

The Supreme Court's Original Jurisdiction Over Disputes Between the United States and a State

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ABSTRACT

Does the Supreme Court have jurisdiction to hear controversies between a state and the United States? Although the Supreme Court has asserted this power, commentators have puzzled over the question for decades. Because Article III does not enumerate controversies between a state and the United States, many scholars have concluded that the Court's exercise of this power is illegitimate, or at least atextual. This Article argues that the Constitution's text does give the Supreme Court the power to hear such controversies, but to understand why it is necessary to understand the way that the framers would, for the sake of brevity, combine several concepts into a single phrase, what this Article terms "collapse textualism." The framers combined two heads of jurisdiction ("controversies between the United States and a State" and "all other controversies involving the United States") into a single grant of jurisdiction over "Controversies to which the United States shall be a Party." Thus, because the Court has original jurisdiction over those controversies "in which a State shall be a Party" it therefore has original jurisdiction over "controversies between the United States and a State."

INTRODUCTION

Does the Supreme Court have original jurisdiction over controversies between a state and the United States?

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Doctrinally, this question has been answered in the affirmative. Ever since the Supreme Court first considered the puzzle in Justice Harlan's 1892 opinion, *United States v. Texas*,¹ which affirmed jurisdiction, the Court has heard numerous cases between a state and the United States in its original jurisdiction,² and has even entertained suits by a state against the United States when there is federal consent.³ Furthermore, Congress has codified these rulings in statute, stating that "The Supreme Court shall have original but not exclusive jurisdiction of . . . [a]ll controversies between the United States and a State."⁴

This jurisdiction, however, has been criticized from all corners of the legal world, from the pages of the U.S. Reports

1. 143 U.S. 621 (1892) (suit in equity brought by the United States against Texas to determine the boundary between that state and a territory of the United States). Before this landmark case, the Supreme Court heard two cases that included the United States as a party, although it did not consider the jurisdictional issue. *United States v. North Carolina*, 136 U.S. 211 (1890) (action of debt at law brought by the United States against North Carolina for interest on bonds issued by the state); *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854) (United States permitted to intervene as a non-technical party in a boundary dispute between the two states, because the United States had granted the disputed lands to Florida).

2. See, e.g., *United States v. Maine*, 469 U.S. 504 (1985) (action by the United States against thirteen States that border the Atlantic Ocean to determine whether the United States has exclusive rights to the seabed and subsoil under the ocean off the States' coastlines); *United States v. Louisiana*, 339 U.S. 699 (1950) (bill in equity by the United States against Louisiana to determine and declare the title to tidelands off Louisiana's coast); *United States v. California*, 332 U.S. 19 (1949) (bill in equity by the United States against the State of California to determine which government has paramount rights in and power over submerged land off the coast of California); see also *United States v. California*, 436 U.S. 32 (1978); *United States v. Florida*, 420 U.S. 531 (1975); *United States v. Michigan*, 190 U.S. 379 (1903).

3. See, e.g., *California v. United States*, 457 U.S. 273, 277 n.6 (1982); *California v. Arizona*, 440 U.S. 59, 63, 65-68 (1979) (holding that California may file its bill to quiet title to the submerged lands against Arizona and the United States because Congress had waived federal sovereign immunity); *Utah v. United States*, 403 U.S. 9, 9-10 (1971) (resolving conflicting claims between Utah and the United States to the shorelands around the Great Salt Lake); see also 43 U.S.C. §§ 615vv, 616d(e), 620m, 1551(c) (1970) (consenting to suit by a state under the Supreme Court's original jurisdiction).

4. 28 U.S.C. § 1251(b)(2) (2012).

to those of law reviews and treatises, and Justice Harlan's opinion in *United States v. Texas* has received sustained criticism for over a century. In addition to Chief Justice Fuller's dissent, joined by Justice Lamar,⁵ Justice Frankfurter has called Justice Harlan's decision "precluded" by the "merely literal language of the Constitution."⁶ Commentators have described Justice Harlan's *Texas* decision as "ignoring,"⁷ "inconsistent with,"⁸ and "a single point of divergence from"⁹ the Court's original jurisdiction doctrine. Others have called it "strained"¹⁰ and even "unconstitutional."¹¹ Indeed, Federal Courts textbooks present the puzzle to students as a seemingly irreconcilable paradox.¹²

The problem centers on the interpretation of Article III's jurisdictional "menu."¹³ Article III, Section 2, Clause 1

5. 143 U.S. at 648–49 (Fuller, C.J., dissenting).

6. *Ex parte Republic of Peru*, 318 U.S. 578, 598 (1943) (Frankfurter, J., dissenting).

7. David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 330 n.46 (1985).

8. David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 693 n.290 (1982).

9. Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1789 (2004).

10. Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 103 (1999).

11. Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 489, 491 n.217 (1989) (rejecting this "literal" interpretation as an "autistic" reading of the Constitution's text).

12. See, e.g., ROBERT N. CLINTON, ET AL., *FEDERAL COURTS: THEORY AND PRACTICE* 1434 (1996); DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 323 (4th ed. 1990); RICHARD H. FALLON, JR., ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 256–57 (6th ed. 2009) [hereinafter *HART & WECHSLER*, 6th ed.]; LARRY W. YACKLE, *FEDERAL COURTS* 160 (2d ed. 2003).

13. For use of the term "menu" to describe the nine jurisdictional grants in Article III, Section 2, Clause 1, see Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205,

outlines federal jurisdictional as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— between a State and Citizens of another State;—between Citizens of different States;— between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.¹⁴

Clause 2 of that same Section states: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and *those* in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction”¹⁵

The question is, to what does “those” refer? In other words, over which state-party cases or controversies does the Supreme Court have original jurisdiction?

Most Supreme Court cases and commentators have concluded that “those” refers to the three state-party-based jurisdictional grants from Clause 1, namely “Controversies between two or more States; . . . between a State and Citizens of another State; . . . and between a State . . . and foreign States, Citizens or Subjects.”¹⁶ Under this “diversity” reading of Article III, Section 2, Clause 2, the Supreme Court has state-party-based original jurisdiction only when the other party is another state(s), a citizen(s) of another state, or a foreign state(s), citizen(s), or subject(s).

Not included in Clause 1’s list, however, are the words

219, 245 (1985).

14. U.S. CONST. art. III, § 2, cl. 1.

15. *Id.* cl. 2.

16. *Id.* cl. 1; *see infra* notes 57–59.

“Controversies between the United States and a State.” Instead, Clause 1 includes the broader words, “Controversies to which the United States shall be a Party.”¹⁷ Thus, the “diversity” interpretation of the Supreme Court’s original jurisdiction, on the surface, would not seem to encompass disputes between the United States and a state. Accordingly, many of those who support the “diversity” reading have assumed the Supreme Court acted inconsistently and illegitimately when it exercised its original jurisdiction over a controversy between a state and the United States.

On the other side are those who see *United States v. Texas* as the lone case espousing what, in their opinion, is the true interpretation of the Supreme Court’s original jurisdiction: that the Supreme Court has original jurisdiction over all federal question cases with a state as a party, regardless of the remaining party configurations.¹⁸ These scholars point to the Supreme Court’s later repudiation of this theory, most notably in *Texas v. ICC*,¹⁹ as inconsistent with *United States v. Texas*, and inconsistent with the Constitution itself.

This Article offers a third interpretation. It argues that the diversity reading of the Supreme Court’s original jurisdiction is correct: the Supreme Court has state-party-based original jurisdiction only over those cases for which the Constitution grants federal jurisdiction on account of the presence of a state, *i.e.* suits between states, suits between a state and citizens of other states, and suits between a state and a foreign state or its citizens. The text of the Constitution, however, allows for one more category to be included with this list: suits between a state and the United States. Numerous delegates suggested giving the federal judicial power jurisdiction over controversies between the United States and a state, and over controversies between

17. *Id.* cl. 1.

18. *See infra* note 56.

19. 258 U.S. 158 (1922).

the United States and an individual. The Framers did not, however, enumerate all of the different United States-based categories over which the Constitution granted federal jurisdiction, *i.e.* State-United States cases, citizen-United States cases, foreign state-United States cases, foreign citizen-United States cases, etc. Instead, they used a single catch-all: “[c]ontroversies to which the United States shall be a [p]arty.”²⁰ Both the delegates and the ratifiers understood that this provision was in fact two separate provisions: one over controversies between the United States and a state, and one over other controversies between the United States and an individual or foreign state. This understanding was informed by antecedents and expectations over what sorts of controversies the federal power would adjudicate.

This Article thus presents a case-study of “collapse textualism.” Several times during the Philadelphia Convention, the Constitution’s drafters consolidated several more specific earlier provisions into a single general provision. Because of the antecedents of the Articles of Confederation and the English judicial procedures, however, both the drafters and later the ratifiers understood that the terse provision contained more assumptions than the bare words, stripped of context, would imply.

Relying on the historical antecedents to the Supreme Court’s original jurisdiction, the process of drafting the Judiciary Article in the Constitutional Convention, and the ensuing ratification debates, this Article argues that the framers and ratifiers all assumed that the phrase, “Controversies to which the United States shall be a [p]arty,”²¹ was a combination of two jurisdictional grants: one between the United States and a state, and one between the United States and an individual litigant. By combining these two grants into the simpler formulation, the framers followed their general pattern of avoiding pleonasm in the

20. U.S. CONST. art. III, § 2, cl. 1.

21. *Id.*

Constitution's text.

