

A DECLARATORY THEORY OF STATE ACCOUNTABILITY

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INTRODUCTION

THE Eleventh Amendment casts a long and familiar shadow over the law of state government accountability.¹ Nominally aimed at curtail-

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¹ Ratified over two hundred years ago, the Eleventh Amendment has been the foundation on which the Supreme Court has built its expansive state-sovereign-immunity doctrine. Familiar examples include *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890) (extending the reach of the Eleventh Amendment beyond its textual confines to prohibit suits against States brought by their own citizens); *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (barring a citizen suit against a state official for the retroactive payment of benefits because “the award resemble[d] far more closely the monetary award against the State itself”—an award barred by the Eleventh Amendment—“than . . . the prospective injunctive relief awarded in *Ex*

ing the judicial power of the United States over “suits in law or equity” brought against the states by two disfavored plaintiffs,² the Eleventh Amendment has been read to exclude a much broader array of claims from federal cognizance.³ What is more, the principle of state immunity that has been said to animate the Eleventh Amendment now operates as a bar to the assertion of federal question claims in both state courts and federal administrative agencies.⁴ These developments, carefully analyzed in a stream of scholarship that shows no signs of abating,⁵ impose

parte Young”); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (clarifying that “[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States”); *Alden v. Maine*, 527 U.S. 706, 748–49, 754 (1999) (holding that Congress could not require that state courts be held open to adjudicate claims of state violations of the Fair Labor Standards Act); cf. *Ex parte Young*, 209 U.S. 123, 168 (1908) (allowing suit to enjoin government officials from engaging in unconstitutional conduct, even though suit against the State itself would be unavailable).

² The Eleventh Amendment specifically declares that the judicial power 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.*” U.S. Const. amend. XI (emphasis added).

³ Since *Hans*, the Court’s “profound shock” theory has been used to expand the sovereign immunity protections afforded states. See, e.g., *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 780 (1991) (extending the protection of state sovereign immunity to insulate states from suits brought by Indian tribes); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 331 (1934) (treating the state as immune from suit by a foreign state, despite the Eleventh Amendment’s failure to foreclose foreign-state plaintiff litigation). Later decisions restricted Congress’s ability to abrogate States’ sovereign immunity, except under grants of legislative authority that were ratified after the Eleventh Amendment. See *Seminole Tribe*, 517 U.S. at 47.

⁴ See *Alden*, 527 U.S. at 712–13 (holding that “the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts” because “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today”); see also *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002) (holding that state sovereign immunity precludes the Federal Maritime Commission—an administrative agency—from adjudicating a private party’s complaint).

⁵ In the 1980s, many academics embraced the diversity theory, a theory that would “narrow the Amendment’s express prohibition by permitting out-of-state citizens and aliens to sue states whenever they [could] invoke a category of Article III jurisdiction other than state-citizen diversity.” Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 *Harv. L. Rev.* 1817, 1830 (2010). The Rehnquist Court revived the debate, and recent scholarly treatments often lend a measure of support to the Court. See, e.g., Steven Menashi, *Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity*, 84 *Notre Dame L. Rev.* 1135, 1144–45 (2009) (arguing that a textualist approach, instead of narrowing the reach of the Eleventh Amendment, actually supports the Court’s adoption of a broad sovereign immunity doctrine); Caleb Nelson, *Sovereign Immun-*

well-known limits both on the power of the courts and on the power of Congress to bring states fully within certain federal regulatory programs.⁶ Thus, while Congress can subject states to suit in legislation adopted pursuant to constitutional powers enumerated after the Civil War, much regulation of the national economy occurs under earlier grants of Article I authority (over interstate commerce, say, or intellectual property) that do not support such “abrogation” of state immunity.⁷

At the same time, equally familiar rules of state accountability provide litigants with tools to test state compliance with federal norms. The

ity as a Doctrine of Personal Jurisdiction, 115 Harv. L. Rev. 1561, 1617 (2002) (explaining that, while the Eleventh Amendment gives states a “‘subject matter jurisdiction’ type of immunity” in suits brought by out-of-state citizens, in non-diversity suits states must rely on the traditional notions of sovereign immunity, which “implicate ideas associated with *personal* jurisdiction,” to avoid litigating claims brought by individuals); Michael B. Rappaport, Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court’s Tenth and Eleventh Amendment Decisions, 93 Nw. U. L. Rev. 819, 821 (1999) (viewing the term “state” in the Constitution as carrying with it elements of sovereign immunity that provide an implicit textual basis for limits on states’ suability).

⁶ Congress has power to regulate the states as states in legislation adopted pursuant to the Commerce Clause, see *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555–56 (1985), but does not have power to subject the states to suit in federal or state court to enforce those regulations. See, e.g., *Seminole Tribe*, 517 U.S. at 47 (holding that, because the Indian Commerce Clause does not grant Congress the power to abrogate the States’ sovereign immunity, the Indian Gaming Regulatory Act could not grant federal courts “jurisdiction over a State that does not consent to be sued”); *Alden*, 527 U.S. at 712 (holding that the “powers delegated to Congress under Article I of the United States Constitution d[id] not include the power to subject nonconsenting States to private suits for damages in state courts” under the Fair Labor Standards Act of 1938).

