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Interpreting the Ratifiers' Intent: The Burger Court's Eleventh Amendment Jurisprudence Reconsidered in the Light of *Erie Railroad v. Tompkins*

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**INTERPRETING THE RATIFIERS' INTENT: THE
BURGER COURT'S ELEVENTH AMENDMENT
JURISPRUDENCE RECONSIDERED IN
THE LIGHT OF *ERIE RAILROAD*
*V. TOMPKINS***

Those societies which cannot combine reverence to their symbols with freedom of revision must ultimately decay, either from anarchy or from slow atrophy of a life stifled by useless shadows.¹

INTRODUCTION

Many critics of the Supreme Court have argued that the Court must examine the intention of the Framers and the Ratifiers of the United States Constitution in order to determine its meaning.² The Burger Court attempted this in its eleventh amendment cases³ wherein it repeatedly held that the eleventh amendment provided the states with sovereign immunity from any individual's federal suit even though the text of the amendment did not so require. The Court based its decisions on the history of the ratification period and on the statements of James Madison, John Marshall and Alexander Hamilton.⁴ By its rulings the Court purported to maintain the balance between state and federal government that the founders intended.⁵

This Note explores the problems of determining the Framers' and Ratifiers' intent within the specific context of these Burger Court eleventh amendment cases. This Note argues that the Court erred when it did not interpret the Ratifiers' statements in light of the decision of *Erie Railroad v. Tompkins*. Then, using the eleventh amendment cases as a starting point, this Note proposes a four-step process for incorporating the Ratifiers' debates into constitutional interpretation.

1. A.N. Whitehead, *quoted in Reston, Not 1776 but 1789*, N.Y. Times, July 4, 1976, § 4, at 11, col. 1.

2. *See generally*, R. BERGER, *GOVERNMENT BY JUDICIARY* (1977); R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); J. ELY, *DEMOCRACY AND DISTRUST* (1980).

3. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Edelman v. Jordan*, 415 U.S. 651 (1974).

4. *Edelman v. Jordan*, 415 U.S. at 660.

5. As then Justice Rehnquist stated in *Edelman*, the eleventh amendment cases represent "one of the more dramatic efforts by the Court to derive meaning [from the Constitution]." *Id.*

Specifically, Part I reviews the background of the eleventh amendment cases and the *Erie* decision. Part II outlines the Burger Court's historical sources and compares them with other documents from that period. Part III critiques the Burger Court's use of the Ratifiers' language and constitutional history. Part IV argues that the Court erred in failing to recognize the relevance of *Erie* in its interpretation of the Ratifiers' statements. Part V proposes a model for determining the relevancy of the Ratifiers' statements in constitutional interpretation and then applies the model to the eleventh amendment.

I. THE ELEVENTH AMENDMENT, *ERIE*, AND DIVERSITY JURISDICTION

A. *A Review of the Eleventh Amendment*

Article III, section 2 of the United States Constitution extends the federal judicial power in part to controversies "between a State and Citizens of another State" (the "state/citizen diversity clause").⁶ In the 1793 decision of *Chisholm v. Georgia*⁷ the Supreme Court ruled that this section gave the Court jurisdiction over a South Carolina citizen's suit to recover a debt from the state of Georgia.⁸ In response to the decision, Congress proposed and the states ratified the eleventh amendment:

6. U.S. CONST. art. III, § 2.

7. 2 U.S. (2 Dall.) 419 (1793).

8. The traditional, but erroneous, account of *Chisholm* is that Chisholm instituted the suit on behalf of a British creditor. In fact, Chisholm represented the estate of Robert Farquhar, a South Carolinian from whom the state of Georgia had purchased war supplies in 1777. C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 46-47 (1972). Charles Warren relying on an erroneous newspaper report, authored the incorrect view of the case. 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 93 n.1 (rev. ed. 1937). Under the contract between Georgia and Farquhar the State agreed to pay almost \$170,000 for merchandise for the American troops near Savannah. He never received a cent. Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 217-218 (1968).

The Court ruled 4-1 in favor of exercising jurisdiction and each judge issued a separate opinion. Justice James Iredell, the lone dissenter, argued that although the Constitution permitted the suit, the Court should not have exercised jurisdiction because Congress had not expressly implemented the state/citizen diversity clause in Article III § 2. *Chisholm*, 2 U.S. at 432-39.

In rejecting Iredell's approach, Justice James Wilson, a member of the Constitutional Convention, stated:

A state, like a merchant, makes a contract. A dishonest State, like a dishonest merchant willfully refuses to discharge it: The latter is amenable to a Court of Justice. Upon general principles of right, shall the former when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring I am a sovereign State? Surely not.

Id. at 456.

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.⁹

The text of the amendment's prohibition does not extend to a citizen's federal question¹⁰ suit against a state. In *Louisiana v. Jumel*¹¹ and *Hagood v. Southern*¹² the Court held that the federal courts did not possess jurisdiction over federal causes of action brought against states by citizens of another state or by aliens. In the 1890 decision of *Hans v. Louisiana*¹³ the Court ruled that a citizen could not sue his own state in federal court for the state's violation of federal law without the state's consent.¹⁴

In *Hans* the Court cited statements of James Madison, John Marshall, and Alexander Hamilton. The Court concluded from these statements that the Ratifiers of the Constitution believed that states were immune from suits in the federal courts even though the Constitution conferred jurisdiction to the federal courts in cases between states and citizens of another state or foreign states.¹⁵ The *Hans* Court stated that the decision in *Chisholm*¹⁶ created such a shock of surprise that the states passed the eleventh amendment thereby constitutionalizing the rule of state sovereign immunity.¹⁷

Eighteen years later the Court adopted an important exception to the

9. The Senate passed the resolution proposing the eleventh amendment on January 14, 1794, and the House approved it on March 4, 1794. Early in 1798 President John Adams notified the Congress that twelve states had passed the amendment and that it was effective. JACOBS, *supra* note 8, at 66-67.

10. The federal question jurisdiction is contained in the clause which states:

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. . . .

U.S. CONST. art. III, § 2. An examination of what cases "arise under" federal law is beyond the scope of this note. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 850-917 (2d ed. 1973) [hereinafter HART AND WECHSLER]; C. WRIGHT, THE LAW OF THE FEDERAL COURTS 90-113 (4th ed. 1983) [hereinafter WRIGHT, FEDERAL COURTS].

11. 107 U.S. 711 (1882).

12. 117 U.S. 52 (1886).

13. 134 U.S. 1 (1890).

14. *Id.* at 14.

15. *Id.* at 12-14.

16. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). See *supra* notes 8-9 and accompanying text.

17. *Hans*, 134 U.S. at 11.

Hans rule in *Ex Parte Young*.¹⁸ In this case the Court ruled that a suit to enjoin a state official from acting pursuant to an unconstitutional state law did not constitute a suit against the state because a state could not authorize unconstitutional conduct.¹⁹

Under Chief Justice Warren Burger the Supreme Court used eleventh amendment sovereign immunity principles to reinforce its decentralized view of state-federal relations.²⁰ In *Edelman v. Jordan*,²¹ the Court limited *Ex Parte Young* to actions seeking prospective injunctive relief and forbade the award of retrospective monetary relief. In *Pennhurst State School and Hospital v. Haldeman*,²² the Court ruled that the federal courts could not exercise pendent jurisdiction over several citizens' state law claims against their state officials. In other cases the Court recognized that only Congress holds the power to abrogate state immunity under the fifth section of fourteenth amendment,²³ and it required that Congress state this intention unequivocally.²⁴ Additionally, although a state may waive its immunity, the state must clearly pronounce that its waiver applies to suits instituted in federal courts.²⁵

18. 209 U.S. 123 (1908). In *Young*, shareholders of a railroad company brought suit against the Attorney General of Minnesota to enjoin him from enforcing a note-fixing law which substantially reduced the rates the railroads could charge. *Id.* at 127.

19. *Id.* at 159-60.

20. Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. LAW. 519, 547 (1986).

21. 415 U.S. 651 (1974).

22. 465 U.S. 89 (1984).

23. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

24. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, (1985) ("[C]ongress] may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.").

25. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court stated that it would only find a waiver:

where stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction. . . . The mere fact that a State participates in a program through which the Federal Government provides assistance for the operation by the State of a system of public aid is not sufficient to establish consent on the part of the State to be sued in the federal courts.

