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HISTORY AND THE ELEVENTH AMENDMENT

*John V. Orth**

More than any other part of the Constitution, the Eleventh Amendment is said to receive its meaning from history. As Justice Kennedy candidly conceded, writing for the majority in *Alden v. Maine*, "The Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."¹ To interpret the Eleventh Amendment by reference only to its words, he dismissed as "ahistorical literalism."² In establishing the proper historical context, judges and commentators routinely rely upon several pieces of evidence: Justice Iredell's dissent in *Chisholm v. Georgia*,³ the case that prompted the Eleventh Amendment; Justice Bradley's opinion of the Court in *Hans v. Louisiana*,⁴ the case that established the primacy of sovereign immunity over the text of the Amendment; the principle of sovereign immunity as understood at the time of the American Revolution; and the fact of American state indebtedness at the time of constitutional ratification. Each item may be profitably re-examined.

But first we should remind ourselves of the neglected words of the Eleventh Amendment: "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."⁵ The words show many signs of being carefully chosen. Explicit reference is

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1 119 S. Ct. 2240, 2254; see also *id.* at 2257 ("[T]he contours of sovereign immunity are determined by the founders' understanding . . .").

2 *Id.* at 2254; see also *id.* at 2257 (arguing that "the bare text of the [Eleventh] Amendment is not an exhaustive description of the States' constitutional immunity from suit").

3 2 U.S. (2 Dall.) 419, 429 (1793).

4 134 U.S. 1 (1890).

5 U.S. CONST. amend. XI.

made, for example, to the parallel legal systems of "law," the common law by which most rights were determined, and "equity," the collection of extraordinary remedies traditionally administered by the court of chancery. American plaintiffs are pointedly described as "citizens," while foreign plaintiffs may be either "citizens or subjects," a recognition of the distinction—much insisted upon in the late eighteenth century—between citizens of the new republics like France and subjects of the old monarchies like Britain.

By far the most attention, in discussions concerning the text of the Eleventh Amendment, has been paid to the words "shall not be construed." This phrase is often taken to indicate that the Amendment was not intended to change the meaning of the Constitution, but only to instruct the Court as to its correct reading.⁶ (Of course, there would be something odd in emphasizing these words while at the same time dismissing a literal reading of the text as "ahistorical.") It is possible, however, that the phrase will not bear the weight put upon it. The Fourteenth Amendment, after all, uses similar words in invalidating Southern war debts and slaveowners' claims for compensation: "all such debts, obligations and claims *shall be held* illegal and void."⁷ No one to my knowledge has ever maintained that this is any different from saying "*shall be* illegal and void," which would seem to be a more natural wording.

There is at least one reason, based in the Amendment's text itself, to wonder whether the drafter understood the phrase in the sense claimed: the suits in question are carefully described as those "commenced or prosecuted" against a state. Either these words are redundant or they draw a distinction between suits in two different stages of litigation. Jurisdiction is disclaimed as to suits yet to be commenced, that is, begun; but jurisdiction is also disclaimed as to suits previously commenced but not yet prosecuted to final resolution. As to the latter, the judicial power had already attached: they too were to be stopped by stripping the court of jurisdiction. Chief Justice John Marshall certainly understood the distinction this way: "Those who were inhibited from *commencing* a suit against a State, or from *prosecuting* one which might be commenced before the adoption of the [elev-

6 See, e.g., *Hans*, 134 U.S. at 11 (emphasizing the words "not be construed to extend"); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1363-65 (1998) (summarizing scholarly theories).

7 U.S. CONST. amend. XIV, § 4 (emphasis added); see also *id.* art. IV, § 3 ("[N]othing in this Constitution *shall be so construed* as to Prejudice any Claims of the United States, or of any particular State.") (emphasis added).

enth] amendment, were persons who might probably be its creditors.”⁸

The principal case already *sub judice* was, of course, *Chisholm v. Georgia*.⁹ By a four-to-one majority the Court had held that it had jurisdiction over a suit against a state brought by a citizen of another state. Despite the fact that the majority included two delegates to the Constitutional Convention barely five years earlier (Justices Wilson and Blair) and a co-author of *The Federalist Papers* (Chief Justice Jay), the dissent by Justice Iredell is now emphasized. Although widely understood to argue that the asserted jurisdiction was unconstitutional, Iredell’s dissent in fact was based on the absence of legislation providing process for such suits. Summing up an opinion spread over twenty pages, Iredell concluded,

