawyer who had played a leading role in the Massachusetts Ratifying Convention and who would later be named to the state’s Supreme Judicial Court — introduced language consistent with the “personal jurisdiction” view of sovereign immunity. Sedgwick’s version provided:

[N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.

jecting those officers to capital punishment. Perhaps not surprisingly, then, the bill proposed by Georgia’s House of Representatives did not get through the state Senate, which considered the proposal “too rigid.” See Letter from George Mathews to the Senators and Representatives of the State of Georgia (Jan. 1, 1794), in 5 DHSC, supra note 1, at 237, 237.

209 See U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

The contrast drawn by the sentence in the text may puzzle some readers. Although modern lawyers certainly think of the language in Article III, Section 2, as addressing subject matter jurisdiction, I have suggested that it also incorporates some concepts of personal jurisdiction. See supra section I.C.2 (suggesting that in order to have a “Case” or “Controversy” within the meaning of Article III, a court needs adverse parties who either have voluntarily appeared or can validly be commanded to appear before the court). Still, it is fair to say that the Eleventh Amendment does not focus on this idea. Rather than trying to clarify the meaning of the terms “Case” and “Controversy,” the drafters of the Eleventh Amendment instead addressed other features of Article III — features that we properly identify with subject matter jurisdiction.

210 See 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791, at 637, 642 (William Charles diGiacomantonio et al. eds., 1995) [hereinafter 14 DHFFC]; see also Pfander, supra note 165, at 1333-34 & n.290 (identifying Sedgwick as one of the lawyers who had assured the Massachusetts Ratifying Convention that Article III would not expose unconsenting states to suit by individuals).

211 Proceedings of the United States House of Representatives (Feb. 19, 1793), GAZETTE U.S., Feb. 20, 1793, reprinted in 5 DHSC, supra note 1, at 605, 605-06.
The following day, however, Caleb Strong introduced different language in the Senate. Unlike the House version, Senator Strong's proposal was cast in the terms that we associate with subject matter jurisdiction.\textsuperscript{212} The Second Congress ended ten days later without further progress on either proposal.\textsuperscript{213} During the long break, various state legislatures adopted resolutions calling for a constitutional amendment to overrule \textit{Chisholm}. As we have seen, all of these resolutions shared Representative Sedgwick's focus on haling unconsenting states into court and making them parties.\textsuperscript{214} But when the Third Congress convened at the end of 1793, the Senate took up the issue first. Senator Strong introduced a slightly revised version of his original proposal,\textsuperscript{215} which the Senate passed by an overwhelming vote and sent to the House.\textsuperscript{216} With the active participation of Representative Sedgwick, the House then voted overwhelmingly to accept the Senate's language and to submit the proposed amendment to the states.\textsuperscript{217}

I am not aware of records that shed light on why Congress shifted away from Representative Sedgwick's initial proposal. But this shift need not be taken to refute my claims about the importance of compulsory process to the traditional framework for sovereign immunity. There are several reasons, consistent with all of the historical evidence presented above, why the Eleventh Amendment might have been worded as it was.

The most obvious reason is that the Amendment's supporters wanted to respond to \textit{Chisholm}, and they may have thought it prudent to use \textit{Chisholm} itself as their model. In \textit{Chisholm}, Article III's extension of the federal government's judicial power to "Controversies ... between a State and Citizens of another State ... and between a State ... and foreign ... Citizens or Subjects"\textsuperscript{218} had been interpreted to expose unconsenting states to suit by individuals.\textsuperscript{219} It may have seemed natural for an amendment responding to \textit{Chisholm} to address

\begin{footnotes}
\textsuperscript{212} \textit{See} Resolution in the United States Senate (Feb. 20, 1793), in 5 DHSC, \textit{supra} note 1, at 607, 607-08 ("The Judicial Power of the United States shall not extend to any Suits in Law or Equity commenced or prosecuted against any one of the United States by Citizens of another State or by Citizens or Subjects of any foreign State.").
\textsuperscript{213} \textit{See} 5 DHSC, \textit{supra} note 1, at 444 n.1, 608 n.1.
\textsuperscript{214} \textit{See} supra notes 198-206 and accompanying text.
\textsuperscript{215} \textit{See} Resolution in the United States Senate (Jan. 2, 1794), in 5 DHSC, \textit{supra} note 1, at 613, 613.
\textsuperscript{216} \textit{See} Proceedings of the United States Senate (Jan. 14, 1794), in 5 DHSC, \textit{supra} note 1, at 617, 617. After rejecting two attempts to water down Strong's proposal, the Senate approved the proposal by a vote of 23 to 2. \textit{See id.}
\textsuperscript{217} \textit{See} Proceedings of the United States House of Representatives (Mar. 4, 1794), in 5 DHSC, \textit{supra} note 1, at 620, 620-23 (reporting a final vote of 81 to 9).
\textsuperscript{218} U.S. CONST. art. III, § 2, cl. 1.
\textsuperscript{219} \textit{See}, e.g., \textit{Chisholm v. Georgia}, 2 U.S. (2 Dall.) 419, 467 (1793) (Cushing, J.); \textit{id.} at 475-77 (Jay, C.J.).
\end{footnotes}
The very grants of subject matter jurisdiction on which members of the Chisholm majority had relied.

The fact that Senator Strong and Representative Sedgwick both represented Massachusetts suggests a second reason for the wording of the Eleventh Amendment. If the Amendment had simply protected states against being haled into court, then it might have had no impact on pending cases in which (according to the Supreme Court) personal jurisdiction had already attached. Representative Sedgwick’s initial proposal, for instance, would certainly have protected states against “be[ing] made part[ies] defendant” in future cases, but it would not necessarily have affected cases in which states had already been forced to become parties. By using the language of subject matter jurisdiction, the Eleventh Amendment kept the Supreme Court from proceeding to judgment in these pending cases — which included not only Chisholm v. Georgia but also a suit against Massachusetts. After the Amendment was ratified, the Supreme Court duly dismissed the suits that were still pending against states.

220 See 5 DHSC, supra note 1, at 364–65 (discussing Vassall v. Massachusetts, in which process against the state had been authorized on February 11, 1793, and was served on July 9 of the same year). At the time Senator Strong proposed his language, suits against two other states were also pending before the Supreme Court. See id. at 61–62 (discussing Oswald v. New York); id. at 282–85 (discussing Hollingsworth v. Virginia). More such suits were filed before the Eleventh Amendment was known to have been ratified. See id. at 458–59 (discussing Cutting v. South Carolina); id. at 506–09 (discussing Moultrie v. Georgia).

221 The requisite number of states ratified the Amendment by early 1795, less than eleven months after Congress had submitted it to them. Some of the states, however, failed to notify Congress of their ratification, and so there was a considerable delay before people knew that the Amendment had been approved. See id. at 601–04.

222 See Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378, 382 (1798); see also 1 DHSC, supra note 180, at 305 (reprinting orders of dismissal).

Senator Strong’s desire to affect pending cases may also explain another feature of the Amendment’s language. Strong initially cast his proposed amendment as a straightforward restriction of the federal government’s judicial power; the language that he introduced at the end of the Second Congress said that “[t]he Judicial Power of the United States shall not extend” to the suits that it covered. See supra note 212. Before reintroducing his proposal at the start of the Third Congress, however, Senator Strong inserted a new phrase; his proposed amendment now said that “[t]he Judicial Power of the United States shall not be construed to extend” to the suits that it covered. See Resolution in the United States Senate, supra note 215, at 613 (emphasis added). Modern readers might think that this new phrase cuts against my argument: it seems to suggest that the Eleventh Amendment, instead of creating a new form of immunity, was intended only to clarify the proper interpretation of the original Constitution. According to Supreme Court Justice Henry Baldwin, however, legal draftsmen of the day used this phrase as a term of art to cause enactments to “operate[] on the past” as well as on the future. See Dudley’s Case, 7 F. Cas. 1150, 1151 (C.C.E.D. Pa. 1842) (No. 4114) (indicating that the words “shall not be construed” were designed to ensure that the Eleventh Amendment “annulled all jurisdiction of such cases then pending”); see also, e.g., Pfander, supra note 165, at 1364 (“[T]he historical record suggests that these words may have been terms of art that signaled a legislature’s desire to secure a retrospective application.”).
Of course, Representative Sedgwick’s initial proposal could presumably have been modified to achieve the same effect. Without switching to the language of subject matter jurisdiction, the proposed amendment could have specified not only that states were not “liable to be made . . . part[ies] defendant” in the future, but also that past attempts to hale states into federal court by means of compulsory process should be considered invalid and ineffective. Until this hypothetical amendment was ratified, however, the states that had already been served with compulsory process would face a difficult choice. If they steadfastly refused to enter an appearance, then they might suffer a default judgment, which might bind them if the amendment failed to win ratification. But if they surrendered to the Supreme Court’s pressure and responded to their adversaries’ lawsuits, then ratification of the amendment might do them no good. Even if the amendment made clear that states could not be forced to become parties defendant, the Court might still proceed to judgment against states that had actually appeared before it, on the theory that this “voluntary” appearance gave the Court another basis for asserting jurisdiction.

Using the language of subject matter jurisdiction might have been seen as a way to minimize this tactical problem without having to draft elaborate provisos calling attention to the amendment’s retroactive application. Although the matter was not entirely free from doubt, lawyers of the 1790s certainly knew of the argument that subject matter jurisdiction (unlike personal jurisdiction) could not be conferred by consent. Thus, the amendment’s drafters could reasonably have thought that states like Massachusetts — which were already subject to pending lawsuits — would be better served by the language of subject matter jurisdiction than by the language of personal jurisdiction.

Another possible reason for the wording of the Eleventh Amendment is more subtle. The argument begins with a simple observation: a number of people who disagreed with Chisholm, and who did not read the Constitution to let individuals sue unconsenting states in fed-

223 See, e.g., Georgia v. Brailsford, 2 U.S. (2 Dall.) 402, 406 (1792) (Iredell, J.) (asserting that a state’s “voluntary appearance” before a lower federal court would not permit the court to adjudicate a matter that was outside its subject matter jurisdiction); Bingham v. Cabot, 3 U.S. (3 Dall.) 19, 32 n.4 (1795) (reporting counsel’s observation, in the context of a dispute about subject matter jurisdiction, that “should the party chuse to avoid taking advantage of [a defect of jurisdiction] on the trial, the Court is bound to take notice of it, if, at any time, it appears on the record,” and noting Justice Paterson’s observation that this statement “is, certainly, the law, if the defect of jurisdiction is apparent on the record”); see also William Tilghman’s Notes of Arguments in the Supreme Court (Feb. 25, 1795), in 6 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 618, 621 (Maeva Marcus ed., 1998) (reporting arguments of counsel in Bingham) (“But consent can’t give Jurisdiction, & the difficulty taken away by consent [in an English case cited by opposing counsel], was not the want of Jurisdict., but . . . the want of proper parties . . . .”).
eral court, nonetheless thought that each state should permit individuals to pursue claims against it in its own state courts. Edmund Pendleton, for instance, thought that principles of "honor and justice" counseled every state to set up "an independent tribunal . . . within itself, to decide upon all claims against the public." Pendleton's Virginia did so, and other states also permitted certain claims against the state to be pursued in state court.

If the Eleventh Amendment had simply corrected Chisholm's perceived misreading of Article III and restored the traditional framework for sovereign immunity, then states that followed this course would have faced a problem: notwithstanding their desire to consent to suit only in state court, some of the suits to which they consented might end up being adjudicated by a federal court. Even the dissenter in Chisholm had suggested that if state law authorized the service of process upon the state, federal courts might be permitted to piggyback upon this authority. And even if a state could somehow ensure that the suits to which it consented would all start off in state court, they might not all remain in state court. Once the state had appeared in its own courts to respond to an individual's claim against it, there would be a "Controversy" within the meaning of the Constitution. If the individual claimant was a citizen of another state or of a foreign country, moreover, this "Controversy" would be one to which the federal government's judicial power extended under Article III. As a result, state courts might not get the last word. Perhaps the federal Supreme Court would enjoy appellate jurisdiction, as in Cohens v. Virginia.

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224 Commonwealth v. Beaumarchais, 7 Va. (3 Call) 122, 169 (1801) (Pendleton, P.J.). Pendleton thought this option preferable to the alternative of leaving all individual claimants to petition the state legislature for redress. See id.


227 This statement should be qualified in one respect. At least some states that opened their courts to claims against the state did so in a limited way. While the state consented to appear and respond to plaintiffs' claims, it did not consent to be subject to compulsory process of execution; the relevant statutes indicated that even if the court ruled in favor of the claimant, the state legislature would retain discretion over whether to pay the resulting judgment. See Act of Dec. 9, 1790, 1790 Ga. Laws 1, 1 (Dec. Sess.) (opening Georgia’s Superior Court to “any person having a claim or demand against the state, where (in like cases) one citizen might sue and maintain an action against another,” but providing for a decision in the plaintiff's favor to “be transmitted to the succeeding legislature, who may provide, as they may think proper, for payment of such judgment”). State-court proceedings that were subject to this limitation might conceivably not qualify as “Controversies” within the meaning of Article III; to the extent that the state legislature retained legal discretion over whether to give effect to the court's ultimate decision, the state court might be thought to be serving as a mere advisor to the legislature, and the court's proceedings in that role might not be deemed truly judicial. Cf. Hayburn's Case, 2 U.S. (2 Dall.) 409, 410–14 n.† (1792) (reporting that when Congress adopted a similar scheme, various federal judges concluded that "the business directed by this act is not of a judicial nature").

228 19 U.S. (6 Wheat.) 264 (1821); see supra pp. 1587–88.
Or perhaps Congress would even provide for the case to be tried in a federal court; federal legislation might authorize plaintiffs to remove such cases to federal court as soon as the requisite "Controversy" had formed.229

These concerns might seem too technical to explain why Senator Strong cast the Eleventh Amendment in terms of subject matter jurisdiction, and why Representative Sedgwick went along with this proposal. Like Representative Sedgwick, however, Senator Strong was an accomplished lawyer.230 He and his colleagues, moreover, were certainly familiar with the Supreme Court's appellate jurisdiction and with the idea of removal, both of which the Judiciary Act of 1789 had addressed.231 In this milieu, it might well have occurred to savvy lawyers that once a state consented to be sued in its own courts, the resulting "Controversies" could wind up in federal court. Without some appropriate limitation on the federal courts' subject matter jurisdiction, the only way for a state to avoid this result might have been to refrain from creating a "Controversy" in the first place by refusing to be sued even in its own courts. The drafters of the Eleventh Amendment might not have wanted the legal regime to discourage states from doing what "honor and justice" required.232

In sum, there are a variety of reasons why the Eleventh Amendment might have been worded as it was. Senator Strong's decision to switch to the language of subject matter jurisdiction does not refute

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229 Such legislation would have raised tricky questions about whether states, by submitting themselves to the power of their state judiciaries, thereby lost the ability to object to compulsory process issuing from the federal judiciary. For instance, if a case against a state was indeed removed to federal court, could the federal court issue process of execution to enforce its ultimate judgment? If not, then the federal court might be unable to proceed at all. Cf. supra p. 1587 (noting John Marshall's observation that one of the prerequisites for a "Case" was the existence of "parties . . . who can be . . . bound by [the court's] power"). But federal judges might have avoided this conclusion by asserting that they could issue process of execution against states in cases that had properly formed in state court and had then been removed to federal court.

230 Before entering Congress, Strong had "built up the largest law practice" in his area of Massachusetts. 14 DHFFC, supra note 210, at 611-14. He returned to this practice after leaving Congress (and before running successfully for governor). See id.

231 See Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (addressing the Supreme Court's appellate jurisdiction); id. § 12, 1 Stat. at 79-80 (addressing removal of cases from state to federal court). While the Judiciary Act authorized only defendants to remove cases from state to federal court, it was not unthinkible that a future Congress might broaden this provision. Indeed, a report submitted to Congress by Attorney General Edmund Randolph had already made a well-known proposal to authorize removal by plaintiffs. See EDMUND RANDOLPH, REPORT OF THE ATTORNEY GENERAL TO THE HOUSE OF REPRESENTATIVES (Dec. 31, 1790), reprinted in 4 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 127, 155 (Maeva Marcus ed., 1992) [hereinafter 4 DHSC]. The same report made clear that Randolph did not accept state sovereign immunity — a connection that might not have been lost on opponents of Chisholm. See id. at 163.

