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ARTICLES

THE SUPREME COURT OF THE UNITED STATES AS QUASI-INTERNATIONAL TRIBUNAL: RECLAIMING THE COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION OVER TREATY-BASED SUITS BY FOREIGN STATES AGAINST STATES

Thomas H. Lee*

In this Article, Professor Lee argues that the Constitution vests in the Supreme Court original and exclusive jurisdiction over suits brought by foreign states against States alleging violations of treaties of the United States. The basis for nonimmunity is a peacekeeping theory of ratification consent: Just as, by ratifying the Constitution, the States agreed to suits by other States and the national sovereign to ensure domestic peace, they agreed to suits by foreign states in the supreme national tribunal for the sake of international peace. The Founders of the new Republic viewed state breach of the 1783 Treaty of Peace as the leading potential cause for a shooting or trade war.

*The Article's thesis is supported by the text of Article III as amended by the Eleventh Amendment and by evidence of original intent, including the inaugural implementation of the Original Jurisdiction Clause by the Judiciary Act of 1789. Nor is it inconsistent with the principle of sovereign dignity for the semisovereign States to be sued by fully sovereign foreign states in the Supreme Court. Justices of the Court throughout the nineteenth and the first quarter of the twentieth centuries acknowledged this aspect of the Court's original jurisdiction, but awareness was lost by the time of the 1934 decision in *Principality of Monaco v. Mississippi* when the Republic had become a world power. Reclaiming the Court's lost jurisdiction today requires a narrowing of that decision, but makes sense given the resurgence of American federalism and the pace of globalization.*

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A foreign citizen or subject cannot sue a State, but a foreign sovereign, as, for instance, the Queen of England, may bring a suit against the State of Massachusetts, or any other State in the Union, in the Supreme Court of the United States. . . . I once advised [in 1860] a representative of the Queen (the Governor General of Canada) that such a suit might be brought to ascertain the liability of the State of New York to certain tribes of Indians settled in Canada. There were obvious reasons why the Queen, at that time, should not become a suitor in our Supreme Court. But the time may come when such a suit may be brought.

—Former Associate Justice Benjamin R. Curtis, 1880¹

INTRODUCTION

For all that has been said and written about the institution of the Supreme Court of the United States, its original jurisdiction remains something of a mystery. The Original Jurisdiction Clause of the Constitution states: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."² The modern Court's original docket is comprised almost entirely of controversies between States,³ which are the only category of the Court's original jurisdiction that Congress has de-

1. Benjamin Robbins Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States* 18 & n.3 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880) [hereinafter *Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence*]. Justice Curtis, appointed to the Supreme Court in 1851 by President Millard Fillmore, resigned from the Court in 1857 after its decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), and represented President Andrew Johnson in his impeachment trial. See Richard Y. Funston, Curtis, Benjamin Robbins, in *The Oxford Companion to the Supreme Court of the United States* 211, 212 (Kermit L. Hall et al. eds., 1992). A man of extraordinary intellect, Curtis was a leading lawyer of his day, and, despite his short tenure as Associate Justice, the eyecatching rigor, craftsmanship, and decency of his opinions mark him as among the very best jurists of the nineteenth-century Court. While in private practice, he was retained as counsel by Great Britain in 1860 in a matter concerning the payment of annuities by the State of New York to Cayuga Indians residing in Canada. See 1 *A Memoir of Benjamin Robbins Curtis, LL.D.* 283–84 (Benjamin R. Curtis ed., 1879) [hereinafter *Memoir of Benjamin Curtis*].

2. U.S. Const. art. III, § 2, cl. 2.

3. See Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 279–80 (5th ed. 2003) [hereinafter *Hart & Wechsler*]. To avoid a source of confusion endemic to writing in this area, and in accord with current Supreme Court practice, "State" is capitalized when referring to one of the United States in a nominal form, and the lower case is used in referring to "foreign state" or the state as a political theoretical concept, for example, "sovereign state," or when the word is used as an adjective, for example, "state sovereign immunity" or "state court." Contrary capitalization in original text has not been altered. I prefer this convention to the otherwise sensible workaround of substitution, e.g., "foreign nation" for "foreign state," because it is faithful to usage in Article III, the Eleventh Amendment, and international law, and because it conveys the complicating affinity between the concepts of an American State and the foreign state as they were understood at the time of the founding.

clared to be exclusive.⁴ It is well settled that a State has no sovereign immunity in a suit by another State, and so it may be sued in the Court without its consent.⁵ The United States may also sue a State without consent,⁶ although Congress has consigned,⁷ and the Court has endorsed,⁸ concurrent jurisdiction over such suits to federal district courts. Even within the exclusive category of suits between States, the Court has claimed discretion in choosing the cases it will hear.⁹

The thesis of this Article is that the Constitution also vests in the Supreme Court original and exclusive jurisdiction over suits against States brought by foreign states alleging violation of ratified treaties of the United States. The basis for nonimmunity in suits by foreign states is the same peacekeeping theory of ratification consent that is presumed to justify suits against States by other States or the United States.¹⁰ Just as the States, by ratifying the Constitution, agreed to suits in the national court by other States and the national sovereign to ensure domestic peace, they agreed to suits by foreign states in the supreme national tribunal—situated as an intermediary between semisovereign States and fully sovereign

4. See 28 U.S.C. § 1251(a) (2000) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

5. See, e.g., *Colorado v. New Mexico*, 459 U.S. 176, 182 n.9 (1982) ("Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State."); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals."); *Kansas v. Colorado*, 206 U.S. 46, 83 (1907) (The Eleventh Amendment "refers only to suits and actions by individuals, leaving undisturbed the jurisdiction over suits or actions by one State against another.").

6. See, e.g., *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001); *United States v. Mississippi*, 380 U.S. 128, 140 (1965) ("[N]othing in . . . the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States."); *United States v. Louisiana*, 339 U.S. 699, 701–02 (1950) (denying Louisiana's claim of sovereign immunity in original action by the United States); *United States v. Texas*, 143 U.S. 621, 642 (1892) (holding that the Supreme Court "has original jurisdiction of a suit by the United States against a State").

7. See 28 U.S.C. § 1251(b) ("The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll controversies between the United States and a State.").

8. See *United States v. Nevada*, 412 U.S. 534, 537 (1973) (approving Congress's provision for concurrent jurisdiction in controversies between the United States and a State).

9. See, e.g., *Louisiana v. Mississippi*, 488 U.S. 990, 990 (1988) (denying Louisiana leave to file complaint against Mississippi in boundary dispute); *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (denying leave to file complaint arising out of an alleged breach of contract covering athletic contests between two state universities); *Arizona v. New Mexico*, 425 U.S. 794, 797–98 (1976) (per curiam) (denying Arizona leave to file an original action alleging unconstitutionality of a New Mexico energy tax where an action was pending in state court); cf. *Ohio v. Wynadotte Chems. Corp.*, 401 U.S. 493, 499 (1971) (denying Ohio leave to file original action in a suit of nonexclusive jurisdiction). But see David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 560–61, 576 (1985) (criticizing the modern Court's policy of discretionary denial of leave to file in original actions over which it has exclusive jurisdiction).

10. See *infra* Part II.C.

foreign states—for the sake of international peace. Ratification consent to suit by foreign states was different from consent to suit by other States because it did not guarantee a State the reciprocal right to sue a foreign state in the Supreme Court or in the foreign sovereign's courts, but in this regard it was similar to the States' constitutional bargain vis-à-vis the United States, which also did not give the States a reciprocal right to sue the United States.¹¹

There was, however, an additional feature of nonreciprocity. While a decision by the Supreme Court of the United States would bind a State or the United States under the Supremacy Clause,¹² there was some question whether it would bind the foreign state as a matter of international law. Certainly, it would be unlikely that a foreign state that had elected to bring suit in the Court would wage war or break relations over an adverse decision, but there was no specific rule under late eighteenth-century international law compelling a sovereign to abide by the decision of another sovereign's national tribunal, no matter its international function. The Court's function was thus one of a "quasi-international"¹³ tribunal not only in the sense that it was a national tribunal performing an international function that involved a subnational, semisovereign American State on one side, but also in the sense of the national, rather than international, legal effect of its decision. The acute danger to the young, weak Republic's trade and peace posed by individual state defections from U.S.

11. See, e.g., *Kansas v. United States*, 204 U.S. 331, 342 (1907) ("It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."); cf. Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 Mich. L. Rev. 92, 111 (1999) (articulating reciprocity rationale for ratification consent by States to suits by the United States and other States).

12. 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

13. Justice Holmes appears to have been the first to coin this term, but in reference to the Court's role in resolving disputes between States:

The case is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy, remembering that there is no municipal code governing the matter, and that this court may be called on to adjust differences that cannot be dealt with by Congress or disposed of by the legislature of either State alone.

Virginia v. West Virginia, 220 U.S. 1, 27 (1911); see also *Kansas v. Colorado*, 185 U.S. 125, 146–47 (1902) (Fuller, C.J.) ("Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand . . ."); Herbert A. Smith, *The American Supreme Court as an International Tribunal*, at iii (1920) (using the title to describe the Court's function in resolving State-versus-State controversies as a model for truly international tribunals). The adjective seems equally, if not more, apt to characterize the Court's role as an American national tribunal in the adjudication of international disputes between a fully sovereign foreign state and a subnational, semisovereign American State.

treaties in the late eighteenth century¹⁴ inspired the Framers to vest the Supreme Court with this original jurisdiction despite the possible lack of reciprocity. It is no coincidence, then, that the jurisdiction was universally affirmed by distinguished Supreme Court justices from the founding through the first quarter of the twentieth century.¹⁵ It was only in 1934, when the great-power status of the United States in the world balance was incontestable, that the reasons for the Court's original and exclusive jurisdiction over treaty-based suits brought by foreign states against States were completely forgotten.

Reclaiming the Court's lost jurisdiction today would require only one departure from existing statutes and precedents. Although there is presently no statute conferring original jurisdiction on the Court for suits by foreign states, the Supreme Court's original jurisdiction has long been presumed to be self-executing.¹⁶ And although the Court has indicated that other aspects of its original jurisdiction are not exclusive as a constitutional matter,¹⁷ it has never said that any original jurisdiction it might have over suits against States by foreign states is not exclusive.¹⁸ Moreover, because Congress has not enacted any statute specifically assigning original jurisdiction to federal district courts in suits by foreign states against States, no revision of the judicial code would be necessary.¹⁹ Nor is it the aim of this Article to criticize the Court's precedents affording it some degree of discretion in deciding whether to hear an original action committed to its exclusive cognizance.²⁰ Indeed, discretion in granting leave to file an original action exercised consistently with Article III standards may prove a useful screen to ensure that foreign states have reason-

14. See *infra* note 291 and text accompanying note 292.

15. See *infra* Part IV.B.

16. See, e.g., *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 74 (1860) ("The judicial power, so far as [the Court's original] jurisdiction . . . is concerned, is vested by the Constitution; it would neither remain dormant, nor would it expire, though the Legislative power had never passed a law to authorize certain processes to assert such jurisdiction.").

17. See, e.g., *Ames v. Kansas*, 111 U.S. 449, 465 (1884) ("[T]he original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens."); *Börs v. Preston*, 111 U.S. 252, 256-57 (1884) ("[T]he original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive . . .").

18. The Court has also never said that its original jurisdiction over suits between States may be concurrently vested. The issue has never come up because there has always been a statute providing for exclusive original jurisdiction in the Court over controversies between two or more States.

19. The diversity statute extends original jurisdiction of civil actions exceeding the amount in controversy between "a foreign state . . . as plaintiff and citizens of a State or of different States" but not the States themselves. 28 U.S.C. § 1332(a)(4) (2000). However, a suit by a foreign state against a State arising under treaty law, which is the focus of this Article, would fall within the scope of the general federal question statute, 28 U.S.C. § 1331, which would accordingly have to be construed not to apply to those suits in order to effectuate the exclusivity of the Court's original jurisdiction.

20. See, e.g., cases cited *supra* note 9.

ably exhausted diplomatic and other methods of resolution before invoking the Court's jurisdiction to decide a U.S. treaty dispute with a State.²¹

The only doctrinal obstacle to jurisdiction is the Supreme Court's decision in *Principality of Monaco v. Mississippi*, in which the Court denied Monaco leave to file an original action on the ground of state sovereign immunity.²² The *Monaco* decision, which members of the present Court have recently questioned,²³ is, in my view, without basis in constitutional text or original intent. Article III extends federal judicial power to controversies between a State and "foreign States, Citizens or Subjects,"²⁴ but the Eleventh Amendment forecloses only suits against States "by Citizens or Subjects of any Foreign State."²⁵ And the historical evidence, as this Article will demonstrate, confirms that the States gave ratification consent to suits in the Supreme Court by foreign states on U.S. treaty claims as a peacekeeping, war-avoidance mechanism. If the Framers intended the resolution of controversies in which a foreign state alleged that a State

21. See *infra* text accompanying notes 192–194.

22. 292 U.S. 313, 331–32 (1934).

23. See *infra* text accompanying notes 507–512.

24. U.S. Const. art. III, § 2, cl. 1.

25. *Id.* amend. XI. The textual and originalist argument against *Monaco* was previewed in an earlier article, which argued generally for a literal interpretation of the Eleventh Amendment based on contemporaneous international law principles of sovereign equality and dignity. See Thomas H. Lee, Making Sense of the Eleventh Amendment: International Law and State Sovereignty, 96 Nw. U. L. Rev. 1027, 1088–92 (2002) [hereinafter Lee, Making Sense of the Eleventh Amendment]. Given the strong textual argument against its holding, it is surprising that the *Monaco* decision attracted no specific, detailed attack—that is, one condemning its unique deviation as opposed to the general evolution of state sovereign immunity—until 2002. In the last two years, however, more scholars have noted that *Monaco* seems a particularly indefensible extension of state sovereign immunity in terms of text and principle. See, e.g., Peter J. Smith, States as Nations: Dignity in Cross-Doctrinal Perspective, 89 Va. L. Rev. 1, 36 n.162, 70 n.293 (2003) (citing Lee, Making Sense of the Eleventh Amendment, *supra*, at 1096–97, 1082–92, for the "argument that *Monaco* was incorrectly decided"); Edward T. Swaine, The Constitutionality of International Delegations, 104 Colum. L. Rev. 1492, 1575 (2004) ("Under *Principality of Monaco v. Mississippi*, states are immune from suits brought by foreign nations, notwithstanding the text of the Eleventh Amendment" (citing Lee, Making Sense of the Eleventh Amendment, *supra*, at 1046–47, 1089–90)); Note, Too Sovereign But Not Sovereign Enough: Are U.S. States Beyond the Reach of the Law of Nations, 116 Harv. L. Rev. 2654, 2676 (2003) [hereinafter Note, Too Sovereign] (*Monaco's* "holding was not required by the letter of the Eleventh Amendment" and could be overruled or distinguished to ensure state compliance with U.S. treaty obligations.). The textual argument against *Monaco* was most recently echoed and expanded by Professor John Manning. See John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1739 (2004) ("Given this obvious selectivity, it is hard to avoid the conclusion that the Amendment reflects a considered judgment to place suits by foreign states on one side of the line rather than the other."). Professor Manning's broader thesis is that "when interpreting a precisely worded constitutional provision like the Eleventh Amendment, the Court must adhere to the compromise embedded in the text." *Id.* at 1750. Because he is a textualist in approach and given his general legislative-process theme, he does not examine in any detail why the Framers might have sought this particular compromise.

was breaching a U.S. treaty to be a judicial question for the Court, then any constitutional separation of powers objection disappears. A prudential objection on separation of powers grounds seems equally off the mark, insofar as the legal question in such a controversy is the purely domestic one of whether a State has breached a treaty obligation it is committed to obey under the Supremacy Clause. This has long been considered a judicial question appropriate for the courts.²⁶ Moreover, because *Monaco* was a simple diversity suit, the Court could, as other commentators have pointed out, avoid overruling it by limiting it to its facts and authorizing suit by foreign states against nonconsenting States only when claims arising under a treaty are alleged.²⁷ Such a move to limit rather than to overrule *Monaco* is admittedly in tension with the text of the Original Jurisdiction Clause as amended by the Eleventh Amendment, which does not distinguish between treaty claims and other claims, but it is consistent with original intent, which was principally concerned with treaty violations by the States.²⁸

Developments subsequent to *Monaco* raise two more potential objections, neither of which is availing. First, the sovereign dignity principle that the Rehnquist Court has relied upon to craft a robust doctrine of state sovereign immunity²⁹ does not require immunity in a suit brought by a foreign state. A foreign state, unlike a private person, is more, not less, vested with sovereignty than an American State. Moreover, when a sovereign state sues another sovereign state, the decision to sue is subjected to the plaintiff state's political process, necessarily filtering out trivial or purely private claims. As the Court concluded in *Alden v. Maine* in reference to suits against States by the sovereign United States, such "[s]uits . . . require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delega-

26. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States § 326 cmt. b (1987) ("The courts . . . have the final say as to the meaning of an international agreement insofar as it is law of the United States applicable to cases and controversies before the courts.").

27. See William J. Aceves, *The Vienna Convention on Consular Relations: A Study of Rights, Wrongs, and Remedies*, 31 Vand. J. Transnat'l L. 257, 296 (1998) (noting that *Monaco* did not address self-executing treaty obligations); Note, *Too Sovereign*, supra note 25, at 2676 (Because it involved state law claims, "*Monaco* could be limited to suits that do not 'implicate national responsibility.'" (quoting Lori Fisler Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 Am. J. Int'l L. 697, 702 (1998))); cf. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1293 n.741 (2000) [hereinafter Golove, *Treaty-Making and the Nation*] (noting that question of whether Eleventh Amendment immunity applies to treaty claims has not yet been answered).

28. See *infra* Part II.C.

29. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); *Alden v. Maine*, 527 U.S. 706, 749 (1999) ("Private suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties regardless of the forum." (internal citation and quotation omitted)).

tion to private persons to sue nonconsenting States.”³⁰ This is as true when the sovereign plaintiff is a foreign state.

Indeed, there is a strong case that the principle of sovereign dignity compels a conclusion of state nonimmunity in a suit by a foreign state. Suppose, for example, and to put the shoe on the other foot, that the current President of the United States were to bring suit, pursuant to a hypothetical Mexican constitutional provision analogous to the Original Jurisdiction Clause, in the highest Mexican federal court against a Mexican state accused of breaking a treaty by systemic denial of justice to American creditors.³¹ The President, in the name of the United States, elects to file suit in the Mexican Supreme Court in lieu of a resort to military force, economic sanctions, or diplomatic pressure. At the very least, the suit does not impugn the dignity of the Mexican state. Rather, the fact that the most powerful foreign state in the world deigned to entrust the dispute to the national court of a far weaker, economically dependent sovereign nation enhances the overall dignity of Mexico by its statement of implicit trust in the commitment to the rule of law of its highest court.³²

Another potential objection is doubt about whether original text or the Framers’ intent on the matter should prevail in today’s very different circumstances.³³ Whatever the general merits of this objection, the Court’s function as a quasi-international tribunal of exclusive original jurisdiction over disputes between States and foreign states concerning U.S. treaty obligations seems particularly timely in an era of resurgent federalism in the domestic sphere and increasing globalization in the international.³⁴ Unsurprisingly, the problem of scattered state defections from

30. 527 U.S. at 756.

31. Mexico, like the United States, is a federal republic, and it is composed of thirty-one states. *Constitución Política de los Estados Unidos Mexicanos* art. 43.

32. This hypothetical is an updated version of a point made in 1844 by future Justice Benjamin Curtis. Justice Curtis reasoned that a net benefit to the sovereign dignity of the United States would result if powerful foreign states consented to resolve in the Supreme Court of the United States disputes they might have with States arising from ratified treaties of the United States. See *infra* text accompanying note 322.

33. See generally Lawrence Lessig, *Fidelity in Translation*, 71 *Tex. L. Rev.* 1165 (1993) (advocating translation of old text to new context).

34. The translation argument, in contrast, seems more important with respect to the Court’s original jurisdiction over ambassadorial cases, which has been nonexclusive since 1978. See *Diplomatic Relations Act*, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified as amended at 28 U.S.C. § 1351 (2000)) (abolishing exclusive original jurisdiction in the Court for suits against foreign ambassadors and public ministers). There is a plausible argument based on section 13 of the *Judiciary Act of 1789* that the Court’s original jurisdiction over suits against ambassadors and public ministers was similarly intended to be exclusive as a constitutional matter. See *infra* text accompanying notes 147–158. Although I argue in this Article that the constitutional text and background history are better read not to require exclusive jurisdiction in the Court over ambassadorial cases, see *infra* text accompanying notes 154–161, there is a strong argument that one should not be bound to text and founding-era history in that instance regardless of how one interprets the evidence. In the modern context, given the coverage of diplomatic immunities, such

treaty obligations of collective benefit to the United States has persisted to the present day.³⁵ Such defections span the political spectrum from conservative States denying alien criminal suspects access to consul³⁶ to progressive States boycotting a foreign nation's goods in possible contravention of bilateral treaties of amity and commerce where they exist.³⁷ At the same time, any lack of institutional capital that might have constrained the early Supreme Court in the exercise of this sensitive peacekeeping function has correspondingly diminished given the present-day eminence of the Court as an institution.³⁸

Reclaiming the Supreme Court's original jurisdiction over treaty disputes between foreign states and States would have enormous consequences. For one, although the Court's interpretation of U.S. treaty obligations at issue would be binding only as a matter of domestic law, it would surely have persuasive influence over understandings of the treaty provisions in international law. Indeed, it does not seem unrealistic that the Court's decisions in such cases would affect other related issues of international law. The pronouncements of the Supreme Court of the United States, as the highest tribunal of the most powerful nation in the world, would thus become a direct force in the shaping and evolution of international law. In addition, on the domestic front, the jurisdiction would reintroduce a useful mechanism of the Framers' design to supplement political pressure on state governors and legislators by Congress and the State Department in the enforcement of treaty discipline against isolated States that defect from ratified treaties of collective benefit to the United States. More generally, reclaiming the Court's original and exclu-

jurisdiction is likely to be invoked in civil suits over traffic accidents—a category of controversies unlikely to cause major rifts in the nation's foreign relations, which was the underlying justification for this provision of the Original Jurisdiction Clause. See *infra* text accompanying notes 162–164.

35. See *infra* Part IV.C.

36. See, e.g., *Federal Republic of Germany v. United States*, 526 U.S. 111, 112 (1999) (*per curiam*) (denying Germany leave to file original complaint against Arizona and the United States alleging that state's failure to advise German citizen charged with a crime of right of access to consul violated U.S. treaties); *Breard v. Greene*, 523 U.S. 371, 377–79 (1998) (*per curiam*) (order denying certiorari on the same issue between Virginia and a Paraguayan national).

37. Cf. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74 (2000) (holding state law imposing trade sanctions on Burma preempted by federal statute).

38. The first Chief Justice of the Supreme Court noted the problem of enforcing the Court's decisions in the context of suits against the United States:

[I]n all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid.

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J.). Concerns about enforcement of an adverse decision against Georgia in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), may also have animated Chief Justice Marshall's dismissal of the suit on state sovereign immunity grounds. See Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *Stan. L. Rev.* 500, 514 (1969).

sive jurisdiction over treaty-based suits by foreign states against States should prompt reexamination of the political question doctrine and the conventional view of the limited scope of the judicial power in matters touching upon foreign affairs.³⁹

But perhaps the most important consequence relates to what the exercise of this long lost original jurisdiction will do to the Supreme Court of the United States as an institution. By deciding controversies of such an international nature, it is inevitable that the Court will become more of an internationalist institution, taking its place as *primus inter pares* within a growing network of domestic courts,⁴⁰ regional courts, and formally international tribunals, which are, in turn, crafting a growing cross-referential body of transnational decisional law. Whether or not one views this judicial globalization as progress, it is surely inevitable, and it is equally certain that for the Supreme Court to sit on the sidelines as it happens is self-defeating. Nor, as this Article seeks to demonstrate, is opting out an option for American constitutionalists who value text and the Framers' intent.

The Article proceeds in four parts. Part I explains how the Original Jurisdiction Clause is best understood as a peacekeeping measure to entrust to the Supreme Court certain sensitive sovereign controversies including treaty disputes between foreign states and States. An important component of this task is to show how the Article's thesis is consistent with the First Congress's implementation of the Clause in section 13 of the Judiciary Act of 1789⁴¹ and how it might be reconciled with subsequent Supreme Court decisions construing the Original Jurisdiction Clause. Part II critiques the textual and historical justifications the Court adopted in *Principality of Monaco v. Mississippi* for extending state sovereign immunity to suits by foreign states. This Part additionally demonstrates how the conclusion of nonimmunity is not only consistent with, but also compelled by, the Rehnquist Court's reliance on sovereign dignity as the principal justification for state sovereign immunity. Finally, it rebuts the *Monaco* dictum interposing a separation of powers objection to suits against States by foreign states in the Supreme Court. Part III sets forth the reasons why the Framers thought it necessary to provide for original and exclusive jurisdiction in the Supreme Court over suits by for-

39. See *infra* notes 329–341 and accompanying text.

40. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (2000). This includes federal district courts, which have made important contributions to the evolution of the international law of human rights through litigation under the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2000). See *Sosa v. Alvarez-Machain*, 159 L. Ed. 2d 718, 753 (2004) (upholding power of federal district courts under the ATS to recognize "private claims under federal common law for violations of any international law norm with . . . definite content and acceptance among civilized nations [comparable to] the historical paradigms familiar when § 1350 was enacted" as part of section 9 of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (recognizing ATS claim for torture).

41. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 77–78.

eign states against States for treaty violations given the alternative means of diplomacy and direct suits by aggrieved foreigners. Part IV discusses why this quasi-international jurisdiction of the Court was lost over time and articulates why reclaiming it makes sense today.

I. THE ORIGINAL JURISDICTION CLAUSE AND SUITS BETWEEN FOREIGN STATES AND STATES

A. Theories of the Original Jurisdiction Clause

According to the popular conception, the Supreme Court of the United States is a domestic legal institution principally concerned with uniform justice in the vindication of individual rights.⁴² On this view, the Court is the capstone of a national court system dispensing judicial remedies for violations of individual rights by the legislative and executive branches of the national government, and, especially concerning U.S. persons after the Civil War, by the States. The doctrine of judicial review announced in *Marbury v. Madison* was premised on that view and an essential enabler of it.⁴³ The Constitution's authorization of Supreme Court appellate jurisdiction over federal law decisions of the state courts and the decisions of any lower federal courts Congress might create⁴⁴ is consistent with this conception of its purpose.

The clause of the Constitution delineating the Court's original jurisdiction, however, seems at odds with this prevailing view of the Court's main institutional purpose.⁴⁵ It says: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."⁴⁶ Cases affecting ambassadors, ministers, and consuls—the representatives of foreign

42. See generally John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (articulating theory of judicial review of open-ended constitutional provisions to enable participation of "society's habitual unequals" in representative government, not to implement values judges perceive to be fundamental).

43. See 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals . . .").

44. "In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. Const. art. III, § 2, cl. 2.

45. Chief Justice John Marshall commented on the apparent difference between the two constitutional grants of Supreme Court jurisdiction in 1821:

When, then, the constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and in all cases arising under the constitution or a law, to be appellate—the conclusion seems irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution or a law.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 393–94 (1821).

46. U.S. Const. art. III, § 2, cl. 2. The first version of this provision drafted by the Constitutional Committee of Detail also provided for original jurisdiction in the Supreme Court "[i]n cases of impeachment." See 2 *The Records of the Federal Convention of 1787*, at 186 (Max Farrand ed., rev. ed. 1966) [hereinafter *Farrand*].

sovereigns—would appear to have no significant implications for the domestic enforcement of the rights of private persons. And the Court has construed the latter, State-as-Party half of the Original Jurisdiction Clause to be defined solely by the character of the other litigants to the suit,⁴⁷ specifically without regard to whether a claim to enforce federal law was at issue.⁴⁸ Moreover, the universe of potential litigants, the Court has concluded, is confined to parties expressly enumerated in Article III, Section 2, Clause 1's general grant of federal judicial power over "controversies" to which a State might be party, necessarily cutting out suits by in-state citizens alleging violations of their federal rights.⁴⁹ This precedent, in conjunction with the evolution of state sovereign immunity doctrine,⁵⁰ limits the Court's present constitutional State-as-Party original jurisdiction to two categories of cases: (1) State versus State and State versus United States, regardless of which is plaintiff and whether a State, if defendant, has expressly consented; and (2) State versus foreign states, citizens, or subjects, and State versus citizens of other States, but only when the State is plaintiff, absent state consent or valid congressional abrogation of immunity. Thus, neither a private plaintiff nor a foreign state can ever invoke the Court's original jurisdiction against a nonconsenting State, federal question or no.

While it has long been acknowledged that the constitutional grant of original jurisdiction is self-executing,⁵¹ there has always been an imple-

47. *California v. S. Pac. Co.*, 157 U.S. 229, 257–58 (1895) ("The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only."); cf. *Pennsylvania v. Quicksilver Co.*, 77 U.S. (10 Wall.) 553, 556 (1870) (The Original Jurisdiction Clause "distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any" additional jurisdiction.).

48. See *Texas v. Interstate Commerce Comm'n*, 258 U.S. 158, 163 (1922) (citing cases but providing no reasoning in denying original jurisdiction in a suit clearly arising under federal law to which a State was party).

49. See *S. Pac. Co.*, 157 U.S. at 257–58 (denying original jurisdiction because a citizen of California was joined in the suit); cf. *Texas v. Interstate Commerce Comm'n*, 258 U.S. at 163 (indicating joinder of a Texas citizen on Texas's side would destroy the Court's original jurisdiction). But cf. *Arizona v. California*, 460 U.S. 605, 614 (1983) (allowing intervention of an Indian tribe in a suit between two States in which the United States had already intervened).

50. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. In *Hans v. Louisiana*, 134 U.S. 1, 21 (1890), the Court extended state sovereign immunity to suits by in-state citizens arising under federal law, and in *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934), it extended immunity to suits by foreign states.

51. See *Arizona v. California*, 373 U.S. 546, 564 (1963); *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 300 (1888); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 74 (1860) ("The judicial power, so far as [the original] jurisdiction of the court is concerned, is vested by the Constitution; it would neither remain dormant, nor would it expire, though the Legislative power had never passed a law to authorize certain processes to assert such jurisdiction."); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1854); *Chisholm v. Georgia*,

menting statute.⁵² The Court has indicated that Congress lacks the power to diminish or enlarge the twin spans of the constitutional grant,⁵³ which the Court has narrowly construed, however, to refer to civil, and not criminal, cases.⁵⁴ But it is also commonly believed that the Court's original jurisdiction is not exclusive as a constitutional matter,⁵⁵ and the

2 U.S. (2 Dall.) 419, 451, 465–66, 467, 479 (1793) (opinions of Blair, J., Wilson, J., Cushing, J., and Jay, C.J., respectively).

52. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (current version at 28 U.S.C. § 1251 (2000)), was the First Congress's inaugural effort. I discuss below, *infra* Part I.C, the possibility that the apparently superfluous enactment of section 13 can be explained as an attempt by the First Congress to fix the parameters of exclusive jurisdiction.

53. See *California v. Arizona*, 440 U.S. 59, 65–66 (1979) (finding it “extremely doubtful” that Congress could divest Supreme Court of original jurisdiction by investing it exclusively in district court); *S. Pac. Co.*, 157 U.S. at 261 (“The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction.”); *Pelican Ins. Co.*, 127 U.S. at 300 (“The original jurisdiction of this court is conferred by the constitution, without limit of the amount in controversy, and congress has never imposed (if indeed it could impose) any such limit.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–74 (1803) (Congress may not enlarge the Court's original jurisdiction); see also Hart & Wechsler, *supra* note 3, at 268–70, 272–73 (noting that Supreme Court precedent suggests Congress may not add or subtract from Court's original jurisdiction); Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* 809 (6th ed. 2002) (same); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 205, 209 (1997) (same); James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 Colum. L. Rev. 1515, 1549–57 (2001) (stating that Article III is designed to foreclose congressional expansion of original jurisdiction). But see Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 444 (1989) [hereinafter Amar, *Marbury*] (arguing that Congress has power “under the ‘necessary and proper’ clause, to reduce or even to eliminate the Supreme Court's original jurisdiction over lawsuits ‘in which a State shall be Party’”); cf. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 254 n.160 (1985) [hereinafter Amar, *A Neo-Federalist View*] (arguing that the Constitution does not require Congress to grant any federal court jurisdiction over Article III, Section 2, Clause 1 “Controversies” including those in which a State is party, but must provide some federal jurisdiction over “All Cases” listed in that clause). Legislative nonabridgement seems a fair inference from the text, for the Original Jurisdiction Clause does not mention “Exceptions” or “Regulations” as its sister provision for appellate jurisdiction does. See U.S. Const. art. III, § 2, cl. 2. By contrast, some scholars believe Congress may increase the Court's original jurisdiction by transferal from its constitutional appellate jurisdiction pursuant to the same provision for “Exceptions” or “Regulations.” See, e.g., Edward S. Corwin, *The Doctrine of Judicial Review* 5–6 (1914); Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329, 398–400; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 31–33.

54. See *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 398–99 (1821); *Chisholm*, 2 U.S. (2 Dall.) at 431–32 (Iredell, J.); cf. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80 (“[T]he Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature . . .”).

55. See *Ames v. Kansas*, 111 U.S. 449, 465 (1884) (“Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a State and citizens of other States or aliens.”); *Börs v. Preston*, 111 U.S. 252, 256–57 (1884) (“[T]he original jurisdiction of this court of cases in which a consul or vice-consul is a party, is not necessarily exclusive, and . . . the subordinate courts

current statute provides that the Court's original jurisdiction is exclusive only for State-versus-State cases.⁵⁶ Nonexclusivity in practice means that the Court's original jurisdiction is nearly a dead letter, for the Court today infrequently exercises its jurisdiction in the first instance when a lower federal or state court is available.⁵⁷ It goes without saying that under both the Court's interpretation of the Constitution and the Court's original jurisdiction statute, whether there is a claim of violation of federal law is of no consequence to the Court's original jurisdiction, exclusive or nonexclusive. From these doctrinal parameters of the Court's original jurisdiction, one can infer little concern with the enforcement of federal rights by foreign or U.S. private persons.

Accordingly, the Court and commentators have justified the Original Jurisdiction Clause using two theories independent of a federal-rights-enforcement theme. First, the Court has speculated that the Clause affords it original jurisdiction over State-as-party and ambassadorial cases to "match[] the dignity of the parties to the status of the court."⁵⁸ Second, Professor Akhil Amar has suggested that the Clause represented a practical accommodation of geography.⁵⁹ He presumes that the Framers thought the Court would be sited in the national capital, where States would be represented by their senators and foreign states by their ambassadors or ministers. Neither would have to travel to a distant forum—a lower federal court that, additionally, might be located within the territory of a litigant State and thus be more vulnerable to local prejudice.⁶⁰ Consuls who, by definition, were stationed at commercial ports, not

of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments.").

56. The statute provides:

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251. The statute does not refer to suits against States by foreign states.

57. See Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 185, 187–88, 198–201 (1993) (reviewing conditions under which the Court has exercised its original jurisdiction from 1961 to 1993).

58. *California v. Arizona*, 440 U.S. at 65–66; see also *Ames*, 111 U.S. at 464 (The "evident purpose" of the Court's original jurisdiction was to "keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made . . ."); cf. *United States v. Texas*, 143 U.S. 621, 643 (1892) (As to statutory implementation of the Original Jurisdiction Clause, "it best comported with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.").

59. See Amar, *Marbury*, supra note 53, at 469–78.

60. See id.

national capitals,⁶¹ though explicitly mentioned in the Original Jurisdiction Clause,⁶² pose a difficulty for Professor Amar's thesis.⁶³

In a seminal article,⁶⁴ Professor James Pfander proposed a reconciliation of this tension between the federal-rights-enforcing vision of the Court's institutional purpose and the restrictive doctrinal position on the Supreme Court's original jurisdiction. In his account, the common law immunity of a sovereign from suit in its own courts precluded the enforcement of federal law by individuals in an allegedly transgressing State's courts.⁶⁵ A separate sort of immunity, which he calls "law-of-nations" immunity to mark its origin in contemporaneous international law, foreclosed suits against sovereigns in the courts of other sovereigns.⁶⁶ As

61. "Among the modern institutions for the utility of commerce, one of the most useful is that of consuls or persons residing in the large trading cities, and especially in foreign seaports, with a commission empowering them to attend to the rights and privileges of their nation" Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Book 2, § 34, at 207 (Northampton, Mass., 4th Am. ed. 1820) (1758).

Because of their commercial responsibilities, it was a subject of debate in late eighteenth-century international law whether consuls were accorded the same rights and privileges as ambassadors and the various orders of public ministers. See *infra* note 151.

It is apparent from Article II of the Constitution that the Framers understood and accepted this conception of consuls. The President is given the power to "appoint Ambassadors, other public Ministers and Consuls" subject to the Senate's advice and consent, U.S. Const. art. II, § 2, cl. 2, but "shall receive Ambassadors and other public Ministers" only, *id.* art. II, § 3. The President would logically not "receive" consuls since their duty stations were ports, not the national capital. Moreover, as commercial, not diplomatic, representatives of a foreign sovereign, consuls would not have presented their credentials to the President in his capacity as head of state.

62. U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, . . . the supreme Court shall have original Jurisdiction.").

63. See Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569, 1604-08 (1990) (criticizing Professor Amar's theory on this and other grounds). Another problem with the geographical convenience theory is the Clause's failure to provide original jurisdiction in the Court over "Controversies to which the United States shall be a Party," a large category of suits for which the Court would be a geographically convenient forum if located in the national capital with the other branches of government.

64. James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555 (1994) [hereinafter Pfander, *Rethinking the Supreme Court's Original Jurisdiction*].

65. See *id.* at 581. In this Article, I refer to the concept Professor Pfander calls "common law immunity" as "home court immunity."

