

# A VISIBLE RADIATION: INTERPRETING THE HISTORY OF THE ELEVENTH AMENDMENT AS FOREIGN POLICY TO CIRCUMSCRIBE THE TREATY POWER

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## I

## INTRODUCTION

In the longstanding debate over the proper place of the Treaty Power in the Constitution's federal structure, on the one hand there are Federalists and on the other hand there are federalists.<sup>1</sup> During the ratification of the Constitution, many Federalists believed the national government needed an expansive Treaty Power to preserve the nascent union.<sup>2</sup> Today, many federalists see such a Treaty Power as a potential threat to the sovereignty of the states.<sup>3</sup> Between 1998 and 2000, the *Michigan Law Review* published a series of articles by Curtis Bradley<sup>4</sup> and David Golove<sup>5</sup> on competing conceptions of how the Treaty Power fits in the Constitution's federal structure. Bradley argued that federalism delimits the capacity of the national government to create binding national law through the forging of treaties.<sup>6</sup> That is, the national government may not invade the sovereign province of the states by using the Treaty Power to circumvent the restrictions placed on the national government by federalism. In contrast, Golove argued that the national government

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1. In this paper, I discuss the ideological positions of both the historical political group known as the "Federalists," and modern-day legal philosophers known as "federalists." Throughout, I capitalize the name of the historical political party and do not capitalize the name of the modern legal philosophers.

2. See WALTER STAHR, JOHN JAY: FOUNDING FATHER 242–46 (2005) (discussing John Jay's ideal of a strong executive, especially in the international arena); THE FEDERALIST NO. 3 (John Jay). Secretary of Foreign Affairs Jay saw this as necessary even before ratification. STAHR, *supra*, at 186, 203.

3. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005) (reviewing textual, historical, and practical reasons for cabining the Treaty Power).

4. See Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98, 122–23 (2000); Bradley, *supra* note 3.

5. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conceptions of the Treaty Power*, 98 MICH. L. REV. 1075 (2000).

6. Bradley, *supra* note 4, at 98.

may use the Treaty Power to legislate in areas generally reserved to the states so long as the Constitution does not explicitly prevent it.<sup>7</sup> Unfortunately, neither author's argument addressed the history of the most important constitutional event bearing on the issue—the ratification of the Eleventh Amendment.

In this Essay, I make two arguments. First, I argue that the national government may not use the Treaty Power to abrogate Eleventh Amendment protections.<sup>8</sup> The Eleventh Amendment voided specific provisions of the Treaty of Peace that states feared would grant British creditors actionable claims against them and, by cabining the Treaty Power, additionally prevented the national government from negotiating a new treaty that would have held states accountable for their denials of British claims. Whatever the original meaning of the Treaty Power was at the Framing, the Eleventh Amendment redefined and curtailed it dramatically. In fact, the Framers of the Eleventh Amendment saw the Supremacy Clause, and the policy reasons underlying it, not as grounds to tolerate an expansive Treaty Power, but rather as the very reasons to amend the Constitution. The background of the Eleventh Amendment as a response to the Treaty of Peace does not resolve all questions in the debate between Golove and Bradley, but it does provide a more complete picture of the constitutional balance between the national and state governments in light of the Treaty Power.

Second, I argue that the states ratified the Eleventh Amendment to protect themselves from out-of-state plaintiffs—but only out-of-

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7. Golove, *supra* note 5, at 1078.

8. Throughout this Essay, I refer distinctly to the barriers provided by the Eleventh Amendment and those provided by state sovereign immunity, which is the broader constitutional principal partly expressed in the Eleventh Amendment, partly in the Tenth Amendment, and partly implicitly expressed in the Constitution.

state plaintiffs—with claims based on diversity or federal question jurisdiction.<sup>9</sup> The states ratified the Eleventh Amendment in reaction to *Chisholm v. Georgia* but did so more as *Chisholm* pertained to British creditors than as *Chisholm* pertained to American, out-of-state creditors.<sup>10</sup> As a domestic policy measure, the Eleventh Amendment protected interests within each state and simultaneously cut short the emergence of a national court that could have held states accountable for practices that were discriminatory, corrupt, or dangerous to national security. As a foreign policy measure, the Eleventh Amendment expressed American outrage over Britain's refusal to evacuate military posts in the Northwest and expressed the American refusal to pay debts to British creditors.<sup>11</sup> To protect states from British creditors, the ratifiers of the Eleventh Amendment had to preclude British merchants from bringing treaty-based claims under either federal question or diversity jurisdiction. They did not have to preclude in-state plaintiffs from bringing federal question claims, because British merchants could not practicably assign their claims to in-state plaintiffs. Competing interpretations of the Eleventh Amendment insufficiently consider its purpose as a foreign policy measure.<sup>12</sup>

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9. This interpretation is consistent with Lawrence Marshall's methodology and reading of the text of the amendment itself. See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1346 (1989). I discuss Marshall's theory in Part IV.A.

10. *Chisholm v. Georgia*, 2 U.S. 419 (2 Dall.) (1793) (holding that American, out-of-state creditors could bring suits against states for money damages). See *infra* Part III.B.

11. In the Treaty of Peace, the United States promised that the claims of British creditors would be heard and fairly paid, and Britain promised it would remove its military forces from the Northwest Territory. See *infra* Part III.A.

12. See, e.g., William 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, 1130 (1983); see also *Hans v. Louisiana*, 134 U.S. 1, 18 (1890) (noting the "profound shock" theory of the Eleventh Amendment); 1 CHARLES WARREN, *THE SUPREME COURT IN U.S. HISTORY* 101 (rev. ed. 1926). I discuss these theories more in Part IV.B. Although some thinkers have advanced non-historical interpretive frameworks for understanding the Eleventh Amendment, the Court's decisions have emphasized history as the interpretive

In Part II, I outline the tensions in the relationship between the Treaty Power and state sovereign immunity. I begin by sketching out pertinent portions of the Court's recent state sovereign immunity jurisprudence and its probable collision with the Treaty Power. In Part II.A, I briefly describe the text, structural placement, and history of the Treaty Power. In Part II.B, I summarize the positions of two camps on the Treaty Power: (1) nationalists, who contend that the Treaty Power may be used to abrogate state sovereign immunity; and (2) federalists, who believe that broad concerns of federalism preclude such abrogation. In Part III, I recount the history of the Eleventh Amendment as a response to the implications of the Treaty of Peace, the threat to the states of *Chisholm's* precedent for British creditors, the War Crisis of the mid-1790s, and the political exigencies of Democratic-Republicans and Federalists. In Part IV, I explain the implications of this history for both the debate on the Treaty Power and the interpretation of the Eleventh Amendment. I conclude that, regardless of any balance struck in the original

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framework with which to understand the Eleventh Amendment for over two hundred years. Christopher Hart & Mark Sigmon, *Getting Past Originalism in the Doctrine of State Sovereign Immunity* (unpublished manuscript, on file with the Duke Journal of Constitutional Law and Public Policy); *see, e.g., Alden v. Maine*, 527 U.S. 706, 735 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996); *Hans*, 134 U.S. at 18; *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821). Remarkably, the Court has concentrated on historical evidence, despite a dearth of direct evidence on the meaning of the Eleventh Amendment—there are virtually no records of either congressional debates or state ratification debates. Marshall, *supra* note 9, at 1350. This reliance on history is a testament to the endurance of originalism, despite the many pitfalls that many authors have discussed. *See, e.g.,* Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611 (1999); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985). The Eleventh Amendment is a provision so lost in history that it has been constructed and reconstructed based on purported original meaning in radically different ways. *See generally* Hart & Sigmon, *supra*. At times, these originalist interpretations have been palpably divorced from the text of the Amendment itself. William Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1378 (1989). But, if history must guide the interpretation of the Eleventh Amendment, and there are few documents to reveal its historical background, then any reasonable interpretation of the Eleventh Amendment must at least reflect the prevailing political exigencies of the 1790s. Marshall, *supra* note 9, at 1355.

Constitution on the Treaty Power, the history of the Eleventh Amendment indicates that the Treaty Power may not be used to abrogate state sovereign immunity.<sup>13</sup> I also conclude that the states ratified the Eleventh Amendment to cover only out-of-state plaintiffs bringing claims against states under federal question and diversity jurisdiction.

## II

### FEDERALISM AND THE TREATY POWER

In recent years, the United States Supreme Court has altered the balance of federalism by curbing Congress's powers under Article I and the Enforcement Clause of the Fourteenth Amendment. Though the Court has so far only curtailed Congress's ability to abrogate state sovereign immunity under Congress's powers under the Enforcement Clause of the Fourteenth Amendment<sup>14</sup> and Article I,<sup>15</sup> the Court might soon face the issue of abrogation through the use of the Treaty Power. The Treaty Power occupies a unique constitutional position because of its roots in two separate branches of government and its specific incorporation of state interests in crafting national policy. These unique traits underlie the debate over its use as a tool to abrogate state sovereign immunity.

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13. Or, to the extent that state sovereign immunity and the Eleventh Amendment represent distinct sources of protections for states, the Treaty Power may not be used to abrogate those protections afforded by the Eleventh Amendment.

14. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441, 451 (2000) (discussing *City of Boerne v. Flores*, 521 U.S. 507 (1997)). According to Post and Siegel, "Eleventh Amendment immunity, however, can be abrogated by legislation enacted 'pursuant to Congress's Section [sic] 5 power.' The upshot is that the scope of Section 5 power has now become the measure of what federal anti-discrimination legislation may effectively be applied to the states." *Id.*

15. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996).

### A. Recent Federalism Jurisprudence and Treaties

The Court's recent federalism jurisprudence has circumscribed the Enforcement Clause of the Fourteenth Amendment. For example, in *City of Boerne v. Flores*, the United States Supreme Court began to demand "congruence and proportionality" between the violation of a judicially-defined right at issue and the remedy or prophylactic proposed by Congress.<sup>16</sup> *Boerne* concerned the constitutionality of the Religious Freedom Restoration Act of 1993, which Congress had passed to "restore the compelling interest test as set forth in *Sherbert v. Verner*."<sup>17</sup> In formulating its decision in *Boerne*, the Court sought to ensure that legislation passed pursuant to the Enforcement Clause merely enforces—not redefines or creates—substantive rights.<sup>18</sup> The Court's limitation on Congress's Enforcement Clause powers in *Boerne* connotes where Congress may abrogate Eleventh Amendment protections.<sup>19</sup>

The Court's decision in *Florida Prepaid* followed *Boerne*. Congress passed the Patent and Plant Variety Protection Remedy Clarification Act to explicitly abrogate state sovereign immunity in 1992, and College Savings Bank, a business that financed college expenses, quickly filed suit against an entity created by the state of Florida that infringed on College Savings Bank's business methodology.<sup>20</sup> Having already required Congress to indicate explicitly its intent to abrogate state sovereign immunity,<sup>21</sup> and

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16. *Boerne*, 521 U.S. at 508.

17. 42 U.S.C. § 2000bb(b)(1) (1994). The compelling interest test refers to state action infringing on religious freedom.

18. *Boerne*, 521 U.S. at 508.

19. Post & Siegel, *supra* note 14, at 451.

20. *Fla. Prepaid*, 527 U.S. at 630–31.

21. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

having already held that Congress generally could not abrogate state sovereign immunity when legislating solely under its Article I powers,<sup>22</sup> the Court in *Florida Prepaid* struck down Congress's statutory abrogation of state sovereign immunity under the Fourteenth Amendment because Congress had not produced a legislative record sufficient to justify remedial efforts.<sup>23</sup>

Would the law struck down in *Florida Prepaid* have fared any better if had it been cast as a statute enforcing a treaty or simply as a self-executing treaty—not as a mere statute? Today, few treaties include provisions granting causes of action against states.<sup>24</sup> Yet, the national government has contemplated and even ratified such treaties. In the early 1950s, the Truman Administration began negotiating a human rights covenant that would have protected the civil liberties of individuals within the United States beyond what the United States Supreme Court then required under the Fourteenth Amendment.<sup>25</sup> In response to these negotiations, Senator John Bricker (R-Oh.) sought to curtail the Treaty Power by constitutional amendment.<sup>26</sup> In 1954, he came within one vote of passing a resolution in the Senate to cabin the Treaty Power's domestic

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22. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996). *But see* *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 995–1005 (2006) (discussing how the Bankruptcy Clause does not implicate the same kind of state sovereign power as other Article I powers and hence does not implicate sovereign immunity notwithstanding *Seminole Tribe*); *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

23. *Fla. Prepaid*, 527 U.S. at 628. Similar results have been reached in several other cases. *See, e.g., Tennessee v. Lane*, 541 U.S. 509 (2004); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

24. These few treaties include the Warsaw Convention, the Convention on International Civil Aviation, and the Bilateral Air Transport Service Agreement between Panama and the United States. Cory Eichhorn, Comment, *Eleventh Amendment Immunity Jurisprudence in an Era of Globalization: The Tension Between State Sovereign Rights and Federal Treaty Obligations*, 32 U. MIAMI INTER-AM. L. REV. 523, 535 (2001).

25. Golove, *supra* note 5, at 1274.

26. *Id.* at 1275.



legislative scope within those subject matters that Congress otherwise may govern under Article I, section 8.<sup>27</sup> Forty years later, these human rights treaties came back into fashion. In the early 1990s, the United States ratified three human rights treaties: the International Covenant on Civil and Political Rights, the Torture Convention, and the Race Convention.<sup>28</sup> In none of these treaties does the United States outline a comprehensive enforcement scheme to remedy violations of human rights by states within the United States, and in none of these treaties did the Senate foreclose a remedy under 42 U.S.C. § 1983, which protects treaty-based rights.<sup>29</sup> Hence, these treaties might be enforceable against state organs and officers under § 1983.<sup>30</sup> But could the Treaty Power be used to take the last step—making states themselves, not just their organs and officers, liable for violations of civil rights?<sup>31</sup>

When Congress abrogates state sovereign immunity, and thereby allows claims against a state, Congress seeks to remedy and prevent violations of important rights. Yet, the Eleventh Amendment delimits the statutory remedies afforded to individuals. Should remedies created through the Treaty Power be different—impervious to Eleventh Amendment qualifications? Among scholars, a lively debate continues over the proper balance between the Treaty Power and federalism.

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27. *Id.*

28. David Sloss, *Ex Parte Young and Federal Remedies for Human Rights Treaty Violations*, 75 WASH. L. REV. 1103, 1107–08 (2000).

29. *Id.* at 1142.

30. *Id.* at 1142–44, 1154–55.

31. 42 U.S.C. § 1983 (1996).

## B. The Treaty Power: Text, Structure, and History

The Treaty Power is special. Unlike other powers of the national government, it is neither exclusively legislative nor executive in nature, but has components of both.<sup>32</sup> Under the Constitution, the power to make treaties is entrusted to the President and the Senate: “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”<sup>33</sup> Treaties are also mentioned in the Supremacy Clause of Article VI: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”<sup>34</sup> Under the

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32. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 245 (1997); Susan Bandes, Comment, *Treaties, Sovereign Immunity, and ‘The Plan of the Convention,’* 42 VA. J. INT’L L. 743, 748 (2002); see THE FEDERALIST NO. 64 (John Jay), NO. 75 (Alexander Hamilton).

33. U.S. CONST. art. II, § 2, cl. 2.

34. *Id.* art. VI, § 2. According to constitutional doctrine, only self-executing treaties are “supreme” under Article VI. Golove, *supra* note 5, at 1311. Yet, Congress may pass legislation implementing non-self-executing treaties under the Necessary and Proper Clause, even if that means legislating on issues outside of its powers but for the treaty. Golove, *supra* note 5, at 1099–1100, 1311–12. Ever since *Missouri v. Holland*, 252 U.S. 416 (1920), this structural argument has included the role of the Necessary and Proper Clause. In this Essay, use of the “Treaty Power” denotes either the creation of a self-executing treaty or the passage of implementing legislation under the Necessary and Proper Clause, because the analysis for investigating whether laws passed by Congress to execute treaties are subject to the Eleventh Amendment essentially runs parallel to the analysis for whether self-executing treaties are subject to the Eleventh Amendment. Generally, statutes creating claims against states are not permissible. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65 (1996). Yet, Congress may pass such laws under some circumstances, even beyond their Enforcement Clause powers. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 126 S. Ct. 990, 995–1005 (2006). In fact, *Katz* fits squarely within the Treaty Power nationalist camp. It regards the Eleventh Amendment as a reiteration of the original understanding of the federal-state balance, but concludes that the Framing extinguished at least some aspects of state sovereignty, including sovereign power in bankruptcy proceedings. *Id.* Treaty Power nationalists certainly make similar claims about how states surrendered sovereignty over international affairs to the national government during the Framing. See *infra* Part II.C.1.

original, unamended Constitution, the judicial power of the United States extended to cases under treaties.<sup>35</sup>

The Treaty Power is also special because of its placement within the structure of the Constitution and its notable, practical differences from the legislative powers described in Article I. These structural aspects convey its distinctiveness among governmental powers.<sup>36</sup> The Treaty Power is not found in Article I, which addresses the legislative branch, but in Article II, which addresses the executive branch.<sup>37</sup> Though Article I does contain some language relevant to treaties, it simply and explicitly prevents states from negotiating international matters.<sup>38</sup>

The different procedural requirements for creating a treaty vis-à-vis a statute also suggest the special status of the Treaty Power. There are two routes by which a normal piece of congressional legislation may become law. First, it may be passed by both houses of Congress and signed by the President.<sup>39</sup> Second, it may be passed by two thirds of both houses over a President's veto.<sup>40</sup> These routes are each different from the requirements for passage of a treaty, which requires a supermajority of present Senators and, in all circumstances, the President's concurrence.<sup>41</sup> As a general matter,

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35. U.S. CONST. art. III, § 2.

36. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); see generally Akhil Reed Amar, *Document and the Doctrine*, 114 HARV. L. REV. 26 (2000); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

37. See U.S. CONST. arts. I–II.

38. *Id.* art. I, § 10 (“No State shall enter into any Treaty, Alliance, or Confederation.”).

39. *Id.* art. I, § 7.

40. *Id.* art. I, § 8.

41. *Id.* art. II, § 2, cl. 2; Golove, *supra* note 5, at 1299.

these requirements make it far more difficult to pass treaties than normal legislation.<sup>42</sup>

Both the text and structure of the Treaty Power reflect the historical developments of the United States. Under the Articles of Confederation, the national government had tremendous difficulties in binding states to duties that the national government had negotiated in treaties.<sup>43</sup> The Framers of the Constitution drew three principal lessons from these difficulties. First, practical vetoes by individual states on the enforcement of treaties could create severe embarrassment and even war if states failed to live up to the promises made by the national government.<sup>44</sup> Second, the national government needed enough power to ensure that the international obligations it negotiated would be observed by the states.<sup>45</sup> Third, treaties absolutely had to supersede conflicting provisions of state law.<sup>46</sup> Secretary of Foreign Affairs John Jay crystallized these lessons in a report to the Continental Congress on October 13, 1786.<sup>47</sup> Jay's report focused on how the states had expressly delegated their power over foreign affairs to Congress and could no longer participate in

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42. Golove, *supra* note 5, at 1299. Because treaties are so difficult to pass, congressional-executive agreements, which require the same procedures as normal legislation, have become preferred in recent years as a method of creating international agreements. *Id.* at 1297.

43. Carlos Manuel Vazquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 728 (2002).

44. JERALD A. COMBS, *THE JAY TREATY: POLITICAL BATTLEGROUND OF THE FOUNDING FATHERS* 27 (1970); *THE FEDERALIST* NO. 3 (John Jay).

45. COMBS, *supra* note 44, at 27; RAKOVE, *supra* note 32, at 26–28.

46. RAKOVE, *supra* note 32, at 173; Golove, *supra* note 5, at 1103–04; Vasquez, *supra* note 43, at 729.

47. JOHN JAY, *CONGRESSIONAL REPORT ON 'STATE LAWS CONTRARY TO THE TREATY OF PEACE'* (1786), *reprinted in* 2 *THE EMERGING NATION: A DOCUMENTARY HISTORY OF THE FOREIGN RELATIONS OF THE UNITED STATES UNDER THE ARTICLES OF CONFEDERATION, 1780–1789*, at 333, 334 (Mary A. Guinta and J. Dane Hartgrove eds., Wash. Nat'l Historical Publ'ns and Records Comm'n) (1996) [hereinafter Jay Report].

foreign affairs except through their congressional delegates.<sup>48</sup> In addition to having delegated their power, Jay argued that the states were incompetent to make treaties.<sup>49</sup> In his report, Jay specified and evaluated the state laws that, according to British diplomats, violated the Treaty of Peace.<sup>50</sup> Finally, Jay outlined a legislative program to repeal in a uniform manner state laws contradicting the Treaty of Peace.<sup>51</sup> Although the report languished in Congress for months, it was eventually turned into legislation in March of 1787, and weeks later its concerns prompted the framing of the Supremacy Clause and the Treaty Power.<sup>52</sup>

The Supremacy Clause establishes the Constitution, federal statutes passed under the Constitution, and treaties made under authority of the United States as supreme law.<sup>53</sup> The Supremacy Clause notably includes as supreme law those treaties negotiated before the Framing, like the Treaty of Peace, that were made under the authority of the United States even if not made pursuant to the Constitution.<sup>54</sup> Yet, to ensure that the national government did not use the Supremacy Clause to allow treaties to run roughshod over state interests (perhaps to the point of even surrendering a state to end a war), the Framers included the many procedural hurdles to

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48. STAHR, *supra* note 2, at 203. Although this remark seems intuitive today, it was radical at the time. *Id.*

49. Jay Report, *supra* note 47, at 334.

50. STAHR, *supra* note 2, at 203. Jay concluded that New York, Virginia, and South Carolina laws contradicted the Treaty but could not determine whether North Carolina or Georgia laws also did, because he did not have updated copies of their laws. *Id.* at 203–04.

51. *Id.* at 205.

52. *Id.* at 205–06, 246. The congressional legislation caused most states to drop much of their anti-British legislation. *Id.* at 206, 296. In Virginia, however, whose debtors owed more than the debtors of any other states, the British still could not win relief in either state or federal court. *Id.* at 297.

53. U.S. CONST. art. VI, § 2.

54. See U.S. CONST. art. VI, § 2; STAHR, *supra* note 2, at 246.

treatymaking discussed above.<sup>55</sup> Moreover, the Framers placed the duty of advice and consent in the Senate, with its equal representation of states, rather than the House of Representatives, with its proportional representation,<sup>56</sup> because they thought the Senate would better represent state interests on a national level.<sup>57</sup> The Framers also protected state interests by adding a minority veto on treaties by requiring two-thirds of the Senate to concur.<sup>58</sup>

These designs suggest that the Framers created a robust and expansive Treaty Power checked by procedural safeguards meant to incorporate state interests. But how does that carefully struck balance operate if the national government makes a treaty abrogating state sovereign immunity by promising that states will be held accountable in federal courts? Does the necessity of these procedural safeguards within the Constitution suggest that the Court must shield states from a power-hungry President and Senate? Or does the presence of these safeguards suggest that the Court should leave defense of state interests to the states because such strong protections and incorporation of state interests already exist?

### C. The Nationalists and the Federalists on the Treaty Power

#### 1. *The Nationalist Position*

Treaty Power nationalists argue that the Treaty Power should be available to abrogate state sovereign immunity for several reasons:

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55. EDWARD S. CORWIN, NATIONAL SUPREMACY 65–67 (1913); Golove, *supra* note 5, at 1135; Vazquez, *supra* note 43, at 728.

56. CORWIN, *supra* note 55, at 65–67; Golove, *supra* note 5, at 1135.

57. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 168 (2d ed. 1996); RAKOVE, *supra* note 32, at 170; Bradley, *supra* note 3, at 412. Now, with control over congressional redistricting in the hands of state legislatures, it may be more accurate, albeit cynical, to say that U.S. Representatives, not Senators, best represent state interests at the national level.

58. Golove, *supra* note 5, at 1296–97.

(1) treaties are part of “foreign affairs exceptionalism;” (2) the inclusion of states in the treaty-making process fulfills the need to recognize state interests; and (3) federalism is not an explicit provision of the Constitution, and therefore cannot curb the Treaty Power under Court doctrine.

The first major argument of Treaty Power nationalists is that foreign affairs are so delicate and important that state sovereign immunity should not challenge the dominance of the national government in the arena of foreign affairs. Justice James Wilson wrote in *Chisholm* that, “as to the purposes of the Union,” the states are not sovereign.<sup>59</sup> Even though the Eleventh Amendment nullified *Chisholm*, modern Treaty Power nationalists have attempted to resurrect Wilson’s idea by emphasizing the importance of the Treaty Power to the national government. According to Eichhorn:

The Supreme Court should not set forth a plan that allows states to avail themselves of their Eleventh Amendment immunity in the face of international obligations because of the traditional view of treaties as a uniform law which all states must abide, the possibility of private actors having no forum to enforce their rights, and the serious consequences that such a decision could have on international trade and the United States’ position as a world power.<sup>60</sup>

Because of the potentially serious consequences of breaking international promises, nations are generally not permitted under international law to invoke constitutional restrictions, including federal structure, as an excuse for breach.<sup>61</sup>

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59. 2 U.S. (2 Dall.) 419, 457 (1793).

60. Eichhorn, *supra* note 24, at 534; see Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 755–56 (2002) (discussing how treaties might abrogate state sovereign immunity more appropriately and easily than federal statutes).

61. Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 450 (2003). According to Professor Swaine, “[n]ations with federal systems should consider

Professor Bandes agrees with Eichhorn's conclusion based not on foreign affairs exceptionalism, but because of a second reason—the incorporation of state interests into the treaty-making process.<sup>62</sup> According to this argument, the designation of the Senate as the ratifying body and the minority veto in that body both prevent easy treaty-making.<sup>63</sup> The Senate was an especially state-oriented body before ratification of the Seventeenth Amendment in 1913, because state legislatures, not statewide popular elections, chose U.S. Senators.<sup>64</sup> If each state has its say in the formation of treaties, no state should be able to evade its responsibility under those treaties.

The third major thread of nationalist thought on the Treaty Power derives from Court doctrine, chiefly *Missouri v. Holland*.<sup>65</sup> In *Holland*, the Court addressed the power of the national government to regulate intrastate affairs, such as wildlife management.<sup>66</sup> Justice Holmes' opinion in *Missouri v. Holland* blesses the nationalist view, suggesting that general concerns of federalism cannot hamper the ability of a modern, unified nation to act in the international community, because the Constitution must respond to the experiences of the nation.<sup>67</sup> Holmes, a veteran of the Civil War, invoked that crisis in his opinion:

It was enough for [the States] to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a

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the compatibility of treaties with their constitutional orders before concluding them, because any errors are almost certainly not a basis for extricating themselves afterward." *Id.* at 456.

62. Bandes, *supra* note 32, at 748–49.

63. HENKIN, *supra* note 57; Bradley, *supra* note 3, at 412; Golove, *supra* note 5, at 1098–99, 1296–97.

64. Golove, *supra* note 5, at 1098.

65. 252 U.S. 416 (1920).

66. *Id.* at 432.

67. *See id.* at 433–34.



nation. . . . The treaty in question does not contravene any *prohibitory words* to be found in the Constitution. The only question is whether it is forbidden by some *invisible radiation* from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.<sup>68</sup>

Trumpeting *Holland*, Treaty Power nationalists contend that unwritten portions of the Constitution, like structural federalism, have no bearing on the responsibilities of the United States to keep its promises in the international community<sup>69</sup>—federalism is merely an “invisible radiation” of the Tenth Amendment.<sup>70</sup>

By concentrating on the Tenth Amendment and ignoring the explicit “prohibitory words” of the Eleventh Amendment,<sup>71</sup> this doctrinal argument cleverly avoids federalism as a constitutional restriction on the Treaty Power. It is clear under *Reid v. Covert* that the national government may not use the Treaty Power to circumvent explicit constitutional prohibitions.<sup>72</sup> For example, a treaty may not raise revenue, because only the House of Representatives may propose laws raising revenue.<sup>73</sup> In *Reid*, the Court reversed the conviction of a non-military U.S. citizen tried by a U.S. military court in Britain acting without a jury pursuant to an executive agreement.<sup>74</sup> That action violated the defendant’s

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68. *Id.* (emphasis added).

69. *Reid v. Covert*, 354 U.S. 1, 18 (1957); Swaine, *supra* note 61, at 449.

70. Golove, *supra* note 5, at 1257–66. The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

71. Or by adopting a “diversity” theory of the Eleventh Amendment (i.e., the Eleventh Amendment was not meant to address federal question jurisdiction, but merely diversity jurisdiction.). See William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261 (1989).

72. *Reid*, 354 U.S. at 17; CORWIN, *supra* note 55, at 10; Golove, *supra* note 5, at 1084, 1097.

73. See U.S. CONST. art. I, § 7; HENKIN, *supra* note 57, at 203.

74. *Reid*, 354 U.S. at 16.

constitutional right to trial by jury under the Fifth and Sixth Amendments.<sup>75</sup>

But, even if the “invisible radiation” of federalism found in the Tenth Amendment—and the rest of the Constitution’s structure—does not trigger barriers to treaty-making, as *Reid* and *Holland* appear to hold,<sup>76</sup> federalism as articulated in the words of the Eleventh Amendment should. If the explicitness tests of *Missouri* and *Reid* determine what is and is not a barrier to treaty-making, the Eleventh Amendment clearly constitutes a *visible radiation* of federalism—its text represents such “prohibitory words” that explicitly enunciate federalism as a barrier to treaty-making, at least concerning state liability to out-of-state plaintiffs in federal court.

## 2. *The Federalist Position*

The most recent round of debate surrounding the Treaty Power’s relationship to federalism began with Bradley’s articles critiquing the nationalist view.<sup>77</sup> Bradley contends that “if federalism is to be the subject of judicial protection—as the current Supreme Court appears to believe—there is no justification for giving the treaty power special immunity from such protection.”<sup>78</sup> Bradley’s conception of federalism deals with the implicit structure and history of the Constitution and Tenth Amendment as well as current interpretations of the Eleventh Amendment.<sup>79</sup>

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75. *Id.* at 8.

76. *Id.* at 18 (“There is nothing in *Missouri v. Holland* which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution.”) (citation omitted).

77. See Bradley, *supra* note 4; Bradley, *supra* note 3.

78. Bradley, *supra* note 3, at 394.

79. *Id.* at 434–50.

Treaty Power federalists contend that the implicit constitutional restriction of federalism must limit the Treaty Power just as express provisions, such as the Fifth or Sixth Amendments, do.<sup>80</sup> In Bradley's words:

[This would] subject the treaty power to the same federalism restrictions that apply to Congress's legislative powers. Under the approach, the treaty power would not confer any additional regulatory powers on the federal government, just the power to bind the United States on the international plane. Thus, for example, it could not be used to resurrect legislation determined by the Supreme Court to be beyond Congress's legislative powers, such as the legislation at issue in the recent *New York, Lopez, Boerne*, and *Printz* decisions.<sup>81</sup>

In other words, Treaty Power federalists would overturn *Missouri v. Holland* and reify the "invisible radiations" of the Tenth Amendment and the implicit, yet obvious, federal structure of the Constitution.<sup>82</sup>

Bradley makes his argument through four discrete historical observations on the balance of federalism established in the Framing.<sup>83</sup> First, the Framers wanted treaties to be procedurally difficult to make.<sup>84</sup> Bradley argues that the heightened procedural steps required of treaty-making over ordinary legislation do not authorize Congress to overreach its legislative authority, but rather reflect ordained federalist barriers to national governmental power.<sup>85</sup> He contends that a federalist view of the Treaty Power would not

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80. Golove, *supra* note 5, at 1277 (discussing Justice Black's opinion in *Reid v. Covert*, 354 U.S. 1 (1957)).

81. Bradley, *supra* note 3, at 456. This is essentially the same thing that Senator Bricker attempted to do by constitutional amendment. Golove, *supra* note 5, at 1311–12; *see supra* note 26 and accompanying text.

82. Bradley, *supra* note 3, at 458; Carlos Vazquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1343 (1999).

83. Bradley, *supra* note 3, at 417.

84. *Id.* at 410–12.

85. *Id.* at 434–50.

prevent the nation from speaking in a single voice—that voice would just be different, accounting for every state’s input, and not raised as often.<sup>86</sup> Second, the Framers meant treaties to govern only truly international relations—war, peace, and commerce. According to Bradley, treaties may not govern domestic affairs because allowing treaties to do so would provide a route for the national government to take sovereignty from the states.<sup>87</sup> Bradley’s account contains a thorough history of subject matter limitations for treaties, starting with the Framers and continuing through the proclamations of Charles Evans Hughes to today.<sup>88</sup> Third, the Framers chose only the Senate, not Congress as a whole, to consent to treaties because of its representation of state interests, not necessarily national, popular interests.<sup>89</sup> Under Bradley’s theory, the states could protect themselves in the Senate under the Constitution primarily because state legislatures elected U.S. Senators.<sup>90</sup> Finally, the Framers gave only limited powers to the national government in the Constitution, reserving the rest for the states.<sup>91</sup> James Madison made such a concept, implicit in the Constitution itself, explicit in *The Federalist Papers*.<sup>92</sup>

This is a remarkable argument for what it leaves out. Though Bradley relies on some Eleventh Amendment doctrinal principles in constructing his argument,<sup>93</sup> he casts these arguments only as

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86. *Id.*

87. *Id.* at 410–12.

