

Leaving the *Chisholm* Trail: The Eleventh Amendment and the Background Principle of Strict Construction

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Leaving the *Chisholm* Trail: The Eleventh Amendment and the Background Principle of Strict Construction

The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

[For example,]

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.

U.S. Constitution, Amendments IX (1791) & XI (1794).

Prologue and Introduction

John Hancock was dying. In less than three weeks time, Massachusetts Lieutenant Governor Samuel Adams would lead the state and the Country in mourning the passing of one of the great men of the American Revolution.¹ This day, however, despite his rapidly declining health, Governor Hancock presided over a special session of the Massachusetts legislature which he had called only weeks earlier.² A crisis had emerged which Hancock was convinced threatened both the state and the Union and required immediate legislative attention. Months earlier, the Supreme Court in *Chisholm v. Georgia* had determined that Georgia could be sued by individuals in federal court without its consent. Although this had not spurred the state to action, Massachusetts had just received notice that it too was being sued in federal court. In broadsides printed and distributed throughout the state, Hancock sent out the call for the members of the Massachusetts Assembly to return to Boston. There, in the old State House where the Declaration of Independence was first proclaimed to the people of the United States, Hancock's assistants led the weakened revolutionary to the front of the hall. Reaching his seat, Hancock sat down, too ill to read his own address. Instead, Hancock offered his apologies and had his assistant read the speech to the assembly. "Gentlemen," the assistant read,

The suit commenced by William Vassal [against the state of Massachusetts] must be decided on principles very interesting to its welfare as a state. I cannot conceive that the people of this Commonwealth, when they, by their representatives in Convention, adopted the Constitution of a General Government, expected that each State should be held liable to answer on compulsory civil process, to

¹ See, e.g., *The Augusta Chronicle* (Nov. 16, 1793) (reporting on the death of Hancock and printing an extended eulogy of a man "whose name shall live forever.").

² See Proclamation by John Hancock (July 9, 1793), in 5 *The Documentary History of the Supreme Court of the United States: Suits Against the States* 387 (Maeva Marcus, ed. 1994) [hereafter "5 DHSC"].

every individual resident in another state or in a foreign kingdom. Three judges of the United States of America, having solemnly given it as their opinion, that the several states are thus liable, the question then has become highly important to the people.³

The Massachusetts assembly, Hancock advised, had but three choices. First, they might agree with the result in *Chisholm* and “make such provision for defending against the suit.” If, on the other hand, they believed that the Supreme Court in *Chisholm* had erroneously construed Article III, then they should draft an amendment to the Constitution declaring “a more unexceptionable construction.” Finally, even if the assembly concluded that the Supreme Court had followed “the letter of the Constitution,” they might nevertheless seek an amendment in order to “secure to the states severally, in the enjoyment of that share of sovereignty, which it was intended they should retain and possess.”⁴

Although Hancock demurred in taking an express position on the matter, his opinion was clear: *Chisholm*’s interpretation of Article III was fundamentally at odds with the state’s expectation of retained sovereignty under the federal Constitution:

There are certain inherent principles in the Constitution . . . which can never be surrendered, without essentially changing the nature, or destroying the existence of the Government. . . . A consolidation of all the states into one Government, would at once endanger the Nation as a Republic, and eventually divide the States united, or eradicate its principles which we have contended for.⁵

It was John Hancock’s last public appearance; he died days later. Within a week of after Hancock’s speech, the Massachusetts legislature issued a Report which declared that allowing a non-consenting state to be sued by an individual was “dangerous to the peace, safety, and independence of the several States, and repugnant to the first principles of a Federal Government” and resolving to seek an amendment that would “remove any clause or article . . . 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.”⁶ On the day after Hancock’s death, Lieutenant Governor, Samuel Adams sent the Massachusetts Resolves to the Governors of the other states, inviting them to join Massachusetts in establishing the proper construction of Article III. The receipt of these resolves triggered a cascade of similar resolves from state legislature around the country.⁷ By the time Congress began their next session, the introduction of an amendment was a foregone conclusion.

³ John Hancock’s Address to the Massachusetts General Court (Sept. 18, 1793), in 5 DHSC, *supra* note 2 at 416. As did many others in the months following *Chisholm v. Georgia*, Hancock incorrectly numbered the justices in the majority (there were four in the majority). See *infra*, note 256 and accompanying text.

⁴ John Hancock’s Address, 5 DHSC, *supra* note 2, at 417 (all quotes in this paragraph).

⁵ *Id.*

⁶ Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 DHSC, *supra* note 2, at 440.

⁷ See *infra* note 326 and accompanying text.

Towards the end of the previous session, Massachusetts Senator Caleb Strong submitted an amendment removing the power of federal courts to hear suits by individuals against the states—essentially Governor Hancock’s third “alternative.” Now, after months of public debate and the broad circulation of his own state’s Resolves, Strong now amended his earlier proposal and added language which transformed the amendment from one removing a previously granted power, to a declaration of how to construe Article III:

The judicial power of the United States *shall not be construed* to extend to any suit 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.

Congress adopted Strong’s proposal without changing a single word and the Amendment was ratified in less than a year. And so it came to pass that Massachusetts, in response to a case called *Vassal v. Massachusetts*, led the country in adopting the Eleventh Amendment—the first stand-alone amendment to the Constitution and the second of only two constitutional provisions that declare the proper method of construing the original Constitution.⁸

The above account differs somewhat from the traditional story of the Eleventh Amendment. Scholars and courts generally attribute the Eleventh Amendment to the “profound shock”⁹ caused by the Court’s analysis of Article III in *Chisholm v. Georgia* and the need to reverse the results of that particular case.¹⁰ Although commentators differ in their choice of the most persuasive opinion in *Chisholm*,¹¹ there is general

⁸ The other being the Ninth Amendment which reads, “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. Const. Amend. IX (1791)

⁹ See 1 Charles Warren, *The Supreme Court in United States History* 96 (1922, reprint 1999 Beard Books) (“[Chisholm] fell upon the country with a profound shock. Both the Bar and the public in general appeared entirely unprepared for the doctrine upheld by the Court.”). See also *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (*Chisholm* “created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states.”).

¹⁰ See e.g., John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 Yale L. J. 1663, 1680 (2004) (“No one questions that the nation adopted the Eleventh Amendment in response to Chisholm.”); 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 Stanford L. Rev. 1033, 1034 (1983) (“The eleventh amendment was passed in the 1790’s in order to overrule a particular case—*Chisholm v. Georgia*.”).

¹¹ Scholars today tend to emphasize the opinions of the majority, particularly those of Chief Justice Jay and Justice Wilson. See, e.g., Randy E. Barnett, *The People or the State? Chisholm v. Georgia and Popular Sovereignty*, 93 Va. L. Rev. 1729, 1733 (2007); Manning, *The Reading of Precise Constitutional Texts*, *supra* note 10 at 1744; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A reinterpretation*, 83 Colum. L. Rev. 1889 (1983); 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 (1983). Since *Hans v. Louisiana*, on the other hand, the Supreme Court has emphasized the dissenting opinion of

agreement that the Eleventh Amendment reflects a public reaction to the issues discussed in that one particular case.¹² In fact, even though the Supreme Court's Eleventh Amendment jurisprudence has long emphasized *Chisholm*, Eleventh Amendment scholars often criticize the modern Supreme Court for not emphasizing *Chisholm* enough.¹³ For example, scholars regularly disparage the modern Supreme Court's reliance on *Hans v. Louisiana* because that case expanded state sovereign immunity doctrine well beyond the text of the Eleventh Amendment and the specific factual circumstances in *Chisholm*.¹⁴ Expanding Eleventh Amendment doctrine beyond *Chisholm*, they argue, uncouples the doctrine from the text of the Constitution and introduces a concept of sovereignty literally foreign to the Founding generation's embrace of popular (as opposed to *state*) sovereignty.¹⁵ In sum, the long-standing and voluminous debate over the Eleventh Amendment generally assumes that this particular Supreme Court case is somehow central to our understanding of the Clause.

This article contends that the modern emphasis on *Chisholm v. Georgia* as the generative source of the Eleventh Amendment is historically incorrect. Public debate regarding the key issues behind the Eleventh Amendment had been underway long before the Court handed down its decision in *Chisholm*. Although the decision added urgency to this debate, the actual opinions in the case had little impact due to their being generally unavailable until months after the decision was handed down. Nor was it Georgia that took the lead in protesting the perceived violation of state sovereignty and organizing support for a constitutional amendment. That role fell to Massachusetts, a New England state which had been engaged in a public debate on the issue of state sovereign immunity for over a year prior to *Chisholm* and whose legislature successfully

Justice Iredell. See *Hans v. Louisiana*, 134 U.S. 1, 12 (1890); *Alden v. Maine*, 527 U.S. 706, 727 (1999) (noting the Supreme Court's traditional agreement with Justice Iredell's dissent in *Chisholm*).

¹² See, e.g., Akhil Reed Amar, *America's Constitution: A Biography* 332 (2005) ("To appreciate the impulse animating this (the Eleventh) Amendment, we need to understand the first constitutionally significant case ever decided by the Supreme Court, *Chisholm v. Georgia*."). See also sources cited note 10.

¹³ Randy Barnett, for example, has recently called on academics to add a full discussion of *Chisholm* to the basic constitutional law curriculum. See Barnett, *The People or the State*, *supra* note 11.

¹⁴ See, Akhil Reed Amar, *America's Constitution: A Biography* 332 (2005); Manning, *Precise Constitutional Texts*, *supra* note 10, at 1680-81 ("Although this text is open to more than one plausible interpretation, one thing about it is quite clear: It cannot bear the meaning assigned to it by *Hans v. Louisiana*, which initiated the strongly purposive approach to the Amendment that governs its interpretation to this day."); 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 *Stanford L. Rev.* 1033, 1063 (1983) ("The most plausible interpretation of the eleventh amendment thus appears to be that it was designed simply and narrowly to overturn the result the Supreme Court had reached in *Chisholm v. Georgia*.").

¹⁵ For scholarship generally critical of the state sovereign immunity doctrine of *Hans v. Louisiana*, see Barnett, *The People or the State?*, *supra* note 11; Manning, *Precise Constitutional Texts*, *supra* note 10; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1426-27 (1987) (arguing that sovereign immunity is inconsistent with Framers' vision of federalism); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 *U. Pa. L. Rev.* 515 (1978); Fletcher, *supra* note 14 at 1054-63; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity Doctrine: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 1894 (1983); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 *Harv. L. Rev.* 1342, 1345 (1989); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269 (1998).

spearheaded the effort to secure an amendment in reaction to the state being sued in *Vassal v. Massachusetts*.

Leaving the deeply rutted trail of *Chisholm*-based interpretations of the Eleventh Amendment allows for a much better view of the principles which informed the debate over state suability. When the first cases were filed against the states in federal court, critics immediately noticed that such suits called into question the very idea of retained state sovereignty. Because a sovereign could not be sued without its consent, compelled suits against the states reduced these bodies to the level of non-sovereign corporations. Although it was possible to read Article III to allow such a result, doing so violated the promises made by Federalists in the State Conventions that federal power (including the powers granted under Article III) would be narrowly construed in order to preserve the independent sovereign character of the states. Alexander Hamilton, James Madison, James Iredell, Rufus King, John Marshall and others all assured the conventions that delegated power would be strictly construed to avoid just such a result. Pressure to make these promises an express part of the Constitution ultimately led to the adoption of the Bill of Rights with the Ninth and Tenth Amendments, according to James Madison, preventing any “latitude of interpretation” of federal power. When federal courts accepted jurisdiction over individual suits against the states, this triggered both a sense of betrayal and a concern that these suits would serve as a precedent leading to the feared “consolidation” of the states. *Chisholm* was just one (and not the first) of a number of cases filed in federal court that fueled this debate. It was mere historical accident that *Chisholm* was the first to generate an actual decision by the Supreme Court, and the Court’s discussion of the issue in *Chisholm* played a minor role at best in the movement to amend the Constitution.

It was not until it was faced with its own suit in federal court that Massachusetts issued the call for other states to join her in adding an amendment to the Constitution that would preserve the sovereignty of the states and restore the interpretation of Article III which Federalists had promised the ratifiers in the state conventions. State after state responded to Massachusetts’ call and issued their own resolves declaring that all such suits against the states as conflicted with the “first principles” of federal government and could not be reconciled with the promised retained sovereignty of the states. Despite Madison’s successful effort to produce a Bill of Rights, the broad generalities of the Ninth and Tenth Amendments were not enough. As Georgia Governor Edward Telfair put it, “notwithstanding certain amendments have taken place in the federal constitution,” the state legislatures had the duty to propose their own amendments to the Constitution “so as to make it more definite.”¹⁶

Modifying his own original proposal, Massachusetts Senator Caleb Strong reworded the proposed amendment so it now declared that Article III “shall not be construed” to allow individual suits against the states. The final wording reflected months of public debate and the resulting state resolutions, almost all of which called for an amendment that marked not a substantive *change*, but the restoration of an original *understanding* of the Constitution. Article III, like all delegations of sovereign power, was to be strictly

¹⁶ Edward Telfair’s Address to the Georgia General Assembly (Nov. 4, 1793), in 5 DHSC, *supra* note 2 at 234.

construed in order to preserve the retained sovereign authority of the people in the several states.

Structure: Following a brief section on the scholarly literature, Part III of this article delves into the original debates regarding the proper construction of federal power. Long before the first suit was filed against a state in federal court, the ratifying conventions saw the possibility from afar and discussed the issue as part of the general debates over the proposed Constitution. Most accounts of the Eleventh Amendment assume that nothing came of these discussions. In fact, the calls for limited construction of Article III merged with more general calls for narrow construction of delegated federal power. Refuting claims that the Constitution would consolidate the states, Federalist proponents of the Constitution promised that the federal government would have only expressly delegated powers, meaning that federal power (including Article III) would be narrowly construed, thus preserving the states' independent sovereign existence. Delivering on these Federalist promises to the states, James Madison drafted a Bill of Rights, with the Ninth and Tenth Amendments serving as rules of construction limiting the power of the federal government to interfere with the sovereign independence of the states.

Part IV sifts through the historical record regarding the state suability debate which emerged almost immediately after the ratification of the Constitution. From the very first suit (filed against the state of Maryland), essays appeared in newspapers throughout the country challenging such suits as irreconcilable with the concept of retained state sovereignty. *Chisholm* itself was just one of a number of such suits and, even though it was the first to result in a Supreme Court decision, the opinions and particular facts in that case did not matter. It was the *concept* of an individual compelling a state to answer in federal court that drove the debate. When an individual filed suit against the state of Massachusetts, the Governor and State legislature issued a set of resolutions calling for a coordinated effort by all the states to secure an amendment restoring the proper (and originally promised) *construction* of Article III.

In a brief concluding section, I consider how this history relates to the modern debates regarding the Eleventh Amendment and state sovereign immunity. I address in particular the four great modern myths of the Eleventh Amendment: (1) The Amendment emerged as a reaction to the Supreme Court's decision in *Chisholm*, (2) None of the justices in *Chisholm*, including dissenting Justice James Iredell, presented an extended constitutional defense of state sovereign immunity, (3) *Hans v. Louisiana* established a doctrine of state sovereign immunity that cannot be derived from the text of the Eleventh Amendment, and (4) the sovereign immunity doctrine of the modern Supreme Court, like other federalist doctrines of limited federal power, departs from the text and original understanding of the Constitution.

Part I: State Suability Before Chisholm

A. Historical Scholarship and the Eleventh Amendment

Modern scholarship on the Eleventh Amendment has come in waves. The first occurred in the 1980s as scholars made a concerted effort to dislodge *Hans v. Louisiana* as the proper guide to state sovereign immunity. Legal historians such as Akhil Amar, William Fletcher, and John Gibbons rejected the view that the Eleventh illustrated the

Founders' commitment to a broader concept of state sovereignty, and insisted that the Amendment simply removed a limited category of cases from the jurisdictional provisions of Article III—the so-called diversity theory of the Eleventh Amendment. Reflecting the modern Supreme Court's own focus on the original meaning of the Amendment, these initial revisionist accounts were heavily invested in an originalist approach to constitutional interpretation.¹⁷ During the 1990s, neo-revisionist accounts emerged which insisted the words of the amendment went beyond pure diversity concerns even while repeating the revisionists' historically-based criticism of *Hans*.¹⁸ Most recently, some scholars have produced *counter*-revisionist accounts that provide a degree of support for *Hans* and the general idea of state sovereign immunity.¹⁹ These efforts, however, continue to follow the general argument that *Hans* wrongly expanded sovereign immunity doctrine beyond the specific issue before the court in *Chisholm v. Georgia*.²⁰

Although differing in significant ways, all of these accounts have deepened our appreciation of the Eleventh Amendment. Akhil Amar, for example, seems to have correctly called attention to the critical role popular sovereignty played at the time of the Founding and the need to reconcile any account of the Eleventh Amendment with the Founders' commitment to sovereign *people*. The textualism of the neo-revisionists forced a renewed appreciation of the actual words of the Eleventh and the importance of matching our jurisprudence with the actual text of the Amendment. Finally, scholarly work in the past few years has drawn renewed attention to the historical debates that

¹⁷ See, e.g., Amar, Of Sovereignty and Federalism, *supra* note 15; Vicki Jackson, The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1 (1988); Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983); 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 (1983). See also Lee, Sovereign Immunity and the Eleventh Amendment: The Uses of History, 18 Urb. Law. 519 (1986); Shapiro, Wrong Turns: The Eleventh Amendment and the *Pennhurst* Case, 98 Harv. L. Rev. 61 (1984). See also, John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* (1987).

¹⁸ See Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342 (1989); James E. Pfander, History and State Suability: An "Explanatory" Account of the Eleventh Amendment, 83 Cornell L. Rev. 1269 (1998); Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819 (1999); Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559 (2002).

¹⁹ See, e.g., Thomas H. Lee, Making Sense of the Eleventh Amendment: International Law and State Sovereignty, 96 Nw. U. L. Rev. 1027 (2002); Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 111 Harv. L. Rev. 1559 (2002). In his important article, Professor Nelson develops the idea that courts generally lacked personal jurisdiction over states qua states, and that the terms "cases and controversies" in Article III would not have been read to include individual suits against non-consenting states. His article is one of the few to seriously investigate the newly expanded historical record surrounding the adoption of the Eleventh Amendment and, for that reason alone, is an important addition to the literature. As I develop below, although I agree with Professor Nelson that Article III properly construed would not allow such suits against the states, my argument is more originalist than textual: the ratifiers of both the original Constitution and the Eleventh Amendment embraced this reading as a matter of limited construction of delegated federal power, as opposed to a consensus regarding the textual meaning of "cases and controversies."

²⁰ See Barnett, *The People or the State?*, *supra* note 11; Manning, *Precise Constitutional Texts*, *supra* note 10.

surrounded the adoption of the Amendment. This is especially appropriate given that a great deal of historical evidence has come to light since the 1980s which involves not only the adoption of the Eleventh Amendment,²¹ but also the general understanding of sovereignty and the construction of delegated power at the time of the Founding.²²

In fact, the very methodology of historical constitutional scholarship has changed in the last few decades. The Supreme Court's use of history in its reading of the Eleventh Amendment has placed a premium on historical investigation of the Clause. As an interpretive method, however, originalism has evolved in significant ways since the initial wave of historical scholarship during the 1980s. At that time, originalism generally involved the search for the original *intentions* of the Framers.²³ Relevant evidence according to this view included whatever information revealed the motivations of those actors primarily involved in the drafting of the text. This included the (originally) secret discussions in the Philadelphia Convention, private letters and correspondence, and the various political and economic factors that likely influenced the various positions of the framers. The search for "original intent" came under heavy scholarly fire, however, as critics challenged the ability of modern historians to identify the private intentions of the Framers as well as the very concept of identifying a single aggregated "intent" of any group at the time of the Founding. Most of all, there appeared to be no normative justification for privileging the private intentions of the framers, regardless of how the text was understood by the public at large.

Conceding the legitimacy of such criticism, the most influential practitioners of originalism today focus their efforts on discovering the likely original public understanding of the text.²⁴ This grounds the originalist endeavor on the normative theory of popular sovereignty—the right of the people to debate and determine for themselves the content of their fundamental law. Even if a precise original meaning cannot be identified, the effort allows various alternative readings to be identified as more or less likely in light of the available evidence. In terms of Eleventh Amendment scholarship, this means the essential effort is to recover the likely public understanding of those who exercised the sovereign authority to accept or reject the proposed amendment: the ratifiers in the state assemblies. It is this focus on the ratifiers that is generally missing from earlier accounts and which I hope to recover in this article.

Finally, almost all historical accounts of the Eleventh Amendment focus narrowly on debates involving state sovereign immunity and Article III. I argue that the relevant debate involved not just the construction of federal judicial power, but also the construction of federal power in general. Understanding how this is so requires placing

²¹ See 5 Documentary History of the Supreme Court of the United States: Suits Against States (1994).

²² See Kurt T. Lash, The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power, 83 Notre Dame Law Review 101 (2008); Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 Stan. L. Rev. 895 (2008); Kurt T. Lash, The Lost Original Meaning of the Ninth Amendment, 83 Tex. L. Rev. 331 (2004); Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment, 83 Tex. L. Rev. 597 (2005).

²³ See, e.g., Robert H. Bork, The Tempting of America: The Political Seduction of the Law (1990).

²⁴ See, e.g., Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2004); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999); Bruce Ackerman, 1 We the People: Foundations (1993). See also, Jack Balkin, Abortion and Original Meaning, 24 Const. Comm. 291 (2007).

the particular history of the Eleventh Amendment in the broader context of the early debates over the proper interpretation of federal power—indeed, the amendment itself was initially delayed due to a belief that the amendment ought to address the construction of federal power in general.²⁵ Establishing how the Eleventh Amendment fit within this wider context requires a broad canvas, and a longer article than I might otherwise prefer to write. In the end, however, I hope to establish how the Eleventh Amendment fit within the original understanding of its siblings, the Ninth and Tenth Amendments, as well as within the Madisonian concept of a Federal Government in which both national and local governments were to be sovereign within their respective spheres.

B. The Roots of the Eleventh Amendment

The initial debates regarding state suability occurred during the debates over the ratification of the Constitution and continued unabated throughout the first years of the Constitution. As such, discussions of state suability were unavoidably caught up in the general debates regarding delegated federal power and the retained sovereignty of the people in the states. It is essential therefore to locate our search for the original understanding of the Eleventh Amendment within the overall context of a country in the midst of establishing a new and untested national government, one that would exist alongside state governments that had previously enjoyed the same sovereign powers as independent nations.

1. The Original Debates Regarding Delegated Federal Power

According to the Declaration of Independence, when the colonies officially severed their ties with Great Britain, they became a collection of “free and independent states” with all the rights of an individual sovereign nation.²⁶ Sovereignty in the United States, however, had a particular meaning. In England, the locus of sovereignty over the centuries had moved from the Royal Head of State to the English people themselves—they alone were the fount of all legitimate government power.²⁷ As the people’s official representatives, Parliament was viewed as an accurate representation of “the people assembled” and therefore could exercise all the authority of the official sovereign, including the establishment or alteration of fundamental law.²⁸ In the United States, however, the struggles with the British Parliament had resulted in a different view of popular sovereignty, one in which the people existed wholly apart from their representatives in government.²⁹ Only the people could establish fundamental law, for

²⁵ See *supra* note 275 and accompanying text.

²⁶ See Declaration of Independence (1776) (“That these united Colonies are, and of Right ought to be Free and Independent States”); Articles of Confederation, Art. II (“Each state retains its sovereignty, freedom, and independence”); Gordon Wood, *The Creation of the American Republic, 1776-1787*, 319 (1969). See also Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1559, 1577 (2002) (noting that although the states had conceded a degree of foreign relations power to the national congress, they remained “sovereign and independent states.”).

²⁷ Wood, *The Creation of the American Republic*, *supra* note 26, at 344.

²⁸ Akhil Reed Amar, *Of Sovereignty and Federalism*, *supra* note 15, at 1431.

²⁹ Wood, *The Creation of the American Republic*, *supra* note 26, at 383; see also Sean Wilentz, *The Rise of American Democracy* 32 (2005); Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* 281 (1988).

example by meeting in a specially called constitutional convention. In such conventions, the people exercised their sovereign authority to debate and adopt written constitutions that both delegated and limited the authority of their government representatives.³⁰

The unique American theory of a sovereign people distinct from their government evolved during the period between the Revolution and the adoption of the federal Constitution,³¹ and continued to evolve in critical ways after that.³² Nevertheless, by 1787 it was broadly accepted that sovereign power resided in the collective *people* of the several states.³³ State constitutions during this early national period reflected evolving notions of separation of powers as well as a broad belief in the retained rights of the people, natural and otherwise.³⁴ The need to form a league with other states, however, called into play a new kind of retained right. Under Article II of the Articles of Confederation each state “retain[ed] its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”³⁵ Although the Articles used the language of states’ rights, the term was commonly understood as referring to the retained rights and powers of the people in their respective states.³⁶

The proper construction of delegated power predictably became a major issue when the members of the Philadelphia Convention submitted a draft constitution which created a new and vastly more powerful federal government. Staunch anti-federalists opposed the idea on principle. But even moderates who might otherwise have supported the creation of a centralized government for certain purposes balked at provisions which seemed to open the door to unlimited federal interference with local matters believed best left to state control. Making matters worse, unlike the Articles of Confederation, the proposed Constitution lacked any reference to the retained rights and powers of the people in the states. Instead, open-ended provisions like the Necessary and Proper Clause raised the specter of a national government so vast that the people in the states (including their legislatures and courts) would be “consolidated” and cease to exist as independent sovereign entities.³⁷

³⁰ See generally Wood, *supra* note 26, at 306-43.

³¹ *Id.* at 344-89.

³² See Christian Fritz, *American Sovereigns: The People and America’s Constitutional Tradition Before the Civil War* (2007).

³³ Amar, *Of Sovereignty and Federalism*, *supra* note 15, at 1446.

³⁴ See Wood, *supra* note 26, at 446.

³⁵ Articles of Confederation, Art. II,

³⁶ See Wood, *supra* note 26, at 354-63 (discussing the pre-constitutional era embrace of popular sovereignty). See also, James Madison, Report on the Virginia Resolutions (Jan. 1800) (explaining that the term “states” in the Tenth Amendment and in the Virginia Resolutions “means the people composing those political societies, in their highest sovereign capacity”).

³⁷ Representing a common theme among Anti-Federalist writers, “Brutus” warned:

How far the clause in the 8th section of the 1st article may operate to do away all idea of confederated states, and to affect an entire consolidation of the whole into one general government, it is impossible to say. . . . A power to make all laws, which shall be necessary and proper, for carrying into execution, all powers vested by the constitution in the government of the united states, or any department or

To this, the Federalist responded that Congress would be limited to just those powers “*expressly*” enumerated in the document, with all non-delegated powers and rights reserved to the separate and independent sovereign states.³⁸ In doing so, Federalists echoed the general principle of the law of nations whereby delegated sovereign powers must be narrowly construed to include only those ancillary powers necessarily or clearly incident to the express enumeration. According to Charles Pinckney in a speech defending the proposed Constitution before the South Carolina House of Representatives in January 1788:

The distinction which has been taken between the nature of a federal and state government appeared to be conclusive—that in the former, no powers could be executed, or assumed, but such as were expressly delegated; that in the latter, the indefinite power was given to the government, except on points that were by express compact reserved to the people.³⁹

In Massachusetts, newspapers published *Observations on the New Federal Constitution and the Alterations That Have Been Proposed as Amendments*, in which “A Citizen of New Haven” explained that “[t]he powers vested in the federal government are particularly defined, so that each state still retains its sovereignty in what concerns its own internal government, and a right to exercise every power of a sovereign state, not expressly delegated to the government of the United States.”⁴⁰ In the same Massachusetts newspaper, the editors published an essay rejecting Anti-Federalist concerns about unlimited power. According to the editorial, “The constitution defines the powers of Congress; & every power not expressly delegated to that body, remains in the several state legislatures.”⁴¹

In New Jersey, the local newspaper published an essay defending the proposed Constitution and declaring that “in America (thanks to the interposing providence of God!) the people hold all power, not by them expressly delegated to individuals, for the good of the whole.”⁴² In Virginia, Alexander White published *To the Citizens of Virginia* in which he declared that “should Congress attempt to exercise any powers

officer thereof, is a power very comprehensive and definite, and may, for all I know, be exercised in such a manner as entirely to abolish the state legislatures.”