66. See *id.* at 582-84. Professor Pfander's law-of-nations immunity differs from this Article's theory of the Eleventh Amendment as articulating a state sovereign immunity based on the principle of sovereign dignity under late eighteenth-century international law. On this theory, a noncitizen could not sue a sovereign state because the state is made up of numerous citizens, and the noncitizen is one person who is, in turn, a constituent part of his own state. See Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1032-34; *infra* Part II.D. Purely on that principle, there is nothing wrong with a fully sovereign state exercising a valid international law claim against another sovereign state, whether in a putative tribunal with jurisdiction (which, of course, did not exist at international law in the eighteenth century) or by waging war. One way to understand this Article's argument is as demonstrating how the Framers, fearful of war as a means of

applied in the American context, this rendered the States immune from suits in the courts of other States and, more importantly, the federal courts of the national sovereign. Significantly in the latter regard, the consequence of the so-called Madisonian compromise was that the Constitution did not commit Congress to create lower federal courts at all.⁶⁷ The invocation of these immunities would have entirely disabled the Supreme Court's appellate jurisdiction: Federal-law-enforcing suits could not be brought in the courts of the allegedly violating State by virtue of common law immunity, nor in the courts of other States or putative lower federal courts (which Congress was not obligated to establish) by virtue of law-of-nations immunity.

Professor Pfander's thesis is that the Supreme Court's original jurisdiction was the Framers' solution to this "remedial gap"⁶⁸ by constitutional abrogation of the States' "law-of-nations" immunity:

The framers appear consciously to have chosen to subject the states to suit in federal courts, thus vitiating the states' law-of-nations immunity. Yet the framers did not necessarily intend the grant of jurisdiction to abrogate the states' common law immunity in all disputes to which the original jurisdiction extends.⁶⁹

The necessary consequence of this for the Original Jurisdiction Clause is that, contrary to precedent, it should extend to State-as-party cases arising under federal law or any other aspect of Article III's general grant of judicial power, regardless of the identity of the other parties to the suit. And presuming nonexclusivity, the same conclusion should apply to any lower federal court. Professor Pfander suggests that an implication of his theory, which generally privileges federal right enforcement by private parties as an institutional purpose of the Court, is that the later enactment of the Eleventh Amendment in 1798 should not be construed to foreclose federal question or admiralty suits, but only state law suits brought by aliens or citizens of other States—the diverse parties the Amendment explicitly mentions.⁷⁰ In Professor Pfander's view, which is shared by a majority of the academy, the Supreme Court's decisions ex-

international law claim-vindication, sought by domestic constitutional law—the Original Jurisdiction Clause—to substitute an alternative remedy to war by creating a permanent, domestic tribunal that might be attractive to potential foreign sovereign litigants for the peaceful resolution of international law claims arising from state breaches of U.S. treaty obligations. In contrast, Professor Pfander's law-of-nations immunity does not turn on whether the plaintiff is itself a sovereign state. The difference between the two conceptions is elusive, see e.g., Smith, *supra* note 25, at 34–36 (presuming that Professor Pfander and I are talking about the same principle of contemporaneous international law), but crucial in understanding how sovereign suits against States are different from private ones.

67. See Hart & Wechsler, *supra* note 3, at 8–9; 2 Farrand, *supra* note 46, at 45–46.

68. Pfander, *Rethinking the Supreme Court's Original Jurisdiction*, *supra* note 64, at 559–60.

69. *Id.* at 560.

70. See *id.* at 651–52.

tending state sovereign immunity to federal question suits by private parties are mistaken.⁷¹

The interpretation of the purpose and meaning of the Original Jurisdiction Clause proposed in this Article draws from each of the three pre-existing theories. Like Professor Pfander's, my approach emphasizes the federal-law-enforcing function of the Supreme Court as against the States. But the Framers had in mind for the Court's original jurisdiction the enforcement of federal law pertaining to certain public sovereign actors or their agents—namely, treaty law and the law of nations in international matters and federal common law based on customary international law in interstate matters⁷²—by the interested public sovereigns or their agents—American and foreign states,⁷³ and foreign ambassadors and ministers.

71. See *id.*; see also *Seminole Tribe v. Florida*, 517 U.S. 44, 101–02 (1996) (Souter, J., dissenting) (“The *Hans* Court erroneously assumed that a State could plead sovereign immunity against a noncitizen suing under federal question jurisdiction, and for that reason held that a State must enjoy the same protection in a suit by one of its citizens.”); John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 134–35 (1987) (arguing that, during the first century of American history, courts uniformly held that Eleventh Amendment touched only diversity jurisdiction). See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) (countering present Court's theories of federalism by emphasizing the principle of popular sovereignty under which no government entity should enjoy sovereign immunity against claimed violation of constitutional right); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983) (contending that Eleventh Amendment requires only narrow construction of constitutional language authorizing federal court jurisdiction, but does not prohibit federal court interventions); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983) (asserting that the Eleventh Amendment only applies to cases in which federal subject-matter jurisdiction is pleaded on the basis of diverse party status); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988) (contending that state sovereign immunity does not extend to claims arising under federal law); Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?* 106 Yale L.J. 1683 (1997) (exploring how the Court has crafted exceptions to state sovereign immunity in order to escape rule-of-law problems).

72. See Hart & Wechsler, *supra* note 3, at 738–41 (discussing the Court's making of federal common law in disputes among States). Applying the law of one State in a dispute between States would have been unacceptable to one or the other. Accordingly, the federal rule of decision in a dispute between States was frequently borrowed from an international lawbook's discussion of a rule at the law of nations. For example, in *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374, 379–80 (1820), Chief Justice Marshall resolved a border dispute between Indiana and Kentucky concerning land along the Ohio River by citing a rule from Vattel, *supra* note 61, Book 1, § 267, at 180–81, and no other American or English decision or treatise.

73. The United States itself is the conspicuously absent sovereign in the Original Jurisdiction Clause—an absence that is explained by the provision's concern with the resolution of sovereign disputes of interstate or international character. The Framers would not have thought that the national government would have breached a ratified treaty of the United States, or that the Court, as an organ of the national government,

Included in the catalogue of such public claims that the Court was intended to hear were the private international law claims of a foreign sovereign's citizens or subjects espoused by the sovereign.⁷⁴ Under international law, "[o]nce a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."⁷⁵ Because a private claim is filtered through the public process of an independently sovereign foreign state, no other sovereign may question its discretion to espouse.⁷⁶ And because the Framers intended the Supreme Court's function in controversies between foreign states and States to mimic that of a putative international tribunal, the Court, in the exercise of this function, could not question the foreign state's decision to espouse a claim before the Court, just as the United States could not question a foreign sovereign's decision to espouse by the instrument of war. (Of course, it does not follow that a semisovereign State, which participates in the process of national government and has surrendered its international sovereign rights to war and to conduct diplomatic relations in acceding to the Union, preserves a similarly robust and unreviewable right to espouse its citizen's claims against other sovereigns, foreign or domestic.⁷⁷) On this view, the overarching purpose of the Court's exercise of its original jurisdiction, even in an instance of hearing a foreign state's espoused claim, was not the political aim of securing private liberties or rights in a republic, but, rather, to advance the national interest in peace and harmony domestically among States and internationally with foreign states.

The Original Jurisdiction Clause, then, was really about affording an eminent, credibly neutral tribunal for the resolution of public disputes implicating the essential national interest in domestic and international peace. Private claims of international law violation espoused by foreign states were an important subset of such public disputes, but for their national-peace-related, not personal-right-related, ramifications. While this theory shares the theme of rights enforcement with Professor Pfander's theory, my interpretation also resembles, in part, the Court's "dignified tribunal" theory of the Clause and the part of Professor Amar's geographical theory emphasizing the perceived territorial neutrality of the Court. The Supreme Court was the ideal forum for sensitive sovereign-to-sovereign disputes both because it was the highest court in the land and because, as a supreme national tribunal composed, in the Framers' design,

could be a credibly neutral arbiter in a dispute involving the United States as party. See *infra* text accompanying notes 107–110, 371–375.

74. See *infra* Part III.C.

75. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

76. See *infra* text accompanying note 321.

77. See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 490–94 (1995) (arguing, based on an exhaustive historical survey, that States should be limited in asserting the claims of their citizens as against the federal government and other States); *infra* Part III.E.

of esteemed jurists from a cross-section of the States and with noted internationalist sensibilities,⁷⁸ there was a good chance both States and foreign states might perceive it as a neutral forum for dispute resolution. My theory of the Court as quasi-international peacekeeping tribunal differs from the dignified tribunal and geographical theories of the Original Jurisdiction Clause, however, in its ultimate grounding—not in symbolism or pragmatic convenience, but in the importance of judicial resolution of certain sovereign-to-sovereign controversies for the sake of international peace and national harmony.

B. *"[T]hose in which a State shall be Party"*

Validation of any theory of the Original Jurisdiction Clause necessarily begins with its literal language. A consensus starting point is that the Clause incorporates by reference some subset of the "Cases" or "Controversies" enumerated in the preceding clause of Article III, Section 2.⁷⁹ Once again, the Original Jurisdiction Clause provides, "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."⁸⁰ No one disputes that the "Ambassadors" Subclause incorporates the identically worded grant of judicial power in the preceding clause: "The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls."⁸¹

Disagreement focuses on which "Cases" or "Controversies" in the general grant are the antecedents referred to by the phrase "those in which a State shall be Party." One textual clue that has been largely ignored is the use of the word "those," which seems to refer to the word "Cases" in the preceding "Ambassadors" half of the Clause. Professor

78. See *infra* text accompanying notes 342–358.

79. See *Pennsylvania v. Quicksilver Co.*, 77 U.S. (10 Wall.) 553, 556 (1870) ("This second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any.") There are nine categories of cases and controversies in the general grant:

[(1)] all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

[(2)] all Cases affecting Ambassadors, other public Ministers and Consuls;

[(3)] all Cases of admiralty and maritime Jurisdiction;

[(4)] Controversies to which the United States shall be a Party;

[(5)] Controversies between two or more States;

[(6)] between a State and Citizens of another State;

[(7)] between Citizens of different States;

[(8)] between Citizens of the same State claiming Lands under Grants of different States[;] and

[(9)] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

80. *Id.* art. III, § 2, cl. 2.

81. *Id.* art. III, § 2, cl. 1.

Pfander has skillfully advanced this literal theory.⁸² Since the only other "Cases" referenced in Article III, Section 2, Clause 1 are those arising under federal law and admiralty cases, Professor Pfander concludes that "those in which a State shall be Party" meant "Cases in Law and Equity, arising under th[e] Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;" and "Cases of admiralty and maritime Jurisdiction . . . in which a State shall be a Party."⁸³ If the Framers intended the word "those" in the Original Jurisdiction Clause to refer to the "Controversies" listed in the general grant, then they could have easily substituted the word "those" with "Controversies" and continued "in which a State shall be Party."

One persuasive objection to Professor Pfander's literal reading is that it is irreconcilable with the First Congress's implementation of the Original Jurisdiction Clause by the Judiciary Act of 1789.⁸⁴ The Act "is widely viewed as an indicator of the original understanding of Article III and, in particular, of Congress'[s] constitutional obligations concerning the vesting of federal jurisdiction."⁸⁵ Section 13 of the Act vested the Supreme Court's original jurisdiction as follows:

That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, [(1a)] except between a state and its citizens; and [(1b)] except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. [(2a)] And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and [(2b)] original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.⁸⁶

The Act thus treated the Original Jurisdiction Clause's State-as-Party provision as one defined by the character of the other parties, without regard to whether a case arose under federal or admiralty law.

Moreover, section 9 of the Act separately provides that federal district courts shall have

exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of im-

82. See Pfander, *Rethinking the Supreme Court's Original Jurisdiction*, *supra* note 64, at 600–04.

83. See *id.* at 600 ("The Court's original jurisdiction thus includes a subset of federal question and admiralty 'cases'—a subset limited to all such 'cases' in which a state appears as a party.").

84. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

85. Hart & Wechsler, *supra* note 3, at 29. A separate provision in section 13 was famously declared unconstitutional in Chief Justice John Marshall's opinion for the Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173–74 (1803), a holding that some commentators question. See, e.g., Van Alstyne, *supra* note 53, at 31–33.

86. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80–81.

post, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas . . . and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States.⁸⁷

The painstakingly comprehensive breadth of this “exclusive original” grant of district court jurisdiction over “all civil causes of admiralty and maritime jurisdiction” (and seizures on “other [inland navigable] waters”) leaves no doubt that there is nothing left of admiralty cases for the original jurisdiction of the Supreme Court. Nor is there any indication that the Framers of the Act intended to distinguish “civil causes of admiralty and maritime jurisdiction” in which a State might be a party. To be sure, there is no similar provision for “exclusive original cognizance” in district courts over federal question suits, but neither is there any indication in the First Judiciary Act of an intent to confer federal jurisdiction over any civil suit arising under federal law, with one famous exception of no relevance here.⁸⁸ The Act’s implementation of the Original Jurisdiction Clause thus suggests the Clause’s use of the word “those” was more likely loose drafting rather than indicative of an intent to refer to the “Cases” previously enumerated in Article III’s general grant of judicial power.

In light of the lead taken by the First Judiciary Act, the Court has held that its “original jurisdiction depends solely on the character of the parties, and is confined to [parties named in Article III, Section 2, Clause 1 ‘controversies’] . . . and those only.”⁸⁹ The Court has held, without comment, that this holds true even if a claim arising under federal law is at issue.⁹⁰ Thus, for example, the Court has no constitutional original jurisdiction over suits by in-state citizens alleging state violations of their federal rights. This is particularly problematic for the individual federal-rights-enforcement model of the Supreme Court.

Certainly, though, the conclusion that in-state citizens cannot sue States is consistent with the literal terms of the First Judiciary Act. The Act rules out “exclusive jurisdiction” over suits “between a state and its

87. Id. ch. 20, § 9, 1 Stat. at 77.

88. That exception is also found in section 9, the so-called “Alien Tort Statute” (ATS). It provides that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Id. The ATS clearly contemplated federal jurisdiction for civil tort suits arising under treaties. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute and Its Implications for Human-Rights Litigation in U.S. Federal Courts Today* 22–27 (Sept. 3, 2004) (unpublished manuscript, on file with the *Columbia Law Review*) [hereinafter Lee, *Safe-Conduct Theory of the Alien Tort Statute Theory*].

89. *California v. S. Pac. Co.*, 157 U.S. 229, 257–58 (1895); see also *Minnesota v. N. Sec. Co.*, 184 U.S. 199, 245 (1902).

90. See *Texas v. Interstate Commerce Comm’n*, 258 U.S. 158, 163 (1922).

citizens" without any subsequent provision for nonexclusive original jurisdiction in the Court.⁹¹ Thus, there is no Supreme Court original jurisdiction for in-state citizens at all in State-as-party cases under the 1789 Act. At the same time, the fact that this exception is made explicit in the Act raises doubt about the Court's starting premise in *California v. Southern Pacific Co.*—that the reference points for determining the State-as-party suits within its original jurisdiction are the four "Controversies" subheadings of Article III, Section 2, Clause 1 in which a State might be party: "[1)] Controversies to which the United States shall be a Party; [(2)] Controversies between two or more States; [(3)] between a State and Citizens of another State, . . . and [(4)] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."⁹²

To be sure, state citizens are an enumerated party in the last, foreign-parties subheading ("Citizens thereof"), but in a context precluding the inference that they were intended to be parties adverse to their State. In light of this, why did the First Congress bother to rule out State-versus-state-citizen suits in section 13 of the Judiciary Act? That is, it would have been superfluous to say "except between a state and its citizens" if the only possible litigants in State-as-party cases were those named as adverse parties to States in the list of "Controversies," since there is no mention of "Controversies" between a State and its citizens.

There are two potential explanations for the Act's puzzling exception of suits between "a state and its citizens," both of which contradict the Court's four-controversies theory of acceptable litigants in State-as-party original suits. First, Congress might have been thinking of all potential litigants against States in the Article III general grant of federal jurisdiction, not just those mentioned in the "Controversies" subheadings. If so, since section 13 began with an open-ended inclusion of all such potential suitors, "[t]hat the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party," it was necessary to qualify "except between a state and its citizens" regardless of the fact that state citizens are not a State-adverse party in any enumerated "Controversies."⁹³ It was unnecessary, however, to mention "Ambassadors, other public Ministers and Consuls" because they were dealt with directly in other provisions of section 13, supplying an independent basis for the Court's original jurisdiction in suits in which such foreign envoys might find themselves in litigation with a State.⁹⁴ Citizens of other States and foreign citizens or subjects were likewise explicitly addressed in other provisions of section 13 affording original but not exclusive jurisdiction.⁹⁵

91. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80.

92. U.S. Const. art III, § 2, cl. 1.

93. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80.

94. See *supra* text accompanying note 86 (provisions (2a) and (2b)).

95. See *supra* text accompanying note 86 (provision (1b)).

On this theory, any conceivable litigants who are not addressed in these exceptions or provisions would be entitled to exclusive original jurisdiction in the Court in a suit against a State because of the inclusionary reach of section 13's opening provision, i.e., "[t]hat the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party."⁹⁶ This makes sense for other States, the United States, and foreign states, which are explicitly mentioned in Article III, Section 2, Clause 1 "Controversies" anyway. But it does not make sense for other potential litigants mentioned elsewhere in the Constitution—namely, captive slaves, who were considered neither citizens of States nor citizens or subjects of foreign states,⁹⁷ and Indian tribes, which seem to have been viewed in 1789 as distinct from States and foreign states.⁹⁸ Indeed, the Court explicitly held in 1831 that Indian tribes were "domestic dependent nations" but not "foreign states" or "States of the Union," the latter two being the only "states" with the presumptive constitutional right to invoke the Court's original jurisdiction.⁹⁹ The fatal flaw of the all-litigants theory, then, is its implication of limitlessness for the section's opening grant providing for the Court's exclusive jurisdiction "of all controversies of a civil nature, where a state is a party," subject to ensuing statutory qualifications.

The second, more plausible theory is that the drafters of section 13 of the Judiciary Act intended a more precise anchor for the opening provision's seemingly boundless grant. Specifically, they construed the Original Jurisdiction Clause's specification of "those in which a State shall be Party" as addressing only the three "Controversies" headings in the preceding clause explicitly naming a State as party. These extended federal judicial power "to Controversies between two or more States;—between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."¹⁰⁰ On this view, the drafters of section 13 wanted to make absolutely clear that the words "Controversies between a State, *or* the Citizens thereof"¹⁰¹ did not mean Controversies between a State *and* citizens thereof. While such a reading seems mistaken, it was a plausible mistake and one that was famously

96. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80

97. See U.S. Const. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation . . ."); id. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour . . .") (modified by the Thirteenth Amendment).

98. U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

99. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15–16 (1831).

100. U.S. Const. art. III, § 2, cl. 1.

101. Id. (emphasis added).

made by George Mason at the Virginia ratifying convention. Here is James Madison's characteristically cool account:

[George Mason]: The last clause is still more improper [than the one giving federal courts jurisdiction of controversies "between citizens of different States"]. To give them cognizance in disputes between a State and the citizens thereof, is utterly inconsistent with reason or good policy.

Here Mr. Nicholas arose, and informed Mr. Mason, that his interpretation of this part was not warranted by the words.

Mr. Mason replied, that if he recollected rightly, the propriety of the power as explained by him, had been contended for; but that as his memory had never been good, and was now much impaired from his age, he would not insist on that interpretation.¹⁰²

Thus, section 13's explicit exception of original jurisdiction over suits between a State and its citizens may have been drafted as a precautionary measure to ensure that no one would construe the foreign-parties provision in Article III, Section 2, Clause 1 to mean what Mason had presumed it to say before he was corrected. If this is right, it strongly indicates that section 13 was concerned exclusively and narrowly with parsing out the exact language of Article III's three "Controversies" subheadings in which a State is named as a party, and with neither all conceivable litigants against States nor all litigants against States mentioned in any "Controversies" subheading. If this, in turn, is correct, then it suggests the State-as-Party provision of the Original Jurisdiction Clause was itself limited to the three sets of "Controversies" in which a State is specifically named as a potential party.

This constitutional implication introduces a single point of divergence from the Court's current doctrine on the issue. In *United States v. Texas*, the Court held that its original jurisdiction extended to controversies between a State and the United States.¹⁰³ But as Chief Justice Fuller, joined by Justice Lamar, cryptically pointed out in his dissenting opinion, the United States is not named in any of the three State-as-Party "Controversies" subheadings.¹⁰⁴ Rather, the relevant grant merely says "Controversies to which the United States shall be a Party"¹⁰⁵ without mentioning

102. George Mason, Remarks at Virginia Convention (June 19, 1788), in 10 *The Documentary History of the Ratification of the Constitution* 1387, 1403 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter *Documentary History of Ratification*].

103. 143 U.S. 621, 646 (1892).

104. See *id.* at 648–49 (Fuller, C.J., dissenting); cf. *Ex Parte Republic of Peru*, 318 U.S. 578, 598 (1943) (Frankfurter, J., dissenting) (agreeing with the dissent in *United States v. Texas* that "the merely literal language of the Constitution precluded" original jurisdiction over a suit by the United States against a State). Indeed, Justice Benjamin Curtis, who was not a States' rights champion by any means, believed the States enjoyed sovereign immunity in suits brought by the United States: "The State of Georgia has consented to be sued by one or more States, or by foreign states, and by no other person or body politic." *Florida v. Georgia*, 58 U.S. (17 How.) 478, 507 (1854) (Curtis, J., dissenting).

105. U.S. Const. art. III, § 2, cl. 1.

a State as party.¹⁰⁶ Certainly, a United States-versus-State suit is theoretically within the pale of this particular grant, but that would be of no consequence if the State-as-Party part of the Original Jurisdiction Clause referred solely to the three "Controversies" of the general grant in which a State is explicitly mentioned as a potential party.

As a historical matter, it seems plausible that the Framers of the Constitution in 1787 did not intend the Original Jurisdiction Clause to extend to a suit between the United States, necessarily represented by the executive branch, and a State. The crucial aspect of neutrality, which could be reasonably presumed in a controversy between States or between a State and a foreign state (or affecting foreign ambassadors), would be more suspect from the State's perspective if the Supreme Court were to serve as tribunal in a dispute between it and a coordinate branch of the national government. Nor would it have been clear at the time of the founding how the Court could have enforced a decision adverse to the United States in a civil suit.¹⁰⁷ As the alternative of a state court forum would be equally unattractive from the United States's perspective, it is possible that the Framers did not consider United States-versus-State controversies amenable to federal or state judicial solution.¹⁰⁸ The

106. Professor Pfander argues that the Article III, Section 2, Clause 1 basis for *United States v. Texas* was its provision for "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." See Pfander, Rethinking the Supreme Court's Original Jurisdiction, *supra* note 64, at 574-76. Justice Harlan's opinion is admittedly hard to decipher on this score, for he mentions both the federal question and the "Controversies to which the United States shall be a Party" subheadings of Article III's general grant as potential bases for the Court's original jurisdiction over the case. See *United States v. Texas*, 143 U.S. at 644-45. In my view, the best way to characterize the holding is that the Court has original jurisdiction over a case in which a State is party, the United States is the other party, and the suit arises under federal law. Thus, *United States v. Texas* decided neither the question of whether the Court might have original jurisdiction in a State-as-party case arising under federal law, nor the question of whether it might have original jurisdiction in a State-as-party suit where the United States was the other party, but the suit did not arise under federal law. But it is hard to imagine that there would be any case between a State and the United States that would not arise under federal law. Contrary to Professor Pfander's view, the Court seems justified, then, in proceeding in subsequent cases on the assumption that *United States v. Texas* stands for the proposition that the Court may exercise its original jurisdiction in "Controversies to which the United States shall be a Party" and any other party is a State, rather than the proposition that the Court may exercise original jurisdiction over a State-as-party case arising under federal law.

107. Cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J.) ("[I]n all cases of actions against States or individual citizens, the National Courts are supported . . . by the arm of the Executive power of the *United States*; but in cases of actions against the *United States*, there is no power which the Courts can call to their aid.").

108. Following the same train of thought, the Court in *United States v. Texas* reached the opposite conclusion—that the Framers could not possibly have intended such controversies to be resolved in any way other than adjudication by the Supreme Court:

[I]f neither party will surrender its claim of authority and jurisdiction over the disputed territory, the result, according to the defendant's theory of the Constitution, must be that the United States, in order to effect a settlement of this

United States never even attempted such a suit until three decades after the Civil War. The closest instance until that time was *Florida v. Georgia* in 1854, when the United States sought to intervene on behalf of Florida in a boundary dispute over territory acquired by the United States in a treaty with Spain.¹⁰⁹ These concerns about neutrality and enforcement explain why the Original Jurisdiction Clause does not provide for jurisdiction in the Court over “Controversies to which the United States is a Party” at all.¹¹⁰

But this divergence between the position in *United States v. Texas*—that the Court’s original jurisdiction extends to suits by the United States “in which a State shall be Party”—and an interpretation of the Original Jurisdiction Clause that restricts the Court’s original jurisdiction to the three named controversies in which a State is a party (as against States, citizens of other States, and foreign states, citizens, or subjects) is largely irrelevant for the purposes of this Article. Either theory would place foreign state-versus-State disputes within the Court’s original jurisdiction. Moreover, there is great affinity between the justifications for state liability in original actions by the United States advanced in *United States v. Texas* and justifications for state liability in suits by foreign states. In contrast to self-interested private suits, both sorts of sovereign suits presume filtration of claims through the suing sovereign’s political process, and both would involve the resolution of controversies implicating the important national interest in peace.¹¹¹ Nor is it my intent, in light of this affinity, to assert that the holding in *United States v. Texas* on this point should be revisited.

To reiterate, section 13 unambiguously mandates original and exclusive jurisdiction in the Supreme Court over cases “where a State is party” and the other party is another State or a foreign state. Section 13 states “[t]hat the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is party.” Neither a State nor a foreign state is an enumerated party exception, although they are expressly named in Article III’s general grant of federal judicial power over

vexed question of boundary, must bring its suit in one of the courts of Texas . . . or that, in the end, there must be a trial of physical strength between the government of the Union and Texas. The first alternative is unwarranted both by the letter and spirit of the Constitution. . . . The second alternative . . . has no place in our constitutional system, and cannot be contemplated by any patriot except with feelings of deep concern.

143 U.S. at 641. Such an impasse would most definitely have been a constitutional crisis, but it does not seem so clear to me that the Framers would have thought the Supreme Court, as an organ of the national government, an appropriate vehicle for its resolution. Of course, by 1892, circumstances had changed so dramatically since 1788 that it was possible, indeed natural, to contemplate such a mission for the Court.

109. 58 U.S. (17 How.) 478, 491 (1854).

110. The Court has indicated that the United States is not a “State” for purposes of the State-as-Party half of the Original Jurisdiction Clause. See *Ex Parte Republic of Peru*, 318 U.S. 578, 583 n.3 (1943).

111. See *infra* text accompanying notes 485–487.

controversies in which a State might be party. Therefore, the Supreme Court "shall have exclusive jurisdiction of all controversies of a civil nature" involving a State and other States or foreign states. (The theory of *United States v. Texas*, if a valid interpretation of the 1789 Act, would extend this to the United States.) Since the statute cannot exceed its constitutional authorization, the only conclusion one can draw is that the Original Jurisdiction Clause affords original jurisdiction in the Supreme Court over suits between foreign states and States.

The original Senate bill version of section 13 of the First Judiciary Act makes this conclusion explicit from another direction by directly naming foreign states as among those within the Supreme Court's original jurisdiction. It provides that

the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where any of the United States *or a foreign state* is a party, except between a state and its citizens; and except also between a state and citizens of other states or foreigners, in which latter case it shall have original but not exclusive jurisdiction.¹¹²

The enacted version deviates slightly but importantly from the Senate bill: "where a state is a party" rather than "where any of the United States or a foreign state is party." The Act in general was little modified from the Senate version. There is no evidence as to why the language of the Senate bill was not adopted in this instance. It is thus impossible to tell whether the enacted phrase "where a state is a party" retained the Senate bill's explicit dual meaning or whether the modification signaled an intent to refer only to States (which, of course, would still have provided the Court exclusive jurisdiction of suits between States and foreign states). The two statutory exceptions to State-as-Party jurisdiction suggest that "state" means State (which is the operating presumption in this Article), but the problem with this inference is that the enacted exceptions are identical to the Senate bill's original exceptions, except for the wholly unrelated substitution of "aliens" (a synonym of negative connotation) for "foreigners."¹¹³ Any clue from the phrasing of the exceptions is therefore a red herring.

An intriguing interpretive implication of the Senate bill is that where the Original Jurisdiction Clause says suits "in which a State shall be Party, the supreme Court shall have original Jurisdiction," the Framers of the Constitution intended "State" to mean "American or foreign" state. The effect of this would be minimal, however, because it would only add "controversies between [state] citizens . . . and foreign States" to the Court's

112. Judiciary Act of 1789, S. 1, 1st Cong., at 6 (Thomas Greenleaf printed version) (emphasis added) (on file with the *Columbia Law Review*). See generally Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789* (Wythe Holt & L.H. LaRue eds., 1990) (providing background on context and drafting history of the Act).

113. See Lee, *Safe-Conduct Theory of the Alien Tort Statute Theory*, *supra* note 88 (manuscript at 16-18).

constitutional original jurisdiction.¹¹⁴ Moreover, given the rules of foreign sovereign immunity at international law at the time, such jurisdiction would have operated principally in suits by foreign states against state citizens, as foreign states could not be sued without their consent.¹¹⁵ Of course, by adopting the language that was ultimately enacted, the First Congress did not explicitly provide for the statutory implementation of this original jurisdiction, which would have been self-executing in any event.¹¹⁶

Apparently, no one has considered or investigated the possibility that "State" in the Original Jurisdiction Clause means foreign or American State.¹¹⁷ The Supreme Court has concluded that "State" does not mean Indian tribes (to the extent they were neither foreign states nor States of the Union)¹¹⁸ or the United States,¹¹⁹ and this is consistent with the Senate bill. Nor is it feasible that "State" has this dual meaning anywhere else

114. Foreign state-versus-State suits would fall within the Original Jurisdiction Clause on the conventional, American state reading of the State-as-Party Subclause.

115. See *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 145–46 (1812) (holding that in the absence of consent, a foreign sovereign "cannot be considered as having imparted to the ordinary tribunals [of another sovereign] a jurisdiction"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451 (1793) (Blair, J.) ("[T]he instances may rarely occur, when a State may have an opportunity of suing in the *American Courts* a foreign State . . .").

116. See cases cited *supra* note 51.

117. In a 1952 article, Wienczyslaw J. Wagner raised but did not answer the question in apparent reference to the statute implementing Article III, Section 2, Clause 1's extension of federal judicial power to "Controversies between two or more States." He asked: "The Supreme Court has original and exclusive jurisdiction of all controversies between two or more states; but how is the word *state* to be understood? Does it cover foreign states, or does it relate only to the states of the union?" Wienczyslaw J. Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 St. Louis U. L.J. 111, 152 (1952). The somewhat confusing ensuing discussion of state sovereign immunity in suits brought by foreign states before and after *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934), indicates that he believed the answer to be negative, inasmuch as he appears to take no issue with *Monaco's* holding that a foreign state could not, like an American State, sue a State in the Supreme Court without its specific consent to suit. See *id.* at 152–55. In any event, Wagner did not consider the questions in the context of interpretation of the State-as-Party provision of the Original Jurisdiction Clause, specifically as it implements Article III, Section 2, Clause 1's provision for "Controversies . . . between a State . . . and foreign States." In addition, Wagner's reference to the Court's "Original and Exclusive Jurisdiction" in the title of his article, which ably provides a descriptive survey of the evolution of doctrine on the subject up to 1952, does not refer to an argument of constitutional exclusivity of the sort made in this Article *supra* Part I.C.

Professor Michael Rappaport, without focusing specifically on the words "State shall be Party" in the Original Jurisdiction Clause, has argued that the use of the word "State" in 1789 had the "primary meaning" of "independent nation or country." See Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court vs. Tenth and Eleventh Amendment Decisions*, 93 Nw. U. L. Rev. 819, 832 (1999). Presumably, he would concur in my view that "State" in the Original Jurisdiction Clause might be a reference to both American and foreign states.

118. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–20 (1831).

119. See *Ex Parte Republic of Peru*, 318 U.S. 578, 583 n.3 (1943).

in Article III or in the Constitution as a whole. If the Senate bill correctly construed the Original Jurisdiction Clause, the only plausible reason for writing "in which a State shall be party" instead of elucidating its dual meaning seems to be economy of phrasing notwithstanding the sacrifice in clarity.

There does not appear to be any evidence in the historical records on this precise interpretive question, but there are two good reasons for believing the Senate bill was accurate in its interpretation of "State" in the Original Jurisdiction Clause as a foreign or American state. First, the Senate bill was largely Oliver Ellsworth's handiwork.¹²⁰ Ellsworth, then a U.S. Senator from Connecticut and a future Chief Justice of the Supreme Court, was an extraordinarily capable technical lawyer and a member of the Constitutional Committee of Detail that drafted Article III.¹²¹ He would certainly have had insight into what the Framers of the Clause had intended, for he was one of them.

Second, it is commonly accepted that the Original Jurisdiction Clause was drafted with an eye to affording domestic and foreign sovereign litigants or their agents a credibly neutral, dignified hearing in the highest court of the nation.¹²² If suits involving American States and foreign ambassadors, public ministers, or consuls warranted the Court's original cognizance, why not the foreign sovereign state itself, of which an ambassador is merely an agent? Under contemporaneous international law, an ambassador or public minister was entitled to the dignity of his sovereign "master," but he himself was not the sovereign, but rather the master's agent.¹²³ That the Framers were aware that a "foreign state" and its "Ambassadors, other public Ministers and Consuls" were separate entities is confirmed by the separate provision for each in Article III's general grant of federal judicial power. In light of this, and given the Original Jurisdiction Clause's provision for American States and foreign envoys, it is reasonable to interpret the Clause's specification of "State

120. See William Maclay, Diary Entry of 29 June 1789, in 9 *Documentary History of the First Federal Congress of the United States of America* 91, 91 (Kenneth R. Bowling & Helen E. Veit eds., 1988) ("[T]his Vile Bill is a child of [Ellsworth's], and he defends it with the Care of a parent."); see also William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 27 (1995).

121. See Casto, *supra* note 120, at 14, 31-32.

122. See *supra* Part I.A. No theory of the Original Jurisdiction Clause doubts that this motive had something to do with its origin; opinions vary on principal cause. Such a privilege would be unnecessary for the United States in its own courts.

123. See, e.g., Vattel, *supra* note 61, Book 4, § 70, at 520-21; *id.* Book 4, § 80, at 525-26; cf. *Ex Parte Gruber*, 269 U.S. 302, 303 (1925) (noting that the right to invoke the Court's original jurisdiction under the "Ambassadors" provision "is a privilege, not of the official, but of the sovereign or government which he represents"); *Davis v. Packard*, 32 U.S. (7 Pet.) 276, 284 (1833) ("If the privilege or exemption was merely personal, . . . it would [not] have been thought a matter sufficiently important to require a special provision in the constitution and laws of the United States."). *Gruber* also held that the "Ambassadors" provisions in Article III's general grant and necessarily the Original Jurisdiction Clause applied only to foreign ambassadors. See 269 U.S. at 303.

shall be Party" to include foreign states.¹²⁴ This necessarily reinforces the argument that the Framers of the Constitution intended controversies between States and foreign states to fall within the Court's original jurisdiction.

C. Does the Original Jurisdiction Clause Require Any Exclusive Supreme Court Jurisdiction?

Whether one believes that the State-as-Party half of the Original Jurisdiction Clause envisioned litigants in four "Controversies" or just those three "Controversies" naming a State as party, one thing is clear from section 13: Civil controversies between States and between States and foreign states were committed to the Supreme Court's exclusive jurisdiction.¹²⁵ As previously noted, section 13 opened by providing "[t]hat the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party,"¹²⁶ subject to ensuing exceptions that mention neither controversies between States nor controversies between a State and a foreign state.¹²⁷ Under the Act, the Court's jurisdiction is similarly exclusive only for "suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations."¹²⁸ All other categories of the Court's original jurisdiction, including suits between States and citizens of other States, foreign citizens, or foreign subjects, suits by ambassadors or ministers and associated domestics, and suits involving consuls or vice consuls, are not exclusive under the First Judiciary Act.¹²⁹ Under the modern statute, the Court's original jurisdiction is exclusive only for "controversies between two or more States."¹³⁰

Members of the early Court were not so sure that the Constitution permitted Congress to share the Court's original jurisdiction with lower courts in this way. With respect to the ambassadors half of the Original Jurisdiction Clause, the following statement in *Federalist No. 81* is a good starting point:

Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned

124. Indeed, given doubt whether consuls were entitled to law-of-nations privileges and protections of the sort enjoyed by ambassadors and public ministers, see *infra* note 151, their inclusion in the Original Jurisdiction Clause indicates the Framers' preference for erring on the side of caution where a foreign sovereign's due dignity was concerned. It is thus especially hard to believe the Framers intended to leave foreign states out of the Original Jurisdiction Clause.

125. On the four controversies theory of *United States v. Texas*, the Court's original jurisdiction under the Act was also exclusive for United States-versus-State controversies. See 143 U.S. 621, 646 (1892).

126. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

127. See *id.*

128. *Id.*

129. See *id.* ch. 20, § 13, 1 Stat. at 80–81.

130. 28 U.S.C. § 1251(a) (2000).

are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.¹³¹

In *United States v. Ravara*,¹³² a 1793 circuit court decision, the two circuit justices on the three-judge panel disagreed about whether the First Congress's grant of concurrent jurisdiction to lower federal courts in cases affecting consuls was constitutional. According to Justice Wilson, whose opinion prevailed in the case,

[A]lthough the Constitution vests in the Supreme Court an original jurisdiction, in cases like the present [involving a foreign consul], it does not preclude the Legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior Courts, as might by law be established¹³³

Justice Iredell took a different view, one that was consistent with Hamilton's position quoted above:

I do not concur in this opinion, because it appears to me, that for obvious reasons of public policy, the Constitution intended to vest an exclusive jurisdiction in the Supreme Court, upon all questions relating to the Public Agents of Foreign Nations. Besides, the context of the judiciary article of the Constitution seems fairly to justify the interpretation, that the word original, means exclusive, jurisdiction.¹³⁴

Chief Justice Marshall had this to say in *Marbury v. Madison*, which supports Justice Iredell's interpretation of the Original Jurisdiction Clause as disabling congressional discretion to vest the Court's original jurisdiction concurrently in lower federal courts:

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested.¹³⁵

Solely on the basis of the Act's foundational bifurcation into exclusive and nonexclusive categories, however, the Court has long presumed that the Original Jurisdiction Clause contains no constitutional mandate of original jurisdiction exclusive to the Court.¹³⁶ Although the Court has

131. The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961). It is unclear whether Hamilton included consuls—the foreign officials at issue in *Ravara*, discussed below—in the category of “[p]ublic ministers of every class.”

132. 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793).

133. *Id.* at 298 (Wilson, J.).

134. *Id.* at 298–99 (Iredell, J.).

135. 5 U.S. (1 Cranch) 137, 174 (1803).

136. See *Ames v. Kansas*, 111 U.S. 449, 469 (1884) (“[W]e are unable to say that it is not within the power of the Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with

formally affirmed nonexclusive jurisdiction in only two instances that were nonexclusive under the 1789 Act—suits in which a consul is a party¹³⁷ and between a State and its citizens¹³⁸—the conventional wisdom is that Congress may concurrently grant the Court's original jurisdiction to the lower federal courts as it pleases, without regard for whether such jurisdiction was nonexclusive under the 1789 Act.¹³⁹ With respect to suits against foreign ambassadors or ministers, the judicial code has provided for nonexclusive jurisdiction in the Court since 1978,¹⁴⁰ thereby reversing the statutory exclusivity that had pertained since 1789. As to State-as-

original jurisdiction.”); *Börs v. Preston*, 111 U.S. 252, 260 (1884) (“[W]e concur . . . that as Congress was not expressly prohibited from giving original jurisdiction in cases affecting consuls to the inferior judicial tribunals . . . , neither public policy nor convenience would justify the court in implying such prohibition, and, upon such implication, pronounce the act of 1789 to be unconstitutional and void.”). *Ames v. Kansas* provides the best example of this mode of analysis—extrapolating from the nonexclusive provisions of section 13 of the 1789 Act a presumption of nonexclusivity as a constitutional matter. 111 U.S. at 463–69.

Another crumb of possibly relevant evidence is typically not mentioned, perhaps because it seems ambiguous and, to the extent any judgment can be made on its import, it would seem to favor Justice Iredell's and Chief Justice Marshall's heretical position of the wholesale constitutional exclusivity of the Court's original jurisdiction. Recall that the Committee of Detail's draft of the precursor to the Original Jurisdiction Clause included provision for the Court's original jurisdiction over “cases of impeachment.” See *supra* note 46. The draft provision also stated that “[t]he Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.” One possible inference from the difference between this provision and the absence of any mention of congressional power to share the Court's original jurisdiction in the Original Jurisdiction Clause as it was ratified is that the Framers intended the Court's original jurisdiction to be exclusive, that in rejecting the excised language the Framers logically rejected its premise of nonexclusivity.

An alternative possible inference is that the Framers believed that congressional power to share the Court's original jurisdiction was implicit in the Clause's language, and that they therefore thought it unnecessary to draw the point out expressly. On this theory, the Framers rejected the language explicitly affording congressional power to make the Court's original jurisdiction nonexclusive without rejecting its meaning either for brevity or for clarity, given that the parenthetical reference to impeachments had to be removed in any event because of their decision to commit the power of trying impeachments to the Senate and not the Court. This is the less persuasive view. Article III contains a clear reference to congressional discretion over the Court's *appellate* jurisdiction reflected in the words “with such exceptions and under such regulations as the Congress shall make,” which, but for the use of “Congress” instead of “Legislature,” were entirely adopted from the Committee of Detail's draft. In contrast, there is no such “exceptions” or “regulations” language in the Original Jurisdiction Clause.

137. E.g., *Börs*, 111 U.S. at 260.

138. E.g., *Ames*, 111 U.S. at 469 (suit between Kansas and Kansas corporations). The suit involved a federal question and was decided before the holding in *California v. S. Pac. Co.*, 157 U.S. 229, 257–58 (1895), limiting the Original Jurisdiction Clause to the party-based Controversies enumerated in Article III, Section 2, Clause 1.

139. See Hart & Wechsler, *supra* note 3, at 271.

140. See Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808, 810 (1978) (amending statute, which, like the 1789 Act, had provided for exclusive jurisdiction in the Court for suits against ambassadors and public ministers). The modern statute provides that

party suits, the current statute, also in contrast to the First Judiciary Act, provides that the Court's original jurisdiction is exclusive only for State-versus-State cases, and not for State-as-party cases involving the United States or a foreign state as the other party.¹⁴¹ Indeed, the modern original jurisdiction statute does not even authorize nonexclusive original jurisdiction in the Court over suits by foreign states,¹⁴² but this does not pose a constitutional difficulty in light of the presumption that the Court's original jurisdiction is self-executing. (If it were not self-executing, the absence of a congressional statute authorizing exclusive or nonexclusive jurisdiction over foreign state-versus-State controversies would be an unconstitutional contraction of the Court's original jurisdiction.¹⁴³)

In practice, nonexclusivity means that the Court's original jurisdiction is dramatically curtailed, for the Court is unlikely to exercise its jurisdiction in the first instance when a state court or lower federal court is available.¹⁴⁴ Moreover, even in cases such as State-versus-State controversies in which the Court's original jurisdiction is exclusive by statute, the Court has held its original jurisdiction not to be mandatory, customarily basing a discretionary denial of leave to file an original action on the presence of an alternative forum.¹⁴⁵ An additional factor appears to be the extent to which a suit by a State is perceived to be one in which it is

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of: (1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; (2) All controversies between the United States and a State; (3) All actions or proceedings by a State against the citizens of another State or against aliens.

28 U.S.C. § 1251 (2000).

141. See 28 U.S.C. § 1251. The statute does not refer to suits against States by foreign states; indeed, no part of the judicial Code provides explicitly for original jurisdiction over such suits in federal court, even in the district courts. The diversity statute only provides for jurisdiction in a suit by a foreign state against "citizens of a State or of different States," *id.* § 1332(a)(4), and a separate part of the Code provides for district court jurisdiction in certain suits where a foreign state is defendant, see *id.* § 1330(a) ("The district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . ."). Thus, under present law, a foreign state cannot bring a suit against a State in any federal court on party status alone as the Original Jurisdiction Clause would appear to contemplate.

142. See *supra* note 56 (quoting 28 U.S.C. § 1251).

143. See *supra* note 53 and accompanying text.

144. See Hart & Wechsler, *supra* note 3, at 299-303.

145. See cases cited *supra* note 9. Members of the Court and commentators have decried this development. See *Wyoming v. Oklahoma*, 502 U.S. 437, 474 n.* (1992) (Thomas, J., dissenting); Shapiro, *supra* note 9, at 560-61; cf. McKusick, *supra* note 57, at 187-88, 198-201 (surveying Court's exercise of original jurisdiction from 1961 to 1993).

litigating as *parens patriae* on behalf of its citizens, rather than suing to validate its own "sovereign" interest "*qua State*."¹⁴⁶

The proposition that the Original Jurisdiction Clause contains no constitutional mandate of exclusivity is a reasonable inference from the First Judiciary Act's bifurcation into exclusive and nonexclusive categories of the Court's original jurisdiction, but it is neither the only inference nor the best one. One could as reasonably (or more reasonably, given that a narrow reading of the 1789 Act seems preferable when the issue at stake is Congress's power over the self-executing original jurisdiction of the Supreme Court) assert that the First Congress considered its bifurcation to be descriptive of the Original Jurisdiction Clause rather than a permissible exercise in legislative discretion. On this view, which I will assert with one exception explained below,¹⁴⁷ what the Act says is exclusive to the Supreme Court is exclusive as a constitutional matter.¹⁴⁸ By contrast, there would be no constitutional requirement of exclusivity for suits between States and citizens of other States or aliens, suits against consuls,¹⁴⁹ and civil suits brought by ambassadors or public ministers, which are nonexclusive under the terms of the 1789 Act.

To be clear, I am not asserting, as did Justice Iredell, that "the context of the judiciary article of the Constitution seems fairly to justify the interpretation, that the word *original*, means *exclusive*, jurisdiction."¹⁵⁰ Nor am I arguing, as one might infer most sharply from the Senate bill version of the Act, that the Court's original jurisdiction is constitutionally exclusive in any cases in which an American or foreign state or ambassador, public minister, or consul is a defendant.¹⁵¹ Finally, my claim is not

146. *Maryland v. Louisiana*, 451 U.S. 725, 763–68 (1981) (Rehnquist, J., dissenting) (criticizing Court for allowing original action by Maryland and seven States against Louisiana for imposing natural gas tax with price effects on consumers in plaintiff States); see *Woolhandler & Collins*, *supra* note 77, at 510–15 (arguing that state standing was traditionally limited to assertion of State's own common-law property or contract interests and property-like boundary claims and, accordingly, advocating limits generally on *parens patriae* suits and specifically on Court's original jurisdiction over State-versus-State suits that could be litigated by private parties).

147. See *infra* text accompanying notes 152–164.

148. Cf. *Louisiana v. Texas*, 176 U.S. 1, 16 (1900) (presuming Court's original jurisdiction over suits between States to be exclusive as a constitutional matter in light of exclusive provision in First Judiciary Act).

149. The Court has formally held its original jurisdiction to be nonexclusive in only these two instances. See *supra* notes 137–138.

150. *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 (C.C.D. Pa. 1793) (Iredell, J.).

151. The bill states, in pertinent part, that the Supreme Court shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, other public ministers or consuls, or their domestics or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits for trespasses brought by ambassadors, other public ministers or consuls, or their domestics or domestic servants.

Judiciary Act of 1789, S. 1, 1st Cong., at 6 (Thomas Greenleaf printed version) (on file with the *Columbia Law Review*). Section 13, by contrast, provides for nonexclusive jurisdiction in

that exclusivity is constitutionally required in all three categories for which the First Judiciary Act prescribed it: (1) controversies between States; (2) controversies between a State and a foreign state; and (3) "suits or proceedings against ambassadors, or other public ministers, or

suits against consuls and vice consuls. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (affording nonexclusive jurisdiction in the Court of "all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul shall be a party."). Section 9 vests in the district courts "jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls" except for certain criminal offenses. *Id.* § 9, 1 Stat. at 77.

The difference between the Senate bill and the enacted version on this point may have reflected a debate at contemporaneous international law about the diplomatic status of consuls, whose primary responsibility—to oversee trade interests and umpire disputes between merchants of his state in a foreign port—was commercial, not diplomatic. As Vattel notes,

Wicquefort, in his treatise of *The Ambassador*, Book I § 5 says that consuls do not enjoy the protection of the law of nations, and that both in civil and criminal cases they are subject to the justice of the place where they reside. But the very instances he cites contradict his proposition.

Vattel, *supra* note 61, Book 2, § 34, at 208. Even under current international law, "Consuls are in principle distinct in function and legal status from diplomatic agents. Though agents of the sending state for particular purposes, they are not accorded the type of immunity from the laws and enforcement jurisdiction of the receiving state enjoyed by diplomatic agents." Ian Brownlie, *Principles of Public International Law* 355 (6th ed. 2003); see also Restatement (Third) of the Foreign Relations Law of the United States § 465 cmt. a (1987) (comparing diplomatic and consular immunities). Alternatively, vesting concurrent jurisdiction in district courts over suits against consuls and vice consuls may have been a practical accommodation of the fact that such foreign officials would be based at ports and not the national capital where the First Congress likely contemplated the Supreme Court would be sited. See *supra* note 61 and accompanying text.

The Senate bill's State-as-party provision, which, in contrast to its ambassadorial provision for consuls, tracks the enacted portion of section 13, appears to authorize nonexclusive jurisdiction in suits brought by citizens of other States or aliens against States. The bill thus seems, at first glance, to contradict the theory that the Supreme Court has exclusive jurisdiction when a party named in the Original Jurisdiction Clause is a defendant. S. 1 at 6 ("[T]he Supreme Court shall have exclusive jurisdiction . . . where any of the United States or a foreign State is a party . . . except also between a State and citizens of other States or foreigners, in which latter case it shall have original but not exclusive jurisdiction.").

It may be, however, that Ellsworth, in line with the future enactment of the Eleventh Amendment, presumed that States would be entitled to sovereign immunity in suits brought by foreigners or citizens of other States, and so presumed the exception to apply solely to suits brought by States against out-of-state private parties, and not at all to suits in which States might be defendants. This is consistent with Circuit Justice Iredell's opinion in *Farquhar v. Georgia* (C.C.D. Ga. 1791), reprinted in 5 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 154 (Maeva Marcus et al. eds., 1994), in which he rejected circuit court jurisdiction over a suit brought by an out-of-state citizen against Georgia, notwithstanding section 13's explicit provision of nonexclusive jurisdiction, reasoning, in part, "It may also fairly be presumed that the several States thought it important to stipulate that so awful & important a Trial should not be cognizable by any Court but the Supreme." The Supreme Court subsequently, and famously, took the case as an original action without questioning the basis of Circuit Justice Iredell's denial of circuit court jurisdiction. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).

their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations.”¹⁵² (The holding in *United States v. Texas*, if an accurate interpretation of section 13, would add to the list controversies between the United States and a State, which are by current statute concurrently committed to lower federal courts.¹⁵³) Rather, the idea I wish to explore is the possibility of a constitutional requirement of exclusivity for the two categories of controversies between States and between a State and a foreign state only.

The argument that the First Judiciary Act’s specification of exclusivity for suits against ambassadors, public ministers, or members of their households was not constitutionally required—in contrast to the statute’s prescribed exclusivity in suits between American and foreign states and among the States—starts with the pertinent language of the Original Jurisdiction Clause. The Clause vests original jurisdiction in the Court over “Cases affecting Ambassadors, other public Ministers and Consuls.”¹⁵⁴ The word “affecting” appears at first glance to be an expansive term, potentially extending original jurisdiction over any suit in which the interests of an ambassador, minister, or consul might be “affected,” even if not a party to the suit.¹⁵⁵ The word is the likely hook for the First Judiciary Act’s extension of original jurisdiction to the constitutionally unenumerated category of cases involving an ambassador’s or minister’s domestics and domestic servants.

But beyond that, the Act seems to assume that the constitutional word “affecting” is a term of limitation. For one, the Act does not afford original and exclusive jurisdiction in the Court over all suits against ambassadors, ministers, and their domestics, but rather only those such suits “as a court of law can have or exercise consistently with the law of nations.”¹⁵⁶ More importantly, notwithstanding the open-ended connotation of “affecting,” the Act only extends federal jurisdiction to cases in which foreign representatives are formally parties, specifically by extending (1) original and exclusive jurisdiction to the Court “of suits or proceedings against ambassadors,” public ministers, or their domestics; and (2) original and nonexclusive jurisdiction when an ambassador or

152. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80.

153. See 28 U.S.C. § 1251(b)(2) (2000). For the purposes of this Article, my argument for the constitutional exclusivity of the Court’s original jurisdiction extends to controversies between States and between States and foreign states only. I can afford to remain agnostic on the question of whether the Court’s original jurisdiction over suits between the United States and States recognized in *United States v. Texas* is similarly exclusive as a constitutional matter. However, because I tend to agree with Chief Justice Fuller and Justice Frankfurter that the decision was unwarranted in terms of constitutional text and original intent, see *supra* text accompanying notes 107–110, I am inclined to the present statute’s position of nonexclusivity for United States-versus-State controversies.

154. U.S. Const. art. III, § 2, cl. 2.

155. See Hart & Wechsler, *supra* note 3, at 306 (“Is the constitutional category of cases ‘affecting’ foreign envoys exhausted by cases in which they are parties?”).

156. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80.

minister is a plaintiff, or a litigant on either side is a consul or vice-consul (of lower rank than an ambassador or public minister, stationed in port cities, and possibly not even entitled to diplomatic status¹⁵⁷).¹⁵⁸ The Court has not taken issue with this party-based interpretation of the word "affecting."¹⁵⁹

What the Act's implementation of the Ambassadors Subclause suggests, then, is that the First Congress interpreted the constitutional text to authorize some flexibility in affording exclusive jurisdiction in the Court over the suits involving foreign representatives and their households most likely to upset foreign relations. The textual hook for such legislative discretion is the word "affecting": "Cases affecting ambassadors, other public Ministers and Consuls," might be understood to mean "Cases affecting ambassadors, other public Ministers and Consuls in a way that might rupture or seriously disrupt relations with the sending foreign state." The constitutional "provision, no doubt, was inserted in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments."¹⁶⁰ Some disputes were more sensitive than others: When an ambassador or minister is the plaintiff initiating a suit, or when the defendant in a suit is a consul or vice-consul, it is not as likely to matter to the foreign sovereign that the suit is heard in the highest national court. By contrast, when a suit is brought against an ambassador or minister, the foreign sovereign could be counted on to care more about a hearing in the supreme tribunal of the host nation. The First Congress thus assigned suits against ambassadors, public ministers,¹⁶¹ or their households exclusively to the Supreme Court.

157. See *supra* notes 61, 151.

158. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80–81. The district courts were correspondingly granted "jurisdiction exclusively of the courts of the several States, of all [civil] suits against consuls or vice-consuls." *Id.* ch. 20, § 9, 1 Stat. at 77. Interestingly, neither federal district courts nor circuit courts were affirmatively granted jurisdiction over suits by ambassadors or public ministers, notwithstanding the section 13 provision assigning nonexclusive jurisdiction to the Supreme Court. See *id.* ch. 20, § 9, 1 Stat. at 76–77 (district courts); *id.* ch. 20, § 10, 1 Stat. at 77–78 (district courts for Kentucky and Maine); *id.* ch. 20, § 11, 1 Stat. at 78–79 (circuit courts). Thus, under the 1789 Act, an ambassador or public minister could bring a civil suit in the Supreme Court or in a state court only, not in a lower federal court. The possibility that an ambassador or public minister could sue as an "alien" under the alien tort provision of section 9 of the 1789 Act is doubtful. See Lee, *Safe-Conduct Theory of the Alien Tort Statute Theory*, *supra* note 83 (manuscript at 19–22) (concluding that the word "alien" as it is used in the 1789 Act was confined to private foreigners, not foreign ambassadors, public ministers, and consuls).

159. *Cf. United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 469 (1826) (holding that a federal criminal prosecution for an assault committed against the Spanish charge d'affaires in the United States is "not a case affecting a public minister" for purposes of the Original Jurisdiction Clause).

160. *Ex Parte Gruber*, 269 U.S. 302, 303 (1925).

161. Vattel describes the range of "public Ministers" the Framers of the Constitution and the First Congress likely had in mind. See Vattel, *supra* note 61, Book 4, §§ 69–74, at 520–22. The most important sort of public minister in vogue in the late eighteenth century was the "envoy extraordinary" and "minister plenipotentiary" combined in the

An application of legislative discretion to the same jurisdictional question today would reasonably compel the conclusion that no ambassadorial civil suit is sensitive enough to warrant exclusive assignment to the Court. For one, diplomatic immunity insulates foreign ambassadors and ministers from most civil suits.¹⁶² Moreover, the specific impetus for Congress's 1978 repudiation of the two hundred-year-old tradition of Supreme Court exclusive original jurisdiction in suits against ambassadors was the proliferation of traffic accidents caused by ambassadors and their household members.¹⁶³ The Supreme Court is ill equipped to serve as a trial court for civil claims relating to traffic accidents, and, more importantly, it seems quite clear that this was not the sort of civil suit the Framers intended to entrust exclusively to the Supreme Court. One would think that to be absolutely safe, Congress might reserve the Court's exclusive original jurisdiction over civil suits against ambassadors and ministers for acts or omissions in the performance of their official duties, but it is bard to see how such conduct would not be entitled to diplomatic immunity.¹⁶⁴

A similar logic of matching exclusivity to the sensitivity of a controversy can be discerned from the exclusivity provisions of the State-as-party provisions of section 13 of the First Judiciary Act. Recall that section 13 confers exclusive jurisdiction only in controversies under the Original Jurisdiction Clause provision "in which a State shall be Party"¹⁶⁵ against an-

same person for sensitive, ad hoc foreign-policy tasks, most notably the negotiation of treaties. For instance, Chief Justice John Jay's status was that of envoy extraordinary and minister plenipotentiary when he was sent to Great Britain to negotiate what is now called the Jay Treaty of 1794. See *infra* Part IV.A.1. According to Vattel, ministers plenipotentiary were "of much greater distinction than simple ministers. These neither have any particular attribution of rank and character, but by custom are now placed immediately after the ambassador, on a level with the envoy extraordinary." Vattel, *supra* note 61, Book 4, § 74, at 522.

162. In fact, there have only been three cases invoking the Ambassadors Subclause in the history of the Republic, and all three involved consuls. See *Gruber*, 269 U.S. at 303; *Casey v. Galli*, 94 U.S. 673, 677 (1877) (failing to consider jurisdictional questions in suit against vice-consul of Italy); *Jones v. Le Tombe*, 3 U.S. (3 Dall.) 384 (1798) (dismissing, without opinion, action against French consul general). The absence of any civil suits in U.S. federal courts against foreign ambassadors or ministers is unsurprising when one considers that the First Congress enacted a criminal statute in 1790 making it a crime punishable by fine and three years' imprisonment to serve civil or criminal process against "the person of any ambassador or other public minister of any foreign prince or state, . . . or any domestic or domestic servant of any." An Act for the Punishment of certain Crimes against the United States, ch. 9, §25, 1 Stat. 112, 117-18 (1790); see also *id.* § 26, 1 Stat. at 118 (prescribing punishments).

163. S. Rep. No. 95-1108, at 3 (1978). See generally Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 651-54 (2003) (discussing the state of law of diplomatic and other immunities); Brownlie, *supra* note 151, at 349-55.

164. See Brownlie, *supra* note 151, at 349-55.

165. U.S. Const. art. III, § 2, cl. 2.

other State or a foreign state.¹⁶⁶ Such sovereign-to-sovereign suits are evidently more important to national or international peace than suits between States and out-of-state private parties, over which the Act vests lower courts with concurrent jurisdiction.

The relevant constitutional text, however, seems at first a formidable impediment to the proposition that the Constitution requires exclusive vesting in the Court of jurisdiction over the sovereign-to-sovereign suits the Act makes exclusive but not over State-as-party suits involving private parties. That is, the words "in which a State shall be Party," do not seem to permit the sort of flexible interpretation as to a constitutional requirement of exclusivity afforded by the open-ended word "affecting" in the Ambassadors Subclause. It would appear particularly difficult to see how those words compel exclusivity in one set of State-as-party cases but not in another.

The constitutional text, of course, is not necessarily inconsistent with the belief inferable from the 1789 Act that the Framers of the Constitution intended some suits to be exclusively heard in the Court. The phrase "in which a State shall be Party" simply does not appear to address the question of exclusivity at all.

In my view, there is at least a plausible case that the text affirmatively supports the interpretation that concurrent vesting in lower courts for suits in which "a State shall be Party" and the other party is not a sovereign state is constitutional, but that such vesting when all the litigants in the suit are sovereign states (State-versus-State or foreign state-versus-State) would be unconstitutional. In the latter case, at least relying on Ellsworth's Senate bill interpretation of "State" to mean American or foreign state,¹⁶⁷ each of the states-parties to the litigation could assert original jurisdiction in the Court on the basis of the words "in which a State shall be Party," so long as the opponents were Article III, Section 2, Clause 1 "Controversies" enumerated parties and regardless of the specific identity of the opposing enumerated party.¹⁶⁸ By contrast, in a suit between a private party and a State, the private party would have no free-

166. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80. Once again, the theory of *United States v. Texas*, 143 U.S. 621 (1892), would add suits between States and the United States. See text accompanying notes 103-109.

167. The Court has held that "State" as the word is used in the Original Jurisdiction Clause does not refer to the United States. See *Ex Parte Republic of Peru*, 318 U.S. 578, 583 n.3 (1943). The consequence of this, in light of my argument here, is that the Court's original jurisdiction over suits between the United States and the States is not exclusive as a constitutional matter.

168. For instance, in a State-versus-State suit, State A could invoke the Court's jurisdiction solely because it was a party regardless of whether its opponent was another State, a foreign state, or a citizen of another State or a foreign state, and State B could do the same. In a foreign state-versus-State suit, the foreign state could invoke the Court's jurisdiction if it were a "State" for purposes of the Original Jurisdiction Clause, regardless of whether its opponent was a State or a state citizen, and a State could invoke the Court's jurisdiction regardless of whether the opponent were another State, a foreign state, or a citizen of another State or a foreign state.

standing right of access to the Court's jurisdiction: Whether the Court has jurisdiction under the Original Jurisdiction Clause would depend entirely on the state-party character of his opponent. Accordingly, it seems plausible that the words "in which a State shall be Party" might be read to mean that the Court's original jurisdiction is exclusive in a suit 'in which a State shall be Party' and 'in which a State shall be Party' on the other side, but nonexclusive in a suit 'in which a State shall be Party' and a non-State shall be Party on the other side. In other words, one could infer from the State-as-Party Subclause that differing treatment (namely, exclusivity of the Court's jurisdiction) might be justified as between cases in which the only litigants were state parties and those involving non-state parties.

But even if one were to conclude that the text is unhelpful one way or the other, there are strong reasons to conclude that the Constitution requires exclusive jurisdiction in the Supreme Court over suits between States and between States and foreign states. First, as previously noted, original jurisdiction in the Court for cases involving ambassadors and States was intended in important part to match the dignity of sovereign or sovereign-agent litigants by ensuring a hearing in the supreme national judicial forum. The forum dignity rationale also justifies exclusivity of the Court's original jurisdiction in the subset of these cases that most implicates sovereign parties. Indeed, because the Court's original jurisdiction is self-executing, the only reason for drafting section 13 at all would be to delineate which parts of it would be, or, in my view, had to be, exclusive.

On this logic, State-versus-State and foreign state-versus-State controversies present a stronger case than ambassadorial suits for an exclusive hearing in the supreme national tribunal as a constitutional matter. First, the sovereign foreign state is logically entitled to more forum dignity than the ambassador or minister who represents it. An ambassador or minister is a natural person with the legal status of a diplomatic agent; a sovereign state is the sovereign entity itself.¹⁶⁹ Second, for a sovereign state, foreign or American, to be judged by the tribunal of another sovereign state (here the United States) implies an inferiority of station at odds with sovereign equality. To entrust a controversy to an inferior tribunal of the forum state multiplies the sense of inferiority. As Justice Harlan observed in discussing the section 13 State-as-party provision for exclusive jurisdiction in the Court, "Such exclusive jurisdiction was given to this court because it best comported with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation."¹⁷⁰ Third, controversies between States or between a State and a foreign state would seem to pose

169. See *supra* note 123 and accompanying text.

170. *United States v. Texas*, 143 U.S. 621, 643 (1892); cf. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 n.11 (2002) (noting that "allowing a private party to haul a State in front of . . . an administrative tribunal" might be "a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge

more of a threat to national or international peace than incidents relating to ambassadors or public ministers by virtue of their direct sovereign-to-sovereign character. Nor would a suit by a foreign state against a State alleging violation of a U.S. treaty obligation require the sort of factfinding necessitated by a traffic suit.

Indeed, while every member of the Supreme Court except Justice Iredell¹⁷¹ and Chief Justice Marshall¹⁷² has thought concurrent jurisdiction constitutional in cases affecting foreign envoys (albeit only in cases involving consuls), the Court has repeatedly indicated that original jurisdiction over controversies between a State and American and foreign states is constitutionally exclusive to the Court. Justice Harlan remarked on the unique suitability of the Supreme Court for disputes between States and other sovereign states in a way that shows he believed it a match made by the Framers of the Constitution:

[T]o what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquillity, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends?¹⁷³

Chief Justice Fuller, in referring to the Court's original jurisdiction of controversies between States, concluded that "by the Constitution[,] . . . the original jurisdiction of this court is exclusive over suits between States."¹⁷⁴ Likewise, the Court in *United States v. Minnesota* opined: "Of course the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States, a sister State, or a foreign State."¹⁷⁵ By contrast, no member of the Court has ever suggested that the Court's original jurisdiction over suits between States and between States and foreign states is *not* exclusive as a constitutional matter. In any event, the question of whether the Court's original jurisdiction over suits against States by foreign states is exclusive has not been decided.¹⁷⁶

D. *The Ramifications of Constitutional Exclusivity*

It should be noted, however, that there is no specific indication from the historical materials that the Court's original jurisdiction, even when

with life tenure nominated by the President of the United States and confirmed by the United States Senate").

171. See *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 298-99 (C.C.D. Pa. 1793) (Iredell, J.).

172. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

173. *United States v. Texas*, 143 U.S. at 645.

174. *Louisiana v. Texas*, 176 U.S. 1, 16 (1900).

175. 270 U.S. 181, 195 (1926) (emphasis added).

176. Nor, for that matter, has it been decided for suits between States, although that issue is likely never to come up so long as Congress continues to enact an original and exclusive jurisdiction statute.

exclusive, was intended to preclude principled discretion in denying motions for leave to file original actions. The procedure itself—an original action begins not with process served on a defendant but with a motion by the plaintiff for leave to file the suit in the Court—implies some greater measure of latitude in the forum's deciding whether to hear the suit than in a common civil action. Indeed, every step in an original action must be preceded by a special motion.¹⁷⁷ The apparent reason for this was the dignified character of sovereign litigants:

This original docket is a thing by itself, and all proceedings in these cases on the original docket are on motion. No case is heard, unless the court makes a special order to have it heard. No proceeding takes place in any of these original cases without a special order. If, for instance, a suit is brought by Virginia against West Virginia, as there was such a controversy not long since, the State of Virginia has to obtain leave to file a bill, to obtain process and have it served, and so get the State of West Virginia before the Court. The next thing is, to obtain from the court an order that West Virginia answer. That is done on motion, by a special order, and the time is fixed. Every step that is taken in the case is on some special motion. That, I suppose, is on account of the dignity of the parties, the nature of the agencies they must employ, and the importance of the subject-matter involved.¹⁷⁸

Given the acute sensitivity of foreign state-versus-State treaty controversies in the early Republic,¹⁷⁹ it is plausible that the Framers intended to allow the Court some flexibility in deciding whether to hear a particularly sensitive original action.¹⁸⁰ For example, although Article III, Section 2, Clause 1's specification of controversies "between a State . . . and foreign States" would seem to encompass suits by States against foreign states, contemporaneous principles of international law precluded suit against a foreign sovereign in national courts absent consent,¹⁸¹ and so it is almost certain that the early Court would have denied leave to file such a suit in the first place, although the prevailing view today is that there is no constitutional basis for foreign sovereign immunity.¹⁸² The Court, of

177. See Sup. Ct. R. 17.

178. Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence*, supra note 1, at 23–24 (citation omitted).

179. See infra note 291 and accompanying text.

180. Cf. *Louisiana v. Texas*, 176 U.S. 1, 15 (1900) ("[I]t is apparent that the [Court's original] jurisdiction [over 'Controversies between two or more States'] is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable.").

181. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451 (1793) (Blair, J.) ("[T]he instances may rarely occur, when a State may have an opportunity of suing in the *American Courts* a foreign State . . ."); cf. *id.* at 467 (Cushing, J.) (arguing that "the reason of the thing, as well as the words of the Constitution, tend to sh[o]w that the Federal Judicial power extends to a suit brought by a foreign State against any one of the *United States*.").

182. Cf. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 492–97 (1983) (holding that a suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611

course, has granted itself discretion to deny leave to file a motion in original actions between States, even though its jurisdiction is exclusive by statute.¹⁸³

Professor David Shapiro, in a characteristically judicious article, has taken issue with this line of cases.¹⁸⁴ His point is not that judicial discretion over whether to hear a case is necessarily a bad thing, but that any exercise of discretion must be cabined by principles consistent with Article III.

[T]he concept of "principled discretion" is [not] an oxymoron. In the present context, it means that criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose guide the choices to be made in the course of defining and exercising that jurisdiction. Of equal importance, it means that these criteria are capable of being articulated and openly applied by the courts, evaluated by critics of the courts' work, and reviewed by the legislative branch.¹⁸⁵

The need for principled discretion seems particularly acute in suits over which the Court's jurisdiction is exclusive, since by definition there is no alternative forum.¹⁸⁶

In identifying principles to guide discretion over foreign state-versus-State controversies, it is worth remembering that such suits differ from State-versus-State original actions. Whatever the merits of the Court's inclination to deny motions for original actions in cases where a State is suing *parens patriae* on behalf of its citizens,¹⁸⁷ such a rationale does not apply when a foreign state is plaintiff. As we shall see, a foreign state's right to sue on behalf of its aggrieved citizen in the Court is grounded in the international law doctrine of espousal, which, unlike its domestic cousin of *parens patriae*, cannot be subjected to question on the ground of its ultimate private nature.¹⁸⁸ This is because the States, as participants in the American Union, have surrendered the right to wage war against the United States to vindicate the claims of their citizens¹⁸⁹ and are, at the same time, participants in the national government through their representatives in Congress and participation in presidential elections.¹⁹⁰

(1982), arises under federal law for purpose of Article III). See generally Bradley & Goldsmith, *supra* note 163, at 571-635.

183. See, e.g., cases cited *supra* note 9.

184. See Shapiro, *supra* note 9, at 560-61.

185. *Id.* at 578.

186. See *id.*

187. See *supra* note 145 and accompanying text.

188. See *infra* Parts III.C, III.E.

189. See *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883) (States "can neither make war nor peace without the consent of the national government.").

190. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558 (1954) (arguing that the States' participation in the national government is the principal and sufficient safeguard of their semisovereign interests).

Foreign states, by contrast, retain the right to wage war and do not have the right of direct participation in the selection of American national government officials. Foreign states' rights to wage war under international law, though not a concern in the present era of American strength, were so vivid a concern in the founding era of American weakness that it inspired the Framers of the Constitution to invest the highest national court with the international function of peacefully mediating U.S. treaty disputes arising from state violations, to present foreign states with a plausible alternative to war or diplomacy for resolving such disputes.¹⁹¹

But although the purported principle that a suit by a sovereign is really a suit on behalf of its citizens cannot validate the Court's declining to exercise jurisdiction over foreign state-versus-State suits, three other relevant factors may justify refusal to exercise the Court's exclusive jurisdiction. The first, as already noted, is consideration for the foreign state's sovereign immunity, whether guaranteed by statute or federal common law based on international law principles. This principle necessarily acts

191. See *infra* Part III.A. In a recent article, Professor Ann Woolhandler reached the contrary conclusion that "[o]n the whole, foreign government standing paralleled state standing." See Ann Woolhandler, *Treaties, Self-Execution, and the Public Law Litigation Model*, 42 Va. J. Int'l L. 757, 765 (2002); see also *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 337–38 (1st Cir. 2000) (concluding that the fact that the States gave up the right to war was a reason to recognize a broader principle of state standing than foreign state standing to assert citizen claims). My difference of opinion with her is not so much about her facts, which are scrupulously researched, but with the conclusions to be drawn from them. The suits Professor Woolhandler focuses on were the few suits involving foreign states typically brought under the lower federal courts' in rem admiralty jurisdiction for sovereign property claims. See Woolhandler, *supra*, at 765–69. There were also some suits brought by foreign consuls in their capacity as commercial agents for fellow citizen merchants concerning ships or other *res* in dispute in American ports, but these do not pose a difficulty for her conclusion because, as noted above, consuls were not viewed as full diplomatic representatives of foreign sovereign states, but rather as commercial agents for foreign merchants during their sojourns abroad. On her view, alienage jurisdiction generally assured vindication of individual rights by the directly affected aliens, and the adjudication of controversies involving foreign states would have additionally implicated separation of powers concerns. See *id.* at 768–72. My argument, which is developed in Part III, *infra*, is that while private alienage jurisdiction and diplomacy by the executive branches were the principal lines of defense in treaty disputes, the Framers established as a war-avoidance, fallback provision specially tailored to the risk of state defection from a U.S. treaty with a powerful foreign state—the Court's original jurisdiction over controversies between foreign states and States (importantly, not between foreign states and the United States). Put another way, Professor Woolhandler may be correct in her view that the Framers did not particularly care for or favor a broad principle of state or foreign-state standing to litigate private rights in federal court, but in the foreign-state context, they strongly preferred a broader conception of standing to the prospect of the foreign state choosing to prosecute a State's alleged violation of international law by the alternative instrument of war. Because this preference was fixed in the Constitution, it is not subject to prudential waiver by the Court as state *parens patriae* standing might be. This unique category of constitutional jurisdiction, necessitated by American weakness in international affairs at the founding, was not in fact invoked until 1934, and then unsuccessfully so, which is unsurprising given the radical intervening change in America's place in the world balance of power. See *infra* Part IV.A.

to protect the foreign state in an original action brought against it by a State.