Id. at 673 (citations omitted). In *Edelman*, the Court ruled that Illinois' acceptance of federal funds under the program of Aid to the Aged, Blind, or Disabled did not constitute a waiver of immunity in private actions brought to enforce the Act. See also *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assoc.*, 450 U.S. 1147 (1981) (state statute authorizing suits against a state department does not constitute waiver to actions in federal rather than state courts); *Atascadero State Hospital v. Scanlon*, 473 U.S. (1985) (state constitutional provision authorizing suits against the state held inapplicable to suits in federal courts).

The Court's decisions have led to a proliferation of lawsuits testing when a state has consented and what the scope of prospective relief is. Gibbons, *The Eleventh Amendment and State Sovereign*

In these decisions the Burger Court relied on its view of the history of the Constitution's passage and the Ratifiers' intent²⁶ for the rule that the eleventh amendment enumerated a constitutional principle of state sovereign immunity.²⁷ One Court member viewed the eleventh amendment jurisprudence as "one of the more dramatic examples of [the] Court's effort to derive meaning from the document given to the Nation by the [Framers]."²⁸ In these decisions the Court relied on the same statements of Madison, Marshall and Hamilton as the *Hans* Court had.²⁹ The statements represented the Burger Court's historical justification for a constitutional doctrine of state sovereign immunity.

A number of commentators have criticized the Burger Court's historical review.³⁰ Additionally, in the case of *Atascadero State Hospital v. Scanlon*,³¹ Justice Brennan issued a lengthy dissent challenging the majority's historical conclusions about state sovereign immunity.³² Justice Brennan concluded that "[t]here is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of exclud-

Immunity: A Reinterpretation, 83 COLUM. L. REV. 1889, 1891 (1983). See also the cases collected in 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 3524 (2d ed. 1984).

26. As used in this Note, the term "ratifier" denotes a member of one of the state conventions which voted to adopt the Constitution composed at the Philadelphia Convention and transmitted to the Continental Congress on September 17, 1787.

27. An extensive review of the history of sovereign immunity is beyond the scope of this Note. Generally, the principle of sovereign immunity is that a government is immune from suit absent its consent. For a discussion of the concept of sovereign immunity in the colonial period, see Gibbons, *supra* note 25, at 1895-97 and the materials cited therein.

28. *Edelman v. Jordan*, 415 U.S. at 660 (1974) (Rehnquist, J.). See also *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 n.2 ("We believe, however, that our Eleventh Amendment doctrine is necessary to support the view of the federal system held by the Framers of the Constitution."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 99 (1984) ("Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system.").

29. See, e.g., *Edelman v. Jordan*, 415 U.S. at 660-62 n.9 (1974).

30. See, e.g., Gibbons, *supra* note 25; Lee, *supra* note 20; Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrine: Part One*, 126 U. PA. L. REV. 515 (1978); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States*, 126 U. PA. L. REV. 1203 (1978); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 HARV. L. REV. 61 (1984).

31. 473 U.S. 234 (1985).

32. *Id.* at 247-302. Justices Marshall, Blackmun and Stevens joined in the dissent. Justice Brennan's opinion extensively examined the records of the ratifying convention, the views of various pamphleteers for and against the Constitution and the circumstances surrounding the passage of the eleventh amendment.

ing suits against States from federal courts.”³³

B. *Erie and Diversity Jurisdiction*

Article III, section 2 of the U.S. Constitution confers the judicial power in part to:

Controversies between two or more states;—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.³⁴

As noted above, *Chisholm* and the eleventh amendment arose out of the state/citizen diversity clause.³⁵ In *Erie Railroad v. Tompkins*,³⁶ however, the Court examined the citizen/citizen diversity clause. In *Erie*, the Supreme Court overturned *Swift v. Tyson*³⁷ and held that in suits “between Citizens of different States” the federal courts must apply the substantive state statutory and common law as rules of decision.³⁸ Federal law, though, still governed rules of procedure.³⁹ Under the reign of *Swift* the federal courts had been free to fashion a federal common law in place of state law.⁴⁰

Justice Louis Brandeis, writing for the Court in *Erie*, declared that *Swift v. Tyson* was “an unconstitutional assumption of powers by the Courts of the United States.”⁴¹ He went on to say that “in applying the [*Swift*] doctrine this Court and the lower courts have invaded rights that in our opinion are reserved by the Constitution to the several states.”⁴² Some writers criticized this constitutional ruling in *Erie* because Justice Brandeis never explicitly stated which section of the Constitution the courts had violated.⁴³ Indeed, his writing perplexed several of his brethren.⁴⁴ Today most writers accept that *Erie* has a constitutional basis but

33. *Id.* at 259.

34. U.S. CONST. art III, § 2.

35. See *supra* notes 6-8 and accompanying text.

36. 304 U.S. 64 (1938).

37. 41 U.S. (16 Pet.) 1 (1842).

38. 304 U.S. at 79-80.

39. *Hanna v. Plumer*, 380 U.S. 460 (1965).

40. For a discussion of the rule of *Swift* and the types of decision which federal courts made under that case see 19 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 4502 (1982) [hereinafter WRIGHT, MILLER & COOPER]. See also, T. FREYER, *HARMONY & DISSONANCE* 45-100 (1981).

41. 304 U.S. at 79-80.

42. *Id.*

43. WRIGHT, MILLER & COOPER, *supra* note 40, § 4505 at 46.

44. Justice Reed, concurring specially, voiced disapproval of the constitutional holding. 304

differ as to just what that basis is.⁴⁵ This Note follows the view that *Erie* rests upon the theory that Congress and the courts have only the powers delegated to them in the Constitution. The tenth amendment simultaneously reserves all other powers to the states and to the people.⁴⁶ Thus, the Constitution requires the courts to apply state law: the Constitution never delegated to Congress the power to confer to the federal courts a right to create state law in diversity actions, and even if it did confer the power Congress never exercised it.

Although the Court decided *Erie* in the context of the citizen/citizen clause, the case rule applies in all diversity actions except those between two states.⁴⁷ The federal courts in fact will usually apply state law in any case where it serves as the source of that litigant's rights.⁴⁸

II. THE RATIFIERS, HISTORY AND THE ELEVENTH AMENDMENT

A. *The Burger Court's View of History and the Ratifiers' Statements*

The Burger Court's eleventh amendment decisions reflect the view that the Ratifiers of the Constitution did not wish to extend the judicial power in Article III to suits against unconsenting states.⁴⁹ The Court drew this conclusion from statements of James Madison and John Marshall at the Virginia Ratifying Convention and from Alexander Hamilton's *The Federalist No. 81*.⁵⁰ The Court reasoned that these three statements repre-

U.S. at 91-2. Justice Stone later referred to the language as "unfortunate dicta." 19 WRIGHT MILLER & COOPER, *supra* note 40, § 4505 at 45 n.7.

45. *See Id.* at 51-52 n.31.

46. 19 WRIGHT, MILLER & COOPER, *supra* note 40, § 4505 at 53-4. *See also*, Friendly, *In Praise of ERIE—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 396 (1964).

47. 19 WRIGHT, MILLER, & COOPER, *supra* note 40 § 4505 at 53-4.

48. *Id.* § 4515.

49. *Pennhurst State Hospital v. Halderman*, 465 U.S. at 98. *See also* *Ex Parte New York*, 256 U.S. 490, 497 (1921) ("the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given . . .").

50. *See* *Edelman v. Jordan*, 415 U.S. at 660 n.9 in which the Court stated:

While the debates of the Constitutional Convention themselves do not disclose a discussion of the question [of state immunity], the *prevailing* view at the time of ratification of the Constitution was stated by various of the Framers in the writings and debates of the period. (emphasis added).

The Court then quoted Madison, Marshall and Hamilton. *See supra* notes 22-26, and accompanying text.

