

THE KEYSTONE OF THE ARCH

The Text and History of Article III and the Constitution's
Promise of Access to Courts

Text and History
Narrative Series





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**The Text and History of Article III and the
Constitution's Promise of Access to Courts**

By David H. Gans

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Introduction

When the Constitution was framed, the promise of access to the federal courts was at the heart of a new system of government accountable to the people. As John Marshall—soon to become our Nation’s greatest Chief Justice—observed, “[t]o what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.”¹ The federal judiciary, with the Supreme Court at its head, would be the “keystone of the arch,” establishing a binding rule of law for the nation.² In Article III, the Framers created the federal judiciary as a co-equal branch of government vested with the power of expounding and enforcing the laws in cases and controversies. Today, the Framers’ constitutional vision is in shambles. Over the last several decades, conservative Justices on the Supreme Court have emasculated this fundamental constitutional principle, filling the *United States Reports* with arcane and impenetrable doctrines that do violence to the rule-of-law values at the Constitution’s core. In filling a vacancy on the Court, left by the passing of Justice Antonin Scalia, progressives have a chance to restore basic constitutional first principles that give Americans their day in court to redress legal wrongs and prevent abuse of power by the government. The story laid out in the pages that follow shows why this is what the Constitution’s text and history requires.

Article III, as its text makes clear, authorizes the “judicial department” to “decide all cases of every description, arising under the constitution or laws of the United States,” extending to the federal courts the obligation “of deciding every judicial question which grows out of the constitution and laws.”³ That settled understanding—which gives the federal courts broad powers to protect individual rights secured by federal law—prevailed for most of American history. In the last half century, conservative majorities on the Supreme Court have developed a strict, highly-technical doctrine of Article III standing, giving a very cramped interpretation to Article III’s grant of judicial power to the federal courts and insisting that the federal courts have only a very limited role in our system of separation of powers. In a host of badly divided rulings, conservative Justices have seized on this very narrow view of Article III to throw out of court individuals who sought to challenge a long list of deprivations of federal rights—such as the use of chokeholds by the police,⁴ governmental aid to racially-segregated schools,⁵ harm to the environment,⁶ and, most recently, the federal government’s system of warrantless wiretapping.⁷ These cases purport to honor the Framers’ vision of the role of the federal courts, but in fact they turn it on its head, dealing a crippling blow to the Framers’ vision that, within a system of separated powers, courts would be bulwarks of individual rights, enforcing the rule of law and maintaining the supremacy of

federal law.⁸ In the conservatives' constitutional vision of Article III, federal courts honor their "properly limited"⁹ role—not by enforcing constitutional protections—but by closing the courthouse doors so they do not have to.

Article III does not require standing doctrine, which is a twentieth century invention of the Supreme Court. If we are to have standing doctrine, it must cohere with the Framers' vision of the Article III judiciary. Our current doctrine fails this basic test: time and again, it keeps plaintiffs out of

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courts, prevents judicial review of abuse of power by the government, and denies to the courts broad power to protect federal rights. Rather than honoring the balance struck by the Framers in creating the Article III judiciary, standing doctrine has left

injured plaintiffs without a remedy and denied courts the power to enforce the Constitution's status as the supreme law of the land.¹⁰ Although the doctrine of standing is supposed to be based on separation of powers, modern standing law all too often turns a blind eye to the judiciary's intended role in our system of separated powers.

At the same time the Court's conservative majority has whittled down Article III, it has given a very expansive interpretation to the Eleventh Amendment, which 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."¹¹ In other contexts, conservatives proclaim that the text of the Constitution—above all else—binds judges, but in a line of divided 5-4 rulings the Court has disregarded the Amendment's precise text, reading it in light of imagined penumbras and emanations protecting state sovereignty. The result has been to give the greenlight to state officials to violate federal rights with impunity.¹² Compounding the errors made in *Hans v. Louisiana*,¹³ the 1890 ruling that held that the Eleventh Amendment prevents states from being sued in federal court, even when they violate the Constitution, conservative majorities on the Court have dramatically expanded the scope of state sovereign immunity and sharply limited the power of Congress to create federal remedies for federal rights. The result, as a host of scholars across the ideological spectrum have shown, is a body of doctrine at war with foundational principles of constitutional accountability.¹⁴ In immunizing states for flouting federal rights, the doctrine turns the Constitution upside down.

These landmark rulings interpreting the Constitution are bad enough, but they are only the tip of the iceberg. The same cramped vision of the role of the federal courts in righting wrongs and in enforcing the Constitution and federal laws has been at the heart of numerous other Rehnquist and Roberts Court rulings that pervert statutes,¹⁴ court rules,¹⁵ and bodies of judge-made law¹⁶ to limit access to the federal courts by those asserting federal claims. In a long list of 5-4 rulings, the Court's conservative majority has tilted the playing field, closing the court house doors to some plaintiffs and making it harder for others to sue for violation of federal protected rights. These rulings have shown more sympathy for defendants facing potential liability than for injured Americans, turning on its head the Framers' vision of the judiciary as a bulwark for vindicating federal rights and liberties.

This Narrative unfolds as follows. Parts I-IV sets the foundation, telling how the Framers in Philadelphia—led by James Madison, Alexander Hamilton, and others—established an independent federal judiciary and charged it with the responsibility to enforce the Constitution's guarantees and the supremacy of federal law. Article III courts would have broad—but not unlimited—powers to redress legal wrongs, ensuring that for every legal right, there was a legal remedy for the violation of that right. The Eleventh Amendment established a narrow species of sovereign immunity in diversity

The Framers in Philadelphia—led by James Madison, Alexander Hamilton, and others—established an independent federal judiciary and charged it with the responsibility to enforce the Constitution's guarantees and the supremacy of federal law.

cases, but did not take away from the federal courts the power to hold states accountable for violating the Constitution or federal laws. Under the leadership of John Marshall—who had made impassioned arguments about the role of courts in urging Virginia to vote to ratify the Constitution—the Supreme Court confirmed each of these fundamental points in a long line of landmark rulings vindicating the Constitution's promise of access to the courts.

The second half of the narrative, Parts V-IX, tells the sad story of how Justices on the Supreme Court turned their back on these fundamental principles that ensure courts are open to hear claims by Americans whose rights have been violated. The story begins in the aftermath of the end of Reconstruction, when a conservative Supreme Court came to the aid of southern state governments, holding in *Hans* that states may not be sued in federal court even when they violate the Constitution's specific guarantees. The same Court that gutted the promises of the Fourteenth Amendment and helped pave the way for Jim Crow rewrote the Eleventh Amendment to give states a sweeping form of sovereign immunity, protecting states from being sued for violating the Constitution.

Restrictive rules for Article III standing took longer to emerge. Article III standing was born in the 1920s, but for the first half century, standing doctrine turned on whether the plaintiff had alleged the violation of a legal right, and was decidedly modest. All that changed in the 1970s, when conservative Justices on the Supreme Court fashioned modern standing doctrine in order to close the courthouse doors on plaintiffs, in many cases minorities victimized by discrimination or abuse of government power. Since then, conservatives on the Supreme Court have repeatedly sought to tighten Article III standing rules to make it harder for plaintiffs to get into court in the first place, while expanding the immunity of states when sued for violating federal rights.

The Text and History of Article III

Article III provides, in relevant part:

Section 1. 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. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, cl. 1. The judicial power shall extend to all Cases, in Law or Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE III FIRST PRINCIPLES

Today, we take it for granted that our national government is composed of three branches. But it was not always so. The dysfunctional government of the Articles of Confederation delegated virtually all power to Congress, with no independent, co-equal Executive or Judicial branch.

As James Madison observed, this was akin to a government with “the mere trunk of a body without arms or legs to act or move.”¹⁷

The Constitution made a decisive change, ensuring, as George Washington put it, that “executive and judicial authorities” would be “fully and effectually vested in

In Article III, the Framers created an independent, co-equal judicial branch of government to ensure that Americans would have access to the courts to vindicate their legal rights.

the general government of the Union”¹⁸ In Article III, the Framers created an independent, co-equal judicial branch of government to ensure that Americans would have access to the courts to vindicate their legal rights.

Article III opens—much like Article I and Article II—with a broad vesting of power.¹⁹ Its first sentence declares that “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.”²⁰ Just as Article

It gives Congress a whole host of legislative powers to ensure that the new Nation could solve national problems,²¹ and Article II gives the President sweeping powers to ensure energetic execution of the laws,²² Article III gives the federal courts the “judicial power” of expounding the law in cases in order to ensure that federal courts could “guard the Constitution and the rights of individuals” and prevent “serious oppressions of the minor party in the community.”²³

To ensure an independent and impartial judiciary, Article III provides that the “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”²⁴ Alexander Hamilton called these guarantees “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws,” explaining that securing “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.”²⁵ Article III’s tenure and salary protections gave federal judges a structural superiority over state judges, who, in many cases, were dependent on state legislatures.²⁶ “State judges, holding their offices during pleasure, or from year to year,” the Framers worried, “will be too little independent to be relied upon for an inflexible execution of the national laws.”²⁷

Article III gives the federal courts the “judicial power” of expounding the law in cases in order to ensure that federal courts could “guard the Constitution and the rights of individuals” and prevent “serious oppressions of the minor party in the community.”

Article III, Section Two spells out the scope of “judicial Power,” providing to the federal courts the power to hear nine categories of “Cases” and “Controversies,” including “all Cases, in Law or Equity, arising under this Constitution, the Laws of the United States, and Treaties.”²⁸ This language, together with the Supremacy Clause,²⁹ ensures that federal courts serve as a “constitutional check”³⁰ on the actions of state governments as well as on the federal government, enforcing the Constitution’s limits on government power and maintaining the supremacy of federal law.³¹ As history shows, “the parallel language of the ‘Arising Under’ and Supremacy Clauses was intentional and structurally crucial,”³² ensuring that “the final word on constitutional questions would lie in federal courts.”³³ As James Madison later observed, “the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt . . . and that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them.”³⁴

The Framers understood that constitutional “[l]imitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”³⁵ Numerous others affirmed what Hamilton spelled out in Federalist 78: “under this Constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department,”³⁶; any attempt to violate the fundamental law “would be considered by the judges as an infringement of the Constitution which they are to guard. . . . They would declare it void.”³⁷ Article III’s grant of jurisdiction in constitutional cases was necessary because the “Constitution might be violated with impunity, if there were no power in the general government to correct and counteract [unconstitutional state] laws. This great object can only be safely and completely obtained by the instrumentality of the federal judiciary.”³⁸ James Madison explained the Constitution’s “new policy” of submitting constitutional questions to the “judiciary of the United States”: “[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions.”³⁹

Article III’s grant of judicial power was viewed as critical to maintain the enforcement and supremacy of federal laws. Article III created a federal judiciary with broad power to protect individual rights secured by federal law by ensuring that the power of the federal courts was co-extensive with the

Article III created a federal judiciary with broad power to protect individual rights secured by federal law by ensuring that the power of the federal courts was co-extensive with the legislative powers of Congress under Article I.

legislative powers of Congress under Article I. James Madison explained that “[a]n effective Judiciary establishment commensurate to the legislative authority, was essential.”⁴⁰ Framer after Framer made the point that “the judicial power ought to be co[e]xtensive with the legislative. The federal government ought

to possess the means of carrying the laws into execution. . . . If laws are not to be carried into execution by the interposition of the judiciary, how is it to be done?”⁴¹ As Alexander Hamilton put it in Federalist No. 80: “If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question.”⁴² Future Chief Justice John Marshall argued that the “service or purpose of a judiciary” is “to execute the laws in a peaceable, orderly manner If this be the case, where can its jurisdiction be more necessary than here?”⁴³ while James Iredell observed that “laws are useless unless they are executed.”⁴⁴ Resort to the “courts of justice,” he explained, “is the only

natural and effectual method of enforcing laws.”⁴⁵ Indeed, the case for this aspect of Article III’s grant of jurisdiction over federal cases was so overwhelming that even some leading Anti-Federalists agreed that “[i]t is proper the federal judiciary should have powers co-extensive with the federal legislature—that is, the power of deciding finally on the laws of the union.”⁴⁶

Article III was the culmination of what historian Gordon Wood has called a “massive rethinking that eventually transformed the position of the judiciary in American life. From the much scorned and insignificant appendages of crown authority, Americans turned judges into one of ‘the three capital powers of Government.’”⁴⁷ The story of that transformation lies in the dysfunctional government of the Articles of Confederation and the efforts of James Madison, Alexander Hamilton and others to create a more perfect Union, one with an independent, co-equal judicial branch vested with the power to enforce the Constitution and remedy legal wrongs. The next section examines that history.

THE FRAMING AND RATIFICATION OF ARTICLE III

Article III was framed against the backdrop of the failure of the Articles of Confederation, which established a single branch of the federal government and no independent court system.⁴⁸ The result was an impotent federal government that could not enforce its laws. Alexander Hamilton observed that a “most palpable defect of the existing Confederation is the total want of a SANCTION to its laws. The United States as now composed have no power to exact obedience, or punish disobedience to their resolutions . . . [T]he United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws.”⁴⁹ A key reason for this was “the

want of a judiciary power. Laws are a dead letter without courts to expound and define their true meaning and operation.”⁵⁰ James Madison offered a similar criticism of the Articles:

“A sanction is essential to the idea of law, as coercion is to that of government. The federal system being destitute of both, wants the great vital principles of a Political Cons[ti]tution.”⁵¹ The result, Madison lamented, is that “acts of Cong. . . . depend[] for their execution on the will of the state legislatures,” making federal laws “nominally authoritative, [but] in fact recommendatory only.”⁵²

With federal law unenforceable, state governments, time and again, flouted federal rights and duties. As Madison described, the “vices” of government under the Articles were many: “[f]ailure of the

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States to comply with the Constitutional requisitions”; “[e]ncroachments by the States on the federal authority”; “[v]iolations of the laws of nations and of treaties”; “[t]respases of the States on the rights of each other”; “[i]njustice of the laws of the States.”⁵³ A central aim of the Constitution was to provide legal remedies to redress these and other legal wrongs committed by state governments.⁵⁴

The Framers recognized that “there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the State legislatures, without some constitutional mode of enforcing the observance of them? . . . No man of

As the Convention unfolded, the Framers chose judicial review as the constitutional check on state governments. Every step of the way the Framers expanded the powers and responsibilities of the federal judiciary, ensuring that federal courts would have the last word on the meaning of the Constitution and federal law.

sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.”⁵⁵ As the Convention unfolded, the Framers chose judicial review as the constitutional check on state governments.⁵⁶ Every step of the way the Framers expanded the powers and responsibilities of the federal judiciary, ensuring that federal courts would have

the last word on the meaning of the Constitution and federal law.

The Virginia Plan, introduced at the start of the Convention, provided four different mechanisms to enforce the Constitution and federal law: (1) it empowered the “National Legislature” to “negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union”; (2) it allowed Congress “to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof”; (3) it created a “council of revision,” composed of members of the Executive and “National Judiciary,” with “authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final”; and (4) it established a “National Judiciary” that would answer “questions which may involve the national peace and harmony.”⁵⁷

The proposal to give the executive branch the power to use force to coerce the states was rejected almost immediately. On May 31, 1787, Madison moved to postpone consideration of the use of force provision, explaining that the “use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound.”⁵⁸ The Committee on the Whole unanimously agreed,

and the Framers never again considered this aspect of the Virginia Plan. The Framers overwhelmingly preferred a “coercion of laws” to a “coercion of arms.”⁵⁹

On June 4, the delegates rejected the Council of Revision. Elbridge Gerry argued that judges should not play any role in evaluating laws before the fact, “as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.”⁶⁰ Rufus King agreed that “the Judges ought to be able to expound the law as it should come before them, free from bias in having participated in its formation.”⁶¹ He explained that “[the judges] will no doubt stop the operation of such as shall appear repugnant to the [C]onstitution.”⁶² By a vote of 8-2, the Committee on the Whole substituted a veto by President for the Council of Revision. The Committee then voted to establish a national judiciary.⁶³ As the debate shows, “the single most important reason the Council of Revision was rejected derived from the Convention’s commitment to judicial review as an integral part of the constitutional structure.”⁶⁴ Judicial review would come after—not be a part of—the legislative process.⁶⁵

On June 8, the Convention, by a vote of 7-3, rejected a proposal to expand the federal negative to permit Congress “to negative all Laws which they shd. judge to be improper.”⁶⁶ Opponents argued that the “negative . . . will be abused,” fearing that Congress might use it to “restrain the States from regulating their internal peace” or to “regulat[e] . . . the militia, a matter on which the existence of a State might depend. The Natl. Legislature with such a power may enslave the States.”⁶⁷ A month later, on July 17, opponents of the negative, again by a 7-3 vote, eliminated the device entirely, preferring judicial review by courts to a congressional negative. As Gouverneur Morris argued, “[a] law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law.”⁶⁸

The rest of the Convention was devoted to strengthening the institution of judicial review and access to the federal courts. Immediately after the defeat of the negative, the Convention unanimously agreed to adopt the Supremacy Clause proposed by Maryland Anti-Federalist Luther Martin, which declared that “[l]egislative acts of the U.S” and “all treaties made & ratified under the authority of the U.S. shall be the supreme law of the respective States” and that the “Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.”⁶⁹ Over the final months of the Convention, the Framers strengthened the requirement of federal supremacy in a number of respects, providing that “this Constitution,” as well as federal laws would be supreme,⁷⁰ subjecting both state constitutions and state laws to the requirement of federal supremacy,⁷¹ and declaring that the Constitution and federal law was to be the “supreme law of the land.”⁷² As a result of these changes, the Supremacy Clause, Professor Jack Rakove has observed, “had

been transformed into a potentially powerful basis for national supremacy.”⁷³

The Convention also substantially expanded the jurisdiction of the federal courts. First, on July 18, the Convention approved the power of Congress to appoint lower federal courts, recognizing that “[i]nferior tribunals are essential to render the authority of the Natl. Legislature effectual” and that “the Courts of the States can not be trusted with the administration of the National laws.”⁷⁴ Second, on that same date, the Convention, which initially had made no provision for federal question jurisdiction, made explicit in the text that the “jurisdiction [of the national judiciary] shall extend to all cases arising under the Natl. laws: And to such other questions as may involve the Natl. peace & harmony.”⁷⁵ Third, on August 27, the Convention agreed that federal courts should have the power to hear cases arising under “[t]his Constitution” as well as under federal laws. During the brief debate that followed, Madison argued that “the right of expounding the Constitution” should be “limited to cases of a Judiciary Nature.”⁷⁶ While no specific text was added to reflect Madison’s concern, the Framers “generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.”⁷⁷

Article III was to be “the keystone of the arch, the means of connecting and binding the whole together, of preserving uniformity in all the judicial proceedings of the Union.”

