



6-1-1999

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Recommended Citation

David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 Notre Dame L. Rev. 935 (1997).

Available at: <http://scholarship.law.nd.edu/ndlr/vol72/iss4/2>

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ADMIRALTY AND THE ELEVENTH AMENDMENT

*David J. Bederman**

This Article considers a constitutional curiosity, one that has surprising and significant ramifications for the balance of power between states and the federal courts. The Eleventh Amendment to the Constitution, ratified on February 7, 1795, provides 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.”¹

I take as the starting point for my inquiry the proposition that the Adopters of the Eleventh Amendment, like the Framers² of the Constitution and Bill of Rights ratified eight and six years before, were careful drafters. They knew how to choose their words. They knew the differences between the great divisions in Anglo-American law and jurisdiction and were prepared to make important legal distinctions based on those differences. The Framers, for example, distinguished between actions in law and equity and granted jury trials for the former and not the latter.³

Why, then did the drafters of the Eleventh Amendment refer only to suits “in law or equity” when they were crafting their grant of immu-

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I am grateful for the comments of many of my colleagues and collaborators, particularly John Harrison, Peter Hess, Paul Keller, and George Rutherglen. Thanks also for the superb research assistance of Philip J. Bauer, Emory Law class of 1996.

All heresies and expurgations are my fault.

1 U.S. CONST. amend. XI (emphasis added).

2 In this Article, I will use the phrase “Adopters” to refer specifically to the members of Congress who proposed, and the state legislators who ratified, the Eleventh Amendment. I will refer to the “Framers” as including the entire generation of politicians who drafted, ratified, and implemented in practice the Constitution of 1787.

3 See U.S. CONST. amend. VII (“In suits at common law . . . the right to trial by jury shall be preserved.”). This provision was explicitly disallowed for admiralty matters. See *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446–47 (1830); see also U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity . . .”).

nity to states from suit in federal court? Why weren't admiralty cases mentioned, even though the Framers regarded them as a special class of litigation, distinct from actions in law or equity?⁴ Did they just forget about admiralty? Did they care? Or did they, as I propose here, purposefully exclude admiralty cases from the grant of immunity to states from suit in federal courts? I believe the Adopters had good cause for wanting states to be amenable to at least some kinds of suits in admiralty in federal court, particularly in rem proceedings asserted against property in which a state may have had an interest as a claimant. Yet these concerns have become obscured with time and the shifting currents of the United States Supreme Court's state sovereign immunity jurisprudence and its interpretations of the Eleventh Amendment. This Article addresses silence in a constitutional text and assigns reasons for unspoken assumptions.

The Eleventh Amendment, whatever construction or gloss might be applied to its textual terms (and there have been many), clearly indicated an intent to limit the jurisdiction of the federal courts over suits in which states were named as defendants without their consent. Yet there have been two stories accounting for the principle of sovereign immunity enshrined in the Eleventh Amendment. One is that state sovereign immunity in the federal courts preexisted the Framing, was implied by Article III of the Constitution, intentionally subverted by the Supreme Court's 1793 decision in *Chisolm v. Georgia*,⁵ and was restored by the Eleventh Amendment. The other story explains the Eleventh Amendment as merely a technical correction to the grant of federal court jurisdiction in Article III, which otherwise allowed competence over "Controversies . . . between a State and Citizens of another State . . . [and] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."⁶

Explanations of the Eleventh Amendment are thus extraordinarily anti-textual in their thrust. The Amendment may mean more than what it says and thus extend principles of state sovereign immunity. Or it may mean rather less than what was intended.⁷ Today, the Supreme Court's Eleventh Amendment jurisprudence has been virtually captured by a teleological gloss on the text which extols inchoate principles of state sovereign immunity with no serious consideration given to *either* the text of the Amendment *or* to the best evidence of

4 See U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . .").

5 2 U.S. (2 Dall.) 419 (1793).

6 U.S. CONST. art. III, § 2, cls. 5 & 8.

7 See Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989).

the Adopting generation's intent. This is a surprising constitutional interpretation for a Court that is strongly originalist in its construction of other, equally significant clauses of the Constitution, and is generally textual or literal with the rest of the document.

The gravity of this will not be lost on those who recognize that the Eleventh Amendment has become the bulwark principle of federalism for the Rehnquist Court. Its significance has surely eclipsed the desultory but well publicized limits the Court has placed on Congress's power to legislate imposed by the Commerce Clause⁸ or the Tenth Amendment.⁹ The Eleventh Amendment's power to refashion federalism is, of course, one of directing the proper forum in which to file a suit against a state. By excluding the jurisdiction of the federal courts for such suits, review can only be had in the U.S. Supreme Court by way of exercise of its supervisory jurisdiction from the final decisions of a state's highest tribunal.¹⁰ Such review is limited, moreover, to only those decisions implicating rights under the federal Constitution, statutes, or treaties. Most significantly of all, the Supreme Court has just ruled in *Seminole Tribe v. Florida*¹¹ that Congress has no power to strip a state of its Eleventh Amendment immunity from suit in federal court, except as pursuant to its power under section five of the Fourteenth Amendment.

The significance of the Eleventh Amendment to our constitutional scheme of federal government requires a renewed consideration of its text and of the Adopters' original intent. The first Part of this Article will consider the period of the framing of the Constitution and prevalent attitudes towards sovereign immunity and admiralty jurisdiction. In Part II, I will carefully address the constitutional history leading to the adoption of the Eleventh Amendment and the extent

8 See *United States v. Lopez*, 115 S. Ct. 1624 (1995).

9 See *New York v. United States*, 505 U.S. 144 (1992).

10 See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation*, 496 U.S. 18, 30-31 (1990); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). But see *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1131 n.14 (1996) (Rehnquist, C.J.) (suggesting that the Supreme Court might not have supervisory jurisdiction over cases coming up from a state supreme court, absent a defendant state's consent). Cf. *id.* at 1151 n.10 (Souter, J., dissenting) (noting that there should be no difference between an "appeal" to the U.S. Supreme Court from a state supreme court, as distinct from a suit originally filed in federal court). For more on this subject, see Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 125-26 (1996) (discussing Supreme Court's holding in *Reich v. Collins*, 115 S. Ct. 547, 549 (1994), which suggested that states must provide remedies in state courts if they are to insist on immunity in federal court); Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?* *Seminole v. McKesson*, 106 YALE L.J. 1683 (1997).

11 116 S. Ct. 1114 (1996).

to which *Chisolm* and the adoption debates contemplated its application to admiralty. Part III traces the evolution of the original understanding that the Eleventh Amendment did not apply to certain admiralty actions through a series of Supreme Court decisions in the early 1800s. How this comprehension unravelled in the extraordinary revolution affecting all doctrines of sovereign immunity in the late nineteenth and early twentieth centuries will be narrated in Part IV.

The legacy of this revolution can still be felt in Eleventh Amendment jurisprudence today, and despite attempts to return to a more originalist understanding of the Amendment, courts have continued to expand its reach, barring admiralty cases from federal court jurisdiction in ways that earlier would never have been contemplated. This process will be assessed in Part V, particularly in the context of disputes regarding sunken shipwrecks. Part VI summarizes the jurisprudential options available in immunizing states from admiralty actions in federal court, and attempts to restore the understandings of the Adopters, while also being faithful to the new currents in sovereign immunity jurisprudence.

Finally, I offer a conclusion suggesting that the convoluted history of admiralty and the Eleventh Amendment, far from being marginal or irrelevant to the balance of power between states and the federal courts, is actually central to that dispute. Part of the intellectual exercise of this Article is an evaluation of the judicial appreciation of the Amendment in the period before its interpretation was revolutionized by such decisions as *Hans v. Louisiana*¹² and its paradoxically logical counterpart, *Ex parte Young*,¹³ both of which were strikingly anti-textual and indifferent to originalist concerns. To the extent that the admiralty cases parallel the wider problems of federal judicial authority over states, they provide a powerful and comprehensible paradigm for solving this essential equation of federalism.

Textualism and originalism are, however, an incomplete antidote to the strange ailment that has afflicted current Eleventh Amendment jurisprudence. An historicist approach must be sensitive, also, to the broader values of constitutional government, which can include federalism, sovereign immunity, and a willingness to immunize states from certain sorts of interference by federal courts. This Article outlines such an approach.

12 134 U.S. 1 (1890). *Hans* held that the Amendment, despite its literal terms, barred a suit by a citizen against her *own* state in federal court.

13 209 U.S. 123 (1908). *Young* held that individuals could sue state *officials* in federal court for injunctive relief, if those officials were engaged in conduct (even under color of state law) which disparaged federally generated rights. *See also* Monaghan, *supra* note 10, at 126-28.

I. THE FRAMERS' UNDERSTANDING

A. *Sovereign Immunity of the Crown and Colonies*

As already noted, it is well established that the Eleventh Amendment was proposed as a direct response to the Supreme Court's decision in *Chisholm v. Georgia*,¹⁴ which held that states could be sued in assumpsit in federal courts by a private citizen of another state. What has been rarely considered, at least in the context of admiralty jurisdiction, was the preexisting law of sovereign immunity and the perceptions of the Adopters in considering whether states of a federal union should be immune from in rem admiralty proceedings.

The received wisdom, of course, is that the principle of sovereign immunity—quite literally, the “King can do no wrong”¹⁵—was transmitted directly from England to its North American colonies.¹⁶ The reality is rather more complex. For starters, it is by no means clear that English common law was absolute in protecting the Crown from suit. While it was a principle that the King could not be sued in his own courts—and the High Court of Admiralty in London was one of those prerogative tribunals—this was largely modified by the *Petition of Right*¹⁷ and *monstrans de droit*,¹⁸ both forms of action which allowed proceedings against the Crown. And in the High Court of Admiralty, only a limited form of immunity was extended to the Crown.¹⁹ In

14 2 U.S. (2 Dallas) 419 (1793).

15 1 WILLIAM BLACKSTONE, COMMENTARIES *244.

16 The U.S. Supreme Court has suggested on occasion that sovereign immunity may have derived not necessarily from the English common law, but from the “jurisprudence of all civilized nations.” See *Hans v. Louisiana*, 134 U.S. 1, 17 (1890) (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857)); see also *Seminole*, 116 S. Ct. at 1130. But see *id.* at 1145–49, 1160 & n.26, 1176 n.59 (Souter, J., dissenting) (savaging this view).

17 See CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5–6 (1972); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 88 (1989). For more on the contemporaneous understanding of the Framers as to the British Crown's immunity from suit, see *Chisolm*, 2 U.S. (2 Dall.) at 437–45 (Iredell, J., dissenting).

18 See 9 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 24–26 (3d ed. 1926) (*monstrans de droit* meant literally a manifestation of right, allowing a subject to sue the Crown for possession of property claimed by the Crown); see also 3 BLACKSTONE, *supra* note 15, at *256–57.

19 See, e.g., *The Marquis of Huntly*, 3 Hag. Adm. 246, 166 Eng. Rep. 397 (Adm. 1835) (Nicholl, J.) (allowing an in rem salvage award to be assessed against government owned cargo); *The Lord Hobart*, 2 Dods. 100, 165 Eng. Rep. 1428 (Adm. 1815) (concluding that a post office packet may be arrested in a suit for mariner's wages); *The Jane*, 1 Dods. 461, 165 Eng. Rep. 1378 (Adm. 1814) (holding that hypothecation or mortgage of a hired transport vessel in the service of the government is enforcea-

certain kinds of admiralty proceedings, most notably those in prize (in which the Admiralty Court determined whether a capture of an enemy vessel or cargo was proper under international law as applied in England), the Crown was not immune from suit.²⁰

Professor Massey has persuasively shown, in any event, that in the colonies "there was no universal belief that the sovereign was immune from suit."²¹ The Charters of many colonies contained clauses disclaiming sovereign immunity,²² and upon independence from England in 1776, not a single one of the new states included in its constitution a general grant of sovereign immunity.²³ Lastly, American legal commentators at the time of Independence were sharply critical of the idea of sovereign immunity, and saw it as a legal vestige of a remote and hostile King with whom they were waging war.²⁴

ble in rem); *see also* *The Prins Frederik*, 2 Dods. 451, 464, 483-86, 165 Eng. Rep. 1543, 1548, 1554-55 (Adm. 1820) (Scott, J.) (allowing in rem salvage action against foreign warship, and impliedly disavowing contrary, unreported 1816 precedent in *The Comus* from the same court). *But see* *The Athol*, 1 W. Rob. 374, 382, 166 Eng. Rep. 613, 616 (Adm. 1842) (Lushington, J.) (suggesting that the Lords of the Admiralty must consent to appear in an action brought against a Crown vessel).

20 *See* *The Zamora*, [1916] 2 App. Cas. 77, 91 (P.C.) (Parker, L.) (After assessing the earlier precedents of the Admiralty Court, the Privy Council concluded that "all those matters upon which the [Prize] Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a [c]ourt his position is in fact the same as in the ordinary courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant.").

For more on prize jurisprudence, see my earlier review essay, David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31 (1995) (reviewing 11 J.H.W. VERZIJL ET AL., *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE* (1992)).

21 Massey, *supra* note 17, at 89; *see also* Doyle Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 209 (1968).

22 *See* Massey, *supra* note 17, at 89 (citing the Colonial Charters of Massachusetts (1620 & 1629), Connecticut (1662), and Rhode Island (1663)).

23 *See* John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1897-98 (1983). Two states—Connecticut and Rhode Island—readopted the contrary provisions of their Colonial Charters, thus expressly allowing suits against the state. *See id.* at 1898 n.42. Both Delaware and Pennsylvania adopted constitutional provisions that permitted the state to waive sovereign immunity. *See* SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 205-06 (1975) (Delaware provision noted that "[s]uits may be brought against the state, according to such regulations as shall be made law."); *id.* at 286, 293 (Pennsylvania Constitution allowed that "[s]uits may be brought against the Commonwealth in such manner, in such courts, and in such cases as the legislature may by law direct.").

24 *See* JACOBS, *supra* note 17, at 6-8; Massey, *supra* note 17, at 89-91.

B. Admiralty Jurisdiction

It may be surprising to realize that the admiralty courts and their jurisdiction were viewed with the same hostility by the colonists. After all, the Vice Admiralty Courts (one for each colony, later consolidated into four courts) were staffed by judges appointed directly by the Crown and were charged with wide-ranging revenue collection and enforcement powers.²⁵ Indeed, the powers and jurisdiction of the Vice Admiralty Courts were more far-reaching than those the High Court of Admiralty in London. The perceived abuses of the Vice Admiralty Courts were even noted in the Declaration of American Independence in 1776.²⁶

During the Articles of Confederation period, each new state erected its own admiralty tribunal to replace the royal Vice Admiralty courts. In response to the tyrannical reputation of those benches, states (for a short time) even experimented with the use of juries in admiralty and prize proceedings.²⁷ Evidence seems to suggest that the work of these state admiralty courts was limited to condemnations in prize, violations of state revenue laws, and some occasional suits brought by mariners for their unpaid wages.²⁸ This last kind of suit

25 See DAVID R. OWEN & MICHAEL C. TOLLEY, *COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE, 1634-1776* (1995); CARL UBBELOHDE, *THE VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960); Charles S. Andrews, *Vice-Admiralty Courts in the Colonies*, in *RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND 1716-1752*, at 1-79 (Dorothy S. Towle ed., 1936); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 *WM & MARY Q.* (3d ser.) 459 (1959); L. Kinvin Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 *AM. J. LEGAL HIST.* 250, 367 (1962).

26 THE DECLARATION OF INDEPENDENCE paras. 10, 11, & 12 (U.S. 1776) (King George III was "obstruct[ing] the Administration of Justice, by refusing his assent to Laws for establishing Judiciary Powers," by "mak[ing] Judges dependent on his Will alone, for the terms of their offices, and the amount and payment of their salaries," and by "erect[ing] a multitude of New Offices, and had sent hither swarms of Officers to harass our People . . .").

27 See HENRY BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787*, at 57-75 (1977); see also JULIUS GOEBEL, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 147-82 (1971).

As a civil law tribunal in England, suits and libels in admiralty were not heard with a jury. In any event, the states' experiences with juries in admiralty courts were short-lived. See generally BOURGUIGNON, *supra*, at 192-94.

28 For an analysis of the kinds of suits brought in state admiralty courts between 1775 and 1787, see William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 *AM. J. LEGAL HIST.* 117, 126-29 (1993) (reviewing published compilations of decisions in FRANCIS HOPKINSON, *JUDGMENTS IN THE ADMIRALTY COURT OF PENNSYLVANIA, 1779-1788* (Philadelphia, T. Dobson 1792);

was often initiated in rem by arresting the vessel on which the mariner had worked and thus had a lien.²⁹ In one tantalizingly elliptical decision of the Pennsylvania Court of Admiralty in 1781, it was held that "mariners enlisting on board a ship of war, or vessel belonging to a sovereign independent state, cannot libel against a ship for wages due."³⁰ The libelled vessel was the South Carolina, a duly commissioned warship of the "sovereign independent state" of the same name.

Despite the perception among the rebelling colonists that the Crown's admiralty tribunals—and the substantive law they applied—were to be regarded as alien and despotic, the Articles of Confederation actually did confer an admiralty jurisdiction upon the fledgling United States government. Article IX, section I of the Articles granted that jurisdiction over "the trial of piracies and felonies committed on the high seas; and . . . appeals in all cases of capture."³¹ Pursuant to this provision, the Continental Congress established the first national tribunal which heard appeals from state courts concerning disputed captures of enemy vessels and cargoes during the Revolutionary War.³² We shall soon hear more about this court and its rulings in a number of controversial cases.

CHARLES MERRILL HOUGH, *REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715–1788* (1925); A. TOKAY, *MARITIME COURTS AND ADMIRALTY JURISDICTION IN CONNECTICUT, 1776–1789* (1975); Aldrich, *Admiralty Jurisdiction and the Admiralty Courts of New Hampshire During the Colonial and Revolutionary Period*, 10 *PROC. B. ASS'N N.H.* 31, 47–54 (1909)).

29 See *The Talbot v. Commander and Owners of the Three Brigs*, 1 U.S. (1 Dall.) 95, 100 (Pa. 1784) ("[T]he case of wages [is] justly a favorite object of Admiralty Jurisdiction.").

30 *Moitez v. The South Carolina*, 17 F. Cas. 574, 574 (Pa. Adm. Ct. 1781) (No. 9697) (Hopkinson, J.). The judge in the case, Francis Hopkinson, later became one of the first federal district judges under the Constitution. See BOURGUIGNON, *supra* note 27, at 331. The decision in *Moitez* was interpreted by another judge to extend as a prohibition against in rem arrests against vessels in actual public service, and not to free-lance privateers. See *Ellison v. The Bellona*, 8 F. Cas. 559, 559 (D.S.C. 1798) (No. 4407) (Bee, J.).

31 ARTICLES OF CONFEDERATION art. 9, § 1, *reprinted in* 1 Stat. 4, 6 (1777).

32 For more on which, see BOURGUIGNON, *supra* note 27. As for its power to create a court for the trial of maritime crimes, Congress delegated this function to the states. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 99–101 (Wythe Holt & L. H. LaRue eds. 1990). In the Constitution of 1787, the federal Congress was granted the power to "define and punish piracy and Felonies committed on the High Seas, and offenses against the law of nations." U.S. CONST. art. I, § 8, cl. 10.

By 1787, of course, the defects of the Articles of Confederation had become manifest to the leading politicians of the day gathered in Philadelphia. Although certainly not a primary concern, a number of the lawyers who had been active in the Continental Congress had been dissatisfied with the weak federal judiciary created by the Articles, and were particularly concerned over the disharmony and lack of uniformity of state court decisions handed down in admiralty and maritime law cases.³³ In response, the Constitution provided simply that "the judicial Power [of the United States] shall extend to . . . all Cases of admiralty and maritime Jurisdiction."³⁴

What the Framers originally intended by the allocation of admiralty jurisdiction to the federal courts has remained a mystery. Virtually no discussion was recorded on the subject at the Constitutional Convention.³⁵ In the subsequent ratification debates, Alexander Hamilton, writing in *The Federalist*, did say that the allocation of admiralty jurisdiction to the federal courts was intended to promote uniformity. Hamilton wrote:

The most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.³⁶

Some recent writers have speculated that Alexander Hamilton's views should be credited for what they were: the purpose of the vesting of admiralty jurisdiction in the federal courts was really intended to protect the young United States from the diplomatic consequences flowing from certain kinds of admiralty controversies, most notably questions having to do with the capture of enemy or neutral vessels in time of war (what was called "prize" jurisdiction).³⁷ The concern for

33 See Casto, *supra* note 28, at 129–32; Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1427–30. The states had attempted also to interfere with appeals taken from state admiralty courts to the Confederation's Court of Appeals for Capture. See BOURGUIGNON, *supra* note 27, at 101–34, 297–318.

34 U.S. CONST. art. III, § 2. For more on the drafting of this Clause by the Convention's Committee of Detail, see Casto, *supra* note 28, at 132–35.

35 See Austin Tappan Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 128–29 (1925).

36 THE FEDERALIST NO. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 503–06 (3d ed., Boston, Little Brown & Co. 1858).

