Sovereign Immunity and the Uses of History

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I. INTRODUCTION

The history of sovereign immunity in the United States is a history of mistakes. One mistake has engendered another, with the result that many federal laws are not enforced against the states, either in state or federal courts or federal administrative courts, and citizens
have limited (or in some instances, no) recourse against their federal, state, and local governments—and all of this seems reasonable, normal, and even inevitable. This Article attempts to identify the reasons why extensive immunities have become the norm in our legal system, and to demonstrate that this entrenched system of immunities owes its existence to multiple errors made by judges, scholars, and legislators in attempting to understand our early history. Because stare decisis does not create historical fact, a great deal of modern doctrine is simply wrong from an historical perspective.

Previous commentators have almost uniformly concerned themselves with the immunity of the states and questions of federalism. In fact, much of the historical record addresses whether the states enjoyed immunity from suit in the federal courts. This record is important for understanding sovereign immunity, and is treated for the insights it provides into the founding generation’s view of sovereign immunity. This Article concludes that the founding generation did not intend state sovereign immunity and instead viewed the ratification of the Constitution as consent to Article III suits by the states individually and collectively for the United States.

The Article also focuses on the generally ignored issue of the immunity of the federal government, which implicates horizontal divisions of power among the legislative, executive, and judicial branches. Because courts have mistakenly read the historical record as affording sovereign immunities to the states, the issue of the federal government’s immunity has not been treated. It is simply assumed that if the Constitution afforded the states full immunities, the federal government must be immune. This Article adds to the arguments of others that the Constitution contemplates actions against the states in Article III cases and further asserts, relying on history and the structural predicates of our government, that the federal government similarly enjoys no constitutional immunity in Article III cases.

Briefly, the errors that account for sovereign immunity in its modern form are these. First, sovereign immunity is based on a modern misunderstanding of eighteenth century English law as prohibiting any form of recovery against the sovereign. Despite this popular misconception, English procedure permitted several forms of action against the Crown as a matter of course. Second, modern observers have assumed, based on scant historical evidence, that the English law of sovereign immunity was received into the law of the newly

formed United States, despite its inconsistencies with the structures and governing philosophies of the Union. This reception by Revolutionaries, whose actions constituted treason under English law and whose aim was the overthrow of the sovereign and institution of a representative government, has been repeatedly described as "one of the mysteries of legal evolution." This Article argues that there was no such "reception," and that the founding generation did not accept or adopt sovereign immunity. The constitutional language and structure, debate in the Convention and in the press, and ratification debates in the states support this theory. The Supreme Court's acceptance of sovereign immunity as a constitutional principle depends on its determination of the intent of the Framers, which ignores a great deal of historical evidence from the time of the founding and relies primarily on a discredited account of the Eleventh Amendment first articulated in the 1890 case of *Hans v. Louisiana.* Third, modern justifications for sovereign immunity, such as promotion of government efficiency and protection of public funds, are tainted by these errors. Non-historical rationales for sovereign immunity derive much of their force from the simple fact that we believe sovereign immunity has been part of our history from the beginning.

Central to the modern doctrine of sovereign immunity is an historical account of the founding which is deeply flawed. This flawed account of the founding relies almost exclusively on an isolated statement of Alexander Hamilton in a *Federalist* paper, later supported by one statement of James Madison and one statement of John Marshall during the Virginia ratification debates. These three statements, which address federal judicial power over the states, interpret the national judicial power afforded in the Constitution as being subject to common law sovereign immunities.

Instead, the Founders believed that the states' ratification of the Constitution supplied consent to suit by individual states and by the

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2. Apparently the first to use the phrase was Edwin M. Borchard, *Government Liability in Tort,* 34 *Yale L. J.* 1, 4 (1924). In the intervening years, he has been quoted by many, including Judge Traynor in *Muskopf v. Corning Hospital District,* 359 P.2d 457 (1961). See also *Owen v. City of Independence,* 445 U.S. 622 (1980), where the Court stated:

> Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, "The King can do no wrong." It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: "The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong."

*Id.* at 645 n.28 (quoting Borchard, *supra,* at 4).

3. 134 U.S. 1 (1890).
SOVEREIGN IMMUNITY

states collectively on behalf of the United States in Article III cases. This belief is evidenced by an examination of the records of the Constitutional Convention, which do not discuss sovereign immunity, but which proceed from and adopt structural predicates inconsistent with immunities, the state conventions, ratification documents, debate in the popular press, private correspondence at the time, and early case law. These materials demonstrate that the founding generation’s interpretation of the Constitution with regard to sovereign immunity is at odds with the Supreme Court’s long-standing view that the sovereign immunity is a constitutional doctrine, with the Eleventh Amendment standing for the broad “presupposition” of immunity implicitly embodied in Article III.

The implications of this mistaken acceptance of Hamilton’s, Madison’s, and Marshall’s statements as authoritative are far-ranging. If this Article is correct in its interpretation of constitutional language and its assessment of the views of the founding generation, ratification of the Constitution by each state effected its consent to suit under Article III, Section 2. Similarly, the immunity of the newly-created national government was limited through consent of the states collectively. Contrary to the current view of sovereign immunity, the Constitution subjects the United States to suit in federal court, and the states to suit in federal and state courts for violations of federal law under the authority of the Supremacy Clause.4 By im-


5. There is some case law which suggests that the obligations of federalism run in the opposite direction, and that states have the power to enforce constitutional law against the United States. See Massachusetts v. Mellon, 262 U.S. 447 (1923), in which Massachusetts brought suit against the Secretary of the Treasury, alleg-
plication, this reading raises questions about the justifications for state and local government immunities in state political systems as well.6 The historical account offered here also renders unnecessary various statutory waivers of immunity, including the Federal Tort Claims Act7 and the Tucker Act,8 and raises questions about the appropriateness of retained immunities contained in general waivers.

Time and tradition have, of course, embedded the mistake of sovereign immunity in our legal culture. Completely excising this embedded mistake and other derivative mistakes, which are now firmly entrenched in constitutional, statutory, and common law, is extraordinarily unlikely,9 and perhaps even impossible. However, the mistake has thwarted the administration of justice in this country over the course of more than two centuries, depriving many claimants against the United States, states, counties, municipalities, and often their corporate and individual agents, of the protection of our law. In recognition of these many injustices, this Article suggests that a claim of sovereign immunity should be assessed on its merits, independent of the doctrine's invalid historical justifications, and applied accordingly. Sovereign immunity in such instances would be a prudential rather than a jurisdictional doctrine, in which concerns about the appropriate vertical allocation of authority between state and federal governments, and appropriate horizontal allocations among the legislative, executive, and judicial branches of both levels of government, would control.

Stripped of its historical justifications, sovereign immunity is supported only by concerns about separation of powers. The government's political functions are entitled to judicial deference. However, separation of powers principles implicate both the division of power and restraint of its exercise. Sovereign immunity clearly protects too

6. To the extent that the law of immunity in the federal courts has had an impact on state law, as it almost certainly has, these questions arise.
9. The mechanisms are available but are not likely viable politically: widespread judicial acknowledgment at the United States and state supreme court levels that sovereign immunity is an accretion of time-honored mistakes which cannot be reconciled with the values of our legal system, or a constitutional amendment prohibiting its use.
much, focusing solely on the division of power and ignoring its restraining function. Separation of powers requires that divisions of government act as a check on the power of other divisions. Thus, the judiciary plays a role in restraining the executive and legislative branches of government. The constitutional structure requires the federal judiciary to monitor its own coordinate branches along a horizontal axis\textsuperscript{10} and the states along a vertical axis.\textsuperscript{11}

Absent the constraints of sovereign immunity, the judiciary properly reviews at least some actions of the political branches of the federal and state governments. The hard question is which actions. Although a full analysis is beyond the scope of this Article, the beginning of an answer can be found in the political question doctrine, which addresses the same concerns of the appropriate balance of power, but independent of the flawed historical account which accompanies constitutional sovereign immunity; in the treatment of non-constitutional immunities, including foreign sovereign immunities; in various federal abstention doctrines; and in the common law of judicially created immunities\textsuperscript{12} following waivers of sovereign immunity, in which courts attempt to balance the needs of the political branches to govern effectively with the rights of the citizenry to redress governmental violations of law.

Following this introduction, Part II describes the Supreme Court’s understanding of sovereign immunity and identifies the historical account which grounds that understanding. Part III demonstrates the flaws in the Supreme Court’s historical account. Part III comprises the bulk of the argument and shows that the Framers and ratifiers of

\textsuperscript{10} This structure is replicated in the states. Some state constitutions specifically include separation of powers provisions. For example, the Florida Constitution states the following in its Declaration of Policy:

The State Constitution contemplates the separation of powers within state government among the legislative, executive, and judicial branches of the government. The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.


\textsuperscript{11} What courts term “federalism” encompasses the same structural concerns as separation of powers. Sovereign immunity in its vertical dimension limits the ability of federal courts to adjudicate issues involving state government; in its horizontal dimension, it operates to limit judicial review of coordinate branches within the federal or state system. Both types of restrictions are based on concerns about separation of powers.

\textsuperscript{12} Including judicial distinctions between ministerial and discretionary functions and proprietary and governmental functions, the public duty doctrine, and others. \textit{See infra} Part V.
the Constitution understood that ratification constituted consent of the individual states, and collective consent of the states for the newly-created United States to suit in federal court under Article III. This conclusion depends on an examination of the law of sovereign immunity in England at the time of the framing, constitutional language, the structure of the new government, and the understandings of Framers and ratifiers as expressed in ratification debates, the popular press, and the ratification documents of the states. This Part also examines the statements of Hamilton, Madison, and Marshall in the political context of the times. It demonstrates that those statements were politically motivated and inconsistent with other views taken by those three men, as well as with the understanding expressed by other Framers and ratifiers. The conclusion that there is no constitutional immunity is also supported by early decisional law which holds that ratification constituted consent to suit in the categories of cases enumerated in Article III, Section 2. Part IV examines the underpinnings of sovereign immunity, independent of its mistaken historical and constitutional basis, concluding that the only valid basis for immunity is the principle of separation of powers. The fifth and last Part suggests eliminating sovereign immunity while preserving its separation of powers functions through existing prudential doctrines, such as the political question doctrine, duty determinations, and discretionary function immunities. Such doctrines demonstrate that separation of powers concerns inherent in sovereign immunity can be protected prudentially rather than jurisdictionally.

II. THE SUPREME COURT'S HISTORICAL ACCOUNT

The Supreme Court has long held that sovereign immunity is a constitutional doctrine that protects the United States and states individually against lawsuits in federal court without consent. The modern Supreme Court's account of the founding holds that the Constitution as originally enacted did not contemplate federal court jurisdiction over non-consenting states and, by necessary implication, over a non-consenting federal government. According to the Supreme Court's view, the only vehicle by which the federal government may act directly against a non-consenting state is the Fourteenth Amendment's enforcement power in Section 5, which is specifically aimed at the states. Otherwise, the states are sovereign and not

13. Acceptance of conditional federal funding may operate to place indirect, voluntary restrictions on the sovereignty of the states.
14. Section 1 of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Section 5 states:
subject to the enforcement of federal law against them through suit in federal courts,\textsuperscript{15} administrative courts,\textsuperscript{16} or even in their own courts,\textsuperscript{17} despite the Supremacy Clause. The basis of this account is the Supreme Court's assessment of the intent of the founding generation. In assessing that intent, the Court has relied upon English history and the common law doctrine of sovereign immunity;\textsuperscript{18} three isolated statements, by Alexander Hamilton in \textit{The Federalist No. 81}, James Madison in the Virginia ratification debates, and John Marshall in the Virginia ratification debates,\textsuperscript{19} that states may not be sued; evidence from the ratification documents of New York and Rhode Island,\textsuperscript{20} ignoring the contrary evidence contained in the ratification documents of other states;\textsuperscript{21} the disputed and uncertain history of the Eleventh Amendment;\textsuperscript{22} and \textit{Hans v. Louisiana},\textsuperscript{23} a decision which postdated the founding by more than a century, has been widely criticized,\textsuperscript{24} and which in turn relies on the statements of Hamilton, Madison, and Marshall noted above.

The Supreme Court's view of the founding also disregards the views of Madison, Hamilton, and many others that limitations on the states as effected through the judicial power were absolutely necessary to the functioning of the United States.\textsuperscript{25} Under the Confederacy, the states had ignored the treaties and laws of the Confederacy.

\textsuperscript{15} E.g., \textit{Blatchford v. Native Vill. of Noatak}, 501 U.S. 775, 779 (1991) (holding states are immune from federal court suits by Indian tribes); \textit{Monaco v. Mississippi}, 292 U.S. 313 (1934) (holding states are immune from federal court suits by foreign nations); \textit{Ex parte New York}, 256 U.S. 490 (1921) (holding states are immune from admiralty proceedings); \textit{Hans v. Louisiana}, 134 U.S. 1 (1890) (holding states are immune from federal question suits brought by their own citizens).


\textsuperscript{17} E.g., \textit{Alden v. Maine}, 527 U.S. 706 (1999) (holding sovereign immunity shields states from private suits in state courts pursuant to federal causes of action).

\textsuperscript{18} Id. at 715 (“When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its courts.”). This is a misstatement of English law. \textit{See infra} section III.B.


\textsuperscript{20} E.g., \textit{Alden}, 527 U.S. at 719, 749. \textit{See infra} subsection III.C.3.c.i.

\textsuperscript{21} \textit{See infra} subsections III.C.3.c.ii to iv.

\textsuperscript{22} \textit{See supra} note 4.

\textsuperscript{23} 134 U.S. 1 (1890).

\textsuperscript{24} \textit{See supra} note 4.

\textsuperscript{25} \textit{See infra} subsection III.A.3.
Willful state violation of these laws had necessitated the Convention. The Supreme Court, in disregard of this clear history, views state sovereignty as encompassing the states' ability to avoid the enforcement of federal law against them. According to the Court, "neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court." To the contrary, all of the Framers and ratifiers who spoke on the issue, Federalists and Antifederalists alike, believed that the powers of the judiciary and the legislature had to be coextensive. Otherwise, there would be no method of enforcing the law and the Constitution would preserve the very problems—state disregard of national law—which had been the downfall of the Confederacy. 

Over time, dissenters have articulated a different and fuller version of the history of the founding and concluded that the states did not enjoy full immunities as a matter of constitutional law. Justices Brennan, Stevens, Souter, and Breyer have propounded this view on the modern Court, concluding that the federal government has the power to bind the states through exercise of its Article I powers. Those dissenting views hold that the states consented to suit by the federal government and by other states. The dissenters stop short, however, of this Article's additional conclusions: first, that the Constitution subjects the federal government, as well as the state governments, to the power of the federal courts under Article III through consent of the United States given by the states collectively in their ratification of the Constitution; and second, that both the federal and state governments are subject to suit by individuals through consent of the states individually and collectively for the United States through ratification of the Constitution.

The Supreme Court's conclusion that Article III was subject to common law sovereign immunity primarily relies on the much-quoted statements of Alexander Hamilton in The Federalist No. 81 and James Madison in the Virginia ratification debates. John Marshall's statement in those debates is also frequently cited. Historians have long concluded that the Constitution was ratified at least in part because

26. See infra subsection III.C.1.
28. Id. at 733.
29. See infra subsection III.C.1.
32. Seminole Tribe, 517 U.S. at 100 (Souter, J., dissenting); Alden, 527 U.S. at 760 (Souter, J., dissenting).
“many of the most eminent advocates of the new Federal Government . . . successfully dissipated . . . the fear” that the “Federal Judiciary [had power] to summon a State as defendant and to adjudicate its rights and liabilities.” 34 The Supreme Court itself has stated that “the representations of Madison, Hamilton, and Marshall that the Constitution did not abrogate the States’ sovereign immunity may have been essential to ratification.” 35 Thus, these three statements form the linchpin of the Supreme Court’s view of sovereign immunity as a constitutional doctrine. 36 According to Hamilton,

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 States and the danger intimated must be merely ideal. . . . [T]here is 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 in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. 37

James Madison made similar statements during the ratification debates in Virginia:

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. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. . . . 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. 38

34. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1923).
36. See Chief Justice Rehnquist’s opinion in Seminole Tribe: “For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States.’” 517 U.S. at 54 (quoting Hans, 134 U.S. at 15). This “presumption” has “two parts: first, that each State is a sovereign entity in our federal system; and second, that ‘[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.’” Id. (quoting THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
38. 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (J.B. Lippincott Co. 1941) (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (This work is a collection of debates and other materials related to the ratification of the Constitution, which includes the Journal of the Federal Convention and the printed debates from the several state
Finally, John Marshall, who was not present at the Constitutional Convention, but served as a delegate to Virginia's ratification convention, argued:

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be a defendant – if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state a defendant, which does not prevent its being a plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?  

Hamilton, Madison, and Marshall were clearly capable and qualified interpreters of the Constitution. Madison is credited as being the primary draftsman of the document that provided the basis for discussion at the Convention, and was a co-author of The Federalist papers and a delegate to both the Constitutional Convention and Virginia's ratification convention. Hamilton was a member of the federal and New York conventions and also a co-author of The Federalist.
Federalist. Marshall was a member of the Virginia ratification convention and later wrote many pivotal opinions during his service as Chief Justice of the United States Supreme Court. These credentials entitle their statements to some measure of deference.

However, the interpretation advanced by Hamilton, Madison and Marshall is contradicted by the great weight of the historical evidence, including their own contemporaneous and later statements bearing on the issue. It is at odds with the reasons for the drafting of the Constitution; the plain language of the Constitution; the structure of the new government (with its system of divided but overlapping executive, legislative, and judicial powers that are each limited by the constitutional structure and restrained by checks and balances of the other branches); the reasons advanced for each category of judicial power by the Framers and ratifiers, including Madison and Hamilton; and, finally, other contemporaneous interpretations of Article III, including interpretations advanced by Madison and Hamilton themselves. Most notably, Madison complained that the federal judicial restraint on the states was inferior to his preferred legislative veto, because "where the law aggrieves individuals, [they] may be unable to support an appeal against a State to the supreme Judiciary."

Other contemporaneous interpretations read the Constitution as clearly authorizing suits against the states and include the opinions of James Wilson, later Supreme Court Justice, Framer, and member of the important Committee of Detail, which drafted the Constitution advanced in the Pennsylvania ratification debates; and the discussion of immunities and Article III in the Virginia ratification debates by all the participants, both Federalist and Antifederalists alike (including the Federalists Edmund Randolph, Framer and member of the Committee of Detail and Governor of Virginia; Edmund...

46. See supra text accompanying note 41.
47. See generally, 3 ELLIOT'S DEBATES, supra note 38.
48. Appointed by John Adams, Marshall served as Chief Justice from his appointment in 1801 to 1835. See infra subsection III.E.4 for discussions of some of those opinions.
49. The impetus for the Constitutional Convention was to permit a central authority to enforce treaty obligations against the states and to prevent the passage of unjust state laws, in particular those creating paper money and interfering with contractual obligations. See 1 BAILYN'S DEBATES, supra note 40, at 198-99. For a full discussion, see infra section III.A.
50. See infra subsection III.C.2.
51. See infra section III.D.
52. See infra subsections III.E.2 and 3.
53. Letter to Thomas Jefferson from James Madison (Oct. 24, 1787), in 1 BAILYN'S DEBATES, supra note 40, at 198. For a full discussion, see infra text accompanying notes 362-69. This statement clearly contemplates the possibility of an individual citizen's suit against a state.
54. And, by implication, suits against the federal government as well.
55. 1 ELLIOT'S DEBATES, supra note 38, at 221.
Pendleton, President of the Virginia convention; George Nicholas; and the outspoken Antifederalists, Patrick Henry, George Mason, and William Grayson),\textsuperscript{56} except Madison and Marshall; statements in the North Carolina ratification debates by William R. Davie, a member of the Federal Convention, and William Lenoir;\textsuperscript{57} debate in the press during the ratification period;\textsuperscript{58} the understandings of the ratifiers evinced by the ratification documents produced by the majority of the states;\textsuperscript{59} and early judicial interpretations of Article III, which viewed ratification of the Constitution as consent to jurisdiction under Article III.\textsuperscript{60} The great weight of the evidence demonstrates that the founding generation, Federalists and Antifederalists alike, understood the Constitution to eliminate common law sovereign immunity by effecting a general consent to suit by the states individually and collectively as the United States in the categories of cases enumerated in Article III.\textsuperscript{61}

It is also problematic to rely on Madison's, Hamilton's, and Marshall's statements as possibly "essential" to ratification of the Constitution, as the Supreme Court has done.\textsuperscript{62} By the time Hamilton's statements in \textit{The Federalist No. 81} appeared, eight states had already ratified. One day after Marshall and Madison spoke at the Virginia convention, the count rose to nine with New Hampshire's ratification. Thus, the Constitution became official without reliance on Madison's and Marshall's statements.\textsuperscript{63}

Against the weight of evidence, Madison's, Hamilton's, and Marshall's statements must be understood as part of the polemics of the ratification process rather than as the prevailing interpretation of the founding generation.\textsuperscript{64} Madison, Hamilton, and Marshall were capable and well qualified to speak on the meaning of the Constitution. But they were also politicians, highly cognizant of the very serious threats to ratification specifically posed by state indebtedness, the

\textsuperscript{56} See infra subsection III.C.3.a.

\textsuperscript{57} See infra note 222.

\textsuperscript{58} See infra subsection III.C.3.b.

\textsuperscript{59} See infra subsection III.C.3.c.

\textsuperscript{60} See infra section III.F.

\textsuperscript{61} Including cases arising under the Constitution and U.S. laws; cases in which the United States is a party; and cases between two or more states, between a state and a diverse citizen, and between a state and a foreign state, citizen, or subject. These latter two categories were eliminated by the Eleventh Amendment.


\textsuperscript{63} Other evidence makes it clear that Virginia's ratification did not depend on their statements either. See infra text accompanying notes 213-19, 264-70.

\textsuperscript{64} Others have made this suggestion previously. Gibbons, supra note 4, at 1906-08; Jackson, supra note 4, at 47-48.
possibility of legal action on those debts in federal courts, and the general Antifederal sentiment. The most plausible construction of the historical record is that the statements of Hamilton, Madison, and Marshall represent a political strategy. In an elevation of political expediency over principle, Hamilton, Madison, and Marshall relied on the common law of sovereign immunity, a doctrine inconsistent with the structure and philosophy of the proposed new government and with the language of the Constitution to improve its chances of ratification. On this slight foundation rests the modern edifice of sovereign immunity.

III. SOVEREIGN IMMUNITY AND FOUNDING GENERATION

A. The Constitutional Convention's Article III Deliberations

There was very little debate in the Constitutional Convention concerning the judiciary, and none specifically addressing sovereign immunity. This section describes the discussion at the Convention itself, provides background for the Article's subsequent arguments, and makes an important preliminary point. Although the Framers did not debate sovereign immunity, the Constitution they drafted is inconsistent with state and federal sovereign immunity. The Framers debated federal power over the states, and statements during the Convention, as well as Article III and the Supremacy Clause, mandate the conclusion that the states were subject to the power of the federal courts at least with respect to issues of federal law. In other words, it is not possible to conclude, as the Supreme Court has done, that the delegates to the Convention ignored sovereign immunity because it was an accepted structural predicate that needed no discussion. Rather, the delegates ignored sovereign immunity because it was inconsistent with and irrelevant to the proposed new union of the states.

1. The Proposals

At the National Convention, the basis of the debate was the Randolph Plan, also known as the Virginia Plan, jointly drafted by the Virginia delegation (but produced primarily by James Madison) during

65. For a compelling and insightful argument that the structure of the government adopted by the United States was shaped substantially by the political battles between creditors and debtors, see Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421.

66. Including the desire of those whose power depended on the primacy of the states to retain that power. One of the most prominent examples is Governor George Clinton of New York, whose Antifederalism posed a major obstacle to ratification in New York. See infra text accompanying notes 333-35.

67. 1 BAILYN'S DEBATES, supra note 40, app. at 1077.
ing the days before the arrival of delegates from other states and presented to the Convention on May 29 by Virginia's governor, Edmund Randolph. Charles Pinckney of South Carolina presented a proposal on the same day. William Patterson of New Jersey and Alexander Hamilton of New York subsequently presented proposals to the Convention. With respect to the judiciary, the Virginia Plan provided in its ninth resolution:

Resolved. That a national judiciary be established [to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature], ... That the jurisdiction of the inferior tribunals shall be to hear and determine in the first instance, and of the supreme tribunal to hear and determine in the dernier ressort, all piracies and felonies on the seas: captures from an enemy; cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested, or which respect the collection of the national revenue; impeachments of any national officers, and questions which involve the national peace and harmony.

Charles Pinckney’s draft, Article IX, provided:

The legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary. ... One of these courts shall be termed the Supreme Court, whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers, and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original; and in all other cases appellate.

Patterson submitted a series of propositions to the Convention on June 15. The New Jersey Plan, as it was known, called for simple amendment of the existing Articles of Confederation to remedy some of the Confederation's problems, retaining the supremacy of the states. With respect to the judiciary, the plan resolved:

68. The Convention met on May 14 but did not achieve a quorum until May 25 when seven state delegations were present. 1 ELLIOT'S DEBATES, supra note 38, at 139.
69. 1 id. at 143.
70. 1 id. at 145. Pinckney's proposal was not discussed by the Convention.
71. Propositions Offered to the Convention by the Honorable Mr. Patterson (June 15, 1787), in 1 ELLIOT'S DEBATES, supra note 38, at 175; Colonel Hamilton's Plan of Government (June 18, 1787), in 1 ELLIOT'S DEBATES, supra note 38, at 179.
72. 1 ELLIOT'S DEBATES, supra note 38, at 144. Elliot's Debates omits the words "to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature," leaving a blank space. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 32 (Adrienne Koch ed., 1966) (1927), includes these words in its version of Randolph's plan. The debate on June 5, as reported in both sources, discusses these words.
73. 1 ELLIOT'S DEBATES, supra note 38, at 148-49. This proposal is notable in that the legislature, and not the Constitution, establishes "such courts ... as shall be necessary." 1 id. The fact that the Convention chose not to adopt the language of Pinckney's proposal suggests that the Framers intended the judicial power to be self-executing.
That a federal judiciary be established, to consist of a supreme tribunal.

That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers; and by way of appeal, in the dernier ressort, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue.74

Hamilton's plan, introduced June 18, called for a strong national government with an executive and Senate elected for life and an assembly elected for three year periods. The national government would establish state courts and appoint state governors, who would have veto power over state legislation. With respect to the national and state judiciaries, Hamilton's plan provided:

7. The supreme judicial authority of the United States to be vested in judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all cases of capture; and an appellate jurisdiction in all causes in which the revenues of the general government, or the citizens of foreign nations, are concerned.

8. The legislature of the United States to have power to institute courts in each state, for the determination of all matters of general concern.75

The Convention focused initially on the Virginia Plan. It agreed unanimously on the first clause, providing for a national judiciary.76 This was in itself a significant advance beyond the Articles of Confederation, which had provided no permanent national court, instead utilizing a complicated method of choosing judges case-by-case in disputes involving the states or between parties claiming land grants from two or more states.77 The Convention also added the words “to consist of one supreme tribunal, and of one or more inferior tribunals”

74. 1 id. at 176. The New Jersey Plan revised the existing Articles of Confederation to afford the Confederation more extensive powers, including powers to levy imposts and create stamp taxes, regulate foreign and interstate commerce, and establish an executive and judiciary. The plan permitted the Congress to make requisitions, but included the power to collect requisitions from any state which did not comply. The plan also included a supremacy clause, which provided the basis for Article VI. The executive would have power to “call forth the powers of the confederated states, or so much thereof as may be necessary” to force the states to obey federal law. 1 id. at 177.