Thus, this Article seeks to rescue the doctrine of the Supreme Court's original jurisdiction over suits between the United States and a state from ignominy. Further, it explains "collapse textualism" and the way the Framers spoke in a terse, abbreviated way, letting background assumptions inform the text. Finally, it argues that Justice Harlan's opinion in *United States v. Texas* did not argue that the Supreme Court had original jurisdiction over *all* federal question cases; instead, Justice Harlan made textual and contextual arguments in favor of jurisdiction in that case in particular.

I. THE SCOPE OF THE SUPREME COURT'S ORIGINAL JURISDICTION

Perhaps the most remarkable year in the history of popular constitutionalism occurred between the summers of 1970 and 1971.

On June 22, 1970, the Voting Rights Act of 1970 was enacted,²² which set eighteen as the voting age for federal and state elections.²³ Almost immediately, states and the United States filed motions for leave to file bills of complaint²⁴ against each other in the Supreme Court's original jurisdiction.²⁵ The states claimed that Congress "exceeded its constitutional powers and thereby usurped powers reposed in the states, present[ing] conflicting claims of governmental powers with regard to the same subject

22. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended in scattered sections of 42 U.S.C. §§ 1973-1973bb-1).

23. *Id.* § 302, 84 Stat. at 318.

24. Before an original action can be brought before the Supreme Court, the plaintiff must file a motion for leave to file. SUP. CT. R. 17.3.

25. *Oregon v. Mitchell*, Orig. No. 43, *Texas v. Mitchell*, Orig. No. 44, *United States v. Arizona*, Orig. No. 46, *United States v. Idaho*, Orig. No. 47, 400 U.S. 112 (1970) (bills consolidated).

matter.”²⁶

The Supreme Court accepted the case, and on December 21, 1970, six months after the bill had been signed, struck down the provision regulating state elections as unconstitutional.²⁷ The Court concluded, “Congress cannot interfere with the age for voters set by the States for state and local elections.”²⁸

Two months later, on March 23, 1971, Congress proposed a constitutional amendment establishing eighteen as the minimum voting age for all elections,²⁹ and it was ratified on July 1, 1971 as the Twenty-Sixth Amendment.³⁰

Thus, in the space of only twelve months, a law was enacted, the Supreme Court struck it down as unconstitutional, and the Constitution was amended to overturn that decision. This remarkable year belies the common trope that the Constitution is nearly impossible to amend, and demonstrates that the populace can take charge of its own governing document, even in the face of state resistance.

The Twenty-Sixth Amendment was possible because the

26. Brief on Motion for Leave To File Complaint, at 3, *Texas v. Mitchell*, Orig. No. 44, 400 U.S. 112 (1970).

27. *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970).

28. *Id.*; *see id.* at 125 (“[T]he whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.”).

29. Proposed Amendment to the Constitution of the United States, 85 Stat. 825; S. JOURNAL, 92d Cong., 1st Sess. 204 (1971); H. JOURNAL, 92d Cong., 1st Sess. 367 (1971).

30. Certification of Amendment to the Constitution of the United States Extending the Right to Vote to Citizens Eighteen Years of Age or Older, 36 Fed. Reg. 12,725–26 (July 7, 1971); *see also* U.S. CONST. amend. XXVI (“Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age. Section 2. The Congress shall have power to enforce this article by appropriate legislation.”). For an analysis of the capacious scope of such enforcement clauses, *see generally* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237 (2017).

Court immediately took up the case in its original jurisdiction to determine its constitutionality.³¹ This allowed the issue to remain visible, prevent malaise, and engage the citizenry to amend the Constitution. But was the Supreme Court’s review of the case in this manner legitimate? Can the Court hear a case between a state and (functionally) the United States? The Court itself declined to address the question. As Justice Black wrote, “[n]o question has been raised concerning the standing of the parties or the jurisdiction of this Court,” and the Court did not consider the justiciability of the case further.³² Where did the Supreme Court get the jurisdiction to decide this controversy?

Article III, Section 2, Clause 1 contains a jurisdictional menu of nine items to which federal jurisdiction extends:

The judicial Power shall extend to [1] all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—[2] to all Cases affecting Ambassadors, other public Ministers and Consuls;—[3] to all Cases of admiralty and maritime Jurisdiction;—[4] to Controversies to which the United States shall be a Party;—[5] to Controversies between two or more States;—[6] between a State and Citizens of another State;—[7] between Citizens of different States;—[8] between Citizens of the same State claiming Lands under Grants of different States, and [9] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.³³

Clause 2 of that same Section states:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before

31. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES 361 (St. George Tucker ed., 1803) (arguing that hearing state-party cases in the Supreme Court’s original jurisdiction was intended to increase the “dispatch to the decision of such important cases, by taking away all unnecessary delays, by appeal”).

32. *Mitchell*, 400 U.S. at 117 n.1. Oregon argued that it had jurisdiction based on *South Carolina v. Katzenbach*, 382 U.S. 898 (1965), but that case also did not address justiciability. Plaintiff’s Brief in Support of Motion for Leave To File Complaint, *Mitchell*, 400 U.S. 112, at 8–9 (1970) (No. 43 Orig.).

33. U.S. CONST. art. III, § 2, cl. 1.

mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.³⁴

Thus, the Supreme Court has jurisdiction over “those” disputes “in which a State shall be a Party.”³⁵ There are three possible interpretations of the word “those.” It may refer to any case whatsoever with a state as a party, it may refer to any case within the federal judicial power with a state as a party, or it may refer only to those controversies wherein federal jurisdiction is granted by virtue of the presence of a state as a party. Below, this Article discusses each of these possibilities, arguing that the correct interpretation is the last: “those” refers only to those controversies where federal jurisdiction is granted on account of the presence of a state as a party.

A. *Any Case with a State as a Party*

First, “those” could refer to any cases whatsoever, even those outside of Article III’s jurisdictional menu, so long as a state is a party, such as a suit based entirely on state law between a state and one of its own citizens, or a state criminal prosecution based on state criminal law. In other words, this interpretation would read this part of Article III, Section 2, Clause 2 as an independent grant of jurisdiction over and above the jurisdictional menu of Clause 1. Neither justices nor scholars, however, have embraced this interpretation,³⁶ and with good reason: the word “those”

34. *Id.* cl. 2.

35. *Id.*

36. See *Pennsylvania v. Quicksilver Co.*, 77 U.S. (10 Wall.) 553, 556 (1871) (“Th[e] second clause distributes the jurisdiction conferred upon the Supreme Court in the previous one into original and appellate jurisdiction; but does not profess to confer any.”); HART & WECHSLER, 6th ed., *supra* note 12, at 256 (stating that the Supreme Court’s original jurisdiction over state-party cases “might have been construed as an independent grant of jurisdiction to hear *any* such case, whether or not it fell within one of the previously specified nine heads of jurisdiction. However, this broadest of possible constructions has been uniformly

must reference a pre-defined antecedent, as opposed to the universe of legal cases. Therefore, we can dispense with this first interpretation.

B. *Any Case Within the Federal Judicial Power Where a State is a Party*

Second, the word “those” could refer to all nine grants of federal jurisdiction. Under this reading, the Supreme Court would have original jurisdiction over any case within any federal court’s jurisdiction, so long as one party was a state. Thus, the Supreme Court would have original jurisdiction over a federal question or admiralty case between a state and a citizen of that state, or over a state prosecuting someone for violation of federal law.

The Supreme Court has rejected this reading. In *Texas v. ICC*, for example, Texas sued the Interstate Commerce Commission, a federal agency, seeking a declaration that the Transportation Act of 1920 was unconstitutional.³⁷ The Court held that the Texas railroad carriers were essential parties and would have to be joined, but that some of them were citizens of Texas.³⁸ Therefore, the Court concluded, the suit would cease to be one purely between a state and citizen(s) of another state, and thus the Supreme Court’s original jurisdiction was defeated.³⁹ The Court accordingly dismissed Texas’s bill, despite the case’s federal question.⁴⁰ At least one scholar has joined the Court in rejecting this

rejected.”); Amar, *supra* note 11, at 481 (“[Such a] reading of the state party clause would, taken alone, seem to mean that the Supreme Court has original jurisdiction in a purely state law case brought by a state against its own citizens. Yet that surely cannot be right, for such a case does not even fall within the Article III jurisdictional menu . . .”).

37. 258 U.S. 158, 159 (1922).

38. *Id.* at 164.

39. *Id.*

40. *Id.* at 165.

reading of Article III.⁴¹

Others, however, have criticized the Supreme Court's conclusion in *Texas v. ICC*. The Solicitor General, for instance, on more than one occasion has argued to the Supreme Court that it should overrule *Texas v. ICC* and hold that the Court's original jurisdiction comprehends any case arising under any of the nine heads of federal jurisdiction if a state happens to be a party. The Solicitor General first took this position in 1973. The state of Georgia sued President Nixon and several federal officers, seeking a declaration that it was entitled to receive federal assistance under various federal statutes, and an order enjoining defendants from withholding those sums.⁴² Solicitor General Robert Bork urged the Court to grant the motion, arguing that the case offered "far and away the best opportunity of reaching a fully-informed and prompt judgment on the complex and profound issues at stake in the assertion of presidential discretion to affect rates and amounts of spending."⁴³ Bork acknowledged, however, the possible jurisdictional difficulty that, although all the named defendants were citizens of states other than Georgia, the President had nominated Russell Train to the position of Administrator of the EPA, and Train was a citizen of the District of Columbia.⁴⁴ Thus, exercise of the Supreme Court's original jurisdiction would conflict with the dictum in *California v. Southern Pacific Company* that the Supreme Court's original jurisdiction over cases between a state and a citizen of another state requires all the defendants to be citizens of other states, and the District of Columbia was not another state.⁴⁵ Bork suggested

41. See, e.g., Amar, *supra* note 11, at 489 (rejecting this "literal" interpretation as an "autistic reading" of the Constitution's text).