With these changes, the Framers ensured that the federal judiciary would be “competent to the decision of any question arising out of the Constitution”⁷⁸ and federal laws, giving the federal courts the power to decide “all questions arising upon their construction, and in a judicial manner to carry those laws into execution.”⁷⁹ Federalist and Anti-Federalist alike agreed that Article III gave the federal courts the power to “declare what is the law of the land,”⁸⁰ requiring them “to resolve all questions that may arise on any case on the construction of the constitution, either in law or in equity.”⁸¹

Article III figured prominently in debates over ratification of the Constitution. Both Federalists and Anti-Federalists agreed that Article III conferred broad, substantial new powers on the federal courts to enforce federal legal protections. They differed sharply over whether federal courts *should* have new judicial powers to enforce the Constitution and federal law. Article III was bitterly attacked by Anti-Federalists, who feared that the new federal judiciary would “impair, and ultimately destroy, the state judiciaries, and . . . the legislation of the state governments.”⁸² Led by George Mason and Patrick Henry, Anti-Federalists charged that the Supreme Court was “exalted above all other power in the government,”⁸³ and would have “more power than any court under heaven.”⁸⁴ In their view, Article III’s grant of judicial power to the federal court was too sweeping—George Mason called it “the most extensive jurisdiction”⁸⁵—and would decimate the state courts. The consequence, Anti-Federalists feared,

was that “[t]his power in the judicial, will enable them to mould the government, into almost any shape they please.”⁸⁶

These arguments, fortunately, did not carry the day. Rejecting Anti-Federalist claims that the breadth of judicial power conferred in Article III was too sweeping, the Framers recognized that constitutional limitations on government would be mere “parchment barriers” without the ability of individuals to have recourse to federal courts to vindicate their rights. Article III was to be “the keystone of the arch, the means of connecting and binding the whole together, of preserving uniformity in all the judicial proceedings of the Union.”⁸⁷ “[E]xtensive authorities,” the Framers concluded, “were necessary,” particularly given the duty of the Supreme Court “to decide all national questions which should arise within the Union” and to “control and keep the state judicials within their proper limits whenever they shall attempt to interfere with its power.”⁸⁸ Article III’s grant of broad judicial powers to the federal courts ensured that “the Constitution should be carried into effect, that the laws should be executed, justice equally done to all the community, and treaties observed.”⁸⁹ The American people recognized that “[t]hese ends can only be accomplished by a general, paramount judiciary.”⁹⁰

ARTICLE III AND THE BILL OF RIGHTS

In 1789, the Bill of Rights was added to the Constitution. In the process, the Framers affirmed the special role of the federal courts in reviewing congressional legislation to ensure that it comported with the fundamental, personal rights guaranteed by the Bill of Rights.

One of the reasons that the original Constitution did not contain a bill of rights was Madison’s fear of “the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. . . . What use . . . can a bill of rights serve in popular Governments?”⁹¹ The answer was judicial review by independent judges. As Thomas Jefferson explained to Madison, “[i]n the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, & kept strictly to their own department merits great confidence for their learning & integrity.”⁹² This argument had a powerful effect on Madison’s thinking.

In 1789, when introducing the Bill of Rights in Congress, Madison explained that “[i]f the [Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally lead to resist

every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.”⁹³ Just as Madison had recognized that “causes of a federal nature” will arise under those provisions of the Constitution in which “states are laid under restrictions,”⁹⁴ Madison tasked the federal courts with the obligation to enforce the rights laid out in the Bill of Rights. Judicial review was the key to ensuring that the guarantees of the Bill of Rights were not “paper barriers . . . too weak to be worthy of attention,” but rather real, enforceable limits on the power of the federal government that would operate “against the majority in favor of the minority.”⁹⁵

THE ORIGINAL MEANING OF “JUDICIARY CASES”

Article III gave the federal courts the responsibility for enforcing the rule of law in adjudicating what Madison called “cases of a judiciary nature.” Neither Madison nor any other Framers clarified the precise meaning of this crucial idea either at the Convention or during ratification debates. The best available evidence, however, suggests that the Framers had a broad—but not limitless—understanding of the power of the federal courts to expound and enforce the Constitution and maintain the supremacy of federal law.

By extending the “judicial power” to “all Cases in Law and Equity,” the Framers incorporated a well-established understanding about the scope of judicial authority and the types of relief courts could provide. “Judiciary cases,” as the Framers understood them, did not require a showing of injury-in-fact by an aggrieved individual or even a dispute between adverse parties, but rather “a party, who asserts his rights in the form prescribed by law.”⁹⁶ By granting the courts the power to hear equitable as well as legal claims, the Framers ensured that courts would possess the “effectual power” to “restrain or correct” any infractions of the Constitution or federal law.⁹⁷

The legal traditions that the Framers brought from England included a host of legal and equitable remedies designed to maintain the rule of law.⁹⁸ Even where individuals could not prove actual damages, the common law allowed recovery for nominal damages, recognizing that “an injury imports a damage, when a man is thereby hindered of his right.”⁹⁹ These common law devices quickly became a central part of American law, and were used to allow individuals to challenge government action as unlawful. Article III’s limitation to “cases of a judiciary nature” was meant to ensure that courts did not intrude on political questions that the Constitution left to other branches of government, not to curtail the power of courts to vindicate individual rights.

The Framers, who were steeped in the writings of Sir William Blackstone, understood that the job of courts was to expound the law and vindicate individual rights. As Blackstone had written, it was

“a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.”¹⁰⁰ “[I]n vain would rights be declared, in vain directed to be observed,” Blackstone declared, “if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law.”¹⁰¹ A number of Founding-era state constitutions explicitly guaranteed redress for a violation of a legal right. The Massachusetts Constitution of 1780, for example, provided that “[e]very subject . . . ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”¹⁰² Numerous other State Constitutions used similar formulations to protect Americans’ right to seek redress in the courts for rights violations.¹⁰³

Not surprisingly, one of the first actions of the First Congress was to invest the newly created federal courts with judicial powers to enforce the Constitution and maintain the rule of law. The Judiciary Act of 1789 gave the Supreme Court the

power to review state court decisions that denied rights protected by the Constitution, federal statutes, or federal treaties;¹⁰⁴ the Act also gave lower federal courts jurisdiction over a significant

One of the first actions of the First Congress was to invest the newly created federal courts with judicial powers to enforce the Constitution and maintain the rule of law.

number of federal constitutional and statutory cases.¹⁰⁵ The 1789 Act also granted Article III courts substantial powers to protect legal rights. The Act authorized the federal courts to grant any common law writs “not specifically provided for by statute, which may be necessary for their respective jurisdictions, and agreeable to the principles and usages of law.”¹⁰⁶ The most important of these were the prerogative writs—prohibition, certiorari, and mandamus—which had, in England, allowed courts to “[keep] subordinate bodies within their legal limits by writs of *certiorari* and prohibition, and ordering them to perform their duties by writs of *mandamus*.”¹⁰⁷ As Blackstone described, these writs helped ensure that “every right when withheld must have a remedy, and every injury its proper redress.”¹⁰⁸

The First Congress, and those that followed, also enacted a host of laws designed to enlist citizens in the enforcement of federal law.¹⁰⁹ Federal statutes that authorized informer and relator actions—in which the informer or relator “himself had no interest whatever in the controversy other than that given by statute”¹¹⁰—were commonplace in the first years of the new nation, and the Judiciary Act of 1789 provided for federal jurisdiction over these suits.¹¹¹ “In the informer’s action, cash bounties were awarded to strangers who successfully prosecuted illegal conduct. In relator actions, suits would

be brought formally in the name of the Attorney General, but at the instance of a private person, often a stranger.”¹¹² These actions were often “called *popular* actions, because they are given to the people in general.”¹¹³

The informer and relator actions adopted by the First Congress applied widely, opening the federal courts for suits against both private individuals and government officials to enforce federal law.¹¹⁴ Such “[s]uits by those without personal injury who were acting as representatives of others were not viewed as raising constitutional problems under article III.”¹¹⁵ On the contrary, the Framers viewed these “popular actions” as an appropriate means of ensuring judicial enforcement of federal law.

Congress also authorized *ex parte* actions to enforce federal law. For example, the Naturalization Act of 1790 conferred on “any common law court of record,”¹¹⁶ including a federal court, the power to entertain petitions for naturalization. Cases under the Act did not involve adverse parties or litigants who had suffered any injury-in-fact. Rather, individuals could file a petition to obtain benefits secured by federal law—namely, a declaration of naturalized citizenship.¹¹⁷ During the Founding era, it was well understood that “Congress can create individual rights and enable individuals to bring an *ex parte* action in federal court to secure formal recognition of the right in question.”¹¹⁸

To be sure, notwithstanding these many measures to afford access to the courts, “[p]rocedural rules of the eighteenth century made many lawsuits hard to bring. Between the need to fit one’s case into one of the forms of action, limitations on joinder of parties and claims, the division of law and equity, restrictive rules of personal jurisdiction, and a variety of other obstacles, there were indeed many

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disputes that never assumed a form suitable for litigation.”¹¹⁹ But the Framers did not write any of these restrictive rules into Article III, leaving them subject to change. Instead, the Framers granted to the Article III judiciary the “judicial power of the United States,” including the power to say what the law is in all cases

arising under the Constitution, federal laws and treaties. To ensure the judiciary’s power to vindicate legal rights, the Framers incorporated into American law common law principles designed to ensure that “every right when withheld must have a remedy, and every injury its proper redress.”¹²⁰ And, while the “general rule” in the Founding era was surely that a legal “action should be brought in the name of the party whose *legal* right has been affected, against the party who committed the injury,”¹²¹ the Framers also recognized that, in certain cases, it was appropriate to give citizens a right as citizens to enforce federal

legal requirements. In short, the Founding era vision of “Judiciary cases” was a broad one, encompassing both private actions in which individuals sued to vindicate their own individual rights and public actions designed to ensure that the government acted in accord with the rule of law.

Broad, however, does not mean unlimited. The Framers had a clear understanding of the limits of the power of Article III courts to say what the law is. First, the Framers maintained a fundamental

The Founding era vision of “Judiciary cases” was a broad one, encompassing both private actions in which individuals sued to vindicate their own individual rights and public actions designed to ensure that the government acted in accord with the rule of law.

distinction between questions of law to be decided by courts and political matters entrusted by the Constitution to other branches of government and not suitable for judicial resolution.

Second, courts were limited by Article III to the exercise of “judicial power.”

For a court to issue advice to the political branches or act as an executive organ would be extra-judicial action, beyond what courts may permissibly do.

In 1793, Alexander Hamilton explained the political question doctrine in defending President Washington’s authority to proclaim the neutrality of the United States in the war between Britain and France. “The province of th[e Judiciary] Department is to decide litigations in particular cases. It is indeed charged with the interpretation of treaties; but it exercises this function only in the litigated cases; that is where contending parties bring before it a specific controversy.”¹²² “[P]ronouncing upon the external political relations of Treaties between Government and Government” was a matter for the Executive alone.¹²³

John Marshall—first in his 1800 speech to the House of Representatives concerning the Jonathan Robbins affair and later in *Marbury v. Madison*—extended Hamilton’s arguments, making clear that some legal questions are committed by the Constitution to other branches and are not suitable for resolution by the courts. Robbins was a seaman on an American ship, who was accused of being British officer Thomas Nash, wanted by the British for committing mutiny and murder. In 1799, after President Adams approved Robbins’s extradition, a federal judge delivered Robbins to the British, who then executed him.¹²⁴ Republicans in Congress attacked President Adams, complaining that his actions represented a “dangerous interference of the Executive with Judicial decisions” and that the judge’s compliance was a “sacrifice of the Constitutional independence of the Judicial power.”¹²⁵ John Marshall answered these objections in a lengthy speech that explained Robbins’s case was one “for Executive and not Judicial decision” because it involved “questions of political law, proper to be decided, . . . by

the Executive, and not by the courts.”¹²⁶ Today, conservatives often try to anchor standing doctrine in Marshall’s famous speech.¹²⁷ But Marshall’s point did not concern standing to sue but rather the role of the judiciary concerning matters left to other branches by the Constitution.

Marshall began by explaining Article III’s limitation to cases arising under the Constitution: “A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the Judicial power extended to every question under the Constitution, it would involve almost every subject proper for Legislative discussion and decision; if, to every question under the laws and treaties of the United States, it would involve almost every subject on which the Executive could act.”¹²⁸ Marshall recognized that a “case in law or equity proper for judicial decision may arise under a treaty, where the rights of individuals acquired or secured by a treaty are to be asserted or defended in court,”¹²⁹ but he asserted that the extradition question was different. “The case was in its nature a national demand made upon the nation. The parties were the two nations. They cannot come into court to litigate their claims, nor can a court decide on them. Of consequence, the demand is not a case for judicial cognizance.”¹³⁰ Because, under Article II, “the President is the sole organ of the nation in its external relations, . . . the demand of a foreign nation can only be made on him.”¹³¹ These arguments carried the day, and form the basis of the political question doctrine.

Marshall’s basic argument—that the “need to act ‘judicially’ [w]as a genuine limitation on the powers of the federal courts,”¹³²—also lies at the core of Article III’s ban on advisory opinions to the political branches. As the Justices explained in 1793 in refusing to answer questions posed by Secretary of State Thomas Jefferson, “the lines of separation drawn by the Constitution between the three departments of the government” are “checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to.”¹³³ This was essentially the same judgment that the Framers had made in rejecting a Council of Revision—it was no part of the business of judges to advise the political branches on the legality of government action before the fact.

Article III’s broad grant of powers to the federal courts led to debate over the scope of the sovereign immunity of state governments, and ultimately to the ratification of the Eleventh Amendment. The next section turns to examine that Amendment’s text and history.

State Sovereign Immunity and the Eleventh Amendment

SOVEREIGN IMMUNITY AT THE FRAMING

The Constitution, as originally written and ratified, made no mention of state sovereign immunity, and for good reason. Sovereign immunity was based on the English notion that the King can do no wrong,¹³⁴ but the Framers rejected that conception of sovereignty.¹³⁵ As James Wilson explained, “sovereignty resides in the people; they have not parted with it; they have only dispensed such portions of power as were conceived necessary for the public welfare. This Constitution stands upon this broad principle.”¹³⁶ The Constitution sought to check the acts of governments, not immunize them from violating basic rights. As James Madison asked, “[w]as, then, the American revolution effected, was the American confederacy formed, was the precious blood of thousands spilt, . . . not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States . . . might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty? . . . [A]s far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter.”¹³⁷

The Constitution’s supremacy depended on the authority of courts to police the federal-state balance in suits by individuals against state governments and their officers. As Madison recognized,

The Constitution sought to check the acts of governments, not immunize them from violating basic rights.

“[t]hat causes of a federal nature will arise, will be obvious to every gentleman who will recollect that the states are laid under restrictions, and that the rights of the Union are secured by these restrictions.”¹³⁸ Indeed, Article III expressly

provided for original jurisdiction in the Supreme Court “[i]n all Cases . . . in which a State shall be Party”¹³⁹ “suppl[y]ing a constitutional basis on which the Court may hear federal claims against the states” and “perfecting the system of judicial control of state action that the framers consciously wrote into Article III.”¹⁴⁰

In the debates over the ratification of the Constitution, the only dispute over sovereign immunity concerned Article III’s grant of jurisdiction to federal courts over “Controversies . . . between a State and Citizens of another State” and “between a State . . . and foreign . . . Citizens or Subjects.” This

grant of jurisdiction was hotly contested because a number of states feared being hauled into federal court to pay millions of dollars of state debts contracted before the ratification of the Constitution.¹⁴¹

Opponents of the Constitution assailed this part of Article III, observing that “[e]very state in the Union is largely indebted to individuals. . . . If the power of the judicial under this clause will extend to the cases above stated, it will, if executed . . . crush the states beneath its weight.”¹⁴² George Mason questioned whether a “state [is] to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification?”¹⁴³

In response, a number of the Constitution’s supporters argued that Article III properly extended to suits against states. Emphasizing that Article III provides original jurisdiction in cases “where a state shall be a party,” Edmund Randolph observed that this was designed “to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government,”¹⁴⁴ while James Wilson explained that “[i]mpartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing.”¹⁴⁵

Others, however, denied that states could be sued under Article III’s grant of jurisdiction over controversies between a State and citizens of other states. Hamilton, Madison and Marshall forcefully urged that Article III’s “Arising Under” jurisdiction was necessary to prevent states from violating the Constitution, federal law, and treaties,¹⁴⁶ but they reached a different conclusion concerning state law claims by citizens of one state against another state. In the *Federalist Papers*, Alexander Hamilton responded to the claim that states would be subject to suit in federal court for refusing to pay their debts. Hamilton argued that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. . . . Unless, . . . there is a surrender of this immunity in the plan of the convention, it will remain with the States”¹⁴⁷ Hamilton found no such “alienation of State sovereignty”: “there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligation of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.”¹⁴⁸ In the Virginia ratification debates, Madison and Marshall urged a narrow construction of Article III’s party-based grant of jurisdiction over controversies between a State and citizens of other states. Madison argued that “[i]t is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court,” while John Marshall contended that “[i]t is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing

in other states.”¹⁴⁹

These arguments did not convince opponents of the Constitution, who argued that the Constitution’s text plainly provided for suits against states. As Patrick Henry urged, “[i]f gentlemen pervert the most clear expressions, and the usual meaning of the language of the people, there is an end of all argument. What says the paper? That it shall have cognizance of controversies between a state and citizens of another state, without discriminating between plaintiff and defendant.”¹⁵⁰ Indeed, a number of state ratifying conventions proposed amendments that would have eliminated state-citizen diversity jurisdiction or provided states some form of immunity from suit, as did members of the First Congress.¹⁵¹ None of the proposed Amendments was adopted.