I have now, I think, established the following particulars. 1st. That the Constitution, so far as it respects the judicial authority, can only be carried into effect by acts of the Legislature appointing Courts, and prescribing their methods of proceeding. 2d. That Congress has provided no new law in regard to this case, but expressly re-

8 *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (emphasis added). There are other reasons to wonder whether the drafter understood the phrase “shall not be construed” to turn back the clock.

First, the word “shall” may be used to express what is mandatory, but it may also be used to express simple futurity. See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2085–86 (1961). The Supremacy Clause includes examples of both uses: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .” U.S. CONST. art. VI. The direction to the state judiciary is mandatory; the distinction between treaties “made” and those “which shall be made” is temporal. The construction of federal judicial power imposed by the 11th Amendment may have been understood to be that which would pertain in the future. Legal drafting in the late 18th century had not yet settled on the modern forms. The provision in section 10 of the 1689 English Bill of Rights, for example, that “excessive [bail] ought not to be required,” which was copied verbatim in section 11 of the Virginia Declaration of Rights of 1776, became “excessive Bail should not be required” in section 10 of the North Carolina Declaration of Rights of 1776 and finally “excessive bail shall not be required” in the Eighth Amendment of the U.S. Constitution. See generally John V. Orth, Book Review, 10 CONST. COM. 203, 205–06 (1993) (reviewing TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991)).

Second, the Amendment Article, U.S. CONST. art. V, seems to contemplate only prospective effect: “Amendments . . . shall be valid . . . when ratified.” This would be in keeping with the well-known republican aversion to retrospective legislation. By denying the Supreme Court jurisdiction over the prosecution of already commenced suits, the 11th Amendment seemingly avoided the stigma of an *ex post facto* law.

9 2 U.S. (2 Dall.) 419 (1793).

ferred us to the old. 3d. That there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy. The consequence of which, in my opinion, clearly is, that the suit in question cannot be maintained¹⁰

Everything Iredell had to say on the constitutional question is expressed in the following hesitant afterthought:

So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power. This opinion I hold, however, with all the reserve proper for one, which, according to my sentiments in this case, may be deemed in some measure extra-judicial.¹¹

In a dissent taking at least an hour and a quarter to deliver, Iredell's "extra-judicial" comments on the constitutional question occupied barely a minute at the very end.¹² If right, of course, they rendered the rest of his elaborate opinion, detailing the "particular grounds" of his dissent, irrelevant.

While historical fact is not, of course, a matter to be determined by majority vote, it must strike the historian as surprising to see the considered opinions of four justices dismissed today so conclusively and so cavalierly. According to Justice Kennedy in *Alden*: "The more reasonable interpretation, of course, is that regardless of the views of four Justices in *Chisholm*, the country as a whole—which had adopted

10 *Id.* at 449.

11 *Id.* at 449–50.

12 See John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia (1793)*, 73 N.C. L. REV. 255, 263 (1994).

the Constitution just five years earlier—had not understood the document to strip the States' [sic] of their immunity from private suits."¹³

The source for the modern understanding of Iredell's dissent is Justice Bradley's opinion in 1890 in *Hans v. Louisiana*.¹⁴ In that case a unanimous court held that it lacked jurisdiction over a suit against a state brought by a citizen of that state. Although the words of the Eleventh Amendment were inapplicable, the constitutional principle of sovereign immunity it supposedly recognized barred the suit. The decision in *Chisholm*, Bradley said, created "such a shock of surprise" that it brought the immediate proposal and prompt ratification of the Eleventh Amendment.¹⁵ As Bradley majestically summed up, "In view of the manner in which that decision was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing, we think we are at liberty to prefer Justice Iredell's views in this regard."¹⁶

While all the Justices joined in the result in *Hans*, one wrote separately for no other reason than to object to Bradley's history lesson:

Mr. Justice Harlan concurring.