Brutus No. 1 (Oct. 18, 1787), in 2 Herbert J. Storing, *The Complete Anti-Federalist* 367 (1981).

³⁸ See Wood, *The Creation of the American Republic*, *supra* note 26, at 524-32 (discussing Federalist assurances that the Constitution would not result in consolidation of the states).

³⁹ 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 253-63 (Jonathan Elliot ed., 1836) [hereinafter *Elliot's Debates*] (reporting the speech of Charles Pinckney before the South Carolina House of Representatives on Jan. 16, 1788). Pinckney’s speech in its entirety was reprinted in South Carolina and Pennsylvania newspapers. See *City Gazette & Daily Advertiser* (Charleston, S.C.), Jan. 25, 1788, at 2; *Pa. Packet & Daily Advertiser* (Phila.), Feb. 21, 1788, at 2.

⁴⁰ *Observations on the Federal Constitution, and the Alterations That Have Been Proposed as Amendments* (pt. 1), *Salem Mercury*, June 30, 1789, at 1, reprinted in 5 DHSC, *supra* note 2, at 652.

⁴¹ Editorial, *Salem Mercury* (Jan. 15, 1788) at [1].

⁴² *A Correspondent*, N.J. J. (Elizabethtown, N.J.), Dec. 19, 1787, at 2.

which are not expressly delegated to them, their acts would be considered as void, and disregarded.”⁴³

All of these declarations that Congress would have only expressly delegated powers came from advocates of the proposed Constitution.⁴⁴ Despite conventional wisdom, it was not the ultimately unsuccessful Anti-Federalists who originally insisted on strict construction of expressly delegated federal power.⁴⁵ Narrow interpretation of delegated authority emerged as a promise by those most interested in ratifying the Constitution. In the state ratifying conventions, for example, Federalists repeatedly insisted that the federal government would have only expressly delegated powers.

In the North Carolina Convention, Archibald Maclaine defended the decision to omit a Bill of Rights on the ground that “[t]he powers of Congress are limited and enumerated. . . . It is as plain a thing as possibly can be, that Congress can have no power but what we expressly give them.”⁴⁶ The President of the Convention, Governor Samuel Johnston, agreed and insisted that “[t]he Congress cannot assume any other powers than those expressly given them, without a palpable violation of the Constitution.”⁴⁷ Sounding a theme that would be repeated throughout the state conventions, former member of the Philadelphia Convention and future Supreme Court Justice James Iredell stressed the link between the people’s retained sovereignty and expressly delegated power:

Of what use therefore, can a bill of rights be in this Constitution, where the people expressly declare how much power they do give; and consequently retain all they do not? It is a declaration of particular powers by the people to their representatives, for particular purposes. It may be considered as a great power of attorney, under which no power can be exercised, but what is expressly given. Did any man ever hear, before, that at the end of a power of attorney it was said the attorney should not exercise more power than was there given him.⁴⁸

⁴³ Alexander White, *To the Citizens of Virginia*, Winchester Va. Gazette, Feb. 29, 1788, in 8 *The Documentary History of the Ratification of the Constitution* 438 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereafter “DHRC”].

⁴⁴ For additional discussion of the Federalists’ use of “expressly delegated powers” in support of the proposed Constitution, see Wood, *supra* note 26, at 539–43. As Wood illustrates, the concept of expressly delegated power was inextricably linked to the emerging concept of popular sovereignty. *See id.*

⁴⁵ See, e.g., Saul Cornell, *The Other Founders: Anti-federalism and the Dissenting Tradition in America, 1788-1828* (1999).

⁴⁶ 4 Elliot’s Debates, *supra* note 39, at 140–41 (reporting the remarks of Archibald Maclaine before the Convention of the State of North Carolina on July 28, 1788).

⁴⁷ *Id.* at 142 (reporting the statement of Samuel Johnston before the Convention of the State of North Carolina on July 22, 1788).

⁴⁸ *Id.* at 148–49 (emphasis added). In spite of the Federalists’ best efforts, a majority of the Convention remained unconvinced and voted against the proposed Constitution 184 to 84. *See id.* at 250. North Carolina ultimately ratified only after Congress drafted and circulated for ratification a proposed Bill of Rights. *See Chronology, 1786–1790*, in 13 *The Documentary History of the Ratification of the Constitution*, at xl–xlii (John P. Kaminski & Gaspare J. Saladino eds., 1981).

In Federalist 39, Madison's "Publius" insisted that "[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."⁴⁹ In a speech delivered to the House of Representatives while the Bill of Rights remained pending in the states, James Madison reminded the assembly that the proponents of the Constitution had assured the states that "the general government could not exceed the *expressly* delegated powers."⁵⁰ Writing shortly after the adoption of the Bill of Rights, Madison again declared that, "[w]hen the people have formed a Constitution, they retain those rights which they have not expressly delegated."⁵¹

No less a nationalist than Alexander Hamilton embraced the same principle of expressly delegated power. Writing in the Federalist Papers, Hamilton declared, "[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."⁵² In his arguments before the New York Convention Hamilton assured the Convention that "whatever is not expressly given to the federal head, is reserved to the members. The truth of this principle must strike every intelligent mind."⁵³ According to Hamilton, the sovereign people of the states "have already delegated their sovereignty and their powers to their several governments; and these cannot be recalled, and given to another, without an *express act*."⁵⁴

This repeated insistence of "expressly" delegated power runs counter to modern accounts of federal authority. In *McCulloch v. Maryland*, Chief Justice Marshall famously rejected Maryland's claims that Congress had only expressly enumerated power, pointing out that the framers of the Tenth Amendment had rejected an attempt to add the term "expressly" to the Clause. According to Marshall this implied that the framers intended Congress to have broad discretion in choosing those means thought necessary and proper to advancing enumerated ends. The actual historical record, however, suggests a very different approach to delegated federal power. Although Congress might have both express and implied powers, the state conventions were assured that all delegated power would be strictly construed in order to preserve the retained sovereignty of the people in the states. "Expressly delegated power" in other words, was understood not as a denial of all non-enumerated powers, but as a rule of strict construction for those powers which *were* enumerated.

For example, in the Virginia Convention Edmund Randolph understood the advocates of the Constitution to be claiming that the Constitution "gives no supplementary power, but only enables them to make laws to execute the delegated powers." Although this allowed for the exercise of incidental powers, Randolph understood that these powers

⁴⁹ The Federalist Papers No. 39, at 245 (Clinton Rossiter, ed. 1961).

⁵⁰ *Debates Continued*, Fed. Gazette & Phila. Daily Advertiser, and Philadelphia Evening Post, page 2 (Feb. 12, 1791).

⁵¹ 4 Annals of Cong. 934 (Nov. 27, 1794).

⁵² The Federalist No. 32, *supra* note 49 at 198 (Alexander Hamilton).

⁵³ XXII DHRC, *supra* note 43 at 1982 (reporting the remarks of Alexander Hamilton to the Ratifying Convention of New York on June 28, 1788).

⁵⁴ *Id.* at 1983 (emphasis added).

would be limited to those means that were “*necessary for the principle thing.*”⁵⁵ Similarly, Roger Sherman, a member of the Philadelphia Convention from Connecticut, declared that “[t]he powers vested in the federal government are clearly defined, so that each state will retain its sovereignty in what concerns its own internal government, and a right to exercise every power of a sovereign state *not particularly delegated* to the government of the United States.”⁵⁶ In New York, the convention embraced the assurances provided by Alexander Hamilton and included the following declaration along with their notice of ratification: “[E]very power jurisdiction and right, which is not by the said constitution *clearly delegated* to the congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same.”⁵⁷ The Rhode Island Convention appended the same declaration along with their own notice of ratification.⁵⁸

In sum, in order to counter concerns about unchecked federal power, the advocates of the Constitution maintained that the Congress would have no more than expressly delegated powers. This did not mean that Congress would have no implied powers whatsoever, but that the implied means would be limited to those “clearly implied” or “necessarily incident” to the enumerated power. This rule of strict construction of delegated power flowed from the fundamental principle of popular sovereignty: All powers delegated from a sovereign authority must be strictly or narrowly construed. Such were the assurances of the *Federalist*, and they were made throughout the states in every available medium, including newspapers, pamphlets, public speeches, and legislative debate. All of this occurred, moreover, *prior* to the adoption of the Ninth and Tenth Amendments. The restrictions in the Bill of Rights were to be added *ex abundanti cautela*.

1. *Strict Construction and Article III*

Just as narrow or strict construction of federal power played a critical role in the Federalist defense of the Constitution in general, it also became a critical component of the Federalist defense of Article III. As written, the Article appeared to authorize suits in federal court brought against states by out of state residents. Section 2, for example, authorized federal courts to hear suits “between a State and citizens of another state.”⁵⁹ A suit brought by an out-of-state resident against a state for recovery of debt clearly falls within the literal terms of the text. It was a commonly accepted principle, however, that a sovereign was presumptively immune from civil process. Article III thus appeared to suggest that states were no longer sovereign under the proposed Constitution, and would be treated no differently than ordinary corporations whose very existence was at the sufferance of a superior authority.

⁵⁵ Edmund Randolph, Debate in the Virginia Convention (June 17, 1788), in X DHRC, *supra* note 43 at 1348.

⁵⁶ A Citizen of New Haven No. 2.” (Dec. 25, 1788). According to Herbert Storing, this was a “rather typical description of the Constitution.” See Storing, *The ‘Other’ Federalist Papers: A Preliminary Sketch*, 6 Pol. Sci. Reviewer 215, 222 (1976).

⁵⁷ See 1 Elliot’s Debates, *supra* note 39 at 327.

⁵⁸ See 1 Elliot’s Debates, *supra* note 39 at 334.

⁵⁹ U.S. Const. Art. III section 2.

In the Virginia Ratifying Convention, George Mason warned that Article III would allowed every individual claim to be “tried before a federal court” and the “sovereignty of the state to be arraigned like a culprit, or private offender.”⁶⁰ In response, James Madison conceded “that this part [of the Constitution] does not stand in that form which would be freest from objection. It might be better expressed.”⁶¹ Nevertheless, Madison insisted that:

It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. . . . It appears to me that this can have no operation but this--to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.⁶²

This is a straight-forward example of what later became known as the principle of strict construction. As applied in the context of federal-state relations, this principle indicated that a term otherwise capable of a broad interpretation should be narrowed if possible in order to preserve the presumed sovereign status of the states. In the case of Article III, the text conceivably allows federal courts to hear *all* suits between states and individuals (including suits brought by individuals against the states). The text is nevertheless *construed* to encompass only those cases where a state is a plaintiff or has consented to be sued by an individual.

Anti-Federalist Patrick Henry, in his effort to derail ratification, derided Madison’s narrow construction of Article III as “perfectly incomprehensible” and in conflict with the “clear expression” of the text.⁶³ In response to Henry’s efforts to use a broad construction of Article III as a reason to reject the Constitution, future Supreme Court Chief Justice John Marshall stood in support of Madison’s limited reading of Article III. Narrow construction of Article III would be appropriate given the special situation of the states:

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal

⁶⁰ X DHRC, *supra* note 43 at 1406 (remarks of George Mason in the Virginia Convention, June 19, 1788).

⁶¹ *Id.* at 1409 (Remarks of James Madison).

⁶² X DHRC, *supra* note 43 at 1414 (remarks of James Madison in the Virginia Convention, June 20, 1788). Eleventh Amendment scholars occasionally dismiss or minimize Madison’s comments in convention regarding Article III. Calvin Johnson, for example, claims Madison “misdescribed” Article III. See Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders’ Constitution* 269 (2005). John Gibbons, on the other hand, believes that Madison’s argument was “ambiguous” in regard to state sovereign immunity. See Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, *supra* note 11 at 1906. As we shall see, the ratifiers found nothing ambiguous about Federalist promises made regarding Article III and, according to the principles of originalism, it is their understanding that comprises the legally binding original understanding of the Constitution—whether “misdescribed” by Madison or not.

⁶³ X DHRC, *supra* note 43 at 1422-23 (remarks of Patrick Henry).

court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant--if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided.⁶⁴

At the same time Madison and Marshall were defending Article III in Virginia, Alexander Hamilton was raising the same defense to Article III in New York. The day after Marshall delivered the above remarks in the Virginia Convention, Alexander Hamilton published the first installment of Federalist No. 81. Apologizing that the subject “may rather be a digression from the immediate subject of this paper,” Hamilton’s “Publius” thought it appropriate to “take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds.”

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States and the danger intimated must be merely ideal. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.⁶⁵

Hamilton bases his argument on a rule of construction derived from the nature of retained sovereignty. Sovereigns are presumed immune from suit by individuals without their consent. Absent an express delegation in the body of the Constitution, this aspect of sovereign power is presumed to be retained by the people in the several states. In other words, even though Article III *could* be construed to authorize such suits in federal courts, it nevertheless ought not to receive such a construction absent express language to the contrary. As Hamilton explained to the New York Ratifying Convention, “whatever is not expressly given to the Federal Head, is reserved to the members. The truth of this principle must strike every intelligent mind. . . . [The people] have already delegated their sovereignty and their powers to their several Governments; and these cannot be recalled and given to another, without an express Act.”⁶⁶ Along with its

⁶⁴ *Id.* at 1433 (Remarks of John Marshall). Edmund Randolph, who ultimately would represent individuals in suits against the states, believed that Article III authorized such suits, but argued that reciprocal suits between states and individuals was a matter of justice. See 5 DHSC, *supra* note 2, at 3.

⁶⁵ The Federalist No. 81, *supra* note 49 at 487-88 (emphasis in original). As they have with Madison’s above remarks, anti-sovereign immunity scholars struggle with Hamilton’s statement in Federalist 81. See e.g., Gibbons, The Eleventh Amendment and State Sovereign Immunity, *supra* note 11 at 1912 (“Reading [Hamilton] to acknowledge the existence of a general principle of state sovereign immunity extending even to claims arising under federal law-as the profound shock school does-wrenches this isolated statement from its context.”). As explained below, the contemporary readers of Federalist 81 had no problem understanding its promise of a narrow construction of Article III in order to preserve the retained sovereign rights of the states.

⁶⁶ Debates in the Convention of the State of New York (Thursday, June 26, 1788) (Remarks of Alexander Hamilton), in 2 The Works of Alexander Hamilton (Federal Edition). See also The

notice of ratification, the New York Convention appended a declaration which explained that it did 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.”⁶⁷

In Massachusetts, in response to Anti-Federalist concerns that individuals might haul non-consenting states into federal court, Federalist Rufus King apparently delivered a two hour speech explaining why Article III “could not possibly bear [this] construction.”⁶⁸ “On the strength of this gentleman’s opinion, [Article III] was assented to but by a small majority.”⁶⁹ According to “Brutus,” “when deliberating on that very clause of the Federal Constitution, respecting the judicial power, but which apprehensions were said to be groundless by the advocates of the Constitution, and the jealousies of the Members on that subject, were laughed at, and treated as ridiculous by KING and others.”⁷⁰

All of these claims about Article III rely on a narrow construction of the text. Article III *could* be read broadly (or simply literally). Nevertheless, the text should not, and *would not*, be read so broadly at the expense of the retained sovereign authority of the states. The record is not unanimous in this regard; Edmund Randolph expressed his belief that Article III ought to be read to allow suits by individuals against the states.⁷¹ Such views, however, were a decided minority.⁷² More common by far were denials of such power, and most common of all was the declaration that strict construction would apply to Article III just as it would the rest of the Constitution.

2. *Retained “Powers, Jurisdiction and Rights”: Popular Sovereignty and the Declarations and Proposals of the State Ratifying Conventions*

However plausible Federalist claims of expressly delegated power might be, there were texts in the Constitution that suggested a very different construction of federal power. If, for example, delegated federal power would be limited to only expressly enumerated

Federalist No. 32 (Hamilton), *supra* 49 at 198 (“the plan of the convention aims only at a partial union or consolidation, [therefore] 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.”).

⁶⁷ See Declaration of Rights and Form of Ratification (July 26, 1788), reprinted in 18 The Documentary History of the Ratification of the Constitution 297, 300 (John P. Kaminski & Gaspare J. Saladino eds., 1995)

⁶⁸ See “Democrat” Massachusetts Mercury (July 23, 1793), in 5 DHSC, *supra* note 2, at 393 and 395 n.3.

⁶⁹ “Marcus,” Salem Mercury (July 13, 1793), in 5 DHSC, *supra* note 2, of S. Ct. at 389.

⁷⁰ “Brutus,” Independent Chronicle (July 18, 1793), in 5 DHSC, *supra* note 2, of Sct. at 392 (capitalization in original). See also Account of William Martin’s Speech in the Massachusetts House of Representatives, *Indep. Chron.* (Boston), Sept. 23, 1793, reprinted in 5 DHSC, *supra* note 2, at 434. (“[I]f the article did convey the meaning as determined by part of the Judiciary [in Chisholm], it was not the intention of the [Massachusetts ratifying] Convention, nor was it understood to be so construed”).

⁷¹ See e.g., 3 Elliot’s Debates, *supra* note 39 at 207 (Remarks of Edmund Randolph) (“I admire that part [of the Constitution] which forces Virginia to pay her debts.”).

⁷² Despite Randolph’s position, Virginia majorities supported an amendment reversing the decision in *Chisholm*.

subjects (thus rendering a Bill of Rights both unnecessary and “dangerous”), why then did the Framers find themselves compelled to add a list of rights in Article I section 9? This list of enumerated rights seemed to imply the Framers *themselves* feared unduly broad constructions of federal power. In the end, relying purely on the unexpressed principle of expressly delegated power was not enough to satisfy those doubters in the state conventions who remained on the fence regarding the proposed Constitution. Instead, most delegates agreed with the Virginian Anti-Federalist George Mason who insisted, “[w]e must have such amendments as will secure the liberties and happiness of the people on a plain, simple construction, not on a doubtful ground.”⁷³ James Madison and the Federalists ultimately conceded the point—limitations on the construction of federal power needed to be made an express part of the national Constitution. Relying on Federalist promises that a Bill of Rights would be among the items on the agenda of the new Congress, most states decided to ratify the Constitution, but did so declaring their understanding of the document and submitting a list of suggested amendments. These declarations and proposed amendments addressed the construction of federal power in general as well as the specific powers delegated under Article III.⁷⁴

Because the discussion of the Eleventh Amendment tends to revolve around the language of “state sovereign immunity,” it carries the modern rhetorical baggage of nineteenth and twentieth century battles over civil rights. It is far more common today to see states rights equated with violations of individual rights than with the protection of rights. This modern conceptual divide between the rights of the *states* and the rights of the *people* was not shared by the generation that drafted and adopted the Constitution and the first eleven amendments. It is important to understand this before moving forward, since it will help explain how the Founding generation linked the underlying principles of the Ninth, Tenth and Eleventh Amendments.

The interlocking concepts of popular sovereignty and the retained rights and powers of the states is most easily seen in the declarations and proposed amendments that accompanied the state notices of ratification. These are worth quoting if only because the concepts today are generally treated as being at odds with one another. The Founding generation, however, saw them as inextricably linked. In Massachusetts, for example, the convention recommended “that it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several states, to be by them exercised.”⁷⁵ According to Samuel Adams, such a provision by itself was “a summary of a bill of rights.”⁷⁶

⁷³ George Mason, Virginia Ratifying Convention (June 14, 1788), in 3 Elliot’s Debates, *supra* note 39 at 271. See also *Letters of Centinel (II)*, in Storing, *The Complete Anti-Federalist*, *supra* note 37, at 147 (“Mr. Wilson tells you, that every right and power not specifically granted to Congress is considered as withheld. How does this appear? Is this principle established by the proper authority? Has the Convention made such a stipulation? By no means.”).

⁷⁴ Eight states submitted proposed amendments, all of which included provisions declaring the retained sovereignty of the people and limiting the construction of delegated federal power. See *The Complete Bill of Rights: The Drafts, Debates, Sources, and origins 674-75* (Neil H. Cogan ed., 1997).

⁷⁵ 1 *The Rights Retained by the People: The History and Meaning of the Ninth Amendment* 353 (Randy E. Barnett, ed.) (1989) New Hampshire proposed the same amendment. See *id.* at 355.

⁷⁶ 2 Elliot’s Debates, *supra* note 39 at 131.

Amendments proposed by a number of states illustrated the assumed connection between the people’s retained rights and the states reserved powers. The New York Ratifying Convention declared that it had ratified the Constitution on the understanding that “all power is originally vested in, and consequently derived from, the people” and that “every power, jurisdiction and right, which is not by the said constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same.”⁷⁷ Similarly, North Carolina’s Convention declared that “all power is naturally vested in, and consequently derived from, the *people*,” and also proposed an amendment which ensured “[t]hat each *state* in the Union shall respectively retain every power, jurisdiction and right, which is not by this Constitution delegated to the Congress of the United States.”⁷⁸ The Virginia Convention declared “[t]hat all power is naturally invested in, and consequently derived from, the people,” and proposed an amendment which ensured that “each state in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government.”⁷⁹ Rhode Island declared that “every other power jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States, or to the departments of government thereof, remain to the people of the several states, or their respective state governments, to whom they may have granted the same.”⁸⁰

All of these declarations and proposed amendments reflect the common assumption that reserving all non-delegated powers and rights to the states was itself a path to individual liberty. As Samuel Adams (an eventual supporter of the Constitution) wrote to Richard Henry Lee:

I mean my friend, to let you know how deeply I am impressed with a sense of the Importance of Amendments; that the good People may clearly see the distinction, for there is a distinction, between the federal Powers vested in Congress, and the sovereign Authority belonging to the several States, which is the Palladium of the private, and personal rights of the Citizens.⁸¹

Preserving local liberty required limiting the powers of the federal government. This was thought to be accomplished through the above declarations and promised amendments which not only limited the federal government to those powers “clearly” or “expressly” delegated under the Constitution. Conventions such as South Carolina were even more explicit and declared “that no section or paragraph of the said Constitution warrants a *construction* that the states do not retain every power not expressly relinquished by them, and vested in the general government of the Union.”⁸² As the Maryland Convention explained, by declaring that “Congress shall exercise no power

⁷⁷ 1 Rights Retained by the People, *supra* note 75 at 356.

⁷⁸ 1 Rights Retained by the People, *supra* note 75 at 364.

⁷⁹ *Id.* at 380.

⁸⁰ *Id.* at 374.

⁸¹ Letter from Samuel Adams to Richard Henry Lee (Aug. 24, 1789), *in* *Creating the Bill of Rights: The Documentary Record from the First Federal Congress*, 286 (Helen E. Veit et al. eds., 1991).

⁸² 1 Rights Retained by the People, *supra* note 75 at 379.

but what is expressly delegated by this Constitution,” “the exercise of *constructive powers* [would be] wholly prevented.⁸³

There was as much concern regarding the powers of the judiciary under Article III as with the other delegated powers of the federal government.⁸⁴ In addition to the examples cited above, New York declared its understanding 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 authorize any suit by any person against a state.”⁸⁵ And, just to add an exclamation point, New York declared that “the jurisdiction of the Supreme Court of the United States . . . is not in any case to be increased, enlarged, or extended, by any faction, collusion, or mere suggestion.”⁸⁶ Rhode Island made the same declarations.⁸⁷ North Carolina suggested altering the language of Article III by omitting the reference to suits between a state and out of state citizens.⁸⁸ Pennsylvania’s proposed amendment, though rather verbose, contained the same dual sentiments of popular sovereignty and retained state rights—including *jurisdictional* rights:

That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power, or jurisdiction, be assumed or exercised by the executive or judiciary departments of the Union, under color or pretence of construction or fiction; but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several states in the Union, according to their respective Constitutions; and that every reserve of the rights of individuals, made by the several constitutions of the states in the Union, to the citizens and inhabitants of each state respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution.⁸⁹

Again, all of the above declarations and proposed amendments reflect a widespread concern about unduly broad construction of federal authority. Some, such as New York and Rhode Island, declared their express understanding that Article III would be narrowly construed. Other conventions suggested particular amendments, such as those which sought to remove any language in Article III which might be read to allow individual suits against the states in federal court. Most state conventions also embraced a broad approach in which *all* delegated federal power would be limited to just those subject expressly enumerated in the Constitution. This included, of course, the powers

⁸³ 2 Elliot’s Debates, *supra* note 39 at 550.

⁸⁴ “Jurisdiction,” of course, was a term that could apply to the general notion of national versus local areas of responsibility. As the examples in the text show, however, the concept *also* included concerns about the jurisdiction of the federal courts.

⁸⁵ 1 Rights Retained by the People, *supra* note 75 at 359.

⁸⁶ *Id.*

⁸⁷ *Id.* at 377. Although Rhode Island placed its statement about the judiciary in its list of proposed amendments, it prefaced its statement with the words “It is declared by the Convention, that the judicial powers of the United States, in cases where a state may be a party, does not extend . . .” *Id.*

⁸⁸ *Id.* at 368.

⁸⁹ *Id.* at 371-72.

delegated under Article III. Finally, the declarations and proposed amendments generally declared the ultimate sovereignty of the people in the states and their sovereign right to all non-delegated powers.

One could dismiss the appended declarations and proposals by the state conventions as self-serving attempts to “control” the later interpretation of the Constitution. A number of scholars in fact have written off limited government proponents in the state conventions as constitutional “losers” whose views need not be taken into account in determining the original meaning of the Constitution.⁹⁰ It is important to remember, however, that these statements reflected assertions and promises made by the advocates of the Constitution in their effort to convince the ratifying conventions to support the Constitution. It was Hamilton, after all who wrote in the Federalist Papers that “[t]he 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.”⁹¹ It was the pseudonymous constitutional advocate “Centinel” who likewise assured the states that under the proposed Constitution that “we retain all our rights, which we have not expressly relinquished to the union.”⁹² Ratifier reliance on such statements is an important consideration in determining the original understanding of powers, jurisdiction and rights delegated under the original Constitution.

In fact, there is good reason to believe the state conventions reasonably relied on these statements regarding a limited construction of federal power, and that their expectations became a part of the constitution itself. As James Madison, later explained, the first ten amendments—in particular the Ninth and Tenth Amendments—codified the promises Federalists made in the state conventions that the federal government had only expressly (meaning narrowly construed) delegated power.

3. *The Bill of Rights and the Ninth and Tenth Amendments*

Recent discoveries have significantly expanded the body of available historical evidence relating to the enactment of the Ninth and Tenth Amendments.⁹³ In brief, this evidence suggests that, contrary to modern assumptions, the Ninth and Tenth Amendments were understood as working together to limit federal interference with the retained right to local self-government. The amendments were, in other words, *federalist* in that they were understood to preserve the distinction between national and local governments. Having seen how the amendments proposed by the states simultaneously sought to preserve the retained rights of the people *and* the states, this may come as no surprise. However, given that this represents a significant revision of the common understanding

⁹⁰ See, e.g., Paul Finkelman, Turning Losers Into Winners: What We Can Learn, If Anything, From the Anti-Federalists?, 79 Tex. L. Rev. 849 (2001).

⁹¹ The Federalist No. 32, *supra* note 49 at 198 (Alexander Hamilton).

⁹² The Centinel, Letter to the Editor, *Some Objections to the New Constitution Considered*, Cumberland Gazette (Portland, Me.), Dec. 13, 1787, at 1, available at Archive of Americana, America’s Historical Newspapers, 1690-1876 (Readex, Newsbank, Inc.).

⁹³ See generally, Kurt T. Lash, A Textual-Historical Theory of the Ninth Amendment, 60 Stanford Law Review 895 (2008); Kurt T. Lash, The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and Expressly Delegated Power, 83 Notre Dame Law Review 101 (2008); Kurt T. Lash, The Inescapable Federalism of the Ninth Amendment, 93 Iowa L. Rev. 801 (2008).

of the Ninth Amendment, many readers may want to consider this new body of evidence for themselves.⁹⁴ For the purposes of this article, I will concentrate on the statements of the man who initially drafted the Bill of Rights, James Madison. The additional evidence referred to simply supports the Madison's own explanation of the origins and purposes of the Ninth and Tenth Amendments.