CHISHOLM V. GEORGIA

The Supreme Court ultimately agreed with those who argued that states were subject to suit. In 1793, in *Chisholm v. Georgia*,¹⁵² the Court held that states could be sued under Article III’s citizen-state diversity jurisdiction, rejecting Georgia’s claim of immunity. Justice Wilson explained that “[t]o the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. . . . They might have announced themselves ‘SOVEREIGN’ people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.”¹⁵³ The majority concluded that Georgia’s argument could not be squared with the “direct and explicit declaration of the Constitution itself,” which, in Article III, provides for a number of controversies in which states can be defendant, including federal question, state-citizen diversity, and state-foreign state cases.¹⁵⁴ Indeed, as Justice Wilson explained, in ratifying the Constitution, “the people of the United States intended to bind the several States, by the Legislative power of the national Government” and subject them to “the exercise of a superintending judicial authority.”¹⁵⁵

Justice Iredell dissented, contending that the Judiciary Act of 1789 had authorized the federal courts to apply common law principles, which would not support a suit against the state. But he agreed with much of the majority’s analysis of the Constitution, recognizing that states surrendered certain of their sovereign powers in ratifying the Constitution, agreeing to be “subject to a superior power composed out of themselves for the common welfare of the whole.”¹⁵⁶ He explained that the “Judicial power” conferred by Article III was broad, “commensurate with the ordinary Legislative and Executive powers of the general government,” but also extending to certain controversies that “do[] not relate to any of the special objects of authority of the general government, wherein the separate sovereignties of the States are blended in one common mass of supremacy”¹⁵⁷ Thus, “[s]o far as the States under

the Constitution can be made legally liable to this authority, so far to be sure they are subordinate to the authority of the United States, and their individual sovereignty is in this respect limited.”¹⁵⁸ To be sure, Justice Iredell was reluctant to permit “a compulsive suit against a State for the recovery of money,” declaring that “every word in the Constitution may have its full effect without involving this consequence.”¹⁵⁹ But he found it unnecessary to decide this important question.

THE TEXT AND HISTORY OF THE ELEVENTH AMENDMENT

Constitutional amendments to overrule *Chisholm* were introduced almost immediately. Within days of the Court’s announcement of the opinion in *Chisholm*, members of Congress introduced two radically different proposals to overturn *Chisholm*: (1) a broad measure that would have forbidden individuals from suing the states in all cases, including for a violation of the Constitution itself, and (2) a narrower measure that would have overturned the result in *Chisholm* by providing for state sovereign immunity in citizen-state and foreign citizen-state diversity cases, but would otherwise have left Article III’s jurisdiction over states intact. The proposal that ultimately prevailed reveals that the Eleventh Amendment was designed, not to embody a general principle of state sovereign immunity, but to restrict two of Article III’s grants of diversity jurisdiction. The text and history of the Eleventh Amendment demonstrates, as Professor John Manning has explained, that “the Amendment’s framers carefully picked and chose among Article III, Section 2, Clause 1’s categories in determining what jurisdictional immunity to prescribe.”¹⁶⁰

The Eleventh Amendment was designed, not to embody a general principle of state sovereign immunity, but to restrict two of Article III’s grants of diversity jurisdiction.

On the day after *Chisholm* was decided, Massachusetts Representative Theodore Sedgwick introduced the first proposed Amendment to overrule *Chisholm*. Written in sweeping terms, the Amendment provided that “no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.”¹⁶¹ Sedgwick’s proposal would have prevented individuals for suing states for violating the Constitution, federal laws, and treaties. It would have eliminated a central feature of Article III and sharply limited the power of the federal courts to enforce constitutional guarantees against the states and to maintain the supremacy of federal over state law.

The following day, Massachusetts Senator William Strong introduced a much narrower proposal, which provided that the “Judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”¹⁶² Rather than striking at the core of Article III, this narrow language simply sought to “effect a partial repeal of two technical diverse party grants.”¹⁶³ The Second Congress tabled both proposals and adjourned without taking any action. Although a handful of suits against the states remained pending, Congress did not move forward with an Amendment.

Eventually, Senator Strong’s proposal, with one minor change, became the Eleventh Amendment. When the Third Congress revisited the issue in 1794, the broader language providing state sovereign immunity from suit in federal court in all cases was shelved, and both houses of Congress introduced resolutions that were identical to Senator Strong’s narrower proposal, save for one change. The change was to make the Eleventh Amendment into an explanatory Amendment, providing that the “Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”¹⁶⁴ By inserting this language, the Third Congress made plain that the “Eleventh Amendment sought to clarify the meaning of Article III and make that meaning applicable to pending claims.”¹⁶⁵ By 1795, the Eleventh Amendment had become part of the Constitution.

As ratified, the Eleventh Amendment fell far short of establishing any general principle of state sovereign immunity. As Professor Randy Barnett has observed, “the Eleventh Amendment contains

*As ratified, the Eleventh Amendment
fell far short of establishing any general
principle of state sovereign immunity.*

no explicit reference either to a principle of state sovereignty or to a doctrine of state sovereign immunity.”¹⁶⁶ This is particularly important given the circumstances that led to the adoption of the Amendment. *Chisholm*

had held that state sovereign immunity did not survive the ratification of the Constitution and that our foundational charter made the people sovereign and subjected states to suit in federal court in a number of circumstances, including in federal question, state-citizen diversity cases, and others.¹⁶⁷ In response, a number of states had urged passage of an Amendment that would “remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer any suit by an individual or individuals in any Court of the United States,”¹⁶⁸ but the Eleventh Amendment did not provide any wide ranging immunity from suit.

Instead, as Professor John Manning has explained, the text provided “a carefully circumscribed answer to the larger question of how much sovereign immunity states should possess against the exercise

of Article III jurisdiction.”¹⁶⁹ The Amendment’s “careful inclusion and omission of particular heads of Article III jurisdiction” provided states immunity from suit in state-citizen diversity cases like *Chisholm* as well as state-foreign citizen diversity cases (cases that “warranted like treatment”) but refused to constitutionalize state sovereign immunity in all cases, including cases arising under the Constitution, federal laws, and treaties.¹⁷⁰ Indeed, “so discriminating is the text that it parses a subcategory from amidst the final head of jurisdiction (‘Controversies . . . between a State . . . and foreign States, Citizens or Subjects’), leaving untouched suits between a state and ‘foreign States’ while restricting suits against states by ‘foreign . . . Citizens or Subjects.’”¹⁷¹ Going forward, as Madison and Marshall had urged at the Virginia ratifying convention, states could be plaintiffs under Article III’s state-citizen and state foreign-citizen diversity jurisdiction, but not defendants.¹⁷² But otherwise, “the Eleventh Amendment le[ft] the reasoning of *Chisholm* as it was”¹⁷³ and preserved “basic structural principles of the original Constitution,” ensuring “the special role of federal judges in protecting individual rights against states.”¹⁷⁴

The Great Access to Court Rulings of the Marshall Court

The Supreme Court's earliest cases interpreting Article III and the Eleventh Amendment hewed closely to the Constitution's text and history. Under the leadership of Chief Justice John Marshall, the Supreme Court time and again vindicated the Constitution's promise of access to the federal courts to enforce the Constitution and remedy legal wrongs. In a series of justly famous rulings, the Marshall Court established judicial review, broadly construed Article III's grant of judicial power to allow individuals to bring federal claims to court, and gave a narrow interpretation to the immunity from suit granted in the Eleventh Amendment. Indeed, in the Marshall Court, "every attempt to expand the amendment's meaning beyond its narrow, party-directed language was decisively rejected."¹⁷⁵

In 1803, in *Marbury v. Madison*,¹⁷⁶ the Supreme Court recognized the power of the courts to strike down legislation that violates the Constitution, explaining that enforcing the Constitution's limitations on government power is "the very essence of judicial duty" and necessary to ensure that "the constitution controls any legislative act repugnant to it."¹⁷⁷ *Marbury* recognized that the "province and duty of the judicial department to say what the law is" had to be broadly construed to protect individual rights.¹⁷⁸ As Chief Justice Marshall

observed, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."¹⁷⁹ Indeed,

Marbury invoked the fundamental

principle that "every right, when withheld, must have a remedy, and every injury its proper redress,"¹⁸⁰ in holding that Marbury could sue to obtain his commission as justice of the peace.¹⁸¹ It did not matter that federal law did not grant an express right of action to Marbury, or even that "the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute."¹⁸² Since the refusal to deliver the commission violated his individual right to the office, Marbury had "a right to resort to the laws of his country for a remedy."¹⁸³

In a series of justly famous rulings, the Marshall Court established judicial review, broadly construed Article III's grant of judicial power to allow individuals to bring federal claims to court, and gave a narrow interpretation to the immunity from suit granted in the Eleventh Amendment.

In 1816, in *Martin v. Hunter's Lessee*,¹⁸⁴ the Supreme Court upheld the constitutionality of Section 25 of the Judiciary Act of 1789, which granted jurisdiction to the Supreme Court to review state court judgments denying a federal right. Justice Story, writing for the Court, stressed the “vital importance” to the “national sovereignty” of federal “arising under” jurisdiction as well as the Constitution’s concern that “state attachments, state prejudices, state jealousies, and state interests, might some times obstruct, or control, . . . the regular administration of justice.”¹⁸⁵

The Constitution was “designed to operate upon states, in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. . . .

The courts of the United States can, . . . revise the proceedings of the

executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.”¹⁸⁶ Any other result would (1) leave the Supremacy Clause “without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue”;¹⁸⁷ (2) deny “*uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution” with the result that “the laws, the treaties, and the constitution of the United States would be different in different states”;¹⁸⁸ and (3) deprive individuals of equal justice, as “there would, in many cases, be rights without corresponding remedies.”¹⁸⁹

In 1821, in *Cohens v. Virginia*,¹⁹⁰ the Supreme Court held that it could exercise jurisdiction under Section 25 in cases in which a state was a party. Chief Justice Marshall’s opinion for the Court explained that, under Article III, “[the judicial department] is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party.”¹⁹¹ Rather than adopt a tortured construction of Article III, the Court followed the Framers in concluding that “the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.”¹⁹² Article III, Chief Justice Marshall concluded, “confer[red] on the judicial department the power of construing the constitution and laws of the Union in every case, in the last resort, and of preserving them from violation

Rather than adopt a tortured construction of Article III, the Court followed the Framers in concluding that “the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.”

from every quarter”¹⁹³

Marshall also rejected Virginia’s argument that the Eleventh Amendment prohibited an appeal to the Supreme Court. Marshall concluded that the text and context of the Amendment provided immunity to states only in a narrow set of cases, observing that the Eleventh Amendment was a response to the fact that “at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument.”¹⁹⁴ Looking at the “terms of the amendment,” Marshall found it plain that “its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation,” and that “[w]e must ascribe the amendment, . . . to some other cause than the dignity of a State.”¹⁹⁵ Even if Cohens’ writ of error to the Supreme Court was a suit—which Marshall rejected—the case was not “commenced or prosecuted ‘by a citizen of another State, or by a citizen or subject of any foreign state.’”¹⁹⁶ Accordingly “[i]t is not then within the amendment, but is governed entirely by the constitution as originally framed” in which “the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.”¹⁹⁷

In 1824, in *Osborn v. Bank of the United States*,¹⁹⁸ the Supreme Court reaffirmed its broad understanding of Article III’s grant of “arising under” jurisdiction and its narrow view of Eleventh Amendment immunity, upholding the Bank’s right to sue for the return of money unconstitutionally seized by state officers. Chief Justice Marshall’s opinion for the Court made three critical holdings, each buttressing the Constitution’s promise of access to the courts.

First, Marshall’s opinion adopted a broad definition of an Article III “case,” keeping in mind that Article III enforced the “great political principle” that “[a]ll governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws.”¹⁹⁹ Article III, Marshall explained, “enables the judicial department to

Chief Justice Marshall recognized that the Eleventh Amendment did not stand for any principle of state sovereign immunity, but simply made clear that Article III’s party-based diversity grants of jurisdiction did not permit a suit against a state.

receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form

prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.”²⁰⁰

Second, Marshall gave a broad reading to Article III's "arising under" jurisdiction, recognizing that its plain terms were "as extensive as the constitution, laws, and treaties of the Union" and "designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals."²⁰¹ He explained that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."²⁰²

Third, the Court held that the Eleventh Amendment did not forbid the Bank's suit, affirming the power of the federal courts to "protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws."²⁰³ Marshall reasoned that "in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, . . . is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens."²⁰⁴ As in *Cohens*, Chief Justice Marshall recognized that the Eleventh Amendment did not stand for any principle of state sovereign immunity, but simply made clear that Article III's party-based diversity grants of jurisdiction did not permit a suit against a state.

Access to the Courts and the Fourteenth Amendment

Until the ratification of the Fourteenth Amendment in 1868, the Constitution's promise of access to the courts was not enjoyed by all. In *Dred Scott v. Sandford*, the Supreme Court held that African Americans could not assert “the rights and privileges which that instrument provides for and secures to citizens of the United States,” including “the privilege of suing in a court of the United States in the cases specified in the Constitution.”²⁰⁵ Even outside the South, states made it impossible for African Americans to vindicate their rights in a court of law. For example, when Oregon entered the Union in 1859, its Constitution barred “free Negro[es], or Mulatto[s]” not then living in the state from “maintain[ing] any suit therein.”²⁰⁶ In the debate over Oregon's admission, John Bingham and others denounced Oregon's denial of access to the courts, arguing that “a State which, in its fundamental law, denies to any person, or to a large class of persons, a hearing in her courts of justice, ought to be treated as an outlaw, unworthy [of] a place in the sisterhood of the Republic.”²⁰⁷ Bingham's arguments did not carry the day, but would be influential a decade later when the Fourteenth Amendment was written and ratified.

The Fourteenth Amendment overruled *Dred Scott*, writing the principle of birthright citizenship into the Constitution and ensuring that the access to courts guaranteed by Article III would be broadly enjoyed by individuals

regardless of race. Equally

important, it added to the

Constitution sweeping

new guarantees protecting

fundamental rights and

outlawing discrimination

against all persons. To ensure

these new promises of liberty

and equality for all, judicial

review was necessary. The

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Not surprisingly, the right to sue in a court of law was one of the fundamental rights enumerated in the nation’s first federal civil rights law, the Civil Rights Act of 1866, which provided that “citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, . . . to sue, be parties, and give evidence, . . . and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens”²⁰⁹ As the debates over the Act reflect, the Framers of the Fourteenth Amendment recognized “the right to enforce rights in the courts” as one of the “great fundamental rights” of all Americans.²¹⁰ Even the most basic understanding of freedom included access to the courts. “Is he free who cannot bring a suit in court for the defense of his rights? Sir, if this be liberty, may none ever know what slavery is.”²¹¹

In 1871, the Reconstruction Framers enacted 42 U.S.C. § 1983 to enforce the Fourteenth Amendment, to this day one of the most important federal statutes ensuring that individuals have their day in court when state and local government actors violate federal rights. In enacting Section 1983, Congress acted to provide “further redress for violations under State authority of constitutional rights,”²¹² concluding that it was necessary to “throw[] open the doors of the United States Courts to those whose rights under the Constitution are denied or impaired,” and, thus, ensure the power of the judiciary to “hear with impartial attention the complaints of those who are denied redress elsewhere.”²¹³ In this respect, Section 1983 reflected the basic notion that “judicial tribunals of the country are the places to which the citizen resorts for protection of his person and his property in every case in a free government.”²¹⁴

In 1875, Congress broadened the jurisdiction of the federal courts, giving the federal courts the power to hear “all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,” subject only to a \$500 amount in controversy requirement.²¹⁵ In expanding federal court jurisdiction, Congress acted to “confer a jurisdiction just as it is conferred in the Constitution,” ensuring that federal courts would be open to hear all claims under federal law consistent with Article III.²¹⁶ “This bill gives precisely the power which the Constitution confers—nothing more, nothing less.”²¹⁷

The Invention of Eleventh Amendment Immunity

The overthrow of Reconstruction brought massive political and social changes, as the nation abandoned its commitment to the constitutional principles of liberty and equality for all persons, turning a blind eye as Southern state governments flouted the guarantees of the Fourteenth and Fifteenth Amendments that had just recently become a part of the Constitution. The Supreme Court was an all too willing participant in this process, handing down a line of decisions that gutted the substantive guarantees of the Fourteenth Amendment, struck down Reconstruction-era civil rights laws, and paved the way for Jim Crow in rulings such as the *Slaughter-Houses Cases*, the *Civil Rights Cases*, and *Plessy v. Ferguson*.²¹⁸ This same era witnessed the invention of Eleventh Amendment immunity, as the Supreme Court rewrote the Amendment to give states immunity from suit even when individuals claimed that the state had violated the Constitution. In the wake of the new Reconstruction Amendments expanding individual rights and limiting state sovereignty, the Supreme Court took the country in a different direction, turning the Eleventh Amendment into a broad immunity from suit in federal court and making it harder for individuals to sue to enforce the Constitution.

The immediate context for the massive expansion of Eleventh Amendment immunity was a series of cases involving the South's efforts to flout the Constitution's Contracts Clause. In the aftermath of Reconstruction, white-supremacist southern state governments repudiated their public debts, in many

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cases bonds that had been issued during Reconstruction as a part of efforts to rebuild the South and provide public education and other services.²¹⁹ Since the early days of the Marshall Court, it was settled that such contractual undertakings by the state were protected from repudiation by the Contracts Clause. To get around the Constitution's protections, states argued that the Eleventh Amendment did not permit

a suit against the state to enforce the Constitution in federal court. As late as 1875, the Justices rejected that argument.²²⁰ But, over the next decade and a half, the Supreme Court would repeatedly come to the

aid of Southern state governments, closing the courthouse doors to plaintiffs seeking to ensure that these governments honored their constitutional obligations. The Southern states did not win every one of the debt repudiation cases,²²¹ but they succeeded in establishing a broad rule of state sovereign immunity, exalting the states over the people and curtailing access to courts in cases in which states flouted the Constitution.

Louisiana's effort to repudiate its Reconstruction-era bonds formed the backdrop of two of the most important rulings. The 1874 Louisiana Constitution provided that the bonds created a valid contract between the state and bondholders "which the state shall by no means and in no wise impair," but in 1880, the state adopted a new Constitution that repudiated the bonds. The resulting challenges led to two major precedents expanding Eleventh Amendment immunity.