The second is the principle of prior resort to other measures by the foreign state; although the state's decision to espouse is not itself subject to question,¹⁹² the Court might decline jurisdiction over an original action if the foreign state has not made good-faith efforts to resolve a controversy with a State by diplomacy with the national government. As this Article will demonstrate, the Framers understood that the Court's original and exclusive jurisdiction over foreign state-versus-State disputes would operate in tandem with diplomatic and private judicial remedies.¹⁹³ To be sure, at the founding, the condition of American weakness in world affairs meant that the Framers would have preferred a foreign state's resort to the Court over heavy-handed diplomacy or war, but it seems, in my view, consistent with the Framers' intent for the Court presently to take cognizance of alternative political measures as a prudential matter in deciding whether to exercise jurisdiction over a particular original suit brought by a foreign state against a State.¹⁹⁴

The third principle is more fact-bound, and has to do with the specifics of *Monaco*. During the nineteenth and early twentieth centuries, States, and then foreign states, were assigned or begifted state debt obligations by private noteholders in efforts to make end-runs around the Eleventh Amendment's express bar on suits by citizens of other States or foreign citizens or subjects.¹⁹⁵ As a doctrinal matter, the Court turned such state efforts back under the rationale that the claims at issue were really private ones¹⁹⁶ and, as to foreign state efforts, by the holding in *Monaco* that Eleventh Amendment immunity extended to suits against States by foreign states. Although I contend the reasoning behind the latter doctrinal holding is fundamentally mistaken, the Court, in my view, would be justified in upholding the *Monaco* decision on its facts: A State

192. See *infra* text accompanying notes 397–400.

193. See *infra* Part III.A–D.

194. As I elaborate below, the fact that political measures are available does not trigger a constitutional separation of powers objection to the extension of the Court's original jurisdiction. Moreover, any prudential separation of powers objection is mitigated because the specific legal question at issue—the domestic meaning and enforcement of a ratified U.S. treaty as against a State—is clearly justiciable. See *infra* text accompanying notes 335–341, 359–365.

195. See, e.g., *Principality of Monaco v. Mississippi*, 292 U.S. 313, 317–18 (1934) (charitable gift to Monaco of Mississippi pre-Civil War bonds); *Republic of Cuba v. North Carolina*, 242 U.S. 665, 665 (1917) (charitable gift to Republic of Cuba of North Carolina bonds); *South Dakota v. North Carolina*, 192 U.S. 286, 321–22 (1904) (charitable gift to South Dakota of North Carolina railroad bonds from private donor); *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) (assignments to New Hampshire and New York of Louisiana Civil War-era bonds).

196. See, e.g., *New Hampshire v. Louisiana*, 108 U.S. at 91 (dismissing suits brought by New Hampshire on behalf of its citizens); see also *infra* Part III.E. But see *South Dakota v. North Carolina*, 192 U.S. at 321–22 (upholding Court's original jurisdiction in the suit brought by South Dakota to enforce the railroad bonds).

is entitled to immunity when a foreign state alleges state law claims, or, I would add, even federal constitutional or statutory claims, against a State on behalf of its national, but does not allege the violation of a treaty by the State. In a case where a foreign state brings a mixed bag of treaty and other claims, the Court would be justified in exercising its jurisdiction only if the core of the suit is an international treaty obligation.¹⁹⁷ Drawing such a distinction seems consistent with original intent and would also serve as an approximate, but serviceable, screen to filter out suits brought by foreign states that are not in some way central to the U.S. national interest in foreign affairs, as signified by the existence of a U.S. treaty underlying the foreign state's claim.

The conclusion that suits between States and between States and foreign states were the most important suits covered by the Original Jurisdiction Clause, and were accordingly entrusted by the Framers of the Constitution for exclusive resolution by the Supreme Court (as opposed to any other state or federal court), is relevant to an important debate about the meaning of the words "Cases" and "Controversies" in Article III, Section 2, Clause 1. To begin with, the classification of those two categories of sovereign-to-sovereign disputes as "Controversies" suggests that the use of the word was meant to signify suits of international or quasi-international (in the sense of interstate)¹⁹⁸ character. This is confirmed by the fact that other "Controversies" in Article III's general grant are those "between a State and Citizens of another State," "between Citizens of different States," "between Citizens of the same State claiming Lands under the Grants of different States," and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."¹⁹⁹ Civil "Controversies to which the United States shall be a Party,"²⁰⁰ in contradistinction to "all Cases, in Law and Equity, arising under" federal law²⁰¹ to which the U.S. might be party, could also be characterized as quasi-international in nature, "insofar as they might involve the [federal] courts in international governmental functions in the sense of a supra-State governmental body challenging a State's misconduct (like the United Nations with respect to the United States' failure to pay dues)."²⁰²

197. For instance, the Court would be justified in denying jurisdiction to a foreign state bringing a class-action tort suit against a State on behalf of its nationals who are U.S. resident aliens, for instance, on the theory that the tort claims simultaneously stated claims of violation of basic safe conducts guaranteed by venerable treaties of amity and commerce. See Lee, *Safe-Conduct Theory of the Alien Tort Statute Theory*, *supra* note 88 (manuscript at 24-27). But for the fact of the alien status of the plaintiffs, such a suit would be indistinguishable from a plain-vanilla tort class action.

198. See *Virginia v. West Virginia*, 220 U.S. 1, 27 (1911) (using "quasi-international" in this interstate sense, rather than to describe the Court's role in adjudicating foreign state-versus-State treaty disputes as the word is used in this Article); *supra* text accompanying note 13.

199. U.S. Const. art. III, § 2, cl. 1.

200. *Id.*

201. *Id.*

202. Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1058.

This interpretive point suggests the following distinction made by Professor Robert Pushaw between Article III, Section 2, Clause 1's use of the words "Cases" and "Controversies":

Article III contemplated that the federal courts' main function in federal question, admiralty, and foreign minister "Cases" would be to declare the law in matters of national and international importance. By contrast, "controversy" meant a bilateral dispute wherein a judge served principally as a neutral umpire whose decision bound only the immediate parties. Hence, the Framers expected federal courts to act chiefly as independent arbitrators in resolving Article III "Controversies," with any legal exposition incidental.²⁰³

Although I agree with Professor Pushaw on the meaning of those words in Article III,²⁰⁴ I disagree with his conclusion as to the significance of the distinction regarding congressional power over federal jurisdiction. Professor Pushaw uses the interpretive point to support a thesis presented by Professor Akhil Amar, building upon a theory first suggested by Justice Joseph Story.²⁰⁵ In a vivid and thought-provoking article, Professor Amar argued that the Framers intended "two tiers" of federal jurisdiction, with Article III's use of the words "all Cases" signifying suits of sufficient importance to require congressional vesting in national courts, and a second tier of Article III "Controversies" of less importance, without a constitutional mandate of statutory vesting in national courts.²⁰⁶ On Professor Amar's theory, the Constitution does not require

203. Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *Notre Dame L. Rev.* 447, 449–50 (1994); see also Robert J. Pushaw, Jr., *Congressional Power Over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 *BYU L. Rev.* 847, 865 (An Article III "Controversy" referred to "a dispute between two parties (often governments) that was resolved by a neutral umpire.").

204. "Cases" [referred] to jurisdictional headings in which the federal courts were to adjudicate in a more binding law-like manner as authoritative national tribunals, paradigmatically on federal criminal matters. On the other hand, "controversies" delineated politically-sensitive international jurisdictional headings where the federal courts . . . [tended] more to mediation than adjudication, and to exclusively civil matters as opposed to "cases" that could be either civil or criminal.

Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1059.

205. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334–36 (1816).

206. See Amar, *A Neo-Federalist View*, *supra* note 53, at 240–46; see also Amar, *Marbury*, *supra* note 53, at 478–88 (squaring the two-tiered theory with the Original Jurisdiction Clause and Section 13 of the First Judiciary Act); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 *U. Pa. L. Rev.* 1651 (1990) (defending the two-tiered theory against critics); Akhil Reed Amar, *The Two-Tiered Theory of the Judiciary Act of 1789*, 138 *U. Pa. L. Rev.* 1499 (1990) (interpreting the Act as consistent with the two-tiered explanation); cf. Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17, 55–56 (1981) (arguing that the "history and logic of the Constitution" require Congress to vest original or appellate jurisdiction over "all Cases . . . arising under this Constitution" in Article III federal courts).

Congress to vest any federal court jurisdiction over “Controversies” at all, including controversies between States and between States and foreign states—although should Congress opt to vest such original jurisdiction, his interpretation of the Original Jurisdiction Clause would require congressional vesting in the Supreme Court.²⁰⁷

Professor Amar’s argument is inconsistent with the position taken in this Article that the Framers thought “Controversies” between States and between States and foreign states to be so important and sensitive as to warrant exclusive assignment to the Supreme Court as a constitutional matter. A necessary consequence of the Court’s constitutionally self-executing original and exclusive jurisdiction over these two sets of “Controversies” is that Congress lacks any power to alter this jurisdiction, whether to make it concurrent or to choose not to vest it at all. As others have noted, it is entirely implausible that the Framers would have thought that controversies between States, in particular, might be committed to resolution in state courts alone at Congress’s discretion.²⁰⁸

But to argue the counterthesis to Professors Amar and Pushaw—that all controversies were considered important enough by the Framers to require congressional vesting—seems, in my view, an equally mistaken proposition. The better view is to conclude that although the Framers appear to have understood “Cases” and “Controversies” as different in character, they did not think that one group or the other, as a general matter, was more important with respect to Congress’s decision to vest federal jurisdiction.²⁰⁹ The Framers likely thought federal jurisdiction

207. See Amar, *Marbury*, supra note 53, at 480–83.

208. See Meltzer, supra note 63, at 1607–08; cf. Harrison, supra note 53, at 248–49 (analyzing use of word “all” in Article III to illustrate “serious textual difficulties” in “Amar’s mandatory-permissive division”).

209. See William Fletcher, *Exchange on the Eleventh Amendment*, 57 U. Chi. L. Rev. 131, 133 (1990) (reaching same conclusion based on interpretive theory that “cases” signified criminal or civil matters and “controversies” applied to civil matters only). The distinction between the two words, in my view, does have force in interpreting the Eleventh Amendment. See Lee, *Making Sense of the Eleventh Amendment*, supra note 25, at 1059. Most scholars believe the Amendment restricts only suits against States brought by citizens of other States or foreign citizens or subjects on the basis of diversity. Thus, they contend, the Amendment would not bar suits brought by such private parties arising under federal law. See articles cited supra note 71. A textual problem with this theory is that the word “Controversies” is used in Article III, Section 2, Clause 1 in both the underlying provisions; in light of this fact, why does the Amendment bar “any suit in law or equity, commenced or prosecuted against” a State by citizens of other States and foreign citizens or subjects, and not “controversies commenced or prosecuted against” a State? It may be that the Framers of the Amendment used the words “any suit in law or equity” to signify an intent to extend state sovereign immunity in “Controversies” between States and noncitizens to suits that might also be “Cases, in law or equity” arising under federal law such as, for instance, suits by British creditors under article IV of the 1783 Treaty of Peace. See *Definitive Treaty of Peace*, Sept. 3, 1783, U.S.-Gr. Brit., 8 Stat. 80 [hereinafter *Treaty of Peace*]. Under the diversity theory, the private plaintiff in such a suit could easily avoid the Amendment by pleading federal question jurisdiction only if a general federal question statute were available (which was not the case in 1798) or, even without such a statute, by invoking the

was more important for some controversies (e.g., between States and other States or foreign states) than some cases (e.g., affecting consuls). Conversely, some cases (e.g., arising under federal law) were likely viewed as more important than some controversies (e.g., between citizens of different States), just as not all cases (e.g., cases affecting consuls as compared to cases arising under the Constitution) or controversies (e.g., controversies between citizens of different States as opposed to controversies among two or more States) were created equal.²¹⁰ What this Article's thesis as to the Court's original and exclusive jurisdiction over controversies between foreign states and States indicates, however, is that such suits, along with controversies between States, were the most sensitive disputes on Article III's jurisdictional menu and accordingly were suitable for entrustment to the highest national tribunal and no other. They were, therefore, constitutionally excepted from the cognizance of state courts or lower federal courts.

To summarize Part I, the Original Jurisdiction Clause grants the Supreme Court original jurisdiction over suits between States and foreign states, the First Judiciary Act makes this jurisdiction exclusive to the Court, and, more controversially, there is a plausible argument that exclusive jurisdiction in such suits, as well as in suits between States, is constitutionally mandated. Although there is no statute presently conferring original jurisdiction of suits by foreign states against States on the Supreme Court (or any federal court), the Court's original jurisdiction is self-executing, so all the Court would have to do is grant a foreign state's motion for leave to file an original action against a State.

II. STATE SOVEREIGN IMMUNITY AND SUITS BY FOREIGN STATES AGAINST STATES

Whatever might be said about the text of the Original Jurisdiction Clause and theories of why it was drafted, in order to make the case for constitutional authorization of original actions in the Supreme Court by foreign states against States on treaty-based claims today, one must ad-

Court's self-executing original but nonexclusive jurisdiction over State-as-party suits involving aliens or citizens of other States.

210. For example, one constitutional amendment proposed in 1789 in the House of Representatives that was never ratified would have limited Article III, Section 2, Clause 1's "Controversies" grant to "Controversies to which the United States shall be a Party;—Controversies between two or more States;—between a State and foreign States, and between citizens of the United States claiming the same lands under grants of different States." *Journal of the House of Representatives* 82–83 (Aug. 18, 1789), reprinted in 3 *Documentary History of the First Federal Congress of the United States of America* 1, 154 (Linda Grant De Pauw ed., 1977) (providing as to Article III, Section 2, Clause 1, "Strike out the words, 'between a State and citizens of another State,' &c to the end; and amend to read thus: 'between a State and foreign States, and between citizens of the United States, claiming the same lands under grants of different States'"). Those who proposed the amendment appear to have perceived no need for federal jurisdiction in diversity of citizenship and State-noncitizen suits.

dress the subsequent evolution of state sovereign immunity doctrine. The ratification of the Eleventh Amendment—the textual basis for state immunity—was certified in 1798,²¹¹ eleven years after the drafting of the Constitution and nine years after the First Judiciary Act. The Amendment limits the possible construction of the Article III, Section 2, Clause 1 jurisdictional grants involving suits against a State. Since it is established that the Original Jurisdiction Clause can confer only what the general grant authorizes, the Court's original jurisdiction would be similarly constitutionally circumscribed. In *Principality of Monaco v. Mississippi*, the Supreme Court held that the general grant did not extend to suits by foreign states against nonconsenting States.²¹²

The prevailing doctrine acknowledges, however, that the States are not immune in certain circumstances. For instance, a State may waive its immunity by consenting to appear in a suit against it²¹³ or litigating the suit.²¹⁴ Second, Congress may abrogate a State's sovereign immunity by making a clear statement of intent to abrogate in legislation to enforce the later enacted Fourteenth Amendment.²¹⁵ Third, a State does not

211. See Richard B. Bernstein with Jerome Agel, *Amending America* 56–57 (1993) (“By February 7, 1795, the Eleventh Amendment had won the support of enough states to be added to the Constitution, though it was not promulgated as such for nearly three years.”).

212. 292 U.S. 313, 330 (1934).

213. E.g., *Petty v. Tenn.-Mo. Bridge Comm'n*, 359 U.S. 275, 276 (1959); *Clark v. Barnard*, 108 U.S. 436, 447 (1883).

214. See, e.g., *Lapides v. Bd. of Regents*, 535 U.S. 613, 620–24 (2002) (holding that State waived immunity by voluntarily agreeing to remove case to federal court).

215. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Although Congress logically may be presumed to have such powers of abrogation in enacting laws to enforce the Thirteenth and Fifteenth Amendments, the Court has recently held that it may not abrogate sovereign immunity when legislating under its Article I powers. See *Bd. of Trs. v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–79 (2000); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 672 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996). Treaties, to the extent they are not self-executing, would require congressional legislation of “necessary and proper” laws under Article I and, therefore, most likely would not suffice to abrogate state sovereign immunity. See 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, 1189–94 (2001); Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 Va. J. Int'l L. 713, 741–42 (2002). But see Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 Loy. L.A. L. Rev. 1399, 1460–61 (2000) (arguing that because “state sovereignty has never been understood to extend to international affairs,” Congress may be empowered under the Necessary and Proper Clause to abrogate state sovereign immunity in the interest of international diplomacy). Professor Vázquez plausibly assumes that the “conclusion . . . that Congress may not abrogate state sovereign immunity in implementing non-self-executing treaties means *a fortiori* that the treaty-makers may not abrogate state sovereign immunity pursuant to self-executing treaties.” Vázquez, *supra*, at 725 n.62. Of course, if I am right that foreign states have a right to sue States for treaty breach on the theory of ratification consent, abrogation of state sovereign immunity by treaty would be unnecessary, at least where the foreign state brings its treaty claim directly against a State in an original action before the Supreme Court.

have immunity as a litigant in certain in rem proceedings before a federal court with legal custody of the res.²¹⁶

The “exception” at issue here, however, is not really an exception, so to speak. It is, rather, a theory of prior, durable consent by ratification of the Constitution—that the States, in accepting the original constitutional bargain, consented to special categories of suits as a necessary condition of union—essentially, constitutional nonimmunity. The specific goal of such consent by ratification was to maintain peace by enabling judicial resolution of sovereign controversies as an alternative to war. Certainly, everything said in Part I of this Article supports the proposition of ratification consent, limited to the Court’s original jurisdiction, in suits against States by foreign states. Under present doctrine, however, ratification consent is confined to two categories of sovereign litigants: other States and the United States. The point of this Part is to show why the text of the Eleventh Amendment, historical evidence, and the sovereign dignity justification for sovereign immunity compel the conclusion that the States similarly gave ratification consent to suit by foreign sovereign states, notwithstanding the holding in *Principality of Monaco v. Mississippi*.

A. *Principality of Monaco v. Mississippi*

In 1933, the legation of the Principality of Monaco in Paris, France, received an “unconditional gift . . . to be applied to the causes of any of its charities, to the furtherance of its internal development or to the benefit of its citizens in such manner as it may select.”²¹⁷ The gift consisted of fifty-five bonds totaling \$100,000 in aggregate face value that Mississippi had issued between 1833 and 1838. The bonds had come due between 1850 and 1866, but the State had refused to make payment.²¹⁸

The gift came with a letter from private American donors attesting to the legality of transfers over the years from the original bondholders.²¹⁹ The letter explained that Mississippi had long since defaulted on the bonds. The donors, it continued, had been advised by their lawyers that they, as private parties, could not bring suit against the State on the bonds, “but that such a suit could only be maintained by a foreign government or one of the United States.”²²⁰ The donation thus appears to have been a litigation stratagem to circumvent the Eleventh Amendment, which by its literal terms barred suits against a State “by Citizens of an-

216. See, e.g., *Tenn. Student Assistance Corp. v. Hood*, 124 S. Ct. 1905, 1912–13 (2004) (finding State not immune in federal bankruptcy proceeding with State-owned student loan debt as res); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 507 (1998) (finding State not immune from in rem admiralty suit because disputed res was subject to federal jurisdiction).

217. *Monaco*, 292 U.S. at 318 (internal quotation marks omitted).

218. *Id.* at 317.

219. *Id.* at 317–18.

220. *Id.* at 318 (internal quotation marks omitted).

other State, or by Citizens or Subjects of any Foreign State,"²²¹ and had been extended by *Hans v. Louisiana* to prohibit suits brought by citizens of the State itself.²²² The Amendment did not say anything about suits by foreign states or other States. Hence the American bondholders conferred the gift to Monaco, a presumptive foreign state.

Monaco promptly commenced litigation to collect on the bonds. It filed a motion in the Supreme Court for leave to file an original action against Mississippi under the Court's original jurisdiction in cases "in which a State shall be Party."²²³ The suit itself appears to have involved nothing more than a simple state law breach-of-contract claim. Mississippi rejoined that "[t]he compact of the States in the Constitution imposed no duties and conferred no rights upon any foreign nation."²²⁴ Logically, then, Mississippi's consent was prerequisite to suit in the Court. The State pointed out that any statutory consent to suit enacted by its legislature had long since expired (in 1880), that it had additionally disavowed any obligation to redeem the bonds by an amendment to its constitution in 1890, and "that since [the Amendment's] adoption no foreign State could accept the bonds in question as a charitable donation in good faith."²²⁵

The Court, in a unanimous opinion by Chief Justice Hughes, agreed that Mississippi had not consented and denied Monaco's motion for leave to file suit under its original jurisdiction. It could have done so on a narrow ground such as a ruling of untimeliness on the Mississippi statute of limitations or on the ground that the assignment to Monaco was collusively made to invoke the Court's jurisdiction.²²⁶ Both subconstitutional grounds, however, were fraught with annoying complexity: The first would have required a foray into muddy Mississippi law, and the second would have required a factual investigation into the circumstances of the donation that the Court as an institution was ill equipped to handle.²²⁷

221. U.S. Const. amend. XI. The inspiration for the stratagem was clearly the success of South Dakota in an analogous suit against North Carolina. See *South Dakota v. North Carolina*, 192 U.S. 286, 321–22 (1904).

222. See 134 U.S. 1, 10–11 (1890).

223. U.S. Const. art. III, § 2, cl. 2.

224. *Monaco*, 292 U.S. at 316.

225. *Id.* at 319.

226. Cf. 28 U.S.C. § 1359 (2000) ("A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.").

227. Cf. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971) ("This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of factfinding and so forced, in original cases, awkwardly to play the role of factfinder without actually presiding over the introduction of evidence."). Another option would have been for the Court to conclude that the Principality was not a "foreign State[]" for purposes of Article III, Section 2, given that Monaco had entrusted its conduct of foreign affairs—its "external" sovereignty—to France. See *James J. Lenoir, Suit by a Foreign State against a State of the Union: Principality of Monaco v. Mississippi*, 7 Miss. L.J. 134, 139 n.30 (1934) (quoting Mississippi's Answer to Rule to Show Cause at 7–10).

The Court chose instead to rest on the broader ground of constitutional sovereign immunity—the right of a State to be free from suit in federal court.²²⁸ Its basic approach was, first, to conclude that the text was unhelpful in deciding the issue.²²⁹ Second, the Court addressed and rejected the theory of ratification consent by the States to suits brought by foreign states, in contrast to suits by other States and the United States.²³⁰ Third, it concluded that suits against nonconsenting States by foreign states were foreclosed by the same principle justifying state sovereign immunity against private persons.²³¹ That principle—that permitting suits against nonconsenting States is a constitutional affront to their sovereign dignity—has come to play a preeminent part in justifying the Court's modern state sovereign immunity jurisprudence.²³² Finally, the Court suggested in dictum that extending its original jurisdiction to such suits was inconsistent with separation of powers.²³³ This Part's discussion of state sovereign immunity implications for the Article's thesis uses these steps in the Court's opinion as a roadmap.

B. *Contratextualism and Supratextualism in Interpreting the Eleventh Amendment*

The *Monaco* Court began its analysis of the constitutional text by conceding that there was nothing in Article III or the Eleventh Amendment explicitly providing that a foreign state may sue a State only with its consent.²³⁴ The Court, however, dismissed this as “inconclusive.”²³⁵ As to Article III, Section 2, Clause 1, the relevant provision simply says that the federal judicial power shall extend to “Controversies . . . between a State . . . and foreign States.” While the Court admitted that the provision did not expressly require “the consent of the State in the case of a suit by a foreign State,” it observed that Article III likewise did not expressly require the consent of the United States in a suit against it in federal court, despite “the established doctrine of the immunity of the sovereign from suit except upon consent.”²³⁶

Although it is true that the United States enjoys sovereign immunity from suit in its own courts absent consent, it does not follow that States should enjoy sovereign immunity in the national courts without their consent. The principle of home court immunity justifies a State's sovereign immunity in its own state courts, but whether one should imply the phrase “only with consent when the State is sued” to the language of Arti-

228. See *Monaco*, 292 U.S. at 321–30.

229. See *id.* at 321–22.

230. See *id.* at 328–29.

231. See *id.* at 329–30.

232. See *supra* note 29.

233. See *Monaco*, 292 U.S. at 330–31.

234. See *id.* at 320–21.

235. *Id.* at 321.

236. *Id.* at 320–21.

cle III concerning States in federal court is an altogether different question. The answer to this question necessarily depends on the terms of the constitutional bargain by which the States formed a union, and my point is precisely that consent to foreign state treaty-based claims was part of the bargain owing to the founding-era danger of war arising from state violations of the 1783 Treaty of Peace.²³⁷ Additionally, how does one, by text alone, reconcile the Court's implicit position that "consent" need not be implied in Article III, Section 2, Clause 1's similarly unadorned provisions, which have been construed to permit suits against States by the United States ("Controversies to which the United States shall be a Party") and other States ("Controversies between two or more States")?

From a textual standpoint, the Eleventh Amendment poses a more serious problem for *Monaco's* holding.²³⁸ Article III, Section 2, Clause 1 lists three categories of "Controversies" involving a State as party to which the federal judicial power "shall extend." They are Controversies (1) "between two or more States; [(2)] between a State and Citizens of another State; . . . [(3)] and between a State . . . and foreign States, Citizens or Subjects."²³⁹ Accordingly, there are five potential litigants against States in Article III controversies in which States are named as parties: (1) one or more States; (2) citizens of another State; (3) foreign states; (4) foreign citizens; and (5) foreign subjects.

Article III does not say whether the State may both sue and be sued by each of these five potential litigants. The Supreme Court in *Chisholm v. Georgia*, a breach-of-contract suit brought by a citizen of South Carolina against Georgia, plausibly interpreted the constitutional words "the judicial power shall extend to . . . Controversies . . . between a State and Citizens of another State" to mean that a State could be sued by a citizen of another State without its consent.²⁴⁰ The Eleventh Amendment provides that the "[j]udicial power . . . 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," overruling *Chisholm*. It also proscribes suits brought by two other of the five categories of potential litigants: "Citizens or Subjects of any Foreign State." The Amendment does not prohibit, or even mention, suits against States brought by other American or foreign states—the two remaining categories of litigants in Article III, Section 2, Clause 1's original list of controversies in which States are named as parties.²⁴¹

The only plausible interpretation is that as to Controversies "between two or more States" or "between a State . . . and foreign States," a State

237. See *infra* note 291.

238. This discussion builds upon my prior discussion of the contratextualism of *Monaco's* holding, see Lee, Making Sense of the Eleventh Amendment, *supra* note 25, at 1088–90, and Professor Manning's textual exegesis, Manning, *supra* note 25, at 1738–43.

239. U.S. Const. art. III, § 2, cl. 1.

240. 2 U.S. (2 Dall.) 419, 476 (1793).

241. U.S. Const. amend. XI.

may still be sued without its consent. In other words, Article III, Section 2, Clause 1 retains its potential bidirectional meaning as to suits involving a State by these two types of sovereign state parties. Indeed, the Supreme Court has concluded on numerous occasions that the Constitution continues to authorize suit against a nonconsenting State by an equally sovereign American State.²⁴² And, as we shall see, the Court for 150 years had no problem thinking that States could be sued without their consent by foreign sovereign states.²⁴³

One might call this conclusion of suability in foreign state-versus-American State suits an unambiguous interpretation of Article III, Section 2, Clause 1 as amended by the Eleventh Amendment. To be sure, the Amendment is not “formally interlineated with Article III,”²⁴⁴ but “its relationship to the prior text could hardly be more direct,”²⁴⁵ for it speaks in terms of how that text “shall not be construed.”²⁴⁶ Statutory interpretation aficionados, however, might take umbrage at this characterization, choosing to identify the textual exegesis above as an application of the interpretive canon *expressio unius est exclusio alterius* to the words of the Eleventh Amendment.²⁴⁷ This is fair but analytically irrelevant. Regardless of the nomenclature, there is an ironclad argument that the text is plain enough to decide the matter without reference to legislative intent, which, in this constitutional case, would be the intent of the Framers of the Eleventh Amendment.

As the Supreme Court has said, “[T]he canon *expressio unius est exclusio alterius* . . . has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.”²⁴⁸ Whatever might be said about proposed applications of the canon in other contexts,²⁴⁹ there can be no question of its applicability here, given two constitutional provisions, the latter of which explicitly addresses how the prior provision “shall not be construed.”

Expressio unius operates here on not just one, but two levels. First, of the five litigants named in Article III controversies to which a State may be party, only three (citizens of other States, foreign citizens, and foreign subjects) are mentioned in the Eleventh Amendment, compelling the inference that the exclusion of the other two (American and foreign states)

242. See, e.g., cases cited *supra* note 5.

243. See *infra* Part IV.B.

244. Manning, *supra* note 25, at 1742.

245. *Id.*

246. U.S. Const. amend. XI.

247. See Manning, *supra* note 25, at 1738.

248. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

249. See, e.g., *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (rejecting plaintiff's proposed use of the canon previously adopted by the Ninth Circuit). When the Supreme Court rejects application of the canon, it is usually because it is not obvious that the hypothesized exclusion was part of an original associated series. See, e.g., *id.* at 81.

was deliberate. This is essentially a rehashing of my previous plain-language argument based on textual juxtaposition of Article III, Section 2, Clause 1 and the Eleventh Amendment in *expressio unius* terms.²⁵⁰ Second, the specific State-foreign parties provision in Article III, Section 2, Clause 1 says “[t]he Judicial Power shall extend . . . to Controversies . . . between a State . . . and foreign States, Citizens or Subjects.” The foreign party half of the Eleventh Amendment says “[t]he judicial power shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States . . . by Citizens or Subjects of any Foreign State.” By expressing only two (“Citizens or Subjects of any Foreign State”) of the original associated series of three items (“foreign States, Citizens or Subjects”) in a single, precise phrase of original constitutional text, the Eleventh Amendment excludes from its prohibition the unmentioned item (“foreign States”). Thus, Article III’s State-foreign parties provision may still “be construed to extend to” suits brought by “foreign States.”

One might argue, as a matter of logic, that given an original proposition that might reasonably be construed to permit a potential act (i.e., suit against a State without consent) by A, B, C, D, and E, and a subsequent proposition that the first statement “shall not be construed” to permit the act by A, B, and C, it does not necessarily follow that the initial proposition “shall be construed” to permit the act by D and E. At the very least, however, the juxtaposition must mean that nothing would block such a construction, i.e., that the original proposition “may be construed” to permit the act by D and E. This solution suffices for the purposes of this Article, since it is consistent with the view that the Eleventh Amendment does not restrict the preexisting original and exclusive jurisdiction of the Supreme Court to hear cases brought by foreign states against States.

The contrary argument, that the Framers of the Amendment inadvertently neglected to mention foreign states, is exceedingly weak. First, the proposition that exclusion of “foreign States” from the Eleventh Amendment’s reach was intentional, not inadvertent, seems particularly true given that the words “Citizens or Subjects of any Foreign State” were used in its utterance, rather than “foreign . . . Citizens or Subjects,” which were the original words in Article III, Section 2, Clause 1. It is implausible to conclude that the Framers of the Amendment intended to include “foreign states” in the nominal phrase but simply forgot to do so given the use of those two very words in the modifying adjectival phrase they ultimately ratified—“of any Foreign State.”

Second, the argument that the Framers of the Amendment inadvertently forgot to mention foreign states because they only intended to overrule *Chisholm v. Georgia*²⁵¹ is not credible given that the Framers did

250. See *supra* text accompanying notes 238–243.

251. 2 U.S. (2 Dall.) 419 (1793).

think to proscribe suits brought by "Citizens or Subjects of any Foreign State," who were similarly not parties to the *Chisholm* case. Moreover, two Justices in *Chisholm* expressly concluded that Article III permitted suits against States by foreign states,²⁵² making it highly unlikely that the Framers of the Eleventh Amendment intended the Amendment's proscription to apply to foreign states and merely forgot to mention them.

A possible response is that foreign citizens or subjects were remembered because they were considered similar to citizens of other States, unlike foreign states. That, of course, raises the further question why foreign states, like American States, were thought to be so different from out-of-state private persons as to escape the attention of the Framers, who wrote a mere forty-three words that were debated in Congress and in every state legislature across the country. Indeed, the suggestion that the absence of reference in the Eleventh Amendment to foreign states was inadvertent is so much a stretch that it has yet to be proposed seriously.

The *Monaco* Court, instead, took another tack. It listed its prior decisions holding that a State could not be sued without its consent by its citizens,²⁵³ by congressionally created corporations,²⁵⁴ or in admiralty (by individuals),²⁵⁵ notwithstanding that none of these cases was "within the express prohibition of the Eleventh Amendment."²⁵⁶ The Court thus implied that the decisional gloss on the Amendment had extended its scope so far beyond the bounds of its language that the text was no longer a factor in constitutional interpretation. Certainly, the notion that a constitutional right (here, of States) exceeds the four corners of the document is not unheard of,²⁵⁷ and the claim here is not about the propriety of generously interpreting reasonable ambiguity in favor of the right. This cannot possibly mean, however, that explicit words can be openly contradicted by virtue of being unhappily embedded in a textually suspect constitutional provision. In general terms, supratextualism does not authorize contratextualism.

252. See *id.* at 451 (Blair, J.) (noting inconsistency if Constitution was construed to grant States right to sue foreign states but not the other way around); *id.* at 467 (Cushing, J.) ("But I conceive the reason of the thing, as well as the words of the Constitution, tend to sh[o]w that the Federal Judicial power extends to a suit brought by a foreign State against any one of the *United States*.").

253. See *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934) (citing *Duhne v. New Jersey*, 251 U.S. 311, 313 (1920), and *Hans v. Louisiana*, 134 U.S. 1, 14-16 (1890)).

254. *Id.* (citing *Smith v. Reeves*, 178 U.S. 436, 449 (1900)).

255. *Id.* (citing *Ex parte New York*, 256 U.S. 490, 498 (1921)).

256. *Id.*

257. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) ("[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." (alteration in original) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting))).

More precisely, the decisions in *Hans*²⁵⁸ and *Smith v. Reeves*²⁵⁹ holding States immune in suits brought by in-state citizens and federal corporations, respectively, dealt with litigants unaddressed by the literal language of Article III, Section 2, Clause 1 and the Eleventh Amendment.²⁶⁰ The Amendment prohibits suits against States by citizens of other States or foreign citizens or subjects, nothing more. Nor did it need to name “in-state citizens” or “federal corporations,” because neither is mentioned in Article III’s general grant. Those cases accordingly represented supratextual moves to fill gaps in the text, not contratextual interpretations, such as the effect of *Monaco*’s holding as to foreign states. Indeed, there is an argument that *Hans*, notwithstanding its supratextual holding, in fact supports the thesis of this Article—that state sovereign immunity does not apply to suits brought by foreign states against States under the Court’s original jurisdiction. The *Hans* Court opined,

[N]either a State nor the United States can be sued as defendant in any court in this country without their consent, *except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution*.²⁶¹

The Court’s decision in *Ex parte New York* holding that States are immune in in personam admiralty suits by private parties²⁶² appears to be contratextual in the same way as the *Monaco* Court’s foreign state move. As an initial matter, however, the textual departure in *Ex parte New York* relates to the words “any suit in law or equity,” not the foreign party specification (or more correctly, lack of specification of foreign state) of the Eleventh Amendment, which is the subject of this Article. The contratex-

258. 134 U.S. at 14–16.

259. 178 U.S. at 449.

260. The Supreme Court has more recently sanctioned similar supratextual extensions of state sovereign immunity. See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760–61 (2002) (upholding state sovereign immunity in an Article I federal-agency proceeding, although the words “judicial power” in Article III and the Eleventh Amendment are universally understood to refer to the Article III federal courts); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (upholding state sovereign immunity in federal question suit brought in state court, ignoring fact that the words “judicial power” in Article III and the Eleventh Amendment refer only to federal “judicial power”). For all its recent extrapolations, though, the Court has never purported to contradict the Amendment’s language, choosing, rather, to characterize the Amendment as one instantiation of a metatextual constitutional principle of sovereign dignity—a robust principle, but a principle, nonetheless, that the case of the foreign state does not fit. See *infra* Part II.D. Even in the midst of its present federalism renaissance, the Court still occasionally quotes language in the Amendment to support its holdings, as, for instance, in a recent unanimous decision where the Court referred to the Amendment’s words “commenced or prosecuted against [a State]” in support of the proposition that “Eleventh Amendment waiver rules are different when a State’s federal-court participation is involuntary.” *Lapides v. Bd. of Regents*, 535 U.S. 613, 622 (2002).

261. 134 U.S. at 17 (emphasis added) (quoting *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 451 (1888)).

262. 256 U.S. 490, 501–02 (1921).

tualism in this instance is as follows: Since "admiralty" is not mentioned in the Amendment, the plain language implication is that States may still be sued by private parties in admiralty cases, yet *Ex parte New York* held otherwise.

As I explained in a prior article,²⁶³ in personam admiralty suits against States, or anyone for that matter, appear to have been quite rare in the late eighteenth century. Accordingly, the Framers may very well have intended to extend sovereign immunity to this category of admiralty suits but did not conceive of the need to do so. By contrast, "the vast majority of admiralty cases in the eighteenth and early nineteenth centuries were in rem, and an admiralty court could only exercise its in rem jurisdiction with respect to property actually before it or in the custody of private persons."²⁶⁴ Unsurprisingly, and consistently with the Amendment's plain language, the Court has recently held that States may be sued by private parties in admiralty when the State does not have possession of the res.²⁶⁵

To summarize the discussion of the constitutional text, the *Monaco* Court offered little to rebut the incontrovertible language of Article III as amended by the Eleventh Amendment. That constitutional text, in precise and unambiguous terms, compels the conclusion that States are not immune in federal suits by foreign states.²⁶⁶ But unless one is an uncompromising textualist, the preceding discussion is not dispositive; we must consider the rationales the *Monaco* Court supplied in its affirmative case for immunity after it dismissed the text. In the Court's famous words: "Behind the words of the constitutional provisions are postulates which limit and control."²⁶⁷ The two postulates the *Monaco* Court focused on were ratification consent—whether "there has been 'a surrender of this immunity in the plan of the convention'"²⁶⁸—and, in dictum, concern with the justiciability of foreign state-versus-State suits from the perspective of separation of powers.²⁶⁹

C. *The States' Ratification Consent to Suit by Foreign States*

As the *Monaco* Court acknowledged, it has long been established that the States, by ratification of the Constitution, acceded to suit by two domestic sovereigns. Accordingly, a State's specific consent to a suit was

263. See Lee, Making Sense of the Eleventh Amendment, *supra* note 25, at 1074–75. There is an erratum in the previous discussion of admiralty: At page 1074, in the second line of the second full paragraph, the word "not" should be inserted after "it would" in the parenthetical.