⁷ *Seminole Tribe*, 517 U.S. at 72–73 (finding that, because “the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is in an area . . . under the exclusive control of the Federal Government,” Article I legislative power could not “be used to circumvent the constitutional limitations placed upon federal jurisdiction”); see also *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332 (2012) (holding that “suits against States under [the Family and Medical Leave Act of 1993—an Act passed pursuant to Congress’s Article I Commerce Clause powers—] are barred by the States’ immunity as sovereigns in our federal system”); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars suits against a State by a state employee for money damages based on the “State’s failure to comply with the provisions of Title I of the Americans with Disabilities Act of 1990”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 636 (1999) (noting that because “Congress may not abrogate state sovereign immunity pursuant to its Article I powers[,] . . . the Patent Remedy Act[—which aimed to abrogate the States’ immunity—could] not be sustained”); cf. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (holding that “the Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . [we]re necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment”).

Ex parte Young proceeding enables individuals to bring suit against state officials, seeking injunctive and declaratory relief against ongoing violations of federal law.⁸ The right to seek prospective relief addresses a good many accountability issues, even under federal statutes that cannot authorize jurisdiction over money claims against the states. Indeed, many find that the right to seek such relief takes much of the sting out of the Eleventh Amendment.⁹ But not everyone agrees. After all, for litigants who have been subjected to one-off violations at the hands of state actors, a prospective remedy will not lie, and some form of damages must be sought.¹⁰ While one can sometimes frame such claims as suits for damages against state officials, the limits of Section 1983 and the doctrine of qualified immunity complicate the assertion of money claims.¹¹

⁸ See *Ex parte Young*, 209 U.S. 123, 168 (1908) (upholding the district court's authority to entertain an action to enjoin a state official from enforcing unconstitutional state regulations, despite claims that the suit in effect sought relief against the state). Scholars conventionally understand *Ex parte Young* to have decided two questions: that the Eleventh Amendment did not bar the suit and that federal law implied a right of action that would enable individuals to challenge state action. See, e.g., Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 927 (7th ed. 2015) [hereinafter H&W VII]. For a challenge to convention, see John Harrison, *Ex Parte Young*, 60 *Stan. L. Rev.* 989 (2008) (arguing that *Ex parte Young* does not recognize an implied right of action but rather relies on an established and limited corollary to the antisuit injunction).

⁹ See, e.g., Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 *Colum. L. Rev.* 213, 261 (2006) (arguing that the Eleventh Amendment cases "[p]reventing private plaintiffs from suing states for retrospective money damages pose[], at most, a minor barrier to national goals when damages actions against state officers and injunctive actions realistically against state governments are readily available to effectively accomplish all federal ends, and when the national political branches may widen the liability of state officers, or completely overcome sovereign immunity by joining a private lawsuit or using other federal authority such as the Spending or Treaty Clauses or foreign affairs power"); see also John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 92 (1999) (suggesting that "[i]n practice, both absolute immunity and absolute liability are less important than they first appear" because "[t]he apparently categorical bar against state liability for constitutional violations can be evaded by suing state officers").

¹⁰ See *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

¹¹ Jeffries, *supra* note 9, at 94, 108 (noting that, even though "damages are available from state officers (and indirectly from the state itself), if the plaintiff can defeat qualified immunity," "[t]he defense of qualified immunity [often] shields government officers, and indirectly shields governments themselves, from damages liability for a substantial range of unconstitutional conduct"); see also James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 *Colum. L. Rev.* 1601, 1603–06 (2011) (discussing the order of battle problem created by qualified immunity doctrine in constitutional tort litigation).

Recent developments offer little reason to think that the “arbitrary stops” in reasoning that now characterize the law of state immunity and accountability will yield to a more coherent set of principles.¹² Scholars, once generally supportive of a limited view of the Eleventh Amendment, have now divided into several camps: diversity theorists,¹³ literalists,¹⁴ and a growing collection of scholars who defend the Supreme Court’s sovereign immunity jurisprudence.¹⁵ Meanwhile, at the Court, the Justices have found little on which to agree: A five-Justice majority persistently adheres to the expansive view of Eleventh Amendment immunity articulated in *Hans v. Louisiana* and extended in *Seminole Tribe v. Flor-*

¹² John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 47 (1998) (describing immunity doctrine as the home of “arbitrary stops” in reasoning and noting the conflict between shifting conceptions of the Eleventh Amendment “as a form of sovereign immunity, as an exception to federal jurisdiction, and as a structural constraint on the powers of the national government”).

¹³ For a brief discussion of the diversity theory and the leading scholarship, see *infra* note 60 and accompanying text.