In 1883, in *Louisiana ex rel. Elliott v. Jumel*,²²² the Supreme Court, by a 7-2 vote, held that New York bondholders could not sue to challenge the state's violation of the Contracts Clause. Chief Justice Morrison Waite wrote that "there is no way in which the state, in its capacity as an organized political community, can be brought before any court of the state, or of the United States," observing that "under the eleventh amendment . . . no state can be sued in the courts of the United States by a citizen of another state."²²³ The Court held that the state's officials could not be sued either, finding that the relief requested would require state officers "to act contrary to the positive orders of the supreme political power of the state."²²⁴

In dissent, Justice John Harlan argued that the majority's expansion of sovereign immunity was in "conflict with the spirit and tenor of its former decisions, subversive of long-established doctrines, and dangerous to the national supremacy as defined and limited by the constitution."²²⁵ The result, Harlan observed, was that the "judicial arm of the nation is hopelessly paralyzed in the presence of an ordinance destructive of those rights, and passed in admitted violation of the constitution of the United States."²²⁶ In a separate dissent, Justice Stephen Field argued that the decision could not be squared with precedent, observing that the "books are full of cases where executive and administrative officers of a state have been required by the judiciary to do certain acts or been enjoined from doing them."²²⁷ "All that is claimed is simply a right to compel her officers to obey her own enactments, such as were constitutionally passed, and thus became laws, and to disregard such as she had no power to pass."²²⁸

In 1890, in *Hans v. Louisiana*,²²⁹ the Court held that a citizen of Louisiana could not sue the state for unconstitutionally repudiating the 1874 bonds. The Court's opinion, written by Justice Joseph Bradley, admitted that the text of the Eleventh Amendment did not cover Hans's suit, but dismissed that fact as irrelevant. According to Bradley, such an "anomalous result" would be "no less startling and unexpected than was the original decision of this court" in *Chisholm v. Georgia*, which "created such a shock of

surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment . . . was almost unanimously proposed, and was in due course adopted by the legislatures of the states.”²³⁰ Hans’s suit against the state, Bradley wrote, “is an attempt to strain the constitution and the law to a construction never imagined or dreamed of.”²³¹

Instead of analyzing what the Constitution actually said, Bradley discussed only what it could have said, offering counter-factuals and speculation. “Can we suppose that, when the eleventh amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, while the idea of suits by citizens of other states . . . was indignantly repelled? Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.”²³² As Randy Barnett has observed, this is the same kind of bankrupt analysis used in *Dred Scott* to justify the conclusion that African Americans were not citizens.²³³

Bradley’s opinion relied on a highly selective analysis of constitutional text and history, invoking the statements of Hamilton, Madison and Marshall during the ratification debates over Article III, while ignoring the text and drafting history of the Eleventh Amendment, which reflected that the Amendment was drafted narrowly to overturn the result in *Chisholm*, but to go no farther, preserving the power of the courts to maintain the Constitution’s status as supreme law over the states. As in *Jumel*, the result ignored the text and turned its federal-state balance upside down, freeing states from federal judicial review—the very check the Framers had insisted on to ensure they complied with the Constitution.

In the wake of *Hans*, the Court applied its rule of state sovereign immunity broadly. Admiralty suits are not suits in law or equity,²³⁴ but in *In re New York*,²³⁵ the Supreme Court extended *Hans* to forbid admiralty suits against a state in federal court. The *New York* Court conceded that the Eleventh Amendment “speaks only of suits in law or equity,”²³⁶ but found the text, as in *Hans*, beside the point. Instead, the Court ruled that “the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given.”²³⁷ Similarly, in *Principality of Monaco v. Mississippi*,²³⁸

In Hans, New York, and Monaco, the Supreme Court ignored the text of the Constitution in favor of penumbras and emanations of state sovereignty, closing the courthouse doors to injured plaintiffs and turning basic principles of constitutional supremacy upside down.

the Court held that the Eleventh Amendment forbids a suit by a foreign state against a state in federal court. Even though the Amendment's text only extends to suits prosecuted by "Citizens or Subjects of any Foreign State,"²³⁹ the Supreme Court, once again, held that this textual limit did not matter. "[W]e cannot . . . assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control."²⁴⁰ In *Hans*, *New York*, and *Monaco*, the Supreme Court ignored the text of the Constitution in favor of penumbras and emanations of state sovereignty, closing the courthouse doors to injured plaintiffs and turning basic principles of constitutional supremacy upside down.

The pendulum, however, soon swung back. In a series of cases, the Supreme Court of the *Lochner* era invoked the Fourteenth Amendment to limit state regulation of railroads and other industries, affirming the power of the courts to intervene to ensure that states obeyed the commands of the Fourteenth Amendment. The turning point was the Court's 1908 decision in *Ex Parte Young*,²⁴¹ which held that suits against state officials for injunctive relief to prevent the enforcement of an unconstitutional state statute did not violate the Eleventh Amendment. Justice Rufus Peckham reviewed the Court's Eleventh Amendment cases from *Osborn* to *Hans*, concluding that "individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."²⁴² Such officer suits, the Court concluded, were not suits against the state. "The act to be enforced is alleged to be unconstitutional . . . [T]he officer, in proceeding under such enactment, comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official . . . character and is subjected in his person to the consequences of his individual conduct."²⁴³

Ex Parte Young rightly affirmed the ability of courts to vindicate the Constitution's limits on state governments and limited much of the damage that had been caused by *Hans*, but the legal fiction at the heart of the ruling left the law confused. How could a suit "be both against the state (for purposes of the Fourteenth Amendment) and yet at the same time not against the state (for purposes of the Eleventh Amendment)?"²⁴⁴ The Court's opinion properly applied the Court's precedents to permit suit against state officials, but failed to lay out why the Constitution must be read to allow individuals their day in court when states violate federal constitutional commands. That failure would prove hugely important, giving conservative Justices in the modern era an opening to limit access to the courts.

The Birth of Article III Standing

For nearly the first 150 years of our nation, there were no Article III standing requirements. Courts assessed a plaintiff's right to bring suit, not as a threshold constitutional inquiry into whether the plaintiff had suffered injury-in-fact, but as part and parcel of deciding whether the plaintiff had a cause of action on the merits. The foundational definition of an Article III case, spelled out by Chief Justice Marshall in *Osborn*, required "a party who asserts his rights in the form prescribed by law,"²⁴⁵ and for that reason a party's right to sue was inextricably bound up with the merits.²⁴⁶ Collusive or friendly suits had long been prohibited in federal courts,²⁴⁷ and the Court had long distinguished between abstract questions of a political nature and suits to vindicate individual rights,²⁴⁸ but there were no Article III standing requirements.

Consistent with the Constitution's text and history, Supreme Court precedent made clear that Article III permitted the federal courts to adjudicate public actions at the behest of plaintiffs who had not suffered any distinctive injury. For example, in 1875, in *Union Pacific Railroad v. Hall*,²⁴⁹ the Supreme Court took a broad view of the power of courts to enforce the law and permitted two merchants to bring an action to compel a railroad to operate its road as a continuous line as required by federal law. Although "the duty they seek to enforce by the writ is a duty to the public generally,"²⁵⁰ the Supreme Court refused to dismiss the case on the grounds that plaintiffs' grievance was a generalized one. "[P]rivate persons may m[o]ve for a *mandamus* to enforce a public duty, not due to the government as such, without the intervention of the government law-officer."²⁵¹ The fact that "the injury complained of is common to the public at large" was no basis for throwing the plaintiffs out of court.²⁵²

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Beginning in the 1920s, this changed, as the Supreme Court would start interpreting the Constitution to close the court house doors to certain plaintiffs. The Court's first Article III standing cases, ironically, spent little time explaining the meaning of Article III. In 1922, in *Fairchild v. Hughes*,²⁵³ the Court dismissed a constitutional challenge to the ratification of the Nineteenth Amendment, explaining that "[p]laintiff's alleged interest . . . is not such as to afford a basis for this proceeding" and stating in conclusory fashion that the suit "is not a case, within the meaning of section 2 of article 3 of the Constitution . . ."²⁵⁴ Plaintiff's "right, possessed by every citizen, to require that the government be administered according to law," the Court wrote, "does not entitle a private citizen to institute in

the federal courts a suit to secure . . . a determination whether a statute, if passed, or a constitutional amendment, about to be adopted, will be valid.”²⁵⁵

The following year, in *Frothingham v. Mellon*,²⁵⁶ the Court dismissed suits brought by federal taxpayers challenging the constitutionality of the Maternity Act, which provided federal funds to improve maternal health. As in *Fairchild*, the Court did not give much attention to the meaning of Article III. Justice Sutherland’s opinion for the Court dismissed the taxpayers’ challenge, reasoning that a federal taxpayer’s interest “is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation . . . so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventative powers of a court of equity.”²⁵⁷ Observing that “[i]f one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same,” the Court declined to permit such suits to go forward, explaining that “[w]e have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act.”²⁵⁸

Decades later, the Burger Court would rely on *Frothingham*’s sweeping language in fashioning the injury-in-fact test as a constitutional threshold for jurisdiction. But *Frothingham* did not impose that requirement. In the early standing cases, the issue of a plaintiff’s right to sue depended on whether he had a legal right that was allegedly violated. Standing remained “a question going to the merits, and its determination is an exercise of jurisdiction,”²⁵⁹ that turned on whether “the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”²⁶⁰

What is most striking about the Court’s early standing cases is how little they said about Article III itself. The Court’s standing cases of the 1920s and 1930s offered nothing in the way of constitutional analysis other than a bare invocation of the fact that the text grants the federal courts judicial power over cases and controversies. In 1939, Justice Felix Frankfurter argued for a new way to interpret Article III. His efforts did not convince a majority of Justices, but would ultimately prove influential.

Justice Frankfurter’s opening salvo came in *Coleman v. Miller*,²⁶¹ in which the Court held that state legislators could challenge the authority of the Lieutenant Governor to cast the deciding vote in favor of Kansas’s ratification of a proposed Child Labor Amendment. In dissent, Justice Frankfurter argued that Article III implied the need for limits on the power of courts to adjudicate cases. “In endowing this Court with ‘judicial Power’ the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for

disposition by judges.”²⁶² “Both by what they said and what they implied, the framers of the Judiciary Article,” Frankfurter wrote, limited the judicial power to “matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’”²⁶³ In his view, “it was not for courts to pass upon [legal questions] as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law.”²⁶⁴

The limitations proposed in Justice Frankfurter’s dissent were not themselves new. What was original was Justice Frankfurter’s efforts to root standing in the text and history of Article III. But his opinion was noticeably light on actual constitutional text and history. Frankfurter said nothing about the Framers’ debates about the role of courts in maintaining the rule of law, the lengthy drafting history of Article III, or even the substantial evidence from the Founding-era concerning the contours of what Madison called judiciary cases. Indeed, Frankfurter seemed to privilege the English experience, focusing more on “the traditional concern of the courts at Westminster,” than the role of the courts in our own constitutional system.

Justice Frankfurter returned to these issues again twelve years later in *Joint Anti-Facist Refugee Committee v. McGrath*,²⁶⁵ a challenge to the Attorney General’s designation of the plaintiff as a Communist organization. The lead opinion quickly disposed of the standing question, explaining that “the touchstone to justiciability is injury to a legally protected right and the right of a bona fide charitable organization to carry on its work, free from defamatory statements of the kind discussed, is such a right.”²⁶⁶ In a lengthy concurring opinion, Justice Frankfurter argued that standing should not turn on the merits, but on whether “the nature of the action challenged, the kind of injury inflicted, and the relationship between the parties are such that judicial determination is consonant with what was, generally speaking, the business of the Colonial courts and the courts of the Westminster when the Constitution was framed.”²⁶⁷ But, as in *Coleman*, Frankfurter did not conduct any analysis of Article III’s text and history, discuss what kind of suits the Framing generation would have recognized, or explain why Article III should be read to rule out salutary improvements since the Founding, such as the use of declaratory judgments. As the Court itself recognized in upholding the Declaratory Judgment Act, the “judiciary clause of the Constitution ‘did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts.’ . . . Congress may create and improve as well as abolish or restrict.”²⁶⁸

Justice Frankfurter’s plea to contract the role of the federal courts proved to be a failure. In the years to come Chief Justice Earl Warren would take the Court in the opposite direction, breathing new life into the constitutional guarantees contained in the Fourteenth Amendment and repeatedly affirming

the role of the federal courts in enforcing the Constitution and maintaining the supremacy of federal law. In this regard, the decisions of the Warren Court would help fulfill the Framers' vision that the federal courts should play a vital role as bulwarks guarding constitutional liberties against invasion by the government.

Access to Courts in the Warren Court

Beginning with *Brown v. Board of Education*,²⁶⁹ the Warren Court revived constitutional guarantees that had long been moribund, nullifying Jim Crow segregation, ensuring that states respected fundamental constitutional principles enshrined in the Bill of Rights and made applicable to them through the Fourteenth Amendment, and requiring states to draw district lines that accorded with political equality. In the process, the Justices repeatedly vindicated the role of the federal courts to act as guardians of individual rights. In *Brown* and the cases that followed it, the Supreme Court turned to the equitable powers specifically conferred on federal courts by Article III, requiring states to run their school system in compliance with the Constitution. While injunctions of the sort ordered by *Brown* were unknown to the Framing era, they followed from Founding and Fourteenth Amendment principles that entrusted to the courts the responsibility for enforcing constitutional guarantees against majorities in the states.²⁷⁰ As *Cooper v. Aaron* made clear, “the federal judiciary is supreme in the exposition of the law of the Constitution” and “[n]o state legislator or executive or judicial officer can war against the Constitution.”²⁷¹

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To achieve these purposes, injunctive relief became the primary engine for enforcing the Constitution’s status as supreme law of the land. *Ex Parte Young*, originally designed to give federal courts the power to supervise state economic regulation, became a crucial tool to enforce the Fourteenth Amendment’s promise of equal citizenship. In numerous cases, the Warren Court invoked *Ex Parte Young* to require states to obey fundamental principles of liberty and equality, repeatedly affirming “the power of courts to protect the people of this country against deprivation and destruction by States of their federally guaranteed rights.”²⁷²

The Warren Court’s standing decisions were very much in line with the notion that it was the responsibility of the judiciary to enforce constitutional limits and vindicate the rights of individuals. In 1962, in *Baker v. Carr*,²⁷³ the Court held justiciable constitutional challenges to the apportionment of seats in Tennessee’s state legislature, which had grossly over-represented rural citizens over city dwellers. To establish standing to sue, the Court held, a plaintiff must demonstrate a “personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of

issues upon which the court so largely depends for illumination of difficult constitutional questions.”²⁷⁴ Invoking Chief Justice Marshall’s affirmation in *Marbury* that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury,”²⁷⁵ the Court found that this test was amply met. “If such impairment [of the right to vote] does produce a legally cognizable injury, they are among those who have sustained it.”²⁷⁶

In 1968, in *Flast v. Cohen*,²⁷⁷ the Court, by an 8-1 vote, held that a federal taxpayer had standing to bring a constitutional challenge to federal aid to education statutes that provided federal funds to finance religious instruction. Chief Justice Warren’s opinion rejected the notion that the standing inquiry turned on “separation of powers” concerns “related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.”²⁷⁸ Rather, “[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court,” and asks “whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.”²⁷⁹ Limiting the ruling in *Frothingham*, the majority held that a taxpayer had standing to challenge “exercises of congressional power under the taxing and spending clause” as a violation of the First Amendment, reasoning that “one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”²⁸⁰

Justice Harlan dissented. He agreed that suits such as *Flast*’s, which he viewed as essentially “‘public actions’ brought to vindicate public rights,” were not “excluded by the ‘case or controversy’ clause of Article III of the Constitution from the jurisdiction of the federal courts” and that “individual litigants, acting as private attorneys-general, may have standing as ‘representatives of the public interest.’”²⁸¹ But he viewed such suits with disfavor, arguing that they “strain the judicial function and press to the limit judicial authority,” and insisted that Congress had to authorize such suits.²⁸² “Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President.”²⁸³

The decisions of the Warren Court succeeded in opening the courthouse doors to individuals seeking to enjoy basic constitutional protections, but they failed to develop a coherent jurisprudence rooted in the text and history of the Constitution. Opinions in cases like *Baker* and *Flast* lowered the bar for Article III standing, but never really developed the point that, in the Constitution’s system of separation of powers, it is the role of the courts to enforce constitutional limits on government action, maintain the supremacy of federal law, and to vindicate the rights of persons. This weakness would be exploited when, in the 1970s, a conservative majority gained an upper hand on the Court.

The Creation of Modern Standing Doctrine

THE ASSAULT ON THE WARREN COURT

Modern standing doctrine was born in the Burger Court. In a host of cases, the conservative wing of the Supreme Court rewrote the meaning of Article III, insisting that courts respect “the proper—and properly limited—role of the courts in a democratic society.”²⁸⁴ As then-judge Antonin Scalia put it, “the judicial doctrine of standing is a crucial and inseparable element of th[e] principle [of separation of powers], whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”²⁸⁵ Under the leadership of Warren Burger, the Supreme Court would write Scalia’s views into constitutional law. In many of the most important standing cases, the Burger Court made it harder to enforce constitutional protections that were at the core of the Warren Court’s landmark rulings.

At first, the Burger Court continued the Warren Court’s legacy of opening courthouse doors. In 1970, in *Association of Data Processing Service Orgs. v. Camp*,²⁸⁶ the Court repudiated prior decisions holding that standing was based on whether the plaintiff had demonstrated a violation of a legal right. “The ‘legal interest’ test goes to the merits. The question of standing is different.”²⁸⁷ Standing analysis turns on whether the “challenged action has caused [plaintiffs] injury in fact, economic or otherwise.”²⁸⁸ The majority invoked the injury-in-fact requirement as a way to lower the barriers for standing to sue, making the test turn on the facts, rather than on whether the plaintiff could show a violation of a legal right. For a time following *Data Processing*, the Justices interpreted the test liberally to allow

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suits by those asserting injury to the environment.²⁸⁹ But beginning in the mid-1970s, in a series of 5-4 rulings, the conservative majority on the Burger Court fashioned a three-part test for standing—requiring (i) “distinct and

palpable,’ and not ‘abstract’ or ‘conjectural’” injury, (ii) that is “‘fairly’ traceable” to the challenged action, and (iii) likely to be redressed by a favorable ruling²⁹⁰—and applied it to keep injured plaintiffs out of court, often seizing on concerns about the effectiveness of proposed remedies to justify denying court access altogether. The resulting standing doctrine was ad hoc at best and unprincipled at worst, with the Court often seizing on standing “to fence out disfavored federal claims.”²⁹¹

The basic building blocks of the Court's new standing jurisprudence were not tied in any way to the text or history of Article III, and one reads the Burger Court's opinions in vain searching for any constitutional analysis of the text, other than a reference to Article III's grant of judicial power to adjudicate certain enumerated "cases" and "controversies." The result was a body of law that had no moorings in Article III and turned a blind eye to the Framers' decision to make the courts the frontline defense against violations of the Constitution.

In 1975, in *Warth v. Seldin*,²⁹² the Supreme Court, in a 5-4 opinion, dismissed a constitutional challenge to zoning ordinances that effectively excluded moderate- and low-income persons from living in the town of Penfield, NY. Justice Powell's majority opinion held that plaintiffs' allegations that they desired to reside in Penfield and had

searched for affordable housing, but

were unable to find any because of

the city's discriminatory practices—

plainly concrete injuries—were not

enough to create an Article III case.