75. 1 id. at 179-80.

76. 1 id. at 160. The action was unanimous. Madison, supra note 72, at 67.

77. 1 Elliot's Debates, supra note 38, at 81-82. The parties would “appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter.” 1 id. If the parties could not agree, Congress would nominate three persons from each state, and the parties would alternately strike names until thirteen remained, then Congress would draw lots to choose between seven and nine judges. See 1 id.
to the first clause of the Virginia Plan's ninth resolution and approved clauses dealing with tenure of office and compensation.

2. The Supreme Court and the Federal Judiciary

There was no disagreement about the creation of the Supreme Court. Whether inferior tribunals should be established was vigorously debated. John Rutledge of South Carolina rejected entirely the establishment of inferior tribunals in favor of state courts which would decide all cases in the first instance and moved to expunge the reference to inferior tribunals. He argued that the right of appeal to the supreme national tribunal would be sufficient to secure national rights and uniformity of judgments and that the establishment of inferior courts would unnecessarily encroach on the states' jurisdiction. James Madison, James Wilson, and John Dickinson disagreed. Madison responded in two ways: first, that without inferior courts, appeals to the Supreme Court would be too numerous, and second, that appeal would not provide an adequate remedy in many cases:

What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for new trial would answer no purpose. To order a new trial at the Supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to legislative authority, was essential.

There was a divided vote. The Convention then passed a compromise proposed by James Madison and James Wilson, deferring the issue: the national legislature was authorized to establish inferior tribunals as it thought necessary.
Views about the appointment of the national judiciary were diverse. Hamilton's plan included no provision concerning appointment.\textsuperscript{86} Patterson's plan called for appointment by the executive,\textsuperscript{87} the Virginia Plan by the national legislature,\textsuperscript{88} and Pinckney's by the Senate.\textsuperscript{89} In debate, James Wilson favored executive appointment, reasoning that "intrigue, partiality, and concealment" would attend appointment by a "numerous body."\textsuperscript{90} Benjamin Franklin suggested the process used in Scotland, namely nomination by lawyers, "who always selected the ablest of the profession in order to get rid of him, and share his practice among themselves."\textsuperscript{91} James Madison favored appointment by the Senate, concurring with Pinckney, and adding that legislatures might not have the ability to assess judicial qualifications. The Senate was "not so numerous as to be governed by the motives of the other branch; and [was] sufficiently stable and independent to follow their deliberate judgments."\textsuperscript{92} Madison moved, and the Convention agreed, that "appointment by the Legislature" be struck and left blank "to be hereafter filled on maturer reflection."\textsuperscript{93} On June 13, Madison's proposal that the Senate appoint the national judiciary passed unanimously.\textsuperscript{94} In subsequent days, the issue was reopened. A motion to substitute the executive for the Senate was rejected.\textsuperscript{95} Massachusetts delegate Nathaniel Gorham suggested that "Judges be nominated and appointed by the Executive by & with the advice & consent of the 2nd branch" and James Madison revised that, moving that Judges would be nominated by the executive and that the nomination would become an appointment unless two-thirds of the Senate disagreed within a specified period.\textsuperscript{96} Only Massachusetts, Pennsylvania, and Virginia were in favor.\textsuperscript{97} Gorham's idea was ultimately approved as part of a compromise on appointments generally.\textsuperscript{98}

\textsuperscript{86} See supra text accompanying note 75.
\textsuperscript{87} 1 Elliott's Debates, supra note 38, at 176.
\textsuperscript{88} 1 id. at 182.
\textsuperscript{89} Pinckney's proposal, supra text accompanying note 73, provided in article VII that "The Senate shall have the sole and exclusive power... to appoint... judges of the Supreme Court." 1 id. at 148.
\textsuperscript{90} Madison, supra note 72, at 67.
\textsuperscript{91} Id. at 68.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} 1 Elliott's Debates, supra note 38, at 174; Madison, supra note 72, at 113.
\textsuperscript{95} 1 Elliott's Debates, supra note 38, at 209; Madison, supra note 72, at 317. Nathaniel Gorham of Massachusetts and James Wilson of Pennsylvania, and their states, along with Virginia and Maryland, favored the motion.
\textsuperscript{96} Madison, supra note 72, at 317.
\textsuperscript{97} Id. at 346.
\textsuperscript{98} 1 Elliott's Debates, supra note 38, at 214, 222.
The Framers' beliefs in the necessity of a strong judiciary are clear in various discussions. For example, the Convention debated the creation of a Council of Revision with authority to review legislative acts. Madison and Wilson moved to include the judiciary in this revisionary check, and were defeated, with others objecting that judges might be biased in their judicial functions by participation in the making of law and that the judiciary should be distinct from other branches. The discussion makes clear, however, the Framers' views of the judiciary as an independent branch with significant constitutional functions. In opposing Madison's and Wilson's positions, Elbridge Gerry stated that the Judiciary need not be part of such a council "as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality." Discussions of the objectives of the national government similarly indicate the necessity of a powerful judiciary. According to Madison's estimation, the "necessity of providing more effectually for the security of private rights and the steady dispensation of Justice" was indisputable; "[i]nterferences with these were evils which had more perhaps than any thing else, produced this convention."

3. Federal Oversight of State Law

The Convention was also clear on the need for a national oversight of state laws. The Convention's working draft, presented by Edmund Randolph for the Virginia delegation and drafted primarily by Madison, included the following provision:

Resolved, . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union.

Early in the Convention, on June 8, Charles Pinckney, seconded by Madison, moved to strike this provision and substitute a much broader power "[t]o negative all laws which to them shall appear im-

99. For a complete discussion, see infra subsection III.C.1.
100. MADISON, supra note 72, at 32. Edmund Randolph proposed that the executive and members of the national judiciary should form a council which would review every legislative enactment, with power to reject it, subject to reenactment by the national legislature. See id.
101. Id. at 66.
102. Id. at 79-81.
103. Id. at 80-81.
104. Id. at 61. Gerry's motion that the executive alone had absolute power to negative legislation was rejected. Id. at 66. The motion that two-thirds of each house of the legislature could overrule the revisionary check of the executive passed. Id.
105. Id. at 76.
106. 1 ELLIOT'S DEBATES, supra note 38, at 144.
proper.” Madison’s notes of the Convention state his position:

He [Madison] could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them. . . . [I]n order to give the negative this efficacy, it must extend to all cases. A discrimination would [sic] only be a fresh source of contention between the two authorities. . . . This prerogative of the General Government is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political System.

When the Convention considered the resolutions offered by Randolph and as amended by the whole house, it reviewed the proposed legislative veto again in its original, narrower version. Madison repeated his arguments in favor of a veto power, adding that the states could “pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature or be set aside by the National Tribunals.” Governor Morris and Roger Sherman argued strongly against a national legislative power to veto state laws as unnecessary and offensive, noting that state laws contrary to the national law would be set aside by the judiciary or repealed by a national law. The proposal was defeated with only three states—Massachusetts, Virginia, and North Carolina—in favor. Luther Martin proposed as an alternative an early version of the Supremacy Clause which passed unanimously.

In the absence of a congressional power to negative the states’ passage of legislation, the Convention recognized that power resided in the national judiciary to override state law which conflicted with national law. Thus, the Supremacy Clause had a very important function to play, a function which has partially disintegrated over time through the Supreme Court’s elevation of state sovereign immunity.

Under the Supreme Court’s current view of sovereign immunity as a constitutional doctrine, the Supremacy Clause cannot fulfill its function in the constitutional design. The Court considers the Supremacy Clause subject to the unexpressed, but underlying constitutional pre-

107. 1 id. at 166.
108. 1 id.
109. MADISON, supra note 72, at 88-89.
110. Id. at 304.
111. Id. at 304-05.
112. 1 ELLIOT’S DEBATES, supra note 38, at 207.
113. 1 id; accord MADISON, supra note 72, at 305-06.
mise of state sovereign immunity.\textsuperscript{115} In other words, the Supremacy Clause and Article III cannot operate to enforce federal law against an unconsenting state. This puts the modern United States in precisely the same situation as under the Articles of Confederation—something the Framers decried and what had necessitated the Constitutional Convention. The possibility of suit by the United States against a state for violations of federal law undercuts this conclusion somewhat. However, that limitation on state power has been rarely used.\textsuperscript{116} It also requires the operation of at least two and possibly three branches of the federal government to control a state: to enforce federal law against a state, the executive must bring an action, possibly through congressional authorization, and the judiciary must decide against the state. Given the Framers' suggestions for a congressional negative, and the historical basis for rejecting sovereign immunity as a constitutional premise, it seems unlikely that this was the sole method of federal control contemplated by the Framers.

4. Article III

There is very little recorded debate with respect to the categories of cases over which the judiciary could exercise power. On June 12, the Convention voted to strike out the extension of jurisdiction over “all piracies and felonies on the high seas” and “all captures from an enemy.”\textsuperscript{117} It also voted to change the words “other States” in the phrase “cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested,” to “two distinct States of the Union, applying to such jurisdictions, may be interested.”\textsuperscript{118} On June 13, Randolph and Madison moved “[t]hat the jurisdiction of the National Judiciary shall extend to cases, which respect the collection of the national revenue, impeachments of any national officers, and

\textsuperscript{115} According to the \textit{Alden} Court, “the Supremacy Clause enshrines as ‘the supreme Law of the Land’ only those federal Acts that accord with the constitutional design. . . . The Constitution, by delegating to Congress the power to establish the supreme law of the land when acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power.” \textit{Id.} at 731-32.


\textsuperscript{117} \textit{1 Elliot’s Debates, supra} note 38, at 173; \textit{accord Madison, supra} note 72, at 112.

\textsuperscript{118} \textit{1 Elliot’s Debates, supra} note 38, at 173; \textit{accord Madison, supra} note 72, at 112.
questions which involve the national peace and harmony.”

On July 18, noting “[s]everal criticisms having been made on the definition” of the jurisdiction of the national judiciary, Madison proposed an alteration which was unanimously adopted: “[t]hat the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.”

The Convention referred this resolution (with others) to the Committee of Detail on July 23 and 26. The Convention also referred to the Committee the propositions offered by Charles Pinckney and by William Patterson. Edmund Randolph prepared a draft for the Committee’s review; James Wilson prepared a second draft for the Committee’s review.

The Committee of Detail presented a draft constitution to the Convention on August 6, 1787. With respect to jurisdiction, article XI provided:

Section 3 The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting Ambassadors, other Public Ministers, and Consuls; to the trial of impeachments of officers of the United States; to all cases of Admiralty and maritime jurisdiction; to controversies between two or more States, (except such as shall regard Territory or Jurisdiction) between a State and Citizens of another State, between Citizens of different States, and between a State, or the Citizens thereof and foreign States, citizens, or subjects. In cases of impeachment, cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be party, this jurisdiction shall be original. In all the other cases before mentioned it shall be appellate, with such exceptions and under such regulations as the legislature shall make. The Legislature may assign any part of the jurisdiction abovementioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.

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119. 1 ELLIOT’S DEBATES, supra note 38, at 174; accord MADISON, supra note 72, at 112.

120. MADISON, supra note 72, at 319.

121. 1 ELLIOT’S DEBATES, supra note 38, at 221. The Committee was composed of Oliver Ellsworth of Connecticut, Nathaniel Gorham of Massachusetts, Edmund Randolph of Virginia, John Rutledge of South Carolina, and James Wilson of Pennsylvania.

122. 1 id. at 223.

123. 1 BAILYN’S DEBATES, supra note 40, app. at 1086. The draft relied on the materials provided by the Convention, but also state constitutions, the Articles of Confederation, and resolutions of the Continental Congress.

124. MADISON, supra note 72, at 393. Section 1 tracked the Convention’s decisions regarding the courts: “The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.” Id. Section 2 dealt with issues of tenure and compensation, but did not address appointment: “The Judges of the Supreme Court, and of the Inferior Courts, shall hold their offices during good behaviour. They shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.” Id. Section 4 provided: “The trial of all criminal offences (except in cases
The Committee apparently received very little guidance from the Convention on this section. The first clause repeats the resolution of the Convention. The remaining clauses presumably constitute the Committee's judgment on the sorts of questions which may affect the national peace and harmony. Many are borrowed from the propositions put forth in the Virginia Plan and those submitted by Charles Pinckney and William Patterson. The second clause of section 3 mirrors Pinckney's draft, which included jurisdiction over cases affecting ambassadors, public ministers and consuls,\textsuperscript{125} and Patterson's as well.\textsuperscript{126} The third clause, dealing with impeachments, was included in the Virginia Plan and in Pinckney's and Patterson's plans.\textsuperscript{127} The fourth, concerning admiralty jurisdiction, appeared in Pinckney's plan\textsuperscript{128} and duplicates parts of the Virginia Plan and Patterson's plan.\textsuperscript{129} Jurisdiction over "controversies between two or more states" had no analog in the materials before the Convention, although the Articles of Confederation had provided for resolution of disputes between states.\textsuperscript{130} The sixth clause, extending jurisdiction to "controversies between a state and citizens of another state" apparently derived from the Virginia Plan, which included jurisdiction over "cases in which foreigners, or citizens of other states, applying to such jurisdiction, may be interested."\textsuperscript{131} But the extension of jurisdiction over controversies between a United States citizen and foreign states, citizens and subjects, and between a state and a foreign state, was entirely new. On August 20,
the Convention referred additional propositions to the Committee of Detail, without debate or consideration of them, including “The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state, or the United States and the citizens of an individual state.”\textsuperscript{132}

The debate on the new draft of the jurisdiction provision was apparently minimal. The first clause was amended to include cases arising under the Constitution as well as the laws of the United States.\textsuperscript{133} The provision was also amended, by unanimous agreement, to include jurisdiction over controversies “to which the United States shall be a party,” apparently without discussion or debate.\textsuperscript{134} Madison and Morris moved to change the beginning of the section to substitute “the Judicial power” for “the jurisdiction of the supreme Court,” which received unanimous agreement.\textsuperscript{135}

The resulting provision underwent further revision by the Committee of Style and Arrangement,\textsuperscript{136} which submitted its report to the Convention on September 12, 1787. The revisions, which are underlined in the following excerpt, included substantive changes, some of which were not previously debated:\textsuperscript{137}

\begin{quote}
Section 2. The judicial power [Jurisdiction of the Supreme Court] shall extend to all cases, both in law and equity, arising under this constitution, the laws [passed by the Legislature] of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party, [to the trial of impeachments of officers of the United States]; to controversies between two or more States [except such as shall regard Territory or Jurisdiction]; between a state and citizens of another state; between citizens of different States; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign States, citizens, or subjects.

In cases [of impeachment,] affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court [this
\end{quote}

\begin{footnotes}
\item[132.] 1 \textit{Elliot’s Debates}, supra note 38, at 250; accord \textit{Madison}, supra note 72, at 486. Charles Pinckney submitted this proposition.
\item[133.] \textit{See generally} 1 \textit{Elliot’s Debates}, supra note 38, at 268.
\item[134.] 1 \textit{id.}; accord \textit{Madison}, supra note 72, at 538.
\item[135.] \textit{Madison}, supra note 72, at 539.
\item[136.] The Convention appointed this Committee, composed of eleven elected members, one from each participating state, on August 31. \textit{Elliot’s Debates}, supra note 38, at 280. The Committee included Nicholas Gilman of New Hampshire, Rufus King of Massachusetts, Roger Sherman of Connecticut, David Brearly of New Jersey, Governor Morris of Pennsylvania, John Dickinson of Delaware, Daniel Carroll of Maryland, James Madison of Virginia, H. Williamson of North Carolina, Pierce Butler of South Carolina, and Abraham Baldwin of Georgia. 1 \textit{id}.
\item[137.] 1 \textit{id}. The Committee was formed “to refer to such parts of the Constitution as have been postponed, and such parts of reports as have not been acted on, to a committee of a member from each state.” 1 \textit{id}. Notably, the Committee included a clause in article I, section 10 prohibiting states from impairing the obligation of contract, which was adopted without debate.
\end{footnotes}
jurisdiction] shall have [be] original jurisdiction. In all other cases before mentioned, the supreme court [it] shall have [be] appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress [Legislature] shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed. The Legislature may assign any part of the jurisdiction abovementioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.]138

5. Conclusion

Thus, the Convention did not explicitly address the issue of sovereign immunity. Was sovereign immunity an underlying assumption so fundamental that it did not require discussion, as the modern Supreme Court has concluded? Or conversely, as this Article argues, was it so antithetical to the nature and purposes of the new union that it was simply irrelevant to the discussion? The debate at the Convention demonstrates the Framers' shared belief that federal power over the states was essential to the union. The example of the Confederacy had proved that point, and the Framers structured the new government so that the federal judiciary could enforce state compliance with federal law. Sovereign immunity is entirely inconsistent with this structural predicate. Further, the ease with which the Framers included a provision which subjected the United States to the jurisdiction of the federal courts suggests that they did not contemplate sovereign immunity with regard to the federal government either.

B. Sovereign immunity in England

The Supreme Court's conclusion that the Constitution embodies the concept of sovereign immunity takes the English common law doctrine of sovereign immunity as a premise which would have informed the Founders' views of appropriate government. However, the nature of sovereign immunity in the English common law, despite modern statements of the doctrine, did not prohibit actions against the Crown, and the Framers, many of them lawyers, some trained in England, and all familiar with the common law, likely understood this point.

The common law rule cited by modern American jurists, that a sovereign may not be sued without consent, derives from Sir William Blackstone’s famous Commentaries on the Law of England ("Black-
Blackstone's Commentaries describes English law as precluding any action against the sovereign:

[The King] owes no kind of subjection to any other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: by who, says Finch, shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment.


140. 1 id. at 242. Other passages contribute to this impression of the King's personal immunity as complete and absolute. As Blackstone describes, the King could submit to the jurisdiction of the Court voluntarily, or, alternatively, his officers could be sued or punished criminally.

Are then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases. And, first, as to private injuries: if any person has, in point of property, a just demand upon the King, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion. ... [A]s to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a King cannot misuse his power, without the advice of evil counselors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the King himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

1 id. at 242-43. In a further passage, Blackstone elaborates on the nature of the Crown and advances a more modern rationale for the King's immunity from suit: the constitutionally mandated independence of the sovereign and the separation of powers.

Besides the attribute of sovereignty, the law also ascribes to the King, in his political capacity, absolute perfection. The King can do no wrong. Which ancient and fundamental maxim is not to be understood, as if every thing transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power in our free and active, and therefore compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

1 id. at 245. Together, these passages create the impression of sovereign immunity as a complete protection from legal action.
Blackstone's Commentaries was widely known and relied upon by lawyers in the colonies and in the new nation,¹⁴¹ and was presumably relied upon by Alexander Hamilton in The Federalist No. 81 and by James Madison and John Marshall in their statements in the Virginia ratification debates. Despite this reliance, it is clear that Blackstone overstated the doctrine of sovereign immunity in parts of Blackstone's Commentaries, and it is possible—perhaps likely—that colonial lawyers realized this, based on Blackstone's Commentaries itself or those lawyers' familiarity with English procedures.¹⁴² In contrast to the broad conception of immunity ascribed to Blackstone, Blackstone's Commentaries suggests that the sovereign had a constitutional obligation to redress aggrieved parties.¹⁴³ Blackstone acknowledged that the King had a constitutional duty to right wrongs and, further, that

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¹⁴¹ Blackstone's work was widely available in the colonies and served as one of the primary resources for American lawyers during the founding period. Julius S. Waterman, *Thomas Jefferson and Blackstone's Commentaries, in Essays in the History of Early American Law* 451-57 (David H. Flaherty ed., 1969); Forrest McDonald, *Novus Ordo Seclorum* (1985).

¹⁴² For example, James Wilson's opinion in *Chisholm v. Georgia*, 2 U.S. 419 (1793), criticizes Blackstone's views on sovereign immunity, notes that the English King could in fact be sued, and recognizing that "the difference is only in the form, not the thing." *Id.* at 460. The comments of George Nicholas in the Virginia ratification debates also supports this view of the general knowledge of educated members of the founding generation. In comparing the English system with that under the Constitution, Nicholas observed:

> In England, in all disputes between the King and people, recurrence is had to the enumerated rights of the people, to determine. Are the rights in dispute secured? Are they included in the Magna Charta, Bill of Rights, &c.? If not, they are, generally speaking, within the King's prerogative. In disputes between Congress and the people, the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with it.

> Which is the most safe? The people of America know what they have relinquished for certain purposes. They also know that they retain every thing else, and have a right to resume what they have given up, if it be perverted from its intended object. The King's prerogative is general, with certain exceptions. The people are, therefore, less secure than we are.

³ *Elliott's Debates*, supra note 38, at 246. The premise of these statements is that the English people had specified rights against the Crown, and that the Constitution provided greater protections.

¹⁴³ See ³ *Blackstone*, supra note 139, at 255. Later revisions of Blackstone's Commentaries attempted to undo the confusion created by Blackstone's discussion of the necessity of royal consent. Warren, in his update of the work, refined Blackstone's statement that persons privately injured by the Crown could petition for relief as a matter of the King's grace with the following additional sentence: "The prayer of this petition, which is really in the nature of an action against the sovereign for the recovery of debts, chattels real, or personal, and unliquidated damages, is grantable *ex debito justitiae* [as a matter of right, as opposed to *ex gratia*, as a matter of grace]." Samuel Warren, *Blackstone's Commentaries, Systematically Abridged and Adapted to the Existing State of the Law and Constitution with Great Additions* (1855).
the King must and always did so: “[A]s it [the law] presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues as of course in the king’s own name, his orders to his judges to do justice to the party aggrieved.” At another point in Blackstone’s Commentaries, he states: “the prerogative of the crown extends not to do any injury; for being created for the benefit of the people, it cannot be exerted to their prejudice.”

These suggestions are borne out in the English case law. Case law from at least a generation before publication of Blackstone’s Commentaries demonstrates that actions were prosecuted against the King without his consent.

Finally, able scholarly analyses demonstrate that sovereign immunity in Blackstone’s time was a matter of pleading practice rather than a true bar. The sovereign could be sued by various devices, without the necessity of consent.

144. 3 BLACKSTONE, supra note 139, at 255.
145. 3 id.
146. The Case of the Bankers in the Court of Exchequer, 1700, 2 W. & M., 12 Will. 3, reprinted in THOMAS BAYLY HOWELL, 14 A COMPLETE COLLECTION OF STATE TRIALS 1-114 (1812) (demonstrating that actions lay against the King without his consent). In such a case, creditors of the Crown sued to enforce payment of royal annuities. The House of Lords ultimately concluded that the plaintiffs had proceeded properly by seeking a remedy in the Court of Exchequer. Lord Chief Justice Holt found that the plaintiffs had proceeded by monstrans de droit, which did not require the King’s prior consent, and observed that it was unnecessary to obtain the King’s consent even where the plaintiff proceeded by petition of right: “It is objected, that the petition should be first sued to the king: but by the records in Ryly’s Placita Parl. 351, 257, Staundf. 72, it appears, that these petitions of right have been sued to the court of the King’s-bench.” Id. at 34. All of the justices agreed that a deprivation of right requires a remedy: “We are all agreed that they [the King’s creditors] have a right; and if so, then they must have some remedy to come at it too.” Id. at 34. Lord Somers argued that the only appropriate remedy was a petition of right addressed to the King, and offered justifications similar to those proffered by modern courts in this country: control of the government’s resources was a public policy decision properly left to political rather than judicial control. See id. at 103, 105. Lord Somers acknowledged, however, that not all petitions required the King’s consent. Id. at 83-84. Lord Somers’s argument prevailed in the Exchequer Chamber, but was rejected by the House of Lords. See id. at 111. Justice Iredell, in his opinion in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429 (1793), relied heavily on Lord Somer’s arguments, quoting him extensively. Id. at 437-39. See infra text accompanying notes 405-09.

147. The devices included the Petition of Right, which originally required the Crown’s consent, but was routinely issued by the court without actual consent of the King well before Blackstone’s time. For descriptions of the Petition of Right, see Ludwik Erhlich, Proceedings Against the Crown (1216-1377), in 6 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY (Paul Vinogradoff ed., Octagon Books 1974) (1921), and WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW (A.L. Goodhart & H.G. Hanburg eds., 7th ed. 1956). Such petitions became available during the reign of Edward I in the thirteenth century and permitted a disposition of a dispute against the King in the court of Exchequer, Chancery, or King’s Bench.
Thus, in England, what our system has termed "sovereign immunity" did not bar relief against the Crown, but specified how such relief could be obtained, channeling actions against the sovereign through a system of mandatory writs which existed alongside other forms of action. Nonetheless, the idea that a sovereign could be sued only with consent was repeatedly by Hamilton, Madison, and Marshall, as well as some early judicial decisions, without the important qualification that the King was constitutionally required to consent if sovereign wrongdoing had occurred. This led ultimately to the now firmly entrenched American belief that neither the federal government nor the individual states may be sued in federal court without consent, as a matter of constitutional law.

C. The Intent of the Founding Generation: Ratification as Consent

For the remainder of the argument, this Article assumes that Blackstone's formulation, that a sovereign may not be sued without consent, was accepted by many of the founding generation as part of English common law. However, as this Article demonstrates, the Founders understood ratification of the Constitution to provide that consent. Through ratification, the states consented to various categories of suit against them as enumerated in the Constitution: cases involving federal law and cases in which the parties were a state and another state, a state and a diverse citizen, or a state and a foreign state, citizen, or subject. Similarly, the states collectively consented to suit against themselves as the United States in cases in which the United States was a party and in cases involving federal

Monstrans de droit and traverse were common law methods of obtaining possession or restitution of real or personal property from the Crown, which did not require consent. These methods had never required the King's consent, having been created by Parliament in the fourteenth century specifically to provide relief against the Crown without the need for consent. For detailed histories of the system of writs, see, e.g., Edwin M. Borchard, Government Liability in Tort, 34 YALE L.J. 1 (1924); Louis L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1, 2-19 (1963); Roger C. Cramton, Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant, 68 MICH. L. REV. 387 (1970); and David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. COLO. L. REV. 1 (1972). James E. Pfander's scholarly and exhaustive treatment of these issues deserves separate mention: James E. Pfander, Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government, 91 NW. U. L. REV. 899, 906-26 (1997).

148. This conclusion follows naturally from the evidence above. If the Founders recognized that sovereign immunity was a matter of pleading practice rather than a jurisdictional bar, see supra note 147 and accompanying text, the conclusion follows even more easily.

149. Consent was revoked in these latter two categories by the Eleventh Amendment.
law. The constitutional extension of the national judicial power to such cases limited the sovereign power of the United States from its very inception by the document that created it. These conclusions are well-supported by the language of the Constitution and the early history of the United States, in particular the reasons for the Constitutional Convention; the structure of government chosen by the Convention; the articulated purposes of various Article III extensions of judicial power; the understandings of the Framers and ratifiers and individuals who participated in the public debate as evidenced by the Convention; the state ratifying conventions and ratification documents; writings in the popular press; and early decisional law which equated ratification with consent, most notably *Chisholm v. Georgia*, decided just six years after the drafting of the Constitution by Justices who were themselves Framers and ratifiers, and *Cohens v. Virginia*, interpreting the Eleventh Amendment as providing only a limited immunity to states.