Madison initially opposed the addition of amendments listing limitations on government power. Like most Federalists, he believed that the principle of enumerated power would sufficiently constrain the operations of the federal government. He also agreed with those who warned that adding a list of rights might be read to carry the negative connotation that any right not specifically enumerated had been "assigned" into the hands of the federal government. Ultimately convinced that amendments were both necessary (to avoid a second convention) and proper (federal power *might* be broadly interpreted in a manner affecting retained rights), Madison presented to the First Congress a list of proposed amendments to the Constitution. The list reflected Madison's choice of those amendments most commonly suggested by the state conventions and which Madison believed best comported with the original vision of the Constitution.⁹⁵

An obvious choice was a proposal which ultimately became our Tenth Amendment: "The powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the states respectively."⁹⁶ Confident that the Constitution itself already reflected the principle of enumerated federal power, Madison was not sure this amendment was completely necessary. Nevertheless, almost every state convention had asked that the principle be expressly added to the Constitution and Madison saw no harm in doing so.⁹⁷

The Ninth Amendment was more critical. One of the objections to adding a list of rights that Madison found most plausible was the problem of implied enlargement of federal power due to the addition of a Bill of Rights. The worry was that all rights not specifically listed in the text would be presumed to be within the scope of congressional power. This would effectively transform the national government into one of general (as opposed to enumerated) power and betray the Federalist promises of narrowly construed enumerated power. Madison addressed this concern in his draft of what ultimately became our Ninth Amendment.

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the

⁹⁴ In addition to the sources cited in note 93, see Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *Tex. L. Rev.* 331 (2004); Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 *Tex. L. Rev.* 597 (2005).

⁹⁵ See Letter from James Madison to Edmund Randolph (Aug. 21, 1789) (Madison explaining that he collected the state proposals and "exclude[ed] every proposition of a doubtful & unimportant nature.")

⁹⁶ See James Madison, *Speech Introducing the Bill of Rights* (June 8, 1789), in *James Madison: Writings* 444 (Jack Rakove ed. 1999).

⁹⁷ *Id.*

powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.⁹⁸

Although the “enlarged powers” language was removed by the time the amendment was sent to the states,⁹⁹ Madison insisted that the final draft limited the construction of federal power every bit as much as the first. Securing retained rights, Madison insisted, amounted to the “same thing” as preventing “extended” federal power.¹⁰⁰

Although scholars have long associated the Ninth Amendment with retained individual natural rights,¹⁰¹ the Amendment does not limit the “other rights” retained by the people to just individual rights. “Rights” at the time of the Founding included everything from the individual freedom of speech, to the right of local majorities to pass municipal laws, to the collective right of the people to revolution.¹⁰² Under the Ninth Amendment, none of these rights were to be denied or disparaged by an enlarged construction of federal power simply because they did not make the cut in Madison’s list of particular amendments.

Most importantly, though often missed in historical Ninth Amendment scholarship, is the fact that all retained rights were, by definition, *federalist* in nature; they were left to the control of the people in the individual states. For example, even though the First Amendment prohibited the federal government from establishing a religion, states were free to do so. Indeed, their right to establish religions was confirmed by the Tenth Amendment which reserved to the states or the people therein all powers not delegated to the federal government.¹⁰³ Likewise, when Madison protested the enactment of the Sedition Acts, he complained that Congress had violated the First Amendment’s protection of the individual right to free speech *and* the Tenth Amendment-protected right of the states to regulate all matters pertaining to speech.¹⁰⁴ As rights retained from federal control, speech remained under the collective control of the people in the states who, in turn could enshrine them in the state constitution, or leave them to the control of the local legislature. Consider once again the declaration of the New York Ratifying Convention—it contains one of clearest examples of the federalist nature of retained rights:

⁹⁸ *Id.* at 443.

⁹⁹ The final draft of the Ninth Amendment reads “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. Const. Amend. IX.

¹⁰⁰ James Madison to George Washington (Dec. 5, 1789), in V Documentary History of the Constitution of the United States of America, 1786-1870 at 221-22 (“If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter be secured by declaring that they shall not be abridged, or that the former shall not be extended.”).

¹⁰¹ For recent discussions of the individual natural rights protected under the Ninth Amendment, see Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004); Daniel A. Farber, *Retained by the People: The “Silent” Ninth Amendment and the Constitutional Rights Americans Don’t Know They Have* (2007).

¹⁰² For a discussion of the various rights existent at the time of the Founding and their likely place in the Ninth Amendment, see Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 *Stanford L. Rev.* 895, 908 (2008).

¹⁰³ See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32 (1998)

¹⁰⁴ See James Madison, *Report on the Alien and Sedition Acts*, in *Writings*, *supra* note 96 at 608.

[E]very power, jurisdiction, and right, which is not by the said Constitution clearly delegated to the Congress of the United States, or the departments of the government thereof, remains to the people of the several states, or to their respective state governments, to whom they may have granted the same.”¹⁰⁵

This “federalist” reading of the Ninth Amendment might seem counterintuitive, given the commonly held modern assumption that the Ninth justifies federal invalidation of state laws abridging retained rights.¹⁰⁶ However, although the scope of the Ninth may have been altered by later amendments (such as the Fourteenth Amendment), Madison’s expressly declared view of the *original* Ninth Amendment was distinctly federalist. Madison not only understood the Ninth as working alongside the Tenth in limiting the power of the federal government to interfere with the sovereign people in the states, he insisted that these two amendments were the textual expression of promises made to the ratifiers in the state conventions that federal power would be strictly construed.¹⁰⁷

4. *Madison’s Speech Opposing the Bank of the United States*

In a speech delivered to the House of Representatives while the Bill of Rights remained pending before the states, Madison explained the origin and meaning of the Ninth and Tenth Amendments. The occasion for his speech was Madison’s opposition to a Bill establishing the First Bank of the United States. Although nationalists like Alexander Hamilton believed that delegated federal power could be construed broadly enough to authorize the Bill, Madison was convinced the matter was beyond the properly interpreted scope of delegated federal authority. Madison’s speech is important not only for its discussion of the Ninth and Tenth Amendments, but also because his approach to interpreting the Constitution—an approach he claimed found expression in the Ninth and Tenth Amendments—was shared by Justice Iredell and formed the basis of Iredell’s rejection of state suability.

In his speech, after some brief remarks regarding the merits of incorporating a bank, James Madison laid out the proper rules of constitutional interpretation:

[1] An interpretation that destroys the very characteristic of the Government cannot be just. . . .

[2] In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

[3] Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

¹⁰⁵ 1 Rights Retained by the People, *supra* note 75 at 356.

¹⁰⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J. concurring).

¹⁰⁷ During the drafting of the Tenth Amendments, Madison joined others in the House in rejecting an attempt to add the term “expressly” to the text of the Amendment. I have written in depth on the significance of this rejection. See Lash, *The Original Meaning of an Omission*, *supra* note 22. In brief, Madison feared the term might be read to deny Congress all incidental powers, no matter how necessary or clearly associated with the delegation. As his public speeches make clear, he did not reject the general concept of “expressly delegated power” properly understood.

[4] In admitting or rejecting a constructive authority, 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.¹⁰⁸

These rules are developed and applied in the main body of Madison's speech. Preserving the "characteristic of the Government" under Rule [1] involved maintaining a federal government of "limited and enumerated powers."¹⁰⁹ The "parties to the instrument" referenced in Rule [2] whose understanding are a proper guide to constitutional interpretation, are the state ratifying conventions.¹¹⁰ The promises made to those conventions about the limited nature of federal power are the "contemporary and concurrent expositions" of Rule [3].¹¹¹ Finally, Rule [4] is an interpretive rule that Madison derives from the Constitution itself: the more important the power, the more likely the parties would have expressly listed it in the text rather than leave such an important matter to implication.¹¹² As we shall see, the application of this particular rule becomes one of the grounds of Justice James Iredell's dissent in *Chisholm v. Georgia*.

Madison argued that deriving the power to charter a bank as necessary and proper to borrowing money would open the door to an unlimited list of implied powers and required a "latitude of interpretation . . . condemned by the rule furnished by the Constitution itself."¹¹³ The manner in which the Founders enumerated powers in the Constitution established an implicit "rule" requiring the express enumeration of all "great and important power[s]."¹¹⁴ Declaring that "[i]t cannot be denied that the power proposed to be exercised is an important power,"¹¹⁵ Madison then listed a number of significant aspects of the Bank Charter, including the fact that the "bill gives a power to purchase and hold lands" and that "[i]t involves a monopoly, which affects the equal rights of every citizen."¹¹⁶ To Madison, these effects established that the power to charter a bank was a "great and important power" that required express enumeration.¹¹⁷

In the final section of his speech, Madison addressed the original understanding of federal power represented to the conventions that ratified the document. He reminded the House that the original objection to a bill of rights had been due to fear that this

¹⁰⁸ James Madison, Speech Opposing the National Bank (Feb. 2, 1791), in Writings, *supra* note 96 at 482.

¹⁰⁹ *Id.* at 485.

¹¹⁰ *Id.* at 489.

¹¹¹ *Id.*

¹¹² *Id.* at 486.

¹¹³ *Id.* at 486.

¹¹⁴ *Id.* at 487 ("The examples cited, with others that might be added, sufficiently inculcate, nevertheless, a rule of interpretation, very different from that on which the bill rests. They condemn the exercise of any power, particularly a great and important power, which is not evidently and necessarily involved in an express power."); see also 1 Annals of Cong. 2009 (Joseph Gales ed., 1834) (statement of Rep. Madison) (observing during the debates over the Bank Bill that "[t]he power of granting Charters . . . is a great and important power, and ought not to be exercised unless without we find ourselves expressly authorized to grant them").

¹¹⁵ Madison, Speech Opposing National Bank, in Writings, *supra* note 96 at 487.

¹¹⁶ *Id.* at 488.

¹¹⁷ *Id.*

would “extend[.]” federal power “by remote implications.”¹¹⁸ Federalists had assured the state conventions that the Necessary and Proper Clause would not be interpreted to give “additional powers to those enumerated.”¹¹⁹ Madison “read sundry passages from the debates” of the state conventions in which “the Constitution had been *vindicated by its principal advocates*, against a dangerous latitude of its powers, charged on it by its opponents.”¹²⁰ These state conventions had agreed to ratify the Constitution only on the condition that certain explanatory amendments would be added that expressly declared what the Federalists claimed were principles already implicit in the structure of the Constitution. Madison then referred the House to the proposals submitted by the state conventions which sought to guard against the constructive extension of federal power: “The[se] explanatory declarations and amendments accompanying the ratifications of the several States formed a striking evidence, wearing the same complexion. He referred those who might doubt on the subject, to the several acts of ratification.”¹²¹

Finally, Madison declared that the proper rule of interpretation, one implied in the structure of the Constitution and promised by the Federalists to the state conventions, found textual expression in the proposed Ninth and Tenth Amendments:

The explanatory amendments proposed by Congress themselves, at least, would be good authority with them [the state proposals]; all these renunciations of power proceeded on a rule of construction, excluding the latitude now contended for. These explanations were the more to be respected, as they had not only been proposed by Congress, but ratified by nearly three-fourths of the States.¹²² He read several of the articles proposed, remarking particularly on the 11th and 12th [the 9th and 10th Amendments] the former, as guarding against a latitude of interpretation; the latter, as excluding every source of power not within the Constitution itself.¹²³

Summing up his argument, Madison linked these amendments and their attendant rule of construction to the preservation of state autonomy.¹²⁴

Madison’s speech is an extended dissertation on the proper rules of constitutional interpretation—and how that interpretation ought to be informed by the expectations of the state conventions. Justifying the Bank required an unduly broad reading of federal power. The state conventions had been assured there would be no “latitudinary” readings of federal power; they had ratified the Constitution with the express understanding that would be the case, and they secured amendments *ensuring* this would

118. *Id.*

119. *Id.* at 489.

120. *Id.*

121. *Id.* (emphasis added).

122. Ratification was still pending in Virginia.

123. Madison, Speech opposing the National Bank, *in* Writings, *supra* note 96 at 489. ___

124. *Id.* at 489-90 (“In fine, if the power were in the Constitution, the immediate exercise of it cannot be essential; if not there, the exercise of it involves the guilt of usurpation, and establishes a precedent of interpretation, levelling all the barriers which limit the powers of the General Government, and protect those of the State Governments.”).

not be the case. The Ninth and Tenth Amendments expressly prohibited this latitude of interpretation and, thus, preserved the expected degree of state autonomy.

Although a divided Congress passed the Bank Bill, the issue of federal power to establish the Bank remained disputed for decades. Indeed, as we shall see, the adoption of the Eleventh Amendment may well have been delayed due to an effort to broaden the amendment to encompass both the Bank controversy and the issue of state suability. Because support for the bank was divided along regional lines,¹²⁵ it was difficult for opponents of the Bank to establish a sufficiently broad-based coalition against the Charter. State suability, on the other hand, affected states north and south, making an effective response to a decision like *Chisholm* far easier and much more likely. It is to the subject of state suability that we now turn.

C. Pre-*Chisholm* Suits Against the States

1. *Beginnings: Van Staphorst and the Debate in Massachusetts*

It did not take long for the new Supreme Court to consider the issue of state suability. The issue presented itself in the very first case entered on the Court's inaugural docket, *Van Staphorst v. Maryland*. The case involved a long-standing contract dispute between the Dutch Van Staphorst brothers and the state of Maryland. Frustrated at the state's unwillingness to offer satisfactory terms, the Van Staphorsts filed suit against the state in the Supreme Court of the United States and the case was scheduled to be heard in February 1791. Their own lawyer advised them to settle for a "[a] suit against a state cannot avail. . . A state is not an individual—The states being individually sovereign."¹²⁶ Although the Maryland legislature did not contest the case, its acquiescence was based on its conclusion that allowing the case to go to trial "may deeply affect the political rights of this state, as an independent member of the union."¹²⁷ Accordingly, the State eventually came to terms with the Van Staphorsts and settled out of court.¹²⁸

Van Staphorst generated the first significant public discussion of state suability since the ratification of the Constitution in 1788. An observer at the opening proceedings of the new Supreme Court was startled to find the Court hearing a case brought by "a *Foreigner*, against the state of Maryland."¹²⁹ The observers' shocked reaction predates *Chisholm* by two years and initiates a theme that would be heard throughout the states until the adoption of the Eleventh Amendment:

Should this action be maintained, one great national question, will be settled; --that is, that the several States, have relinquished all their

¹²⁵ Opposition to Hamilton's fiscal policies, including his Funding Program and the creation of the national bank, had, as Sean Wilentz puts it "a strong sectional character, pitting North Against South." Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* 46 (2005).

¹²⁶ Pierce Butler to Messrs. Van Staphorsts and Hubbard (Sept. 23, 1791), in 5 DHST, *supra* note 2, at 34.

¹²⁷ Report of the Committee of Ways and Means, Maryland House of Delegates (Dec. 13, 1791), in 5 DHSC, *supra* note 2, at 35.

¹²⁸ *Id.* at 20.

¹²⁹ Letter from an Anonymous Correspondent, Independent Chronicle (between Feb. 13 and 19, 1791) (Philadelphia), in 5 DHSC, *supra* note 2 at 20-21.

SOVEREIGNITIES, and have become mere *corporations*, upon the establishment of the General Government: For a Sovereign State, can never be sued, or coerced, by the authority of another government.¹³⁰

Looking on from the state of Massachusetts, the state attorney general James Sullivan shared the same troubled reaction and published his remonstrance against such suits in a pamphlet titled “Observations Upon the Government of the United States of America.”¹³¹ To Sullivan, the issue of “whether the separate states, as states, are liable to be called to answer before any tribunal by civil process?” necessarily involved the subsidiary question “Whether we are an assemblage of Republics, held together as a nation by the form of government of the United states, or one great Republic, made up of diverse corporations?”¹³² In cases involving independent republics, there was no recourse in cases of injustice except by negotiation and, ultimately, the sword.¹³³ If states then could be subjected to suits in federal court, this had to mean that legally, states were no different than mere “corporations”—an idea with troubling implications:

A corporation cannot be corporally punished, or be imprisoned, but it may be disenfranchised, and lose its privileges for misuse of them. This is called a civil death. But this process of punishment carries with it the full and complete idea of subordination to a superior power, which is quite inconsistent with every idea of any kind of sovereignty.¹³⁴

Although Article III *could* be construed to authorize suits brought by foreigners against the states, this was not a *necessary* construction. The party diversity provisions of Article III could be understood to apply only where states appeared as plaintiffs, as opposed to defendants.¹³⁵ A strict construction of Article III was appropriate because it preserved the independent sovereign existence of the states:

If the paragraphs above recited, by having the construction which I have given them, can be fully satisfied, and be rendered consistent with the other parts of the system they belong to; and if a contrary, or more enlarged construction would render them incompatible with, and derange the whole system, and compel us to affix new meanings to the language of it, then I think I may conclude that my construction is right.¹³⁶

Written only a few months after Madison’s speech opposing the Bank of the United States, Sullivan’s *Observations* adopts some of the same rules of constitutional construction, in particular the need to strictly construe federal power in order to avoid an “interpretation that destroys the very characteristic of the Government.”¹³⁷ Sullivan’s argument laid out the general defense that would be repeated time and again over the

¹³⁰ *Id.* at 21 (emphasis in original).

¹³¹ James Sullivan, *Observations Upon the Government of the United States of America*, July 7, 1791, in 5 DHSC, *supra* note 2, at 21.

¹³² *Id.* at 21.

¹³³ *Id.* at 27.

¹³⁴ *Id.* at 29.

¹³⁵ *Id.* at 26.

¹³⁶ *Id.* at 26-27.

¹³⁷ See Madison, *Speech Opposing the Bank of the United States*, in *Writings*, *supra* note 96 at 482.

coming months; subjecting states to suits by individuals without their consent rendered the states no different than “corporations” and could not be reconciled with the promise of retained state sovereignty. This was not a necessary construction of Article III and violated the promise that federal power would be narrowly construed wherever it threatened the independence of the states.

Sullivan’s Observations triggered an extended response by “Hortensius” who argued that the plain meaning of the text allowed such suits, and that requiring states to pay their debts to individuals was simply a matter of justice.¹³⁸ Justice, however, apparently only went so far. Although the text of Article III also speaks of suits in which the national government was a party, this should not be construed to mean that the country itself could be sued in federal court. The United States was, after all, a sovereign nation and, according to Hortensius, “no suit can be brought against a nation.”¹³⁹ States, however, could not claim the same sovereign immunity:

[A]s the similtude does not hold between the United States, in their national capacity, and any one of the states in its individual, the conclusion that the latter cannot be sued, is utterly unwarranted by the premises.¹⁴⁰

This was not a rejection of sovereign immunity per se; it was a rejection of the retained sovereignty of the *states*. Or, as Hortensius phrased it, although states might be sovereign as to “state objects,” they could not “contend for the absurdity of *equal sovereignty*” which would grant them the same prerogatives of immunity naturally bestowed on the national government.¹⁴¹

Sullivan’s Observations and Hortensius’ Response were extended and nationally distributed dissertations on the subject of state sovereign immunity under Article III. The basic arguments were thus being debated in the public sphere long before *Chisholm*. The rapidity with which Sullivan produced his Observations, and the broad readership it received, suggests a segment of the public was well aware of what was at stake in cases like *Van Staphorst*. More cases soon emerged, and the public debate intensified accordingly.

2. *Justice Iredell and Oswald v. New York*

A leader of the Federalist Party in North Carolina and a supporter of the original Constitution, Justice James Iredell was the youngest of the Justices on the Supreme Court in 1793, and he would write the lone dissent in *Chisholm v. Georgia*. Credited by the Supreme Court in *Hans v. Louisiana* with expressing the country’s general sentiment regarding state suability,¹⁴² Iredell’s opinion in *Chisholm* has been downplayed by

¹³⁸ See An Enquiry Into the Constitutional Authority of the Supreme Federal Court, Over the Separate States, in Their Political Capacity. Being an Answer to Observations Upon the Government of the United States of America (April 12, 1792), in 5 DHSC, *supra* note 2, at 36, 39.

¹³⁹ *Id.* at 52.

¹⁴⁰ *Id.* at 53-54.

¹⁴¹ *Id.* at 39, 40.

¹⁴² *Hans v. Louisiana*, 134 U.S. 1, 12 (1890).

revisionist scholars in favor of the extended constitutional remarks by Wilson and Jay.¹⁴³ The general approach has been to present Iredell as only briefly touching, or avoiding altogether, the constitutional issue of whether Article III abrogated state sovereign immunity. It turns out, however, that Iredell drafted opinions in two separate cases that both addressed the constitutional issue at length, including one for *Chisholm*. His opinion in *Chisholm*, in fact, incorporated sections of an essay he had written in conjunction with an earlier case, *Oswald v. New York*.¹⁴⁴

Oswald had its roots in New York's hiring of John Holt to serve as state printer in the years immediately following the Revolution. After Holt died, the administrator of his estate, Eleazer Oswald, sued the state of New York in the Supreme Court of the United States for Holt's unpaid services.¹⁴⁵ The suit was filed in February 1791, with the case eventually scheduled to be heard during the February 1792 term.¹⁴⁶ Even before the Court had the chance to hear the case, a widely-published article raised the hue and cry about "an important question" before the Court regarding "[w]hether a state can be compelled to appear and answer to a process" issued by the Supreme Court.¹⁴⁷ Governor George Clinton and the state legislature ignored the original summons, leading Oswald to seek a writ of *distringas* compelling New York to respond.¹⁴⁸ It was at this point that Justice Iredell sketched his initial thoughts about the power of the federal courts to hear individual suits against a non-consenting state.

Iredell's "Observations on State Suability" seems to have been originally planned as an opinion in *Oswald*. Because the Court ultimately dismissed Oswald's motion on other grounds,¹⁴⁹ Iredell saved his notes and incorporated some of the passages into his later opinion in *Chisholm v. Georgia*.¹⁵⁰ "Observations" begins by addressing an apparent deficiency in the motion—Article III authorizes suits between a state and a citizen from another state, but there was reason to believe the plaintiff in this case was a resident of New York. If that were so, then the Court lacked jurisdiction to hear the case.¹⁵¹ Nevertheless, because the issue in the case would likely arise in another case, and because the "great question" raised by the case came before the Court "judicially" even if not "necessarily," Iredell continued his observations in order "state my sentiments on the subject as clearly and fully as I am able."¹⁵²

"The question," Iredell wrote, "comes to this--What controversy of a civil nature can be maintained against a state by an individual?"¹⁵³ Answering this question requires

¹⁴³ See sources cited in note 11.

¹⁴⁴ See 5 DHSC, *supra* note 2, at 77 (editor's introductory note).

¹⁴⁵ 5 DHSC, *supra* note 2, at 57-58.

¹⁴⁶ *Id.* at 60.

¹⁴⁷ Pennsylvania Gazette (Philadelphia) (Feb. 1, 1792), in 5 DHSC, *supra* note 2, at 60.

¹⁴⁸ *Id.*

¹⁴⁹ It was not clear that federal diversity jurisdiction was appropriate due to the failure of Oswald to establish his status as a resident of Pennsylvania and not New York. See DHST, *supra* note __ at 61. Oswald's attorney withdrew his motion for a writ of *distringas*, but later refiled after having more clearly established Pennsylvania citizenship. *Id.*

¹⁵⁰ 5 DHSC, *supra* note 2 at 76.

¹⁵¹ James Iredell's Observations on State Suability (Feb. 11-14, 1792), in 5 DHSC, *supra* note 2 at 79.

¹⁵² *Id.*

¹⁵³ *Id.* at 81.

identifying the “principles the courts of the United States are bound to determine in [the] execution of the various parts of their jurisdiction.”¹⁵⁴ These principles depend on the nature of the case before the Court and the area of law which the Court must consult in rendering a decision. Here Iredell listed three general areas of law: (1) The Law of Nations, (2) The Acts of Congress, and (3) The laws of the particular states. Beginning with the Law of Nations, Iredell placed construction of the Constitution within the same category as construction of treaties between foreign powers.¹⁵⁵ This was appropriate because the Constitution “form[ed] out of several independent Governments a new one composed of definite Powers.”¹⁵⁶ In every area “where authority has been surrendered to the general Government, the states as such have no right to exercise their sovereignty separately.”¹⁵⁷ However, “[i]n every instance where authority has not been so surrendered, the separate states remain sovereign & independent: for they have done nothing to divest that sovereignty.”¹⁵⁸ It required the “true construction” of the Constitution “to determine in any particular instance . . . whether the Sovereignty of the state be or not be retained.”¹⁵⁹

As far as the Acts of Congress were concerned, Congress had not provided a statutory process for a suit against a state and the Court lacked the power to create “new laws for new cases” –meaning cases unheard of under state law before the adoption of the Constitution.¹⁶⁰ Although some had argued the law of corporations applied, treating a sovereign state as no more than a corporation raised serious constitutional issues. Although some degree of state sovereignty had been “abridged by the Constitution of the U.S.,” it remained the case that “whenever considered as a state, it is a Sovereign power.”¹⁶¹ And how could corporate law-based judgments be enforced against a sovereign power?

“A corporation may be dissolved, by a forfeiture of its Charter, through negligence or abuse of its Franchise. . . . Is there any authority in the U.S. to dissolve one of the American states?__God forbid__no Man will pretend such a thing.”¹⁶²

Iredell concludes that states cannot be treated as dependent corporations, as they retain all independent sovereign powers not delegated to the United States.

[W]hat right have we to proceed against any one of the states, by applying the law applicable to dependent corporate bodies, the mere creatures of Governmental Authority, to a State Sovereignty, dependent in no particular whatever on the United States but in certain cases voluntarily and solemnly surrendered? & in every other particular retaining all the attributes and real power of Sovereignty and

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 82.

¹⁵⁶ *Id.* (emphasis in original).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 85.

¹⁶¹ *Id.* at 87.

¹⁶² *Id.* at 88.

Independence. I presume therefore no general law as to corporations will apply to this case.¹⁶³

Iredell believed that compelling a state to defend itself in a suit for recovery of debt was analogous to similar suits against corporations. In this, both advocates and opponents of state suability were in agreement. Treating a state like a corporation, however, was incompatible with the idea of retained sovereignty, at least as sovereignty was understood according to the Law of Nations. And this was a critical point: The states *ought* to be treated as independent sovereign entities because the Constitution itself was created through the exercise of independent delegations of sovereign power by the people in the several states. Like Vattel, Iredell's rules of construction presumed that a sovereign people would not delegate power in a manner destructive of sovereignty itself.

Again, Iredell's basic conclusions were not generally denied by proponents of state suability. Instead, the conclusions were embraced as positive outcomes—yes, suing a state was analogous to suing a corporation and, yes, such a suit denied the states any claim to “equal sovereignty” with that of the national (or any other) government. To proponents, however, this was both a just and reasonable reading of Article III.¹⁶⁴ To opponents, on the other hand, such a reading betrayed the ratifiers' understanding that Article III would be narrowly construed in order to preserve the retained sovereignty of the states.¹⁶⁵

Political in-fighting between the Governor and the state legislature would result in the New York legislature authorizing a defense of the *Oswald* case in federal court.¹⁶⁶ This did not, however, suggest legislative agreement with Oswald's reading of Article III. When presented with the proposed Eleventh Amendment, New York was the first state to ratify.¹⁶⁷

3. *Hollingsworth v. Virginia: The Indecision of Virginia Governor Henry Lee*

Hollingsworth had its roots in the rampant land speculation that took place in the decades after the Revolution. The case involved a dispute between the state of Virginia and the Indiana Company—a group of land speculators which included Supreme Court Justice James Wilson¹⁶⁸--over a disputed section of land in western Virginia. Although initially stymied by a powerless national Congress and a recalcitrant Virginia legislature, the Indiana Company looked forward to the adoption of the federal Constitution and the new possibilities it would bring for their claim. Article III in particular appeared to

¹⁶³ *Id.* at 88.