37 See Casto, *supra* note 28, at 135–37.

uniformity did not seem, at least in the Framers' contemplation, to extend to the commercial aspects of the maritime law.³⁸

When the First Congress convened under the authority of the Constitution, it charged President Washington's Attorney General, Edmund Randolph, to prepare a study of the just created federal judiciary.³⁹ His conclusions on admiralty jurisdiction were issued in 1790 and, as has been noted by Professor Casto,⁴⁰ were quite significant. It is important to bear in mind that Randolph had heard appeals in prize cases brought to the Continental Congress prior to the adoption of the Articles of Confederation.⁴¹ He was the acknowledged leader of the Virginia delegation at the Constitutional Convention, and was a member of the Committee of Detail which had actually drafted the Admiralty Clause in the Judiciary Article of the Constitution.⁴²

In his report, Randolph proceeded from the premise that "[t]he nature [of admiralty litigation] shuts out the jurisdiction of the State courts, as such, on the vital principles of the Union."⁴³ Randolph was emphatic that the states "by joining the federal compact . . . ha[ve] resigned [their admiralty jurisdiction] to the Federal Government."⁴⁴ He specifically included the following subject matters within the particular competence of the federal admiralty jurisdiction: "1. condemning all lawful prizes in time of war, 2. criminal sea law, 3. offenses on water against the revenue laws, and 4. claims for specific satisfaction on the body of a vessel, as for mariners' wages, &c."⁴⁵

Professor Casto has forcefully argued that Randolph's conception of a federal admiralty jurisdiction was essentially that of Alexander Hamilton's: strictly limited to those subject matters which directly implicated the concerns of the federal government over the conduct of

38 *But see id.* at 138–39 (discussing comments made by James Madison and Edmund Randolph at the Ratification Debates that are at least suggestive of a concern regarding uniformity of decisions in private maritime commerce cases); *see also* Southern Pac. Co. v. Jensen, 244 U.S. 205, 251 (1917) (Pitney, J., dissenting).

39 H.R. REP. 1st Cong., 3d Sess. (Dec. 31, 1790), *reprinted in* 1 AMERICAN STATE PAPERS: CLASS X MISCELLANEOUS 21–22 (Walter Lowrie & Walter S. Franklin eds., 1834) [hereinafter *Randolph Report*]; *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1333 (1996).

40 *See* Casto, *supra* note 28, at 119–22.

41 *See* C. Hobson, *The Early Career of Edmund Randolph, 1753–1789*, at 75–76 (1971) (unpublished Ph.D. dissertation, Emory University).

42 *See* 2 MAX FARRAND, *THE RECORD OF THE FEDERAL CONVENTION OF 1787*, at 97 (rev. ed. 1937).

43 *Randolph Report*, *supra* note 39, at 22.

44 *Id.* at 25; *see also* Letter from Edmund Randolph to Thomas Jefferson (Nov. 13, 1779), *in* 3 *THE PAPERS OF THOMAS JEFFERSON* 184 (J. Boyd ed. 1951).

45 *Randolph Report*, *supra* note 39, at 25.

war and diplomacy.⁴⁶ Private maritime disputes, Casto has suggested, did not figure prominently in Randolph's plan for the federal admiralty court, despite his mention of "claims for specific satisfaction on the body of a vessel," which we would today call a maritime lien enforced by an in rem action against a vessel or other property. Randolph noted that for such claims, "the State Legislatures may establish a jurisdiction reaching the vessel itself."⁴⁷ Confirming evidence of the Framer's intent for the non-exclusiveness of federal admiralty jurisdiction can probably be gleaned from section nine of the Judiciary Act of 1789, by which the basic federal court structure and jurisdiction was established. That section provided that the district courts of the United States shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . ; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."⁴⁸

What Randolph seemed to be suggesting was that, based on the "savings to suitors" clause of the Judiciary Act of 1789, state courts might be able to offer a common law remedy which allowed in rem process "reaching the vessel itself." But in this he was mistaken. American courts had consistently ruled that an in rem libel enforcing a maritime lien that had attached to a vessel was a uniquely admiralty remedy, and thus was not saved to suitors.⁴⁹ As a consequence, the sole forum for bringing an in rem action was in the federal admiralty

46 See Casto, *supra* note 28, at 120-21.

47 *Randolph Report*, *supra* note 39, at 22.

48 Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73 (codified at 28 U.S.C. § 1333(1) (1994)) (known as Judiciary Act of 1789). For a contrary view of the meaning of this provision, see Steven Breker-Cooper, *The Eleventh Amendment: A Textual Solution*, 38 WAYNE L. REV. 1481, 1519-20 (1992).

49 See *The Hind v. Trevor*, 71 U.S. (4 Wall.) 555, 571-72 (1866); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866). Professor Casto has suggested that the U.S. Supreme Court's enunciation in *The Moses Taylor* and *The Hind* that an in rem remedy is within the exclusive jurisdiction of federal admiralty courts was "virtually unprecedented in 1866 when it was essentially invented by the Court." Casto, *supra* note 28, at 142; accord Clark, *supra* note 39, at 1350-51.

I must beg to disagree, and the sources upon which Casto relies seem to disagree, too. While few judicial decisions and publicists drew the clear connection between an in rem remedy and exclusive federal court jurisdiction, the authorities were clear that in rem remedies were not available in common law courts. See CHARLES ABBOTT, A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 162, 238 n.1, 654, 665 n.2, 788 n.1 (6th Am. ed. 1850); JOSEPH ANGELL, A TREATISE ON THE LAW OF CARRIERS OF GOODS AND PASSENGERS BY LAND AND BY WATER § 610 (1849); 2 ARTHUR BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY 111-12 (2d ed. 1802). For more on Browne's influence, see Joseph C. Sweeney, *The Admiralty Law of Arthur Browne*, 26 J. MAR. L. & COM. 59 (1995).

court, and, to this extent, the states "by joining the federal compact . . . ha[d] resigned [this jurisdiction] to the Federal Government."⁵⁰

C. *State Sovereign Immunity and the Constitution*

Attorney General Randolph's language was significant, for it bore not only on the capacity of state courts to hear admiralty matters, but also on the immunities enjoyed by states in the new federal courts. As for sovereign immunity and federal jurisdiction, consider Alexander Hamilton's comments in *The Federalist No. 81*:

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . A recurrence to the principles there established will satisfy us, that there is no colour 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 obligations of good faith.⁵¹

Much ink has been spilt as to Hamilton's meaning here.⁵² Was he articulating a conception of full-blown state sovereignty which an-

Moreover, some sources were clear in making the correlation between in rem remedies and exclusive federal court jurisdiction. See *Waring v. Clarke*, 46 U.S. (5 How.) 441, 461 (1847) (Wayne, J.) ("It [the savings to suitors clause of the Judiciary Act of 1789] certainly could not have been intended more for the benefit of the defendant than for the plaintiff, which would be the case if he could at his will force the plaintiff into a common law court, and in that way release himself and his property from all the responsibilities which a court of admiralty can impose upon both, as a security and indemnity for injuries of which a libellant may complain,—security which a court of common law cannot give."); *Ashbrook v. The Golden Gate*, 2 F. Cas. 10, 10-11, 12 (D. Mo. 1856) (No. 574); *Clarke v. New Jersey Steam Navigation Co.*, 5 F. Cas. 974 (C.C.D. R.I. 1841) (No. 2859); *Percival v. Hickey*, 18 Johns. 257, 292 (N.Y. Sup. Ct. 1820).

⁵⁰ *Randolph Report*, *supra* note 39, at 25.

⁵¹ THE FEDERALIST NO. 81, *supra* note 36, at 487 (Alexander Hamilton); see also THE FEDERALIST NO. 32, *id.*, at 200 (Alexander Hamilton) ("[A]s the plan of the Convention aims only at the partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States.")

⁵² For a sampling, see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 370 (2d ed. 1994); JACOBS, *supra* note 17, at 40; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 91 (1922); Stewart A. Baker, *Federalism and the Eleventh Amend-*

tedated the Constitution?⁵³ If so, would this bar a state from being haled into a federal court unless it had explicitly consented in the litigation, waived its immunity by state statute, or implicitly accepted federal court jurisdiction by acceding to the Constitution under the “plan of the convention”?

Reading Hamilton’s and Randolph’s remarks together suggests strongly that there was a class of cases over which the federal courts were given exclusive jurisdiction and in which, states would not enjoy immunity if they were sued as a defendant. Assuming (and it may be an heroic assumption) that Hamilton was describing a class of cases to which, under the “plan of the convention,” states would not be immune, the problem is to determine the sorts of controversies he was contemplating.

What few have realized in glossing *The Federalist No. 81* is that Hamilton went on to consider a topic closely allied to state sovereign immunity: the ability of the Supreme Court, in the exercise of its appellate jurisdiction, to review the decisions of lower courts. The precise question he was addressing was whether, in an appeal from a common law judgment, the Supreme Court could review not only the legal conclusions reached by the lower court, but also the factual findings made (most likely) by a jury. Hamilton rejected that idea. But as for judgments from civil law tribunals—of which the leading category was admiralty—

the re-examination [by the Supreme Court] of the fact[s found by the court] is agreeable to usage, and in some cases, of which prize causes are an example, might be essential to the preservation of the public peace. It is therefore necessary, that the appellate jurisdic-

ment, 48 U. COLO. L. REV. 136 (1977); Gibbons, *supra* note 23, at 1911–12; Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1 (1988); Massey, *supra* note 17, at 94–96; Monaghan, *supra* note 10, at 123–24; John E. Nowak, *The Scope of the Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1427–30 (1975).

53 In current Eleventh Amendment litigation, Hamilton’s comment is extensively relied upon for this proposition. See, e.g., *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1130 (1996) (citing Hamilton for the proposition). *But see id.* at 1167–68 (Souter, J., dissenting) (suggesting that reliance on Hamilton may be unwarranted).

For a vigorous rebuttal of the notion that Hamilton’s statement in *The Federalist No. 81* is clear evidence of the Framers’ opinions on state sovereign immunity, “the crown jewel” of that argument in fact, see Gibbons, *supra* note 23, at 1911. Judge Gibbons’ view, supported by Professor Massey, *supra* note 17, at 94–95, is that Hamilton was only making a very modest point: “that no substantive right of action against a state for its pre-Constitution public debt could exist absent a state’s consent to grant such a right.” Gibbons, *supra* note 23, at 1911.

tion should, in certain cases, extend in the broadest sense to matters of fact.⁵⁴

And, as already noted,⁵⁵ it seems to have been beyond question that certain admiralty remedies—most notably in rem arrests—were quintessentially civil law in character, and were not saved to suitors in common law courts.

We will never know, of course, whether the Framers of the Constitution actually intended, under the “plan of the convention,” to waive the entirety of the state’s sovereign immunity from suit in the federal courts. Some delegates may have had that intent, as perhaps Hamilton did.⁵⁶ Quite clearly, some of the Anti-Federalist opponents to the Constitution railed against this furtive attack on state sovereign immunity.⁵⁷ And in New York, some members of the ratifying convention in 1788 proposed what they believed to be an equal and opposite riposte to the thrust of Article III: an amendment providing that “nothing in the Constitution . . . is to be construed to authorize any suit to be brought against any state, *in any matter whatever*.”⁵⁸

D. Admiralty and the States

In the take-no-prisoners debate on the original meaning of Article III and its impact on state sovereign immunity, no one has bothered to wonder whether the Framers might possibly have intended a limited withdrawal of state immunity in federal courts, according to the “plan of the convention.” I am suggesting there is evidence that the Framers believed and intended the states to be amenable to the jurisdiction of federal courts in admiralty actions, and particularly those actuated by in rem libels.

I begin with the premise that the Framers contemplated a core area of exclusive federal court jurisdiction over admiralty matters. It is not necessary to my argument to believe that Article III literally meant

54 THE FEDERALIST NO. 81, *supra* note 36, at 488–89 (Alexander Hamilton).

55 See *supra* notes 48–49 and accompanying text.

56 Hamilton was said to have supported the Supreme Court’s decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which interpreted Article III to permit a state to be sued by an individual from another state or country for a contract or debt. See 17 PAPERS OF ALEXANDER HAMILTON 9, 12 & n.13 (1972) (minutes of conference of Aug. 2, 1974) (quoting Hamilton as saying that opposition to the Court’s decision in *Chisolm* was “opposition to the Constitution”).

57 See Gibbons, *supra* note 23, at 1906 (Virginia debates); Nowak, *supra* note 52, at 1425–27 (discussing ratification debates in New York and Virginia).

58 2 JONATHAN ELLIOTT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 409 (Philadelphia, J.B. Lippincott 1876) (emphasis added).

what it said: that “*all* cases of admiralty and maritime Jurisdiction” were to be in federal court. That would make a nonsense out of the “savings to suitors” clause of the Judiciary Act of 1789, which clearly allowed concurrent state court jurisdiction over a class of cases in which a common law remedy was being sought. Rather, I think the Framers intended that those admiralty cases actuated through in rem arrests and libels (and not through common law in personam process) would be handled exclusively by the new federal courts. As Edmund Randolph noted in his 1790 report, the states when joining the Union “resigned [this power] to the Federal Government.”⁵⁹

I believe also that the Framers drew a parallel between the states’ surrender of judicial power to the federal government (as reflected in the Admiralty Clause in Article III) and their relinquishment of sovereign immunity in federal court. Each was part of the same bargain in the “plan of the convention,” as both Hamilton and Randolph wrote. It would have made no sense for the Framers to have believed that certain kinds of admiralty cases were triable only in federal court, and then to have allowed those same suits to proceed in state court if one of the claimants to the disputed res, or property, was a state government. So even if the states enjoyed sovereign immunity from suit in admiralty cases during the Articles of Confederation period, and that might have been suggested in the cryptic holding of the *Moitez* case,⁶⁰ they lost it with the ratification of the Constitution. The Anti-Federalist opponents to the Constitution (correctly) recognized that state sovereign immunity had been bargained away at Philadelphia.

Quite clearly, the Framers were most concerned about state admiralty courts adjudicating prizes. And they had good reason to be. Prize actions involved the legality of maritime captures in wartime under the law of nations and implicated the most delicate questions of diplomacy and national security. Hamilton said, these were questions “essential to the preservation of the public peace.”⁶¹ And as I have narrated,⁶² during the Confederation period there had been a constant struggle between state courts and the Congress (acting through its Court of Appeals for Captures) over which would have the last say in many of the disputed—and financially lucrative—claims to vessels and cargoes captured from the British Crown and its subjects during the late war. It is inconceivable to me that the Framers of the Constitution intended that prize cases in which a state government had a

59 *Randolph Report*, *supra* note 39, at 25.

60 *See supra* note 30 and accompanying text.

61 THE FEDERALIST NO. 81, *supra* note 36, at 488–89 (Alexander Hamilton).

62 *See supra* note 33 and accompanying text.

substantial interest (as a captor or other claimant) would be adjudicated in state court because of state sovereign immunity.

I think the Framers had the same concerns over non-prize (“instance”) cases within the admiralty jurisdiction. But once again the key issue was whether state courts would have concurrent jurisdiction. If they did, state sovereign immunity in federal court was not so objectionable. For in rem proceedings, however, which were denied to state courts under the Framers’ understanding of the “savings to suitors” clause, a state’s claim to sovereign immunity could not be seriously entertained in a federal court proceeding in which the state was a claimant to disputed property. Alexander Hamilton was right to note that civil law proceedings in rem were of a different kind and character, one which, “agreeable to usage,”⁶³ would permit the adjudication of a state’s interests in a disputed property in a federal admiralty court.

II. THE ADOPTERS’ UNDERSTANDING

One could charge that these are idle speculations, rendered irrelevant by the adoption of the Eleventh Amendment itself. But there is that small matter of textual silence in the Amendment. It doesn’t mention admiralty cases, while it does explicitly cover “any suit in law or equity.” A textual gap in a constitutional text requires contextual filling, and for that we must turn to the available evidence of the adoption of the Amendment in response to the Supreme Court’s decision in *Chisolm v. Georgia*.

A. *Chisolm and its Critics*

In 1792, the executor of a South Carolina merchant brought an action in assumpsit against the State of Georgia in the U.S. Supreme Court, claiming breach of a supplies contract from the Revolutionary War.⁶⁴ Georgia, claiming sovereign immunity, declined to even enter an appearance in the Supreme Court.⁶⁵ *Chisolm*’s argument before the Court was presented by none other than Edmund Randolph, the sitting Attorney General of the United States,⁶⁶ and his argument pro-

63 See *supra* note 54.

64 For historical background on the case, see Gibbons, *supra* note 23, at 1921–23; Massey, *supra* note 17, at 98–100; Mathis, *supra* note 21, at 217–19.

65 See JACOBS, *supra* note 17, at 48.

66 See *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 419 (1793). Judge Gibbons persuasively argues that Randolph’s representation had been approved by the Washington administration, anxious to allow the Supreme Court to enforce the United States’ obligations under the Peace Treaty with Great Britain, a position that Georgia was

ceeded from the clear language of Article III's grant of judicial power to the federal courts (as confirmed in the Judiciary Act of 1789),⁶⁷ which appeared unconditioned by whether the state was a plaintiff or a defendant. All but one justice of the Court (Iredell dissented)⁶⁸ accepted this argument, leaving open the substantive merits of *Chisolm's* case, as these might have been affected by any immunities Georgia might enjoy under its own common law or statutory grants against collection of its sovereign debts and obligations.⁶⁹

Randolph's argument was a ringing plea for federal supremacy and uniformity. Because the Constitution imposed a number of restrictions upon the states—among these Randolph enumerated⁷⁰ the prohibition against issuing authorizations to privateers to make captures on the high seas (“grant[ing] Letters of Marque and Reprisal”)⁷¹ and that against laying imposts or duties on tonnage, imports, or exports,⁷² both concerns of maritime law—it was surely contemplated that redress could be had against states in federal court. “[U]nconstitutional actions must pass without muster,” Randolph argued, “unless States can be made defendants These evils . . . cannot be corrected without a suit against the state” by ag-

defying by refusing to recognize the Supreme Court's jurisdiction in cases brought by foreign citizens against a state. See *Gibbons*, *supra* note 23, at 1923.

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

The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its own citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

Id.

68 See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1134–36 (1996) (Stevens, J., dissenting) (analyzing Justice Iredell's dissent in *Chisolm*); see also John V. Orth, *The Truth About Justice Iredell's Dissent in Chisolm v. Georgia* (1793), 73 N.C. L. Rev. 255 (1994).

69 See *Chisolm*, 2 U.S. (2 Dall.) at 479 (Jay, C.J.); see also *Seminole*, 116 S. Ct. at 1140–41 (Stevens, J., dissenting) (analyzing *Chisolm*); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1469–70 (1987); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1055–56 (1983); *Gibbons*, *supra* note 23, at 1925–26; Nowak, *supra* note 52, at 1430–33.

70 See *Chisolm*, 2 U.S. (2 Dall.) at 421–22 (Randolph, argument).

71 See U.S. CONST. art. I, § 10, cl. 1. Moreover, the Constitution also barred states from keeping “Ships of War in time of Peace.” *Id.* at cl. 3. This would have removed another source of sovereign friction and another reason that a state would have to enjoy sovereign immunity in admiralty actions filed in a federal court. Such a claim of state sovereign immunity was made by South Carolina in the *Moitex* case. See *supra* note 30 and accompanying text.

72 U.S. CONST. art. I, § 10, cls. 2 & 3; see also THE FEDERALIST NO. 32, *supra* note 36, at 202 (Alexander Hamilton) (discussing this restriction on state sovereignty).

grieved citizens.⁷³ Finally, echoing his (and Hamilton's) earlier comments on state sovereign immunity and the "plan of the convention," Randolph argued in *Chisolm* that the states had entered the Union of their "free will" and were thus "liable to process."⁷⁴

Much has been made of the fact that *Chisolm* did not concern the federal courts' admiralty jurisdiction. Later courts and commentators could fairly conclude, therefore, that to the extent the Eleventh Amendment responded to the Supreme Court's holding in *Chisolm*, it is unsurprising and unexceptional that the text of the Amendment would be silent as to admiralty matters.⁷⁵ This deduction ignores not only the salient conditions which influenced the Adopter's thinking about admiralty and state sovereign immunity, it also ignores some hints made in the body of the *Chisolm* decision.

In Randolph's argument to the Court, he expressly noted that had a suit been commenced against property in rem in federal court, and a claim to that res was subsequently interposed by a state, no immunity would be granted to the state.⁷⁶ Even more emphatically, Chief Justice John Jay added to Randolph's list of powers that the states had ceded to the federal government as part of the "plan of the convention." He included the grant of admiralty jurisdiction in Article III, "because, as the seas are the joint property of nations, whose

73 *Chisolm*, 2 U.S. (2 Dall.) at 423 (Randolph, argument).

74 *Id.*

75 See *In re New York* (Petition of Walsh), 256 U.S. 490, 497 (1921) ("It is true [that] the [Eleventh] Amendment speaks only of suits in law or equity; but this is because, as was pointed out in *Hans v. Louisiana*, the Amendment was the outcome of a purpose to set aside the effect of the decision of this court in *Chisolm* which happened to be a suit at law brought against the State by a citizen of another State . . .") (citations omitted); see also *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1130 (1996) (making the same suggestion but with regard to the fact that *Chisolm* did not contemplate federal question jurisdiction).

76 See *Chisolm*, 2 U.S. (2 Dall.) at 425-26 (Randolph, argument) ("The jurisdiction of this Court reaches to *Georgia*, as well as to *Philadelphia*. If therefore, the process could be commenced in *rem*, the authority of *Bynkershoek* would justify [the Court to hold it has jurisdiction over Georgia]; and whether it be commenced in *rem*, or in *personam*, the principle of amenability [of the state to suit] is equally avowed.")