232 See supra note 224 and accompanying text.
the extensive evidence that sovereign immunity, as traditionally understood, had more to do with personal jurisdiction.

E. Conclusion

This Part has sought to unravel a puzzle. By reconstructing the Founding generation's legal framework for sovereign immunity, we have explained how James Madison and John Marshall could have insisted that Article III did not subject unconsenting states to suit by individuals. We have also explained how other prominent lawyers could have condemned Chisholm's contrary interpretation of Article III as "forced" and unwarranted. There is indeed a solid legal argument that the Supreme Court should not have ordered Georgia to answer Alexander Chisholm's lawsuit.

I do not mean to suggest that everyone in the Founding generation accepted the position staked out by Madison and Marshall. In Chisholm, after all, four Justices endorsed a contrary interpretation of Article III. To be sure, those Justices lacked the benefit of an adversarial presentation; the very doctrines of personal jurisdiction that lay at the heart of Georgia's position discouraged Georgia from appearing before the Court to explain and defend that position. The surviving records of the reaction to Chisholm, moreover, suggest that critics of the decision substantially outnumbered supporters. But the opinions in Chisholm show at least that the logic behind Georgia's position was not universally known and accepted.

Still, this Part has tried to show that there was a logic behind Georgia's position. Contrary to the conventional academic wisdom, the Supreme Court's eventual repudiation of Chisholm — first expressed in the 1890 case of Hans v. Louisiana and continuing ever since — does not offend "the plain meaning of the language used [in Article III]."

II. THE LEGAL EFFECT OF THE ELEVENTH AMENDMENT

The historical case against Chisholm is important in its own right. But modern readers will naturally wonder how my exposition of the traditional framework for sovereign immunity might bear on the Su-
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preme Court’s current jurisprudence. The next two Parts of this Article sketch out some tentative thoughts on that subject.

I emphasize at the outset that these thoughts are more speculative than the historical analysis offered in Part I. Readers should keep my historical analysis separate from my speculations about modern doctrine; it is quite possible to accept the analysis in Part I without embracing the ideas of Parts II and III. Like many historical analyses, my exposition of the traditional framework for sovereign immunity does not lead inevitably to a particular view of what modern constitutional doctrine should be.

Still, the analysis developed above does suggest some ways in which modern doctrine could be rethought. In this Part, I focus on the interaction between the Eleventh Amendment and the traditional framework for sovereign immunity. As Justice Kennedy has noted, the modern Court’s doctrine about suits against states has a “hybrid nature”: some aspects of the doctrine resemble rules of personal jurisdiction, while other aspects resemble rules of subject matter jurisdiction.238 Section II.A of this Article suggests why the modern Court has jumbled together these different sets of ideas: the rules that sound like subject matter jurisdiction have been inspired by the language of the Eleventh Amendment, while the rules that sound like personal jurisdiction have been inspired by the comments of prominent Federalists during the debates over the ratification of the original Constitution. As section II.B explains, the modern Court may well be right to believe that both types of ideas remain relevant. But there is little legal basis for mixing them together in the way that the Court has done. Using the analysis of Part I as background, section II.B raises the possibility of a more logical approach that would keep the two strands of immunity doctrine distinct, and that would confine ideas that stem entirely from the Eleventh Amendment to suits in which the Eleventh Amendment provides a basis for invoking them. Part III then considers how this approach might bear on another much-debated issue: to what extent can federal statutes abrogate the states’ protections against suit?

A. The Hybrid Nature of Current Doctrine

When it comes to sovereign immunity, the modern Supreme Court has tried to enforce the “original understanding” of the Constitution.239 To determine the content of that original understanding, the Court has drawn heavily upon two sources: (1) the comments made by people

238 Wis. Dep’t of Corr. v. Schacht, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring); see also, e.g., Amar, supra note 9, at 1480 n.223.
like Madison and Marshall during the original ratification debates and (2) the Eleventh Amendment. The Court has assumed that both of these sources bear on the same question; in its view, the sole function of the Eleventh Amendment was to "restore the original constitutional design." The Court therefore has combined insights from both sources to derive a single doctrine of "sovereign immunity." Consistent with its assumptions, the Court has applied this unitary doctrine across the board, without paying careful attention to whether the relevant suit is covered by the terms of the Eleventh Amendment or instead triggers only the traditional framework that Madison and Marshall had in mind.

Unfortunately, the Court has failed to notice that the comments of Madison and Marshall reflect the states' traditional exemptions from compulsory process, while the Eleventh Amendment — for whatever reason — instead seems to be about subject matter jurisdiction. In deriving its doctrine of sovereign immunity, the Court has therefore mixed together two very different sorts of ideas; it has blended concepts drawn from the law of personal jurisdiction with concepts drawn from the law of subject matter jurisdiction. Justice Kennedy is quite correct to describe the resulting doctrine as a strange "hybrid."

Consider, for instance, the relevance of a state's consent to suit. On this issue, the Court's doctrine of "sovereign immunity" reflects the law of personal jurisdiction: in matters that are otherwise within the federal government's judicial power, states can consent to be sued in federal court. In keeping with the unitary nature of the Court's doctrine, the Court apparently follows this rule even in suits covered by the terms of the Eleventh Amendment — notwithstanding the usual principle that parties cannot confer subject matter jurisdiction by consent.

On the closely related question of when a state is deemed to have waived its sovereign immunity, however, the Court has taken a different tack. Ordinarily, a defendant who wants to challenge a federal court's personal jurisdiction must assert this objection at the outset of the litigation; if the defendant appears and answers the plaintiff's complaint without doing so, the defendant will be deemed to have implicitly consented to the suit. Objections to subject matter jurisdic-

240 Id. at 722.
241 Schacht, 524 U.S. at 394 (Kennedy, J., concurring).
243 See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 675, 689 (1999) (indicating that "a State's sovereign immunity is a personal privilege which it may waive at pleasure," even in suits that "fall four square within the literal text of the Eleventh Amendment" (internal quotation marks omitted)).
244 See, e.g., FED. R. CIV. P. 12(g), (h)(1).
tion, by contrast, are not waived simply because the defendant failed to assert them at the first opportunity. Here, the Court's unitary doctrine of "sovereign immunity" has drawn upon ideas of subject matter jurisdiction: the Court has indicated that states may successfully raise sovereign immunity objections for the first time in post-judgment motions or even in appellate briefs. The Court apparently follows this rule even in suits not covered by the terms of the Eleventh Amendment, and even when the lawyer who initially entered the state's appearance was fully authorized to consent to suit on the state's behalf.

A similar jumble surrounds whether judges should raise the issue of sovereign immunity sua sponte. Ordinarily, federal courts are required to raise questions of subject matter jurisdiction on their own motion. By contrast, they leave it to the litigants to decide whether to inject the issue of personal jurisdiction. When it comes to sovereign immunity, the Supreme Court has split the difference: federal courts may raise the issue sua sponte but are not required to do so.

B. Separating the Two Strands of Current Doctrine

This section tries to untangle the different strands that modern doctrine mixes together. In particular, it asks the following question: if one accepts the historical argument spelled out in Part I, and if one therefore repudiates Chisholm's interpretation of Article III of the original Constitution, how might one understand the interaction be-

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245 See, e.g., FED. R. CIV. P. 12(h)(3).

246 See Edelman v. Jordan, 415 U.S. 651, 677-78 (1974). Notwithstanding Edelman, some circuit courts will infer a waiver when the state has proceeded too far into a case before asserting its immunity. See, e.g., Neinast v. Texas, 217 F.3d 275, 279 (5th Cir. 2000) (indicating that "the state cannot simultaneously proceed past the motion and answer stage to the merits and hold back an immunity defense"); Hill v. Blind Indus. & Servs., 179 F.3d 754, 756 (9th Cir. 1999), amended by 201 F.3d 1186 (9th Cir. 2000) (concluding that a state agency "consented to jurisdiction in federal court by actively litigating this action on the merits, while waiting until trial to first assert Eleventh Amendment immunity"); cf. United States ex rel. Long v. SCS Bus. & Tech. Inst., 173 F.3d 890, 892-93 (D.C. Cir. 1999) (noting the existence of "difficult questions about whether the state's attorneys must be authorized by state law to waive the state's immunity, and about whether such authorization, if needed, has been granted"). No circuit, however, treats the waiver of sovereign immunity like the waiver of objections to personal jurisdiction. See, e.g., Neinast, 217 F.3d at 279-80 (refusing to find a waiver even though the state had not asserted its immunity in the district court, but instead had filed and litigated a motion to dismiss the plaintiff's complaint on other grounds).

247 See Fletcher, supra note 11, at 1091 n.227. The Court may have occasion to revisit issues of waiver this Term in Lapides v. Board of Regents of the University System of Georgia, No. 01-298 (argued Feb. 25, 2002).


249 See, e.g., FED. R. CIV. P. 12(h)(1); Ins. Corp. of Ir., 456 U.S. at 704-05.

tween the Eleventh Amendment and the traditional framework for sovereign immunity?

The premise of this question is obviously important. It requires us, at least for the sake of argument, to start on the same page as the modern Court: instead of urging a return to *Chisholm*’s interpretation of Article III, we will be emphasizing the contrary interpretation that Madison and Marshall offered at the Virginia Ratifying Convention.

This starting point is open to attack. But even readers who would prefer to embrace *Chisholm* may find it useful to think about where the contrary view might lead. Like it or not, the modern Court’s decisions about sovereign immunity all purport to accept the position articulated by Madison and Marshall. It is instructive to consider whether that position, coupled with the subsequent ratification of the Eleventh Amendment, justifies the hybrid doctrine that the Court currently enforces.

We can also make a more affirmative case for our starting point. Based on the historical argument presented above, we might simply conclude that *Chisholm*’s interpretation of the Constitution was less sound than the interpretation offered by Madison and Marshall at the Virginia Ratifying Convention. Alternatively, we might believe that although much can be said on both sides of this debate, the Supreme Court repudiated *Chisholm* long ago, and principles of stare decisis now counsel against overturning the last century of precedents. To be sure, those same principles might have counseled against repudiating *Chisholm* in the first place, but the Court crossed that bridge in

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251 Chief Justice Marshall, for one, showed little interest in repudiating *Chisholm* after his appointment to the Supreme Court. Indeed, dicta in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), seem to be premised on *Chisholm*’s interpretation of Article III; Marshall noted that before the adoption of the Eleventh Amendment, “[t]he constitution ... gave the courts of the United States jurisdiction in suits brought against individual states,” with the result that “[a] state ... which violated its own contract was suable in the courts of the United States for that violation.” *Id.* at 139.

Modern commentators have seized on this passage as evidence that “contrary to his statement during the Virginia ratification convention, ... [Marshall] did not believe that an original understanding on sovereign immunity existed.” Gibbons, *supra* note 9, at 1948 n.319. But this conclusion does not follow. First, Marshall’s comments in *Fletcher* may simply reflect the influence of stare decisis: even if Marshall would not himself have agreed with the *Chisholm* Court as an original matter, he may have thought that the Constitution left room for *Chisholm*’s interpretation and that the Court’s early decisions had settled this ambiguity. *See New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 288–91 (1831) (Marshall, C.J.) (discussing the precedential effect of *Chisholm* and its progeny). Second, even if we reject this defense of Marshall’s intellectual integrity, we do not know which of his comments to discount: instead of assuming that his *earlier* position was disingenuous, we might equally well suspect that Marshall was trying to seize rhetorical advantage in *Fletcher* itself (in which he thought that *Chisholm*’s interpretation of Article III buttressed his own interpretation of the Contracts Clause). Cf. Pfander, *supra* note 165, at 1344 & n.337 (suggesting that Marshall’s position in *Fletcher* departed from the original understanding of the Contracts Clause). In any event, even if we suppose that Marshall was being disingenuous at the Virginia Ratifying Convention, the terms in which he cast his argument were obviously intended
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1890; ever since *Hans v. Louisiana*, the Court's decisions have favored the position taken by Madison and Marshall over the position taken by the majority in *Chisholm*. Even if we think that the views articulated by Madison and Marshall were contestable, we may see little advantage in unsettling things again simply to reinstate an equally contestable view of the Constitution.252

At least for the sake of argument, then, let us agree that the traditional framework for sovereign immunity — the framework contemplated by Madison and Marshall — survived the adoption of Article III. Given that assumption, we can plausibly ask how the traditional framework might interact with the Eleventh Amendment. This section considers some of the different possibilities.

1. Did the Eleventh Amendment Simply Codify the Traditional Framework? — One possibility is that the Eleventh Amendment adds nothing at all to the traditional framework for sovereign immunity. The modern Supreme Court treats the Amendment less as a legal provision than as an expression of opposition to *Chisholm*. On this view, the Eleventh Amendment simply endorsed the position that Madison and Marshall staked out at the Virginia Ratifying Convention: the Amendment's only effect was to make clear that *Chisholm* had misinterpreted Article III and to restore the traditional framework for sovereign immunity.253

If this were true, the Supreme Court would be right to have a unitary doctrine of "sovereign immunity," but it would be wrong to let ideas of subject matter jurisdiction influence that doctrine. As we have seen, the traditional framework for sovereign immunity instead emphasized sovereigns' exemptions from compulsory process, and hence drew upon ideas of personal jurisdiction.

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253 See, e.g., *Alden v. Maine*, 527 U.S. 706, 722 (1999) (arguing that "Congress acted not to change but to restore the original constitutional design"); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . . ."). While academics criticize the Court's understanding of "the original constitutional design," the notion that the Eleventh Amendment did no more than overrule *Chisholm* has attracted some academic support. See, e.g., *Field*, supra note 27, at 538-46 (suggesting that the Amendment can be understood simply "to repudiate the theory that article III abrogated [the states'] immunity and to revert to the Madison-Marshall-Hamilton view expressed in the ratification debates").
In fact, however, the Eleventh Amendment cannot plausibly be read as merely echoing the traditional framework for sovereign immunity. By specifying that “[t]he 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,” the Amendment seems to deprive the federal courts of authority to adjudicate the designated categories of suits even if a “Controversy” has properly formed within the meaning of Article III. In this respect, the Eleventh Amendment sidesteps the issue that Madison and Marshall discussed at the Virginia Ratifying Convention. Rather than focusing on the federal courts’ ability to hale unconsenting states before them, the Eleventh Amendment is cast instead as a withdrawal of subject matter jurisdiction.

Some theories of constitutional interpretation might let us second-guess the Amendment’s text in order to effectuate the “original intent” behind it. But we have no cause to apply those theories here, because there is little reason to conclude that the subjective intent behind the Eleventh Amendment was inconsistent with the text’s focus on subject matter jurisdiction. Indeed, the notion that the Amendment was intended simply to echo the traditional framework for sovereign immunity is hard to reconcile with what we know about the Amendment’s drafting history. We know that both Representative Sedgwick and Senator Strong — the two men most responsible for the introduction of the Eleventh Amendment in Congress — were accomplished lawyers. We know, too, that language consistent with the personal-jurisdiction approach occurred to them; Sedgwick’s initial proposal would have specified that no state is “liable to be made a party defendant” in a federal court. We also know that Sedgwick ultimately shifted away from this approach and came to support Strong’s preferred formulation, which sounded instead in subject matter jurisdiction. Finally, we can identify plausible legal reasons for this switch, and we can even explain why the switch was spearheaded by members of Congress from Massachusetts: both Strong and Sedgwick may have been trying to protect their home state against a prominent suit that the federal Supreme Court had already allowed to get under way.

Thus, even though the traditional framework for sovereign immunity drew on ideas of personal jurisdiction, the Eleventh Amendment’s language amply supports the Supreme Court’s decision to inject ideas

254 U.S. CONST. amend. XI.
255 See supra notes 210 and 230 and accompanying text.
256 See supra p. 1602.
257 See supra pp. 1604–05; see also supra pp. 1605–07 (offering another possible legal reason for the switch).
of subject matter jurisdiction into the law of sovereign immunity. As I am about to explain, however, it does not support the Court's decision to extend those ideas beyond the limits of the Eleventh Amendment itself.