The Court stated its view of the history surrounding the eleventh amendment most thoroughly in *Edelman*. In its decisions after *Edelman*, the Burger Court majorities stated the broad principle that states were immune from suit and simply cited *Edelman* or *Hans* for historical support, e.g., *Pennhurst*, 465 U.S. at 98; *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 and n.2. Therefore, this Note focuses on *Edelman* as demonstrative of the Burger Court's use of historical sources.

sented the positions of all the Ratifiers and concluded that *Chisholm v. Georgia* did indeed “literally shock the Nation” into passing the eleventh amendment.⁵¹ Therefore, the Court concluded, although the amendment addressed only the specific holding in *Chisholm*, it exemplified the broad and accepted rule of state sovereign immunity from suit.⁵²

In *Edelman v. Jordan*,⁵³ the Court most plainly detailed its view of eleventh amendment history. Justice Rehnquist’s opinion, in which Chief Justice Burger and Justices Stewart, White and Powell joined, excerpted Madison’s and Marshall’s statements with little adornment. The Court stated that Madison believed that the article III provision conferring jurisdiction over controversies between the States and foreign States to the federal courts⁵⁴ only operated where both parties consented. The Court quoted Madison:

The next case provides for disputes between a foreign state and one of our states, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, with-

51. The Burger Court’s source for the “profound shock” theory and indeed for all its historical assertions is 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 92-102 (rev. ed. 1937) [hereinafter WARREN]. Even though *Edelman* cited Warren only one time, a comparison of the opinion’s language with Warren’s text clearly shows that Warren’s writing exerted a strong influence on the Court.

Justice Rehnquist writing for the majority cited Warren:

The right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted.

Edelman, 415 U.S. at 660, (citing 1 WARREN, *supra*, at 91). Justice Rehnquist continued that “despite such disclaimers” the first suit entered in the Supreme Court at its 1791 Term was a suit against a state and that additional suits against states were causing “considerable alarm and consternation in the country.” 415 U.S. at 660-662. Warren had used almost the exact same language. 1 WARREN at 91-92 (“Yet in spite of all such disclaimers, the very first suit entered in the Court at its February Term in 1791 was brought against [a state. This suit and others] aroused great alarm. . .”). Justice Rehnquist also described *Chisholm* incorrectly as a suit brought by two executors of a British creditor. 415 U.S. at 662. Warren himself was the author of this view. See *supra* note 8.

52. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 (“[T]he significance of this Amendment lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Article III of the Constitution.”) (citation omitted).

53. 415 U.S. 651 (1974).

54. The relevant constitutional text provides that the judicial power extends to controversies “between a state, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. CONST. art. III, § 2.

out the consent of the parties. If they consent, provision is here made.⁵⁵

According to the Court, Marshall expressed a similar view. He stated: "If a foreign state brought a suit against the commonwealth of Virginia, would she not be barred from the claim if the federal judiciary thought it unjust? The previous consent of the parties is necessary; and, as the federal judiciary will decide, each party will acquiesce."⁵⁶ The Court never explained how these statements justified the conclusion that states were immune from suits by their own or foreign citizens accusing the state of violating federal law.⁵⁷

The Burger Court also cited Alexander Hamilton. Unlike Madison and Marshall, Hamilton directly addressed the question of state immunity. In *The Federalist No. 81* he stated:

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 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.⁵⁸

Unless the Constitution forced this surrender of immunity, Hamilton reasoned, the immunity "[would] remain with the State."⁵⁹ Hamilton concluded that the Constitution did not require such a surrender. Therefore, he wrote, "[t]he contracts between a nation and individuals are only binding on the conscience of sovereign, and have no pretensions to a compulsive force."⁶⁰

According to the Burger Court these statements represented the "prevailing view at the time of the ratification."⁶¹ This belief in sovereign immunity accounted for the shock the country felt about the decision in

55. *Edelman*, 415 U.S. at 660 n.9 (citing 3 THE DEBATE IN THE SEVERAL STATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (J. Elliot ed. 1836) [hereinafter ELLIOT'S DEBATES]).

56. *Id.* (citing 3 ELLIOT'S DEBATES at 557).

57. *E.g.*, *Edelman v. Jordan*, 415 U.S. 651 (1974); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

58. *Edelman*, 415 U.S. at 661 n.9 (emphasis added).

59. *Id.*

60. *Id.*

61. *Id.* at 660 n.9. In this pronouncement, the Court failed to consider the reliability of the sources on which it relied, specifically ELLIOT'S DEBATES. In a recent article Dr. James Hutson, the Chief of the Manuscript Division of the Library of Congress questioned Elliot's purposes for publishing the *Debates*. He also pointed out the deficiencies of the reporters of the state conventions. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 12-24 (1986).

*Chisholm v. Georgia*⁶² and led to the ratification of the eleventh amendment.

B. *The Ratifiers' Statements and Chisholm in Context*

The Burger Court interpreted the history of the ratification of the constitution and of the adoption of the eleventh amendment so as to require a rule of state sovereign immunity. This view rested primarily on two critical historical conclusions. First, the Court accepted the statements of Marshall, Madison and Hamilton as stating the prevailing view of the Ratifiers.⁶³ Second, the Court accepted the theory that *Chisholm v. Georgia* stunned the nation into rapidly adopting the eleventh amendment.⁶⁴ Implicitly, the Court identified the source of this profound shock as being a generally accepted belief that the federal courts could not possess jurisdiction over a state without its consent.⁶⁵

In order to explore the validity of these two historical assertions, this section examines the context in which Marshall, Madison and Hamilton delivered their statements and explores alternative reasons for the rapid passage of the eleventh amendment.

1. *The Virginia Ratifying Convention*

To the Ratifiers, the concept of two coexisting sovereigns defied explanation.⁶⁶ Madison stated that the new government was “a system hitherto without a model” and “a nondescript, to be tested and explained by itself alone.”⁶⁷ In debating the concept of dual sovereignty the members of the Virginia Ratifying Convention examined the state/citizen diversity clause: “The judicial power shall extend to [controversies] between a state and citizens of another state [and] between a state, or the citizen thereof, and foreign states, citizens or subjects.”⁶⁸ The Virginia Ratifiers focused on this clause more extensively than the members of any other state convention.⁶⁹ The debate over the state/citizen diversity clause

62. 2 U.S. (2 Dall.) 419 (1793). For a discussion of this case see *supra* notes 7-8 and accompanying text.

63. See *supra* note 46 and accompanying text.

64. See *supra* note 47.

65. See *supra* note 48.

66. Fletcher, *supra* note 30, at 1067.

67. *Id.* at 1068, (citing J. MADISON, ON NULLIFICATION, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 420-21 (1865)).

68. U.S. CONST. art III, § 2.

69. Fletcher, *supra* note 30, at 1049. When the Virginia Convention convened, eight of the

centered on two issues.

The first issue concerned a series of western Virginia land grants which King George III had conveyed to a private company in 1768. In 1779 the Virginia legislature voided the conveyance, and the shareholders of the company had since been demanding that the state compensate their loss.⁷⁰ The second issue involved the Peace Treaty of 1783. Article IV of the agreement prohibited both the British and American governments from impeding creditors' recovery of valid debts. Article VI meanwhile forbade all future escheats of loyalist property in America.⁷¹ Like most of the states, Virginia had incurred substantial debts both before and during the war which it did not have the resources to repay. Furthermore, the enormous estate of Lord Fairfax had escheated to the state after the signing of the treaty.⁷²

George Mason, a member of the Philadelphia Constitutional Convention, led Virginia's antifederalists in opposing the federal plan.⁷³ In dis-

necessary nine states had ratified the Constitution. The importance of Virginia's ratification cannot be underestimated. Virginia possessed one-fifth of the nation's population and most of the country's best-known leaders. If the state chose not to join or if it wavered, New York, whose convention had not yet met, would most likely have followed its lead. C. BOWEN, *MIRACLE AT PHILADELPHIA* 293-95 (1966) [hereinafter BOWEN]. For a brief review of several other states which examined article III, § 2, see Gibbons, *supra* note 25, at 1902-03 (Pennsylvania); 1908-12 (New York); 1912-14 (North Carolina). For the sake of clarity and precision, this Note focuses on the Virginia debates.

70. Gibbons, *supra* note 25, at 1904. This dispute did reach the Supreme Court but not before the passage of the eleventh amendment required its dismissal. See *Grayson v. Virginia*, 3 U.S. (3 Dall.) 320 (1796) *dismissed sum. nom.* *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798). See also *Atascadero State Hospital v. Scanlon*, 473 U.S. at 262 (1985) (Brennan J., dissenting) (discussing the anti-federalists' fear that non-citizens would hail the states into federal courts).