I concur with the court in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued. Upon this ground alone I assent to the judgment. But I cannot give my assent to many things said in the opinion. The comments made upon the decision in *Chisholm v. Georgia* do not meet my approval. They are not necessary to the determination of the present case. Besides, I am of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was.¹⁷

Although Iredell's lonely dissent in *Chisholm* is regularly emphasized, Harlan's solitary concurrence in *Hans* is just as regularly ig-

13 *Alden v. Maine*, 119 S. Ct. 2240, 2252 (1999).

14 134 U.S. 1 (1890). The primacy of *Hans* is described by Chief Justice Rehnquist in *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996).

"[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." That presupposition, first observed over a century ago in *Hans v. Louisiana*, has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."

Id. (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)) (alteration in original).

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

16 *Id.* at 18–19.

17 *Id.* at 21.

nored. Yet Harlan's opinion, as is so often the case with that jurist, had something to be said for it.

To understand Harlan's jurisprudential position one must refer to *North Carolina v. Temple*,¹⁸ argued and decided at the same time as *Hans* and also involving a suit against a state brought by a citizen of that state. Unlike *Hans*, the plaintiff in *Temple* had sued a state officer as well as the State itself. Writing for the majority, Bradley dismissed the claim against the State by referring to the decision just rendered in *Hans*; the claim against the state officer he cursorily dismissed as "virtually a suit against the State."¹⁹

Harlan dissented from the part of the judgment in *Temple* dismissing the suit against the state officer:

The legislation of which complaint is here made impaired the obligation of the State's contract, and was therefore unconstitutional and void. It did not, in law, affect the existence or operation of the previous statutes out of which the contract in question arose. So that the court was at liberty to compel the officer of the State to perform the duties which the statutes, constituting the contract, imposed upon him. A suit against him for such a purpose is not, in my judgment, one against the State. It is a suit to compel the performance of ministerial duties, from the performance of which the state's officer was not, and could not be, relieved by unconstitutional and void legislative enactments.²⁰

The reason, in other words, that Harlan could join in the result in *Hans* despite his disagreement with Bradley's history lesson was that he thought a remedy should be available to the plaintiff in the form of a suit against a state officer. Ironically, Harlan served long enough on the Court to see just such a suit upheld in *Ex parte Young*,²¹ although by then he had changed his mind and filed another lonely dissent.²²

Harlan's opinion that *Chisholm* was "based upon a sound interpretation of the Constitution as that instrument then was,"²³ although it drew only one vote on the Court in 1890, had honorable antecedents. During Chief Justice Taney's tenure from 1836 to 1864 *Chisholm* was rarely mentioned, but when it was, it was assumed to have been correctly decided; the Eleventh Amendment, in other words, was under-

18 134 U.S. 22 (1890).

19 *Id.* at 30.

20 *Id.* at 31.

21 209 U.S. 123 (1908).

22 *See id.* at 168.

23 *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

stood to have altered the Constitution.²⁴ Indeed, in *New Hampshire v. Louisiana*²⁵ in 1883, only a few years before *Hans*, a unanimous Court including both Bradley and Harlan had conceded the correctness of *Chisholm*. The plaintiff State had invoked the original jurisdiction of the Supreme Court, jurisdiction unaffected by the words of the Eleventh Amendment and by the nontextual doctrine of sovereign immunity. New Hampshire had sought to collect on behalf of certain of its citizens debts owed them by the state of Louisiana. While conceding that the right to collect such debts was "well recognized as an incident of national sovereignty,"²⁶ the Court, speaking through Chief Justice Waite, reasoned that American states had surrendered it on joining the Union.