¹⁴ The “literalist” theory reads the Amendment “to preclude all suits against a state by citizens of a foreign state or aliens—irrespective of the asserted grounds for jurisdiction—while implicitly authorizing jurisdiction over suits” brought by parties, such as in-state plaintiffs, who invoke a federal basis for jurisdiction under Article III and whose alignment does not trigger the Amendment’s restrictive language. Menashi, *supra* note 5, at 1145; see also Lawrence C. Marshall, Fighting the Words of the Eleventh Amendment, 102 Harv. L. Rev. 1342, 1346 (1989) (noting that, in light of the Amendment’s “unusually precise” provisions, “if an out-of-state citizen brings the case under the federal question head of jurisdiction, the suit is barred,” while “an in-state citizen’s or a foreign government’s ability to sue a state in federal court is not affected by the amendment”); William P. Marshall, The Diversity Theory of the Eleventh Amendment: A Critical Evaluation, 102 Harv. L. Rev. 1372, 1396 (1989) (arguing that diversity theorists have not met their burden of “disproving the historical assumption that underlies the current jurisprudence: protecting state treasuries against any federal court intrusion *regardless of the basis of the underlying claim* was the core concern that the eleventh amendment was intended to reflect” (emphasis added)); Calvin R. Massey, State Sovereignty and the Tenth and Eleventh Amendments, 56 U. Chi. L. Rev. 61, 65–66 (1989) (proposing that “we take Eleventh Amendment text and the history of its enactment at face value” and treat it as a “jurisdictional trump card,” such that “[w]hatever the Article III source of jurisdiction—principally diversity or federal question—if the party alignment is within that prohibited by the Eleventh Amendment, the federal courts are deprived of jurisdiction”).

¹⁵ Central to its work, the Court has fashioned an “immunity theory” that “regards the text of the Eleventh Amendment as underinclusive” and focuses on restoring the background principle of state sovereign immunity that existed in the Constitution before *Chisholm v. Georgia*. Clark, *supra* note 5, at 1826; Menashi, *supra* note 5, at 1143. As Justice Antonin Scalia explained, the Court understands the provision “to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact.” *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

ida;¹⁶ the *Ex parte Young* fiction enjoys qualified support;¹⁷ and the doctrine of qualified immunity continues to undercut the power of federal courts to define constitutional norms in connection with suits to challenge positive government wrongs.¹⁸

In this Article, we propose a new synthesis of the law of state government immunity and accountability, one that seeks to articulate a middle ground between seemingly intractable opposing positions and to clarify and simplify existing practice. In constructing this new synthesis, we take as given the lesson of such pro-immunity decisions as *Alden v. Maine* and *Edelman v. Jordan*, both of which imposed limits on the extent to which federal law and federal courts can direct the payment of money from state treasuries.¹⁹ While we do not necessarily agree that those cases were rightly decided, their holdings establish one important theme in the nation's two-hundred-year debate over state accountability: Individuals with money claims against the state treasury should proceed

¹⁶ See *supra* note 7.

¹⁷ *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1638 (2011) (reaffirming the *Ex parte Young* action in the context of a suit brought by one agency of the state government to enforce federal obligations against a different agency of the same government); see also *Verizon Md. Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 647 (2002) (upholding the use of an *Ex parte Young* action to seek declaratory and injunctive relief from an allegedly preempted state regulation); cf. *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1384 (2015) (concluding that the *Ex parte Young* remedy was unavailable to enforce rights under a federal Medicaid statute that specified a funds cut-off remedy for state violations of federal standards).

¹⁸ *Pearson v. Callahan*, 555 U.S. 223, 236–44 (2009) (declining to decide if the claimed right should be recognized after concluding that the right was not clearly established, and allowing lower federal courts to follow a similar decisional approach in future cases). For criticisms, see John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 137 (arguing that, though merits-first adjudication is not necessary to vindicate all constitutional rights, it is the desired approach when “money damages provide the chief or substantial vehicle for vindicating the right in question”); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 87 S. Cal. L. Rev. (forthcoming 2016) (exploring the impact of *Pearson* on the development of constitutional law).

¹⁹ In *Alden v. Maine*, the Court held that States “retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation.” 527 U.S. 706, 754 (1999). In *Edelman v. Jordan*, the Court barred a citizen suit against a state official for the retrospective payment of benefits. See 415 U.S. 651, 665 (1974). The Court explained that “though a State is not named a party to the action, [a] suit may nonetheless be barred by the Eleventh Amendment.” *Id.* at 662–63. Thus, if the funds needed to satisfy an award “must inevitably come from the general revenues of the State,” as opposed to the government official himself, “the award resembles far more closely the monetary award against the state itself, than it does the prospective injunctive relief awarded in *Ex Parte Young*.” *Id.* at 665 (citation omitted).