264. *Id.* at 1075.

265. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 494–95 (1998).

266. See Manning, *supra* note 25, at 1725–26 (reaching same conclusion).

267. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

268. *Id.* at 322–23 (quoting *The Federalist* No. 81, *supra* note 131, at 487 (Alexander Hamilton)).

269. See *id.* at 331–32.

unnecessary as a constitutional matter if the plaintiff were a State²⁷⁰ or the United States.²⁷¹ The Court concluded, however, that there was no evidence of similar consent by ratification as to foreign sovereign states.

The Court reasoned that a suit by a foreign state against a nonconsenting State was different from suits brought by a State or the United States because “[t]he foreign State lies outside the structure of the Union. The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan, and to the United States as the sovereign”²⁷² Additionally, the Court thought it only fair to require a State’s consent to suit by a foreign state, as “[t]he foreign State enjoys a similar sovereign immunity and without her consent may not be sued by a State of the Union.”²⁷³

With specific respect to the category of suits by other States, the Court added that “[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union.”²⁷⁴ Accordingly, the Court reasoned,

the States by the adoption of the Constitution, acting in their highest sovereign capacity, in the convention of the people, waived their exemption from judicial power. The jurisdiction of this Court over the parties in such cases was thus established by their own consent and delegated authority as a necessary feature of the formation of a more perfect Union.²⁷⁵

The right of a State to sue a State without consent was thus “a distinct and essential principle of the constitutional plan.”²⁷⁶

As to suits by the United States against a nonconsenting State, the Court concluded that its original jurisdiction rested “[u]pon a similar ba-

270. See, e.g., cases cited *supra* note 5.

271. See, e.g., cases cited *supra* note 6.

272. *Monaco*, 292 U.S. at 330; see also Caminker, *supra* note 11, at 108–09 (stating that the reasoning in *Monaco* “envision[s] anthropomorphized states . . . agreeing to a mutual pact waiving their immunity for certain kinds of suits but not for others”).

273. *Monaco*, 292 U.S. at 330. But cf. *Kansas v. United States*, 204 U.S. 331, 342 (1907) (“It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.”). It is unclear whether the Court meant the foreign state may not be reciprocally sued without its consent in the Supreme Court or in its own national courts. If the Court meant the former, which seems more likely, foreign sovereign immunity in federal courts has been significantly scaled back since 1934 by statute, most notably for the commercial activity of a foreign state occurring within the United States or causing “a direct effect” in the United States. See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (2000). Section 1605(a)(2) delineates the commercial activity exception. See Bradley & Goldsmith, *supra* note 163, at 585–600 (discussing cases and scholarship on the commercial activity exception).

274. *Monaco*, 292 U.S. at 328.

275. *Id.* at 328–29 (internal citations and quotation marks omitted).

276. *Id.* at 328.

sis.”²⁷⁷ Although no “express words” in the Constitution conferred the judicial power to hear such suits, it was also “inherent in the constitutional plan” in the Court’s view because without it, “the permanence of the Union might be endangered.”²⁷⁸ The Court said no more, but the operative presumption appears to have been that a feature of the well-tempered state is that the political branches of the national government, which make and must “faithfully execute[]” its supreme laws,²⁷⁹ have recourse to national courts for relief against political subdivisions should they break those laws.²⁸⁰

The Court admitted that there was little direct evidence to support its interpretation of what the Framers intended. There was, for one, no discussion at the federal Constitutional Convention of Article III, Section 2, Clause 1’s grant of jurisdiction in “Controversies between . . . a State . . . and foreign States”—the State-foreign States provision.²⁸¹ What we do have, and what the Court considered dispositive, were two remarks at the Virginia ratifying convention by eminent members of the founding group.

James Madison addressed the State-foreign States provision in a comment he made at the Virginia convention on June 20, 1788. Below is his comment, which the *Monaco* Court quoted, with the italicized addition of an important part of his remarks the Court omitted:

The next case provides for disputes between a foreign State, and one of our States, should such a case ever arise; and between a citizen and a foreign citizen or subject. I do not conceive that any controversy can ever be decided in these Courts, between an American State and a foreign State, without the consent of the parties. If they consent, provision is here made. *The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favourable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war?*²⁸²

277. *Id.* at 329.

278. *Id.*

279. U.S. Const. art. II, § 3.

280. See *Alden v. Maine*, 527 U.S. 706, 755–56 (1999); *United States v. Texas*, 143 U.S. 621, 644–45 (1892). But see *supra* text accompanying notes 107–109 (questioning this logic). An alternative rationale, suggested in *Alden*, is that suits brought by the national government are the result of a political process in a way that individual private suits are not: “Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.” 527 U.S. at 756. Outlier suits and demands are therefore logically filtered out, and one can safely assume that the suit serves the public interest. *Alden*’s functional sovereign-process argument applies with equal force to suits brought by foreign sovereign states.

281. See *Monaco*, 292 U.S. at 323 (“The debates in the Constitutional Convention do not disclose a discussion of this question.”).

282. James Madison, Remarks at Virginia Convention (June 20, 1788), in 10 Documentary History of Ratification, *supra* note 102, at 1414–15 (emphasis added). A fascinating implication of the first sentence of Madison’s comment is that the Article III,

The Court also quoted a peroration delivered by John Marshall the same day at the Virginia convention in response to comments made the previous day by George Mason. Once again, the Court omitted a crucial sentence:

He objects in the next place to its jurisdiction in controversies between a State, and a foreign State. Suppose, says he, in such a suit, a foreign State is cast, will she be bound by the decision? If a foreign State brought a suit against the Commonwealth of Virginia, would she not be barred from the claim if the Federal Judiciary thought it unjust? The previous consent of the parties is necessary. And, as the Federal Judiciary will decide, each party will acquiesce. *It will be the means of preventing disputes with foreign nations.*²⁸³

The excerpts the Court quoted seem to support its conclusion that a State could not be sued by a foreign state without its specific consent in the case. Madison opined, "I do not conceive that any controversy can ever be decided in these Courts, between an American State and a foreign State, without the consent of the parties." Marshall said, "The previous consent of the parties is necessary."

Closer investigation of the substance and context of their remarks, however, supports the theory of ratification consent—that the State's "consent" they were talking about was a durable consent conferred by the States' ratification of the Constitution, including Article III's State-foreign States provision, similar to the States' ratification consent with respect to Article III "Controversies between two or more States."

First, the rationales Madison and Marshall gave for the State-foreign States provision support the theory of ratification consent. Madison and Marshall admitted that the underlying purpose of the "State . . . foreign States" provision was "preventing disputes with foreign nations"²⁸⁴ by ensuring that it was not "in the power of a member of the Union to drag the whole community into war."²⁸⁵ This goal is inconsistent with the theory of specific consent their preceding words imply. If the Constitution required the consent of the State in each case where it was sued by a foreign state, then it would be unlikely that "the national tribunal" would ever hear the case, since the State could hardly be expected to consent to

Section 2, Clause 1 grant of federal jurisdiction over "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" intended "a State . . . and foreign States" and state "Citizens" and "foreign . . . Citizens or Subjects" to be two matched pairs of litigants.

283. John Marshall, Remarks at Virginia Convention (June 20, 1788), in 10 Documentary History of Ratification, supra note 102, at 1434–35 (emphasis added).

284. *Id.* at 1435.

285. Madison, supra note 282, at 1415; see also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451 (1793) (Blair, J.) (pointing out "the policy which, no doubt, suggested [the State-foreign States] provision, viz. That no State in the Union should, by withholding justice, have it in its power to embroil the whole confederacy in disputes of another nature"). Justice Blair was being subtle: "[D]isputes of another nature" was, of course, a reference to war.

suit where it was accused of having breached a U.S. treaty obligation. By contrast, if the States' consent to this scheme of treaty arbitration in the national court was prospectively effected by ratification, then the reason for establishing it could be better achieved. A State would have no choice in the matter if a foreign state were to bring a dispute to the Supreme Court alleging that the State had broken a U.S. treaty.

One response, suggested by Marshall's comment that "as the Federal Judiciary will decide, each party will acquiesce," is that even if specific consent were required, a State would have enough confidence in the national judiciary and regard for the collective stakes at issue to consent. This seems at first glance a plausible point (though, from Marshall, perhaps gnilefully naïve). For example, modern arbitration agreements purport to arbitrate not all possible disputes between the parties, but only those pertaining to the subject matter of an agreement.²⁸⁶ Within that ambit, the parties voluntarily submit.

But upon more careful thought, the analogy works more in the other direction. A party to a modern arbitration agreement does not typically reserve the right to consent or not to consent each time a specific controversy arises that is covered by the agreement; rather, the agreement covers a category of prospective contemplated disputes.²⁸⁷ If that were not the case, arbitrations would be infrequent, as the party benefiting from a favorable status quo would likely withhold specific consent, defeating the purpose of the arbitration agreement. The idea of ratification consent is that the Constitution was in the nature of a durable agreement to arbitrate sensitive disputes between States and other sovereign states in the Supreme Court. The *Monaco* Court observed, with respect to suits by other States, that "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States, in place of an inadequate scheme of arbitration, was essential to the peace of the Union."²⁸⁸ If state ratification consent to suits by other States is to be presumed given the interest in interstate peace, then how much more justified is a conclusion of state consent to suit by foreign states, given the acute interest in international peace with the more powerful European states? Indeed, while the Constitution expressly proscribes a State from waging war without the consent of the national government against anyone (unless invaded or in "imminent danger"), including another

286. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("[W]e look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement [to arbitrate]." (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985))); *United Steel Workers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

287. See, e.g., *Waffle House*, 534 U.S. at 282 & n.1 (involving an employment contract arbitration clause providing that "any dispute or claim" concerning employment would be "settled by binding arbitration").

288. 292 U.S. 313, 328 (1934).

State,²⁸⁹ there is no such limitation on the right of foreign states to wage war.

The documentary record is replete with affirmations of Madison's and Marshall's acute concern that a State's particular difficulties in adhering to U.S. treaty obligations with a foreign state would drag the entire United States into war, and that the intent behind the constitutional State-foreign parties jurisdiction over controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"²⁹⁰ was to address this precise concern.²⁹¹ As the Supreme Court recently observed,

289. "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." U.S. Const. art. I, § 10, cl. 3.

290. *Id.* art. III, § 2, cl. 1.

291. A brief sample of the evidence drawn from *The Federalist Papers* and debates at the federal Constitutional Convention and state ratifying conventions—in particular the Virginia convention where Madison and Marshall made their remarks—should suffice to support the point, which is uncontroversial. Alexander Hamilton, in *Federalist No. 80*, put it this way:

[T]he peace of the whole ought not to be left at the disposal of a part. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility.

The *Federalist No. 80*, *supra* note 131, at 476 (Alexander Hamilton) (emphasis omitted). James Madison, in objecting to the more State-deferential New Jersey plan at the federal Constitutional Convention, had the same problem in mind when he asked,

Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. Hitherto indulgence has been sh[o]wn to us. This cannot be the permanent disposition of foreign nations. A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole.

James Madison, Remarks at the Federal Convention, in 1 Farrand, *supra* note 46, at 316. James Wilson, at the Pennsylvania ratification convention, defended the State-foreign parties jurisdiction in a similar but more comprehensive fashion:

[I]s it not necessary, if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? . . . Is it not an important object to extend our manufactures and our commerce? . . . Further, it is necessary, in order to preserve peace with foreign nations. Let us suppose the case, that a wicked law is made in some one of the states, enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him. What can that prince or sovereign do? Bound by inclination as well as duty to redress the wrong his subject sustains from the hand of perfidy, he cannot apply to the particular guilty

Both during and after the Revolution, state courts were notoriously frosty to British creditors trying to collect debts from American citizens, and state legislators went so far as to hobble British debt collection by statute, despite the specific provision of the 1783 Treaty of Paris that creditors in the courts of either country would "meet with no lawful impediment" to debt collection. Ultimately, the States' refusal to honor the treaty became serious enough to prompt protests by the British Secretary of State, particularly when irked by American demands for treaty compliance on the British side.

This penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III of the Constitution . . . (federal jurisdiction "extend[s] to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects"). "[T]he proponents of the Constitution . . . made it quite clear that the elimination or amelioration of difficulties with credit was the principal reason for having the alienage and diversity jurisdictions, and that it was one of the most important reasons for a federal judiciary."²⁹²

state, because he knows that by the Articles of Confederation, it is declared that no state shall enter into treaties. He must therefore apply to the United States. The United States must be accountable. "My subject has received a flagrant injury; do me justice, or I will do myself justice." If the United States are answerable for the injury, ought they not to possess the means of compelling the faulty state to repair it? They ought, and this is what is done here. For now, if complaint is made in consequence of such injustice, Congress can answer, "why did not your subject apply to the General Court, where the unequal and partial laws of a particular state would have had no force?"

James Wilson, Remarks at Pennsylvania Convention (Dec. 7, 1787), in 2 *The Documentary History of the Ratification of the Constitution* 519–20 (Merrill Jensen ed., 1976).

Indeed, other notable delegates at the Virginia ratifying convention expressed the same concern. Francis Corbin, on the day before Madison and Marshall made the remarks quoted by the *Monaco* Court, observed:

Fatal experience has proved, that treaties would never be complied with, if their observance depended on the will of the States; and the consequences would be constant war.—For, if any one State could counteract any treaty, how could the United States avoid hostility with foreign nations?—Do not Gentlemen see the infinite dangers that would result from it, if a small part of the community could drag the whole Confederacy into war?

Francis Corbin, Remarks at Virginia Convention (June 19, 1788), in 10 *Documentary History of Ratification*, supra note 102, at 1392.

On the day after Madison and Marshall made their remarks, Edmund Randolph, Governor of Virginia at its ratification convention, summarized the reasons for creating a federal judiciary in the following way: "That it shall be an auxiliary to the Federal Government, support and maintain harmony between the United States and foreign powers, and between different States, and prevent a failure of justice in cases to which particular State Courts are incompetent." Edmund Randolph, Remarks at Virginia Convention (June 21, 1788), in 10 *Documentary History of Ratification*, supra note 102, at 1450–51.

292. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94–95 (2002) (alteration in original, citations omitted) (quoting U.S. Const. art. III, § 2, cl.

A second reason why the theory of ratification consent seems more persuasive involves the context in which Madison and Marshall made their remarks. The obvious problem with ratification consent from a States' rights perspective was the fact that the Constitution could not, as an American legal document, bind foreign states to reciprocal consent to suit in a U.S. or foreign court. By contrast, it is axiomatic that other States would be reciprocally bound, although the point deflates when one considers that the United States is not reciprocally bound. Nor did international law require a foreign state to provide a reciprocal privilege in its own courts if granted the privilege in the national court of a treaty partner.²⁹³ William Grayson, who with Richard Henry Lee would represent Virginia as a U.S. Senator in the first Congress, made precisely this point in response to Madison, who tellingly offered no rebuttal:

My honorable friend [Madison], whom I much respect, said that the consent of the parties must be previously obtained. I agree that the consent of foreign States must be had before they become parties: But it is not so with our States. It is fixed in the Constitution that they shall become parties. . . . There is no reciprocity in this, that a foreign State should have a right to sue one of our States, whereas a foreign State cannot be sued without its own consent. The idea to me is monstrous and extravagant.²⁹⁴

Two days earlier, George Mason—who, unlike Marshall, had attended the federal Constitutional Convention, although he refused to sign the Constitution²⁹⁵—made the exact same point as Grayson with respect to the lack of reciprocity of consent. He remarked:

Let us consider the operation of the last subject of its cognizance.—Controversies between a State, or the citizens thereof, and foreign States, citizens or subjects.—There is a confusion in this case. This much, however, may be raised out of it—that a suit will be brought against Virginia.—She may be sued by a foreign State.—What reciprocity is there in it?—In a suit between Virginia and a foreign State, is the foreign State to be bound by the decision?—Is there a similar privilege given to us in foreign

1; Treaty of Peace, *supra* note 209, art. IV, 8 Stat. at 82; Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1473).

293. The concern was addressed to the extent that treaties, like the Definitive Treaty of Peace, implicitly provided such reciprocity. See, e.g., Treaty of Peace, *supra* note 209, art. IV, 8 Stat. at 82 ("It is agreed that creditors *on either side*, shall meet with no lawful impediment" (emphasis added)). Moreover, the Republic's most important early treaty partners—France, Great Britain, and Spain—were not federated states presenting the prospect of treaty defection by quasi-sovereign political subdivisions.

294. William Grayson, Remarks at Virginia Convention (June 21, 1788), in 10 Documentary History of Ratification, *supra* note 102, at 1448.

295. See *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* 208 (Patrick T. Conley & John P. Kaminski eds., 1988).

States?—Where will you find a parallel regulation? How will the decision be enforced?—Only by the *ultima ratio regum*.²⁹⁶

In sum, the only direct evidence against the States' ratification consent to suit in the Court by foreign states are two stray remarks by ardent federalists in the heat (literal and figurative) of the Virginia ratifying convention in 1788. Whatever support these words lend to the theory of specific consent is diminished by the war-avoidance rationale Madison and Marshall jointly offered for the constitutional provision of jurisdiction of controversies between States and foreign states, which validates ratification consent. Even putting aside the internal contradictions in their statements, Madison's and Marshall's suggestion of specific consent was strenuously challenged by prominent antifederalists, whose key point of nonreciprocity Madison and Marshall did not rebut.

In any event, legislative history from one State's ratifying convention in 1788 can only go so far in answering the question of whether the States presently have sovereign immunity in original actions brought by foreign states given the later enactment of the Eleventh Amendment. How the text of the Amendment unambiguously commands nonimmunity in suits by foreign states has already been demonstrated.²⁹⁷ And as we shall see,²⁹⁸ John Marshall, as Chief Justice of the United States, on two occasions in the early nineteenth century indicated that the Court retained jurisdiction in "controversies between two or more States, or between a State and a foreign State."²⁹⁹ If the *Monaco* Court was correct in construing Marshall's remarks as a delegate to the Virginia ratifying convention in 1788 as probative of a theory of constitutional immunity in controversies between a State and a foreign state, then one can only conclude that Marshall, as Chief Justice, understood the ratification of the Eleventh Amendment a decade later in 1798 to reverse that understanding. In contrast, if, as this Article has argued, the complete context of Marshall's comments in 1788 is consistent with the theory of the States' ratification consent to suits by foreign states, then it would indicate that Marshall's statements in 1788 possibly implying otherwise were made strategically to speed ratification, and that his pronouncements as Chief Justice presuming ratification consent were consistent with his true opinion in 1788. Either way, one can only conclude that by 1798, there remained in the Constitution a right of foreign states to sue a State, albeit on the thesis of this Article, one that could be exercised only in the Supreme Court.

296. Mason, *supra* note 102, at 1406. It is in response to Mason that Marshall made his statement quoted *supra* text accompanying note 283.

297. See *supra* Part II.B.

298. See *infra* Part IV.B.

299. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16–20 (1831) (holding that an Indian tribe is barred from bringing an original action against a State in the Supreme Court because it was not "a foreign state in the sense in which that term is used in the constitution").

D. *Sovereign Dignity as an Argument Against State Sovereign Immunity in Suits by Foreign States*

In conjunction with the defensive tack that the foreign state was unlike an American State and the United States for purposes of ratification consent, the *Monaco* Court argued offensively that, for purposes of state sovereign immunity, foreign states were very much like private persons. And the Court noted that “[t]o suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar.”³⁰⁰ The “same fundamental principle” afforded the State immunity absent consent in federal suits brought by its own citizens.³⁰¹ The Court continued: “We are of the opinion that the same principle applies to suits against a State by a foreign State.”³⁰²

That principle, which has come to be known as sovereign dignity, was, as the *Monaco* Court implicitly recognized, born with the supratextualism of *Hans v. Louisiana*.³⁰³ To extend state sovereign immunity to a litigant who was unspecified by the Eleventh Amendment, it was necessary for the *Hans* Court to articulate a general historical principle that could justify both the textual manifestations of sovereign immunity (citizens of other states and foreign citizens or subjects) and the supratextual one at issue (in-state citizens). The obvious choice was the idea of unconstitutional affront to the dignity of a sovereign state to be haled into court against its will by an individual. The *Monaco* Court quoted Alexander Hamilton’s articulation of this “general principle of immunity: ‘It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.’”³⁰⁴ Using this originalist principle and fol-

300. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934).

301. *Id.*

302. *Id.* at 330.

303. 134 U.S. 1 (1890).

304. 292 U.S. at 324 (quoting *The Federalist* No. 81, *supra* note 131, at 487 (Alexander Hamilton)). There is language in *Hans v. Louisiana*, which the *Monaco* Court also quoted liberally, that hints at a broader principle—that a State may not be sued by anyone absent consent. See *id.* at 327 (“The suability of a State without its consent was a thing unknown to the law.” (quoting *Hans*, 134 U.S. at 16)). But the *Monaco* Court also cited language from *Hans* in line with the narrower principle of sovereign immunity vis-à-vis private persons (including corporations). See *id.* at 326 (“Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the States, had been expressly disclaimed, and even resented, by the great defenders of the Constitution, whilst it was on its trial before the American people.” (quoting *Hans*, 134 U.S. at 12)). Even under the more general principle—that a State may not be sued by anyone absent its consent—the fact that the doctrine nonetheless recognizes that other States and the United States may sue a State without its express consent means at the very least that ratification consent suffices to waive immunity under the principle. The *Hans* Court explicitly recognized the exception for ratification consent to suit in the Supreme Court in noting “that neither a State nor the United States can be sued as defendant in any court . . . without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court . . . by virtue of the original jurisdiction conferred . . . by the Constitution.” 134 U.S. at 17 (quoting *Cunningham v. Macon & Brunswick R.R. Co.*, 109

lowing *Hans's* supratextual cue, the Rehnquist Court has extended state sovereign immunity to federal agency proceedings and state court suits,³⁰⁵ notwithstanding that neither circumstance implicates the Article III judicial power, to which the Eleventh Amendment is solely addressed.

I have elsewhere argued that the Framers' conception of state sovereign immunity was indeed centrally concerned with the larger principle of sovereign dignity, but dignity of a different sort than the *Hans* Court had in mind.³⁰⁶ The starting premise of this different conception of sovereign dignity is the literal language of the Eleventh Amendment, which extends immunity to suits by citizens of other States and foreign citizens or subjects without mention of in-state citizens. This, to the *Hans* Court, was "startling and unexpected."³⁰⁷

I explained the seeming implausibility by reference to principles of contemporaneous international law, which, like the Eleventh Amendment, would not have been thought to answer the question of a sovereign state's suability by its own citizens—a domestic law question.³⁰⁸ As such, the Eleventh Amendment does not go so far as to say that federal question suits by in-state citizens were permitted—it simply does not say anything on the issue. I suggested, however, that international legalists of the time were normatively inclined to think in-state citizens should be able to seek redress for fundamental violations in republican states, which the Constitution requires the American States to be.³⁰⁹ Any such republican "privilege" to sue one's State for fundamental violations was extended to all U.S. citizens by virtue of the Privileges or Immunities Clause of the Fourteenth Amendment.³¹⁰

Foreign individuals, by contrast, had no claim to another state's sovereignty at contemporaneous international law, being fractions of their

U.S. 446, 451 (1888)). It is, of course, a purpose of this Article to show that the constitutional plan incorporated ratification consent to original actions exclusively in the Supreme Court by foreign states against States to avoid war and disruption of trade with powerful foreign states.

305. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (noting that "[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities" in holding State immune in a federal agency proceeding); *Alden v. Maine*, 527 U.S. 706, 749 (1999) (concluding that "[p]rivate suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties regardless of the forum" to hold a State immune on federal law claims in state court (internal citations and quotation marks omitted)).

306. See Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1095–97, 307, 134 U.S. at 11.

308. Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1028–29.

309. See *id.* at 1036–37. The Republican Government Clause reads, "The United States shall guarantee to every State in this Union a Republican Form of Government . . ." U.S. Const. art. IV, § 4.

310. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. Const. amend. XIV, § 1; see also Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1087–88.

own state's sovereignty and therefore inferior in dignity as compared to other sovereign states, each comprised of many persons. As Vattel put it:

[E]very sovereign and independent state, deserves consideration and respect, because it . . . is an assemblage of a great number of men who are, doubtless, more considerable than any individual. The sovereign represents his whole nation, he united in his person all its majesty. No individual, though ever so free and independent, can be placed in competition with the sovereign; this would be to put a single person alone upon an equality with an united multitude of his equals. Nations and sovereigns, are then, at the same time under an obligation, have a right to maintain their dignity, and to cause it to be respected as of the utmost importance to their safety and tranquility.³¹¹

Late eighteenth-century international law accordingly limited remediation against a sovereign state by a noncitizen to the possibility that his own equally sovereign state might espouse the private claim and thereby make it public, whether by an appeal to legal resolution in an international forum such as treaty-based ad hoc arbitration or by diplomacy or war.³¹²

The operative rationale of this theory of the Eleventh Amendment based on Enlightenment-era international law, then, was the equality-based idea of sovereign dignity that Vattel described.³¹³ Each State's sovereignty, because it is republican in nature, was created by the collective will of its numerous citizens, and so demands due respect for its collectivity. Each State is the equal of any other; thus, to recognize a noncitizen's (whether a foreign citizen or subject, or a citizen of another State) legal

311. Vattel, *supra* note 61, Book 2, § 35, at 208–09. The one exception in terms of comparable sovereign dignity was the king of a foreign monarchy (or the emperor of an empire), to whom the technical constitutional term of “foreign citizen” (the Framers used “citizen” in a precise sense to denote an individual participating in the sovereignty of a republic like Switzerland or republican France) or “foreign subject” (of a monarchy like Great Britain or pre-revolutionary France) would not apply. See *Hennessey v. Richardson Drug Co.*, 189 U.S. 25, 34–35 (1903) (“The term ‘citizen,’ as understood in our law, is precisely analogous to the term ‘subject’ in the common law, and the change of phrase has entirely resulted from the change of government. . . . [H]e who before was a ‘subject of the King’ is now ‘a citizen of the State.’” (internal citations omitted)); *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 93 (1795) (Iredell, J.) (“The great distinction between Monarchies and Republics . . . in general, is, that in the former the monarch is considered as the sovereign, and each individual of his nation as subject to him . . . [b]ut in a Republic, all the citizens, as such, are equal . . .”).

312. As Justice Iredell noted,

When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it as to foreign negotiations, and he will be entitled to all the redress which the nature of his case requires, and the situation of his own country will enable him to obtain.

Ware v. Hylton, 3 U.S. (3 Dall.) 199, 259 (1796) (Iredell, J.).

313. See Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1032–37.

right against the State in federal court would presume the unconscionable equality of the one against the many.³¹⁴

The demands of sovereign dignity in this sense cast the right to sue a State as something like a mathematical equation: A noncitizen, a mere fraction of his own State (or a foreign state), does not equal another State and so cannot sue it. Of course, affirmatively stated, the same concept of sovereign dignity would seem to compel nonimmunity in suits against States by other semisovereign States: A State equals a State and so can sue it. Because a fully sovereign state is greater in sovereignty than a semisovereign State, it has a greater right to sue a semisovereign State than an equally semisovereign State would. Of course, this international law-based sovereign dignity principle cannot answer the question of a State's suability by its own citizens, but the separate principle of republican government which is a constitutional feature of a State's sovereignty and resultant dignity surely suggests a measure of nonimmunity with respect to these citizens.

For the Rehnquist Court, however, the sovereign dignity of the State operates without an anchor in the political theory of republican sovereignty based on the collective consent of the governed.³¹⁵ In the Court's apparent view, dignity is due to the State qua sovereign—a governmental entity possessed of coercive sovereign power without regard to the basis of the power. Sovereign liability is a matter of sovereign grace, not of republican right, and therefore is indistinguishable in scope as between, say, an absolute monarchy and a republic. This statist formulation of sovereign dignity ignores the fact, which would have been self-evident to the Framers, that the citizen of a republican State possesses a share of his State and should be able to sue to vindicate his share. The Court's conception of dignity thus compels state immunity in federal court as against all private citizens, even citizens of a State necessarily republican in form who have a claim to its sovereignty.³¹⁶

314. See *id.* at 1033.

315. See, e.g., *Alden v. Maine*, 527 U.S. 706, 714 (1999) (describing state sovereign immunity as "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status" without regard to what the representative nature of this sovereignty might entail in terms of sovereign liability).

316. Many constitutionalists have decried as unfounded the Rehnquist Court's reliance on sovereign dignity as a justification for doctrines of sovereign immunity. See, e.g., *Alden*, 527 U.S. at 802–03 (Souter, J., dissenting) ("Whatever justification there may be for an American government's immunity from private suit, it is not dignity."); Evan H. Caminker, Judicial Solicitude for State Dignity, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 81, 85 (2001) (criticizing the dignity concern as "a category mistake"); Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 *Notre Dame L. Rev.* 1011, 1038–42 (2000) (arguing that the use of state dignity to deny private suits is "difficult to integrate with the American constitutional tradition"); cf. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 788 (2002) (Breyer, J., dissenting) ("Just as this principle [of sovereign dignity] has no logical starting place, I fear that neither does it have any logical stopping point."); Judith Resnick & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 *Stan. L. Rev.* 1921, 1962

As noted above, however, even presuming *arguendo* the Court's statist vision of sovereign dignity as a protection against any private suit, that principle cannot be coherently applied to require immunity from a suit brought by another sovereign state. The doctrines of state sovereign immunity are consistent with this logical limitation insofar as the Supreme Court has held that a State may be sued without its consent by another State³¹⁷ or by the United States.³¹⁸ It bears repeating that a foreign state is, in terms of relative sovereign dignity, superior to an American State because it is a full-fledged member of the community of sovereign nation-states rather than one of fifty semisovereign States that together comprise one sovereign state. Thus, to justify constitutional state sovereign immunity in a suit brought by a foreign state, one cannot rely on the principle of sovereign dignity, but must turn to other arguments such as text or history, both of which this Article has already demonstrated to be unavailing.

Indeed, the principle of sovereign dignity fairly compels the conclusion of nonimmunity in suits by foreign states against States in the Supreme Court. First, any affront to a State's sovereign dignity is mitigated by forum dignity—the fact that the suit may be brought in the Supreme Court only³¹⁹ and initiated not by the service of process but by a more respectful motion for leave to file by the foreign state.³²⁰ Second, there is the straightforward mathematical argument mentioned above: A fully sovereign foreign state's quantum of sovereignty exceeds that of a semisovereign American State, and so to accord the former the right to sue the latter cannot diminish the sovereignty of the latter. Third, underlying the mathematical argument is the functional point that sovereign suits

(2003) (“[R]equiring governments to participate in litigation . . . enhanc[es], rather than diminish[es], the role-dignity appropriate to sovereignty.”). My position is similarly critical but differs from others inasmuch as I agree with the Court that dignity is indeed the foundation of state sovereign immunity, but that “it is a dignity that is based on the private citizens who constitute the State, not a dignity that is separate from and superior to its citizens.” Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1097; cf. *Alden*, 527 U.S. at 802 (Souter, J., dissenting) (“It would be hard to imagine anything more inimical to the republican conception, which rests on the understanding of its citizens precisely that the government is not above them, but of them, its actions being governed by law just like their own.”).

317. See, e.g., cases cited *supra* note 5.

318. See, e.g., cases cited *supra* note 6.

319. As the Court has noted,

One, in fact, could argue that allowing a private party to haul a State in front of . . . an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.

S.C. State Ports Auth., 535 U.S. at 760 n.11.

320. Cf. Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *Harv. L. Rev.* 1561, 1595–99 (2002) (grounding doctrine of state sovereign immunity in personal jurisdiction idea of the impropriety of a court assuming power over State as defendant).

are different from private suits inasmuch as they are the result of a political process. As the Supreme Court pointed out in *Alden v. Maine*, "Suits [against States by the United States] require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."³²¹ The point also holds for suits against States by foreign sovereign states.

Finally, and perhaps most importantly, in the historical context of the founding, it would enlarge, not diminish, the national sovereign dignity of the American Republic for a powerful foreign state like Great Britain to agree to allow the new Supreme Court of the United States to decide a controversy between it and one of the United States. The foreign state's willingness to appeal to the decisionmaking authority of a less powerful national sovereign's tribunal in an international dispute rather than resort to diplomacy or war itself pays homage to the dignity of the national sovereign. Future Justice Benjamin Curtis put it this way in 1844:

Certainly it would not be a subject of complaint or regret on our part . . . that the foreign sovereign should submit the question to the decision of our own highest tribunal, instead of resorting directly to negotiation. . . . [W]e should look upon an application to the Supreme Court of the United States as not only practicable but desirable, and we should feel thankful for . . . that wise provision in our own Constitution, which . . . was created to establish [the Court's jurisdiction of suits by foreign states against States]—a tribunal known to the world as elevated far above all State biases and prejudices, whose members come together from the North and the South, from the East and the West, across distances wider than half of Europe[;] . . . a tribunal which is our own ark of safety, and to which offended Europe may come confidently and obtain such justice as war and reprisals never gave and never can give.³²²

E. *Separation of Powers: A Judicial, Not a Political, Question*

After holding that Mississippi was entitled to sovereign immunity, the *Monaco* Court opined in dictum that the general category of suits by foreign states against States might not be "of a justiciable character."³²³ The Court noted, "The question of the right of suit by a foreign State against a State of the Union is not limited to cases of alleged debts or of obligations issued by a State and claimed to have been acquired by transfer."³²⁴ Rather, "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United States has a sovereign prerogative,"³²⁵ and in which, correspondingly, "a State has no pre-

321. 527 U.S. at 756.

322. 2 Memoir of Benjamin Curtis, *supra* note 1, at 146-47.

323. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934).

324. *Id.* at 330-31.

325. *Id.* at 331.

rogative of adjustment.”³²⁶ Analogizing to controversies between States, the Court gave as examples of such international questions, “disputes over territorial boundaries[,] . . . the obstruction of navigation, the pollution of streams, and the diversion of navigable waters.”³²⁷ As to such disputes, the Court continued:

The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, through treaty, agreement of arbitration, or otherwise. It cannot be supposed that it was the intention that a controversy growing out of the action of a State, which involves a matter of national concern and which is said to affect injuriously the interests of a foreign State, or a dispute arising from conflicting claims of a State of the Union and a foreign State as to territorial boundaries, should be taken out of the sphere of international negotiations and adjustment through a resort by the foreign State to a suit under the provisions of § 2 of Article III. In such a case, the State has immunity from suit without her consent and the National Government is protected by the provision prohibiting agreements between States and foreign powers in the absence of the consent of the Congress. While, in this instance, the proposed suit does not raise a question of national concern, the constitutional provision which is said to confer jurisdiction should be construed in light of all its applications.³²⁸

The Court’s express words were “international questions,” but it appeared to be invoking the subconstitutional policy of constitutional avoidance³²⁹ in light of what is more commonly known as the political question doctrine. The doctrine, which exempts political subject matter from judicial review, is as old as judicial review itself.³³⁰ Chief Justice Marshall offered the foundational articulation in *Marbury v. Madison*:

326. *Id.*

327. *Id.* (internal citations omitted).

328. *Id.* at 331–32.

329. See *id.* at 332 (“[T]he constitutional provision which is said to confer jurisdiction should be construed in light of all its applications.”); see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (“The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.”).

330. The two most common domestic invocations concern (1) state governance under the rubric of the Republican Government Clause, U.S. Const. art. IV, §4 (“The United States shall guarantee to every State in this Union a Republican Form of Government”); see, e.g., *Taylor v. Beckham*, 178 U.S. 548 (1900) (legality of State’s resolution of gubernatorial election); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (validity of state constitution); cf. *O’Brien v. Brown*, 409 U.S. 1 (1972) (validity of state procedures for party primary and selecting delegates for national party convention without invocation of the Republican Government Clause); and (2) congressional governance, see, e.g., *Nixon v. United States*, 506 U.S. 224 (1993) (Senate procedures for impeachment); *Field v. Clark*, 143 U.S. 649 (1892) (passing of a bill). The application of the political question

The province of the court is . . . not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this Court.³³¹

In the *Monaco* Court's view, controversies between a State and foreign states were best resolved not by original actions brought by foreign states in the Supreme Court, but by diplomatic negotiations, treaty revisions, reparations, and other such means as might be employed by the political branches.³³² It is a telling omission that the Court, in 1934, could not conceive of the possibility that a foreign state might resort to the ultimate political sanction of war and that the United States should greatly fear the possibility.

The political question doctrine is thought to have both a constitutional and a prudential version.³³³ The precise distinction between the two has been the subject of disagreement, but the basic line is that a political question objection is

constitutional if it is thought to be based on separation of powers or textual commitments to other branches of government. On the other hand, the doctrine is prudential if it reflects the

doctrine in both domestic contexts has been questioned by members of the Court, see, e.g., *New York v. United States*, 505 U.S. 144, 184–86 (1992) (“[T]he Court has suggested that perhaps not all claims under the [Republican Government] Clause present nonjusticiable political questions.”); *United States v. Munoz-Flores*, 495 U.S. 385, 393 (1990) (“[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.”); cf. *Nixon*, 506 U.S. at 253 (Souter, J., concurring in the judgment) (“If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a bad guy, judicial interference might well be appropriate.” (internal quotation marks omitted)). Indeed, *Baker v. Carr*, the foundational modern political question case, rejected application of the Republican Government Clause-based prong of the political question doctrine in a case involving redistricting for the state legislature, holding the redistricting unconstitutional under the Equal Protection Clause. 369 U.S. 186, 228 (1962); cf. *Bush v. Gore*, 531 U.S. 98, 103 (2000) (per curiam) (finding justiciable and unconstitutional under the Equal Protection Clause a state supreme court decision ordering an outcome-determinative manual recount of contested ballots in a U.S. presidential election). Constitutionalists have also been critical of overenthusiastic application of the political question doctrine in the foreign affairs context. See, e.g., *Baker*, 369 U.S. at 211 (“[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”); David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. Colo. L. Rev. 1439, 1445–46 (1999); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 Ohio St. L.J. 649, 675–86 (2002).