Randolph's citation to the work of Cornelius van Bynkershoek is somewhat mysterious. See *id.* at 425 n.* (citing "8 Bynk. c.3 c.4"). The best guess is that he was referring to CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS [A MONOGRAPH ON THE JURISDICTION OVER AMBASSADORS IN BOTH CIVIL AND CRIMINAL CASES] (1744), reprinted in CLASSICS OF INTERNATIONAL LAW 22-25 (Gordon J. Laing transl., Clarendon Press 1946) (photo. reprint 1995) (noting that "[t]hrough the practice of nations it has been established that [foreign sovereign] property . . . shall be treated just like the property of private individuals and shall be subject in equal degree to burdens and taxes").

right[s] and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."⁷⁷ Here again is the connection between the powers of the federal government and the sovereign immunity enjoyed by the states in the new federal courts: federal judicial power necessarily included admiralty jurisdiction, and this necessity required from the beginning a corresponding exception to state sovereign immunity. The justices who decided *Chisolm* were well aware of the admiralty jurisdiction and its impact on claims of state sovereign immunity. This was surely manifest and notorious to any state official or member of Congress who read the decision and resolved to achieve by Amendment what the Constitution—and the Supreme Court—had failed to embrace: a sweeping recognition of state sovereign immunity from suit in the federal courts.

B. Congress Debates the Eleventh Amendment

Very little is known about the passage of the Eleventh Amendment in Congress in 1793 and 1794. As best as can be discerned, within a day or two of the handing down of the decision in *Chisolm*, a constitutional amendment was introduced in the House of Representatives by Theodore Sedgwick of Massachusetts. It provided that:

[N]o state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.⁷⁸

Sedgwick's rather prolix proposal was clearly offered in anticipation of the entreaties that would be made by various state governors and legislatures for the adoption of a constitutional amendment in the wake of the *Chisolm*.⁷⁹ Both Massachusetts and Virginia adopted resolutions⁸⁰ calling on an amendment that would clarify that a State "should [not] be held liable to answer on compulsory civil process,"⁸¹ nor "be made a defendant at the suit of any individual or individu-

⁷⁷ *Chisolm*, 2 U.S. (2 Dall.) at 475 (Jay, C.J.).

⁷⁸ PA. J. & WKLY. ADVERTISER, Feb. 27, 1793, at col. 2, quoted in Fletcher, *supra* note 69, at 1058–59 & n.116. This proposal was never reprinted in the *Annals of Congress*, the official gazette of record for Congress. See also Mathis, *supra* note 21, at 226 & n.73 (providing a slightly different citation).

⁷⁹ See Gibbons, *supra* note 23, at 1931.

⁸⁰ See Mathis, *supra* note 21, at 224–26.

⁸¹ RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 28, 31–32 (1793).

als.”⁸² These were much like the resolution adopted by the New York Assembly in 1788.⁸³ Some states even made calls for a Convention to be summoned under Article V of the Constitution to remedy the *Chisolm* decision.⁸⁴ The thrust of all of these proposals was clearly to reverse *Chisolm*, as well as to go a step further and insulate states from any in personam process at the instance of an individual in a federal court. Left unstated, of course, was any concern about the ability of federal courts to hear in rem actions in which the state was a claimant to disputed property.

In any event, Representative Sedgwick’s proposed amendment was tabled in the House; while in the Senate this text was proposed on February 20, 1793, by an unknown member: “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.”⁸⁵ This text, nearly identical to the one adopted the following year, certainly had the virtue of tighter composition, but carried with it the same problem of textual silence: the amendment seemed only a partial riposte to *Chisolm* and, unlike Representative Sedgwick’s proposal, did not extend broad sovereign immunities to the states.⁸⁶ Moreover, actions in law and equity were mentioned, but those characteristic of the admiralty jurisdiction were not. Curiously, and for some scholars quite significantly,⁸⁷ no legislative action was taken by Congress on these proposed amendments in 1793.

On January 2, 1794, likely the same unidentified Senator re-introduced his draft amendment.⁸⁸ The proposal was taken from the table on January 13 and debated on January 14,⁸⁹ when two additional drafts were submitted. Senator Albert Gallatin of Pennsylvania, a Republican ally of Madison and Jefferson, proposed the following:

The Judicial power of the United States, except in cases arising under treaties made under the authority of the United States, shall not be construed to extend to any suit in law or equity, commenced

82 1793 Va. Acts ch. 52; 1 Statutes at Large of Virginia, 1792–1806, at 284 (1835).

83 See *supra* note 58 and accompanying text.

84 See *Gibbons*, *supra* note 23, at 1930–32; *Massey*, *supra* note 17, at 113; see also U.S. CONST. art. V.

85 3 ANNALS OF CONG. 651–52 (1793). For more on the disputed authorship of this proposal, see *Gibbons*, *supra* note 23, at 1926–27.

86 See *Gibbons*, *supra* note 23, at 1927.

87 See *id.* at 1926–32.

88 4 ANNALS OF CONG. 25 (1794).

89 *Id.* at 29–30.

or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State.⁹⁰

An unidentified senator proposed this version:

The Judicial power of the United States extends to all cases in law and equity in which one of the United States is a party; but no suit shall be prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State, where the cause of action shall have arisen before the ratification of this amendment.⁹¹

Neither of these versions was accepted. Although no explanation is provided in the *Annals of Congress*, the historical context explains their respective rejections. Gallatin's surprising proposal would have, under the Peace Treaty of 1783, enabled loyal British subjects to sue states to recover property expropriated by the rebelling colonies or allowed citizens of other foreign nations to sue in recovery of defaulted state bonds.⁹² This would have wreaked havoc on the foreign relations of a young America at a time when the world's contemporary superpowers, England and France, were on the verge of war. The United States wished to stay neutral to protect its ships at sea from the warships and privateers of both nations. Although Jefferson's Republican party was aligned with anti-Federalist sentiments in many states, Gallatin's motion had the sanction of Jefferson.⁹³

The second proposal was an apparently misguided attempt to offer a compromise solution in the wake of *Chisolm*.⁹⁴ It would have confirmed the jurisdictional result in that case by allowing prospective suits against state defendants in the Supreme Court. At the same time, however, it would bar suits arising previously, including the vexatious suits for Revolutionary debts and recovery of Loyalist property confiscated by state governments. It had no chance of passage.

So it was that the first proposal made in the Senate was approved by a vote of 23 to 2.⁹⁵ Much has been made of its preambular statement that the "Judicial Power of the United States shall *not be construed to extend to*" the enumerated kinds of suits, seemingly indicating that

90 *Id.* at 30.

91 *Id.*

92 A specific right to sue was granted to aliens for torts in violation of the "law of nations" or "treaties of the United States" under another provision of the Judiciary Act of 1789, now codified at 28 U.S.C. § 1350 (Supp. 1996).

93 See Gibbons, *supra* note 23, at 1933. For the views of the Federalist party, see JACOBS, *supra* note 17, at 72; Massey, *supra* note 17, at 114; Nowak, *supra* note 52, at 1437-40.

94 See Gibbons, *supra* note 23, at 1933.

95 4 ANNALS OF CONG. 30-31 (1794).

Congress wished to propose merely a technical reinterpretation of Article III.⁹⁶ It was sent to the House of Representatives on January 15 and debated on March 4.⁹⁷ On that day, language was proposed by Representative Elias Boudinot of New Jersey,⁹⁸ a Federalist, that would have added a clause to the end of the existing draft:

The Judicial Power of the United States shall not be construed to extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State, *where such State shall have previously made provision in their own Courts, whereby such suit may be prosecuted to effect.*⁹⁹

This version of the amendment would have conditioned state sovereign immunity in federal courts upon the availability of real and effective remedies in state courts.¹⁰⁰ This initiative was soundly defeated, 8 to 77, and the original text, as sent to the House by the Senate, was approved 81 to 9 and thence referred to the several state legislatures for ratification.¹⁰¹

From the surprising number of variants of the Eleventh Amendment that were considered by Congress in 1793 or 1794, some conclusions can be reached about the Adopters' intentions as to admiralty jurisdiction and state sovereign immunity. First, and most pertinently, there was no explicit discussion, nor any proposal made, to include admiralty cases within the ambit of a state's sovereign immunity from suit in federal court. As has already been noted, the Founding generation was well aware of distinctions to be made between law, equity, and admiralty, and yet in none of the Congressional debates was this distinction drawn.¹⁰²

Nor was this an oversight, because Albert Gallatin's proposal in the Senate clearly referred to another basis of federal court jurisdiction over cases arising under "treaties made under the authority of the United States." That proposal's defeat would have been a clarion call to action for those who espoused the broadest grant of state sovereign immunity in order to extend even further the classes of cases to which

96 Compare JACOBS, *supra* note 17, at 67–69, and Fletcher, *supra* note 69, at 1061–62 (suggesting this), with Massey, *supra* note 17, at 117–18 (criticizing this view).

97 See 4 ANNALS OF CONG. 225, 476 (1794).

98 See Mathis, *supra* note 21, at 227.

99 4 ANNALS OF CONG. 476 (1794) (emphasis added).

100 See Fletcher, *supra* note 69, at 1059.

101 See 4 ANNALS OF CONG. 477, 1484 (1794).

102 See Fletcher, *supra* note 69, at 1061.

the Amendment applied.¹⁰³ But they did not extend it. And although great scholarly dispute remains over whether the adopted text of the Amendment was a mere technical correction of Article III jurisdiction or a broader grant of state sovereign immunity, the fact remains that even if the latter theory is embraced, the text of the Amendment applies only to a "suit in law or equity." In other words, it is possible to believe that the Adopters of the Eleventh Amendment intended to prevent suits by individuals against their own states under federal question jurisdiction (as, for example, regarding the construction of treaties), and did not intend to bar admiralty cases from federal court.¹⁰⁴

Additionally, the adopted text places emphasis on the manner in which a state is haled into federal court. Once again, the Amendment applies only to actions "commenced or prosecuted against one of the United States" In the Adopters' legal conception, this formulation would have made little sense with actions brought in rem against a property, to which title or possession is claimed by a state. Compared even with Representative Sedgwick's first cut at a draft in 1793,¹⁰⁵ and many of the proposals emanating from the states,¹⁰⁶ the finally adopted text of the Eleventh Amendment seemed to doubly exclude in rem actions brought under the maritime law: it neither mentioned suits (or libels) in admiralty, nor contemplated actions in which a state had a less than direct interest.

C. Admiralty Cases in the Amendment's Aftermath

A few final pieces of evidence can close these thoughts on the adoption of the Eleventh Amendment. At the same time that the Eleventh Amendment was being considered in Congress and ratified by the states, other cases were being filed under the original jurisdiction of the Supreme Court. One of these was *Cutting v. South Caro-*

103 This is especially true since the Act of Feb. 13, 1801, § 11, 2 Stat. 92 (1801), granted federal question jurisdiction to the federal circuit courts. The statute was, however, repealed the following year. See Act of Mar. 8, 1802, 2 Stat. 132 (1802). It was not re-enacted until 1875. See *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1152 n.12 (1996) (Souter, J., dissenting) (describing further the significance of this short-lived experiment with federal question jurisdiction).

104 But see Fletcher, *supra* note 69, at 1061 (linking the two by noting that the failure to mention admiralty cases "suggests that the adopters did not intend to forbid suits in admiralty, just as their failure to mention in-state citizens suggests that they did not intend to forbid federal question suits"); see also *Seminole*, 116 S. Ct. at 1150 (Souter, J., dissenting) (agreeing with Fletcher).

105 See *supra* note 78 and accompanying text.

106 See *supra* note 80 and accompanying text.

lina,¹⁰⁷ where the plaintiff served as the administrator for the Prince of Luxembourg. The suit arose over a ship chartered for use in the American Revolution by the State of South Carolina. The vessel was, however, captured by the British, and Luxembourg (through Cutting) sued South Carolina for breach of the charter.¹⁰⁸ Cutting filed an original action in the Supreme Court in 1796; the Court issued a default judgment against South Carolina the following year, and a jury empanelled by the Supreme Court awarded Cutting damages in the amount of \$55,002.84.¹⁰⁹ Before the Court could issue a final decree against South Carolina, the Eleventh Amendment completed its ratification process, and the case was dismissed by the Court for lack of jurisdiction in view of the amendment.¹¹⁰

Some may cite this as evidence that the Eleventh Amendment was construed, at the time of its adoption, as a bar against admiralty actions, despite the fact that the explicit language of the Amendment did not reach such suits. This might be true, except that *Cutting* was not an action in admiralty and was certainly not initiated as an in rem proceeding. The case was itself styled as an action in law, and it was questionable whether (under the precedents of English admiralty) an action for breach of a charter was even within the jurisdiction of the admiralty.¹¹¹ *Cutting*, therefore, provides no authority regarding the contemporary understandings of the Adopters as to the application of the Eleventh Amendment to suits or libels in admiralty.

Better evidence of the immediate post-ratification understanding of the Eleventh Amendment can probably be gleaned from the Supreme Court's handling of another case, *Penhallow v. Doane's Administrators*.¹¹² This case arose out of a dispute to a prize taken in 1777 during the Revolutionary War, in which the New Hampshire Court of Admiralty had condemned a vessel, the *Lusanna*, to the crew of the

107 *Cutting v. South Carolina*, Case File; Minutes, Feb. 29, Aug. 6, 1796; Docket 31 (U.S.).

108 See Mathis, *supra* note 21, at 228.

109 *Cutting v. South Carolina*, Case File; Minutes, Feb. 8, 10, Aug. 8, 11, 1797 (U.S.).

110 See *South Carolina v. French Republic & Cutting*, Case File. Minutes, Aug. 15, 1797, Feb. 14, 1798; Docket 49 (U.S.).

111 See 1 STEVEN F. FRIEDEL, *BENEDICT ON ADMIRALTY: JURISDICTION AND PRINCIPLES* §§ 50 & 51, at 3-22 to 3-25 (1996). The indeterminate jurisdiction of the admiralty courts was a problem that had been noted in *THE FEDERALIST* NO. 37, *supra* note 36, at 221 (James Madison). See also STORY, *supra* note 36, §§ 1665-1673, at 498-506. Justice Joseph Story, writing much after the *Cutting* case, might have been disposed to have included a contractual action for breach of a ship charter within the admiralty jurisdiction, but he was not explicit on that point. See *id.* § 1671, at 503.

112 3 U.S. (3 Dall.) 54 (1795).

privateer (operated by John Penhallow) that had captured it.¹¹³ Elisha Doane was the owner of the brig, and he sought an appeal from the New Hampshire court to the appeals committee of Congress. Leave to appeal was denied, but Doane insisted and took his case to Congress anyway.¹¹⁴ After some delay, the matter was referred to the new Court of Appeals created under the Articles of Confederation, and, after very substantial briefing and argument before the court, it reversed the New Hampshire Admiralty Court's decision and ordered the return of the *Lusanna* to Doane.¹¹⁵

The New Hampshire authorities refused to comply with the decision, and years of desultory correspondence followed between the captors, Elisha Doane, New Hampshire officials, and Congress.¹¹⁶ But Doane had the last laugh. Following the creation of the district courts in 1789, he filed in the federal district court (and thence transferred to the federal circuit court)¹¹⁷ in New Hampshire for the enforcement of the Court of Capture's decree. New Hampshire officials protested that Doane's renewed action offended state sovereignty and was, moreover, barred by the Eleventh Amendment.¹¹⁸ Doane's position prevailed in the circuit court, and the Supreme Court affirmed in a decision handed down in 1795.¹¹⁹ New Hampshire renewed its protests in Congress,¹²⁰ which referred them to a committee chaired by James Madison; the committee rebuffed them.¹²¹

Manifestly, the Adopters of the Eleventh Amendment did not regard the Eleventh Amendment as a bar to a federal court ordering a state official to convey a res, a vessel or prize proceeds to a particular individual. Unlike *Cutting*, there was no doubt that the underlying action was one initiated in rem within the admiralty jurisdiction of a court.¹²² New Hampshire was free to interpose its claim to the res, but

113 See *id.* at 54–63.

114 See BOURGUIGNON, *supra* note 27, at 242–44.

115 See *id.* at 244–51; see also Doane's Adm'r v. Penhallow, 1 U.S. (1 Dall.) 218 (C. P., Phila. County 1787) (describing how Doane unsuccessfully tried to enforce his judgment from the Confederation Court of Appeals by attaching Penhallow's property in Philadelphia).

116 See BOURGUIGNON, *supra* note 27, at 310–17.

117 See *Penhallow*, 3 U.S. (3 Dall.) at 62.

118 See 10 AMERICAN STATE PAPERS: 1 MISCELLANEOUS 79, 81, 124 (1834).

119 See *Penhallow*, 3 U.S. (3 Dall.) at 118.

120 See 10 AMERICAN STATE PAPERS: 1 MISCELLANEOUS 124 (1834).

121 See *id.* at 123; see also Gibbons, *supra* note 23, at 1938–39.

122 See *Penhallow*, 3 U.S. (3 Dall.) at 86 (Patterson, J.)

Whether the [federal] District Court of New Hampshire had jurisdiction; or, in other words, whether the libel exhibited before that court, was the proper remedy[,] . . . [o]n this point I entertain no doubts. . . . The property was

it could not (according to the Supreme Court's decision in *Doane*) thereby oust federal court jurisdiction based on the Eleventh Amendment.

III. FASHIONING AN UNDERSTANDING OF THE ELEVENTH AMENDMENT AND ADMIRALTY

Justice Joseph Story, writing somewhat later in his *Commentaries on the Constitution of the United States*, directly addressed the question whether the Eleventh Amendment applied to actions in admiralty directed against states. He wrote:

It has been doubted, whether this amendment [the Eleventh Amendment] extends to cases of admiralty and maritime jurisdiction, where the proceeding is *in rem* and not *in personam*. There [in an *in rem* action] the jurisdiction of the court is founded upon the possession of the thing; and if the state should interpose a claim for the property, it does not act merely in the character of a defendant, but as an actor. Besides, the language of the amendment is, that "the judicial power of the United States shall not be construed to extend to any suit *in law or equity*." But a suit in the admiralty is not, correctly speaking, a suit in law or in equity, but is often spoken of in contradistinction to both.¹²³

Story's views—not only as a sitting Justice of the Supreme Court, but also as among the great successors of the Framing generation—are entitled to some weight and were, moreover, echoed in the writings of other publicists, including Peter DuPonceau who concluded that "[i]t has been held that this restriction [in the Eleventh Amendment] does not extend to cases of admiralty and maritime jurisdiction."¹²⁴ Nevertheless, Story's views must be carefully assessed because of his self-professed desire to extend the admiralty jurisdiction, partic-

not restored to the libellants, nor were they compensated in damages; of course the decree in their favour remains unsatisfied. They had no remedy at common law; they had none in equity; the only forum competent to give redress is the District Court of New Hampshire, because it has admiralty jurisdiction. There they applied, and, in my opinion, with great propriety.

Id.

123 STORY, *supra* note 36, § 1689, at 475 (citing *United States v. Bright*, 24 F. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647), *Governor of Ga. v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), and *United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809)).

124 PETER S. DUPONCEAU, *A BRIEF VIEW OF THE CONSTITUTION OF THE UNITED STATES* 38 (Philadelphia 1834).

ularly as a vehicle to increase the power of the federal government (and courts) at the expense of the states.¹²⁵

Story's and DuPonceau's deductions concerning the extent of the Eleventh Amendment's jurisdictional bar in suits in admiralty brought by individuals against States stemmed from a series of cases before the Supreme Court beginning in 1809. From these cases, a general rule could be derived that the Eleventh Amendment did not bar federal courts from hearing admiralty in rem cases brought against states. It is exceedingly important, however, to carefully analyze these decisions.

A. *Peters and Bright: The Understanding Articulated*

The first case was *United States v. Peters*,¹²⁶ a decision coming in the later stages of a judicial saga that reached back to the Revolution and virtually identical to the facts and procedural posture presented in *Penhallow v. Doane's Administrators*.¹²⁷ The *Peters* case involved an American sailor, Gideon Olmstead, a citizen of Connecticut, who in 1778 had been captured and pressed into service by the British sloop *Active*. Olmstead led a mutiny and took control of the sloop. Just after Olmstead's band had assumed command, though, an armed brig belonging to the State of Pennsylvania, the *Convention*, came alongside and claimed the *Active* as a prize, and the vessel was, indeed, later condemned in a prize proceeding in the Pennsylvania Court of Admiralty.¹²⁸ Olmstead and his associates, however, received from the jury's verdict only a quarter share of the prize, even though they claimed they were the exclusive captors of the vessel.¹²⁹

Olmstead immediately appealed the Pennsylvania admiralty court's decision to the committee of the Continental Congress charged with resolving such matters. This was the committee upon which Edmund Randolph had served in Congress, and which had

125 This point has been emphatically made by recent courts. See *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 493 n.25 (1987)

Moreover, Justice Story was noted for his expansive view of the admiralty jurisdiction of federal courts. See, e.g., . . . Note, 37 *Am. L. Rev.* 911, 916 (1903) ("It was said of the late Justice Story, that if a bucket of water were brought into his court with a corn cob floating in it, he would have at once extend the admiralty jurisdiction of the United States over it.").

Id.

126 9 U.S. (5 Cranch) 115 (1809).

127 3 U.S. (3 Dall.) 54 (1795).

128 The decision of the Pennsylvania Court of Admiralty, along with its jury's verdict, was reprinted in *Peters*, 9 U.S. (5 Cranch) at 120-21.