in accordance with the forms and modes of state practice that govern payment of state obligations.²⁰ At the same time, we propose to follow the (pro-accountability) diversity theory of the Eleventh Amendment as to suits for injunctive and declaratory relief (and thus reject one feature of the Court's decision in *Seminole Tribe*).²¹ Such an approach would allow individuals to file federal lawsuits against state officials in their official capacity, even when Congress has created a right of action that runs against the states as states. As a practical matter, the *Ex parte Young* fiction already permits such litigation over a broad range of state-party lawsuits; our approach would clarify that all federal rights of action against state parties may proceed against the responsible state official.²²

We blend these elements by calling for the adoption of a “declaratory” theory of government accountability under which the federal courts would enjoy the power to declare the federal rights and liabilities of the parties in litigation between claimants and state officials. Following the issuance of a declaration, remedial consequences would follow under current law. For a federal court seeking to ensure official compliance with systemic remedies, injunctive relief and threat of contempt sanctions would remain. When the decree necessarily implies a past violation of federal law, the federal court would honor the primacy of the state in defining access to treasury payments. Where the state has adopted state law authorizing payments from the state treasury on the basis of a federal judgment, litigants could seek money judgments in federal courts.²³ In

²⁰ See *infra* Parts II & III.

²¹ For criticisms of *Seminole Tribe*, see Vicki C. Jackson, *Seminole Tribe*, The Eleventh Amendment, and the Potential Evisceration of *Ex Parte Young*, 72 N.Y.U. L. Rev. 495, 543–44 (1997) (warning that “*Seminole Tribe* not only limits the powers of federal courts to provide relief against states to persons injured by state action in violation of federal law, but it also casts doubt on the federal courts’ authority to vindicate federal law through equitable relief against state officers” and urging that it “be abandoned—as quickly as possible”); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 40 n.185, 41–42 (highlighting the Court’s refusal to recognize *Ex parte Young* and § 1983 as a vehicle for enforcing state law against Florida).

²² We would thus reject that portion of *Seminole Tribe* which held that the federal statute in question, though doubtless meant to foster litigation against the state, could not be enforced through an action against the responsible state official (in this case, the governor). See *Seminole Tribe*, 517 U.S. at 73.

²³ 745 Ill. Comp. Stat. Ann. 5/1.5 (West 2014) (waiving sovereign immunity for claims brought against the state in state circuit court or federal court for violations of the Age Discrimination in Employment Act of 1967, Fair Labor Standards Act of 1938 (“FLSA”), Fami-

the absence of such legislation, litigants would follow the forms of state law within a framework of federal obligations. States owe a federal common law obligation to give effect to federal decrees.²⁴ Such a federal duty obliges the states to recognize and enforce federal judgments and to provide any money remedy that state law would afford in the circumstances.

As an exercise in cooperative federalism, our approach draws on several elements in current law. Federal courts largely follow the diversity theory of the Eleventh Amendment in actions for injunctive and declaratory relief: Suits may proceed to enforce rights grounded in federal but not in state law.²⁵ Many states, for their part, have established mechanisms by which individuals may pursue money claims against the state in state court. What is more, many states take the understandable view that it makes sense to compensate individuals, as a matter of state law, in cases where the state has violated their federal rights.²⁶ We propose to

ly and Medical Leave Act, Americans with Disabilities Act of 1990, and Title VII of the Civil Rights Act of 1964).

²⁴ *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001) (holding that a Maryland state court was obligated to give effect to a prior federal court decision in California).

²⁵ Compare *Edelman*, 415 U.S. at 664, 677–78 (permitting a suit for prospective declaratory or injunctive relief in a case dealing with a federal law cause of action), with *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106, 121 (1984) (finding that “a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment,” even if the only relief sought is prospective, injunctive relief).

²⁶ For example, the State of Maine adopted legislation to appropriate funds to pay a backpay award to state employees as a matter of *state law* after the Supreme Court found in *Alden v. Maine* that the State owed no such duty as a matter of *federal law*. Other states, including Montana and Wisconsin, have similarly taken steps to authorize collection of FLSA payments due to state employees. See *infra* note 304 and accompanying text (discussing how Montana and Wisconsin state laws have incorporated FLSA protections for state employees); see also Melinda Herrera, *Fair Labor Standards Act and Sovereign Immunity: Unlocking the Courthouse Door for Texas State Employees*, 32 *St. Mary's L.J.* 269, 302 & n.197 (2001) (detailing Wisconsin's incorporation of the FLSA into state law in 1971); cf. *id.* at 304 (detailing Texas's “Payday Law,” a law that incorporated some FLSA provisions into state law to protect non-state—but not state—employees). The State of North Carolina, after *Alden*, went even farther, enacting the State Employee Federal Remedy Restoration Act, an Act that waived sovereign immunity “for the limited purpose of allowing State employees, except for those in exempt policy-making positions . . . , to maintain lawsuits in State and federal courts and obtain and satisfy judgments against the State” under numerous federal statutes, including the FLSA. N.C. Gen. Stat. § 143-300.35 (2015). And New York, more generally, waived all state sovereign immunity from liability and consented to have liability “determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.” N.Y. Ct. Cl. Act § 8 (Consol. 2004). Pursuant to this waiver, claimants may

develop and defend a framework within which such claims should proceed, thereby providing a mechanism by which litigants can pursue appropriate relief. While we agree with Justice Kennedy that a state wishing to facilitate the payment of just federal claims can either “waive its immunity or create a parallel state law cause of action,”²⁷ we focus here on the use of existing modes of state redress.