88. *Id.* at 413–14, 429.

89. *Id.* at 412.

90. *Id.*

91. *Id.*

92. THE FEDERALIST NO. 45, at 283 (James Madison) (Bantam Books 2003) (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”).

93. Bradley, *supra* note 3, at 458 (citing *Breard v. Greene*, 523 U.S. 371 (1998)).

indicators of the Court's evolving jurisprudence in the area of state sovereign immunity.<sup>94</sup> Instead of discussing the history of the Treaty Power as originally framed in the Constitution or by the Tenth Amendment, Bradley could have relied on the history of the Treaty Power as *redefined* by the Eleventh Amendment. As evident from its history, the Eleventh Amendment contains specific prohibitory words that delimit the Treaty Power and support Bradley's argument.

### III

#### THE FOREIGN POLICY HISTORY OF THE ELEVENTH AMENDMENT

At first blush, the text of the Eleventh Amendment seems simple enough: "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." Yet the Eleventh Amendment is unusual among constitutional provisions because of the way the U.S. Supreme Court has interpreted it. According to many scholars and judges, the Eleventh Amendment's text does not control the jurisprudence of the principles it expresses.<sup>95</sup> Rather, according to a majority of the Court, state sovereign immunity, which the Eleventh Amendment only partially expresses, affords protections to states beyond the text of the Eleventh Amendment. For example, these state sovereign immunity protections include prohibitions on suits against states filed by in-state plaintiffs.<sup>96</sup> Conversely, the Eleventh Amendment does not

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94. Bradley, *supra* note 4, at 118.

95. See *Blatchford v. Noatak*, 501 U.S. 775, 779 (1991); see, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 18 (1890); Mitchell N. Berman, et al., *State Accountability for Violations of Intellectual Property Rights: How To "Fix" Florida Prepaid (and How Not To)*, 79 TEX. L. REV. 1037, 1046 (2001).

96. *Hans*, 134 U.S. at 18.

protect state officers from suits in equity even though the state can accomplish nothing except through human agents.<sup>97</sup> This hodge-podge jurisprudence has accreted over a century since the Court first disregarded the history of the Eleventh Amendment in favor of political expediency in *Hans v. Louisiana*.<sup>98</sup> In *Hans*, the Court “transformed the Eleventh Amendment from a specific, ordinary, and written part of the Constitution into a paratextual loophole that allowed [the Court] to infuse into the supreme law a ‘principle’ of state sovereign immunity that was textually unmentioned and therefore amorphous, highly elastic, and manipulable at will.”<sup>99</sup> Since *Hans*, the meaning of the Eleventh Amendment has never been simple.

The apparent malleability of the Eleventh Amendment’s text is remarkable because Congress chose its words carefully. Although a resolution to amend the Constitution was initially introduced in February 1793, just days after the Court issued *Chisholm* on February 18, 1793,<sup>100</sup> Congress chose not to act on it for almost a year. The resolution was reintroduced on January 2, 1794, tabled, and then considered in tandem with several other potential constitutional amendments.<sup>101</sup> Congress discussed changes to the proposed amendment, including making it purely prospective, a suggestion that was defeated.<sup>102</sup> On January 14, 1794, the Senate explicitly considered whether claims arising under treaties should be

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97. *Ex parte Young*, 209 U.S. 123, 154 (1908).

98. Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and “Federal Courts,”* 81 N.C. L. REV. 1927, 1933–34 (2003) (discussing the three major reasons why *Hans* should have no precedential value).

99. *Id.* at 1937.

100. STAHR, *supra* note 2, at 296.

101. 4 ANNALS OF CONG. 25 (1794).

102. *Id.* at 30–31. This suggestion, like the proposal by Albert Gallatin, which is discussed below, would have allowed claims to be brought against the states under the Treaty of Peace.

exempted.<sup>103</sup> Senator Albert Gallatin of Pennsylvania sought to amend the resolution to read as follows:

The Judicial Power of the United States, *except in cases arising under treaties made under the authority 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.<sup>104</sup>

The Senate rejected Gallatin's proposed exceptional language.<sup>105</sup> But why? The Eleventh Amendment is widely considered to have been enacted solely in direct response to the U.S. Supreme Court's ruling on state liability to American out-of-state creditors in *Chisholm*.<sup>106</sup> According to this popular account, the Eleventh Amendment was purely designed to save states money during a time of great debt.<sup>107</sup> But if the Eleventh Amendment was meant merely to protect states against suits by American out-of-state citizens seeking payment for debts incurred during the Revolutionary War, why did Congress not exclude treaty-based claims from those barred by the proposed Eleventh Amendment?

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103. John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1932–33 (1983).

104. 4 ANNALS OF CONG. 30 (1794) (emphasis added). The fact that this language was considered and rejected has been considered by the Court in dicta. See *Alden v. Maine*, 527 U.S. 706, 735 (1999). Gallatin here is clearly referring to the Treaty of Peace, as indicated by his invocation of “treaties made under the authority of the U.S.,” language that parallels the supremacy clause’s recognition of the supreme nature of the Treaty of Peace. See U.S. CONST. art. VI, § 1, cl. 2.

105. Only Senators Gallatin and Rutherford of New Jersey voted for Gallatin’s amendment to the resolution. 4 ANNALS OF CONG. 31 (1794). Of the state legislatures that considered the Eleventh Amendment, only Pennsylvania and New Jersey, the home states of Senators Gallatin and Rutherford, refused to ratify it. WARREN, *supra* note 12, at 101.

106. 2 U.S. (2 Dall.) 419 (1793). See, e.g., NORMAN K. RISJORD, *JEFFERSON’S AMERICA, 1760–1815*, at 339 (2d ed. 2002); STAHR, *supra* note 2, at 296; WARREN, *supra* note 12, at 96 (discussing the “profound shock” theory of the Eleventh Amendment); Berman, *supra* note 95, at 1045; Eichhorn, *supra* note 24, at 526–27; Fletcher, *supra* note 12, at 1045.

107. JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 7 (1987).

Judge John Gibbons has attempted to square the rejection of Gallatin's amendment with Gibbons' understanding of the Eleventh Amendment by contending that Gallatin's language was merely redundant and unnecessarily controversial and that Congress actually sought to preserve treaty-based claims.<sup>108</sup> As discussed below, it is unrealistic to argue that U.S. Senators of the Federalist Era would see the potential redundancy of Gallatin's amendment as a reason to reject it. It is more likely that the Senate rejected Gallatin's amendment because Senators sought to prevent British creditors from bringing claims under the Treaty of Peace. After all, *Chisholm* had spurred British creditors to file numerous claims in federal courts.<sup>109</sup> Moreover, the state ratification debates over the Eleventh Amendment occurred during an Anglo-American war crisis. This encouraged both Democratic-Republicans and Federalists alike in Congress and state legislatures to ride a wave of anti-British feeling by ratifying the Eleventh Amendment. In contrast, Federalist figures in the national government's executive and judiciary sought to ease Anglo-American tensions through the immensely unpopular and unpopulist Jay Treaty by dealing with the claims of British creditors without relying on the states. In this way, the failures of the Treaty of Peace spawned both the Eleventh Amendment and the Jay Treaty.<sup>110</sup> To get a complete picture of federalism and the Treaty Power, scholars should consider the close ties between the Treaty Power and the Eleventh Amendment.

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108. Gibbons, *supra* note 103, at 1934–36; Mark Strasser, Chisholm, *the Eleventh Amendment, and Sovereign Immunity: On Alden's Return to Confederation Principles*, 28 FLA. ST. U. L. REV. 605, 620–21 (2001). Gibbons asserts, "The Gallatin proposal . . . was not needed, since the Eleventh Amendment in its final form excluded from federal courts *only* suits against states where jurisdiction was based exclusively on Article III's grant of party-status jurisdiction." Gibbons, *supra* note 103, at 1936 (emphasis added).

109. See WARREN, *supra* note 12, at 99.

110. See Gibbons, *supra* note 103, at 1899.



### A. Revolutionary War Debt and the Treaty of Peace

Treaty Power scholars argue over the Framers' intent in crafting the Treaty Power. But the basis of the Framers' understanding of the Treaty Power—the Treaty of Peace—grew out of a Revolution over a decade old at the time of the Framing. Treaty Power scholars should consider the causes and results of the Treaty of Peace in determining the original and subsequent meanings of the Treaty Power.

The role of debt in spurring the American Revolution is well-documented.<sup>111</sup> Before the Revolution, the British Parliament passed several acts, among them the Navigation and Currency Acts, to solidify Britain's grip on trade with the colonies and collect on the colonists' debt to the Crown for protection during the Seven Years War and Pontiac's Rebellion.<sup>112</sup> These acts limited colonial trade and greatly increased deficits in the colonies.<sup>113</sup> The amount of colonial debt owed to British mercantile firms grew wildly in the last ten years before the Revolution.<sup>114</sup> In response to increasing trade problems, colonists retaliated against Britain commercially—Virginia's courts even closed their doors to prevent the debt hearings that British creditors sought.<sup>115</sup> In quick succession, commercial retaliation gave way to military retaliation.

Debt—this time owed domestically and to countries beside Britain—continued to play an important role in American politics during and after the Revolutionary War. According to James

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111. See, e.g., WOODY HOLTON, *FORCED FOUNDERS: INDIANS, DEBTORS, SLAVES, AND THE MAKING OF THE AMERICAN REVOLUTION IN VIRGINIA* (1999).

112. *Id.* at 51.

113. *Id.*

114. Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1434 (1989).

115. HOLTON, *supra* note 111, at 126.

Ferguson, “The war for independence . . . gave birth to Congressional functions requiring money expenditures and, most important, created a large domestic and foreign debt.”<sup>116</sup> In addition to paying expenditures, Congress authorized the impressment of goods and services during the war.<sup>117</sup> These widespread impressments further indebted Congress to many creditors, especially in states like New York that hosted a great deal of military activity.<sup>118</sup> During the war, many states paid soldiers when Congress could not afford it and impressed both domestic- and foreign-owned goods for military use.<sup>119</sup>

In the aftermath of the war, the states with the heaviest domestic debts, like Massachusetts and South Carolina, wanted Congress to assume their war debts.<sup>120</sup> The political twists and turns of domestic state debt assumption caused fluctuations in the debt speculation markets centered in New York City.<sup>121</sup> Of the many categories of Revolutionary War debt, domestic state debt was the best for speculation.<sup>122</sup> Many domestic debts sold for pennies on the dollar and before long were concentrated in the hands of relatively few

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116. E. JAMES FERGUSON, *THE POWER OF THE PURSE: A HISTORY OF AMERICAN PUBLIC FINANCE, 1776–1790*, at xv (1961). Congress funded much of the war using loans, and by 1783, owed about \$11 million in loan certificates to specific wealthy creditors of Congress, \$17 million in final settlement certificates to soldiers and civilian creditors, and \$13 million in certificates of accrued interest. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800*, at 137–38 (1993).

117. FERGUSON, *supra* note 116, at 58.

118. *Id.* at 59.

119. *Id.* at 180; FORREST McDONALD, *THE PRESIDENCY OF GEORGE WASHINGTON* 50–51 (1974). Several states, including Maryland, Virginia, and Pennsylvania, also authorized impressments. FERGUSON, *supra* note 116, at 59–61.

120. ELKINS & MCKITRICK, *supra* note 116, at 147. South Carolina was an exception to the pattern of lessened debt in the South. FERGUSON, *supra* note 116, at 212.

121. FERGUSON, *supra* note 116, at 256–58.

122. ELKINS & MCKITRICK, *supra* note 116, at 138; FERGUSON, *supra* note 116, at 270.

investors.<sup>123</sup> Concentration was especially high for state debts.<sup>124</sup> According to Stanley Elkins and Eric McKittrick, “Seventy-two percent of the North Carolina debt, for example, was held by a group small enough to have met in one room.”<sup>125</sup> National assumption of state debts would dramatically improve the value of these debts.<sup>126</sup> As part of the nationalization process, the national government would collect from debtor states and pay creditor states for their expenses during the Revolutionary War.<sup>127</sup> This move was politically popular, because each state thought it would be a creditor when the national government settled the accounts.<sup>128</sup>

On the whole, the Revolutionary War debts that the states owed to domestic creditors were not large or frightening, especially given the economic growth of the 1780s.<sup>129</sup> On June 29, 1793, the final settlement of the state accounts for the Revolutionary War was completed.<sup>130</sup> Only New York owed a substantial sum—just over \$2 million.<sup>131</sup> The other states were either creditors or debtors owing anywhere from \$100,000 to \$612,000.<sup>132</sup> By 1794, the national government had assumed most state debts, which at the time constituted over \$18 million.<sup>133</sup> At that point, the states altogether

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123. ELKINS & MCKITRICK, *supra* note 116, at 138 (“\$12.3 million in Continental securities for which there are specific records was held by 3,300 individuals, 100 of them holding \$5 million of it, and another 170 holding \$2.6 million more. In state debts the concentration was even more striking.”); FERGUSON, *supra* note 116, at 251, 273 (discussing the example of Massachusetts).

124. ELKINS & MCKITRICK, *supra* note 116, at 138.

125. *Id.*

126. FERGUSON, *supra* note 116, at 207–17.

127. ELKINS & MCKITRICK, *supra* note 116, at 120–21.

128. FERGUSON, *supra* note 116, at 212; McDONALD, *supra* note 119, at 97.

129. GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 394 (1998).

130. FERGUSON, *supra* note 116, at 332–33.

131. *Id.* at 333.

132. *Id.* Massachusetts, the largest creditor, owed \$1,248,000. *Id.*

133. CLYDE JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 69 (1972).

retained only about \$8 million in domestic debt from the Revolutionary War.<sup>134</sup> Hamilton projected that amount would be cut in half by the end of 1795.<sup>135</sup>

In addition to drawing upon patriotic resources, states seized the estates of Loyalists and passed laws forcibly transferring debts owed to British creditors to state-controlled loan offices.<sup>136</sup> By doing so, states began to collect on debt contractually owed to British merchants.<sup>137</sup> Jay, Franklin, and Adams used these recovered debts as a significant bargaining chip when they negotiated the end of Anglo-American hostilities in 1782.<sup>138</sup> Although it is impossible to know how much value the potential claims had when the negotiations occurred, they were sizeable; even at the outset of the war, American debtors had owed at least \$28 million to British creditors.<sup>139</sup>

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134. *Id.*

135. James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1350 (1998).

136. Gibbons, *supra* note 103, at 1899–1901; Golove, *supra* note 5, at 1151.

137. Gibbons, *supra* note 103, at 1900–01. Britain was primarily concerned with impediments to debt collection in Virginia. STAHR, *supra* note 2, at 200. According to Egerton Ryerson:

[H]ad Virginia especially been honest enough to have permitted the payment of debts which her people owed to British subjects before the war, the first years of our freedom would not have been stained with a breach of our public faith, and the long and angry controversy with Great Britain, which well-nigh involved us in a second war with her, might not have occurred.

2 EGERTON RYERSON, *THE LOYALISTS OF AMERICA AND THEIR TIMES: FROM 1620 TO 1816*, at 142 (1880). State juries and judges additionally reduced interest on pre-war debts and discharged debts of creditors that did not file timely, even though courts could not notify British creditors. Holt, *supra* note 114, at 1439.

138. Gibbons, *supra* note 103, at 1899.

139. *Id.* at 1900–01. In Hamilton's 1790 report to Congress, he thought the state debts to British creditors would cost the national government around \$25 million. MCDONALD, *supra* note 119, at 58–59. When a mixed commission finally dealt with the claims in 1802, the U.S. government paid out only just over \$2.6 million to British creditors, a number far less than the potential value of the claims in 1783. SAMUEL FLAGG BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* 110 (5th ed. 1965).