42. Georgia's Motion for Leave To File Complaint, at 19–20, *Georgia v. Nixon*, 414 U.S. 810 (1973) (No. 63 Orig.).

43. Memorandum for the Defendants, at 2–4, *Georgia v. Nixon*, 414 U.S. 810 (1973) (No. 63 Orig.).

44. *Id.* at 9–12.

45. *California v. South Pacific Co.*, 157 U.S. 229, 258 (1895).

that the Court overrule *Texas v. ICC* and hold that any case raising a federal question in which a state is a party is within the Court's original jurisdiction.⁴⁶ As Bork argued, “[c]ertainly it seems inappropriate that issues of this Court's original jurisdiction and its capacity to entertain cases of great constitutional moment should depend upon whether a nominee for an administrative position happens at the moment to reside in the District or in Virginia.”⁴⁷ The Court summarily dismissed Georgia's motion for leave to file a bill of complaint.⁴⁸

More than a decade later, the Solicitor General again opined that the Supreme Court has original jurisdiction over any case within the federal jurisdiction as long as a state is a party. In 1985, Indiana sued the United States in the Supreme Court's original jurisdiction. It argued that Richard McIntyre had been “duly elected” as Representative of Indiana's Eighth Congressional District at the November 6, 1984 general election, after which Indiana certified McIntyre as winner of the election.⁴⁹ On January 3, 1985, the House of Representatives passed House Resolution 1, which referred “the question of the right of Frank McCloskey or Richard McIntyre to a seat” to the Committee on House Administration.⁵⁰ Indiana sued to enjoin the House of

46. Memorandum for the Defendants, at 11–12, *Georgia v. Nixon*, 414 U.S. 810 (1973) (No. 63 Orig.) (acknowledging that the Court may have to overrule *Texas v. ICC*, 258 U.S. 158, and *New Mexico v. Lane*, 243 U.S. 52 (1917)).

47. *Id.* at 13.

A number of other states, who had initiated similar causes of action in lower federal courts, filed a brief as Amici Curiae, arguing that the Court not grant the motion for leave to file a bill of complaint in the Supreme Court's original jurisdiction. They argued that the Court would be deprived of the opportunity of the opinions of lower federal courts, but did not raise any jurisdictional opposition. Brief for Amici Curiae, *Georgia v. Nixon*, 414 U.S. 810 (1973) (No. 63 Orig.).

48. *Georgia v. Nixon*, 414 U.S. 810, 810 (1973).

49. Indiana's Motion for Leave To File a Complaint at 3–4, *Indiana v. United States*, 471 U.S. 1123 (1985) (No. 102 Orig.).

50. *Id.* at 5.

Representatives from refusing to administer the oath of office to McIntyre.⁵¹

Solicitor General Rex Lee stated that the United States opposed the bill, arguing that the case presented a non-justiciable political question, because the matter concerns “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”⁵² Lee did not, however, contest Indiana’s standing to bring the case. He acknowledged that “Indiana here has sufficiently alleged injury to the State in its sovereign capacity.”⁵³ Lee then went further, arguing that the Court “enjoys concurrent jurisdiction of *all* cases within the federal judicial power, not barred by sovereign immunity, where a state is a party, including a suit founded on federal law by a state against its own citizens.”⁵⁴ The Court summarily dismissed Indiana’s motion for leave to file a bill of complaint.⁵⁵

Some scholars, too, have argued that the original understanding of the word “those” extends the Court’s original jurisdiction to any case in the federal judicial power where a state is a party. Professor Pfander, for instance, has argued that the Supreme Court’s original jurisdiction should be interpreted “to encompass all state-party cases, including federal question and admiralty cases, and not simply the diverse-party controversies.”⁵⁶

51. *Id.* at 6.

52. Brief for the United States in Opposition at 6, *Indiana v. United States*, 471 U.S. 1123 (1985) (No. 102 Orig.) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

53. *Id.* at 5 n.2.

54. *Id.* at 4 n.2 (emphasis added). The House of Representatives also filed a Brief in Opposition, arguing that they had already sworn in McCloskey, thus rendering the controversy moot. Brief for the United States House of Representatives Defendants in Opposition at 3, *Indiana v. United States*, 471 U.S. 1123 (1985) (No. 102 Orig.).

55. *Indiana v. United States*, 471 U.S. 1123, 1123 (1985).

56. See, e.g., James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 561 (1994); *id.* at 560 (“[T]he text of the clause . . . refers to state-party ‘cases’ and thus appears to

C. *Only Those Controversies Defined by the Presence of a State as a Party*

Finally, the word “those” could refer only to those controversies that are defined by the presence of a state as a party. Justice Marshall endorsed this reading in his landmark decision *Cohens v. Virginia*.⁵⁷ Marshall stated: “the original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party.”⁵⁸ Other Supreme Court cases have also embraced this “diversity” reading of the Court’s original jurisdiction.⁵⁹ This reading has further been endorsed by scholars, such as Professor Amar, who refers to this interpretation of the word “those” as the “diversity”

encompass all the ‘cases’ that Article III defines as arising under federal law.”); see also STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 25 (2010) (calling Marshall’s holding in *Cherokee Nation v. Georgia* that the Supreme Court has original jurisdiction “only in those cases where a state is a party and the case involves another state, a citizen of a different state, or a foreign state” a “highly dubious interpretation of the Constitution”).

57. 19 U.S. (6 Wheat.) 264, 398 (1821).

58. *Id.*; see also *id.* at 393–94 (“When . . . the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, . . . the conclusion seems irresistible, that its framers designed to include in th[is] . . . class those cases in which jurisdiction is given, because a State is a party . . .”).

59. See, e.g., *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 463–464 (1945) (“Clause 2 of § 2 of Article III confers on this Court jurisdiction of those cases ‘in which a State shall be Party.’ But Clause 2 of § 2 merely distributes the jurisdiction conferred by Clause 1 of § 2.”); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321 (1934) (“[W]hile Clause two of § 2 of Article III gives this Court original jurisdiction in those cases in which ‘a State shall be Party,’ . . . Clause two merely distributes the jurisdiction conferred by Clause one . . .”); *Texas v. ICC*, 258 U.S. 158, 163–65 (1922); *California v. S. Pac. Co.*, 157 U.S. 229, 257–58 (1895) (“The language, ‘in all cases in which a State shall be party,’ means in all the cases above enumerated in which a state shall be a party . . . This second Clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of the parties, and is confined to the cases in which are those enumerated parties and those only.”); *Louisiana v. Texas*, 176 U.S. 1, 15–16 (1900) (same).

reading.⁶⁰

Thus, this third “diversity” reading is the dominant theory of the Supreme Court’s state-party-based original jurisdiction.⁶¹ Many commentators, however, have argued that the Supreme Court’s jurisprudence does not precisely track *Cohens*’s diversity interpretation of the Court’s original jurisdiction. These commentators state that the “diversity” interpretation means that the Supreme Court’s state-party-based original jurisdiction comprehends the three cases in which federal jurisdiction exists based on the presence of a state as a party; namely, “(1) Controversies between two or more States; . . . (2) between a State and Citizens of another State; . . . and (3) between a State . . . and foreign States,

60. Amar, *supra* note 11, at 488–92.

61. Some scholars have argued that Marshall retreated from this view in *Governor of Georgia v. Madrazo*, 26 U.S. (1 Pet.) 110 (1828), when he noted that the Supreme Court’s original jurisdiction would include that admiralty case to which a state is a party. *Id.* at 124 (“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.”). See, e.g., STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 619 n.2 (10th ed. 2013); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1967, 1967 n.427 (calling the opinion “irredeemably flawed as a matter of law.” “The entire edifice rested on two propositions, both of which were false. . . . [U]nder art. III, § 2, admiralty jurisdiction does not fall within the Supreme Court’s original jurisdiction.”); Pfander, *supra* note 56, at 644 (“In his subsequent opinion in *Governor of Georgia v. Madrazo*, moreover, Marshall casually rejects the implications of his *Cohens* dicta in holding that admiralty claims against the states were proper subjects for original Supreme Court cognizance If we take this reading of *Madrazo* seriously, it casts doubt on the depth of Marshall’s own commitment to a diverse-party reading of the Original Jurisdiction Clause.”) (footnote omitted). These scholars are mistaken, however, and the stray line in *Madrazo* is perfectly consistent with *Cohens*. The Supreme Court’s original jurisdiction would have extended to that case, not because it was an admiralty case to which a state was a party, as the scholars seem to have construed Marshall’s words, but because it was a case between a state and a foreign citizen, *Madrazo*, 26 U.S. (1 Pet.) at 118 (Marshall describing the libellant as “Juan Madrazo, a Spaniard, residing in the Island of Cuba”), and thus within the state-party-based jurisdiction conferred by Article III, Section 2, Clause 2’s conferral to the Supreme Court of original jurisdiction over state-party controversies. See Currie, *supra* note 8, at 698 n.319 (stating Marshall found that the Supreme Court had original jurisdiction over the case “because it was a suit between a state and a foreign national”).

