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Exchange on the Eleventh Amendment

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The principal battleground upon which Professor Fletcher and I joust is that of history. Professor Fletcher makes four criticisms of my reading of history, but each fails to demonstrate the superiority of his historical interpretation.

The "Plain Meaning" of the Text. Professor Fletcher's best argument is that the phrase employed in the Eleventh Amendment—"[t]he Judicial power . . . shall not be construed to extend"—was intended to accomplish no more than repeal of the two party-based heads of federal jurisdiction addressed in the amendment. Professor Fletcher argues that Senator Breckenridge used the same language in an amendment proposed in 1875, which, as explained by Representative Elliot, would have repealed all diversity jurisdiction.1

But if the text was as clear as Professor Fletcher supposes, why did Chief Justice Marshall go to such lengths when deciding Eleventh Amendment cases to avoid stating that federal question jurisdiction of suits against states was unimpaired by the amendment?2 Professor Fletcher will answer that the Court never needed to say so because the trial courts did not have general federal question jurisdiction, but Justice Marshall readily delivered dicta concerning the scope of the Eleventh Amendment. In Osborn v Bank of the United States,3 for example, Marshall observed that the Eleventh Amendment "has its full effect, if the constitution be construed as it would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens."4 While Professor Fletcher relies heavily on this quote,5 it does not clinch his argument because Henry Clay made Professor Fletcher's point in his

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3 22 US (9 Wheat) 738 (1819).
4 Id at 857-58.
5 See Fletcher, 56 U Chi L Rev at 1264 (cited in note 1).
argument to the Court and Marshall rejected it by constructing the party-of-record rule in *Osborn*.

Professor Fletcher's argument also fails to account adequately for *Cohens v Virginia*, where Justice Marshall seemed to say that the Eleventh Amendment does not disturb federal question jurisdiction. If Marshall really believed that, however, the Court could have avoided the Eleventh Amendment by noting that the Cohens were asserting a federal question defense to the Virginia prosecution. Instead, Marshall chose to rely on the Cohens' Virginia citizenship.

The Rejected Gallatin Amendment. In Professor Fletcher's view, Congress rejected Senator Gallatin's proposed language excepting treaty claims from the Eleventh Amendment's operation in order to preclude the assertion of treaty claims under the state-citizen diversity heads of jurisdiction; treaty claims could still be asserted under other heads of jurisdiction. The problem is that the evidence is persuasive—and Fletcher concedes—that the Eleventh Amendment was animated by a desire to protect state treasuries. If the amendment preserved federal question jurisdiction for treaty claims, it would not have completely protected state treasuries from these claims.

Professor Fletcher assumes either (1) that the anti-federalist proponents of the Eleventh Amendment were willing to tolerate the possibility of claims against states under federal question jurisdiction, or (2) that the anti-federalists were unable to muster a majority to eliminate federal question jurisdiction of claims against states by outsiders. Professor Fletcher disables himself from relying on the first assumption by conceding that the ambition of the Eleventh Amendment was to protect state treasuries. He speculates that uncertainty about congressional ability to abrogate state sovereign immunity in federal question cases was enough to satisfy the anti-federalists. Given the passionate growl of opposition to *Chisholm v Georgia*, I do not think this very likely.

The second possibility is more promising for, after all, the anti-federalists lacked the strength to obtain passage of Representative Sedgwick's version of the Eleventh Amendment, which

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6 See Massey, 56 U Chi L Rev at 130-33 (cited in note 2).
7 19 US (6 Wheat) 264 (1821).
8 Id at 392 (federal judicial power "extends to all cases arising under the constitution or a law of the United States, whoever may be the parties").
9 Fletcher, 56 U Chi L Rev at 1285-87 (cited in note 1).
10 Id at 1287.
11 2 US 363, 2 Dall 419 (1793).
would have assured complete immunity to the states. Given the rejection of both the Sedgwick and Gallatin proposals, we can be reasonably certain that the final version of the Eleventh Amendment embodied a compromise. Almost everyone agrees that the text is badly drafted, a hallmark of political compromise. My explanation accounts much better for the awkward compromise than does Professor Fletcher's, which portrays the anti-federalists as complacent and short-sighted, inexplicably agreeing to a compromise inadequate to its purpose.\footnote{Professor Fletcher must make the heroic assumption that the antifederalists complacently accepted the possibility of congressional resurrection of the disfavored claims via a general grant of federal question jurisdiction. Since Congress did just that only three years later, in the short-lived Judiciary Act of 1801, Professor Fletcher's implicit assumption is most improbable. See Act of Feb 13, 1801, ch 4, 2 Stat 89, repealed by Act of March 8, 1802, ch 8, 2 Stat 132; and see Massey, 56 U Chi L Rev at 114-15 & n 281 (cited in note 2).}

If the Eleventh Amendment preserved the jurisdictional bite of the federal courts upon the states whenever a federal question was present, Professor Fletcher is compelled to explain why Chief Justice Marshall failed to cement that federalist victory when he was given the chance to do so, obliquely in *Cohens* and directly in *Osborn*. Professor Fletcher's failure to do so unravels his explanation.

