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The Eleventh Amendment and the North Carolina State Debt

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THE ELEVENTH AMENDMENT AND THE NORTH CAROLINA STATE DEBT*

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Changing economic conditions, the political context, and the ideologies of the shifting personnel of our courts are just a few of many factors that combine to influence legal decisions. By examining all factors that influence legal decision-making, and not just doctrinal theory, one is better able to explain past legal policy and determine factors that may influence, or even decide, future judicial action. In this Article, Professor Orth, a specialist in legal history, explores the history of the eleventh amendment with emphasis on its use to repudiate or readjust much of the debt incurred by the former Confederate states during Reconstruction. Commentators often recognize the Supreme Court's shifting interpretation of the eleventh amendment during the latter part of the nineteenth century. They seldom attempt to explain this shift, however, except in purely doctrinal terms. Professor Orth, using often controversial theories, attempts to set this part of the eleventh amendment's history in the context of the economic and political conditions of the time. Influenced by a political climate in which this country was striving for national reconciliation, the Supreme Court, according to Professor Orth, used the eleventh amendment, which had previously been narrowly confined, as a means to allow the former Confederate states to renege on their debts and to cover up the Court's own inability to make a politically unpopular decision to order the states to pay up.

In recent years, there has been renewed interest in the eleventh amendment,[1] the oldest amendment outside the Bill of Rights. The Supreme Court has held that the eleventh amendment bars suits by individuals against a state to enforce rights conferred by federal legislation, in the absence of clear congressional intent to authorize such suits.[2] It also has held that the amendment bars retrospective compensatory relief for past breaches of legal duty by state officials.[3] While these decisions suggest renewed vitality in the eleventh amendment, there is also recent evidence of a trend to limit the breadth of the

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1. U.S. CONST. amend. XI: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

2. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973).

3. Edelman v. Jordan, 415 U.S. 651 (1974).

amendment. The Supreme Court has held that Congress has the power to subject states to suit for money damages in federal court, pursuant to the enforcement provisions of the fourteenth amendment,[4] and several of the circuit courts of appeals have held that other constitutional provisions confer similar power.[5] Furthermore, by holding that a state cannot claim immunity from suit in the courts of another state,[6] the Court has indicated that the eleventh amendment does not make sovereign immunity constitutionally required.

The Supreme Court's reliance on the eleventh amendment in some cases and its refusal to use the amendment in others has attracted scholarly comment. Attention has focused primarily on the trend to limit the amendment. The eleventh amendment has been designated an "endangered species,"[7] and the devices to escape its effect have been surveyed.[8] The "erosion" of state sovereignty has been decried,[9] and the long-standing refusal to extend the eleventh amendment to political subdivisions of the states has been criticized for placing an "unjustifiable strain" on federalism.[10] On the other hand, some recent scholarship has offered theories for further curtailment of the amendment. It has been argued that the eleventh amendment qualifies only article III of the Constitution and that, while the judicial branch cannot subject states to suit in federal court, the legislative branch can constitutionally do so.[11] It has even been argued that the eleventh amendment does not qualify the Constitution at all, but rather modifies the common law of sovereign immunity.[12]

Scholarly articles on recent decisions involving the eleventh amendment frequently include surveys of the amendment's history. The standard version begins in 1793 with the Supreme Court's decision in *Chisholm v. Georgia*.[13] In that case, over the dissent of the North Carolinian Justice James Iredell,[14] the Court held that federal judicial power extended to a suit against a state brought by a citizen of another state. The eleventh amendment was proposed

4. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

5. *E.g.*, Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (war powers); Mills Music, Inc. v. Arizona, 591 F.2d 1278 (9th Cir. 1979) (copyright and patent clause); Jennings v. Illinois Off. of Educ., 589 F.2d 935 (7th Cir.) (war powers), *cert. denied*, 441 U.S. 967 (1979).

6. Nevada v. Hall, 440 U.S. 410, *reh. denied*, 441 U.S. 917 (1979).

7. Thornton, *The Eleventh Amendment: An Endangered Species*, 55 IND. L.J. 293 (1980).

8. Comment, *Avoiding the Eleventh Amendment: A Survey of Escape Devices*, 1977 ARIZ. ST. L.J. 625. *See also* Comment, *Implied Waiver of a State's Eleventh Amendment Immunity*, 1974 DUKE L.J. 925.

9. Weick, *Erosion of State Sovereign Immunity and the Eleventh Amendment by Federal Decisional Law*, 10 AKRON L. REV. 583 (1977).

10. Comment, *The Denial of Eleventh Amendment Immunity to Political Subdivisions of the States: An Unjustifiable Strain on Federalism*, 1979 DUKE L.J. 1042.

11. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975); Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies about Federalism*, 89 HARV. L. REV. 682 (1976).

12. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pts. 1-2), 126 U. PA. L. REV. 515, 1203 (1978).

13. 2 U.S. (2 Dall.) 419 (1793).

14. *See* Fordham, *Iredell's Dissent in Chisholm v. Georgia: Its Political Significance*, 8 N.C. HIST. REV. 155 (1931).

and ratified to overturn this decision.[15] During the Chief Justiceship of John Marshall, however, the amendment was narrowly confined. In 1824, in *Osborn v. Bank of the United States*,[16] the Court held that a suit is not against a state unless the state is named as a party on the record, at least when an unconstitutional state law is involved. Although the Marshallian tradition continued for half a century, the eleventh amendment eventually was released from its confines. During the last quarter of the nineteenth century, it was used to justify refusing jurisdiction over a suit against a state officer when the state was the defendant "in fact, though not in form."[17] In addition, the amendment was held to justify refusing jurisdiction over a suit against a state brought by another state to collect debts owed the latter's citizens,[18] and over a suit against a state brought by a citizen of that state.[19] After these frolics, however, the amendment was confined once more. As one recent student of the Court has observed, after 1890 sophistry was "the common coin of the Court in coping both with sovereign immunity and the bar of the Eleventh Amendment."[20] Concluding the standard historical surveys is the 1908 decision in *Ex parte Young*[21] in which the Supreme Court held that federal injunctive relief is available to bar enforcement of unconstitutional state statutes, notwithstanding the eleventh amendment.[22]

Although the unprecedented expansion of the eleventh amendment during the last quarter of the nineteenth century has regularly been recognized, few attempts have been made to account for it. The scholar who has given the subject the most extended treatment has explained it in purely doctrinal terms:

> The lack of a satisfactory rationale for the doctrine of sovereign immunity, and the tension between that doctrine and basic precepts of the American Constitution, account in large part for the erratic course traversed by the Court between 1873 and 1908 as immunity pleas by public officers were sustained or rejected in various cases.[23]

This Article will reexamine that period in light of the experience of North Carolina, a defendant in many of the landmark cases. The Tar Heel state was defending its right to repudiate or readjust much of its state debt. The state was permitted to repudiate almost twenty million dollars worth of indebtedness, much of it owed to northern and foreign investors. Therefore, attention will be paid to questions of state finance. In order to understand this period, however, the analysis must extend beyond economic considerations. The political climate in which the Supreme Court reached its decisions will also be

15. *See* Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798).