¹⁶⁴ See, e.g., Essay by Hortensius, *supra* note 138.

¹⁶⁵ See George Clinton's Address to the New York Legislature (Jan. 7, 1794): “[The Supreme Court's decision in *Chisholm*] involves so essentially the sovereignty of each state, that no observations on my part can be necessary to bespeak your early attention to the subject matter of them. It may be proper, however, to suggest, that our Convention, when deliberating on the federal Constitution, in order to prevent the Judiciary of the United States from extending itself to questions of this nature, expressly guarded against such a construction, by their instrument of ratification.”), in 5 DHSC, *supra* note 2, at 93.

¹⁶⁶ See 5 DHSC, *supra* note 2, at 62-64.

¹⁶⁷ See Ratification by New York (March 27, 1794), in 5 DHSC, *supra* note 2 at 625.

¹⁶⁸ See 5 DHSC, *supra* note 2, at 282 n.50.

empower the new federal courts to hear (and enforce) claims brought by individuals against the states. Thus, soon after the adoption of the Constitution the state rather predictably found itself facing a suit in federal court brought by the Indiana Company soon after the adoption of the Constitution.¹⁶⁹

In August of 1792, the Supreme Court approved a subpoena ordering Virginia Governor Henry Lee and Attorney General James Innes to appear before the Court on February 4, 1793, or face a \$400 fine.¹⁷⁰ Innes, a member of the Virginia Ratifying Convention who advocated the adoption of the Constitution, considered the suit to involve “an attempted usurpation” by the federal court that threatened the “Sovereignty of the State.”¹⁷¹ Unsure of what to do, Governor Lee referred the matter to the Virginia Assembly which passed a resolution declaring that the Supreme Court had no jurisdiction over the suit and that a state could not be “made a defendant.”¹⁷² The Assembly left it to the Governor’s discretion, however, to determine how best to respond to the suit that had already been initiated before the Court. Still unsure whether the matter was “merely of a judicial nature” or instead “involve[d] important constitutional doctrine,”¹⁷³ Governor Lee traveled to Philadelphia where he witnessed the oral arguments in *Chisholm v. Georgia* and was present when the Court delivered its judgment in the case on February 18, 1793.¹⁷⁴ During this same period, Lee wrote to Virginia Senators James Monroe and John Taylor, suggesting “the propriety of introducing an amendment to the constitution of the U States explanatory of the rights of the federal judiciary.”¹⁷⁵ Having been among the few to hear the Justices’ opinions in their entirety, Lee returned to Virginia distracted (as always) by personal financial matters¹⁷⁶ and still uncertain about what to recommend to the Virginia House of Delegates.

Part II. *Chisholm* and the Massachusetts Road to Amendment

A. *Chisholm v. Georgia*

It should be clear by now that *Chisholm* did not explode like a bombshell on an unsuspecting public. The issue of state suability had long been the subject of debate prior to the Court’s decision in February 1793. *Chisholm* was just one of many suits against the states pending before the Supreme Court. Nor did the decision shock the state legislatures into immediate action. Virginia Governor Lee attended the oral presentation of the Justice’s opinions and subsequently left town to take care of some

¹⁶⁹ Lawyers for the Company were William Lewis and William Rawle. See DHSC, *supra* note 2, at 282.

¹⁷⁰ *Id.* at 282.

¹⁷¹ James Innes to Henry Lee (Jan. 22, 1793), in 5 DHSC, *supra* note 2, at 324.

¹⁷² Proceedings of the Virginia House of Delegates (Dec. 18, 1792), in 5 DHSC, *supra* note 2, at 322.

¹⁷³ Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 14, 1792), in 5 DHSC, *supra* note 2, at 320-21.

¹⁷⁴ See 5 DHSC, *supra* note 2, at 284.

¹⁷⁵ Henry Lee to James Wood (Mar. 3, 1793), in 5 DHSC, *supra* note 2, at 332.

¹⁷⁶ See Henry Lee to James Ward (March 3, 1793), in 5 DHSC, *supra* note 2, at 332 (“All of these matters I shall soon have the pleasure of communicating on my return which will not be so soon as I desire, in as much as private business of magnitude to myself must detain me here”). For a discussion of Henry Lee’s financial woes and their impact on his political career, see Kurt T. Lash & Alicia Harrison, Minority Report: John Marshall and the Defense of the Alien and Sedition Acts, 68 Ohio St. L.J. 435, 468 (2006).

personal financial matters, still unsure of how Virginia should respond to its own suit pending before the Court. Georgia took no official action on the *Chisholm* decision until much later in the year. In fact, it turns out that there was little public discussion of the actual opinions in *Chisholm*, if for no other reason than they were difficult (and expensive) to obtain. The original report of the Court's decision was hopelessly incorrect and publication of the full opinions was delayed due to copyright concerns. For months, governors and state legislatures did not appear to know how many Justices had actually voted with the majority.

None of this mattered to the public debate. The fact that a majority of the Supreme Court had actually ruled that states were subject to such suits was important, but the particular facts and full opinions in the case were of little moment. Unlike today, in 1793 few people viewed the opinions of five justices in Philadelphia as presumptively authoritative constructions of the Constitution. One of the major contributions to constitutional theory over the last decade has been the growing appreciation of the role the "people out of doors" played in the early construction and interpretation of the Constitution.¹⁷⁷ The basic insight of work like Professors Larry Kramer and Christian Fritz is that the people in the early Republic expected that they would play a role in liquidating the meaning of the document. It would be more than half a century before the Supreme Court established a significant cultural role in determining the "true" meaning of the Constitution.¹⁷⁸ If anything, the people considered themselves the court of last appeal, and it was their construction of the Constitution that counted.

This is not to say, however, that we should ignore the opinions in *Chisholm*. The opinions of the Justices did play *some* role in the public debate. Also, whatever their contemporary impact, the opinions illustrate the interpretive choices before the Court, and the reasons that divided opponents from supporters of state suability. Finally, if for no other reason, the constitutional views of Justice James Iredell deserve more study than they have heretofore received. It is a common canard-- one repeated in even the most recent literature on the Eleventh Amendment--that Iredell had little to say about the constitutional issue before the Court. In fact, the Justice had been considering the question for months and prepared at least two essays on the subject, one which went unreported but may have been delivered orally when the Justices delivered their opinions in *Chisholm*.

1. *Prequel: Farquhar v. Georgia*

The background controversy in *Chisholm* involved the estate of South Carolina merchant Robert Farquhar who had delivered goods to the state of Georgia but had never been paid. The initial suit, *Farquhar v. Georgia*, was filed in the United States Circuit Court for the district of Georgia where it was heard by Justice James Iredell (riding on circuit) and district judge Nathaniel Pendleton.¹⁷⁹ Georgia Governor Edward

¹⁷⁷ Larry Kramer, *The People Themselves; Popular Constitutionalism and Judicial Review* (2004); Fritz, *American Sovereigns*, *supra* note 34.

¹⁷⁸ In the first decades of the Constitution, there were a great many battles to be played out between the people and their governments in terms of daily oversight. See Christian Fritz, *American Sovereigns*, *supra* note 34.

¹⁷⁹ See 5 DHSC, *supra* note 2, at 128.

Telfair, through his attorneys, argued that, as a “free, sovereign and independent state,” Georgia “cannot be drawn or compelled, nor at any time past hath been accustomed to be, or could be drawn or compelled . . . 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.”¹⁸⁰

In his circuit court opinion, Justice James Iredell took the position that, absent express language to the contrary, the term “controversies” should be read to include only those controversies involving states which were permitted at common law prior to the adoption of the Constitution.¹⁸¹ Unlike courts in other countries that have “prima facie” jurisdiction over all causes except for “special exceptions,” the federal courts of the United States had no powers except those specially delegated to them under the Constitution and authorized by the federal Congress. This created two problems: Under Article III, it seemed to Iredell that the Supreme Court had exclusive jurisdiction over cases wherein a state was a party and, in any event, Congress had not provided lower federal courts jurisdiction to hear such claims against a state. Iredell concluded that the suit should be dismissed; Judge Nathaniel Pendleton, for unknown reasons, agreed.¹⁸²

Apparently having written his Uncle about the case, Judge Pendleton received a reply in which Edmund Pendleton confessed his surprise that some “respectable opinions” believed that states could be sued by a “citizen of another state.”

I have been taught by all writers on the subject, that there is no earthly tribunal before whom Sovereign and Independent nations can be called & compelled to do justice, either to another Nation or its individual citizens__ Nor can I conceive any idea of a proper process to bring a state into Court, or do execution of its judgment. . . . This being the general law of nations, how are the United States to be distinguished from others as to this point? Altho’ confederated for certain purposes, each remains a Sovereign & independt State to every purpose, not conceded to the General Government by the Federal Constitution.”¹⁸³

Edmund Pendleton, the man who had presided over the Virginia Ratifying Convention, believed that the disputed passage in Article III referred only to cases where a state is a plaintiff. Nor could congressional statutes be read to impliedly authorize such suits. Following Madisonian rules of construction, Pendleton wrote that “[a] suit against a Sovereign state” was “a privilege of too much importance to be granted away in so loose a manner. If Congress had meant to have authorized such a suit, they would surely have directed the mode of proceeding.”¹⁸⁴

2. *Chisholm in the Supreme Court*

¹⁸⁰ Plea to Jurisdiction (Oct. 17, 1791), in 5 DHSC, *supra* note 2, at 143.

¹⁸¹ James Iredell’s Circuit Court Opinion (Oct [21], 1791, in 5 DHSC, *supra* note 2, at

¹⁸² *Id.* at 155.

¹⁸³ See Edmund Pendleton to Nathaniel Pendleton (May 21, 1792), in 5 DHSC, *supra* note 2, at 157.

¹⁸⁴ *Id.* at 157-58.

Complying with Iredell’s reading of Article III, Chisholm took his case directly to the Supreme Court where he filed suit in early 1792.¹⁸⁵ The word quickly spread that the Supreme Court was scheduled to hear a case involving “questions of magnitude” that “may affect the interests of states and individuals.”¹⁸⁶ In December of 1792, the Georgia House of Representatives passed resolutions declaring that allowing suits like Chisholm’s to go forward “would effectively destroy the retained sovereignty of the states,” and would “render [states] but tributary corporations to the government of the United States.”¹⁸⁷ It was the opinion of the House that Article III did not grant the federal courts power “to compel states to answer any process” in a case commenced by an individual against a state.¹⁸⁸ The “contrary construction thereof . . . is totally repugnant to the smallest idea of sovereignty.” The House further resolved that “the state of Georgia will not be bound by a decree or judgment of the said supreme court subjecting the said state to any process” in such a case “but will consider the same until an explanatory amendment of the said constitution takes place as unconstitutional and extrajudicial, and that the same will and ought to be *ipso facto* void, and to be holden for none.”¹⁸⁹ The resolves were transmitted to the state’s federal representatives so that they might “apply for an explanatory amendment accordingly.”¹⁹⁰

Despite being given multiple opportunities to do so, the State of Georgia declined to appear before the Supreme Court and present its argument on either jurisdiction or the merits of the case. On the day of oral arguments, the Court went so far as to invite *any* member of the Bar in attendance to offer an argument in opposition to Chisholm’s suit. The offer was met with silence from the audience.¹⁹¹ Thus, on February 5, 1793, Edmund Randolph, Attorney General of the United States but acting as private counsel for Chisholm, presented his argument to the court without rebuttal.

3. *Randolph’s argument*

Randolph’s oral argument in *Chisholm* hewed closely to the text of Article III and stressed the good policy of allowing individuals the opportunity to seek justice against the states in federal court.¹⁹² Recognizing that the appropriate rule of construction turned on the issue of delegated sovereign power, Randolph refuted the idea that the Constitution received its power from the people of the states. According to Randolph, the Constitution “derives its origin immediately from the people”—meaning a single *national* people.¹⁹³ Far from exhibiting concerns about state sovereignty, the people of the United States had placed serious restrictions on state authority, such as the *ex post facto* Clause.¹⁹⁴ Allowing states to sue individuals but not individuals to sue the states prevented the full vindication of these restrictions and, in fact, placed the states on a

¹⁸⁵ 5 DHSC, *supra* note 2, at 130.

¹⁸⁶ General Advertiser (Aug. 6, 1792), in 5 DHSC, *supra* note 2, at 158.

¹⁸⁷ Proceedings of the Georgia House of Representatives (December 14, 1792), in 5 DHSC, *supra* note 2, at 161.

¹⁸⁸ *Id.* at 162.

¹⁸⁹ *Id.* at 162.

¹⁹⁰ *Id.*

¹⁹¹ See George Morgan to Alexander McKee (Feb. [20], 1793), in 5 DHSC, *supra* note 2, at 222.

¹⁹² *Chisholm v. Georgia*, 2 U.S. 419, 420 (1793).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

higher level than the people themselves.¹⁹⁵ Randolph insisted, however, that nothing in his argument suggested that the people could sue the *national government*.¹⁹⁶

4. *The Opinions of the Justices*

The justices delivered their opinions in *Chisholm* orally from the bench on February 18, 1793. The opinions of Blair and Cushing were short and focused on the text of Article III: The words of Article III clearly allow suits between a state and a party from out of state. This case involves a suit between a state and a party from out of state: *ergo*, jurisdiction lies.¹⁹⁷ The opinions of Justice Wilson and Jay were more substantial, and are better known.

i. *The Opinion of James Wilson*

The fact that Justice James Wilson wrote anything at all is surprising, at least in terms of modern judicial ethics. The same issue of state suability in *Chisholm* was *also* before the Court at the same time in *Hollingsworth v. Virginia*¹⁹⁸—a case in which Wilson had a direct financial interest in the Court’s rejecting any claim of state sovereign immunity.¹⁹⁹ Wilson nevertheless used the occasion to issue an extended dissertation on sovereignty and the law of nations. In words that would be ruefully repeated by *Chisholm*’s critics, Wilson opened his opinion by announcing the “important” issue before the Court in terms unmistakably critical of state sovereignty:

This is a case of uncommon magnitude. One of the parties to it is a State; certainly respectable, claiming to be sovereign. The question to be determined is, whether this State, so respectable, and whose claim soars so high, is amenable to the jurisdiction of the Supreme Court of the United States? This question, important in itself, will depend on others, more important still; and, may, perhaps, be ultimately resolved into one, no less radical than this ‘*do the people of the United States form a Nation?*’²⁰⁰

Georgia insisted it occupied the same position as any other sovereign nation whose retained rights must be preserved through the properly narrow construction of delegated sovereign power. Justice Wilson, however, rejected any analogies to the law of

¹⁹⁵ *Id.*.

¹⁹⁶ *Id.* at 425.

¹⁹⁷ According to Justice Blair, reading Article III in a narrower manner would itself violate the Constitution. *Chisholm*, 2 U.S. at 451 (Blair, J. concurring).

¹⁹⁸ Governor Lee in fact was in attendance when Wilson read his opinion from the bench in *Chisholm*. See 5 DHSC, *supra* note 2, at 332.

¹⁹⁹ 5 DHSC, *supra* note 2, 504. Throughout his life, James Wilson exhibited the unfortunate tendency of issuing legal opinions in matters where he had a direct financial conflict of interest. For example, while deeply in debt to the Bank of North America, he published his pamphlet supporting Congress’s power to charter the Bank. Robert G. McCloskey, Introduction to 1 *The Works of James Wilson* 21-22 (Robert G. McCloskey ed., 1967). For additional discussion of Wilson’s involvement in cases in which he had a personal interest see 1 Warren, *supra* note 9, at 99 n.2.

²⁰⁰ *Chisholm*, 2 U.S. at 453 (emphasis added).

nations.²⁰¹ Rather than a compact between sovereigns, Wilson viewed the constitution as forming a single consolidated *nation*. To him, the state's claims rested on a feudal conception of sovereignty which, although "degrading to man," nevertheless "still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States."²⁰² Despite Wilson's rather provocative statements regarding the very idea of state sovereignty (and those who embraced it), in the end his position on state suability rested entirely on what he viewed was the plain meaning of the text.²⁰³ Given its harsh language, extensive distribution of Wilson's full opinion in *Chisholm* most likely would have only inflamed public sentiment against the majority's decision. Not surprisingly, despite the fact that Judge Wilson's supporters widely reprinted his work in newspapers during this period,²⁰⁴ neither they nor the supporters of state suability saw any advantage in publishing his opinion in *Chisholm*.²⁰⁵

ii. *The Opinion of John Jay*

Although every bit the nationalist as was Wilson, John Jay presented his position in far less strident tones. Jay's key point, however, remained the same: Was federal power derived from a single undifferentiated national people (thus no need for narrow construction) or delegated by the independent sovereign people of the several states? Setting the tone for all that follows, Jay argued that a single national people preexisted the states and it was from this undifferentiated people that the Constitution came into being.²⁰⁶ Passing over the historical accuracy of Jay's account,²⁰⁷ his underlying assumption about the document is clear: The Constitution emerged from a single national people. The guiding purposes of the document are found in the opening preamble, particularly the declared intent to "establish justice" and "insure domestic tranquility." Rejecting calls for a limited construction, Jay insisted that Article III be "construed liberally."²⁰⁸ To Jay, this meant that jurisdiction over the states should be broadly construed in the absence of language expressly stating otherwise.²⁰⁹ This is precisely the opposite of the rule of strict construction which excludes application of federal power against the states unless expressly enumerated or by unavoidable

²⁰¹ *Id.* ("From the law of nations little or no illustration of this subject can be expected . . . By that law the several States and Governments spread over our globe, are considered as forming a society, not a nation.").

²⁰² *Chisholm*, 2 U.S. at 457-58.

²⁰³ According to Wilson, "this doctrine [of state suability] rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself." *Id.* at 466.

²⁰⁴ Newspapers throughout the country regularly published Wilson's grand jury charges during this period.

²⁰⁵ The short synopsis of the Justice's opinion published by "S.B." did not mention Wilson's dramatic and derogatory descriptions of the concept of state sovereignty.

²⁰⁶ *Chisholm*, 2 U.S. at 470-71.

²⁰⁷ Julius Goebel, the author of the first volume of the History of the Supreme Court of the United States, describes the above argument as exhibiting "the lamentable standards of American judicial historiography." See Julius Goebel, Jr., 1 *The History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, 732 (1971).

²⁰⁸ *Chisholm*, 2 U.S. at 476-77.

²⁰⁹ *Id.* at 477 (had the framers intended to limit suits in which states were a party to those in which the states appeared as plaintiff, "it would have been easy to have found words to express [that intention].")

implication. Finally, Jay carefully distinguished the case of the national government from that of the states: Although states could be compelled to answer in federal court, the same reasoning did not apply to suits against the *national government*.²¹⁰

iii. *The Dissent of James Iredell*

The rise of revisionist Eleventh Amendment scholarship has inevitably led to a rise in scholarly appreciation for the nationalist opinions of men like James Wilson and John Jay and a diminished appreciation for Judge James Iredell and his *Chisholm* dissent.²¹¹ The same scholars who criticize *Hans*' reading of the amendment as representing a background principle of constitutional interpretation also tend to minimize the constitutional dimensions of Iredell's opinion.²¹² As some have put it, Iredell's comments on the Constitution amounted to no more than a minute in an argument of an hour and a half.²¹³ Even the most recent scholarly accounts presume that the U.S. Reports contain a full discussion of Iredell's views and that he did not commit himself on the constitutional issue.²¹⁴ It turns out, however, that Iredell's views on the constitutional question of state sovereignty were far more extensive than the version presented in the United States Reports. We know, for example, that Iredell had been composing his thoughts on the constitutional issue for some time prior to his *Chisholm* opinion.²¹⁵ We also now know that Iredell drafted extensive remarks on the constitutional issue of state sovereignty for *Chisholm* which are not published in the official opinion but may have been delivered as part of his oral remarks.²¹⁶

I will address these extended remarks in a moment. First, however, even if one focuses only on the commonly published version of his dissent, one finds principles of constitutional construction which contradict the nationalist views of Jay and Wilson and which lead inevitably to the strict construction of Article III. Consider, for example,

²¹⁰ *Id.* at 478 (“[I]n all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view.”).

²¹¹ See, e.g., Barnett, *The People or the State?*, *supra* note 11 (holding up the opinions of Wilson and Jay as best representing the original “individualist” conception of popular sovereignty); Akhil Reed Amar, *Of Sovereignty and Federalism*, *supra* note 15; Jeremy M. Sher, Note: The Renewed Significance of James Wilson’s Writings on Popular Sovereignty in the Wake of *Alden v. Maine*, 61 N.Y.U. Ann. Surv. Am. L. 591 (2005).

²¹² See e.g., Calvin E. Johnson, *Righteous Anger*, *supra* note 62 at 267 (“Justice James Iredell, dissenting, did not reach the constitutional issue”); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty* 96 Nw. U. L. Rev. 1027 (2003) (Iredell “avoided the tough constitutional question and found his answer in the common law”); John V. Orth, *History and The Eleventh Amendment*, 75 Notre Dame L. Rev. 1147, 1155-56 (2000) (“Justice Iredell certainly spent by far the largest part of his dissent in *Chisholm* looking for legislative authorization for the exercise of jurisdiction over suits against states.”).

²¹³ John V. Orth, *History and the Eleventh Amendment*, 75 Notre Dame L. Rev. 1147, 1150 (2000) (“In a dissent taking at least an hour and a quarter to deliver, Iredell’s “extra-judicial” comments on the constitutional question occupied barely a minute at the very end.”).

²¹⁴ See Manning, *The Reading of Precise Constitutional Texts*, *supra* note 10, at 1679-80.

²¹⁵ See *supra* note 150 and accompanying text.

²¹⁶ See James Iredell’s Observations on “this great Constitutional Question,” (Feb. 18, 1793), in 5 DHSC, *supra* note 2, at 186.

Iredell's explanation for why common law suits against the sovereign in England are analogous to suits against the American states:

Every State in the Union, in every instance where its Sovereignty is not delegated to the United States, I consider to be as completely Sovereign, as the United States are in respect to the powers surrendered. The United States are Sovereign as to all the powers of Governments actually surrendered: Each State in the Union is Sovereigns to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course, the Part not surrendered must remain as it did before.²¹⁷

There are several critical assumptions about state and federal power contained in this brief statement. Iredell describes the federal government as having derived its powers from the sovereign states, with all non-delegated power retained by the same. This has implications both for the application of the common law to the states, but also for the construction of delegated federal power. Most of all, it directly contradicts the description of the federal Constitution having been derived from a sovereign national people provided by Justices Wilson and Jay. When Iredell spoke of sovereign states, this was a shorthand reference to the sovereign people in the several states. Like most of the Founders, Iredell embraced the concept of popular sovereignty—a concept that applied first and foremost to the collective people of a state.²¹⁸

Iredell's rejection of the common law of corporations is explicitly based on the constitutional status of the sovereign states and the prior and continued existence of a separate sovereign people within the states:

A Corporation is a mere creature of the King, or of Parliament . . . It owes its existence, its name, and its laws, . . . to the authority which creates it. A state does not owe its origin to the Government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source

²¹⁷ *Id.* at 172.

²¹⁸ In *Penhallow v. Doane's Adm'rs*, 3 U.S. 54, 93 (1795), Iredell wrote,

In such governments, therefore, the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their politic capacity only. . . . I conclude, therefore, that every particle of authority which originally resided either in Congress, or in any branch of the state governments, was derived from the people who were permanent inhabitants of each province in the first instance, and afterwards became citizens of each state; that this authority was conveyed by each body politic separately, and not by all the people in the several provinces, or states, jointly, and of course, that no authority could be conveyed to the whole, but that which previously was possessed by the several parts; that the distinction between a state and the people of a state has in this respect no foundation, each expression in substance meaning the same thing; consequently, that one ground of argument at the bar, tending to show the superior sovereignty of Congress, in the instance in question, was not tenable, and therefore that upon that ground the exercise of the authority in question cannot be supported.

Id. at 93.

as itself. The voluntary and deliberate choice of the People. . . . A State, though subject in certain specified particulars to the authority of the Government of the United States, is in every other respect totally independent upon it. The People of the State created The People of the State can only change its Constitution.²¹⁹

Finally, there is Iredell's telling reference to the Law of Nations. Although some scholars have noted Iredell's reference, no Eleventh Amendment scholar appears to have investigated Iredell's meaning, much less considered its critical role in Iredell's theory of constitutional interpretation. In fact, Iredell's reference ties together his claims in the North Carolina Ratifying Convention about the proper interpretation of federal power, his discussion of the Law of Nation's in his *Oswald* "Observations," and his view of the proper construction of Article III in his draft opinion for *Chisholm*.

In the following passage, Iredell criticizes Randolph's use of the Law of Nations to support the general policy of state suability:

No part of the Law of Nations can apply to this case, as I apprehend, but that part which is termed "The Conventional Law of Nations": nor can this any otherwise apply than as furnishing rules of Interpretation, since unquestionably the People of the United States had a right to form what kind of Union, and upon what terms they pleased, without reference to any former examples.²²⁰

At first glance this is an exceedingly odd statement. It begins with a reference to a body of law common to all nations, and ends with a reference to the people's sovereign right to ignore all former (and foreign) examples and create a completely unique republic. How exactly does a rule of interpretation furnished by the "Conventional Law of Nations" relate to the people's right to form a Union wholly unlike any other nation?

Part of the answer can be found by revisiting Iredell's discussion of the Law of Nations which he wrote some months earlier in conjunction with the *Oswald* case. There, Iredell listed three categories of the Law of Nations, *Necessary*, *Conventional* and *Customary*.²²¹ The only applicable area to Iredell involved the Conventional Law of Nations, or "that part of the Law of Nations which applies to the construction of the treaties the United States have with foreign Powers."²²² At this point in his manuscript, Iredell planned to insert a definition from Emmerich de Vattel's "Law of Nations."²²³ Published in 1752, Vattel's *Le Droit des Gens*²²⁴ deeply influenced the Founding

²¹⁹ James Iredell's Observations on State Suability, in 5 DHSC, *supra* note ___ at 183. See also Julius Goebel, Jr., 1History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 729 (This section of Iredell's opinion "is an explicit recognition of the transfer of royal prerogatives to the states").

²²⁰ Iredell's Observations on this great Constitutional Question, *supra* note 216 at 184-85.

²²¹ Iredell's Observations on State Suability, *supra* note 150 at 81.

²²² *Id.* at 82.

²²³ *Id.* at 82 nn.7, 8.

²²⁴ See Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle: Appliques a la Conduite et aux Affaires des Nations et des Souverains* [The Law of Nations, or Principles of the Law

generation and his treatise would continue to be well-cited in legal scholarship and judicial opinions for the next one hundred years²²⁵--indeed, up until today.²²⁶ In his section on the proper construction of treaties, Vattel explained that, because sovereigns are presumed to have retained all sovereign powers not expressly delegated away, delegations of sovereign power must be strictly construed.²²⁷ Thus, when Iredell linked the proper construction of the Constitution to the Conventional Law of Nations, he grounded it on the commonly accepted principles of international law.

This rule of construction had important implications when it came to the subject of retained sovereignty. In his *Oswald* essay, Iredell stressed that Vattel's rule was appropriate because the Constitution "form[ed] out of several independent Governments a new one composed of definite Powers."²²⁸ In every area "where authority has been surrendered to the general Government, the states as such have no right to exercise their sovereignty separately."²²⁹ However, "[i]n every instance where authority has not been so surrendered, the separate states remain sovereign & independent: for they have done nothing to divest that sovereignty."²³⁰ Although other sovereigns might have permitted themselves to be sued for recovery of debt, whether the people of the United States had done so was a matter of constitutional construction—a construction that took into account the people's right to form whatever manner of government, and governmental liability, they pleased. As Iredell put it, "true construction" of the Constitution required determining in "any particular instance . . . whether the Sovereignty of the state be or not be retained."²³¹

Vattel had written that delegated authority required a clear or express delegation. Absent such a clear statement, power was presumed retained by the sovereign. In the published version of his *Chisholm* dissent, Iredell adopts this same point about strict construction and the presumed retention of all power not clearly delegated away:

I think every word in the Constitution may have its full effect without involving this consequence ["a compulsive suit against a state for recovery of money"], and that nothing but *express words or insurmountable implication* (neither of which, I consider, can be found in this case) would authorize the deduction of so high a power.²³²

of Nature Applied to the Conduct and Affairs of Nations and Sovereigns] (New York, S. Campbell 1796) (1757).