Citizens or Subjects.”⁶² The line of cases asserting the Court’s original jurisdiction over controversies between the United States and a state, however, these commentators argue, insert an additional and extra-textual grant of jurisdiction.

The first Justice Harlan delivered the Court’s defense of its original jurisdiction over state-United States disputes in *United States v. Texas*,⁶³ and this case has been the target of accusations of inconsistency and illegitimacy. Justice Frankfurter, for instance, writing in dissent fifty years after *United States v. Texas*, stated that “the mere[] literal language of the Constitution precluded” the Supreme Court’s original jurisdiction over controversies between the United States and a state.⁶⁴

The Wright & Miller treatise has stated that *Cohens’s* “diversity” reading “has been flatly rejected, however, in the cases that establish original jurisdiction for actions between a state and the United States.”⁶⁵ This jurisprudence “necessarily defeats the argument that it is limited to cases in which the judicial power is defined by the presence of a state as a party.”⁶⁶ The Hart & Wechsler casebook also states that *United States v. Texas* “rejected that narrow

62. U.S. CONST. art. III, § 2, cl. 1 (numbering is not in original and has been added for clarity). See, e.g., Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1597 n.96 (1990) (“More difficult is the question whether the jurisdiction extends to cases that are within the judicial power, but not by virtue of the fact that the state is a party—as might be true of federal question cases or cases in which the United States is a party. The court declined jurisdiction in the first situation, see *California v. Southern Pacific Co.*, 157 U.S. 229, 257–62 (1895), but accepted it in the second, see *United States v. Texas*, 143 U.S. 621 (1892).”).

63. 143 U.S. 621, 646 (1892).

64. *Ex parte Republic of Peru*, 318 U.S. 578, 598 (1943) (Frankfurter, J., dissenting); see CHARLES EVAN HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATION, METHODS AND ACHIEVEMENTS* 120 (1928) (calling the Supreme Court’s original jurisdiction over cases between the United States and a state “within the spirit of the Constitution although not conferred by its letter”).

65. 17 CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE & PROCEDURE* 194 (3d ed., 2007).

66. *Id.*

construction” that the Court’s original jurisdiction extends only to state-party-based grants of jurisdiction.⁶⁷ Professor Amar has similarly argued that

[t]he words of *Cohens*, along with the textual, structural, and geographic arguments presented above, suggest that the Court later erred in upholding its original jurisdiction in a suit between the United States and a state (*United States v. Texas*, 143 U.S. 621 (1892)), and that 28 U.S.C. § 1251 (b)(2) (1982), giving the Court original jurisdiction in such a suit, is unconstitutional.⁶⁸

These scholars have not been alone in criticizing *United States v. Texas*.⁶⁹ Indeed, to read Federal Courts casebooks, hornbooks, and treatises, it has become standard to question *United States v. Texas* and assume that it is irreconcilable with the Court’s original jurisdiction jurisprudence and clashes with the Constitution itself.⁷⁰

67. HART & WECHSLER, *supra* note 12, at 257.

68. Amar, *supra* note 11, at 491 n.217. For another example of a scholar considering *United States v. Texas* to be irreconcilable with the Court’s doctrine, see Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 11 n.45 (1989) (“[D]ifficult to justify doctrinally is the conclusion in *United States v. Texas*, 143 U.S. 621 (1892), that the United States could sue a state within the original jurisdiction of the Supreme Court, in light of the Court’s conclusion elsewhere that the fact that a state is a party is insufficient, standing alone, to bring the case within the Court’s original jurisdiction and that only those cases to which the judicial power extends because of a party-alignment including a state are within the original jurisdiction . . .”).

69. See, e.g., Currie, *supra* note 8, at 693 n.290 (“The Court’s later decision to entertain original jurisdiction in a controversy between the United States and a state, *United States v. Texas*, 143 U.S. 621, 643–45 (1892), is inconsistent with [*Cohens*’s] reasoning.”); Currie, *supra* note 7, at 330 n.46 (arguing that Justice Harlan in *United States v. Texas* “ignor[ed] Marshall’s express alternative holding in *Cohens* . . . that the Supreme Court’s original jurisdiction in cases ‘in which a State shall be Party’ was limited to those cases in which the only basis of federal jurisdiction is that a state is a party”); Lee, *supra* note 9, at 1789–91 (assuming that *United States v. Texas* was wrongly decided).

70. See, e.g., ROBERT N. CLINTON, ET AL., *FEDERAL COURTS: THEORY AND PRACTICE* 1434 (1996) (“[D]id the Court in *United States v. Texas* get it right? Consider the statement of the dissenters in that case”); CURRIE, *supra* note 12, at 323 (“Can *Texas* and *Cohens* stand together?”); LARRY W. YACKLE, *FEDERAL COURTS* 160 (2d ed. 2003) (“Suits in which the United States is a party are on the Article III menu, but not because a state is invariably a party. Accordingly, the

Many commentators have also criticized Justice Harlan's reasoning in *United States v. Texas*.⁷¹ Indeed, scholars have assumed that Justice Harlan was here declaring that the Supreme Court had original jurisdiction over all cases arising under any head of federal jurisdiction, including federal question, where a state happened to be a party.⁷²

Thus, most commentators assume that either *Cohens's* "diversity" reading is correct, in which case *United States v. Texas* was wrongly decided, or *United States v. Texas* was correct and the Supreme Court has original jurisdiction over all federal question cases where a state is a party, in which case *Texas v. ICC* was wrongly decided.

But perhaps these cases were all correctly decided, because the Supreme Court has original jurisdiction over controversies between states, between a state and an out-of-state-citizen, between a state and a foreign state or its citizens, and over a fourth category: suits between the United States and a state.

The Supreme Court has original jurisdiction over controversies between a state and the United States because the constitutional language extending federal jurisdiction over controversies "to which the United States shall be a party" is a combination of two jurisdictional grants: over controversies between the United States and an individual state, and over controversies between the United States and other parties.⁷³ This was the meaning the framers expected

Court was forced to carve out an exception to the usual understanding of original jurisdiction[,] . . . the usual limitation of original jurisdiction to three kinds of diversity actions notwithstanding.").

71. See, e.g., Caminker, *supra* note 10, at 103 ("Perhaps the Court placed greater reliance on a structural analogy than on its strained textual claim.").

72. See Pfander, *supra* note 56, at 574.

73. Professor Pfander, while expressly not endorsing this view, does suggest in a footnote that something like it might offer an alternative basis to justify *United States v. Texas*. See Pfander, *supra* note 56, at 575–76 n.77 ("[S]ubstantial historical support exists for reading the Court's original jurisdiction as encompassing controversies between the United States and a state, even if one

the language to express, and was the meaning that the ratifiers understood the language to signify. Thus, under *Cohens's* diversity rationale of the Supreme Court's original jurisdiction, controversies between the United States and a state *is* one of the enumerated controversies to which a state is a party.

II. HISTORY OF ARTICLE III

A. *Constitutional Convention*

The records from the Philadelphia convention suggest that Article III's extension of federal jurisdiction to "controversies to which the United States is a party" was understood by the framers to be a combination of two provisions: controversies between the United States and an individual state or states, and other controversies to which the United States is a party.

Several early proposals specifically recognized the need for an arbiter over disputes between one of the United States and the other states assembled together as the federal government. Alexander Hamilton's proposed plan, for

accepts (as I do not) the Court's assumption that its original jurisdiction focuses exclusively on party alignments. As originally drafted, the U.S.-party provision expressly embraced controversies between the United States as a party and one or more states or citizens. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342 (Max Farrand ed., 1911) . . . Although the final language chosen refers more generally to controversies to which the U.S. shall be a party, the Convention apparently assumed that disputes between the United States and the states were encompassed within the clause. See *id.* at 465 ('Mr. Madison considered the claim of the U.S. [to territories involved in disputes with the states] as in fact favored by the jurisdiction of the Judicial power of the U- S- over controversies to which they should be parties.')."); see also Caminker, *supra* note 10, at 103, 103 n.62 (suggesting that this thesis may be the "best support for the Court's holding that United States-against-state suits fall within its original jurisdiction" and further suggesting that it might be bolstered by the following citation: "THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ('Controversies between the nation and its members [meaning states] or citizens can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.').").

instance, would have given the Supreme Court “original jurisdiction in all cases in which the United States shall be a party, in all controversies between the United States, and a particular State.”⁷⁴ Under Hamilton’s plan, controversies between a state and the United States over “claim of territory” were to be subject to a complex special court reminiscent of that under the Articles of Confederation.⁷⁵

Similarly, Paterson appended to his New Jersey Plan the resolution “that provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual State respecting territory.”⁷⁶

Later in the convention, on August 20, 1787, when the draft constitution did not yet provide for jurisdiction over any cases where the United States was a party, Madison and Pinckney submitted to the Committee of Detail the resolution that “[t]he Jurisdiction of the supreme Court shall be extended to all controversies between the U.S. and an individual State, or the U.S. and the Citizens of an individual State.”⁷⁷ Two days later, on August 22, Rutledge reported that the Committee had considered the proposal and recommended adding to the federal jurisdiction controversies “between the United States and an individual State, or the United States and an individual person.”⁷⁸

A few days later, on August 27, Rutledge assumed that

74. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS]. It is not clear when Hamilton composed this plan, nor with whom he shared it. It varies considerably from the plan he presented to the convention on June 18. *Id.* at 617–18. Some have argued that Hamilton composed this later draft sometime near the end of the convention, 4 THE PAPERS OF ALEXANDER HAMILTON 253 n.2 (Harold C. Syrett, ed., 1962), while other have argued it was contemporaneous with his June 18 speech, 3 JOHN C. HAMILTON, LIFE OF ALEXANDER HAMILTON: A HISTORY OF THE REPUBLIC OF THE UNITED STATES OF AMERICA 284–302 (1879).