16. 22 U.S. (9 Wheat.) 738 (1824).

17. *In re* Ayres, 123 U.S. 443, 489 (1887). *See also* Louisiana *ex rel.* Elliott v. Jumel, 107 U.S. 711 (1883).

18. New Hampshire v. Louisiana, 108 U.S. 76 (1883).

19. North Carolina v. Temple, 134 U.S. 22 (1890); Hans v. Louisiana, 134 U.S. 1 (1890).

20. J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 191 (1978).

21. 209 U.S. 123 (1908).

22. *Id.* at 156-60.

23. C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 155 (1972).

examined. The decisions expanding the eleventh amendment will, in other words, be placed in their economic and political context, rather than be taken simply as doctrinal statements. Before that can be done, however, the course of the amendment from its ratification in 1798 through the aftermath of the Civil War must be reviewed in some detail.

I. RATIFICATION AND EARLY INTERPRETATION

Historical surveys of the eleventh amendment invariably include references to the economic and political milieu of the early Republic.[24] To finance the Revolutionary War the states had contracted large debts; to exhibit patriotic fervor they had confiscated the property of American Loyalists. Because of the states' potential liabilities, some attention was paid to their suability in the national courts authorized by the proposed federal Constitution. The issue occasionally was raised during the debates on ratification, although it apparently was overshadowed by the larger problems of nation building. Despite the diligence of scholars, no consensus has emerged on the original understanding of sovereign immunity under the Constitution of 1787. Perhaps the most that can be said is that James Wilson told the Pennsylvania ratification convention that the states could be sued,[25] and John Marshall told the Virginia ratification convention that they could not.[26]

Whatever the original understanding, the Supreme Court soon took jurisdiction over a suit by a citizen of one state against another state.[27] Alexander Chisholm, the executor of the estate of a South Carolina citizen, filed an original action in the Supreme Court to compel Georgia to pay a debt owed his decedent. Georgia refused to appear, and the Court in due course issued a judgment against it. According to Supreme Court Justice Joseph P. Bradley, writing a century later, the decision in *Chisholm v. Georgia* sent a "shock of surprise" through the Nation.[28] Fear that claimants, particularly British and Loyalist claimants, would resort to the Supreme Court for enforcement of their claims moved the states speedily to amend the Constitution. The eleventh amendment denied the federal courts jurisdiction over suits like *Chisholm*.

Just as scholarly attention focuses on the political and economic milieu of *Chisholm*, so it regularly focuses on the Federalist ideology of John Marshall, Chief Justice of the United States from 1801 to 1835.[29] The Federalist Party

24. *See, e.g., id.* at 3-74; Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 140-47 (1977); Cullison, *Interpretation of the Eleventh Amendment (A Case of the White Knight's Green Whiskers)*, 5 HOUS. L. REV. 1, 6-14 (1967); Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 5-9 (1972); Field, *supra* note 12, at 527-36; Mathis, *The Eleventh Amendment: Adoption and Interpretation*, 2 GA. L. REV. 207, 211-30 (1968); Nowak, *supra* note 11, at 1422-41; Comment, *supra* note 10, at 1057-62.

25. 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 491 (2d ed. 1888).

26. 3 *id.* at 555.

27. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

28. Hans v. Louisiana, 134 U.S. 1, 11 (1890).

29. *See* 4 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 117, 169, 308 (1919); 3 A. BEVER-

favored a strong central government, encouragement of industry, protection of property, and a well-ordered society.[30] In 1801 the Federalists lost control—permanently, as it turned out—of the legislative and executive branches. The judicial branch, staffed by Federalist appointees of Washington and Adams, remained the last bastion of Federalism. By limiting the jurisdiction of the national courts, the eleventh amendment endangered the central tenets of the Federalist faith. On the bench, John Marshall forgot his reassurances to the Virginia ratifying convention; instead, the Federalist Chief Justice led the Supreme Court to defend its jurisdiction in a series of landmark decisions. In nine cases[31] the Marshall Court faced challenges to its jurisdiction based on the eleventh amendment, but in none of the important constitutional cases of the day did the Court find itself deprived of jurisdiction by the amendment. In *United States v. Peters*,[32] the Court held that a state could not assert the eleventh amendment on behalf of an individual defendant merely because the state claimed an interest in the subject matter of the dispute.[33] In *Cohens v. Virginia*,[34] it faced an argument, based on the eleventh amendment, that it lacked jurisdiction to review state criminal convictions, because the writ of error by which such convictions were reviewed was itself a "suit in law . . . commenced or prosecuted against one of the United States." As the plaintiffs in this particular writ of error were citizens of Virginia, the amendment did not apply according to its terms. The argument was that, because the amendment denied to foreigners and citizens of other states the right to prosecute suits against a state, it implied that the federal courts never had jurisdiction over suits between a state and its citizens; otherwise the anomaly would result that a state could be sued in federal court by its own citizens, but not by foreigners or citizens of another state. In an opinion by the Chief Justice, the Court rejected that argument on the ground that process by writ of error was not a suit within the meaning of the amendment. But the Chief Justice also made clear that even if it were, Virginia would not be able to rely on the amendment because the suit was not "commenced or prosecuted . . . by Citizens of another State."[35]

Finally, in 1824, John Marshall led the Court to confine the amendment

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IDGE, at 594; E. CORWIN, COURT OVER CONSTITUTION 98 (1938); F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WAITE 14 (1937); C. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835, at 619 (1960); B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 43 (1942). *But see* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978).

30. J. MILLER, THE FEDERALIST ERA, 1789-1801, at 116-17 (1960).

31. *Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627 (1833); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828); Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809).

32. 9 U.S. (5 Cranch) 115 (1809).

33. *Id.* at 139-41.

34. 19 U.S. (6 Wheat.) 264 (1821).