Under the Constitution, as it was originally construed, a citizen of one State could sue another State in the courts of the United States for himself, and obtain the same relief his State could get for him if it should sue. Certainly, when he can sue for himself, there is no necessity for power in his State to sue in his behalf, and we cannot believe it was the intention of the framers of the Constitution to allow both remedies in such a case. Therefore, the special remedy, granted to the citizen himself, must be deemed to have been the only remedy the citizen of one State could have under the Constitution against another State for the redress of his grievances, except such as the delinquent State saw fit itself to grant. In other words, the giving of the direct remedy to the citizen himself was equivalent to taking away any indirect remedy he might otherwise have claimed, through the intervention of his State, upon any principle of the law of nations. It follows that when the amendment took away the special remedy there was no other left. Nothing was added to the Constitution by what was thus done. No power taken away by the grant of the special remedy was restored by the amendment. The effect of the amendment was simply to revoke the new right that had been given, and leave the limitations to stand as they were. In the argument of the opinions filed by the several justices in the

24 See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 55 (1849) (Woodbury, J., dissenting) ("Though at first the federal judiciary was empowered to entertain jurisdiction where a State was a party in a suit, it has since been deprived even of that power by a jealous country, except in cases of disputed boundary."); *Livingston's Ex'x v. Story*, 36 U.S. (11 Pet.) 351, 397 (1837) (Baldwin, J., dissenting) ("The effect of these words ["shall not be construed"] in the 11th amendment of the constitution, has been adjudged by this Court to annul all jurisdiction over cases actually pending therein, past, present and future; though the constitution had expressly given jurisdiction in the very case.").

25 108 U.S. 76 (1883).

26 *Id.* at 90.

Chisholm case, there is not even an intimation that if the citizen could not sue, his State could sue for him.²⁷

It is therefore untrue to say that “[t]he Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence ‘that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution.’”²⁸ In the New Hampshire case the Court conceded the correctness of *Chisholm*, reasoning from it that since the framers had given citizens the “direct remedy” of suing a state, they had taken away the indirect remedy of suit by a state on their behalf. In light of the New Hampshire case, it is particularly bizarre for the majority in *Seminole Tribe v. Florida*²⁹ to rebuke the dissenters in that case for questioning *Hans*, which had “a much closer vantage point”³⁰ from which to understand *Chisholm* than they did.

Whatever else Harlan and the majority in *Hans* disagreed about in 1890, they agreed on the efficacy of a sovereign’s consent to suit. “I concur with the court,” Harlan had written, “in holding that a suit directly against a State by one of its own citizens is not one to which the judicial power of the United States extends, unless the State itself consents to be sued.”³¹ Bradley agreed, “Undoubtedly a State may be sued by its own consent”³² The rule still holds. Writing for the majority in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Justice Scalia recognized that “a State may waive its sovereign immunity by consenting to suit.”³³

The ability of the sovereign to consent to suit is certainly sanctioned by history. As Justice Kennedy put it in *Alden*, “When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts.”³⁴ The problem is to explain how this principle of English law permits American sovereigns, to the extent the states are such, to consent to suit in courts other than their own. In other words, how can a state ever consent to be sued in federal court by citizens of another state when

27 *Id.* at 91.

28 *Alden v. Maine*, 119 S. Ct. 2240, 2253 (1999) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996)).

29 517 U.S. 44 (1996).

30 *Id.* at 69.

31 *Hans v. Louisiana*, 134 U.S. 1, 21 (1890).

32 *Id.* at 134 (citing *Clark v. Barnard*, 108 U.S. 436, 447 (1883)).

33 119 S. Ct. 2219, 2223 (1999) (citing *Clark*, 108 U.S. at 447–48); *id.* at 2228 n.3 (describing as “unremarkable” the proposition that “a State waives its sovereign immunity by voluntarily invoking the jurisdiction of the federal courts”).

34 119 S. Ct. at 2247 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793) (Iredell, J., dissenting)).

the Eleventh Amendment directs that “[t]he Judicial power of the United States shall not be construed to extend”³⁵ to any such suit? Where do the judges get the authority to decide such cases?³⁶ If nothing else, *Marbury v. Madison*³⁷ stands for the proposition that the Supreme Court cannot exercise a jurisdiction not granted it by the Constitution. In this case the Eleventh Amendment seems to mean less, rather than more, than it says.

Similar historical conundrums surround the transformation of the English doctrine of sovereign immunity into an American “constitutional principle.” English law recognized that the sovereign was immune from suit without its consent in its own courts. This immunity was derived from the character of the intended defendant, the sovereign; it had nothing to do with the character of the intended plaintiff. Yet the American “constitutional principle,” when applied to the states, is limited in precisely this way: the judicial power of the United States is construed to extend to suits commenced against one of the United States by another state or by the United States.