331. 5 U.S. (1 Cranch) 137, 170 (1803).

332. See 292 U.S. at 331.

333. See generally Hart & Wechsler, *supra* note 3, at 244–67 (discussing the political question doctrine).

Court's concerns about preserving judicial credibility and limiting the role of an unelected judiciary in a democratic society.³³⁴

A justiciability objection of the prudential sort is consistent with the thesis of this Article: There is no constitutional bar to federal suit by foreign states against States, at least with respect to claims "arising under" treaty law. It would be a Pyrrhic victory, though, to conclude that there is no constitutional problem under the doctrinal rubrics of state sovereign immunity and separation of powers, but that the Court should decline jurisdiction in the entire class of foreign state-versus-State cases as a prudential, subconstitutional matter.

A constitutional political question objection is patently off the mark. We can dispense with any argument that there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department."³³⁵ There are two potential textual provisions in play. The national government alone makes treaties under the Constitution,³³⁶ which also provides that "[n]o State shall enter into any Treaty."³³⁷ It is the latter text to which the *Monaco* Court alluded when it mentioned "the provision prohibiting agreements between States and foreign powers in the absence of the consent of the Congress."³³⁸

The problem that concerns us, the breach by a State of a treaty the United States has ratified and wants to keep, has nothing to do with treaty-making by the United States or the States. There is no plausible argument that in deciding a case in which a foreign state alleges that a State has broken a U.S. treaty, the judicial power is infringing upon Congress's and the President's treaty-making powers. The treaty has already been made, and the foreign state, by bringing suit in the highest U.S. national court against a State, is not alleging that the United States qua national government has breached it. Nor is it even remotely persuasive to say that the State, by breaking the U.S. treaty, is in fact "making" its own separate treaty.

In contrast, as the preceding discussion of other constitutional text—Article III, Section 2, Clause 1, the Original Jurisdiction Clause, and the Eleventh Amendment—and its legislative history indicates, the Framers intended the power to hear and decide on a foreign state's claim against a State, specifically concerning state breach of U.S. treaty obligations, to be a judicial power.³³⁹ That this power was intended to be original and exclusive to the Supreme Court is also consistent with the text and confirmed by the historical evidence, most notably by the implemen-

334. Erwin Chemerinsky, *Federal Jurisdiction* 150 (3d ed. 1999); see also Spiro, *supra* note 330, at 675–86 (discussing application of the political question doctrine in foreign relations).

335. *Nixon*, 506 U.S. at 228 (quoting *Baker*, 369 U.S. at 217).

336. U.S. Const. art. II, § 2, cl. 2.

337. *Id.* art. I, § 10.

338. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331–32 (1934).

339. See *supra* Part II.B–C.

tation of the Original Jurisdiction Clause by the First Congress.³⁴⁰ The specific function of declaring a State in breach of a U.S. treaty obligation was never intended for the political branches (or for the self-interested States themselves)—an assignment of powers that makes sense when one considers the importance of the issue to the early Republic coupled with the structural incapacity of the political branches to apply effective coercion to a defecting State.³⁴¹ The political question doctrine in its core, constitutional sense, thus, seems an argument for, not against, judicial review in this instance.

That the Framers gave the Supreme Court the power to decide U.S. treaty-based controversies between States and foreign states is confirmed by the pattern of appointments to the early Supreme Court. Consider, as prologue, the text of Article II on the subject:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States³⁴²

From the list of named officials in the Appointments Clause, the Clause's juxtaposition to the Treaties Clause, and the senatorial "Advice and Consent" role common to both clauses, it seems reasonable to infer that the Framers intended some foreign affairs function for the Supreme Court.

George Washington's inaugural presidential nominations to the Court support the inference that the Framers envisioned a forum with a quasi-international function of arbitrating controversies between States and between States and foreign states.³⁴³ As one historian has noted, "Washington nominated men with wide experience of the world" and from a broad "geographical distribution."³⁴⁴ John Jay of New York, the first Chief Justice of the United States (a position he accepted after turning down Washington's offer to be Secretary of State), had been Minister Plenipotentiary to Spain in 1779, a principal negotiator of the 1783 Treaty of Peace,³⁴⁵ and Minister of Foreign Affairs for the thirteen former colonies from 1784 to 1789. While he was still Chief Justice, Wash-

340. See *supra* Part I.B–C.

341. This incapacity of the political branches to enforce treaty discipline on the States continued through the nineteenth century and persists in the present day. See *infra* Parts IV.A.2, IV.A.3, IV.C. (discussing national government's failure to ensure compliance in the Southern Port Quarantine Act incidents, mob lynchings, and the consular notification controversy).

342. U.S. Const. art. II, § 2, cl. 2.

343. See generally Casto, *supra* note 120, at 56–65; 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (1971); Seriatim: *The Supreme Court Before John Marshall* (Scott Douglas Gerber ed., 1998). The following analysis draws from these fine works on the pre-Marshall Court.

344. Maeva Marcus, *George Washington's Appointments to the Supreme Court*, 24 J. Sup. Ct. Hist. 243, 245, 253 (1999).

345. See Treaty of Peace, *supra* note 209, 8 Stat. 80.

ington sent Jay as Envoy Extraordinary and Minister Plenipotentiary to Great Britain as war over breaches of the 1783 Treaty of Peace seemed imminent, and he negotiated the so-called Jay Treaty of 1794.³⁴⁶ Jay, apart from any affection he might be expected to have for the treaties from pride of authorship, was also one of the most pro-British of the founding Federalists,³⁴⁷ and so his appointment as the first Chief Justice is particularly supportive of this Article's argument that the Framers intended the Supreme Court to be an attractive, credibly neutral tribunal for Great Britain if that nation were at all inclined to seek peaceful vindication of Treaty of Peace claims against a specific State by judicial resolution.

All of Washington's inaugural appointments to the Court were consistent with the conception of the Supreme Court as a diplomatic tribunal vested with the power to arbitrate controversies between States, and between States and foreign states. Among Washington's Associate Justice appointments were James Iredell of North Carolina and James Wilson of Pennsylvania, both comparatively recent immigrants from Great Britain (in 1768 and 1765, respectively). The two, who were dear friends, had reputations as brilliant, cosmopolitan lawyers with a shared veneration of international law.³⁴⁸ As Justices, they revealed a particular affection for international law's foundational precept of *pacta sunt servanda* (treaties must be kept), which they, along with their colleagues, unanimously voiced in the famous case of *Ware v. Hylton*, where the Court struck down Virginia debtor relief laws as inconsistent with article IV of the 1783 Treaty of Peace.³⁴⁹

346. Treaty of Amity, Commerce and Navigation, Nov. 19, 1794, U.S.-Gr. Brit., 8 Stat. 116 [hereinafter Jay Treaty].

347. See Casto, *supra* note 120, at 89 ("In the Senate, Jay's nomination was strenuously opposed by those who believed that he was pro-British and would negotiate an agreement that would draw the United States closer to Britain and away from France.").

348. See Lee, Making Sense of the Eleventh Amendment, *supra* note 25, at 1078-88 (describing their respect and understanding of international law).

349. 3 U.S. (3 Dall.) 199, 220, 245, 281, 281 (1796) (opinions of Chase, J., Paterson, J., Wilson, J., Cushing, J., respectively). Justice Iredell, who did not participate in the disposition of the case, nonetheless delivered this memorable paean to the sanctity of the 1783 Treaty of Peace:

None can reverence the obligation of treaties more than I do. The peace of mankind, the honour of the human race, the welfare, perhaps the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the Treaty in question. It gave peace to our country, after a war attended with many calamities, and, in some of its periods, presenting a most melancholy prospect. It insured, so far as peace could insure them, the freest forms of government, and the greatest share of individual liberty, of which, perhaps, the world had seen any example. It presented boundless views of future happiness and greatness, which almost overpower the imagination, and which, I trust, will not be altogether unrealized: The means are in our power; wisdom and virtue are alone required to avail ourselves of them. Such was the peace which

Associate Justices John Blair of Virginia and John Rutledge of South Carolina were both American-born but trained in law at the Middle Temple in London.³⁵⁰ Rutledge, a recess appointment as Chief Justice from August to December of 1795, was, as it turned out, not internationalist enough. The Senate rejected him for a permanent appointment as Chief Justice because of his outspoken opposition to the 1794 Jay Treaty³⁵¹—a litmus test consistent with the thesis of this Article, but surely utterly foreign to Americans accustomed to modern Supreme Court appointment controversies. Washington then offered the position to William Cushing, another early Associate Justice appointee, who, although neither educated nor born in Great Britain, had served on the Massachusetts Superior Court during the colonial period from 1772 to 1775 and thereafter until his appointment to the Court in 1789 under a state commission.³⁵² Unsurprisingly, Cushing was, like Wilson and Iredell, with whom he agreed in *Ware v. Hylton*, a rock-solid *pacta sunt servanda* man: “[I]t can hardly be considered as an odious thing, to [e]nforce the payment of an honest debt, according to the true intent and meaning of the parties contracting”³⁵³ When Cushing refused to replace Rutledge as Chief Justice for health reasons, Washington nominated Oliver Ellsworth,³⁵⁴ who we know was the principal architect of the First Judiciary Act, which provided original and exclusive jurisdiction in the Supreme Court for suits brought by foreign states against States.³⁵⁵ When Ellsworth resigned as Chief Justice owing to health problems arising from his other job as U.S. Envoy Extraordinary and Minister Plenipotentiary to France, President John Adams replaced him with his chief diplomat, Secretary of State

was procured by the Treaty now in question—a treaty which, when it shall be fully executed in all its parts, on both sides, future generations will look up to with gratitude and admiration, and with no small degree of fervour towards those who had an active share in procuring it.

In proceeding to examine the treaty with these sentiments, it may well be imagined I do it with a reverential and sacred awe, lest by any misconstruction of mine, I should weaken any one of its provisions.

Id. at 270–71 (Iredell, J.); cf. id. at 281 (Wilson, J.) (striking down Virginia statute on basis of a rule of the law of nations that sovereign state at war may not confiscate debts of its enemies and, alternatively, on grounds that 1783 Treaty of Peace annulled the Virginia law in question).

350. See Robert M. Ireland, Blair, John, Jr., in *The Oxford Companion to the Supreme Court of the United States*, supra note 1, at 77–78; Robert M. Ireland, Rutledge, John, in *The Oxford Companion to the Supreme Court of the United States*, supra note 1, at 750–51.

351. See Casto, supra note 120, at 92 (“Although charges of insanity and bankruptcy were leveled against Rutledge, the available evidence indicates that these allegations were essentially pretextual and the true basis for the negative was Rutledge’s strident and public opposition to the Jay Treaty.”); Goebel, supra note 343, at 748 & n.120; infra Part IV.A (discussing the Jay Treaty).

352. See Casto, supra note 120, at 59.

353. 3 U.S. (3 Dall.) at 283 (Cushing, J.).

354. See Goebel, supra note 343, at 749.

355. See Goebel, supra note 343, at 458–60; supra note 120 and accompanying text.

John Marshall.³⁵⁶ But before enlisting Marshall, Adams asked John Jay, the Republic's preeminent diplomat, if he wanted his old job back.³⁵⁷ It is a particularly telling insight into the founding group's conception of the Court that President Adams's first choice as Chief Justice was Jay, the very person who had negotiated a controversial treaty upon which the Court might have future cause to pass.

As a group, then, the first appointments to the Court exhibited traits supporting the inference that the Court was intended to act as a quasi-international tribunal, particularly with regard to potential disputes among the States and between the States and Great Britain. All of the first Justices were "initially leery of an outright separation with Great Britain."³⁵⁸ All three Chief Justices had, or would have, significant diplomatic experience. Two were trained for the practice of law in Britain; others had practiced under British colonial rule. They were all widely respected in their home States.

Although the cosmopolitan and diplomatic background of the first Justices of the Court is common knowledge, the logical inferences that follow as to the Framers' conception of the Court's institutional role are not so often made. One such inference is that the Framers intended an international role for the Court, and that original and exclusive jurisdiction over suits by foreign states directly against States for treaty violations was an important part of this function. Another is that the modern tendency to label matters touching upon foreign affairs as political questions implicating the separation of powers is overinclusive as an originalist matter. What good would come of appointing diplomats to the Court if they could not bring their expertise to bear on the cases they were constitutionally empowered to decide? A particularly poignant confirmation of this is that President Washington asked one sitting Chief Justice (Jay) to negotiate a treaty with Great Britain and another (Ellsworth) to smooth over difficulties with France, and his successor President Adams saw no problem in asking the former to come out of retirement to replace the latter in a second go as Chief Justice.

The most dispositive objection to the contention that it would offend the constitutional separation of powers for the Supreme Court to hear a case brought by a foreign state alleging treaty breach by a State is the nature of the underlying problem in such a suit. When a foreign state alleges that a State has breached a U.S. treaty obligation, the issue is internal treaty discipline within the borders of the United States. This has nothing to do with "the sphere of international negotiations and adjustment"³⁵⁹ delegated to the political branches in the constitutional structural scheme. The puzzle is how to get a recalcitrant State to live up to a treaty the United States has ratified and wishes to honor, not how to ne-

356. See Casto, *supra* note 120, at 118–19, 124–25.

357. See *id.* at 124.

358. *Id.* at 64.

359. See *supra* text accompanying note 328.

gotiate a treaty, revise it, or even to go about breaking it as a matter of national policy. Deciding whether a State has violated a U.S. treaty involves treaty interpretation as the domestic law of the United States, a quintessentially judicial function,³⁶⁰ as opposed to, for example, the job of deciding whether a foreign government should be recognized,³⁶¹ or more relevantly, the meaning of the treaty in international law and relations.³⁶² Any remedy in the event of a determination of breach would be inward-looking, that is, ordered and enforced against the breaching

360. "The courts . . . have the final say as to the meaning of an international agreement insofar as it is law of the United States applicable to cases and controversies before the courts." Restatement (Third) of the Foreign Relations Law of the United States § 326 cmt. b (1987); see also *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 254 (1984) ("We are bound to uphold [the executive branch's] determination [under a multilateral treaty convention] unless we find it to be contrary to law established by domestic legislation or by the Convention itself."); *Perkins v. Elg*, 307 U.S. 325, 336-39 (1939) (supplanting Secretary of Labor's interpretation of 1869 treaty with Sweden with Court's own interpretation); David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 956 (1994) ("In the United States, courts ultimately decide the meaning of treaties."); Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 Cal. L. Rev. 1263, 1268 (2002) ("[W]hile some form of calibrated deference may be appropriate, foreign affairs and executive expertise rhetoric does not justify absolute judicial abdication in favor of fleeting executive views on the interpretation of all treaties."). But see John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 Cal. L. Rev. 851, 864 (2001) (reviewing Frances Fitzgerald, *Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War* (2000)) ("Both formalist and functionalist approaches to the separation of powers indicate that the President should enjoy substantial freedom in defining the meaning of international agreements."). For an example of cases in which the Supreme Court interpreted treaties as domestic law in contravention of the meaning assigned by the political branches (to the point of requiring diplomatic renegotiation of treaty terms), compare *Maiorano v. Balt. & Ohio R.R. Co.*, 213 U.S. 268, 272-73 (1909), which held, contrary to what the State Department argued, that the Treaty of Commerce and Navigation, Feb. 26, 1871, U.S.-Italy, 17 Stat. 845, did not provide a right of action for damages to Italian citizens in U.S. courts, with *Liberato v. Royer*, 270 U.S. 535, 538-39 (1926), which interpreted the same treaty, as amended by Treaty of Commerce and Navigation, Feb. 25, 1913, U.S.-Italy, 38 Stat. 1669, to uphold a right of action for damages by an Italian citizen in U.S. courts.

361. See, e.g., *Guar. Trust Co. v. United States*, 304 U.S. 126, 137-38 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("Who is the sovereign, de jure or de facto, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges This principle has always been upheld by this court" (internal quotation marks omitted) (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890))); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634-35 (1818) (arguing that recognition of foreign governments rests with Congress because it alone "can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise").

362. "The President has authority to interpret international agreements for the purpose of United States foreign relations since he is the country's 'sole organ' in its international relations and is responsible for carrying out agreements with other nations." Restatement (Third) of the Foreign Relations Law of the United States § 326 cmt. a.

American State, and would thus raise fewer concerns for interference in the national government's extraterritorial conduct of foreign policy. Relief in the case of a State's defection from a binding treaty regime is, thus, much like relief in a suit asserting that state law or action is unconstitutional or preempted by a federal statute.

Any other prudential objection on the basis of separation of powers seems similarly weak. It is hard to see how the Supreme Court, in deciding whether a State has breached a binding U.S. treaty obligation, would tarnish its institutional credibility or be perceived as acting antidemocratically. Moreover, doctrinal evolution recognizing the Court's discretion in granting leave to file original actions,³⁶³ however controversial,³⁶⁴ provides a useful safety valve for the Court to exercise principled discretion consistent with Article III in declining jurisdiction over cases where it is apparent that the political branches are dealing with state defection in an effective way, or that the foreign state has not undertaken a good-faith effort to redress treaty breach through diplomatic or other political means.³⁶⁵

Before moving on, it may be worth making one metapoint about the *Monaco* Court's presumptive invocation of political question doctrine in dictum. Application of the political question doctrine, or any justiciability doctrine, though it may potentially reach the same result as a holding based on sovereign immunity—namely, no original jurisdiction in the Court of suits by foreign states against nonconsenting States alleging U.S. treaty violations—is premised not on a respect for the States' sovereignty, but rather on New Deal era deference to the intrastate reach of the political branches of the national government. It differs in this respect from an argument based on state sovereign immunity in the constitutional plan, which is rooted in respect for federalism. The nonjusticiability claim is that, notwithstanding text and history, the Supreme Court ought not to have the power to determine the veracity of a foreign state's allegation that a State has breached a treaty, because this is the job not of the States, but of the executive and legislative branches. To the contrary, the reasoning in *Monaco* is in fact dismissive of state sovereignty in its assumption that a suit involving U.S. treaty obligations colliding with state law or action is necessarily a foreign relations matter to be taken up by the political branches, despite the potential for interference in state affairs. The assignment of this particular function to the judicial branch would have been, in this sense, the truly profederalism move.

Ironically, then, *Monaco* could be justified on an antitextualist, anti-originalist constitutional theory; this is ironic because members of the Court inclined to both textualism and originalism have stood behind *Monaco* and other precedents extending state sovereign immunity well

363. See, e.g., cases cited *supra* note 9.

364. See Shapiro, *supra* note 9, at 561 ("This development elicited strong (and in my view unanswerable) dissent within the Court." (citation omitted)).

365. See *supra* Part I.D.

beyond the words of the Eleventh Amendment and careful examination of the intent of its Framers.³⁶⁶ The argument would be that the need to provide for original and exclusive jurisdiction in the Court over suits against States by powerful foreign states in 1787 notwithstanding, by 1934 America was itself a powerful nation, the dogma of dual sovereignties had become anathema, and the political branches of the national government held supreme power to enact and enforce all ratified treaties against the States, no matter the encroachment on the traditional province of the States' internal sovereignty. There would thus be no need for the Court to decide, on the direct appeal of a foreign state and without the involvement of the political branches, whether a State has unlawfully defected from a treaty regime by failing to honor its obligations.³⁶⁷ The implication is that such a controversy, by virtue of being a treaty claim, can and always should be resolved by the political branches of the national government. Such a conclusion produces the ultimate of many ironies of the *Monaco* decision: A New Deal era opinion profoundly nationalistic and anti-States' rights in sentiment and logic has been embraced by a profederalism Court by virtue of a happy coincidence in its implications for state sovereign immunity.

The better view is to acknowledge what the evidence shows—the Framers had in mind a more complex and flexible plan. On the one hand, fearful of the wars and ruinous economic retaliation that might result from States' refusals to honor fundamental peace treaty obligations of the United States, the Framers viewed the Supreme Court as an essential peacekeeping, war-avoidance institution, a quasi-international arbitral tribunal to handle foreign state-versus-State treaty disputes. On the other hand, the very same realities of state power and dogmatic belief in internal States' sovereignty that vivified the threat of treaty-breaking by States' defection in the first place created a fear of rebellion in the event that the political branches of the national government attempted heavy-handed tactics of national treaty enforcement on behalf of aggrieved foreign states. Even when that fear had subsided, the structure of American federalism handcuffed the ability of the political branches to redress state violations of treaties of the United States.³⁶⁸ Moreover, for the executive

366. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) (Thomas, J., opinion of the Court, joined by Scalia, J.) (dismissing the language of the Eleventh Amendment on the basis that “[i]nstead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose . . . only to ‘address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision.’” (quoting *Alden v. Maine*, 527 U.S. 706, 723 (1999))); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (Scalia, J., opinion of the Court) (“[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms . . .”).

367. Of course, the executive branch might intervene in some instances as *amicus curiae* to give its opinion regarding breach and effect on the national interest.

368. See *infra* text accompanying notes 463–471, 504–506.

branch to sue for or otherwise seek treaty enforcement against the States would appear to concede what might be an arguable treaty violation, to the detriment of the national government's negotiating position vis-à-vis foreign state treaty partners. Once again, a Supreme Court staffed by eminent jurists from a cross-section of the States, with diplomatic experience and internationalist sensibilities, suggested itself as a useful means to deal with sensitive U.S. treaty controversies in a way the States might perceive as mindful of their respective internal sovereignties, and foreign states might perceive as credibly neutral.

III. WHY ORIGINAL ACTIONS AGAINST STATES IN THE SUPREME COURT?

The previous Part's discussion of ratification consent touched briefly on the war-avoidance rationale for authorizing the Supreme Court to hear suits by foreign states against States.³⁶⁹ This Part addresses the puzzle of seemingly redundant remedies: If the paradigm problem redressed by the Court's jurisdiction was state defection from obligations to British creditors under the 1783 Treaty of Peace, why was such jurisdiction necessary given the alternative measures of diplomacy—such as the negotiation of the 1794 Jay Treaty—and provisions for lower federal courts and appellate review from state courts to provide redress directly to aggrieved aliens, as demonstrated by the aforementioned result in *Ware v. Hylton*?³⁷⁰ The solution to the puzzle requires an understanding of late eighteenth-century international law and relations.

A. *How to Deal with States Breaking Treaties*

The place to begin is with a judicial remedy the Constitution does not authorize. The Court has held that the word "State" in the Original Jurisdiction Clause does not include the sovereign United States.³⁷¹ Thus, the Constitution does not permit original jurisdiction in the Court for disputes between the collective United States and a foreign state, regardless of the fact that such a suit would fall under a controversies subheading of Article III, Section 2, Clause 1—"Controversies to which the United States shall be a Party."³⁷²

There are three rationales for this conclusion. First, as a matter of common sense, the Supreme Court—itself a national governmental institution—would not be perceived by a foreign state as likely to act as a neutral arbiter in a dispute between it and a coordinate branch of the same national government.³⁷³ Second, although, as mentioned above,

369. See *supra* Part II.C.

370. See *supra* note 349 and accompanying text.

371. See *Ex Parte Republic of Peru*, 318 U.S. 578, 583 n.3 (1943) ("The United States has never been held to be a 'State' within [U.S. Const. art. III, § 2, cl. 2] . . .").

372. U.S. Const. art. III, § 2, cl. 1.

373. Cf. *The Federalist* No. 80, *supra* note 131, at 478 (Alexander Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias.").

the international law principle of home court immunity as against another sovereign has no force as to a State in a national court, it is certainly applicable to a suit by a foreign sovereign against the national government in the national court.³⁷⁴ This is not wholly persuasive, however, because the national government could waive its own immunity if it thought a waiver of immunity would advance the national interest.³⁷⁵ Thus, the third and most important reason why the Framers did not provide for treaty-based original actions in the Court by foreign states against the United States seems to be the Framers' impression that States, not the national government, would be the domestic sovereigns likely to breach treaty obligations of importance to the survivability of the Republic.

As a matter of international law, however, it was immaterial whether the national government or a State occasioned breach of a ratified treaty of the United States. The treaty had been breached, and the offended sovereign treaty partner had legal rights of redress.³⁷⁶ In the late eighteenth century, lawful recourse included the right of the aggrieved foreign sovereign to wage war against the entire United States, particularly if the breached treaty was a peace treaty.³⁷⁷ In this way, the principal internal threat for the Republic—States' defection from national policy—was simultaneously the cause of the principal external threat—war with a foreign state over the alleged breach of a peace treaty. Doing away with American federalism altogether was, theoretically, the best solution to the lack of a federalism affirmative defense to treaty breach, but that expedient was inconceivable to many, and impracticable given the circumstances of the Republic's founding.

This left few options to deal with the problem of potential treaty breach by States. The more obvious option was diplomacy, but that was too blunt an instrument. Negotiations, treaties, reparations, and settlements were serviceable (if possibly costly) options when treaty breach was

374. See *supra* text accompanying notes 234–236. This discussion of why there is no provision in the Original Jurisdiction Clause for foreign state-versus-United States controversies parallels the earlier discussion about why the Framers might not have intended the Original Jurisdiction Clause to cover United States-versus-State controversies. See *supra* text accompanying notes 107–110.

375. See, e.g., Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491(a)(1) (2000) (waiver of United States immunity for certain nontort claims); Federal Tort Claims Act, 28 U.S.C. § 1346(b) (2000) (primary jurisdictional and waiver provision).

376. As a precaution against subunit breach, a sovereign state could draft explicit “federalism” clauses, usually in the form of a “best efforts” or “recommend” provision, with respect to the national authority’s securing subunit cooperation in treaty enforcement. See, e.g., Treaty of Peace, *supra* note 209, art. V, 8 Stat. at 82.

377. Vattel, *supra* note 61, Book 4, § 54, at 513 (“[I]f [the offended party] determines on demanding a just indemnification, and the party in fault refuses it, the treaty is then, of consequence, broke, and the injured contractor has a very just cause for taking up arms again.”).

systemic—when a large number of States were backsliding on a treaty.³⁷⁸ But if the culprit were one or a couple of States defecting from a U.S. treaty, it would be giving away too much for the national government to negotiate and pay a settlement on behalf of all of the United States. At the same time, to defend the isolated defections would risk war and disruption of trade, which would be contrary to the interests of the majority of States remaining faithful to the treaty.

Conversely, heavy-handed coercion by the political branches of the national government to enforce treaty discipline on a recalcitrant State was fraught with danger. This was particularly true in the case of a powerful State like Virginia. True, the States had conceded to the inexorable logic of a “more perfect Union”³⁷⁹ in the wake of the war for revolution, but the national government lacked the military resources to force treaty compliance on a stubborn State.

To do nothing and run the risk of war was another option, at least in theory. In reality, it was no option at all for the young Republic in the late eighteenth century. War weary, militarily weak, financially strapped, and internally divided notwithstanding the wave of nationalism that carried through the Constitution, the last thing the Framers wanted was reprise of war with Great Britain or any other European power. They had barely won the war of revolution, and that only with the military and financial assistance of France, a great power and Great Britain’s adversary. Only slightly less distressing for the Republic was the risk that Great Britain would order a naval blockade or take other economic sanctions. The colonies had been too long weaned as a cog of the British mercantilist empire to be able to flourish without access to Britain and her retained colonial possessions through trade with other powers. A British naval blockade, difficult to do but within the capability of the greatest navy in the world, would have choked the young nation’s economic growth.

A fourth option was to provide a network of national courts as an alternative or supplement to state courts for the vindication of foreigners’ legal claims directly. This was the most responsive measure to the paradigm threat, which, as we have seen, involved state denials of access to justice for British creditors in contravention of the 1783 Treaty of Peace with Great Britain. Article IV famously dealt with debts: “It is agreed that creditors on either side, shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted.”³⁸⁰ As the Supreme Court held in *Ware v. Hylton*, the article was explicit and broad enough to encompass any sort of statutory

378. Moreover, in the event of systemic breach, the option of suit in the Court by foreign states against States would be unwieldy and perhaps impracticable given the need for multiple lawsuits.

379. U.S. Const. pmbi.

380. Treaty of Peace, *supra* note 209, art. IV, 8 Stat. at 82. Article V concerned restitution for confiscated properties. The argument that this treaty provision might be breached by state action was more difficult for the British sovereign to make, because it

or judicial "impediment" a State might interpose to disable full payment of debts in valuable specie.³⁸¹ The Framers of the Constitution left Congress the option of availing itself of this solution.

B. *Suits by Foreign Citizens or Subjects*

Thus, the State-foreign parties provision of Article III, Section 2, Clause 1³⁸² broadly authorized federal judicial power over suits by foreign citizens or subjects, and the Judiciary Act of 1789 intricately and parsimoniously doled out this power to the lower federal courts the Act created.³⁸³ Under the Act, in certain disputes between private parties, an alien could sue a state citizen in (1) federal circuit or district court rather than state court, or (2) in state court, with a right to appeal to the Supreme Court or to remove to federal court in cases that could have been brought in the district or circuit courts. The circuit courts were specifically invested with jurisdiction over such disputes involving greater sums of money, regardless of the specific cause of action. Section 11 of the Act provided,

That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party³⁸⁴

Section 12 of the Act afforded defendants the right to remove state court cases brought against aliens to federal court when the claims met the amount-in-controversy requirement.³⁸⁵

contained a primitive federalism clause that cast the national government's basic treaty obligation as one of merely "recommending" remedial measures to the States.

It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties, which have been confiscated, belonging to real British subjects [A]nd that Congress shall also earnestly recommend to the several states a reconsideration and revision of all acts or laws regarding the premises, so as to render the said laws or acts perfectly consistent, not only with justice and equity, but with that spirit of conciliation, which on the return of the blessings of peace should universally prevail.

Id. art. V, 8 Stat. at 82–83. A subsequent clause of article V provided, like article IV, that "all persons who have any interest in confiscated lands . . . shall meet with no lawful impediment in the prosecution of their just rights," but as there was no treaty obligation to reverse the confiscations defining baseline "just rights," the clause lacked teeth. Article VI prohibited any "future Confiscations" or "Prosecutions" for participation in the war. *Id.* art. VI, 8 Stat. at 83.

381. See 3 U.S. (3 Dall.) 199, 239–42 (1796) (Patterson, J.).

382. "The judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign . . . Citizens or Subjects." U.S. Const. art. III, § 2, cl. 1.

383. See generally Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1478–1517 (detailing drafting and passage of Judiciary Act of 1789).

384. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

385. *Id.* ch. 20, § 12, 1 Stat. at 79–80.

The federal district courts were assigned jurisdiction of suits by aliens regardless of amount, but for a "tort only in violation of a treaty or the law of nations," not for simple breach-of-contract causes of action, such as the writ in debt.³⁸⁶ Thus, debt or other nontort causes of action involving five hundred dollars or less in controversy, which would appear authorized under a plain reading of Article III, Section 2, Clause 1's alienage jurisdiction, were simply left out in the inaugural statutory grant, presumably because denial of justice in small-potato disputes was thought unlikely to raise the ire of the alien creditor's home state. The alien was thus stuck with state court without even a right of appeal to the Supreme Court in debt actions for five hundred dollars or less (since the right of appeal depended on the presence of a right to file in or remove to a federal district or circuit court). By contrast, in all cases in which federal circuit and district courts were afforded concurrent jurisdiction, an alien who chose to sue in state court had a right of appeal to the Supreme Court.³⁸⁷

From the perspective of the Framers, as thorough as the First Judiciary Act's scheme of national forums of first instance for foreign private litigants was, it, like diplomacy, had shortcomings in addressing the signal problem of treaty-based controversies between foreign states and States. First, the Framers would not have known in 1787 that the First Congress in 1789 would do what it did. By virtue of the so-called Madisonian compromise, the Constitution did not require Congress to create lower courts,³⁸⁸ and there was a strong lobby that believed the only lower courts necessary would be admiralty courts.³⁸⁹ Thus, the Framers had to plan

386. Section 9 of the Act, the "Alien Tort Statute" (ATS), granted jurisdiction in the federal district courts "concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." *Id.* ch. 20, § 9, 1 Stat. at 77. In enacting the ATS, the First Congress appears to have had in mind suits that presented both federal questions and alien-diverse parties. See Lee, *Safe-Conduct Theory of the Alien Tort Statute Theory*, *supra* note 88 (manuscript at 44–50). In addition, the State might be a defendant in a suit by an alien in the Supreme Court, at least for the short nine years between enactment of the 1789 Judiciary Act, of which the ATS was a part, and the ratification of the Eleventh Amendment in 1798. See *id.* at 46 n.155.

387. "The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for . . ." Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 81. This would include suits originating under § 11 in the district courts, via the right of appeal to the circuit courts. See *id.* ch. 20, § 11, 1 Stat. at 79 ("And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.").

388. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art III, § 1.

389. The possibility of inferior federal courts of admiralty was first presented in a draft proposal for Article III that was likely presented at the federal Constitutional Convention. The proposal was found among the papers of George Mason, but in the handwriting of his codelegate John Blair of Virginia, one of George Washington's inaugural appointments to the Court. See Hart & Wechsler, *supra* note 3, at 5 & n.23; 2 Farrand, *supra* note 46, at 432

for the possibility that the only way an alien creditor's suit against a state citizen debtor might reach a national court would be by a time-consuming process of appeal to the Supreme Court from a state court.

Second, even if the Framers of the Constitution did expect statutory establishment of a network of lower federal courts affording access to private foreigners along the lines actually set up by the First Congress, such a network would have been unavailing for direct claims by foreign states against States. Foreign sovereign-to-State sovereign lending apparently did not constitute a significant portion of debt at the founding of the Republic,³⁹⁰ but it was certainly something to worry about. In Chief Justice Marshall's words, although "[t]here was not much reason to fear that foreign or sister States would be creditors [of States] to any considerable amount, . . . there was reason to retain the jurisdiction of the [Supreme Court] in [these] cases, because it might be essential to the preservation of peace."³⁹¹

Third, there was a greater chance that a State might be liable to foreign citizens or subjects in violation of the 1783 Treaty of Peace. A State might have directly owed money to the foreigner, whether for a debt, a contractual obligation, or payment for confiscation of property or goods. In addition, a State might have denied justice to a class of foreign claimants in violation of the treaty by, for example, enacting a statute impeding the payment of debts in full and in pounds sterling or by systemic denial of justice in its courts. If the decision in *Chisholm v. Georgia*, holding

("The judicial power of the United States shall be vested in one Supreme Court and in such Courts of Admiralty as Congress shall establish in any of the States."). In 1789, constitutional amendments were proposed in both the Senate and the House of Representatives to limit Congress's power to establish inferior federal courts to those with jurisdiction only over admiralty and maritime suits. See Journal of the House of Representatives, *supra* note 210, at 82 (Aug. 18, 1789) (proposing the following amendment to "Article 3, section 1: From each sentence strike out the words, 'inferior courts,' and insert the words, 'courts of admiralty'"); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 67 (1923) (citing an amendment proposed in the Senate in 1789 "[t]hat no subordinate federal jurisdiction be established in any State, other than for admiralty or maritime causes"); cf. Casto, *supra* note 120, at 38 ("Virtually every member of the first Congress agreed on the necessity of creating federal trial courts with an admiralty jurisdiction over maritime disputes."); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 7 (1927) ("Maritime commerce was then the jugular vein of the Thirteen States. The need for a body of law applicable throughout the nation was recognized by every shade of opinion in the Constitutional Convention." (citation omitted)); The Federalist No. 80, *supra* note 131, at 478 (Alexander Hamilton) ("The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.").

390. See Merrill Jensen, *The New Nation: A History of the United States During the Confederation, 1781-1789*, at 303 (1950) ("At the end of the war state debts consisted largely of money owing to farmers and merchants for supplies, the remnants of depreciated currencies, and sums due to soldiers for back payments or inadequate pay."). It is possible that States accumulated some sovereign-to-sovereign debts in the four years between the end of the war in 1783 and the federal Constitutional Convention in 1787.

391. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

Georgia suable on a contract obligation to a citizen of South Carolina,³⁹² was incorrect as a matter of the Framers' intent, then constitutional immunity precluded any such suits directly by aggrieved foreign citizens or subjects in federal court. That would certainly be the case after the enactment of the Eleventh Amendment. Moreover, because of home court immunity in state courts, if Congress chose not to set up any lower federal courts other than admiralty courts, any private foreign claims against States could not have reached the Supreme Court even in the exercise of its appellate function over claims arising under federal treaty law.

But even if *Chisholm* were right, and state sovereign immunity did not stand as a bar to suit in federal court by foreigners against States from the perspective of the Framers in 1787, a rule of contemporaneous international law called "espousal" recognized the right of an aggrieved foreigner's sovereign state to adopt his claim and advance it in his stead.³⁹³ The foreign state could espouse both sorts of claims its citizen or subject might have against a State: (1) individual espousal of a debt owed by a State to the citizen or subject; or (2) class espousal of the claims of a class of citizens or subjects alleging systemic denial of justice by the State's legislature or courts. Equally important, the foreign state could employ whatever means it elected, including the waging of war, regardless of the provision of a private judicial remedy in the American national courts. In order to understand the sovereign's espousal right and how it operated, the best place to begin may be long after the Framers had perished, at the dawn of the twentieth century.

C. *The International Law Doctrine of Espousal*

The United States under President Theodore Roosevelt was the moving force behind the first modern multilateral treaty prohibiting a specific reason for a sovereign state to go to war. Article I of the 1907 Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, which the United States ratified in 1910,

392. See 2 U.S. (2 Dall.) 419, 453 (1793) (Blair, J.) ("The order, I think, should be thus: 'Ordered, that unless the State of *Georgia* should, after due notice of this order . . . cause an appearance to be entered in behalf of the State . . . or then sh[o]w cause to the contrary, judgment be then entered up against the State . . .'"); id. at 466 (Wilson, J.) ("I have now tried this question [whether a State may be sued in federal court by a citizen of another State] by the principles of general jurisprudence; by the laws and practice of States . . . and by the Constitution . . . From all, the combined inference is; that the action lies."); id. at 468 (Cushing, J.) ("[I]f a State is entitled to Justice in the Federal Court, against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both?"); id. at 479 (Jay, C.J.) ("I am clearly of opinion, that a State is suable by citizens of another State . . .").