Our Article will unfold in three parts. Part I will review the familiar incongruities of existing practice, criticize scholarly attempts to defend the status quo, and thus set the stage for embarking on a new approach. Part II will set out the elements of our declaratory theory; we will begin with a brief institutional and historical overview of the use of declaratory judgments in the context of litigation with the government and then describe how our declaratory theory lines up with elements of current law. Part III will explore the implementation of the declaratory theory, paying particular attention to the manner in which a federal declaration of rights can be translated into a state proceeding for payment of money. We do not embrace an originalist methodology, but we do find a surprisingly rich array of historical support for understanding the judicial role in declaratory terms.²⁸

I. ON THE NEED FOR A NEW APPROACH

A. *Problems with the Court’s Jurisprudence*

We begin with *Alden v. Maine*,²⁹ which provides an excellent introduction to the many perplexing features of the Court’s immunity and accountability jurisprudence and which may, oddly enough, suggest a way

bring claims under the FLSA, provided the claimant complies with the conditions set forth in N.Y. Ct. Cl. Act § 8. *Alston v. New York*, 762 N.E.2d 923, 924 (N.Y. 2001).

²⁷ *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327, 1332, 1337–38 (2012) (plurality opinion).

²⁸ Scholars working outside the originalist methodology often make textual and historical arguments. For a useful catalog of non-originalist historical arguments, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *Fordham L. Rev.* 641, 644–45, 647–49, 652–53, 660 (2013) (describing the range of historical arguments, in addition to original meaning originalism, that can inform interpretive decisions in the construction zone); Richard H. Fallon, Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 *Notre Dame L. Rev.* 1753, 1754–56, 1787, 1833 (2015) (explaining that “the challenge for the courts is to figure out how most sensibly to resolve particular disputes in light of history-based considerations that include prior practice, settled expectations, motivating congressional purposes, and other enactment history”).

²⁹ 527 U.S. 706 (1999).

forward. The plaintiffs in *Alden* brought suit against the State of Maine in federal court seeking both damages and injunctive relief.³⁰ Maine came into compliance with the suggested federal standard and sought dismissal of the suit for damages on the strength of the then-recent decision in *Seminole Tribe v. Florida*.³¹ The *Seminole Tribe* Court had interpreted the Eleventh Amendment as a bar to the exercise of federal jurisdiction over claims against the states under federal statutes adopted pursuant to Congress's commerce power. The state employees in *Alden* were suing to enforce federal wage and hour laws that Congress had imposed on the private commercial sector in 1938 and extended to the states in 1966, and again in 1974.³² The federal courts agreed that *Seminole Tribe* required dismissal of the suit for damages.³³

Undeterred, the employees filed a new suit in the state court of Maine, arguing that they were entitled to damages for breach of federal law, that the state courts were bound to enforce the federal liability, and that the Eleventh Amendment had no application to litigation in state court. On the last point, they were correct: The Amendment curtails the "Judicial power of the United States" in specified matters and says nothing at all about the viability of suits in state court.³⁴ Moreover, the Court had previously held that the Supremacy Clause requires states to make their courts available on an even-handed basis for the enforcement of federal obligations.³⁵ Perhaps, then, plaintiffs frustrated by the bar to state accountability established in *Seminole Tribe* could secure relief by refile in state court, as the Arkansas Supreme Court held in the contemporaneous case of *Jacoby v. Arkansas Department of Education*.³⁶

Yet the Maine Supreme Court's contrary, pro-immunity decision was upheld by the Court in *Alden*.³⁷ In what one might charitably call a labored majority opinion, Justice Kennedy concluded that the employees' action in state court was barred by the presupposition of state sovereign

³⁰ Id. at 711–12.

³¹ Id. at 712, 759.

³² See Fair Labor Standards Act of 1938, 29 U.S.C. §§ 203(x), 216(b) (2012). On the extension of the Fair Labor Standards Act to state employees, see Herrera, *supra* note 26, at 299–307 (2001).

³³ See *Mills v. Maine*, 118 F.3d 37, 48, 55 (1st Cir. 1997).

³⁴ U.S. Const. amend XI.

³⁵ See *Testa v. Katt*, 330 U.S. 386, 392–94 (1947) (concluding that the Supremacy Clause forbids states from refusing on grounds of local public policy to entertain federal claims when they would hear analogous claims based on state law).