The Supreme Court's conclusion that the Constitution affords immunity to the states relies heavily on what it perceives to be the intent
of Framers and ratifiers, as expressed by Hamilton in *The Federalist No. 81* and Madison and Marshall in the Virginia ratification debates. This Article offers a different view of that collective intent. Although there is no direct evidence of the Framers' intent in the debates of the Convention, several sources provide substantial evidence that the Framers and ratifiers read the Constitution as subjecting the states, and by logical extension, the federal government, to the power of the federal courts. Most notably, the language of the Constitution, the ratification debates and documents, and debate in the press during the period of ratification, demonstrate that the Founders, Federalists and Antifederalists alike, understood the Constitution to extend the national judicial power to the states and the federal government by implication.

With respect to the Framers, the most reliable indicator of collective intent is the language of the Constitution itself, which subjects government entities to the judicial power.\(^{154}\) Further, inferences of the collective intent may be drawn from the structure of the government set forth by the Constitution, which contemplates independent co-equal branches with the power to check each other. Discussion in the Convention of the necessity of a judiciary, the division of power to prevent abuse, and the need for uniformity of law, demonstrates that the government created by the Framers requires susceptibility of the states, and the federal government as well, to the national judicial power. The Framers viewed as necessary a federal judiciary with powers coequal to those of the political branches to provide a check on those branches (horizontal separation of powers) and with power to act on the states to ensure uniformity of law (vertical separation of powers).

Collective intent may also be discerned through examination of the statements of individual Framers and ratifiers, as well as others who participated in the public debate. Additionally, the state ratification process provides important information. The understanding of those whose actions put the Constitution in place, as much as the intentions of those who drafted it, is crucial to discerning the meaning of Article III, Section 2 and its relation to common law sovereign immunity. Debate in the various state ratification proceedings and in the popular press, including *The Federalist*, indicate clearly that those who ratified the Constitution, as well as those who refused to vote for ratification, understood it to extend the judicial power of the United States to the states through their consent.

\(^{154}\) See infra subsection III.C.2.
1. The Structure of the Federal Government and the Necessity of a Powerful Judiciary

The Constitution sets out three branches of government, in three initial articles: Article I, the legislative; Article II, the executive; and Article III, the judiciary. The Framers enumerated the powers of each branch and provided for checks by the various branches on the power of the others because they were greatly concerned about possible abuses of power. Although a number of delegates argued against any national courts other than the Supreme Court, the delegates were in agreement that a national judiciary, with powers equivalent to the legislative power, was necessary for a properly functioning government.

The Framers had two existing models for the structure of the new government—in the Confederation and in many of the states—both of which they chose to avoid. The Confederation lacked power over the states. The difficulties with that political structure led the Framers to adopt a system in which the vertical allocation of powers permitted the federal judiciary to oversee state conformance to federal law. In many of the states, the legislature was supreme. The example of these states demonstrated the need for a horizontal allocation of power in which the judiciary was a coequal branch, not subservient to the legislature.

The Confederation had no judiciary. Rather than a permanent national court, the Articles of Confederation established a method for case-by-case resolution of disputes involving the states; state courts handled all other matters. This aspect of the Confederacy had engendered significant problems, and it was clear from the earliest discussions about a new government that a national judiciary was essential. In a letter to Edmund Randolph, written in April 1787, prior to the beginning of the Convention, James Madison addressed the need for a national judiciary:

Let this national supremacy be extended also to the judiciary department. If the judges in the last resort depend in the states, and are bound by their oaths to them and not to the union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the tribunals to the policy or prejudices of the states.

Commenting more specifically on the defects of the Confederation, Hamilton observed in The Federalist No. 22:

A circumstance which crowns the defects of the Confederation remains yet to be mentioned—the want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the

155. See supra text accompanying note 85 for references to the compromise which permitted Congress discretion to authorize inferior federal courts.
156. See supra text accompanying note 77.
157. 5 ELLIOT'S DEBATES, supra note 38, at 108.
law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.\textsuperscript{158}

Madison’s comments in \textit{The Federalist No. 10} also decried the mingling of power, which characterized the Confederation:

Complaints are everywhere heard from our most considerate and virtuous citizens, \ldots that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minority party, but by the superior force of an interested and overbearing majority.

\ldots

No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time; yet what are many of the most important acts of legislation but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which creditors are parties on one side and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are, and must be, themselves the judges; and the most numerous party, or in other words, the most powerful faction must be expected to prevail.\textsuperscript{159}

Edmund Randolph also noted this defect in the Articles of Confederation in a speech in the Virginia ratification debate: “I cannot conceive how they could have formed a system that provided no means of enforcing the powers which were nominally given it. Was it not a political farce to pretend to vest powers, without accompanying them with the means of putting them in execution?”\textsuperscript{160}

Concerns about vertical divisions of power clearly informed the Framers’ decisions about the judiciary. One of the issues which motivated the Convention was the Confederation’s inability to enforce the Treaty of 1783 against the recalcitrant states. The treaty provided that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”\textsuperscript{161} Many states had passed laws which violated the treaty, making Continental or state bills of credit legal tender, but there were no national courts to enforce provisions of the peace agreement. The national judicial power was consequently seen as critically important to the proposed government. James Wilson’s argument for the national government in the Pennsylvania ratification debates focused on such problems: “[w]e could not, in some instances, perform our treaties, on our part; and, in other instances, we

\begin{flushleft}158. \textit{The Federalist} No. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961). \\
160. 3 \textit{Elliott’s Debates}, \textit{supra} note 38, at 26. \\
161. Treaty of 1783, article IV, 8 Stat. 58.\end{flushleft}
could neither obtain nor compel the performance of them, on the part of others." 162 Similarly, William Davie, in the North Carolina ratification debate, recognized:

The people of the United States have one common interest; they are all members of the same community and ought to have justice administered to them equally in every part of the continent, in the same manner, with the same despatch, and on the same principles. It is therefore absolutely necessary that the judiciary of the Union should have jurisdiction in all cases arising in law and equity under the Constitution. 163

Thus, the Framers recognized as necessary a system in which the national government had the ability to enforce its laws. It was essential to the union that the national judiciary had the power to compel the states to conform to the laws of the United States. 164 It is impossible to reconcile this essential objective of the new government with an unexpressed intention that the power of the national judiciary would be limited by sovereign immunity. Such an implicit limitation would simply replicate the central defects of the Confederation and it was clear that the Framers set out to accomplish much more. The need for federal oversight of state law was recognized at the Convention; although the Convention rejected a national legislative veto over state law, 165 the Framers recognized that power resided in the national judiciary to enforce federal law against the states. 166 State immunity in the federal courts is inconsistent with the structure of the government devised by the Framers.

The example of the states also helped define the Framers' vision of the federal judiciary's function within the federal government. In many of the states, the legislature was supreme. The Framers instead provided the national judiciary with independent power (including tenure and specified compensation) as well as power to check the political branches of the federal government. A judiciary empowered to review congressional action and to enforce the law against the political branches was essential to the horizontal separation of powers envisioned by the Framers. If the legislative or executive branches have the power to act, the judiciary must have the power to review such action for conformance to law. Federalists and Antifederalists alike believed that the judicial and legislative powers should be coextensive. One of the most vocal Antifederalists, Patrick Henry, in discussing the Virginia judiciary in the Virginia ratification debates, stated:

162. 2 Elliot's Debates, supra note 38, at 431. Wilson discussed the subject at greater length, noting that many of the states had violated the Treaty of 1783.
163. 4 id. at 157-58.
164. The argument that the federal executive could enforce federal law against the states by bringing a lawsuit against a state does not meet this objection. See supra text accompanying note 116.
165. See supra text accompanying notes 106-14.
166. Id.
Our judges opposed the acts of the legislature. They had fortitude to declare that they were the judiciary, and would oppose unconstitutional acts. I take it as the highest encomium on this country [meaning Virginia], that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary.  

George Nicholas, in responding to Patrick Henry, stated,

Who is to determine the extent of such legislative powers? I say, the same power which, in all well-regulated communities, determines the extent of legislative powers. If they exceed these powers, the judiciary will declare it void, or else the people will have a right to declare it void.

Other examples of this basic premise include Edmund Pendleton's view, expressed in the Virginia ratification debates and William Davie's, in the North Carolina debates. According to Pendleton:

I have mentioned the necessity of making a judiciary an essential part of the government. It is necessary, in order to arrest the executive arm, prevent arbitrary punishments, and give a fair trial, that the innocent may be guarded, and the guilty brought to just punishment, and that honesty and industry be protected, and injustice and fraud be prevented. Taking it for granted, then, that a judiciary is necessary, the power of that judiciary must be coextensive with the legislative power, and reach to all parts society intended to be governed.

Davie similarly stated:

If there were any political axiom under the sun, it must, be that the judicial power ought to be coextensive with the legislative. The federal government ought to possess the means of carrying the laws into execution. If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?

Thus, both Federalists and Antifederalists believed that the judiciary was essential to monitor and ensure the appropriate vertical allocation of power between the states and the federal government. The federal judiciary was also necessary to provide a horizontal check on the powers of the federal legislative and executive branches. Sovereign immunity of the federal and state governments is inconsistent with this structural premise.

At the outset of the Convention, the Randolph Plan, introduced by the Virginia delegation and credited primarily to Madison, proposed that the national legislature have authority to override state law. The sixth resolution provided:

6. Resolved, . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union.

167. 3 Elliot's Debates, supra note 38, at 325.
168. 3 id. at 443.
169. 3 id. at 517.
170. 4 id. at 158.
171. 1 id. at 144.
The Convention agreed to this resolution on May 31, 1787. On June 8, Pinckney moved and was seconded by Madison to strike this resolution and replace it with, "to negative all laws which to them shall appear improper." This revision was rejected, seven to three, with Delaware divided. On July 17, the Convention again considered the sixth resolution, and this time rejected it. The judiciary, then, was left with the ability to enforce federal law against the states and to invalidate contradictory state laws. In Madison's view, this was not an optimal solution, being less direct and less effective than a legislative veto. Hamilton's comments in The Federalist No. 22, however, indicate that the national judiciary would have the power to ensure uniformity of law where necessary among the states:

The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. And this tribunal ought to be instituted under the same authority which forms the treaties themselves. These ingredients are indispensable. If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. . . . To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence and authorized to settle and declare in the last resort a uniform rule of civil justice.

Thus, the modern Supreme Court's view, that the states cannot be bound by the laws of the United States, except in suits brought by the United States or with their consent, and (implicitly) that the federal government cannot be sued except with consent, simply ignores much of the historical record and the constitutional structure adopted by the Framers.

172. 1 id. at 153.
173. 1 id. at 166.
174. 1 id. Massachusetts, Pennsylvania, and Virginia voted in favor; Connecticut, New York, New Jersey, Maryland, North Carolina, South Carolina, and Georgia voted against.
175. 1 id. at 207. Massachusetts, Virginia, and North Carolina voted for the resolution; Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, South Carolina and Georgia voted against. 1 id.
2. The Constitutional Language

The most important source of information concerning the meaning of the Constitution and the intent of Framers and ratifiers must be the language of the Constitution itself, and the language of the Constitution is clear on this point. The language of the Constitution as originally ratified afforded no immunity from suit to the United States or any state individually. To the contrary, Article III, Section 2 specifically provided that the jurisdiction of the national courts extends to cases against the United States and against individual states:

The judicial Power shall extend . . . to Controversies to which the United States shall be a party;-to Controversies between two or more States;--between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.178

This language is clear on its face.179

The prevailing reading of the Constitution as being subject to implicit sovereign immunities has given rise to an extensive body of law designed to determine whether a government entity has in fact consented to suit. Notably, Article III, Section 2 constitutes consent to suit under the "clear statement" rule adopted by the Supreme Court. The long-standing rule is that a purported waiver of immunity must be strictly construed and can occur only through a "clear statement" of

178. U.S. Const. art. III, § 2. The Eleventh Amendment changed the states' susceptibility to suit in federal court, providing that the states may not be sued by citizens of another state or by citizens or subjects of a foreign state. Importantly, the Eleventh Amendment did not address judicial power over the United States or over cases arising under federal law. The Supreme Court has read the Eleventh Amendment as a broad statement of sovereign immunity; this Article accepts the views of the many critics of this interpretation, and argues that the Supreme Court's expansive reading is incorrect. See supra note 4.

179. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 81, n.6 (1996) (Stevens, J. dissenting) (observing, based on the language of Article III and the decision of the justices in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 429 (1793), that the view that the Supreme Court had a constitutional obligation to take jurisdiction of suits against states was "not implausible"). In Seminole Tribe, Justice Stevens also posed the question, "[W]hy a general grant of jurisdiction to federal courts should not be treated as an adequate expression of the sovereign's consent to suits against itself?" Id. at 97 (quoting John Paul Stevens, Is Justice Irrelevant?, 87 NW. U. L. REV. 1121, 1126 (1993)). John J. Gibbons, in The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889 (1983), also states:

Certainly from a textual standpoint, the suggestion that the states were immune from suit in federal court seems preposterous on its face in light of the express provision in article III of the Constitution for federal jurisdiction "extending to all Cases" arising under the Constitution or federal statutes and treaties.

Id. at 1895. Early case law also supports this position, see infra notes 389-428 and accompanying text.
the government’s intention. If Article III is subjected to the clear statement rule, it passes. Congress has used language very similar to that in Article III to waive the United States’ immunity in the Tucker Act, 28 U.S.C. § 1346(a)(1), and the United States Supreme Court has upheld that waiver under the clear statement rule. The text of 28 U.S.C. § 1346(a)(1) provides:

The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the . . . recovery of . . . any penalty claimed to have been collected without . . . authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

Although this provision is obviously narrower than the various government-party extensions of judicial power in Article III, it differs from Article III only in that specific respect. Both provisions simply extend judicial power to federal courts over cases against specified government entities. The language of neither provision explicitly precludes a retained sovereign immunity. If congressional enactment of


181. According to the majority in Williams, 28 U.S.C. § 1346(a)(1) waives the government’s sovereign immunity from suit by authorizing federal courts to adjudicate “[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected.” 514 U.S. at 529. The dissenters did not question the general conclusion that § 1346(a)(1) was a waiver of sovereign immunity, focusing instead on standing issues (the respondent Williams paid taxes owed by her ex-husband in order to remove a federal tax lien from her property). 514 U.S. at 545-46 (Rehnquist, C.J., dissenting). See M. Carr Ferguson, Jurisdictional Problems in Federal Tax Controversies, 48 IOWA L. REV. 312, 327 (1963). For the history of the provision, see H.R. REP. No. 83-659, at 3 (1953), H.R. CONF. REP. No. 83-2276, at 2 (1954).


183. Affording “jurisdiction” rather than “extending judicial power” and addressing a particular type of action against the United States, rather than to more generally specified actions, such as those involving federal law, or more broadly specified party actions, such as those “to which the United States shall be a Party,” U.S. CONST. art. III, § 2, exemplifies the restricted nature of this provision.

184. Other jurisdictional provisions which satisfy the clear-statement rule are somewhat more explicit in subjecting the United States to suit. Unlike Article III, Section 2 and § 1346(a)(1), it is impossible to read these provisions as subject to implicit immunities. See, e.g., 28 U.S.C. § 1491 (2002) (stating the Court of Claims “shall have jurisdiction to render judgment” in any claim against the United States); 28 U.S.C. § 2410 (2002) (stating the United States may be named a party in specified actions involving real property); 43 U.S.C. § 666 (2002) (stating that “consent is given to join the United States as a defendant” in suits involving the adjudication of water rights). Similarly, the Federal Tort Claims Act, 28 U.S.C. § 2674 (2002), provides that the “The United States shall be liable” for torts in the same way that individuals are, in addition to the jurisdictional provision in 28 U.S.C. § 1346(b) (2002). See also Administrative Procedure Act, 5 U.S.C. § 702 (2002); Quiet Title Act, 28 U.S.C. § 1346(f), 2409(a) (2002).
this language, standing alone, constitutes consent to suit against the
United States, it is extremely difficult to argue that ratification of the
Constitution, extending "judicial power" to enumerated cases in which
the United States or a state is a party and "original jurisdiction" to
state-party cases, does not. The first cannot constitute a clear and un-
equivocal waiver of immunity, while the second is subject to an unex-
pressed but understood immunity. The irony here is apparent. The
Supreme Court reads the constitutional provision granting judicial
power as requiring congressional implementation through clear con-
sent to suit; however, the constitutional provision itself, enacted by
the states as part of the nation's founding document, satisfies the
Court's test but has been itself held insufficient to constitute consent.
As Justice Stevens has remarked, "[t]he majority's affection for plain
language seems to end where its devotion to sovereign immunity
begins." 185

Other aspects of Article III, Section 2, indicate that it encompasses
the consent of the states to suit against themselves individually and
collectively as the new United States. Article III speaks of "judicial
power" in the first paragraph, enumerating the categories of cases to
which that power extends, but uses the term "jurisdiction" in the sec-
ond paragraph, which specifies that the Supreme Court will have orig-
inal jurisdiction over some of those categories. While an earlier
version of the provision used the term "jurisdiction" in both places,
Madison and Morris moved to change the term to "judicial power,"
which was passed unanimously. 186

The term "judicial power" is a broad and encompassing term,
broader than simple "jurisdiction." The term "jurisdiction" suggests
procedural concerns, and may more easily encompass underlying limi-
tations such as sovereign immunity. In contrast, the term "judicial
power" suggests that Article III extends to the national judiciary a
fundamental governmental authority not subject to unexpressed and
extraconstitutional common law limitations. This "judicial power" ex-
tends to all cases involving the United States and to specified cases
involving the states.

What sort of power can be exercised only if its objects permit? If
the judicial power over states and the United States extended by Arti-
cle III is subject to the constraints of sovereign immunity, it is no
power at all. 187 If it has any meaning at all, the language of Article III
demonstrates at a minimum that suits against the government were
contemplated by the Framers; there is no mention of immunity from
suit for the United States or the states. Fairly read, Article III does

186. See Madison, supra note 72, at 539.
187. See supra subsection III.C.1., which demonstrates that the purposes of Article III
are inconsistent with an implicit sovereign immunity.
not simply give federal courts jurisdiction in instances where the United States or a state consents to be sued; it *authorizes* actions against states and the United States as a fundamental constitutional principle and empowers the national judiciary to decide those actions.

Other portions of the Constitution provide additional indirect support for the interpretation that ratification of the Constitution entails rejection of common law doctrines of sovereign immunity. First, although immunity is not mentioned in connection with suits against the United States, the states, or for cases involving federal law, it is explicitly afforded in the Constitution in other instances. Article I, Section 6, protects Senators and Representatives from arrest except for treason, felony, or breach of peace when Congress is in session and provides immunity for speech and debate in the Congress. Second, several provisions of the Constitution make it clear that the new United States rejected other privileges associated with a monarchy. It would be reasonable to conclude that the broad language of Article III, and the representative government contemplated by the Constitution, constitutes a rejection of the monarch's privilege to avoid suit without consent. Third, the guarantee in Article VI that the contractual obligations of the United States were to be “as valid against the United States under this Constitution, as under the Confederation,” articulates an intention to honor contractual obligations.

188. Article I, Section 6 provides:

> The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.


189. U.S. CONST. art. I, §§ 6, 10; art. II, § 1. Several provisions convey this rejection clearly. Article I, Section 9, Clause 8 provides: “No Title of Nobility shall be granted by the United States.” Article I, Section 10, Clause 1 similarly restricts the States: “No State shall . . . grant any Title of Nobility.” Article II, Section 1, Clause 6 limits the President’s receipt of “emoluments” from the states: “The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during that Period for which he shall have been elected, and he shall not receive within the Period any other Emolument from the United States, or any of them.” The debates of the Federal Convention also make this point clear: Benjamin Franklin discusses his “apprehension” that the government of the States may “end in a Monarchy” and describes this possibility as “Catastrophe.” See MADISON, supra note 72, at 53. John Dickenson, although noting the merits of limited monarchy, stated: “A limited Monarchy however was out of the question. The spirit of the times—the state of our affairs, forbade the experiment, if it were desirable.” Id. at 56-57. Edmund Randolph noted that the “permanent temper of the people was adverse to the very semblance of Monarchy,” id. at 58, and argued against a single executive, regarding it “as the foetus of monarchy.” Id. at 46.

190. U.S. CONST. art. VI, cl. 1. It would be possible to argue that this provision means that any immunities afforded the Confederation would inure to the United States.
which is inconsistent with a notion of broad implicit immunities under Article III.

Article III should be interpreted in the context of the reasons for its inclusion in the Constitution. Although the record is scant, the Framers’ apparent reasons for extending the judicial power to cases involving a state and a citizen of another state was to prevent bias by the state courts against other states or their citizens and to provide equal justice. It is almost inconceivable that this concern for justice would incorporate an unexpressed understanding that such actions could occur only if a state, whose biased courts would not provide justice to a diverse citizen, consented case-by-case to jurisdiction in the federal courts. There is no reason to suppose that a state legislature or executive would be any less biased against diverse citizens in the waiver of immunity than the state judiciary in hearing and deciding a suit. It is unlikely that bias infected state judicial but not legislative or executive branches, or that the Framers believed that it did. With respect to cases arising under federal law, the Framers extended judicial power to the federal courts to ensure necessary uniformity of the federal laws. Again, it is inconceivable that the judicial power to hear cases raising issues of federal law was subject to an unexpressed understanding that the United States, or any state, could evade the application of federal law and defeat the acknowledged necessity of uniformity by simply refusing to appear in court.

An additional embarrassment which plagues the interpretation of Article III as encompassing sovereign immunity is the assignment of different meanings to various clauses in Article III, Section 2, despite their similarities. If one inserts into the constitutional text the Supreme Court’s interpretations relating to immunity, Article III, Section 2 as originally ratified would read:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority excluding cases in which the United States or a State is sued as a defendant- unless the United States or the State consents, or in the case of a State, unless the United States sues a State;-to all cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction excluding cases in which the United States or a State is sued as a defendant, unless the United States or

under the Constitution, but it seems a poor vehicle by which to convey that idea. If the point had been to provide for immunity rather than to preserve existing obligations, surely the clause would be more direct.

191. See infra subsection III.D.3. There was no debate in the Federal Convention over this head of jurisdiction. The resolution of the Convention, adopted July 18, 1787, provided that the federal courts should have “jurisdiction . . . to cases arising under laws passed by the general legislature, and to such other questions as involve the national peace and harmony.” 1 ELLIOT’S DEBATES, supra note 38, at 210.

192. See infra subsection III.D.1.
Considering only the states, it is universally agreed first, that the language “The judicial Power shall extend... to Controversies between two or more States” in fact constitutes consent of the states to suit,193 but second, that the language “The judicial Power shall extend... to Controversies between a State and Citizens of another State” does not.194 This is a curious reading. Each of these clauses is part of the same sentence; each follows the introductory phrase, “The judicial Power shall extend... to Controversies”; each is part of an enumeration of cases or controversies. The common law of sovereign immunity applied equally to both instances. According to Blackstone’s account, the sovereign answered to no one—neither subject nor foreign sovereign.195 If the sovereign consents to suit by ratifying the constitutional language, “The judicial Power shall extend... to Controversies between two or more States,” how is it possible that ratification of the language in the next clause, “The judicial Power shall extend... to Controversies... between a State and citizens of another State,” does not constitute consent? It cannot be that the states surrendered their immunity in suits between states because that was contemplated “in

193. South Dakota v. North Carolina, 192 U.S. 286 (1904). In that case, the Court ruled that its original jurisdiction over “controversies between two or more states,” extended to a suit by South Dakota as the donee of holders of bonds issued by North Carolina, and secured by a mortgage of railroad stock owned by North Carolina, to compel payment of the bonds and subjection of the mortgaged property to satisfaction of the debt. Id. at 317-18. Justice White dissented, joined by Chief Justice Fuller and Justices McKenna and Day, on the grounds that the construing the Fifth Clause of Section 2 as permitting a state to sue another state on bonds donated to it by a private citizen would circumvent the spirit of the Eleventh Amendment prohibition on such suits by a citizen against a state. See id. at 328 (White, J., dissenting); see also New Hampshire v. Louisiana, 108 U.S. 76 (1883) (holding that one state could not create a controversy with another state by assuming the prosecution of debts owed by the other state to its citizens, in view of the Eleventh Amendment).

194. This latter clause, of course, has been changed by the Eleventh Amendment, but the Supreme Court has insisted that the Eleventh Amendment did not change the law; rather, it simply restored the original constitutional intention which had been subverted by the majority in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). See, e.g., Alden v. Maine, 527 U.S. 706, 722-23 (1999). This Article disagrees with the Supreme Court’s interpretation. See infra Section III.G.

195. See supra Section III.B.
the plan of the convention" (which is simply a synonym for "Constitution") while a surrender of immunity in other contexts was not. Nothing in the language of the Constitution or the debates of the Federal Convention and the state ratification conventions supports such a conclusion.

It is similarly problematic to read the Fourth Clause of Section 2, "The judicial Power shall extend . . . to Controversies to which the United States shall be a Party" as a surrender of immunity by the states in suits brought against them by the United States, but not as a limitation on the immunity of the United States. The Supreme Court has long recognized that the United States may bring a lawsuit against a state without the state's consent. As the Supreme Court held in *Monaco v. Mississippi*:

196. The terms "Constitution" and "plan of the convention" appear to have been used interchangeably by the founding generation. See, e.g., Madison's statement in the Virginia ratification debates in discussing diversity jurisdiction: "There are also many public debtors, who have escaped from justice for want of such a method as is pointed out in the plan on the table." *Elliott's Debates*, supra note 38, at 583. The latter phrase, "plan of the convention" has perhaps been misused by some modern jurists following the example of Alexander Hamilton, see infra text accompanying notes 341-44, to advance interpretations of the Constitution which are contrary to its plain language.

197. Nothing in the language of the Constitution, the debates in the Federal Convention or the state ratification conventions, or other sources supports this divergent reading of the similarly worded and constructed clauses of Article III. The Court's decision in *Monaco v. Mississippi*, 292 U.S. 313 (1934), announces, but does not support, the conclusion that the states' consent to suits involving two or more states was inherent "in the plan of the convention" while consent to other extensions of the judicial power was not. See *id.* at 323. Accordingly, the Court denied Monaco's motion for leave to file suit against Mississippi. *Id.* at 332.

198. Although the Articles of Confederation provided that the Congress had power to decide disputes between two or more states "concerning boundary, jurisdiction, or any other cause whatever," 1 *Elliott's Debates*, supra note 38, at 81, the Articles generally offer no insight into the meaning of the Constitution on immunity issues. The mechanism for resolution of disputes between states was complex and could be invoked only case-by-case. The legislative or executive branch of a state could petition Congress, which would meet with representatives of both states, who would agree to appoint a judge to constitute a court for resolution of the matter. If the disputing states could not agree, Congress would list three persons from each, and the disputing states would take turns striking names to limit the list to thirteen persons from which seven to nine would be drawn by lot to act as judges. 1 *id.* at 82.


200. *Kansas v. United States*, 204 U.S. 331, 342 (1907) (concluding that "[i]t does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.").