According to the majority, the plaintiffs

also had to show that their "inability

to locate suitable housing in Penfield

reasonably can be said to have resulted,

in any concretely demonstrable way,

from respondents' alleged constitutional and statutory infractions" and that "absent the . . . restrictive

zoning practices, there is a substantial probability that they would have been able to purchase or lease

in Penfield."²⁹³ The majority's crabbed analysis lost sight of the plaintiffs' most basic injury—the state's

denial of equal opportunity.²⁹⁴ Overturning the town's discriminatory practice would have ensured the

plaintiffs an equal opportunity to participate in a housing market not distorted by government-sponsored

discrimination.²⁹⁵

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In 1983, in *City of Los Angeles v. Lyons*,²⁹⁶ the Court threw out a lawsuit brought by Adolphus

Lyons, who had been placed in a chokehold by Los Angeles police officers after being stopped for a

traffic violation. In a 5-4 opinion, the majority held that, despite the injuries inflicted on him, "Lyons has

failed to demonstrate a case or controversy with the City that would justify the equitable relief sought."²⁹⁷

Lyons could sue for damages, but the majority held that he lacked standing to sue for injunctive relief

under Article III absent a showing of a "real and immediate threat that he would again be stopped . . .

by an officer or officers who would illegally choke him into unconsciousness without any provocation

or resistance on his part.”²⁹⁸ Unless Lyons could prove that the remedy would certainly benefit him, the majority ruled, he lacked Article III standing.

The majority’s analysis turned Article III on its head, throwing Lyons out of court despite the clear presence of a case or controversy between Lyons and the city, and effectively immunized the city’s policy from constitutional scrutiny. As Justice Thurgood Marshall made the point in his dissenting opinion, the “Court’s decision removes an entire class of constitutional violations from the equitable powers of a federal court.”²⁹⁹ “Since no one can show that he will be choked in the future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy.”³⁰⁰

In 1984, in *Allen v. Wright*,³⁰¹ by a vote of 5-3, the Court dismissed a suit brought by parents of African American public school children against the IRS for failing to deny tax-exempt status to racially discriminatory private schools. Adopting then-Judge Scalia’s separation of powers analysis of standing, the *Allen* majority explained that “the law of Article III standing is built on a single basic idea—the idea of separation of powers” and that standing inquiries “must be answered by reference to the Art. III notion that federal courts may exercise power only ‘in the last resort, and as a necessity,’ and only when adjudication is ‘consistent with a system of separated powers’”³⁰² The majority conceded that injury suffered by plaintiffs was “one of the most serious injuries recognized in our legal system,”³⁰³ but nevertheless held that they could not sue. The majority doubted whether an injunction would “make an appreciable difference in public school integration”³⁰⁴ and found that separation of powers principles did not permit plaintiffs “to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.”³⁰⁵ In a sharply worded dissent, Justice Brennan charged that the majority had “denied access to litigants who properly seek vindication of their constitutional rights” and turned its back on “the important historical role that the courts have played in the Nation’s efforts to eliminate racial discrimination from our schools.”³⁰⁶

The most important development to come out of these cases was not simply the creation of the injury-in-fact test, but the Burger Court’s insistence on what has been called “remedial standing.”³⁰⁷ In *Warth*, *Lyons*, and *Allen*, the Burger Court’s conservative majority kicked plaintiffs out of court who had unquestionably been injured because of concerns that the remedy they sought would not truly benefit them. Anelino Ortiz and the other plaintiffs in *Warth* lost because of the majority’s concern that relief forbidding exclusionary zoning would not result in housing they could actually afford. Adolph Lyons lost because the majority thought he would not benefit from an injunction preventing chokeholds of the kind to which he had been subjected. Inez Wright lost because of doubts that a judgment would affect segregation in the public schools. This reasoning—which has no basis in the text of Article III, let alone

the history that put access to courts at its center—inverts the normal process of litigation, “foreclose[ing] a federal court from obtaining pertinent information about the lawfulness of the defendant’s conduct and from balancing the various interests, before deciding whether relief ought to be provided.”³⁰⁸

Even if the Burger Court’s highly contestable judgments in these cases were correct, the Court never sufficiently explained why these remedial questions should be a part of the definition of an Article III case. Indeed, even if there were room to doubt the efficacy of injunctive relief, any plaintiff whose constitutional rights are violated should at the very least qualify for nominal damages on the grounds that “an injury imports a damage, when a man is thereby hindered of his right.”³⁰⁹ Given that there should always be some remedy available to a plaintiff whose constitutional rights have been denied, even if it is only a \$1 in nominal damages, “an inquiry into the effectiveness of a particular remedy should play no part in article III standing analysis.”³¹⁰

The Burger Court justified its restrictive view of standing on the separation of powers, forgetting that the judiciary’s role in the Constitution’s scheme of separation of powers is to enforce the Constitution’s commands and vindicate the rights of individuals. Cases like *Allen* were “separation of powers decision[s] that employ[ed] no separation of powers analysis.”³¹¹ Rather than focusing on its

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own conceptions of “the proper—and properly limited—role of the courts in a democratic society,”³¹² the Burger Court should have looked to the text and history of Article III and the role that the Framers of the Constitution gave to the courts in our constitutional scheme.

If it had, it would have recognized the

Framers’ view that “courts of justice” would function as “bulwarks of a limited Constitution” and “guard the Constitution and the rights of individuals.”³¹³ Indeed, even on then-Judge Scalia’s view that “the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority,”³¹⁴ the Burger Court’s standing decisions were seriously out of step with the Constitution.

ARTICLE III IN THE REHNQUIST COURT: THE ATTACK ON CITIZEN SUITS

Next to come under attack were citizen suit provisions in federal statutes designed to open up the federal courts to lawsuits by citizens to enforce federal laws. Going all the way back to the Founding, Congress had provided for public actions enlisting citizens in the enforcement of federal law³¹⁵ and Supreme Court precedent had long blessed such congressional efforts.³¹⁶ Nonetheless, in a sharp departure from prior precedent, the conservative majority held such citizen suits violated Article III. In 1992, in *Lujan v. Defenders of Wildlife*,³¹⁷ the Supreme Court held unconstitutional as applied the citizen suit provision of the Endangered Species Act.

In *Lujan*, environmental groups contended that the Secretary of the Interior had violated the Endangered Species Act by eliminating the Secretary's duty to consult with relevant federal agencies to ensure protection of endangered species. In the most consequential part of Justice Scalia's majority opinion, the Court held that the plaintiffs could not invoke the citizen suit provision of the Endangered Species Act. In the majority's view, "a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy."³¹⁸ Enforcing the citizen suit provision, Scalia argued, "would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch," giving to the courts the power to enforce "the public interest in proper administration of the laws," and thereby "permit[ting] Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty."³¹⁹

Ignoring the text and history of Article III as well as the long history of federal statutes that enlisted citizens in the enforcement of federal law, Justice Scalia's opinion in Lujan improperly limited the power of Congress to create legal remedies for violations of federal law, exalting the power of the Executive over the judiciary and Congress.

Ignoring the text and history of Article III as well as the long history of federal statutes that enlisted citizens in the enforcement of federal law, Justice Scalia's opinion in *Lujan* improperly limited the power of Congress to create legal remedies for violations of federal law, exalting the power of the Executive over the judiciary and Congress. The Framers had insisted that the "judicial power" should be co-extensive with the legislative powers, but in Justice Scalia's view, courts cannot enforce "public rights" created by Congress even if Congress provides a right to sue to enforce such rights.³²⁰ That view cannot be squared with the Constitution's text and history.

Justice Scalia's opinion in *Lujan* limiting citizen suits garnered six votes, but there were clear signs of fracturing among the *Lujan* majority. In a critical concurring opinion, Justice Kennedy affirmed that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," stressing that "[a]s Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition."³²¹ In Justice Kennedy's view, Article III permits Congress to open the federal courts to such new kinds of cases so as long as Congress identifies "the injury it seeks to vindicate" and relates "the injury to the class of persons entitled to bring suit."³²² Indeed, in a number of cases following *Lujan*, the Justices upheld citizen suit provisions often over forceful dissents by Justice Scalia. These cases moved the law back in line with Article III's text and history that afforded Congress substantial latitude to create judicial remedies that enlist citizens in the enforcement of federal law.

In 1998, in *FEC v. Akins*,³²³ the Court held that a group of voters had standing to sue under the Federal Election Campaign Act to vindicate their statutory right to information related to campaign finance. Justice Breyer's majority opinion held that the "'injury in fact' that [the voters] have suffered consists of their inability to obtain information" that, they argue, "the statute requires AIPAC make public."³²⁴ It did not matter that the voters' injury was widely shared by many others. "[T]he informational injury . . . is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts."³²⁵ A contrary conclusion would limit the power of courts to redress injuries in cases in which "large numbers of individuals suffer the same common-law injury" or "where large numbers of voters suffer interference with voting rights conferred by law."³²⁶ In dissent, Justice Scalia argued that the statute could not be constitutionally applied to permit a generalized grievance shared by all. As in *Lujan*, Scalia contended that Article III did not give the courts the power to vindicate public rights held by all Americans.

In 2000, in *Friends of the Earth v. Laidlaw Environmental Services*,³²⁷ the Court held that environmental groups had standing to sue under the Clean Water Act's citizen-suit provision to obtain an award of civil penalties in order to deter water pollution. The majority concluded that Congress could authorize suits by aggrieved individuals to ensure effective enforcement of federal law, observing that "an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties."³²⁸ In dissent again, Justice Scalia, joined by Justice Thomas, argued that the majority's ruling had "marr[ied] private wrong with public remedy in a union that violates traditional principles of federal standing" thereby "permitting law enforcement to be placed in the hands of private individuals."³²⁹

That same year, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*,³³⁰ the Justices upheld the power of the federal courts to hear *qui tam* suits, recognizing, as Justice Ginsburg observed in a concurring opinion, that “history’s pages place the *qui tam* suit safely within the ‘case’ or ‘controversy’ category.”³³¹ Justice Scalia had dissented in prior cases upholding citizen suit provisions, but in *Vermont Agency*, he authored the majority opinion, finding it impossible to ignore the Framers’ plain validation of *qui tam* suits. Scalia’s opinion examined the long history of *qui tam* suits since the Founding, observing that “immediately after the framing, the First Congress enacted a considerable number of informer statutes,” some of which “provided both a bounty and an express cause of action; others provided a bounty only.”³³² This history was “well nigh conclusive” on the meaning of Article III.³³³

As these cases reflect, *Lujan* has been narrowed significantly, allowing courts to hear cases brought under citizen suit provisions and other federal laws that expand standing. After *Akins* and *Friends of the Earth*, Congress may enact citizen

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suit provisions that enlist individuals in the enforcement of federal law when the underlying federal statutes create rights, such as the right to information about campaign finance or the right to enjoy the environment free from water pollution. As these cases hold, “Congress is entirely authorized to grant standing to individuals who share an injury with many other people, even with all citizens.”³³⁴ Further, as Scalia himself recognized in *Vermont Agency*, Congress may also use *qui tam* suits to help ensure more effective enforcement of federal law. In all these ways, standing doctrine has moved more in line with the Framers’ understanding that Congress would have the authority to create judicial remedies that enlist citizens in the enforcement of federal law.

ARTICLE III IN THE ROBERTS COURT

After this string of progressive victories in the Rehnquist Court, conservatives Justices, once again gained the upper hand in the Roberts Court. Under the leadership of John Roberts—who was a strong advocate for limiting the role of the federal courts before his confirmation—the Roberts Court has moved the law to the right in significant ways, making it harder for individuals to vindicate individual rights secured by the Constitution. That said, the Roberts Court has continued to affirm Congress’ broad authority to create statutory standing.

Perhaps, the biggest, and most troubling, standing ruling of the Roberts Court is *Clapper v.*

Amnesty International USA,³³⁵ which dismissed a Fourth Amendment challenge to provisions of the Foreign Intelligence Surveillance Act Amendments that authorized covert, warrantless surveillance of Americans' international communications. In a 5-4 decision handed down just a few months before Edward Snowden revealed that the government had been engaged in a secret wiretapping program, the Court dismissed a Fourth Amendment challenge to the statute, finding "it is speculative whether the Government will imminently target communications to which respondents are parties."³³⁶ In a ruling that asked plaintiffs to do the impossible, the Court's conservative majority held that a threatened injury had to be "certainly impending," and that plaintiffs could not meet that new, demanding test because they "have set forth no specific facts demonstrating that the communications of their foreign contacts will be targeted."³³⁷

Clapper reads Article III's definition of cases and controversies in a crabbed manner, disabling courts from performing their historic role of vindicating individual rights. In the context of a program of secret surveillance, requiring proof of specific facts that individual plaintiffs will be surveilled is tantamount to denying judicial review altogether. Indeed, as observers have noted, it is not clear that the majority's restrictive view of standing would be satisfied even in the wake of Snowden's disclosures.³³⁸ In a dissenting opinion, Justice Breyer argued that "*certainty* is not, and never has been, the touchstone of standing."³³⁹ But the dissent missed the opportunity to make the larger point that it is the Article III judiciary's duty, in our Constitution's system of separation of powers, to ensure that Congress does not trample on the individual rights our Constitution secures to all.

In two other 5-4 rulings featuring the same division among the Justices, the Roberts Court dismissed suits by taxpayers challenging the government's use of funds to advance religion, making it harder for individuals to go to court to challenge violations of the Establishment Clause. In *Hein v. Freedom From Religion Foundation*,³⁴⁰ the Court held that Article III did not permit federal taxpayers to sue to challenge a federal agency's spending of federal funds in a manner that advances religion. Stressing that "*Flast* focused on congressional action," Justice Alito's plurality opinion "decline[d] . . . to extend its holding to encompass discretionary Executive Branch expenditures," emphasizing that allowing taxpayers to challenge executive action on Establishment Clause grounds would pose grave separation-of-powers concerns.³⁴¹ Once again, the majority's analysis perverted true separation of power principles, eliminating an essential check on executive infringement of constitutional liberties. As Justice Souter's dissenting opinion observed, "if the

Clapper reads Article III's definition of cases and controversies in a crabbed manner, disabling courts from performing their historic role of vindicating individual rights.

Executive could accomplish through the exercise of discretion exactly what Congress cannot do through legislation, Establishment Clause protection would melt away.”³⁴²

In *Arizona Christian School Tuition Organization v. Winn*,³⁴³ a sequel to *Hein*, the Court dismissed a suit challenging the constitutionality of Arizona’s tax credit for contributions to school tuition organizations that used the contributions to provide scholarships to religious schools, emphasizing that a tax credit was different for standing purposes than a government expenditure of the kind involved in *Flast*. In a powerful dissent, Justice Elena Kagan ridiculed that distinction, observing that “[c]ash grants and targeted tax breaks are means of accomplishing the same governmental objective” and both allow the government to “finance[] the religious activity.”³⁴⁴ The Court’s reading of Article III, she wrote, “enables the government to end-run *Flast*’s guarantee of access to the Judiciary. . . . And that result—the effective demise of taxpayer standing—will diminish the Establishment Clause’s force and meaning.”³⁴⁵

Not all of the Roberts Court’s standing cases take such a stingy view of Article III’s grant of judicial power to resolve cases or controversies. The Court has continued to affirm the power of Congress to confer statutory standing. In *Massachusetts v. EPA*,³⁴⁶ the Court held, by a 5-4 vote, that Massachusetts could sue the EPA for failing to regulate greenhouse gas emissions under the Clean Air Act, continuing the trend of limiting *Lujan*. The majority’s opinion stressed the importance of the Clean Air Act’s grant of statutory standing, noting its “critical importance to the standing inquiry: ‘Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.’”³⁴⁷ Since Congress had provided a procedural right to seek judicial review of the EPA’s order, a “litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.”³⁴⁸ Rejecting the dissent’s charge that the Court had intruded into the political domain, the majority reasoned that the “parties’ dispute turns on the proper construction of a congressional statute, a question eminently suitable to resolution in federal court” and that “EPA’s steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both ‘actual’ and ‘imminent.’”³⁴⁹

This Term, in *Spokeo, Inc. v. Robins*,³⁵⁰ the Justices recognized that Congress has broad powers to give consumers the right to sue to vindicate their federal rights, observing that “Congress is well positioned to identify intangible harms that meet minimum Article III requirements.”³⁵¹ While Justice Alito’s brief majority opinion held that the lower court’s standing analysis was “incomplete” and should have asked whether Robins had suffered a concrete injury when Spokeo misrepresented his credit information,³⁵² every member of the Court recognized, as Justice Ruth Bader Ginsburg observed in dissent, that “Congress has the authority to confer rights and delineate claims for relief where none existed before.”³⁵³

An important theme running through the *Spokeo* opinions is that common law history can provide a strong foundation for providing access to the courts. Justice Alito's majority opinion drew an analogy to libel and slander cases and explained that "[j]ust as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances

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point, observing that, dating back to the Founding, the common law power of courts to vindicate private, individual rights was broad and extensive. "In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. . . . Many traditional remedies for private-rights causes of action . . . are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right."³⁵⁵ Accordingly, Justice Thomas observed that "the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights" and that "[a] plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right."³⁵⁶

to constitute injury in fact. . . . [A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified."³⁵⁴ In an important concurring opinion, Justice Clarence Thomas amplified this key

The Expansion of Eleventh Amendment Immunity

The Supreme Court's rightward shift in the 1970s and 1980s also produced a substantial expansion of Eleventh Amendment immunity. In a series of 5-4 rulings, the Court's conservative majorities on the Burger and Rehnquist Courts claimed that the Eleventh Amendment secured the dignity of states and prevented suits brought by individuals against the states, and, in some cases, state officials as well. Taking a broad view of *Hans* and a crabbed one of *Ex Parte Young*, these rulings ignored the text of the Constitution and turned a blind eye to the fundamental principles of constitutional supremacy, letting states off the hook when individuals sought to hold them accountable in a court of law. The "state dignity" theory of the Eleventh Amendment had been rejected in landmark rulings of the Marshall Court. Ensuring dignity for states, not individuals, however, would be the linchpin of the Court's new Eleventh Amendment doctrine.