To construct a lasting peace, Jay, Franklin, and Adams demanded the removal of British troops in the Northwest and American ports.<sup>140</sup> In exchange for the evacuation of troops, the Americans guaranteed in the Treaty of Peace that “creditors on either side, shall meet with no lawful impediment to the recovery of the full value of sterling money, of all bona fide debts heretofore contracted,”<sup>141</sup> and that Congress would suggest, but not require, state governments to make restitution for property seized from Loyalists.<sup>142</sup> Not even the British believed that the most important states would actually follow Congress’s recommendation to return seized property to Loyalists.<sup>143</sup> Indeed, while South Carolina quickly moved to strike names off of the list of the banished and returned property to Loyalists, New York, Massachusetts, and Virginia were “neither merciful nor just.”<sup>144</sup> More importantly, when Congress turned out to be incapable of making states open their courts to British creditors, the British kept their posts.<sup>145</sup>

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140. STAHR, *supra* note 2, at 100.

141. Treaty of Peace, U.S.-Gr. Brit., art. IV, July 16, 1782, 8 Stat. 80. Jay dutifully explained to Congress, which largely despised the idea of paying British merchants, that it needed to pay to secure evacuation of the posts. STAHR, *supra* note 2, at 176.

142. Gibbons, *supra* note 103, at 1900–01. Jay drafted these requirements and recommendations. STAHR, *supra* note 2, at 165, 297. Jay also drafted the treaty provisions to allow British merchants, but not American Loyalists, to seek compensation for debts incurred before the war. *Id.* at 165. Article IV of the Treaty of Peace dealt with British creditors. Article V dealt with American Loyalists. See Treaty of Peace, *supra* note 141, art. IV–V. Ultimately, Britain would pay many of the Loyalists’ claims but not those who had claims under the Treaty. See 2 RYERSON, *supra* note 137, at 174.

143. SAMUEL FLAGG BEMIS, THE DIPLOMACY OF THE AMERICAN REVOLUTION 235 (Greenwood Press 1983) (1935); BEMIS, *supra* note 139, at 59, 72; COMBS, *supra* note 44, at 4. Parliament recognized this implicitly by appropriating money to give relief to Loyalists. BEMIS, *supra* note 139, at 72.

144. 2 RYERSON, *supra* note 137, at 141–42; see also CLAUDE HALSTEAD VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION 295–96 (2004) (describing the persecution of Tories in New York State).

145. COMBS, *supra* note 44, at 11–13; ELKINS & MCKITRICK, *supra* note 116, at 126. The British kept their posts to maintain their fur trade in the region by protecting traders and Indian

British creditors turned to the federal courts. In the years following ratification of the Treaty of Peace, British creditors filed many suits against states.<sup>146</sup> This put many states at substantial risk from British merchants seeking sequestered property and from American debtors who had paid their debts to the state loan offices instead of British merchants.<sup>147</sup> Given the lingering hostilities between the United States and Britain, coupled with the amount of the claims against U.S. debtors, many Americans despised the idea of paying British creditors. Many states kept their statutory impediments to British debt collection or even enacted further ones.<sup>148</sup> The already difficult situation for American debtors was so bad in the southern states that they considered leaving the Union rather than fulfilling their obligations under the Treaty of Peace and subsidizing security for northern states.<sup>149</sup>

On the whole, the domestic state debts were not serious.<sup>150</sup> In comparison, American debts to British creditors loomed large. Treaty Power scholars should consider that treaty-based claims in the Federalist Era represented the largest and most bitter-tasting debt. Valued at \$28 million at the beginning of the war, debts to British

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hunters. COMBS, *supra* note 44, at 11–12, 91; ELKINS & MCKITRICK, *supra* note 116, at 126. At the time, furs were extraordinarily profitable. *Id.*

146. WARREN, *supra* note 12, at 99.

147. Gibbons, *supra* note 103, at 1903. The financial burden would not be small. See BEMIS, *supra* note 139, at 110; Fletcher, *supra* note 71, 1273 (“Claims against the states under the treaty involved enormous amounts of money, sought by loyalists and British subjects, at a time when political tension with Britain was high.”).

148. STAHR, *supra* note 2, at 202–04. The situation was particularly bad in Virginia—its debtors owed more to British creditors than the debtors of any other state. COMBS, *supra* note 44, at 83; STAHR, *supra* note 2, at 203. While most states eventually began allowing suits by British plaintiffs, Virginia held firm, and neither federal nor state courts there offered help to British creditors. STAHR, *supra* note 2, at 297. Between 1790 and *Chisholm*, British creditors filed over one hundred cases against debtors in Virginia federal court. *Id.*

149. Gibbons, *supra* note 103, at 1924.

150. FERGUSON, *supra* note 116, at 336.

creditors with interest were nearly four times greater than the \$8 million in domestic state debts that existed before the Eleventh Amendment ratification process began.

## B. The Meaning of *Chisholm*

Several of the Court's earliest cases dealt with state debts to domestic and foreign individuals,<sup>151</sup> but the case that most directly and quickly pitted the Court against a state after the Framing was *Chisholm*.<sup>152</sup> *Chisholm* spurred the Eleventh Amendment's ratification, as virtually all scholars agree, but it did so in large part because of its relevance to British creditors. Once Treaty Power scholars consider this aspect of *Chisholm*, they can better evaluate the importance of the Eleventh Amendment to their debate.

South Carolinian Robert Farquahar had provided materials to Georgia during the Revolutionary War, but Georgia refused to pay for them.<sup>153</sup> After Farquahar died, his executor, another South Carolinian, Alexander Chisholm, sued Georgia to recover the money owed.<sup>154</sup> Chisholm initially sued in lower federal court but later

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151. Indeed, the very first case docketed in the U.S. Supreme Court, *Vanstaphorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791), dealt with state debt to individual citizens. JACOBS, *supra* note 133, at 43. John Jay, then Secretary of Foreign Affairs, was selected by Maryland in that case to serve as an arbiter and did not recuse himself from presiding over the case. 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 14, 18 (Maeva Marcus ed., 1994) [hereinafter 5 DHSC]. These debt cases were not traditional debt collection cases. In one set of cases—*Vanstaphorst*, 2 U.S. 401, *Cutting v. South Carolina*, (U.S. 1797) in JACOBS, *supra* note 133, at 62–63, and *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)—states did not refuse to pay because of insolvency but because of irregularities or lack of proof of the underlying debt. JACOBS, *supra* note 133, at 70. In some of these cases, states ultimately paid the debt even after it became apparent that the Eleventh Amendment would protect the states. *Id.* In another set of cases—*Grayson v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), *Moultrie v. Georgia*, (U.S. 1797) in JACOBS, *supra* note 133, at 63, and *Vassall v. Massachusetts*, (U.S. 1793) in JACOBS, *supra* note 133, at 62—states were impleaded, not directly sued. JACOBS, *supra* note 133, at 70. None of the cases concerned state paper, securities, or loan certificates issued by a state. *Id.*

152. 2 U.S. 419.

153. ORTH, *supra* note 107, at 12.

154. *Id.*

brought the claim in the U.S. Supreme Court under its original jurisdiction.<sup>155</sup> Chisholm was represented by Edmund Randolph, the U.S. Attorney General, in his personal capacity.<sup>156</sup> Despite not facing an opponent, Randolph engaged the Court with the fundamental questions that the case presented. He acknowledged that Chisholm's position was unpopular and attempted to defuse populist paranoia over the erosion of state power by saying that "the prostration of State-rights is no object to me," and that states "need not fear an assault from bold ambition."<sup>157</sup>

Georgia did not enter an appearance—it denied the right of the Court to hear the case.<sup>158</sup> The Court ruled in Chisholm's favor, with only Justice Iredell dissenting.<sup>159</sup> Each of the four concurring seriatim opinions concluded that the Constitution authorized the Court's jurisdiction over suits against states filed by out-of-state citizens.<sup>160</sup> Of the *Chisholm* opinions, Chief Justice Jay's opinion especially made the states begin to fear their obligations under the Treaty of Peace, because Jay loudly promoted a powerful national government,<sup>161</sup> and he had chosen to be on the Supreme Court instead of in Washington's cabinet to do so.<sup>162</sup> In addition to its controversial

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155. *Id.* at 12–13.

156. *Id.* at 13.

157. 5 DHSC, *supra* note 151, at 132, 134.

158. ORTH, *supra* note 107, at 13.

159. Iredell called the question differently based on his belief that a citizen could not bring such a suit against the government under British common law. *Id.* at 13–14.

160. ORTH, *supra* note 107, at 14–15.

161. STAHR, *supra* note 2, at 90; see also THE FEDERALIST NO. 3 (John Jay), *supra* note 92, at 14 ("[T]he national government will be more wise, systematical and judicious, than those of individual States, and consequently more satisfactory with respect to other nations, as well as more safe with respect to us."). Iredell also agreed that the judicial power of the United States covered issues arising out of treaties. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793).

162. McDONALD, *supra* note 119, at 38. In fact, Jay's main purpose in sitting on the Supreme Court bench was to enforce the Treaty of Peace. According to Jay biographer Walter Stahr,



content, Jay's opinion was the only opinion published in a newspaper.<sup>163</sup> According to Jay's opinion:

[T]he *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; *in their national character and capacity, the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties*; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent.<sup>164</sup>

Even though the plaintiff in *Chisholm* did not invoke a treaty-based right and Congress had failed to provide the Court with federal question jurisdiction in the Judiciary Act of 1789, the Justices,

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Jay was interested in being Chief Justice . . . because he expected the new federal courts to handle important issues, especially international issues. The state courts were still not allowing British creditors to recover from American debtors. Jay feared that, if the United States did not honor this critical provision of the peace treaty, Britain would not honor the provision requiring it to evacuate the forts, and some frontier incident would lead to a war. From his perspective, therefore, the most pressing problem facing the new federal courts was to enforce British debts, and thus prevent a second war.

STAHR, *supra* note 2, at 272. Jay had already sought to use lower federal courts to enforce the treaty that he had negotiated. When riding circuit in Connecticut, Jay struck down a state statute he held to be inconsistent with the Treaty of Peace. *Id.* at 281 & n.25. Jay similarly had struck down a state statute in Rhode Island under the Contracts Clause. *Id.* at 291 & n.52. After *Chisholm*, Jay continued to use the courts to remedy wrongs enacted against British creditors. *Id.* at 297–300; 1 MELVIN I. UROFSKY & PAUL FINKELMAN, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 159–60 (2d ed. 2002). Ultimately, the U.S. Supreme Court, without Jay, would uphold Jay's decisions in these cases. *See, e.g.*, *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 242–43, 245 (1796) (holding that Article IV of the Treaty of Peace nullified a Virginia law impeding payment to British creditors). Jay was able to avoid criticism after *Chisholm* in other cases involving states by having a jury decide legal matters under his guidance rather than issuing a written opinion himself. STAHR, *supra* note 2, at 309. In these cases, Jay was only partially able to assuage British concerns with the way that debts were treated in the United States. *Id.* at 312.

163. *A Citizen of the United States*, NATIONAL GAZETTE, Aug. 3, 1793, *reprinted in* 5 DHSC, *supra* note 151, at 232 n.1. Jay's opinion appeared in the Federalist paper, *GAZETTE OF THE UNITED STATES*, in August 1793. *Id.*

164. *Chisholm*, 2 U.S. at 474 (second emphasis added).

especially Chief Justice Jay, focused on such questions.<sup>165</sup> In his opinion in *Chisholm*, Jay grabbed for further national government power by relying on the Constitution, not the Judiciary Act of 1789, for jurisdiction.<sup>166</sup> Because three other justices also made this point, *Chisholm* formed the precedent that the Court had constitutional, not statutory, jurisdiction over treaty-based claims.

*Chisholm*, and especially Jay's opinion, threatened the legitimacy of state laws protecting American debtors against British creditors.<sup>167</sup>

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165. After all, Jay had been responsible for cataloguing the problems associated with fulfillment of state obligations under the Treaty of Peace. ORTH, *supra* note 107, at 16–17; 1 UROFSKY & FINKELMAN, *supra* note 162, at 157; see *supra* Part II.A. Since at least October 1786, Jay had espoused a strongly nationalistic view of the Treaty Power. STAHR, *supra* note 2, at 203. According to Jay, states could only participate in the treatymaking process through their representatives in the national government, and, once the national government ratified a treaty, “it immediately becomes binding on the whole nation, and super-added to the laws of the land, without the intervention, consent or fiat of state legislatures.” Jay Report, *supra* note 47, at 334. This vision of national supremacy was espoused by Randolph in oral argument in *Chisholm* as a way of preserving international peace and reiterated by Jay in his opinion. JACOBS, *supra* note 133, at 49. The year after his report, many of Jay's Federalist friends incorporated Jay's ideas into key clauses of the Constitution, including the bar on state treaties, the Supremacy Clause, and the text and structure of the Treaty Power. STAHR, *supra* note 2, at 206.

166. Years earlier, Jay had given a specific justification for the Court's constitutional jurisdiction in cases arising out of treaties:

Because under the national Government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense, and executed in the same manner—whereas adjudications on the same points and questions, in thirteen States, or in three or four confederacies, will not always accord or be consistent; and that as well from the variety of independent courts and judges appointed by different and independent Governments, as from the different local laws and interests which may affect and influence them. The wisdom of the Convention in committing such questions to the jurisdiction and judgment of courts appointed by, and responsible only to one national Government, cannot be too much commended. . . . The case of the treaty of peace with Britain, adds great weight to this reasoning.

THE FEDERALIST NO. 3 (John Jay), *supra* note 92, at 14.

167. Many Americans were particularly nervous that the courts would force them to pay the British claims, because Jay had previously publicly stated that the confiscation of British debts was illegal and that the Americans had violated the Treaty of Peace as much as the British had. ELKINS & MCKITRICK, *supra* note 116, at 395; see also STAHR, *supra* note 2, at 203–05 (discussing Jay's belief that some state laws had violated the Treaty of Peace and had even preceded British violations of the Treaty). Part of this sentiment likely arose from the fact that Jay's father, Peter Jay, had been an agent for British merchants and had earned his money by collecting debt for

The decision, though protecting a patriot of the American Revolution, set the precedent that the opponents of the Revolution could sue states. Among the populace, this generated widespread fear and anger that state treasuries were vulnerable to litigation by British creditors, Tories, and Loyalists.<sup>168</sup> State treasuries faced a large loss from these claims.<sup>169</sup> Some congressional delegates responded right away to this fear. Within days after the Court announced *Chisholm*, Massachusetts Representative Theodore Sedgwick introduced a resolution in the House for a constitutional amendment that would bar suits against states in federal court by any person.<sup>170</sup> The next day, Massachusetts Senator Caleb Strong introduced a similar resolution in the U.S. Senate barring suits against a state by citizens of another

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British merchants. STAHR, *supra* note 2, at 5. In addition, Jay's law practice in New York City had consisted primarily of commercial debt actions. *Id.* at 29.

168. WARREN, *supra* note 12, at 99. According to Warren,

Although opposition to the Court's decision was to some extent based on divergencies of political theories as to State sovereignty, the real source of attack on the *Chisholm Case* was the very concrete fear of the 'numerous prosecutions that will immediately issue from the various claims of refugees, Tories, etc., that will introduce such a series of litigation as will throw every State in the Union in the greatest confusion.'

*Id.* at 99; see also Pfander, *supra* note 135, at 1278 (arguing that the "shock" resulting from *Chisholm* stemmed from a fear that states would be required to honor old debts).

169. See Gibbons, *supra* note 103, at 1900–01 (stating that, immediately prior to the War, American debts to British merchants totaled about \$28 million).

170. STAHR, *supra* note 2, at 296; 5 DHSC, *supra* note 151, at 365 n.61, 597. This resolution read:

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.

*Pennsylvania Journal and Weekly Advertiser* 1, col 2 (Feb 27, 1793) reprinted in Fletcher, *supra* note 71, at 1269 & n.45. Congress could have later adopted this type of blanket amendment, but instead used words that only explicitly circumscribe the ability of only out-of-state plaintiffs to sue states in law or equity, probably in reaction to *Chisholm*'s legal action in assumpsit and Vassall's equitable claim. See "The True Federalist" to Edmund Randolph, Number III, INDEPENDENT CHRONICLE (Boston), Feb. 6, 1794, reprinted in 5 DHSC, *supra* note 151, at 253, 256; 5 DHSC, *supra* note 151, at 365.

state or a foreign state.<sup>171</sup> State legislatures began inquiring into their state liabilities and evaluating the potentially dire state consequences of *Chisholm*.<sup>172</sup> But reaction to *Chisholm* was not unanimous; rather, ultra-federalists loudly supported the decision, and even mainstream Federalist newspapers like the *Connecticut Courrant* and the *Gazette of the United States* responded to *Chisholm* favorably.<sup>173</sup> Generally, reaction to *Chisholm* was partisan, with Federalists supporting the decision and Democratic-Republicans opposing it.<sup>174</sup> In Congress, both resolutions were tabled, and Congress adjourned without taking further action.<sup>175</sup> *Chisholm* had no immediate legislative impact.<sup>176</sup>

*Chisholm* encouraged Tories and Loyalists to file and press suits, especially against states such as South Carolina, Georgia, Virginia, and Massachusetts.<sup>177</sup> The most important of these cases was *Vassall*

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171. STAHR, *supra* note 2, at 296; 5 DHSC, *supra* note 151, at 365 n.61, 597.