201. See, e.g., *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (finding that "[t]he reading of the Constitution urged by Mississippi [that it could not be sued without its consent] is not supported by precedent, is not required by any lan-
Upon a similar basis rests the jurisdiction of this Court of a suit by the United States against a State, albeit without the consent of the latter. While that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan. Without such a provision, as this court said in United States v. Texas, supra, "the permanence of the Union might be endangered."202

Despite the Court's opinion in Monaco, it strains credulity to read the Fourth and Fifth Clauses of Article III, Section 2, as surrendering immunity while the First, Sixth, and Ninth Clauses do not.

The last clause of Article III, Section 2 as originally ratified extends the judicial power of the United States to controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." If all of the clauses are read consistently such that their ratification constituted consent to suit, then the states consented in this last clause to suit by foreign sovereigns in federal courts. This provision was, of course, changed by Eleventh Amendment, which reads in pertinent part: "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 or Subjects of any Foreign State."203

Sovereign nations generally do not submit to the jurisdiction of another nation's courts, and the original inclusion of this power may lend legitimacy to the prevailing view that these jurisdictional categories are generally subject to an unexpressed retention of common law sovereign immunity. Madison spoke to this point in the Virginia ratification debates, taking the position that the clause was subject to sovereign immunity.

I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made. The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war? As the national tribunal is to decide, justice will be done. It appears to me, from this review, that though, on some of the subjects of this jurisdiction, it may seldom or never operate, and though others be of inferior consideration, yet they are mostly of great importance, and indispensably necessary.204

It may seem inconceivable that states would have consented to suit against themselves in federal courts by any foreign nation or subjects or citizens of foreign nations. It is possible—but obviously problematic—to adopt the Supreme Court's approach and assume that the

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203. U.S. Const. amend. XI.
204. 3 Elliot's Debates, supra note 38, at 533-34.
Framers assigned different meanings to the same language in various clauses of Article III. If the different clauses were intended to have differing effects, it would have been an easy matter to so indicate. A failure to do so cannot be viewed as the result of compromise and the difficulties of drafting by committee, since the Committees ofDetail and of Style apparently had a fairly free hand with the drafting of the judiciary article. This clause, however, may deserve a different interpretation than the others. The other categories contemplate reciprocal arrangements: the states gain the protection of the Union by agreeing to be subject to the power of the national judiciary with respect to federal laws; the United States is formed only if it is subject to the power of the judiciary; the states agree reciprocally to submit to suit by each other, each other's citizens, and the United States, and so on. Retention of common law sovereign immunities is inconsistent with these reciprocal arrangements. But the Constitution obviously embodies no reciprocal agreements with respect to foreign nations, and it may accordingly be reasonable to read this clause as subject to the law of nations, which permitted a suit against a sovereign only with its consent.

Consent requires reciprocity in this context.

205. See supra subsection III.A.4.
206. This analysis would also apply to suits against the United States by a foreign sovereign, which would be encompassed in the extension of judicial power under Article III “to Controversies to which the United States shall be a Party.” U.S. CONST. art. III, § 2.
207. The remaining approach is to take the Framers at their word and to view the pre-Eleventh Amendment clause as affording foreign states and subjects rights to sue the states in federal courts. In historical context, this reading may not be as surprising as it appears to a modern generation inured in the doctrine of sovereign immunity. First, one important reason for the Constitutional Convention was the necessity of centralized power over foreign relations and the defense of the United States. Permitting the federal courts to determine controversies between states and foreign states or their subjects or citizens would promote the peace and permit the national government, rather than individual states, to handle issues which could potentially lead to armed conflict. See Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 467-68 (1793) (opinion of Justice Cushing). Second, the articulated reasons for diverse citizen/diverse state-citizen suits was the presumed bias of state courts in favor of their residents. See infra subsection III.D.3. The founding generation would similarly have believed that the federal courts of the United States would be predisposed in favor of the states against a foreign state in any such action. Such suits perhaps also seemed fairly unlikely, given the difficulties of communication and travel at the time, and the probable recognition by foreign states and citizens of the bias factor just described. Finally, the ability of foreign sovereigns to sue in federal court was limited in the original clause to actions against the states, and did not include actions against the United States, which may simply suggest that the position of the states in the federalist view was much more limited than that typically accorded sovereigns of the time.
3. The Understandings Expressed in the Ratification Process
   a. The State Ratification Debates

Apart from Madison and Marshall in the Virginia ratification debates, the recorded comments of every other participant in the ratification debates—Federalist and Antifederalist alike—show that they read the Constitution to extend the national judicial power to cases brought against the states by diverse citizens. The most extensive discussion in the ratification debates occurred in Virginia, where Madison and Marshall argued that the exercise of power under the State/Diverse Citizen Clause of Article III, Section 2, required the consent of the state. Their arguments addressed the Antifederalist concerns that the Constitution would permit British creditors to sue in federal court for the payment of debts, and that holders of depreciated obligations against the states would use the federal courts to force payment by the states at face value. As Patrick Henry argued:

> It sounds mighty prettily to gentlemen, to curse paper money and honestly pay debts. But apply to the situation of America, and you will find there are thousands and thousands of contracts, whereof equity forbids an exact literal performance. Pass that government, and you will be bound hand and foot. There was an immense quantity of depreciated Continental paper money in circulation at the conclusion of the war. This money is in the hand of individuals to this day. The holders of this money may call for the nominal value, if this government be adopted. This state may be compelled to pay her proportion of that currency, pound for pound. Pass this government, and you will be carried to the federal court, (if I understand that paper right,) and you will be compelled to pay shilling for shilling. I have doubt on the subject; at least, as a public man, I ought to have doubts. A state may be sued in the federal court, by the paper on your table. It appears to me, then, that the holder of the paper money may require shilling for shilling.

Henry warned that the constitutional prohibition against ex post facto laws would prevent the government from protecting the states against such claims. George Mason argued similarly that the judicial power to enforce payments of debts, and the prohibition of ex post

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208. A statement by Oliver Ellsworth in the Connecticut ratification debates suggests that he may have shared the view articulated by Hamilton in *The Federalist No. 81*, and Madison and Marshall in the Virginia ratification debates. In discussing the necessity of forcing the states to conform to national law, Ellsworth stated:

> Hence we see how necessary for the Union is a coercive principle. No man pretends the contrary: we all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. . . . I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, states, in their political capacity.

2 *Elliott's Debates*, supra note 38, at 197. Ellsworth's meaning depends on what he meant by the political capacity of the states. It is possible to subject a state to suit without intruding on its political functions.

209. 3 *id.* at 318-19.
210. 3 *id.* at 473-75.
facto laws, would entail the “destruction and annihilation of all the citizens of the United States, to enrich a few.”

Mason raised other concerns: that debts already paid (in land grants) would have to be paid again; that jurisdiction over the states for the payment of state debts would impair the dignity of the sovereign states; and that any judgment entered against a state could not be enforced, concluding that “[a] power which cannot be executed ought not to be granted.” These comments indicate that the Antifederalists in the Virginia convention believed that the Constitution subjected the states to suit in federal court.

Madison’s attempts to reassure the opponents of ratification were met with disbelief. Madison advanced an interpretation, later seconded by Marshall, that the suits feared by the Antifederalists would not materialize because the states enjoyed immunity under the Constitution:

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 a 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.

Patrick Henry’s response was cutting:

As to controversies between a state and the citizens of another state, his [Madison’s] construction of it is to me perfectly incomprehensible. . . . [H]e says that the state may be plaintiff only. If gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant. What says the honorable gentleman? The contrary—that the state can only be plaintiff. When the state is debtor, there is no reciprocity. It seems to me that gentlemen may put what construction they please on it.

Another Antifederalist, Grayson, also rejected Madison’s arguments although with less vehemence: “My honorable friend, whom I much respect, said that the consent of the parties must be previously obtained. . . . [I]t is not so with our states. It is fixed in the Constitution that they shall become parties.”

Notably, Madison and Marshall also failed to convince their fellow Federalists. In response to Antifederalist concerns, Edmund Ran-

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211. 3 id. at 479-80.
212. 3 id. at 526-27.
213. 3 id.
214. 3 Id.
215. 3 id. at 555-56.
216. 3 id. at 533.
217. 3 id. at 543.
218. 3 id. at 566-67.
dolph agreed that a state could be sued in federal court by a citizen of another state and argued that such suits furthered justice:

It is only to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government. It is said to be disgraceful. What would be the disgrace? Would it not be that Virginia, after eight states had adopted the government, none of which opposed the federal jurisdiction in this case, rejected it on this account? ... I ask the Convention of the free people of Virginia if there can be honesty in rejecting the government because justice is to be done by it? I beg the honorable gentleman to lay the objection to his heart—let him consider it seriously and attentively. Are we to say that we shall discard this government because it would make us all honest? Is this to be the language of the select representatives of the free people of Virginia?

Randolph's view is entitled to special deference. As a member of the Committee of Detail, he drafted the Constitution presented to the Committee of Detail, and ultimately to the Convention on August 6, which included jurisdiction over controversies between “a state and citizens of another state.” The drafter's interpretation, particularly when it accords with that of the great majority of contemporaneous interpretations, should control.

The discussion in other states was not as extensive as Virginia's, and only a few relevant comments have survived. In North Carolina, Lenoir also raised the concern of state indebtedness and expressed his understanding that the states were subject to suit by Article III:

This state has made a contract with its citizens. The public securities and certificates I allude to. These may be negotiated to men who live in other states. Should that be the case, these gentlemen will have demands against this state on that account. The Constitution points out the mode of recovery; it must be in the federal court only, because controversies between a state and the citizens of another state are cognizable only in the federal courts.

b. The Popular Press

The debate in the newspapers and pamphlets of the day raised numerous objections to the extensions of national judicial power in Article III. Many commentators objected to the supposed deprivation of the right to trial by jury and to the inconvenience of having cases

219. According to Randolph, “[A]ny doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words where a state shall be a party.” 3 id. at 573.
220. 3 id. at 573-75.
221. James Wilson prepared a second draft of the Constitution for the Committee. His view accords with Randolph’s. See 2 id. at 491-93; see also discussion infra text accompanying notes 318-19.
222. 4 ELLIOT’S DEBATES, supra note 38, at 205-06.
223. See THE FEDERALIST No. 83 (Alexander Hamilton) (discussing that the Constitution guarantees trial by jury in criminal cases and does not abolish it in civil cases). The Massachusetts debates also contained similar statements, see 2 ELLIOT’S DEBATES, supra note 38, at 109-12 (Holmes, expressing concern about the qualification, selection, and regulation of jurors), as did North Carolina, see 4 id.
tried in federal courts, which many assumed would be far distant from their homes. The more general concern that the creation of a national government would ultimately eliminate state governments was

at 147, 170-72 (Iredell assuring convention that the right to trial by jury in civil cases is left to discretion of Congress); 4 id. at 150-51 (Governor Johnson, same); 4 id. at 175-76 (Maclain, same); 4 id. at 144 (Spaight, same); 4 id. at 149-50 (M'Dowall stating that the right to trial by jury in civil cases should be assured in the Constitution); 4 id. at 155 (Spencer, same); 4 id. at 151 (Bloodworth, concluding that the right to trial by jury is removed by the Constitution), and South Carolina, see 4 id. at 295 (Barnwell, arguing that right to jury trial problematic in cases in other states, where litigant has no neighbors, friends, or relations to sit as jurors); 4 id. at 306-08 (Pinckney, expressing that the difficulty of specifying the right to trial by jury in civil cases is left to Congress). Other publications also expressed this notion. See The Impartial Examiner I, part 2, On the Diversity of Interests and the Dangers of Standing Armies and a Supreme Court, VIRGINIA INDEP. CHRON., Feb. 27, 1788, reprinted in 2 BAILYN'S DEBATES, supra note 40, at 254 (Constitution does not provide for civil jury trial); Brutus XIV, The Supreme Court: The Danger of Appellate Jurisdiction, NEW YORK J., Feb. 28 and March 6, 1788, reprinted in 2 BAILYN'S DEBATES, supra note 40, at 260 (Supreme Court's appellate jurisdiction, as to law and fact, destroys right to jury trial); A Columbian Patriot [Mercy Otis Warren], Observations on the Constitution, The Gulph of Despotism Set Open, Feb. 1788, reprinted in 2 BAILYN'S DEBATES, supra note 40, at 290 (noting abolition of trial by jury in civil cases). Various state ratification debates included proposed amendments giving the federal court jurisdiction over diversity cases where the amounts in controversy are satisfied and trial by jury in such cases where either party requested it. 1 ELLIOT'S DEBATES, supra note 38, at 323 (Massachusetts, proposed amendments VII and VIII); 1 id. at 326 (New Hampshire proposed amendments VII and VIII); 1 id. at 328 (New York: "That the trial by jury . . . ought to remain inviolate."); 1 id. at 334 (Rhode Island's Declaration of Rights IX: "That no freeman ought to be taken, imprisoned, or dispossessed of his frehold, liberties, privileges, or franchises, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the trial by jury"); Hugh Williamson, General Bankruptcy and Loss of Honor . . . Rejoice in the Prospect of Better Times, Speech at Edenton, North Carolina (Nov. 8, 1787), in DAILY ADVERTISER, Feb. 25-27, 1788, reprinted in 2 BAILYN'S DEBATES, supra note 40, at 227-28 (explaining that diversity of civil practice prevented constitutional extension of right to jury trial).

224. Letter from Richard Henry Lee to the Governor (Oct. 16, 1787), VIRGINIA GAZETTE, Dec. 6, 1787, reprinted in 1 BAILYN'S DEBATES, supra note 40, 465 at 471 (citing the "vexatious and oppressive callings of citizens from their own country to be tried in a far distant court, and as it may be without a jury"); Agrippa [James Winthrop] XII, Cherish the Old Confederation Like the Apple of Our Eye, MASSACHUSETTS GAZETTE, Jan. 11, 15, 18, 1788, reprinted in 1 BAILYN'S DEBATES, supra note 40, at 767 ("This, right to try causes between a state and citizens of another state, involves in it all criminal causes; and a man who has accidentally transgressed the laws of another state, must be transported, with all his witnesses, to a third state, to be tried. He must be ruined to prove his innocence."); see Hugh Williamson, supra note 221, at 230 (addressing Agrippa's concern, noting that "[t]he authors of this remark have not fully considered the question, else they must have recollected that the poor of this country have little to do with foreigners, or with the citizens of distant States. They do not consider that there may be an Inferior Court in every State; nor have they recollected that the appeals being with such exceptions, and under such regulations as Congress shall make, will never be permitted for trifling sums, or under trivial pretences, unless
given voice in this debate as well. Many assumed that the national courts would displace state judiciaries. Commentators also objected specifically to the lack of immunity with regard to state war debts. These objections clearly demonstrate the general understanding that the states were in fact subject to suit by the terms of the Constitution.

Examples of the view that ratification constituted the ratifying states' consent to the power of the federal courts are numerous. Brutus, who published a number of articles in the New York Journal, wrote a lengthy article entitled The Judicial Power: Can an Individual Sue a State? in which he concluded that the Constitution did in fact permit an individual to sue a state, and argued extensively that such jurisdiction should not be extended. Brutus argued that subjecting a state to the power of the federal courts was "humiliating" and "degrading," and raised the familiar objection that suits against the states for revolutionary war debts would cripple the states:

Every state in the Union is largely indebted to individuals. For the payment of these debts they have given notes payable to the bearer. At least this is the case in this state. Whenever a citizen of another state becomes possessed of one of these notes, he may commence an action in the supreme court of the general government; and I cannot see any way in which he can be prevented from recovering. . . . And when the citizens of other states possess them, they may bring suits against the state for them, and by this means, judgments and executions may be obtained against the state for the whole amount of the state debt. . . . The situation of the states will be deplorable. By this system, they will surrender to the general government, all the means of raising money, and at the same time, will subject themselves to suits at law, for the recovery of the debts they have contracted in effecting the revolution. . . . If the power of the judicial under this clause will extend to the cases above stated, it will, if executed, produce the utmost confusion, and in its progress,

we suppose that the national Legislature shall be composed of knaves and fools.

225. The Impartial Examiner, supra note 223, at 254 ("The supreme court is another branch of federal authority, which wears the aspect of imperial jurisdiction, clad in dread array, and spreading its wide domain into all parts of the continent. This is to be co-extensive with the legislature, and, like that, is to swallow up all other courts of judicature."); Brutus XV, The Supreme Court: 'No Power Above Them that Can Control Their Decisions, or Correct Their Errors, New York Journal, March 20, 1788, reprinted in 2 Bailyn's Debates, supra note 40, at 372, 376-77 ("Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accommodate themselves to the temper of the people.").


will crush the states beneath its weight. And if it does not extend to these cases, I confess myself utterly at a loss to give it any meaning.\textsuperscript{228}

Anticipating possible objections that such suits would never be permitted or, that if they were, judgments could never be enforced,\textsuperscript{229} Brutus opined:

It may be said that the apprehension that the judicial power will operate in this manner is merely visionary, for that the legislature will never pass laws that will work these effects. Or if they were disposed to do it, they cannot provide for levying an execution on a state, for where will the officer find property whereon to levy? To this I would reply, if this is a power which will not or cannot be executed, it was useless and unwise to grant it to the judicial. For what purpose is a power given which it is imprudent or impossible to exercise? If it be improper for a government to exercise a power, it is improper they should be vested with it. And it is unwise to authorise a government to do what they cannot effect.\textsuperscript{230}

The Federal Farmer raised similar objections, clearly demonstrating the view that Article III, Section 2 was not subject to an underlying common law sovereign immunity.

How far it may be proper to admit a foreigner or the citizen of another state to bring actions against state governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a state, as to oblige it to answer to an individual in a court of law, is worthy of consideration; the states are now subject to no such actions; and this new jurisdiction will subject the states, and many defendants to actions, and processes, which were not in the contemplation of the parties, when the contract was made; all engagements existing between citizens of different states, citizens and foreigners, states and foreigners; and states and citizens of other states were made the parties contemplating the remedies then existing on the laws of the states—and the new remedy proposed to be given in the federal courts, can be founded on no principle whatever.\textsuperscript{231}

Timothy Pickering reiterates the interpretation that the Constitution subjected the states to diverse citizen or foreign citizen suits and approves that extension of power as necessary and appropriate, in a refutation of the Federal Farmer:

[As particular states may pass laws unjust in their nature, or partially unjust as they regard foreigners and the citizens of other states, it seems to be a wise provision, which puts it in the power of such foreigners & citizens to resort to a court where they may reasonably expect to obtain impartial justice....]

[There is a particular & very cogent reason for securing to foreigners a trial, either in the first instance, or by appeal, in a federal court. With respect to foreigners, all the states form but one nation. This nation is responsible for the conduct of all its members towards foreign nations, their citizens & sub-

\textsuperscript{228} 2 id. at 224-26.
\textsuperscript{229} Including Hamilton's statements in The Federalist No. 81. See supra note 37 and accompanying text. For a full discussion of Hamilton's position, see subsection III.E.2.
\textsuperscript{230} Brutus XIII, supra note 225, at 225.
James Winthrop, writing under the pseudonym “Agrippa,” argued against the Constitution in a number of essays. He also understood the Constitution to subject the states to the jurisdiction of the federal courts:

This power extends to all cases between a state and citizens of another state. Hence a citizen, possessed of the notes of another state, may bring his action, and there is no limitation that the execution shall be levied on the publick property of the state, but the property of individuals is liable. This is a foundation for endless confusion and discord. This, right to try causes between a state and citizens of another state, involves in it all criminal causes; and a man who has accidentally transgressed the laws of another state, must be transported, with all his witnesses, to a third state, to be tried. He must be ruined to prove his innocence.

Winthrop believed that this jurisdiction was essential to the design of the new government: “These are necessary parts of the new system, and it will never be complete till they are reduced to practice.”

Winthrop also argued, as Agrippa, for the Massachusetts convention to ratify the Constitution only subject to amendments, including the following:

Resolved, that the constitution lately proposed for the United States be received only upon the following conditions: . . . 3. Congress shall not have power to try causes between a state and citizens of another state, nor between citizens of different states; nor to make any laws relative to the transfer of property between those parties, nor any other matter which shall originate in the body of any state. . . . 9. The judicial department shall be confined to cases in which ambassadours are concerned, to cases depending upon treaties, to offences committed upon the high seas, to the capture of prizes, and to cases in which a foreigner residing in some foreign country shall be a party, and an American state or citizen shall be the other party; provided no suit shall be brought upon a state note.

In his summary of his views, Winthrop specifically advanced his interpretation that the states were subject to suit: “By article 3, section 2, Congress empowered [sic] to appoint courts with authority to try civil causes of every kind, and even offences against particular states.”


234. Id. His view was in accord with that of the Framers. See supra subsection III.C.1.


236. Agrippa [James Winthrop] X, A Summary View: This System Ought to Be Rejected, MASSACHUSETTS GAZETTE, Jan. 1, 1788, reprinted in 1 BAILYN’S DEBATES, supra note 40, at 673, 674.
Thus, those who addressed the issue of state sovereignty believed that the Constitution, through Article III, Section 2, specifically permitted individuals to bring suits against states in federal courts. Many of these commentators disagreed with the wisdom of extending that power to the national judiciary, but none doubted that the Constitution did in fact do so.

c. Inferences from the Ratification Documents

The ratification documents of the majority of the states permit or compel the inference that the states understood that both they and the federal government were subject to suit by the terms of Article III, Section 2. The states can be grouped into two main categories. The first group, which includes only New York and Rhode Island, specifically interpreted Article III judicial power over the states as subject to underlying sovereign immunities in accord with interpretations advanced by Hamilton, Madison, and Marshall during the ratification process. The Supreme Court has relied on the ratification documents of these two states in its recent case law, and ignored the significant majority of eleven states which comprise the second group, whose ratification documents either permit to varying degrees, or compel the inference that ratification constituted consent to suit under Article III. These eleven states may further be divided into three subgroups. The first includes a group of five states which proposed no amendments in their ratification documents, despite the Antifederalist criticism of state/citizen suits in the popular press that was underway at the times of their ratifications. A second subgroup of three states proposed amendments. None dealt with the issue of suits against government entities, although critics of the Constitution had proposed specific amendments limiting state/citizen suits. Finally, the last group was comprised of two states, Virginia and North Carolina, which proposed identical amendments of Article III which would have protected state sovereignty by deleting state/citizen jurisdiction, but which specifically retained judicial power over suits involving the federal government.

The implicit premise is that the extension of judicial power over suits between a state and a diverse citizen waived any existing common law immunity, a rejection of the position taken by Hamilton.

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237. With the exception of Alexander Hamilton in The Federalist No. 81. See infra subsection III.E.2 for a full discussion of Hamilton's position.
239. Delaware, New Jersey, Georgia, Connecticut, and Maryland.
240. At the least, Federal Farmer's letters had appeared during the fall of 1787, prior to any ratification. By the time Maryland ratified in April 1788, many of the publications cited in subsection III.C.3.b, supra, had been circulated.
Madison, and Marshall in the ratification process. Virginia's proposed amendment lends further support to the earlier argument that the Virginia convention discounted Madison's and Marshall's arguments: if the convention accepted their representations, the proposed amendment would have been superfluous.

The ratification documents of Virginia and North Carolina are also notable for their conscious retention of jurisdiction over the United States, which precludes any contention that Virginia and North Carolina accepted sovereign immunity as an implicit constitutional premise. The most plausible conclusion from the ratification documents of these eleven states, considered as a whole, is that the states understood the Constitution to eliminate the English common law of sovereign immunity and to extend the national judicial power to cases involving the state and national governments.

Thus, only two states directly opposed judicial power over government entities in ratifying the Constitution. Of the remaining eleven states, nine chose, in the face of Antifederalist criticisms about the national judicial power over the states, not to propose such amendments. With respect to these nine, a reasonable (although admittedly unnecessary) inference is that their ratification of the Constitution waived immunity, individually as states and collectively as the United States in Article III cases. The other two states eliminated state/citizen jurisdiction precisely because they believed it was NOT subject to underlying common law sovereign immunities, rejecting the Hamilton-Madison-Marshall argument that Article III did not permit state/citizen suits absent state consent. Notably, they retained the Article III grant of power over the United States government, demonstrating that they did not object to sovereign immunity generally, but only to the extent it permitted citizen suits against the states in federal court.

i. New York and Rhode Island: No Citizen Suits against States

The ratification documents of New York and Rhode Island have been cited by the modern Supreme Court in support of the view that the Constitution embodies sovereign immunities.242 These ratification documents preclude an inference that New York and Rhode Island interpreted the Constitution as extending the judicial power to cases involving states and diverse citizens. Both New York and Rhode Island ratified specifically subject to the understanding that Article III did not permit citizen suits against the states. New York's ratifica-

242. E.g., Alden, 527 U.S. 706. The Court has not recognized that the ratification documents of the remaining states permit or compel a contrary inference. Justice Kennedy's opinion identifies the New York and Rhode Island ratification documents as “the only state conventions to address the issue in explicit terms.” Id. at 719.
tion document stated, “That the judicial power of the United States, in cases in which a state may be a party, does not extend... to authorize any suit by any person against a state.”243 The Constitution was ratified “[u]nder these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution.”244 The Rhode Island ratification document proposed a similar amendment, the first part of which sets out Rhode Island’s interpretation of Article III:

It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to... authorize any suit by any person against a state; but to remove all doubts or controversies respecting the same, that it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states, in the redemption of paper money already emitted, and now in circulation, or in liquidating and discharging the public securities of any one state; that each and every state shall have the exclusive right of making such laws and regulations for the before-mentioned purpose as they shall think proper.245

Although this statement is cast in the form of an amendment, it adopts the interpretation of Article III advanced by Hamilton, Madison, and Marshall: states were not subject to suit by citizens.

The latter part of Rhode Island’s amendment also limits general judicial power over cases involving United States law. The limited nature of the latter part of the clause suggests a very specific concern that states be permitted to handle their debts in their own way. The fact that it does not go further suggests that the Rhode Island convention accepted the Framers’ view on the necessity of extending national judicial power over the states with respect to United States law.246 As

243. 1 ELLIOT’S DEBATES, supra note 38, at 329. The document also specified:

[T]he jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended, by any faction, collusion, or mere suggestion; and that no treaty is to be construed so as to alter the Constitution of any state.

1 id. The New York ratification document also proposed amendments that there would be no inferior federal courts, except for trial of admiralty and maritime cases, and piracies and felonies on high seas; in other cases, state courts would have jurisdiction with a right of appeal to the Supreme Court. In addition, individuals who disagreed with a judgment of the Supreme Court could make application to the President, who could nominate with the advice and consent of the Senate, not less than seven commissioners, to correct the errors or review the decree, “and to do justice to the parties in the premises.” 1 id. at 331.

244. 1 id. at 329. Gibbons, supra note 4, at 1912, also incorrectly characterizes this language as a proposed amendment rather than as an “impression” or “explanation,” and concludes that the New York ratifying convention thus believed that without this language, the Constitution subjected the states to suit in some instances.

245. 1 ELLIOT’S DEBATES, supra note 38, at 336.

246. See supra text accompanying notes 99-114.
experiences under the Articles of Confederation confirmed, uniformity of law on national issues was essential, as was state conformance to that law.