The Burger Court's rulings consistently limited the scope of *Ex Parte Young*, holding that the Eleventh Amendment's bar applied broadly to suits against states as well as state officials. In 1974, in *Edelman v. Jordan*,³⁵⁷ then-Justice Rehnquist authored a 5-4 ruling holding that an individual could not sue state officials seeking an award of retroactive relief. Emphasizing that "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment," Rehnquist concluded that a retroactive award of benefits would violate the Eleventh

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Amendment because it was "in practical effect indistinguishable . . . from an award of damages against the State."³⁵⁸ "[A] federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief, and may not include a retroactive award which requires the payment of funds from the state treasury."³⁵⁹

In 1984, in *Pennhurst State School & Hospital v. Halderman*,³⁶⁰ the Court held that the Eleventh Amendment did not permit a federal court to award injunctive relief against state officials on the basis of state law, concluding that "the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III."³⁶¹ According to the majority, the "entire basis for the

doctrine of *Young* . . . disappears” when “a plaintiff alleges that a state official has violated *state* law.”³⁶² In a blistering dissent, Justice John Paul Stevens took the majority to task for “repudiat[ing] at least 28 cases, spanning well over a century,” arguing that “[s]ince a state official’s conduct in violation of state law is no less illegal than his violation of federal law, in either case the official, by committing an illegal act, is ‘stripped of his official or representative character.’”³⁶³

In 1985, Justice Brennan led a counter-attack. In *Atascadero State Hospital v. Scanlon*,³⁶⁴ which held that individuals with disabilities could not sue the states for disability discrimination forbidden

Hans and its progeny “read[] into the Amendment words that are not there” and “simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments.”

by the Rehabilitation Act, Justice Brennan strenuously argued that the Court’s Eleventh Amendment doctrine should be reconsidered.³⁶⁵ Brennan’s dissent, speaking for four Justices, argued that “the Court’s Eleventh Amendment doctrine diverges from text and history,” and “rests on flawed

premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect.”³⁶⁶ In an exhaustive review of the Constitution’s text and history, Justice Brennan concluded that “[t]here simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.”³⁶⁷ Rather, as the text of the Eleventh Amendment and its history confirm, “the Amendment was intended simply to adopt the narrow view of the state-citizen and state-alien diversity clauses; henceforth, a State could not be sued in federal court where the basis of jurisdiction was that the plaintiff was a citizen of another State or an alien.”³⁶⁸ In a separate dissent, Justice Blackmun wrote that *Hans* and its progeny “read[] into the Amendment words that are not there” and “simply cannot be reconciled with the federal system envisioned by our Basic Document and its Amendments.”³⁶⁹

In case after case, the conservative majority—first under the leadership of Warren Burger and then under William Rehnquist—rejected these arguments, and continued to expand aggressively the scope of Eleventh Amendment immunity.³⁷⁰ The exception was *Pennsylvania v. Union Gas Co.*,³⁷¹ in which Brennan cobbled together a majority to uphold the power of Congress to subject states to suit for violation of federal laws. But *Union Gas* would be overruled in just a matter of years. In two key 5-4 rulings by the Rehnquist Court, the conservative majority imposed severe limits on the power of Congress to provide remedies for state violation of federal rights, holding that Congress could not use its Article I authority to subject states to suit for violation of federal law either in federal or state court.³⁷² These cases, and their progeny,³⁷³ freed states from compliance with a host of federal legal protections.

In 1996, in *Seminole Tribe v. Florida*, the Court held that the Eleventh Amendment forbids Congress from using its Article I authority to subject states to suit, overruling *Union Gas*. Chief Justice Rehnquist's majority opinion recognized that the "text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts" but refused to follow the text where it led, insisting that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"³⁷⁴ In the majority's view, "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."³⁷⁵ To subject states to suit, Congress could only use powers, such as the grant of enforcement power in the Fourteenth Amendment, which "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."³⁷⁶

In a strongly worded dissent, Justice Souter castigated the majority for holding "for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right."³⁷⁷ In a lengthy review of the Constitution's text and history, Justice Souter concluded that "the history and structure of the Eleventh Amendment convincingly show that it reaches only to suits subject to federal jurisdiction exclusively under the Citizen-State Diversity Clauses."³⁷⁸ The Amendment "did not affect federal-question jurisdiction," reflecting the "Framers' general concern with curbing abuses by state governments" and the need "to render the States judicially accountable for violations of federal rights."³⁷⁹ Justice Souter argued that "constitutionalizing *Hans*'s rule against abrogation by Congress compounds and immensely magnifies the century-old mistake of *Hans* itself"³⁸⁰

In 1999, in *Alden v. Maine*, the Court held that state employees could not sue their employer in state court to redress violations of the Fair Labor Standards Act. In an opinion by Justice Kennedy, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."³⁸¹ To get around the fact that the Eleventh Amendment does not apply to suits in state court, the majority announced a new, far-reaching basis for sovereign immunity. "[T]he sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. . . . [T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."³⁸² In the majority's view, state immunity from private suits was "central

to sovereign dignity” and “inheres in the system of federalism established by the Constitution.”³⁸³ For that reason, “the scope of the States’ immunity from suit is demarcated not by the text of the [Eleventh] Amendment alone but by fundamental postulates implicit in the constitutional design.”³⁸⁴ This analysis, as Justice Souter explained in another lengthy dissenting opinion, “is true neither to history nor to the structure of the Constitution,” “stints on enforcing federal rights,” and substitutes “politesse in place of respect for the rule of law.”³⁸⁵

As dissents written by Justice Brennan, Souter, and others have powerfully made the case, the Court’s Eleventh Amendment doctrine fails the basic test of constitutional fidelity. It ignores the very words of the Eleventh Amendment, missing the basic fact that the Constitution’s text does not guarantee

As dissents written by Justice Brennan, Souter, and others have powerfully made the case, the Court’s Eleventh Amendment doctrine fails the basic test of constitutional fidelity. It ignores the very words of the Eleventh Amendment, missing the basic fact that the Constitution’s text does not guarantee sovereign immunity to states.

sovereign immunity to states. Alden goes even further, suggesting that the Eleventh Amendment is essentially irrelevant since principles of federalism implicit in the Constitution prohibit private suits against states, whether in federal or state court and whether the claim arises under the Constitution, federal law, or state law. The result is a body of doctrine at war with a whole host of deeply embedded constitutional first principles.

The Court’s doctrine exalts the dignity of states at the expense of both federal authority and individual rights, preventing the federal courts from fulfilling their historic role of vindicating individual rights and remedying wrongs. Worse still, these cases do not even grapple with the Framing era history that shows the special role the federal courts were to play in ensuring that states respect the Constitution and the supremacy of federal law. It is hard to find a line of cases so badly out of step with the Constitution’s text and history.

Conclusion

Conservatives insist on a very narrow view of the role of the federal courts. The Framers had a different view of the role of the federal judiciary they created. When the Framers gathered in Philadelphia to create a new system of government, courts figured prominently in their thinking. Article III's grant of judicial power to the federal courts would ensure that our new nation would not relive the experiences of government under the Articles of Confederation, when federal laws were effectively a dead letter. In the Framers' conception of separation of powers, the courts had a critical role to play in protecting freedom, stopping abuse of power, and ensuring that our nation lived according to the rule of law. This basic history has been cast aside in the Court's cases.

The checking function of the Article III judiciary—central to the Framers—has been virtually ignored in the Supreme Court's separation of powers-focused standing doctrine. All too often, the Court's Article III doctrines have been most crabbed in cases in which racial minorities and others not likely to prevail in the political process have sued to vindicate constitutional protections and redress abuse of power by the government. It's precisely in these cases that we depend on courts to act to uphold the rule of law and ensure that the government is accountable to the people. At the same time conservative Justices insist that Article III's grant of judicial power to decide cases and controversies must be strictly construed, these same Justices have given a wildly expansive construction to the Eleventh Amendment, viewing suits against states to enforce federal law as insulting to the sovereign dignity of the states. That view has no basis in the Constitution's text and history, and has left individuals whose federal rights have been violated unable to pursue meaningful remedies, either in state or federal court.

Access to courts is the building block of the rule of law and all of our most precious constitutional guarantees. That was the Framers' vision, and it should be ours too. Courts matter, and the vitality of the rule of law depends on individuals being able to go to court to vindicate their legal rights and prevent abuse of power by the government. Now—with a vacancy on the Supreme Court left by Justice Scalia's death—progressives have a critical opportunity to move the law back in line with the Constitution's text and history. That history, detailed in this report, is essential to restore the Constitution's promise of access to courts.

In the Framers' conception of separation of powers, the courts had a critical role to play in protecting freedom, stopping abuse of power, and ensuring that our nation lived according to the rule of law.

Endnotes

- ¹ 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 554 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].
- ² 4 *id.* at 258.
- ³ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382, 384 (1821).
- ⁴ *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).
- ⁵ *Allen v. Wright*, 468 U.S. 737 (1984).
- ⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
- ⁷ *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).
- ⁸ For leading commentary, see Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1 (1984); Gene R. Nichol, Jr., *Abusing Standing: A Comment on Allen v. Wright*, 133 U. PA. L. REV. 635 (1985); William A. Fletcher, *The Structure of Standing*, 98 YALE L. J. 221 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).
- ⁹ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
- ¹⁰ U.S. CONST. amend. XI.
- ¹¹ See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Coleman v. Md. Court of Appeals*, 132 S. Ct. 1327 (2012).
- ¹² 134 U.S. 1 (1890).
- ¹³ See JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); 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); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663 (2004); Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729 (2007).
- ¹⁴ *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).
- ¹⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

¹⁶ *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Minneci v. Pollard*, 132 S. Ct. 617 (2012).

¹⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., 1966) [hereinafter FARRAND’S RECORDS].

¹⁸ 2 *id.* at 666.

¹⁹ Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 231-32 (1985) (observing that the “mandatory vesting of judicial power in Article III parallels the opening passages of Article I and Article II” and that “[r]ead together, the first three Articles of the Constitution establish three equal and co-ordinate branches of federal government, each of which derives its power not from the other branches, but from the Constitution itself”); *see also* Stephen G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1175 (1992) (explaining that the “Vesting Clauses of Articles II and III contain nearly identical language in parallel grammatical formulations”).

²⁰ U.S. CONST. art. III, § 1.

²¹ *See* 2 FARRAND’S RECORDS, *supra* note 17, at 131-32; Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 8-12 (2010).

²² THE FEDERALIST NO. 70, at 391 (Clinton Rossiter ed., 1961) (Hamilton); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 599-603 (1994).

²³ THE FEDERALIST NO. 78, *supra* note 22, at 437 (Hamilton).

²⁴ U.S. CONST. art. III, § 1.

²⁵ THE FEDERALIST NO. 78, *supra* note 22, at 433, 434 (Hamilton).

²⁶ *See* FARRAND’S RECORDS, *supra* note 17, at 27-28 (“Confidence can (not) be put in the State Tribunals as guardians of the National authority and interests. In all the States these are more or less dependt. on the Legislatures.”); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *in* 2 THE WRITINGS OF JAMES MADISON 336, 339 (Gaillard Hunt ed., 1901) (“If the Judges in the last resort depend on the States, and are bound by their oaths to them and not to the Union, the intention of the law and the interests of the nation may be defeated by the obsequiousness of the tribunals to the policy or prejudices of the States.”). As Gordon Wood has observed, Article III’s tenure and salary protections were the first of their kind in American law. “No single state constitution had granted that degree of independence to its judiciary; indeed, in 1789 most state judges remained remarkably dependent on the popular legislatures, which in nearly all the states . . . retained some appellate authority in adjudication.” GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 408 (2009).

²⁷ THE FEDERALIST NO. 81, *supra* note 22, at 454 (Hamilton); 3 ELLIOT’S DEBATES, *supra* note 1, at 570 (Randolph) (“If the state judiciaries could make decisions conformable to the laws of their states, in derogation to the general government, . . . the federal government would soon be encroached upon.”); 4 *id.* at 172 (Maclaine) (“[I]f they be the judges of the local or state laws, and receive emoluments for acting

in that capacity, they will be improper persons to judge of the laws of the Union. . . . It is impossible for any judges, receiving pay from a single state, to be impartial in cases where the local laws or interests of that state clash with the laws of the Union . . .”).

²⁸ U.S. CONST. art. III, § 2, cl. 1.

²⁹ The Supremacy Clause provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties . . . shall be the supreme Law of the Land . . .” U.S. CONST. art. VI, cl. 2.

³⁰ 2 ELLIOT’S DEBATES, *supra* note 1, at 196 (Elsworth).

³¹ See Randy E. Barnett, *The Original Meaning of the Judicial Power*, 12 SUP. CT. ECON. REV. 115, 117 (2004) (arguing that “the original meaning of the ‘judicial power’ in Article III, included the power of judicial nullification”).

³² James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required by Article III Courts*, 98 COLUM. L. REV. 696, 708 (1998); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1333 (2001) (noting that Article III’s “arising under” language is “virtually identical to the corresponding language in the Supremacy Clause”).

³³ Amar, *supra* note 19, at 249.

³⁴ Letter from James Madison to Thomas Jefferson (June 27, 1823), in 9 THE WRITINGS OF JAMES MADISON, *supra* note 26, at 137, 142 (1910).

³⁵ THE FEDERALIST NO. 78, *supra* note 22, at 434 (Hamilton).

³⁶ 2 ELLIOT’S DEBATES, *supra* note 1, at 445 (Wilson); see also *id.* at 196 (Elsworth) (“If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void. . . . [I]f the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.”).

³⁷ 3 ELLIOT’S DEBATES, *supra* note 1, at 553 (Marshall).

³⁸ 4 ELLIOT’S DEBATES, *supra* note 1, at 157 (Davie); see also *id.* at 156 (“Without a judiciary, the injunctions of the Constitution may be disobeyed, and the positive regulations neglected or contravened.”).

³⁹ 3 ELLIOT’S DEBATES, *supra* note 1, at 532.

⁴⁰ 1 FARRAND’S RECORDS, *supra* note 17, at 124.

⁴¹ 4 ELLIOT’S DEBATES, *supra* note 1, at 158 (Davie); see also 1 FARRAND’S RECORDS, *supra* note 17, at 128 (Madison) (proposing to “vest the Genl. Govt. with authority to erect an Independent Judicial, coextensive wt. ye. Nation”); *id.* at 147 (Wilson) (“[T]he Judicial, Legislative and Executive departments ought to be commensurate.”); 3 ELLIOT’S DEBATES, *supra* note 1, at 517 (Pendleton) (“[T]he power of the judiciary must be coëxtensive with the legislative power, and reach to all parts of society intended to

be governed.”); *id.* at 532 (Madison) (“[I]t is so necessary and expedient that the judicial power should correspond with the legislative”); Letter from Samuel Holden Parsons to William Cushing (Jan. 1, 1788), in *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* (John P. Kaminski et al. eds, digital ed. 2009) (“[T]he judicial powers of every state must be coextensive with the legislative – and I cannot find that the legislative powers proposed in this Constitution are extended to any objects in which the nation are not immediately or mediately concerned.”).

⁴² *THE FEDERALIST* No. 80, *supra* note 22, at 444.

⁴³ 3 *ELLIOT’S DEBATES*, *supra* note 1, at 554; *see also* 4 *id.* at 139 (Spaight) (“When any government is established, it ought to have power to enforce its laws, or else it might as well have no power. What but that is the use of a judiciary? . . . [N]o government can exist without a judiciary to enforce its laws . . .”).

⁴⁴ *Id.* at 145.

⁴⁵ *Id.* at 146.

⁴⁶ *See* Richard Henry Lee, *Letters of the Federal Farmer* (Oct. 8, 1787), in *PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES* 279, 306-07 (Paul L. Ford ed., 1888).

⁴⁷ Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 *WASH. & LEE L. REV.* 787, 792 (1999) (quoting *Address of the Convention* (Mar. 1780), in *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, at 434, 437 (Oscar Handlin & Mary Handlin eds., 1966)).

⁴⁸ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1443 (1987) (explaining that Confederation courts were “pitiful creatures of Congress, dependent on its pleasure for their place, tenure, salary, and power”); *see also* Robert J. Pushaw, Jr., *Article III’s Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 *NOTRE DAME L. REV.* 447, 469 (1994) (explaining that “Confederation tribunals failed because they were dependent, advisory organs”); James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 *CALIF. L. REV.* 555, 585 (1994) (observing that the “limited scope of national judicial power” under the Articles “prevented national courts from enforcing the obligations of the states to the confederation”).

⁴⁹ *THE FEDERALIST* No. 21, *supra* note 22, at 106, 107 (Hamilton).

⁵⁰ *THE FEDERALIST* No. 22, *supra* note 22, at 118 (Hamilton).

⁵¹ James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 *THE PAPERS OF JAMES MADISON* 345, 351 (Robert A. Rutland & William M. E. Rachal eds., 1975).

⁵² *Id.* at 352; *see also* *THE FEDERALIST* No. 38, *supra* note 22, at 206 (Madison) (“[T]he Confederation is chargeable with the still greater folly of declaring certain powers in the federal government to be absolutely necessary, and at the same time rendering them absolutely nugatory . . .”).

⁵³ Madison, *supra* note 51, at 348, 349, 354; *see also* 1 *FARRAND’S RECORDS*, *supra* note 17, at 315 (Madison) (“[T]he violations of the federal articles had been numerous & notorious.”).

⁵⁴ 1 *FARRAND’S RECORDS*, *supra* note 17, at 167 (Wilson) (“To correct its vices is the business of this

convention.”).

⁵⁵ THE FEDERALIST NO. 80, *supra* note 22, at 443-44 (Hamilton). As James Pfander notes, “Hamilton’s statement implicitly speaks of actions in law (‘correct’) and equity (‘restrain’), and thus echoes the reference in Article III to ‘cases, in law and equity.’” Pfander, *supra* note 48, at 601 n.185; *see also* Gibbons, *supra* note 13, at 1910 n.104.

⁵⁶ For accounts of the debates in the convention, *see* Liebman & Ryan, *supra* note 32, at 705-73; Clark, *supra* note 32, at 1346-55; Anthony J. Bellia, Jr., *The Origins of Article III “Arising Under” Jurisdiction*, 57 DUKE L.J. 263, 292-304 (2007).

⁵⁷ 1 FARRAND’S RECORDS, *supra* note 17, at 21-22.

⁵⁸ *Id.* at 54.

⁵⁹ *Id.* at 284 (Hamilton) (emphasis removed); *see also* 4 ELLIOT’S DEBATES, *supra* note 1, at 155 (Davie) (“I know but two ways in which the laws can be executed by any government. . . . The first mode is coercion by military force, and the second is coercion through the judiciary.”).

⁶⁰ 1 FARRAND’S RECORDS, *supra* note 17, at 97.

⁶¹ *Id.* at 98.

⁶² *Id.* at 109.

⁶³ *Id.* at 94-95, 104.

⁶⁴ Robert L. Jones, *Lessons from a Lost Constitution: The Council of Revision, the Bill of Rights, and the Role of the Judiciary in Democratic Governance*, 27 J.L. & POL. 459, 507 (2012).

⁶⁵ Later in the Convention, Madison sought a second bite at the apple, proposing a Council of Revision once again. Once again, the Convention preferred judicial review to a Council of Revision in which judges participated: “[A]s to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.” 2 FARRAND’S RECORDS, *supra* note 17, at 76 (Martin); *id.* at 79 (Ghorum) (“Judges ought to carry into the exposition of the laws no prepossessions with regard to them.”); *id.* at 80 (Rutledge) (“The Judges ought never to give their opinion on a law till it comes before them.”).