75. FARRAND’S RECORDS, *supra* note 74, at 626.

76. *Id.* at 611 (internal quotation marks omitted).

77. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 342 (Max Farrand ed., 1911) .

78. *Id.* at 367.

the Supreme Court would have original jurisdiction over cases between a state and the United States. The convention was discussing tenure of federal judges. John Dickinson moved to amend the draft constitution by adding, after the words “good behavior,” the words “provided that they may be removed by the Executive on the application [by] the Senate and House of Representatives.”⁷⁹ Rutledge opposed the amendment, stating, “[i]f the supreme Court is to judge between the U.S. and particular States, this alone is an insuperable objection to the motion.”⁸⁰ In other words, because the Supreme Court would hear cases between the United States and an individual state, it was necessary that the justices be entirely independent of the whims of the Executive and Legislative branches, lest their votes be swayed.

Madison and Morris then moved to add to the Judiciary Article a grant of federal jurisdiction over controversies “to which the United States shall be a Party,” which was approved.⁸¹ Because Madison had been the one to recommend extending the Supreme Court’s jurisdiction to “all controversies between the U.S. and an individual state, or the U.S. and the citizens of an individual state,” it is reasonable to assume that his proposal to add jurisdiction over controversies “to which the United States shall be a party,” was a combination of those two categories. The convention approved this addition.⁸²

The convention then voted to extend the Supreme Court’s original jurisdiction to controversies to which the United States was a party, in addition to state-party controversies.⁸³ The convention then immediately changed its mind, and removed the Court’s original jurisdiction over

79. *Id.* at 428.

80. *Id.*

81. *Id.* at 423, 430.

82. *See id.* at 424.

83. *Id.*

all United-States-party cases.⁸⁴ Although there is no recorded debate over this abrupt about-face, it is likely that the convention recognized that, while it did want the Supreme Court to have original jurisdiction over cases between the United States and an individual state, it did not want it to have original jurisdiction over every controversy the United States had with any individual person.

Soon thereafter, on August 30, the delegates engaged in a discussion that shows they assumed that competing claims between the United States and a state would be litigated before the Supreme Court.⁸⁵ While discussing what would become Article IV, Daniel Carroll of Maryland moved to add the words “Provided nevertheless that nothing in this Constitution shall be construed to affect the claim of the U.S. to vacant lands ceded to them by the Treaty of peace.”⁸⁶ Carroll stated that he meant this to apply both to lands claimed by particular states, and those not claimed by any particular states.⁸⁷ Madison stated that, while he thought it best to be silent, he felt that if such a provision were included, it should also “declare that the claims of particular States also should not be affected.”⁸⁸

Carroll withdrew his motion, and moved in its stead: “Nothing in this Constitution shall be construed to alter the claims of the U.S. or of the individual States to the Western territory, but all such claims shall be examined into & decided upon, by the Supreme Court of the U. States.”⁸⁹

Morris moved that this be changed as follows:

84. *Id.* It was moved to add: “[b]ut in cases in which the United States shall be a Party ‘the jurisdiction shall be original or appellate as the Legislature may direct,’” but this motion was voted down. *Id.* at 424–25.

85. *Id.* at 465.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 465–66.

The Legislature shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U. States; and nothing in this constitution contained, shall be so construed as to prejudice any claims either of the U— S— or of any particular State⁹⁰

This was unanimously approved.⁹¹

Luther Martin moved to add to this provision lines that Carroll had included but which Morris had omitted: “[b]ut all such claims may be examined into & decided upon by the supreme Court of the U—States.”⁹² Morris stated that “this is unnecessary, as all suits to which the U. S— are parties— are already to be decided by the Supreme Court.”⁹³ Martin insisted, arguing that “it is proper in order to remove all doubts on this point.”⁹⁴ Martin’s amendment was voted down.⁹⁵

This exchange reveals two assumptions shared by the delegates to the Philadelphia convention. First, it shows that the delegates recognized that there could arise boundary disputes or competing claims to land between the United States and a particular state. Second, it shows that the delegates assumed such claims would be heard by the Supreme Court in the first instance.

Thus, as the convention proceedings show, the constitutional language “[c]ontroversies to which the United States shall be a [p]arty”⁹⁶ was the combination of two jurisdictional grants, one over controversies between the United States and an individual state, and one over controversies between the United States and other parties.

90. *Id.* at 466.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. U.S. CONST. art. III, § 2, cl. 1.

Such a combination was a natural linguistic choice that privileged brevity without sacrificing precision.

B. *Ratification*

The ratification debates also reveal that the voters understood the Supreme Court's original jurisdiction to extend to cases between the United States and a state. The convention debates contain precious little exposition of Article III.⁹⁷ Nevertheless, those authors that do discuss the provision confirm that the public meaning of the relevant language was the same as the framers at the Philadelphia convention expected it to express.

Alexander Hamilton, in Federalist No. 80, discussed the federal judiciary's jurisdiction over "controversies to which the United States shall be a party," and defined it just as the framers had in convention: as a combination of controversies between the United States and a state, and controversies between the United States and other parties. Hamilton justified federal jurisdiction over "all those [causes] in which the United States are a party," by stating: "Still less need be said in regard to [this] point. *Controversies between the nation and its members* or citizens, can only be properly referred to the national tribunals."⁹⁸ By "members" of the nation, Hamilton was referring to the states. Similarly, James Wilson, in a speech to the Pennsylvania ratification convention on December 7, 1787, while discussing the grant of federal jurisdiction over "controversies to which the United States shall be a party," argued that the federal judiciary would prevail when states "should be engaged in a

97. See, e.g., *Virginia v. West Virginia*, 246 U.S. 565, 600 (1918) ("[I]n the Convention, so far as the published debates disclose, the [judiciary] provisions . . . were adopted without debate."); MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 154 (1913) ("[T]here is surprisingly little on the subject [of the judiciary] to be found in the records of the convention.").

98. *THE FEDERALIST* No. 80, at 412 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001) (emphasis added).

controversy with the United States.”⁹⁹

Even those who had not been at the Philadelphia convention assumed that the Supreme Court would have original jurisdiction over controversies between the United States and a state. The pseudonymous author Aristides described the Supreme Court’s original jurisdiction as extending to, among other party configurations, “1. Cases between the United States, and one or more of the individual states.”¹⁰⁰ As Samuel Osgood wrote to Samuel Adams on January 5, 1788, “[w]here the united States are a Party against a State the supreme Judicial Court have expressly original Jurisdiction.”¹⁰¹ Indeed, Osgood continued, if any state should object to an act of Congress, “the legal Remedy is to try the Question before the supreme Judicial Court.”¹⁰²

C. *The First Decade*

There is ample evidence from the Republic’s first decade showing the general understanding that Article III granted the Supreme Court original jurisdiction over cases between a state and the United States.

The Georgia House of Representatives, for instance, had occasion, while *Chisholm v. Georgia*¹⁰³ was pending in the Supreme Court’s original jurisdiction, to give its interpretation of the scope of that jurisdiction. After Georgia

99. See James Wilson, Pennsylvania Ratifying Convention, *reprinted in* 1 THE COLLECTED WORKS OF JAMES WILSON 247 (Kermit L. Hall & Mark David Hall eds., 2007).

100. Aristides, *reprinted in* 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 533 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter DHRC].

101. Letter from Samuel Osgood to Samuel Adams (January 5, 1788), *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 619 (John P. Kaminski & Gaspare J. Saladino eds., 1984). Osgood feared that the Supreme Court would exercise its equitable powers over such legal suits to vindicate congressional statutes that violate the Constitution. See *id.*

102. *Id.*

103. 2 U.S. (2 Dall.) 419 (1793).

refused to appear before the Supreme Court, the Georgia House of Representatives passed a resolution, stating that Article III gave the Supreme Court the power “to hear and determine” only those “causes commenced by a state as a plaintiff against a citizen as defendant, or in cases where two states are parties or between the United States and an individual state.”¹⁰⁴

St. George Tucker similarly interpreted the Court’s original jurisdiction to extend to state-United States controversies. As he put it in his Commentaries on Blackstone, “[a]s here applied [in the Clause granting federal jurisdiction over ‘controversies to which the United States shall be a party’], it seems particularly appropriate to such disputes as might arise between the U. States, and any one or more states, respecting *territorial*, or fiscal, matters.”¹⁰⁵

Representative Samuel Dana, during the debates over the 1802 Judiciary Act, gave an extended disquisition, describing the importance of having a tribunal to decide controversies that might arise between states or between a state and the United States:

[T]here were . . . various restrictive provisions in the Constitution, which appear framed to guard against evils which might be apprehended from the change of system. Restrictions were imposed on the powers of Congress, and the respective states. Some of the restrictions, undoubtedly, were to guard individuals against public oppression; and some, to guard the particular States against the Government of the United States, or against each other. Controversies were known to exist between particular States and others might be expected to arise, as well as controversies between a State and the United States. The parties in such controversies would be powerful, each might put armed forces in motion. When provision was to be made for questions of this nature, who could hesitate to acknowledge the importance of establishing an impartial

104. Proceedings of the Georgia House of Representatives, Dec. 14, 1792, reprinted in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 161–62 (Maeva, et al. eds., 2007) [hereinafter DHSC].