The ratification documents of these two states demonstrate that both rejected the extension of national judicial power over suits by citizens against states. This conclusion, however, extends no further: the ratifiers did not object to the exercise of national judicial power over other actions against the states (by another state, or by the United States) and they did not object to judicial power over the United States. States’ rights, then, and not preservation of sovereign immunity as a generally applicable doctrine, prompted the proposals of New York and Rhode Island. Neither proposed an amendment with respect to judicial power over the United States or over cases involving federal law, which the Framers saw as necessary to ensure uniformity. Consequently, the ratification documents in New York and Rhode Island cannot be taken as a full rejection of the view that ratification of the Constitution waived sovereign immunity.

ii. No Proposed Amendments; Inference that Ratification Constituted Consent to Suit

Delaware, which was the first state to ratify, proposed no amendments; neither did New Jersey, Connecticut, or Georgia, all of which ratified soon after. Criticisms of Article III for its abrogation of the sovereign immunity of the states had appeared in the press when these four states ratified, in late 1787 and early 1788, although much of the material discussed above had not yet been published. Alexander Hamilton’s contrary interpretation in The Federalist No. 81, for example, did not appear in print until May 28, 1788. Given the language of the Constitution, the governmental structures it established, and the existence of Antifederalist criticisms, it is reasonable to infer that these states understood their ratifications as constituting consent to suit in Article III cases. The inference is stronger

247. See supra text accompanying notes 77, 105.
248. There is one exception: the Rhode Island document, which would ensure that the federal government could not exercise power to regulate state debt in anyway.
249. 1 Elliott’s Debates, supra note 38, at 319. Delaware ratified December 7, 1787.
250. 1 id. at 320-21. New Jersey ratified December 18, 1787.
251. 1 id. at 321-22. Connecticut ratified January 9, 1788.
252. 1 id. at 323-24. Georgia ratified January 2, 1788.
253. Pennsylvania also ratified early, on December 12, 1787, without proposed amendments. 1 id. at 319-20. However, Pennsylvania subsequently proposed amendments, and so is treated below. See infra text accompanying notes 257-58.
254. E.g., Federal Farmer, supra note 231.
255. See supra subsection III.C.3.b.
with respect to Maryland, which ratified April 28, 1788,\textsuperscript{256} when the debate in the press was well under way. Each of these five states arguably acceded to the implications of Article III: that the states were subject to suit, without the necessity of consent, in the categories of cases enumerated. The inference that the ratifiers considered the federal government to be subject to suit is somewhat weaker, since that issue had not been explicitly debated in the conventions or the press. However, given the clear language of the Constitution and the similarities between the extensions of judicial power over the United States and the states, it is reasonable to infer that these states understood ratification to subject the new central government to suit as well.

\textit{iii. Article III Amendments Proposed}

This group includes four states which proposed some amendments, but did not include proposals dealing with the judicial power over the states or the United States, although several dealt with Article III issues.

\textsuperscript{256} 2 Elliot's Debates, supra note 38, at 549. Maryland ratified on April 26, 1788. Delegates from eleven counties and from Annapolis and Baltimore announced on behalf of their colleagues that: "[T]hey were elected and instructed, by the people they represented, to ratify the proposed Constitution, and that as speedily as possible, and to do no other act; that, after the ratification, their power ceased, and they did not consider themselves as authorized by their constituents to consider any amendments." 2 id. at 548. After ratification, a minority proposed amendments. None dealt with the immunity of the states or the federal government. Several dealt with the judiciary, ensuring trial by jury in all criminal cases, concurrent state court jurisdiction over certain actions, and amount in controversy limitations on federal court jurisdiction:

- The great objects of these amendments were, 1st. To secure the trial by jury in all cases . . . 2d. To give a concurrent jurisdiction to the state courts, in order the Congress may not be compelled, as they will be under the present form, to establish inferior federal courts, which, if not numerous, are very expensive; the circumstances of the people being unequal to the increased expense of double courts and double officers—an arrangement that will render the law so complicated and confused, that few men can know how to conduct themselves with safety to their persons or property, the great and only security of freeman. 3d. To give such jurisdiction to the state courts that transient foreigners, and persons from other states, committing injuries in this state, may be amenable to the state whose laws they violate and whose citizens they injure. 4th. To prevent an extension of the federal jurisdiction, which may, and in all probability will, swallow up the state jurisdictions, and consequently sap those rules of descent and regulations of personal property, by which men hold their estates.

2 id. at 550-51.

Interestingly, the Minority Committee appointed to consider amendments rejected the proposed amendment: "That every man hath a right to petition the legislature for redress of grievances, in a peaceable and orderly manner." 2 id. Perhaps this method was rejected as unnecessary, since judicial process was available.
Pennsylvania ratified early, on December 12, 1787, without proposed amendments. However, on September 3, 1788, Pennsylvania proposed, in the form of a petition to the new Congress, a revision of Article III, Section 1: “That Congress establish no court other than the Supreme Court, except such as shall be necessary for determining causes of admiralty jurisdiction”; and of Article III, Section 2: “[T]hat such appellate jurisdiction, in all cases of common-law cognizance, be by a writ of error, and confined to matters of law only; and no such writ of error shall be admitted, except in revenue cases, unless the matter in controversy exceed the value of three thousand dollars.” Pennsylvania’s proposals would have prevented the establishment of inferior federal courts and limited the appellate jurisdiction of the Supreme Court.

South Carolina ratified on May 23, 1788, proposing a limitation of the United States’ taxing power, and also declaring “that no section of 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.” Massachusetts, which ratified on February 6, 1788, and New Hampshire, which ratified on June 21, 1788, each proposed a limitation of the federal judicial power in diversity cases. The Massachusetts proposal limited the Supreme Court’s power over such cases based on the amount in controversy; New Hampshire’s proposal went further, stating that the federal courts had appellate jurisdiction only, and limited that jurisdiction based on the amount in controversy.

The inference that the states understood that ratification constituted consent to suit under Article III is very strong with respect to each of these states. They ratified (or, in the case of Pennsylvania, proposed amendments subsequent to ratification) at a time when the press was circulating criticisms of Article III for subjecting the states to suit, and each proposed amendments dealing with the judiciary but not with sovereign immunity. The inference is even stronger with respect to Massachusetts, since the Massachusetts convention rejected Agrippa’s suggested amendments to prevent citizen suits against the states, which had been directed specifically at the Massachusetts convention.

257. 2 id. at 546.
258. 2 id.
259. 1 id. at 325.
260. 1 id. at 323.
261. 1 id. at 325-27.
262. 1 id. at 323.
263. 1 id. at 325-27.
264. See supra subsection III.C.3.b.
265. Supra text accompanying notes 233-36.
Finally, it is not possible to read the remaining ratification documents from Virginia and North Carolina except as an explicit refutation of the argument that Article III preserved common-law sovereign immunities. The Virginia convention adopted the view taken by its delegates (except Madison and Marshall) that the Constitution subjected the states and the United States government to suit in the specified categories of cases.\textsuperscript{266} To avoid that result with respect to the states and to preserve the powers of state judiciaries, the Virginia convention proposed rewriting Article III so that it omitted power over cases arising under the Constitution or laws of the United States, and over cases between a state and diverse citizens, foreign states, citizens or subjects.\textsuperscript{267} The North Carolina ratification document is identical.\textsuperscript{268} This provision was specifically identified as an “amendment” to the Constitution, in contrast to the ratification documents of New York and Rhode Island, which ratified based on the “understanding” that the states were not subject to suit.\textsuperscript{269} It also included a new provision, based on George Mason’s suggestions in the ratification debates,\textsuperscript{270} which made the national judicial power prospective only, except with respect to certain categories of cases.\textsuperscript{271}

Importantly, however, the Convention’s rewritten Article III retained the judicial power over “controversies to which the United States shall be a party.”\textsuperscript{272} The only possible inference is that the Virginia convention did not object to suits against the government entities as a general principle. It viewed the Constitution as a rejection of sovereign immunities. Its recommended amendments would have avoided that result with respect to the states, but it approved the re-

\textsuperscript{266} See supra text accompanying notes 208-21.
\textsuperscript{267} See 3 ELLIOT’S DEBATES, supra note 38, at 660-61. The Virginia convention also proposed eliminating diversity jurisdiction.
\textsuperscript{268} See 4 id. at 246.
\textsuperscript{269} See supra subsection III.C.3.c.i.
\textsuperscript{270} Mason suggested the following provision as a solution to the problem of collection of British debts and other claims (specifically, Indiana Company claims, and the escheat or British land titles): “[T]he judicial power shall extend to no case where the cause of action shall have originated before the ratification of this Constitution, except in suits for debts due to the United States, disputes between states about their territory, and disputes between persons claiming lands under grants of different states.” 3 ELLIOT’S DEBATES, supra note 38, at 530.
\textsuperscript{271} The provision read:

[T]he judicial power of the United States shall extend to no case where the cause of action shall have originated before the ratification of the Constitution, except in suits for debts due to the United States, disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.

\textsuperscript{3} id. at 660-61.
\textsuperscript{272} 3 id.
jection of sovereign immunity with respect to the United States. This subjection of the United States, but not the states, to the power of the national courts may simply be viewed as part and parcel of the state-centered union that many Virginians advocated. But their proposed amendments make it impossible to assert that Virginia and North Carolina ratified a Constitution which they read to encompass sovereign immunities. Rather, both conventions clearly understood the Constitution to do just the opposite. And at least with respect to the United States government, that result was acceptable to the ratifiers. Sovereign immunity clearly was not an implicit structural premise of the new union for the important state of Virginia and its neighbor, North Carolina, and the certainty that these states understood the Constitution to abrogate immunity lends support to the inferences about the views of the other nine states analyzed above.

D. Reasons for the Various Categories of Judicial Power in Article III

It is inconceivable that the grants of judicial power in Article III were subject to an unexpressed understanding that the United States or the states could opt out and subvert the constitutional framework of horizontal separation of powers (with respect to the United States government) and vertical separation of powers (with respect to the states).

The reasons given by the Framers and ratifiers for judicial power over cases involving federal law and cases involving a state and a diverse citizen make it clear that they did not interpret the Constitution as subject to implicit immunities. It is implausible that the judicial power over issues of federal law was subject to an unexpressed state sovereign immunity. One of the central reasons for the Convention was the Confederation's inability to enforce its laws against the states. To replace the impotent Articles with a Constitution subject to the same deficiency would have been senseless. Much of the discussion in the Convention and the ratification debates indicated a clear necessity for uniformity of federal law through the action of federal courts on the states.

It is similarly implausible that the Framers intended the judicial power over state-diverse citizens suits to be subject to implicit immunities. The Framers' concern was that the state courts would not afford an unbiased forum for state-diverse citizen suits. The creation of a national judicial power which could be executed only if the state's legislature consented cannot address that concern. The result of such an arrangement would be that the national forum would never be used: state legislatures and executives would likely be as or more biased against diverse citizens than state judiciaries, and there is no
reason to think that they would routinely consent to suit against the State in the federal forum.

I. Cases Involving Federal Law

Each of the proposals for the Constitution submitted at the Convention included national jurisdiction over cases involving federal issues. The Virginia Plan, in its ninth resolution, included jurisdiction over “questions which involve the national peace or harmony.” Article IX of Charles Pinckney’s proposal extended national judicial power to “all cases arising under the laws of the United States.” The New Jersey Plan gave federal courts power to hear cases involving the construction of treaties or any act of Congress dealing with commerce or collection of the federal revenue. Hamilton suggested the creation of inferior federal courts for “the determination of all matters of general concern.” Following a discussion of the Virginia Plan, Madison’s proposal passed unanimously, extending jurisdiction to “cases arising under laws passed by the general legislature.” This was the resolution which was referred to the Committee of Detail, along with some of the other proposals listed above. This resolution provided the authority for the ensuing draft of the Constitution, which extended the jurisdiction of the Supreme Court “to all cases arising under laws passed by the legislature of the United States.” The Committee of Style and Arrangement revised this language to read: “to all cases . . . arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority.”

The purpose of this extension of judicial power was to ensure uniformity of the national law by providing a Supreme Court which would have power to interpret and enforce the law. There seems to have been very little disagreement, if any, about this power. Discussion in the ratification debates on this category was minimal. Edmund Pendleton in the Virginia ratification debates asked rhetorically:

Must not the judicial powers extend to enforce the federal laws, govern its own officers, and confine them to the line of their duty? Must it not protect them, in the proper exercise of duty, against all opposition, whether from individuals or state laws?

John Marshall opined:

273. 1 id. at 144.
274. 1 id. at 148-49.
275. 1 id. at 176.
276. 1 id. at 179-80.
277. 1 id.
278. 1 id. at 229.
279. 1 id. at 303.
280. 3 id. at 548.
Is it not necessary that the federal courts should have cognizance of cases arising under the Constitution, and the laws, of the United States? What is the service or purpose of a judiciary, but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? Edmond Randolph also spoke on the issue:

It has not yet been denied that a federal judiciary is necessary to a certain extent. Every government necessarily involves a judiciary as a constituent part. If, then, a federal judiciary be necessary, what are the characters of its powers? That it shall be auxiliary to the federal government, support and maintain harmony between the United States and foreign powers, and between different states, and prevent a failure of justice in cases to which particular state courts are incompetent. If this judiciary be reviewed as relative to these purposes, I think it will be found that nothing is granted which does not belong to a federal judiciary. Self-defence is its first object. Has not the Constitution said that the states shall not use such and such powers, and given exclusive powers to Congress? If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, I humbly apprehend that the federal government would soon be encroached upon. If a particular state should be at liberty, through its judiciary, to prevent or impede the operation of the general government, the latter must soon be undermined. It is, then, necessary that its jurisdiction should "extend to all cases in law and equity arising under this Constitution and the laws of the United States."

Madison's opinions were similar:

The first class of cases to which its jurisdiction extends are those which may arise under the Constitution. . . . That causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions. . . . With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to. . . . Controversies affecting the interest of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

Discussion in the North Carolina ratification debates was similar. In response to Spencer's comments that state judiciaries were incompetent to handle cases arising under federal law, several delegates responded. Spaight stated:

The gentleman objects to the cognizance of all cases in law and equity arising under the Constitution and the laws of the United States. This objection is very astonishing. When any government is established, it ought to have power to enforce its laws, or else it might as well have no power. What but

281. 3 id. at 554.
282. 3 id. at 570-71.
283. 3 id. at 532.
284. 4 id. at 136-37. Spaight also criticized the establishment of federal courts on grounds of the expense occasioned by creating and maintaining them, as well as for the inconvenience federal courts might occasion for litigants, who might be required to travel long distances to court.
that is the use of a judiciary? The gentleman, from his profession, must know
that no government can exist without a judiciary to enforce its laws, by distin-
guishing the disobedient from the rest of the people, and imposing sanctions
for securing the execution of the laws.\textsuperscript{285}

Governor Johnston responded similarly, and noted the possibility of
concurrent jurisdiction in the federal and state courts over some
matters:

[T]he learned member from Anson [Spencer] says that the federal courts have
exclusive jurisdiction of all cases in law and equity arising under the Constitu-
tion and laws of the United States. The opinion which I have always enter-
tained is, that they will, in these cases, as well as in several others, have
concurrent jurisdiction with the state courts, and not exclusive jurisdiction. I
see nothing in this Constitution which hinders a man from bringing suit where-
ever he thinks he can have justice done him. The jurisdiction of these courts
is established for some purposes with which the state courts have nothing to
do, and the Constitution takes no power from the state courts which they now
have.\textsuperscript{286}

Governor Johnston added: “It is obvious to every one that there ought
to be one Supreme Court for national purposes.”\textsuperscript{287} Later Supreme
Court Justice Iredell added: “As to the clause respecting cases arising
under the Constitution and laws of the Union, which the honorable
member objected to, it must observed, that laws are useless unless
they are executed.”\textsuperscript{288} Davie stated:

With respect to their having jurisdiction of all cases arising under the laws
of the United States, although I have a very high respect for the gentleman, I
heard his objection to it with surprise. I thought, if there were any political
axiom under the sun, it must be, that the judicial power ought to be coexten-
sive with the legislative. The federal government ought to possess the means
of carrying the laws into execution.... If laws are not to be carried into execu-
tion by the interposition of the judiciary, how is it to be done?\textsuperscript{289}

Davie also stated, in discussing the issue of states debts:

The people of the United States have one common interest; they are all mem-
ers of the same community, and ought to have justice administered to them
equally in every part of the continent, in the same manner, with the same
despacht, and on the same principles. It is therefore absolutely necessary that
the judiciary of the Union should have jurisdiction in all cases arising in law
and equity under the Constitution.\textsuperscript{290}

It is inconceivable that this extension of the judicial power, deemed
so necessary and important to the enforcement of law and to the uni-
formity of law, was subject to an unexpressed understanding that any
state (unless sued by the United States), or the United States, could

\textsuperscript{285} 4 id. at 139.
\textsuperscript{286} 4 id. at 141.
\textsuperscript{287} 4 id. at 142.
\textsuperscript{288} 4 id. at 145.
\textsuperscript{289} 4 id. at 158.
\textsuperscript{290} 4 id. at 157-58.
simply decide not to submit itself to the power of the federal court. The experience of the Confederacy, in which states had routinely and almost uniformly ignored the obligations imposed by the central government, taught the Framers that a union could not be created if the states were free to avoid the dictates of the Constitution and federal law.

2. Cases Involving the United States as a Party

None of the proposals submitted by delegates to the Federal Convention included judicial power over cases in which the United States was a party. Neither did the Committee of Detail's August 6 draft. On August 20, the Convention referred to the Committee additional propositions, including Charles Pinckney's: "The jurisdiction of the Supreme Court shall be extended to all controversies between the United States and an individual state, or the United States and the citizens of an individual state." The Framers agreed unanimously to the final version of the clause, "the judicial power shall extend to . . . controversies to which the United States shall be a party."

It is appropriate that national courts rather than state courts would hear cases involving the United States. Hamilton, in The Federalist No. 80, stated simply, "Controversies between the nations and its members or citizens can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum." Even the vocal Antifederalist George Mason criticized the clause but accepted it as extending power over cases involving the United States. First, he questioned the interpretation advocated by George Nicholas, that the clause contemplated only actions in which the United States was a plaintiff, as "incomprehensi-

291. It is possible to read Hamilton's, Madison's, and Marshall's statements concerning the sovereignty of the states as extending only to the judicial power over cases involving a state and a diverse citizen or a state and a foreign citizen. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 145-49 (1996) (Souter, J., dissenting) (explaining that Hamilton's statements in The Federalist No. 81 referred only to immunity with respect to diversity cases); see also Alden v. Maine, 527 U.S. 706, 773 n. 13 (1999) (Souter, J., dissenting). The modern Court, however, has extended state sovereign immunity to cases arising under federal law. See, e.g., Seminole Tribe, 517 U.S. 44; Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991). Under the Supreme Court's interpretation of Article III, the states were also subject to suit by the United States. See supra text accompanying note 116.

292. 1 Elliot's Debates, supra note 38, at 250.

293. 1 id. at 268.


295. It is possible that this was a political strategy on Mason's part, and that absent his goal of defeating ratification by Virginia, he would have read the clause as encompassing an underlying immunity. Given the language of the Constitution, and the context of the entire ratification process, this seems unlikely.
ble."296 Second, he admitted that "the decision of controversies to which the United States shall be a party may at first view seem proper," but argued vaguely that "it may, without restraint, be extended to a dangerously oppressive length."297 Finally, he enumerated the effects of ratification of this clause:

They [the federal courts] are also to have cognizance in controversies to which the United States shall be a party. This power is superadded, that there might be no doubt, and that all cases arising under the government might be brought before the federal court. Gentlemen will not, I presume, deny that all revenue and excise controversies, and all proceedings relative to the duties of the officers of government, from the highest to the lowest, may and must be brought by these means to the federal courts; in the first instance, to the inferior federal court, and afterwards to the superior court.298

The unanimous passage of this category of judicial power, the reading of the clause by various Framers and ratifiers, and the fact that sovereign immunity was not mentioned in any recorded discussion of it, suggests that the Framers intended to subject the United States to suit in the federal courts. This understanding of the historical record reflects English practice involving sovereign immunity at the time, which permitted such actions with various procedural limitations (special forms of pleadings addressed to specific courts).299 The record is consistent with, and indeed suggests, that the primary issue for the Framers and ratifiers of the Constitution was where the United States could be sued rather than whether it could be sued.

3. Cases Involving States and Diverse-State or Foreign Citizens

The Randolph, or Virginia Plan, which formed the Convention's working draft, included jurisdiction in inferior federal courts and the Supreme Court over "cases in which foreigners, or citizens of other states, applying to such jurisdictions, may be interested" and "questions involving the national peace and harmony."300 Pinckney's plan did not include any reference to these types of suits.301 New Jersey's plan, which simply sought to remedy the defects of the Articles of Confederation and to maintain the supremacy of the states, included judi-

296. See 3 ELLIOT'S DEBATES, supra note 38, at 479-80 ("The worthy gentleman has told you that the United States can be plaintiffs, but never defendants. If so, it stands on very unjust grounds. The United States cannot be come at for any thing they may owe, but may get what is due to them. There is therefore no reciprocity. The thing is so incomprehensible that it cannot be explained.").

297. 3 id. at 523.

298. 3 id. at 525-26.

299. See supra section III.B.

300. 1 ELLIOT'S DEBATES, supra note 38, at 144.

301. 1 id. at 148-49.
cial authority over “cases in which foreigners may be interested,” and Hamilton’s plan contained a similar provision.

The Convention voted to change the language of the Randolph Plan to read “cases in which foreigners, or citizens of two distinct states of the Union, applying to such jurisdictions, may be interested.” Although there were further votes on the provisions, there was no recorded debate. The August 6 draft prepared by the Committee of Detail included the following provisions: “The jurisdiction of the Supreme Court shall extend... to controversies... between a state and citizens of another state... and between a state... and foreign states, citizens, or subjects.” There was no recorded discussion of this provision.

The idea that national courts should handle cases involving states and diverse citizens informed the constitutional process from its earliest beginnings. In a letter to Edmund Randolph in April 1787, prior to the beginning of the Convention, James Madison discussed his preliminary ideas for a plan of government: “It seems at least essential that an appeal should lie to some national tribunals in cases which concern foreigners, or inhabitants of other states” in order to preserve the nation’s interests against “the obsequiousness of the tribunals to the policy or prejudices of the states.” Madison was the primary draftsman of the Randolph Plan, which (unlike the other proposals) includes a provision addressed to this issue.

Hamilton’s discussion of state-diverse citizen jurisdiction in the judiciary article in The Federalist No. 80 is extensive. Hamilton describes this category of national judicial power as necessary to the peace of the confederacy and thus a “proper object of federal superintendence and control.” Hamilton gives two specific, related reasons for this extension of power. First, the Constitution guarantees that citizens of each state are entitled to the privileges and immunities of citizens of the other states. It follows from the Privileges and Immunities Clause that the national judiciary must hear cases involving state-diverse citizen cases:

It may be esteemed the basis of the Union that, “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several

302. 1 id. at 176.
303. 1 id. at 179.
304. 1 id. at 173.
305. Supra text accompanying notes 117-38.
306. 1 Elliot’s Debates, supra note 38, at 229.
307. 5 id. at 108.
309. Article IV, Section 2, provides: “The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. Const. art. IV, § 2.
States." And if it be a just principle that every government ought to possess the means of executing its own provisions by its own authority, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.310

Second, and related, the state courts could not be trusted to apply the law impartially to diverse citizens:

To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded. . . . The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens.311

This concern over the likelihood of state court adjudication prejudiced against diverse citizens was repeated over and over in the ratification debates. It seems clear that such prejudice existed; states had passed laws which favored their citizens in the payment of debts312 and were generally believed to favor their own citizens.313 James Wilson, who prepared a draft of the Constitution as a member of the Committee of Detail, articulated the following reason for state-diverse citizen jurisdiction during the Pennsylvania ratification debates:

311. Id.
312. Supra notes 161-62 and accompanying text.
313. Davie's comments in the North Carolina ratification debates are instructive on this point. He posed this hypothetical question:

Is it probable, if a citizen of South Carolina owed a sum of money to a citizen of this state, that the latter would be certain of recovering the full value in their courts? That state might in future, as they have already done, make pinebarren acts to discharge their debts. They might say that our citizens should be paid in sterile, inarable lands, at an extravagant price. They might pass the most iniquitous instalment laws, procrastinating the payment of debts due from their citizens, for years—nay, for ages. Is it probable that we should get justice from their own judiciary, who might consider themselves obliged to obey the laws of their own state? Where, then, are we to look for justice? To the judiciary of the United States. Gentlemen must have observed the contracted and narrow-minded regulations of the individual states, and their predominant disposition to advance the interests of their own citizens to the prejudice of others. Will not these evils be continued if there be no restraint?

4 Elliott's Debates, supra note 38, at 157.
When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.\(^\text{314}\)

David Ramsay\(^\text{315}\) explained the judiciary article similarly: “The judicial declares, that where impartial trials from the nature of the case cannot be expected from state tribunals, there the federal judiciary shall interpose.”\(^\text{316}\)

In the North Carolina ratification, William Davie, a delegate to the Constitutional Convention as well as to North Carolina’s convention, echoed these concerns:

It has been equally ceded, by the strongest opposers to this government, that the federal courts should have cognizance of controversies between two or more states, between a state and the citizens of another state, and between the citizens of the same state claiming lands under the grant of different states. Its jurisdiction in these cases is necessary to secure impartiality in decisions, and preserve tranquility among the states. It is impossible that there should be impartiality when a party affected is to be judge.\(^\text{317}\)

James Wilson’s lengthy discussion in the Pennsylvania ratification convention sounded these same themes. With respect to the power over cases involving a state and foreign states, citizens or subjects, Wilson acknowledged that “This part of the jurisdiction, I presume, will occasion more doubt than any other part”\(^\text{318}\) but articulated important reasons for it:

[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have property lie at the mercy of the laws of Rhode Island. I ask, further, How will a creditor feel who has his debts at the mercy of tender laws in other states? It is true that, under the Constitution, these particular iniquities must be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been instalment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

Is it not an important object to extend our manufactures and our commerce? This cannot be done, unless a proper security is provided for the regular discharge of contracts. This security cannot be obtained, unless we give the power of deciding upon those contracts to the general government. . . .

. . . .

It was thought proper to give the citizens of foreign states full opportunity of obtaining justice in the general courts, and this they have by its appellate

\(^{314}\) 2 id. at 491.

\(^{315}\) Ramsay was trained as a physician and served in the South Carolina House of Representatives and as delegate in the South Carolina ratifying convention. 2 Bailyn’s Debates, supra note 40, at 1009.

\(^{316}\) Oration at Charleston, South Carolina entitled “Heaven Smiled on Their Deliberations, and Inspired Their Councils with a Spirit of Conciliation,” in Columbian Herald (South Carolina), June 5, 1788, reprinted in 2 Bailyn’s Debates, supra note 40, at 507.

\(^{317}\) 4 Elliot’s Debates, supra note 38, at 159.