2. The Argument for a Two-Track System of Jurisdictional Immunities. — Once we recognize how the Eleventh Amendment differs from the traditional framework for sovereign immunity, we should question the unitary nature of current Supreme Court doctrine. We may well agree with the Court that ideas of subject matter jurisdiction and ideas of personal jurisdiction are both relevant to the law of sovereign immunity. But there is no apparent justification for blending these ideas together into a single hybrid doctrine, applicable to all suits against states. Instead, the Court's own logic requires it to pay careful attention to the sources of the relevant ideas.

In suits that the Eleventh Amendment covers, it makes sense to apply the ideas that we associate with subject matter jurisdiction. If we abandon the search for a unitary doctrine, in fact, we can carry those ideas through to their logical conclusion. If the Eleventh Amendment is indeed about subject matter jurisdiction, then we might well conclude that suits covered by the Amendment simply cannot proceed in federal court. As with other issues of subject matter jurisdiction, the parties should be able to point out this defect at any time, and federal courts must raise it sua sponte if the parties fail to do so. Even the state's consent would be irrelevant: if the federal government's judicial power does not extend to a particular category of suits, then federal courts cannot adjudicate those suits even if the parties want them to do so.

This "subject matter jurisdiction" type of immunity, however, does not apply to all suits brought against states in federal court. When federal courts would otherwise have subject matter jurisdiction, this type of immunity exists only by virtue of the Eleventh Amendment, and it therefore should not reach suits that the Amendment does not cover. Even in federal courts, there are many such suits. There is much to be said for the view that the Eleventh Amendment targets only Article III's grants of diversity jurisdiction and does not affect suits that can

\[258\] See Pennsylvania v. Union Gas Co., 491 U.S. 1, 25-26 (1989) (Stevens, J., concurring) (indicating that "in any actual Eleventh Amendment case" — that is, a suit described by the Amendment's terms — federal courts should not be able to exercise jurisdiction even if the state consents); Massey, supra note 11, at 65-66 (agreeing that the Eleventh Amendment withdraws subject matter jurisdiction from the federal courts, and adding that "parties may not confer jurisdiction by waiver"); see also, e.g., Pfander, supra note 165, at 1374 ("The history of the Eleventh Amendment raises profound questions about the Court's notion that state consent can empower the federal courts to proceed in the face of a constitutional amendment that clearly sought to curtail the 'judicial power.'").
be brought under other heads of jurisdiction. In any event, no one can read the Eleventh Amendment to cover suits that are brought against a state by its own citizens.

Even in suits not covered by the Eleventh Amendment, of course, states may enjoy other sorts of protections. Commentators often focus on what can be described as “substantive” immunities: the applicable substantive law may exempt states from certain causes of action, or it may give states some special defenses to whatever causes of action are available. But we should not overlook an additional type of juris-

259 See supra note 11 (citing scholars who take this position). But see Letter from James Madison to Spencer Roane (May 6, 1821), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 221-22 (Philadelphia, J.B. Lippincott & Co. 1869) (explicitly reading the Eleventh Amendment to cover federal question as well as diversity suits).

The basis for the “diversity reading” of the Eleventh Amendment is simple. Article III extends the federal government’s judicial power to nine categories of “Cases” and “Controversies,” including two categories that specifically mention controversies between states and individual citizens. See U.S. CONST. art. III, § 2, cl. 1 (covering “Controversies . . . between a State and Citizens of another State” and “Controversies . . . between a State . . . and foreign . . . Citizens or Subjects”). The Eleventh Amendment can reasonably be read as simply refining those two categories. See id. amend. XI (excluding “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”). On this view, the Eleventh Amendment does nothing to limit any of the other categories of cases and controversies covered by Article III; it has no bearing, for instance, on any “Case[ ] . . . arising under this Constitution [or] the Laws of the United States,” even if the case happens to have been brought against a state by a citizen of another state.

This understanding of the Eleventh Amendment meshes well with longstanding interpretations of the Original Jurisdiction Clause in Article III itself, which gives the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” U.S. CONST. art. III, § 2, cl. 2. This language has long been understood to refer to the categories of cases that Article III has just finished listing. Thus, if the sole reason that a case can be heard in federal court is that it “arise[s] under . . . the Laws of the United States,” the case will not be within the Supreme Court’s original jurisdiction even if a state happens to be a party. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393-94 (1821). Assuming that one accepts this category-based approach to the Original Jurisdiction Clause, it may well be natural to take the same category-based approach to the Eleventh Amendment.

Oddly, advocates of the “diversity reading” of the Eleventh Amendment do not stress this argument as much as they might. Indeed, one of the leading proponents of the category-based approach to the Eleventh Amendment actually opposes the category-based approach to the Original Jurisdiction Clause. See Pfander, supra note 70, at 598-617. But see Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 493-98 (1989) (endorsing the category-based approach to the Original Jurisdiction Clause and using it to support the diversity reading of the Eleventh Amendment).

260 See, e.g., Amar, supra note 9, at 1469-70 (arguing that in Chisholm, the Supreme Court should have recognized substantive immunities that protected Georgia on the merits of Chisholm’s claims); see also infra section III.B.1.b.

In addition to acknowledging the possibility of these straightforward protections, some commentators have developed more elaborate theories about what might protect states against suits that are not covered by the terms of the Eleventh Amendment. Vicki Jackson, for instance, has suggested that many existing doctrines of sovereign immunity can be recharacterized as part of a “federal common law of remedies,” developed by virtue of the federal courts’ “power to determine appropriate remedies for governmental wrongdoing for cases within their jurisdiction.” Jackson, supra note 9, at 84-86; see also id. at 72-104 (elaborating upon this idea).
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dictional immunity. If we accept the Supreme Court’s repudiation of Chisholm, we may believe that the traditional framework for sovereign immunity sometimes protects states against suit even when substantive law would otherwise make them liable.

Still, any protections derived from this source are of the “personal jurisdiction” type and not the “subject matter jurisdiction” type. States therefore can consent to suits that these protections would otherwise bar, and states that want to invoke these protections must be careful to avoid waiving them.

This analysis boils down to a commonsense conclusion: suits that the Eleventh Amendment does cover should be handled differently than suits that the Eleventh Amendment does not cover. We can plausibly read the Eleventh Amendment to give the states a “subject matter jurisdiction” type of immunity, but only in the suits that the Amendment covers. In other situations, the states may still enjoy jurisdictional protections against suit, but those protections do not stem from the Eleventh Amendment; they derive instead from the traditional framework for sovereign immunity (resurrected by the Court’s repudiation of Chisholm). They therefore implicate ideas associated with personal jurisdiction.261

3. Some Other Possibilities. — This two-track understanding of the states’ jurisdictional immunities makes more sense than the Court’s current hybrid doctrine, but it is not self-evidently correct. This section considers some other possibilities.

(a) Did the Eleventh Amendment Supersede the Traditional Framework? — Instead of embracing a two-track system, one might claim that the Eleventh Amendment wholly superseded the traditional framework for sovereign immunity. Even if Chisholm was wrong, the Eleventh Amendment did not overrule it in its entirety; the Amendment’s drafters rejected some of its applications, but they allowed other applications to stand. One might try to give this decision legal

261 The structure of this system will remind readers of Justice Stevens’s concurring opinion in Union Gas, which described the Supreme Court as having recognized “two Eleventh Amendments.” 491 U.S. at 23 (Stevens, J., concurring). First, there is the real Eleventh Amendment, which deprives the federal courts of subject matter jurisdiction over the suits that it covers. Second, there are additional protections that the states have been accorded in suits not covered by the terms of the Eleventh Amendment. These latter protections, Justice Stevens argued, are “not a matter of Eleventh Amendment law at all.” Id. at 25; see also Pfander, supra note 70, at 651–52 (endorsing this approach).

Up to this point, I agree entirely with Justice Stevens’s analysis. I have a different view, however, about the source (and therefore the content) of the states’ protections against suits not covered by the Eleventh Amendment. Cf. Union Gas, 491 U.S. at 27 (Stevens, J., concurring) (attributing those protections to the Court’s “balancing of state and federal interests,” and suggesting that the Court’s precedents should be understood as reflecting “the comity and federalism concerns discussed in our abstention cases”).
weight by arguing that the Eleventh Amendment effectively ratified the parts of *Chisholm* that it left intact.

An example illustrates how this argument might proceed. Because Article III gives the Supreme Court original jurisdiction over "Controversies . . . between a State . . . and foreign States," *Chisholm*'s logic suggested that foreign countries could hale unconsenting states into federal court. The drafting history of the Eleventh Amendment shows that Senator Strong recognized this potential application of *Chisholm*: one version of his proposed amendment would have covered suits brought "by any foreign State" as well as suits brought by individuals. Ultimately, however, this language was crossed out, and it did not become part of the Eleventh Amendment. One can plausibly infer that Senator Strong or his allies decided against overriding *Chisholm* with respect to suits brought by foreign countries.

Notwithstanding the superficial appeal of this argument, the Supreme Court has long held that states enjoy protection against such suits. In *Monaco v. Mississippi*, the Court refused to conclude "that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting States." Instead, the Court hearkened back to the comments that Madison and Marshall made at the Virginia Ratifying Convention; relying on those comments (rather than on *Chisholm*'s contrary view), the Court concluded that Article III does not expose unconsenting states to suit by foreign countries. To judge from *Monaco*, the traditional framework for sovereign immunity — the framework on which Madison and Marshall based their comments — survived not only the ratification of Article III, but also the ratification of the Eleventh Amendment.

This conclusion is perfectly sensible. Indeed, there is considerable irony in the notion that the Eleventh Amendment should have prevented the Court from repudiating *Chisholm*. A constitutional amendment that fails to override some applications of a Supreme Court decision is not the same as a constitutional amendment that codifies those applications. As adopted, the Eleventh Amendment simply did not address suits brought by foreign countries. It therefore left those suits to be governed by the unamended provisions of Article

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262 U.S. CONST. art. III, § 2.
263 See Resolution in the United States Senate (Feb. 20, 1793), supra note 212, at 607–08.
264 292 U.S. 313 (1934).
265 Id. at 322.
266 See id. at 323–24, 330. At the Virginia Ratifying Convention, Madison indicated that just as the background rules of general law protected unconsenting states against suit by individuals, so too they protected unconsenting states against suit by foreign countries. According to Madison, the "consent of the parties" was necessary before states could hale foreign countries into court or vice versa. See Debates of the Virginia Convention (June 20, 1788), supra note 158, at 1414.
III. If one agrees that *Chisholm* read too much into those provisions, then one can rationally reach *Monaco*’s conclusion.

This analysis applies even if one accepts some unfavorable assumptions about the drafting history of the Eleventh Amendment. We know that Senator Strong or his allies, after initially drafting language that would have covered suits by foreign countries, edited the proposed amendment to focus exclusively on suits by individuals. We have no direct evidence of the reasons for this change, but let us assume the worst: after some deliberation, Senator Strong or his allies affirmatively decided that foreign countries should be able to sue unconsenting states in federal court. Even if this were true, the most that one could conclude is that an amendment protecting unconsenting states against such suits would have failed to win the necessary supermajorities in Congress. One certainly cannot conclude that the necessary supermajorities would have approved an amendment explicitly *exposing* states to such suits, or that such an amendment would then have been ratified by three-fourths of the states. All that one can conclude from the drafting history of the Eleventh Amendment, then, is that the Amendment was deliberately drafted to say nothing one way or the other about suits by foreign countries.

The upshot is that the Eleventh Amendment left the Constitution unchanged on this issue. It did not codify the anti-*Chisholm* position, but it also did not codify *Chisholm*. In suits not covered by the Eleventh Amendment, the Court therefore remained free to reexamine whether *Chisholm* was correct about the meaning of Article III. Far from foreclosing restoration of the traditional framework for sovereign immunity in these suits, the Eleventh Amendment left ample room for the two-track system.

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267 *See U.S. Const.* art. V (setting out procedures for amendment).

268 Instead of suggesting that the Eleventh Amendment effectively ratified all applications of *Chisholm* that it did not override, opponents of the two-track approach might try to make a more modest use of the Amendment. They might portray the Amendment’s limited scope as a piece of evidence bearing on the original understanding of the states’ protections against suit. In particular, they might contend that if members of the Founding generation had really embraced what I am calling the traditional framework for sovereign immunity, the Amendment would have been written more broadly.

This hypothesis, however, is not necessarily correct. The Eleventh Amendment unquestionably overrode what were then the most prominent applications of *Chisholm*. Because it created a new type of immunity, moreover, *expressio unius* arguments do not really work. The fact that the Amendment did not extend the new “subject matter jurisdiction” type of immunity to suits brought by foreign countries, for instance, has no necessary bearing on whether members of the Founding generation thought that such suits triggered the old “personal jurisdiction” type of immunity. One could perfectly well believe that such suits should be within the federal government’s judicial power if *they were to proceed at all* — that is, if states consented to appear as parties defendant, or if some valid statute overrode the protections of the general law. Not only might federal courts be more sensitive to diplomatic concerns than state courts, but the aggrieved
(b) Did the Restoration of the Traditional Framework Supersede the Eleventh Amendment? — Perhaps the two-track approach is vulnerable to the opposite criticism: even if we agree that the Eleventh Amendment did not supersede the traditional framework for sovereign immunity, we might think that the restoration of the traditional framework superseded the Eleventh Amendment. After all, the Amendment was adopted because of *Chisholm*. Now that the Court has repudiated *Chisholm* and has tried to return to the traditional framework, one might think that the Eleventh Amendment does not address our current situation. Thus, one might be tempted to argue that the Amendment mattered only during the period in which the Court embraced *Chisholm*'s interpretation of Article III; with the demise of that interpretation, the Amendment should have no continuing relevance.

This position, though, does not square with our normal approach to written laws. The statute books are full of laws that were enacted for reasons that no longer apply. We do not ordinarily say that courts are free to disregard those laws.\(^2\)\(^6\)\(^9\)

In any event, the repudiation of *Chisholm*'s interpretation of Article III has not eliminated all possible reasons for the Eleventh Amendment. As we have seen, a state that consented to be sued in its own courts thereby permitted the formation of “Controversies” within the meaning of Article III. In the absence of the “subject matter jurisdiction” type of immunity that the Eleventh Amendment confers, Congress could perhaps have permitted some of those “Controversies” — the ones brought by foreigners or citizens of other states — to end up in federal court even though they raised no questions of federal law.\(^2\)\(^7\)\(^0\) This possibility, which stood independent of *Chisholm*, might have offended people’s ideas of sovereignty, and might also have dissuaded states from consenting to be sued in the first place. Even if the Supreme Court had never strayed from the views of Madison and Marshall, then, something like the Eleventh Amendment might have been necessary to clarify how the traditional framework for sovereign immunity would operate in a federal system. Thus, while *Chisholm* surely provided the immediate occasion for the Amendment’s adoption, the “subject matter jurisdiction” type of immunity created by the Amendment can be understood to address broader issues.

Especially in light of this fact, there is little reason to conclude that the Court’s later repudiation of *Chisholm* effectively erased the

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\(^2\)69 *But see* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982) (arguing that courts should have authority to disregard “obsolete” statutes).

\(^2\)70 *See supra* pp. 1605–07.
(c) Has the Content of the Traditional Framework Changed? —

The two-track system may nonetheless be subject to a more powerful objection. One can plausibly argue that even if nothing has abrogated the traditional framework for sovereign immunity, the rules that apply under that framework have changed since the Founding. Indeed, now that we understand the legal basis for the views articulated by Madison and Marshall, even the most committed originalist might take this position.

As we have seen, Madison and Marshall insisted that Article III did not abrogate the states' protections against being haled into court by individuals. But the content of those protections was not set by anything in the Constitution; in the absence of any other relevant rules of law, the general law of nations determined the scope of the states' protections. The content of the general law of nations, in turn, was thought to depend partly on the immutable law of nature and partly on more variable sources (such as custom and tacit agreements among nations). 271

To the extent that the states' protections against suit depend on sources that can change over time, one need not assume that the general law of nations continues to give states the same protections that it gave them at the time of the Founding. Today's sovereigns, after all, do not always follow exactly the same customs as the sovereigns of the late eighteenth century. Thus, even if we still believed in the concept of the "general law," we could criticize the Supreme Court for acting as if the content of that law has been frozen in time. We could readily agree that Article III does not abrogate whatever protections the general law gives sovereign states, but we could maintain that those protections themselves have changed in important ways since the days of Madison and Marshall.