129 See BOURGUIGNON, *supra* note 27, at 101-04; JACOBS, *supra* note 17, at 77.

been the predecessor of the Court of Appeals in Cases of Capture, created under the Articles of Confederation. The committee which heard Olmstead's appeal included such legal luminaries as Oliver Ellsworth (the drafter of the Judiciary Act of 1789), and it voted to reverse the Pennsylvania admiralty court's decision and declare that Olmstead and his associates were the exclusive captors of the prize.¹³⁰ However, the Pennsylvania courts refused to recognize Congress's decision and, moreover, refused to pay Olmstead even his quarter share of the prize money, ledgering it into the accounts of the state treasurer. What ensued was a political stand-off between Pennsylvania officials and the Continental Congress, each side claiming that it was to have the last say as to the disposition of vessels taken as prize during the War.¹³¹ As a result, Olmstead never received *any* prize money, and Congress grew worried about the problems inherent in concurrent state and national jurisdiction in maritime cases,¹³² anxieties that led to the creation of the Appellate Prize Court under the Confederation and also the granting of admiralty jurisdiction to the federal courts under the Constitution.

The Revolution ended, time passed, and still Olmstead had never been paid. Every time he applied to the State Treasurer, David Rittenhouse, for the funds that had been escrowed on his behalf, he was rebuffed. Olmstead filed a second action in the federal district court in Pennsylvania in 1803 and obtained a favorable judgment from Judge Peters, ordering Rittenhouse's heirs to hand the money over to Olmstead.¹³³ The Pennsylvania legislature immediately passed a statute declaring Judge Peters's decision a nullity and ordered the estate of the deceased state treasurer to pay the proceeds into the Pennsylvania treasury.¹³⁴

Upon application for a writ of mandamus by Olmstead, the Supreme Court ordered district court Judge Peters to issue execution of the judgment. The Court rejected the State's argument that the Eleventh Amendment barred the suit by holding that the suit was actually filed against the executrix of the state treasurer's estate and not against the State itself.¹³⁵ The Supreme Court interpreted the amendment to not affect the right of a State to bring suit in federal court on

130 See *Peters*, 9 U.S. (5 Cranch) at 121-23; BOURGUIGNON, *supra* note 27, at 104-05.

131 See BOURGUIGNON, *supra* note 27, at 105-12.

132 See Holt, *supra* note 33, at 1427-30.

133 Judge Peters's decision is reprinted in *Peters*, 9 U.S. (5 Cranch) at 124-26.

134 The Pennsylvania legislative acts are reprinted in *Peters*, 9 U.S. (5 Cranch) at 124, 127-34. At that time, state treasurers were personally liable for the accounts of the state.

135 See *Peters*, 9 U.S. (5 Cranch) at 139; see also Gibbons, *supra* note 23, at 1943-44.

its own behalf.¹³⁶ Chief Justice John Marshall, writing for a unanimous Court, went on to hold that

it certainly can never be alleged, that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

Since, then, the state of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within the [Eleventh] amendment; and, consequently, the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.¹³⁷

The Court's decision in *Peters* was not controlled by the fact that Olmstead's claim to the proceeds of the prize money for the Active was one based in admiralty. What was important for the Court was that Judge Peters's decision was simply in the form of injunctive relief directed to a state officer who, under color of state law, was depriving an individual of a federally derived right (in Olmstead's case, the decision granted by the Congressional committee of appeal for captures). In this sense, *Peters* was a forerunner of the Court's jurisprudence of *Ex parte Young*, which carved out an exception to the Eleventh Amendment for injunctive actions brought against state officers holding property without any colorable claim.¹³⁸ Moreover, it seemed to weigh on the Court that Olmstead's action was one that had always proceeded in rem, and that Pennsylvania's interest in the suit was tangential.

If this had been the end of the Olmstead saga, it would still provide persuasive evidence that the Eleventh Amendment was never intended to apply to in rem admiralty actions in which states had interposed themselves. But it was not, and events took a bizarre turn. When the U.S. Supreme Court announced its decision, the Governor of Pennsylvania responded by deploying the state militia around the home of the Rittenhouse heirs in order to prevent service of process of the writ of execution for Judge Peters's earlier decision. A clash between two armed groups—one led by the U.S. Marshal (under or-

136 See *Peters*, 9 U.S. (5 Cranch) at 139.

137 *Id.* at 139–40, 141.

138 Compare *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 (1982) (Stevens, J., plurality opinion) (establishing a three-prong test to determine if such suits were permissible), with *id.* at 713–17 (White, J., dissenting and concurring) (arguing for the adoption of a "colorable claim" standard).

ders to serve the process), the other led by state militia officers—seemed imminent until President Madison indicated that he would use his powers to enforce the Supreme Court's decision on behalf of Olmstead. The Pennsylvania authorities backed down, and their humiliation was complete when a federal indictment was returned against General Michael Bright, the militia commander who had forcibly resisted the U.S. Marshal.¹³⁹

Bright and the Pennsylvania authorities objected to the jurisdiction of the federal circuit court on the grounds of the Eleventh Amendment.¹⁴⁰ Riding circuit, Justice Bushrod Washington denied the objection, noting that "[e]very reason is opposed to the construction contended for by [Bright's] counsel; and to our apprehension there is not one sound reason in favor of it."¹⁴¹ Washington held, first, that since the suit was not filed against the State, and since the State had entered the case to press its own interests, the Eleventh Amendment did not bar the suit.¹⁴² This was simply a repeating of the Supreme Court's holding in *Peters*.¹⁴³

Washington went on to write, however, that "[w]e think that the amendment to the constitution does not extend to suits of admiralty and maritime jurisdiction."¹⁴⁴ Washington based his decision on the plain language of the Eleventh Amendment and the fear that by interpreting it to include language that was not in the text of the Amendment he would be opening the door for a construction which destroyed the intent of the original drafters:

Would we be justified by any rule of law in admitting such an interpolation [of admiralty cases into the Eleventh Amendment], even if a reason could not be assigned for the omission of those words in the amendment itself? I think not. In our various struggles to get at the spirit and intention of the framers of the constitution, I fear that this invariable charter of our rights would, in a very little time, be entirely construed away, and become at length so disfigured that its founders would recollect very few of its original features.¹⁴⁵

139 See JACOBS, *supra* note 17, at 80.

140 *United States v. Bright*, 24 F. Cas. 1232, 1234 (C.C.D. Pa. 1809) (No. 14,647).

141 *Id.* at 1235.

142 See *id.* ("It is certain that the suit in the district court was not commenced or prosecuted against the state of Pennsylvania. She was in no respect a party to that suit.")

143 But see *Gibbons*, *supra* note 23, at 1945 (suggesting that Washington went further on this point than Marshall's decision in *Peters*).

144 *Bright*, 24 F. Cas. at 1236.

145 *Id.*

Here was a plea for restraint in constitutional interpretation, all the more remarkable in that it was made just a few years after the adoption of the Eleventh Amendment!

But Justice Washington did not stop with a paean to intelligent textualism. He went on to observe that there “appears to be a solid reason for the limitation of the amendment to cases at law and in equity.”¹⁴⁶ The limitation lay in the key distinction between suits in law or equity, and those in admiralty. In the former, Washington wrote, the state must be made a party and enforcement of a judgment acts directly against the state:

But in cases of admiralty and maritime jurisdiction the property in dispute is generally in the possession of the court, or of persons bound to produce it, or its equivalent, and the proceedings are in rem. The court decides in whom the right is, and distributes the proceeds accordingly. In such a case the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree. All the world are parties to such a suit, and of course are bound by the sentence. The state may interpose her claim and have it decided. But she cannot lie by, and, after the decree is passed say that she was a party, and therefore not bound, for want of jurisdiction in the court.¹⁴⁷

Not content with relying on principles of constitutional interpretation and the significant doctrinal differences between admiralty libels in rem and other forms of action in law and in equity, Justice Washington also made an important policy point. To accept Pennsylvania’s position, he wrote, would place in jeopardy the legitimacy of “the proceedings of a court of the law of nations, and in which all nations are interested, [and] might be productive of the most serious consequences to the general government, to whom are confided all our relations with foreign governments.”¹⁴⁸ It is important, though, to note that this particular concern would probably be confined to those in rem libels proceeding on the prize side of the admiralty court, which was exactly the disposition of the underlying claim by Gideon Olmstead. Justice Washington did not limit the possibility that an in rem “instance” libel, perhaps arising from a collision between two vessels or the rendering of salvage services, might implicate foreign affairs issues.

In any event, Justice Washington’s decision in *Bright* seems a ringing endorsement of the idea that the Eleventh Amendment does not

146 *Id.*

147 *Id.*

148 *Id.* Prize tribunals were often conceived of as “a court of the law of nations.” For more on this, see Bederman, *supra* note 20, at 52 & n.105, 54.

apply to admiralty libels in rem.¹⁴⁹ Admittedly, Washington was careful in framing his decision on the distinction between in personam process running against a state (or state official) and an in rem libel against an object, thus avoiding what he acknowledged was the "delicate" "subject" of effective execution of a judgment against an unconsenting state.¹⁵⁰

B. *The Madrazo Cases: The Understanding Refined*

Almost twenty years later, the Supreme Court was given the opportunity to rule again on the applicability of the Eleventh Amendment to admiralty cases. *Governor of Georgia v. Madrazo (Madrazo I)*¹⁵¹ involved the capture of a slave ship, the *Isabelita* (owned by a Spanish subject, Juan Madrazo), by an American pirate who then libelled the human "property" in a "pretended Court of Admiralty" erected at Fernandina, Amelia Island, Florida. The slaves were then sold to a William Bowen and thence found their way into Georgia, where they were seized by United States customs officials.¹⁵² The customs agent delivered the Africans to the Governor, who then sold some of them (without any notice), while the remainder stayed in the possession of a state appointed agent. The *Isabelita* was later restored to Madrazo, but there remained the disputed claim to the slaves.

Madrazo brought a libel in rem in the federal district court of Georgia to recover not only the unsold slaves but also the proceeds of the earlier sale by the state. The Governor brought an information of

149 See also Massey, *supra* note 17, at 122-23. For a criticism of this holding, see Gibbons, *supra* note 23, at 1945 n.306.

But see *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 491 n.23 (1987) (suggesting that Justice Washington's Eleventh Amendment holding may have been part of his charge to the jury, but wrongly concluding that his statements were dicta).

150 See *Bright*, 24 F. Cas. at 1236; see also *Fletcher*, *supra* note 69, at 1079.

151 26 U.S. (1 Pet.) 110 (1828).

152 See *id.* at 110-11. The slave trade had been outlawed by an act of Congress in March 1807, Act to Prohibit the Importation of Slaves into any Port or Place within the Jurisdiction of the United States, ch. 22, 2 Stat. 426 (1807), as was contemplated in the Constitution. See U.S. CONST. art. I, § 9, cl. 1. *Madrazo I* was closely linked to another cause célèbre decided by the Supreme Court, *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). For more on the background of this case, see JOHN T. NOONAN, JR., *THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS* (1977).

Also significant to the *Madrazo I* case was a Georgia law, also passed in 1807, which gave to the governor the power to receive slaves forfeited under federal law and to dispose of them in a manner advantageous to the state. See Act of Dec. 19, 1817, 1817 Ga. Laws 78; see also Gibbons, *supra* note 23, at 1962 & n.392.

forfeiture to gain title to all the slaves and, by accepting a monition from the district court, accepted in personam jurisdiction by the federal admiralty court. Bowen also joined the suit to claim title to the slaves.¹⁵³ The district court dismissed both Madrazo's libel and Bowen's claim and affirmed the Governor's information. Madrazo appealed to the federal circuit court,¹⁵⁴ which reversed, and granted Madrazo's libel against the Governor and State of Georgia. The Governor, John Clark, appealed to the U.S. Supreme Court.¹⁵⁵

Governor Clark's attorney in the Supreme Court specifically focused his argument on the proposition that the Eleventh Amendment barred Madrazo's action. John MacPherson Berrien noted that the "spirit" of the Amendment was such as to apply to actions in admiralty.¹⁵⁶ "Proceedings in admiralty, are suits in law," he submitted, "[d]oes the admiralty proceed without law, according to the will of the judge?"¹⁵⁷ Moreover, he argued that

[t]he objections made by the states to their liability, before the amendment of the constitution, was not to the mode by which the suit was instituted; but to the fact of their being made answerable to the courts of the Union. To restrict the amendment to cases of common law and equity, would not, therefore, have afforded an adequate remedy to the alleged grievance.¹⁵⁸

Realizing, though, that the text of the Amendment was against him on this score, Berrien went on to make two other points. The first was that, assuming that the Eleventh Amendment did not apply to admiralty actions, Madrazo was obliged to have filed his case as an original action in the Supreme Court (as a matter brought by "foreign States, Citizens or Subjects" against a state), and not in the district court.¹⁵⁹ Second, Berrien argued that the district court did not, in any event, have jurisdiction over the res in the in rem action because a warrant of arrest had never been served on the slaves in the state agent's custody. Governor Clark had merely stipulated that the slaves would be held "subject to the jurisdiction of th[e] Court."¹⁶⁰

153 See *Madrazo I*, 26 U.S. (1 Pet.) at 111–12.

154 Federal circuit courts had appellate jurisdiction over the admiralty and forfeiture judgments of district courts, pursuant to sections 21 and 22 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, 83–84 (1789).

155 See *Madrazo I*, 26 U.S. (1 Pet.) at 112.

156 See *id.* at 114–15 (argument of John Berrien).

157 *Id.* at 115.

158 *Id.*

159 See *id.* at 115–16; see also U.S. CONST. art. III, § 2, cl. 1.

160 See *Madrazo I*, 26 U.S. (1 Pet.) at 112 (statement of the case), 115–16 (argument of counsel).

Chief Justice John Marshall, writing for the Court, grasped these arguments as a way to craft a compromise result. He was clearly worried about the ability of the federal government to enforce a decision in Georgia.¹⁶¹ The Court, therefore, affirmed the dismissal of the governor's forfeiture claim since a state could not have good title to slaves illegally exported into the United States in violation of the Act of 1807 banning that trade, pursuant to the Constitution. The Court also dismissed Madrazo's admiralty in rem claim by holding that since the district court did not have possession of the slaves at the time of the decision (because of the imperfect arrest), it was actually a proceeding in personam.¹⁶²

The decree cannot be sustained as against the state, because, if the 11th amendment to the constitution does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the supreme court. It cannot be sustained as a suit, prosecuted not against the state, but against the thing; because the thing was not in possession of the district court.¹⁶³

Marshall thus avoided an express holding that the Eleventh Amendment did not apply to admiralty in rem proceedings against a state by holding it was not an admiralty proceeding in rem at all. It was just an in personam case against the Governor himself, acting in his official capacity.¹⁶⁴ However, the opinion stopped short of ordering the specific performance of Madrazo's claim.¹⁶⁵ Madrazo would have to sue for a separate judgment to obtain money from the state treasury for the sale of the seized slaves and the slaves remaining in the custody of the state.

In *Ex parte Juan Madrazo (Madrazo II)*,¹⁶⁶ Madrazo (ostensibly informed of Marshall's jurisdictional views from *Madrazo I*) attempted to invoke the Supreme Court's original jurisdiction to "award admiralty process against the State of Georgia . . . to show cause why the pro-

161 See *Gibbons*, *supra* note 23, at 1966.

162 Cf. *Madrazo I*, 26 U.S. (1 Pet.) at 131-32 (Johnson, J., dissenting) (arguing that Georgia had consented to the suit by filing a stipulation that the res would be kept at the disposal of the federal district court).

163 *Id.* at 124.

164 See *id.* at 123-24. For more on *Madrazo I* as an officers' suit, see *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 711 (1949) (Frankfurter, J., dissenting). See also *JACOBS*, *supra* note 17, at 103-05; 1 BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES 400 (1963).

165 See *Madrazo I*, 26 U.S. (1 Pet.) at 135 (remanding the case to the circuit court "with directions for further proceedings, to be had thereon, according to law and justice, in conformity to this opinion").

166 32 U.S. (7 Pet.) 627 (1833). Notice the difference in spelling between the two cases.

ceeds of the said slaves, paid into the treasury of said state, should not be paid over to the libellant [Madrado], [and] the slaves remaining in the possession of the state restored to him."¹⁶⁷ Marshall held simply that

[t]his is not a case where the property is in custody of a court of admiralty, or brought within its jurisdiction, and in the possession of any private person; it is not, therefore, one for the exercise of that jurisdiction. It is a mere personal suit against a state, to recover proceeds in its possession, and in such a case, no private person has a right to commence an original suit in this court against a state.¹⁶⁸

In other words, this was an in personam action brought against a state (whether denominated in admiralty or otherwise), a kind of case barred by the Eleventh Amendment. *Madrado II* impliedly left open the possibility that a properly perfected in rem libel could be brought in the Supreme Court, and even if a state interposed a claim, jurisdiction would not be denied under the Eleventh Amendment.

Marshall's combined decisions in the *Madrado* cases were, as already suggested, a masterful political solution to the problem of Georgia's defiance of federal authority. But they were premised on some false assumptions of federal jurisdiction. The first, and relatively minor, issue was the ineffectiveness of the stipulation made by Governor Clark that the res which was the subject of the action (the slaves and derivative proceeds held in the treasury) would be held at the disposal of the circuit court. To the extent the circuit court could hear appeals in admiralty from the district court,¹⁶⁹ it surely was empowered to issue all writs in pursuance and in protection of its jurisdiction.¹⁷⁰

Marshall's more serious misstep was in thinking that an in rem admiralty action initiated by an individual, in which a state interposed a claim to the res, was within the exclusive original jurisdiction of the Supreme Court. The Judiciary Act of 1789 did not so provide. Instead, it gave exclusive jurisdiction to the Supreme Court "of all controversies of a civil nature, where a state is a party, *except* . . . between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction."¹⁷¹ Assuming (as Chief Justice Marshall said he did) that the Eleventh Amendment did not

167 *Id.* at 631 (submission of counsel).

168 *Id.* at 632.

169 See Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85 (1789).

170 See *id.* § 14, 1 Stat. at 81-82. Justice Johnson, in dissent in *Madrado I*, ably made this point. See *Madrado I*, 26 U.S. (1 Pet.) at 132-35; see also Gibbons, *supra* note 23, at 1967 n.427.

171 Judiciary Act of 1789 § 13, 1 Stat. at 80 (original emphasis); see also Massey, *supra* note 17, at 125 & n.316.

apply to admiralty actions, the proper court to file any admiralty action (whether one proceeding in personam or in rem) would have been a federal district court under section nine of the Judiciary Act of 1789.¹⁷² Moreover, Article III of the Constitution made clear that admiralty and maritime causes were not within the Supreme Court's original *and exclusive* jurisdiction.¹⁷³ Nor could even Congress authorize the Supreme Court to hear an original proceeding in admiralty.¹⁷⁴ As Justice Johnson noted in his dissent in *Madrazo I*, "[n]ow, it is very clear, that wherever the District Court is vested with 'exclusive original cognizance,' the Supreme Court can possess no original jurisdiction; and such is clearly the case with regard to . . . suits in the admiralty."¹⁷⁵

There was, moreover, a jurisdictional trap in Marshall's suggestion: in an in rem action, how was a libellant to know (in advance) whether a state would be a claimant? If a party filed a libel in district court and a state interposed a claim, under Marshall's theory, the action would have to be dismissed. But, if (as *Madrazo* did in his second action) a party brought an original action in the Supreme Court, and the state (or state officer) did not interpose a claim, then the action was not properly one "where a state is a party," and would also be dismissed. The far more logical position was the one advocated by Justice Johnson: that an in rem libel in admiralty could be filed in federal district court, and even if a state interposed a claim, it would not be barred by the Eleventh Amendment. In any event, the important point that all the justices seemed to agree on in the *Madrazo* cases, as well as in *Peters* and *Bright*, was that an in rem admiralty action, when properly commenced and pursued, could never be construed to be an action "commenced or prosecuted" against a state, and thus could not be barred by the Eleventh Amendment.

IV. THE SOVEREIGN IMMUNITY REVOLUTION

That the Eleventh Amendment did not block in rem libels brought in admiralty was the rule of law for the next ninety years. Nevertheless, by the mid-nineteenth century a jurisprudential revolution was taking place within the doctrine of sovereign immunity. It began subtly enough with a series of decisions on the immunities en-

172 Judiciary Act of 1789, §9, 1 Stat. at 76.

173 U.S. CONST. art. III, § 2.

174 An analogous problem was the issue on the merits in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

175 *Madrazo I*, 26 U.S. (1 Pet.) at 129-30 (Johnson, J., dissenting) (quoting from Judiciary Act of 1789, § 9, 1 Stat. at 76).

joyed by the vessels owned and operated by foreign sovereigns.¹⁷⁶ And although the immunities of foreign sovereigns may be analogous to those enjoyed by the United States in its own courts, the connection with the immunities possessed by states in a federal union seems more attenuated.¹⁷⁷

Much more pertinent to the problem of the application of the Eleventh Amendment to actions in admiralty was a series of cases decided by the Supreme Court as to the immunities of the federal government. As has occurred in many areas of Eleventh Amendment jurisprudence, doctrines of *federal* sovereign immunity have been merged into the law concerning states' Eleventh Amendment immunity.¹⁷⁸ Although relatively unnoticed by judges or commentators,¹⁷⁹ exactly the same process of merger has occurred in admiralty cases, with predictably curious and distortive effects.

176 See, e.g., *The L'invincible*, 14 U.S. (1 Wheat.) 238 (1816); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); see also Stefan A. Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1 (1940).

Mistakenly included in discussions of cases standing for the proposition of absolute sovereign immunity for foreign owned or operated vessels is *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), where a U.S. court did exercise jurisdiction over a vessel brought into neutral, American waters as an illegal prize. See Bederman, *supra* note 20, at 56-57 (discussing this case). But see *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 493 n.26 (1987) (citing the case for the general proposition).