\(^{318}\) 2 id. at 491.
jurisdiction; therefore, in order to restore credit with those foreign states, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice: they ought to have the same security against the state laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other. Further, it is necessary to preserve peace with foreign nations.\textsuperscript{319}

Madison’s statements in the Virginia ratification debates similarly acknowledged the problems of biased state courts:

We well know, sir [speaking to Monroe] that foreigners cannot get justice done them in these [state] courts and this has prevented many wealthy gentlemen from trading or residing among us. There are also many public debtors, who have escaped from justice for want of such a method as is pointed out in the plan on the table.\textsuperscript{320}

Thus, the debate in the ratification process addressed a widespread concern that state judiciaries would not treat diverse citizens fairly. In a time in which individuals thought of their state as their country\textsuperscript{321} this was a real concern. The extension of federal judicial power over cases between states and diverse citizens afforded a solution to this problem. If the state-diverse citizen clause were subject to an unexpressed sovereign immunity, it would provide no solution at all. State legislative and executive actors, who would be charged with providing consent, could not be presumed to be any less biased against diverse citizens than the state judiciary. Thus, a presupposition of sovereign immunity on the part of the Framers and ratifiers would defeat their articulated purposes, rendering this head of judicial power completely ineffective.

E. The Statements of Hamilton, Madison, and Marshall Reconsidered

1. The Immediate Political Context

When Hamilton, Madison, and Marshall commented on the immunity issue, it was clear that ratification of the Constitution was uncertain. By order of the Convention, ratification by nine states was necessary for creation of a new government under the Constitution. Although eight states\textsuperscript{322} had ratified when these statements were made, several by unanimous vote\textsuperscript{323} and others by wide margins,\textsuperscript{324}

\begin{itemize}
  \item \textsuperscript{319} id. at 491-93.
  \item \textsuperscript{320} id. at 583.
  \item \textsuperscript{321} See, e.g., supra text accompanying note 167 (quoting Patrick Henry’s praise in the Virginia ratification debates for “this country,” meaning the State of Virginia).
  \item \textsuperscript{322} Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, and South Carolina.
  \item \textsuperscript{323} Delaware, New Jersey, and Georgia ratified by unanimous vote on December 7, 1787, December 18, 1787, and January 2, 1788, respectively. See 1 Elliot’s Debates, supra note 38, at 319, 320-21, 323-24.
\end{itemize}
Massachusetts had ratified only by a very narrow margin,\(^{325}\) and difficult battles were anticipated in New Hampshire, Virginia (Marshall's and Madison's home state), and New York (Hamilton's home state).\(^{326}\) *The Federalist No. 81* appeared on May 28, 1788, shortly after the eighth state (South Carolina) ratified. Madison and Marshall spoke at the Virginia ratification convention on June 20, 1788.\(^{327}\) New Hampshire ratified the following day, on June 21, 1788, making the Constitution official. Virginia became the tenth state to ratify, on June 25, 1788, and New York, the eleventh, on July 26, 1788. Taken in this immediate context, it is clear that Marshall, Madison and Hamilton had an enormous incentive to advance a "safe" interpretation on the controversial issue of state susceptibility to suit in the federal courts.

2. Alexander Hamilton

Alexander Hamilton's statements in *The Federalist No. 81* have been routinely cited in modern decisions and commentary as primary support for the proposition that the Constitution embodied common law sovereign immunities. As this Article has already suggested, when taken against the backdrop of the historical evidence, Hamilton's statements constitute an elevation of political expediency over philosophical integrity. Hamilton relied on the principle of sovereign immunity to calm Antifederalist fears about the solvency of the states and to secure New York's ratification of the Constitution over strong opposition. In *The Federalist No. 81*, Hamilton addressed the issue of the States' debts and concerns that the States would be subject to suit:

> Though it may rather be a digression from the immediate subject of this paper, I shall take occasion to mention here a supposition which has excited some alarm upon very mistaken grounds. It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.

> 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 States and the danger intimated must be merely ideal. . . .

\(^{324}\) Pennsylvania ratified by a vote of 46 to 23 on December 12, 1787, 1 *id.* at 319-20, Connecticut by 128 to 40 on January 9, 1788, 1 *id.* at 322, Maryland by 63 to 11 on April 28, 1788, 1 *id.* at 324-25, South Carolina by 149 to 73 on May 23, 1788. 4 *id.* at 340.

\(^{325}\) The vote in Massachusetts was 187 to 168. 2 *id.* at 178-81. Massachusetts was the sixth state to ratify, on February 6, 1788. 1 *id.* at 323.

\(^{326}\) North Carolina did not ratify until November 21, 1789, after Congress proposed the Bill of Rights. 1 *id.* at 333. Rhode Island, the last of the original states to ratify, voted for ratification by a vote of 34-32 on May 29, 1790. 1 *id.* at 334-37.

\(^{327}\) 3 *id.* at 531, 533, 555-56.
There is 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 in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.

Others have read Hamilton simply as addressing state-citizen diversity cases rather than cases arising under federal law. This is a credible position. However, this Article concludes that these statements, so critical to the Supreme Court's present position on sovereign immunity, should be discounted generally, with respect to state-citizen diversity cases as well as cases arising under federal law.

First, the political context and Hamilton's correspondence demonstrates his conviction that ratification was both absolutely necessary and highly unlikely. In these circumstances, Hamilton had an enormous incentive to manipulate public opinion in favor of ratification, and one should exercise caution in taking Hamilton's statements at face value. Hamilton believed that ratification of the Constitution produced by the Convention was essential to the security of the states. His private correspondence with Madison demonstrates Hamilton's view that ratification by Virginia and New York was crucial and that the consequences of a failure to ratify would be disastrous. Hamilton wrote in May: "We think here that the situation of your state is critical," and later,

For my own part the more I can penetrate the views of the Antifederal party in this state, the more I dread the consequences of non adoption of the Constitution by any of the other states, the more I fear an eventual disunion and civil war. God grant that Virginia may accede.

332. Letter from Alexander Hamilton to James Madison (June 8, 1788) in Alexander Hamilton, A Biography in His Own Words, supra note 331, at 193. Hamilton also offered to pay the costs of delivering, by the quickest possible means, information from the conventions in New Hampshire and Virginia. See Letter from Alexander Hamilton to James Madison, supra, at 189 ("and the moment any decisive question is taken, if favorable, I request you to dispatch an express to me with pointed orders to make all possible diligence, by changing horses &c. All
In Hamilton's estimation, the stakes were high: the alternatives to ratification were "anarchy and convulsion" and "disunion and civil war." The political climate in New York rendered ratification unlikely. New York had been represented at the Constitutional Convention by Hamilton and two Antifederalists, ensuring that New York's votes would be Antifederalist; the popular vote for the New York convention had yielded forty-six Antifederalist delegates and only nineteen Federalist delegates, all from New York City and surrounding counties; and the popular governor George Clinton, who presided over New York's ratification convention, opposed ratification. Hamilton's conviction that ratification was necessary, in light of the apparently overwhelming opposition to it, certainly gave him an incentive to manipulate opinion on a matter of great concern to the Antifederalists. As it turned out, New York's successful ratification was due in large part to the ratifications by New Hampshire on June 21 and Virginia on June 25. Virginia's ratification was particularly significant, since it was the largest of the states, and the home of George Washington, the most likely leader of the new union. Circulation of a rumor that New York City and some of the surrounding counties in the southern part of the state, a Federalist stronghold, would secede from the state if it failed to ratify, probably also contributed to New York's ratification.

Second, the timing of The Federalist No. 81 supports the suggestion that it was motivated by extreme political circumstances and

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333. MADISON, supra note 72, at 656 ("Mr. Hamilton expressed his anxiety that every member should sign. A few characters of consequence, by opposing or even refusing to sign the Constitution, might do infinite mischief by kindling the latent sparks which lurk under an enthusiasm in favor of the Convention which may soon subside. No man's ideas were more remote from the plan than his were known to be; but is it possible to deliberate between anarchy and Convulsion on one side, and the chance of good to be expected from the plan on the other.").

334. Letter from Alexander Hamilton to James Madison, supra note 332.

335. Those Antifederalists were Robert Yates and John Lansing, who left the Convention on July 10, 1787, because the Convention intended to exceed their instructions and to do more than simply amend the Articles of Confederation, and both of whom also served as delegates to the New York convention where they opposed ratification.

336. 2 BAILYN'S DEBATES, supra note 40, at 1025-85. Forrest McDonald estimates that the popular vote was about 16,000 to 7,000 against ratification. See FORREST MC DONALD, ALEXANDER HAMILTON 114 (1979).

337. See generally 2 ELLIOT'S DEBATES, supra note 38, at 261-62, 268, 326, 359-60.

should be read in that light. This important edition of *The Federalist* was written on May 28, 1788, just days before the New York convention assembled in Poughkeepsie. The quoted passages were clearly a digression, specifically intended to answer Antifederalist concerns which had been previously raised by others.339 *The Federalist* is a political document, written with the specific aim of securing New York’s ratification of the Constitution, and Hamilton was perhaps not above manipulation of popular opinion to achieve so important an objective.340

Third, Hamilton’s phrasing in the passage is conditional rather than direct: the states enjoy sovereign immunity “[u]nless . . . there is a surrender of this immunity in the plan of the convention.”341 “The plan of the convention” simply refers to the Constitution,342 Hamilton attended much of the Convention343 and the finished document was before him. He was as able as anyone to determine whether there was or was not a surrender of immunity in the plan of the Convention. Why the qualification? Hamilton may have qualified the statement precisely because he believed, in conformance with the majority’s reading,344 that the Constitution entailed a surrender of immunity in Article III cases. Hamilton’s equivocation may thus have permitted him to meet Antifederalist objections, without actually misstating the meaning of the Constitution.

Fourth, and related, Hamilton avoided specific discussion of the issue by simply referring to an earlier issue of *The Federalist*: “The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation and need not be repeated here.”345 Hamilton’s reference to *The Federalist* No. 32 permits him to sidestep a specific discussion of sovereign immunity, avoiding the necessity of explaining how its supposed retention squared with the language of the Constitution and the structure

339. See supra subsection III.C.3.b.
340. See, e.g., M.E. Bradford, *Original Intentions* 75 (1993) (“Hamilton was sometimes honest about the model of government under consideration.”).
342. See supra note 196.
344. See supra subsection III.C.3.b.
SOVEREIGN IMMUNITY

of the new government. According to The Federalist No. 32, alienation of state sovereignty would only exist in three cases:

Where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant.\footnote{346}{The Federalist No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961).}

Application of the principles discussed in The Federalist No. 32 to sovereign immunity is difficult. The fit is not precise: Hamilton is discussing the powers delegated to the national government in Article I, and not its privileges. However, Article III, Section 2 extends the judicial power of the United States to cases between states and between a state and a citizen of another state, and specifies that the Supreme Court has original jurisdiction over cases "in which a State shall be Party." This is an alienation of the privilege of sovereign immunity within Hamilton’s third category. It is clearly part of the judicial power of the United States to entertain these suits, and state sovereign immunity is “contradictory and repugnant” to this power.

Fifth, although Hamilton is correct in saying that there is nothing in the Constitution which would prevent the States from “paying their own debts in their own way,”\footnote{347}{The Federalist No. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 1961).} this too seems to involve rhetorical maneuvering. The states could pay their debts in their own way; nothing in the Constitution specified how such debts must be discharged. However, under Article I, Section 10, the states could not pass any “law impairing the obligation of contracts”; and under Article III, Section 2, the states could not refuse to pay their debts to noncitizens without facing a potential lawsuit in federal court. Again, Hamilton provides reassurance without addressing the real question.

Sixth, the paucity of Hamilton’s substantive rationale for the retention of common law sovereign immunity is evident. He simply recites Blackstone’s flawed account of the sovereignty of the King, without acknowledging the King’s susceptibility to suit without consent evidenced in Blackstone and in English case law of the time,\footnote{348}{See supra Section III.B.} and without advancing reasons for its adoption in a republican form of government. His pragmatic concerns are also problematic. The enforceability of any constitutional mandate can be questioned: How could the Article I delegation to the federal government of the power to coin money, or the requirements of Article II for the selection of representatives, be enforced against a truly recalcitrant state except through war? The greatest and the least of the constitutional agree-
ments are susceptible to the objection Hamilton raised concerning juris-  
diction over the states.

Finally, sovereign immunity is inconsistent with Hamilton's interpre-
tation of the Constitution advanced in other writings and in other  
parts of The Federalist. Hamilton's own plan of government, intro-
duced to the Constitutional Convention on June 18, 1787, during a  
single speech which lasted five or six hours, almost completely elimi-
nated state authority. The national legislature had "power to pass all  
laws whatsoever" subject to the veto of the highest executive, with-  
out any limitation reserving specified or residual legislative powers of  
the states. The plan further provided:

All laws of the particular states, contrary to the Constitution or laws of the  
United States to be utterly void. And the better to prevent such laws being  
passed, the governor or president of each state shall have a negative upon the  
laws about to be passed in the state of which he is governor or president.350

Hamilton's plan also created a Supreme Court, with appellate juris-  
diction [from state courts] "in all causes in which the revenues of the  
general government, or the citizens of foreign nations, are con-  
cerned."351 The plan permitted establishment of state courts by the  
national government "for the determination of all matters of general  
concern."352 In explaining the Constitution in The Federalist, Hamil-  
ton is clear that it is necessary for the federal judiciary to have power  
over the states:

It seems scarcely to admit of controversy that the judiciary authority of the  
union ought to extend to these several descriptions of causes. 1st. To all those  
which arise out of the laws of the United States, passed in pursuance of their  
just and constitutional powers of legislation. . . . The first point depends upon  
this obvious consideration that there ought always to be a constitutional  
method of giving efficacy to constitutional provisions. What for instance  
would avail restrictions on the authority of the state legislatures, without  
some constitutional mode of enforcing the observation of them? The states, by  
the plan of the convention are prohibited from doing a variety of things; some  
of which are incompatible with the interests of the union, and others with the  
principles of good government. The imposition of duties on imported articles,  
and the emission of paper money, are specimens of each kind. No man of  
sense will believe that such prohibitions would be scrupulously regarded,  
without some effectual power in the government to restrain or correct the in-  
fractions of them. This power must either be a direct negative on the state  
laws,353 or an authority in the federal courts, to over-rule such as might be in  
manifest contravention of the articles of the union. There is no third course

349. 1 Elliot's Debates, supra note 38, at 179.
350. 1 id. at 180.
351. 1 id. at 179.
352. 1 id. at 179-80.
353. This was apparently Hamilton's preference. His plan for the government, sub-  
mited June 18, 1787, provided:

10. All laws of the particular states, contrary to the Constitution or laws of  
the United States, to be utterly void. And the better to prevent such  
laws being passed, the governor or president of each state shall be ap-
that I can imagine. The latter appears to have been thought by the convention preferable to the former, and I presume will be most agreeable to the states.\textsuperscript{354}

The idea that the states must be subject to the control of the national government, through the authority of the federal courts, cannot be squared with the idea that the states have sovereign immunity.

Others have explained Hamilton's various statements by recognizing the limited nature of his remarks in \textit{The Federalist No. 81}: he speaks not of a full sovereign immunity, but only about the possibility of individual suits against states for the payment of debts.\textsuperscript{355} Thus, these disparate statements, published on the same day, can be reconciled: Hamilton's remarks about sovereign immunity apply only to creditor suits against the states, and not to cases involving issues of national uniformity. Under this reading, \textit{The Federalist No. 81} makes only the limited point that the states would lose their sovereign immunity where it was necessary to ensure the primacy of the Union, which presumably would not include actions to enforce contracts against the state.

However, some of the arguments advanced by this Article above and other of Hamilton's statements suggest that the constitutional waiver of states' immunity has a broader reach. For example, Hamilton stated in \textit{The Federalist No. 80} that "[c]ontroversies between the nation and its members or citizens can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum."\textsuperscript{356} This statement presupposes that the United States, and by implication, the states, can be parties to lawsuits, and not only as plaintiffs, without limitation as to type of action.

Thus, Hamilton's often-quoted comments on sovereign immunity in \textit{The Federalist No. 81} reflect neither the views of other Framers and ratifiers nor his own, and should be discounted as an attempt to secure ratification of the Constitution in the face of Antifederalist con-

\begin{itemize}
\item 1 id. at 180. It was Madison's preference as well. See infra text accompanying note 366.
\item 355. For example, Justice Stevens has stated: "Hamilton offered his view that the federal judicial power would not extend to suits against unconsenting States only in the context of his contention that no contract with a State could be enforceable against the State's desire. He did not argue that a State's immunity from suit in federal court would be absolute." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 92 (1996) (Stevens, J. dissenting); Justice Souter has argued that Hamilton limited his argument to diversity jurisdiction, and that his statements do not apply to federal question jurisdiction. Id. at 145-49 (Souter, J., dissenting). See also Gibbons, \textit{supra} note 4.
\end{itemize}
cerns about the future of the states under a new system. Given the importance of the issues, Hamilton equivocated on the issue of immunity, and according to contemporaneous and later observers, Hamilton's view affords the words of the Constitution an interpretation which they cannot reasonably bear. In his own time, Hamilton was accused of deviating from his own philosophy for political purposes. During the New York debates, John Lansing, a member of the New York delegation at the Philadelphia convention, noted Hamilton's admission that state governments should be preserved under the new government, and his earlier arguments in Philadelphia, which Lansing characterized as inconsistent:

It has been admitted by an honorable gentleman from New York, (Mr. Hamilton,) that the state governments are necessary to secure the liberties of the people. . . . [t]hat honorable gentleman was then fully convinced that [hostility between the general and state governments] would exist, and argued, with much decision and great plausibility, that the state governments ought to be subverted, at least so far as to leave them only corporate rights, and that, even in that situation, they would endanger the existence of the general government. But the honorable gentleman's reflections have probably induced him to corrupt that sentiment.

Bracketed material appears in the notes of the New York debates at this point:

[Mr. Hamilton here interrupted Mr. Lansing, and contradicted, in the most positive terms, the charge of inconsistency included in the preceding observations. This produced a warm personal altercation between those gentlemen, which engrossed the remainder of the day.]

The notes for the next day, Monday, June 30, begin: “The personal dispute between Mr. Hamilton and Mr. Lansing was again brought forward, and occupied the attention of the committee for a considerable part of this day.”

In our time, Hamilton has been similarly accused of sacrificing principle for political gain. Clinton Rossiter, who defends Hamilton against the “popular” charge that The Federalist consists of a lawyer's

357. See supra text accompanying notes 179, 208-21.
358. 2 ELLIOT'S DEBATES, supra note 38, at 376.
359. 2 id.
360. 2 id. According to reports in the Daily Advertiser, Judge Robert Yates's minutes of the Convention were consulted, with the conclusion that Hamilton did not intend that the states would have only such powers as were held by municipal corporations, but only that they would be “deprive[d] of the means of impeding the operation of the Union.” DAILY ADVERTISER, June 30, 1788, reprinted in ALEXANDER HAMILTON, A BIOGRAPHY IN HIS OWN WORDS, supra note 331, at 201. At least one piece of Hamilton's correspondence suggests that Lansing's assessment was correct. In a letter to Robert Morris he states: “It has ever been my opinion that Congress ought to have complete sovereignty in all but the mere municipal law of each state; and I wish to see a convention of all the States, with full power to alter and amend finally and irrevocably the present futile and senseless confederation.” (April 30, 1871) in 2 THE PAPERS OF ALEXANDER HAMILTON 630 (Harold C. Cyrett ed., 1981).
efforts to win a weak case with arguments known to be false,\textsuperscript{361} nonetheless acknowledged that Hamilton was not above an occasional lapse: "[I]n all the struggles of the age over the distribution of power and prestige between nation and states, Hamilton fought tirelessly, cleverly, and if necessary even unscrupulously for the cause of Union."\textsuperscript{362}

The linchpin of the current view of states' immunity is a questionable interpretation of Constitutional language, advanced by a man whose defenders as well as his critics acknowledge that some of his statements were pragmatic polemics. A review of the language and structure of \textit{The Federalist No. 81}, against the backdrop of an historical record contrary to Hamilton's expressed view, supports a conclusion that \textit{The Federalist No. 81} was written by a man who was dissembling for the greater good.

3. \textit{James Madison}

The Supreme Court's view of sovereign immunity also rests on the statements of James Madison in the Virginia ratification debates. Speaking about the judicial power extended to the federal courts, Madison said:

\begin{quote}
Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. It is a case which cannot often happen, and if it should be found improper, it will be altered. But it may be attended with good effects. This may be illustrated by other cases. It is provided, that citizens of different states may be carried to the federal courts.

But this will not go beyond the cases where they may be parties. A \textit{femme covert} may be a citizen of another state, but it cannot be a party in this court. A subject of a foreign power, having a dispute with a citizen of this state, may carry it to the federal court; but an alien enemy cannot bring suit at all. 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.\textsuperscript{363}
\end{quote}

It is clear from the debate in Virginia that those present did not accept Madison's explanation; Patrick Henry, in particular, believed that Madison was dissembling.\textsuperscript{364}

Madison's private correspondence supports this view of his statements regarding the immunity of the states. His letters make clear that he considered federal control over the states to be essential, and

\begin{itemize}
\item \textsuperscript{361} Rossiter, \textit{supra} note 338, at 59.
\item \textsuperscript{362} Id. at 19.
\item \textsuperscript{363} 3 Elliot's Debates, \textit{supra} note 38, at 533.
\item \textsuperscript{364} See \textit{supra} subsection III.C.3.a.
\end{itemize}
that the judicial power was the method by which that goal would be accomplished. The need for control is clear in a letter to George Washington, dated April 16, 1787. In discussing the division of authority between federal and state governments, Madison states:

[A] negative in all cases whatsoever on the legislative acts of the States, as heretofore exercised by the Kingly prerogative, appears to me to be absolutely necessary, and to be the least possible encroachment on the State jurisdictions. Without this defensive power, every positive power that can be given on paper will be evaded & defeated. The States will continue to invade the National jurisdiction, to violate treaties and the law of nations & to harass each other with rival and spiteful measures dictated by mistaken views of its interest.

Madison’s letter to Thomas Jefferson, New York, October 24, 1787, explains how this division of power was hammered out in the Convention:

The Second object, the due partition of power, between the General & local Governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; some for indefinite power of Legislation in the Congress, with a negative on the laws of the States: some for such a power without a negative: some for a limited power of legislation, without such a negative: the majority finally for a limited power without the negative. The question with regard to the Negative underwent repeated discussions, and was finally rejected by a bare majority. As I formerly intimated to you my opinion in favor of this ingredient, I will take this occasion of explaining myself on the subject. Such a check on the States appears to me necessary 1. to prevent encroachments on the General authority. 2. to prevent instability and injustice in the legislation of the States. 1 . . . It may be said that the Judicial authority under our new system will keep the States within their proper limits, and supply the place of a negative on their laws. The answer is, that it is more convenient to prevent the passage of a law, than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals, who may be unable to support an appeal against the Supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them, and that a recurrence to force, which in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible. 2. A constitutional negative on the laws of the States seems equally necessary to secure individuals against encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

It is impossible to read this passage, written after the Constitution was presented to the states for ratification, as consistent with sover-


eign immunity. In contrasting federal legislative and judicial power to override state law, Madison specifically contemplates actions by individuals against states: the legislative veto would be better protection, “particularly . . . where the law aggrieves individuals, who may be unable to support an appeal agst. a State to the supreme Judiciary.” Madison was clear on the need for a national oversight, through private suits, on state laws. The original draft, presented by Edmund Randolph for the Virginia delegation and drafted primarily by Madison, included the following provision:

Resolved, . . . that the national legislature ought to be empowered . . . to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the Union.

Early in the Convention, on June 8, Charles Pinckney, seconded by Madison, moved to strike this provision and substitute a much broader power, “to negative all laws which to them shall appear improper.” This proposal was defeated, with only Massachusetts, Pennsylvania, and Madison’s Virginia voting in the affirmative. Madison’s notes of the Convention state his position:

He [Madison] could not but regard an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system. Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other; to oppress the weaker party within their respective jurisdictions. A negative was the mildest expedient that could be devised for preventing these mischiefs. The existence of such a check would prevent attempts to commit them . . . [I]n order to give the negative this efficacy, it must extend to all cases. A discrimination would only be a fresh source of contention between the two authorities . . . This prerogative of the General Government is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits and destroy the order & harmony of the political System.

When the Convention considered the resolutions offered by Randolph as amended by the whole house, it reviewed the proposed legislative veto again, in its original, narrower version. Madison repeated his arguments in favor of a veto power, adding that the states could “pass laws which will accomplish their injurious objects before they can be repealed by the General Legislature or be set aside by the National Tribunals.” Governor Morris and Roger Sherman argued strongly against a national legislative veto power to veto state laws as unnecessary and offensive, noting that state laws contrary to the national law would be set aside by the judiciary or repealed by a national

367. 1 id. at 198.
368. 1 ELLIOT’S DEBATES, supra note 38, at 144.
369. 1 id. at 166.
370. 1 id.
371. MADISON, supra note 72, at 88-89.
372. Id. at 304.
law.373 The proposal was defeated, with only three states, Massachusetts, Virginia, and North Carolina in favor.374 Luther Martin proposed, as an alternative, an early version of the Supremacy Clause, which passed unanimously.375 In the absence of a congressional power to negative the states' passage of legislation, the Convention recognized that power resided in the national judiciary to override state law. This extension of national judicial power to suits against the states was, in Madison's view, a poor alternative to the legislative veto. However, given his repeated expression of concern, Madison considered it absolutely essential to accomplish the vertical separation of powers necessary to the system.

Given this context, it is not plausible to explain Madison's comments in the Virginia ratification debates as an attempt to explain the provision from the perspective of those who carried the day. Those who prevailed and defeated the national legislative veto of state laws viewed the states as subject to the power of the national judiciary. And in the statements to Jefferson, Madison clearly contemplates the possibility of an action against the states under the system as it was passed by the majority. Madison's comments to the contrary in the Virginia ratification debates must be viewed, like Hamilton's The Federalist No. 81 digression, as a political attempt to secure ratification in Virginia.

That Madison, like Hamilton, felt political pressures, is clear. He understood the difficult political situation in New York, and in his own state of Virginia, and understood that the national government he envisioned could not be realized absent ratification in those states. Madison believed also that this was the only opportunity for national unity; his writings make it clear that he believed a second Constitutional Convention would prove disastrous. Writing to Edmund Randolph in January 1788, Madison said:

\[I\]f a Government be ever adopted in America, it must result from a fortunate coincidence of leading opinions, and a general confidence of the people in those who recommend it. The very attempt at a second Convention strikes at the confidence in the first; and the existence of a second by opposing influence to influence, would in a manner destroy an effectual confidence in either, and give a loose to human opinions;--which must be as various and irreconcilable concerning theories of Government, as doctrines of Religion; and give opportunities to designing men, which it might be impossible to counteract.376

Madison's later correspondence on the nullification controversy reiterates his view of the vertical division of power between states and the United States as depending on the judiciary.

373. Id. at 305-06.
374. 1 ELLIOT'S DEBATES, supra note 38, at 207.
375. 1 id.; see also MADISON, supra note 72, at 305-06.
376. Letter of James Madison to Edmund Randolph (Jan. 10, 1788), in 1 BAILYN'S DEBATES, supra note 40, at 746.
In forming this compound scheme of Government, it was impossible to lose sight of the question, What was to be done in the event of controversies, which could not fail to occur, concerning the partition line between the powers belonging to the Federal and to the State governments? That some provision ought to be made, was as obvious and as essential as the task itself was difficult and delicate. . . . The provision immediately and ordinarily relied on is manifestly the Supreme Court of the United States, clothed as it is with a jurisdiction "in controversies to which the United States shall be a party."377

In other correspondence relating to nullification, Madison identified the Supremacy Clause and the extensions of the national judicial power to cases involving federal law as creating an essential check on the power of the states. In speaking of the government of United States and the state governments, Madison noted that:

[It could not escape attention, that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable and authoritative termination of occurring controversies, would not be more than the shadow of a government; the object and end of a real government being the substitution of law and order, for uncertainty, confusion, and violence.]