²²⁵ For a discussion of Vattel's influence on the Founding generation, see Daniel G. Lang, *Foreign Policy in the Early Republic: The Law of Nations and the Balance of Power* (1985). See also Francis Stephen Ruddy, *International Law in the Enlightenment, The Background of Emmerich de Vattel's *Le Droit des Gens* ("The Law of Nations")* (1975).

²²⁶ See *District of Columbia v. Heller*, 554 U.S. ____ (2008), slip op. at 14 n.10 (Scalia, J.).

²²⁷ See *id.* at Book I, Chap. 2 sect. 16 (On the duty of self-preservation); see also *id.* at Book 2, sections 305, 308 (on the need to narrowly construe "odious" delegations of sovereign power).

²²⁸ Iredell's *Observations on State Suability*, *supra* note 150 at 82. (emphasis in original).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Iredell's *Dissent*, in 5 DHSC, *supra* note 2, at 185.

Iredell stressed the need to apply strict construction (a clear statement rule) in any case involving a claimed delegation of a “high power.” In his speech on the Bank of the United States, James Madison embraced this same rule of construction—a rule which Madison claimed had been promised to the ratifiers of the Constitution. In fact, in his draft notes for his *Chisholm* opinion—notes which have gone almost completely unnoticed in Eleventh Amendment scholarship-- Iredell laid out almost the identical rules of construction.

iv. *James Iredell’s “Observations on This Great Constitutional Question”*

In the vast scholarship on the Eleventh Amendment, I have been able to locate but a single citation to Iredell’s *“Observations on This Great Constitutional Question.”*²³³ Prepared in conjunction with his opinion in *Chisholm*, the Observations may have been delivered orally along with the rest of his opinion.²³⁴ The essay was not widely available until published in 1994 as part of the fifth volume in the Documentary History of the Supreme Court, which might account for its omission in the traditional canon of Eleventh Amendment historical materials.

Just as Madison opens his speech on the Bank of the United States with the general rules of constitutional interpretation, Iredell states the proper rules of constitutional construction in the opening passages of his “Observations”:

I conceive before any authority can be deemed to be conveyed under this great Instrument, the words must be either clear & express for that purpose, or carry with them a fair and reasonable implication.

That in proportion to the greatness & importance of the surrender, ought to be the requisite of greater clearness in the expression.

That where every word can be fully satisfied, without implying a grant of a very high authority, that authority ought not to be understood to be conveyed.

That when the consequences ensue from one construction, inconsistent with the known basis on which the Constitution was formed & adopted, that construction shall not be received, if there be another at least equally natural & more consistent with the principles of the Constitution, which can take place.²³⁵

Compare Iredell’s rules with those of James Madison in his speech against the Bank of the United States:

²³³ See Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1559, 1578 n.86 (2002). Almost all scholarly analysis of *Chisholm* and Iredell’s Opinion either omits or is simply unaware of Iredell’s extended comments on the constitutional question before the court. See e.g., Goebel, 1 History of the Supreme Court of the United States, *supra* note 207 at 729-30.

²³⁴ See 5 DHSC, *supra* note 2, at 186 (editorial note).

²³⁵ Iredell’s Observations on this great Constitutional Question, in 5 DHSC, *supra* note 2, at 187.

[1] An interpretation that destroys the very characteristic of the Government cannot be just. . . .

[2] In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.

[3] Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.

[4] In admitting or rejecting a constructive authority, 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.²³⁶

Both Madison and Iredell required any claimed power fit with the overall principles of the Constitution and that these principles are found in the original understanding of the ratifiers (Iredell’s “known basis” upon which the Constitution was adopted). Most importantly, both men insisted that the more important the power, the greater need for an express delegation of authority, for it was unlikely that important matters would have been “left to construction.” Madison believed that this rule of strict construction (particularly when it came to important powers) became an express part of the Constitution through the Ninth and Tenth Amendments. Iredell finds the rule in the commonly accepted Law of Nations of Emmerich de Vattel. St. George Tucker believed that both men were correct.²³⁷

Attorney General Randolph, of course, had applied a very different rule of construction. According to Randolph, the framers of Article III twice had the opportunity to clarify that the provision did not allow suits by individuals against the states. Because they did not do so when they had a chance suggested that they thought such power was appropriate. From Iredell’s perspective, however, this flipped the proper rule of construction on its head. If a power did not exist before the Constitution was enacted, one simply could not say the power “continue[d] unless excluded.” Instead, the rule should be that the power “does not exist, if not conveyed by this Instrument.”²³⁸ And here, Iredell fairly erupts,

[I]f ever there was a case, where the Convention should have spoken out explicitly, if they meant what is ascribed to them__this certainly was the case__Where whole Sovereignties are to be brought to the Bar of Justice in the very same manner, & without any distinction, as single Individuals.²³⁹

²³⁶ 1 Annals of Cong. 1944 (Joseph Gales ed., 1834) (statement of Rep. Madison).

²³⁷ See St George Tucker, View of the Constitution, in 1 Blackstone’s Commentaries, Appx D 151 (1803) (citing Vattel and the Ninth and Tenth Amendments in support of the general rule of strict construction of federal power).

²³⁸ Iredell, Observations on this Great Constitutional Questions, in 5 DHSC, *supra* note 2 at 189.

²³⁹ *Id.* at 189 (underlining in original).

“Observations on This Great Constitutional Question” should put to rest once and for all the notion that Justice Iredell avoided taking a position on the constitutional issue of state suability and retained state sovereignty. Not only do his notes for *Chisholm* and the *Oswald* case present a carefully thought out and constitutionally based opposition to individual suits against the states, his interpretive approach matched that of James Madison and embraced the very rule of construction that Madison and the Federalists promised the ratifiers in the state conventions.

G. *The Reporting of Chisholm v. Georgia*

Newspaper accounts of *Chisholm* were immediately and hopelessly botched. The day after the Justices delivered their opinions, Philadelphia’s *Dunlap’s American Daily Advertiser* published a short account of the case that incorrectly stated the issues before the Court, presented the wrong facts (describing instead the facts from a *different* case), and radically misstated the conclusion of the majority. According to the paper, the Court had to decide not only whether a state could be sued by an individual, but also whether the *United States* was subject to such suits. The report went on to describe the facts from a different case arising out of Georgia, *Georgia v. Brailsford*. Finally, although correctly stating that the case was decided four to one in favor of the attorney general’s position, the reporter describes the majority as concluding “that every individual of any state has the natural privilege of suing *either the United States* or any state whatever in the Union, for redress in all cases where he can prove a just claim, a loss, or an injury having been sustained, a vice versa.”²⁴⁰ The erroneous report was picked up and published in other newspapers around the country.²⁴¹

Two days later, the Supreme Court clerk, Samuel Bayard sent the *Advertiser* a corrected account of the case along with a summary of the opinions “which will be found accurate, but by no means so full as I could wish,” and that Bayard thought might “give umbrage to the Advocates of State Sovereignty.”²⁴² Taking the Justice’s opinions in the order delivered, Bayard first described Iredell’s opinion:

In an argument of one hour and a quarter, he maintained the negative of this question, he considered the states as so many separate independent sovereignties. He relied much on the books of English jurisprudence in proof that no sovereign could now be sued unless with the consent of the same__He was aware that the states had transferred certain prerogatives of their sovereignty to the United States, but whatever they had not clearly transferred were certainly retained__The right of commencing a suit against the states he did not think clearly vested in the government

²⁴⁰ Dunlap’s *Daily American Advertiser* (Feb. 19, 1793) [Dunlap’s *American Daily Advertiser*; Issue: 4390; Page: [3], available online in America’s Historical Newspaper database.

²⁴¹ See, e.g., *The Providence Gazette and Country Journal* (Mar. 2, 1793) Volume: XXX; Issue: 9; Page: [3]; *Independent Gazetteer* (Philadelphia) (Feb. 23, 1793); *Pennsylvania Journal* (Philadelphia) (Feb. 27, 1793); *New York Journal* (New York) (Feb. 27, 1793); *Newport Mercury* (Newport) (Mar. 4, 1793); *Diary*, published as *The Diary or Loudon’s Register* (Feb. 20, 1793); Issue: 320; Page: [3]; *The Mirrour* (Mar. 11, 1793); Volume: I; Issue: 20; Page: [3]; *Vermont Journal*, published as *Vermont Journal and Universal Advertiser* (Mar. 11, 1793); Volume: X; Issue: 502; Page: [2].

²⁴² See 5 DHSC, *supra* note 2, at 220 n.1.; See *Dunlap’s American Daily Advertiser* (Feb. 21, 1793); Page: [3], available online in America’s Historical Newspaper database.

of the United States, nor recognized by the judiciary law past in pursuance of the 3d article of the constitution__Judge Iredell referred to many authorities, and on a variety of grounds declared his opinion to be against the motion of the attorney general.²⁴³

Note that Clerk Bayard understood Iredell as having made a constitutional as well as statutory argument; if anything, Iredell's statutory argument is underplayed. Bayard's emphasis on the constitutional side of Iredell's dissent may indicate that Iredell did in fact include his "Observations on This Great Constitutional Question" in his oral remarks on the case. Note also that Bayard twice refers to Iredell's rule that delegated sovereign power must be "clearly transferred" or "clearly vested." Bayard apparently understood this to be central to Iredell's argument.

Turning to Justice Wilson, Bayard reported that Wilson "took a very broad and enlarged view of the question, which he thought would again resolve itself into a question of no less magnitude than whether the people of the United States formed a nation. . . .his argument was elegant, learned, and contained sentiments highly republican."²⁴⁴ Bayard's report of Justices Cushing and Blair was similarly brief.²⁴⁵

On the other hand, Clerk Bayard's account of his employer's opinion was effusive and fairly detailed (in comparison with the others): "Chief justice Jay delivered one of the most clear, profound and elegant arguments perhaps ever given in a court of judicature," Bayard wrote. "[H]e took a view of the United States previous to the late revolution, when we were the subjects of a sovereign after our independence he considered the people as becoming individually sovereign. In this capacity they formed the present government, he then expressed the reasons of adopting the present constitution as expressed in the preamble of the same . . ." According to the distribution of powers "which they had made in this instrument" "the judiciary department" had the power "of compelling the appearance of a state in the supreme court of the united states, even at the suit of an individual of another state." The Chief Justice then "commented on the wisdom and sound policy of this arrangement, and concluded in favour of the attorney general's motion in the present cause."²⁴⁶

Despite Bayard's obviously partisan presentation of the opinions, it seems he correctly understood the key difference between Jay and the dissenting Iredell: The proper interpretation of federal power turns on the nature of the sovereign who delegated the power in the first place. If delegated from a national people, then the interpretation of this power should reflect national principles; if delegated from separate state level sovereigns, on the other hand, then the interpretation should favor these independent entities.

²⁴³ 5 DHSC, *supra* note 2, at 218.

²⁴⁴ *Id.* at 219. Bayard also provided short statements on the opinions of Cushing and Blair. *Id.* at 218, 219.

²⁴⁵ *Id.*

²⁴⁶ Dunlap's American Daily Advertiser (Feb. 18, 1783), *in* 5 DHSC, *supra* note 2, at 219-20.

Sometime later, the Philadelphia printing house of T. Dobson, which had also recently printed the lectures of James Wilson,²⁴⁷ published a pamphlet containing the opinions of the Justices and the arguments of Attorney General Randolph.²⁴⁸ It is unclear who arranged for this publication, or when it first appeared. There is reason to think the persons involved sought to capitalize on the public interest in the case; the price was steep and there may have been an effort to copyright the opinions in order to prevent their being published in the local newspapers.²⁴⁹ In any event, the publication does not appear to have reached many people and by the summer of 1793, the Massachusetts Legislature found itself having to make special arrangements just to get its own copy of the opinions.²⁵⁰ Several months had passed since the decision was first handed down before Jay's opinion first appeared in public newspapers.²⁵¹ Boston's *Columbian*

²⁴⁷ See James Wilson, *An Introductory Lecture to the Course of Law* (Press of T. Dobson 1791).

²⁴⁸ A case decided in the Supreme Court of the United States, in February, 1793. In which is discussed the question--"Whether a state be liable to be sued by a private citizen of another state?" , Philadelphia: Printed by T. Dobson, at the stone-house, no. 41, South Second-Street., M,DCC,XCIII. [1793]. Evans # 25370.

²⁴⁹ The original pamphlet cost 50 cents which generated complaints about its being placed out of reach of the ordinary citizen. See "A Citizen of the United States" (Aug. 3, 1793), in 5 DHSC, *supra* note 2, at 231.

²⁵⁰ See A case decided in the Supreme Court of the United States, in February, 1793. In which is discussed the question, "Whether a state be liable to be sued by a private citizen of another state." Published by authority. Printed by Adams & Larkin, at the State-Press, Court-Street., M,DCC,XCIII. [1793]. According to the publication notes for Evans, the publication was "Ordered to be printed for the Massachusetts Legislature, June 22, 1793." See also Letter from Anonymous Correspondent (April 4, 1793), in 5 DHSC, *supra* note 2, at 228 (indicating that the Massachusetts legislature would soon get copies of the opinion "so that it will not be forgotten, or worked out of sight until next session").

²⁵¹ Individual opinions did not appear in newspapers until after the matter had been the subject of numerous newspaper articles and Governor Hancock had issued his call for a special session of the Massachusetts General Court to address Vassal's suit against the state. Seeing the tenor of public sentiment clearly moving against state suability, proponents made an effort to publish the opinions in *Chisholm* they believed were most helpful to their case. Apparently the effort was designed to have some impact on the September meeting of the Massachusetts General Court, for the publications appear in a wave just prior to that meeting and then stop immediately afterwards. For example, on July 23, the *Salem Gazette* published the "one national people" section of Chief Justice John Jay's opinion with the following introductory note:

[The *Chisholm*] decision has excited great apprehension in some, as striking at the root of individual State sovereignty; and the subject was taken up in the last session of the Legislature of this Commonwealth, but nothing decisive acted upon it. The attention of the citizens of Massachusetts will now be more closely drawn to this subject, since the State has been made a party-defendant in the above courts, at the suit of a foreign individual, by a writ served upon the Governor and the Attorney General. Many pieces have already appeared in the public papers on the subject, some of which at least, are addressed more to the passions than the reason. It is fortunate for the citizens of the United States, who are ever desirous of examining the real merits of any important question, that the Judges, before whom this was argued for several days [sic], have permitted the opinions they gave upon it to be published. From them we have selected for the information of our readers, that of Mr. Jay; who appears to have investigated the subject with great coolness, candor, and regard to the rights of the citizens; has placed it in a variety of views; and considered it not only on constitutional; but on rational grounds."

Centinel published Justice Cushing's short opinion in mid-July.²⁵² It appears that these two were the only opinions printed in any of the nation's newspapers and they seem to have all appeared in the period just prior to the special session of the Massachusetts General Court.²⁵³ Even with the sporadic publication of Jay and Cushing's opinions, in late summer of 1793 supporters of state suability complained to local newspapers about the failure to make all of the opinions available to the public at large.²⁵⁴ As late as September, people remained unclear about either the specific arguments in the opinion or even how many Justices had voted in favor of state suability.²⁵⁵

It did not matter. Although the decision triggered more vigorous discussion, the precise nature of the justices' opinions was irrelevant.²⁵⁶ The issue was whether a state could be compelled to appear before a federal court at the behest of an individual. The Supreme Court had said yes and that was enough to further fuel the on-going debate.

Salem Gazette (Salem Massachusetts) (July 23, 1793) Volume: VII; Issue: 354; Page: [3]. See also Gazette of the United States (August 8, 1793); Volume: IV; Issue: 125; Page: 497 (longer version of same passage, but not the above introduction); Gazette of the United States (Aug. 17, 1793) (concluding portion of the opinion); The Mirrour (July 12, 1793), Vol. I; Issue: 42; Page: [4] (includes introduction and only the "one national people" passage); The Monitor (Litchfield Connecticut) (Aug. 14, 1793) Volume: 9; Issue: 419; Page: [1] (longer version, but stops just prior to the "establish justice" section of the Preamble and the need for a liberal interpretation of Article III and ends with "to be continued"); The Carlisle Gazette, and the Western Repository of Knowledge (Sept. 4, 1793) Volume: IX; Issue: 421; Page: [2];(first half of Jay's opinion, no intro) (next two parts in Sep. 11 & 18th issues).

²⁵² See "Veritas" Columbian Centinel (July 17, 1793), in 5 DHSC, *supra* note ___ at 390. See also Dunlap's American Daily Advertiser (July 24, 1793); Issue: 4523; Page: [3] (Philadelphia, Pennsylvania)(includes introduction by Veritas about "different facts, but same underlying principle at issue in Vassal); Gazette of the United States (July 27, 1793); Volume: IV; Issue: 121; Page: 481;(Philadelphia, Pennsylvania) (same); American Mercury (July 29, 1793); Volume: X; Issue: 473; Page: [1] (Hartford, Connecticut)(same).

²⁵³ No one appears to have been interested in discussing Justice Wilson's opinion except for opponents who used his arguments as reasons *to support* an amendment rebuking the Court's construction of Article III. See, e.g., Account of William Martin's Speech in the Mass. House (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 435. (quoting Wilson's opinion and describing it "as containing a meaning derogatory to the dignity of every state in its distinct capacity."); Charles Jarvis Speech in the Mass. House (Sept. 23, 1793), in 5 Doc. at 439 (quoting Wilson's "whether the people of the united states form a nation" and replying that the real issue is "whether we are to be a state.").

²⁵⁴ See "A Citizen of the United States," National Gazette (August 3, 1793), in 5 DHSC, *supra* note 2, at 231-32 (complaining that the copyrighted 50 cent version prevented broad dissemination of the opinion). No newspaper appears to have printed any portion of Wilson's opinion in *Chisholm*. The same was true for Blair and Iredell's opinions, which like Wilson's, appeared only in pamphlet form.

²⁵⁵ See "Brutus," Independent Chronicle (Boston, Mass.) (July 18, 1793), in 5 DHSC, *supra* note 2, at 392. (claiming that "two of the associate justices have decided in favor of their own jurisdiction"); John Hancock's Address to the Massachusetts General Court (September 18, 1793), in 5 DHSC, *supra* note 2, at 416 (declaring that "[t]here judges of the United States of America, having solemnly given it as their opinion, that the several States are thus liable"). As the notes explain in the opening "Guide to editorial method" in 5 DHSC, *supra* note 2, at xxiv-xxv, there was no official reporter for the Supreme Court at this time. Although Dallas eventually published his Report in 1798, he took "substantial liberties" in his reporting of Supreme Court cases. See *id* at xxiv-xxv.

²⁵⁶ Even once some of Justices' opinions began to appear in newspapers, the public debate rarely addressed the actual opinions. The exception was the particular contempt heaped upon Justice Wilson's presumption of a nation composed of a single national people. See *infra* notes _____ and accompanying text.

B. General Response to the Decision

Although some supported the majority's decision, the reaction in the main was broadly, and strongly, negative. The decision was "generally reprobated here by Gentlemen of first information," wrote Philadelphia resident William Few to Georgia Governor Telfair.²⁵⁷ The underlying principles of the case were "so incompatible" with "the intentions of the framers of the Constitution that it must be resisted," otherwise it would "eventually tend to exterminate the small remainder of state Sovereignities."²⁵⁸ John Wereat had spoken with "New-England delegates who were unanimously of opinion that an explanation of that part of the Constitution should be made."²⁵⁹ Massachusetts Representative (and High Federalist) Theodore Sedgwick reportedly declared that "he could not have believed that any professional Gentleman would have risked his reputation on such a forced construction of the clause in the Constitution."²⁶⁰ An anonymous writer to the Boston Independent Chronicle reminded readers that when Article III had been discussed in convention, Federalists had dismissed warnings about suits against the states "as an absurdity in terms." Now, the writer sardonically noted, "the Chief Justice has made that to be right, which was at first doubtful, or improper."²⁶¹

Despite the broad opposition to the decision, the Georgia state government did not immediately respond. Having been served with the order of the Court, Governor Telfair instead appears to have authorized counsel to represent Georgia at the Supreme Court's next term in August.²⁶² At that time, the Court granted Georgia's motion to postpone further argument on the matter until February 1794.²⁶³ The state of Georgia took no further action until that Fall, and did then so only *after* having received the call from Massachusetts to join with other states in supporting a constitutional amendment. The road to the Eleventh Amendment thus leads us to Massachusetts.

C. *Vassal v. Massachusetts* and the Call for Amendment

A Loyalist who eventually ended up living on the outskirts of London, William Vassal fled Boston at the outbreak of hostilities with England. Vassal claimed his property and belongings had been unconstitutionally confiscated under state anti-loyalist laws and he spent years in court seeking both the return of his property and proceeds on the sale of his belongings.²⁶⁴ In early 1793, Vassal gave up seeking justice from the Massachusetts legislature and brought suit against the state in the Supreme Court of the United States.²⁶⁵ The suit was never argued; Massachusetts refused to appear in court to defend itself and the case was finally dismissed in 1797.²⁶⁶ Although the Supreme Court never

²⁵⁷ William Few to Edward Telfair (Feb. 19, 1793) (Phil.), in 5 DHSC, *supra* note 2, at 221.

²⁵⁸ *Id.*

²⁵⁹ John Wereat to Edward Telfair (Feb. 21, 1793) (Phil.), in 5 DHSC, *supra* note 2, at 223.

²⁶⁰ *Id.*

²⁶¹ Letter from an Anonymous Correspondent, Independent Chronicle (April 4, 1793) (Boston) in 5 DHSC, *supra* note 2, at 228.

²⁶² 5 DHSC, *supra* note 2, at 135.

²⁶³ *Id.*

²⁶⁴ Vassal claimed the confiscation amounted to an unconstitutional *ex post facto* law and a violation of the peace treaty with Great Britain. See *id.* at 361.

²⁶⁵ 5 DHSC, *supra* note 2, at 352-64.

²⁶⁶ *Id.* at 352.

heard the case, Vassal's suit put into motion a series of events that culminated in Massachusetts' leading the country in adopting the Eleventh Amendment to the Constitution.

Massachusetts had already proven itself quick to perceive a threat to the state's autonomy in suits like Vassal's. Two years earlier, Massachusetts attorney general James Sullivan had published his "Observations Upon the Government of the United States," prompting the first extended public discussion on whether Article III authorized individual suits against the states.²⁶⁷ Sullivan's Observations were written in response to a case brought against the state of Maryland.²⁶⁸ Now, with Massachusetts facing its own suit in federal court, the response was swift indeed. Less than one week after Vassal filed suit,²⁶⁹ and only *one day* after the Supreme Court issued its decision in *Chisholm*,²⁷⁰ Massachusetts Congressman Theodore Sedgwick proposed the following Amendment to the Constitution:

That no 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, foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.²⁷¹

The next day, Massachusetts Senator Caleb Strong submitted his own proposed amendment in the United States Senate:

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 of any foreign State.²⁷²

No recorded action was taken on Sedgwick's proposal in the House. In the Senate, after defeating a motion to postpone consideration, "further consideration thereof was postponed."²⁷³ Because both proposals were submitted with less than two weeks left in the congressional session,²⁷⁴ it seems likely the members thought the matter required more time to craft a proper response. Some members wished to postpone the discussion in the hope of generating support for broader declaration of limited federal power. Virginia Governor Henry Lee had requested that Senators James Monroe and John Taylor propose their own amendment on the subject of state suability. The two Senators resisted, however, explaining in a letter that it was too late in the session and that they

²⁶⁷ See *supra* note 131 and accompanying text.

²⁶⁸ *Van Staphorst v. Maryland*, discussed *supra* at note 126 and accompanying text.

²⁶⁹ Vassal filed suit on February 11, 1793. See 5 DHSC, *supra* note 2, at 364.

²⁷⁰ *Chisholm* was decided February 18, 1793. 5 DHSC, *supra* note 2, at 164.

²⁷¹ See Proceedings of the United States House of Representatives, *Gazette of the United States* (Feb. 19, 1793), in 5 DHSC, *supra* note 2, at 605-06. There is no record of such a motion in either the House Legislative Journal or the Annals of Congress. *Id.* 606. However, the fact that Sedgwick's motion was reported in two different newspapers, including one recording a second to Sedgwick's motion to introduce the amendment, the reports seem credible.

²⁷² Resolution in the United States Senate (February 20, 1793), in 5 DHSC, *supra* note 2, at 607-08.

²⁷³ *Id.* at 608 n. 1.

²⁷⁴ 5 DHSC, *supra* note 2, at 398.

hoped to use the time between sessions to generate support for a “more general” amendment that would address not only Article III but also “the exercise of constructive powers” such “as that exemplified in the establishment of the Bank” (among others).²⁷⁵ Senator Strong’s proposal thus was too “partial.” In their opinion, “the doctrine of constructive powers . . . in the latitude contended for, to convert the national government from a limited into an unlimited one, should be suppressed in its infancy.”²⁷⁶

In March, the Massachusetts House of Representatives appointed a committee to study the *Chisholm* decision and report on its potential impact on the state. The Committee was unable to procure a copy of the decision, however, and postponed issuing their report until the next session. By that time, the Committee had managed to get a copy of the Justices opinions and in June 1793, the Joint Committee of the Massachusetts General Court published a series of resolutions in Boston’s *Independent Chronicle*:²⁷⁷

3. *Resolved*, That the idea of a *Federal Government* necessarily involves the idea of component parts, consisting of *distinct and separate Governments*.

4. *Resolved*, That a Government being liable to be sued by an individual Citizen, either of that, [or] of any other Government, is inconsistent with that sovereignty which is essential to all Governments, and by which alone any Government can be enabled, either to preserve itself, or to protect its own members . . .

5. *Resolved*, That the article in the Constitution which extends the Judicial Power to *controversies between a state and the citizens of another state* as applied by the judges of the Supreme Judicial Court in the case aforesaid, is in its principle subversive of State Governments, inconsistent with the [ease] and safety of the body of Free Citizens; and repugnant to every idea of a *Federal Government*, and therefore it is

6. *Resolved*, That the Senators of this Commonwealth . . . be, and are hereby instructed, and the Representatives requested, to use their utmost influence that the article in the federal Constitution, which refers to controversies between a state and the citizens of others states, be either wholly expunged from the Constitution, or so far *modified and explained*

²⁷⁵ James Monroe and John Taylor to Henry Lee (Feb. 20, 1793), in 5 DHSC, *supra* note 2, at 606. “Among other” issues of concern at the time included the wide-spread resentment to Hamilton’s Funding Program.

²⁷⁶ James Monroe and John Taylor to Henry Lee (March 2, 1793), in 5 DHSC, *supra* note 2, at 608. See also, Mercy Otis Warren to George Warren (Oct. 16, 1793), in 5 DHSC, *supra* note 2, at 444. (overhearing that the initial attempt to amend the constitution was delayed in the hopes of adding to it an additional amendment “exclud[ing] all holders in the bank from a seat in Congress”). Some scholars have attributed the delay as an indication that issue was of “no moment” to Congress. See Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, *supra* note 11 at 1927. The issue, however, had already been the subject of substantial debate and, as the text indicates, the delay could just as likely reflect the lateness of the date and the efforts by men like Monroe and Lee to secure a broader restriction on federal power.

²⁷⁷ See generally, 5 DHSC, *supra* note 2, at 231 n1.

as to give the fullest security to the States respectively against the evils complained of. . . ; more especially as this Legislature have the fullest assurance, that the late decision of the Supreme Judicial Court of the United States, hath given a *construction* to the Constitution, very different from the idea which the Citizens of this Commonwealth en[tertained of it at the time it was adopted].²⁷⁸

The Joint Committee Report was scheduled to be discussed at the next session of the Legislature (the General Court) in January of 1794. Ailing Governor Hancock decided that the matter could not wait and took the extraordinary step of calling for a special session of the Legislature to be held in mid-September.²⁷⁹

1. Hancock's Address

On September 18, 1793, John Hancock addressed the special session and explained its three options: (1) Acquiesce, (2) add an amendment explaining the proper construction of the Constitution, or (3) add an amendment removing power granted under the original Constitution.²⁸⁰ Option (2), by declaring the proper construction of the Constitution, suggested that the Court in *Chisholm* erred both in its reasoning and its result.