105. 1 WILLIAM BLACKSTONE, COMMENTARIES 420 app. (St. George Tucker ed., 1803).

tribunal beyond the immediate control of either party? A tribunal, the constitution of which might inspire general confidence, and thereby prevent the recourse to a very different mode of deciding conflicting pretensions.¹⁰⁶

Similarly, Section 13 of the First Judiciary Act defined the scope of the Supreme Court's original jurisdiction:

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 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.¹⁰⁷

According to this Section, the Supreme Court was to have original jurisdiction over all civil controversies where a state is a party, except between a state and its own citizens, thus including United States-state disputes.

Professor Thomas Lee argues that the Judiciary Act's explicit exclusion of cases between a state and in-state citizens from the Supreme Court's original jurisdiction shows that its drafters may not have considered the Court's original jurisdiction to be limited to the "diversity" reading of Article III.

[W]hy did the First Congress bother to rule out State-versus-state-citizen suits in section 13 of the Judiciary Act? That is, it would have been superfluous to say 'except between a state and its citizens' if the only possible litigants in State-party cases were those named as adverse parties to States in the list of 'Controversies,' since there is no mention of 'Controversies' between a State and its citizens.¹⁰⁸

Lee concludes that, either the Judiciary Act's drafters thought that the Court's original jurisdiction encompassed any case falling within the federal judicial power to which a state was a party, or went out of their way to make it clear

106. THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES, SEVENTH CONGRESS 929 (Gales & Seaton 1851).

107. Judiciary Act of 1789, ch. 20, sec. 13, 1 Stat. 80.

108. Lee, *supra* note 9, at 1787.

that the Constitution gave the Court original jurisdiction only in the three state-as-party configurations.¹⁰⁹

In fact, Section 13 was just demonstrating a version of “collapse textualism.” In the Constitution, the state-party controversies are enumerated: state-state, state-out of state citizen, and state-foreign state or foreign citizen. State-United States disputes are included in the broader category of all “[c]ontroversies to which the United States shall be a [p]arty.”¹¹⁰ What is left? Suits between a state and its own citizens. As this would likely be the bulk of litigation the state would undertake, this was no small prohibition. But how to express it? There are two ways. One is to enumerate each instance, as the Constitution did in this case. But another way is to consolidate the provisions and point out what is missing: all controversies where a state is a party, except between a state and its citizen.

Indeed, the Connecticut Supreme Court of Errors interpreted Section 13 of the First Judiciary Act just this way, as giving the Supreme Court original jurisdiction “in controversies of a civil nature, between the United States and a particular State—and between particular states.”¹¹¹

As this Section has argued, the Constitution’s grant of federal jurisdiction over “[c]ontroversies to which the United States shall be a [p]arty”¹¹² is in fact the combination of a grant over controversies between a state and the United States, and a grant over controversies between the United States and other parties. Moreover, framers, ratifiers, and individuals all understood this to be the case. This provision thus presents a case-study of “collapse textualism.”

The Constitution is a terse document. At a little over four-thousand words, it was meant to be easily read and

109. *Id.* at 1788.

110. U.S. CONST. art. III, § 2, cl. 1.

111. *Miller v. Lynde*, 2 Root 444, 446 (Conn. 1796).

112. U.S. CONST. art. III, § 2, cl. 1.

easily understood. To accomplish this feat of brevity, the Framers worked hard to abbreviate the words whenever they could. They relied on antecedents and background assumptions to ensure that the text's meaning would be understood. To unwrap these packages of meaning today, it is necessary to understand background assumptions.

For instance, in the draft constitution reported by the Committee of Detail on August 6, 1787, the Senate was given jurisdiction over "all Disputes and Controversies . . . between two or more States respecting jurisdiction or territory," while the judiciary was given jurisdiction over "[c]ontroversies between States, except those which regard Jurisdiction or Territory."¹¹³ When these two jurisdictions were consolidated in the federal judiciary, the drafter did not write out that the judiciary had jurisdiction over controversies between states, both those respecting jurisdiction and territory and those not respecting jurisdiction and territory, even though such jurisdiction was not an obvious common law court power. Instead, they abbreviated the two provisions into the words, "Controversies between two or more States."

III. SUPREME COURT JURISPRUDENCE

A. *Florida v. Georgia*

The Supreme Court first had occasion to consider the presence of the United States as a party in an original jurisdiction case in *Florida v. Georgia*,¹¹⁴ although the Court would not squarely address whether its original jurisdiction comprehended a controversy between a state and the United States for four more decades.

In 1850, Florida filed a bill against Georgia in the Supreme Court's original jurisdiction to resolve a boundary

113. 2 Farrand's Records 129.

114. 58 U.S. (17 How.) 478 (1854).

dispute.¹¹⁵ In 1854, the United States moved to intervene because it had granted Florida the lands in dispute, lands that Georgia claimed to have owned all along.¹¹⁶ The United States argued that it had a responsibility to its grantees to intervene in the suit.¹¹⁷ Further, as the Attorney General argued, the United States has “a general interest in the question of the boundaries of States.”¹¹⁸ The Attorney General wanted to intervene “not as a technical party, . . . but free to co-operate with, or to oppose both, or either, and to bring forth all the points of the case according to his own judgment.”¹¹⁹

Both Georgia and Florida opposed the motion, arguing that the addition of the United States as a party would remove the case from the Supreme Court’s original jurisdiction.¹²⁰

Chief Justice Taney, writing for the majority, found that the United States could intervene as a non-technical party.¹²¹ He reasoned that, although the case was a boundary dispute between two states, “there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court.”¹²² The United States would not be able “to interfere in the pleading, or evidence, or admissions of the States,” but would be able to offer its own evidence and arguments.¹²³

115. *Florida v. Georgia*, 52 U.S. (11 How.) 293 (1850).

116. 58 U.S. at 491.

117. *Id.*

118. *Id.* at 482.

119. *Id.*

120. *Id.* at 486.

121. *Id.* at 495.

122. *Id.* at 494.

123. *Id.* at 495.

The case featured two dissenting opinions. Justice Curtis stated that the Constitution divided that Court's jurisdiction into two classes, original and appellate.¹²⁴ Because all those cases that were not defined by the presence of a state were therefore not part of the Court's original jurisdiction, controversies to which the United States were a party must "come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution," and therefore were not included in the Court's original jurisdiction.¹²⁵

Justice Campbell, in his companion dissent, offered an historical elaboration on the claim that the presence of the United States as a party removed the case from the Supreme Court's original jurisdiction:

There were before the federal convention propositions to extend the judicial powers to questions "which involve the national peace and harmony;" "to controversies between the United States and an individual State;" and in the modified form, "to examine into and decide upon the claims of the United States and an individual State to territory." None were incorporated into the constitution, and the last was peremptorily rejected.¹²⁶

124. *Id.* at 504 (Curtis, J., dissenting) ("In distributing this jurisdiction, the constitution has provided that, in all cases in which a State shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, the supreme court shall have appellate jurisdiction. One of the other cases before mentioned, is a controversy to which the United States is a party.").

125. *Id.* at 504-05 ("I am not aware that any doubt has ever been entertained by any one, that controversies to which the United States are a party, come under the appellate jurisdiction of this court in this distribution of jurisdiction by the constitution. Such is the clear meaning of the words of the constitution. So it was construed by the congress, in the judiciary act of 1789, which, by the 11th section, conferred on the circuit courts jurisdiction of cases in which the United States are plaintiffs, and so it has been administered to this day."). Curtis acknowledged that his reasoning, none of which has been embraced by the Court, would "lead[] necessarily to the conclusion that the United States cannot be a party to a judicial controversy with a State in any court." *Id.* at 506.

126. *Id.* at 521. As we have seen in Part II, this is not an accurate portrayal of the Constitution's composition.

B. United States v. Texas

On May 2, 1890, Congress passed a statute directing the Attorney General to file a bill of equity in the Supreme Court's original jurisdiction to determine whether Greer County was within the jurisdiction of Texas or was a territory of the United States.¹²⁷ The statute stated that it desired the controversy to be heard in the Court's original jurisdiction "in order to provide for a speedy and final judicial determination of the controversy."¹²⁸

The Attorney General accordingly filed a bill of equity in the Supreme Court's original jurisdiction to "determin[e] and settl[e] the true boundary line between the United States and the State of Texas."¹²⁹ Texas demurred to the bill, arguing, among other things, that the Supreme Court's original jurisdiction did not extend to suits between the United States and Texas.¹³⁰

In an opinion written by Justice Harlan, the Court granted the motion for leave to file the bill of complaint, deciding that it did have jurisdiction over the case. Justice Harlan noted that, under the Articles of Confederation, that congress was given power to decide all disputes or differences "between two or more States, concerning boundary, jurisdiction, or any other cause whatever."¹³¹ The First Judiciary Act, Harlan continued, gave "exclusive jurisdiction" to the Supreme Court of all controversies to which a state was a party, save for those between a state and its own citizens.¹³² "Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a

127. Act of May 2, 1890, ch. 182, 26 Stat. 81, 92.

128. *Id.*

129. United States v. Texas, 143 U.S. 621, 621–22 (1892).

130. *Id.* at 626–29.