To permit negotiation, as between independent sovereigns, in cases of dispute, would have lost sight altogether of a Constitution and Government for the Union, and opened a direct road from a failure of that resort, to the ultima ration between nations wholly independent of and alien to each other.

The Constitution, not relying on any of the preceding modifications, for its safe and successful operation, has expressly declared, on the one hand, 1, "that the Constitution, and the laws made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land; 2, that the Judges of every state shall be bound thereby, anything in the constitution and laws of an state to the contrary notwithstanding; 3, that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made under their authority, &c."378

This passage was written well after the Eleventh Amendment.379 Although perhaps Madison had in mind only the possibility of the United States government suing a state government, it is reasonable to read this passage as supporting the proposition that the structure of the government required susceptibility of state governments to suits in Article III cases generally.

Thus, Madison's statements and positions, apart from that single position taken in the Virginia ratification debate, indicate an understanding that governments could be sued. It is an extraordinary irony that Madison and Hamilton, ardent supporters of a strong centralized

379. The Eleventh Amendment was proposed to the states in March 1794 and ratification was completed in February 1795.
government, provide the cornerstones of a modern system so at odds with their fundamental conception.

4. John Marshall

John Marshall was not present at the Constitutional Convention, but served as a delegate to the Virginia ratifying convention. Following Madison's remarks on state sovereign immunity during the ratification debate in Virginia, Marshall seconded Madison's interpretation:

With respect to disputes between a state and the citizens of another state, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called at the bar of the federal court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be a defendant— if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. It is necessary to be so, and cannot be avoided. I see a difficulty in making a state a defendant, which does not prevent its being a plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?

Marshall's participation in the ratification process was lesser than Madison's and Hamilton's, and these comments are his only recorded statements relevant to the issue. However, his later writings on the Supreme Court suggest a very different perspective. Marshall's service as Chief Justice from 1801 to 1835, and his opinions, notably in Marbury v. Madison, McCulloch v. Maryland, and Cohens v. Virginia, affirmed the supremacy of the Constitution and the power of the Supreme Court to review the constitutionality of state legislation and decisional law. His 1810 opinion in Fletcher v. Peck advances a constitutional reading specifically at odds with his view as expressed in the Virginia ratification debates:

The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the state had passed a law absolving itself from the contract? . . . And yet, if a state is neither re-

380. 3 Elliot's Debates, supra note 38, at 555-56. By 1821, in his decision in Cohens v. Virginia, 19 U.S. 264, Marshall described sovereign immunity as a device utilized to protect states from their creditors, having nothing to do with the dignity of states or the respect that should be accorded them. Id. at 291-92.

381. 5 U.S. (1 Cranch) 137 (1803).
strained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.  

Marshall's opinions in *Cohens v. Virginia* also indicate that ratification constituted consent to suit. These decisions suggest, as with other statements made by Hamilton and Madison, that the view Marshall expressed in the Virginia ratification debates was part of a political strategy to secure ratification.

5. Conclusion

Thus, the great weight of evidence from the years 1787 and 1788 demonstrates that the founding generation read Article III as an agreement by the states individually and collectively as the United States to submit to the jurisdiction of the national courts in Article III cases, including cases brought by individuals. This Article disagrees with the concession of the current Court's dissenters, that "Madison, Hamilton, and Marshall all agreed that Article III did not of its own force abrogate the States' pre-existing common-law immunity." The statements by Hamilton, Madison, and Marshall comprise the sum of the evidence for the contrary view, and these are simply insufficient to support the conclusion that Article III was intended to be subject to common law sovereign immunities.

F. Early Case Law Holding that Ratification Constituted Consent

Early judicial interpretations of the language in Article III indicate that the jurisdictional grants in Article III themselves constitute the consent of the sovereign (the individual states and the United States) to suit. In the case of the states, their ratification of the Constitution, with its extension of judicial power to actions involving the states in Article III, constituted this consent: "The judicial Power shall extend . . . to Controversies between two or more States;--between a State and Citizens of another State." Early case law recognized ratification as consent (with the exception, after the adoption of the Eleventh Amendment, of suits against a State by a citizen of another State or citizens or subjects of a foreign state). In the case of the national government, the states limited the sovereign power of the new national government by subjecting it to suit. The grant of jurisdiction over the United States limits the power delegated by the states to the federal government.

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385. See infra text accompanying notes 414-18.
government: "The judicial Power shall extend . . . to Controversies to which the United States shall be a Party."388

Early decisions of the Supreme Court held that the states, through their ratification of the Constitution, did in fact consent to submit to the jurisdiction of the federal courts. In Chisolm v. Georgia, Justice Blair, who was part of the Virginia delegation at the Constitutional Convention and who also represented his state in the ratification debates, found that the Constitution expressly extended the national judicial power to controversies such as the one before the court, rejected as contrary to constitutional language the construction that the jurisdictional grant extended only to cases brought by a state, and held explicitly that ratification constituted consent: "[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."389 Justice Blair confined his analysis to the words of the Constitution, and did not rely on external evidence of any sort. His interpretation of these words, given his participation as a Framer and a ratifier, and his status as a member of the Court, is entitled to significant weight.

Justice Wilson similarly ruled in his opinion in Chisolm that the State of Georgia could be sued by an individual, in a ringing rejection of Georgia's argument that a government could not be held accountable for its wrongs. Wilson was a delegate to the Constitutional Convention and to the Pennsylvania ratifying convention. Most importantly, however, as a member of the Committee of Detail, Wilson, along with Edmund Randolph, drafted the Constitution presented to the Convention on August 6 which included much of the present language of Article III.390 Thus, Wilson's opinion in Chisolm is entitled to particular deference. He was not simply a Framer and ratifier of the Constitution, but one of its primary draftsmen. Wilson's opinion describes the people as sovereign, bound by law because they choose to be; the aggregate body of the people, the State, is similarly bound by law. The dignity of the states does not alter this conclusion: "If the dignity of each singly is undiminished; the dignity of all jointly must be unimpaired."391 Any other notion of sovereignty was misplaced in the new United States:

[S]overeignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced, never extended to the American States.392

388. Id.
390. Supra note 123 and accompanying text.
391. Chisholm, 2 U.S. (2 Dall.) at 456 (Wilson, J.).
392. Id. at 457.
According to Wilson, "laws derived from the pure source of equality and justice must be founded on the CONSENT of those, whose obedience they require." Thus, the people had the power to bind the states and to vest the national government with legislative power over the states, and they had in fact done so.

If the legislative power extended to the states, the judicial necessarily followed: "it would be superfluous to make laws, unless those laws, when made, were to be enforced." This conclusion was consistent with and even necessitated by the purposes of the Constitution to form a more perfect union, to establish justice, and to ensure domestic tranquility.

Is it congruous, that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the national Government? Would not such claims, crowned with success, be repugnant to our very existence as a nation?

Finally, Wilson agreed with Blair that the language of the Constitution removed any doubts about his conclusions with Article III: "[T]he judicial power of the United States shall extend to controversies, between a state and citizens of another State."

Justice Cushing's analysis of the language of the Constitution in Article III, Section 2, and his assessment of the reasons for the various extensions of judicial power, led him to the same conclusion. He found that the language of the Constitution clearly permitted diverse citizen suits against the States. The reasons for this extension of judicial power supported the conclusion: the central government was entrusted with preserving the peace, and the ability to adjudicate controversies between states, between states and diverse citizens, and between states and foreign states, citizens, or subjects, was essential to avoiding armed conflict.

Chief Justice Jay was in accord. He framed the question as, "[W]hether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State," and concluded that Georgia did in fact consent to suit through the express language of the Constitution, as well as its spirit:

393. Id. at 458.
394. Wilson supported his position by examining the structure of the government created by the Constitution. He concluded that the Constitution specifically contemplated congressional control over the states, id. at 464, relying on the incontrovertible evidence of this intent in Article I, Section 10, which provides that all state laws with respect to duties and imposts "shall be subject to the Revision and Control of the Congress." U.S. CONST. art. 1, §10.
396. Id. at 465.
397. Id. at 466.
398. Id. at 467-68 (Cushing, J.).
399. Id. at 473 (Jay, C.J.).
I am convinced that the sense in which I understand and have explained the words "controversies between States and citizens of another State," is the true sense. The extension of the judiciary power of the United States to such controversies, appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice without respect of persons, and by securing individual citizens as well as States, in their respective rights, performs the promise which every free Government makes to every free citizen, of equal justice and protection. It is useful, because it is honest, because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighbouring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national Government, which places all our citizens on an equal footing, and enables each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action, and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined.\(^4\)

Again, Jay's participation in the process of ratification entitles his opinion to special deference. Although Jay did not attend the Constitutional Convention, he was active in the ratification effort in New York, writing five of The Federalist papers, and helping to guarantee New York's ratification by assisting New York Antifederalists in their proposal to call a convention to amend the Constitution.

Notably, counsel for the plaintiff Chisolm in the case was Edmund Randolph. His position as the proponent of the first working draft of the Constitution ("the Randolph Plan"),\(^4\) a member of the Committee of Detail, and a draftsman of the Constitution submitted to the Convention following its summer deliberations,\(^4\) entitles his opinion to significant weight. He argued in Chisolm, consistent with his arguments in the Virginia ratification convention,\(^4\) that the Constitution permitted actions against the states by its language and by its spirit.\(^4\)

The only Justice who dissented from the conclusion that the states were subject to suit in federal court under Article III was Justice Iredell.\(^4\) He agreed with the majority of the court that the people were sovereign, and that in ratifying the Constitution, the people limited the sovereignty of the states. If the federal courts had jurisdiction

\(^{400}\) \(\text{id. at 479}\).

\(^{401}\) See supra text accompanying notes 67-69.

\(^{402}\) See supra text accompanying note 123.

\(^{403}\) See supra text accompanying notes 219-21.

\(^{404}\) Chisholm, 2 U.S. (2 Dall.) at 420-21.

\(^{405}\) Justice Iredell had been a delegate to North Carolina's ratifying convention. 4 Elliot's Debates, supra note 38, at 1.
over the state of Georgia under Article III, Section 2, Iredell reasoned, it was still necessary to determine whether substantive law permitted a particular action. The source of such law included the laws of the United States, statutory and decisional, and the common law of England. Justice Iredell stated that no precedent existed which would sanction suit against the state of Georgia contrary to its will. To demonstrate his point, Iredell made extensive reference to The Case of the Bankers, decided in England at the end of the seventeenth century. In that case, the court permitted subjects to sue the King, without his consent, to enforce payment of debts he owed. Lord Chief Justice Holt found that the plaintiffs had proceeded by monstrans de droit, which did not require the King's prior consent, and observed that it was unnecessary to obtain the King's consent even where the plaintiff proceeded by petition of right. Justice Iredell relied entirely on the opinion of Lord Sommers, whose decision was overturned on appeal and whose opinion also supports the position that suit may lie against the King without his consent. Although Iredell acknowledged that The Case of the Bankers supported an action against Georgia, he constricted its holding radically: "admitting the authority of that decision in its fullest extent, yet it is an authority only in respect to such cases, where letters patent from the crown have been granted for the payment of certain sums out of a particular revenue." Iredell has it both ways: no action lies against the state for its debts unless there is English common law precedent for it, but the precedent of Bankers, which in fact permits such an action, does not apply because it deals with debts of the Crown under letters patent rather than the debts of a state. So, a suit is possible only where the common law

406. The Case of the Bankers in the Court of Exchequer, 1700, 2 W. & M., 12 Will. 3, reprinted in 14 HOWELL, supra note 146, at 1-114.
407. Id. at 34. Holt stated: "It is objected, that the petition should be first sued to the King: but by the records in Ryley's Placita Parl. 351, 257 Staundf. 72, it appears, that these petitions of right have been sued to the court of the King's bench." Id.
408. Lord Sommers discussed Stat. 8 Ed., I Ryley 442:

Where notice is taken that the business of parliament is interrupted by a multitude of petitions, which might be redressed by the chancellor and justices. Wherfore it is thereby enacted, that petitions which touch the seal shall come first to the chancellor; those which touch the Exchequer, to the Exchequer; and those which touch the justices, or the law of the land, should come to the justices; and if the business be so great, or si de grace that the chancellor, or others, cannot do them without the King, then the petitions shall be brought before the King to know his pleasure; so that no petitions come before the King and his council, but by the hands of the chancellor, and other chief ministers; that the King and his council, may attend the great affairs of the king's realm, and his foreign dominions.

Id. at 83-84. The clear import of these passages in Sommers's opinion is that the King could be sued, and that such suits could proceed without his personal consent.
409. Chisholm, 2 U.S. (2 Dall.) at 439 (Iredell, J., dissenting).
supplies a precedent, as it does here, but the systems are so different that the precedent is factually inapplicable.

Two of the Justices in *Chisolm* discussed, in dicta, the issue of citizen suits against the United States. Justice Cushing noted the objection that the United States, under his analysis of the Constitution, was similarly subject to suit by citizens. Although he "doubted" that conclusion, he said, "[i]f this be a necessary consequence, it must be so."\textsuperscript{410} Justice Jay also recognized that his analysis led to the conclusion that the United States was subject to suit by a citizen. He noted a distinction which might yield a different conclusion—that the judiciary could seek the assistance of the national government in enforcing its judgments against a state, but that no such assistance would be available to enforce judgments against the national government.\textsuperscript{411} Jay concluded, however, that such actions should lie:

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.\textsuperscript{412}

Subsequent decisions reached the conclusion that the states, and by implication the United States through the collective action of the states, had consented to suit simply by ratifying the Constitution with its Article III extensions of jurisdiction over states and United States.\textsuperscript{413} Among these decisions was *Cohens v. Virginia*,\textsuperscript{414} in which the Court held that Virginia was subject to the federal question jurisdiction of the Supreme Court. Chief Justice Marshall set out the general proposition which "will not be controverted" that states can be sued only if they consent.\textsuperscript{415} But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.\textsuperscript{416}

The states surrendered their sovereignty over war, peace, commerce, and other significant matters to the national government by the Constitution. In Marshall's view, Virginia surrendered its sovereign im-

\begin{itemize}
  \item 410. *Id.* at 469.
  \item 411. *Id.* at 478.
  \item 412. *Id.*
  \item 413. The states could, consistent with the Constitution, retain immunity from suit in their own courts.
  \item 414. 19 U.S. (6 Wheat.) 264 (1821).
  \item 415. *Id.* at 380.
  \item 416. *Id.*
\end{itemize}
munity from suit through various jurisdictional grants in Article III: "[A] case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case." The mere circumstance, that a State is a party, gives jurisdiction to the Court. Thus, Chief Justice Marshall understood ratification of the Constitution by the states as their consent to suit. His later opinion in Osborn v. Bank of the United States similarly held that the Eleventh Amendment did not prevent an action against a state concerning an unconstitutional tax.

The 1838 case of Rhode Island v. Massachusetts similarly found:

Those states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plenitude unimpaired by any act, and controllable by no authority, adopted the constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the constitution, it was ordained that this judicial power, in cases where a state was a party, should be exercised by this Court as one of original jurisdiction. The states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this Court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified.

Mr. Justice Curtis, in his dissenting opinion in Florida v. Georgia stated: "It must be remembered, also, that a State can be sued only by its own consent. This consent has been given in the constitution ..." In United States v. Texas, the court also found that Texas had consented to suits against it through Article III:

The States of the Union have agreed, in the Constitution, that the judicial power of the United States shall extend to all cases arising under the Constitution, laws, and treaties of the United States, without regard to the character

417. Id. at 383.
418. Id. The Eleventh Amendment did not apply, according to Marshall, because the writ of error was not a "suit" within the meaning of the amendment. See also McKesson Corp. v. Division of ABT, 495 U.S. 18, 31 (1990) (holding that Eleventh amendment does not constrain the appellate jurisdiction of the Supreme Court over cases arising from the state courts); Graber, The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Political Power, 12 CONST. COMMENT 67 (1995); Jackson, supra note 4, at 13-25.
419. 22 U.S. (9 Wheat.) 738 (1824).
420. 37 U.S. 657 (1838).
421. Id. at 720 (citation omitted).
422. 58 U.S. 478 (1854) (Curtis, J., dissenting) (concluding that the United States was not entitled to participate as a nonparty in a boundary dispute between Georgia and Florida, since, inter alia, Article III did not entail states' consent to such a suit).
423. Id. at 507.
424. 143 U.S. 621 (1892).
of the parties, (excluding, of course, suits against a State by its own citizens or by citizens of other States, or by citizens or subjects or foreign States,) and equally to controversies to which the United States shall be a party, without regard to the subject of such controversies, and that this court may exercise original jurisdiction in all such cases, "in which a state shall be party," without excluding those in which the United States may be the opposite party. The exercise, therefore, by this court, of such original jurisdiction in a suit brought by one State against another to determine the boundary line between them, in a suit brought by another to determine the boundary line between them, or in a suit brought by the United States against a state to determine the boundary between a Territory of the United states and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States. 425

Even cases well into the twentieth century found that Article III in itself constituted a waiver of sovereign immunity. In the 1934 case of Monaco v. Mississippi,426 the Court noted that states possess immunity from unconsented suit except where there has been a surrender of this immunity in the plan of the Convention (quoting The Federalist No. 81) and held that such a surrender was inherent in and essential to the Constitution when a state is sued by another state or the United States (but not, as in Monaco v. Mississippi, where a foreign state sues the state). According to the Court, "The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign which the Constitution creates," and "[t]he jurisdiction of this Court over the parties in such cases was thus established 'by their own consent and delegated authority' as a necessary feature of the formation of a more perfect Union."427 In 1989, the Supreme Court held that by ratifying the Constitution, the states relinquished immunity by consent:

[To the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.428

Collectively, these cases establish that the various jurisdictional grants in Article III, from federal question jurisdiction to party-specific jurisdiction, constitute a waiver of sovereign immunity.

425. Id. at 646.
426. 292 U.S. 313 (1934).
427. Id. at 328-30.
G. The Eleventh Amendment

The Supreme Court's view is that the Eleventh Amendment is not limited to its language, but stands for a "presupposition" of sovereign immunity. The Eleventh Amendment reads simply:

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.

This language, which appears to have merely eliminated the Article III state-citizen diversity jurisdiction of the federal courts, has been broadly construed to prevent actions by a citizen against his or her own state, as well as actions brought under the first clause of Article III, Section 2, which arise under federal law, actions brought by foreign nations or Indian tribes, actions in admiralty, actions in administrative courts, and even actions in state courts to enforce federal law.

All of these holdings depend on the view of history adopted by the Supreme Court in 1890, in Hans v. Louisiana, in which the Supreme Court held that the Eleventh Amendment prevents a citizen from suing his own state in federal court, despite its specific limiting language. The Court reached that conclusion based on its view of the country's reaction to Chisolm v. Georgia. According to the Hans...
Court, the majority's decision in *Chisolm*, that the Constitution permitted suit by a diverse citizen against a state "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." This account has been discredited. The Congress did not act on the proposed amendment until January 1794, almost a year after the decision in *Chisolm*. The states did not complete the ratification process until 1798. As of March 1797, more than four years after the *Chisolm* decision, half of the states had not even responded on the issue. These facts substantially undercut the "shock of surprise" account advanced by the *Hans* court. The *Hans* court also stated, "Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States had been expressly disclaimed, and even resented, by the great defenders of the Constitution whilst it was on its trial before the American people," and quoted Hamilton in *The Federalist No. 81*, and Madison and Marshall in the Virginia ratification debates. As this Article has demonstrated, there is good reason to doubt that Hamilton, Madison, and Marshall articulated the consensus of the drafters and ratifiers. Significantly, Marshall's view of the Eleventh Amendment differed substantially from that announced in *Hans*. In his 1821 opinion in *Cohens v. Virginia*, Justice Marshall offered a forthright account of state indebtedness as a matter of concern to the states in ratification of the Constitution and as the reason for the Eleventh Amendment:

> It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so exten-

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442. See *id.* at 1933-34.
443. *Id.* at 1938 n.261; accord 1 *Elliott's Debates*, *supra* note 38, at 341.
446. *See supra* subsection III.E.2.
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sively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. 449

This narrow view of the Eleventh Amendment was accepted by the Supreme Court until the post-Reconstruction period. During that era, the Supreme Court wrestled with difficult political issues created by the refusal of newly restored southern governments to honor bonds issued by their predecessors. According to Judge Gibbons' analysis, the Court's decision in Hans v. Louisiana is attributable to its recognition that its position and power was under serious threat in the post-Civil War era. If the Court ruled against the southern states, there was a very real possibility that its decisions could not be enforced. In 1878, the Congress had passed the Posse Comitatus Act, which prohibited United States Marshalls from using Army regulars to help to enforce court orders. The President's power to use the Army to enforce the Court's rulings was also in question. In 1886, the Democratic House had blocked appropriations for the Army. These actions effectively precluded enforcement of federal law against a resisting state. In the face of these political realities, the Court simply adopted the expedient solution and expanded the reach of the Eleventh Amendment. In Judge Gibbons' words, "the justices needed a way to let the South win the repudiation war. The means Bradley chose was to rewrite the eleventh amendment and the history of its adoption." 453

Dissenters on the Supreme Court and numerous scholars have adopted the early view of the Eleventh Amendment, exemplified

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450. Gibbons, supra note 4, at 1990.
452. Gibbons, supra note 4, at 1990.
453. Id. at 2000.

[The Court's Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests. In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation.]

by Marshall’s opinion in *Cohens v. Virginia*, rather than the post-Reconstruction view of Bradley in *Hans v. Louisiana*. This original reading of the Eleventh Amendment relies on the language and history of the Amendment and holds that it simply overruled *Chisolm v. Georgia*, repealing the citizen-state and alien-state diversity clauses in Article III, but leaving the rest of Article III, including judicial power over actions against the states on issues of federal law, intact. Particularly given the Framers’ and ratifiers’ sense of the importance of federal judicial power over the states, this reading of the Eleventh Amendment must be preferred.

H. Conclusion

Each of these arguments concerning the intent of the Framers (the structure of the government, the language of the constitution, the statements of the Framers and ratifiers, the specific reasons for the extensions of various judicial power, and understandings expressed in the early years of the republic) is in itself compelling evidence. Taken together, they provide a powerful refutation of the notion that the states and the United States are protected by broad constitutional sovereign immunities.

IV. NONHISTORICAL RATIONALES FOR SOVEREIGN IMMUNITY

The arguments above demonstrate that the ratification of the Constitution entailed consent of the states and the United States to the exercise of the national judicial power over Article III cases, subject to the narrow immunity later afforded by the Eleventh Amendment. However, in addition to the discredited historical arguments advanced for sovereign immunity, the courts have articulated other reasons for immunity. This Article turns now to an assessment of these additional, nonhistorical rationales for sovereign immunity. Just as the historical rationale for sovereign immunity is flawed, nonhistorical justifications are also problematic. None of the rationales advanced by the courts, except separation of powers, possesses sufficient force, singly or collectively, to sustain the doctrine independent of its dis-

456. See supra text accompanying notes 106-14, 161-66.
credited historical foundation. And although separation of powers justifies immunity in some cases, it cannot provide an adequate justification in many of the cases which are dismissed based on immunity.

A. Early Case Law

A number of the early decisions of the Supreme Court simply stated that no action would lie against a sovereign without consent, without justification by reason or citation to authority, and ignoring the language of the Constitution and the early case law holding that ratification was consent.\footnote{457} United States v. McLemore,\footnote{458} a suit by a judgment debtor against the United States, held that the circuit court should not have issued an injunction against the United States' attempt to obtain payment and should not have ordered the United States to pay the plaintiff's costs:

There was no jurisdiction of this case in Circuit Court, as the government is not liable to be sued, except with its own consent, given by law. Nor can a decree or judgment be entered against the government for costs.\footnote{459}

\textit{Hill v. United States,}\footnote{460} an action seeking an injunction against the United States's enforcement of the plaintiffs' promissory note, similarly held that actions against the United States could proceed only with its consent, citing only \textit{McLemore}:

No maxim is thought to be better established, or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot ex delicto be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. . . . [We content ourselves with referring to a single and recent case in this court which appears to cover the one now before us in all its features. We allude to the case of the United States v. McLemore.\footnote{461}}

Subsequent cases fail to add much. The case of \textit{The Siren}\footnote{462} states:

It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow any different rule. It is obvious the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemp-

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\footnote{457. See supra section III.F.} 
\footnote{458. 45 U.S. (4 How.) 286, 288 (1846) (mem.).} 
\footnote{459. \textit{Id.} at 288.} 
\footnote{460. 50 U.S. (9 How.) 386 (1850) (mem.).} 
\footnote{461. \textit{Id.} at 389 (citing \textit{McLemore}, 45 U.S. at 288).} 
\footnote{462. 74 U.S. (7 Wall.) 152, 154 (1868).}
tion from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.463

The Supreme Court in Nichols v. United States464 held:

Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as [sic] private person.465

Each of the cases invoke the notion of sovereignty, but offer only the additional rationales that to permit suits against the government would be “inconvenient” and “dangerous” and would prevent the functioning of government. These concerns are inconsistent with the view of separation of powers, both horizontal and vertical, envisioned by the Framers, in which the branches of government check each other and the federal government checks the states.466 The founding generation viewed these checking functions as essential to the proper functioning of government. Further, concerns about the ability of governments to function has surely been set to rest, given the extensive waivers of immunity by the Congress and various states.467

463. Id. at 154.
464. 74 U.S. (7 Wall.) 122 (1868).
465. Id. at 126.
466. See supra subsection III.C.1.
467. Congressional waivers include the Tucker Act, 28 U.S.C. § 1364(a)(2) (2002) (establishing jurisdiction over claims against the United States based on the Constitution, acts of Congress, executive department regulations, express or implied contracts with the United States, and claims for liquidated or unliquidated damages not sounding in tort; passed in 1887, to remedy inadequacies of the Court of Claims which was created in 1855); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2002) (subjecting the United States to suit in district court for common law torts); the Mandamus and Venue Act, Judicial Code §1361 (2002) (providing that the district courts shall have original jurisdiction of any action in the nature of mandamus to compel officers or employees of the United States of its agencies to perform a constitutional or statutory duty owed to the plaintiff); the Administrative Procedure Act, 5 U.S.C. §702 (2002) (permitting individuals to sue the United States for legal wrongs committed by its agency or employees and seeking relief other than money damages); 28 U.S.C. §1346(a)(1) (2002) (permitting recovery in district courts against the United States for erroneously or illegally assessed or collected taxes); 28 U.S.C. §1347 (2002) (jurisdiction over partition actions when the United States is a joint tenant); 28 U.S.C. §2410 (2002) (waiving immunity in actions to quiet title, foreclose mortgage, partition, condemn on property on which the United States has claims, a mortgage, or other lien).
B. Modern Rationales

Modern courts have also articulated various rationales for sovereign immunity, including maintenance of the states' dignity, protection of the treasury, promotion of efficient government, and the structural concerns represented by the doctrine of separation of powers. Only the last rationale, separation of powers, has validity. This Article turns next to an assessment of each of these rationales.