More fundamentally, any inquiry into the modern content of the "general law" is likely to strike many lawyers as misguided. To Madison and Marshall, this inquiry would have made sense: lawyers of their day believed in the existence of various rules that were not promulgated by any particular government (whether state or federal) but that nonetheless answered legal questions unless overridden by some valid provision of local law. Ever since Erie Railroad Co. v.

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Tompkins, however, the Supreme Court has rejected this vision of the general law as "a brooding omnipresence in the sky." According to modern lawyers, there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." Instead, "law in the sense in which courts speak of it today does not exist without some definite authority behind it.”

Still, these modern jurisprudential views do not make the traditional framework for sovereign immunity wholly irrelevant. Suppose the courts of a particular state recognize, as a matter of state common law, the old general-law rule that individuals cannot hale unconsenting states into court. This exemption from compulsory process certainly seems “outcome determinative” in the sense relevant to Erie analysis: if federal courts did not recognize the exemption, plaintiffs would know that they could proceed against the state in federal court and could not proceed against the state in state court, and this knowledge would surely affect which forum they chose. The Erie doctrine therefore suggests that the state’s exemption from compulsory process should apply in federal as well as state court, unless it is trumped by some paramount rule of law.

If we have repudiated Chisholm, the trump does not come from Article III of the Constitution. Under Article III, federal courts can entertain a suit against a state only if a “Case” or “Controversy” can form; Article III does not mandate that such “Cases” or “Controversies” must be able to form, and so a legal rule exempting states from compulsory process can coexist with Article III. But one might well think that federal statutes can displace such rules. The next Part of this Article takes up this hotly disputed question: to what extent, if any, does Congress have power to abrogate the states’ exemptions from suit?

III. CAN CONGRESS ABROGATE THE STATES’ IMMUNITIES?

According to the current Supreme Court, the original Constitution did not permit Congress to expose unconsenting states to any suits by individuals, whether in state or federal court. As a result, "Congress

272 304 U.S. 64 (1938).
274 Erie, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).
275 Id. (quoting Black & White Taxicab, 276 U.S. at 533 (Holmes, J., dissenting)).
276 Cf. Hanna v. Plumer, 380 U.S. 460, 468 n.9 (1965) (interpreting Erie and its progeny to focus on "whether application of the [state law] rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court").
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may not abrogate state sovereign immunity pursuant to its Article I powers.\textsuperscript{278} But when Congress is exercising the authority conferred by Section 5 of the Fourteenth Amendment (which gives Congress power to enact “appropriate legislation” to enforce the Fourteenth Amendment’s provisions), it \textit{can} expose unconsenting states to suit by individuals, at least in federal court.\textsuperscript{279}

In formulating these propositions, the Court has persisted in its unitary approach to sovereign immunity: it has not distinguished between suits that \textit{are} covered by the Eleventh Amendment and suits that are \textit{not} covered by the Eleventh Amendment. If one accepts the two-track approach discussed in Part II, however, then the question of abrogation is really two different questions. This Part takes up those questions in turn. Section III.A argues that Congress cannot abrogate the “subject matter jurisdiction” type of immunity conferred by the Eleventh Amendment. Section III.B discusses whether Congress can abrogate the “personal jurisdiction” type of immunity that state law (or surviving notions of the “general law”) might confer in situations not covered by the Eleventh Amendment.

\textbf{A. The “Subject Matter Jurisdiction” Type of Immunity Cannot Be Abrogated}

Neither Congress nor any other institution of the federal government can let federal courts adjudicate suits to which the judicial power of the United States does not extend.\textsuperscript{280} The Eleventh Amendment explicitly says that the judicial power of the United States should not be construed to extend to the categories of suits that the Amendment covers. The logical conclusion is that federal courts cannot adjudicate any suit covered by the Eleventh Amendment, even if Congress says that they can.\textsuperscript{281}

The practical importance of this conclusion depends on the scope of the Eleventh Amendment. If one accepts the “diversity” reading,\textsuperscript{282} then the Eleventh Amendment does relatively little to limit Congress’s powers. According to the “diversity” reading, after all, the Eleventh Amendment does not prevent the federal government from exercising judicial power over any case that “aris[es] under . . . the Laws of the

\textsuperscript{281} See, e.g., \textit{Seminole Tribe}, 517 U.S. at 93 (Stevens, J., dissenting) (“[I]n all cases to which the judicial power does not extend — either because they are not within any category defined in Article III or because they are within the category withdrawn from Article III by the Eleventh Amendment — Congress lacks the power to confer jurisdiction on the federal courts.”); Massey, supra note 11, at 66 (similar).
\textsuperscript{282} See supra notes 11, 259.
United States" within the meaning of Article III. Thus, whenever Congress can create a federal cause of action (or, for that matter, a federal defense), Congress can give the federal courts subject matter jurisdiction over the resulting cases.

More is at stake if one rejects the "diversity" reading of the Eleventh Amendment. If one truly believes that the federal government's judicial power does not extend to any suits (including even federal question suits) brought against a state by citizens of another state, then one should conclude that Congress cannot authorize the federal courts to hear any such suits.

This issue matters because the Supreme Court itself purports to reject the "diversity" reading of the Eleventh Amendment. Nonetheless, the Court has said that when Congress is acting under Section 5 of the Fourteenth Amendment, it can let the federal courts hear suits that are brought against states by citizens of other states. This conclusion makes little sense unless one accepts the "diversity" reading of the Eleventh Amendment; we do not ordinarily think that Congress can use its enumerated powers to expand the subject matter jurisdiction of the federal courts beyond the limits set forth in the Constitution.

In construing the principal statutory grant of "arising under" jurisdiction, 28 U.S.C. § 1331 (1994), the Supreme Court has required the federal question to appear on the face of a well-pleaded complaint. See, e.g., Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 252 (1908). This limitation, however, does not apply to the constitutional grant of "arising under" jurisdiction. See, e.g., Verlinden, 461 U.S. at 494–95.


See, e.g., Seminole Tribe, 517 U.S. at 94 (Stevens, J., dissenting) ("There is no language anywhere in the constitutional text that authorizes Congress to expand the borders of Article III jurisdiction or to limit the coverage of the Eleventh Amendment.").

People who wish to reconcile the Court's statements have one possible argument to make. If one rejects the "diversity" reading (as the Supreme Court says that it does), then the Eleventh Amendment cut back on all of the categories in Article III, Section 2. This was true of "Cases . . . arising under the laws of the United States" no less than of other cases; by virtue of the Eleventh Amendment, the federal government's judicial power did not extend to any suit, in law or equity, commenced or prosecuted against a state by citizens of another state or of a foreign country. Still, a subsequent amendment to the Constitution could relax this restriction and restore the federal government's judicial power over certain suits that meet the description in the Eleventh Amendment. The Supreme Court has suggested that the Fourteenth Amendment did precisely that: it amended the Eleventh Amendment and allowed Congress to let federal courts hear certain suits brought against a state by citizens of other states. See, e.g., Seminole Tribe, 517 U.S. at 65–66; Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

This logic, however, "is less than overwhelming." DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1886–1986, at 573 (1990). Although a subsequent amendment certainly could restore some of the subject matter ju-
The Court's statements become easier to understand once we recognize its tendency to conflate the "subject matter jurisdiction" type of sovereign immunity with the "personal jurisdiction" type. Despite its protestations, the Court really does seem to accept the "diversity" reading of the Eleventh Amendment: the Court must believe that the federal government's judicial power extends to federal question suits brought against states by citizens of other states, or else Congress could never open the federal courts to such suits. But even though such suits do not implicate the "subject matter jurisdiction" type of immunity conferred by the Eleventh Amendment, they might well implicate the type of immunity that Madison and Marshall discussed at the Virginia Ratifying Convention. This is the essence of the Court's current position. When the Court says that it rejects the "diversity" reading of the Eleventh Amendment, it is not really talking about the Eleventh Amendment at all; it is simply saying that the type of immunity contemplated by Madison and Marshall applies to federal question suits as well as to diversity suits. Likewise, when it talks about Section 5 of the Fourteenth Amendment, the Court is simply saying that Section 5 authorizes Congress to abrogate the protections that Madison and Marshall had in mind.287

This latter conclusion seems perfectly sound. The Fourteenth Amendment imposes plenty of obligations directly upon the states, and Section 5 gives Congress discretion over how to enforce those obligations. One might well conclude that Congress can let people sue states in federal court for violating the Fourteenth Amendment, or for

287 The Supreme Court's tacit acceptance of the "diversity" reading of the Eleventh Amendment is apparent not only in its statements about Congress's powers under Section 5, but also in the Court's understanding of its own appellate jurisdiction. As Vicki Jackson has noted, if the Supreme Court really believes that the federal government's judicial power does not extend to any suits commenced or prosecuted against a state by citizens of another state — including suits raising federal questions — then it is hard to account for the Court's willingness to exercise appellate jurisdiction over state-court judgments in such suits. See Jackson, supra note 9, at 32-39 (rejecting other explanations for this phenomenon); id. at 44-45 (invoking the diversity reading to explain why "the Eleventh Amendment is irrelevant to the Supreme Court's appellate jurisdiction over state cases that arise under federal law for Article III purposes"). On the other hand, if federal question suits implicate only the "personal jurisdiction" type of immunity, then the Court's approach makes more sense: it is possible that these suits cannot start off in a federal district court (because the state has consented to enter its appearance only in a state court) even though they can end up in the federal Supreme Court (because the state's appearance in state court produces a "Case" that falls within the federal government's judicial power). Cf. McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 28 n.9 (1990) (noting this apparent oddity in current doctrine).
breaching related duties validly imposed as part of Congress's enforcement scheme.

It is important to stress, though, that all such suits "aris[e] under th[e] Constitution [or] the Laws of the United States" within the meaning of Article III, and hence fall outside the terms of the Eleventh Amendment (at least on the "diversity" reading). The conclusion that Section 5 lets Congress expose states to private suits does not mean that Congress can abrogate the "subject matter jurisdiction" type of immunity conferred by the Eleventh Amendment, but only that Congress has some power to abrogate the "personal jurisdiction" type of immunity contemplated by Madison and Marshall.

The upshot is simple. The Constitution does not extend the federal government's judicial power to suits covered by the terms of the Eleventh Amendment, and Congress cannot abrogate this "subject matter jurisdiction" type of immunity. To the extent that one accepts the "diversity" reading of the Amendment, though, this conclusion does little to alter current views of Congress's powers. The more important issue, to which I now turn, is the extent to which Congress can abrogate the "personal jurisdiction" type of immunity.

B. To What Extent Can Congress Abrogate the "Personal Jurisdiction" Type of Immunity?

Outside of the Section 5 context, the Court has indicated that the immunity contemplated by Madison and Marshall "is protected by the Constitution" and "is not defeasible by [federal] statute."288 Both scholars and dissenting Justices have attacked this conclusion,289 and the historical analysis set forth in Part I gives us good reason to share their skepticism. Section III.B.1 presents a straightforward argument for the proposition that the original Constitution gave Congress broad power to abrogate the protections that Madison and Marshall were talking about. Section III.B.2 sketches out a more complicated argument why the Court might be right after all.

288 Alden v. Maine, 527 U.S. 706, 734 (1999). Thus far, the current Court has permitted Congress to abrogate this immunity only when Congress is acting under Section 5 of the Fourteenth Amendment. See id. at 756; Seminole Tribe, 517 U.S. at 59–66. One suspects, however, that the Court would also permit Congress to expose states to suit under the enforcement clauses in the other Civil War Amendments, see U.S. Const. amend. XIII, § 2; id. amend. XV, § 2, and perhaps under the enforcement clauses in some later amendments too, see id. amend. XIX, § 2; id. amend. XXIV, § 2; id. amend. XXVI, § 2.

289 See, e.g., Alden, 527 U.S. at 760–814 (Souter, J., dissenting); Seminole Tribe, 517 U.S. at 76–99 (Stevens, J., dissenting); id. at 100–68 (Souter, J., dissenting); Amar, supra note 9, at 1467–75; Field, supra note 27, at 536–49; Jackson, supra note 9, at 44–51; John E. Nowak, The Scope of Congressional Power To Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments, 75 COLUM. L. REV. 1413, 1441–45 (1975).
The Straightforward Case for the Power To Abrogate. — In the recent case of Alden v. Maine, the Court asserted that "the contours of sovereign immunity are determined by the Founders' understanding." It is not necessarily true, however, that most of the Founders thought Congress incapable of abrogating the states' preexisting protections against suit.

To be sure, opponents of Chisholm v. Georgia believed that federal courts could not act on their own to abrogate the protections that Madison and Marshall discussed at the Virginia Ratifying Convention. Lawyers of the day did not think that federal judges could simply disregard the general law of nations and make up new rules to suit themselves. If the general law did indeed protect unconsenting sovereigns against being haled into court at the behest of individuals, then it was not within the "judicial Power" conferred by Article III to discard this principle unilaterally.

But commentators were much more cautious about Congress's ability to abrogate the exemptions of sovereignty. Some people — including people who opposed Chisholm — indicated that the Constitution did give Congress this power. Others made arguments in the alternative; they emphasized that "even if the Constitution has established a Legislative power for that purpose," the Supreme Court could not properly "make a State a defendant, previously to any law being made therefor by the Congress."

It is easy to understand why members of the Founding generation might have thought that Congress could abrogate the states' preexisting protections against suit. Part I of this Article, after all, traces those protections to background principles of general law rather than to any-

291 Id. at 734.
292 See, e.g., Resolution of the North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, supra note 1, at 615, 615 (asserting that the power to compel a state to answer an individual's lawsuit "was not generally conceived by the representatives of this State in the Convention which adopted the Federal Constitution as a power to be vested in the Judiciary of the General Government"); James Iredell, Observations on State Suability (Feb. 11-14, 1792), in 5 DHSC, supra note 1, at 76, 85 (asserting that "certainly" no one would think that federal courts should unilaterally "devise new modes of suit unheard of or unrecognized before"); cf. Nelson, supra note 252, at 22-37 (discussing the extent to which early American lawyers thought that the unwritten law was discovered rather than made by judges).
293 See William Widgery, Speech in the Massachusetts House of Representatives (Sept. 23, 1793), in 5 DHSC, supra note 1, at 427, 430 (indicating that during the debates over the ratification of the Constitution, Widgery had "objected to [Article III] because I thought it authorized Congress to make a law, where the States might be called on as defendants to appear in the Judicial Court").
294 "The True Federalist" to Edmund Randolph, Number V, INDEP. CHRON., Mar. 20, 1794, reprinted in 5 DHSC, supra note 1, at 270, 270.
thing that the Constitution affirmatively enshrined.295 The Constitution did not itself abrogate the states' exemptions from suit, because the background principles of general law prevented individuals from forming "Cases" or "Controversies" with unconsenting states. But the Constitution nowhere declares that legislatures cannot override those principles and subject states to compulsory process at the behest of individuals.