The question of the sovereign immunities of foreign vessels in English courts was only settled with *The Parlement Belge*, 5 P.D. 197, 219-20 (Eng. 1880), which held that an *in rem* action against foreign sovereign vessel was barred. This case marked the complete reversal of *The Prins Frederik*, 2 Dods. 451, 165 Eng. Rep. 1543 (Adm. 1820), which had permitted such suits.

177 This point was made by the dissent in *Welch*, 483 U.S. at 500 n.4 (Brennan, J., dissenting).

178 The leading such area is the ability to sue a governmental officer and to not have such a suit barred by sovereign immunity. Eleventh Amendment jurisprudence concerning suits against state officers who, while acting under color of state law, are depriving an individual of a federally derived right, have been substantially influenced by cases involving federal officers. See, e.g., *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) (state officers); *Malone v. Bowdoin*, 369 U.S. 643 (1962) (federal officers); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (federal officers); *Tindal v. Wesley*, 167 U.S. 204 (1897) (state officers); *United States v. Lee*, 106 U.S. 196 (1882) (federal officers).

For more on this phenomenon of merger between state and federal sovereign immunities, see Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515 (1977).

179 But see *Treasure Salvors*, 458 U.S. at 710 n.6 (White, J., dissenting) (discussing some federal sovereign immunity decisions in admiralty in an Eleventh Amendment case).

A. *Federal Sovereign Immunity in Admiralty*

In 1868, the Supreme Court heard a maritime tort case involving the prize ship, *Siren*. This steamer had been captured in the harbor at Charleston, South Carolina, attempting to run the Union blockade of the Confederacy in 1865. As the vessel was being brought into New York Harbor under the command of a Union prize crew, she negligently ran into and sank another ship, the *Harper*. The owners of that ship intervened in the government's condemnation of its prize in the Federal District Court of Massachusetts, to recover damages for the loss of their ship. The United States claimed that the district court had no jurisdiction over such a suit by reason of federal sovereign immunity.¹⁸⁰

Justice Stephen Field first laid out the common law doctrine of sovereign immunity and the policy reasons which supported the doctrine. He stated that "inconvenience and danger" would follow any other rule that would permit "the supreme authority [to] be subjected to suit at the instance of every citizen."¹⁸¹ It would interfere with public safety and service and prevent the usual administration of governmental duties. Without a specific act of Congress waiving immunity, the United States could not be haled into court.

However, Field went on to note that

when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed *in rem*, they open to consideration all claims and equities in regard to the property libelled.¹⁸²

He explained that, under ordinary circumstances, when a vessel which is the property of the United States commits a maritime tort, a cause of action arises against that vessel. Because the vessel is government property, "for reasons of public policy . . . [the claim] cannot be enforced by direct proceedings against the vessel. It stands . . . like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose."¹⁸³ In dicta, he expanded

180 *See The Siren*, 74 U.S. (7 Wall.) 152, 152–53 (1868).

181 *Id.* at 154.

182 *Id.*

183 *Id.* at 155; *see also* *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233–34 (1844) (expanding on the concept of *in rem* liability of an object).

this holding to include maritime contract liens, including those for mariners' wages.¹⁸⁴

But in an in rem prize proceeding, since the government instituted the action for judicial sale of the prize ship upon which claims existed, it had waived its immunity. This meant it had given the prize court the right to determine how the sale proceeds, which had been paid into the court's registry, should be directed.¹⁸⁵ So the general rule from *The Siren* is that an admiralty claim will arise against a federally owned vessel for a maritime tort, but, due to public policy, the claim cannot be enforced. An exception to this rule comes about when the federal government itself institutes an in rem libel and subjects itself to the jurisdiction of a court, as in a prize proceeding. In such a case, the federal government stands as a private party against the existing claimants.¹⁸⁶

A year later, the Supreme Court heard a case in salvage brought by the captain of a vessel which had saved the personal property of the federal government from destruction aboard the *Davis*.¹⁸⁷ Justice Miller stated the two issues before the Court as, first, whether the personal property of the federal government is subject to a lien for salvage services rendered in saving the property, and, second, whether such a lien, if it did exist, may be enforced. As to the first issue, Miller quickly held that the lien did arise, citing numerous cases in support.¹⁸⁸

"The second of the questions above stated," Justice Miller noted with some understatement, "presents the more difficult problem."¹⁸⁹ After looking to *The Siren* and a Massachusetts decision, *Briggs v. Light-Boats*,¹⁹⁰ he stated the general rule that "no suit *in rem* can be main-

184 *The Siren*, 74 U.S. (7 Wall.) at 157 (discussing, without citing, the Pennsylvania Admiralty Court's decision in *Moitez*). For more on the *Moitez* opinion, see *supra* note 30 and accompanying text).

185 *See id.* at 159.

186 This was the rule observed in England at the time of the Revolution. *See supra* note 20 and accompanying text.

187 *See The Davis*, 77 U.S. (10 Wall.) 15 (1869).

188 *See id.* at 18.

189 *Id.* at 19.

190 93 Mass. (11 Allen) 157 (1865). In *Briggs*, a maritime lien attached to a vessel before the United States purchased it. The lien holder sought to enforce the lien in Massachusetts state courts. Such relief was denied because the Massachusetts Supreme Court properly ruled that an in personam action against the United States was not possible without an express waiver of sovereign immunity by Congress, which was not forthcoming here. Yet, in what had to be dicta (because a state court could not offer an in rem remedy, see *supra* note 49 and accompanying text), it was held that the government's possession of property could not be disturbed by a suit in rem.

tained against the property of the United States when it would be necessary to take such property out of the possession of the government by any writ or process of the court."¹⁹¹

Applying this general rule to the specific facts of the case, Miller sought to give it a liberal construction in order to promote justice.¹⁹² He stated that the law recognizes the existence of the lien for salvage and that enforcement against the government was permissible so long as no process was needed and the possession of the government would not be disturbed. The key question for the Court, then, was "what shall constitute a possession which, in reference to this matter, protects the goods from the process of the court?"¹⁹³ Miller replied that government possession must be actual, not constructive or implied by ownership of personal property, and that it "can only exist through some of its officers, using that phrase in the sense of any person charged on behalf of the government with the control of the property, coupled with its actual possession."¹⁹⁴ In this case, the goods that had been the subject of salvage were in the possession of the master of the private ship, the *Davis*, and not the government. Therefore, the lien for salvage existed and could be enforced.¹⁹⁵

The Davis was an immensely significant holding. The rule of that case permits an in rem action to be instituted, even where the United States is an obvious (or the only) claimant, so long as the res being disputed is not within the actual possession of the federal government or its officers. If the disputed property is not in the possession of the government at all, or at most can be deemed to be constructively held by the United States, the suit can proceed.¹⁹⁶ This position strikes a

191 *The Davis*, 77 U.S. (10 Wall.) at 19.

192 *See id.* at 20–21.

193 *Id.* at 21.

194 *Id.*

195 *See id.* at 22; *see also* *Goldsmith v. The Revenue Cutter*, 6 Or. 250, 252–53 (1877) (holding, in a case similar to *Briggs*, that a federally owned vessel was in the actual possession of the United States and that, therefore, no "warrant" could issue).

The Supreme Court later refined *The Davis* holding in *The Western Maid*, 257 U.S. 419 (1922), in which Justice Holmes held that if a lien purportedly attached to a vessel in actual government service (and thus was not enforceable in rem), it remained unenforceable in rem even if the vessel was later transferred to a private party unprotected by sovereign immunity.

196 This rule was applied to cases involving other federal vessels. *See* *United States v. Morgan*, 99 F. 570 (4th Cir. 1900) (deciding that the United States waived in personam immunity by statute for an implied maritime contract for towing and salvage services, but no in rem proceeding is allowed); *In re White Star Towing Co.*, 91 F. 285 (S.D. Ga. 1898) (holding that a prize ship in the control and possession of officers of the United States is immune from maritime lien for salvage). *The Davis* and *The Siren* were also applied, by analogy, to foreign sovereign vessels. *See* *Long v. The Tampico*,

neat balance between two doctrinal extremes with the invocation of federal sovereign immunity in admiralty libels: permitting all such suits or barring all of them.¹⁹⁷ It is a balance that survives today with the statutory codifications made by Congress¹⁹⁸ in this field, the Suits in Admiralty Act¹⁹⁹ and the Public Vessels Act.²⁰⁰

B. *Municipal Immunities in Admiralty*

A separate stream of cases, analogous to the Eleventh Amendment immunity enjoyed by vessels owned by states, was presented in decisions concerning vessels operated by municipalities. The case of *The Fidelity*²⁰¹ involved a maritime tort committed by a tug owned by the city of New York, dedicated to public use and actually performing a public service at the time of the incident. The district court dismissed the libel,²⁰² and the matter was appealed. The federal circuit court Justice Waite, riding circuit, affirmed, relying upon the general proposition that public property devoted to public use and necessary for carrying on the operations of government was not subject to seizure and judicial sale.²⁰³

The private libellant sought, however, to have the court find an exception to this rule under the theory that the immunity from seizure of government property stemmed from the immunity of the government itself. Since the city of New York was subject to suit (being unprotected by the Eleventh Amendment as a municipality or

16 F. 491 (S.D.N.Y. 1883) (holding that foreign sovereigns enjoy same immunity as the United States, but when title to vessel has not passed to foreign sovereign, despite contract, no immunity arises).

197 This was a compromise that seemed to be embraced in English admiralty law, until such time as extremist principles of Crown immunity prevailed in *Young v. The S.S. Scotia*, 1903 App. Cas. 501 (P.C.) (appeal taken from Newfoundland).

198 The earliest of these was the Merchant Shipping Act of 1916, ch. 451, § 9, 39 Stat. 730 (1916), which appeared to waive much federal sovereign immunity in this area. See *The Florence H.*, 248 F. 1012 (S.D.N.Y. 1918) (finding that where U.S. vessel is chartered by foreign sovereign pursuant to 1916 Merchant Shipping Act, it is still subject to all laws, regulations, and liabilities governing private merchant vessels); *The Ceylon Maru*, 266 F. 396 (D. Md. 1920) (same).

199 Act of Mar. 9, 1920, ch. 95, 41 Stat. 525 (codified as amended at 46 U.S.C. app. §§ 741-752 (1994)).

200 Act of Mar. 3, 1925, ch. 428, 43 Stat. 1112 (codified as amended at 46 U.S.C. app. §§ 781-790 (1994)).

201 8 F. Cas. 1188 (S.D.N.Y. 1878) (No. 4757), *aff'd*, 8 F. Cas. 1189 (C.C.S.D.N.Y. 1879) (No. 4758).

202 See *The Fidelity*, 8 F. Cas. at 1189 (citing *The Seneca*, 21 F. Cas. 1080 (E.D.N.Y. 1876) (No. 12,668)).

203 See *The Fidelity*, 8 F. Cas. 1189, 1190 (C.C.S.C.D.N.Y. 1879) (No. 4758) (citing *Klein v. New Orleans*, 99 U.S. 149 (1878)).

political subdivision of a state),²⁰⁴ ran the argument, the ship should be subject to suit in rem.²⁰⁵ The circuit court rejected this, holding that “[t]he simple right to sue, therefore, does not carry with it the right to seize all property. It follows, necessarily, that the exemption from seizure is not always the same thing as an exemption from suit.”²⁰⁶

Justice Waite went on to explain the reasoning of this holding. “A public vessel is part of the sovereignty to which she belongs, and her liability is merged in that of the sovereign.”²⁰⁷ This meant that in order to recover for a maritime tort, “redress must be sought from the sovereign, and not from the instruments he uses in the exercise of his legitimate functions.”²⁰⁸ The circuit court found support for this purported general rule of sovereign immunity in admiralty cases from a selective and crabbed reading of the older English precedents.²⁰⁹ Yet this holding did not contradict *The Siren* or *The Davis*, since neither of those cases involved the public use of public property.²¹⁰ Indeed, Justice Waite was very careful to cite *The Davis* and to add that “[p]roperty does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the government.”²¹¹

In any event, most later cases concerning city-owned vessels did not strictly follow *The Fidelity*.²¹² In *Workman v. Mayor of New York*,²¹³

204 See *Mount Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280–81 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

205 See *The Fidelity*, 8 F. Cas. 1189, 1190–91 (C.C.S.D.N.Y. 1879) (No. 4758).

206 *Id.* at 1191.

207 *Id.*

208 *Id.*

209 See *id.* at 1191–92 (citing *The Athol*, 1 W. Rob. 374, 166 Eng. Rep. 613 (Adm. 1842), (stating the proposition that consent was required from the Lords of Admiralty for the initiation of in rem libels, and distinguishing *The Lord Hobart*, 2 Dods. 100, 165 Eng. Rep. 1428 (Adm. 1815) and *The Marquis Of Huntly*, 3 Hag. Adm. 246, 166 Eng. Rep. 397 (Adm. 1835), as being cases which “were, in form, suits in rem, but there was no seizure and no bail”); see also *supra* note 19 and accompanying text.

Interestingly, Justice Waite relied upon a very late Admiralty Court precedent from England (*The Athol*), that marked the transition of British courts to a more extreme view of Crown immunity in in rem admiralty actions. See *supra* note 197.

210 See *The Fidelity*, 8 F. Cas. at 1191–92.

211 *Id.* at 1191 (citing *The Davis*, 77 U.S. (10 Wall.) 15 (1869)).

212 See the following cases which relied not upon the authority of *The Fidelity* so much as the actual versus constructive possession distinction of *The Davis*: *The John McCracken*, 145 F. 705 (D. Or. 1906); *The F.C. Latrobe*, 28 F. 377 (D. Md. 1886); *The Protector*, 20 F. 207 (C.C.D. Mass. 1884).

213 179 U.S. 552 (1900).

the Supreme Court threw into doubt the basis of the immunity of municipalities used in the holding of *The Fidelity*. *Workman* involved a ship struck by a New York City fire-boat steaming to reach a warehouse fire. After first holding that local law did not control a case in admiralty where the local law conflicts with general maritime law,²¹⁴ the Court went on to declare that where the relation of master and servant exists between the vessel and the municipality, as in this case, liability for a maritime tort lies with the city under the rule of respondeat superior.²¹⁵

The Court then noted that a split in the lower courts of admiralty existed concerning the seizure of public property to satisfy a judgment. Justice White labeled the holding in *The Fidelity* as "the application of the exception as to the mode of execution of a judgment or decree against such a [municipal] corporation."²¹⁶ The Supreme Court stated that while the exception existed, it did not exist in all maritime cases.²¹⁷ Moving on to the issue of municipal sovereign immunity, White noted a distinction between national immunity and municipal immunity. National sovereign immunity, both of foreign governments and of the United States, rested on the inability of the courts to obtain jurisdiction over the sovereign parties. With municipalities, White noted, immunity rested on the choice of a court not to invoke jurisdiction, although it was within its authority to do so.²¹⁸ White cited *The Siren* for the proposition that "the fact that a wrong has been committed by a public vessel of the [C]rown affords no ground for contending that no liability arises, because of the public nature of the vessel."²¹⁹

Based on this assertion of law, the Court seemed to hold:

[I]n the maritime law, the public nature of the service upon which a vessel is engaged at the time of commission of a maritime tort affords no immunity from liability in a court of admiralty, where the court has jurisdiction. This being so, it follows that as the municipal corporation of the city of New York, unlike a sovereign, was subject to the jurisdiction of the court, the claimed exemption from liability asserted in the case at bar, because of the public nature of the service upon which the fire-boat was engaged . . . was without foundation in the maritime law, and therefore afforded no reason for

214 *See id.* at 557-64.

215 *See id.* at 565.

216 *Id.* (citing *Oyster Police Steamers*, 31 F. 763, 767-68 (D. Md. 1887) (refusing to grant sovereign immunity exemption from federal seizure of state-owned vessel)).

217 *See id.*

218 *See id.* at 566.

219 *Id.* at 568.

denying redress in a court of admiralty for the wrong which the courts below both found to have been committed.²²⁰

I say "seemed" for two reasons. First, the defense asserted by the city was founded on a theory of emergency, not sovereign immunity,²²¹ and second, the Court declined to resolve the "contrariety of opinion"²²² regarding seizure of public vessels for maritime torts because they found that in personam liability applied to the city as owners of the fire-boat.²²³ So while the main holding of the case was that local law cannot create an exception to liability found in contrary general maritime law,²²⁴ the clear import of Justice White's opinion was to repudiate *The Fidelity* to the extent that it purported to advance an overweaning theory of municipal immunity in admiralty.²²⁵

In any event, White's language can be taken as the Court's continued endorsement of the twin rules of *The Davis* and *The Siren* in admiralty libels brought against federally claimed property. If either (1) the government initiated the in rem action, or (2) the res was not in the actual possession of the government or one of its officers, the libel may proceed. This was, arguably enough, the prudential rule that the Court would have advanced in cases of municipal admiralty liability as well. In a sense, this was the unified rule applicable to all sovereign immunity defenses in admiralty in rem actions. Nevertheless, in 1920, on the eve of the Supreme Court's decisions in *In re New York (Petition of Walsh)* and *In re New York (The Queen City)*, the holding of *Bright* still governed state immunity under the Eleventh Amendment.

C. *The Revolution Complete: Petition of Walsh and The Queen City*

On September 27, 1920, the District Court for the Western District of New York decided a maritime tort case involving two tugboats, the Henry Koerber, Jr. and the Charlotte, operating on the Erie Canal.²²⁶ Both vessels were under charter by the Superintendent of Public Works of the State of New York. Libels were filed in rem.²²⁷ The State Superintendent raised the Eleventh Amendment as a bar to the court's jurisdiction. The court rejected this defense. In his opinion,

220 *Id.* at 570.

221 *See id.* at 572.

222 *Id.*

223 *See id.* at 573.

224 *See id.* at 573-74.

225 *But cf. id.* at 586-90 (Gray, J., dissenting) (disputing this point).

226 *The Henry Koerber, Jr. & The Charlotte*, 268 F. 561 (W.D.N.Y. 1920).

227 *See id.* at 561.

Judge Hazel of the district court noted that under *Workman*, only the federal government possessed sovereign immunity in admiralty cases.²²⁸ The district court also relied heavily on *The Davis*, as well as the established rule that the Eleventh Amendment did not apply to admiralty actions in rem, to hold that

all vessels, regardless of ownership . . . are amenable to process in admiralty; the national government alone being exempted, although a suit at law or in equity where a state must respond is distinctly a suit against the state . . . , yet it is clearly and definitely recognized in the law that a proceeding in admiralty is sui generis, and general rules of procedure are treated as inapplicable.²²⁹

Judge Hazel also distinguished *Madrazo I* by noting that, unlike in that case, the district court did properly have jurisdiction over the res, by virtue of monitions in personam which issued from the court.²³⁰

In so holding, the district court denied dismissal of three monitions, one for each libel, issued against the State and delivered to the Superintendent of Public Works, Edward Walsh. The Attorney General of New York, on behalf of the State and Walsh, filed a petition for a writ of prohibition²³¹ and mandamus in the U.S. Supreme Court. What is so surprising about the case is that there appeared to have been substantial misunderstanding about the nature of the process that had emanated from the federal district court. Judge Hazel knew that a libel had been presented before him, and that a writ of arrest had issued and had been executed upon the Charlotte and the Henry Koerber, Jr., thus bringing the res within the in rem jurisdiction of his court.²³² Yet, in its briefing, New York claimed that “[a]t no time in these proceedings has any *res subjecta* belonging to the State of New York or Mr. Walsh, or in which they claim any interest, been attached or brought under the jurisdiction of the District Court.”²³³

228 *See id.* at 562.

229 *Id.* at 563 (also citing *The John G. Stevens*, 170 U.S. 113, 120 (1898)).

230 *See id.* (citing *In re The Louisville Underwriters*, 134 U.S. 488 (1889)).

231 A writ of prohibition was directed from a common law court to a court of admiralty ordering that a case be dismissed for lack of jurisdiction. Such a writ was available under the Act of Mar. 3, 1911, ch. 231, § 234, 36 Stat. 1087, 1156 (1911); *see also* 28 U.S.C. § 342 (1940) (now codified at 28 U.S.C. § 1651 (1994)) (“The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction.”).

232 *See* Return, Brief in Opposition to the Petition at 26, *In re State of New York*, 256 U.S. 490 (1921) (Orig. No. 26) (Dec. 2, 1920) [hereinafter *Judge Hazel’s Brief*].

233 *See* Petition for a Writ of Prohibition, Memorandum in Support of Application at 156, *In re State of New York*, 256 U.S. 490 (1921) (Orig. No. 25) (Oct. 13, 1920) [hereinafter *New York’s Brief*].

What seemed to have happened was that the arrests were served on the tugs after they were no longer under charter to the state. Once the arrests were made, Judge Hazel then issued the monitions in aid of his jurisdiction. But New York may well have been correct in suggesting that since the arrests had not been made at a time when the state was in actual possession of the vessels, the proceeding was one in personam, and not in rem. And if this was true, New York properly emphasized that the law seemed settled that an admiralty suit brought in personam against a state official was barred by the Eleventh Amendment. This was precisely the ruling made by the Supreme Court, Justice Pitney writing,²³⁴ in the Eleventh Amendment analysis which followed.