In the opening of his Address, Governor Hancock rejected the idea that “the People of this Commonwealth, when they, by their representatives in Convention, adopted the Constitution of a General Government, expected that a State should be held liable to answer on *compulsory civil* process, to every individual resident in another state, or in a foreign Kingdom.”²⁸¹ Although the Supreme Court had decided otherwise, this was an issue that Hancock could not “consider as settled.”²⁸² Although Hancock declined to take an official position on the issue, he nevertheless presented an extended analysis of why the Supreme Court had erred in *Chisholm*. Extending the judicial power in cases such as Vassal’s would reduce the states to “mere corporations,” under the centralized authority of the national government. Such a “consolidation of all the states into one government, would at once endanger the Nation as a Republic, and eventually divide the States united, or eradicate the principles which we have contended for.”²⁸³

Such weighty matters were not to be left in the hands of the Supreme Court. Hancock conceded that when the Constitution was first proposed, he “considered it as being by no

²⁷⁸ Report of a Joint Committee of the Massachusetts General Court, *Independent Chronicle*, (Boston) (June [20], 1793), in 5 DHSC, *supra* note 2, at 230-31.

²⁷⁹ Proclamation by John Hancock, *Independent Chronicle* (July 9, 1793), in 5 DHSC, *supra* note 2, at 387.

²⁸⁰ John Hancock’s address to the Massachusetts General Court (September 18, 1793), in 5 DHSC, *supra* note 2, at 416-17. The speech was published as a broadside by Boston Printers Adams and Larkin. According to the publication notes by Evans, Hancock’s secretary of state, John Avery delivered the actual speech for the ailing Hancock. See *Speech of His Excellency the governor to both branches of the legislature of the Commonwealth of Massachusetts, at their sessions began and held in Boston, Sept. 18, 1793. Agreeably to His Excellency's proclamation*, Early American Imprints Series 1, no. 25790 (filmed).

²⁸¹ *Id.* at 416.

²⁸² *Id.*

²⁸³ *Id.* at 419.

means explicit in the description of the powers intended to be delegated.”²⁸⁴ He trusted, however, “that the wisdom of the People would very soon render every part of it definite and certain.” More, the idea that the People should not engaged in ensuring a proper interpretation of their Constitution was a notion “inadmissible among a Free People.”

If the people are capable of practicing on a Free Government, they are able, without disorder or convulsions, to examine, alter and amend the systems which they have ordained.—And it is of great consequence to the Freedom of a Nation to review its civil Constitution, and to compare the practice under it, with the principles upon which it depends. The tendency of every measure, and the effect of every precedent, ought to be scrupulously attended to, and critically examined. This is the business of the Representatives of the People, and can never be by them confided to any other persons.”²⁸⁵

Following Hancock’s speech, a Joint Committee was appointed to consider the matter and, a week later, they issued a Report that weakly complained that “it is not expedient that a State should be suable by individual citizens of other states, or subjects of foreign states,” and that Massachusetts’ representatives in Congress should “use their influence to effect such alterations in the Constitution of the U.S. as shall secure each state from being so suable.”²⁸⁶ The full Assembly overwhelmingly rejected the Report as failing to adequately reflect the General Court’s rejection of the Supreme Court’s construction of Article III. After considering a Resolution which openly declared that the Court’s decision in *Chisholm* reversed the people’s original understanding of the Constitution,²⁸⁷ the Assembly adopted a set of compromise resolutions which declared that the decision in *Chisholm* was “unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several states, and repugnant to the first principles of a Federal Government.”²⁸⁸ The General Court called upon their representatives in Congress “to obtain such amendments . . . 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.”²⁸⁹ Finally, the Assembly directed that its resolutions be sent “to the Supreme Executives of the several states, to be submitted to the consideration of their respective legislatures.”²⁹⁰

The Resolves adopted by the Massachusetts General Court did not call for the removal of a delegated power. Instead, the Resolves sought to remove any clause that could be *construed* to allow individuals to sue non-consenting states—a concept “repugnant to the first principles of a federal Government.” By “federal,” the assembly meant

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 419.

²⁸⁶ Report of a Joint Committee of the Massachusetts General Court (September 23, 1793), in 5 DHSC, *supra* note 2, at 424.

²⁸⁷ See *id.* at 368 (editorial note).

²⁸⁸ Resolution of the Massachusetts General Court (September 27, 1793), in 5 DHSC, *supra* note 2, at 440.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 440.

“confederated” as opposed to “consolidated” government.²⁹¹ The Massachusetts Resolves did not expressly state that the Supreme Court grievously departed from the people’s original intentions in creating a Federal Government, but the implication seems fairly clear. The problem was not a particular delegated power, but the construction of any provision in a manner so out of step with the Constitution’s “first principles.”

2. *The Public Debate*

Within days of Governor Hancock’s call for a special session, Massachusetts newspapers began to fill with commentary, some objecting to an old man’s folly,²⁹² but most strongly supporting Hancock’s call to the people. Four basic themes emerged from this broad public criticism of state suability: First, these suits effectively reduced states to the status of mere corporations, thus threatening a “consolidation” of the states under one national government. Second, this result contradicted the ratifiers’ understanding of the Constitution as proposed and explained by its Federalist advocates. Third, this betrayal of ratifier understanding violated the *people’s* retained sovereignty in both theory and effect. Fourth, the error involved not a mistakenly granted power but an erroneous judicial construction of Article III.

a. *Consolidated States; Dependent Corporations*

Perhaps the most pervasive theme in the literature opposing state suability involved the implied reduction of states to the status of dependent corporations. This was the very first issue raised in the press following the docketing of *Van Staphorst* in 1791.²⁹³ The same point was picked up by James Sullivan in his “Observations Upon the Government of the United States.”²⁹⁴ Indeed, to Sullivan, this was the central issue in the debate over

²⁹¹ In his 1800 treatise on the Constitution, Tunis Wortman explained the meaning of “federal”:

The term “Federal,” which is usually and properly applied to our general Constitution, is derived from the latin “*Faedus*,” signifying a league. It implies that each of the contracting States retains its existence and its sovereignty, subject to the limitations imposed by the compact of Confederation, and is evidently distinguishable from Consolidation, which would suppose that the separate existence of each State was lost in the general body.

Tunis Wortman, *A Treatise Concerning Political Enquiry and the Liberty of the Press* 210 (1800).

²⁹² See Letter to the Editor, *General Advertiser* (July 17, 1793 (Boston, Mass.)), in 5 DHSC, *supra* note 2, at 391 (in sardonic terms praising the Governor and the public’s willingness to pay for “a scheme which seems to be the delight of his old age.”); Letter to the Editors, *Massachusetts Mercury* (July 26, 1793), in 5 DHSC, *supra* note 2, at 402 (“That the Governor of Massachusetts should be roused from his peaceful slumbers in the chair of state, by the service of a bill in equity, is an offense so atrocious as calls for the whole force of the Legislature to avenge the injury.”).

²⁹³ Letter from an Anonymous Correspondent, *Independent Chronicle* (between February 13 and 19, 1791), in 5 DHSC, *supra* note 2, at 20-21 (“Should this action be maintained, one great national question, will be settled; --that is, that the several States, have relinquished all their SOVEREIGNITIES, and have become mere *corporations*, upon the establishment of the General Government: For a Sovereign State, can never be sued, or coerced, by the authority of another government.”).

²⁹⁴ James Sullivan, *Observations Upon the Government of the United States* (July 7, 1791), in 5 DHSC, *supra* note 2, at 21.

state suability.²⁹⁵ If states could be sued without their consent, then they, like corporations, were subject to punishment or penalty if they refused to comply with the judgment of the federal courts. “But this process of punishment carries with it the full and complete idea of subordination to a superior power, which is quite inconsistent with every idea of any kind of sovereignty.”²⁹⁶ In his draft opinion for the Oswald case, Supreme Court Justice James Iredell recognized the effort to reduce states to mere “dependent corporations” and rejected the concept as irreconcilable with the retained sovereign authority of the states.²⁹⁷ According to “Brutus,” should the Massachusetts Legislature “acquiesce in the construction given to the federal Constitution,” “you will seal your own extinction, as a legislative body . . . and your acts those of an unimportant subordinate corporation.”²⁹⁸ “Marcus” in the Massachusetts Mercury wrote that the Court’s decision in Chisholm was “truly alarming to every individual citizen” and would lead to “a direct consolidation of the governments of the union into one.”²⁹⁹

Subjecting states to the same civil process as corporations, critics claimed, led inevitably to a consolidation of the separate states and the establishment of a single (and itself sovereign) national government.³⁰⁰ Consolidation was more than a mere red shirt of anti-federalists; Madison himself had stressed how a federalist system could succeed where a single government could not—through a division of powers between the national and state governments.³⁰¹ Consolidation thus threatened the states *and* the liberties of

²⁹⁵ His observations were focused on the question “Whether we are an assemblage of republics, held together as a nation by the form of government of the United States, or one great republic, made up of divers corporations.” *Id.* at 21.

²⁹⁶ *Id.* at 29.

²⁹⁷ *Id.* at 88. See also *id.* (““A corporation may be dissolved, by a forfeiture of its Charter, through negligence or abuse of its Franchise. . . . Is there any authority in the U.S. to dissolve one of the American states?__God forbid__no Man will pretend such a thing.”); “The True Federalist” to Edmund Randolph, No. II (Jan. 23, 27, 1794), in 5 DHSC, *supra* note 2, at 245 (quoting the Constitution’s declaration that “Congress should guarantee to every state in the Union, a republican form of government” and pointing out that “‘a form of government’ was never a mode of expression applied to the police of a town, parish, city or other corporation.”).

²⁹⁸ Brutus, Independent Chronicle (July 18, 1793), in 5 DHSC, *supra* note 2, at 392.

²⁹⁹ Marcus, Massachusetts Mercury (July 13, 1793), in 5 DHSC, *supra* note 2, at 389.

³⁰⁰ In addition to the sources cited in the text, see “Anti-Consolidation,” Independent Chronicle (September 19, 1793), in 5 DHSC, *supra* note 2, at 423 (quoting Hamilton’s Federalist No. 81 denying the power of the judiciary to destroy “the pre-existing right of State Governments”); Edmund Pendleton to Nathaniel Pendleton (Aug. 10, 1793) in 5 DHSC, *supra* note 2, at 232-33 (The reasoning of Justice Wilson “is reprehensible as tending to prove the Federal to be a consolidated Government for all America, & to Annihilate those of the States”); “The True Federalist” to Edmund Randolph, No. III, Independent Chronicle (February 6, 1794) in 5 DHSC, *supra* note 2, at 254 (construing Article III to allow suits against the states “completely comprises a consolidation of all the states into one government for every purpose of legislation and judicial procedure, and thereby excludes the nature of a Federal Government.”); Samuel Adams to the Governors of the States (Oct. 9th, 1793), in 5 DHSC, *supra* note 2, at 443 (“it is easily discerned, that the power claimed [by the Supreme Court], if once established, will extirpate the federal principle, and procure a consolidation of all the Governments.”); Virginia Governor Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), in 5 DHSC, *supra* note 2, at 334 (“A consolidation of the States was expressly disowned by the framers and by the adopters of the Constitution.”).

³⁰¹ See The Federalist Papers, No. 39, *supra* note 49 at 240-46 (James Madison).

the national people as a whole.³⁰² As William Widgery put it in the Massachusetts General Court “as the existence of the Federal Government depends on that of the States, I think every true friend to his country must be in favor of doing away all the State suability.”³⁰³

b. The Claim of Original Understanding

[T]his Legislature have the fullest assurance, that the late decision of the Supreme Judicial Court of the United States, hath given a construction to the Constitution very different from the ideas which the citizens of this Commonwealth entertained of it at the time it was adopted.

*Report of the Joint Committee of the Massachusetts General Court (June 20, 1793)*³⁰⁴

Given the widespread assumption that a true sovereign could not be sued without its consent, much of the debate regarding state suability involved whether the states, by ratifying Article III, had in fact consented to suits brought by individuals in federal court. Here proponents of state suability stressed what they claimed was the plain meaning of the text: It was *so clear* that Article III authorized such suits, ratification could only be taken to mean the states had willingly consented such suits.³⁰⁵ Some went

³⁰² One of the themes of Anti-Federalist writing had been the republican based concern that successful democracies must be relative small in size. See Herbert J. Storing, 1 *The Complete Anti-Federalist: What the Anti-Federalists Were For* 15 (1981). According to “Crito”

[The claim that state should be forced to “do justice”] is only a subterfuge, in order, the easier to ram down the throats of freemen, a consolidated government and, to introduce a King, Lords and Commons with the concomitants of a standing army; For, it is well known, that, if the sovereignty of the States is annihilated, that such an army must be the consequence; for, the immense territory of the United States cannot be otherwise governed.”

“Crito,” *Salem Gazette* (July 29, 1793), in 5 DHSC, *supra* note 2, at 405. See also, John Hancock, Address to the Massachusetts General Court, *supra* note __ at __ (“A consolidation of all the states into one government, would at once endanger the nation as a Republic, and eventually divide the state United, or eradicate the principles we which we have contended for.”); Virginia Governor Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), in 5 DHSC, *supra* note 2, at 334 (“we ought not to forget this important truth, that the duration of the General Government must very much depend on the strict adherence in practice to this fundamental principle on which it was erected. A consolidation of the States was expressly disowned by the framers and by the adopters of the Constitution.”).

³⁰³ William Widgery’s Speech in the Massachusetts House of Representatives, *Independent Chronicle* (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 430 (“It is therefore high time to agree on measures, whereby to effect an amendment in the Federal Constitution, in order that the Judicial Court may not construe it in a different manner from that which the States intended; and in order to secure to the people of the United States the lasting blessings of energetic Federal and State Governments, and as the existence of the Federal Government depends on that of the States, I think every true friend to his country must be in favor of doing away all the State suability.”).

³⁰⁴ Report of the Joint Committee of the Massachusetts General Court, *Independent Chronicle* (June [20], 1793) in 5 DHSC, *supra* note 2, at 230.

³⁰⁵ See, e.g., “Solon,” *Independent Chronicle* (September 19, 1793), in 5 DHSC, *supra* note 2, at 421 (“That jurisdiction of such a cause is given by the People in the Federal Constitution, to the Judiciary

so far as to claim otherwise amounted to an implied admission of rank stupidity, or, at the very least, a concession that they had been “duped & deceived.”³⁰⁶

To opponents of state suability, on the other hand, there was a very real question whether they had been duped. “Brutus” reminded readers that “apprehensions” about Article III voiced in the state ratifying convention “were said to be groundless by the advocates of the Constitution, and the jealousies of the members on that subject, were laughed at, and treated as ridiculous by KING and others:”

There suspicions were considered by them, as visions and chimeras of the brain, and as phantoms of a distorted imaginations. But what do we now behold! These chimeras, these phantoms, these visions, are no longer imaginary, but appear in the bold colors of a demand, as founded on that very Constitution!³⁰⁷

“Democrat” also reminded readers of the promises of Rufus King, “a great civilian” who “rose; and, in an harangue, of two hours length, endeavored to prove that, the article in debate, could not possible bear the construction put on it by gentlemen.”³⁰⁸ William Martin insisted that “the meaning as determined by part of the Judiciary . . . was not the intention of the [Massachusetts Ratifying] Convention,” and as evidence pointed out that “there were several gentlemen then present, who signified their remembrance, that Mr. Sedgwick and Mr. Strong, both in Convention . . . had declared their minds to that purpose.”³⁰⁹ The powers granted under Article III “would not have been consented to by this commonwealth, but for Rufus King, Esq., who “pledged his honor,” in the state convention, “that the convention at Philadelphia never discovered a disposition to infringe on the Government of an individual state; and that in his opinion no Congress on earth would dare to invade the SOVEREIGNTY OF THIS COMMONWEALTH. On the strength of this gentleman’s opinion, the Article in the Constitution was assented to but by a small majority.”³¹⁰

of the United States, is so clearly expressed, as not to admit of dispute.”); *George Morgan to Alexander McKee* (Feb. [20], 1793) in 5 DHSC, *supra* note 2, at 222 (praising the Randolph’s argument on the “letter and spirit of the Constitution”).

³⁰⁶ Account of John Davis’s Speech in the Massachusetts House of Representatives, *Independent Chronicle* (September 23, 1793), in 5 DHSC, *supra* note 2, at 434 (“Would we strengthen and confirm the doctrine of despots, as well as enemies of the Constitution, by declaring to our sister states and to the world, that the people of this Commonwealth did not comprehend the Constitution which they had adopted, or that they had suffered themselves to be duped & deceived? . . . he could never give his assent to a resolution . . . by which the dignity and reputation of the Commonwealth, for intelligence and consistency, might be hazarded or impaired.”).

³⁰⁷ *Id.* at 392.

³⁰⁸ “Democrat,” *Massachusetts Mercury* (July 23, 1793), in 5 DHSC, *supra* note 2, at 393. See also “Hampden,” *Independent Chronicle* (July 25, 1793), in 5 DHSC, *supra* note 2, at 399-400 (“The objection was then, that the clause might have the same construction which the Judges have now given it; but the great lawyers in the Convention declared, that no such construction could ever be made; though some of them are now, the warm advocates of the power claimed by the Supreme Judiciary.”).

³⁰⁹ Account of William Martin’s Speech in the Massachusetts House of Representatives, *Independent Chronicle* (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 434.

³¹⁰ *Id.* (caps in original).

In the Federalist Papers No. 81, Publius declared that “[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent.”³¹¹ Because an “alienation of State Sovereignty” required an express delegation, there was “no color to pretend that the State Governments, would, by the adoption of that plan, be divested of the privilege of paying their own debts their own way, free from every constraint but that which flows from the obligations of good faith.”³¹² By 1793, it was well known that Alexander Hamilton and current Chief Justice John Jay both contributed to the essays that all sides considered to be the most persuasive brief in favor of ratifying the Constitution. Seizing the opportunity, opponents of state suability now reprinted the key portions of Federalist 81, along with introductions dripping with irony, in support of their claim that the Constitution, properly construed, did not allow individual suits against the states. “Anti-Consolidation,” for example, introduced the Independent Chronicle’s republication of Federalist 81 by pointing out that its purported author was a “gentleman who never has been suspected of indulging a predeliction for too lax a system of government.”³¹³

Underneath the sarcasm was a serious point. Some of the same men who had swayed votes in the ratifying conventions with their promise of a narrowly construed Article III, now either vocally (or through silence) supported the Supreme Court’s decision in *Chisholm*. This was not a case of legislative embrace of inherently vague terms, trusting that the courts would work out the meaning throughout litigation. Instead, this involved a specific issue that had been debated at ground zero of popular sovereignty, the state ratifying conventions. It appeared now that these conventions may have been, in at least some cases, intentionally misled in order to gain support for ratification. The following passage from “A *True* Federalist” (note the name) is a good example of what was a widely felt sense of betrayal:

I am a firm friend to the federal government; I consider it as an inestimable blessing to this country . . . But I consider our motion, and your arguments and opinions as subversive of it, and as tending to

³¹¹ The Federalist No. 81, *supra* note 37 at 487 (Hamilton).

³¹² *Id.* at 488.

³¹³ “Anti-Consolidationist,” Independent Chronicle (Sept. 19, 1793), in 5 DHSC, *supra* note 2, at 423-24. See also, “A Consistent Federalist,” National Gazette (Sept. 18, 1793), Vol. II, issue 93, page 371 (introducing the same section of Federalist No. 81 with the comment that the passage “was considered by the friends of the Constitution as a candid construction of its several parts, at the time it was adopted by the people.”). The North Carolina Journal printed the same portion of Federalist No. 81 alongside of John Hancock’s Address to the special session of the Massachusetts General Court. See North-Carolina Journal, published as The North-Carolina Journal (October 23, 1793) Vol. II, Issue 67, Page 1. In Georgia, the editors of the Augusta Chronicle reprinted the same note and excerpt from the National Gazette immediately following Edward Telfair’s address calling for an amendment to make “more definite” the delegated powers of the federal judiciary. See “From the National Gazette,” Augusta Chronicle Vol. III. No. 370] Page [2] (Nov. 9, 1793). See also Augusta Chronicle, Nov. 6, 1793, page 2a (“Various opinions having been published respecting the suability of a state, the public mind being engaged on the subject, it may not be improper to publish the following extracts from a *Work*, which was considered by the friends of the Constitution as a candid construction of its several parts, at the time it was adopted by the people: “It is inherent in the nature of sovereignty”(Fed. No. 81: Hamilton); [Same in Philadelphia] [Mr. Freneau; Various; Suability; State; Constitution]; Article Type: Letters Paper: National Gazette; Date: 09-18-1793; Volume: II; Issue: 93; Page: 371; Location: Philadelphia, Pennsylvania.

establish a civil government for the United States, which the citizens of those communities, have never consented to. When the Constitution under consideration, was proposed to the people of Massachusetts, *some men*, in whom the people had placed confidence, 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. *Some of them*, for reasons very obvious to their fellow citizens, have altered their opinions, and others openly confess, that they thought it best to deceive the people into the measure of adopting the plan proposed. The idea of deceiving the people into a measure, is much more criminal, in my opinion, than of subduing them by force; in the first there is necessarily a perfidious breach of trust, but in the last there is only open and manly warfare. The first is predicated upon the tyrannical idea, that the people are incapable of understanding what is best for them, and most conducive to their own political happiness; but in the last there is a hope of relief in revolution, to be gained at one time or other, by superior force.”³¹⁴

Perhaps most telling in regard to the claims of original understanding is the dog that did not bark. Not a single proponent of state suability denied the reported promises of the Federalists (nor could they, given such publicly available passages like Federalist 81), or claimed that the ratifiers intended federal courts to have the power to compel states to defend against suits by private citizens. Instead, the counter argument stressed the irrelevance of the debates and the primacy of the text, regardless of original intent. This approach was in considerable tension with the idea that the people retained to the sovereign power to debate and decide the scope of delegated power. The possibility that the conventions were misled cut to the heart of what the Founding generation widely accepted as the legitimizing source of law: the considered will of the people.

c. Popular Sovereignty

Citizens, rouse! Let us before the general court comes together, call town meetings and county conventions on this business and take the sense of the PEOPLE on a question as big with the fate of our interest and liberties as any one that has agitated the public mind since the peace with Britain.”

Marcus³¹⁵

One of the most common objections to state sovereign immunity doctrine is that it appears to graft a feudal concept of royal prerogative onto a system of democratic popular sovereignty.³¹⁶ Judge Wilson stressed this point in his *Chisholm* opinion, and the Supreme Court’s later defenders did as well.³¹⁷ The point was directly undermined,

³¹⁴ “The True Federalist” to Edmund Randolph, No 1, Independent Chronicle, Jan. 16, 1794 (Boston), in, 5 DHSC, *supra* note 2, at 242.

³¹⁵ Marcus, Massachusetts Mercury (July 13, 1793), in 5 DHSC, *supra* note 2, at 390.

³¹⁶ See, e.g., Amar, America’s Constitution, *supra* note 2, at 335.

³¹⁷ See, e.g., Gazette of the United States (April 3, 1793), in 5 DHSC, *supra* note 2, at 227 (mocking the states’ complaint of the “clipping of the plumes of imperial sovereignty” and the irony that

of course, by the majority's acceptance of *national* sovereign immunity—an obvious weakness to any claim that the very concept of sovereign immunity was an unacceptable affront to justice. Still the argument that the people should be able to hold their governments accountable at law carried considerable rhetorical force.

The concession of *national* sovereign immunity, however, signaled that the underlying issue was less a matter of the injustice of governmental immunity, than it was an issue of *which* government could claim such immunity and why. Nationalists viewed the country as composed of a single mass of sovereign people who happened to live in states. Federalists (meaning the theory, not the political party), on the other hand, viewed the Constitution as establishing a delicate balance between a newly created national people (and government) and a group of sovereigns within the states who retained all sovereign power not expressly delegated away under the Constitution.³¹⁸ Defenders of state sovereign immunity thus viewed themselves as preserving the sovereignty of the people who had adopted the Constitution.³¹⁹ Edmund Pendleton, for example, found Justice Wilson's reasoning in *Chisholm* to be "reprehensible as tending to prove the Federal to be a consolidated Government for all America, & to Annihilate those of the States__ A Principle, which, if established, would make that Constitution as great a curse as I have hitherto thought it a blessing."³²⁰

In a letter published in the Boston Independent Chronicle two days before the Special Session, the writer reminded the assembly that the sovereignty of the states was inextricably linked to the sovereignty of the *people*.³²¹

"The *consolidationists* will be zealous that the states should submit to prosecutions of this nature, but every real *federalist*, will be anxious to retain that degree of sovereignty which was *unanimously* acknowledged among the members of the Convention (who were the voice of "The People") that the state in no instance could be sued by individuals before the federal court."³²²

Georgia had a suit against an individual before the same court at the same time); See also Massachusetts Mercury (July 26, 1793).

³¹⁸ Madison's writings from the time of the Constitution's ratification until the end of his life stressed this "balance" of state and national authority. In addition to sources cited throughout this paper, see, James Madison, "Consolidation" (Dec. 5, 1791), in Writings, *supra* note 96 at 498; James Madison, Government of the United States (Feb. 6, 1792), in Writings, *supra* note 96 at 508-09; James Madison to William Cabell Reeves (March 12, 1833), in Writings, *supra* note 96 at 863-66.

³¹⁹ Nor could the concept of *state* immunity from suit be divorced from the idea of the *people's* immunity from suits they had not authorized themselves. As Caleb Nelson has pointed out, individuals who sue the states "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 non-sovereign) government, but can instead be seen as suits against the sovereign people of the state in their collective capacity." See Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, *supra* note __ at 1584.

³²⁰ Edmund Pendleton to Nathaniel Pendleton (Aug. 10, 1793) (Virginia), in 5 DHSC, *supra* note 2, at 232-33.

³²¹ Independent Chronicle (Sept. 16, 1793), in 5 DHSC, *supra* note 2, at 415.

³²² *Id.* at 415-16 (emphasis in original). See also, "A Consistent Federalist," Independent Chronicle (Sept. 23, 1793) in 5 DHSC, *supra* note 2, at 425-26 ("[i]t was the unanimous opinion of [the convention] , that the State could not be suable before the Federal Court, it must [therefore] be a strong argument that "The People" of this Commonwealth are opposed to this measure."); "A Consistent Federalist," Independent Chronicle (October 3, 1793), in 5 DHSC, *supra* note 2, at 441-42

The issue of state suability thus went straight to the sovereign right of the people to establish fundamental law. Remarks in the State conventions reflected “the opinions and intentions of ‘the people.’”³²³ “[I]f we are to conclude from the determinations of the Convention, [the people of Massachusetts] never adopted the Constitution upon any such acknowledgment [of state suability], but on the contrary. *All the members expressly declared themselves opposed to the principle.*”³²⁴

“If the decision of the Judges has a tendency to give an operation to the Constitution, contrary to what the Convention conceived, the Constitution as now explained, is not the Constitution adopted by “THE PEOPLE” of this Commonwealth.”³²⁵

There could not be a stronger rejection of judicial supremacy. Whatever the interpretation of the United States Supreme Court, the Constitution emanated from the people, and it was their understanding which controlled.

d. Judicial Construction and the Resolves of the State Assemblies

It is therefore high time to agree on measures, whereby to effect an amendment in the Federal Constitution, in order that the Judicial Court may not construe it in a different manner from that which the States intended.

*William Widgery*³²⁶

Following Governor Hancock’s address, the Massachusetts General Court referred the matter to a joint committee which weakly reported back “that it is not expedient that a state should be suable by individual citizens of other States, or subjects of foreign states,” and advised Massachusetts’ representatives in Congress “to endeavor, to effect such alterations in the Constitution” as would remove the “inexpediency.”³²⁷ The Report said nothing about the proper construction of the Constitution or whether the Supreme Court had erred in *Chisholm*, and it was immediately rejected by the House.³²⁸ In its place, an overwhelming majority of the House approved a new set of draft Resolves which expressly declared the Court had departed from the original understanding of the ratifiers in the state convention and called for an amendment which mandated the proper construction of Article III.