The modern Supreme Court has concluded that nothing in the federal Constitution keeps state legislatures from overriding the exemptions of sovereignty and exposing their sister states to private suits. In Nevada v. Hall,296 the Court held that California could open its courts to individuals' suits against other states, even if those states did not consent to be sued.297 A state legislature, then, can subject other states to suit by individuals.298

Of course, "[t]he Constitution ... treats the powers of the States differently from the powers of the Federal Government": as far as the

295 In this respect, my analysis is consistent with the work of other modern scholars. See, e.g., Field, supra note 27, at 538 (positing that if sovereign immunity survived Article III at all, it did so "as a common law requirement"); Jackson, supra note 9, at 81-82 (similar); Pfander, supra note 70, at 599 (arguing that traditional notions of sovereign immunity did survive the Constitution to some extent, but only as a "common law immunity").
297 Id. at 426-27.
298 For much of American history, accepted views about personal jurisdiction would have kept this possibility from being a serious threat to most states. In the early Republic and throughout the nineteenth century, it was widely acknowledged that states could not validly send their judicial process beyond their own borders, except possibly when seeking to command the appearance of their own citizens or domiciliaries. See Flower v. Parker, 9 F. Cas. 323, 324 (C.C.D. Mass. 1823) (No. 4891) (Story, J.) ("No legislature can compel any persons, beyond its own territory, to become parties to any suits instituted in its domestic tribunals."); Rogers v. Coleman, 3 Ky. (Hard.) 413, 417-19 (1808) (denying that states may "exercise a jurisdiction ... extra territorium," and asserting that "the jurisdiction of every court, must attach, either because the person is within the sphere of its authority; or because the property or effects of the person, or that which is the subject matter of the controversy, is within that sphere"); Kilburn v. Woodworth, 5 Johns. 37, 40 (N.Y. Sup. Ct. 1809) (noting that because the defendant was domiciled in New York and was not present in Massachusetts, he "could not have been served with process" issuing out of Massachusetts); cf. Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (referring to the "well-established principle[] of public law" that "no State can exercise direct jurisdiction and authority over persons or property without its territory"). When combined with accepted limitations on the Full Faith and Credit Clause, see supra p. 1591, this principle of territorial jurisdiction limited a state's ability to render effective judgments against other states: even if State A purported to open its courts to private suits against State B, State B would face little pressure to appear unless it owned property within State A's borders.

These concepts presumably explain why in 1879, when the state of New Hampshire wanted to help its citizens collect debts owed by other states, it did not simply open its own courts to private suits against delinquent states. Instead, it enacted a statute permitting its citizens to assign their claims to New Hampshire itself, which would then pursue those claims in the original jurisdiction of the United States Supreme Court. See New Hampshire v. Louisiana, 108 U.S. 76 (1883) (rebuffing this attempt to circumvent Louisiana's protections against being sued by individuals in federal court).
federal Constitution is concerned, the states can do things that the Constitution does not expressly or implicitly prohibit, while Congress can do only those things that the Constitution expressly or implicitly authorizes. Yet the Necessary and Proper Clause might well be thought to give Congress the requisite authority to abrogate the states' traditional exemptions from suit.

The Necessary and Proper Clause is such a staple of modern constitutional law that we rarely feel the need to read it. All lawyers know that after conferring various powers upon Congress, Article I authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." But Congress is not limited to making laws that are necessary and proper for carrying into execution its own powers. The so-called "horizontal" part of the Clause adds that Congress can also "make all Laws which shall be necessary and proper for carrying into Execution ... all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Both aspects of the Necessary and Proper Clause bear on Congress's power to expose the states to suit by individuals.

(a) The Relevance of the "Horizontal" Necessary and Proper Clause. — Once we understand the legal basis for the protections that Madison and Marshall discussed at the Virginia Ratifying Convention, we can make a straightforward argument that the horizontal Necessary and Proper Clause permits Congress to abrogate those protections.

The first step in the argument is hard to dispute. Article III of the Constitution vests the judicial power of the United States in the federal courts, and laws prescribing when and how the federal courts can hale people before them seem "necessary and proper for carrying [this power] into Execution." The original Constitution, then, gives Congress considerable power to specify the types of writs that federal courts can use and the restrictions to which those writs are subject.

Members of the First Congress took it for granted that they had authority in this general area. The Judiciary Act of 1789, which organized the federal judiciary, authorized federal courts to issue "all ... writs ... which may be necessary for the exercise of their respec-

300 U.S. CONST. art. I, § 8, cl. 18.
301 Id. For the leading discussion of this aspect of the Necessary and Proper Clause, see William Van Alstyne, The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause," 36 OHIO ST. L.J. 788 (1975).
tive jurisdictions, and agreeable to the principles and usages of law." 302 The same committee that drafted this statute also proposed a separate bill that would have specified exactly how people would be commanded to appear in federal court. 303 Unable to agree upon the particulars of this proposal, the First Congress instead adopted a stopgap measure: the Process Act of 1789 specified that "until further provision shall be made, ... the forms of writs ... and modes of process" used by the lower federal courts in suits at common law "shall be the same in each state respectively as are now used or allowed in the supreme courts of the same." 304 But even this statute was prescribing a federal law of writs and processes for suits at common law: federal courts were bound to use state modes of process as they had existed at the time the Process Act was enacted, not as subsequently modified by the states. 305 On the equity side of the federal courts, moreover, Congress did not require even this degree of conformity with state law; instead, it directed federal courts to follow "the course of the civil law." 306

In 1792, Congress reiterated these basic directions, 307 but gave federal courts authority to make "such alterations and additions [to the forms of process and modes of proceeding] as the said courts respectively shall in their discretion deem expedient." 308 When Chief Justice Marshall had occasion to discuss this statute three decades later, he entertained "no doubt whatever" that the Necessary and Proper Clause authorized Congress to regulate the process used by the federal courts; his only real concern was the extent of Congress's ability to delegate this power to the courts. 309

302 Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.
304 Process Act of 1789, ch. 21, § 2, 1 Stat. 93, 93; see also GOEBEL, supra note 303, at 535–39 (discussing how this Act emerged from the committee's proposal).
306 See Process Act of 1789, § 2 (providing that "the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law").
307 See Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276. With respect to suits at common law, the Process Act of 1792 provided that "the forms of writs, executions and other processes ... and the forms and modes of proceeding" in federal courts "shall be the same as are now used in the said courts respectively in pursuance of [the Process Act of 1789]." With respect to equity and admiralty cases, the statute directed federal courts to follow "the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law." Id.
308 Id.
309 See Wayman, 23 U.S. (10 Wheat.) at 22, 43 (strongly suggesting that the Process Act of 1792 fell on the permissible side of "[the line ... [that] separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details").
To judge from these early statutes, members of the Founding generation believed that Congress could take a variety of approaches in regulating the federal courts' writs and processes. Congress did not have to direct the federal courts to follow the general law on questions of this sort; otherwise, Congress could not have told lower federal courts to use local state practices in suits at common law. By the same token, state law did not have to govern such questions of its own force; otherwise, Congress could not have told federal courts to follow outdated state practices in suits at common law, and to disregard local practices altogether when hearing suits in equity.\footnote{310}

Once we acknowledge that the Necessary and Proper Clause authorizes Congress to prescribe whether and how defendants can be haled into federal court, it seems reasonable to conclude that Congress could set up mechanisms for haling states into federal court. Indeed, the committee draft of the Process Act of 1789 would have done just that: one of the sections of the proposed bill, which did not make it through the full Senate, included a provision for serving process in actions against a state.\footnote{311}

The contrast between the Articles of Confederation and the Constitution strongly suggests that Congress has at least some power along these lines. In providing for the appointment of special courts to resolve "disputes and differences . . . between two or more States," the Articles had made detailed provisions for what amounted to compulsory process: the contending states could be required to appear on a particular day to select the commissioners who would decide their dispute, and those commissioners could proceed to judgment even if one of the states refused to appear before them.\footnote{312} The Constitution similarly extended the federal government's judicial power to "Controversies between two or more States,"\footnote{313} but it did not specify any mechanism for compelling the contending states to appear. One can plausibly infer that the Framers did not think it necessary for the Constitution itself to address this issue: by virtue of the Necessary and Proper Clause, Congress would be able to establish appropriate forms of compulsory process after the Constitution had gone into effect.

\footnote{310} See supra p. 1630; see also Boyle v. Zacharie, 31 U.S. (6 Pet.) 647, 658 (1832) (pointing out that "the courts of the United States are not governed by the state practice" in cases of equity jurisdiction, but instead follow "the practice of courts of equity" in England, "subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated by those acts, the courts of the United States may . . . prescribe").

\footnote{311} See GOEBEL, supra note 303, at 520–21. Purporting to exercise powers delegated by the Process Act of 1792, the Supreme Court later adopted a modified version of this provision to govern its own proceedings. See Grayson v. Virginia, 3 U.S. (3 Dall.) 320, 320 (1796).

\footnote{312} See ARTICLES OF CONFEDERATION art. IX, c. 2 (U.S. 1781); see also supra note 83 (summarizing this provision).

\footnote{313} U.S. CONST. art. III, § 2, cl. 1.
Of course, another explanation is possible. Perhaps the Framers decided that the Articles were wrong to subject states to any form of compulsory process, and perhaps they resolved not to make this mistake under the Constitution. But Founding-era commentary provides relatively little support for this hypothesis. Although there were some dissenting voices, the dominant view — even among opponents of Chisholm v. Georgia — seems to have been that Congress could provide for one state to hale another into federal court. James Iredell, for instance, thought that Congress "undoubtedly" enjoyed this power.

It does not automatically follow that Congress could also provide for individuals to hale states into federal court. Congress’s ability to subject states to suit by other states (or, by analogy, by the United States as a whole) was a natural extension of powers that the central authorities had enjoyed under the Articles of Confederation. But the Articles had not included any comparable provision "for compelling a State to answer an individual Citizen on a civil process."

Some members of the Founding generation indicated that Congress’s powers under the new Constitution should be interpreted in light of this baseline: The Georgia House of Representatives, for instance, seemed to think that states could be subjected to compulsory process in suits brought by other states or by the United States, but that the federal courts could not be granted power to make states answer suits brought by individuals.

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315 See Iredell, supra note 86, at 187 ("[I]t does indeed appear, that in some cases a State must be a Defendant[] because 'Controversies' are spoken of between two or more States. This I take to have been intended to convey a Power similar in effect to that possessed by Congress under the old Articles of Confederation. I doubt very much even now whether any remedy exists applicable to such a case. But the [Legislature] undoubtedly may provide one."); see also "The True Federalist" to Edmund Randolph, Number IV, supra note 195, at 266 (asserting that "whenever there shall arise a controversy between two or more States, a process may be provided by Congress, perhaps similar to that provided in the old confederation, for settling the same by the Judiciary power of the United States," and that "should a State refuse to comply with the decree given, the United States would compel a compliance").

316 The provision in the Articles of Confederation, in turn, grew out of practices that had been common in colonial times. See SMITH, supra note 197, at 417–22, 442–63 (noting that the king had often directed royal commissioners to resolve disputes between two colonies, with appellate review in the king’s Privy Council); id. at 462 (identifying this practice as the source of the provision in the Articles of Confederation).

317 "The True Federalist" to Edmund Randolph, Number IV, supra note 195, at 265.

318 See Proceedings of the Georgia House of Representatives (Dec. 14, 1792), supra note 191, at 161–62; cf. Pfander, supra note 165, at 1360 ("[T]he debate Chisholm triggered suggests that the generation that framed the Eleventh Amendment saw a fundamental difference between claims brought against the states by individuals and those brought by jural equals or superiors. In Massachusetts, Virginia, and Georgia, the public debate over Chisholm distinguished sharply between state suability in claims brought by individuals and that in proceedings brought by other governments.").
At least at first glance, however, this claim seems to confuse what was familiar with what was required. In regulating the federal courts' use of compulsory process, Congress presumably could have chosen to codify exemptions that had been recognized as part of the general law, such as sovereigns' traditional exemptions from command. But if Congress could legislate in this area, then it had some choice about how to do so. After all, the Necessary and Proper Clause enables Congress "to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."\(^\text{319}\) If the horizontal part of the Necessary and Proper Clause permitted Congress to codify the general law's rules regarding compulsory process, then it also permitted Congress to make appropriate modifications to those rules.\(^\text{320}\)

The Necessary and Proper Clause certainly gave Congress discretion over how to handle other issues on which there were established rules of general law. Consider, for instance, the general law's rules regarding married women. Traditionally, so-called *femes coverts* lacked capacity to sue or be sued on their own. As Blackstone put it, "[i]f the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant."\(^\text{321}\)

For reasons that should sound familiar by now, Article III of the federal Constitution did not itself change this principle. To be sure, Article III extended the federal government's judicial power to "Controversies . . . between Citizens of different States,"\(^\text{322}\) and members of the Founding generation acknowledged that a *feme covert* could be "a citizen of [a] State."\(^\text{323}\) But if *femes coverts* could not become parties to lawsuits on their own, they could not form "Controversies" within the meaning of Article III. Since Article III did not address the general law's rules about legal capacity, it did not itself open the federal courts to *femes coverts*. At the Virginia Ratifying Convention, indeed, James Madison made precisely this point, which he used to illustrate and explain his argument that Article III would not abrogate the states' pre-existing exemptions from suit.\(^\text{324}\)

\(^{321}\) 1 BLACKSTONE, *supra* note 147, at 431 (footnotes omitted).
\(^{322}\) U.S. CONST. art. I, § 2, cl. 1.
\(^{323}\) E.g., Debates of the Virginia Convention (June 20, 1788), *supra* note 158, at 1414 (reporting remarks of James Madison).
\(^{324}\) See id. ("It is provided [in Article III] that citizens of different States may be carried to the Federal Court. — But this will not go beyond the cases where they may be parties. A *feme covert* may be a citizen of another State, but cannot be a party in this Court.").
Still, while the original Constitution did not itself alter the general law’s rules about *fames coverts*, it presumably gave Congress some power to do so. Surely Congress’s authority to “make all Laws which shall be necessary and proper for carrying [the federal government’s judicial power] into Execution” enabled it to regulate who has the capacity to sue or be sued in federal court. It is hard to see why, in exercising this authority, Congress had to adhere to the traditional rules about married women.

To appreciate Congress’s powers in this area, one need only consider what happened in the latter half of the nineteenth century, when more and more state legislatures were giving married women the capacity to sue and be sued on their own.325 In 1872, Congress changed its approach to federal practice in suits at common law: the system of “static” conformity (in which Congress directed federal courts to use *old* state practices) gave way to a system of “dynamic” conformity (in which Congress directed federal courts to use *current* state practices).326 In suits at common law, then, married women could proceed on their own in at least some federal courts — those located in states that had given them this capacity. On the equity side of those same courts, however, federal law took a different approach; instead of incorporating local state law, federal equity practice followed more uniform rules that Congress had authorized the Supreme Court to promulgate,327 and some federal judges understood those rules to require the appointment of “next friends” before married women could bring suit.328 Each of these approaches apparently was thought to be within Congress’s power.

325 See, e.g., Act of Mar. 30, 1874, § 1, in 3 THE STATUTES OF ILLINOIS: AN ANALYTICAL COMPILATION OF ALL THE GENERAL LAWS OF THE STATE IN FORCE AT THE PRESENT TIME 229 (William L. Gross ed., 2d ed., Springfield 1874) (“A married woman may in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried . . .”); Act of Apr. 24, 1874, ch. 184, § 3, 1874 Mass. Acts 117, 117 (“A married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife.”); Act of Mar. 20, 1860, ch. 90, § 7, 1860 N.Y. Laws 157, 158-59 (authorizing married women to bring a variety of suits “in the same manner as if [they] were sole”); Act of Apr. 10, 1862, ch. 172, § 7, 1862 N.Y. Laws 343, 345 (amending Act of Mar. 20, 1860) (providing that “[a] married woman may be sued in any of the courts in this State”); see also 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIED WOMEN UNDER THE STATUTES OF THE SEVERAL STATES, AND AT COMMON LAW AND IN EQUITY § 782 (Boston, Little, Brown & Co. 1875) (reading this latter statute to imply that a married woman “may be sued alone”).

326 See Conformity Act, ch. 255, 17 Stat. 196, 197 (1872); HART AND WECHSLER, supra note 149, at 661-63.


328 See Wills v. Pauly, 51 F. 257 (C.C.S.D. Cal. 1892) (“If the present was an action at law, the provisions of [a state statute authorizing married women to sue on their own] would be applicable and enforceable in this court; but, being a suit in equity, the state statute has no application.
One can plausibly argue that just as Congress could modify the principles of general law restricting plaintiffs' ability to form "Controversies" with married women, so too Congress could modify the principles of general law restricting plaintiffs' ability to form "Controversies" with states. Although these two sets of principles derived from different branches of the general law, Madison himself had linked them at the Virginia Ratifying Convention. If the horizontal part of the Necessary and Proper Clause gives Congress wide discretion to deviate from the general law's rules about whether married women could sue and be sued, then it arguably gives Congress similar power to let federal courts issue compulsory process against states.