71. The Peace Treaty plays a paramount role in Judge Gibbons' examination of the eleventh amendment. In addition to the requirements of articles IV and VI, article VII required the British to evacuate all military posts within American territory and to leave behind all slaves. The British did not act accordingly. Gibbons, *supra* note 25, at 1900. The Americans responded to the British non-compliance in their own turn. Many states imposed additional obstacles to British creditors' efforts to collect debts. *Id.* at 1901. Judge Gibbons states that a desire to create an enforcement mechanism for the treaty provided a major impetus for the Philadelphia Convention. He argues that because the Treaty required enforcement against the states, the theory that the Ratifiers of the Constitution believed that states were immune from suit is incorrect. *Id.* at 1902.

72. *Id.* at 1905. The land dispute culminated in the case of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

73. Mason had refused to support the Constitution at the Philadelphia Convention. He feared the institution of a powerful central government. BOWEN, *supra* note 69, at 261-62. Mason also authored the Virginia Bill of Rights which served as a model for many states and for the federal government. See generally H.S. COMMAGER, *THE EMPIRE OF REASON* 217-23 (1977) [hereinafter COMMAGER]. Compare Mason's statements at the Virginia Convention with a provision he wrote in the Virginia Bill of Rights: "[A]ll men . . . have certain rights, of which, when they enter into a state of society they cannot by any compact deprive or divest their posterity." COMMAGER at 220.

cussing that part of article III, section 2 which conferred federal jurisdiction to all cases arising under treaties, Mason stated that “[t]his is one of the powers which ought to be given them.”⁷⁴ At the same time, of the British creditors he said:

Everyone [knows] that I always spoke for the payment of British debts. I wish every honest debt to be paid. Though I would wish to pay the British creditor, yet I would not put it in his power to gratify private malice to our injury.⁷⁵

Mason examined the state/citizen diversity clause and asked, “How will their jurisdiction in this case do?” He warned the convention that claims concerning the western lands would be brought against the state.⁷⁶ He stated:

What is to be done if a judgment be obtained against a state? Will you issue a *feri facias*? It would be ludicrous to say that you could put the state’s body in jail. How is the judgment, then, to be enforced? A power which cannot be executed ought not to be granted.⁷⁷

Finally Mason argued that the state/citizen clause would “prostrate” state legislatures.⁷⁸

In responding to Mason’s objections, James Madison⁷⁹ stated that the

74. 3 ELLIOT’S DEBATES, *supra* note 55, at 523.

75. *Id.* at 526.

76. *Id.* See also *supra* text accompanying notes 70-72 for a discussion of the western Virginia land claims.

77. *Id.* at 527. Mason’s statement left open one important question: What if the power could be executed? At the time of the ratification and for many years after the federal government was weak. But today the federal government, with its immense resources and its ability to cut payments in state programs, could in reality coerce a state into answering a judgment.

78. *Id.* at 527. Mason stated,

There is a confusion in this case. This much, however, may be raised out of it—that a suit will be brought against Virginia. She may be sued by a foreign state. What reciprocity is there in it? In a suit between Virginia and a foreign state, is the foreign state to be bound by the decision? Is there a similar privilege given to us in foreign states? Where will you find a parallel regulation? How will the decision be enforced? Only by the *ultima ratio regum*. A dispute between a foreign citizen or subject and a Virginian cannot be tried in our own courts, but must be decided in the federal court. Is this the case in any other country? Are not men obliged to stand by the laws of the country where the disputes are? This is an innovation which is utterly unprecedented and unheard-of. Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful; it will annihilate your state judiciary: it will prostrate your legislature.

Id.

79. Madison, often called the “Father of the Constitution,” was something less than that. A delegate from Pennsylvania, Gouverneur Morris, in fact wrote the Constitution based upon the various drafts in the Convention. BOWEN, *supra* note 69, at 234-42. Madison also sat on the Committee of Style and Arrangement which drafted the text of the Constitution but he acknowledged that the

Supreme Court should be the final arbiter of treaties.⁸⁰ He answered Mason's attack on the state/citizen diversity clause by stating "[i]t 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."⁸¹ Madison replied to Mason's criticisms of the state/citizen diversity clause by stating that the provision conferred jurisdiction only if the parties consented.⁸² Madison's response came in the context of the dispute over the western lands.

Patrick Henry, another strident anti-federalist, did not find Madison's defense of article III plausible.⁸³ He argued

As to controversies between a state and the citizens of another state, [Madison's] construction of it is to me perfectly incomprehensible. He says it will seldom happen that a state has demands on individuals. There is nothing to warrant such an assertion. But he says that the state may be plaintiff only. If the gentlemen prevent the most clear expression, 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, without discriminating between plaintiff and defendant.⁸⁴

John Marshall rose to defend the Constitution from Henry's attack. He argued that the national interest dictated that the federal courts pos-

"*finish* given to the style and arrangement . . . fairly belongs to the pen of Mr. Morris." *Id.* at 242 (emphasis added). This is not to belittle Madison's achievements, but only to suggest that there are several authoritative sources for determining the Constitution's meanings.

80. 3 ELLIOT'S DEBATES at 532.

81. *Id.* at 533.

82. *Id.* This is the portion of Madison's speeches that the Burger Court quoted. *See supra* note 55 and accompanying text.

83. Henry was no friend of Madison, Washington, or any other federalist. Although named to attend the Philadelphia convention, he refused to attend, saying he "smelt a rat." BOWEN, *supra* note 69, at 18. *Compare* Henry's statements at the Virginia Convention with one he declaimed in 1775, that "the distinctions between Virginians, Pennsylvanians, New Yorkers and New Englanders are no more." COMMAGER, *supra* note 70, at 162, (quoting W.W. HENRY, 1 PATRICK HENRY: LIFE CORRESPONDENCE AND SPEECHES 266 (1891)).

84. 3 ELLIOT'S DEBATES at 543. In part by drawing on Madison's statement and Henry's rebuttal Professor Fletcher concluded that the drafters only intended for article III to confer jurisdiction in state/citizen diversity suits where the state was a plaintiff. The eleventh amendment, therefore, only confirmed that narrow intention and did not prohibit federal question suits against the states by a citizen of that state or by a citizen of another state, a foreigner, or an alien. Fletcher, *supra* note 30, at 1035. Justice Brennan has also reached this conclusion with the concurrences of Justices Blackmun, Marshall and Stevens. *Atascadero State Hospital*, 473 U.S. at 301-02 (Brennan, J., dissenting).

sess jurisdiction of cases arising under the Constitution and Laws of the United States.⁸⁵ According to Marshall, the state/citizen diversity clause only enabled states to bring suits as plaintiffs “to recover claims of individuals residing in other states.”⁸⁶ He also claimed that the state/citizen clause required the previous consent of the parties.⁸⁷

Governor Edmund Randolph, a member of the Committee of Detail at the Philadelphia Constitutional Convention, also discussed article III, section 2.⁸⁸ Although he had not supported the Constitution at the Philadelphia Convention, he changed positions at the Virginia Ratifying Convention.⁸⁹ Before debate over article III began in earnest he stated, “I admire that part which forces Virginia to pay for her debts.”⁹⁰ He later referred to Mason’s remarks, “An honorable gentleman has asked, Will you put the body of the state in prison? How is it between independent states? If a government refuses to do justice to individuals war is the consequence. Is this the bloody alternative to which we are

85. 3 ELLIOT’S DEBATES at 554.

86. *Id.* at 555.

87. *Id.* at 557. The Burger Court quoted Marshall’s discussion of the state/citizen clause. See *supra* note 56 and accompanying text.

Marshall was only discussing state-law based causes of action. When Marshall was Chief Justice in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), the Court addressed the question of the eleventh amendment’s effect on the Supreme Court’s appellate jurisdiction over a Virginia criminal conviction. The Court held that a writ of error brought against the Virginia court was not a suit against the state. The Court continued:

But should we in this be mistaken, the error does not affect the case now before the Court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced, or prosecuted by citizens of another State, or by a citizen or subject of any foreign State. It is not within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origins, the judicial power was extended to all cases arising under the constitution or laws of the United States without respect to parties.

Id. at 412.

Marshall’s earlier statements are only reconcilable with *Cohens* if one recognizes that article III extended the judicial power to two types of cases—one based on party status, the other based on the substantive issues—and that the eleventh amendment only affected party based jurisdiction. *Accord*, *Fletcher*, *supra* note 30, at 1035; *Atascadero State Hospital v. Scanlon*, 473 U.S. at 295-99 (Brennan, J., dissenting); *Gibbons*, *supra* note 24, at 2004.