35. *Id.* at 389-96.

more narrowly than ever before. In *Osborn v. Bank of the United States*,[36] the Court held that a suit was not "against one of the United States" unless the state was a defendant of record.[37] By implication, a plaintiff could avoid the bar of the amendment simply by suing an officer of the state, rather than the state itself. Furthermore, the Court held that a state officer acting pursuant to an unconstitutional state law was acting not as an agent of the state, but in his individual capacity.[38] Thus, whenever a state officer was enforcing a law that was unconstitutional, or even alleged to be unconstitutional, the state's immunity from suit did not protect him. Also in 1824, in another suit involving the Bank of the United States, the Marshall Court curtailed the eleventh amendment by narrowly defining the words "one of the United States": a corporation chartered by a state and partly owned by it could not avail itself of the state's immunity.[39] The same result was reached even when the state owned all the stock in the corporation.[40]

In one case only, *Governor of Georgia v. Madrazo*,[41] did the Marshall Court find itself without jurisdiction because of the eleventh amendment. Although in *Osborn* the Chief Justice had laid it down "as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record,"[42] he in fact admitted an exception only four years later:

> [W]here the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made.[43]

Madrazo was clearly not the rule, but the exception, and a minor one at that: it was not even mentioned in the standard collections of Marshall's "complete constitutional decisions."[44] So effectively did the great Chief Justice confine the eleventh amendment that it never once prevailed during the long chief justiceship of his successor, Roger B. Taney, despite the Taney Court's well-known sympathy for states' rights. The amendment was cited in five cases[45] and rejected in all of them. *Madrazo* was cited by a majority only once, and then not relied upon;[46] otherwise it was referred to only twice, in

36. 22 U.S. (9 Wheat.) 738 (1824).

37. *Id.* at 842-43.

38. *Id.* at 843-44.

39. Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 906-07 (1824).

40. Bank of Kentucky v. Wister, 27 U.S. (2 Pet.) 318 (1829).

41. 26 U.S. (1 Pet.) 110 (1828). *See also Ex parte* Madrazzo, 32 U.S. (7 Pet.) 627 (1833).

42. 22 U.S. (9 Wheat.) at 857.

43. 26 U.S. (1 Pet.) at 123-24.

44. CONSTITUTIONAL DECISIONS OF JOHN MARSHALL (J. Cotton ed. 1905); JOHN MARSHALL: COMPLETE CONSTITUTIONAL DECISIONS (J. Dillon ed. 1903).

45. Howard v. Ingersoll, 54 U.S. (13 How.) 381 (1851); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); McNutt v. Bland, 43 U.S. (2 How.) 9 (1844); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Livingston v. Story, 36 U.S. (11 Pet.) 351 (1837).

46. Kentucky v. Dennison, 65 U.S. (24 How.) 66, 97 (1860).

dissents.[47]

II. THE ELEVENTH AMENDMENT DURING RECONSTRUCTION

At the outbreak of the Civil War, the law of the eleventh amendment was well settled, and there seemed little reason to expect that the outcome of the war would deflect American constitutionalism in the direction of states' rights. After all, the United States Army won the war to preserve the Union. For a dozen years after the war, the national government pursued a policy of Reconstruction.[48] The defeated states of the Confederacy needed to be supplied with loyal governments and restored to the Union, and the place of the emancipated Negroes in Southern society had to be defined. These ambitious aims demanded the concentration of power in the national government. Until 1877 federal troops occupied parts of the South. The judicial analogue of military occupation was the extension of federal jurisdiction. Piecemeal additions during the war and after culminated in the Judiciary Act of 1875, which gave the lower federal courts jurisdiction over all federal questions.[49] Neither the law nor the politics of Reconstruction dictated a departure from the Marshallian tradition on the eleventh amendment. The standard laid down in *Osborn* fifty years earlier remained the law of the land.

Some of the shadiest financing of the era of Reconstruction involved the bonded indebtedness of the states of the old Confederacy. The Southern governments—the Carpetbagger regimes of popular history—floated extravagant bond issues, ostensibly for internal improvements. The North Carolina state debt, for example, more than doubled in the five years after the end of the Civil War.[50] Particularly reckless and dishonest financiering marked the Republican administration of Governor William W. Holden from 1868 to 1870.[51] Millions of dollars of state bonds, bearing six percent interest, were issued to railroads, whose stock was pledged to the state as security. As North Carolina's Reconstruction Constitution of 1868 prohibited the issue of any bonds without the simultaneous levy of a special tax to pay the annual interest,[52] the legislature enacted several special taxes; but it confidently expected not to need the revenue, because the dividends on the railroad stock would pay the interest on the bonds. The state was, of course, destitute at this time. In addition to the military losses, the thirteenth amendment[53] in 1865 had destroyed the cap-

47. Florida v. Georgia, 58 U.S. (17 How.) 478, 500 (1854) (Curtis J., dissenting); McNutt v. Bland, 43 U.S. (2 How.) 9, 23, 27 (1844) (Daniel J., dissenting).

48. *See* K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (1965).

49. Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 844-47 (2d ed. 1973); F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 56-69 (1928).

50. On January 1, 1866, North Carolina's debt was $14,369,500; by October 1, 1870, it had risen to $33,084,641. Ratchford, *The North Carolina Public Debt, 1870-1878*, 10 N.C. HIST. REV. 1, 3 (1933).

51. W. POWELL, NORTH CAROLINA: A BICENTENNIAL HISTORY 154 (1977).

52. N.C. CONST. art. V, § 5 (1868).

53. U.S. CONST. amend. XIII, § 1: "Neither slavery nor involuntary servitude, except as a

italized value of the prewar labor system, and the fourteenth amendment[54] in 1868 had destroyed the Confederate war debt. So the Reconstruction bonds were peddled, usually at a great discount, in the money markets of the Northeast and Europe. The disputes that arose over repayment raised obvious questions under the contracts clause of the federal Constitution.[55] If the federal courts were ousted of jurisdiction, it could only be because of the eleventh amendment.