(b) The Relevance of the Rest of the Necessary and Proper Clause. — Even if one accepts this argument, of course, Congress's power under the horizontal part of the Necessary and Proper Clause is limited in various ways. For one thing, while the horizontal part of the Necessary and Proper Clause lets Congress prescribe writs and processes for the federal courts, it does not let Congress subject states to compulsory process in state courts. Even with respect to federal courts, moreover, Congress's ability to abrogate the "personal jurisdiction" type of immunity that Madison and Marshall discussed at the Virginia Ratifying Convention merely means that Congress can authorize federal courts to issue compulsory process against states. The horizontal part of the Necessary and Proper Clause does not give Congress plenary power over the substantive rules of decision that will govern the resulting cases.

This limitation may seem important. So far, I have focused on the states' jurisdictional immunities, whether of the "personal jurisdiction" type or the "subject matter jurisdiction" type. But states can enjoy substantive immunities too. Even if a state can be haled into a federal court that enjoys subject matter jurisdiction, the governing rules of substantive law might fail to give the plaintiff a cause of action here.

See supra note 324 and accompanying text.

In referring to "the governing rules of substantive law," I am oversimplifying — though not, I hope, to the point of inaccuracy. The Constitution presupposes that federal courts will need to apply choice-of-law rules, and Congress presumably has considerable power over the content of those rules. See, e.g., Henry J. Friendly, In Praise of Erie — and of the New Federal Common Law, 39 N.Y.U. L. REV. 383, 402 (1964) ("For Congress to direct a federal court sitting in State A whether to apply the internal law of State A, B or C, or to use its own judgment which to apply, can well be said to be 'necessary and proper' to enabling federal judges to function, and consistent with the general role of the central government under the Constitution . . ."). Still, this authority has its limits. See, e.g., Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 COLUM. L. REV. 249, 250–51 (1992) (identifying "three [constitutional] principles from which all domestic choice-of-law rules must be de-
against the state, or might give the state special defenses to the plain-
tiff’s claims. If states enact laws granting themselves such substantive
immunities, and if those laws are not preempted by any contrary pro-
visions of federal law, then suits against states may not succeed even if
they can proceed.

One might well conclude, however, that the Constitution gives
Congress considerable power to preempt such substantive immunities.
Even if the horizontal part of the Necessary and Proper Clause does
not confer much power over substantive rules of decision, the rest of
the Clause may step into the breach. Suppose, for instance, that Con-
gress decides to regulate commerce among the several states by estab-
lishing certain standards of conduct that states as well as other actors
are obliged to respect. If creating causes of action against states that
violate these standards would be a useful way of carrying Congress’s
regulatory power into execution, there is no obvious reason why Con-
gress could not do so. Some of Congress’s enumerated powers might
even be broad enough to confer this sort of authority directly, without
any help from the Necessary and Proper Clause. For example, creat-
ing causes of action against states that infringe federal patents might
be part and parcel of “securing ... to ... Inventors the exclusive Right
to their ... Discoveries.”

To the extent that federal laws creating these substantive rights are valid, both state and federal courts would
be bound to apply those laws in the cases that come before them.

In state courts, it is possible that cases calling for the application of
these laws would not actually arise. Although Congress can (within
the limits of its enumerated powers) provide rules of decision for cases
that wind up in state courts, Congress might be unable to confer jurisdiction upon state courts.

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Congress’s Article I powers, including its powers under the Patent Clause).

332 The Supreme Court has held that when states define the jurisdiction of their courts, they
cannot discriminate against federal law; if a state effectively confers general jurisdiction upon its
courts but purports to strip those courts of jurisdiction over federal claims, the jurisdiction-
stripping part of the law might be invalidated, leaving only the grant of general jurisdiction. See,
230, 233–34 (1934). But if nondiscriminatory state law fails to give any state court jurisdiction to
adjudicate a particular class of federal claims, Congress cannot necessarily require (or even au-
thorize) the state courts to hear those claims. See Richard H. Seamon, The Sovereign Immunity of
States in Their Own Courts, 37 BRANDEIS L.J. 319 (1998); see also Michael G. Collins, Article III
Cases, State Court Duties, and the Madisonian Compromise, 1995 WIS. L. REV. 39, 135–61, 191
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substantive immunities that a state might try to confer upon itself, a state could perhaps give itself a species of "subject matter jurisdiction" immunity in its own courts, and Congress might not always be able to trump this immunity.

But suits in the federal courts do not face this complication. Congress unquestionably can give the federal courts subject matter jurisdiction over all cases that arise under federal law and are not covered by the Eleventh Amendment. If one accepts the "diversity" reading of the Eleventh Amendment, moreover, a case arising under federal law is automatically not covered by the Eleventh Amendment. Thus, when Congress's enumerated powers permit it to create a federal cause of action against a state, Congress can kill two birds with one stone: it can simultaneously (1) trump the substantive immunities that the state

n.428 (presenting extensive historical evidence that for many years, "the ordinary understanding [of the Constitution] was that state judges would be bound by federal law as a rule in cases that they decided, and not that federal law would supply authority for deciding in the first instance"). As Representative Fisher Ames told fellow members of the First Congress in 1789, "The law of the United States is a rule to [state judges], but not an authority for them. It controls their decisions, but cannot enlarge their powers." 11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS: DEBATES IN THE HOUSE OF REPRESENTATIVES 1358 (Charlene Bangs Bickford et al. eds., 1992) [hereinafter ii DHFFC]; see also Letter from Fisher Ames to George Richards Minor (Sept. 3, 1789), in 4 DHSC, supra note 231, at 507, 507 (stressing this "distinction between jurisdiction and the rule of decision in causes properly cognizable in a State Court"); Collins, supra, at 152-53 (arguing that Ames's views were widely held).

One argument for Ames's position has received relatively little attention. State courts obviously exercise what the Constitution calls "judicial Power," but the Vesting Clause of Article III suggests that they cannot exercise "the judicial Power of the United States." See U.S. CONST art. III, § 1 ("The judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Thus, when a state court proposes to adjudicate a case, the Vesting Clause of Article III arguably makes it important to know whose judicial power the court will be exercising. This question, in turn, arguably relates to the source of the court's authority to adjudicate the case: if that authority comes from the United States, then the "judicial Power" at issue is that of the United States. According to this chain of reasoning, Article III prevents Congress from conferring judicial jurisdiction upon any courts that are not "ordain[ed] and establish[ed]" by Congress itself and that do not enjoy the structural protections described by Article III. Around the time of the Founding, Federalists who wanted Congress to create lower federal courts (instead of relying upon the existing state courts) made arguments along precisely these lines. See, e.g., Letter from Oliver Ellsworth to Richard Law (Aug. 4, 1789), in 4 DHSC, supra note 231, at 495, 495 (asserting that "[t]o annex to State Courts jurisdictions which they had not before . . . would be constituting the Judges of them, pro tanto, federal Judges"); see also Houston v. Moore, 18 U.S. (5 Wheat.) 1, 27-28 (1820) (calling it "perfectly clear" that "Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States, although the State Courts may exercise jurisdiction on cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the federal Courts"); Collins, supra, at 155-57 & n.335 (noting the widespread acceptance of this view in nineteenth-century cases and commentary); cf. id. at 128 & n.258 (citing an unsuccessful attempt in 1793 to amend Article III to let Congress vest the judicial power of the United States in state courts as well as federal courts).

333 Even if one rejects the "diversity" reading of the Eleventh Amendment, the "subject matter jurisdiction" immunity conferred by that Amendment does not affect federal question suits brought by individuals against their own states. See supra p. 1616.
might otherwise enjoy and (2) lay the groundwork for avoiding the "subject matter jurisdiction" type of immunity that the Eleventh Amendment confers. If the horizontal part of the Necessary and Proper Clause lets Congress abrogate the "personal jurisdiction" sort of immunity too, then Congress has broad power to expose unconsenting states to suit by individuals in federal court.

2. The Complicated Case Against the Power To Abrogate. — Still, the Founding generation did not unanimously embrace this conclusion. At least some early commentators believed not only that the states' preexisting protections against suit survived the ratification of Article III, but also that the Constitution did not empower Congress to abrogate those protections. On this view, neither the horizontal part of the Necessary and Proper Clause nor anything else in the original Constitution authorized the federal government to expose unconsenting states to suit by individuals.334

The commentators who took this position may simply have been denying that the Necessary and Proper Clause granted much power to the federal government. Not all members of the Founding generation shared the broad view of the federal government's "incidental" powers that Chief Justice Marshall articulated in *McCulloch v. Maryland.*335 But that was then, and this is now; *McCulloch*'s endorsement of a plausible interpretation of the Necessary and Proper Clause has helped to fix the meaning of an otherwise ambiguous provision of the Constitution.336 If the commentators who denied that Congress could expose unconsenting states to suit were relying upon a pre-*McCulloch* view of the Clause, then their position has little continuing relevance.

In fact, however, the position taken by these early commentators may be perfectly consistent with *McCulloch,* and may also connect naturally with other aspects of modern constitutional doctrine. Section III.B.2.a explains how the Court's recent sovereign immunity decisions (which hold that Congress cannot use its powers under the original Constitution to expose unconsenting states to suit by individuals337)

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334 See, e.g., *Sullivan,* supra note 99, at 28-29 (noting that "those laws which shall be made by Congress, and which are repugnant to the rights and powers reserved for the state governments, are . . . void," and denying that "the government of the United States . . . can compel each of the states to answer in [federal] courts"); see also Letter from an Anonymous Correspondent (Feb. 13-19, 1791), INDEP. CHRON., Mar. 3, 1791, reprinted in 5 DHSC, supra note 1, at 20, 21 ("[A] Sovereign State, can never be sued, or coerced, by the authority of another government.").
336 See generally Nelson, supra note 252, at 8-21 (discussing antebellum ideas about how precedents could help fix the meaning of laws by selecting one interpretation from a range of permissible alternatives).
arguably involve the same broad question as the Court's recent "anti-commandeering" decisions (which hold that Congress cannot require states to enact particular laws or to execute federal regulatory programs). Section III.B.2.b contends that the answer to this question was not clear at the time of the Founding, and that the Court's position therefore has a sounder historical basis than the Court's critics acknowledge. In the end, though, section III.B.2.c suggests that the Court has been mixing two incompatible understandings of the Constitution: the Court's doctrines would be on sounder footing if the Court either pulled back or went further than it has already gone.

(a) McCulloch's Notion of "Great Substantive and Independent Powers."—The arguments of counsel in McCulloch help reveal one of the principal limitations built into Chief Justice Marshall's interpretation of the Necessary and Proper Clause. Attorney General William Wirt maintained that the Clause authorized Congress to create a corporation, because this authority would be a useful means of carrying out various other powers that the Constitution expressly gave the federal government. Luther Martin responded that this understanding of the Clause would render superfluous some of the Constitution's specific grants of power. In particular, Martin suggested that if the Necessary and Proper Clause were interpreted as Wirt proposed, the Constitution would not have needed to specify that Congress has the power to tax; according to Martin, the taxing power was only a means by which the federal government could collect the resources necessary to carry out its other enumerated powers. Because the Framers had thought it necessary to make a specific grant of the power to tax, Martin inferred that Wirt's interpretation of the Necessary and Proper Clause could not be correct.

Chief Justice Marshall disagreed. He did not question Martin's premise that the power to tax was only a means to effectuate the federal government's other enumerated powers. Still, Marshall argued


339 See id. at 373-74.

340 This premise was debatable. See, e.g., DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 160-63 (2001) (reporting discussions in Congress from 1817 about the meaning of the relevant clause in the Constitution). More than a century later, the Supreme Court rejected Martin's premise and endorsed a broader view of Congress's power to tax (and to spend). See United States v. Butler, 297 U.S. 1, 65-66 (1936). Ironically, the Butler Court used a version of Martin's argument to support its conclusion: it suggested that if Congress's power to tax were "confined to the enumerated legislative fields committed to the Congress," then the Tax Clause would add nothing to the Necessary and Proper Clause. Id. at 65.
that a relatively broad understanding of the Necessary and Proper Clause would not render superfluous the Constitution's express grant of the power to tax. Marshall explained that the power to levy taxes, like the power to make war or to regulate commerce, was "a great substantive and independent power, which cannot be implied as incidental to other powers." Powers of this sort could not be read into the Necessary and Proper Clause; if the Constitution had not specifically conferred them, Congress would not have them. The power to create a corporation was different: instead of being "a great substantive and independent power," it was something that could "pass as incidental to those powers which are expressly given."

Marshall's concept of "great substantive and independent power[s]" reflects a sensible canon of interpretation. By their nature, the powers of levying taxes and declaring war seem like things that the Constitution would specifically grant if Congress was to have them. If the Constitution had not specifically given Congress these powers, but had still included the Necessary and Proper Clause, would anyone maintain that Congress could levy taxes or declare war as a means of helping it "regulate the Value . . . of foreign Coin" or helping the President "receive Ambassadors"? Such claims, if accepted, would let relatively small tails wag some very big dogs.

It is at least conceivable that for members of the Founding generation, the power to command states to do things was like the power to declare war or to levy taxes. This authority too may have been "a great substantive and independent power," which the federal government enjoyed only to the extent that the Constitution specifically conferred it.

More modestly, one might distinguish between commands that the states were used to receiving from the central authorities (like the

343 Id.; see also Alexander Hamilton, Opinion on the Constitutionality of an Act To Establish a Bank (Feb. 23, 1791), in 8 THE PAPERS OF ALEXANDER HAMILTON 63, 119 (Harold C. Syrett ed., 1965) (agreeing, in the context of debates over the First Bank of the United States, "[t]hat the power to erect corporations is not to be considered, as an independent & substantive power but as an incidental & auxiliary one; and was therefore more properly left to implication, than expressly granted"). But cf. Gary Lawson & Patricia B. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 DUKE L.J. 267, 331 (1993) (arguing that "[t]he power of incorporation seems more like a subject to be separately enumerated than a vehicle for carrying into execution another enumerated power.").
344 U.S. CONST. art. I, § 8, cl. 5.
345 Id. art. II, § 3.
346 Cf., e.g., 14 DHFFC, supra note 210, at 369 (reporting remarks of Rep. James Madison on Feb. 2, 1791) ("In admitting or rejecting a constructive authority [under the Constitution], not only the degree of its incidentality to an express authority, is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.").
command to appear and answer claims filed by another state\(^{347}\) and commands that were unprecedented (like the command to appear and answer claims filed by an individual). To the extent that the states had previously surrendered whatever aspects of sovereignty might have protected them from commands of the former sort, perhaps the Necessary and Proper Clause was enough of a textual warrant to let the federal government continue issuing such commands.\(^{348}\) But members of the Founding generation might have hesitated before reading the Necessary and Proper Clause to let the federal government command states in unprecedented ways. The latter sort of authority, one might argue, needed to rest on something more specific than the Necessary and Proper Clause.

Indeed, the logic behind this argument can extend beyond the Necessary and Proper Clause to other provisions in Article I. Suppose that at the time of the Framing, federal authority to command the states in unprecedented ways was indeed considered a "great substantive and independent power." If Chief Justice Marshall was right that such powers should not be read into the Necessary and Proper Clause, the reason must be that they triggered a kind of clear-statement rule; they were sufficiently important that draftsmen who wanted to convey them would do so expressly rather than by implication or as incidental to other powers. But if federal authority to command the states was such a big deal, one might well decline to read this authority into other generally worded grants of power. On this way of thinking, Article I's provisions about "regulat[ing] Commerce" or "securing . . . to . . . Inventors the exclusive Right to their . . . Discoveries" might seem too general to confer a power to command the states in unprecedented ways.\(^{349}\)

Before we consider the historical evidence for (and against) this argument about the meaning of the original Constitution, it is worth noting the argument's utility. The argument provides a straightforward way to explain the Supreme Court's decision that Congress cannot order state legislatures to enact particular laws, even when the laws are

\(^{347}\) See supra notes 312–318 and accompanying text.