³⁶ 962 S.W.2d 773, 778 (Ark. 1998), vacated, 527 U.S. 1031 (1999).

³⁷ 527 U.S. at 733, 760.

immunity from suit that was embedded in the structure of the Constitution. Thus, the fact that the Eleventh Amendment's text said nothing about federal question claims was deemed irrelevant; other constitutional principles barred Congress from creating a commerce-based money liability running against the states as states and from subjecting the states to federal law enforcement suits in state courts. The decision was apparently animated by a desire to prevent the state-court option from eroding the holding of *Seminole Tribe*, but it may have served to undermine the logic of *Seminole Tribe* itself. After all, as the dissent observed, if Congress lacks power to fashion an individually enforceable money liability, per *Alden*, there was little reason for the Court to depart from the text of the Eleventh Amendment to fashion a judge-made rule of immunity from federal jurisdiction in *Seminole Tribe*.³⁸

Alden thus illustrates many of the curious elements of the Court's jurisprudence:

- The Eleventh Amendment by its terms applies only to suits brought against the states by aliens and citizens of other states.³⁹ The employees in *Alden* were citizens of the State of Maine and thus fell outside the scope of the Amendment. But the Court has long held that the principle of sovereign immunity underlying the text of the Eleventh Amendment also blocks suits by in-state plaintiffs who invoke federal question jurisdiction. That is the holding of *Hans v. Louisiana*, as reaffirmed in *Seminole Tribe*.⁴⁰
- The Eleventh Amendment includes a number of further limitations: It applies only to suits in law and equity and restricts only the "Judicial

³⁸ See *id.* at 760–61 (Souter, J., dissenting).

³⁹ See 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.").

⁴⁰ See *Seminole Tribe*, 517 U.S. at 54 (noting that "[a]lthough the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, 'we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.'" (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991))). This is a presupposition first observed in *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). The presupposition underscored in *Hans*, and since relied on to prohibit suits by in-state plaintiffs invoking federal question jurisdiction, is that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*." *Hans*, 134 U.S. at 12–13 (quoting *The Federalist* No. 81 (Alexander Hamilton)) (internal quotation marks omitted).

power of the United States.”⁴¹ Yet just as the principle of immunity (rather than the text of the Eleventh Amendment) informed the *Alden* Court’s decision to foreclose state court suits, so too has the Court ruled that the immunity principle blocks other suits not encompassed within its terms, such as proceedings before federal administrative agencies,⁴² suits brought in admiralty jurisdiction,⁴³ and suits brought by foreign states.⁴⁴

- While the principle of sovereign immunity blocks individual suits based on federal rights of action, it does not prevent plaintiffs from seeking prospective relief against ongoing or continuing violations of federal law. Under the *Ex parte Young* exception, suits for prospective relief may proceed against officers of a state in their official capacity.⁴⁵ Lower federal courts have the power to adjudicate suits for injunctive relief; the *Hans-Seminole Tribe* immunity doctrine protects the states only from being named as parties and from being subject to retrospective claims for money.⁴⁶
- While the *Ex parte Young* fiction⁴⁷ eliminates the Eleventh Amendment barrier to injunctive relief, it does not permit individuals to secure the functional equivalent of damages through a decree aimed at state officials. In *Edelman v. Jordan*, the Court found that the power to enjoin ended with the issuance of relief that could be fairly character-

⁴¹ See supra note 39 and accompanying text.

⁴² See *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

⁴³ See *In re New York*, 256 U.S. 490 (1921).

⁴⁴ See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

⁴⁵ *Ex parte Young*, 209 U.S. 123, 155–56, 159–60 (1908) (finding that there was “ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action”).

⁴⁶ See H&W VII, supra note 8, at 929 (describing *Edelman*’s concern with “retrospective relief”).

⁴⁷ As aptly explained by Thomas Rowe:

To ensure the enforceability of federal law, suits for prospective injunctive or declaratory relief against state officials . . . are generally not barred by the Eleventh Amendment, which requires the fictive contortion that the official’s challenged action is *not* action by the “state” for purposes of the Eleventh Amendment . . . but *is* state action for purposes of applicability of the Fourteenth Amendment and other federal-law restraints on states’ policies and their officials’ conduct.