393. The doctrine of *parens patriae*, by which a State has standing to litigate the quasi-sovereign claims of a class of its citizens, is a weaker, domestic cousin of the international espousal right. See generally Hart & Wechsler, *supra* note 3, at 287-94 (discussing standing of a State to sue as *parens patriae*); Woolhandler & Collins, *supra* note 77, at 490-94.

provided, "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals."³⁹⁴ The Convention also provided for arbitration in a permanent international tribunal in lieu of a sovereign state's exercise of the now forfeited right to wage war on behalf of its private citizen's or subject's contract debt claim.³⁹⁵ The contemplated international tribunal was established, but no sovereign state invoked its jurisdiction for the specific purpose intended by article I of the Hague Convention.

Original jurisdiction in the Supreme Court over foreign state-versus-State treaty disputes was, in principal part, the Framers' solution to the same issue addressed by the 1907 Hague Convention: how to disable the venerable right at international law of a sovereign state to wage war against another state on behalf of its citizen or subject, when the latter state (or in the American case, a subnational State) had defaulted on a contract debt in violation of international law (such as article IV of the 1783 Treaty of Peace with Great Britain).³⁹⁶ The technical and general term for this sovereign right was espousal: A sovereign's espousal of its citizen's private grievance rendered it a public claim on the international plane,³⁹⁷ and the sovereign could lawfully wage war to vindicate the espoused claim. Notwithstanding the Hague Convention's abolition of an espousal right to war for private contract debt, espousal is still the rule at international law in debt and other contexts, although typically by means of diplomatic negotiations, for instance, for compensation arising from expropriations:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.³⁹⁸

394. Hague Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, art. 1, 36 Stat. 2241, 2251, 1 Bevans 607, 614.

395. *Id.* arts. 1–2, 36 Stat. at 2251–52, 1 Bevans at 614.

396. See *supra* text accompanying note 380.

397. See generally Anthony D'Amato, *International Law: Process and Prospect* 205–33 (2d ed. 1995) (explaining the concept of espousal and its ramifications); *Espousal and Settlement of Claim*, 8 Whiteman Digest § 37, at 1216–33 (describing espousal and significant twentieth-century applications).

398. *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30).

Espousal was a necessary axiom of traditional international law, under which individuals lacked standing to pursue claims of international law, violations against other sovereign states on their own.

Because espousal was considered a domestic political decision by a sovereign state, international law recognized no right on the part of other sovereign states to question its merits.³⁹⁹ Nor, importantly, could another sovereign require exhaustion of available peaceful diplomatic or judicial measures by the state of the offended citizen or subject before recourse to war to vindicate the espoused claim. To do so would undermine the espousing state's discretionary sovereign power to decide on its own what was important enough to press as a national grievance on the international plane and how to go about vindicating it—whether by arbitration, diplomacy, or war.⁴⁰⁰

But notwithstanding the sovereign's uninhibited discretion to press its citizen's complaint of international law violation, the doctrine of espousal made sense from a policy perspective given the safeguards inherent in conferring a legal right upon a sovereign state.

Because a sovereign state aggregated the preferences of many citizens for the good of the state, the more extreme and trivial legal claims of individuals aggrieved in their dealings with foreign states could be filtered and mitigated through the domestic political process. Moreover, sovereign states could resort to a range of political and diplomatic measures besides lawsuits, and they could be counted upon to think strategically about the merits of pursuing a claim versus countervailing costs to valuable political and economic relationships that might be jeopardized. For instance, pursuing a suit against another state concerning defaulted debt obligations might invite similar claims in the fu-

399. The insulation from judicial inquiry by a U.S. federal court of a foreign sovereign's decision to espouse its citizen's or subject's claim and how to vindicate it fits under the general rubric of the act-of-state doctrine. See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357–58 (1909) (“[T]he improbabil[i]ty of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious”); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (“Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.”).

400. See, e.g., David A. Levy, *The Am. Soc'y of Int'l Law, International Law in Brief* (1998), at <http://www.asil.org/ilib/ilib0105.htm> (on file with the *Columbia Law Review*) (summarizing the decisions of *Hau v. Dep't of State*, No. CV-F-94-5964 (E.D. Cal. Feb. 13, 1995) (unpublished opinion), which held that the State Department's decision not to espouse plaintiff's claim of expropriation of their hotel by Vietnam because they were not U.S. citizens at the time of espousal is political question insulated from judicial review, and *Brown v. Christopher*, No. 93-1375-CIV (S.D. Fla. Nov. 18, 1993) (unpublished opinion), which denied court's authority to issue writ of mandamus ordering U.S. Secretary of State to espouse U.S. citizen plaintiffs' claim against Brazil for torture and death of her husband because espousal is discretionary to the executive branch); *Espousal and Settlement of Claim*, *supra* note 397, § 37, at 1216–33 (providing examples of State Department discretion regarding espousal).

ture against the plaintiff state. The end result would be that state-to-state lawsuits would be relatively rare and confined to issues that were more national than individual in character.⁴⁰¹

The Supreme Court made this very point in *Alden v. Maine*, in explaining why suits by the United States against nonconsenting States posed an altogether different issue from suits by private individuals: "Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."⁴⁰²

The Framers understood and embraced espousal.⁴⁰³ Justice Iredell, the famous dissenter in *Chisholm v. Georgia*,⁴⁰⁴ endorsed the doctrine from the American perspective:

When any individual, therefore, of any nation, has cause of complaint against another nation, or any individual of it, not immediately amenable to authority of his own, he may complain to that power in his own nation, which is entrusted with the sovereignty of it as to foreign nego[t]iations, and he will be en[titled] to all the redress which the nature of his case requires, and the si[tuation] of his own country will enable him to obtain.

....

Miserable and disgraceful indeed, would be the situation of the citizens of the United States, if they were obliged to comply with a treaty on their part, and had no means of redress for a non-compliance by the other contracting power.

But they have, and the law of nations points out the remedy. The remedy depends on the discretion and sense of duty of their own government.⁴⁰⁵

Implicit in Justice Iredell's statement is a broader presumption of the scope of a sovereign's espousal right than that advanced in this Article. Iredell believed that a sovereign could espouse the private claim of its citizen not just against another sovereign (which is the prevailing modern opinion),⁴⁰⁶ but even as against "any individual of it."⁴⁰⁷ If Iredell's view

401. Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1034.

402. 527 U.S. 706, 756 (1999).

403. The Supreme Court, in *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883), has since disavowed the doctrine of espousal as between American States. See discussion *infra* Part III.E.

404. 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J.).

405. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 259-60 (1796) (statement of Iredell, J., who did not participate in the disposition of the case).

406. "The diplomatic protection afforded by the Government of the United States to its nationals for injuries suffered at the hands of foreign governments contrary to accepted principles of international law is not a matter of [the nationals'] legal right." Memorandum from the Office of the Assistant Legal Adviser for Claims (Kwiattek), Department of State, to the Legal Adviser (Hager), Department of State (Jan. 21, 1960), reprinted in *Espousal and Settlement of Claim*, *supra* note 397, § 37, at 1216 (internal citation omitted).

407. *Ware*, 3 U.S. (3 Dall.) at 259.

was typical of the Framers' understanding of the scope of the espousal right—and there is no reason to believe it was not—then a foreign sovereign could lawfully go to war even on the basis of its citizen's or subject's claims against a citizen of a State.

The Supreme Court of the United States, as late as 1883, specifically acknowledged that a sovereign state's failure to pay a debt owed to a citizen or subject of another state was an acceptable ground under international law for the sovereign to go to war on the private creditor's behalf:

There is no doubt but one nation may, if it sees fit, demand of another nation the payment of a debt owing by the latter to a citizen of the former. Such power is well recognized as an incident of national sovereignty, but it involves also the national powers of levying war and making treaties. . . . [I]f a sovereign assumes the responsibility of presenting the claim of one of his subjects against another sovereign, the prosecution will be "as one nation proceeds against another, not by suit in the courts, as of right, but by diplomatic negotiation, or, if need be, by war."⁴⁰⁸

The Framers confronted the functionally identical problem posed by the sovereign's right to war on espoused private contract claims as Roosevelt did in the early twentieth century with the Hague Convention, but under radically different circumstances. First, in the late eighteenth century, the American States and their citizens had accumulated significant prewar and postwar debts to British and other foreign creditors—many with enough influence with their governments to mobilize sovereign intercession on their behalf rather than risk litigation on their own in American state or lower federal courts. The United States was, by a gross margin, a net debtor nation and thus particularly vulnerable to espousal claims. Given this circumstance, the Framers were in an exceedingly poor position to negotiate a treaty proscribing debt espousals as a lawful reason for war.

Second, given the primitive nature of international politics in 1787, the Framers could not conceive of the Convention's twin solution of forbidding the specific *casus belli* by treaty and setting up a truly international tribunal. Nor did they have the power in world affairs to act to implement such a proposal. The sovereign right to wage war on espoused private contract debts was considered inviolate at the time.⁴⁰⁹ It was therefore unlikely that civilized nations would universally agree to surrender that right in exchange for a tribunal to arbitrate the claims.⁴¹⁰

408. *New Hampshire v. Louisiana*, 108 U.S. at 90 (alteration in original) (quoting *United States v. Diekelman*, 92 U.S. 520, 524 (1875)).

409. See *id.* (citing the power of Congress to declare war in the event of a treaty infraction); *Diekelman*, 92 U.S. at 524 (citing diplomacy or war as the only means of citizen redress against another nation).

410. Contrast this with the concern in the late eighteenth century about piracy along the North African coast—a practice commanding sufficient universal condemnation that Vattel went so far as to urge the formation of an international league to fight the pirates.

Third, the espousal problem the Framers confronted was importantly different insofar as it was quasi-international in the sense that the national government itself had no interest in preventing the recovery of private contract debts owed to citizens or subjects of foreign states. Rather, the root of the danger was a domestic artifact of American federalism—the States and their citizens had sufficient scope for independent action to breach U.S. treaties on their own. Fourth, and most important, the espousal problem in its eighteenth-century incarnation was one of life or death for a weak, agrarian, and heavily indebted republic in a world of powerful monarchies. War or the disruption of vital foreign trade and credit posed a more urgent threat to national interests than it would in the early twentieth century.

Under these circumstances, the Framers assigned to the Supreme Court the quasi-international function of deciding treaty disputes between American States and foreign states. It is worth quoting again James Madison's description of the intent behind the Constitution's extension of federal judicial power to "Controversies . . . between a State . . . and foreign States":

The next case provides for disputes between a foreign State, and one of our States, should such a case ever arise The disputes ought to be tried by the national tribunal. This is consonant to the law of nations. Could there be a more favourable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community into war?⁴¹¹

D. *A Two-Tiered System of National Courts for International Controversies*⁴¹²

To summarize, then, the Framers of the Constitution created an original and exclusive jurisdiction of the Supreme Court as the capstone

"Christian nations have no less a right to unite against the barbarous republics, in order to destroy those haunts of pirates, among whom the love of plunder, or the fear of a just chastisement, are the only rules of peace and war." Vattel, *supra* note 61, Book 2, § 78, at 224. Vattel offers a similar sentiment in a more general context of possible relevance today:

If then there is any where a nation of a restless and mischievous disposition, always ready to injure others, to traverse their designs, and to raise domestic troubles; it is not to be doubted that all have a right to join, in order to repress, chastise, and put it ever after out of its power to injure them.

Id. Book 2, § 53, at 215. Thomas Jefferson sought to put Vattel's suggestion into practice in 1786 by proposing an international "confederation" of naval forces to protect shipping in the Mediterranean from the pirates. Proposed Confederation Against the Barbary States (Oct. 1786), in 10 *The Papers of Thomas Jefferson* 569–70 (Julian P. Boyd ed., 1954); see David Golove, *The New Confederatism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 *Stan. L. Rev.* 1697, 1726–34 (2003) (discussing Jefferson's efforts to construct a confederation of states to challenge the Barbary pirates).

411. Madison, *supra* note 282, at 1414–15.

412. The use of the term "two-tiered" in this Article is different from that employed by Professor Amar in his articles discussed *supra* text accompanying notes 206–210. As used

of a layered strategy to enable peaceful settlement of disputes between States or their citizens and foreign states or their citizens or subjects, most notably involving enforcement of article IV of the 1783 Treaty of Peace with Great Britain. They had to invest this quasi-international role in the Supreme Court because there were no international courts at the time to serve this crucial function. At stake was nothing less than the survival of the Republic, for an aggrieved treaty partner had a right at international law to break off diplomatic or crucial trade relations and even to wage war against all of the United States to remedy the breach.

Two primary mechanisms existed to deal with the problem of state defection from treaty obligations to foreign creditors: (1) diplomacy and (2) a system of lower national courts. From the Framers' perspective, though, each of these posed significant problems. Diplomacy necessarily shifted costs to guiltless States and the national government, and was therefore unattractive when defections were isolated to one or a couple of States. Pressure by the national government's political branches on a recalcitrant State was stymied by the same dogma and practice of federalism that gave birth to the problem of state defection. The provision of lower federal courts would help by affording an alternative forum to state courts for private disputes, but the Framers of the Constitution could not be sure that Congress would create such courts, and the solution did not address direct claims by foreign states against States; even as to private foreign claims, the solution was rendered in theory inadequate by the contemporaneous international law doctrine of espousal. A foreign state could espouse, without question or explanation, the private claims of its citizens or subjects alleging a violation of international law. The foreign state could then demand satisfaction, whether by peaceful means or by war, regardless of whether an avenue of private relief was afforded in the courts of the transgressing sovereign state.

Consequently, the Framers made explicit provision in the Constitution for federal judicial power as to "Controversies" between States and foreign states as well as between state citizens and foreign citizens or subjects. The drafters of the First Judiciary Act of 1789 availed themselves of the two constitutional authorizations by crafting a two-tiered framework of national-court jurisdiction. A lower tier of national district and circuit courts provided alternative forums to inhospitable state courts for private alien suits. The appellate jurisdiction of the Supreme Court provided an avenue of appeal from state courts for those foreigners with treaty claims who chose to take their chances in the state courts. An upper tier consisted of the original and exclusive jurisdiction of the Supreme Court to deal with the residual risk of class espousal, individual espousal, and the smaller but significant category of sovereign-to-sovereign direct claims.

in this section, the term refers to a lower tier of federal district and circuit courts established by the Judiciary Act of 1789 to hear controversies between state citizens and private foreign citizens or subjects, and an upper tier consisting of the Supreme Court to decide controversies between foreign states and States.

The Court's jurisdiction over foreign state-versus-State controversies was a shrewd but risky innovation, since the only institutional asset the early Court could rely on to enforce an adverse decision against a State (and its militia) or a foreign state (and its army and navy) was the belief of both sides that the Court would reach a just and fair decision as to whether the State had breached the treaty and what the remedy should be. For that reason, the earliest members of the Court were jurists with credibility in important States, foreign states, or, preferably, both.

Original intent, on this theory, provides a narrower grant of constitutional jurisdiction than the text would appear to require. Although reliance on the unambiguous text alone compels the conclusion that *Monaco* was wrongly decided, the Framers specifically intended nonconsenting States to be sued by foreign states in the Supreme Court only with respect to those claims alleging U.S. treaty violations by a State. It is plausible to think that the Framers did not intend to extend the federal judicial power to purely state law claims a foreign state might bring against a State. Certainly, state law claims alone did not provide a ground for espousal of private claims absent some colorable allegation of international law violation. Indeed, the Framers may not have even conceived that a foreign state might have a purely state law claim against an American State given the prevalent, if flawed, presumption that international law alone would govern the rights and duties of sovereign states as against each other.

E. *The Interaction of Espousal and State Sovereign Immunity*

Yet another puzzle raised by the subject of this Article is the interaction of the international law doctrine of espousal and the American domestic doctrine of state sovereign immunity for controversies between States. To the extent that States are semisovereign, are they entitled to espousal? In *New Hampshire v. Louisiana*, an undervalued gem of a case, the Court ruled that the States surrendered their right of espousal at international law by ratification of the Constitution.⁴¹³ This question is not directly relevant for the purposes of this Article, which deals with suits by foreign states against States. An understanding of this 1883 decision, however, provides powerful insight into how nineteenth-century American jurists, who were not so different from the late eighteenth-century Framers in their traditional view of international law, understood espousal to operate.

The author of the unanimous opinion for the Court in *New Hampshire v. Louisiana* was Chief Justice Morrison R. Waite.⁴¹⁴ Waite was intimately acquainted with international law, for he had represented the U.S. delegation in a treaty-based international arbitration in 1872 to negotiate Great Britain's liability and reparations arising from British involvement

413. 108 U.S. at 90.

414. *Id.* at 85.

in outfitting the C.S.S. Alabama, a Confederate raider that wreaked havoc on Union merchant shipping during the Civil War.⁴¹⁵ The arbitration resulted in an award of fifteen million dollars for the United States, a result that brought Waite public acclaim and likely contributed to his nomination by President Ulysses Grant to be Chief Justice.⁴¹⁶ The arbitration was also a watershed event in U.S.-British relations, for it signalled the effective end of the prospect of war between the two nations and the start of their special relationship, which has endured into the twenty-first century.

The principal and more famous holding was that, notwithstanding the general rule of nonimmunity in controversies between States, Louisiana retained its Eleventh Amendment immunity in a suit brought by New Hampshire under the Supreme Court's original jurisdiction.⁴¹⁷ New Hampshire sued pursuant to a law its legislature had enacted authorizing the attorney general to espouse meritorious private claims against other States on defaulted debt obligations upon assignment of a share of the claims and a deposit to cover litigation costs.⁴¹⁸ The intent of the law appears to have been to enable an end-run around the Eleventh Amendment, which clearly barred a citizen of New Hampshire from bringing the suit against Louisiana directly.⁴¹⁹

Under then and present international law, New Hampshire's decision to prosecute the claim would have sufficed to effect a legitimate espousal at international law, and the Court admitted as much. If the doctrine of espousal were applicable, New Hampshire would be free to prosecute the claim in whatever manner it pleased, whether by negotiating with Louisiana, filing an original action in the Supreme Court, or "if need be, by war."⁴²⁰ But the Court concluded that the American States were not "sovereign" with respect to espousal rights at international law because, as part of their constitutional bargain, they had given up their rights to engage in diplomacy and wage war:

All the rights of the States as independent nations were surrendered to the United States. The States are not nations, either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status at home and abroad is that of

415. See John V. Orth, Waite, Morrison Remick, in *The Oxford Companion to the Supreme Court of the United States*, supra note 1, at 906-07. See generally C. Peter Magrath, Morrison R. Waite (1963).

416. See Orth, supra note 415, at 906.

417. See *New Hampshire v. Louisiana*, 108 U.S. at 91. The opinion also adjudicated an analogous suit brought by New York against Louisiana.

418. See *id.* at 76-78.

419. "The Judicial power . . . shall not be construed to extend to any suit in law . . . commenced or prosecuted against one of the United States by Citizens of another State" U.S. Const. amend. XI.

420. *New Hampshire v. Louisiana*, 108 U.S. at 90 (quoting *United States v. Diekelman*, 92 U.S. 520, 524 (1875)).

States in the United States. They can neither make war nor peace without the consent of the national government. Neither can they, except with like consent, "enter into any agreement or compact with another State."⁴²¹

New Hampshire, however, had readied a rejoinder. "[E]ven if a State, as sovereign trustee for its citizens, did surrender to the national government its power of prosecuting the claims of its citizens against another State by force," the State argued, "it got in lieu the constitutional right of suit in the national courts."⁴²² It takes only a very small step to see how New Hampshire's argument, with a twist, might have occurred to the Framers with respect to the problem of state defection from U.S. treaty obligations vis-à-vis foreign states. A foreign state just might be persuaded to put aside its "power of prosecuting the claims of its citizens against [a S]tate by force" if "it got in lieu the constitutional right of suit in the national courts."

The Court, however, rejected New Hampshire's argument, and in so doing crafted an ingenious theory on the complicated interaction of noncitizen remedies against States and espousal in the founding blueprint for the federal court system. First, the Court proposed that "[t]here is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government."⁴²³ In other words, there is no obligation for a sovereign state to espouse the claims of a citizen, even if they are public in nature, if the citizen has an option of direct redress in the other sovereign state. This is, of course, true—a sovereign state has no *obligation* to espouse the claim of its citizens; the decision to espouse is entirely within the sovereign's discretion. The Court did not say, nor could it say, that a sovereign state's choice to espouse, even with the provision of direct private remedies, would not be consistent with international law, even though it had no obligation to espouse.

Second, Chief Justice Waite continued, New Hampshire's citizens had, before the ratification of the Eleventh Amendment, the right to sue Louisiana directly on a private debt claim.⁴²⁴ Interestingly, the Court's point here flatly contradicts the view that *Chisholm v. Georgia* was wrongly decided: It necessarily presumes that citizens of other States and foreign citizens or subjects had direct rights against a State in federal court before the enactment of the Eleventh Amendment in 1798.⁴²⁵ In other words, when Article III, Section 2, Clause 1, as unamended, extended

421. *Id.* (quoting U.S. Const. art. 1, § 10, cl. 3).

422. *Id.*

423. *Id.*

424. *Id.* at 91 ("Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue.").

425. For a statement of the standard view that *Chisholm* was so wrong that it produced a "profound shock" across the nation, see *Alden v. Maine*, 527 U.S. 706, 719–27 (1999)

judicial power to "Controversies . . . between a State and Citizens of another State [or] . . . between a State . . . and foreign States, Citizens or Subjects," the Framers intended to give those out-of-state private parties the right to sue States.

Third, said the Court, it followed that "[c]ertainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case."⁴²⁶ The grant of the direct remedy to the noncitizen necessarily made the noncitizen's indirect remedy—the espousal of his claim by his sovereign—redundant. The Court then concluded:

Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for redress of his grievances, except such as the delinquent State saw fit to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the [Eleventh] amendment took away the special remedy there was no other left.⁴²⁷

On the theory of the Court, Article III, Section 2, Clause 1's grant of judicial power over "Controversies between two or more States" did not include espousal cases, which were taken away in the original Constitution when a direct right to sue a State was given instead to citizens of other States in that Clause's separate grant of judicial power over "Controversies between a State and Citizens of another State." This substituted right to sue the State accorded to citizens of other States was subsequently taken away by the Eleventh Amendment in 1798. Thus, a State might still bring a direct sovereign claim against another State under the "between two or more States" grant, but not an espousal claim on behalf of its citizen who, by the Eleventh Amendment, could no longer sue.

What about espousal claims by a foreign state, the subject of interest in this Article? In dictum, the Court indicated that the original Constitution effected an identical substitution, thereby abrogating the foreign state's espousal right, and that the Eleventh Amendment in turn abrogated the alien's direct right to sue just as it did for citizens of other States: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, *or aliens*, without the consent of the State to be sued."⁴²⁸ Context suggests that the words "by or for" applied to "aliens,"

(quoting 1 Charles Warren, *The Supreme Court in United States History* 96 (rev. ed. 1926)).

426. *New Hampshire v. Louisiana*, 108 U.S. at 91.

427. *Id.*

428. *Id.* (emphasis added).

implying that, after the enactment of the Eleventh Amendment, neither a foreign citizen or subject directly, nor a foreign state on his behalf, could bring suit against a State. That would mean, necessarily, that the Framers had not intended the State-foreign States provision of the Article III State-foreign parties Controversies subheading⁴²⁹ to encompass espousal actions against States. Rather, this implies that the Framers intended that only direct claims by the foreign state against a State could be pursued (in the Supreme Court)—for instance, on debts owed to the foreign state by the State, or with respect to territorial boundary disputes.

Chief Justice Waite, in this way, weaved a complicated, fascinating theory of how espousal interacted with Article III, Section 2, Clause 1 and the Eleventh Amendment, but was it correct? For the purposes of this Article, it is unnecessary to challenge his story as to the States' espousal rights, although, as noted above, it necessarily presumes that *Chisholm* was rightly decided—that noncitizens did have a right to sue States from 1788 to 1793.⁴³⁰

Even assuming that Waite was right about the constitutional substitution of a direct right by a state citizen in the place of his State's espousal right on his behalf, Waite's dictum as to Article III's effect on foreign state espousals seems indubitably mistaken. First, although it may be true that a State did "surrender" its espousal "power of prosecuting the claims of its citizens against another State by force" as part of the constitutional bargain,⁴³¹ a foreign state was not a part of the bargain and did not surrender anything. Thus, any "constitutional right of suit in the [American] national courts"⁴³² the Framers gave to the foreign state was a bonus gift to appease in the name of peace, not a condition. Indeed, the very fact that vastly more powerful foreign states retained the right to espouse to war was why the Framers sought to create an alternative, peaceful vehicle for the foreign state to exercise its espousal right in the Supreme Court in the first place.

On a related point, the citizen of another State or alien was stripped of access to the national courts by the effect of the Eleventh Amendment on Waite's theory. The noncitizen could not bring his own suit against a State, nor could his own State, or, if an alien, his sovereign state bring it in his stead. Leaving an out-of-state American without recourse to the national courts was one thing: The most his State could do was to complain to the other State's government, and his State benefited from the same protection against espousal by other States. By contrast, freezing a foreigner from national courts altogether increased the risk of war, which foreign states, as a matter of contemporaneous international law, had a sovereign right to choose as a means of espousal.

429. U.S. Const. art. III, § 2, cl. 1.

430. This is, of course, contrary to everything the Court has said in its state sovereign immunity jurisprudence since *Hans v. Louisiana*, 134 U.S. 1 (1890).

431. *New Hampshire v. Louisiana*, 108 U.S. at 90.

432. *Id.*

IV. RECLAIMING THE SUPREME COURT'S ORIGINAL JURISDICTION OF TREATY-BASED SUITS BY FOREIGN STATES AGAINST STATES

If the text and history are so clear, why was *Principality of Monaco v. Mississippi* the first original action brought in the Court by a foreign state against a State, and what was the opinion of the Court on the issue of state suability by foreign states between 1798 and 1934? Furthermore, why should we revive the Court's original jurisdiction of treaty-based suits by foreign states against States today?

A. Explaining Why Monaco Was the First Original Action

In fact, *Monaco* was nearly not the first suit by a foreign state against a State in the Supreme Court. In November 1916, the Republic of Cuba, represented by the same lawyers who would represent Monaco, began a lawsuit against North Carolina on defaulted bonds the State had issued.⁴³³ Cuba, however, moved to dismiss the motion for leave to file an original action on the day the motion was set to be argued.⁴³⁴ More than a half-century earlier, former Justice Curtis, in his capacity as private counsel for Queen Victoria's Governor General in Canada, had given a legal opinion urging suit in the Supreme Court by Great Britain on behalf of Cayuga Indians resident in Canada, whose claims arose from a transfer of tribal lands to New York.⁴³⁵ The year was 1860, and in light of the sensitive situation in the United States and the delicate relations with Great Britain the situation occasioned, the Queen did not pursue the original action her American lawyer advised.⁴³⁶

As a general matter, there were four reasons why there were no original actions in the Court by a foreign state against a State until 1934. The first and most important reason was the fact that problems were typically successfully resolved by diplomacy and private suits by aliens in national courts—the avenues devised by the Framers as the primary lines of defense against state treaty defections. The second was uncertainty among potential litigants about whether the Court, in its early and middle years, had sufficient institutional capital to solve the problem by effecting state compliance with an adverse decision.⁴³⁷ Third, as American power and sophistication in foreign affairs grew, the United States was better able to

433. *Republic of Cuba v. North Carolina*, 242 U.S. 665 (1917); see also Lenoir, *supra* note 227, at 135 & n.6.

434. See James Brown Scott, *Judicial Settlement of Controversies between States of the American Union: An Analysis of Cases Decided in the Supreme Court of the United States* 106 (1919); see also Smith, *supra* note 25, at 75. It is interesting to speculate why Cuba chose to withdraw its motion for leave to file on the eve of its hearing. My own surmise is that North Carolina may have made an offer to settle, having been stung by South Dakota's success in *South Dakota v. North Carolina*, 192 U.S. 286, 321–22 (1904).

435. See 1 *Memoir of Benjamin Curtis*, *supra* note 1, at 283–84.

436. See Curtis, *Jurisdiction, Practice, and Peculiar Jurisprudence*, *supra* note 1, at 18 n.3.

437. See *supra* note 38.

negotiate favorable treaty terms, most notably federalism clauses in treaties of potential domestic effect. This precluded onerous treaty obligations, like article IV of the 1783 Treaty of Peace with Great Britain,⁴³⁸ that carried high risks of state defection. Fourth, as the Republic itself expanded its frontiers, the Court's original jurisdiction revealed itself to be more useful as a means of solving interstate disputes, overshadowing the international dispute resolution function the Framers also intended. To understand how the Court's original jurisdiction over treaty-based controversies between foreign states and States came into disuse, it is helpful to review instances from the late eighteenth to the early twentieth centuries, when state treaty defections became an issue in foreign affairs, and examine how they were resolved.

1. *The Jay Treaty of 1794*. — Diplomacy gained prominence as a tool for conflict resolution—and original jurisdiction consequently lost prominence—when States began to defect en masse from treaty terms. Epidemic defection meant that the Supreme Court, as a national court, could no longer command the mantle of a neutral tribunal vis-à-vis the foreign state since the treaty breach itself seemed national in scope. And as a practical matter, multiple state defections would have required multiple suits in the Court for resolution. The best illustration of this was the Jay Treaty of 1794,⁴³⁹ which was negotiated when the States' broad non-compliance with the 1783 Treaty of Peace⁴⁴⁰ contributed to bringing the United States to the brink of war with Great Britain. The Jay Treaty preempted resort to the Supreme Court as a quasi-international tribunal by the implementation of an ad hoc binational arbitral solution of a sort proposed by Vattel:

When sovereigns cannot agree about their pretensions, and yet desire to maintain, or to restore peace, they sometimes trust the decision of their disputes to arbitrators, chosen by common agreement. As soon as the compromise is concluded, the parties ought to submit to the sentence of the arbitrators; they have engaged to do this, and the faith of the treaties should be regarded.⁴⁴¹

Article VI of the Jay Treaty created a binational tribunal to arbitrate claims by British subjects concerning

[d]ebts, to a considerable amount, which were bona fide contracted before the peace . . . and that by the operation of various lawful impediments since the peace, not only the full recovery of the said debts has been delayed, but also the value and security thereof have been, in several instances, impaired and lessened, so that by the ordinary course of judicial proceedings, the Brit-

438. See *supra* text accompanying note 380.

439. Jay Treaty, *supra* note 346, 8 Stat. 116; see also Stanley Elkins & Eric McKittrick, *The Age of Federalism* 375–449 (1993) (discussing events surrounding the treaty's negotiation and ratification).

440. Treaty of Peace, *supra* note 209, 8 Stat. 80.

441. Vattel, *supra* note 61, Book 2, § 329, at 342–43.

ish creditors cannot now obtain . . . full and adequate compensation.⁴⁴²

The tribunal was to be composed of two American commissioners, two British commissioners, and a neutral to be picked by the four or by lot.⁴⁴³

The Jay Treaty tribunal, however, ultimately failed to achieve a satisfactory result. Less than a decade later, in an 1802 convention to the Jay Treaty, the United States agreed to render payment of six-hundred thousand pounds sterling to “his Britannic Majesty . . . for the use of the persons described in the said sixth article.”⁴⁴⁴ Note that the recipient of the payment was the British sovereign, not his subjects to whom the debts were directly due. This was, of course, consonant with the principle of espousal: The claim at the international level was between sovereigns, regardless of the private character of the parties directly involved. The convention “cancelled and annulled” article VI and necessarily the commission of the binational tribunal.⁴⁴⁵

The creation and fate of the Jay Treaty article VI tribunals confirms the resolute innovation the Framers applied to the most important and enduring foreign policy issue of their time—state defection from U.S. treaties essential to national peace and trade. In this sense, it reinforces rather than contradicts this Article’s thesis as to the Framers’ initial solution to the problem—a durable national tribunal to perform the same function that, owing to systemic state defection from the 1783 Treaty of Peace, the Republic’s leaders committed first to treaty-based arbitration and then to the payment of reparations.

After the War of 1812 a decade later, it became evident that the chief axis of threat to peace and harmony for the Union was internal, not external, and so the domestic sovereign peacekeeping function of the Court’s original jurisdiction became preeminent. The first original action between States filed (though not adjudicated) in the Court was a dispute between Connecticut and New York in 1799 involving contesting land grants to territory in dispute.⁴⁴⁶ In the first quarter of the nine-

442. Jay Treaty, *supra* note 346, art. VI, 8 Stat. at 119.

443. *Id.* art. VI, 8 Stat. at 120. Article VII of the Jay Treaty ordained a similar bilateral tribunal for the arbitration of claims by American merchants whose ships were captured or damaged by British vessels. *Id.* art. VII, 8 Stat. at 121.

444. Convention Between the United States and Great-Britain, Jan. 8, 1802, U.S.-Gr. Brit., art. I, 8 Stat. 196, 196–97.

445. *Id.* art. I, 8 Stat. at 196. The article VII tribunal was likewise suspended in favor of single plenipotentiary negotiators for each side, although its awards prior to suspension were validated, albeit made payable under different conditions. *Id.* art. III, 8 Stat. at 197.

446. See *New York v. Connecticut*, 4 U.S. (4 Dall.) 1, 2 (1799) (deeming sufficient New York’s notice to Connecticut of motion to enjoin actions of ejectment in Connecticut court against New York grantees); *New York v. Connecticut*, 4 U.S. (4 Dall.) 3, 6 (1799) (denying New York’s motion for an injunction because it was not party to the suits it sought to enjoin); *New York v. Connecticut*, 4 U.S. (4 Dall.) 6, 6 (1799) (counsel for New York moved for *ex parte* proceedings if Connecticut were to fail to appear on the first day of the next term, then withdrew the motion upon acknowledgement that Connecticut had not been subpoenaed).

teenth century, no original actions between States were filed in the Court. In the second quarter and up to the outbreak of the Civil War, the Court heard six original actions between States,⁴⁴⁷ and one original action filed by the Cherokee Nation against Georgia.⁴⁴⁸ Between 1870 and the end of the First World War in 1918, the Court published forty-nine dispositions of motions and findings in original actions between States (many of them in the same protracted controversies, including ten in a protracted, fifty-year border dispute between West Virginia and Virginia), and nine published dispositions in original actions between a State and the United States.⁴⁴⁹ As these figures indicate, the Court's original docket of controversies between States grew exponentially after the Civil War, when the failure of secession and the prominence of the Supreme Court as an institution made judicial resolution of controversies between States more important and more enforceable.

2. *The Southern Port Quarantine Acts of 1822–1860.* — The next significant treaty-based controversy between States and foreign states began nearly forty years after the Jay Treaty, with the discovery that a free black man had been complicit in the planning of a slave insurrection in Charleston, South Carolina.⁴⁵⁰ The ensuing hysteria prompted the South Carolina legislature to pass a law in 1822 requiring free black sailors entering the State's ports on ships to be imprisoned, and requiring their captains to pay housing costs and take them away at egress.⁴⁵¹ A free black sailor was to be enslaved and sold if his captain did not comply with these conditions.⁴⁵² Over the next several decades, other Southern States enacted similar laws: Georgia passed a law in 1829 quarantining free black sailors and passengers for forty days, North Carolina enacted a statute like Georgia's in 1831, Florida in 1832, Alabama in 1839 and 1841, and Louisiana in 1842.⁴⁵³

The British, who bore the brunt of the indignity and inconvenience caused by the state statutes, argued that the acts violated the bilateral Commerce and Navigation Convention of 1815.⁴⁵⁴ The first article of the treaty provided that

447. Scott, *supra* note 434, at 118–207 (cataloguing, describing, and analyzing these opinions in excruciating detail).

448. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

449. Scott, *supra* note 434, at 220–535 (cataloguing these opinions in detail).

450. See Golove, *Treaty-Making and the Nation*, *supra* note 27, at 1211–37. See generally Philip M. Hamer, *Great Britain, the United States, and the Negro Seamen Acts, 1822–1848*, 1 J. S. Hist. 3 (1935) (describing the impact of the resulting law restraining free black sailors and British protests against such laws).

451. *Negro Seaman Act*, ch. 3, § 4, 1822 S.C. Acts 12.

452. *Id.*

453. See Hamer, *supra* note 450, at 12–26; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1874 nn.260–261 (1993).

454. *Commerce and Navigation Convention*, July 3, 1815, U.S.-Gr. Brit., 8 Stat. 228 [hereinafter *Commerce and Navigation Convention*].

[t]he inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories . . . and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively.⁴⁵⁵

Accordingly, the British authorities leveled diplomatic pressure on the executive branch of the national government to impress upon the States the importance of honoring the treaty commitment.⁴⁵⁶ As a practical matter, the British had no credible threat of recourse to reciprocal breach, as similarly quarantining free black American sailors or passengers were not politically viable options in Great Britain. The resulting asymmetry in reciprocity meant that the costs borne by the national government in this episode of States' defection were primarily reputational.

Perhaps for that reason, efforts at intercession by the national government were not as strenuous as they might have been and were largely unsuccessful. Intercession took the form of executive branch recommendations to state governors,⁴⁵⁷ of appeals to members of Congress representing the States,⁴⁵⁸ and even of a Supreme Court Justice riding circuit opining that South Carolina's law was unconstitutional when it was challenged in the posture of a private habeas corpus petition.⁴⁵⁹ It seems clear from the history that many officials of the national government, particularly in the early years of the controversy, were genuinely sympathetic with the British position but effectively powerless to push it in anything more than an advisory fashion.⁴⁶⁰ In frustration, British consuls in the United States interceded directly with the States themselves to obtain relief. Professor Hamer sums up the history nicely:

455. *Id.* art. I, 8 Stat. at 228.