The only argument that Pitney really had to address was the pure textualist point that since the Eleventh Amendment did not mention admiralty actions, an in personam process issued against a state official was not barred. He made short work of this, based on the Court's reasoning in *Hans v. Louisiana*,²³⁵ which had ruled that even though the Eleventh Amendment did not mention federal question suits brought by individuals against their own state, they were still blocked. "[I]t seems to us equally clear," Justice Pitney wrote, "that it [the Eleventh Amendment] cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not."²³⁶ Pitney went on to explain that Justice Washington's decision in *Bright*, and the doubts expressed by Justice Story in his *Commentaries*, had been laid to rest in *Hans*, although he did not explain how. A reader of the *Petition of Walsh* opinion was left to conclude that Justices Washington and Story had simply made the mistake of reading the Eleventh Amendment literally, an error corrected by the Supreme Court in *Hans*. In this one admittedly important respect, *Petition of Walsh* overruled *Bright*.²³⁷

234 *In re New York (Petition of Walsh)*, 256 U.S. 490, 496 (1921) (*Petition of Walsh*)

The record shows that the charters had expired according to their terms, and the tugs were in possession of the claimants [their owners who were not happy with the damages that the New York tug drivers had inflicted on the vessels during the charter], neither the State nor Walsh having any claim upon or interest in them. At no time has any *res* belonging to the State or to Walsh, or in which they claim any interest, been attached or brought under the jurisdiction of the District Court.

Id.

235 134 U.S. 1 (1890).

236 *Petition of Walsh*, 256 U.S. at 498.

237 See Amar, *supra* note 69, at 1476; Fletcher, *supra* note 69, at 1081-82 n.194.

Justice Pitney then suggested that the *Madrazo* cases were dispositive, to the extent that they held that an in personam admiralty action against a state official was not maintainable. He acknowledged, of course, that neither *Madrazo* case was an in rem decision since the federal district court never had possession of the res.²³⁸ Pitney also distinguished *Workman* on the basis of the subject of immunity in that decision:

[*Workman*] dealt with a question of the substantive law of admiralty, not the power to exercise jurisdiction over the person of defendant; and in the opinion the court was careful to distinguish between the immunity from jurisdiction attributable to a sovereign upon grounds of policy, and immunity from liability in a particular case.²³⁹

In making this statement he reaffirmed the sovereign immunity enjoyed by a state in in personam admiralty actions brought by a private citizen without the state's consent.

Justice Pitney then analyzed whether this was, in fact, a suit against the State of New York and not one against Walsh in an individual capacity. "[T]he proceedings . . . have no element of a proceeding *in rem*, and are in the nature of an action *in personam* against Mr. Walsh . . . in his capacity as superintendent of public works . . ." ²⁴⁰ Further, any judgment against Walsh would have to be satisfied out of state property or out of the state treasury.²⁴¹ With this finding, the Court concluded,

In the fullest sense, therefore, the proceedings are shown by the entire record to be in their nature and effect suits brought by individuals against the State of New York, and therefore—since no consent has been given—beyond the jurisdiction of the courts of the United States.²⁴²

Interestingly, this conclusion was based on common law sovereign immunity and not specifically on the Eleventh Amendment. This is supported by Pitney's later statement in the opinion,

It is not inconsistent in principle [that is, uniformity in maritime law] to accord to the States, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of

238 This same point was made in New York's brief. See *New York's Brief*, *supra* note 233, at 159.

239 *Petition of Walsh*, 256 U.S. at 499 (citing to *Workman v. New York City*, 179 U.S. 552, 566 (1900)).

240 *Id.* at 501.

241 See *id.* at 502.

242 *Id.*

individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.²⁴³

Petition of Walsh interred (once and for all) any argument, arising from Justice Washington's opinion in *Bright*, that the Eleventh Amendment would not apply to in personam admiralty actions. This was a welcome development, to the extent that the focus shifted in Justice Pitney's analysis to the question of whether, in such an in personam claim, a state officer was impleaded in his official character, or whether a claim was being made against the state treasury. These were precisely the concerns raised by the Court in handing down *Ex parte Young*,²⁴⁴ which permitted injunctive relief against state officials, acting under color of state law in such a fashion as to derogate federal rights, including those to disputed property.

But if *Petition of Walsh* fittingly laid to rest concerns about in personam actions in admiralty, it served as a curious prelude to the second decision that Justice Pitney delivered the same day in *The Queen City*.²⁴⁵ As ambiguous as the procedural posture was with the libels and monitions at issue in *Petition of Walsh*, the facts of *The Queen City* were crystalline: a libel in rem was brought by the estate of a deceased state employee who worked on the Erie Canal and was killed by the negligent operation of a state-owned vessel, the *Queen City*. No doubt subsisted in the record that the libel was properly filed and the arrest executed and that the *Queen City* was, at the time of its arrest, "employed in the public service of the State for governmental uses and purposes."²⁴⁶ And although there was some suggestion that it was improper for the Attorney General of New York to dispute the jurisdiction of the district court by filing a verified suggestion (alleging the fact that the vessel was used in public service), the Court ruled that such a suggestion "ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge."²⁴⁷

Once the Court accepted the facts stated in the suggestion made by the New York Attorney General, the second issue in the case was

243 *Id.* at 503; see also Walter Landry Smith, Comment, *Eleventh Amendment Immunity and State-Owned Vessels*, 57 TUL. L. REV. 1523, 1533-34 (1983).

244 209 U.S. 123 (1908); lawmaking authority; see *supra* note 13 and accompanying text.

245 256 U.S. 503 (1921).

246 *Id.* at 508; see also Brief of Petitioners on Rule to Show Cause at 26-29, *The Queen City*, 256 U.S. 503 (1921) (No. 26 Original) (Dec. 1, 1920) (arguing not that Eleventh Amendment barred suit, but rather, rule of comity prevented the action).

247 *The Queen City*, 256 U.S. at 509 (distinguishing *In re Muir*, 254 U.S. 522 (1921) (holding that such a suggestion of official immunity, when made by a private litigant, should not be accorded such deference)).

framed by Justice Pitney as "whether the proceeding can be based upon the seizure of property owned by a State and used and employed solely for its governmental uses and purposes."²⁴⁸ Or, put in a slightly different way, "whether a suit in admiralty brought by private parties through process *in rem* against property owned by a State is not in effect a suit against the State, barred by the general principle applied in *Ex parte New York, No. 1, No. 25, Original*."²⁴⁹ Curiously, Justice Pitney did not invoke the Eleventh Amendment at all.²⁵⁰ Instead, the Court's discussion focuses on the "general principle" flowing from various forms of sovereign immunity, including those enjoyed by foreign sovereigns²⁵¹ and municipal corporations:

[I]t is uniformly held in this country that even in the case of municipal corporations, which are not endowed with prerogatives of sovereignty to the same extent as the States by which they are created, yet because they exercise the powers of government for local purposes, their property and revenue necessary for the exercise of those powers are to be considered as part of the machinery of government exempt from seizure and sale under process against the city.²⁵²

Justice Pitney concluded emphatically,

The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem*, applies with even greater force to exempt public property of a State used and employed for public and governmental purposes.²⁵³

248 *Id.* at 510.

249 *Id.*

250 Six months later, the Court held that the prohibition of jurisdiction found in *Petition of Walsh* and *The Queen City* applied to vessels owned by the United States either absolutely or *pro hac vice*. See *The Western Maid*, 257 U.S. 419, 434 (1922). This is further evidence that neither *Petition of Walsh* nor *The Queen City* relied upon the Eleventh Amendment for their holdings. See also *The Charlotte*, 285 F. 84 (W.D.N.Y. 1922), *aff'd*, 299 F. 595, 596 (2d Cir. 1924) (per curiam) ("We think it unnecessary to do more than state our acceptance of the proposition that in the absence of any diminution of power in this regard by the Constitution of the United States, the state of New York can neither be sued in personam for the tort complained of, nor can its property, whether absolute or owned *pro hac vice*, be made to respond to the same tort. In other words, the doctrine of *Western Maid* . . . applies to and governs this case.").

251 See *The Queen City*, 256 U.S. at 510 (citing *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), *Moitez v. The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9697), *The Parlement Belge*, 5 P.D. 197, 219-20 (Eng. 1880)).

252 *Id.* at 511 (citing *Klein v. New Orleans*, 99 U.S. 149, 150 (1878)).

253 *Id.* This was, of course, the language from *The Fidelity*, 8 F. Cas. 1189, 1191 (C.C.S.D.N.Y. 1879) (No. 4758), and from *The Davis*, 77 U.S. (10 Wall.) 15, 21 (1869).

Indeed, Justice Pitney put an even sharper point on the matter: in order to be immunized by the Eleventh Amendment, the property in question must be "owned by the state and used and employed *solely* for its governmental uses and purposes."²⁵⁴

The principle of sovereign immunity (rather than an express ruling that the Eleventh Amendment bars in rem actions in admiralty) was the rule relied upon by the lower courts immediately following *Petition of Walsh* and *The Queen City*.²⁵⁵ But what has been overlooked by many commentators is that the Supreme Court's decisions in 1922 kept intact the earlier jurisprudence arising from *The Davis* and *The Fidelity*. Notice again Justice Pitney's language in *The Queen City*, limiting the holding to preventing in rem arrests against "public property of a state used and employed for public and governmental purposes."²⁵⁶ This was virtually the same idea as invoked in *The Davis* (property in the "actual possession" of the state), which the Court did not cite in *The Queen City*, and in *The Fidelity*, to which the Court did make reference.

In other words, after *The Queen City*, an in rem action could still be brought against a res in a federal admiralty court, even if it was likely that a state would intervene to press a claim against the property. Such a case would not be dismissed under the Eleventh Amendment so long as the property in question was not being "used and employed for public and governmental purposes," or was not in the actual (and not merely constructive) possession of the state government or its officers. Cases coming after *The Queen City* embraced this interpretation, and thus denied Eleventh Amendment immunity to states under these circumstances.²⁵⁷

Moreover, courts were obliged to consider whether state-claimed property was of a character to invoke Eleventh Amendment immunity in an in rem admiralty proceeding. The mere appearance of a state in

Cf. New York's Brief, supra note 233, at 155 (arguing that whether vessel was operated in a governmental or proprietary capacity was "unimportant").

254 *The Queen City*, 256 U.S. at 510 (emphasis added).

255 See *Intracoastal Transp., Inc. v. Decatur County, Ga.*, 482 F.2d 361 (5th Cir. 1973) (finding that sovereign immunity granted states through Eleventh Amendment invokes immunity to in personam claims); *The Lisbon*, 3 F.2d 408 (9th Cir. 1925); *The Onteora*, 298 F. 553 (S.D.N.Y. 1923) (holding that ferry boat operated by a state agency is immune to in rem action).

256 *The Queen City*, 256 U.S. at 510.

257 See *The West Point*, 71 F. Supp. 206, 207-08, 211 (E.D. Va. 1947) (deciding that a ferry co-owned by state and municipality and operated for profit and not used for governmental purposes, is not within scope of Eleventh Amendment immunity). *But cf. United States v. Jardine*, 81 F.2d 745 (5th Cir. 1935) (holding that immunity applies even if libel seeks to question state's legitimate possession of the vessel).

making such a claim was insufficient, even though such a suggestion of immunity "ought to be accepted as sufficient evidence of the fact, at least in the absence of special challenge."²⁵⁸ Federal district courts thus continued to have the competence to decide their own jurisdiction in cases such as these, cases that certainly reflected why certain characteristic admiralty actions were excluded from the Eleventh Amendment.

V. TODAY'S ELEVENTH AMENDMENT IN ADMIRALTY

A. *The Supreme Court Speaks—Sort Of*

1. *Treasure Salvors* Holding

Thus matters stood for the next sixty years or so. The next major step for Eleventh Amendment jurisprudence in admiralty came with the enigmatic decision of the Supreme Court in *Florida Department of State v. Treasure Salvors, Inc.*²⁵⁹ The facts giving rise to that case, while certainly opaque, were paradigmatic of a new kind of admiralty litigation involving claims to historic shipwrecks. *Treasure Salvors* had located the wreck of the Spanish galleon, the *Nuestra Señora de Atocha*. The wreck was located within nine and one-half miles of Florida's coast, and an in rem arrest was employed to bring the res into the jurisdiction of the district court. The State of Florida then claimed ownership to the galleon pursuant to a Florida statute.²⁶⁰ *Treasure Salvors* entered into a salvage contract with the state, parts of the galleon and its contents were recovered, and some items were placed in the custody of the Florida Department of State. When it was later ruled that the wreck was located too far from Florida's coast to support the State's claim,²⁶¹ *Treasure Salvors* sued the Florida Department of State (and its officers) for return of the artifacts. Florida refused, claiming immunity under the Eleventh Amendment.²⁶²

In the district court, Judge Mehrten's holding on the Eleventh Amendment issue was simply that, by instituting a claim for the wreck, Florida had waived its immunity.²⁶³ Without citing the case, the district court was, in effect, relying on the analogy of *The Siren* in holding

²⁵⁸ *The Queen City*, 256 U.S. at 509. This was consistent with the submission made in *Judge Hazel's Brief*, *supra* note 232, at 19.

²⁵⁹ 458 U.S. 670 (1982).

²⁶⁰ The relevant statute was FLA. STAT. ch. 267.061(1)(b) (1974).

²⁶¹ *See United States v. Florida*, 420 U.S. 531 (1975).

²⁶² *See Treasure Salvors*, 458 U.S. at 673-77.

²⁶³ *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 521 (S.D. Fla. 1978).

that where the sovereign itself is initiating the dispute in rem (as in a prize condemnation proceeding), immunity is waived.²⁶⁴ The district court then focused on *Petition of Walsh* and *The Queen City*. But Judge Mehrten mischaracterized their holdings as being strictly under the Eleventh Amendment,²⁶⁵ as opposed to general principles of state sovereign immunity. The district court noted that, unlike *The Queen City*, there was a very real doubt whether Florida could make a real claim to ownership over the Atocha. This was a case, in other words, where there was reason to entertain a "special challenge"²⁶⁶ to the State of Florida's suggestion of immunity.²⁶⁷ On this point, Judge Mehrten went on to describe the Eleventh Amendment as "a shield to protect the fiscal integrity of the State. It is not a sword whereby agents of the State can take and appropriate the property and lives of its citizens without due process."²⁶⁸

The Fifth Circuit Court of Appeals affirmed the holding of the district court. It upheld the mistaken notion that "the eleventh amendment applies to admiralty in rem actions," without any discussion, aside from citing *Petition of Walsh* and *The Queen City*.²⁶⁹ It agreed with the district court that *The Queen City* was the controlling law for this case:

The *Queen City* tells us that when a state submits uncontroverted evidence of ownership in an admiralty in rem action, the district court is bound to accept the assertion and apply the eleventh amendment accordingly. In the case at bar, however, we have a controverted claim of ownership. Treasure Salvors offered evidence and legal arguments to show that it, and not Florida, owned the artifacts from the Atocha. Such an offer is the "special challenge" that the Supreme Court envisioned in the *Queen City*. This challenge operates to rebut the presumption of validity attributed to a state's ownership claim.²⁷⁰

The Court of Appeals then held that the district court's finding that Florida had no ownership interest was correct; therefore, no Eleventh Amendment immunity was invoked, since the suit was not one

264 In its analysis of the Eleventh Amendment's effect on the proceedings, the district court analogized the state's claim to the wreck to one in bankruptcy. *Id.* at 526 ("The situation is directly analogous to a state filing a claim to a res under the jurisdiction of the Federal Bankruptcy Court.").

265 *See id.* at 526-27.

266 *The Queen City*, 256 U.S. 503, 509 (1921).

267 *See Treasure Salvors*, 459 F. Supp. at 527.

268 *Id.* at 528.

269 *In re Florida Dep't of State v. Treasure Salvors, Inc.*, 621 F.2d 1340, 1345 (5th Cir. 1980).

270 *Id.*

against a state.²⁷¹ Treasure Salvors's "special challenge" obliged the courts to collapse the jurisdictional inquiry (whether the Eleventh Amendment applied to the in rem action) into the merits (whether Florida owned the shipwreck).

The Supreme Court affirmed in part and reversed in part in a badly fractured and confused set of opinions.²⁷² Justice Stevens, writing for a plurality of justices, framed the issue to be answered as "whether a federal court exercising admiralty in rem jurisdiction may seize property held by state officials under a claim that the property belongs to the State."²⁷³ In a footnote, Stevens simply stated that the Supreme Court had previously held the amendment to apply to admiralty actions, citing to *Petition of Walsh* and *The Queen City*.²⁷⁴ Yet, rather enigmatically, Stevens wrote,

In ruling that the Eleventh Amendment does not bar execution of the warrant [of arrest against the artifacts held by the Florida officials], we need not decide the extent to which a federal district court exercising admiralty in rem jurisdiction over property before the court may adjudicate the rights of claimants to that property as against sovereigns that did not appear and voluntarily assert any claim that they had to the res.²⁷⁵

This seemed to suggest that the *Treasure Salvors* Court was not prepared to disturb those earlier decisions holding that the Eleventh Amendment was not implicated in in rem actions adjudicating title to property to which the state (or its officers) may have advanced a claim, but where such property was not being used for a governmental purpose.²⁷⁶

271 See *id.* at 1346.

272 See *In re Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982). The plurality was penned by Justice Stevens (for Chief Justice Burger, and Justices Marshall and Blackmun). Justice Brennan filed an opinion concurring in part and dissenting in part. Justice White filed an opinion also concurring in part and dissenting in part (on behalf also of Justices Powell, Rehnquist, and O'Connor).

273 *Id.* at 683. The key holding in the case concerned the use of the *Ex parte Young* doctrine, see *Ex parte Young*, 209 U.S. 123 (1908), as an exception to a state's Eleventh Amendment immunity. See also *supra* note 13 and accompanying text. Since the Court found the action to be one against a state official and not one against the State, the Eleventh Amendment did not bar the action. See *Treasure Salvors*, 458 U.S. at 691-92. The dissent penned by Justice White in *Treasure Salvors* would have held that if Florida had a "colorable claim" to the artifacts, then the suit against the state officials would have been barred under the Eleventh Amendment. See also *supra* note 138 and accompanying text.

274 See *Treasure Salvors*, 458 U.S. at 683 n.17.

275 *Id.* at 697.

276 See Fletcher, *supra* note 69, at 1081 n.194.

In his analysis of *Petition of Walsh* and *The Queen City*, Justice Stevens distinguished them from the case before him since Treasure Salvors had merely attempted to arrest the wreck to obtain jurisdiction and not to assert an ownership interest. Therefore, the present action was not one in personam to recover damages from the state.²⁷⁷ His reading of *The Queen City* was that an in personam action against the state cannot be turned into an in rem action simply by attaching state property to the claim.²⁷⁸ He went on to hold, however, that even though Treasure Salvors's claim against the Florida officials was not barred by the Eleventh Amendment (because of the *Ex parte Young* doctrine which permits injunctive relief against state officials acting contrary to federal law), the courts below could not determine the ownership interest of the State of Florida.²⁷⁹

Justice Brennan, concurring in the judgment in part and dissenting in part, took a literal reading of the Eleventh Amendment. In his separate opinion, he held that the amendment did not apply since the plain language of the amendment did not extend to suits instituted against a state by one of its own citizens.²⁸⁰ In Brennan's view, the *Hans* decision, much like *Petition of Walsh* and *The Queen City*, was not based on a fair textual reading of the Eleventh Amendment. Justice Brennan would have, therefore, permitted the district court to adjudicate the State's title and interest in the artifacts from the Atocha in an in rem admiralty proceeding.²⁸¹

Justice Byron White wrote the third opinion in *Treasure Salvors*, concurring in the judgment in part and dissenting in part. His analysis of *Petition of Walsh* and *The Queen City* was more literal and protective of state sovereignty than that provided by Justice Stevens. White held that the present case was actually one against the State and not a state official. His conclusion was that

In re New York (I) [*Petition of Walsh*] indicates that the Eleventh Amendment will bar a suit that has the effect of proceeding against a state officer and involving the State's property. In re New York (II) [*The Queen City*] squarely stands for the proposition that sovereign immunity bars process against a res in the hands of state officers. This is true even though an in rem action strictly proceeds against the vessel, and the owner of the vessel or artifacts is not an indispensable party

277 See *Treasure Salvors*, 458 U.S. at 699-700.

278 See *id.* at 699.

279 See *id.* at 700.

280 See *id.* at 700-01.

281 See *id.* at 701. Justice Brennan repeated these concerns in his dissent in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 288 n.41 (1985).

The *In re New York* cases [*Petition of Walsh* and *The Queen City*] are particularly forceful because they reflect the special concern in admiralty that maritime property of the sovereign is not to be seized. This principle dates back to the English and has not been significantly altered in this country. The *In re New York* cases [*Petition of Walsh* and *The Queen City*] are but the most apposite examples of the line of cases concerning in rem actions brought against vessels in which an official of the State, the Federal Government, or a foreign government has asserted ownership of the res. The Court's consistent interpretation of the respective but related immunity doctrines pertaining to such vessels has been, upon proper presentation that the sovereign entity claims ownership of a res in its possession, to dismiss the suit or modify the judgment accordingly.²⁸²

2. *Treasure Salvors's* Anti-Historicism

This is a significant passage, and it may be telling that Justice White had the better part of the argument in his characterization of *Petition of Walsh* and *The Queen City*. But there were a number of flaws in Justice White's observations, and although these went undetected in the plurality, they need to be pointed out here. The first is an historical mistake. As has been suggested already, it is by no means clear that there ever was a doctrine of immunity from in rem actions for property owned, or claimed, by the sovereign.²⁸³ The research presented here is that, at the time of the Revolution (in both England and in the colonies), such a doctrine would have been doubted. It only grew in prominence through a series of decisions, beginning with the immunities of foreign sovereign vessels, and then assimilating to vessels and property owned and operated by the federal sovereign (the United States and the British Crown), and only circumstantially being applied to states and municipalities.²⁸⁴

The second misstep Justice White made in his analysis was to ignore the consistent language of the precedents that he relied upon for his "historical" basis for sovereign immunity in admiralty. Chief among these was *The Siren*, *The Davis*, and the crucial, limiting language of *The Queen City* itself (the *locus classicus* for applying the Eleventh Amendment bar to in rem actions). Justice White asserted that "maritime property of the sovereign is not to be seized" via in rem process and that immunity attaches at the moment the relevant sover-

282 *Treasure Salvors*, 458 U.S. at 709–10 (citations omitted) (White, J., concurring and dissenting).