⁶⁶ 1 FARRAND’S RECORDS, *supra* note 17, at 164.

⁶⁷ *Id.* at 166, 165.

⁶⁸ 2 FARRAND’S RECORDS, *supra* note 17, at 28. Later in the Convention, the negative was, once again, proposed and rejected. *Id.* at 390-91.

⁶⁹ 2 FARRAND’S RECORDS, *supra* note 17, at 28-29.

⁷⁰ *Id.* at 389.

⁷¹ *Id.* at 183 (report of Committee on Detail).

⁷² *Id.* at 603 (report of Committee on Style).

⁷³ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION

174 (1996).

⁷⁴ 2 FARRAND'S RECORDS, *supra* note 17, at 46.

⁷⁵ *Id.*

⁷⁶ *Id.* at 430. We take up the question of the meaning of the term “Judiciary Cases” in Part I.D.

⁷⁷ *Id.* The Framers also agreed to give the federal courts the power to hear cases arising under federal treaties, further conforming Article III's Arising Under Clause with the Supremacy Clause. *Id.* at 431.

⁷⁸ 4 ELLIOT'S DEBATES, *supra* note 1, at 156 (Davie).

⁷⁹ Luther Martin, *The Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention* (Nov. 29, 1787), reprinted in 3 FARRAND'S RECORDS, *supra* note 17, at 172, 220.

⁸⁰ *Brutus XIII* (Feb. 21, 1788), reprinted in THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES 462, 463 (Bruce Frohnen ed., 1999).

⁸¹ *Brutus XI* (Jan. 31, 1788), reprinted in THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES, *supra* note 80, at 448, 450; see also *Brutus XII* (Feb. 7, 1788), reprinted in THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES, *supra* note 80, at 455, 456 (observing that “the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means”).

⁸² 3 ELLIOT'S DEBATES, *supra* note 1, at 527 (Mason); 4 *id.* at 136 (Spencer) (arguing that federal question jurisdiction “will be oppressive in their operation”); *Brutus XI*, *supra* note 81, at 448, 452 (arguing that the “judicial power will operate to effect, . . . an entire subversion of the legislative, executive and judicial powers of the individual states”).

⁸³ *Brutus XV* (Mar. 20, 1788), reprinted in THE ANTI-FEDERALISTS: SELECTED WRITINGS AND SPEECHES, *supra* note 80, at 476.

⁸⁴ 3 ELLIOT'S DEBATES, *supra* note 1, at 564 (Grayson).

⁸⁵ *Id.* at 523 (Mason); see also *id.* at 565 (Grayson) (“The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude.”); see also *Centinel I*, INDEP. GAZETTEER (Oct. 5, 1787), reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41 (“The objects of jurisdiction . . . are so numerous . . . that it is more than probable that the state judicatories would be wholly superseded . . .”); *The Impartial Examiner I*, VA. INDEP. CHRON. (Feb. 27, 1788) reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41 (“This is to be co-extensive with the legislature, and, like that, is to swallow up all other courts of judicature.—For what is that judicial power which ‘shall extend to all cases in law and equity’ . . . but an establishment universal in its operation?”).

⁸⁶ *Brutus XI*, *supra* note 81, at 454.

⁸⁷ 4 ELLIOT'S DEBATES, *supra* note 1, at 258 (Pinckney); see also *A Landholder V* (Dec. 3, 1787), reprinted in THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 41 (“A perfect

uniformity must be observed thro the whole Union, or jealousy and unrighteousness will take place; and for a uniformity, one judiciary must pervade the whole.”).

⁸⁸ 4 ELLIOT’S DEBATES, *supra* note 1, at 258 (Pinckney); *see also* Aristides, *Remarks on the Proposed Plan of a Federal Government* Jan. 31, 1788), in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, *supra* note 46, at 238 (“The purpose of extending so far the jurisdiction of the federal judiciary, is to give every assurance to the general government, of a faithful execution of its laws, and to give citizens, states, and foreigners, an assurance of the impartial administration of justice.”).

⁸⁹ 4 ELLIOT’S DEBATES, *supra* note 1, at 160 (Davie).

⁹⁰ *Id.*

⁹¹ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON, *supra* note 51, at 295, 297-98.

⁹² Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 51, at 13, 13.

⁹³ 1 ANNALS OF CONG. 457 (1789).

⁹⁴ 3 ELLIOT’S DEBATES, *supra* note 1, at 532.

⁹⁵ 1 ANNALS OF CONG. 455, 454 (1789).

⁹⁶ *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1640, at 507 (1833).

⁹⁷ THE FEDERALIST NO. 80, *supra* note 22, at 444 (Hamilton).

⁹⁸ For discussion, *see* Sunstein, *supra* note 8, at 171-79; Winter, *supra* note 8, at 1394-1409; Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 819-27 (1969).

⁹⁹ *Ashby v. White*, (1702) 92 Eng. Rep. 126, 137 (Holt, C.J., dissenting), *rev’d*, (1703) 91 Eng. Rep. 665. For discussion, *see* F. Andrew Hessick, *Standing, Injury In Fact, and Private Rights*, 93 CORNELL L. REV. 275, 280-86 (2008) (discussing English and early American case law permitting “nominal damages for violations of rights that did not result in harm”); *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 508 (C.C.D. Me. 1838) (No. 17,322) (opinion of Story, J.) (“Actual, perceptible damage is not indispensable as the foundation of an action. The law tolerates no farther inquiry than whether there has been the violation of a right. If so, the injured party is entitled to maintain his action for nominal damages, in vindication of his right, if no other damages are fit and proper to remunerate him.”).

¹⁰⁰ 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *23.

¹⁰¹ 1 *id.* at *55-56.

¹⁰² MASS. CONST. of 1780, art. XI.

¹⁰³ MD. CONST. of 1776, art. XVII; N.H. CONST. of 1784, art. XIV; VT. CONST. of 1786, ch. 1, para. 4; PA. CONST. of 1790, art. IX, § 11; DEL. CONST. of 1792, art. I, § 9; KY. CONST. OF 1792, art. XII, § 13; TENN. CONST. of 1796, art. XI, § 17.

¹⁰⁴ Act of Sept. 24, 1789, § 25, 1 Stat. 73, 85-86 (1789).

¹⁰⁵ See David E. Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U. L. REV. 521, 525-34 (1989) (discussing 1789 Act); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 85-86 (1997) (discussing Framers' expectation that federal courts would hear certain constitutional claims in diversity actions).

¹⁰⁶ Act of Sept. 24, 1789, § 14, 1 Stat. at 81-82.

¹⁰⁷ S.A. de Smith, *The Prerogative Writs*, 11 CAMBRIDGE L.J. 40, 48 (1951).

¹⁰⁸ 3 BLACKSTONE, *supra* note 100, at *109; see also *James Bagg's Case*, (1615) 77 Eng. Rep. 1271, 1277-78 (K.B.) (noting the broad judicial power of the King's Bench to ensure that "no wrong or injury, either public or private, can be done but that it shall be (here) reformed or punished by due course of law"); *Rex v. Barker*, (1762) 97 Eng. Rep. 823, 824-25 (K.B.) (explaining that mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one").

¹⁰⁹ See Act of July 31, 1789, § 29, 1 Stat. 29, 44-45 (providing that, in the event an duty collector's or naval officer's fails to post a table of rates and fees, that he "shall forfeit and pay one hundred dollars . . . to the use of the informer"); Act of Sept. 1, 1789, § 21, 1 Stat. 55, 60 (following provisions of Act of July 31, 1789 regarding "penalties and forfeitures"); Act of Mar. 1, 1790, § 3, 1 Stat. 101, 102 (providing, in the event that a marshal fails to file properly census forms, for "forfeitures" to "be recoverable . . . by action of debt, information or indictment; the one half thereof to the use of the United States, and the other half to the informer"); Act of July 20, 1790, § 1, 1 Stat. 131, 131 (providing, in the case failure of a vessel commander to execute a contract with a mariner, that the commander "shall . . . forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States"); *id.* at § 4, 1 Stat. at 133 (providing for similar forfeiture for harboring runaway seamen); Act of July 22, 1790, § 3, 1 Stat. 137, 138 (providing, in the case of trading with Indians without a license, for a "forfeiture" of merchandise, "one half to the benefit of the person prosecuting, and the other half to the benefit of the United States"); Act of Feb. 25, 1791, § 8, 1 Stat. 191, 196 (providing for a forfeiture, in the case of violation of provisions of the Bank Act, "one half thereof to the use of the informer, and the other half thereof to the use of the United States"); Act of Mar. 3, 1791, § 44, 1 Stat. 199, 209 (providing that "penalties and forfeitures," in the case of violation of Distilled Spirits Act, "shall be for the benefit of the person or persons who shall make a seizure, or who shall first discover the matter or thing whereby the same shall have been incurred; and the other half to the use of the United States"); Act of Feb. 20, 1792, § 25, 1 Stat. 232, 239 (providing that "pecuniary penalties and forfeitures" for violation of the Post Office Act "shall be, one half for the use of the person or persons informing or prosecuting for the same, the other half to the use of the United States"); Act of Mar. 22, 1794, §§ 2, 4, 1 Stat. 347, 349 (providing for forfeiture, in the case of a person engaging in foreign slave trade, "one moiety thereof to the use of the United States, and the other moiety to the use of such person or persons, who shall sue for and prosecute the same"); Act of May 19, 1796, § 18, 1 Stat. 469, 474 (providing that "fines and

forfeitures,” for violation of the Act regulating trade with Indian tribes, “shall be, one half to the use of the informant, and the other half to the use of the United States”). For discussion, see Sunstein, *supra* note 8, at 175; Winter, *supra* note 8, at 1407-09; Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1315 (2006) (observing that “[d]ozens of statutes contained provisions for sharing the proceeds of prosecution with informants in so-called qui tam actions”).

¹¹⁰ *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

¹¹¹ Act of Sept. 24, 1789, § 9, 1 Stat. at 76-77.

¹¹² Sunstein, *supra* note 8, at 172.

¹¹³ 3 BLACKSTONE, *supra* note 100, at *160. As James Pfander has demonstrated, 18th century Scottish law also recognized some kinds of public actions, permitting “popular actions primarily in the nature of declaratory judgment proceedings that would clarify contested public rights.” James E. Pfander, *Standing to Sue: Lessons from Scotland’s Actio Popularis*, 66 DUKE L.J. (forthcoming 2017) (manuscript at 18), available at <http://bit.ly/pfander>.

¹¹⁴ See Sunstein, *supra* note 8, at 175; see also Mashaw, *supra* note 109, at 1317-18 (observing that “qui tam actions were often provided by statute as a means of recovering from wayward officials”).

¹¹⁵ Winter, *supra* note 8, at 1409.

¹¹⁶ See Act of Mar. 26, 1790, § 1, 1 Stat. 103.

¹¹⁷ For discussion, see James E. Pfander & Daniel D. Birk, *Article III Judicial Power, The Adverse Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1361-63 (2015).

¹¹⁸ *Id.* at 1452.

¹¹⁹ John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1003-04 (2002); see also Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 784-92 (2004) (discussing “[f]ormal, [r]emedies-[b]ased” understanding of cause of action at time of the Founding).

¹²⁰ 3 BLACKSTONE, *supra* note 100, at *109.

¹²¹ 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON PLEADING 1 (1809), quoted in William A. Fletcher, *The “Case or Controversy” Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 273 (1990) (emphasis in original).

¹²² Alexander Hamilton, *Pacificus No. I* (June 29, 1793), in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38 (Harold C. Syrett & Jacob E. Cooke eds., 1969).

¹²³ *Id.*

¹²⁴ On the Jonathan Robbins affair, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

¹²⁵ 10 ANNALS OF CONG. 533 (1800).

¹²⁶ *Id.* at 605, 613.

¹²⁷ See, e.g., *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

¹²⁸ 10 ANNALS OF CONG. 606 (1800).

¹²⁹ *Id.*

¹³⁰ *Id.* at 613; see also *id.* at 615 (“[T]he question whether the nation has or has not bound itself to deliver up any individual, charged with having committed murder or forgery within the jurisdiction of Britain, is a question the power to decide which rests alone with the Executive department”).

¹³¹ *Id.* at 613.

¹³² Fletcher, *supra* note 121, at 267.

¹³³ See Letter from Chief Justice Jay & Associate Justices to President George Washington (Aug. 8, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 488, 488 (Henry P. Johnston ed., 1891).

¹³⁴ Even in England, sovereign immunity was far from complete. “The immunity was personal to the monarch; it was not enjoyed by other government officers, all of whom were subject to ordinary legal process, More important, by the eighteenth century, the petition of right, the writ by which suit could be brought against the monarch, was entertained routinely” Gibbons, *supra* note 13, at 1895-96.

¹³⁵ See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 50 (1988). A number of the colonial charters and earliest state constitutions expressly provided that the governing authorities could be sued. Gibbons, *supra* note 13, at 1896-98; e.g. PA. CONST. of 1790, art. IX, § 11 (“Suits may be brought against the commonwealth in such manner, in such courts, and in such cases, as the legislature may by law direct.”). By contrast, “[n]ot a single eighteenth-century state constitution . . . asserted that the newly created state was not subject to suit.” Gibbons, *supra* note 13, at 1897-98.

¹³⁶ 2 ELLIOT’S DEBATES, *supra* note 1, at 443; see also THE FEDERALIST NO. 46, *supra* note 22, at 262 (Madison) (“The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes. . . . [T]he ultimate authority . . . resides in the people alone”). For further discussion, see Amar, *supra* note 13, at 1429-66.

¹³⁷ THE FEDERALIST NO. 45, *supra* note 22, at 257 (Madison). Indeed, Madison pushed for a federal negative because he was concerned that judicial review, alone, would not be sufficient to check the acts of state governments. He worried that “a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decree in support of them.” Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 5 WRITINGS OF JAMES MADISON, *supra* note 26, at 17, 27. Plainly, Madison expected states to be subject to suit for violating the Constitution.

¹³⁸ 3 ELLIOT’S DEBATES, *supra* note 1, at 532 (Madison).

¹³⁹ U.S. CONST. art. III, § 2, cl. 2; see also THE FEDERALIST NO. 39, *supra* note 22, at 213 (Madison) (“In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only.”); 3 ELLIOT’S DEBATES,

supra note 1, at 549 (Pendleton) (“The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party.”).

¹⁴⁰ See Pfander, *supra* note 48, at 613.

¹⁴¹ See Pfander, *supra* note 13, at 1281-1313.

¹⁴² *Brutus XIII*, *supra* note 80, at 466.

¹⁴³ 3 ELLIOT’S DEBATES, *supra* note 1, at 527.

¹⁴⁴ *Id.* at 573 (emphasis omitted); see also *id.* at 575 (“Are we to say that we shall discard this government because it would make us all honest?”).

¹⁴⁵ 2 *id.* at 491.

¹⁴⁶ See *infra* text accompanying notes 28-46.

¹⁴⁷ THE FEDERALIST NO. 81, *supra* note 22, at 455-56.

¹⁴⁸ *Id.* at 456.

¹⁴⁹ 3 ELLIOT’S DEBATES, *supra* note 1, at 533, 555.

¹⁵⁰ *Id.* at 543.

¹⁵¹ *Id.* at 660-61 (Virginia); 4 *id.* at 246 (North Carolina); 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 317 (1894) (Rhode Island); 1 ANNALS OF CONG. 791-92 (1789). For discussion, see Fletcher, *supra* note 13, at 1051-53.

¹⁵² 2 U.S. (2 Dall.) 419 (1793).

¹⁵³ *Id.* at 454 (opinion of Wilson, J.); *id.* at 457 (“[T]he citizens of Georgia, when they acted upon the large scale of the Union, as part of the ‘People of the United States,’ did not surrender the Supreme or Sovereign Power to that State; but, as to the purposes of the Union, retained it to themselves. As to the purposes of the Union, therefore, Georgia is NOT a sovereign State.”); *id.* at 479 (opinion of Jay, C.J.) (affirming the “great and glorious principle” that “the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own Courts to have their controversies determined”).

¹⁵⁴ *Id.* at 466 (opinion of Wilson, J.); *id.* at 466-68 (opinion of Cushing, J.); *id.* at 474-77 (opinion of Jay, C.J.).

¹⁵⁵ *Id.* at 464, 465; see also *id.* at 465 (“What good purpose could this Constitutional provision secure, if a State might pass a law impairing the obligation of its own contracts; and be amenable, for such violation of right, to no controuling judiciary power”); *id.* at 468 (opinion of Cushing, J.) (“[N]o argument of force can be taken from the sovereignty of States. Where it has been abridged, it was thought necessary for the greater indispensable good of the whole.”).

¹⁵⁶ *Id.* at 447 (opinion of Iredell, J.).

¹⁵⁷ *Id.* at 435.

¹⁵⁸ *Id.* at 435-36.

¹⁵⁹ *Id.* at 449-50.

¹⁶⁰ Manning, *supra* note 13, at 1739.

¹⁶¹ See *Proceedings of the United States House of Representatives*, GAZETTE U.S. (Feb. 19, 1793), reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: SUITS AGAINST STATES 605, 605-06 (Maeva Marcus ed., 1994).

¹⁶² 3 ANNALS OF CONG. 651-52 (1793).

¹⁶³ Amar, *supra* note 13, at 1482.

¹⁶⁴ 4 ANNALS OF CONG. 25 (1794); *id.* at 30-31 (passage in the Senate); *id.* at 477-78 (passage in the House).

¹⁶⁵ Pfander, *supra* note 13, at 1314.

¹⁶⁶ Barnett, *supra* note 13, at 1751; see also Amar, *supra* note 13, at 1481 (“The text does not speak sweepingly of state ‘sovereign immunity,’ . . .”).

¹⁶⁷ Barnett, *supra* note 13, at 1754 (explaining that the “narrowly drafted words of the Eleventh Amendment were adopted by Congress in the face of the Court’s open denial of state sovereignty”).

¹⁶⁸ See, e.g., Resolution of the Massachusetts General Court (Sept. 27, 1793), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800: SUITS AGAINST STATES, *supra* note 161, at 440, 440; see also Pfander, *supra* note 13, at 1336-38 (discussing Massachusetts resolution and others similar state resolutions).

¹⁶⁹ Manning, *supra* note 13, at 1748.

¹⁷⁰ See *id.* at 1739, 1740; see also Fletcher, *supra* note 13, at 1060 (observing that the Senate version did not “create a general state sovereign immunity protection from all suits by private citizens, as the first proposal would have done”).

¹⁷¹ Manning, *supra* note 13, at 1739.

¹⁷² See Fletcher, *supra* note 13, at 1061-62 (“The amendment required that the Clause be construed . . . to authorize federal court jurisdiction only when the state was a plaintiff.”).