\(^{348}\) A similar idea might explain why, in Alexander Chisholm's initial suit against Georgia, Georgia's plea emphasized not only that the state "cannot be drawn or compelled . . . to answer against [its] will," but also that "at [no] Time past hath [the state] been accustomed to be, or could be drawn or compelled to answer against [its] will . . ., before any Justices of the federal Circuit Court for the District of Georgia or before any Justices of any Court of Law or Equity whatever." Plea to the Jurisdiction, supra note 188, at 143.

within Congress's power to enact directly. The reason that Congress cannot give states such orders is not that the Tenth Amendment somehow limits powers that the Constitution otherwise gives to Congress, but rather that the Constitution nowhere gives Congress the power to command state legislatures in this way. As the Court suggested in *New York v. United States*, the power to regulate interstate commerce is different from a power "to regulate state governments' regulation of interstate commerce," and the Constitution need not be read to confer the latter authority.

The same argument also provides one way of explaining *Prints v. United States*, which held that the Necessary and Proper Clause does not let Congress command state executive officers "to administer or enforce a federal regulatory program." Of course, *Prints* is an extension of *New York*; the commands at issue in *Prints* were not explicitly directed at the state governments as a whole, but rather at individual officers of those governments. Still, the federal commands could plausibly be understood as commands to the states, because they directed the officers in question to use the apparatus of the state governments to carry out federal orders. Perhaps, as the Court suggested in *Prints*, Congress needs "a particularized constitutional authorization" before it can "command the States' executive power" in this way. Unless one accepts this argument, indeed, it is hard to account for the Constitution's first Militia Clause, which specifically authorizes Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union." If the Necessary and Proper Clause gives Congress incidental authority to commandeerm the state executive apparatus in general, there might be little need for a clause specifically giving Congress this power with respect to the state militias.

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351 Id. at 166.
353 Id. at 935.
354 Id. at 909.
355 U.S. CONST. art. I, § 8, cl. 15.
356 Evan Caminker has sought to explain why this clause serves a function even if Congress has a more general power to commandeerm the states' executive apparatus. He emphasizes that the last part of the second Militia Clause, id. cl. 16, "secur[es] an enclave of state authority" that the federal government cannot invade. Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1034 (1995). This explanation, however, does not account for the first Militia Clause.

A more promising argument is that the first Militia Clause addresses the separation of powers within the federal government. Article II of the Constitution specifies that when the state militias are "called into the actual Service of the United States," the President shall be their "Commander in Chief." U.S. CONST. art. II, § 2, cl. 1. The first Militia Clause may have been designed to make clear that notwithstanding this role for the President, Congress was in charge of whether to call forth the militias in the first place. This explanation potentially gives the Clause
Similar ideas also explain why the majority in *Alden v. Maine* could refer to *Printz* as an "analogous" case.\(^3\)\(^5\)\(^7\) At first glance, there is no necessary connection between the "commandeering" cases and the question of state sovereign immunity. As we have seen, however, to say that federal statutes can abrogate the states' sovereign immunity is to say that Congress has the power to expose the states to compulsory process. When we think of such statutes as commanding state executive officers to appear on behalf of the state upon pain of a default judgment that will itself be executed by compulsory process against the state, we begin to understand how the sovereign immunity cases may link up to the "commandeering" cases.\(^3\)\(^5\)\(^8\)

(b) The Original Understanding(s) of Federal Commands to States.
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According to both *New York* and *Printz*, "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people."\(^9\)\(^3\)\(^5\)\(^9\)

Commentators have concluded that the historical evidence does not compel the Court's position.\(^3\)\(^6\)\(^0\) But it does not compel the dissenters'...
position either. Members of the Founding generation expressed a variety of views about Congress's ability to command the states; the extent of that authority was one of the early Republic's unsettled questions of constitutional law.

Some high Federalists, like Alexander Hamilton, indicated that Congress could command the states as states, or at least could command individual state officers to use governmental power to accomplish federally assigned tasks.\(^3\)\(^6\)\(^1\) Ironically, Antifederalists tended to agree with Hamilton on this point; they wanted to avoid the creation of separate federal bureaucracies, and they argued that Congress not only could but should accomplish its projects through the agency of the states.\(^3\)\(^6\)\(^2\) But as Roderick Hills has suggested, many Federalists—fearing that reliance upon state institutions would prevent the federal government from being self-sufficient—argued that such commands were beyond Congress's power.\(^3\)\(^6\)\(^3\) Debates in early Congresses reveal

\(^3\) The commandeering rule is far from conclusive"; Powell, supra note 103, at 635 (concluding that "New York is a decision without a firm basis in founding-era discussion or the subsequent history of constitutional debate"). But see Collins, supra note 332, at 194–95 (observing that "the historical foundation for the vision of federalism put forward in New York is not so weak as its detractors would suggest," although "the Court may have made the historical record seem neater than it was"); cf. Saikrishna Bangalore Prakash, Field Office Federalism, 79 VA. L. REV. 1957, 1959–60 (1993) (reading history to support the majority's holding in New York but the dissenters' position in

\(^6\) See, e.g., THE FEDERALIST NO. 27, at 177 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (asserting that "the legislatures, courts, and magistrates, of the respective [states] will be incorporated into the operations of the national government as far as its just constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws" (emphasis omitted)); see also THE FEDERALIST NO. 36, at 220 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that if the federal government's new power of taxation proved inconvenient, Congress could requisition money from the states instead, as the central authorities had done under the Articles of Confederation). The Prints majority tried to reconcile Hamilton's words with its position, see 521 U.S. at 911–14, but its reading seems strained; Hamilton is more naturally classified as being opposed to Prints, and perhaps even to New York. See Caminker, supra note 356, at 1047; Powell, supra note 103, at 663–64.

\(^1\) See, e.g., 3 ANNALS OF CONG. 579 (1792) (noting Rep. Elbridge Gerry's observation that "nothing could be plainer than this — that the General Government had a right to require the assistance of the officers of the several State Governments"); see also Hills, supra note 106, at 833 (pointing out that "the Anti-Federalists ... wanted the national government to rely exclusively on the state governments to implement national policy").

\(^2\) See, e.g., 11 DHFFC, supra note 332, at 1358 (reporting comments by Rep. Fisher Ames) ("We may command individuals: But what right have we to require the servants of the State to serve us?"); 3 ANNALS OF CONG. 579 (1792) (reporting comments by Rep. Alexander White, who "said he had no idea that the General Government had any right to call on the officers of the particular States to execute the laws of the Union"); cf. Hills, supra note 106, at 836 (noting that "the Federalists ... probably wished to discourage state implementation of national law," albeit "for totally nationalistic reasons").

James Madison is probably best classified in this camp. During debates at the Philadelphia Convention, Madison indicated that there was not "a single instance" in which the proposed federal government "is to act on the States as such." 2 FARRAND, supra note 6, at 8–9. After the Committee of Detail had fleshed out the judiciary article, Madison qualified this view somewhat:
continuing uncertainty about this issue. The Supreme Court's decisions in *New York* and *Printz*, then, are not wildly ahistorical; their conclusions are within the range of understandings held by members of the Founding generation.

Commentaries written about *Chisholm v. Georgia* in the 1790s confirm that some authors took the conclusions of *New York* and *Printz*.

in *The Federalist No. 40*, he noted that there were "some instances" in which "the powers of the new government will act on the States in their collective characters." The Federalist No. 40, at 250 (James Madison) (Clinton Rossiter ed., 1961). To judge from the example that he offered in The Federalist No. 39, however, Madison was not referring to the federal government's legislative powers. Instead, he cited "the trial of controversies to which States may be parties" (such as "controversies relating to the boundary between . . . two states"), which states would be able to bring against each other "in their collective and political capacities" in the new federal Supreme Court. See The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

Academic commentators and dissenting Justices have argued that whatever Madison thought about federal commands directed to the states as collective entities, he expected Congress to be able to command individual state officers to use governmental power to execute federal laws. This argument rests on Madison's observation, in *The Federalist No. 45*, that whatever taxes Congress laid directly on individual citizens were likely to be collected by state officers. See *Prints*, 521 U.S. at 947 (Stevens, J., dissenting); Caminker, supra note 356, at 1043-44; Powell, *supra* note 103, at 662; Prakash, *supra* note 360, at 1996-97. But Madison explicitly based this prediction on the states' own voluntary choices: he explained that instead of collecting taxes directly from the people, the federal government would probably give states "an option . . . to supply their quotas by previous collections of their own," and the states would probably elect to do so. The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961).

364 See, e.g., 6 ANNALS OF CONG. 1983 (1797) (reporting discussion among members of Congress about "doubts whether they had a right to direct the [officers] of a State government to do certain acts"); cf. 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1789-1791: HOUSE OF REPRESENTATIVES JOURNAL 770 (Linda Grant De Pauw ed., 1977) (Mar. 3, 1791) (reporting a proposal to amend the Constitution — "[d]eclare that "all officers, as well ministerial as judicial, in the administration of justice under the authority of a state, shall also be held to execute their respective offices, for carrying into effect the laws of the United States; and, in addition to the duties assigned to them by the laws of the state, the Congress may assign to them such farther duties as they shall deem proper for that purpose" (emphasis omitted)); 14 DHFFC, *supra* note 210, at 712 (identifying Hamilton's ally Egbert Benson as the sponsor of this proposed amendment). For pointing my attention to these sources, I am indebted to Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925).

The statutes and resolutions actually adopted by early Congresses arguably reflect the same uncertainties. Compare Resolution of Sept. 23, 1789, 1 Stat. 96, 96-97 (refraining from commanding state jailers to house federal prisoners, and instead "recommend[ing]" that the state legislatures pass laws for this purpose), with Presidential Election Act, § 3, 1 Stat. 439, 240 (1792) (specifying that "the executive authority of each state shall cause three lists of the names of the electors of such state to be made and certified and to be delivered to the electors"). See also 3 ANNALS OF CONG. 279 (1791) (remarks of Rep. Niles) (objecting to this latter provision on the grounds "that no person could be called upon to discharge any duty on behalf of the United States, who had not accepted of an appointment under their authority"); id. (remarks of Rep. Sedgwick) (responiding "that if Congress were not authorized to call on the Executives of the several States, he could not conceive what description of persons they were empowered to call upon"). The Presidential Election Act requires some qualification of *Prints*’s statements about "the utter lack of [early federal] statutes imposing obligations on the States' executive," 521 U.S. at 907-08, but it is true that Congress enacted relatively few such statutes.
for granted, and assumed that their readers would too. In an effort to discredit *Chisholm*, several tracts invoked what G. Edward White calls the theory of “coterminous power” — the “political axiom” that “the judicial power of a government [should be] coextensive with its legislative [power].” Although modern lawyers think this “axiom” misguided, many people in the early Republic assumed its validity. For these people, the federal government’s legislative power had to “extend[]” over the states, as states, as far as the judicial power can act upon them as such; *Chisholm*’s conclusions about the judicial power therefore implied that Congress must be able to “bind the states, as states, by their [statutes].” But a number of authors thought that this latter proposition was absurd. As a pamphleteer who called himself “A True Federalist” put it, “[t]he idea, that the Supreme Executive, and the legislative power of each state, shall be directed and controuled by laws, made by Congress, will be so far from being considered seriously, that it will be at first ridiculed.”

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367 Hamilton’s explanation for the “axiom” was limited to the proposition that the federal judiciary should be able to hear all cases arising under federal laws; he did not advance any arguments for the converse proposition that federal laws should be able to reach all cases that the federal judiciary can hear. See id. (“The mere necessity of uniformity in the interpretation of the national laws decides the question.”). Other authors, however, sought to explain this converse proposition too. “Whenever the judiciary power can be applied to a subject,” one writer claimed, “it must be directed by the hand of legislation”; the only alternatives were for the judiciary to “make rules for itself” or to “act arbitrarily and without rules,” and both of these alternatives were “rejected with abhorrence.” See A True Federalist, INDEP. CHRON., Mar. 2 & 6, 1797, reprinted in 5 DHSC, supra note 1, at 629, 633. According to this author, it “inevitably follow[ed]” that a government’s legislative power had to extend as far as the judicial power did. Id.

Modern readers will object that this conclusion was not “inevitabl[e]” at all. After all, state statutes could guide the courts even in cases to which the federal lawmaking power did not extend. Thus, the axiom shows its age: it was developed before the invention of American-style federalism.

368 See White, supra note 365, at 123–25, 513, 528–40, 562–75; Fletcher, supra note 11, at 1074 & n.140; see also G. Edward White, Recovering Coterminous Power Theory, 14 NOVA L. REV. 155 (1989) (discussing the ideas built into this theory).
369 A True Federalist, supra note 367, at 633; see also Sullivan, supra note 99, at 30 (“There is no principle in civil government, which will admit of a judicial, without a legislative power. . . . If this position is just, and I believe that no one will controvert it, then it will clearly follow, that if the judicial authority of the United States can extend to the several states, as states, [then] the several states, as states, are under the legislative authority of the United States.”).
370 A True Federalist, supra note 367, at 633; see also Sullivan, supra note 99, at 31 (“If the authority of the United States extends to the governments of the particular states, then the republican form of government, guarantied by the United States [in Article IV of the Constitution], means nothing more than a form of police for a corporation . . . .”).

Other commentaries about *Chisholm* point in the same direction. According to one correspondent, “[t]he grand and fundamental principle, upon which all State Governments are founded, is, Freedom, Independence, Sovereignty, the rectitude of the will of the People, and not being liable to coercion or accountability.” Observator, INDEP. CHRON., Nov. 28, 1793, reprinted
Not everyone really ridiculed this idea. Indeed, a 1792 pamphlet by "Hortensius" used exactly the same logic as "A True Federalist" to reach exactly the opposite conclusion. Hortensius too embraced the theory of coterminous power, but he believed that "the states, as well as the people, are made the subjects of federal legislation." In his view, Congress "can ... constitutionally comm[a]nd ... the performance of an act by the state." For Hortensius, then, the theory of coterminous power led to the conclusion that states could be haled into federal court. Thus, early discussions of state sovereign immunity reveal continuing disputes about whether Congress could command the states as a means of carrying the federal government's other enumerated powers into execution.

According to Vicki Jackson, the Supreme Court put these doubts to rest in 1816, when Justice Story's opinion in Martin v. Hunter's Lessee called it "a mistake" to suppose "that the constitution was not designed to operate upon states, in their corporate capacities." As Story pointed out, the Constitution itself imposes some specific prohibitions and affirmative duties on the states as states. It also gives Congress special control over state legislation in certain situations. But Story did not claim that Congress can operate upon the states as states without any particularized authorization, and simply as a means of carrying out other powers that the Constitution vests in the federal government. Story's opinion in Martin is perfectly consistent with the notion that the power to command the states is what McCulloch called a "great substantive and independent power" — a power that could not

\footnotesize{\textit{in 5 DHSC, supra note 1, at 445, 445.} Hearkening back to the debate over imperia in imperio, newspapers suggested that having "one sovereign power[] under the control of another sovereign power" would be a contradiction in terms. See Sydney to Crito, supra note 197, at 409; cf. supra note 101 and accompanying text (recounting earlier discussions of imperia in imperio). See HORTENSIUS, supra note 116, at 38 (observing that "it is a truth, too evident, and too generally recognized to need demonstration, that in all governments, the judicial department must be co-extensive with the legislative"). Id. at 40 & n.4. Hortensius's printer may have disagreed; in the original pamphlet, "command" was rendered as "commend." See id.

14 U.S. (1 Wheat.) 304 (1816).

Id. at 343; see Jackson, supra note 104, at 2200 & n.92 (reading this statement to "firmly reject[ ] people's "suggestions that the federal government could not operate on the states in their corporate capacity").