283 See *supra* Part I.A.

284 See *supra* Part IV.A.–B.

eign "has asserted ownership of the res."²⁸⁵ Yet, what each of those three cases indicated was that, in certain situations, an in rem claim could be used to adjudicate title and possession over property in which a state had a claim. These circumstances included where the sovereign itself initiated the action (as in prize or in forfeiture)²⁸⁶ or where the res subject to the arrest was not in the "actual possession" of the state²⁸⁷ or was not being used for "public and governmental purposes."²⁸⁸ Justice White's opinion did not appreciate those situations in which in rem claims cannot be said to implicate state sovereignty, although he did mention the condition that the "res [must be] in the hands of state officers"²⁸⁹ in order for the Eleventh Amendment to be triggered.

Lastly, by confounding principles of foreign sovereign immunity, the sovereign immunity of the United States, and the Eleventh Amendment immunity enjoyed by states in federal courts, White perpetuated a mixing of doctrinal metaphors that has caused substantial mischief. In fairness, Justice White was following the lead of the *Petition of Walsh* and *The Queen City* which had relied upon all of these sources of sovereign immunity to fashion a new doctrine for states, despite nearly 120 years of precedent to the contrary. Nevertheless, by not analytically distinguishing the underlying purposes and principles of these manifestations of immunity from admiralty jurisdiction, the natural result was to grant a privilege to states (immunity from admiralty in rem actions) that they had not hitherto enjoyed.

3. *Welch*

In large measure, then, the *Treasure Salvors* opinion marked the battle lines of the doctrinal debate for the Eleventh Amendment in many different contexts for the years to follow. Yet, despite that, only once since that decision has the Court returned to the problem of admiralty and the Eleventh Amendment. That was in *Welch v. Texas Department of Highways & Public Transportation*,²⁹⁰ which involved a dock worker for a public ferry injured in an accident on the job who sued under the federal Jones Act.²⁹¹ In yet another plurality opinion (this time authored by Justice Powell), the Court affirmed the dismis-

285 *Treasure Salvors*, 458 U.S. at 709-10 (White, J., concurring and dissenting).

286 This is the rule of *The Siren*, 74 U.S. (7 Wall.) 152, 154-55 (1868).

287 See *The Davis*, 77 U.S. (10 Wall.) 15, 21 (1869).

288 See *The Queen City*, 256 U.S. 503, 510 (1921).

289 *Treasure Salvors*, 458 U.S. at 709 (White, J., concurring and dissenting).

290 483 U.S. 468 (1987).

291 See 46 U.S.C. § 688 (Supp. 1996).

sal of the action on Eleventh Amendment grounds.²⁹² As to admiralty actions brought by a private citizen against a state, Justice Powell again upheld the jurisdictional bar of the Amendment, citing *Petition of Walsh, The Queen City*, and *Treasure Salvors* for the proposition that the Eleventh Amendment prohibited a private citizen from bringing an in rem action against a vessel owned by a state.²⁹³ This was, of course, dicta, since Welch's suit (under the Jones Act) was in personam.²⁹⁴ The plurality carefully avoided deciding the issue whether Congress, in adopting the Jones Act pursuant to its power under the Admiralty Clause, had abrogated the state's Eleventh Amendment immunity.²⁹⁵ The underlying assumption for this proposition (that Congress had this power) was, in any event, ultimately rejected by the Supreme Court in 1996 in *Seminole Tribe v. Florida*,²⁹⁶ holding that Congress could only abrogate states' Eleventh Amendment immunity pursuant to the Fourteenth Amendment.

It was Justice Brennan's dissent in *Welch* (joined by Justices Marshall, Blackmun, and Stevens) which, for the first time, attempted to reach an historical understanding of the Eleventh Amendment and admiralty. Beginning with the supposition that the inapplicability of the Eleventh Amendment to admiralty matters was settled in *Bright*,²⁹⁷ Brennan proceeded to analyze how the Court later (in *Petition of Walsh* and *The Queen City*) began to stray. Justice Brennan was insistent that, to the extent the Eleventh Amendment did not textually include admiralty actions within its ambit, acts of Congress should be liberally construed to abrogate the states' immunity from suit in federal court,

292 Justice Powell ran through the history of the Eleventh Amendment to find that there was no cause to overrule *Hans* or to rule that private citizens could bring a federal question action against a state. See *Welch*, 483 U.S. at 480–88.

293 See *id.* at 473 & n.3.

294 Powell acknowledged it as such. See *id.* at 490.

295 See *id.* at 476 n.5; see also *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051 (4th Cir. 1995); Daniel J. Cloherty, Comment, *Exclusive Jurisdiction and the Eleventh Amendment: Recognizing the Assumption of State Court Availability in the Clear Statement Compromise*, 82 CAL. L. REV. 1287, 1318–19 (1994).

296 116 S. Ct. 1114 (1996).

297 See *Welch*, 483 U.S. at 499 (Brennan, J., dissenting) (quoting JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 37 (1987) (“Although the Supreme Court did not pass on the applicability of the Eleventh Amendment in admiralty until more than a century later, it was assumed by bench and bar in the meantime that Bright was correctly reasoned.”)).

especially when individuals are suing under federal statutory schemes pursuant to the Commerce and Admiralty Clauses.²⁹⁸

In response to Brennan's historical evidence, Justice Powell was reduced to nitpicking. He asserted that the rule of *Bright* was actually a jury charge to a federal circuit court, that it was not a real holding, and that the Supreme Court never had an opportunity to review the decision.²⁹⁹ Moreover, Powell read the ambiguous opinions in the *Madrazo* cases as suggesting that "the early cases in fact indicate that unconsenting States were immune from suits in admiralty. At the very least, they demonstrate that the dissent errs in suggesting that the amenability of States to suits in admiralty was 'settled.'"³⁰⁰

In a sense, of course, both Justices Powell and Brennan were wrong in their respective historical treatments in *Welch*. To the extent that Brennan argued (as he was required to) that the Eleventh Amendment did not apply to in personam admiralty actions, his only support was the textual silence of the Eleventh Amendment and Justice Washington's opinion in *Bright*. Not even Justice Story, in his *Commentaries*, seemed to unreservedly support such a view.³⁰¹ On the other hand, Justice Powell seems to have erred in ignoring the strong evidence that in rem actions were treated differently, not only as a matter of admiralty procedure, but also because of concerns for uniformity and national control over sensitive subject matters often implicated in such in rem proceedings.

B. Later Shipwreck Cases

1. History and Fiction

It was thus only a matter of time before additional cases implicating the states' immunities in in rem cases were bound to appear. As in *Treasure Salvors*, disputes as to ownership of historic shipwrecks provided the context. The procedural posture of almost all of the shipwreck cases that followed *Treasure Salvors* was remarkably consistent. In virtually every case, an individual salvor or salvage company had identified the location of a lost shipwreck. Each of the shipwrecks, unlike the *Atocha* in *Treasure Salvors*, was located on state submerged lands (usually within three to nine nautical miles from shore).³⁰²

298 See *id.* at 502-03; see also Clark, *supra* note 39, at 1332-60; William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Fletcher, *supra* note 69, at 1082.

299 See *Welch*, 483 U.S. at 491 n.23.

300 *Id.* at 493 (citation omitted).

301 See *supra* note 123 and accompanying text.

302 See *United States v. Florida*, 420 U.S. 531, 532-33 (1975).

That location is what gave rise, in each case, to a state's claim that it (and not the finder or salvor of the property) was the owner. States invariably raised their claims in response to in rem libels filed by the finders or salvors of the property. And, at the same time, states challenged the jurisdiction of the federal courts in hearing these libels, on the theory that if they did so, such an adjudication would violate their Eleventh Amendment immunities.

This precise problem had been left open by *Treasure Salvors*, and courts considering the question reached very different conclusions. Those decisions rejecting states' Eleventh Amendment immunity tended, of course, to follow Justice Stevens's narrow plurality decision. In *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*,³⁰³ Judge King on the district court held that a mere declaration of ownership by the State did not invoke the jurisdictional bar of the Eleventh Amendment.³⁰⁴ In the same passage, he added that only such public property that is actually possessed by the state or "employed for governmental purposes" is exempt from seizure under the *The Queen City* holding.³⁰⁵ Judge King specifically indicated that the *Treasure Salvors* opinions (including Justice White's dissent) were to be read consistently with the limiting language of *The Queen City*, which was, in turn, drawn from *The Fidelity* and *The Davis*.³⁰⁶

A less satisfying approach in denying a state's Eleventh Amendment immunity was taken in *The Sindia Expedition, Inc. v. The Sindia*.³⁰⁷ There, the Third Circuit held that not all in rem actions involving a shipwreck which may be claimed as state property are barred by the Eleventh Amendment.

We hold that under the law of Treasure Salvors the Expedition's admiralty complaint in rem is not barred by the Eleventh Amendment. Here, the Expedition has claimed an ownership interest in the vessel under the law of finds and also seeks to enforce a lien against the ship under the laws of maritime salvage. Therefore, the action is a genuine admiralty in rem action against the vessel and not a circuitous in personam action to obtain jurisdiction over the State for purposes of money damages.³⁰⁸

Relying on Justice Stevens's plurality in *Treasure Salvors*, the Third Circuit felt comfortable in ruling that because the libel against the shipwreck did not specifically name the state or a state agency as a party,

303 549 F. Supp. 540 (S.D. Fla. 1982).

304 See *id.* at 551 n.10.

305 *Id.*

306 See *id.*

307 895 F.2d 116 (3d Cir. 1990).

308 *Id.* at 120 (footnotes omitted).

the proceeding was not one against a state for the purposes of the Eleventh Amendment. Furthermore, the Third Circuit noted that a district court need not determine the interests of the state in the wreck; the court's judgment in rem could act against the entire world save for the state.³⁰⁹

This fictional logic used in saving in rem actions from the Eleventh Amendment bar to jurisdiction (as distinct from an historical approach which explains the doctrinal exceptions) was bound to be savaged by other courts. The First Circuit noted in *Maritime Underwater Surveys, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*³¹⁰ that "the Court has never defined the precise contours of the Eleventh Amendment bar to admiralty jurisdiction," but held that where antiquities were lodged in the seabed within the territorial boundaries of a state, the Eleventh Amendment did serve to bar the jurisdiction of the court to determine title to that property, absent the state's consent.³¹¹ Moreover, the *Maritime* court held that the mere claim by a state to such title, "regardless of the[] merit" of the claim,³¹² ousted the jurisdiction of the district court under the Eleventh Amendment.

Taking an analogous position, a district court decision relied on *Petition of Walsh, The Queen City*, and *Treasure Salvors* to find that the Eleventh Amendment barred a claim to antiquities brought up from the seabed where the state had "colorable claim" to title over the property and the state had not consented to a determination of its interest in the property.³¹³ Yet, such a "colorable claim" could be satisfied simply by virtue of state legislation making a bald assertion of title to property situated on submerged lands, irrespective of whether the property was actually possessed by the state or its officers.³¹⁴

309 See *id.* at 121. The Third Circuit also held that the State of New Jersey was not an indispensable party to the litigation. See *id.* at 121-23.

310 717 F.2d 6 (1st Cir. 1983).

311 *Id.* at 8.

312 *Id.*

313 *Subaqueous Exploration & Archaeology, Ltd. v. Unidentified, Wrecked & Abandoned Vessel*, 577 F. Supp. 597, 605 (D. Md. 1983); see also *Riebe v. Unidentified, Wrecked & Abandoned 18th Century Shipwreck*, 691 F. Supp. 923, 926-27 (E.D.N.C. 1987). For a case where a state had waived its (purported) immunity for a federal court to adjudicate title in a shipwreck subject to an in rem libel, see *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F. Supp. 801, 803-04 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985).

314 See *Subaqueous Exploration*, 577 F. Supp. at 608 (citing Md. Nat. Res. Code Ann. § 2-309 (1982)); see also *Marx v. Guam*, 866 F.2d 294, 301 (9th Cir. 1989); *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1383-84 (S.D. Fla. 1988).

2. Congress and Colorability

a. The Abandoned Shipwreck Act

In 1987, however, a literal sea change occurred in the character of shipwreck litigation and the application of the Eleventh Amendment in these cases. This was precipitated by the adoption of the Abandoned Shipwreck Act (ASA) by Congress in that year.³¹⁵ The stated purpose of the Act was to “vest title to certain abandoned historic shipwrecks that are buried in State lands to the respective States.”³¹⁶ Congress estimated that there were as many as 50,000 abandoned shipwrecks located in the navigable waters of the United States, potentially under state jurisdiction.³¹⁷ While the ASA did not identify what made a vessel “abandoned,” it did partially identify an “abandoned shipwreck” as being one “embedded in submerged lands of a State.”³¹⁸

To accomplish the goal of transferring title over abandoned shipwrecks to the states, Congress employed a two step process in the ASA. First, the United States asserted title to all abandoned shipwrecks coming within the ambit of the Act.³¹⁹ Next, the United States transferred that title “to the State in or on whose submerged lands the shipwreck is located.”³²⁰ Congress also decided that “the law of salvage and the law of finds shall not apply to abandoned shipwrecks” for which the Act had transferred title to the states.³²¹ This meant two things. First, the ASA would be construed as overruling the admiralty’s common law of finds which would have, absent a statute, vested title in the finder of an abandoned shipwreck.³²² Second, the states were free to

315 See Pub. L. No. 100-298 (Apr. 28, 1988) (codified at 43 U.S.C. §§ 2101-2106 (Supp. 1996)).

316 H.R. REP. NOS. 100-514(I) & 100-514(II) (1987), reprinted in 1988 U.S.C.C.A.N. 365, 365, 370.

317 See *id.* at 365.

318 ASA § 6(a)(1), 43 U.S.C. § 2105(a)(1) (Supp. 1996).

319 See *id.*

320 *Id.* § 6(c), 43 U.S.C. § 2105(c).

321 *Id.* § 7(a), 43 U.S.C. § 2106(a).

322 For more on the differences between the law of finds and salvage, see *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992); *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981); Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 73 B.U. L. REV. 559, 601-22 (1995); Douglas S. Cohen, Note, *Should Noli Forfendi Apply to Sunken Ships?*, 73 B.U. L. REV. 193 (1993).

adopt legislation which could bar or sharply curtail an individual's right to a salvage award for locating an abandoned shipwreck.³²³

The many possible constitutional defects of the Abandoned Shipwreck Act were fully explicated in two cases brought by Harry Zych in federal district court in Illinois, one involving the wreck of the *Lady Elgin*, the other the *Seabird*.³²⁴ Although the cases began as a consolidated action, they were split off for a fundamental reason: Zych had conceded that the *Seabird* was abandoned, while the question of continued ownership of the *Lady Elgin* was still very much an issue.

b. The *Lady Elgin*

In *The Lady Elgin*, the federal district court granted an injunction, good against the entire world, to protect Zych's salvage rights in the vessel. Illinois appealed, claiming that the district court lacked jurisdiction even to issue an injunction in such a case, and the Seventh Circuit agreed.³²⁵ The Seventh Circuit, Judge Easterbrook writing, held that the mere assertion of a claim by a state triggered the Eleventh Amendment. "[I]t is the existence, and not the strength, of the claim that activates the eleventh amendment," he wrote.³²⁶

This elevated the "colorable claim" standard, enunciated by the dissent in *Treasure Salvors*,³²⁷ to unimagined heights. Taken literally, the simple interposition of a claim to a property under libel in the federal district court would oust the court's jurisdiction. Indeed, Judge Easterbrook may have been suggesting that the court may be without power to test the colorability or strength of the state's claim to the res, without running afoul of the Eleventh Amendment.³²⁸ This extremist result was specifically rejected by a number of other

323 See H.R. REP. NOS. 100-514(I) & 100-514(II) (1987), reprinted in 1988 U.S.C.C.A.N. 365, 371.

324 The writer discloses that he served as counsel to Harry Zych in both these proceedings. For more on this extraordinary litigation, see Gerstenblith, *supra* note 322, at 612-17; Peter A. McLauchlan et al., *Recent Developments in Maritime Law*, 18 TUL. MAR. L.J. 259, 313 (1994); Peter Tomlinson, Comment, "Full Fathom Five": *Legal Hurdles to Treasure*, 42 EMORY L.J. 1099 (1993).

325 See *Zych v. The Lady Elgin*, 960 F.2d 665 (7th Cir. 1992), *vacating*, No. 89-C6501, 1991 WL 34714 (N.D. Ill. Mar. 13, 1991).

326 *Id.* at 670. For a criticism of this, see Tomlinson, *supra* note 324, at 1134-35.

327 See *supra* note 273.

328 *Cf.* the lower court opinion in the case, *Zych v. The Seabird*, 746 F. Supp. 1334, 1338-41 (N.D. Ill. 1990) (applying Justice Stevens's three-pronged test in *Treasure Salvors*). Judge Rovner indicated that "[e]ngaging in this preliminary inquiry does not cross the line into an impermissible determination of the merits of the state's claim." *Id.* at 1341 n.8.

courts,³²⁹ which held that a federal court has the jurisdiction to determine whether the factual predicates of the Abandoned Shipwreck Act are satisfied,³³⁰ and thus whether the state has a colorable claim to the wreck.

c. The Seabird

In 1989, Harry Zych discovered the wreck of the Seabird and filed an in rem admiralty action in federal district court seeking a declaration of ownership in the vessel or, in the alternative, a liberal salvage award from its true owner. The Illinois Department of Transportation and the Illinois Historic Preservation Agency intervened on behalf of the State of Illinois, asserting title to the remains of the Seabird, pursuant to the ASA, and also claiming that the Eleventh Amendment barred Zych's salvage action. Zych countered by submitting that the Act was unconstitutional to the extent that it purported to divest him of title or to deny his salvage award. The United States then intervened to defend the ASA's constitutionality.

Upon its first review of the case, the district court conditioned its analysis on whether any litigation of Illinois's interest in the Seabird was barred by the Eleventh Amendment. If Illinois had a colorable claim to the wreck, the district court, reasoning from *Treasure Salvors*,³³¹ concluded that to the extent Zych sought relief from the State of Illinois, his suit would be barred.³³² The only possible basis for Illinois's claim to the Seabird was the ASA, and so Judge Rovner proceeded to consider Zych's constitutional challenges to that statute, which she rejected.³³³

329 See *Deep Sea Research, Inc. v. The Brother Jonathan*, 102 F.3d 379 (9th Cir. 1996) (in which the author served as counsel for the libellant); *Fairport Int'l Exploration, Inc. v. The Captain Lawrence*, 913 F. Supp. 552, 554 (W.D. Mich. 1995), *aff'd*, 105 F.3d 1078, 1083-84 (6th Cir. 1997); see also Robert Miller, Note, *Charting the Future of Historic Shipwreck Legislation in California: Application of the English Model in the Salvage of the Brother Jonathan*, 17 HASTINGS INT'L & COMP. L. REV. 793 (1994).

330 These include showing that the wreck is (1) abandoned, and either (2) embedded or (3) listed (or found eligible for listing) on the Registry of National Historic Places. See ASA, 43 U.S.C. § 2105(a) (1994).

331 See *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 690 (1982).

332 See *Zych v. The Seabird*, 746 F. Supp. 1334, 1338-41 (N.D. Ill. 1990).

333 Drawing on the Supreme Court's admiralty clause jurisprudence, particularly *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386-87 (1924), the district court noted that the ASA would be unconstitutional if the statute excluded from the federal court's jurisdiction a subject matter traditionally reserved to admiralty, or if it rendered the substantive maritime law non-uniform throughout the United States. Judge Rovner held that the ASA did neither. See *Zych v. The Seabird*, 746 F. Supp. 1334, 1344-49 (N.D. Ill. 1990). The district court therefore dismissed any claims against Illinois.

The court of appeals reversed in *Zych v. The Seabird (The Seabird I)*. Departing significantly from Judge Rovner's analysis, the Seventh Circuit focused exclusively on the ASA.³³⁴ But the court of appeals found that a ruling on the ASA's constitutionality was premature; there had been no finding that the *Seabird* was actually embedded in Illinois's submerged lands. Absent such a finding,³³⁵ the ASA was apparently not even implicated.³³⁶ Back on remand, the district court decided that as to Zych's salvage claims, if title in the *Seabird* was held by Illinois, any salvage claim against the state necessarily was barred by the Eleventh Amendment. And, if the Eleventh Amendment barred salvage actions against states, then the ASA could not be found to impermissibly remove such cases from federal court jurisdiction.³³⁷

Impressed with Judge Rovner's reasoning on the matter, Zych recanted on appeal any interest in seeking title in the *Seabird* as against Illinois. By conceding that the wreck was owned by the state, Zych submitted that the ASA nonetheless was unconstitutional by impermissibly excluding salvage claims from federal court jurisdiction or by making the substantive admiralty law of salvage non-uniform. The Seventh Circuit held that the ASA did not unconstitutionally exclude salvage claims against states over abandoned shipwrecks from federal

334 See *Zych v. The Seabird*, 941 F.2d 525, 528 (7th Cir. 1991) (*The Seabird I*).

335 On remand to the district court, Zych stipulated that the *Seabird* was embedded in the submerged lands of Illinois, thus proffering the factual predicate for a constitutional review of the ASA, which Judge Rovner proceeded to supply. See *Zych v. The Seabird*, 811 F. Supp. 1300, 1305 (N.D. Ill. 1992).