131. *Id.* at 639 (quoting ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2).

132. *Id.* at 643.

State?”¹³³

Justice Harlan then underwent an analysis of Article III that has never been accused of being perspicuous.¹³⁴ It has generally been assumed that Harlan’s opinion stands for the proposition that the Supreme Court has original jurisdiction over any case arising under any head of federal jurisdiction, so long as a state happens to be a party.¹³⁵ Such an interpretation of Harlan’s words, this Article maintains, is mistaken, though hardly inexcusable, given the opinion’s circuitous and opaque language. Instead, Harlan makes a sort of *a fortiori* argument, in which he argues that, if the Supreme Court was given jurisdiction over boundary disputes between states, then *all the more* must that Court have jurisdiction over a boundary dispute between the United States and a state.

As Harlan put it, “[t]he important question therefore, is, whether this court can, under the Constitution, take cognizance of an original suit brought by the United States against a State to determine the boundary between one of the Territories and such State.”¹³⁶ If the framers gave the Supreme Court original jurisdiction over disputes between states, then certainly they must have given the Court jurisdiction over disputes between the United States and a state. As Harlan put it, “the framers of the Constitution did provide, by that instrument, for the judicial determination of all cases in law and equity between two or more States, including those involving questions of boundary.”¹³⁷ Harlan then asked rhetorically, “[d]id they omit to provide for the judicial determination of controversies arising between the

133. *Id.*

134. *See, e.g.,* Caminker, *supra* note 10, at 103 (“Perhaps the Court placed greater reliance on a structural analogy than on its strained textual claim.”); Lee, *supra* note 9, at 1790 n.106 (calling Harlan’s opinion “hard to decipher”).

135. *See, e.g.,* Pfander, *supra* note 56.

136. *United States v. Texas*, 143 U.S. at 641.

137. *Id.* at 642.

United States and one or more of the States of the Union?”¹³⁸ Obviously not, is the assumed answer.

Harlan’s next point was based on the intent of the framers of the Judiciary Act of 1789. The suit between the United States and Texas, Harlan reasoned, was unquestionably within Article III’s description of federal jurisdiction. First, it concerned the interpretation of treaties, and therefore arose under federal question jurisdiction.¹³⁹ Second, it was a case in which the United States is a party.¹⁴⁰ Thus, the case certainly was one that is comprehended by Article III jurisdiction. The first Congress, however, gave exclusive jurisdiction of a controversy between the United States and a state to the Supreme Court’s original jurisdiction. As Section 13 of the Judiciary Act of 1789 stated, “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 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.”¹⁴¹ This language was still the law in 1892. Harlan stated that “[s]uch exclusive jurisdiction was given to this Court because it best comported with the dignity of a State that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation.”¹⁴² Again, Harlan resorted to *a fortiori*, rhetorical embellishment: “Why then may not this court take original cognizance of the present suit involving a question of boundary between a Territory of the United States and a State?”¹⁴³

Harlan did not argue that the Constitution’s words

138. *Id.*

139. *Id.* at 643.

140. *Id.*

141. Judiciary Act of 1789, 1 Stat. 73, 80.

142. *United States v. Texas*, 143 U.S. at 643.

143. *Id.*

giving the Supreme Court original jurisdiction in those controversies “in which a state shall be party” referred to all nine jurisdictional grants from the preceding Clause, as has often been assumed. Instead, he argued that the Supreme Court’s original jurisdiction over state-party controversies “necessarily refer[red] to all cases mentioned in the preceding clause in which a State may be made, of right, a party defendant, or in which a State may, of right, be a party plaintiff.”¹⁴⁴ By those cases “in which a state may be made of right a party,” thus, Harlan was referring to a subset of federal jurisdiction. Indeed, the term “of right” suggests that Harlan was repeating *Cohens’s* conclusion that the Court’s original jurisdiction comprehends those cases where “jurisdiction might be exercised in consequence of the character of the [state as a] party.”¹⁴⁵

In elaborating on his “of right” terminology, Harlan wrote several sentences that form the basis for the conclusion by some scholars that Harlan endorsed Supreme Court original jurisdiction over any federal question case in which a state happened to be a party:

Besides, unless a State is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States “to *all* cases,” in law and equity, arising under the Constitution, laws and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this Court original jurisdiction “in *all* cases . . . in which a State shall be party,” that is, in all cases mentioned in the preceding clause in which a State may of right be made a party defendant, as well as in all cases in which a State may, of right, institute a suit in a court of the United States. The present case is

144. *Id.* at 643–44.

145. *Cohens v. Virginia*, 19 U.S. (1 Wheat.) 264, 398 (1821).

of the former class.¹⁴⁶

Again, however, this portion of Harlan's argument is based not on the presence of a federal question—a point that only serves to heighten the appropriateness of the suit for a federal court—but on Harlan's term "of right." A suit between the United States and a state is one of those disputes "in which a state may of right be made a party defendant."

Harlan then reiterated his main point, namely that the Court's original jurisdiction over a controversy between a state and the United States follows *a fortiori* from the grant of jurisdiction over disputes between states.

We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more States of the Union, and between a State of the Union and foreign states, intended to exempt a State altogether from suit by the General Government. They could not have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice and insure domestic tranquility, have constituted with authority to speak for all the people and all the States, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State.¹⁴⁷

Thus Harlan's main point here and throughout the opinion is that the jurisdiction is logically and structurally implicit and necessary, following as a matter of course from

146. *United States v. Texas*, 143 U.S. at 644.

147. *Id.* at 644–45.

jurisdiction over disputes between states. The Constitution must, Harlan argues, have given the Court original jurisdiction over cases between a state and the United States. As the Supreme Court stated four decades later, “[w]hile that jurisdiction is not conferred by the Constitution in express words, it is inherent in the constitutional plan.”¹⁴⁸

Chief Justice Fuller, joined by Justice Lamar, delivered a terse dissent:

This court has original jurisdiction of two classes of cases only, those affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

The judicial power extends to “controversies between two or more States;” “between a State and citizens of another State;” and “between a State or the citizens thereof, and foreign States, citizens or subjects.” Our original jurisdiction, which depends solely upon the character of the parties, is confined to the cases enumerated, in which a State may be a party, and this is not one of them.

The judicial power also extends to controversies to which the United States shall be a party, but such controversies are not included in the grant of original jurisdiction. To the controversy here the United States is a party.

We are of opinion, therefore, that this case is not within the original jurisdiction of the court.¹⁴⁹

Chief Justice Fuller had the opportunity only three years later to assert his vision of the scope of the Court’s original jurisdiction, in *California v. Southern Pacific Railroad*.¹⁵⁰ California filed a bill in equity against the Kentucky corporation Southern Pacific Railroad, arguing that the state, and not the Railroad, was the owner of the entire San Francisco Bay, including all submerged lands.¹⁵¹ California acknowledged that by certain statutes it had purported to transfer that ownership to the Town of Oakland, and that Oakland, in turn, had transferred ownership to the Southern

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

149. *United States v. Texas*, 143 U.S. at 648–49 (Fuller, C.J., dissenting).

150. *California v. South Pacific R.R.*, 157 U.S. 229 (1895).

151. *Id.* at 254.

Pacific Railroad.¹⁵² California argued, however, that

the state of California was admitted into the Union under an act of congress approved September 9, 1850, with certain specified boundaries, . . . that the state, upon its admission into the Union, acquired and continued to retain jurisdiction over the soil of the beds of [the] bay . . . and absolute title to the same, subject only to the right of the United States of supervision over the navigable waters of the bay.¹⁵³

California argued that the lands were “incapable of alienation to any person, or of being reduced to private ownership.” Therefore, California’s bill sought “a decree adjudging that the state could not make such a grant to the town.”¹⁵⁴

Chief Justice Fuller, writing for the majority, held that the City of Oakland was a necessary party to the proceedings; the presence of Oakland as a party, however, would make the controversy, at least in part, one between a state and a citizen of that state.¹⁵⁵ This, Chief Justice Fuller concluded, would divest the Court of original jurisdiction:

Under the Constitution the cases in which a State may be a party are those between two or more States; between a State and citizens of another State; between a State and foreign States, citizens, or subjects; and between the United States and a State, as held in *United States v. Texas*, 143 U.S. 621. By the Constitution and according to the statute this court has exclusive jurisdiction of all controversies of a civil nature where a State is a party, but not of controversies between a State and its own citizens, and original but not exclusive jurisdiction of controversies between a State and citizens of another State or aliens.¹⁵⁶

Fuller then recognized that a federal question may be involved, but that nevertheless the Court’s original

152. *Id.* at 252–54.

153. *Id.* at 252.

154. *Id.* at 254.

155. *Id.* at 260.

156. *Id.* at 258.

jurisdiction did not exist merely because a case comes under the federal judicial power and a state happens to be a party. Instead, it must be a case between states, between a state and an out-of-state citizen, between a state and the United States, or between a state and a foreign state or citizen.