88. In a remarkable era, Edmund Randolph was a remarkable man. In the 1770s at the age of twenty-three he had been a member of Virginia’s State Constitutional Convention. He served as the state’s attorney general. Later as Attorney General of the United States under George Washington, he argued the position which the Supreme Court adopted in *Chisholm*. See BOWEN, *supra* note 69, at 37-39; *Chisholm*, 2 U.S. (2 Dall.) at 419-21.

89. BOWEN, *supra* note 69, at 263.

90. 3 ELLIOT’S DEBATES at 207.

referred?"⁹¹ He further concluded that the state/citizen diversity clause conferred jurisdiction not only when the states were plaintiffs as Madison and Marshall opined, but also when they were defendants.⁹² Randolph's statements thus indicate that, contrary to the Supreme Court's pronouncements in *Edelman*,⁹³ Madison's and Marshall's views did not represent all of the Ratifiers'.

2. *Hamilton's The Federalist No. 81*

Alexander Hamilton, John Jay and James Madison wrote the eighty-five articles which made up *The Federalist* in order to persuade citizens of New York, a center of anti-federalist discontent, to adopt the Constitution.⁹⁴ None of New York's delegates to the Philadelphia Convention had officially signed the Constitution.⁹⁵

In a leading anti-federalist pamphlet of the period, one critic argued that the state/citizen diversity clause would completely displace the power of the state courts.⁹⁶ Hamilton addressed the attacks expressed in this and other articles in six papers which examined the judiciary, *The Federalist Nos. 78-83*.

In *The Federalist No. 80* Hamilton examined article III, section 2.⁹⁷ He stated that the state/citizen diversity clause rested on the "plain proposition, that the peace of the *whole* ought not to be left at the disposal of a *part*."⁹⁸ He argued that the federal courts ought to have jurisdiction over all cases involving a foreign citizen in order to prevent international unrest⁹⁹ and further recognized that a foreign citizen's case could turn on a construction of "municipal law" but was unclear about

91. *Id.* at 573.

92. *Id.* Although Randolph did possess a great deal of stature during the ratification period, *see supra* note 88, the Burger Court never cited or examined his statements. *But see* *Atascadero State Hospital v. Scanlon*, 473 U.S. at 268-70 (Brennan, J., dissenting) (discussing Randolph's arguments).

93. *Edelman*, 415 U.S. at 671 n. 9; *see also supra* note 50 and accompanying text.

94. THE FEDERALIST LXXXIV - LXXXV (J. Hamilton ed. 1869) [hereinafter THE FEDERALIST].

95. Robert Yates, John Lansing, Jr., and Hamilton were New York's delegates to the Philadelphia Convention. Yates and Lansing left the Convention in July. Hamilton had left in June, returning to the convention from time to time over the summer. When he signed the Constitution in September he apparently did so without his state's authorization. BOWEN, *supra* note 69, at 115.

96. *Brutus No. 13*, in THE FOUNDER'S CONSTITUTION 237-38 (P. Kurland & R. Lerner eds. 1987).

97. THE FEDERALIST No. 80 at 587.

98. *Id.* at 588 (emphasis added).

99. *Id.* at 589.

whether federal courts would apply this law.¹⁰⁰ He also announced that the state/citizen diversity clause was “not less essential to the peace of the union. . . .”¹⁰¹ Hamilton found support for the state/citizen diversity jurisdiction in the Privileges and Immunities clause.¹⁰² He maintained that

[t]o serve 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.¹⁰³

The Federalist No. 81 primarily explored article III, section 1, which vested the judicial power “in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁰⁴ The bulk of this essay allayed fears that the federal judiciary would usurp all legislative functions. In what Hamilton expressly labeled a “digression” from the paper’s subject, he examined an antifederalist suggestion “that an assignment of the public securities of one state to the citizens of another, would enable them to prosecute that state in the federal courts for the amount of those securities.”¹⁰⁵ He answered that states retained their sovereignty unless they gave it up in the “plan of the convention.”¹⁰⁶ He found, though, that the constitution did not divest the states of the privilege to pay their debts in their own way “free from every constraint but that which flows from the obligations of good faith.”¹⁰⁷ He concluded that the “contracts between a nation and an individual are only binding on the conscience of the sovereign, and have no pretension to a compulsive force.”¹⁰⁸ Undoubtedly the antifederalist suggestion

100. *Id.*

101. *Id.*

102. The Privileges and Immunities clause states: “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.

103. THE FEDERALIST, No. 80 at 590.

104. U.S. CONST., art. III, § 1.

105. *Id.* THE FEDERALIST No. 81 at 601.

106. *Id.* at 602.

107. *Id.*

108. *Id.* Hamilton, like Marshall, Madison and Mason, was writing about state law causes of action. Arguably the antifederalists only feared that the diversity clauses in article III gave the federal courts power to create substantive law. See notes 74-92, 96 and accompanying text. Justice Story’s opinion in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) demonstrated how well grounded these fears were. *Swift* held that the decisions of state tribunals concerning commercial law did not bind the federal courts sitting under diversity jurisdiction. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)

Hamilton addressed in this context was a question of state contract law. Implicitly then Hamilton suggested that the state/citizen clause, while authorizing a federal court to obtain jurisdiction, did not grant the courts the power to usurp state contract law under diversity jurisdiction.¹⁰⁹

3. *The Profound Shock of Chisholm v. Georgia*

In *Chisholm v. Georgia*¹¹⁰ the Supreme Court ruled that it held jurisdiction over an action in assumpsit by a South Carolinian against the State of Georgia and ordered the state to discharge its debt. The Court released its opinion on February 18, 1793, and within five years the states ratified the eleventh amendment.¹¹¹ The proponents of the "profound shock" theory argue that the speed with which the states passed the amendment demonstrated that the Ratifiers believed that the Constitution guaranteed a rule of state sovereign immunity.¹¹² This section considers that assumption in light of the various proposed amendments and of other political forces which may have led to the proposal and the ratification of the eleventh amendment.

Many states reacted angrily to the Court's decision in *Chisholm* at least in part because of their considerable indebtedness.¹¹³ One day after the Court's decision, a member of the House of Representatives proposed the following amendment:

That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.¹¹⁴

overruled *Swift*. In examining the statements of Marshall, Madison and Hamilton, the Burger Court never considered the relevance of the *Erie* branch of federal law even though it deals with the same article and section of the Constitution.

109. Cf. Justice Brennan's description of Hamilton's views:

In the cases arising under state law that would find their way into federal court under the state-citizen diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. The States retained their full sovereign authority over state-created causes of action, as they did over their traditional sources of revenue.

Atascadero State Hospital v. Scanlon, 473 U.S. at 276-77.

110. 2 U.S. (2 Dall.) 419 (1793).

111. See *supra* notes 7-9 and accompanying text.

112. See *supra* notes 20-25 and cases cited therein.

113. Fletcher, *supra* note 30, at 1059; Jacobs, *supra* note 8, at 57; 1 WARREN, *supra* note 51, at 99. Another reason for the states' anger is that *Chisholm* was incorrectly reported as a suit on behalf of a British creditor. See *supra* note 8.

114. Fletcher, *supra* note 30, at 1058-59. Some authors dispute whether anyone ever proposed

The next day another resolution proposed the following: "The Judicial power of the United States shall not extend to any suits 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."¹¹⁵ The Second Congress tabled both proposals and adjourned on March 4, 1793, without reconsidering the problem.¹¹⁶

The Third Congress convened in December 1793. On January 2, 1794 an unidentified senator introduced what became the eleventh amendment: "The Judicial power of the United States shall not be construed to extend to any suits 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."¹¹⁷ The Senate and House overwhelmingly passed the amendment after rejecting two other proposals.¹¹⁸

Between the adjournment of the Second Congress and the convening of the Third, a number of forces were threatening the unity of the new nation. While the *Chisholm* Court's opinion certainly aroused dissatisfaction, these other forces also played an important role in persuading the Federalist Congress to propose the eleventh amendment.

this form of the amendment at all. Fletcher's source is a newspaper and he notes that the amendment does not appear in the *Annals of Congress*. *Id.* at 1059 n. 116. Judge Gibbons traced the first account of the proposal to 1 WARREN, *supra* note 51, at 101. Gibbons points out though that no evidence of the resolution exists in the National Archives. Gibbons, *supra* note 25, at 1926 n. 186. Professor Jacobs does not mention this proposal.