Thomas D. Rowe, Jr., *Exhuming the “Diversity Explanation” of the Eleventh Amendment*, 65 Ala. L. Rev. 457, 463 (2013) (citations omitted).

ized as prospective.⁴⁸ As a result, the federal court in *Edelman* was not permitted, and the state court in *Alden* was not obliged, as a matter of federal law, to offer complete relief by awarding damages for past violations.⁴⁹

- While Congress has power to abrogate the states' immunity from suit by adopting legislation that expressly subjects the states to suit for certain violations of federal law, the abrogation power applies only to legislation adopted to enforce Amendments ratified after the Civil War.⁵⁰ In *Alden*, the legislation under review had been adopted pursuant to Congress's Article I power to regulate commerce among the several states, a source of power that will not support abrogation.⁵¹
- The Supreme Court can exercise appellate jurisdiction over claims brought against the states in state court, despite the fact that such suits require the Court to exercise the judicial power of the United States in a suit "commenced or prosecuted" against one of the states.⁵² In re-

⁴⁸ *Edelman*, 415 U.S. at 665, 678 (noting that because "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois . . . the award resembles far more closely the monetary award against the State itself, [an award barred in] *Ford Motor Co. v. Department of Treasury*, . . . than it does the [permissible] prospective injunctive relief awarded in *Ex parte Young*," before finding that the Eleventh Amendment barred the "portion of the District Court decree which ordered retroactive payment of benefits").

⁴⁹ *Id.* at 678; *Alden*, 527 U.S. at 712 (holding that the "powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts" and that "the State of Maine ha[d] not consented to suits for overtime pay and liquidated damages under the [Fair Labor Standards Act]").

⁵⁰ *Seminole Tribe*, 517 U.S. at 65–66 (distinguishing *Fitzpatrick* because "*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, viz., that the Fourteenth Amendment, adopted *well after* the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment" (emphasis added)); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455–56 (1976) (finding that "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . [we]re necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

⁵¹ 527 U.S. at 712, 731–33, 748.

⁵² See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 26–31, 26 n.7 (1990) (quoting U.S. Const. amend. XI) (internal quotation marks omitted); see also Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 *Yale L.J.* 1, 15, 74, 99–100 (1988) (arguing that the Eleventh Amendment had been interpreted as a forum-allocation principle, barring certain suits in the lower federal courts but leaving the Supreme Court's appellate jurisdiction open to correct errors of federal law in state court proceedings).

viewing the Maine Supreme Court, the *Alden* Court used its appellate jurisdiction and did not question its own power to hear a proceeding against the state.⁵³

Similarly incongruous stops and starts have come to characterize the Court's jurisprudence. The Court generally treats the Eleventh Amendment as a restriction on federal subject matter jurisdiction, in keeping with its terms.⁵⁴ Ordinarily, when the Constitution or laws limit the subject matter jurisdiction of federal courts, the parties cannot sidestep those limits by consenting to adjudicate their claims in federal court.⁵⁵ Yet the Court has allowed jurisdiction by consent in certain Eleventh Amendment cases when the state affirmatively invokes the jurisdiction of the federal courts.⁵⁶ In administering its abrogation rules, moreover, the Court's decisions display some inconstancy. As noted above, the Court has held that Congress has authority to abrogate only through legislation adopted pursuant to grants of constitutional authority that were conferred after the Eleventh Amendment took effect in the 1790s.⁵⁷ Odd enough as a mode of constitutional interpretation,⁵⁸ the Court's rule

⁵³ The focus of the *Alden* Court's decision was on the duty of the state court to entertain certain federal claims; by freeing the states from any such duty, the Court did not use its appellate jurisdiction to fashion coercive relief against the state as it had done in other cases. Cf. *McKesson*, 496 U.S. at 22, 51–52 (invalidating state law on due process grounds and clearing the way to the recovery of damages in state court).

⁵⁴ The Amendment operates as a limit on the “judicial power of the United States” and has been interpreted in other contexts as jurisdictional. See *Edelman*, 415 U.S. at 677–78 (allowing the state to raise its “jurisdictional” Eleventh Amendment defense for the first time on appeal).

⁵⁵ See, e.g., *Rowe*, supra note 47, at 464 (noting the “strong rule that party consent cannot override limits on federal courts’ subject-matter jurisdiction”); see also Fed. R. Civ. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action.” (emphasis added)).

⁵⁶ See *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 616, 624 (2002) (holding that the State's removal of the action to federal court waived its sovereign immunity from suit).

⁵⁷ See supra note 50 and accompanying text.

⁵⁸ See Meltzer, supra note 21, at 21–24 (criticizing this temporal approach to abrogation power); see also Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 *Notre Dame L. Rev.* 1011, 1062–63 (2000) (“[T]he entire structure of abrogation doctrine—permitting congressional abrogation under the Fourteenth and Fifteenth Amendments but not under Article I—makes little sense.”). Meltzer explains:

The temporal argument—that the Fourteenth Amendment postdates the Eleventh—fails on its own terms: on the one hand . . . proponents of sovereign immunity view the principle underlying it as predating the Commerce Clause; on the other hand, the Reconstruction Amendments cannot have had the purpose of overruling the sovereign immunity recognized by the Eleventh Amendment, as that recognition was given only

would seemingly foreclose abrogation pursuant to all original grants of constitutional power in Article I. Yet the Court has permitted Congress to authorize suit against states in bankruptcy proceedings, using a dodge to work around abrogation limits that will not bear close scrutiny.⁵⁹