Reconstruction in North Carolina ended in 1870 when the federal army of occupation was withdrawn and the Democratic Party returned to power. North Carolina's conservative leaders after the end of Reconstruction, like those of the South generally, were referred to as Bourbons.[56] The term means social and political reactionaries and comes, of course, from the name of the French royal family, whose scion forfeited the chance of restoration in 1871 by insisting that the white flag of Bourbon replace the Revolutionary tricolor.[57] On coming to power in 1870, the Bourbons took action against the Reconstruction bonds. The special tax acts were repealed, and the money already collected was appropriated to the use of the state government.[58] Because the Reconstruction Constitution of 1868 had expressly prohibited the repudiation of the state debt,[59] the legislature began the process that ended in 1873 with the popular approval of an amendment repealing the prohibition.[60] Unmistakably, North Carolina was intent on repudiating its debt. But the federal courts, the keepers of the Marshallian tradition, might have something to say about that.

Perhaps to avoid the bad odor of the special tax bonds, the litigators sued first on some antebellum bonds that had been in default since 1869. These bonds, which were known as "construction bonds," had been authorized in 1849 and 1855 to finance the building of the North Carolina Railroad.[61] They were secured by a first mortgage on railroad stock owned by the state. Because the railroad was turning a nice profit at the time and paying dividends to the state, the litigators probably felt confident of recovering the arrearages. Recovery would also pay dividends, as it were, for the holders of the special

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punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

54. U.S. CONST. amend. XIV, § 4: "[N]either the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States. . . ."

55. U.S. CONST. art. 1, § 10, cl. 1: "No State shall . . . pass any . . . law impairing the obligation of contracts. . . ."

56. W. POWELL, *supra* note 51, at 172.

57. 3 A. COBBAN, A HISTORY OF MODERN FRANCE 16 (1965). Needless to say, this is the same family of which Talleyrand spoke when he said: *"Ils n'ont rien appris, ni rien oublié."* ("They have learned nothing, and forgotten nothing.") J. BARTLETT, FAMILIAR QUOTATIONS 400 (15th ed. 1980).

58. Law of March 8, 1870, ch. 71, 1869-70 N.C. Sess. Laws 119.

59. N.C. CONST. art. 1, § 6; art. V, § 4 (1868).

60. Law of Feb. 24, 1873, ch. 85, 1872-73 N.C. Sess. Laws 115; Law of Jan. 19, 1872, ch. 53, § 1, 1871-72 N.C. Sess. Laws 81.

61. Law of Feb. 14, 1855, ch. 32, 1854-55 N.C. Sess. Laws 64; Law of Jan. 27, 1849, ch. 82, 1848-49 N.C. Sess. Laws 138.

tax bonds. The inviolability of North Carolina's obligations would be established, and so would federal jurisdiction over the controversy.

In 1871, in *Swasey v. North Carolina Railroad*,[62] the holders of the construction bonds sued the railroad, its directors, and the state treasurer asking for an injunction against the payment of dividends to the state, the appointment of a receiver to collect the dividends for the bondholders, and the sale of stock if the dividends were insufficient. At the commencement of the suit, it appeared that no stock certificates had ever been issued to the state. The court ordered the issuance of the proper certificates to a receiver, who was appointed to collect the dividends and pay them over to the bondholders.

The dividends were sufficient to pay the current interest but not to discharge the arrearages, and in 1874 the bondholders asked for the sale of stock. The case was heard by federal District Judge Bond and Morrison R. Waite, Chief Justice of the United States, sitting on circuit. North Carolina challenged the court's jurisdiction, but the Chief Justice, on behalf of the court, rejected the state's arguments. The eleventh amendment was inapposite, said the Chief Justice, because North Carolina, although interested in the matter, was not a party of record. To the contention that the state was a necessary party, without whom the case could not be heard, the Chief Justice replied:

> If the state could be brought into court, it undoubtedly should be made a party before a decree is rendered, but since the case of Osborn v. Bank of U.S. . . . it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a state in the hands of its agents without making the state a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent.[63]

The "real question" was, therefore, whether the court had jurisdiction over the property or the agent. Finding that it had jurisdiction over the property, the Chief Justice ordered an accounting of the amount due and the sale of the security if the state failed to pay by April 1, 1875. The defendants appealed to the Supreme Court, but it dismissed the appeal on the ground that the order was not final because the account was not complete.[64] For an unexplained reason, the plaintiffs did not force a sale, and until 1890 the receiver continued to collect the state's dividends on behalf of the bondholders.[65]

What *Swasey* revealed about the status of the eleventh amendment during Reconstruction—that the Marshallian tradition was alive and well—was twice confirmed by the Supreme Court. The two leading cases of the period, both involving Southern states, arose respectively out of disputes concerning railroads and state bonds, two fertile fields for litigation during the Gilded

62. 23 F. Cas. 518 (C.C.E.D.N.C. 1874) (No. 13,679).

63. *Id.* at 519 (citation omitted).

64. 90 U.S. (23 Wall.) 405 (1875) (Waite, C.J.).

65. Ratchford, *The Conversion of the North Carolina Public Debt After 1879*, 10 N.C. HIST. REV. 251, 253 (1933).

Age. In "one of the great railroad give-aways of the time,"[66] the assets of the Memphis, El Paso, and Pacific Railroad were turned over to the Texas and Pacific Railroad in return for a nominal consideration. The losers were the bondholders in the Memphis, El Paso, and Pacific, most of whom were French investors. The winner was the notorious Tom Scott, later president of the Pennsylvania Railroad and associate of John A.C. Gray, the court-appointed receiver of the insolvent Memphis, El Paso, and Pacific line. Gray had been named by Justice Joseph P. Bradley, a railroad attorney appointed to the Court by President Grant.[67] In an extraordinary proceeding in 1872, Bradley had convened his Circuit Court for the Western District of Texas in Newark, New Jersey, and approved Gray's handling of his receivership.[68]

In a later phase of the litigation in 1873, Gray sought to defend the Memphis, El Paso, and Pacific's title to its most valuable assets, land grants from Texas, against seizure by the state.[69] The Texas Constitution of 1869 had declared all land grants forfeited unless the grantee had built all the lines promised. Asserting that Texas' belligerency during the Civil War had rendered its fulfillment impossible, Gray on behalf of the railroad sued to enjoin the Texas governor from seizing the land. The governor, like his Georgia counterpart a generation earlier, asserted the bar of the eleventh amendment and cited *Madrazo*. Ignoring the inconvenient precedent, the Court repulsed the attack on its jurisdiction by harking back to *Osborn v. Bank of the United States*. That case, it held, stood for three propositions dispositive of the governor's claimed immunity:

> (1) A Circuit Court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.
>
> (2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.
>
> (3) In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.[70]

Finding itself with jurisdiction, the Court proceeded to the merits. It accepted

66. Friedman, *Joseph P. Bradley*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 1181, 1190 (L. Friedman & F. Israel eds. 1969).