[W]e are not called on to consider . . . whether any Federal question is involved, since the original jurisdiction of this court in cases between a State and citizens of another State rests upon the character of the parties and not at all upon the nature of the case. If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States.¹⁵⁷

Justice Harlan delivered a lengthy dissent, which Justice Brewer joined. Tellingly, however, Justice Harlan never articulated the principle for which later commentators have cited his *United States v. Texas* opinion, namely that the Court has original jurisdiction over any federal question case where a state happens to be a party. Considering his *Texas* opinion had been written only three years before, if Fuller's opinion was rejecting his reasoning, it would be natural to expect Harlan to mention it somewhere in his long dissent. Instead, Harlan dissented on completely different grounds. Harlan argued that Oakland should be admitted as a non-technical party, much as the United States was allowed to do in *Florida v. Georgia*.¹⁵⁸

It seems to me that according to both the letter and spirit of the Constitution this court cannot refuse to exercise its original jurisdiction over a controversy between a State and a citizen of another State, because a citizen of the plaintiff State has or may assert some interest in the subject-matter of that controversy; and that in such a case it is our duty either to permit the latter citizen to be heard without becoming a party of record if thereby our

157. *Id.* at 261.

158. *Id.* at 263–64 (Harlan, J., dissenting).

jurisdiction would be defeated, or proceed to a decree between the original parties to the controversy, leaving unaffected, in law, the rights of others.¹⁵⁹

Thus, Harlan never articulated the position that the Court had jurisdiction over any case falling within the judicial power of the United States to which a state happened to be a party, neither in 1892, nor in 1895.

IV. REBUTTING COUNTERARGUMENTS

Some scholars have argued that in fact it makes sense for the framers not to have given the Supreme Court original jurisdiction over controversies between a state and the United States. Professor Thomas Lee, for instance, has given three reasons why the framers would not have given the Court original jurisdiction over cases between the United States and a state.

First, Lee argues that, while the Supreme Court might be a neutral forum to adjudicate disputes between states, or between a state and a citizen of another state, or between a state and a foreign state or citizen, it would not be a neutral forum in a dispute between a state and the United States.¹⁶⁰ “The crucial aspect of neutrality . . . would be more suspect from the State’s perspective if the Supreme Court were to serve as tribunal in a dispute between it and a coordinate branch of the national government.”¹⁶¹ This objection, however, would apply, not merely to the Supreme Court’s original jurisdiction, but to any case where the United States was a party in any federal court. Because every federal court constitutes a portion of one branch of the federal government, and the Executive, a coordinate branch of the federal government, would necessarily represent the United States in the controversy, any federal court would present

159. *Id.* at 269.

160. Lee, *supra* note 9, at 1790.

161. *Id.*

this neutrality problem in a United-States-party case. This argument thus seems to prove too much.

Second, Lee argues that the framers did not extend the Supreme Court's original jurisdiction to controversies between the United States and a state because it would not "have been clear at the time of the founding how the Court could have enforced a decision adverse to the United States in a civil suit."¹⁶² Once again, however, this argument seems prove too much, because any suit involving the United States in any federal court, whether or not a state is a party, would present the same problems, especially considering that, even when the United States is the plaintiff, a private defendant could present counterclaims.¹⁶³

Third, Lee suggests that the framers may never have considered the possibility of suits between a state and the United States: "As the alternative of state court forum would be equally unattractive from the United States' perspective, it is possible that the Framers did not consider United States-versus-State controversies amenable to federal or state judicial solution." As this Article has already posited, however, the framers, both within the Philadelphia convention and during the ratification debates, did consider the possibility of suits between the United States and a state and assumed that they would be heard by the Supreme Court in its original jurisdiction.¹⁶⁴

There have been several other attempts to rationalize the holding of *United States v. Texas* with the Constitution. First, the traditional interpretation of the case has been that it extends the Court's original jurisdiction to any case within the federal judicial power to which a state happens to be a

162. *Id.*

163. *See, e.g.,* *The Siren*, 74 U.S. (7 Wall.) 152, 161–62 (1868) (holding that, even where Congress has not waived sovereign immunity, when the United States initiates a suit, it may consent to the adjudication of a related claim, such as a tort suit); *see also* HART & WECHSLER, *supra* note 12, at 868–69.

164. *See supra* notes 74–95 and accompanying text.

party. As discussed above, some commentators have defended this theory as the “better view.” But this argument presents its own difficulties. Consider the assortment of cases over which the Supreme Court would have original jurisdiction. First, the Court would have jurisdiction to hear criminal cases. States could prosecute federal officers acting under federal statutes for violating state criminal law in the Supreme Court’s original jurisdiction, even if that officer was a citizen of that state.¹⁶⁵ Indeed, considering that every state criminal prosecution contains “federal ingredients”¹⁶⁶ in the form of constitutionally protected procedural rights, any state prosecution could be pursued in the Court’s original jurisdiction under this theory. Moreover, because the well-pleaded complaint rule is statutory and does not apply to the Supreme Court’s original jurisdiction, any civil case brought by a state against any party, so long as there is a federal ingredient in it, would be amenable to the Court’s original jurisdiction. Any admiralty case or diversity case where a state was a party could also be brought in the Court’s original jurisdiction.

Professor Amar, several decades after calling the case “unconstitutional,” offered an alternative justification for *United States v. Texas*. Saying that *Texas* “muddied the waters, slightly,” he argued that “[t]he result of this case can be best reconciled with Marshall’s approach [in *Cohens*] by viewing the lawsuit in question as a de facto controversy between one state (Texas) and its sister states (represented

165. Ever since 1815, Congress has considered state prosecutions of federal officers acting under color of federal law to be comprehended within the Constitution’s grant of federal question jurisdiction, Act of Feb. 4, 1815, 3 Stat. 195, 198, and the Supreme Court has upheld this jurisdiction. *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 302 (1880).

166. Justice Marshall interpreted the Constitution’s scope of federal question jurisdiction as follows: “[W]hen a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause.” *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824).

by the federal government itself).¹⁶⁷ Under this rationale, *United States v. Texas* actually arises under the grant of jurisdiction over “[c]ontroversies between two or more States.”¹⁶⁸ This approach finds support in Chief Justice Taney’s opinion in *Florida v. Georgia*, in which the Court allowed the United States to intervene as a non-technical party in a controversy between two states. Taney characterized the United States’ interest as representing that of all other states, arguing that, although it was “a suit between two States,” there were “twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States.”¹⁶⁹

Professor Amar’s rationale, however, also seems to prove too much. If the United States as a party is a “state” for the purposes of the Supreme Court’s original jurisdiction whenever it represents all (other) states—this presumably being some subset of the capacities in which the United States could be a party—then the Supreme Court would have original jurisdiction in any controversy where the United States is a party in its all-states-representative capacity, regardless of who the other party is, whether a citizen, a foreign state, or any other party.¹⁷⁰

167. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 580 n.52 (2006).

168. U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

169. *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1854). For another example of the Court considering the United States, when a party litigant, as the representative of the other states, see Chief Justice John Jay explaining why the Constitution gave federal courts jurisdiction over controversies to which the United States is a party: “[B]ecause, in cases in which the whole people are interested, it would not be equal or wise to let one State decide and measure out the justice due to others.” *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793).

170. *See Ex parte Republic of Peru*, 318 U.S. 578, 583 n.3 (1943) (“The Constitution confers original jurisdiction . . . [over] ‘those in which a State shall be Party’ The United States has never been held to be a ‘State’ within this provision—and it obviously is not”); *United States v. West Virginia*, 295 U.S. 463, 470 (1935) (“Our original jurisdiction does not include suits of the United States against persons or corporations alone”). As discussed above, there was a moment when the Philadelphia convention had approved an amendment to the draft constitution which gave the Supreme Court original jurisdiction over

In the Third Edition of Hart & Wechsler, the editors offered a third possible justification for *United States v. Texas*. The Casebook suggested that “the jurisdiction distributed in the second clause [*i.e.* ‘those in which a State is party’] extends only to those classes of cases in the first clause which are described in terms of parties rather than of subject matter.”¹⁷¹ This explanation too, however, sweeps too broadly. Included in the class of cases “described in terms of parties rather than of subject matter” are controversies between citizens of different states. Neither the Court nor any commentator, however, has ever thought that its original jurisdiction would extend to a controversy brought, for instance, by Michigan and an Illinois citizen against a Michigan citizen, even though it would constitute a controversy between citizens of different states, and would be a controversy to which a state was a party. Thus, this attempt at justifying *United States v. Texas* also falls short.

CONCLUSION

The Supreme Court’s original jurisdiction over cases between the United States and a state can be understood by recognizing the process by which the Constitution was composed and the assumptions of those who wrote and read it. The document uses abbreviation and consolidation to convey as much information as possible in a small space. The grant of federal jurisdiction over “all controversies to which the United States shall be a party” was understood to include within it a grant of jurisdiction over controversies between a state and the United States. This implicit independent grant was then cross-referenced by the next Clause, which gave the Supreme Court original jurisdiction over “those [controversies] in which a State shall be a Party.” Thus, the

controversies to which the United States shall be a party, but the convention promptly removed this provision. See *supra* note 77 and accompanying text.

171. PAUL M. BATOR, ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 297 (3d ed. 1988).

diversity reading of the Supreme Court's state-party original jurisdiction, this Article has argued, is correct, *United States v. Texas* is correct, and *Texas v. ICC* is also correct.