See Martin, 14 U.S. (1 Wheat.) at 343.

id. (referring to U.S. CONST. art. I, § 4, which requires each state legislature to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives" and adds that "the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators"); see also U.S. CONST. art. I, § 10, cl. 2 (generally forbidding states to "lay any Imposts or Duties on Imports or Exports" without Congress's consent, and specifying that "all such Laws shall be subject to the Revision and Control of the Congress"); id. art. I, § 10, cl. 3 (listing other things that no state may do "without the Consent of Congress").}
be read into the Necessary and Proper Clause, and that the federal government enjoys only insofar as other parts of the Constitution affirmatively grant it.\(^{378}\)

In 1825, no less an authority than Chief Justice Marshall explicitly recognized that this issue still was not settled. In *Wayman v. Southard*,\(^ {379}\) Marshall suggested that courts should hesitate before reading federal statutes enacted under the horizontal part of the Necessary and Proper Clause to require "the agency of State officers." He explained that "[t]he laws of the Union may permit such agency, but it is by no means clear that they can compel it."\(^ {380}\)

The Founding generation's uncertainty on this score may have been no accident; members of the Philadelphia Convention may deliberately have left the Constitution ambiguous about Congress's ability to command the states. Consider the drafting history of the Supremacy Clause. As it emerged from the Committee of Detail, the Clause would have specified that "[t]he Acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of their citizens and inhabitants."\(^ {381}\) When read in the context of debates about the appropriate targets of federal legislation,\(^ {382}\) the italicized language might have suggested that Congress could command not only individuals, but also the states as states.

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\(^{378}\) For evidence of the continuing doubts over the extent of the federal government's power to command the states, one need only consider Justice Johnson's separate concurrence in *Martin*. Johnson agreed with Story that the Constitution gives the Supreme Court appellate jurisdiction over certain cases that the state courts have decided. Johnson suggested, however, that even this constitutionally authorized power did not necessarily entail any coercive power over the state courts themselves. He stressed, moreover, that the Court was deliberately reserving this issue. See *Martin*, 14 U.S. (1 Wheat.) at 362 (Johnson, J., concurring) ("It will be observed in this case, that the court disavows all intention to decide on the right to issue compulsory process to the state courts; thus leaving us, in my opinion, where the constitution and laws place us — supreme over persons and cases as far as our judicial powers extend, but not asserting any compulsory control over the state tribunals."); see also Collins, *supra* note 332, at 151 n.319 (observing that Johnson's concurrence "reveals the difficulty of reading *Martin* as an unqualified manifesto for federal control over the instrumentalities of state government").

\(^{379}\) 23 U.S. (10 Wheat.) 1 (1825).

\(^{380}\) Id. at 39-40.

\(^{381}\) 2 *Farrand*, *supra* note 6, at 183 (emphasis added).

\(^{382}\) The Articles of Confederation had authorized the Confederation Congress to make requisitions upon the states, but had not authorized Congress to tax the people directly. See ARTICLES OF CONFEDERATION art. VIII (U.S. 1781); id. art. IX, cl. 5. Many members of the Founding generation thought that "[t]he great and radical vice" of the Articles was this "principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist." THE FEDERALIST NO. 15, at 108 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Philadelphia Convention therefore "resort[ed]... to a national Legislation over individuals." 1 *Farrand*, *supra* note 6, at 256 (reporting Edmund Randolph's objections to the New Jersey Plan, which would have preserved a modified version of the Articles).
Instead of sending this signal, however, the Committee of Style replaced the italicized language with the phrase "supreme law of the land." This alteration may have been a compromise designed to accommodate competing views within the Committee itself.

(c) Is the Court's Current Doctrine Coherent? — To say that the original Constitution was unclear about the scope of Congress's ability to command the states is not to say that the Supreme Court's current doctrine is coherent. To the contrary, the Court seems to have drawn upon both sides of the historical debate about federal commands to states.

The modern Court has understood Article I of the Constitution to grant Congress considerable power to regulate the states in their corporate capacities. To be sure, Printz holds that Congress cannot "commandeer[]" state executive officers and require them "to participate... in the administration of a federally enacted regulatory scheme." But Congress can give the states (and state officials) many other sorts of duties. According to Garcia v. San Antonio Metropolitan Transit Authority, for instance, Congress can command state agencies to pay their employees the same minimum wage that Congress requires private employers to pay. More generally, the modern Court permits Congress to impose duties on the states as long as Congress is regulating the states' own activities rather than requiring state officials "to assist in the enforcement of federal statutes regulating private individuals."

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383 2 FARRAND, supra note 6, at 603. The full convention had previously made a few other changes to the language proposed by the Committee of Detail. See, e.g., id. at 389 (adding "[t]his Constitution" to the list of supreme law); id. at 572 (reporting the language that was referred to the Committee of Style).

384 The Committee of Style consisted of William Samuel Johnson, Alexander Hamilton, Rufus King, James Madison, and Gouverneur Morris. See id. at 547. Hamilton may have believed that Congress could command the states as states, see supra note 361 and accompanying text, but three of the others may have disagreed. See 2 FARRAND, supra note 6, at 6 (reporting King's assertion that "[t]here never will be a case in which [the proposed government] will act as a federal Government on the States and not on the individual Citizens"); Debates of the Connecticut Convention (Jan. 4, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 541, 546 (Merrill Jensen ed., 1978) (reporting Johnson's comments at the Connecticut Ratifying Convention, to the effect that the Framers "saw th[e] imperfection in attempting to legislate for states in their political capacity" and "have therefore gone upon entirely new ground," with the result that the force of the general government "is to operate only upon individuals who fail in their duty to their country"); supra note 363 (discussing Madison's similar comments).


387 Id. at 555-56.

388 Reno v. Condon, 528 U.S. 141, 159-51 (2000); see also South Carolina v. Baker, 485 U.S. 505, 513-15 (1988) (distinguishing federal statutes that "regulate[] state activities" from those that "seek to control or influence the manner in which States regulate private parties," and suggesting that only the latter statutes are vulnerable to arguments about "commandeering").
To judge from Printz, the Court’s line between impermissible “commandeering” and permissible regulation apparently tracks the line between “executing” a law and merely obeying it. Article II of the federal Constitution specifies that “[t]he executive Power” shall be vested in the President, who is charged with “tak[ing] Care that the Laws be faithfully executed.”\footnote{U.S. CONST. art. II, §§ 1, 3.} Invoking this language, Printz suggested that only the President or his subordinates can “execute” federal laws, and that the statute at issue in Printz violated this principle: Congress had impermissibly tried to transfer the responsibility for “executing” a federal law to state and local officials.\footnote{See Printz, 521 U.S. at 922–23.} This argument is harder than Printz makes it look, because the Court does not tell us exactly what it means to “execute” a law; at least when private people do what a law says, we do not think that they are encroaching on the President’s turf.\footnote{Cf. M. Elizabeth Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. PA. L. REV. 603, 612–23 (2001) (noting the academic literature’s failure to pin down what it means to “execute” a law).} But if we can flesh out this concept, it may well explain how Printz can come out differently than Garcia. The law at issue in Garcia, which extended the federal minimum wage to state employees, arguably required state agencies only to obey federal law and not to “execute” it; the law simply gave state agencies duties like those that Congress already imposed on private employers. By contrast, the duties that Congress gave the state officials in Printz might seem more “executive.”

Yet if this distinction matters — that is, if Congress has broad power to command the states as long as it does not “commandeer” them — then the Court’s recent sovereign immunity decisions are jarring. Suppose that the original Constitution does indeed give Congress far-reaching authority to “regulate[] state activities,”\footnote{See Baker, 485 U.S. at 514.} and that Congress can therefore give states various legal duties that they must respect in their dealings with individuals. A federal law requiring states to respond to individuals’ lawsuits about breaches of those duties might well be considered part and parcel of the regulatory scheme. Such laws, after all, merely subject states to compulsory process on the same terms as private defendants. They therefore seem to trigger the analysis of Garcia, not the analysis of Printz.

Garcia itself, of course, is open to question. As we have seen, at least some members of the Founding generation would have recognized sharp limitations on Congress’s ability to command the states. The Supreme Court’s recent sovereign immunity decisions draw on
this tradition. But they do so while simultaneously preserving Garcia, which drew on the contrary tradition.

The result is an exceptionally strange view of Congress's powers. In Alden v. Maine, the Court did not question Garcia's conclusion that Article I authorizes Congress to command the states to pay their employees a federally mandated minimum wage. Even so, Alden indicated that Article I does not authorize Congress to command the states to answer private suits brought to collect the required wages. If we have rejected the view of sovereign immunity as an affirmative constitutional right and are simply thinking about the scope of Congress's enumerated powers, this conclusion is puzzling. If Article I lets Congress give states the underlying substantive duty, why does it not let Congress expose the states to private suits brought to enforce that duty?

The question becomes all the more pointed when one considers the various remedial mechanisms that Article I apparently does let Congress use. Suppose that a state agency is refusing to pay its employees the minimum wage that Congress has (validly) commanded the state to pay. While insisting that Article I does not let Congress expose the state itself to private suits for any sort of relief, Alden indicated that Article I does let Congress expose individual state officials to private suits for certain kinds of relief that really run against the state. In particular, Congress apparently can let aggrieved employees sue state officials for injunctions directing them to use the state's resources to pay the required wages in the future. What is more, Article I apparently lets Congress authorize the federal government to sue the state on behalf of the aggrieved employees, and to seek not only forward-looking injunctions but also back pay and damages.

This vision of Article I — as authorizing Congress to command the states in various ways but as minutely regulating the remedial mechanisms that Congress can use to enforce those commands — is hard to fathom. Not only does it lack any textual basis, but it also has no obvious point. To be sure, the Alden majority tried to link its position to

394 Alden's specific holding — that Article I does not let Congress open the state courts to such suits — might be defended on the ground that other aspects of the Constitution prevent Congress from conferring jurisdiction upon state courts. See supra note 332 and accompanying text. But this argument does not limit Congress's power to expose states to suit in federal court. The Eleventh Amendment does impose some constraints on this latter power, but those constraints do not apply to suits like Alden: not only were the plaintiffs seeking to enforce a federal duty, but they also were citizens of the very state that they were suing. See supra notes 11, 259.
395 See Alden, 527 U.S. at 757 (comparing Ex parte Young, 209 U.S. 123 (1908), with Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)).
concerns about excessive federal interference with the workings of state government.\textsuperscript{397} Such concerns are certainly legitimate, and they may well color our understanding of Congress's enumerated powers: even though Congress has a general power to tax, Congress presumably cannot tax the introduction of bills in state legislatures.\textsuperscript{398} But if a law requiring states to pay their employees the minimum wage does not violate this structural principle, and if Congress has an arsenal of permissible methods to secure judicial enforcement of the wage law, then it requires suspiciously subtle argumentation to explain why Congress cannot use the specific method of letting employees sue delinquent states.

This analysis suggests that the Court's recent sovereign immunity decisions either go too far or do not go far enough: Congress's power to command states to answer private suits seeking the minimum wage should stand or fall with Congress's power to command states to pay the minimum wage in the first place.\textsuperscript{399} On this view, the Court's recent decisions may herald the overruling of Garcia, or Garcia may require the overruling of the Court's recent decisions. Coherent arguments can be made for either outcome, but the Court cannot comfortably remain where it is.

CONCLUSION

Scholars have variously described the Supreme Court's current doctrine of sovereign immunity as "incoherent,"\textsuperscript{400} "contradictory,"\textsuperscript{401} and "a mess."\textsuperscript{402} Under the Court's doctrine, for instance, a state can

\textsuperscript{397} See Alden, 527 U.S. at 752.
\textsuperscript{398} I owe this example to a conversation with my colleague John Harrison. Cf. Federalism & Separation of Powers: 21st Century Federalism — A Tenth Amendment and Enumerated Powers Revival?, 1 ENGAGE 56, 62 (2000) (comments of Judge Frank Easterbrook) (invoking the "intergovernmental immunity doctrine" and suggesting that Congress cannot "regulate... the internal structure of the state government... unless the federal law [is] necessary to produce a republican form of government").
\textsuperscript{399} Before either Garcia or Alden was decided, Judge Fletcher had already suggested this position. See Fletcher, supra note 11, at 1108 (arguing that if one adopts the "diversity" reading of the Eleventh Amendment, so that "the extent of state immunity from federally based private causes of action depends not on the amendment itself but on the rest of the Constitution," then "the power of federal courts to hear causes of action and to grant remedies against the states should be coextensive with the substantive power of the federal government to create those causes of action"); see also id. at 1112-13 (suggesting that "the power to create state obligations under federal law" and "the power to create private causes of action based on those obligations" are at least "closely related aspects of the larger problem of the states' immunity from the exercise of national power").
\textsuperscript{400} Amar, supra note 9, at 1480 & n.223.
\textsuperscript{401} Ernest A. Young, State Sovereign Immunity and the Future of Federalism, 1999 SUP. CT. REV. 1, 7.
assert its immunity for the first time on appeal, because the state’s immunity “sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.”\textsuperscript{403} Unlike most such bars, though, consent matters: states can waive their immunity and agree to be sued in federal court.\textsuperscript{404} For scholars, these features make the Court’s doctrine “the home of self-contradiction.”\textsuperscript{405}

The scholars are absolutely right about the internal inconsistencies in the Court’s doctrine. But they have failed to identify the real source of those inconsistencies. The Court has made one fundamental mistake: it has been content to quote prominent Framers without investigating the legal basis for their conclusions. As a result, the Court has failed to recognize the difference between the “personal jurisdiction” type of immunity that Madison and Marshall discussed at the Virginia Ratifying Convention and the “subject matter jurisdiction” type of immunity that the Eleventh Amendment later created. This oversight, in turn, has caused the Court to combine two very different sets of ideas into a single hybrid doctrine. The doctrine’s most prominent “self-contradiction[s]” all stem from this failing.

This Article has sought to reconstruct the traditional framework for sovereign immunity and to explain the legal basis for the Founding generation’s outcry against \textit{Chisholm v. Georgia}. Contrary to the conventional academic wisdom,\textsuperscript{406} the argument against \textit{Chisholm} can indeed be cast in jurisdictional terms. Indeed, it almost must be cast in such terms: instead of deciding the merits of Alexander Chisholm’s claims, the \textit{Chisholm} Court decreed only that Georgia had to appear and answer those claims. But while jurisdictional concepts were indeed important to the traditional framework for sovereign immunity, those concepts were more about \textit{personal} jurisdiction than about \textit{subject matter} jurisdiction. This insight clears up a number of longstanding puzzles: it lets us understand how the position that Madison and Marshall took at the Virginia Ratifying Convention is consistent with the language of Article III, and it also explains how a “jurisdictional” bar could be overcome by the state’s consent. It even helps rationalize

\textsuperscript{403} Edelman v. Jordan, 415 U.S. 651, 678 (1974); accord, \textit{e.g.}, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98–99 & n.8 (1984) (asserting that “the principle of sovereign immunity is a constitutional limitation on the federal judicial power” and “thus may be raised at any point in a proceeding”).

\textsuperscript{404} See, \textit{e.g.}, Idaho v. Coeur d’Alene Tribe, 521 U.S. 261, 267 (1997).

\textsuperscript{405} Jeffries, \textit{supra} note 402, at 47 & n.2; see also, \textit{e.g.}, Amar, \textit{supra} note 9, at 1480 n.223 (using this as the first of several “examples of incoherent doctrine”); Pfander, \textit{supra} note 165, at 1373 (“Of the many debatable features of the Court’s Eleventh Amendment jurisprudence, perhaps none can match the curious notion that suits against the states, though nominally placed beyond the ‘judicial power’ of the federal courts, may nonetheless be brought back within that power by the state’s consent to suit.”).

\textsuperscript{406} See \textit{supra} note 9 and accompanying text.
some of the more technical curiosities in modern doctrine, such as the Supreme Court's willingness to exercise appellate jurisdiction over federal question suits that sovereign immunity would prevent from starting off in a federal district court,407 or the Court's distinction between abrogation of sovereign immunity under Section 5 of the Fourteenth Amendment and abrogation of sovereign immunity under the Necessary and Proper Clause of Article I.408

At the same time, this insight lets us see how the traditional framework for sovereign immunity differs from the type of immunity that the Eleventh Amendment created. The second goal of this Article has therefore been to untangle the different threads that current doctrine inadvertently combines. The two-track approach suggested by Part II is more logical — and more faithful to the constitutional text — than the unitary doctrine that the Court has been trying to develop. But in contrast to much of the current academic commentary on that doctrine, it also accommodates the last century of precedents reasonably well. In particular, it lets us explain the precedents' central premise: even when the Eleventh Amendment does not apply, states may still enjoy a species of "jurisdictional" protection against suit.

407 See supra note 287.
408 See supra note 358.