67. *See* Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases* (pts. 1-2), 54 HARV. L. REV. 977, 1128 (1941).

68. Forbes v. Memphis, El Paso & Pac. R.R., 9 F. Cas. 408 (C.C.W.D. Tex. 1872) (No. 4,926).

69. Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872).

70. *Id.* at 220.

the railroad's excuse for nonperformance and enjoined the governor from interference with the railroad's land. Not even John Marshall had given a state's claim of sovereign immunity such short shrift.[71]

As late as 1875, the Supreme Court still was adhering to the *Osborn* rule. In *Board of Liquidation v. McComb*[72] the Court was confronted by an attempt by another state of the old Confederacy, Louisiana, to play fast and loose with her creditors.[73] In 1874 the legislature had created the Board of Liquidation to fund the state debt.[74] The Board was to issue new bonds, called consolidated bonds, bearing seven percent interest, and offer them in exchange for outstanding bonds at the rate of sixty cents on the dollar. A contemporaneous amendment to the Louisiana Constitution declared that the consolidated bonds were valid contracts with the state and imposed a tax to service the bonds, which was to be levied and collected annually without further legislation.[75] Only one year later, the legislature enacted a statute[76] that directed the Board to exchange consolidated bonds for the outstanding debt of the Louisiana Levee Company at par, not at the reduced rate of exchange offered other creditors. Henry S. McComb, a bondholder who had accepted consolidated bonds, sued the Board in federal court to keep his security from being diluted and won an injunction against the exchange with the Levee Company. Affirming the decision for a unanimous Court, Justice Joseph P. Bradley ruled that the eleventh amendment did not insulate a public officer from judicial compulsion in the performance of his nondiscretionary duty.[77] Furthermore, the writ of mandamus was available to compel needful action, and an injunction was available to prevent illegal interference.[78] Whether or not the officer was acting pursuant to state law was immaterial, if the Court found the law unconstitutional.[79] John Marshall's Federalist faith in the rights of property and the power of the national courts was alive and well. Northern creditors of Southern states were seemingly well protected.

Shortly after Justice Bradley announced the Court's decision in *McComb*, however, a political crisis occurred that was to alter the law of the eleventh amendment. The presidential election of November 1876 ended in a deadlock.[80] The Democratic nominee, Samuel J. Tilden, received a majority of the popular vote but was one vote short of a majority in the Electoral College. There was a contest over one Oregon elector, and there were double and con-

71. Justice Davis, joined by Chief Justice Chase, dissented "because the State is exempt from suit at the instance of private persons, and on the face of the bill it is apparent that the State is arraigned as a defendant." *Id.* at 233 (Davis, J., dissenting).

72. 92 U.S. 531 (1875).

73. For more details on Louisiana history and politics, see Orth, *The Fair Fame and Name of Louisiana: The Eleventh Amendment and the End of Reconstruction*, 2 TUL. LAW. 2 (1980).

74. 1874 La. Acts, No. 3.

75. LA. CONST. of 1868, amend., § 1 (1874).

76. 1875 La. Acts, No. 24.

77. 92 U.S. at 541.

78. *Id.*

79. *Id.*

80. *See* P. HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906).

flicting returns of electoral votes from Florida, South Carolina, and Louisiana. To settle this dispute, Congress created an unprecedented Electoral Commission of fifteen members. On the Commission were five Senators and five Congressmen, equally divided between the parties. The remaining Commissioners were justices of the Supreme Court. Four justices—Nathan Clifford, Stephen J. Field, William Strong, and Samuel F. Miller—were named outright. These four, of whom the first two were Democrats and the second two Republicans, were empowered to choose a fifth. Given the composition of the Commission, the fifth justice would decide the outcome. When the impartial Justice David Davis precipitately resigned from the Court, the choice fell on Justice Bradley, a Republican. Voting with his fellow party members on straight party votes, he declared the Republican nominee, Rutherford B. Hayes, President of the United States.

The political maneuvers that preceded the inauguration of President Hayes were as important in their results as they were obscure in their details. Filled with drama, intrigue, and political low life, they deserve to be made the subject of an historical novel—as indeed they have been.[81] Their object was to rearrange American politics for years to come. In this they succeeded, though not in the manner intended by any of the participants. Hayes and his advisers hoped to convert those Southerners who had been Whigs before the war into loyal Republicans. The price of Southern acquiescence in the decision of the Electoral Commission was an end to Reconstruction, a share in government patronage, and federal subsidies for internal improvements, in particular the Texas and Pacific Railroad. The horse trading was detailed and complicated.[82] Although the Reconstruction bonds were never referred to, the Compromise of 1877 altered the balance of power between the South and the national government in such a way that the bonds were inevitably affected. The federal troops were ordered back to their barracks, while the federal courts remained open. The issue would soon arise whether the states of the old Confederacy could shield themselves from their creditors with the eleventh amendment.

III. THE ELEVENTH AMENDMENT AND THE END OF RECONSTRUCTION

The compromise between Southern Democrats and Northern Republicans meant that Congress would pass no more Civil Rights Acts[83] or Force Bills[84] and that the President would no longer use the army to coerce the South. The political decision to restore home rule to the states of the old Confederacy left two groups to the mercies of their enemies. Black Americans saw their newly won rights slipping away; creditors of Southern states feared for

81. *See* G. VIDAL, 1876 (1976).

82. *See* C. WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION (rev. ed. 1956).

83. *See* Act of March 1, 1875, ch. 114, 18 Stat. 335 (1875); Act of May 31, 1870, ch. 114, 16 Stat. 140 (1871); Act of April 9, 1866, ch. 31, 14 Stat. 27 (1868).

84. *See* Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871); Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 (1871).

their investments. Both groups turned to the United States Supreme Court, since the days of Marshall the proud defender of constitutional rights. In 1883 both groups were rebuffed by the Court. In the *Civil Rights Cases*,[85] the Court ruled that Congress lacked the power under the fourteenth amendment[86] to outlaw racial segregation in accommodations. In two cases involving Louisiana's state debt, *Louisiana ex rel. Elliott v. Jumel*[87] and *New Hampshire v. Louisiana*,[88] the Court found itself impeded in enforcing the "obligation of contracts" by the eleventh amendment.