456. See Hamer, *supra* note 450, at 4, 9, 15–17, 24–25, 27 (describing notes by British ministers to various Presidents and U.S. Secretaries of State demanding action against the state statutes).

457. See *id.* at 10 (“By direction of the President, [Secretary of State John Quincy] Adams . . . expressed to [the governor of South Carolina] the hope that the state’s legislature would remedy the ‘inconveniences’ against which the British had protested.”).

458. See *id.* at 4–5 (Secretary Adams “had communicated regarding the situation with at least two of the South Carolina delegation in Congress.”).

459. See Golove, *Treaty-Making and the Nation*, *supra* note 27, at 1214–21; Hamer, *supra* note 450, at 4–7. This substantive holding was dictum, however, as Justice Johnson held that he lacked the authority to issue a writ of habeas corpus against South Carolina officials. See Golove, *Treaty-Making and the Nation*, *supra* note 27, at 1216 n.465; Hamer, *supra* note 450, at 7.

460. Compare, e.g., Hamer, *supra* note 450, at 8 (“The British charge [d’affaires in Washington] was so impressed with the truth of what [Secretary Adams] said and with his evidently sincere desire to do everything he could to remedy the situation [in 1823], that he was reluctant to press the matter . . .”), with *id.* at 27 (“With regret [the British charge] found that the Secretary of State [James Buchanan] was even more firmly convinced than in the preceding year [1847] of ‘the utter hopelessness of any attempt’ on the part of the Federal government to get rid of the objectionable laws.”).

For a quarter of a century the British government had sought to protect her free Negro subjects from imprisonment while in southern ports. It had sought to do this through the instrumentality of the Federal government. But the repeated requests, remonstrances, protests, and demands which it addressed to secretaries of state failed to secure any effective action from the government in Washington or, through it, from the states. Whatever its theoretical authority, the Federal government was without power, practically, to compel the states to repeal their laws regarding Negro seamen. It was without influence sufficient to persuade them to accede to Great Britain's wishes. In 1848 it was not willing to attempt either to compel or to persuade. Finally convinced that she could get nothing through the government of the United States, Britain turned to the states themselves. Her consuls became lobbyists and quasi-diplomats.⁴⁶¹

It is puzzling at first glance why the British did not think to bring an original action in the Court alleging violation of the 1815 Convention by any of the Southern States that had enacted quarantines. It is particularly puzzling in light of the fact (which this Article will develop below) that members of the Court during the period virtually unanimously indicated in dictum that a foreign state could bring suit in the Court against a State.⁴⁶² But the mystery fades upon an inspection of the above quoted terms of the treaty. British efforts were fatally hamstrung as a matter of law by the treaty's expansive qualification that any protections be "subject always to the law and statutes of the two countries, respectively,"⁴⁶³ which seemed conclusively, as British diplomats conceded in exasperation,⁴⁶⁴ to include state as well as national laws. In effect, if not in intent, the provision created an insurmountable federalism defense that made it nearly impossible for the British to make the case for a flat-out treaty violation.

It is important to point out before moving on to our postbellum case study that the problem of state defection from treaties underwent an important transformation due to the Civil War. Because the States no longer wielded substantial independent military power, the danger of open rebellion arising from the national government's effort to police defection from treaty regimes had abated. So, too, diminished regard for the States' internal sovereignty meant that the States lacked the sort of political independence that formerly made it seem imperative for foreign states seeking remedies for defection on treaty-based claims to lobby the States directly. Finally, the brute military power displayed by the victori-

461. *Id.* at 28.

462. See *infra* Part IV.B.

463. Commerce and Navigation Convention, *supra* note 454, art. 1, 8 Stat. at 228.

464. See Hamer, *supra* note 450, at 13-14 (describing 1830 legal opinion to the British Foreign Office that Georgia's quarantine act did not violate the treaty by virtue of this qualification); *id.* at 28 (noting the following comment from British foreign minister Palmerston in 1848: "In this clause lies the whole difficulty.").

ous Union during the Civil War virtually guaranteed that no foreign state would resort to war to rectify breach of a U.S. treaty obligation by States' defection. But even if war, the ultimate potential harm of States' defection, was no longer a viable threat, unwanted defections could still cause much trouble for the national government in its mission to protect and advance the national interest abroad.

3. *Mob Violence Against Chinese Nationals in the Late Nineteenth Century.* — Near the end of the nineteenth century, mob violence resulted in the deaths of Chinese and other foreign nationals by lynching, shooting, or other means.⁴⁶⁵ As was the case with respect to the Quarantine Acts, the national government appears to have genuinely abhorred this violence.⁴⁶⁶ In many cases, state or local officials were complicit or sanctioned by passivity the excesses of the mobs. Once again, this conduct by the States created colorable claims of violation of treaties of commerce, amity, and navigation, and once again there was precious little the national government could do to stop the violations. But China, in its beleaguered and economically backward quasi-sovereign status, was in no position to assert its treaty claims in the Supreme Court which were not hampered by a federalism clause of the sort that had frustrated British officials during the Southern Port Quarantine controversies.

Nevertheless, the United States took conciliatory diplomatic measures. Congress voted reparations and the executive branch conveyed condolences to the affected signatory nations along with the appropriated monies.⁴⁶⁷ Such ad hoc measures, however, were inadequate to ad-

465. See *Mob Violence*, 6 Moore Digest § 1025, at 820–37 (“Attacks on Chinese at Rock Springs and Elsewhere”); *id.* § 1026, at 837–49 (“Lynchings of Italians at New Orleans and Elsewhere”).

466. *Id.* §§ 1025–1026. Notwithstanding the Exclusionary Acts, which were famously discriminatory in immigration policy, federal laws were surprisingly protective of Chinese and Japanese aliens when they were inside the United States. Italians, Irish, and immigrants from Eastern Europe were similarly targets of intermittent mob violence in the States. See *id.* § 1026, at 837–49 (describing the lynching of Italians in Louisiana and Colorado).

467. For instance, Congress, upon the recommendation of President Grover Cleveland, enacted a statute on February 24, 1887, ordering

paid to the Chinese Government, in consideration of the losses unhappily sustained by certain Chinese subjects by mob violence at Rock Springs, in the Territory of Wyoming, Sept. 2, 1885; the said sum being intended for distribution among the sufferers and their legal representatives, in the discretion of the Chinese Government.

Id. § 1025, at 835 (quoting Act of Feb. 24, 1887, ch. 253, 24 Stat. 418, 418). The Act made no reservation on the question of liability. See *id.* A subsequent appropriations Act of October 19, 1888, did not concede liability in providing for the payment of \$276,619.75 out of the U.S. treasury for injuries and deaths suffered by Chinese nationals in California, and the Washington, Montana, and Alaska Territories. See *id.* § 1025, at 836. The Act stated the payment was being made “out of humane consideration and without reference to the question of liability . . . to the Chinese Government as full indemnity for all losses and injuries sustained by Chinese subjects within the United States at the hands of residents thereof.” *Id.* (quoting Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566).

dress the systemic root of the troubles, which lay in state action or inaction, notwithstanding binding U.S. treaty obligations of reciprocal protection.

That the national government, while hedging on the question of liability, expeditiously authorized reparations in these cases may be explained in part by humanitarianism, but also in large part as prophylaxis against the threat of reciprocal governmental *laissez faire* or complicity in mob violence against United States citizens abroad. As Secretary of State Bayard explained to President Cleveland in a memorandum on compensation for Chinese victims of mob violence in the 1888 Immigration Treaty between the United States and China,⁴⁶⁸

[T]he fact remains that [the Chinese] have suffered grievously in person and property, and whilst the liability of the United States is wholly inadmissible, as is recited in Art. V. of the treaty now submitted, yet it is competent for this Government, in humane consideration of these occurrences, so discreditable to the community in which they have taken place, and outside of the punitive powers of the National Government, to make voluntary and generous provisions for those who have been made the innocent victims of lawless violence within our borders, and to that end, following the dictates of humanity, and, it may be added, the example of the Chinese Government in sundry cases where American citizens who were the subjects of mob violence in China have been indemnified by that Government,⁴⁶⁹ the present treaty provides for the payment of a sum of money. . . . This payment will, in a measure, remove the reproach to our civilization caused by the crimes referred to, as well as redress the grievance so seriously complained of by the Chinese representative, and unquestionably will also reflect most beneficially upon the welfare of American residents in China.⁴⁷⁰

The concern about "the welfare of American residents in China" proved prescient, and appropriation of reparations for States' defection prudent, as the very next year the Chinese Government expeditiously reciprocated by settling "claims growing out of the then recent riots at Chin Kiang by the payment of 156,000 taels and the offering of apologies and the firing of salutes."⁴⁷¹

Beyond the utilitarian calculus of reciprocity, Secretary Bayard's remarks hint at yet another cost of States' defection having to do with damage to honor ("the firing of salutes") and norms of civilized conduct ("the

468. The treaty was not ratified for reasons unrelated to article V, but Congress, by an appropriations act, provided for a payment to the Chinese government in the same amount as provided for in article V. See *id.* § 1025, at 836.

469. The prior indemnifications made by the Chinese government referred to prompt payments made to the United States for losses sustained by United States citizens in riots that took place in 1878 in the French concession at Shanghai. See *id.* § 1026, at 837.

470. *Id.* § 1025, at 836 (alterations in original).

471. *Id.* § 1025, at 837.

dictates of humanity") distinct from realpolitik. Certainly, China at the turn of the century was no threat to the national security of the United States, nor did it possess sufficient power to exert its will on American citizens doing business or proselytizing within its borders. Banking credibility for future treaty negotiations was likewise an insignificant concern for the United States, as American "gunboat diplomacy" ensured that the national government could obtain favorable terms in agreements with the Chinese regardless of its track record in honoring prior treaty commitments such as the treaties of amity and commerce plausibly violated by the instances of mob violence in the States and territories.

In the case of mob violence against Chinese nationals, recourse to the Court was made unnecessary by the national government's resort to diplomacy, as in the case of the Jay Treaty and its 1802 reparations supplement. The reasons for diplomacy, however, were importantly different. The United States did not act for fear that treaty disputes occasioned by state defection might lead to a war it would lose. Rather, the principal reason was a concern for reciprocal violence against American nationals abroad. What had not changed by the turn of the century, however, even in the face of growing national power in the wake of the failed secession of the Southern States, was the capacity of the States to defect from U.S. treaty obligations of collective benefit to the country and the inability of the national government's political branches to solve the problem by enforcing state treaty compliance. The durability of this structural problem, despite radical changes in the American condition, supports the case for retaining the Framers' intended constitutional solution of original and exclusive jurisdiction in the Court over foreign state-versus-State treaty controversies.

B. Dormant But Not Forgotten: Affirmations of the Court's Jurisdiction of Suits by Foreign States Against States from 1821 to 1926

Different circumstances, then, led to the resolution, without resort to the Supreme Court, of disruptions in foreign relations caused by state violations of United States treaty obligations in the years between 1787 and 1934. But during the nineteenth century and the first quarter of the twentieth century, Justices of the Court virtually unanimously agreed that the Original Jurisdiction Clause permitted suit in the Court by a foreign state against a State to vindicate a treaty claim if the need arose. Necessarily, these Justices presumed that such suits survived the passage of the Eleventh Amendment in 1798, consistent with the inevitable import of its precise language.

It was Chief Justice Marshall who first broached the subject after the ratification of the Eleventh Amendment.⁴⁷² He remarked in *Cohens v.*

472. As previously noted, two Justices of the Court expressed the view that foreign states could sue States in the Court without consent before the enactment of the Eleventh Amendment. See *supra* note 252.

Virginia that the Eleventh Amendment "does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these a State may still be sued."⁴⁷³ Marshall unequivocally restated his understanding of state sovereign liability as against foreign states in his opinion for the Court in *Cherokee Nation v. Georgia*.⁴⁷⁴ The Court there held that an Indian tribe could not bring a suit against Georgia without its consent precisely because it was not a foreign state: "May the plaintiff sue in [this Court]? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?"⁴⁷⁵ Marshall thus presumed that a for-

473. 19 U.S. (6 Wheat.) 264, 406 (1821).

474. 30 U.S. (5 Pet.) 1 (1831).

475. *Id.* at 16. The Court subsequently clarified that States are also entitled to sovereign immunity in suits by Indian tribes qua tribes; States are immune independent of the argument rejected in *Cherokee Nation* that tribes are not foreign states. See *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991). However, the United States may sue as trustee of a tribe, see *United States v. Minnesota*, 270 U.S. 181, 194 (1926), and the tribe can subsequently intervene, see *Idaho v. United States*, 533 U.S. 262, 271 n.4 (2001). A tribe may also intervene in an original action between States in which the United States has already intervened on its behalf. See *Arizona v. California*, 460 U.S. 605, 614 (1983). See generally Catherine T. Struve, *Raising Arizona: Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 Mont. L. Rev. 105 (2000).

Although the issue of state sovereign immunity in suits by tribal sovereigns is beyond the scope of this Article dealing with foreign sovereigns, it is obviously analytically relevant. My view is that the States' ratification consent to suits in the Supreme Court was confined to other States and foreign states. (The holding in *United States v. Texas*, 143 U.S. 621, 646 (1892) would add the United States, notwithstanding a colorable argument that the holding was inconsistent with the Framers' intent. See *supra* text accompanying notes 103-109.) There is no indication from the historical evidence that the Framers thought troubles between States and Indian tribes were of sufficient concern and sensitivity to vest jurisdiction in the Supreme Court. There was a regrettable but familiar hypocrisy in this: The Framers sought to offer the Court as a quasi-international tribunal in the eyes of more powerful European states but did not think to do so for the Indian tribes, where the balance of power was more favorable to the United States.

Even if the argument for ratification consent for Indian tribes is unavailing, should tribal sovereign status enhance Congress's ability to abrogate state sovereign immunity under the Indian Commerce Clause ("To regulate Commerce . . . with the Indian Tribes," U.S. Const. art. I, § 8, cl. 3)? Professor Henry Monaghan thinks it should and accordingly criticizes the Court's implicit holding to the contrary in *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (deciding without considering the relevance of tribal sovereign status). See Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102, 116-17 (1996). It is a typically ingenious move, but I am not so sure that it is right. Unlike the theory of congressional abrogation as applied to the enforcement of the post-Civil War amendments for the benefit of U.S. persons that the Court has recognized, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976), there is no post-Eleventh Amendment constitutional amendment enhancing congressional power to abrogate state immunity vis-à-vis Indian tribes. Accordingly, any federal legislative power to abrogate state sovereign immunity must have existed in 1788, at the time of the ratification of the Indian Commerce Clause. Such a theory of abrogation would "seem[] to contradict the significance, if not the letter, of the holding in *Cherokee Nation*" in 1831, see Lee, *Making Sense of the Eleventh Amendment*, *supra* note 25, at 1089 n.282, which of course was not decided in the context of a congressional statute purporting to abrogate state sovereign immunity. Moreover,

eign state could sue a State, but held that the Cherokee nation was not a foreign state.

Justice Thompson, speaking for himself and Justice Story, wholeheartedly agreed: "That a state of this union may be sued by a foreign state, when a proper case exists and is presented, is too plainly and expressly declared in the constitution to admit of doubt" ⁴⁷⁶ He dissented on the belief that the tribe was indeed a foreign state. ⁴⁷⁷ In 1831, when *Cherokee Nation* was decided, the Court had not yet held that a State could be sued without its consent by another State or by the United States. It is therefore particularly telling that Chief Justice Marshall presumed that one clear case where state sovereign immunity did not apply was in the case where a foreign state sued a State in federal court.

The next case in which the issue was raised was *Florida v. Georgia*. ⁴⁷⁸ The holding of the Court affirmed the right of the United States to intervene in a boundary dispute between Florida and Georgia involving territory acquired by the United States from Spain. Justice Benjamin R. Curtis, joined by Justice John McLean, dissented on the ground that, although Georgia had "consented" to suit by Florida as part of the original constitutional plan, it did not "thereby consent[] to the introduction into the controversy of any party whose rights were so involved in the controversy that the court is bound, upon principles of natural justice, to have that party before the court, in order to make a decree." ⁴⁷⁹ The third party in this case was, of course, the United States. Justice Curtis agreed that the Constitution, under his theory of ratification consent, allowed suits against States by foreign states, even absent specific consent to the suit. ⁴⁸⁰ "The State of Georgia has consented to be sued by one or more States, or by foreign states, and by no other person or body politic." ⁴⁸¹ The Court had expressed no view on this specific matter, al-

whatever might be said for greater congressional power to abrogate under pre-Eleventh Amendment constitutional provisions like the Interstate Commerce Clause on *Fitzpatrick v. Bitzer*'s theory of a fundamental rebalancing of federal and state power to regulate the rights of U.S. persons in the wake of the Civil War, see id. at 1087 n.276, *Bitzer*'s theory does not seem big enough to support a similar rebalancing of federal legislative power for States with respect to their relations with Indian tribes.

476. *Cherokee Nation*, 30 U.S. (5 Pet.) at 52 (Thompson, J., dissenting).

477. See id.

478. 58 U.S. (17 How.) 478 (1854).

479. Id. at 507 (Curtis, J., dissenting).

480. Id. at 507, 510.

481. Id. at 507. Justice John Campbell, in a separate solo dissent, disagreed with Justice Curtis on the point. See id. at 520-21 (Campbell, J., dissenting). Justice Campbell was the only member of the Court to have expressed a contrary opinion on the question prior to the 1934 decision in *Principality of Monaco v. Mississippi*. But he did not disagree as a textual matter and relied, rather, on original intent. In short, Justice Campbell rejected Justice Curtis's ratification theory of consent. Instead, he consciously advocated the contemporaneous international law position that, absent specific consent to suit, a sovereign state could not be sued in a tribunal by another sovereign state. In a preview of the principal argument in *Monaco*, he reasoned, "It is clear the constitution did not abrogate any law of nations, and the only question is whether the States consented to suits

though its holding was clearly consistent with Justice Curtis's view, and, indeed, more restrictive of state sovereign immunity in its implication that the State might be sued without specific consent by the United States.

Nearly sixty years after *Cherokee Nation*, and only two years after the Supreme Court extended state sovereign immunity to suits by citizens of the State in *Hans v. Louisiana*,⁴⁸² it reaffirmed, in *United States v. Texas*, Marshall's reading of the Eleventh Amendment as recognizing the constitutional power of the federal court to hear suits by foreign states against nonconsenting States.⁴⁸³ The specific issue was the right of the United States to sue the State of Texas over contested territory. But in answering the question in the affirmative, the Court relied on the presumptive suability of American States by foreign states under the Constitution as main ballast, just as Marshall had done in *Cohens* and *Cherokee Nation*. Justice Harlan wrote for the Court:

We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and *between a State of the Union and foreign States*, intended to exempt a State altogether from suit by the General Government.⁴⁸⁴

Apart from its recognition of the obvious plain meaning of the constitutional text, *United States v. Texas* is additionally important to our subject because, in deciding that the Constitution authorized suits by the United States against the States absent consent, the Court articulated rationales broad enough to encompass suits by foreign states. First, Justice Harlan reasoned that this judicial power made sense from a functional perspective given the overarching constitutional aim of protecting the Union.⁴⁸⁵ To understand how easily this rationale might be applied to the external threat to the Union posed by foreign state-versus-State treaty disputes during the founding period of American weakness, consider the following excerpt, which repeats and continues the above-quoted passage, and to which I have suggested a substitution for italicized portions in brackets:

We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controver-

without any reciprocal right, or whether the existence of such a power in foreign states could possibly assist any objects of the confederacy." *Id.* at 520.

In support of his position, Justice Campbell quoted the same remark by James Madison at the Virginia ratifying convention that the *Monaco* Court would highlight eighty years later. *Id.* at 520-21 ("I do not conceive . . . that any controversy can ever be decided in these courts, between an American and foreign state, without the consent of parties. If they consent, provision is here made. . . . This is consonant with the law of nations." (internal quotation marks omitted)).

482. 134 U.S. 1 (1890).

483. 143 U.S. 621, 644 (1892).

484. *Id.* (emphasis added).

485. *Id.* at 641-42.

sies between two or more States of the Union, and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the *United States* [foreign states] and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquility, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends?⁴⁸⁶

Second, the Court noted,

The question as to the suability of one government by another government rests upon wholly different grounds. Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of *all the States* [the entire people of a sovereign state].⁴⁸⁷

These rationales underscore a functional affinity between a suit against a nonconsenting State in which the United States is plaintiff and one in which a foreign state is plaintiff.

In *California v. Southern Pacific Co.*, Justice Harlan, joined by Justice Brewer, once again acknowledged the constitutional authorization of suit by foreign states against nonconsenting States.⁴⁸⁸ In dissenting from the Court's holding invalidating original jurisdiction in a suit by California because private and municipal parties had interests on California's side, Justice Harlan pointed out that

under the interpretation of the Constitution adopted in this case, our jurisdiction cannot be invoked in any mode for its final settlement if it appears in evidence that some individual or corporation is interested in that settlement. Still more, although this court is given original jurisdiction of a case between one of the States of the Union and a foreign State, it will not exercise it even in such a case if individual parties are interested in the controversy.⁴⁸⁹

Justice Harlan did not invoke his prior statement in *United States v. Texas* to support this point, which the Court did in *Minnesota v. Hitchcock*, quoting the entire passage from *Texas* excerpted above in rejecting a narrow interpretation of its original jurisdiction in a suit over ownership to

486. *Id.* at 644–45.

487. *Id.* at 646.

488. 157 U.S. 229, 269–70 (1895).

489. *Id.* This passage also implicates the doctrine of espousal, which I discussed *supra* Part III.C.

Indian lands.⁴⁹⁰ Minnesota had argued that original jurisdiction under the State-as-Party Subclause existed only when "the opposite party is another State of the Union or a foreign State,"⁴⁹¹ but not the United States.

Minnesota v. Hitchcock was followed in the span of five years by decisions in *South Dakota v. North Carolina*⁴⁹² and *Virginia v. West Virginia*,⁴⁹³ which quoted Chief Justice Marshall's conclusion in *Cohens* verbatim, that the Eleventh Amendment "does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases; and in these a State may still be sued."⁴⁹⁴

A unanimous Supreme Court similarly read the Eleventh Amendment to have no effect on the constitutional authorization of suits by foreign states against States as late as 1926. The Court in *United States v. Minnesota* matter-of-factly declared: "Of course the immunity of the State is subject to the constitutional qualification that she may be sued in this Court by the United States, a sister State, or a foreign State."⁴⁹⁵ It is thus particularly surprising that the Court in *Principality of Monaco v. Mississippi* came to the polar opposite conclusion with nary a mention of *United States v. Minnesota*, decided a mere eight years earlier.⁴⁹⁶ In so doing, the *Monaco* Court limited *Cherokee Nation* to its facts (i.e., the Eleventh Amendment applies to Indian tribes) and did not mention Chief Justice Marshall's statement in *Cohens*, or the Court's pronouncements in *United States v. Texas* and *United States v. Minnesota*.

To sum up, between the ratification of the Eleventh Amendment in 1798 and the decision in *Monaco*, nine of the ten Justices who expressed a position in a published judicial opinion asserted the constitutionality of suits in the Court by foreign states against States. The pronouncements may be dicta, but their number and consistency cast serious doubt on the holding in *Monaco* and strongly support the thesis of this Article. The nine included some of the most legally distinguished justices of the nineteenth century: Marshall, Thompson, Curtis, Harlan, Brewer, and Fuller. It would also be fair to count Justice Story, who joined Justice Thompson's two-man dissent in *Cherokee Nation*. Although they disagreed with Chief Justice Marshall's disposition of that case for the Court, they emphatically agreed with him on one point: "That a state of this Union may be sued by a foreign state, when a proper case exists and is presented, is

490. *Minnesota v. Hitchcock*, 185 U.S. 373, 385 (1902) (Brewer, J.).

491. *Id.*

492. 192 U.S. 286, 315 (1904) (Brewer, J.).

493. 206 U.S. 290, 318 (1907) (Fuller, C.J.).

494. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

495. 270 U.S. 181, 195 (1926).

496. Charles Evans Hughes had replaced William Howard Taft as Chief Justice in 1930, but six members of the *Monaco* Court were on the bench in 1926, including Justice Willis Van Devanter, author of the unanimous decision in *United States v. Minnesota*. That *Monaco* was a unanimous decision in light of this continuity on the Court is hard to explain.

too plainly and expressly declared in the constitution to admit of doubt"⁴⁹⁷

C. *Reclaiming the Court's Lost Original Jurisdiction*

Long dormant, the Court's original and exclusive jurisdiction of treaty-based suits by foreign states against States has become an issue in the past decade. States' habit of ignoring rights to consular access by criminal defendants who were foreign citizens sparked lawsuits by the defendants and the foreign states affected.⁴⁹⁸ In the lead case, *Angel*

497. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 52 (1831) (Thompson, J., dissenting).

498. See *Breard v. Greene*, 523 U.S. 371, 378–79 (1998) (per curiam order denying certiorari); *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 514–17 (June 27) (finding that, by not informing German nationals of their right to consular access and refusing to reconsider their convictions, the United States breached its obligation to Germany under article 36 of Vienna Convention on Consular Relations); *Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248, 257–58 (Apr. 9) (ordering United States to “take all measures at its disposal to ensure” that *Breard*, a Paraguayan national who was sentenced to death in Virginia without having been informed of his right to consular access, was not executed pending final decision in the proceedings). In the most recent important iteration of the controversy, Oklahoma state courts stayed the execution of a Mexican national, and the state governor commuted his sentence to life imprisonment, in response to a judgment from the International Court of Justice (ICJ). See *Order Granting Stay of Execution and Remanding Case for Evidentiary Hearing*, Oklahoma Criminal Court of Appeals (May 13, 2004) (on file with the *Columbia Law Review*); *Final Judgment of ICJ in Mexico v. United States* (Mar. 31, 2004), available at <http://www.icj-cij.org> (on file with the *Columbia Law Review*); see also William J. Aceves, *Avena and Other Mexican Nationals (Mexico v. United States)*, 97 Am. J. Int'l L. 923, 924–28 (2003) (detailing circumstances of the ICJ case and likely consequences); Sarah M. Ray, Comment, *Domesticating International Obligations: How to Ensure U.S. Compliance with the Vienna Convention on Consular Relations*, 91 Cal. L. Rev. 1729, 1758–66 (2003) (discussing *Avena* and counseling adherence by the Court and other United States entities to ICJ resolution).

The suits have been the subject of great interest among international lawyers and law professors, and so this Article will not belabor discussion. For a sampling of scholarship, see generally William J. Aceves, *LaGrand (Germany v. United States)*, 96 Am. J. Int'l L. 210 (2002) (providing synopsis of *LaGrand* decision); Curtis A. Bradley, *Breard*, Our Dualist Constitution, and the Internationalist Conception, 51 Stan. L. Rev. 529 (1999) (claiming that the internationalist approach espoused by critics of *Breard* is inconsistent with the United States's long-standing dualist approach, in which domestic and international law are distinct); Curtis A. Bradley & Jack L. Goldsmith, *The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 Am. J. Int'l L. 675 (1998) (arguing that, in its criticism of *Breard*, the international law community failed to consider federalism concerns); Lori Fisler Damrosch, *Interpreting U.S. Treaties in Light of Human Rights Values*, 46 N.Y.L. Sch. L. Rev. 43, 51–58 (2002–2003) (discussing the trend of interpreting the Vienna Convention on Consular Relations in light of human rights values); Damrosch, *supra* note 27 (disagreeing with the United States government's position that Paraguay's claim in *Breard* was nonjusticiable); Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 Am. J. Int'l L. 679 (1998) (asserting that the International Court of Justice's Order to the United States that it take all measures to ensure *Breard* is not executed was legally binding); Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 Colo. L. Rev. 1317 (1999) (exploring whether the treaty provision in question in

Breard, a Paraguayan national on death row for murder, brought suit against Virginia under article 36 of the Vienna Convention on Consular Relations and a U.S.-Paraguay treaty of amity and commerce.⁴⁹⁹

Many of these lawsuits were dismissed on grounds not relevant to our problem, such as procedural bars applicable to state and federal post-conviction proceedings and the lack of a private cause of action or a judicially enforceable remedy (e.g., suppression of evidence) in the terms of the underlying treaties.⁵⁰⁰ But the federal district and circuit courts in *Breard* cited the state sovereign immunity holding in *Principality of Monaco v. Mississippi* as an alternative ground for dismissing Paraguay's suit against Virginia.⁵⁰¹ Moreover, the courts that have extended *Monaco's* holding to this treaty context have indicated that an *Ex parte Young*⁵⁰² exception to the Eleventh Amendment was inappropriate in the circumstances because there was no continuing violation in each individual case that might be enjoined.⁵⁰³

In a refrain reminiscent of the antebellum Southern Port Quarantine controversies, the national government professed attempts at lobbying the offending States informally but effected no change in policy. In the *Breard* case, for example, Secretary of State Madeleine Albright asked the Governor of Virginia to delay the execution of Breard, a Paraguayan national, upon the issuance of a provisional order by the International Court of Justice, where Paraguay had brought a separate suit in the matter.⁵⁰⁴ In an echo of the national reciprocity interest implicated by the Chinese mob violence controversies, the State Department pled concern about possible repercussions for American citizens abroad. The plea fell on deaf ears: Virginia executed Breard after the Supreme Court denied review in the concurrent domestic case on the ground that Breard's federal habeas petition was procedurally barred for failure to exhaust state

Breard violates the anticommandeering principle); Note, Too Sovereign, *supra* note 25 (exploring different legal options for enforcing consular treaty obligations on the States).

499. See Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 36, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94 (providing that consular offices should have access to nationals of the sending state, specifically that they have the right to visit and correspond with nationals who are in prison, custody, or detention); Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Para., 12 Stat. 1091.

500. See, e.g., *United States v. Page*, 232 F.3d 536, 540 (6th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 888 (9th Cir. 2000); *United States v. Li*, 206 F.3d 56, 62-63 (1st Cir. 2000); *Republic of Paraguay v. Allen*, 134 F.3d 622, 629 (4th Cir. 1998).

501. See *Allen*, 134 F.3d at 627-28; *Republic of Paraguay v. Allen*, 949 F. Supp. 1269, 1273 (E.D. Va. 1996); see also *United Mexican States v. Woods*, 126 F.3d 1220, 1222-24 (9th Cir. 1997) (upholding Arizona's sovereign immunity in suit by Mexico for treaty violation).

502. 209 U.S. 123 (1908).

503. See, e.g., *Allen*, 134 F.3d at 627-28; *Woods*, 126 F.3d at 1223.

504. See Brief for the United States as Amicus Curiae at 46, *Republic of Paraguay v. Gilmore and Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214).

court remedies.⁵⁰⁵ In dictum, the Supreme Court reasoned that even absent the procedural bar, Paraguay's case was barred on state sovereign immunity grounds, citing *Principality of Monaco v. Mississippi* for the "fundamental principle" that "the States, in the absence of consent, are immune from suits brought against them . . . by a foreign State."⁵⁰⁶ Because *Breard* involved treaty claims, it seemed unlikely that the Court would be inclined to hold that a foreign state could bring a treaty-based suit against a State in the Court or any federal court without consent if the issue presented itself in a subsequent vehicle.

But, surprisingly, in a 1999 per curiam order denying the Federal Republic of Germany leave to file an original action in the Court against the United States and Arizona in another death row consular notification case,⁵⁰⁷ the Court intimated that the issue was not foreclosed. The motion for leave to file was denied, but apparently as a matter of discretion: "Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction."⁵⁰⁸ On the specific matter of its original jurisdiction as to Arizona,⁵⁰⁹ the Court said,

[I]t is doubtful that Art. III, § 2, cl. 2, provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard*[,] . . . a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles.⁵¹⁰

Justice Souter, in a short concurring statement joined by Justice Ginsburg, added that he did "not rest [his] decision to deny leave to file the bill of complaint on any Eleventh Amendment principle."⁵¹¹ Justice Breyer, in a dissenting statement joined by Justice Stevens, asserted,

[T]he jurisdictional matters are arguable. Indeed, the Court says that it is merely "doubtful that Art. III, § 2, cl. 2, provides an anchor" for the suit and that a foreign government's ability to assert a claim against a State is ". . . in probable contravention of Eleventh Amendment principles." The words "doubtful" and "probable," in my view, suggest a need for fuller briefing.⁵¹²

This Article has taken up Justice Breyer's invitation.⁵¹³

505. See *Breard v. Greene*, 523 U.S. at 378–79 (per curiam order denying certiorari).

506. *Id.* at 377 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329–30 (1934)); see also *Seminole Tribe v. Florida*, 517 U.S. 44, 67–68 (1996) (citing *Monaco* for the same proposition).

507. *Federal Republic of Germany v. United States*, 526 U.S. 111, 111 (1999).

508. *Id.* at 112.

509. As to the United States, the Court said "it appears that the United States has not waived its sovereign immunity." *Id.*

510. *Id.*

511. *Id.* (Souter, J., concurring).

512. *Id.* at 114 (Breyer, J., dissenting) (citation omitted).

513. Although it takes four Justices to grant certiorari on a petition for review, "a majority seems to be needed to grant a motion for leave to file. . . . During the period

CONCLUSION

The highest foreign policy priority for the Framers of the Constitution was to keep the 1783 Treaty of Peace and avoid renewed war with Great Britain. The greatest danger to honoring the peace treaty was breach by a State. At the apex of an ingenious, complex scheme of judicial and political solutions the Framers designed to deal with the problem was an original and exclusive jurisdiction in the Supreme Court of suits by foreign states against States. The only obstacle that stands in the way of reclaiming this jurisdiction is *Principality of Monaco v. Mississippi*, a 1934 decision, which, although mistaken in its reading of constitutional text and history, may be distinguished on its facts.

The Rehnquist Court has consistently claimed that the basis of its state sovereign immunity doctrine is a respect for the dignity of the States faithful to the original constitutional plan. The Court has applied this guiding principle to uphold the States' claims to immunity, notwithstanding the protests of constitutionalists who discount dignity's importance and interpret the historical evidence differently. But as this Article has sought to demonstrate, original and exclusive jurisdiction in the Supreme Court of suits brought by foreign states charging state treaty violations is consistent with the dignity principle, and, additionally, compelled by the text and supported by the overwhelming weight of historical evidence. There can be no serious question that a suit by a foreign state works no offense on a State's dignity, and that the Framers drafted into the Constitution a role for the Supreme Court in resolving foreign state-versus-State treaty disputes.⁵¹⁴

1961–93, 50 of the 102 motions for leave to file were denied, generally without opinion.” Hart & Wechsler, *supra* note 3, at 273 (internal citations omitted).

514. Ratification consent dispenses of the need to find workarounds to state sovereign immunity, but it is worth pointing out, to support the argument for ratification consent, that at least two of the most important workarounds appear unavailable or inappropriate with respect to foreign states alleging violations of international law vis-à-vis States and state officials. First, as six members of the Court indicated in *Breard*, a foreign state is most likely not a “person” for purposes of 42 U.S.C. § 1983 (2000) and, hence, could not avail itself of that statute to vindicate a claim of treaty violation against a state official. See 523 U.S. at 378 (per curiam, for five members of the Court) (“Paraguay is not a ‘person’ as that word is used in § 1983.”); *id.* at 379 (statement of Souter, J.) (“I have substantial doubts that either Paraguay or any official acting for it is a ‘person’ within the meaning of 42 U.S.C. § 1983.”). While there would appear to be no similar threshold obstacle to a foreign state filing for prospective injunctive relief against a state official for an ongoing violation of federal treaty law under *Ex parte Young*, 209 U.S. 123, 159–60 (1908), (putting aside for the moment concerns about implying the *Ex parte Young* cause of action from a treaty given the unavailability of § 1983 and a constitutional provision to ground it), this option raises the reverse dignity problem. That is to say, why should a sovereign state sue an official person under a legal fiction to protect the official's sovereign? To force the foreign sovereign to do so must surely work an affront to its sovereign dignity, much in the way members of Congress in the wake of the September 11 attacks refrained from declaring war on Osama bin Laden because it was considered “beneath our dignity” to declare war on an individual person. See Alison Mitchell & Philip Shenon, *After the Attacks: Congress; Agreement on \$40 [B]illion for Aid and a Response*, N.Y. Times, Sept. 14, 2001,

Nor does it sabotage the conduct of the Republic's foreign relations to allow foreign states access to federal court to press claims of treaty violations by individual States. The original reason to permit such suits—fear of war and retaliation by more powerful European states absent the opportunity for a judicial remedy—may have faded with the days of American weakness, but in its stead, the complexity of transnational interactions in the modern world has increased both the level of direct interaction between foreign and American states and the potential that state interests may differ from those of the nation at large. The result is that the States continue to violate treaties, and such violations continue to be at odds with the national interest. At the same time, the nature of our federalism continues to make it difficult for the political branches to do anything about it. In the words of the Solicitor General in *Breard*, when a State defects from a U.S. treaty, the Executive's means to deal with the problem "under our Constitution may in some cases include only persuasion."⁵¹⁵

It makes sense under these circumstances to stick to the constitutional solution the Framers devised for this very problem. As they well understood, it is wrong and shortsighted to think the States have no direct influence on the Republic's foreign relations and the federal courts, and specifically the Supreme Court, have no role in them. Their ingenious solution to this counterproductive byproduct of federalism was to address the deleterious effects of the former with the institutional expertise of the latter. In so doing, they created what may fairly be called the first modern permanent international court—one that was formally "national." All that is required for the Court to remain true to its own federalism principles is to give present effect to the Framers' constitutional ingenuity.

at A19 ("Senator John W. Warner, Republican of Virginia, who was working closely on the language of an authorization of force, said he would also argue strongly against a declaration of war, saying 'it is beneath our dignity' to declare war against Mr. bin Laden.").

515. See Brief for the United States as Amicus Curiae at 51, *Republic of Paraguay v. Gilmore and Breard v. Greene*, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214).