*The Assignment Problem.* Professor Fletcher observes that my reading treats the anti-federalists as "inept" by virtue of their failure to prohibit assignment of claims to in-staters.\footnote{Fletcher, 56 U Chi L Rev at 1287 (cited in note 1).} Rather, I contend that the anti-federalists accepted a certain measure of risk that such assignments could occur but thought, correctly in my view, that such collusive, jurisdiction-manufacturing assignments would be judicially precluded. Section 11 of the 1789 Judiciary Act deprived the circuit courts of diversity jurisdiction over suits brought by an assignee "unless a suit might have been prosecuted in such court . . . if no assignment had been made."\footnote{Judiciary Act of 1789, ch 20, § 11, 1 Stat 73, 79.} This provision could have been interpreted to defeat collusive assignments made in order to avoid the party-based *bar* of the Eleventh Amendment.\footnote{It is instructive, though of course not dispositive, that § 11 has evolved to divest the district courts of all jurisdiction when a "party, by assignment or otherwise, has been improperly or collusively . . . joined to invoke [j]urisdiction." 28 USC § 1359 (1982). Compare *New Hampshire v Louisiana*, 108 US 76 (1883), discussed in Massey, 56 U Chi L Rev at 137-38 (cited in note 2).}

The Supreme Court construed other provisions of § 11 to comport with the constitutional limits of federal judicial power. In
Mossman v Higginson and Hodgson v Bowerbank, for example, the Court narrowly construed the affirmative jurisdictional grant of § 11 (over cases involving aliens). If the anti-federalists sought in the Eleventh Amendment to create a party-based bar to federal jurisdiction, the logic of Mossman and Hodgson suggests that the statutory bar would be construed as coterminous with the constitutional limits of federal jurisdiction, thus prohibiting jurisdiction derived from assignments that eliminated the fatal party alignment.

The Use of a Constitutional Amendment Instead of Legislation to Overturn Chisholm. Professor Fletcher asserts that this choice tells us very little about the intentions of the adopters and was most likely due to uncertainty over whether the Court's jurisdiction was self-executing. But resolution of the latter point has a great deal to do with the former.

Contrary to Professor Fletcher's suggestion, the actors of the time were likely not in agreement that the Court's original jurisdiction was self-executing. Professor Fletcher must explain Congress' inclusion, in § 13 of the 1789 Judiciary Act, of a jurisdictional grant encompassing a portion of the Court's original jurisdiction. He must also account for the virtual silence of Justice Iredell's four colleagues in Chisholm in the face of the public disagreement between Attorney General Randolph and Justice Iredell over this issue.

I submit that Professor Fletcher has not carried the burden of persuasion on this point, and that the use of a constitutional amendment was likely due to a desire "to guarantee perma-

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16 4 US 11, 12-13, 4 Dall 12 (1800).
17 9 US (5 Cranch) 303, 304 (1809).
18 Fletcher, 56 U Chi L Rev at 1288-89 (cited in note 1).
19 Massey, 56 U Chi L Rev at 116-17 (cited in note 2). Professor Fletcher has somewhat altered his view; he now contends "that four of the five justices in Chisholm might reasonably have been thought by the adopters of the Eleventh Amendment to have held [the opinion that the Court's jurisdiction was self-executing]." Fletcher, 56 U Chi L Rev at 1289 n 141 (cited in note 1).
20 Judiciary Act of 1789, ch 20, § 13, 1 Stat 80.
21 2 US at 373. Professor Fletcher relies upon Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan, 86 Colum L Rev 1515, 1563-68 (1986), for the proposition that Justice Iredell's four brethren agreed with Randolph that the Court's original jurisdiction was self-executing. Fletcher, 56 U Chi L Rev at 1289 n 140 (cited in note 1). But even Professor Clinton, a staunch defender of the idea that Article III created federal jurisdiction "that was not subject to diminishment or curtailment by the other branches" of government, 86 Colum L Rev at 1516, admits that Justices Cushing, Blair and Jay did not "directly address[] the debate." Id at 1567. Only Justice Wilson was clearly in Randolph's camp.
Permanency would not result from either a statutory or constitutional repeal of party-based jurisdiction conferred by § 13 of the Judiciary Act. The reason is simple: the joker of federal question jurisdiction would remain. Only the erection of a new, and constitutional, barrier to the exercise of federal jurisdiction over claims held by the disfavored classes would suffice.

Contemporary Theory and Policy. Professor Fletcher and I agree that the Eleventh Amendment does not answer the question of whether there are other constitutional limitations that might vest the states with sovereign immunity from suit in the federal courts. We agree that the Tenth Amendment, or principles borrowing from its spirit, are the source of any such limitations. Reconstructing the Eleventh Amendment is a small step toward recognizing that the Tenth Amendment has independent, normative teeth that impinge upon the exercise of federal judicial power directly against the states.

William P. Marshall†

Professor Fletcher’s claim that he and I are in substantial agreement might initially seem odd.¹ Fletcher’s diversity theory implies that states could be subject to federal question jurisdiction in federal court. My conclusion—that states may enjoy some constitutional protection from suit in federal court—is near the opposite end of the spectrum.

Yet we are in fact in substantial agreement. As Professor Fletcher recognizes, my position is narrow. I do not argue that states are immune from all federal question suits. Rather, I take the position that the diversity theorists have failed to show that states are not entitled to immunity from suits seeking monetary relief. Professor Fletcher, if I read him correctly, does not categorically deny that states might enjoy this limited immunity. He contends that any such immunity cannot properly be ascribed to the Eleventh Amendment.²

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²² See Clinton, 86 Colum L Rev at 1558.

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² Id at 1298-99.