172. 5 DHSC, *supra* note 151, at 365.

173. John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1435 (1975); see also *A Citizen of the United States*, *supra* note 163, at 232 (“For my own part, I have never yet heard a good reason assigned, why a fraudulent state should not be amenable to justice, as well as a fraudulent individual! for such we know there are.”).

174. Nowak, *supra* note 173, at 1434. State sovereign immunity was a contentious issue, not only between states, but within many states. For example, the strange and shifting responses of New York to a contract suit filed by Eleazer Oswald arose from political contests within the state legislature over potential instructions to the state attorney general. 5 DHSC, *supra* note 151, at 62–64. Even in Georgia, whose House passed legislation making it a capital offense to attempt to enforce *Chisholm*, political actors were not unanimous—the state Senate failed to act on the House’s frightening legislation. *Id.* at 135. Similarly, newspapers published tracts both for and against state sovereign immunity and its implications for foreign plaintiffs in Massachusetts. See generally 5 DHSC, *supra*, at 389–424 (presenting myriad articles that argue the merits and shortcomings of sovereign immunity relative to the plaintiff’s demand for payment from the state in *Vassall v. Massachusetts*).

175. Fletcher, *supra* note 12, at 1059. Vassall believed, perhaps correctly, that the Eleventh Amendment was created to defeat his claim against the state of Massachusetts. 5 DHSC, *supra* note 151, at 369.

176. 5 DHSC, *supra* note 151, at 597.

177. WARREN, *supra* note 12, at 99. These states, with federal constitutional and treaty-based claims mounting against them, were later particularly ardent supporters of the Eleventh

*v. Massachusetts*.<sup>178</sup> *Vassall* concerned Loyalist William Vassall, who had left Massachusetts during the Revolutionary War, after which the state seized his property.<sup>179</sup> The state of Massachusetts auctioned off Vassall's furniture and mortgaged his home.<sup>180</sup> After the United States negotiated the Treaty of Peace with Britain, Massachusetts passed a law in March 1784 allowing Loyalists to reclaim seized, unmortgaged properties, but eight months later officially confiscated all mortgaged properties.<sup>181</sup> Vassall sued, claiming he had been damaged by the state's confiscation act, which Vassall claimed contravened the prohibitions against future confiscations contained in the Treaty of Peace.<sup>182</sup>

When the Court issued process in *Vassall* in June 1793 on Massachusetts Governor John Hancock, the state legislature grappled with how to respond.<sup>183</sup> The problem was that the clear language of the Treaty of Peace, which said "there shall be no future confiscations made," conflicted with the express purpose of the later Massachusetts law confiscating Loyalist property.<sup>184</sup> The legislature considered making an appropriation to pay the debt or judgment, seeking an

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Amendment. Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 114–15 (1989).

178. In fact, *Vassall* was probably the basis for the original resolutions proposing the terms later adopted as the Eleventh Amendment. Massachusetts Representative Theodore Sedgwick and Senator Caleb Strong, who likely introduced amendment resolutions directly after *Chisholm*, might actually have responded to leaked news regarding the Court's processing of *Vassall*, and not to *Chisholm*. See 5 DHSC, *supra* note 151, at 365 n.61. Of course, the precedent of *Chisholm* gave teeth to the Court's proceedings in *Vassall*.

179. JACOBS, *supra* note 133 at 60; 5 DHSC, *supra* note 151, at 352–69.

180. 5 DHSC, *supra* note 151, at 354.

181. *Id.* at 355.

182. Treaty of Peace, *supra* note 141, art VI.

183. JACOBS, *supra* note 133, at 61. Not all states were as reactionary as Massachusetts or Virginia. Despite the fact that New York's state sovereignty was under threat from suit in *Oswald*, the New York Assembly, against the recommendation of Governor George Clinton, refused to pass resolutions similar to those of Massachusetts and Virginia. 5 DHSC, *supra* note 151, at 63.

184. See Treaty of Peace, *supra* note 141, at art. VI; 5 DHSC, *supra* note 151, at 355.

advantageous construction of the judiciary article, or seeking to amend the Constitution.<sup>185</sup> But the patent, anti-British prejudice of Massachusetts, expressed in newspapers and legislative committees, prevented any real consideration by the Massachusetts legislature of honoring claims by Loyalists or Tories.<sup>186</sup> In the words of one Massachusetts resident, “If [Vassall] should obtain what he has sued for—what a wide extended door will it open for every DIRTY TORY, TRAITOR to his countries liberties to enter.”<sup>187</sup> Moreover, Massachusetts would be unlikely to win a favorable interpretation of the judiciary article, based on *Chisholm*.<sup>188</sup> If U.S. Attorney General Edmund Randolph, who represented Vassall just as he had represented Chisholm, brought this case to the *Chisholm* Court, headed by Federalist and Treaty of Peace negotiator Chief Justice Jay, the Court would strike down the Massachusetts law as unconstitutional, making the Treaty of Peace and its assurances for Tories the supreme law of the United States.<sup>189</sup>

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185. JACOBS, *supra* note 133, at 61.

186. See, e.g., Marcus, MASS. MERCURY (Salem), July 13, 1793, reprinted in 5 DHSC, *supra* note 151, at 390 (“Let the *freemen* of Massachusetts but *only hear*, much more *see*, that the arm of a tyrannical power is *uplifted to strike a blow at their liberties*. . . .”); but see Veritas, COLUMBIAN CENTINAL (Boston), July 17, 1793, reprinted in 5 DHSC, *supra*, at 390–91 (noting that the principles underlying the decision of a former Massachusetts Chief Justice weigh “in favour of a foreign citizen”).

187. *Democrat*, MASS. MERCURY (Salem), July 23, 1793, in 5 DHSC, *supra* note 151, at 394; see also *The Crisis*, No. XIII by “A Republican,” INDEPENDENT CHRONICLE (Boston), July 25, 1793, reprinted in 5 DHSC, *supra*, at 395 (“For should it be admitted that the *States may be sued in the Federal Judiciary*, the numerous prosecutions that will immediately issue from the various claims of refugees, tories, etc. will introduce such a series of litigation, as will throw *every State in the Union* into the greatest confusion.”).

188. 5 DHSC, *supra* note 151, at 361–64.

189. *Id.* Randolph advised Vassall that the Court would affirm *Chisholm* and strike down the Massachusetts law as contravening the Treaty of Peace. *Id.* at 364.

The Massachusetts legislature ultimately decided to push for a constitutional amendment barring court jurisdiction over the issue.<sup>190</sup> The Massachusetts legislature passed a resolution urging congressional action in September 1793<sup>191</sup> and forwarded its resolution to other state legislatures for their consideration.<sup>192</sup> Connecticut passed a similar resolution a month later and was joined by Virginia, South Carolina, and Maryland before the end of 1793.<sup>193</sup> Several other states began moving to pass analogous resolutions, including Pennsylvania, New Hampshire, and North Carolina, before being preempted by congressional action.<sup>194</sup> At the beginning of 1794, the U.S. Senate again considered Senator Strong's resolution to amend the U.S. Constitution and, after giving itself two more weeks, finally came to a vote on the resolution.<sup>195</sup>

The precedent of *Chisholm* threatened to turn the provisions of the Treaty of Peace into enforceable claims.<sup>196</sup> Although the states could largely pay their debts because the national government had already assumed most of them,<sup>197</sup> citizens became enraged over the course of the year after *Chisholm* that Americans might now have to pay those who fought against the Revolution. The pursuit of claims

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190. JACOBS, *supra* note 133, at 62. The state failed to appear before the Court and continuances were repeatedly granted until 1797, when the case was dismissed. *Id.*

191. Fletcher, *supra* note 12, at 1058. This resolution differed slightly from an earlier version written in June 1793. Compare *Report of a Joint Committee of the Massachusetts General Court*, INDEPENDENT CHRONICLE (Boston), June 20, 1793, reprinted in 5 DHSC, *supra* note 151, at 230–31 with *Resolution of the Massachusetts General Court*, Sept. 27, 1793, reprinted in 5 DHSC, *supra*, at 440.

192. *Id.*

193. See generally 5 DHSC, *supra* note 151, at 609–11.

194. See generally *id.* at 612–16.

195. 4 ANNALS OF CONG. 25–31 (1794).

196. Marshall, *supra* note 9, at 1358.

197. See JACOBS, *supra* note 133, at 69 (“[O]ver two-thirds of the debts of the states had been assumed by the federal government, and the state governments, for the most part, were able and willing to meet their obligations.”).

like *Vassall*, based on the *Chisholm* precedent, pushed state legislatures to suggest constitutional change in order to prevent payouts to opponents of the Revolution. Thus, contrary to what many scholars argue, the immediate political context of the ratification of the Eleventh Amendment was not the Court's decision in *Chisholm* protecting American patriots,<sup>198</sup> but rather *Chisholm*'s value as precedent to British creditors.

### C. The War Crisis

The international context of 1793–95 compounded the already mounting anger and fear over litigation by British creditors. It is within this context that Treaty Power scholars should understand the ratification of the Eleventh Amendment in order to gauge its relevance to their debate. The Eleventh Amendment was an anti-British act.<sup>199</sup>

Anti-British feelings were widespread throughout the United States even before the war crisis.<sup>200</sup> In April 1793, President Washington first heard that France and Britain had committed to war against each other.<sup>201</sup> The United States proclaimed official neutrality between France and Britain but continued to supply

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198. Marshall, *supra* note 9, at 1358–59. Many scholars have emphasized American creditors rather than British creditors. See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 185 (2d ed. 2002) (claiming erroneously that *Chisholm* was decided in 1794 and that Congress passed the Eleventh Amendment within three weeks of the decision); Marshall, *supra* note 12, at 1378.

199. According to Clyde Jacobs:

[I]n Congress, as well as in the state legislatures, there was strong opposition to recognition of any liability to reimburse British creditors or to make restitution for the seizure of Loyalist property. In fact, this was the transcendent political issue of 1794 and 1795, when the Eleventh Amendment was under active consideration.

JACOBS, *supra* note 133, at 70–71.

200. See STAHR, *supra* note 2, at 200 (describing British violations of the peace treaty and labeling Britain as “the main threat to American security” at this time).

201. BEMIS, *supra* note 139, at 95.



French colonies in the West Indies.<sup>202</sup> After all, France had been an ally in revolution against monarchy, and the United States had promised to protect French colonies in the Caribbean.<sup>203</sup> But many people in northern states, especially those exposed to the frontier, wanted the United States to fulfill its treaty obligations so that Britain would no longer have an excuse to maintain its military presence in the Northwest.<sup>204</sup> With British troops still in the Ohio River Valley,<sup>205</sup> Pennsylvanians feared further Anglo-American hostilities or incitement of Britain's Indian allies.<sup>206</sup> By the beginning of 1794, when Congress considered the Eleventh Amendment resolution, Congress was already primed to act on American ill-will toward Britain.<sup>207</sup>

When it appeared that Congress would pass an amendment erecting new barriers to fulfill promises made in the Treaty of Peace, thus potentially endangering Americans on the frontier, it was Senator Gallatin from Pennsylvania (a frontier state) who suggested

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202. *Id.* at 96–97.

203. *Id.*

204. STAHR, *supra* note 2, at 200; ELKINS & MCKITRICK, *supra* note 116, at 126. This desire was voiced despite Britain's already diminished military presence on the American frontier. After France declared war on Britain, Britain essentially abandoned its posts on the North American continent. According to Combs:

The whole of Britain's North American colonies now contained a total of thirty-five hundred regular troops, including those in Nova Scotia and New Brunswick. The frontier posts were greatly undermanned. Detroit and Niagara had a few more than three hundred men apiece guarding the walls, but Michilimachinack had only sixty-one, Erie thirty-nine, and Ontario fifty-four. The fortifications themselves were in a ruinous state.

COMBS, *supra* note 44, at 138.

205. ORTH, *supra* note 107, at 17.

206. This threat was vivid in the minds of many frontier Americans—on November 4, 1791, Indians had routed St. Clair's Army and chased them back to Fort Washington on the Ohio River. ELKINS & MCKITRICK, *supra* note 116, at 271. In response, many American leaders called for the British to quit their posts. *Id.*

207. Nowak, *supra* note 173, at 1438.

the Eleventh Amendment not apply to claims arising under treaties.<sup>208</sup> To facilitate the removal of British troops from the Northwest pursuant to the Treaty of Peace, Gallatin sought to maintain the power of federal courts to enforce the Treaty of Peace against the states.<sup>209</sup> He failed. Widespread hostility toward British creditors spurred passage of the resolution in the Senate without Gallatin's exception for treaty-based claims.<sup>210</sup> A week before the House voted on the resolution, word arrived that the British had issued an order allowing the seizure of American ships carrying goods from the French West Indies.<sup>211</sup> The House, after some further discussion and proposed amendments, passed the resolution proposing the Eleventh Amendment to the states on March 4, 1794.<sup>212</sup> Both Democratic-Republicans and Federalists in Congress had overwhelmingly supported the Eleventh Amendment during a spasm of anti-British hatred.

The uneasy peace between the United States and Britain continued to erode as tensions ran high during the spring of 1794 over British troop placement in the Northwest and the British navy's

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208. See *supra* note 104 and accompanying text. Gallatin was also concerned that a new constitutional convention, an opportunity for French intrigue, would jeopardize the nation's future. Gibbons, *supra* note 103, at 1935.

209. 5 DHSC, *supra* note 151, at 600; Gibbons, *supra* note 103, at 1933. Gallatin may also have been concerned that, if the Eleventh Amendment was enacted, the national debt would further increase as the national government stepped up to pay off the claims of foreign creditors of states. Gallatin and Secretary of the Treasury Alexander Hamilton viewed the national debt very differently. Hamilton saw a national debt as an affirmative good because it could serve as liquid capital that, if properly governed, would help develop the country and be a "national blessing." ELKINS & MCKITRICK, *supra* note 116, at 116. Gallatin did not agree. SELECTED WRITINGS OF ALBERT GALLATIN xxiv (E. James Ferguson ed. 1967); RAYMOND WALTERS, JR., ALBERT GALLATIN: JEFFERSONIAN FINANCIER AND DIPLOMAT 60 (1957).

210. ORTH, *supra* note 107, at 20.

211. Nowak, *supra* note 173, at 1439.

212. Fletcher, *supra* note 71, at 1290-91.

further interference with American-French trade in the Caribbean.<sup>213</sup> By March 24, 1794, Washington received word that the British navy had begun seizing American shipments and impressing American sailors in the Caribbean.<sup>214</sup> Within days, Washington also received word that the longstanding tensions in the Northwest had come to a head—Governor Lord Dorchester had exhorted Indians there to prepare for war against the United States.<sup>215</sup>

These actions stoked the fires of anti-British fervor in the United States, pushing the United States and Britain to the brink of war.<sup>216</sup> They brought swift and nearly unanimous responses. Democratic-Republicans and Federalists, who did not want to appear soft on Britain, began to ratify the Eleventh Amendment in state legislatures;<sup>217</sup> Congress pushed forward embargoes and sequestration bills.<sup>218</sup> Two states, Rhode Island and New York, ratified the Eleventh Amendment immediately after learning of the British seizures and impressments.<sup>219</sup> The British campaign also gave rise to a month-long embargo against Britain starting at the end of March.<sup>220</sup> Weeks later, despite learning that Britain had established a new, less aggressive order, the House Committee of the Whole

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213. BEMIS, *supra* note 139, at 99–100; ELKINS & MCKITRICK, *supra* note 116, at 375; McDONALD, *supra* note 119, at 135–37 (discussing, inter alia, British arming of slave revolts and allowing Barbary pirates to prey freely upon Americans as further reasons Americans despised Britain).