As mentioned in connection with the *McComb* case, the Louisiana Constitution had been amended in 1874 to impose a constitutional tax to service the state's consolidated bonds. By 1879 the Bourbons were in the saddle in Louisiana, and a constitutional convention was called to replace the state's Reconstruction Constitution. So determined were the Bourbons to reduce taxes that the convention added to the Constitution of 1879 an extraordinary provision, known as the Debt Ordinance, which ended the constitutional tax and reduced the rate of interest on the consolidated bonds from seven percent to two percent for the five years after 1880, three percent for the fifteen years after 1885, and four percent after 1900. If the bondholders preferred, they were permitted to exchange the consolidated bonds for new bonds, bearing four percent interest immediately, but available only at seventy-five cents on the dollar. In addition, the Debt Ordinance provided that the interest due on the consolidated bonds in January 1880 would not be paid.

Needless to say, the bondholders who had already surrendered forty percent of their claims were loath to accept lower rates of interest or to surrender a quarter of their principal. Several immediately brought suit in federal court, claiming that the Debt Ordinance violated the contracts clause of the federal Constitution. In *Louisiana ex rel. Elliott v. Jumel*,[89] a bondholding relator sought to compel Louisiana to order the state auditor, Allen Jumel, to pay the interest on the consolidated bonds according to the terms agreed in 1874. The lower court denied relief, and in 1883, by a vote of seven to two, the Supreme Court affirmed its judgment. The Court's opinion, written by Chief Justice Morrison R. Waite, did little more than note that Louisiana law prohibited suit against the state in her own courts, and that the eleventh amendment foreclosed the federal courts. *McComb* was distinguished on the ground that the

85. 109 U.S. 3 (1883).

86. U.S. CONST. amend. XIV:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . .

§ 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

87. 107 U.S. 711 (1882).

88. 108 U.S. 76 (1882).

89. 107 U.S. 711 (1882).

Board of Liquidation had been the trustee of the consolidated bond issue.[90] Among the majority, incidently, were Justice Bradley, the author of *McComb*, and Justice Miller, who had joined in the decision of *McComb*. These two justices, who seemed to have changed their minds on the eleventh amendment, were the only surviving Republicans who had served on the Electoral Commission of 1877.

The only surviving Democratic justice from the Commission was Stephen J. Field. In *Jumel* Field filed a vigorous dissent. Rhetorically asking if the contracts clause was of any efficacy, he replied: "The majority of the court answer 'No'. I answer, adhering to the doctrines taught by a long line of illustrious judges preceding me, 'Yes, it is;' and though now denied, I feel confident that at no distant day its power will be reasserted and maintained."[91] The theory Field would have relied on, had he been writing for a majority, was simple:

> When a State enters into the markets of the world as a borrower, she, for the time, lays aside her sovereignty and becomes responsible as a civil corporation, And [sic] although suits against her even then may not be allowed, her officers can be compelled to do what she then contracts that they shall do.[92]

In defense of his position Field asserted one of the most powerful concepts of late nineteenth-century jurisprudence: property. "If contracts are not observed, no property will in the end be respected; and all history shows that rights of persons are unsafe when property is insecure."[93] The other dissenter in *Jumel*, Justice John Marshall Harlan, shared Field's conviction that the decision was a break with precedent: "[T]he opinion of the court is in conflict with the spirit and tenor of our former decisions, subversive of long-established doctrines, and dangerous to the national supremacy as defined and limited by the Constitution . . . ."[94] Ironically, this threat to the national supremacy emerged within twenty years of Appomattox.

The stakes were high, and the bondholders were evidently men with excellent legal advice and considerable political influence. Shortly after the Louisiana constitutional convention—about the time, in other words, that the *Jumel* litigation was commenced—the legislatures of New Hampshire and New York passed extraordinary legislation.[95] These two states offered their names and legal advisers to citizens who stood to lose if Louisiana were permitted to readjust her debt. The attorneys general of the two Northern states were authorized to accept the assignments of Louisiana debts and to pay any money collected, less expenses, to the assignors. The bondholders obviously

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90. *Id.* at 726.

91. *Id.* at 733 (Field, J., dissenting).

92. *Id.* at 740 (Field, J., dissenting).

93. *Id.* (Field, J., dissenting and quoting himself in Sinking Fund Cases, 99 U.S. 700, 767 (1878)).

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

95. Law of July 18, 1879, ch. 42, 1879 N.H. Laws 357; Law of May 15, 1880, ch. 298, 1880 N.Y. Laws 440.

anticipated that Justice Field's views on the eleventh amendment would not prevail in the post-Reconstruction Supreme Court. So they attempted an end run around the amendment. Whatever its effect on the Court's jurisdiction, the eleventh amendment did not touch the grant of original jurisdiction over "Controversies between two or more States."[96] The Court could not dodge its responsibility under the contracts clause on jurisdictional grounds—or so the litigators supposed. In fact, the Court did. In *New Hampshire v. Louisiana*,[97] decided the same day as *Jumel*, a unanimous Court held that the eleventh amendment prevented it from hearing cases in which a state, acting on behalf of her citizens, seeks relief against another state, when the prosecuting state has no interest of her own.[98] Of course, New Hampshire and New York asserted their rights as sovereigns to collect from another sovereign debts owed their citizens. Writing for the Court, Chief Justice Waite denied that American states possessed that undoubted badge of sovereignty; it was surrendered on joining the Union. In proof of this, the Chief Justice relied on *Chisholm v. Georgia*.[99] In that case, it was held that a citizen of one state could sue another state in federal court.[100] From this holding, the Chief Justice inferred that a state could not sue on behalf of her citizen, there being no reason to allow two remedies. Ergo, when the eleventh amendment superseded *Chisholm*, the citizen was remediless.

The commentators were loud in their wail. The New Hampshire and New York strategy apparently had been long in preparation, and the law reviews had staked out Northern and Southern positions on the issue.[101] But *Jumel* was a bombshell. The greatest legal scholar of the day, John Norton Pomeroy, was almost speechless: "In combating the reasoning and conclusions of the court, we feel ourselves to be in the position of one called upon to substantiate an axiom, or to sustain a truism."[102] But, as the bondholders learned to their cost, the United States Constitution is not a set of axioms or truisms; it is what the Supreme Court says it is. Reminiscent of the response to *Chisholm*, a resolve was promptly introduced in Congress to repeal the eleventh amendment.[103] But the North was sick of trying to reconstruct the South, and the bondholders lacked popular sympathy. Still, it might be more accurate to see the "shock of surprise" in 1883 that Justice Bradley discerned a century earlier.