¹⁷³ Barnett, *supra* note 13, at 1756.

¹⁷⁴ Amar, *supra* note 13, at 1483. Some conservatives argue that state sovereign immunity should be considered a constitutional backdrop—a common law rule that Congress cannot change. See, e.g., William Baude, *Sovereign Immunity and the Constitutional Text* (Univ. of Chi., Pub. Law Working Paper No. 558, 2016), available at <http://bit.ly/BaudeSSRN>. Sovereign immunity may certainly qualify as a common law doctrine, but Baude cannot show that it has or should have constitutional stature—at least outside the diversity context. On the contrary, the text and history of Article III and the Eleventh Amendment demonstrates that the sovereign immunity of states is limited to the diversity cases specified in the text.

¹⁷⁵ Gibbons, *supra* note 13, at 1941.

¹⁷⁶ 5 U.S. (1 Cranch) 137 (1803).

¹⁷⁷ *Id.* at 178, 177.

¹⁷⁸ *Id.* at 177; *see also id.* (“Those who apply the rule to particular cases, must of necessity expound and interpret the rule.”).

¹⁷⁹ *Id.* at 163.

¹⁸⁰ *Id.* (quoting 3 BLACKSTONE, *supra* note 100, at *109).

¹⁸¹ *See* Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 447-48 (1989).

¹⁸² *Marbury*, 5 U.S. at 172.

¹⁸³ *Id.* at 166.

¹⁸⁴ 14 U.S. (1 Wheat.) 304 (1816).

¹⁸⁵ *Id.* at 334, 347.

¹⁸⁶ *Id.* at 343-44.

¹⁸⁷ *Id.* at 342.

¹⁸⁸ *Id.* at 347-48, 348.

¹⁸⁹ *Id.* at 350.

¹⁹⁰ 19 U.S. (6 Wheat.) 264 (1821).

¹⁹¹ *Id.* at 382.

¹⁹² *Id.* at 384.

¹⁹³ *Id.* at 388.

¹⁹⁴ *Id.* at 406.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 412.

¹⁹⁷ *Id.*

¹⁹⁸ 22 U.S. (9 Wheat.) 738 (1824).

¹⁹⁹ *Id.* at 818-19.

²⁰⁰ *Id.* at 819.

²⁰¹ *Id.* at 820.

²⁰² *Id.* at 823.

²⁰³ *Id.* at 849.

²⁰⁴ *Id.* at 857-58; *see* Fletcher, *supra* note 13, at 1086 (explaining that *Osborn* “implies quite strongly that the amendment itself had no prohibitory effect, but rather required only a limiting construction on the jurisdiction conferred by the state-citizen diversity clause of article III”).

²⁰⁵ 60 U.S. (19 How.) 393, 403-04 (1856).

²⁰⁶ OR. CONST. of 1857, art. XVIII, § 4.

²⁰⁷ CONG. GLOBE, 35th Cong., 2d Sess. 984 (1859); *see also id.* at 985 (1859) (refusing to “destroy that great instrument, the Constitution of my country, by supporting a bill which, on its face, . . . denies to

citizens of the United States the right of a fair trial in the courts of justice for the enforcement of a right or the redress of a wrong”).

²⁰⁸ CONG. GLOBE, 41st Cong., 2nd Sess. 94 (1869).

²⁰⁹ Civil Rights Act of 1866, Pub. L. No. 39-26, 14 Stat. 27.

²¹⁰ CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866); *see also id.* at 1064 (discussing the “right to prosecute a suit . . . either for the vindication of a right or the redress of a wrong”).

²¹¹ *Id.* at 1160.

²¹² CONG. GLOBE, 42d Cong., 1st Sess. app. 315 (1871).

²¹³ CONG. GLOBE, 42d Cong., 1st Sess. 376, 459 (1871).

²¹⁴ *Id.* at 578.

²¹⁵ Act of March 3, 1875, § 1, 18 Stat. 470.

²¹⁶ 2 CONG. REC. 4986 (1874).

²¹⁷ *Id.* at 4987.

²¹⁸ We have told the story in previous narratives. *See* David H. Gans & Douglas T. Kendall, *The Gem of the Constitution: The Text and History of the Privileges or Immunities Clause of the Fourteenth Amendment*, CONST. ACCOUNTABILITY CTR. (2008), <http://bit.ly/GemNarrative>; David H. Gans & Douglas T. Kendall, *The Shield of National Protection: The Text and History of Section 5 of the Fourteenth Amendment*, CONST. ACCOUNTABILITY CTR. (2009), <http://bit.ly/GansShield>; David H. Gans, *Perfecting the Declaration: The Text and History of the Equal Protection Clause of the Fourteenth Amendment*, CONST. ACCOUNTABILITY CTR. (2011), <http://bit.ly/14thNarrative>.

²¹⁹ For the legal and political context surrounding the bond cases see Gibbons, *supra* note 13, at 1973-82.

²²⁰ *See Bd. of Liquidation v. McComb*, 92 U.S. 531, 541 (1875).

²²¹ For a notable exception, see *Poindexter v. Greenhow*, 114 U.S. 270 (1885), which affirmed that the courts could hear suits against state officers to ensure compliance with the Constitution. *See, e.g., id.* at 297 (“The immunity from suit by the state, now invoked, vainly, to protect the individual wrong-doers, finds no warrant in the eleventh amendment”). The four dissenters in that case would have held the suit was effectively against the state, and thus forbidden by the Eleventh Amendment.

²²² 107 U.S. 711 (1883).

²²³ *Id.* at 720.

²²⁴ *Id.* at 721.

²²⁵ *Id.* at 746-47 (Harlan, J., dissenting).

²²⁶ *Id.* at 748.

²²⁷ *Id.* at 736 (Field, J., dissenting).

²²⁸ *Id.* at 746.

²²⁹ 134 U.S. 1 (1890).

²³⁰ *Id.* at 10-11.

²³¹ *Id.* at 15.

²³² *Id.*

²³³ Barnett, *supra* note 13, at 1744.

²³⁴ Amar, *supra* note 13, at 1475 (explaining that “[t]he three basic categories of cases familiar to the framers were law, equity, and admiralty”); Fletcher, *supra* note 13, at 1083 (discussing “omission of admiralty from the coverage of the amendment”).

²³⁵ 256 U.S. 490 (1921).

²³⁶ *Id.* at 497.

²³⁷ *Id.*

²³⁸ 292 U.S. 313 (1934).

²³⁹ U.S. CONST. amend XI.

²⁴⁰ *Monaco*, 292 U.S. at 322.

²⁴¹ 209 U.S. 123 (1908).

²⁴² *Id.* at 155-56.

²⁴³ *Id.* at 159-60.

²⁴⁴ Barry Friedman, *The Story of Ex Parte Young: Once Controversial, Now Canon*, in *FEDERAL COURT STORIES* 247, 271 (Vicki C. Jackson & Judith Resnik eds., 2010).

²⁴⁵ *Osborn*, 22 U.S. at 819.

²⁴⁶ See Fletcher, *supra* note 8, at 224 (right to sue was “determined by reference to a particular common law, statutory, or constitutional right”); Sunstein, *supra* note 8, at 170 (“there had always been a question whether the plaintiff had a cause of action”); see, e.g., *Mayor of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 99, 100 (1838) (dismissing suit against building of an aqueduct on the grounds that common law of nuisance requires a plaintiff requesting equitable relief “aver[] and prove[] some special injury” and “appellants have no such interest as enables them to sue in their own name”); *R.R. Co. v. Ellerman*, 105 U.S. 166, 174 (1881) (“[T]he appellee has no interest, and he cannot raise them in order, under that cover, to create and protect a monopoly which the law does not give him. The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right”).

²⁴⁷ See *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850) (“plaintiff and defendant have the same interest”); *Cleveland v. Chamberlain*, 66 U.S. (1 Black) 419, 425 (1861) (“Selah Chamberlain is, in fact, both appellant and appellee.”); *Chi. & G. T. Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892) (“It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”)

²⁴⁸ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 28-31 (1831); *id.* at 58-59, 68-69, 75 (Thompson, J., dissenting); *Georgia v. Stanton*, 73 U.S. 50, 71-77 (1867).

²⁴⁹ 91 U.S. 343 (1875).

²⁵⁰ *Id.* at 354.

²⁵¹ *Id.* at 355.

²⁵² *Id.*

²⁵³ 258 U.S. 126 (1922).

²⁵⁴ *Id.* at 129.

²⁵⁵ *Id.* at 129-30.

²⁵⁶ 262 U.S. 447 (1923).

²⁵⁷ *Id.* at 487.

²⁵⁸ *Id.* at 487, 488.

²⁵⁹ *Gen. Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230-31 (1926). Compare *Chi. Junction Case*, 264 U.S. 258, 267 (1924) (finding standing because “[b]y reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company”) with *Alexander Sprunt & Sons, Inc. v. United States*, 281 U.S. 249, 255 (1930) (denying standing because “the appellants have no independent right which is violated by the order to cease and desist”) and *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (denying standing to bring constitutional challenge to New Deal program on the ground that “where, although there is damage, there is no violation of a right no action can be maintained”).

²⁶⁰ *Tenn. Elec. Power v. Tenn. Valley Auth.*, 306 U.S. 118, 137 (1939).

²⁶¹ 307 U.S. 433 (1939).

²⁶² *Id.* at 460 (opinion of Frankfurter, J.).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 341 U.S. 123 (1951).

²⁶⁶ *Id.* at 140-41 (plurality opinion); *id.* at 143 (Black, J., concurring) (“[P]etitioners have standing to sue for the reason among others that they have a right to conduct their admittedly legitimate political, charitable and business operations free from unjustified governmental defamation”). See also *id.* at 198 (Reed, J., dissenting) (“The ‘standing’ turns on the existence of the federal right.”).

²⁶⁷ *Id.* at 150 (Frankfurter, J., concurring).

²⁶⁸ *Aetna Life Ins. Co of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937) (quoting *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U.S. 249, 264 (1933)).

²⁶⁹ 347 U.S. 483 (1954).

²⁷⁰ See Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 703-06 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)).

²⁷¹ 358 U.S. 1, 18 (1958).

²⁷² See *United States v. Mississippi*, 380 U.S. 128, 141 (1965); see also *Dombrowski v. Pfister*, 380 U.S. 479, 483-87 (1965); *Griffin v. Cnty. Sch. Bd. of Prince Edward Cnty.*, 377 U.S. 218, 228 (1964).

²⁷³ 369 U.S. 186 (1962).

- ²⁷⁴ *Id.* at 204.
- ²⁷⁵ *Id.* at 208 (quoting *Marbury*, 5 U.S. at 163).
- ²⁷⁶ *Id.*
- ²⁷⁷ 392 U.S. 83 (1968).
- ²⁷⁸ *Id.* at 100-01.
- ²⁷⁹ *Id.* at 99, 101.
- ²⁸⁰ *Id.* at 102, 103.
- ²⁸¹ *Id.* at 120 (Harlan, J., dissenting) (quoting *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942)).
- ²⁸² *Id.* at 130.
- ²⁸³ *Id.* at 131-32.
- ²⁸⁴ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
- ²⁸⁵ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).
- ²⁸⁶ 397 U.S. 150 (1970).
- ²⁸⁷ *Id.* at 153.
- ²⁸⁸ *Id.* at 152.
- ²⁸⁹ See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 683-90 (1973).
- ²⁹⁰ See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (internal citations omitted).
- ²⁹¹ Nichol, *supra* note 8, at 635.
- ²⁹² 422 U.S. 490 (1975).
- ²⁹³ *Id.* at 504.
- ²⁹⁴ Gene R. Nichol, Jr., *Rethinking Standing*, 72 CALIF. L. REV. 68, 80 (1984).
- ²⁹⁵ Cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (finding “injury, apart from failure to be admitted, in the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race”); *Ne. Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”).
- ²⁹⁶ 461 U.S. 95 (1983).
- ²⁹⁷ *Id.* at 105.
- ²⁹⁸ *Id.*
- ²⁹⁹ *Id.* at 137 (Marshall, J., dissenting).
- ³⁰⁰ *Id.* at 113.
- ³⁰¹ 468 U.S. 737 (1984). Justice Marshall did not participate.

- ³⁰² *Id.* at 752 (internal citations omitted).
- ³⁰³ *Id.* at 756.
- ³⁰⁴ *Id.* at 758.
- ³⁰⁵ *Id.* at 761.
- ³⁰⁶ *Id.* at 782 (Brennan, J., dissenting).
- ³⁰⁷ Fallon, *supra* note 8, at 11.
- ³⁰⁸ *Id.* at 7.
- ³⁰⁹ *See infra* note 99.
- ³¹⁰ Fallon, *supra* note 8, at 7.
- ³¹¹ Nichol, *supra* note 8, at 652.
- ³¹² Warth, 422 U.S. at 498.
- ³¹³ THE FEDERALIST NO. 78, *supra* note 22, at 437 (Hamilton).
- ³¹⁴ Scalia, *supra* note 285, at 894.
- ³¹⁵ *See infra* text accompanying notes 109-115.
- ³¹⁶ *See, e.g., Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 136 (1947) (“Congress may create legally enforceable rights where none before existed. . . . Violation of such a statutory right normally creates a justiciable cause of action”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (upholding standing of testers to sue under the Fair Housing Act because Congress has “conferred on all ‘persons’ a legal right to truthful information about available housing. . . . ‘The actual or threatened injury required by Art. III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing’”) (quoting Warth, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))).
- ³¹⁷ 504 U.S. 555 (1992).
- ³¹⁸ *Id.* at 573-74.
- ³¹⁹ *Id.* at 576, 577.
- ³²⁰ *Id.* at 578.
- ³²¹ *Id.* at 580 (Kennedy, J., concurring).
- ³²² *Id.*
- ³²³ 524 U.S. 11 (1998).
- ³²⁴ *Id.* at 21.
- ³²⁵ *Id.* at 24-25.
- ³²⁶ *Id.* at 24.
- ³²⁷ 528 U.S. 167 (2000).
- ³²⁸ *Id.* at 186.
- ³²⁹ *Id.* at 198 (Scalia, J., dissenting).
- ³³⁰ 529 U.S. 765 (2000).

³³¹ *Id.* at 788 (Ginsburg, J., concurring).

³³² *Id.* at 776-77 (majority opinion).

³³³ *Id.* at 777.

³³⁴ Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 644 (1999).

³³⁵ 133 S. Ct. 1138 (2013).

³³⁶ *Id.* at 1148.

³³⁷ *Id.* at 1148, 1149.

³³⁸ See Stephen I. Vladeck, *Standing and Secret Surveillance*, 10 I/S: J.L. & POL'Y INFO. SOC'Y 551, 553 (2014) (observing that the Snowden disclosures “don’t necessarily cure the standing defect identified by Justice Alito”).

³³⁹ *Clapper*, 133 S. Ct. at 1160 (Breyer, J., dissenting).

³⁴⁰ 551 U.S. 587 (2007).

³⁴¹ *Id.* at 609.

³⁴² *Id.* at 640 (Souter, J., dissenting).

³⁴³ 563 U.S. 125 (2011).

³⁴⁴ *Id.* at 148 (Kagan, J., dissenting).

³⁴⁵ *Id.*

³⁴⁶ 549 U.S. 497 (2007).

³⁴⁷ *Id.* at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

³⁴⁸ *Id.* at 518.

³⁴⁹ *Id.* at 516, 521 (quoting *Lujan*, 504 U.S. at 560).

³⁵⁰ 136 S. Ct. 1540 (2016).

³⁵¹ *Id.* at 1549.

³⁵² *Id.* at 1545.

³⁵³ *Id.* at 1554 (Ginsburg, J., dissenting).

³⁵⁴ *Id.* at 1549 (majority opinion).

³⁵⁵ *Id.* at 1551 (Thomas, J., concurring).

³⁵⁶ *Id.* at 1552, 1553.

³⁵⁷ 415 U.S. 651 (1974).

³⁵⁸ *Id.* at 663, 668.

³⁵⁹ *Id.* at 677.

³⁶⁰ 465 U.S. 89 (1984).

³⁶¹ *Id.* at 98.

³⁶² *Id.* at 106.

³⁶³ *Id.* at 127, 147 (Stevens, J., dissenting).

³⁶⁴ 473 U.S. 234 (1985).

³⁶⁵ Justice Brennan had previously written dissenting opinions in Eleventh Amendment cases that had rejected the notion that “sovereign immunity is a constitutional limitation upon the federal judicial power to entertain suits against States,” *Emps. of the Dep’t of Pub. Health & Welfare v. Dep’t of Public Health & Welfare*, 411 U.S. 279, 309 (1973) (Brennan, J., dissenting); see also *Edelman*, 415 U.S. at 687 (Brennan, J., dissenting); *Pennhurst State Sch. & Hosp.*, 465 U.S. at 125-26 (Brennan, J., dissenting), but Brennan’s dissent in *Atascadero* would be his defining opinion on the subject, offering a comprehensive account of the Constitution’s text and history and the Court’s precedents from the Marshall Court on.

³⁶⁶ *Atascadero*, 473 U.S. at 247-48 (Brennan, J., dissenting).

³⁶⁷ *Id.* at 259 (Brennan, J., dissenting).

³⁶⁸ *Id.* at 286-87 (Brennan, J., dissenting).

³⁶⁹ *Id.* at 302, 303 (Blackmun, J., dissenting).

³⁷⁰ See, e.g., *Green v. Mansour*, 474 U.S. 64 (1985); *Papasan v. Allain*, 478 U.S. 265 (1986); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468 (1987); *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991).

³⁷¹ 491 U.S. 1 (1989).

³⁷² *Seminole Tribe of Fla.*, 517 U.S. 44; *Alden v. Maine*, 527 U.S. 706 (1999).

³⁷³ *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999) (immunity from suit under federal patent law); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (immunity from suit under the Age Discrimination in Employment Act); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (immunity from suit under the employment provisions of the Americans With Disabilities Act); *Coleman v. Md. Court of Appeals*, 132 S. Ct. 1327 (2012) (immunity from suit under the self-care provisions of the Family Medical Leave Act).

³⁷⁴ *Seminole Tribe of Fla.*, 517 U.S. at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

³⁷⁵ *Id.* at 72-73.

³⁷⁶ *Id.* at 65-66.

³⁷⁷ *Id.* at 100 (Souter, J., dissenting).

³⁷⁸ *Id.* at 110.

³⁷⁹ *Id.* at 102, 155.

³⁸⁰ *Id.* at 117.

³⁸¹ *Alden*, 527 U.S. at 712.

³⁸² *Id.* at 713.

³⁸³ *Id.* at 715, 730.

³⁸⁴ *Id.* at 729.

³⁸⁵ *Id.* at 814, 803 (Souter, J., dissenting).

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