214. ELKINS & MCKITRICK, *supra* note 116, at 388–391, STAHR, *supra* note 2, at 313.

215. ELKINS & MCKITRICK, *supra* note 116, at 392; STAHR, *supra* note 2, at 313; *see* BEMIS, *supra* note 139, at 99–100; COMBS, *supra* note 44, at 91. Americans greatly feared a combined British-Indian attack. STAHR, *supra* note 2, at 200.

216. Golove, *supra* note 5, at 1116.

217. Nowak, *supra* note 173, at 1439–40.

218. BEMIS, *supra* note 139, at 100.

219. *See* U.S. Constitution: Amendments to the Constitution of the United States of America, <http://caselaw.lp.findlaw.com/data/constitution/amendments.html#f3> n.3 (last visited Feb. 7, 2007).

220. COMBS, *supra* note 44, at 121.

passed an additional bill banning commerce with Britain on April 15, 1794.<sup>221</sup>

Foreseeing a looming military and commercial crisis, Treasury Secretary Hamilton implored President Washington to send Chief Justice Jay to London to work out a new treaty.<sup>222</sup> Because Federalists were relatively powerful in the Senate and in the minority in the House, a treaty dealing with the debts would be more likely to succeed than mere legislation.<sup>223</sup> On April 16, 1794, Washington nominated Jay as a special envoy to try to take the air out of attempts by Congress and the states to retaliate commercially against Britain.<sup>224</sup> In doing so, President Washington sought to soothe relations by seeking a new treaty with Britain that did not rely on the cooperation of individual states or the House.<sup>225</sup>

The American envoy had three major areas of complaint: (1) the British military presence in the Northwest; (2) the expansion of the definition of “contraband,” which resulted in increased seizures of American shipments to French colonies; and (3) Britain’s refusal to lower restrictions on American shipping to Britain.<sup>226</sup> In the negotiations, the payment of debts and the evacuation of the posts were always connected, reciprocal obligations.<sup>227</sup> Washington’s ploy

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221. *Id.* at 122.

222. BEMIS, *supra* note 139, at 101. Jay had had extensive experience in foreign relations under the Articles of Confederation and during the start of Washington’s administration. He was Washington’s first pick for Secretary of State, but Washington granted his wish to be Chief Justice instead. MCDONALD, *supra* note 119, at 27, 38.

223. MCDONALD, *supra* note 119, at 106–07 (discussing that Federalists generally had control of the Senate, but not of the House, after the election of 1792).

224. COMBS, *supra* note 44, at 122.

225. *Id.* at 104; MCDONALD, *supra* note 119, at 106–07, 141.

226. ELKINS & MCKITRICK, *supra* note 116, at 377; STAHR, *supra* note 2, at 317–18.

227. ELKINS & MCKITRICK, *supra* note 116, at 397. Even after negotiations, when the Senate was determining whether to ratify, Alexander Hamilton continued to connect occupation of the posts with the barriers states had erected to collection of British debts. *See id.* at 434–35.

to use a special envoy to take the wind out of the sails of anti-British hysteria largely worked in the House,<sup>228</sup> but one after another, the state legislatures continued to ratify the Eleventh Amendment.<sup>229</sup> By the time Jay returned with treaty terms, ten more states had ratified, completing the procedural requirements outlined in the Constitution for ratification of an amendment.<sup>230</sup>

The political test of the Jay Treaty did not reach Philadelphia until March 7, 1795.<sup>231</sup> The Jay Treaty guaranteed that the United States would pay Britain for the bona fide debts contracted before the Treaty of Peace.<sup>232</sup> The Jay Treaty itself did not address the debts owed to British creditors; that question was referred to a special mixed commission established by the treaty.<sup>233</sup> The Jay Treaty also prohibited either the United States or Britain from supplying military aid to Indians in the border area.<sup>234</sup> The treaty required Americans to exhaust their judicial remedies in Britain before referring their claims

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228. COMBS, *supra* note 44, at 127, 135 (discussing how most congressional Anglo-American legislation got sidetracked after the Eleventh Amendment went to ratification procedures and Washington nominated Jay as an envoy); *see, e.g.*, MCDONALD, *supra* note 119, at 142–43.

229. *See* U.S. Constitution, *supra* note 219, at n.3.

230. These states were: Connecticut, May 8, 1794; New Hampshire, June 16, 1794; Massachusetts, June 16, 1794; Vermont, between October 9 and November 9, 1794; Virginia, November 18, 1794; Georgia, November 29, 1794; Kentucky, December 7, 1794; Maryland, December 26, 1794; Delaware, January 23, 1795; and North Carolina, February 7, 1795. *Id.* at n.3. The Eleventh Amendment was officially added to the Constitution on January 8, 1798, when President Adams notified Congress that the required number of states had ratified the amendment. *Id.*

231. ELKINS & MCKITRICK, *supra* note 116, at 417.

232. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. VI, Nov. 19, 1794, 8 Stat. 116. [hereinafter Jay Treaty]; ORTH, *supra* note 107, at 17.

233. Jay Treaty, *supra* note 232, art. VI; BEMIS, *supra* note 139, at 101; ORTH, *supra* note 107, at 17. Later, additional negotiations after the breakup of the commission resolved the debts. ORTH, *supra* note 107, at 17. Ultimately, the Jay Treaty's mixed commissions would break up, only to have another mixed commission finally resolve the debts. BEMIS, *supra* note 139, at 110. The U.S. government, not the states, paid \$2,664,000 to British creditors. ORTH, *supra* note 107, at 17.

234. ELKINS & MCKITRICK, *supra* note 116, at 410.

to a commission, even though British subjects who sought to bring claims against Americans did not have to exhaust such remedies.<sup>235</sup> Moreover, the Treaty prohibited the sequestration of British debts or legislation discriminating against British merchants, by then a long-standing tradition in the United States.<sup>236</sup>

As expected in a highly anti-British environment, the terms of the Jay Treaty were incredibly unpopular.<sup>237</sup> Mobs burned Jay in effigy and threw stones at Hamilton when he spoke out for the treaty.<sup>238</sup> Americans generally believed Jay had paid too much for peace.<sup>239</sup> Given its controversial provisions, the Jay Treaty required some political maneuverings to achieve ratification. The Treaty barely passed the Senate, with a vote of 20-10.<sup>240</sup> Treaty opponents, especially House Democratic-Republicans, sought to set up constitutional barriers to the treaty by demanding an independent House review of treaties requiring expenditures,<sup>241</sup> but the appropriations passed the House without the review by three votes.<sup>242</sup> Britain abandoned its military posts in June 1796.<sup>243</sup> Jay had saved the nation in an hour of crisis.<sup>244</sup>

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235. COMBS, *supra* note 44, at 152.

236. BEMIS, *supra* note 139, at 102; COMBS, *supra* note 44, at 152.

237. COMBS, *supra* note 44, at 151-52. The question remains to this day whether Jay got a good deal. *Id.*

238. BEMIS, *supra* note 139, at 103.

239. Certainly, Jay was told to be prepared to pay dearly because the Federalists were so determined to avoid war, COMBS, *supra* note 44, at 133-34, but the threat of the Northwest posts was virtually eliminated before Jay returned, and without his knowledge, MCDONALD, *supra* note 119, at 149.

240. BEMIS, *supra* note 139, at 103.

241. RAKOVE, *supra* note 32, at 357.

242. BEMIS, *supra* note 139, at 104.

243. COMBS, *supra* note 44, at 147. The British kept the posts until the treaty terms were funded by the House. *Id.* at 180.

244. BEMIS, *supra* note 139, at 103. Remarkably, in the end the Jay Treaty came to be almost universally supported. COMBS, *supra* note 44, at 173.

This crisis was not limited to the international arena. In fact, the Jay Treaty also allowed the U.S. Supreme Court to evade addressing a crucial and potentially destructive question.<sup>245</sup> *Ware v. Hylton*,<sup>246</sup> which dealt with treaty-based claims, was making its way to the Court when the Jay Treaty established its mixed commissions. Because the Jay Treaty established an alternative forum, the case moved from the Court to the commission.<sup>247</sup> Because Washington, Hamilton, and Jay had moved deftly and swiftly to negotiate a new treaty without the involvement of the states, the Court did not directly face the contentious question of whether claims brought under the Treaty of Peace were enforceable against the states.<sup>248</sup> In this way, while the Eleventh Amendment defused the Treaty of Peace, the Jay Treaty defused the Eleventh Amendment.

#### **D. Bipartisan Support among the States and Congress**

Viewing the Eleventh Amendment in the political context of the partisan conflicts over international and domestic debt highlights how the Eleventh Amendment reaffirmed the vision of Democratic-Republicans and cabined the Treaty Power.

During the war crisis, Americans generally shouted for the fortification of ports, the increase of military spending, and the sequestration of British debts.<sup>249</sup> Federalists and Democratic-Republicans reacted differently to the burgeoning war crisis. Federalists tended to demand stronger defenses as a means to

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245. Gibbons, *supra* note 103, at 1940.

246. 3 U.S. (3 Dall.) 199 (1796).

247. Gibbons, *supra* note 103, at 1940.

248. There were some related cases in the Court and directly related cases in other courts, however. See Gibbons, *supra* note 103, at 1949–56.

249. COMBS, *supra* note 44, at 121–25; ELKINS & MCKITRICK, *supra* note 116, at 405.

peace.<sup>250</sup> Although not prepared to declare war, Democratic-Republicans were generally more hostile and pushed for commercial retaliation.<sup>251</sup> These different positions stemmed primarily from different beliefs about how bad a war between the United States and Britain would be—Federalists believed war would be much worse than Democratic-Republicans believed.<sup>252</sup> Hence, Democratic-Republicans continued to antagonize British interests in state legislatures and Congress.<sup>253</sup> Many Federalists at the state level also rode the anti-British wave, taking it to political victory in state legislatures and in Congress.<sup>254</sup> But the most powerful and politically insulated Federalists at the national level—Washington, Jay, and Hamilton—sought to reconcile differences with Britain, secure the nation, and grow the national government through the Jay Treaty. As the states rushed to ratify the Eleventh Amendment, Washington rushed Chief Justice Jay to Britain to negotiate a new treaty. In sum, in ratifying the Eleventh Amendment, Democratic-Republicans reacted to the Treaty of Peace and Federalists relied on the forthcoming Jay Treaty.

### *1. Democratic-Republicans: Ideology and Corruption*

The Eleventh Amendment was a Democratic-Republican victory over the vision of government that Washington and Jay espoused both officially and personally. It particularly admonished John Jay as

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250. COMBS, *supra* note 44, at 122.

251. STAHR, *supra* note 2, at 313–14. Leaders like Jefferson and Madison believed that Britain would not be able to wage war against the United States because of the vast Atlantic Ocean, so they were ready to antagonize the British more than their Federalists counterparts were. COMBS, *supra* note 44, at 79.

252. COMBS, *supra* note 44, at 130.

253. *Id.* at 127.

254. Nowak, *supra* note 173, at 1440 (“A vote for the eleventh amendment was consistent with the Federalists’ strategy of proving to the people that they were as anti-British as the Democratic-Republicans.”).



the negotiator of the Treaty of Peace, the most vocal proponent of an expansive Treaty Power, and the author of the most frightening *Chisholm* opinion.<sup>255</sup> *Chisholm* reaffirmed the Federalist ideal,<sup>256</sup> and Democratic-Republicans fought that ideal through the processes outlined in the Constitution.

Some Democratic-Republicans supported the Eleventh Amendment for principled reasons,<sup>257</sup> but state legislatures of the time also had baser motivations such as graft, venality, and revenge. Robert Morris, for example, believed that “state legislatures were generally immune to all considerations of honor and sound policy.”<sup>258</sup> Under the Articles of Confederation, the popular assemblies in many states wielded essentially supreme sovereign power, with all its concomitant corruption and foolishness.<sup>259</sup> In New York, after the Framing, rumors abounded that state legislators were heavily invested in state securities and preferred to pay themselves before anyone else.<sup>260</sup> Throughout the 1780s, the collapse of trust between the populace and their representatives was a constant issue.<sup>261</sup>

Discrimination against out-of-state creditors was not beyond the short-sighted and corrupt nature of many state legislatures after the Framing. According to James Madison, state assembly members

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255. 2 U.S. (2 Dall.) 419 (1793).

256. JACOBS, *supra* note 133, at 71.

257. For example, the essays of the “True Federalist” marshaled a fairly cohesive intellectual rebuke of *Chisholm*. See, e.g., “The True Federalist” to Edmund Randolph, Number I, INDEPENDENT CHRONICLE (Boston), Jan. 16, 1794, reprinted in 5 DHSC, *supra* note 151, at 238, 238–43.

258. FERGUSON, *supra* note 116, at 148. Conservatives generally had little faith in state legislatures. *Id.* at 244.

259. ELKINS & MCKITRICK, *supra* note 116, at 10. Indeed, this may have been why state legislatures were not trusted with ratification of the Constitution. See *id.* at 31.

260. See FERGUSON, *supra* note 116, at 231.

261. WOOD, *supra* note 129, at 368.

easily lost sight of the community's interest in favor of their own constituencies' immediate desires,<sup>262</sup> even to the point of enacting protectionist laws that greatly limited commerce between the states.<sup>263</sup> He was deeply concerned that states would commit fraud against out-of-state creditors, thereby entangling the United States in disputes with foreign powers or commercial interests.<sup>264</sup> State legislatures and state courts of the era were notoriously protectionist—Congress had to encourage the states to honor out-of-state debts, even if those debts were owed to sister states.<sup>265</sup> In ratifying the Eleventh Amendment, state legislatures might simply have given lip service to Democratic-Republican virtues while advancing less noble interests.

## 2. *Federalists: The Jay Treaty and Growing National Power*

Once Congress proposed the Eleventh Amendment in the midst of a war crisis, the Amendment sailed through state ratification procedures with widespread support from Federalists. This is puzzling because Federalists generally considered payment of public debt to be a sacred obligation.<sup>266</sup> Moreover, there were many pro-

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262. *Id.* at 195; *see also id.* at 406 (“The acts of almost every legislature,’ charged Judge Alexander Hanson in 1784, ‘have uniformly tended to disgust its citizens, and to annihilate its credit.”); MCDONALD, *supra* note 119, at 69.

263. ELKINS & MCKITRICK, *supra* note 116, at 24 (discussing how states were “hemmed in by the commercial regulations of neighbor states”).

264. JACOBS, *supra* note 133, at 14; ELKINS & MCKITRICK, *supra* note 116, at 11. Jay felt similarly. *See, e.g.*, STAHR, *supra* note 2, at 74; THE FEDERALIST NO. 3 (John Jay), *supra* note 92, at 14. Indeed, this was one of the main motivations for creating a federal court system. Holt, *supra* note 114, at 1458.

265. *See* FERGUSON, *supra* note 116, at 225; Holt, *supra* note 114, at 1456–57. This protectionism was consistent with the mercantilist tendencies that were the hallmark of national political economies of the time. ELKINS & MCKITRICK, *supra* note 116, at 20.

266. FERGUSON, *supra* note 116, at 147; MCDONALD, *supra* note 119, at 65 (discussing Washington’s belief that debt repayment was a “crucial matter of honor”). According to Ferguson, payment during peace, even of speculators who had paid much less than face value, was important, even though states had steeply cut the debts during war time. FERGUSON, *supra* note 116, at 244.

creditor Federalists in many state legislatures and the U.S. Congress in the mid-1790s.<sup>267</sup>

Yet, because most state debts had already been taken care of by this time,<sup>268</sup> Federalists could support the Eleventh Amendment as a shrewd political move to deprive opponents of a winning political issue,<sup>269</sup> keeping Democratic-Republicans out of office and preventing a new constitutional convention.<sup>270</sup> After all, Americans hated the British and voted their hatred, but if Federalists regained power in the House of Representatives and retained their power in the Senate,<sup>271</sup> they could appropriate money for the British debts when tempers cooled without courts forcing them to do so.<sup>272</sup> Federalists might also have believed that the thriving state debt market would redistribute the state debt claims to in-state plaintiffs, thus nullifying any potential domestic protectionist effect of enacting the Eleventh Amendment.<sup>273</sup>

On the other hand, if the states actually meant the Eleventh Amendment to bar state securities claims, Federalists might simply have bowed to political pressure.<sup>274</sup> Each pro-creditor Federalist had a political incentive to protect his own constituency and in-state

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267. JACOBS, *supra* note 133, at 4, 70.

268. *Id.* at 74; MCDONALD, *supra* note 119, at 51.

269. JACOBS, *supra* note 133, at 71; Marshall, *supra* note 9, at 1369.

270. Gibbons, *supra* note 103, at 1932–33.

271. Partisan identification in the 1790s was not an exact science, but Federalists generally had power in the Senate after the 1792 elections, but clearly lost power in the House. MCDONALD, *supra* note 119, at 106–07.