The decisions in *Jumel* and *New Hampshire* indicated that the Louisiana adjustment of 1879 was going to last. North Carolina also adjusted her debt in

96. U.S. CONST. art. III, § 2.

97. 108 U.S. 76 (1883).

98. *Id.* at 90-91.

99. 2 U.S. (2 Dall.) 419 (1793).

100. *Id.* at 466.

101. *See* Johnson, *Can States Be Compelled to Pay Their Debts?* 12 AM. L. REV. 625 (1878) (answering yes); Burroughs, *Can States Be Compelled to Pay Their Debts?* 3 VA. L.J. 129 (1879) (answering no).

102. Pomeroy, *The Supreme Court and State Repudiation—the Virginia and Louisiana Cases*, 17 AM. L. REV. 684, 702 (1883).

103. 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 388 (1922).

1879.[104] Prewar bonds were scaled down to forty percent of face value; bonds issued for internal improvements during and after the war were scaled down to twenty-five percent of face value; the funding bonds of 1866 and 1868 were scaled down to fifteen percent of face value. As accrued interest was not provided for and as the interest on the new bonds was lower than that on the old, the settlement overall equalled less than thirteen percent of the claims.[105] The special tax bonds were not included in this settlement. They were repudiated outright. By a constitutional amendment initiated in 1879, the legislature was deprived of the power to pay anything on the special tax bonds; any proposal to pay them had to be approved by a majority of all the qualified voters of the state.[106] By this amendment bonds with a face value of more than twelve million dollars and accrued interest of seven million dollars were repudiated.[107]

The only remaining question was whether the United States Supreme Court would be open to plaintiffs complaining about the state's impairment of the obligation of her contract with the bondholders. The litigation began with what seemed like the strongest case. Among the bonds converted at forty percent of face value were some authorized in 1855 to aid the Atlantic and North Carolina Railroad.[108] Like the construction bonds involved in *Swasey*, these bonds were secured by a lien on stock owned by the state. In *Christian v. Atlantic & North Carolina Railroad*,[109] the bondholders sued the railroad, its president and directors, the person holding the state's proxy, and the state treasurer. The bondholders asked the federal court to enjoin the railroad from paying dividends to the state, to appoint a receiver to collect the dividends for the bondholders, and to order the sale of stock if the dividends were insufficient. *Christian* was, in other words, the identical twin of *Swasey*. The only difference, if difference it be, was that in *Christian* the state already held the stock certificates, while in *Swasey* no certificates had ever been issued. Of course, in *Swasey* the court had ordered the issuance of certificates to the receiver. Justice Joseph P. Bradley, writing for a unanimous Court, found the difference dispositive. Although the state admittedly had mortgaged her stock, she had retained possession. The mortgagees were out of possession, and the mortgagor in possession was a sovereign state and immune from suit. Chief Justice Waite's decision in *Swasey*, read in the light of his later opinion in *Jumel*, was distinguished in the following manner:

> We are referred to a decision made at the circuit by Chief Justice Waite in the case of *Swasey v. North Carolina Railroad Company* . . . in which, in a case similar to the present, it was held that, inasmuch as the shares of stock belonging to the State were pledged for the

104. Law of March 4, 1879, ch. 98, 1879 N.C. Sess. Laws 183.

105. Ratchford, *The Adjustment of the North Carolina Public Debt, 1879-1883*, 10 N.C. HIST. REV. 157, 158 (1933).

106. Law of March 14, 1879, ch. 268, 1879 N.C. Sess. Laws 436.

107. Ratchford, *supra* note 105, at 166.

108. Law of Feb. 12, 1855, ch. 232, 1854-55 N.C. Sess. Laws 298.

109. 133 U.S. 233 (1890).

> payment of the complainants' bonds, they were held by the railroad company as trustee for the bondholders as well as the State; and that if the trustee was a party to the suit, it was not necessary that the State should be a party. We are not certain that we are fully in possession of the facts of that case; but if they were the same as in the present case, with the highest respect for the opinions of the lamented Chief Justice, we cannot assent to the conclusions to which he arrived. In the general principles, that a State cannot be sued; that its property, in the possession of its own officers and agents, cannot be reached by its creditors by means of judicial process; and that in any such proceeding the State is an indispensable party; Chief Justice Waite certainly did express his emphatic concurrence, in the able opinion delivered by him on behalf of the court, in the case of *Louisiana v. Jumel*. . . . His views in the *Swasey* case seem to have been based on the notion that the stock of the state was lodged in the hands of the railroad company as a trustee for the parties concerned, and was not in the hands of the State itself, or of its immediate officers and agents. But if the facts in that case were as he supposed them to be, the facts in the present case are certainly different from that. No stockholder of any company ever had more perfect possession and ownership of his stock than the State of North Carolina has of the stock in question. There may be contract claims against it; but they are claims against the State, because based solely on the contract of the State, and not on possession.[110]

North Carolina's failure to secure for itself the certificates in *Swasey* had cost it two and a half million dollars, because without the *Swasey* decision the holders of the construction bonds would undoubtedly have been treated as were the other bondholders.[111]

The Court's unwillingness to interfere in the post-Reconstruction financial readjustment was obvious. But too much money was at stake to leave any loophole unexplored. By its terms, the eleventh amendment did not apply to suits brought against one of the United States by citizens of that state. It was a simple matter for a North Carolina citizen to sue his state in federal court for payment of the long-overdue interest on the special tax bonds. The argument was obvious: the act authorizing the bonds and imposing a special tax to service them was a contract, which subsequent statutes and constitutional amendments attempted to impair. In *North Carolina v. Temple*,[112] this argument was made by a North Carolinian in the United States Circuit Court for the Eastern District of North Carolina. The two judges who heard the suit disagreed on the suability of the state. Judge Bond, perhaps recalling his sitting with Chief Justice Waite more than a dozen years earlier on the *Swasey* case, believed that it was maintainable, but his colleague Judge Seymour disagreed. Justice Bradley quickly disposed of the matter. Sovereign immunity,

110. *Id.* at 245-46 (citations omitted).