115. Gibbons, *supra* note 25, at 1927. Fletcher, *supra* note 29 at 1059; Jacobs, *supra* note 8, at 65.

116. Gibbons, *supra* note 25, at 1927.

117. *Id.* at 1932 (quoting 4 *Annals of Cong.* 25 (1794)).

118. Gibbons, *supra* note 25 at 1932-34. The Senate passed the resolution 23-2; the House voted 81-9. The first defeated proposal would have exempted from the amendment cases arising under treaties of the United States. After this rejection an unidentified senator proposed the following:

The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment.

When the senators and representatives were constructing the text of the eleventh amendment, they were not working with an empty record. A number of state conventions had proposed amendments to article III, § 2. The Virginia convention proposed that the judicial power "shall extend to no case where the cause of action shall originate before the ratification of the Constitution. . . ." 3 ELLIOT'S DEBATES at 661. A New York proposal extended even further: "[T]hat nothing in the constitution now under consideration contained, is to be construed to authorize any suit to be brought against any state, in any manner whatever." 2 ELLIOT'S DEBATE at 409. According to Judge Gibbons these amendments suggest that the Ratifiers believed that article III, § 2 extended to suits where states were defendants or else they would not have offered amendments. Gibbons, *supra* note 25, at 1918. Compare Justice Powell's statements, *supra* note 28.

In April 1793, one month after the Second Congress' adjournment, news first reached America that revolutionaries in France had beheaded King Louis XVI and had declared war on Great Britain, Holland and Spain.¹¹⁹ At the same time a French emissary, Citizen Genet, landed in America to advance the new government's interests.¹²⁰ The French hoped that the United States would accelerate its payments of debt owed to France. Furthermore, they tried to enlist America's aid in harassing British and Spanish holdings in North America.¹²¹ President Washington, however, firmly rejected Genet's advances as the president greatly feared war with the British. Instead Washington issued a proclamation of neutrality over Secretary of State Thomas Jefferson's objections that only Congress had the power to issue such a decree.¹²²

The French intrigue infiltrated the state legislatures which were convening to consider the *Chisholm* decision. In September 1793 Massachusetts called for a constitutional convention to consider the amendability to suit of the states in federal courts. Virginia followed suit in November. By the time the Third Congress met in December, seven other states were considering such a resolution. By January New York's legislature began debating the issue. If New York and the seven other states had adopted convention resolutions, then Article V of the Constitution would have forced Congress to call one.¹²³

This backdrop of French connivance, of a perceived threat of war with Great Britain and of state proposals for a new constitutional convention, in addition to the "shock" of the decision in *Chisholm*, persuaded the Federalist-dominated Congress to pass the eleventh amendment to the states.¹²⁴ *Chisholm* alone probably had not brought about the event. The overriding concern of the Congress could have been the fear that the states would call for a new constitutional convention rather than a desire to restore an original understanding of state sovereign immunity from all claims. After all, the state debates on the diversity clauses focused on

119. Gibbons, *supra* note 25, at 1927-28.

120. *Id.* at 1928.

121. *Id.* at 1929. Also, the French emissary hoped to hold America to its promise in the Treaty of Alliance with France to guarantee "forever against all other powers . . . the present possessions of the crown of France in North America." *Id.* at 1928.

122. *Id.* at 1929. Washington refused to call Congress for fear that the mounting tension would force a declaration of war with the British. *Id.*, (citing A. DECONDE, *ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON, 178-80, 187-90* (1958)).

123. *Id.* at 1930-31.

124. Judge Gibbons also credits these disturbances with having played an important role in convincing a Federalist Congress to propose the amendment. *Id.* at 1931-32, 2003-04.

war debts and land grants.¹²⁵ Thus, the eleventh amendment may only have allowed the new states to avoid old debts and land grants in order to dissuade state legislators from calling a convention during a period of crisis.

III. THE BURGER COURT'S USE OF THE RATIFIERS' STATEMENTS

The crucial historical question for the Burger Court was whether the Ratifiers believed that the constitution dictated a rule of state sovereign immunity.¹²⁶ The Court correctly identified the Ratifiers' views as controlling.¹²⁷ But, though it purported to examine the historical basis of the eleventh amendment, the Court only recited the statements of Marshall, Madison and Hamilton and gave a scanty background of *Chisholm v. Georgia*.¹²⁸ In 1985, when Justice Brennan set forth an extensive review to buttress his argument that no constitutional rule of state sovereign immunity existed, the Court majority of Chief Justice Burger, Justices Rehnquist, Powell, White and O'Connor responded: "The "new evidence," discovered by the dissent [has] been available to historians and Justices of this Court for almost two centuries. Viewed in isolation some of it is subject to varying interpretations."¹²⁹

The Court implicitly made several assumptions when it used the statements of Marshall, Madison and Hamilton. First, it dismissed the fears of prominent antifederalists as irrelevant to the constitution's interpretation.¹³⁰ Second, it disregarded the views of the noteworthy federalist, Edmund Randolph.¹³¹ Finally, the Court imputed these statements not

125. See *supra* notes 66-108 and accompanying text.

126. See *supra* note 28 and cases cited therein.

127. Although the Ratifiers' intention is in principle controlling, some writers argue that the difficulty of ascertaining their intent leaves little choice but to accept the intention of the Framers as reflecting it. E.g., Monaghan, *Our Perfect Constitution*, 56 N.Y.U.L. REV. 353, 375 n. 30 (1981). The Framers, though, did not substantially debate the state-citizen diversity clauses of article III, § 2. The only discussions occurred in the state ratifying conventions and in pamphlets such as THE FEDERALIST. See generally, Fletcher, *supra* note 30, at 1045-54.

128. For the Court's study of the historical basis of the eleventh amendment, see *supra* notes 49-62 and accompanying text.

129. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 n.2.

130. For several of the antifederalist views see *supra* notes 73-78, 83-84, 96 and accompanying text. See generally the material collected in THE FOUNDER'S CONSTITUTION (P. Kurland and R. Lerner 1987). Justice Brennan stated that the Court should examine the ideas of the antifederalists because the federalist's "fervent desire for ratification" might have led them to downplay controversial aspects of the constitution. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 270 n.20.

131. For a discussion of Randolph's statements at the Virginia Convention, see *supra* notes 88-92 and accompanying text.

only to the whole Virginia convention, but also to every other ratifier in every other state.¹³²

The Burger Court also assigned a meaning to these statements which, considered in their entirety, they did not possess. Marshall, Madison and Mason agreed that federal courts should be the arbiter of treaties.¹³³ When Madison and Marshall made their statements that individuals would not have the power to call states into federal courts it was in the context of the relationship between the state/citizen diversity clause and the western Virginia lands disputes.¹³⁴ These disputes concerned state real property law and the Paris Peace Treaty. In the cases of suits under the Peace Treaty, both the antifederalists and the proponents of the Constitution seem to have agreed that article III should permit suits against the states.¹³⁵

In *The Federalist No. 80*, Hamilton argued that federal courts must have jurisdiction over suits by foreign citizens to ensure international tranquility.¹³⁶ He further declared that the jurisdiction over state/citizen diversity cases would guarantee the full effect of the Privileges and Immunities clause.¹³⁷ But, in *The Federalist No. 81* where he declared that the states were sovereign, he was referring to suits against states under state contract law.¹³⁸

On their face the statements of Madison, Marshall and Hamilton did not directly address the question before the Burger Court, whether the eleventh amendment barred an individual's federal question suit against a state. In order to find that these statements required state sovereign immunity from all suits the Burger Court attributed what one semiologist calls a "rich" semantic intent to the words. A "rich" semantic intention supplies the speaker's mind with a wide variety of reasons for making a statement, which may aid a court interpreting specific language.¹³⁹ Here, the Burger Court intimated that Marshall, Madison and

132. Before citing Madison, Marshall and Hamilton in *Edelman*, the Court stated that their views prevailed at the time of ratification. 415 U.S. at 660 n.9.

133. See *supra* notes 74, 80 & 85 and accompanying text.

134. See *supra* notes 81 and 86 and accompanying text. See also note 70 and accompanying text for a discussion of the land disputes.