(“It seemed to be the prevailing opinion [of the special session] that no such *right* [of an individual to sue a state] was ever meant to be surrendered to the Federal Government, and that the voice of “The People” was decidedly opposed to the measure.”).

³²³ The Crisis, No. XIII by “A Republican,” *Independent Chronicle* (July 25, 1793), in 5 DHSC, *supra* note 2, at 394.

³²⁴ *Id.* at 396 (caps in original).

³²⁵ *Id.* at 396 (caps in original).

³²⁶ William Widgery’s Speech in the Massachusetts House of Representatives, *Independent Chronicle* (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 430.

³²⁷ Report of the Joint Committee of the Massachusetts General Court, *Independent Chronicle* (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 424.

³²⁸ *Id.*

House member John Davis objected to the General Court presuming to know the original understanding of the people in convention.³²⁹ Davis further warned the assembly against mandating the proper construction of the Constitution. Doing so “might authorize a construction in some future instances, which would be hostile to the rights and privileges of the people. We should be very careful, therefore, how we encourage, and especially how we insist on a construction of the Constitution, repugnant to the plain sense and meaning of the words.”³³⁰ To the vast majority of the assembly, however, it was the Court’s construction that threatened the retained rights and privileges of the people, and they very much wanted to authorize a different construction for this and future cases. Accordingly, although the language expressly declaring the original sense of the people was removed, the language of compelled construction was not.

Whereas a decision has been had in the Supreme Judicial Court of the United States, that a State may be sued in the said Court by a citizen of another state . . .

Resolved, That a power claimed, or which may be claimed, of compelling a State to be made a defendant in any Court of the United States, at the suit of an individual or individuals, is in the opinion of the legislature unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of the Federal Government: Therefore

Resolved. That the [state’s representatives in Congress] obtain such amendments to 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.³³¹

The Massachusetts Resolutions concluded with a call for the Governor “to communicate the foregoing Resolves to the Supreme Executives of the several States, to be submitted to the consideration of their respective Legislatures.”³³² Although the final draft did not expressly state that the Court’s decision contradicted the original understanding of the ratifiers, the implication was hard to miss. The judgment in *Chisholm* was “repugnant to the first principles of the Federal Government.” Not only was the Court’s construction “unnecessary and inexpedient,” it was “dangerous to the peace, safety and *independence* of the several States.” Thus the need to remove any possibility of any similar “constructions” in the future. In his letter transmitting the Resolves to the Governors of the several states, Samuel Adams was blunt. “It is easily discerned,” wrote Adams, “that the power claimed [by the Supreme Court], if once established, will extirpate the federal principle, and procure a consolidation of all the Governments.”³³³

³²⁹ Account of John Davis’ Speech in the Massachusetts House of Representatives, Independent Chronicle (Sept. 23, 1793), in 5 DHSC, *supra* note 2, at 433 (“it is not becoming now to declare, what was then the sense of the people”).

³³⁰ *Id.* at 432.

³³¹ Resolution of the Massachusetts General Court (September 27, 1793), in 5 DHSC, *supra* note 2, at 440.

³³² *Id.* at 440.

³³³ Samuel Adams to the Governors of the States (Oct. 9, 1793), in 5 DHSC, *supra* note 2, at 443.

i. *Georgia*

We know that to men like James Madison, the Bill of Rights included provisions which sought to control the interpretation of federal power, particularly the Ninth and Tenth Amendments.³³⁴ To Georgia Governor Telfair, however, these recent amendments clearly were not enough. Having received the call from Massachusetts to join their efforts to secure yet another amendment, Governor Telfair declared that “[n]otwithstanding certain amendments have taken place in the federal Constitution, it still rests with the state legislatures, to act thereon as circumstances may dictate, so as to make it more definite.”³³⁵ According to Telfair, “were [such] actions admissible under such grievous circumstances, an annihilation of her political existence must follow.”³³⁶ Soon after the Governor’s address, a Legislative Committee issued its Report suggesting that “an Act of the Legislature of the state ought to be passed, declaratory of the retained sovereignty thereof” and that a notice should be sent to other states “requesting their concurrence in a proposal for an explanatory amendment to the Constitution of the United States, in the second section of the third article.”³³⁷

ii. *Virginia*

Upon receiving Lt. Governor Samuel Adams’ letter and the accompanying resolutions of the Massachusetts legislature,³³⁸ Virginia’s indecisive Governor Henry Lee finally reached a conclusion: *Chisholm* was wrongly decided and an amendment was necessary in order to restoring the original understanding of Article III. Addressing the Speaker of the Virginia House of Delegates, Lee laid out the constitutional case against the Court’s reading of Article III. Lee first pointed out that “[a] consolidation of the states was expressly disowned by the framers and by the adopters of the Constitution, because it was evident to the whole people that such a political Union was by no means suited to their circumstances.”³³⁹ Any attempt to determine “the meaning and extend of any power delegated by the Constitution” had to refer to the “chief object” of the Constitution, “which is a confederation of the states and not a consolidation.”³⁴⁰ These first principles by themselves called into question the Court’s decision in *Chisholm*:

If the right exercised by the supreme judiciary be constitutional, then certainly consolidation and not confederation must be acknowledged to

³³⁴ See *supra* note 123 and accompanying text.

³³⁵ Edward Telfair’s Address to the Georgia Assembly, *Augusta Chronicle* (November 4, 1793), in 5 DHSC, *supra* note 2, at 234-35.

³³⁶ *Id.*

³³⁷ Proceedings of the Georgia House of Representatives, *Augusta Chronicle* (Nov. 9, 1793), in 5 DHSC, *supra* note 2, at 235. Georgia also considered, but apparently never passed, a bill declaring that any one who entered the state attempting to enforce a judgment in favor of *Chisholm* “are hereby declared to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged.” Proceedings of the Georgia House of Representatives, *Augusta Chronicle* (Nov. 19, 1793), in 5 DHSC, *supra* note 2, at 236.

³³⁸ See Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), in 5 DHSC, *supra* note 2, at 338 (indicating that he had “lately received” a letter from the Lieutenant Governor” regarding Massachusetts’ decision to seek a constitution amendment). See also *id.* n.3.

³³⁹ Henry Lee to the Speaker of the Virginia House of Delegates (Nov. 13, 1793), in 5 DHSC, *supra* note 2, at 334.

³⁴⁰ *Id.* at 335.

be the influential principle of the constitution__But that this is not the case may be proved by a comparison of the many parts of the constitution as well as for the reason before alleged which in my judgment is of itself conclusive. . . .Admit that a state can be sued and you admit the exercise of a right incompatible with Sovereignty and consonant to consolidation.³⁴¹

In considering other provisions in the Constitution, Lee argued that the same construction which permitted states to be sued would also permit individual suits against the national government.³⁴² However, given that everyone agreed that the federal government could *not* be sued,

“How then can it be inferred that the people in framing their constitution should apply the same words to the General Sovereignty and to the State Sovereignty for any other purpose but to manifest in the most unequivocal manner that they meant that the two sovereigns both emerging from themselves should be regarded in the same light by their own judiciary.”³⁴³

Lee recommended that the Assembly transmit to Congress a Memorial containing their “disavowal of the right of the Judiciary to call a State into Court” and instruct their Senators “to press the passage of a law explaining and detailing the power granted by the constitution to the Judiciary so far as State are affected.”³⁴⁴ If successful, this would “forever crush the doctrine asserted by the supreme Judiciary of the Union respecting the Suability of a State.”³⁴⁵ Lee’s letter to the Speaker was discussed by the House of Delegates who, two days later, passed the following Resolutions:

1. *Resolved*, That a State cannot under the Constitution of the United States be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Foederal 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.
2. *Resolved Unanimously*: That the Senators representing this state in the Senate of the United States, be, and are hereby instructed, and the representatives requested to unite their utmost and earliest exertions with the Senators and Representatives from other states, coinciding in sentiment with this state, to obtain such amendments in the constitution of the United States, as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States.”³⁴⁶

Despite the concurrence of a strong majority of the Virginia Senate, six state senators dissented. To this group, not only did the resolutions “deny what the Constitution expressly warrants,” they also wrongly “censure[d] the judiciary of the United States” by asserting that they had “acted in a manner [] clearly improper.”³⁴⁷ Although the dissenters disagreed with the majority’s conclusion, they apparently understood the import of the Resolutions. They implied that the Supreme Court had erred in its construction of the Constitution, thus the need for an amendment that would restore the proper interpretation of Article III.

iii. *Other States*

Upon receiving the call from Massachusetts, state after state fell into line and echoed the call for an amendment establishing the proper construction of the Constitution, thus implying (and sometimes declaring) the Court’s decision in *Chisholm* to be in error. The Connecticut General Assembly, for example, called for an alteration or amendment to the article “on which the decision of said Supreme Court, *is supposed to be founded* so that in the future no State can on any Construction be held liable to any such suit.”³⁴⁸ South Carolina rejected Chief Justice Jay’s “liberal” reading of federal power and declared that the “sovereign States of America . . . have only surrendered so much of their respective rights, as are fully and clearly expressed so to be by the federal constitution.”³⁴⁹ The power of “compelling a state to appear, and answer to the plea of an individual” not being one of these expressly delegated powers, the assembly charged their federal representatives with obtaining such amendments “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 [such] suit.”³⁵⁰

In New York, the issue became caught up in state politics as the pro-Amendment Governor George Clinton battled a newly elected Federalist Majority who were intent on electing Chief Justice John Jay to the Governorship.³⁵¹ Clinton’s position, however, was unequivocal: “Our Convention, when deliberating on the Federal Constitution, in order to prevent the Judiciary of the United States from extending itself to questions of this nature, expressly guarded against such a construction, by their instrument of ratification.”³⁵² On January 24, a Joint Committee submitted a set of resolutions which

³⁴⁶ *Id.* 338-39. The Resolves were subsequently sent to the Governors of the several states. See *id.* at 339 n.3.

³⁴⁷ Proceedings of the Virginia Senate (Dec. 4, 1793), in 5 DHSC, *supra* note 2, at 339.

³⁴⁸ Resolution of the Connecticut General Assembly (Oct. 29, 1793), in 5 DHSC, *supra* note 2, at 609. The Connecticut Assembly started the process which resulted in the above resolve upon their receipt of Samuel Adams’ transmission of the Massachusetts Resolves. See *id.* at 609 n.1.

³⁴⁹ Proceedings of the South Carolina Senate (Dec. 17, 1793), in 5 DHSC, *supra* note 2, at 610.

³⁵⁰ *Id.* at 611.

³⁵¹ See 5 DHSC, *supra* note 2, at 60-67. Jay, in fact, would soon resign his position as Chief Justice and take the helm as New York Governor, stating his belief that the position of Chief Justice would “never amount to much.”

³⁵² George Clinton’s Address to the New York Legislature (January 7, 1794), in 5 DHSC, *supra* note 2, at 93.

declared that judicial power to compel states to defend against suits brought by individuals “is unnecessary and inexpedient and in its exercise may be dangerous to the peace, safety and independence of the several states”³⁵³ The committee therefore recommended its states representatives seek amendments to the Constitution “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 to any suit by an individual or individuals in any court of the United States.”³⁵⁴ Although the New York Legislature ultimately directed its attorney general to defend the state in federal court against Oswald’s suit, it does not appear to have been due to the sense that states ought to be subject to such suits. New York was the first to ratify the Eleventh Amendment, one week after its submission to the states.³⁵⁵

The Maryland House of delegates adopted the Massachusetts General Court’s declaration that finding such power in Article III was “repugnant to the first principles of a federal government,” and called for an amendment that “will remove any part” of the Constitution “which can be construed to 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.”³⁵⁶ North Carolina declared that the power claimed by the Supreme Court in *Chisholm* “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,” and called for an amendment “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 any [such] suit by an individual.”³⁵⁷ Finally, a joint session of the New Hampshire General Court tasked their federal representatives with obtaining “such amendments in the Constitution of the United States, as 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.”³⁵⁸

iv. *Pro-Chisholm Resolves*

Amidst the flood of resolves calling for an amendment controlling the construction of Article III, there were islands of dissent. In addition to the minority in the Virginia Senate, a committee in the Delaware Senate reported that they did not think “it would be proper for the Legislature of this state, to adopt any plan that might tend to prevent the

³⁵³ Proceedings of the New York Assembly (January 24, 1794), in 5 DHSC, *supra* note 2, at 100.

³⁵⁴ *Id.* at 101. The resolves were submitted for the consideration of the whole House, but ultimately were treated as moot as the federal Congress began consideration of the Eleventh Amendment. *Id.* at 101 n.4.

³⁵⁵ See 5 DHSC, *supra* note 2, at 625. See also Ezra L’Hommedieu to Nathaniel Lawrence (Jan. 18th, 1794), in 5 DHSC, *supra* note 2, at 99 (“Whatever the Resolution may be which you receive from the Assembly, you may depend there is a majority of the Senate who wish you to [endeavor to] avail yourself of the Sense of the Convention contained in their Instrument of Ratification.”)

³⁵⁶ Proceedings of the Maryland House of Delegates (Dec. 27, 1793), in 5 DHSC, *supra* note 2, at 611.

³⁵⁷ Resolution of the North Carolina General Assembly (Jan. 11, 1794), in 5 DHSC, *supra* note 2, at 615.

³⁵⁸ Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794) in 5 DHSC, *supra* note 2, at 618.

suability of a State.”³⁵⁹ Pennsylvania adopted Hancock’s third option which assumed that the decision in *Chisholm* was correct, but nevertheless concluding that the exercise of such power was inexpedient and thus should be removed from the Constitution. Presenting Samuel Adams’ letter to the state Legislature, Pennsylvania Governor Thomas Mifflin instructed the legislators

The discussion of this question . . . will unavoidably lead you to consider, even though the power thus claimed (and supported, indeed, by a decision in another case of a similar nature) has been legitimately delegated by the Constitution to the Supreme Federal Tribunal; whether experience, the attributes of state sovereignty, and the harmony of the Union, do not require that it be abolished.”³⁶⁰

Following the Governor’s lead, a legislative committee presented a set of resolutions which avoided the language of proper judicial construction, and instead proposed an amendment which assumed the federal Court *had* been granted power under Article III to hear individual suits against the states:

Resolved, That the Senators and Representatives of this state, in the Congress of the United States, be requested to unite with members of Congress representing other states, in taking measures agreeably to the fifth article of the Constitution of the United States, to obtain such amendments to the said Constitution as will abridge the general government of the power of compelling a state to appear at the suit of an individual citizen or foreigner, as a defendant, in the court of the United States.”³⁶¹

Although no other state followed this approach, the Pennsylvania Resolves are important in that they illustrate the preferred wording of those who believed the Court had properly construed the Constitution. The amendment does not call for a particular *construction* (thus implying judicial error). Instead, the resolves call for an amendment removing a previously granted power. This tracks the Governor’s defense of the Court’s decision in *Chisholm* by avoiding any implied criticism of the Court—indeed, the resolution implies support for the Court’s approach to interpreting the Constitution, even as it supports removing an otherwise appropriately enforced power. In rejecting the proposed language of proper judicial construction, the Pennsylvania resolves thus point to a very different view of the proper construction of federal power, one more in keeping with fellow Pennsylvanian Justice James Wilson than the dissenting view of James Iredell. The draft of the Eleventh Amendment ultimately submitted to the states, however, embraced the language of proper construction. Though other states quickly ratified the Amendment, Pennsylvania did not.³⁶²

³⁵⁹ Proceedings of the Delaware Senate (Jan. 10, 1794), in 5 DHSC, *supra* note 2, at 614. The Senate thought state suability was proper as a matter of equal justice. They did not address the original understanding of the Article. See *id.*

³⁶⁰ 5 DHSC, *supra* note 2, at 613 n.3.

³⁶¹ Proceedings of the Pennsylvania House of Representatives (Dec. 30, 1793), in 5 DHSC, *supra* note 2, at 612-13. The House never voted on the committee resolutions, being preempted by the submission of the proposed eleventh amendment. See 5 DHSC, *supra* note 2, at 613 n.3.

³⁶² Of the existing states, neither Pennsylvania nor New Jersey took action on the proposed Eleventh Amendment.

D. The Drafting and Adoption of the Eleventh Amendment

Only two days after the Court handed down its decision in *Chisholm*, Massachusetts' federal representatives submitted draft proposed amendments in both houses of the United States Congress. In the House, Theodore Sedgwick proposed:

That no 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, foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.³⁶³

The next day, Massachusetts Senator Caleb Strong proposed:

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 of any foreign State.³⁶⁴

Both amendments focused on suits against the states brought by individuals, but neither proposal mentioned proper judicial construction. Both proposals, in fact, could be construed to concede the legitimacy of the Court's construction of Article III in *Chisholm*, for they appeared to presume the amendment would remove a power previously granted under the federal Constitution.

The proposals came late in the congressional session and the matter was postponed, with some members hoping that the delay would allow for a broader amendment.³⁶⁵ A year later, the debate had crystallized opposition to state suability into a few fairly succinct points. Opponents of such judicial power believed that federal power must be construed in light of the fundamental principle of federalism and the retained sovereignty of the people in the states. Narrow construction of delegated power was an assumed law of sovereign nations, and the conventions had been promised that states would be treated as sovereigns even after the adoption of the constitution and that federal power would be construed accordingly. Not only had this been promised as a general matter, this had been specifically promised in regard to the judicial power and the issue of state suability. The decision in *Chisholm* thus erred in its approach and violated an express understanding of the ratifiers.

Finding the appropriate response required more than simply removing a particular power. It was possible that a poorly worded amendment would impliedly vindicate the Supreme Court's nationalist construction of federal power. Such would have been the approach of the Pennsylvania resolves. The year long debate, however, illustrated a

³⁶³ See Proceedings of the United States House of Representatives, *Gazette of the United States* (Feb. 19, 1793), in 5 DHSC, *supra* note 2, at 605-06. There is no record of such a motion in either the House Legislative Journal or the Annals of Congress. *Id.* 606. However, in light of the fact that Sedgwick's motion was reported in two different newspapers, including one recording a second to Sedgwick's motion to introduce the amendment, the reports seem credible.

³⁶⁴ Resolution in the United States Senate (February 20, 1793), in 5 DHSC, *supra* note 2, at 607-08.

³⁶⁵ See *supra*, note 274 and accompanying text.

broad and deeply held belief that not only was the power wrong but the manner of construction wrong as well. Despite the obvious aspersion that would be cast on the Court, the amendment had to address this problem, particularly in light of what appeared to be a troubling series of broad constructions of federal power.³⁶⁶

Scholars have commonly characterized the response to *Chisholm* as reflecting a self-interested attempt by the states to avoid ruinous judgments against them in the federal courts.³⁶⁷ This was how Chief Justice John Marshall famously characterized the call for the Eleventh Amendment in his 1821 decision in *Cohens v. Virginia*.³⁶⁸ The precarious financial situation of states like Georgia did, in fact, intensify the opposition to state suability.³⁶⁹ However, whatever one makes of Marshall's reductionist argument in *Cohens*, or the various personal and financial interests of advocates on both sides of the debate,³⁷⁰ the original sources illustrate that preserving the sovereign dignity of the states was the primary issue discussed in public calls for an amendment to the Constitution. This seems to have been conceded even by the advocates of state suability.³⁷¹ Thus, regardless of whatever self-interested motives individuals may have had in pressing for a narrow construction of Article III, the public debate focused on the nature of the federal system itself. Attorney General Sullivan's early and extensive discussion of the issue focused on the concept of retained sovereignty and the proper construction of delegated power; so did the even more detailed response to Sullivan published by "Hortensius."³⁷² The general thrust of the debate over the next year followed the general outlines of these opening salvos: Opponents of state suability stressed the original understanding of the ratifiers and the "consolidating" effect of broad constructions of federal power. Proponents stressed what they saw as the plain meaning of the text and the simple justice of holding states equally amenable to being sued in federal court as private

³⁶⁶ Letters published in opposition to state suability often raised additional concerns about the broad construction of federal power exhibited in Hamilton's Funding Program and the creation of a National Bank.

³⁶⁷ See, for example, 1 Warren, *supra* note 9, at 99 ("While this opposition to the Court's decision was to some extent based on divergence of political theories as to state sovereignty, the real source of the attack on the *Chisholm* case was the very concrete fear of the "numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc, that will introduce such a series of litigation as will throw every State in the Union into greatest confusion."); Pfander, *History and State Suability*, *supra* note 15 at 1278 (The *Chisholm* decision was a "shock" "less because it contemplated the suability of the states as corporate bodies than because it threatened to require the states to honor old obligations to individual suitors in specie, without regard to the states' traditional freedom to adopt strategies of agrarian finance.").

³⁶⁸ *Cohens v. Virginia*, 19 U.S. 264, 406 (1821). For an historical account which seeks to support Marshall's assertion about the original purpose of the Eleventh Amendment, see James Pfander, *History and State Suability*, *supra* note 15 at 1342 (quoting Marshall's passage in *Cohen* as supporting a financial interest-based reading of the Eleventh Amendment).

³⁶⁹ See Edward Telfair's Address to the Georgia Assembly, *Augusta Chronicle* (Nov. 4, 1793), in 5 DHSC, *supra* note 2, at 234 (noting that, in addition to the infraction on state sovereignty, suits against the state introduced serious "difficulties" in light of the depleted state coffers due to on-going battles with Native American tribes).

³⁷⁰ For evidence of Justice James Wilson's conflicts of interest in the state suability cases, see 5 DHSC, *supra* note 2 at 282 n.50.

³⁷¹ See introduction to published version of Jay's *Chisholm* opinion in newspapers.

³⁷² See *Observations Upon the Government of the United States* (July 7, 1791), in 5 DHSC, *supra* note 2, at 21; "Hortensius," *An Enquiry Into the Constitutional Authority of the Supreme Federal Court* (April 12, 1792), in 5 DHSC, *supra* note 2, at 36.

individuals.³⁷³ The ultimate draft of the Eleventh Amendment and its remarkably rapid ratification reflected the outcome of this debate.

The New Draft

In the Third Congress, on January 2, 1794, Caleb Strong again submitted a proposed amendment, only this time, his proposal focused on the issue of *construction*:

“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.”³⁷⁴

On January 14, Albert Gallatin moved to amend the text to exclude suits “arising under [United States] treaties”³⁷⁵ Gallatin’s proposal would have exempted the *Vassal* case and other like it. It was rejected.³⁷⁶ One other attempted modification which would have allowed suits against the states in future cases, but not those cases arising before the ratification of the amendment.³⁷⁷ It too was rejected. Strong’s original version was then approved (with only two votes against).³⁷⁸ There was one final attempt to amend the proposal in the House of Representatives and limit its application to only those states that had made adequate provision for such suits in their own state courts—it too failed.³⁷⁹ Finally, on January 15, 1794, the House voted 81 to 9 to concur with the Senate’s acceptance (23-2) of Strong’s proposal.³⁸⁰ Strong’s version of the Eleventh Amendment thus was adopted without a single amendment and submitted to the states for ratification in March of 1794. In less than a year, a sufficient number of states had ratified the Eleventh Amendment to make it an official part of the Constitution.³⁸¹

Describing the drafting of the Eleventh Amendment as it occurred, two members of Congress from the state of New York produced almost identical descriptions of the proceedings in Congress, one in a letter to a friend, the other in a circular letter to his

³⁷³ See, e.g. “Solon,” *Independent Chronicle* (September 19, 1793) in 5 DHSC, *supra* note 2, at 421, 423 (stressing the plain language of Article III and the policy of maintaining a government “of laws which are equal and certain—laws which give a remedy to the weak, as well as the strong, to the single citizen as to the whole people.”).

³⁷⁴ Resolution in the United States Senate (Jan. 2, 1794), in 5 DHSC, *supra* note 2, at 613.

³⁷⁵ Proceedings of the United States Senate (January 14, 1794), in 5 DHSC, *supra* note 2, at 617.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ Proceedings of the United States House of Representatives (March 4, 1794), in 5 DHSC, *supra* note 2, at 620.

³⁸⁰ *Id.*

³⁸¹ 5 DHSC, *supra* note 2, 625-28. In this early period, the process by which states notified the national government regarding ratification had not yet been codified, leading to a delay in the official notice of the eleventh’s ratification. See 5 DHSC, *supra* note 2, at 601. This fact has occasionally led historians to misstate the time states took to act on the proposed amendment. See, e.g., Goebel, 1 *History of the Supreme Court*, *supra* note 207 at 737 (“it was close to four years before a sufficient number of states had ratified [the Eleventh Amendment]”). The record indicates, however, that the amendment was ratified in less than a year—and included a state that had originally been on record as opposing the amendment.

constituents. Both men explained that the House was engaged in producing an amendment that would “prevent the *learned* Judges of the federal judiciary from extending its construction to the suability of states by individuals.”³⁸²

E. Post Adoption Commentary: The Eleventh Amendment as the Voice of the People

Madison argued in the Federalist Papers that, should the federal legislature extend its powers beyond that authorized in the Constitution, the state legislatures could be counted on the “sound the alarm to the people,” for every unconstitutional extension of power by the federal government necessarily invaded the rights of the states.³⁸³ According to Madison, the people could then secure a remedy by electing new federal representatives.³⁸⁴ Curing a usurpation by the unelected federal judiciary was a different matter; even constitutional amendments are subject to judicial construction. Faced with a widely perceived interpretive error by the Supreme Federal Judiciary, the people chose one of the few tools at their disposal that could adequately address the problem: *Mandate* the proper construction of Article III. In taking this step, the people exercised for the first time under the new Constitution their sovereign right to control the operations of the federal government.

This, at least, is how the event was perceived in the years immediately following the adoption of the Amendment. Materials dealing with the Eleventh Amendment in the first decade of its existence are scarce, but what we do have reflects the view that it represented a movement of the people to secure the ratifiers’ original understanding of Article III. The most obvious example is the Supreme Court’s later dismissal of the suit against Virginia in *Hollingsworth*, the Court apparently accepting the state’s argument that the Amendment was declaratory of the proper construction of Article III and thus must apply retroactivity against all pending suits against the states.³⁸⁵

There are other examples, though less well known. Three years after the amendment was ratified, the Supreme Court of Pennsylvania heard a case involving whether a state could be compelled by a criminal defendant to remove the case to federal court.³⁸⁶ In its oral argument, the state raised the case of the Eleventh Amendment in support of broad reading of the sovereign power of the state to refuse removal to federal court:

The language of the amendment, indeed, does not import an alteration of the Constitution, but an authoritative declaration of its true construction.³⁸⁷

³⁸² See Theodore Bailey to his Constituents (January 22, 1794), in 5 DHSC, *supra* note 2, at 618; Philip Van Cortlandt to David Gelston (Jan. 30, 1794), in 5 DHSC, *supra* note 2, at 618 n. 1 (emphasis in both originals).

³⁸³ James Madison, The Federalist No. 44, *supra* note 49 at 286.

³⁸⁴ *Id.*

³⁸⁵ *Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

³⁸⁶ *Respublica v. Cobbett*, 3 U.S. 467 (1798) (Supreme Court of Pa.). Judge Spencer would rely on this opinion rather heavily in *Hunter v. Martin*, 4 Munf. 1, 29-30 (1815).

³⁸⁷ *Id.* at 472.

The Chief Justice of the Pennsylvania Supreme Court, Thomas McKean, agreed that the Eleventh Amendment represented a movement by the people themselves to declare the true meaning of Article III. A former member of the Pennsylvania Ratifying Convention, Judge McKean began his opinion by pointing out the pre-constitutional states “had absolute and unlimited sovereignty within their respective boundaries.”³⁸⁸ Under the current Constitution, the states enjoy all “powers, legislative, executive, and judicial” except “such as are granted to the government of the United States by the present instrument and the adopted amendments.” The combination of state and federal governments thus combine to “form one complete government.” Problems arose, however, in cases of “collision” between state and federal power:

Should there be any defect in this form of government, or any collision occur, it cannot be remedied by the sole act of the Congress, or of a State; the people must be resorted to, for enlargement or modification. If a State should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affair by making amendments in the constitutional way, or suffer from the defect. In such a case the constitution of the United States is federal; it is a league or treaty made by the individual States, as one party, and all the States, as another party. When two nations differ about the meaning of any clause, sentence, or word in a treaty, neither has an exclusive right to decide it . . . I rather think the remedy must be found in an amendment of the constitution.