Sovereign immunity could undoubtedly be described as a “constitutional principle” in English law at the time of American independence. But the English Constitution did not simply become the United States Constitution, else the Revolution was fought in vain. When James Otis, appearing for the defendant in the colonial Writs of Assistance Case in 1762, declared that “an act against the constitution is void,”³⁸ he used words that seemed to prefigure Chief Justice Marshall’s in *Marbury* forty years later: “a law repugnant to the constitution is void.”³⁹ Yet the operational meaning of the words in *Marbury* was no longer the same: the “constitution” referred to had in the meantime undergone a sea change. The English Constitution was (and is) subject to revision at any time by act of parliament; the United States Constitution is alterable only pursuant to Article V. In which sense of the word “constitutional” did the Revolutionary generation think of sovereign immunity, if it thought of it as a “constitutional principle” at all? Justice Iredell certainly spent by far the largest

35 U.S. CONST. amend. XI.

36 This question troubled the distinguished New York lawyer, William D. Guthrie, who told the New York State Bar Association nearly a century ago that it was a “fundamental principle that a federal court cannot exercise jurisdiction in any case to which the judicial power of the United States, as delegated and defined in the Constitution, does not extend.” William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 189 (1908).

37 5 U.S. (1 Cranch) 137 (1803).

38 M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 364, 555 (1978).

39 5 U.S. (1 Cranch) 137, 180 (1803).

part of his dissent in *Chisholm* looking for legislative authorization for the exercise of jurisdiction over suits against states.

As is conceded on all sides, the Eleventh Amendment was proposed and ratified in the context of state indebtedness. "It is part of our history," Chief Justice Marshall observed in 1821 in *Cohens v. Virginia*,

that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal Courts, formed a very serious objection to that instrument. Suits were instituted; and the Court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. . . . Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors.⁴⁰

Justice Kennedy in *Alden* agreed, "It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages."⁴¹

While the historical context of the Eleventh Amendment is routinely acknowledged in judicial opinions, it is equally routine for judges to ignore the historical context of *Hans*, the case that established the primacy of sovereign immunity over the text of the Amendment. In part, this may be attributable to the traditional form of legal discourse. *Hans* was, as I have summarized it above, a suit against a state brought by a citizen of that state. Stating the case at that level of abstraction obscures the fact that *Hans* was a creditor's suit, like *Chisholm*. Louisiana, like many Southern states at the time, was deeply indebted and was engaged in massive repudiation. *Hans* was only one of a series of suits by disappointed creditors.⁴² While it is a character-

40 19 U.S. (6 Wheat.) 264, 406-07 (1821).

41 119 S. Ct. at 2264; see also *id.* at 2260 (acknowledging "the overriding concern regarding the States' war-time debts").

42 See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890) (concerning Louisiana); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883) (same); *Louisiana v. Jumel*, 107 U.S. 711 (1882) (same); *Board of Liquidation v. McComb*, 92 U.S. 531 (1875) (same); *North Carolina v. Temple*, 134 U.S. 22 (1890) (concerning North Carolina); *Christian v. Atlantic & N.C. R.R.*, 133 U.S. 233 (1890) (same); *McGahey v. Virginia*, 135 U.S. 662 (1890) (concerning Virginia); *Virginia Coupon Cases*, 114 U.S. 269 (1885) (same); *Antoni v. Greenhow*, 107 U.S. 769 (1882) (same); *Hartman v. Greenhow*, 102 U.S. 672 (1880) (same). See generally B.U. RATCHFORD, *AMERICAN STATE DEBTS* 162-259 (1941); WILLIAM A. SCOTT, *THE REPUDIATION OF STATE DEBTS* 67-128 (1893).