111. Ratchford, *supra* note 65, at 257.

112. 134 U.S. 22 (1890).

constitutionally recognized by the eleventh amendment, protected the state.[113]

In *Hans v. Louisiana*,[114] a similar suit decided the same day as *Temple*, Justice Bradley reexamined the history of the eleventh amendment. Looking backward a hundred years, he saw sovereign immunity writ large in the Constitution. The decision in *Chisholm* created such a "shock of surprise" that it was constitutionally reversed. Of course, this history lesson contradicted the reasoning in the *New Hampshire* case. In the opinion written by Chief Justice Waite and joined by Justice Bradley only a half dozen years earlier, the Court had accepted *Chisholm* as a correct interpretation of the Constitution as it then stood. Indeed, it had reasoned that the states, on adopting the Constitution, had surrendered their rights as sovereigns to collect the debts of their citizens because the Constitution provided a forum in which their citizens could sue debtor states.[115] Despite the inconsistent rationales, *New Hampshire* and *Hans* were effective to cut off the bondholders' remedies.

Only one of the state's creditors was able to collect in full. The United States of America, as trustee of funds held for Indian tribes, owned almost two hundred thousand dollars worth of construction bonds. Although almost all the other holders of this issue had compromised with the state in 1882 and accepted new bonds, par for par, with remission of some interest,[116] the federal government had stood out, insisting on the contract debt. In 1889 North Carolina tendered the full principal and interest due on the bonds, which had matured in 1884 and 1885. Not content with its pound of flesh, the United States demanded the payment of interest after maturity. The state refused, and the United States invoked the jurisdiction of the Supreme Court, which of course had not been diminished in this regard by the eleventh amendment. In 1890, in *United States v. North Carolina*,[117] the Court ruled for the state, over the dissent of Justices Miller, Field, and Harlan.

By 1890 the war was over, although the bondholders continued to mount guerrilla attacks for more than forty years. In 1896, in *Baltzer v. North Carolina*,[118] holders of special tax bonds sued the state, claiming that the constitutional amendment that prohibited payment was an impairment of their contract with the state. The Supreme Court rejected the argument on the ground that under North Carolina law before the amendment the state supreme court had no power to issue a binding judgment against the state. As there had never been a remedy under state law, the constitutional amendment worked no impairment. No consideration was given to the loss of a federal remedy.

In 1904 the bondholders who had never accepted the readjustment of 1879 found a plaintiff not barred by the eleventh amendment. In *South Da-*

113. *Id.* at 30.

114. 134 U.S. 1 (1890).

115. *See* text accompanying notes 397-100 *supra*.

116. Ratchford, *supra* note 105, at 163-65.

117. 136 U.S. 211, 221 (1890).

118. 161 U.S. 240 (1896). *See also* Baltzer & Taaks v. North Carolina, 161 U.S. 246 (1896).

kota v. North Carolina,[119] a state won a judgment on bonds donated to it. A closely divided Court distinguished the *New Hampshire* case on the ground that South Dakota, the recipient of a completed gift, was the real party in interest.[120] The donor's motive was, of course, to induce North Carolina to settle with him on more favorable terms—or face donations to other states able to collect at par. In 1905 the state reluctantly negotiated a compromise with her creditor.[121]

In despair, the litigators for the bondholders tried their final gamble. While the eleventh amendment barred federal jurisdiction over suits "against one of the United States . . . by Citizens or Subjects of any Foreign State," it did not preclude suits by foreign sovereigns. Plans were made to give North Carolina obligations to Venezuela and Columbia, and bonds were actually given to Cuba. But diplomatic pressure was exerted to forestall a suit.[122] The idea, however, was to reappear later. In 1934 the Principality of Monaco forced the Supreme Court to decide the issue of whether a "Foreign State" could compel a delinquent American state to pay its bonds.[123] Involved were thousands of dollars worth of antebellum Mississippi bonds, but an affirmative ruling obviously would have affected the value of millions of dollars worth of repudiated Reconstruction obligations. Like South Dakota thirty years earlier, Monaco was the recipient of a completed gift. Like South Dakota's donor, Monaco's donor was presumably moved not by altruism but by a desire to induce a settlement. That desire was frustrated, however, by the decision that federal courts lack jurisdiction over such suits, absent consent to jurisdiction by the state. As in *Hans*, the eleventh amendment was relied on as constitutional recognition of sovereign immunity.[124]

IV. CONCLUSION

A turning point in the history of the eleventh amendment was 1877. Proposed and ratified in the first flush of fear that out-of-state claimants could invoke the aid of federal jurisdiction, the amendment soon had been confined by the Federalist faith of John Marshall. The Marshallian tradition had suited the nationalist needs of Reconstruction, and so the confinement of the amendment had continued through 1876. After the Compromise of 1877 the national will to enforce unpopular policies in the South was lacking. The states of the old Confederacy were readmitted to the political life of the Union under governments of their own choosing, and the Nation's interests in the rights of its black citizens were foresworn for almost a century. Incidental victims of the historic Compromise were the holders of Reconstruction bonds. In the de-

119. 192 U.S. 286 (1904).

120. *Id.* at 310.

121. For a detailed account of the strategy leading to this compromise, see R. DURDEN, RECONSTRUCTION BONDS AND TWENTIETH-CENTURY POLITICS: SOUTH DAKOTA V. NORTH CAROLINA (1962).

122. Ratchford, *supra* note 65, at 269-71.

123. Principality of Monaco v. Mississippi, 292 U.S. 313 (1934).

124. *Id.* at 330.

cades after 1877 the creditors of the Southern states made repeated and imaginative attempts to enforce the obligation of their contracts, but all in vain. Like the out-of-state claimants in the early Republic, the bondholders were met with the eleventh amendment. After 1877, and until the issue faded from public consciousness, the eleventh amendment, by its terms or by implication, was used by the Supreme Court to deny itself jurisdiction over an issue it could not resolve.

Surveys of the amendment's history would be more comprehensible if attention were paid to the political facts of life. After the politicians had agreed to end Reconstruction, there was no way for the judges to enforce an order to collect a tax or pay a debt. North Carolina, for example, was able to renege on its obligations to the extent of twenty million dollars. Chief Justice Waite and Justice Bradley, despite inconsistent precedents of their own making in *Swasey* and *McComb*, led the Court to turn its back on the creditors. In *Jumel*, *New Hampshire*, *Christian*, *Hans*, *Temple*, and *Baltzer*, the interests of the bondholders were sacrificed to the cause of national reconciliation. At Appomattox Courthouse in 1865 the slave owners had lost their human property, and the investors in Confederate securities their equity. The thirteenth and fourteenth amendments subsequently made the losses legal. At the inauguration of Rutherford B. Hayes in 1877 the bondholders lost their money. It was the capitalists' Appomattox. The eleventh amendment, as subsequently interpreted, made it legal.