McKean thus places resolution of disputes over the interpretation of delegated power in the hands of the people themselves who can remedy the situation through the adoption of an amendment declaring the proper understanding of the Constitution. This, to Judge McKean, is precisely what occurred through the adoption of the “declarative” Eleventh Amendment.

It has been well observed by the attorney general, that by the last amendment, or legislative declaration of the meaning of the Constitution, respecting the jurisdiction of the courts of the United States over the causes of States, it is strongly implied, that States shall not be drawn against their will directly or indirectly before them, and that if the present application should prevail this would be the case. The words of the declaration are: ‘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.’

McKean read the Amendment as “declarative” of a preexisting principle that “States shall not be drawn against their will” before the federal courts. Indeed, McKean goes so far as to refer to the Eleventh as a “legislative declaration” instead of an amendment, if only to underscore his agreement with the state that the provision did not alter powers granted under the original constitution. Finally, McKean reads the amendment as “resolving” a dispute between the federal and state governments regarding the suability

³⁸⁸ *Id.* at 473.

of the states—the very act of the people he earlier suggested was the proper means of settling such disputes.³⁸⁹

In the first constitutional treatise, St. George Tucker presented the same view of the Eleventh as representing an act by the sovereign people themselves in response to an unconstitutional act of the federal government. Published eight years after the adoption of the Eleventh Amendment, Tucker’s “View of the Constitution” for decades served as the authoritative work on the federal Constitution, and remained influential throughout the nineteenth century. In his discussion of the Eleventh Amendment, Tucker links the meaning of the clause to the principles underlying the Tenth Amendment:

[The judicial power] does not extend to *any case* that may arise between a state and its own citizens or subjects; or to any case between a state, and foreign citizens or subjects, or the citizens of any other state* [here Tucker cites the Eleventh Amendment] . . . so every such case, whether civil or criminal, and whether it arises under the law of nations, the common law, or law of the state, belongs exclusively to the jurisdiction of the states, respectively. And this, as well as from the reason of the thing, as from the express declarations contained in the twelfth and thirteenth articles of the amendments to the constitution.³⁹⁰

To Tucker, the “reason of the thing” as much established the restrictions of the Eleventh Amendment as much as the text itself. Tucker, of course, insisted that states could not be divested of their retained sovereign rights by “implication” but only by its own written consent given “in the *most express terms*.”³⁹¹ Elsewhere in his treatise, Tucker addresses the question of “what would be the consequences in case the federal government should exercise powers not warranted by the constitution.”³⁹² Tucker answers the question by quoting James Madison and using the adoption of the Eleventh Amendment as an example of the people correcting the errors of their government:

Where [the usurpation] may affect a state, the state legislature, whose rights will be invaded by every such act, will be ready to mark the innovation and sound the alarm to the people*[here Tucker cites the Federalist Papers]; and thereby either affect a change in the federal representation, or procure in the mode prescribed by the constitution, further “declaratory and restrictive clauses”, by way of amendment

³⁸⁹ The dissent in *Alden* cites only the final words of McKean on this subject, and badly misstates their context: “fn28 It is interesting to note a case argued in the Supreme Court of Pennsylvania in 1798, in which counsel for the Commonwealth urged a version of the point that the Court makes here, and said that “[t]he language of the amendment, indeed, does not import an alteration of the Constitution, but an authoritative declaration of its true construction.” [citing *Respublica*]. The court expressly repudiated the historical component of this claim in an opinion by its Chief Justice: “When the judicial law [*i.e.*, the Judiciary Act of 1789] was passed, the opinion prevailed that States might be sued, which by this amendment is settled otherwise.” *Id.* at 475 (M’Kean, C.J.)” Obviously the full passage shows that McKean viewed the amendment as declaratory and, in fact, expressly *agreed* with counsel for the state.

³⁹⁰ St. George Tucker, 1 Blackstone’s Commentaries 422 (1803).

³⁹¹ *Id.* at 423.

³⁹² *Id.* at 153.

thereto. *An instance of which may be cited in the conduct of the Massachusetts legislature: who, as soon as that state was sued in federal court, by an individual, immediately proposed, and procured an amendment to the constitution, declaring that the judicial power of the United States shall not be construed to extend to any suit brought by an individual against a state.*³⁹³

F. A Brief Textual-Historical Theory of the Eleventh Amendment

The historical debates which accompanied the passage of the Eleventh Amendment seem to allow for some tentative conclusions about the received meaning of the Amendment. Most critically, there appears to have been widespread agreement among those who supported the amendment that the Supreme Court had erred in its construction of Article III. New York, of course, had expressly declared its understanding of that article when it adopted the Constitution. Georgia just as expressly declared the Eleventh to represent “the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured.”³⁹⁴ Other states expressed the same view through their call for language controlling the *construction* of Article III. Both proponents and opponents viewed the language of construction as implicating the Supreme Court’s interpretation of Article III in *Chisholm*. This point is further supported by the Pennsylvania Resolutions which omit the language of construction in an amendment that presumes the Supreme Court did *not* err in *Chisholm*. Finally, although there were some exceptions,³⁹⁵ the vast

³⁹³ *Id.* at 153. Madison appears to have agreed that the language of the Eleventh Amendment suggests it was declaratory rather than a substantive removal of delegated power. In a letter to Spencer Roane, James Madison shared Roane’s criticism of John Marshall’s opinion in *Cohens*, writing:

On the question relating to involuntary submissions of the States to the Tribunal of the Supreme Court, the Court seems not to have adverted at all to the expository language when the Constitution was adopted; nor to that of the Eleventh Amendment, which may as well import that it was declaratory, as that it was restrictive of the meaning of the original text. . . . Nor is it less to be wondered that it should have appeared to the Court that the dignity of a state was not more compromised by being made a party against a private person than against a co-ordinate party.

The Judicial power of the U.S. over cases arising under the Constitution, must be admitted to be a vital part of the System. But that there are limitations and exceptions to its efficient character, is among the admissions of the Court itself. The Eleventh Amendment introduces exceptions *if* there were none before. . . . It is particularly incumbent, in taking cognizance of cases arising under the Constitution, and in which the laws and rights of the States may be involved, to let the proceedings touch individuals only. Prudence enjoins this *if there were no other motive*, in consideration of the impracticability of applying coercion to States.

See James Madison to Spencer Roane (May 6, 1821) in *Mind of the Founder* at 366-67.

³⁹⁴ See An Act to ratify the resolution of congress, explanatory of the judicial power of the United States (Nov. 29, 1794), reprinted in 2 *The First Laws of the State of Georgia* 537-38 (Michael Glazier, Inc., photo. reprint 1981) (1800).

³⁹⁵ See, e.g., Zaphenia Swift to David Daggett (March 5, 1794), in 5 *DHSC*, *supra* note 2, at 624 (“A general opinion seemed to prevail that it was most prudent__that the states should not be subject to

majority of supporters of a “construction” amendment also declared their view that the Supreme Court had wrongly interpreted Article III to authorize federal courts to hear suits brought by individuals against non-consenting states. One of the major themes of oppositionist literature was that such power ran against the understanding of the ratifiers in the state ratifying conventions—an understanding supported by the express claims of the Federalist advocates of the Constitution.

Scholars have repeatedly parsed the text of the Eleventh Amendment, seeking clues regarding its scope and intended meaning. One of the problems with much of this literature, however, has been its assumption (expressly stated or tacitly assumed) that the amendment imposed a substantive change on the original scope of federal power delegated under Article III. Under this assumption, the textual scope of the amendment becomes critical indeed, for it leaves federal power otherwise untouched and subject to the same broad construction of judicial authority generally granted to other national powers. The historical evidence presented in this article, however, suggests a very different meaning of, and different approach to, the text of the Eleventh Amendment. The text itself is fairly clear—it forbids any *construction* that *extends* federal judicial power to suits brought by out of state individuals against a state. As neo-revisionists have argued (persuasively in my mind), the text makes no exception for suits based on so called “federal questions,” whether involving domestic federal rights or rights established by treaty.³⁹⁶ Given that everyone at the time knew the issue of state suability involved the potential enforcement of federal treaties, and given the express rejection of language which would have excepted treaties from the text of the amendment, it seems reasonable to allow the text full value as applying to both federal questions and diversity cases involving questions of state law.

One textual mystery involves why the amendment refers only to suits by out of state individuals, rather than asserting that states were immune from *any* individuals. This was the approach of Theodore Sedgwick’s original proposal,³⁹⁷ though he seems to have abandoned it by the time Caleb Strong submitted his revised proposal in the next session of Congress. Although a mystery, some answers are less likely than others. For example, it seems quite unlikely that the omission was meant to preserve the right of in-state individuals to sue their own state. To begin with, no one thought states *could* be sued by their own residents. No state law provided for such a procedure, and the debates reflect an assumption by participants that states were not subject to compelled suits by their own citizens.³⁹⁸ Most obviously, of course, such an exception would raise all of

such inconvenience__ and that it was advisable to remove a ground of jealousy which the states felt pretty strongly and which might have issued in some bad consequences__This does not seem to be owing to the exertion of any party unfriendly to the government.”).

³⁹⁶ See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 Harv. L. Rev. 1342 (1989).

³⁹⁷ See *supra*, note 362 and accompanying text. Sedgwick’s proposal was never debated. See *id.*

³⁹⁸ See, for example, William Widgery’s remarks in Massachusetts House of Representatives:

[I]f an individual property is taken to satisfy an execution against this States, he has no remedy in either state or federal court. For the State being completely sovereign, as it respects its own citizens, no action for damages will lie in his favor against the state. . . and no man will pretend to say, that the Federal Constitution authorizes any action in the federal court between a state and its own citizens.

the same issues of retained sovereign immunity that were raised by suits like Vassal's and Chisholm's.³⁹⁹

Some scholars have suggested that the narrow language of the Amendment suggests not only a narrow construction, but an additional negative implication that the principles of state sovereign immunity are to be excluded in all cases except those mentioned in the language of the text.⁴⁰⁰ Had the Amendment said nothing about judicial construction, this might be a plausible approach. However, the language of the Amendment does not say “the judicial power of the United States shall not extend,” but instead “the judicial power of the United States *shall not be construed* to extend.” The former follows Caleb Strong's original proposal which he abandoned in favor of the latter. Had the amendment followed its original formulation, it would have reversed the effects of the *Chisholm* decision, but would have left in place its *ratio decidendi*—its reasoning, and this could have a far great effect on the people in the states than the single humiliating prospect of being sued on a debt in federal court. As Senator of the state of Massachusetts, Strong had been *instructed* (not merely “requested” as was the case for representatives) to secure an amendment which reflected the conclusions of the Massachusetts General Court that *Chisholm* was wrong as a matter of constitutional law, not just constitutional policy. The error, moreover, was one of *construction*—the need to narrowly construe Article III in order to preserve the retained sovereignty of the people in the states. Those scholars who suggest the amendment carries a negative implication that preserving state sovereignty applies nowhere else *except* in the narrow category of cases listed in the Eleventh Amendment have it exactly backwards.⁴⁰¹ The language of the Eleventh was chosen in a manner that prevents exactly that kind of *expressio unius est exclusio alterius*⁴⁰² rule of construction.

A full theory of the Eleventh Amendment is beyond the scope of this article. Any theory based on the original understanding of the Eleventh, however, must take into account four basic characteristics, or four “layers”⁴⁰³ of constitutional meaning, which inform the Amendment. First, the Constitution as a whole was broadly understood to retain the independent sovereign existence of the states. This understanding included the idea that federal power had been delegated by the people in the states, with all non-delegated power, jurisdiction, and rights, retained by the delegators. This leads to the second layer of understanding: As a matter of popular sovereignty and the applicable law of nations, all delegated powers were to be strictly construed. This rule of strict construction which applied to all powers delegated under the federal constitution were made an express part of the Constitutional text through the adoption of the Ninth and

5 DHSC, *supra* note 2, at 429.

³⁹⁹ An additional reason might involve the unresolved question whether an individual who proceeded against a state in state court with the state's permission, could appeal to the Federal Supreme Court. Although the issue would be contested in coming years, the Eleventh Amendment does not foreclose this possibility, nor are the sovereignty concerns underlying the Eleventh Amendment as deeply implicated in cases involving *voluntary* state submission to a suit brought by an individual.

⁴⁰⁰ See Manning, *supra* note 10.

⁴⁰¹ See, e.g., John Manning, Reading Precise Constitutional Texts, *supra* note 10.

⁴⁰² “The expression of one thing is the exclusion of another.”

⁴⁰³ I thank Professor Lawrence Solum for the suggestion of “four layers” in the original understanding of the Eleventh Amendment.

Tenth Amendment. These amendments were declaratory, however, meaning that the rule was broadly assumed to inform the Constitution even without the addition of these two amendments. Third, Article III, like all delegated powers, was to be narrowly construed in manner preserving the retained powers, jurisdiction and rights of the people in the states. It was the failure of the Supreme Court to apply this proper construction of Article III which led to the four layer: the Eleventh Amendment itself. By adopting the language of construction—language well debated prior to the drafting of the Eleventh Amendment—the framers of the Amendment signaled an agreement with a broadly shared sentiment that the Supreme Court had erred in failing to construe Article III in a manner preserving the retained rights of sovereignty to the people in the states. This not only suggests a background rule of strict construction informs the Eleventh Amendment, it also precludes any attempt to read the amendment in a manner that denies or disparages other aspects of sovereignty retained by the people.⁴⁰⁴

Again, a full discussion of how the above theory of the Eleventh Amendment applies across the range of cases involving state suability is beyond this article. At least two important conclusions seem justified, however, in regard to the jurisprudence of the Eleventh Amendment. To begin with, the original understanding of the Eleventh Amendment appears to vindicate the Supreme Court’s conclusion in *Hans v. Louisiana* that the underlying principles informing the Amendment extend beyond the narrow subject matter of the text. Whatever the motivations of the *Hans* Court, their conclusion that preserving sovereign immunity was an essential limitation on the proper construction of Article III is in keeping with the historical evidence canvassed in this article. Much work needs to be done regarding the parameters of this immunity, but the basic insight of the *Hans* model seems appropriate as a matter of the original understanding of Article III and the Eleventh Amendment.

For similar reasons, the modern Supreme Court’s use of sovereign immunity as a principle limiting the construction of Article I also seems justified by the historical record. As Hancock put it, “[t]here are certain inherent principles in the Constitution . . . which can never be surrendered, without essentially changing the nature, or destroying the existence of the Government.”⁴⁰⁵ The principle of retained sovereignty was promised by the Federalists and reasonably relied upon by the state conventions. Although the Eleventh Amendment responded to an interpretation of Article III, the principle which drove that amendment applied to the construction of federal power as whole. Thus, when Justice Kennedy in *Alden v. Maine*⁴⁰⁶ invoked the Tenth Amendment as justifying a limited construction of Article I in order to preserve the sovereign immunity of the states, he invoked a rule of construction James Madison believed expressed by both the Ninth and Tenth Amendment.⁴⁰⁷ This is not a matter of stretching the Eleventh Amendment beyond its text; it is a matter of construing texts

⁴⁰⁴ This reading of the Amendment implies a distinction between a grant of subject matter jurisdiction and the concept of state sovereign immunity. Article III clearly grants subject matter jurisdiction over suits involving states as a party and cases involving the United States as a party. The grant of subject matter jurisdiction over the United States was broadly understood as *not* abrogating the sovereign immunity of the national government.

⁴⁰⁵ John Hancock’s Address to the Massachusetts General Court (Sept. 18, 1793), in 5 DHSC, *supra* note 2 at 417.

⁴⁰⁶ *Alden v. Maine*, 527 U.S. 706, 713 (1999).

⁴⁰⁷ See *supra* note 123 and accompanying text.

containing delegated power according to the original understanding of the state ratifying conventions.

Conclusion:
The Four Myths of the Modern Eleventh Amendment

By suggesting in the title to this piece that we “leave the *Chisholm* trail,” I do not mean to suggest that the decision is unimportant. *Chisholm* was the first great constitutional case issued by the Supreme Court, and the opinions in the case represent important streams of thought regarding early understanding of the Constitution. Nor has it been my intent to prove some kind of unified public embrace of retained state sovereignty and strict construction of federal power at the time of the Founding. Obviously, different Founders took different positions on both issues. The opinions in *Chisholm*, again, reflect these divided views.

My point has been to descriptively broaden the historical record and, in so doing, make the normative case that we *ought* to look beyond *Chisholm* if we truly wish to understand how the Eleventh Amendment came into being and what the Clause was understood to signify. The Eleventh was not the first rule of construction added to the Constitution; its slightly older sibling the Ninth Amendment was adopted as part of an effort to limit the construction of federal power in order to preserve the retained rights of the people. These retained rights included all powers, jurisdiction and rights not expressly delegated to the federal government under the Constitution. Too many leading Federalists had promised this strict construction of federal power, and too little time had passed since ratification, to expect suits like *Oswald*, *Chisholm* and *Vassal* to slip by unnoticed.

And too much was at stake. Scholars are right to point out the contemporary concerns about a flood of suits and the burden of financial claims on states already struggling with debt. There also was the indignity of being compelled to defend a suit by someone who most state citizens would view as having deserted their country in its hour of need. But above and beyond all of this, there was the on-going concern that had fueled so much opposition to the original Constitution—the threat of annihilation as an independent sovereign. It is impossible to spend time in the original sources and not come away with the sense that this was widely viewed as the central problem with allowing individuals to sue a state. Whatever the personal motive of the writers making the claim, it was apparently well-understood throughout the country that this argument would generate the widest support for a constitutional amendment. The failure to focus on this central cause of public support for an amendment to the Constitution that has led to what I call the Four Myths of the Eleventh Amendment.

The first myth is that the Eleventh Amendment emerged from the decision in *Chisholm* and is somehow uniquely tied to that case. The evidence presented in this article suggests otherwise. *Chisholm* occurred midway down the road to the Eleventh Amendment, with the first shot fired by Massachusetts’ James Sullivan in his published response to the Maryland *Van Staphorst* case. The themes developed by Sullivan and his critics established the general outlines of the arguments that would follow, in particular the idea that a compelled suit by an individual reduced a state to a mere non-sovereign corporation, implying that the Constitution had in fact “consolidated” the

states under a solely sovereign national government. The *Chisholm* case showed the Supreme Court was willing to embrace state suability, but neither the facts nor the opinions had much influence on the debate—indeed, they were generally unknown until well into the next stage of the debate—the drafting of state resolutions calling for an amendment to the Constitution. Nor did Georgia respond with the immediate resolve one might expect from a case that supposedly triggered the Eleventh Amendment. It was not until Massachusetts acted in response to the *Vassal* case that Georgia joined the bandwagon with the rest of the states calling for a Constitutional Amendment. Finally, it was Massachusetts that laid out the options for the state assemblies and it was representatives from Massachusetts that ultimately chose the form of the Eleventh Amendment. Again, the point is not to make *Chisholm* irrelevant; it was not. Had the Court chosen to follow the reasoning of Justice Iredell, the issue would have disappeared (at least until Chief Justice Marshall almost certainly would have revived it at a later date). Despite the important status of *Chisholm*, however, there is nothing about the facts of the case or the opinions that played a particularly important role in the creation and understanding of the Eleventh Amendment. A decision in *Vassal*, *Oswald*, *Hollingsworth*, or any suit against the state would have led to the same result. Indeed, unlike *Chisholm*, the *Vassal* cases involved a suit by a despised “Tory,” a fact well noted in the public debates and may well have served an important role in generating such broad support for an amendment. In the end, however, it was not the specific facts in any of these cases that informed the Eleventh Amendment. It was the *concept* of state suability and the implications for the construction of delegated sovereign power.

The second modern myth about the Eleventh Amendment may seem somewhat at odds with the first, but in fact illustrates the importance of getting beyond *Chisholm* in our understanding of the Eleventh Amendment. One of the most common assertions in Eleventh Amendment scholarship is the claim that Supreme Court Justice James Iredell did not present a constitutional case against state suability in his *Chisholm* dissent. The assertion is generally used as rhetorical support for the reasonableness of the majority’s construction of Article III. There are a number of problems with this myth, however. To begin with, we know that Iredell wrote at least two separate essays on the constitutional problem of state suability, one in conjunction with *Oswald*, the other for *Chisholm* (which he may have delivered orally when the court issued its ruling). But even if we just focus on Iredell’s published dissent, his argument is based on a reading of the Constitution that is critical to his ultimate conclusion that Congress has not authorized suits against the states: if suits against corporations served as an appropriate analogue to suits against states, then the procedures of corporate law would fall under the “principles and usages” Congress had authorized in the Judicial Act. It was because states as sovereigns *could not* be treated as mere corporations that Iredell concluded this area of law did not apply. The issue of whether states could be treated as corporations, of course, was the *central constitutional issue* in the debate over state suability—and had been treated as such since Sullivan first published his “Observations” in the aftermath of the *Van Staphorst* case. The constitutional importance of Iredell’s decision is further highlighted by the fact that the two major opinions of the majority, those of Justice Wilson and Chief Justice Jay, were penned by men with significant conflicts of interest. Jay had joined the court specifically hoping to move the law in the direction of state accountability in terms of international treaties, an interest obviously furthered by his

opinion in *Chisholm*.⁴⁰⁸ James Wilson was hopelessly conflicted due to his financial investments.⁴⁰⁹ James Iredell, on the other hand, spoke *against* his political interest as a committed Federalist.⁴¹⁰ This makes his solo dissent in *Chisholm* all the more persuasive, for it shows the depth of support for state sovereign immunity. Indeed, the fact that a Federalist like Iredell would go against his colleagues in the first major Supreme Court opinion helps to explain the remarkably broad-based reaction to the decision by both Federalist and Anti-Federalist.⁴¹¹

The third modern myth about the Eleventh Amendment is that *Hans v. Louisiana* established a doctrine of state sovereign immunity that cannot be derived from the text of the Eleventh Amendment. This basic objection to *Hans* has been phrased in different ways, but the essence of the argument is that the Eleventh Amendment refers only to suits against a state by out-of-state citizens. By extending the Eleventh Amendment to suits brought against the state by the states' own residents, the Court in *Hans* made a fatal break from the language of the Amendment. As the Court has long noted, however, *Hans* was not about construing the text of the Eleventh Amendment, it was about construing Article III.⁴¹² *Hans* read the Eleventh Amendment as suggesting that the *Chisholm* Court had erroneously construed Article III, and that the error was a failure to construe the Constitution in a manner that preserved the retained sovereignty of the states. The language of the Eleventh Amendment, of course, makes precisely this suggestion by declaring how the Court should have construed Article III. The language of construction was specifically added to the amendment in the face of claims that doing so would amount to an official censure of the new Supreme Court. Putting aside the fact that a significant number of people believed the court ought to be censored, the purpose of adding the language was to signal the problem was not merely one of result, but one of interpretive method. Had the amendment done nothing more than reverse the result in *Chisholm*, this would have left in place the reasoning of the court—indeed, it could be understood as a tacit *acceptance* of the reasoning of the *Chisholm* majority. In such a case the cure would be worse than the disease, for absent a statement about proper construction, the Amendment could be read to carry the negative implication that in all cases *except* this one, the Court's broad construction of federal power was appropriate.⁴¹³ As the public and legislative debates make clear, however, there was much more at stake than liability on a claimed debt. Any construction of Article III that threatened the very existence of the people as independent entities in the states could not be correct. As John Hancock put it in his address, "[t]here are certain inherent principles in the Constitution . . . which can never be surrendered, without essentially changing the

⁴⁰⁸ See Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A reinterpretation*, *supra* note 11 at 1920-26 (discussing Jay's efforts to ensure federal treaties were enforceable against the states in federal courts).

⁴⁰⁹ See *supra* note __ and accompanying text.

⁴¹⁰ Iredell was no Anti-Federalist. He supported the Constitution and the Federalist Party's Alien and Sedition Acts. See *supra* note __ and accompanying text.

⁴¹¹ Theodore Sedgwick and Caleb Strong were both Massachusetts Federalists.

⁴¹² See, e.g., *Monaco v. Mississippi*, 292 U.S. 313, 328 (1934). See also Manning, *Precise Constitutional Texts*, *supra* note 10, at 1726.

⁴¹³ John Manning has recently argued that the Eleventh Amendment should be read to carry this kind of negative implication. See Manning, *Precise Constitutional Texts*, *supra* note 10, at 1740. The historical evidence presented in this paper suggests the Amendment was meant to prevent just this kind of negative implication.

nature, or destroying the existence of the Government.” In his *Chisholm* essay, Justice Iredell echoed the same point, declaring that “when the consequences ensue from one construction, inconsistent with the known basis on which the Constitution was formed & adopted, that construction shall not be received.” Or, as James Madison succinctly put it, [a]n interpretation that destroys the very characteristic of the Government cannot be just.”

Which brings us to the fourth and final myth: *The sovereign immunity doctrine of the modern Supreme Court, like other federalist doctrines of limited federal power, depart from the text and original understanding of the Constitution.* James Madison believed that the Ninth and Tenth Amendments would sufficiently secure a narrow construction of all delegated federal power. These amendments declared the broad principles of enumerated federal power and the retained rights and powers of the people in the states. The very concept of popular sovereignty, as articulated by all sides in the ratification debates, demanded that the sovereign people retained all powers and rights not expressly delivered into the hands of the federal government. Compelling the people’s state governments to defend themselves against individual suits in federal court, while declaring the immunity of the *federal* government in regard to the same class of suit, violated the very basis for believing that federal power would be narrowly construed as promised. Thus, “notwithstanding” the addition of “certain amendments” like the Ninth and Tenth, it was clear an amendment regarding the construction of Article III was required “so as to make it more definite.”⁴¹⁴ These three amendments, the Ninth, Tenth, and Eleventh, all stand as textual declarations of the need to narrowly construe federal power in order to preserve the sovereign independence of the people in the states. Together, they retain all non-delegated powers, jurisdiction, and rights to the people. Accordingly, as discussed above, Justice Kennedy followed the original understanding of Constitution when he linked preservation of state sovereign immunity to the text of the Tenth Amendment in *Alden v. Maine*—indeed, the historical case is much stronger than he apparently realized, for it finds support in the original understanding of Article I, Article III, the Ninth and Tenth Amendments *and* the Eleventh Amendment.

Today, when we think of state sovereign immunity, we tend to view the term in opposition to the people’s retained rights. This is because we have largely moved away from the Founding-period concerns about centralized national authority, and view states rights as having more to do with violating individual rights than protecting them. Even today, however, there remains a remnant understanding that sometimes local immunity from federal control can be a good thing. For its part, the Supreme Court continues to patrol the boundary between state and federal governments, ensuring, if only in a limited and sporadic way, the separation of powers between the state and federal governments. The idea is pure Madison—distributed powers the better to secure liberty.

What we forget, however, is that the federalist separation of powers is itself premised on the existence of independent sovereign people(s) in the states. Without this independent sovereign existence, state and local governments would be no more autonomous from federal control than the District of Columbia. Perhaps this would be a good thing. Perhaps not. The point is that avoiding this result is *exactly* what was understood to be

⁴¹⁴ Edward Telfair’s Address to the Georgia General Assembly (Nov. 4, 1793), in 5 DHSC, *supra* note 2, at 234.

at stake in the debates over state suability, for such a precedent called into question the very idea of autonomous states and *that* called into question the concept of limited federal power. Without the counter-pressure of individual local sovereigns, the only limits to the construction of federal authority are those limits expressly listed in the Constitution, for example in the Bill of Rights. This reading of federal power, of course, is precisely what the Ninth Amendment was supposed to prevent—just because the constitution enumerated *certain* limits on federal power, this does not mean there are no *other* constraints on federal power.

It is in this way that the Ninth, Tenth, and Eleventh Amendments fit together. As Madison put it, the Tenth Amendment declares Congress has only enumerated powers, and the Ninth declares that these enumerated powers must have a limited construction. For example,

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.