istic of forensic legal history to treat historical facts as relevant to the understanding of legal documents such as statutes or constitutions (or constitutional amendments), judges tend to treat cases as ahistorical, perhaps because to do otherwise, to emphasize the particular historical context of a decision, would seem to detract from the appearance of judicial impartiality. However understandable, this approach to doing legal history must strike the historian as trying to do history with one hand tied behind the back.⁴³ If the context of state indebtedness was relevant in the late eighteenth century to the adoption of the Eleventh Amendment, surely it is at least possible that it was also relevant in the late nineteenth century to the litigation that established a realm of sovereign immunity beyond the words of the Amendment.⁴⁴

To resolve the legal interpretation of the Eleventh Amendment into a question of historical interpretation may be to ask the historical sources for answers they simply cannot give. While history may be able to demonstrate with a high degree of certainty the truth of generalizations such as "power corrupts,"⁴⁵ it may not be able to answer particular questions with a high degree of specificity. Exactly what the delegates to the Constitutional Convention in 1787 thought remained of state sovereign immunity, or exactly what the ratifiers of the Eleventh Amendment thought about cases not covered by the words of the text may be impossible to recover today, given the state of the record. What may be involved here may be just what a distinguished property lawyer thought was involved in many cases concerning the interpretation of wills, a "guess at what the testators would have intended if they had thought of the point in question, which they did not."⁴⁶

Over and above the gaps in the record looms the larger question of whether it is reasonable to expect a comprehensive answer to the specific question asked in this case. At the time of the drafting of the United States Constitution, it was axiomatic that sovereignty was indivisible: there could be no *imperium in imperio*. To divide sovereignty was impossible, yet the Founders attempted just that. Embarked on uncharted seas, they obviously lacked an exact idea of what lay ahead.

43 For other examples, see John V. Orth, *Doing Legal History*, 14 IRISH JURIST 114 (1979).

44 I have elsewhere attempted at some length to relate the development of 11th Amendment jurisprudence and the history of states' attempts to relieve themselves of their debts. See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* (1987).

45 See John V. Orth, *Thinking About Law Historically: Why Bother?*, 70 N.C. L. REV. 287 (1991).

46 JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 176 (2d ed. 1921).

To expect that they had answers, particularly that all or most of them had detailed answers to every question concerning divided sovereignty, is to expect the impossible. Trained in the common law, as many of them were, they probably planned to resolve the unsettled questions as they arose, case by case.

If history is to be made a judge, then it must be made to speak as a judge speaks, with authority. The past must be made to appear clear and intelligible, and it must be made to speak, if possible, with one voice. This may explain Chief Justice Rehnquist's exasperation in *Seminole Tribe*: "The dissent . . . disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. . . . Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional method of adjudication."⁴⁷ It may also explain Justice Scalia's sarcasm in *College Savings Bank* concerning "the now-fashionable revisionist accounts of the Eleventh Amendment set forth in other opinions in a degree of repetitive detail that has despoiled our northern woods."⁴⁸ Finally and most interestingly, it may explain Justice Kennedy's attempt to put an end to the historical debate by invoking "the authoritative interpretations by this Court" concerning "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."⁴⁹ The attempt is to invoke an "official history," authoritatively laid down from on high and no longer open to question.

The debate, of course, cannot be so easily silenced. Whatever the Court's authority to end the purely legal debate, and in this case even that seems questionable,⁵⁰ it cannot stop the historical debate. The gaps in the historical record, the multiple and conflicting inferences that the existing evidence supports, the need for the Court to consult history in the context of deciding specific cases implicating pressing issues of current public policy—all conspire to render the historical discourse continuous, contentious, and inconclusive. It seems safe to

47 *Seminole Tribe v. Florida*, 517 U.S. 44, 68–69 (1996).

48 *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2232 (1999).

49 *Alden v. Maine*, 119 S. Ct. 2240, 2246–47 (1999).

50 See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2237 (1999) (Breyer, J., dissenting) ("I am not yet ready to adhere to the proposition of law set forth in *Seminole Tribe*."); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2219 (1999) (Stevens, J., dissenting) ("I shall continue to register my agreement with the views expressed in the *Seminole* dissents and in the scholarly commentary on that case.").

predict that the precise confines of state sovereign immunity will continue to shift, as they have at various times in the last two hundred years. And that history will be said to justify the result.