272. JACOBS, *supra* note 133, at 71; *see also* Marshall, *supra* note 9, at 1369–70; Nowak, *supra* note 173, at 1440 (“However, the near-unanimous Federalist support for the amendment is understandable if they believed that Congress would retain the power to grant such jurisdiction in order to effectuate federal powers and goals.”).

273. Fletcher, *supra* note 71, at 1281.

274. Massey, *supra* note 177, at 113.

creditors at the expense of out-of-state creditors.<sup>275</sup> Though most debtholders resided in the states that owed them, the speculation market concentrated most state debt outside each state.<sup>276</sup> According to Lawrence Marshall:

As elected officials, the congressmen and senators who voted for the bill proposing the eleventh amendment were probably conscious of their constituents' anticipated response to the amendment. In any event, they certainly wanted to create an amendment that would be ratified by the states. For the typical voter, the amendment as drafted was a relatively costless provision; it did not affect his right to invoke federal jurisdiction in suits against his own state, but spared his state from being subject to federal jurisdiction in suits by outsiders. Had the amendment immunized states from all suits, on the other hand, it would have directly affected in-state citizens, and might have triggered opposition.<sup>277</sup>

The Eleventh Amendment protected states by precluding federal courts from exercising jurisdiction over cases with out-of-state plaintiffs, thereby allowing state courts, or state legislatures, to decide whether to pay the out-of-state creditors.<sup>278</sup> In-state plaintiffs, the voting constituency within each state, kept their claims.<sup>279</sup>

Regardless of why Federalists supported it, the Eleventh Amendment still allowed Federalist majorities in each state to pay the public debt, at least to most creditors and specifically to each Federalist's constituency. Moreover, Federalists could support the Eleventh Amendment without further upsetting the British because

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275. Marshall, *supra* note 9, at 1367–70.

276. See JACOBS, *supra* note 133, at 24, 71–72. Obligations by some states with large debt markets, such as New York, largely remained within the state. FERGUSON, *supra* note 116, at 258.

277. Marshall, *supra* note 9, at 1369–70.

278. *Id.*

279. JACOBS, *supra* note 133, at 71–72. The Eleventh Amendment does not mention in-state plaintiffs. See *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

Jay was simultaneously negotiating a treaty to rectify the dire situation. Hence, Federalists in state legislatures knew that if both the Jay Treaty and the Eleventh Amendment became law that the national government would pay the state obligations. Indeed, Federalists might have supported the Eleventh Amendment in order to limit Jay's negotiating positions to national solutions.<sup>280</sup> After all, if states would not pay British claims, the national government would step in, thereby growing in power—a boon to Federalists.<sup>281</sup> In this way, although the Eleventh Amendment radically altered the national government that Washington, Jay, and other Framers envisioned,<sup>282</sup> its passage was not simply a Democratic-Republican victory.

### E. The Unsung History of the Eleventh Amendment

In the Treaty of Peace, Americans bought peace with promises to pay British creditors. Amid mounting anger at British military action and fear of litigation from British creditors, Congress carefully selected the wording of a constitutional amendment to protect states from a volley of suits filed by British creditors with claims under the Treaty of Peace.<sup>283</sup> This was no mere coincidence. John Jay—negotiator of the Treaty of Peace, critic of discriminatory state practices, influence on the new Constitution, and Chief Justice of a court claiming the power to hold states to account—had scared the states and Congress into passing the Eleventh Amendment. The states ratified the Eleventh Amendment to overrule *Chisholm*, which suggested that the Court would hold states to account for breaches of

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280. See McDONALD, *supra* note 119, at 144.

281. ELKINS & MCKITRICK, *supra* note 116, at 116.

282. COMBS, *supra* note 44, at 61.

283. ORTH, *supra* note 107, at 7.

treaties, by preventing out-of-state plaintiffs from bringing claims based on either diversity or federal question jurisdiction. But, contrary to what many legal scholars and judges contend, *Chisholm* did not directly spur the Eleventh Amendment, though it did lay the groundwork for a hysteria that indirectly resulted in it. States legislatures were not very worried about domestic debt; rather, they were concerned about debt to British creditors and by the specter of federal courts forcing them to pay those debts.

The Eleventh Amendment was not a simple or knee-jerk creation. It responded precisely to a constellation of concerns within American political parties over contemporaneous international crises and competing conceptions of the nation's new federal constitutional structure. That foreign policy history has implications for modern interpretation.

#### IV

#### IMPLICATIONS OF THE FOREIGN POLICY HISTORY OF THE ELEVENTH AMENDMENT

Despite the fact that interpretation of the Constitution based on original meaning is fraught with challenges, originalism has become the language of debate on the Court concerning the meaning of the Eleventh Amendment.<sup>284</sup> In the case of the Eleventh Amendment, these challenges are exacerbated because of a near total lack of documentation from ratifying state legislatures.<sup>285</sup> Scholars examining the modern jurisprudence of the Treaty Power and Eleventh Amendment have thus based much of their analysis on an

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284. Hart & Sigmon, *supra* note 12. Even Justice Antonin Scalia, a self-proclaimed textualist on statutory matters, has abandoned the text of the Eleventh Amendment in favor of historical explanations. Antonin Scalia, *Originalism: the Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

285. Marshall, *supra* note 9, at 1350.

incomplete historical account.<sup>286</sup> Legal scholars have generally mischaracterized *Chisholm*'s relationship to the Eleventh Amendment either by relying on incorrect facts or emphasizing the Eleventh Amendment's seemingly swift, overwhelming ratification without considering its one-year delay from *Chisholm* or its role as an act of commercial retaliation during a war crisis. Some of these inaccuracies are understandable because leading history books fail to explain the Eleventh Amendment's ratification.<sup>287</sup> Other inaccuracies are understandable because Eleventh Amendment and state sovereign immunity jurisprudence is confusing and exhausting.<sup>288</sup> Finally, the relationship between the Treaty of Peace and the Eleventh Amendment is easily overlooked, despite having been well established by historians, because the Eleventh Amendment itself is cast in generic terms that do not immediately alert readers to its foreign policy implications.

The Eleventh Amendment's foreign policy implications can help legal scholars and judges understand the Amendment's meaning and that of the Treaty Power. The history of the ratification of the Eleventh Amendment shows that its current jurisprudence is likely not well-founded in history and, further, that the original meaning of the Treaty Power, whatever it was, cannot fully control Treaty Power jurisprudence. The meaning of the Treaty Power must include its circumscription by the Eleventh Amendment; the original meaning

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286. The incompleteness of the record has not hindered, and has perhaps helped, different scholars' adoption of various interpretations of amendment. ORTH, *supra* note 107, at 28 ("The search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire.").

287. See, e.g., ELKINS & MCKITRICK, *supra* note 116. Historians, for their part, might be reluctant to consider the history of an amendment so poorly documented. Marshall, *supra* note 9, at 1350.

288. John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) ("As everyone knows, the Eleventh Amendment is a mess.").

of the Eleventh Amendment should likewise include its circumscription of the Treaty Power.

### A. Interpreting the Treaty Power

Treaty Power nationalists trumpet Holmes' opinion in *Missouri v. Holland* to argue that federalism cannot limit the Treaty Power.<sup>289</sup> But Justice Holmes' opinion indicates that prohibitory words within the Constitution can control the scope of the Treaty Power,<sup>290</sup> and the Eleventh Amendment's text specifies when federal courts lack jurisdiction over claims against states. The states ratified the Eleventh Amendment to nullify specific terms in the Treaty of Peace and to cut off the President and Senate's ability to together authorize federal courts to hear cases against states. That is, in order to overturn John Jay's vision of the Treaty Power, the Eleventh Amendment overruled the balance espoused in *Chisholm* that, as to the purposes of the Union, the states are not sovereign.<sup>291</sup> The Eleventh Amendment specifically curbed national treaty-making power despite the then-vigorous representation of state interests in the Senate to alter the supremacy of the national government in foreign relations. Hence, the Eleventh Amendment offers exactly the kind of prohibitory words that Holmes contemplated in *Holland*. Scholars like Golove and Bradley, who debate the nature of the Treaty Power, should consider this history.

Treaty Power nationalists describe two principal problems with the application of the Eleventh Amendment to the Treaty Power: "limiting the remedies against the states generally undermines treaty supremacy and calls into question U.S. performance of its primary

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289. See, e.g., Golove, *supra* note 5, at 1257.

290. *Missouri v. Holland*, 252 U.S. 416 (1920).

291. 2 U.S. (2 Dall.) 419, 457 (1793).



obligations,” and “state sovereign immunity may breach U.S. undertakings directly relating to remedies.”<sup>292</sup> Indeed, state discretion to exercise sovereign immunity against treaty-based claims could invite destruction of the Union.<sup>293</sup> Thus, if the national government has negotiated a deal with a foreign power that governs local affairs, states cannot have discretion in their adherence, because that would invite a relationship between the foreign power and the domestic state.<sup>294</sup> Under the Articles of Confederation, the United States experienced tremendous difficulty reconciling its treaty-based obligations and its constitutional structure.<sup>295</sup> In no small part, the Framers specifically designed the Supremacy Clause to mitigate these problems in the hope that it would prevent these problems from dragging the United States into another war with Britain.<sup>296</sup>

But the Framers of the Supremacy Clause did not have the last word on the national government’s power to make treaties. Whether believing in foreign affairs exceptionalism,<sup>297</sup> or that states already have a sufficient role in the crafting of treaties,<sup>298</sup> Treaty Power nationalists ignore an important motivation behind the Eleventh Amendment—to create exactly the problems that Treaty Power nationalists associate with states overruling international treaties. The Eleventh Amendment radically altered the balance struck at the Framing between the state and national governments, and Treaty

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292. Swaine, *supra* note 61, at 438.

293. Golove, *supra* note 5, at 1098 (“[P]ermitting states to carry on formal diplomatic contacts and enter into separate relationships with foreign powers raises the prospect of foreign intrigue, of divided loyalties, and of conflict and competition among the states.”).

294. *Id.*

295. See generally Jay Report, *supra* note 47.

296. STAHR, *supra* note 2, at 205–06, 246.

297. Eichhorn, *supra* note 24, at 534.

298. Bandes, *supra* note 32, at 748.

Power nationalists have turned a blind eye to that history.<sup>299</sup> Though the Eleventh Amendment renders treaty obligations problematic, that is no reason to allow the Treaty Power to undercut the Eleventh Amendment. Rather, it is a reason to allow the Eleventh Amendment to undercut the Treaty Power.

Remarkably, federalists have also ignored this history, despite its support of their position.<sup>300</sup> Bradley makes a case for limited Treaty Power by considering the invisible radiations of the Tenth Amendment, the unwritten and abstract notions of federalism, and recent Eleventh Amendment Court doctrine.<sup>301</sup> Such an argument seeks to overturn or at least skirt around *Holland*, which allows the national government to make treaties that do not contravene any specific part of the Constitution.<sup>302</sup> But federalists like Bradley could instead embrace *Holland* and its counterpart, *Reid*, which prevents the national government from making treaties that contravene specific provisions of the Constitution.<sup>303</sup> By doing so, federalists could abandon the invisible radiations of the Tenth Amendment and unwritten notions of federalism to instead rely on the Eleventh Amendment as a “specific provision” preventing the national government from making certain treaty provisions. The specificity of

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299. A particularly egregious omission is in a piece by Cory Eichhorn concerning the relationship between treaties and state sovereign immunity where he describes only the domestic implications of *Chisholm*. See Eichhorn, *supra* note 24, at 526–27.

300. See Bradley, *supra* note 4; Bradley, *supra* note 3. Bradley does treat current Eleventh Amendment jurisprudence in both of his articles. See Bradley, *supra* note 4, at 117 nn.117–24; Bradley, *supra* note 3, at 458 nn.379–84.

301. See Bradley, *supra* note 4; Bradley, *supra* note 3. Even if federalists accept *Holland*'s test, the history of the Eleventh Amendment demonstrates that it should be considered explicit prohibitory words. That is, the logic of *Reid v. Covert*, 354 U.S. 1 (1957), would recognize the explicit bar to federal court jurisdiction enunciated in the Eleventh Amendment. See Dodson, *supra* note 60, at 758. Indeed, in doing so, Treaty Power federalists could suggest an even more expansive view of state sovereign immunity against claims arising solely under treaties.

302. *Reid*, 354 U.S. at 18.

303. *Id.* at 41.

the Eleventh Amendment as a barrier to treaty-making, especially in light of its history as a foreign policy instrument, suggests it would fall on the *Reid* side of the specificity test rather than the *Holland* side.<sup>304</sup> Hence, if Bradley and other federalists consider the barriers erected in the Eleventh Amendment to protect states from treaty-based claims, they could argue that federal courts lack jurisdiction over claims against states brought under a treaty, not just under statute. This would protect states from causes of action under treaties.<sup>305</sup>

## B. Interpreting the Eleventh Amendment

After two hundred years, scholars and courts still hotly dispute the meaning of the Eleventh Amendment. While scholars have written articles advancing a variety of theories of the Eleventh Amendment,<sup>306</sup> two theories presently have currency in the U.S. Supreme Court—the “profound shock” and “diversity” theories.<sup>307</sup> The profound shock theory holds that the Eleventh Amendment reaffirmed the Framers’ understanding of state sovereign immunity.<sup>308</sup> The diversity theory holds that the Eleventh

304. Some federalists might argue more strongly still that the Eleventh Amendment could serve as a “specific provision” taproot for state sovereign immunity. That position would be tenuous given that the history of the Eleventh Amendment, which serves to identify it as a barrier to treaty-making, indicates that it was not intended to enact general sovereign immunity.

305. See *supra* Part II.A.

306. See, e.g., Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002); Nowak, *supra* note 173; Pfander, *supra* note 135.

307. For a short explanation of both of these theories, see CHEMERINSKY, *supra* note 198, at 185–90. For fuller explanations of the theories see, for the diversity theory, Fletcher, *supra* note 71; Fletcher, *supra* note 12. For the profound shock theory, see WARREN, *supra* note 12, at 96.

308. The Profound Shock Theory creates these outcomes for claims against state defendants.

	In-State Plaintiff	Out-of-State Plaintiff
Diversity Jurisdiction	N/A	Barred by 11 <sup>th</sup> Amendment
Federal Question Jurisdiction	Barred by 11 <sup>th</sup> Amendment	Barred by 11 <sup>th</sup> Amendment

Amendment merely removed the Court's grant of diversity jurisdiction under Article III of the Constitution.<sup>309</sup>

The foreign policy history of the Eleventh Amendment indicates that neither theory is correct. Rather, it indicates that the Eleventh Amendment bars all legal and equitable claims made by an out-of-state plaintiff against a state, regardless of whether the suit is brought pursuant to federal question or diversity jurisdiction.<sup>310</sup> This meaning comports with the political realities of the early and mid-1790s<sup>311</sup> and, not coincidentally, agrees with the "plain language" of the Eleventh Amendment.<sup>312</sup>

Consider the profound shock theory. According to Judge Gibbons, the profound shock theory is the result of a wholly inaccurate and politically motivated historical account.<sup>313</sup> Gibbons

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309. The Diversity Theory creates these outcomes for claims against state defendants.

	In-State Plaintiff	Out-of-State Plaintiff
Diversity Jurisdiction	N/A	Barred by 11 <sup>th</sup> Amendment
Federal Question Jurisdiction	Allowed	Allowed

310. For a full explanation of this theory, see generally Marshall, *supra* note 9. This Foreign Policy Theory creates these outcomes for claims against state defendants.

	In-State Plaintiff	Out-of-State Plaintiff
Diversity Jurisdiction	N/A	Barred by 11 <sup>th</sup> Amendment
Federal Question Jurisdiction	Allowed	Barred by 11 <sup>th</sup> Amendment

311. Marshall, *supra* note 9, at 1355. This reading also keeps with John Manning's argument that precise constitutional texts must be read precisely because they are the result of political compromises meant to protect constitutional minority positions. See generally John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004) (discussing the importance of recognizing the plausibility of selected language as a precise compromise in the case of the Eleventh Amendment).

312. See Marshall, *supra* note 9, at 1355. Although I recognize that all language has ambiguity, I respectfully submit that the foreign policy history of the Eleventh Amendment comports with a reading of the amendment that is much plainer and simpler than that of *Hans* or diversity theorists'.