1. Protection of the Treasury

One of the rationales offered for the extension of immunity to government entities is the protection of the public fisc. This is an important consideration. As the historical materials demonstrate, concerns over the states' indebtedness was a central issue in the ratification debates. However, many Framers and ratifiers believed that states should honor their obligations and pay their debts, and they provided a method for enforcement of those debts. In modern times, the United States Congress, as well as many state legislatures, have consented to suit in broad categories of cases, indicating that protection of the public treasury is not a central concern as balanced against the right to a remedy for legal wrongs. Waivers of immunity by the very entities entrusted with public funds suggests that the courts' concerns about protecting public funds are misguided. Basic fairness requires that government, perhaps more so than private individuals or entities, should remedy its wrongs. The fact that courts

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468. Under the modern Supreme Court's view, however, concerns about state funds have assumed central importance in the Eleventh Amendment context. For example, to determine whether Eleventh Amendment immunity applies, courts consider the source of recovery in the action. If the action seeks recovery of funds from the state treasury, Eleventh Amendment immunity applies. Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S.Ct. 1864 (2002) (stating that "state sovereign immunity serves the important function of shielding state treasuries and thus preserving 'the States' ability to govern in accordance with the will of their citizens'"); Alden v. Maine, 527 U.S. 706, 750-51 (1999) ("Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States," possibly placing an "unwarranted strain on the States' ability to govern in accordance with the will of their citizens."); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47 (1994) (stating that protection of the state treasury from federal court judgments is the "impetus" for the Eleventh Amendment: "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations").

469. See supra subsection III.C.3.a.

470. U.S. Const. art. I, § 10, cl. 1 (providing that "No State shall . . . pass any . . . law impairing the obligations of contracts.")

471. See supra note 467.

regularly issue large damage awards against government entities de-
prives this rationale of its force.

Federalism concerns alone are not sufficient to overcome the con-
clusion that protection of public funds cannot justify broad immuni-
ties. If protection of the treasury is not a significant concern along a
horizontal axis (suits against states in state court, and against the
federal government in federal court), it is difficult to see why it is a
compelling concern along a vertical axis (in suits against states in fed-
eral courts). Justice Kennedy in Alden v. Maine473 cites two related
rationales for immunity apart from considerations of constitutional
form. First, suits against states may threaten their financial integ-
rity, and second, such suits impede political processes in the states by
affecting political decisions about allocation of funds. If suits against
states in state courts have not threatened their financial or political
integrity, it is unlikely that suits in federal court will. If they did,
other doctrines, including separation of powers and the political ques-
tion doctrine, could be employed to protect the state. In short, fiscal
concerns are not in themselves sufficient to ground complete immu-
nity, and such concerns could be taken into account in appropriate
cases in the absence of immunity.

2. Promotion of Government Efficiency

The often-repeated rationale for sovereign immunity, that it pro-
motes effective decisionmaking, unhampered by the threat of liability,474 is perverse. We typically think that accountability for
decisions, including the threat of liability in appropriate cases, pro-
motes good decisionmaking. This is a premise which underlies both
enacted and decisional law and much of legal scholarship. To hold
those who are entrusted with important decisions accountable for
their decisions is simple common sense. Legislators and elected mem-
bers of the executive branch are politically accountable to the public,
but unelected government actors, who carry out the bulk of the gov-
ernment's activities, are typically not. If governmental immunities
apply, these unelected members of the executive branch are not pub-
licly accountable in any way. They may be accountable, if at all, only

473. 527 U.S. at 750-51.
474. This rationale has received its fullest explication in the context of the discretion-
ary function exception to the United States' waiver of immunity in the Federal
Tort Claims Act, 28 U.S.C.§ 2680(a) (2002). A line of Supreme Court cases ex-
plains the purposes of this exception as protecting the judgment of executive or
administrative actors, preventing judicial second-guessing of such judgments,
and protecting the government from liability that would impede its efficiency.
United States v. Gaubert, 499 U.S. 315 (1991); Berkovitz v. United States, 486
U.S. 531 (1988); United States v. S.A. Empresa de Viacao Aerea Rio Grandense
(Varig Airlines), 467 U.S. 797 (1984); United States v. Muniz, 374 U.S. 150, 163
to their government employers (who may in fact benefit by their actions). Thus, we might expect that government immunities would lead to a lower quality of government decisionmaking. Interestingly, early discussions in the English courts focusing on the need for accountability of various public officials balanced competing factors very differently than modern American courts. In 1703, Chief Justice Holt said, "If public officers will infringe men's rights, they ought pay greater damages than other men, to deter and hinder other officers from the like offenses."475 Lord Mansfield, writing a generation later, opined:

> Therefore, to lay down in an English court of Justice such a monstrous proposition, as that a governor, acting by virtue of letters patent under the great seal, is accountable only to God and his own conscience; that he is absolutely despotic and can spoil, plunder, and affect his Majesty’s subjects, both their liberty and property, with impunity, is a doctrine that cannot be maintained.476

As with protection of government funds, this argument applies horizontally and vertically; if accountability promotes good decisionmaking, it matters little whether the decisionmaker acts for the state or the federal government or is accountable in state or federal court. The most complicated cases would, of course, involve federal courts making states accountable based on federal law, but as the historical analysis in Part III demonstrates, this form of accountability inheres in the structure of the Constitution and was intended by the Framers.477

A related rationale for immunity is that litigation stops or slows the activities of government. This rationale is susceptible to the same critique. First, governments at state and federal levels have in fact subjected themselves to suit in many instances, undercutting the argument.478 Second, stopping or slowing government activities to prevent or remedy government breaches of the law is unquestionably appropriate. Finally, concerns about the functioning of government can be protected with measures far less expansive than broad immunities, as Part V argues.

3. The Dignity of the States

Although the need to preserve the dignity of the states by not subjecting them to suit is typically cited in decisions dealing with federal judicial power over the states, it is, based on the history recounted by this Article479 and the fact that federal and state legislatures have

476. Mostyn v. Fabrigas, 1 Cowp. 161, 175 (1744).
477. See supra subsections III.C.1 and 3.
478. See supra notes 467, 472.
479. See supra Part III.
waived immunities in many cases. As envisioned by the Framers, federalism entailed numerous limitations on the powers of both the states and the federal government, including subjection to suit in federal court in the categories of cases enumerated in Article III.482

4. Separation of Powers

Sovereign immunity furthers the structural principle of separation of powers when courts defer to the political decisionmaking of the legislative or executive branches. This is true whether that deference occurs horizontally, between coordinate branches of government, or vertically when federal courts defer to the political decisions of the states (or vice versa). Separation of powers is an important modern justification for sovereign immunity. However, it cannot provide a justification for judicial abstention from all cases involving government entities. A good illustration of this point is the level of immunity typically afforded municipalities. As both proprietary or corporate and governmental entities, municipalities have never been afforded the full immunities enjoyed by states and the federal government. Where municipalities exercise proprietary functions, courts treat them as they would any private corporation. However, even with respect to their public functions, municipalities do not enjoy complete immunity. Their immunity is qualified rather than absolute. When municipalities exercise discretion on matters of public policy, the courts use a deferential standard of review in recognition of a municipal litigant’s public functions, often consisting of a determination of whether there was any rational basis for the municipal action. Courts have generally viewed municipal immunities restrictively in recognition of the basic principle that legal wrongs require a remedy.

The discretionary function exception to waivers of immunity by the federal government in the Federal Tort Claims Act and in similar state acts provides another analogy. The exception is based in separation of powers concerns. As construed by the Supreme Court, it

480. See supra notes 467, 472.
482. See supra Part III.
485. E.g., Owen, 445 U.S. at 650-51.
486. The Second Circuit, for example, stated that by barring tort liability for activities that require the alleged tortfeasor to consider and weigh competing policies in arriving at his decision, the discretionary function test protects courts from "involve[ment] in making . . . decision[s] entrusted to other branches of the govern-
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shields from liability government actions which are discretionary and
which are based on public policy considerations. Thus, separation of
powers concerns are not sufficient to preclude cases against the gov-
ernment as a jurisdictional matter. Rather, these concerns simply
counsel abstention in cases in which the issues are not appropriate for
judicial resolution. Yet another analogy is the common-law treatment
government duties in negligence actions. In such cases, the courts
have jurisdiction (generally as a result of a waiver of immunity), but
they defer to the executive actor in cases involving issues appropriate
for political rather than judicial resolution.487

Each of these examples involves horizontal separation of powers.
As this Article has argued above,488 the same concerns underlie verti-
cal separation of powers. The treatment of foreign sovereigns under
the Foreign Sovereign Immunities Act and the act of state doctrine
provide useful analogies here.

V. REPLACING SOVEREIGN IMMUNITY AS A
JURISDICTIONAL BAR WITH
PRUDENTIAL DOCTRINES

This Article has reached two important conclusions. First, the as-
terted historical basis for sovereign immunity is incorrect. Sovereign
immunity was not, and is not, a constitutional doctrine. Only the rep-
etition of mistakes of historical fact account for the doctrine’s vitality.
Second, the only plausible rationale for sovereign immunity, among
all of those which have been advanced, is separation of powers. This
section outlines, in a preliminary fashion, existing doctrines which
could be used to protect structural separation of powers concerns in
the absence of sovereign immunity.

The Supreme Court should recognize that the purportedly histori-
cal facts on which it has relied since *Hans v. Louisiana* are incorrect.
Over time, the Supreme Court has created its own history of the
founding; decisions which fit the exigencies of their own times, like
*Hans v. Louisiana*,489 provide the basis of that history. The recitation
by the Supreme Court of purported fact, even over time, cannot create
historical fact.490 It simply creates legal precedent based on incorrect

487. See infra section V.B.
488. See supra note 11.
489. See supra notes 23, 440-45 and accompanying text.
490. Despite implications to the contrary. See, for example, Justice Powell’s footnote
dence’ discovered by the dissent in *The Federalist* and in the records of the state

historical fact. Stare decisis does not require adherence to mistakes of fact, and the Court should correct its errors. Correcting these errors requires a recognition that sovereign immunity is neither a constitutional doctrine nor a jurisdictional doctrine.

Correcting the Supreme Court's factual errors also requires a recognition that the value of sovereign immunity lies only in its ability to maintain the integrity of political decisionmaking, both horizontally (federal-federal and state-state) and vertically (federal-state). Complete immunity obviously protects too much. Sovereign immunity’s value can be protected with the political question doctrine, common law duty determinations, or discretionary function analyses, among others, on a horizontal axis. Where the federal government has consented to suit, it has often recognized and protected separation of powers principles. Given the broad immunities afforded to states in the federal courts, vertical abstention doctrines are less developed. However, as a conceptual matter, the issues to be decided and the values to be protected in horizontal separation of powers and vertical federalism are quite similar. Whether cases involve the limits of judicial power within a single system (state-state or federal-federal) or within a dual system (federal-state), the basic issue is which part of the government has power to handle a particular matter and the values to be protected are those which inhere in a system of divided and checked powers.

Given the common value of protecting political decisionmaking which underlies both vertical and horizontal separation of powers, the political question, duty, and discretionary function analyses developed in the context of horizontal separation of powers could appropriately be used in federalism cases. Existing federalism doctrines, including Burford, Pullman, and Colorado River, which reflect some of the same concerns as the political question, duty, and discretionary function analyses, can be expanded and developed to provide further protection of state political decisionmaking from federal court interference. The Foreign Sovereign Immunities Act, which protects equal sovereigns against judicial oversight of political, but not private or commercial decisionmaking, may also provide a useful analogy in the process of replacing sovereign immunity with prudential doctrines.

ratifying conventions, has been available to historians and Justices of this Court for almost two centuries.” It is perhaps appropriate to assume that one’s predecessors have done their jobs adequately, but this statement suggests a view of the historical record, and the Supreme Court’s role in assessing it, which is problematic. The Court cannot create historical fact through the process of stare decisis. If the Court can review the legal interpretations of its predecessors, why not the historical interpretations?

491. See infra notes 515-18 and accompanying text.
A. The Political Question Doctrine

Federal courts may abstain from deciding cases which fall within their Article III jurisdiction on grounds of nonjusticiability. The political question doctrine presupposes that courts share responsibility for constitutional interpretation with other branches of government. The doctrine is one of the ways in which this division of responsibility is expressed. For example, lower federal courts left the question of the constitutionality of the war in Vietnam to the political branches through application of the political question doctrine. Justice Brennan summarized the political question doctrine in Baker v. Carr, the leading case on the doctrine:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

A federal court may thus defer to Congress or the executive branch on a particular constitutional question. Similarly, a federal court might defer to the political decision of a state’s legislative or executive branch. Most of Justice Brennan’s considerations for abstention apply equally to horizontal and vertical separation of powers concerns, and most of them could support a decision that a federal court should not interfere with the political decisionmaking of a state.


493. This view of the political question doctrine may be criticized on two grounds. First, the Supreme Court has indicated that political questions involve separation of powers among coordinate branches and not federal-state relations. In Baker v. Carr, 369 U.S. 186 (1962), Justice Brennan wrote that “it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” Id. at 210. See also Elrod v. Burns, 427 U.S. 347, 352 (1976) (Brennan, J., plurality opinion) (“[T]he separation-of-powers principle, like the political question doctrine, has no applicability to the federal judiciary’s relationship to the States.”); Powell v. McCormack, 395 U.S. 486, 517-22 (1969) (reiterating that the political question doctrine arises from separation of powers concerns). This conclusion has been criticized by some commentators. See, e.g., Robert F. Nagel, Separation of Powers and the Scope of Federal Equitable Remedies, 30 Stan. L. Rev. 661, 664 (1978) (arguing that separation of powers principles apply to relations between the federal judiciary and state governments;
There is also an important relationship between political questions and other means by which courts defer to other branches of government. The political question doctrine derives from Chief Justice Marshall's opinion in Marbury v. Madison, which relates political questions to discretionary functions:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.495

Interestingly, many of the commentators who argue that the federal courts deny their constitutional duty when they abstain from exercising jurisdiction also rely on Marshall. In his opinion in Cohens v. Virginia, the Chief Justice stated that the federal courts have "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."496

B. Duty Questions: Ministerial vs. Discretionary Functions; Governmental vs. Proprietary Functions; The Public Duty Doctrine

Even in cases where the immunity of a state or municipality has been waived, courts acknowledge that separation of powers principles require protection of decisionmaking functions of coordinate branches, and may refuse to find that a government entity or agent owed a duty of care to protect against a particular harm. Courts generally treat the issues of duty and immunity as distinct. Thus, even where a legislative waiver exists, whether the government entity or actor owed a duty of reasonable care to the plaintiff is an antecedent question. The federal courts may lack power to remedy specific constitutional violations committed by state government). This Article takes the position that federalism concerns may encompass doctrines like the political question doctrine, even if that doctrine is not specifically applicable to federal-state relations.

Second, the political question doctrine has come under attack as undercutting the fundamental principles of judicial review articulated in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), despite Marshall's own recognition in Marbury, see infra text accompanying note 495, that some matters are reserved to the political branches and may not be adjudicated. See, e.g., Martin Redish, Judicial Review and the "Political Question," 79 Nw. U. L. Rev. 1031 (1985). Others have argued that there is no political question doctrine. See, e.g., Louis Henkin, Is There a Political Question Doctrine?, 85 Yale L.J. 597, 600 (1976) ("The thesis I offer for discussion is that there may be no doctrine requiring abstention from judicial review of political questions." ); Wayne McCormack, The Justiciability Myth and the Concept of Law, 14 Hastings Const. L.Q. 595, 614 (1987) (stating that the political question doctrine is "more easily demonstrated to be nonexistent than any other nonjusticiability doctrine").

495. 5 U.S. (1 Cranch) 137, 170 (1803).
496. 19 U.S. 264, 404 (1821).
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Duty determination may take into account the identity of the defendant as a government entity and the nature of the defendant's responsibilities as a government entity, in addition to other considerations. Courts have protected government entities from tort liability in appropriate cases using various doctrines and tests, all of which are based on the principles of separation of powers. Thus, courts shield discretionary decisions as opposed to ministerial functions of government entities; governmental as opposed to proprietary functions; and public as opposed to private duties.

Courts often distinguish between ministerial, routine, and operational functions of government actors, for which liability may be imposed, and discretionary functions involving the exercise of judgment on policy matters, for which the government enjoys immunity. Although this distinction has been criticized for imprecision, courts have continued to articulate and apply it. It has been codified in the Federal Tort Claims Act's discretionary function exception to the federal government's waiver of sovereign immunity as well as similar state statutes.

Another method by which courts protect the decisionmaking of coordinate branches is the public duty doctrine. Although it has been repudiated following waivers of sovereign immunity in some jurisdictions, and criticized as undercutting legislative waivers of sovereign immunity.

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497. For example, California courts have long enumerated the following factors to assess duty generally:

- [1] the foreseeability of harm to the [injured party],
- [2] the degree of certainty that the [injured party] suffered harm,
- [3] the closeness of the connection between the defendant's conduct and the injury suffered,
- [4] the moral blame attached to the defendant's conduct,
- [5] the policy of preventing future harm,
- [6] the extent of the burden to the defendant,
- [7] the consequences to the community of imposing a duty to exercise care with resulting liability.


498. See infra note 514.

499. Id.

500. See infra note 510.

501. See supra note 472.

502. E.g., Commercial Carrier Corp. v. Indian River, 371 So. 2d 1010, 1015 (Fla. 1979)
neign immunity in others, many courts continue to use the doctrine to protect state or municipal agencies from liability to individual citizens for a breach of a duty owed to the public generally. The public duty doctrine holds that because the government owes a duty to the public in general, it does not owe a duty to any individual citizen. For example, the public duty doctrine protects law enforcement authorities from liability for failure to prevent criminal harms or state agencies from liability for negligence in the conduct of inspections for the protection of the public generally. The public duty doctrine explicitly acknowledges the limited resources of local governments and the nature of decisionmaking by those bodies.

C. Discretionary Functions

The federal government has waived its sovereign immunity in many instances. In the Federal Torts Claims Act, for example, Congress made the federal government susceptible to tort claims in the same way as an individual would be. This possible tort liability is subject to a number of exceptions, including the “discretionary function” exception. Under this exception, the government retains immunity for claims “based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.” Although the legislative history is minimal, the Court’s subsequent decisions make it clear that the purpose of the exception was “to prevent judicial ‘second-


505. The doctrine has a long history, having originated in the Supreme Court’s 1855 decision in South v. Maryland, 59 U.S. (18 How.) 396 (1855).


508. See supra note 467 and accompanying text.


510. 28 U.S.C. § 2680(a) (2002). This exception to the waiver of immunity is conceptually akin to the ministerial/discretionary distinction discussed above, and shares similar problems.

511. Id.
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guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. The Court has adopted a two-part analysis: the exception shields only (1) discretionary decisions (those which involve judgment or choice), which are (2) based on considerations of public policy. Application of the test has proved problematic for the courts. The Supreme Court has explained that public policy considerations include social, economic, and political considerations, including the balancing of safety concerns against budgetary or other feasibility concerns, and has distinguished public policy con-


515. Berkovitz, 486 U.S. at 537; Varig Airlines, 457 U.S. at 820.

516. Varig Airlines, 467 U.S. 797, 819-20 (stating that government decisions regarding safety regulation entail balancing safety against practical considerations such as staffing and funding); Dalehite v. United States, 346 U.S. 15, 40-41 (1953) (holding that this exception protected government decision involving balancing of safety and feasibility); Richardson v. United States, 943 F.2d 1107, 1111-12 (9th Cir. 1991) (holding that this exception protected government conduct based on balancing safety and cost). But see Dalehite, 346 U.S. at 58 (Jackson, J.,
siderations from scientific, mathematical, and other "objective" criteria.\textsuperscript{517}

The discretionary function analysis, although it derives from a statute, has much in common with common law distinctions between protected planning or discretionary functions and unprotected ministerial or operational functions. Both are based on separation of powers concerns and both protect government decisionmaking in the absence of immunities. Thus, common law analyses may inform the interpretation of the discretionary function exception, and the discretionary function exception may offer a useful resource for common law adjudication. The Supreme Court has in fact indicated its willingness to use the discretionary function immunity absent statutory authorization by engrafting it onto other Congressional waivers of immunity which do not explicitly include it.\textsuperscript{518}

D. Abstention Doctrines Based on Federalism Concerns

Again, the broad immunities afforded to the states as a result of the Supreme Court's misconstruction of the Constitution and the resulting law of sovereign immunity means that federal courts often have no need to invoke the political question doctrine or related separation of powers concerns to protect political decisionmaking at the state level. Where immunity is viewed to be constitutional and jurisdictional, many such questions simply do not arise. However, in the absence of immunity, the Court has shown deference to state adminis-

\textsuperscript{517} Gaubert, 499 U.S. at 331; Berkowitz, 486 U.S. at 545.

\textsuperscript{518} Courts have read a discretionary function immunity into government waivers, such as the Suits in Admiralty Act (SAA), codified as amended at 46 U.S.C.A. §§ 741-52 (2002), which do not contain such a provision, based on the principle of separation of powers. See, e.g., Tew v. United States, 86 F.3d 1003 (10th Cir. 1996); Earles v. United States, 935 F.2d 1028, 1030-32 (9th Cir. 1991); Sea-Land Serv., Inc. v. United States, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); In re Asbestos Litigation, 891 F.2d 31, 35 (2d Cir. 1989); Wiggins v. United States, 799 F.2d 962, 966 (5th Cir. 1986); Williams v. United States, 747 F.2d 700 (11th Cir.1984) (per curiam), affg Williams ex rel. Sharpley v. United States, 581 F.Supp. 847 (S.D.Ga. 1983); Gemp v. United States, 684 F.2d 404, 408 (6th Cir. 1982); Bearce v. United States, 614 F.2d 556, 558-60 (7th Cir. 1980), cert. denied, 449 U.S. 837 (1980); Chute v. United States, 610 F.2d 7, 11-13 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980); Canadian Transport Co. v. United States, 663 F.2d 1081, 1086 (D.C. Cir. 1980); Contra Lane v. United States, 529 F.2d 175, 179 (4th Cir. 1975). The Fourth Circuit's contrary view has been narrowed by Tiffany v. United States, 931 F.2d 271, 277 (4th Cir. 1991) (applying discretionary function exception to the SAA on constitutional separation of powers grounds), cert. denied, 502 U.S. 1030 (1992), and Faust v. South Carolina State Highway Dept., 721 F.2d 934, 938-40 (4th Cir.1983) (applying discretionary function exception analysis to a claim under the SAA), cert. denied, 467 U.S. 1226 (1984).
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trative and legislative processes through various abstention doctrines. These doctrines also provide a foundation for judicial protection of vertical separation of powers in the absence of constitutional and jurisdictional immunities.

*Pullman* abstention entails federal court deference to state courts where the resolution of a state law question might eliminate the necessity of deciding a federal constitutional question.\(^5\)\(^1\) This situation obviously does not apply in many cases which presently involve the assertion of an immunity, but the Supreme Court in *Pullman* articulated a number of considerations justifying abstention, which might be applied in immunity cases. Those considerations include avoiding "needless friction with state policies"\(^5\)\(^2\) and "sensitive area[s] of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open,"\(^5\)\(^3\) and maintaining "scrupulous regard for the rightful independence of the state governments."\(^5\)\(^4\) *Pullman* thus provides support for a decision by federal courts to abstain from deciding a case against a state, independent of sovereign immunity.\(^5\)\(^5\)

*Burford* abstention extends the *Pullman* holding. In *Burford v. Sun Oil Co.*,\(^5\)\(^6\) the plaintiff sought to enjoin execution of an order by the Texas Railroad Commission granting an adjacent leaseholder permission to drill new wells. Unlike *Pullman*, *Burford* involved no concerns about avoiding an unnecessary constitutional holding.

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520. *Id.* at 500. According to the Court, "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Id.*
521. *Id.* at 497.
522. *Id.* at 501.
524. 319 U.S. 315 (1943).
Nonetheless, the Supreme Court held that the district court should have exercised its discretion to decline jurisdiction. Justice Black's opinion was premised on the fact that the case involved complex questions of Texas policy in the regulation of oil and gas, which impacted the economy and tax structure of the state and which had been decided by the state administrative agency charged with authority and discretion to administer the law. In such circumstances, the Texas courts should have the first opportunity to address these state policy issues, and federal courts appropriately abstain to permit the development of coordinated policy by state courts and agencies. The Court has subsequently summarized the *Burford* holding as follows:

Where timely and adequate state review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."\(^{525}\)

*Thibodaux* abstention takes *Burford* a step further. In the absence of a state agency decision, federal courts may abstain where adjudication of a state policy is best left to state courts. *Thibodaux*\(^{526}\) involved the issue of whether Louisiana municipalities had power to condemn the property of a public utility. Justice Frankfurter's opinion emphasized that eminent domain proceedings were state matters, "intimately involved with sovereign prerogative" best left to state courts, especially where the "apportionment of governmental powers between City and State" were at issue.\(^{527}\) Justice Brennan, joined by Chief Justice Warren and Justice Douglas, dissented. However, Justice Brennan explicitly recognized that abstention can be justified to avoid "the hazard of unsettling some delicate balance in the area of federal-state relationships."\(^{528}\) Although the Supreme Court has not often relied on these abstention doctrines, it has continued to cite abstention cases with approval.\(^{529}\)

In these cases, the Supreme Court has demonstrated its willingness to avoid federal adjudication of cases involving matters of state authority. Thus, existing doctrine provides a foundation for similar forms of abstention in cases which could arise if the Court abandoned its current view of immunity.
E. Foreign Sovereign Immunities Act and the Act of State Doctrine

The Foreign Sovereign Immunities Act (FSIA) affords jurisdiction to the federal courts over foreign states in specified circumstances. The limitations on a sovereign's immunity are instructive in considering the appropriate scope of immunity for states in the absence of a broad constitutional immunity. The FSIA permits a federal court to take jurisdiction over cases in which a foreign sovereign has waived immunity; which arise from the foreign sovereign's commercial activities carried on in the United States or which have a direct effect in the United States; which involve torts by a foreign state or its agents acting in the scope of employment, subject to discretionary function and intentional tort exceptions similar to those in the Federal Tort Claims Act; and which involve terrorism by identified nations.

Despite these extensions of jurisdiction, the common law act of state doctrine precludes United States courts from adjudicating the public acts of a foreign power in its own territory. The leading case is Banco Nacional de Cuba v. Sabbatino. According to Justice Harlan in Sabbatino, the act of state doctrine is not a constitutional doctrine: the Constitution does not "require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." The doctrine thus parallels the view of state sovereign immunity advanced in this Article. Nonetheless, the doctrine has "constitutional underpinnings," arising out of the basic relationships between branches of government in a system of separation of powers. The doctrine expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole.

VI. CONCLUSION

Despite its long history to the contrary, sovereign immunity is not a constitutional doctrine. For too many years, a flawed history of the founding, enunciated by the Supreme Court in *Hans v. Louisiana* and perpetuated by subsequent Courts, has prevented application of fed-

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533. *Id.* at 423.
534. *Id.* at 423-24.
eral law to the federal and state governments in many instances, and has provided indirect support for immunities within state and municipal governments. Such immunities simply elevate the government above the law, shielding it from the operation of the law and depriving potential litigants against the government of the protection of the law. Sovereign immunity does in fact protect the structural principle of separation of powers: in many cases, there are good and compelling reasons based in separation of powers for judicial deference to the decisions of political branches of government. However, these interests can be protected without resorting to historically discredited sovereign immunities. Existing doctrines, including the political question doctrine, duty determinations, discretionary function immunities, and various abstention doctrines among others, may provide a framework for handling cases in which such deference is appropriate.