336 Although the issue of the ASA's constitutionality was deferred, the court of appeals nonetheless opined on the two-pronged *Panama R.R.* test earlier elaborated by Judge Rovner. The Seventh Circuit, in what appeared to be entirely dicta, see *The Seabird I*, 941 F.2d at 534, checked both the ASA's effect on traditional admiralty jurisdiction and on the uniformity of substantive maritime law. See *id.* at 530-31. The court of appeals sensibly observed that the issue whether the ASA excluded a substantial class of traditional admiralty causes from federal jurisdiction was "a close one," *id.* at 531, and left that for further briefing and deliberation before the district court.

But on the matter of substantive uniformity, the Seventh Circuit decided that "[i]f the ASA passes the first constitutional hurdle [of not impermissibly excluding a class of traditional cases from admiralty jurisdiction], then it passes constitutional muster, for it does not violate the second requirement that admiralty law foster uniformity." *Id.* at 532. In collapsing the two prongs of *Panama R.R.*, the court of appeals noted that "[i]f the ASA permissibly takes embedded shipwrecks entirely out of the realm of federal admiralty jurisdiction, the uniformity principle has not been violated." *Id.* at 533.

I discuss this misstep in David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 29-32 (1997).

337 See *Zych v. The Seabird*, 811 F. Supp. 1300, 1309-13 (N.D. Ill. 1992).

court jurisdiction because such claims were never within that jurisdiction by virtue of the Eleventh Amendment.³³⁸

The court of appeals, in *Zych v. The Seabird (The Seabird II)*, rejected Zych's submission that in rem salvage claims against sovereigns were allowed by the Eleventh Amendment.³³⁹ Also, the Seventh Circuit took pains to differentiate between federal sovereign immunity and state immunity under the Constitution. Zych had argued that the Eleventh Amendment bar to in rem admiralty actions implicating state claims to property had to be understood in view of the Supreme Court's earlier decisions, most notably in *The Davis*. The Seventh Circuit declined to apply what it regarded only as an "analogy,"³⁴⁰ this exception to Eleventh Amendment state immunity:

[S]tate sovereign immunity is categorically different from federal sovereign immunity. Federal sovereign immunity is a common law doctrine that simply holds that the federal government cannot be sued without its consent. State sovereign immunity is a *constitutional* doctrine which rests on principles of federalism. As in *The Davis*, it is one thing for a federal court to order the federal government—of which the federal court is part—to do something. It is quite another for a federal court to order a state—a separate sovereign—to pay something, like a salvage award, without the state's consent. . . .

The exception to the common law doctrine of federal sovereign immunity alluded to in *The Davis* does not apply to the state sovereign immunity established by the Eleventh Amendment.³⁴¹

The irony of this passage should not be lost on those who have read this far. Doctrines of federal sovereign immunity and foreign sovereign immunity were what drove the transformation of the Eleventh Amendment's application in admiralty. Before the turn to an extremist position in sovereign immunity in the mid to late nineteenth century, it seemed well settled that the states did not enjoy Eleventh Amendment immunity in in rem actions. It was understood, certainly in such cases as *Bright*, that the Eleventh Amendment should be read as only applying to such cases as the plain language of the provision mentioned.

By the turn of this century, the Supreme Court applied the common law doctrine of sovereign immunity to the admiralty cases against states to bar federal court jurisdiction of in rem, as well as in personam claims. It was manifest in the decisions following the *Petition of Walsh* and *The Queen City* opinions that the common law doctrine was

338 See *Zych v. The Seabird*, 19 F.3d 1136 (7th Cir. 1994) (*The Seabird II*).

339 See *id.* at 1141–42.

340 *Id.* at 1142.

341 *Id.* (citations omitted).

the basis of the extension of the Eleventh Amendment to in rem actions. But *The Queen City* was scrupulous in retaining the common law exceptions subsisting with the grant of immunity. At a minimum, these included situations where the sovereign was itself initiating the proceedings and where the res was not in the actual possession of the state nor being used for a governmental purpose.

The opinion in *The Seabird II* indicates the extent to which the historic evolution of states' Eleventh Amendment immunity in admiralty has been forgotten. The Seventh Circuit seemed to assume that the Eleventh Amendment bar to in rem actions predated the related doctrine (with its exceptions) in federal sovereign immunity. Not so. When Eleventh Amendment jurisprudence incorporated those principles of federal sovereign immunity, it took not only the rule (that, after *The Queen City*, the Eleventh Amendment would apply to in rem admiralty actions), but also the exceptions to the rule (derived from *The Siren*, *The Davis*, and *The Fidelity*). Unlike Judge King's opinion in *Cobb Coin*,³⁴² which correctly traced the evolution of the doctrine, the Seventh Circuit simply erased much of this history.

VI. RETURNING TO AN ORIGINAL UNDERSTANDING OF THE ELEVENTH AMENDMENT IN ADMIRALTY

Of all the possible constructions of the Eleventh Amendment, which, then, is best reconciled with the Adopters' views of state sovereign immunity in cases implicating the federal admiralty jurisdiction? To answer this, it would be wise to review the range of doctrinal possibilities. Here are the choices: (1) The Eleventh Amendment is inapplicable to admiralty actions involving states as parties or claimants, whether initiated in personam or in rem; (2) the Amendment bars in personam claims, but permits all in rem libels, even those to which a state interposes a claim; (3) the Amendment proscribes all in rem libels involving state-claimed property, except for those falling within the common law exceptions of sovereign immunity detailed in *The Siren*, *The Davis*, *The Fidelity*, and *The Queen City* (that is, where the state initiates the proceeding, or where the state is not in actual possession of the res or if the res is not in the governmental service of the state); (4) the Amendment bars all in rem claims, except for prize libels; and (5) the Amendment bars a federal court from hearing any in rem libel after a state enters a claim to the res.

Let me consider the more extreme options first. I believe it would be extravagant to maintain that the Eleventh Amendment per-

³⁴² See *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540, 551 n.10 (S.D. Fla 1982).

mits an in personam admiralty action against a state without its consent.³⁴³ Much of this Article has, of course, considered the textual implication of the omission of admiralty actions in the Eleventh Amendment. And while I have concluded that the omission was purposeful,³⁴⁴ I can find no authority for the proposition that it was intended to allow all suits against states to proceed under both in personam and in rem mechanisms.

The only support for such a conclusion would have to be based on the interplay of state sovereign immunity and exclusive federal court jurisdiction over admiralty and maritime matters under Article III of the Constitution. If such a grant had, in fact, been exclusive, then I might believe that under Hamilton's and Randolph's notion of the "plan of the convention"³⁴⁵ there had been a "surrender" of state sovereignty in two senses: the loss of state court jurisdiction over all admiralty and maritime matters and also the concomitant relinquishment of state sovereign immunity in such cases. But, as we know from the "savings to suitors" clause of the Judiciary Act of 1789,³⁴⁶ federal court jurisdiction was not exclusive in all cases. There was a class of cases involving common law remedies where state and federal courts had concurrent jurisdiction. These common law remedies in state court would have, in all cases, been initiated by in personam process.

I conclude, therefore, that the Adopters, despite the textual lacunae regarding admiralty, would not likely have contemplated in personam proceedings against states in admiralty. I regard as error Justice Washington's categorical view in *Bright*,³⁴⁷ even though it was supported by at least some of the publicists of his day.³⁴⁸ Nor does the opinion by the four dissenting Justices in *Welch*³⁴⁹ persuade. It appears that much of that opinion depended on the idea that, irrespective of whether the Eleventh Amendment covered admiralty in personam actions, Congress was always free to abrogate state sovereign immunity pursuant to its Commerce Clause powers. That idea has certainly been repudiated by *Seminole*, and Justice Brennan's fol-

343 My only doubt would be in the rather far-fetched event that Congress, pursuant to its Fourteenth Amendment power, and under the Court's decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), abrogates the state's Eleventh Amendment immunity by providing a statutory remedy arising in admiralty.

344 See *supra* Part II.B.

345 See *supra* Part I.B-C.

346 See *supra* note 48 and accompanying text.

347 See *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647).

348 See DUPONCEAU, *supra* note 124, at 38.

349 See *supra* Part V.A.3.

lowers³⁵⁰ in the *Welch* dissent may not have been so enthusiastic in suggesting that the Eleventh Amendment bar (on its own terms) does not extend to in personam admiralty actions.

That brings up the equal but opposite doctrinal position: that states are immune from all admiralty actions, even those initiated in rem, where the state enters a bare claim to the disputed res. Not surprisingly, I regard this position as radical and extreme, one repudiated even during the heyday of sovereign immunity in the late nineteenth and early twentieth centuries. Despite the resurrection of this idea by the First and Seventh Circuit's decisions in some of the shipwreck cases,³⁵¹ I do not believe this doctrine can be seriously entertained in its most literal form. The language of Judge Campbell in *Maritime* and Judge Easterbrook in *The Lady Elgin* seemed to emphasize that the colorability, much less the relative strength, of the state's claim to a disputed res was irrelevant. All that mattered was that the state had made the claim.

If taken literally, this position embraces the heresy that a federal court is powerless to decide its own jurisdiction. I do believe that there may be some merit to the idea that the Eleventh Amendment protects the dignitary interest of states in avoiding being haled into federal court,³⁵² just as much as it insulates states from the coercive powers of the federal courts. To accept such a view is not, however, the same as believing that a state, by simply interposing itself in an admiralty in rem action, automatically divests the federal court of its otherwise *constitutionally* allocated jurisdiction under Article III. There must be some test applied to weigh the colorability of the state's claim, some determination to be made regarding whether the extent of the state's interests are such as to implicate the Eleventh Amendment immunity from litigation in federal court. And it must be the federal court itself that makes that evaluation of its own jurisdiction. A state simply cannot arrogate that power.

Quite apart from whether the common law of federal sovereign immunity might provide such a standard for generally distinguishing weak from strong claims of state interest (which I will consider presently), it might be that there is a continued role for Congress to prescribe what is (and what is not) a colorable claim in admiralty for

350 On the other hand, Justice Brennan himself made clear in his *Treasure Salvors* and *Atascadero* opinions that he did believe that the Eleventh Amendment simply did not apply to any admiralty action. See *supra* note 281 and accompanying text.

351 See *supra* Part V.B.

352 See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993); *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring).

purposes of the Eleventh Amendment. Consider again the Abandoned Shipwreck Act. In no event should it be construed as a Congressional *abrogation* of states' Eleventh Amendment immunity, even if the Supreme Court had not ruled in *Seminole* that such abrogation could only occur pursuant to Congress's powers under the Fourteenth Amendment. What the ASA does, though, is define those conditions under which a state will have valid title to shipwrecks located on its submerged lands.³⁵³ I would suggest that this should also be considered the standard for colorability.

States might, of course, object that they are being made to prove their title in order to win their immunity from suit. The dignitary interest implicated in the Eleventh Amendment demands, moreover, that a state's immunity from suit in federal court be protected even if it seems that the state's claim lacks merit. And while there is some logical appeal to this submission, it usually evaporates when a state pushes its point too far: that it should not be required to prove *anything* to have the in rem libel dismissed on Eleventh Amendment grounds. The best approach, it would seem to me, would be one in which a subset of the elements used to establish title for a disputed res would be employed to determine if the state's claim is colorable for purposes of dismissing the libel. So if the ASA requires abandonment and embeddedness to establish title, it would make sense for a federal court to require that a state, at a minimum, show that the relevant shipwreck is abandoned in order to have the case dismissed under the Eleventh Amendment. If a state cannot make such a showing, it cannot prove the most basic element of its claim, and it therefore lacks colorability. The state's interposition of a claim in such circumstances would lack credibility and the vital connection to a state interest which the Eleventh Amendment was intended to serve in our federal system.

The extreme positions aside, I think the Adopters of the Eleventh Amendment believed that at least some sorts of in rem suits could be maintained in federal court, even in the face of claims made by states. Taking the easiest such proof first, I do not harbor any doubts whatsoever that the Adopters had no intention of permitting a state to claim Eleventh Amendment immunity in in rem prize proceedings. These cases had been a continuous source of friction in state-federal relations in the Articles of Confederation period. Remember, concurrent state and federal prize courts had issued the disputed rulings that fea-

³⁵³ Specifically, the wreck must be abandoned and either embedded in the seabed or found eligible for listing on the National Register of Historic Places. See ASA, 43 U.S.C. § 2105(a) (1994).

tured so prominently in *Pennhallow v. Doane's Administrators*³⁵⁴ and *United States v. Peters*.³⁵⁵

There is not a doubt that the Framers of the Constitution desired to vest in the federal courts exclusive power over prize actions. The grant of admiralty and maritime jurisdiction in Article III of the Constitution was truly intended to be exclusive for prize proceedings, as these were never "saved to suitors" and concurrent state court jurisdiction under the Judiciary Act of 1789. Prize proceedings were paradigmatic civil law actions proceeding solely in rem. And, as even those that advocate the narrowest ambit of federal admiralty jurisdiction acknowledge,³⁵⁶ the Framers were unanimous in their belief that prize proceedings had to be heard solely in federal court in order to ensure the consistent treatment of these cases which so profoundly implicated delicate issues of national security.

The Adopters of the Eleventh Amendment could not, therefore, have admitted to the possibility that states making claims to disputed prizes would demand that these be heard in state court. It would not have been inconceivable in 1795 to believe, as the Constitution itself allowed,³⁵⁷ that some states would have naval forces operating during wartime. Some of these vessels might have even made captures of enemy ships or cargoes on the high seas, or at least made a claim to prize moneys. The exclusion of admiralty actions from the text of the Eleventh Amendment was, at a minimum, a recognition that the Adopters did not believe that the states could erect a defense of sovereign immunity in such cases and direct that such cases be heard in state prize tribunals.

But was the exclusion of admiralty meant to do more than that? I think it was, and the answer to the riddle lies, I believe, in the understanding developed in this Article about in rem actions involving sovereigns. One of the points I have made here is that many judges and scholars have embraced erroneous views about the nature of sovereign immunity in admiralty. Beginning with Justice Waite in *The Fidelity*, and continuing with Justice Pitney in *The Queen City*, and culminating with Justice White in *Treasure Salvors*, the assumption has been advanced that in the English Admiralty the Crown enjoyed total immunity in in rem proceedings. But, as I have sketched here,³⁵⁸ this was not true. And although I acknowledge that the historical evi-

354 3 U.S. (3 Dall.) 54 (1795); see *supra* Part II.C.

355 9 U.S. (5 Cranch) 115 (1809); see *supra* Part III.A.

356 See, e.g., *Casto*, *supra* note 28; *Clark*, *supra* note 39, at 1332-60; see also *supra* Part I.B.

357 See U.S. CONST. art. I, § 10, cl. 3.

358 See *supra* Part I.A.

dence is incomplete, I think (if anything) it leans towards a conclusion that the English Crown was often compelled to litigate claims to property in admiralty in rem actions.

I am mindful, of course, that a doctrinal revolution overtook the common law of sovereign immunity in the nineteenth century. It would, indeed, make little sense to argue that sovereign immunity in admiralty should be frozen at 1787 or 1795. That is not, however, my submission here. Rather, it is that even as doctrines of immunity grew and expanded to further insulate all levels of sovereignties (foreign, national, state, and municipal) from court interference, there always remained common law exceptions which permitted courts to hear in rem actions involving sovereign claims.

The combined rules of *The Siren*, *The Davis*, and *The Fidelity* permitted in rem actions when the sovereign itself initiated the action (as in prize, bankruptcy, or forfeiture), or when the res subject to the arrest was not in the "actual possession" of the state, or was not being used for "public and governmental purposes." Moreover, the holdings of these late nineteenth century cases may well have reflected the realities of sovereign immunity in the Framing period. The holding in the *Moitez* case,³⁵⁹ where the Pennsylvania Admiralty court denied an in rem libel for unpaid mariner's wages against a sovereign vessel, is fully explicated under the rule of *The Davis* and *The Fidelity*: the sovereign vessel was in the actual possession of the State of South Carolina and used for public purposes.

But even more important than the historical pedigree of these judge-made exceptions to the judge-made law of sovereign immunity is that they were explicitly embraced in the *locus classicus* for the Eleventh Amendment bar of in rem actions involving states: the Supreme Court's 1921 decision in *The Queen City*.³⁶⁰ And, yet, as has been explained here, later courts simply decided that Justice Pitney did not mean it when he wrote that the Eleventh Amendment bar on federal court jurisdiction only "exempt[ed] public property of a State used and employed for public and governmental purposes."³⁶¹

The results in most of the recent shipwreck cases are thus doubly wrong. As already noted, it is error to permit states to demand (and receive) Eleventh Amendment immunity without first proving some colorable claim to the res. It is wrong, moreover, to believe that states have any immunity to lose where the property at issue in an in rem

359 *Moitez v. The South Carolina*, 17 F. Cas. 574 (Pa. Adm. 1781) (No. 9697); see *supra* Part I.B.

360 *The Queen City*, 256 U.S. 503 (1921); see *supra* Part IV.C.

361 *The Queen City*, 256 U.S. at 511.

libel is not in the actual possession of the state (or its officers) or not used solely for public purposes. Shipwrecks, by their very nature, fail such a test and one could imagine other species of maritime property that would as well.

It is, therefore, possible to imagine that the Adopters of the Eleventh Amendment would have been comfortable with the proposition that in some forms of in rem libels the states could seek immunity, while in others they could not. The distinction, as implicated in the text of the Eleventh Amendment itself, is whether the suit is actually one being "commenced or prosecuted against one of the United States."³⁶² In rem libels in admiralty could, depending on the nature of the maritime lien being enforced or the nature of the property being arrested and brought within the jurisdiction of the federal court, ensnare important interests of state sovereignty. That is precisely the reason that the common law of federal sovereign immunity worked out such differences in the jurisprudence of such cases as *The Davis* and *The Fidelity*.

There is also a point to be considered, first advanced by Justice Washington in *Bright*, that in enforcing in rem remedies, "the court need not depend upon the good will of a state claiming an interest in the thing to enable it to execute its decree."³⁶³ This was precisely the same observation made by Justice Miller in *The Davis*: if an admiralty court could acquire in rem jurisdiction over an object without disturbing the actual possession of the sovereign, sovereign immunity could not possibly be offended.³⁶⁴

In short, the common law of federal sovereign immunity in admiralty recognized that there had to be limits on the claims made by government in insulating itself from judicial power. And, as I have charted here, these limits were directly incorporated into the doctrine of state sovereign immunity as superimposed on the textual silence of the Eleventh Amendment. These limits were respected by courts for the first 130 years of the Republic.

In contrast, today's Eleventh Amendment jurisprudence respects no bounds to claims of state sovereignty. States lay claim to property they do not actually possess and which is not used in governmental service and still insist that such cases not be heard in federal court. State officials, acting under color of state law, interfere with individuals' ownership or enjoyment of property in violation of federal law and still claim immunity from suit in federal court. And what is the

362 U.S. CONST. amend. XI.

363 *United States v. Bright*, 24 F. Cas. 1232, 1236 (C.C.D. Pa. 1809) (No. 14,647).

364 *See The Davis*, 77 U.S. (10 Wall.) 15, 20–21 (1869).

basis of this extraordinary surge in state authority drawn at the expense of the power of the federal courts? It is a hybrid construction of the Eleventh Amendment that has filled textual holes (whether they concern admiralty actions or suits involving federal questions) with judge-made notions of sovereign immunity.

What has been considered in this Article is the extent to which the intent of the Adopters, as manifested in *their* expectations as to state sovereign immunity, has been largely ignored in the new Eleventh Amendment jurisprudence. By using admiralty as an example, it is manifest that different values and desires prevail today in employing the Eleventh Amendment as the critical constitutional provision regarding federalism. And, as has just been made clear by the Supreme Court in *Seminole*, the Eleventh Amendment (through its judicial gloss) is not just a doctrine reflecting judicial rectitude, an understandable reluctance to allow federal courts the power to interfere with state government. Rather, state immunity from federal court jurisdiction is a bedrock principle of federalism which Congress itself is powerless to alter, save in very narrow contexts, circumstances that may well be restricted further over time.

The issue, it seems to me, is as Judge Mehrrens put it in his opinion in the *Treasure Salvors* case: can states use the Eleventh Amendment as a "sword . . . [to] take and appropriate the property and lives of its citizens without due process."³⁶⁵ And, if it seems extravagant to argue that treasure salvage cases implicate such profound concerns, then one might instead reflect on whether states can interpose claims in federal bankruptcy or forfeiture proceedings and thereby divest federal court jurisdiction in favor of their own tribunals. Outlandish? That is precisely the result we now have with the Supreme Court's jurisprudence post-*Seminole*. When one starts to consider, there are many forms of action that proceed in rem. Based on the admiralty precedents, states seem free to enter the legal lists by presenting claims to disputed property.

So what we have in the Eleventh Amendment today is a judge-made doctrine drawing sustenance from a history that never was. Texts are always drafted with certain understandings made and written, with others reflected and yet unwritten. As the detailed doctrinal expectations that gave rise to the Eleventh Amendment were forgotten, its jurisprudence was released from the bonds of the text itself as well as from the intent of the Adopters. So much so, that, as far as

³⁶⁵ *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 528 (S.D. Fla. 1978).

admiralty is concerned, many decisions granting states Eleventh Amendment immunity today are simply living a constitutional lie.