313. Gibbons, *supra* note 103, at 1893–94, 1989–2002.

argues that the *Hans* Court redefined state sovereign immunity to reassure the securities market after the financial and political meltdown of Civil War debt repudiation.<sup>314</sup> To do so, it invented the idea that *Chisholm* had profoundly shocked the nation's beliefs in the fundamental structure of federalism,<sup>315</sup> instead of simply frightening the states with the notion that they might have to pay British creditors.

But the Eleventh Amendment probably did not reaffirm a generally shared conception of state sovereign immunity.<sup>316</sup> The profound shock theory of the Eleventh Amendment garners approval based on the false fact that the Eleventh Amendment passed quickly and with little controversy.<sup>317</sup> This account gives short shrift to the consideration Congress gave to the amendment, the international context of state ratifications, the nuance of Federalist political posturing, and the lack of a cohesive vision of state sovereignty among the Framers.<sup>318</sup> It is true that, shortly after the Justices announced their opinions in *Chisholm*, a U.S. Representative proposed an amendment barring suit against states in federal courts by any person.<sup>319</sup> The next day, a U.S. Senator proposed a similar amendment.<sup>320</sup> But Congress then tabled the measures for nearly a

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314. *Id.* at 1989–2002.

315. *Id.* at 2001.

316. According to some scholars, the Eleventh Amendment created subject matter jurisdiction restrictions on the federal courts despite the Framers' original understanding of sovereign immunity in terms of personal jurisdiction. *See generally* Nelson, *supra* note 306. Others contend that the narrow and precise formulation of the Eleventh Amendment suggests a negative implication for other forms of sovereign immunity. *See generally* Manning, *supra* note 311.

317. JACOBS, *supra* note 133, at 4.

318. *See generally* RAKOVE, *supra* note 32; WOOD, *supra* note 129.

319. STAHR, *supra* note 2, at 296.

320. *Id.*

year amid decidedly split public and partisan opinion.<sup>321</sup> When a similar resolution was reintroduced while anti-British sentiments simmered over cases filed during the course of the previous year, Congress still considered the matter for two months, rejecting a series of amendments to the resolution before passing it on to the states.<sup>322</sup> The states ratified the amendment in a fit of anti-British hysteria in the midst of a war crisis and in large part because Federalists wanted to maintain or grow political power. Reaction was by no means swift or simple.<sup>323</sup>

Moreover, the *Hans* Court's historical account of *Chisholm* and of the Framers' conceptions of state sovereignty is almost certainly wrong.<sup>324</sup> While the Framers at the Constitutional Convention did not explicitly consider the key clause, "controversies between a state and citizens of another state," both Justice Wilson's opinion and U.S. Attorney General Edmund Randolph's argument in *Chisholm* are instructive.<sup>325</sup> Both Wilson and Randolph served on the five-member committee of detail that wrote the clause;<sup>326</sup> both advanced strongly Federalist understandings of the Court's jurisdiction in *Chisholm*. At the Pennsylvania ratification convention, Wilson said, "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."<sup>327</sup> Edmund Randolph had similarly remarked at the Virginia ratifying

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321. Nowak, *supra* note 173, at 1435.

322. See *supra* Part III.B-C; 4 ANNALS OF CONG. 30 (1794).

323. Even Georgia, the defendant in the case, reacted slowly to *Chisholm*. Georgia's House only passed legislation nine months after the opinion in *Chisholm* was handed down. See 5 DHSC, *supra* note 151, at 135.

324. Marshall, *supra* note 9, at 1349-50.

325. ORTH, *supra* note 107, at 23.

326. *Id.*

327. As quoted in *id.*

convention that, “I admire that part which forces Virginia to pay her debts.”<sup>328</sup>

Although the profound shock theory of the Eleventh Amendment has held sway for over a century since *Hans*, in the 1980s and 1990s, the diversity theory of the Eleventh Amendment gained currency with the Court. Like the profound shock theory, the diversity explanation holds that the states ratified the Eleventh Amendment to overrule the Court’s holding in *Chisholm*.<sup>329</sup> The diversity theory differs from the profound shock theory by positing that the states ratified the Eleventh Amendment to accomplish that goal by only negating the Court’s claim of state-citizen diversity jurisdiction under Article III of the Constitution.<sup>330</sup> It posits that the Eleventh Amendment does not bar claims brought under federal question or other forms of jurisdiction.<sup>331</sup>

The principle difficulty with the diversity theory is that it fails to address the fact that legislators must have been worried about federal claims.<sup>332</sup> Diversity theorists posit that original federal question

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328. As quoted in *id.* Of course, similar remarks were made on the other side of the coin by Hamilton in the Federalist papers and by Marshall and Madison at the Virginia ratifying convention. *Id.* at 24–25, 36–37; see JONATHAN ELLIOT, 3 THE DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF VIRGINIA, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533. Such statements may not have been entirely true. See Kramer, *supra* note 12; Massey, *supra* note 177, at 95.

329. Fletcher, *supra* note 71, at 1263.

330. *Id.* at 1264 (“In more complicated but precise terms, the amendment required that the state-citizen diversity clause be construed to authorize jurisdiction only when the state was a plaintiff; when the state was a defendant, the clause was not to be construed to authorize jurisdiction.”); Fletcher, *supra* note 12, at 1035–36.

331. Marshall, *supra* note 9, at 1342–43; *contra* Pfander, *supra* note 135, at 1344. Indeed, Jay himself struck down state statutes based on the Contract Clause as part of a pattern that alarmed state legislatures to growing federal power. STAHR, *supra* note 2, at 291 n.52.

332. See Massey, *supra* note 177, at 117–19 (discussing the clear desires of Georgia, Virginia, and Massachusetts to be free from liability for federal claims).

jurisdiction was not established even as a concept during the 1790s.<sup>333</sup> This position is incorrect. Legislators worried about federal constitutional claims based on both the Contracts Clause and the Ex Post Facto Clause.<sup>334</sup> But even if state legislators were not concerned that domestic creditors might reframe denied contract claims as constitutional claims requiring federal court intervention,<sup>335</sup> they must have been concerned that foreign creditors would bring federal question claims based on the Treaty of Peace.<sup>336</sup> State legislatures suffered from major anti-British hysteria over potential claims under the Treaty of Peace.<sup>337</sup> Treaty-based claims were almost certainly federal questions;<sup>338</sup> surely, they would have been treated as such had the *Chisholm* Court faced the question.

These treaty-based claims become a large problem for the diversity theory when considering assignment of claims.<sup>339</sup> Assignment is the process by which a claim or cause of action can be sold or given to another individual, who may then sue on the claim.<sup>340</sup> Assignment of claims thrived in debt markets during the early Federalist Era. Creditors of states could sell their claims across

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333. Fletcher, *supra* note 71, at 1264. The Judiciary Act gave the U.S. Supreme Court appellate federal question jurisdiction, but made no mention of original federal question jurisdiction. *Id.* at 1267–68.

334. Marshall, *supra* note 12, at 1381–82.

335. Pfander, *supra* note 135, at 1344.

336. *Id.* at 1361.

337. *See supra* Part III.

338. Fletcher, *supra* note 71, at 1281.

339. *Contra* Pfander, *supra* note 135, at 1360–61. In arguing that the Eleventh Amendment closed the loophole of assignment and gave control back to state legislatures and state courts, Pfander assumes that creditors' contract claims against states could not have been brought as federal questions, an assumption that is at best controversial given the opinions of the federal judiciary, and especially those of Chief Justice John Jay. *See* STAHR, *supra* note 2, at 291 n.52.

340. BLACK'S LAW DICTIONARY 128 (8th ed. 2004) (assuming a claim or cause of action is a right or property that can be transferred).



borders; much of it concentrated in New York.<sup>341</sup> As soon as states began repudiating this debt, these claims transformed into federal question claims under the Contracts Clause, which prevented states from interfering with existing contracts.<sup>342</sup> Hence, by selling repudiated state debt, private parties could sell federal question claims.<sup>343</sup>

The diversity theory of the Eleventh Amendment allows federal question jurisdiction regardless of whether a plaintiff is in-state or out-of-state.<sup>344</sup> The primary historical argument for this treatment is that it makes no sense to discriminate against out-of-state plaintiffs, because they could assign claims to in-state plaintiffs, who could in turn bring suit.<sup>345</sup> According to diversity theorists, because states would still pay in-state plaintiffs who brought federal question claims purchased from out-of-state creditors, it is absurd to deny out-of-state plaintiffs the chance to bring their suits directly via federal question jurisdiction.<sup>346</sup>

Diversity theorists fail to consider, though, that not all out-of-state plaintiffs could have assigned claims. British plaintiffs—those

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341. FERGUSON, *supra* note 116, at 258. Philadelphia and Boston were also centers of speculation trade. *Id.* at 252.

342. *The True Federalist* to Edmund Randolph, Number III, INDEPENDENT CHRONICLE (Boston), Feb. 6, 1794, reprinted in 5 DHSC, *supra* note 151, at 253, 256–57 (“By a piece of artifice, the Securities may be nominally transferred out of the State, for the purpose of supporting an action in the Federal Court, and will no doubt be thus managed.”)

343. This further erodes the historical foundation for the diversity theory of the Eleventh Amendment. If out-of-state creditors had federal question claims, a bar to just diversity jurisdiction would not have prevented them from bringing suit. I thank Chris Hart for reminding me of the point.

344. Fletcher, *supra* note 71, at 1282.

345. *Id.* at 1281; see *The True Federalist* to Edmund Randolph, Number III, reprinted in 5 DHSC, *supra* note 342, at 256–57.

346. There are some potential reasons under the diversity theory for treating federal question claims differently between in-state and out-of-state plaintiffs. Such treatment would profit in-state plaintiffs, who could purchase the out-of-state claims. Each state would pay back its debt to its own citizens, profiting them rather than out-of-state speculators.

most feared financially and politically—were completely or effectively barred from assignment. Because of this bar, it was reasonable to treat federal question claims differently based on the plaintiff's home. Barring federal question claims by out-of-state plaintiffs effectively barred all British creditors' claims while not necessarily affecting American debtholders' ability to sell their claims to in-state plaintiffs.

British creditors could not assign their claims to in-state plaintiffs. Many state laws specifically precluded the sale of property by Loyalists, Tories, and British creditors.<sup>347</sup> Though legislatures and courts relaxed many of these laws after the Revolution, many states maintained the *de facto* denial of rights to Loyalists, Tories, and British creditors. In some places, the scope of those denied access to courts included even those merely insufficiently patriotic.<sup>348</sup> According to Claude Halstead Van Tyne:

In the courts of law, not even the rights of a foreigner were left to the loyalist. If his neighbors owed him money . . . All legal action was denied him. He might be assaulted, insulted, blackmailed or slandered, though the law did not state it so baldly, yet he had no recourse in law.<sup>349</sup>

Even if a British creditor could legally assign his treaty-based claim, he would still face substantial practical obstacles. The first and most obvious problem for a British creditor would be finding a local American friend in an environment of deep suspicion and occasionally violent prejudice.<sup>350</sup> Most Americans already harbored a

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347. VAN TYNE, *supra* note 144, at 275.

348. 5 DHSC, *supra* note 151, at 352–53 (discussing treatment by Massachusetts of William Vassall). Indeed, Vassall might have been treated even more poorly than most Loyalists—he was not even allowed to return to Massachusetts after Massachusetts began allowing Loyalists to return in March 1784. *Id.* at 357.

349. VAN TYNE, *supra* note 144, at 193.

350. JACOBS, *supra* note 133, at 70–71.

great deal of animosity toward creditors who had purchased Revolutionary War debt certificates from veterans, orphans, and widows at steeply reduced prices.<sup>351</sup> Few, if any, Americans would have been willing to walk into federal court to seek redress for a claim purchased from an opponent of the American Revolution. Such an action would risk branding the American as a Loyalist, or at least a British sympathizer.<sup>352</sup> Additionally, there would be little chance of a fair trial even if the British creditor's claim got into court—jurors were drawn from the public and thus shared its dispositions, fears, and prejudices.<sup>353</sup> Anyone who did not share these proclivities would probably have been kept from the jury,<sup>354</sup> or, if placed on the jury, would feel threatened for supporting British claims.<sup>355</sup> Attorneys, too, shared anti-British sentiments, not least because the bar associations in many states had purged themselves of British sympathizers during the Revolution.<sup>356</sup> Even the remaining attorneys were not safe—after Cornwallis' surrender, American attorneys representing British merchants or Loyalists were physically attacked for bringing claims in state courts.<sup>357</sup> As if the chances of finding a brave and fair-minded jury, judge, and attorney were not slim enough, the assignee would also have to enlist the help of witnesses, and few witnesses would have been friendly to British

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351. ELKINS & MCKITRICK, *supra* note 116, at 116–17.

352. *See generally* VAN TYNE, *supra* note 144.

353. *Id.* at 194.

354. *Id.* (discussing Tories and jury selection during the American Revolution).

355. HAROLD M. HYMAN, TO TRY MEN'S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 91 (1960) (discussing that, during the Revolutionary War, "It took a brave grand juror to taint himself by freeing persons accused of disloyalty, and an even braver attorney to risk his own freedom and career by defending a nonjuring, self-proclaimed 'enemy to American liberty'").

356. VAN TYNE, *supra* note 144, at 195–96.

357. Holt, *supra* note 114, at 1440–41.

creditors.<sup>358</sup> All in all, British creditors would have had a very difficult time getting claims successfully assigned and won.

If the states ratified the Eleventh Amendment to prevent enforcement of claims under the Treaty of Peace, the Eleventh Amendment should apply to out-of-state plaintiffs bringing either federal question claims or diversity claims. Because British creditors could not assign their federal question claims under the treaty, such a jurisdictional bar would preclude these claims from ever being filed in federal court. Contemporaneous understandings of the Eleventh Amendment bear out this interpretation.<sup>359</sup> Such discrimination against out-of-state plaintiffs would have eliminated the most reviled claims against the states—those financially large, politically charged claims of the British creditors—while not preventing American debtholders from assigning their claims to in-state plaintiffs.<sup>360</sup> Under the terms of the Eleventh Amendment, once these in-state plaintiffs acquired the federal question claims from out-of-state American creditors, they could still bring suit under federal question jurisdiction as in-state parties.<sup>361</sup>

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358. RYERSON, *supra* note 137, at 169 (discussing how Loyalists lacked friendly American witnesses to prove their claims before the British commissions).

359. According to the judge:

[T]he American people have decided, that it is no cause of offence to foreign nations, to have their causes decided, and exclusively and finally decided, by the state tribunals. In that amendment to the constitution, by which the jurisdiction of the Federal Courts is prohibited, in suits brought against the states, by foreign citizens or subjects, this construction is most undoubted, and has never been complained of. Since the adoption of that amendment, the election of jurisdictions has been entirely taken away from foreigners, in all suits against the states, and those suits can, now, be only brought in the state courts, in exclusion of every other: and that, too, in cases in which, from the circumstance of the states themselves being parties, it might, perhaps, be plausibly argued, that the judges of the state courts were not free from bias.

Hunter v. Martin, 18 Va. 1, 23 (1815).

360. See *supra* Part III.D.2.

361. See *id.*

## V

## CONCLUSION

The debate between Treaty Power nationalists and Treaty Power federalists has been ongoing since the Framing. Today, Treaty Power nationalists rely on a vision of state sovereign immunity that does not gel with the history of the Eleventh Amendment. On the other side, Treaty Power federalists ignore the foreign policy history of how the Eleventh Amendment changed the Treaty Power, even though that history would substantially bolster their position. By protecting states from foreign creditors with potential claims based on the Treaty of Peace, the Eleventh Amendment nullified specific provisions of the treaty and prevented the President and Senate from trading the keys to state treasuries for peace with Britain in the Jay Treaty. In doing so, the Eleventh Amendment altered the contours of the national-state balance of the Constitution, especially as it relates to the Treaty Power. Because the Eleventh Amendment delimits the Treaty Power, federalists need not try to limit it by constructing an abstraction of federalism based on the “invisible radiations” of the Tenth Amendment or implicit constitutional structures. Treaty Power federalists should instead rely on the very visible radiations of the Eleventh Amendment.

The often-ignored history of the Eleventh Amendment as a reaction to the Treaty of Peace indicates that the Treaty Power is a wholly inappropriate vehicle with which to abrogate state sovereign immunity. It also indicates that the Eleventh Amendment might well mean what it says. In a calculated move to cut off British creditors from federal courts, the states ratified the Eleventh Amendment to take away the federal judiciary’s constitutional grant of diversity and federal question jurisdiction when out-of-state plaintiffs sue states,

but left in-state plaintiffs with the capacity to bring federal question claims against states.