135. See *supra* note 74 and accompanying text. Mason's views on this point were contradictory. At one point he stated that the federal judiciary ought to have the power to hear cases arising under the treaties. At the same time he begrudged the British creditors right to sue under the treaty. *Id.*

136. See *supra* note 99 and accompanying text.

137. See *supra* notes 102-03 and accompanying text.

138. See *supra* notes 105-08 and accompanying text.

139. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 340 (1985). A

Hamilton were arguing for a broad rule of sovereign immunity from all suits.¹⁴⁰ The Court never justified this claim.

The Burger Court also maintained that *Chisholm v. Georgia* shocked the nation into passing the eleventh amendment.¹⁴¹ The Court implicitly found that the nation believed that all states were immune from suit and that the swift ratification affirmed this general understanding. The Court thereby ignored other possible political forces.¹⁴² This narrow view of history, coupled with the Court's broad reading of Madison, Marshall and Hamilton, distorted its interpretation of the eleventh amendment.

IV. *ERIE RAILROAD* AND THE RATIFIERS

By using a narrow and simplistic version of the historical events surrounding the adoption of both the Constitution and the eleventh amendment, the Burger Court avoided the complex question of whether the doctrine of *Erie Railroad v. Tompkins*¹⁴³ should have affected its inter-

"spare" semantic intention offers only a limited number of possible meanings. A rich semantic intention offers a wide array of possible meanings. Professor Moore maintains that attributing either rich or spare semantic intentions to the speaker is not useful as an interpretive tool. *Id.* at 340-47. The Burger Court's attribution of a "rich" semantic intention to Madison and Marshall was compounded by Court's implicit conclusion that the Virginia convention ratified the Constitution with the belief of this broader intention. In doing so the Court disregarded the fact that Virginia proposed an amendment to article III which would have only forbidden causes of action against the states which had arisen before the ratification of the Constitution. *See supra* note 118.

In another context, Justice Rehnquist, who wrote the *Edelman* decision, recognized this very problem of searching for the intent of a legislature: "Inquiries into [motives] or purposes are a hazardous matter. [What] motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *Hunter v. Underwood*, 471 U.S. 222,228 (1985) (citation omitted).

Finally, the Court's use of Madison's and Marshall's statements may be undermined by Governor Edmund Randolph's declaration at the end of the convention:

Mr. Chairman, one parting word I humbly supplicate.

The suffrage which I shall give in favor of the Constitution will be ascribed, by malice, to motives unknown to my breast. But, although for every other act of my life I shall seek refuge in the mercy of God, for this I request his *justice* only. Lest, however, some future annalist should, in the spirit of party vengeance, deign to mention my name, let him recite these truths—that I went to the *federal Convention* with the strongest affection for the Union; that I acted there in full conformity with this affection; that I refused to subscribe, because I had, as I still have, objections to the Constitution, and wished a free inquiry into its merits; and that the accession of eight states reduced our *deliberations* to the single question of *Union or no Union*. (emphasis added).

3 ELLIOT'S DEBATES, *supra* note 55, at 652.

140. 415 U.S. at 660, n.9.

141. *See supra* notes 61-62 and accompanying text.

142. *See supra* notes 110-24 and accompanying text for a discussion of some political forces which may have shaped the proposal of the eleventh amendment.

143. 304 U.S. 64 (1938).

pretation of the ratifying conventions. The Court in *Erie* had stated that the Constitution compelled its decision.¹⁴⁴ Thus, *Erie* restored a constitutional balance which the Supreme Court itself had upset for almost one hundred years. Plausibly, *Erie* restored what the Framers and Ratifiers intended as the meaning of the diversity clauses.¹⁴⁵

Stated simply, *Erie* required that federal courts sitting in diversity apply state statutory and common law in questions of substantive law.¹⁴⁶ Antifederalists like George Mason and Patrick Henry, afraid of a *Swift*-type¹⁴⁷ interpretation, clearly believed that the diversity clauses were conferring to the federal courts the power to formulate the law governing state obligations in areas like debt and contract.¹⁴⁸ They feared that the federal judiciary would swallow up the state legislatures' power to create the law which governed their citizens.¹⁴⁹ By reference to various state law causes of action, Madison, Marshall, and Hamilton were reassuring these dissenters that the federal courts would discern and apply state law.¹⁵⁰

Erie thus appears to have restored what some Ratifiers intended as the meaning of the diversity clauses. The decision in *Chisholm*,¹⁵¹ therefore, contradicted this view of article III, section 2 which *Erie* later propped and which Madison, Marshall and Hamilton seem to have advocated. History would have been different if *Erie* had preceded *Chisholm*. In *Chisholm*, Georgia, the situs of the contract, would have been the source of the substantive law. Under *Erie*, a federal court sitting in diversity would have applied Georgia's rule of sovereign immunity, allowing Georgia to prevail.¹⁵²

144. *Id.* at 79-80. For a discussion of the constitutional basis of *Erie*, see *supra* notes 44-46 and accompanying text.

145. *Cf.* Friendly, *In Praise of ERIE—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 392-98 (1964); R. BERGER, *FEDERALISM* 179 (1987).

146. See *supra* notes 38-39 and accompanying text.

147. *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842). See *supra* notes 37-40 and accompanying text.

148. While Mason and Henry did not speak in "*Erie* terms" they voiced an important concern of *Erie*: That the federal courts would swallow the state courts. See *supra* notes 70-75, 80-81 and accompanying text.

149. See *supra* note 96 and accompanying text.

150. For the most part, state law causes of action served as the background for the debate in Virginia. In their discussions on the Peace Treaty of 1783 the debaters did not resolve their conflicting interpretations. See *supra* notes 66-68 & 83 and accompanying text. When Hamilton addressed the issue of state sovereignty under the diversity clause, he was addressing the state law question of a state's obligations for debt it had issued. See *supra* notes 106-08 and accompanying text.

151. *Chisholm v. Georgia* 2 U.S. (2 Dall.) 419 (1793).

152. This assumes that the federal courts would find that Georgia's rule of state sovereign immu-

While *Erie* would have dictated a different result in *Chisholm*, it also holds importance for a separate reason. *Erie* vitiated fears such as those of Mason and Henry that the diversity clauses would authorize the federal courts to swallow state legislatures and courts. If *Erie* had somehow existed during the conventions, then the antifederalists would have had little need to pursue their criticisms of the diversity clauses. If they had stayed silent, Madison, Marshall and Hamilton would not have had the opportunity to respond. The Burger Court's historical documentation for its eleventh amendment decisions would not have existed. Because of these problems the Court should have considered how to incorporate its present understanding of the Constitution into its use of the Ratifiers' statements.

V. INCORPORATING THE RATIFIERS' STATEMENTS INTO CONSTITUTIONAL JURISPRUDENCE

The Burger Court's interpretation of the Ratifiers' statements and of the history of *Chisholm v. Georgia* calls into consideration the methodology of using history to construe the Constitution.¹⁵³ When the Court quoted the statements of Madison, Marshall and Hamilton it did not attempt to place them within the specific contexts of the state conventions or the other *Federalists* respectively, nor within the broader cultural context of late 18th century America.¹⁵⁴ At the same time, the Burger Court failed to see that the *Chisholm* ruling itself, notwithstanding the eleventh amendment, could not have existed after *Erie Railroad v. Tompkins*. In order to make its decisions more principled and to give more rational

nity was substantive law. Under *Erie*, as refined in *Hanna v. Plumer*, 380 U.S. 460 (1965), federal courts sitting in diversity apply state substantive law, but retain federal rules of procedure.

153. Historical investigation and legal reasoning are seldom good partners, as Professor Fletcher has stated:

History and law frequently make an awkward marriage, for legal analysis typically selects and molds historical facts to serve its own purposes to a degree that is unknown to conventional history. Whether legal analysis suffers as a result may be an open question, but it is clear that history frequently does.

Fletcher, *supra* note 30, at 1037.

154. The Constitution derives its "force and meaning from a larger political and moral culture. . . ." Richards, *Interpretation and Historiography*, 58 S. CAL. L. REV. 489, 508 (1985). See also Gumperz, *The Speech Community*, in LANGUAGE AND SOCIAL CONTEXT 219 (P. Giglioli ed. 1972) ("verbal interaction is a social process in which utterances are selected in accordance with socially recognized norms."). For historical examinations of the period see generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); COMMAGER, *supra* note 73; BOWEN, *supra* note 69.

effect to the Ratifiers' language, the Court should consider the following procedure.

First, if the Court chooses to attach significance to the statements of the members of a state ratifying convention, it should carefully examine the record of the whole convention. The Court should focus on the differences among the Ratifier's positions and interpret these within the narrow context in which the Ratifiers spoke. The Court should articulate whether the statements of the Ratifiers dispose of the issue before it or only if they inform the debate with more meaning. While reviewing these statements, the Court should hesitate to ascribe to the Ratifiers a rich semantic intent¹⁵⁵ because this opportunity often has led the Court to reconstruct the colonial period in its own image.

Second, the Court should review pamphlets, letters, and broader histories of the period in order to give meaning to the words and phrases which the Ratifiers used. The Court must recognize that the Ratifiers spoke within the broader context of their social period.¹⁵⁶ Indeed the concept of sovereignty seems to have possessed a different meaning in their time.¹⁵⁷

155. The Court can only apply the text if its purposes are usefully understood, Monaghan, *supra* note 127, at 375. By inferring a rich semantic intention, the Court defeats the search for the Ratifiers' belief by not allowing their statements to stand alone. The text's purposes then include any motive the Court desires to find in the Ratifiers' statements.

156. Translation of one nation's language into another is not the sole source of misunderstanding of meaning. The founders choice of words could today possess a very different meaning. For instance, Alexander Hamilton stated that it was "inherent in the nature of sovereignty not to be amenable to the suit of an individual. . . ." See *supra* note 58 and accompanying text. But what meaning did the word sovereignty hold for Hamilton? How do modern Supreme Court Justices reconcile their conception of the meaning of the term with the founders? Simply to recite a statement which Hamilton delivered two hundred years ago, without placing it in some kind of historical/cultural context, divests the message of meaning. It is, as the semiologist Roland Barthes states, an "illusion to consider on equal status the language spoken and the language heard, as if they were the same. . . ." R. Barthes, *Pax Culturalis*, in *THE RUSTLE OF LANGUAGE* 102 (R. Howard trans. 1986).

157. British common law is the source of sovereign immunity with the maxim "The King can do no wrong." But the documents of the colonial period tend to establish the absence of any expectation that the various charter governments were immune from suit. Gibbons, *supra* note 25, at 1895-99. Indeed to impute such an anti-democratic formula to the Framers and Ratifiers runs counter to their general trend of creating a new world divested of the old one's corruption. See generally, COMMAGER, *supra* note 73, at 162-235. Before the Declaration of Independence no colony had pretensions of sovereignty and the word "states" does not appear in that document. At the Philadelphia Convention though, George Washington wrote that the word "states" was like a "monster." BOWEN, *supra* note 69, at 32-34.

In addition to not examining the colonists' understandings about sovereignty, the Burger Court did not consider the influences of the "peculiar institution" of slavery on concepts of state sover-

Third, when the Court finds a conflict in the Ratifiers' statements, it should compare the differing views with present constitutional understanding. Where Court decisions have subsequently clarified the misunderstanding in the constitutional text, the Court should carefully incorporate this view into its interpretation of the Ratifiers.¹⁵⁸

Finally, if after applying these steps, the Court cannot reconcile the Ratifiers' views or incorporate present understanding into the debate, it must choose to base its ruling on other constitutional grounds. In other words, the Court should not rest its decisions on its view of the historical significance of a speaker.¹⁵⁹ Instead the Court's decision should fit within the Court's construction of the constitution as a whole.¹⁶⁰

This model suggests that when the Burger Court examined the statements of Marshall, Madison and Hamilton, it should have recognized that they were only three of many spokesmen in the ratification process¹⁶¹ and that they were merely discussing issues of state law.¹⁶² Instead, the Court ascribed to their words a rich semantic intent to bar all suits against states regardless of their basis in federal or state law.¹⁶³ The

eignty. The state sovereignty theories of Mason, Madison and Jefferson directly evolved into the secessionist doctrine of John Randolph and John C. Calhoun. H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW* 211-13 (1982). The Court should consider whether Federalists like Madison, Marshall and Hamilton made their statements to allay slave owners' fears that the proposed federal government would abolish slavery.

158. A number of the Ratifiers' statements suggest they believed that the diversity clauses conferred on the federal judiciary the power to fashion substantive law. *See supra* note 90. The Supreme Court should consider whether the *Erie* Doctrine affects the relevance of these statements and if so in what manner.

159. The myth of the Founding Fathers is a powerful one. *See generally*, J.O. ROBERTSON, *AMERICAN MYTH, AMERICAN REALITY*, 54-71 (1980). In retrospect, a person like Hamilton or Marshall may seem to rise to greater heights than others. The audience at the time of the ratification, however, may have held Edmund Randolph or Patrick Henry in equal esteem.

160. The Burger Court specifically linked its eleventh amendment doctrine with the Court's concern for the role of the states in the federal system. *Atascadero State Hospital v. Scanlon*, 473 U.S. at 238 n.2. Exhaustive examination of the Ratifiers' statements indicates that they were at best uncertain about the meaning of the diversity clauses and indeed all of article III § 2. *See supra* notes 66-108 and accompanying text. This uncertainty would not prevent the Court from adopting its view of the important role the states play. The Court's failure lay only in the cursory manner in which it used history.

161. *See supra* notes 66-108 and accompanying text for an outline of the broader context in which Madison, Marshall and Hamilton spoke.

162. *See supra* notes 133-38 and accompanying text for a discussion of the state law basis of the debates in Virginia and Hamilton's *FEDERALIST*.

163. *See supra* note 134 and accompanying text for a discussion of the concept of rich semantic intent.

Court should have accepted that the Ratifiers did not directly answer the issue of federal question suits against the states.

Second, the Court should have studied broader histories of the period. Such an examination could have revealed more thoroughly what the Ratifiers meant when they spoke of sovereignty. In all likelihood the term held many meanings. To some it represented a return to the anti-democratic monarchies of the Old World. To others it reflected an idea that states possessed certain powers which the proposed federal government could not take away. This latter concept flowered into the secessionist movements in the 1800s.¹⁶⁴ The question the Court should have addressed was whether either concept of sovereignty holds any strength in the twentieth century.

By not examining histories of the period, the Court too easily accepted the "profound shock" theory.¹⁶⁵ The Burger Court failed to consider other factors such as the passing of the Peace Treaty of 1783, the French intrigues to draw the United States into war, and the Federalist Party's fear of a second constitutional convention.¹⁶⁶ The Burger Court should have acknowledged that the *Chisholm* decision was not the sole impetus for the eleventh amendment.

Third, the Court should have considered the relevance of *Erie*¹⁶⁷ to the eleventh amendment. At the very least *Erie* introduced into the debate an interesting puzzle. In all likelihood the decision made the Ratifiers' discussion of the diversity clauses irrelevant. In light of *Erie*, the Burger Court should have realized that the Ratifiers' views did not answer the question of whether a citizen could bring a federal question suit against a state.

The Burger Court should have based its decisions on other aspects of the Constitution. An easy solution for the Court would have been to rule that the federal judiciary cannot allow suits against states without express Congressional authority to do so.¹⁶⁸ This brief rationale presents

164. See *supra* notes 156-57 for a discussion of the sovereignty concept in the era of the ratification.

165. For an outline of the "profound shock" theory, see *supra*, note 113 and accompanying text.

166. See *supra* notes 119-24 and accompanying text.

167. 304 U.S. 64 (1938).

168. By the rule of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), Congress may authorize suits against states using its powers under fourteenth amendment § 5. Logically the Court could extend this rule to allow federal question suits against states only when Congress authorized such actions regardless of the eleventh amendment.

a defensible ground for the Burger Court decisions. The Ratifiers' statements and the history of the eleventh amendment unfortunately do not.

VI. CONCLUSION

Whatever the federalist merits of the Burger Court's doctrine of state sovereign immunity, the Court's use of history and the Ratifiers' statements was misleading. While legal and historical investigation certainly diverge at points, the Court should have endeavored to support its historical assertions with fact. When the Court chose to adopt the intention of the Ratifiers as controlling, it should have committed itself to a comprehensive review of the history of the ratification period. Instead the Court cited three naked statements out of context.

The history of the adoption and ratification of the Constitution is relevant to constitutional interpretation, but only after a thorough examination of that history. In the future the Court should not cite statements of the Ratifiers without exploring the specific textual context and the relative cultural meaning. The Court must undertake this difficult task in order to maintain defensible principles of constitutional law and to prevent the manipulation of the Ratifiers' statements.

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