B. The Failure of Scholarly Consensus

Scholars have so far failed to reach a consensus about how to read the Eleventh Amendment and to strike the balance between immunity and accountability. The terms of scholarly debate have long been shaped by the so-called “diversity” explanation, which holds that the Eleventh Amendment blocks only suits based on state or common law theories of liability (trespass, *assumpsit*) and predicated jurisdictionally on the existence of diversity between the plaintiff and the defendant state.⁶⁰ A va-

in subsequent decisions. Moreover, there is a deeper objection to the temporal argument: our practice when construing a positive enactment that has been amended—whether a Constitution or a statute—is not ordinarily to treat the later-added provision as trumping any predecessor. . . . Rather, we seek to make sense of the amended enactment as a whole. Suppose that Congress, fearing jury nullification, enacted a law providing that all federal court suits seeking damages for racial discrimination by state or local officials should be tried to a judge rather than a jury. If a defendant objected that the law denied the right to jury trial guaranteed by the Seventh Amendment, the response that the Fourteenth Amendment postdated the Seventh surely would not be adequate.

Meltzer, *supra* note 21, at 21–22 (citations omitted).

⁵⁹ See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 359–63 (2006) (concluding that proceedings in bankruptcy do not implicate the sovereign immunity of the states and do not require the exercise of abrogation authority). For a critique, see Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 *Am. Bankr. Inst. L. Rev.* 13 (2007).

⁶⁰ See, e.g., Jeffries, *supra* note 12, at 48 (“The *dominant academic position* asserts that the Eleventh Amendment limits only diversity jurisdiction, that it has no application in federal question cases, and that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track these past 100 years.” (emphasis added)); see also William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 *U. Chi. L. Rev.* 1261, 1262, 1264 (1989) (same); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 *Stan. L. Rev.* 1033, 1034 (1983) (suggesting that, based on a historical account, the Eleventh Amendment “merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction,” rather than completely prohibiting federal court jurisdiction); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 *Colum. L. Rev.* 1889, 2004 (1983) (“It is time for the Supreme Court to acknowledge that the eleventh amendment applies only to cases in which the jurisdiction of the federal court depends solely upon party status.”); Jackson, *supra* note 52, at 4 (arguing that the Eleventh

riety of evidence supports the diversity account: The two disfavored plaintiffs identified in the Eleventh Amendment (out-of-state citizens and aliens) were included in the diversity jurisdiction conferred by Article III; these sorts of plaintiffs had in fact brought suit on the Supreme Court's original docket shortly after the federal courts were created in 1789;⁶¹ and the Court had upheld its power to entertain such diverse-party claims in *Chisholm v. Georgia*,⁶² thus triggering the Eleventh Amendment's proposal and ratification.⁶³ Adoption of the diversity account would narrow the force of the Eleventh Amendment considerably, rendering it inapplicable to claims based on federal law, claims brought in admiralty jurisdiction, and claims brought by plaintiffs (like foreign states) that were included within Article III's grant of party-based subject matter jurisdiction but excluded from the terms of the Amendment.

Yet the diversity account has failed to persuade all observers. Literal theorists point out that the language of the Amendment does not in terms curtail the exercise of jurisdiction over the diverse-party "controversies" identified in Article III, but rather blocks "any suit in law or equity commenced or prosecuted" by the two disfavored plaintiffs.⁶⁴ For literalists, then, the Amendment bars all legal and equitable claims brought by such plaintiffs, without regard to the jurisdictional basis for the claims. On this view, claims brought by out-of-staters and aliens would be barred, even if they invoked jurisdiction over cases arising under the Constitution, laws, and treaties of the United States. The posited foreclosure of federal question jurisdiction over suits brought by disfavored plaintiffs lies at the center of the diversity-literal divide. On the other

Amendment neither supplies nor implies "a constitutional immunity for states as to claims arising under federal law").

⁶¹ See, e.g., *Oswald v. New York*, 2 U.S. (2 Dall.) 401 (1792) (out-of-state citizen suit against New York); *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791) (Dutch citizen suit against Maryland). Though little detail exists in the court reporter regarding *Vanstophorst* and *Oswald*, good accounts, along with collections of pleadings, occasional commentary, and legislative reactions, appear in 5 *The Documentary History of the Supreme Court of the United States, 1789-1800: Suits Against States* 7-126 (Maeva Marcus ed., 1994) [hereinafter 5 D.H.S.C.] (cataloging the cases brought on the Court's original docket in the 1790s).

⁶² 2 U.S. (2 Dall.) 419, 450-51 (1793) (Blair, J., concurring); *id.* at 465-66 (Wilson, J., concurring); *id.* at 467 (Cushing, J., concurring); *id.* at 473 (Jay, C.J., concurring).

⁶³ James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 *Cornell L. Rev.* 1269, 1326-28, 1333-39 (1998) [hereinafter Pfander, *History and State Suability*] (describing the decision in *Chisholm*, the decision to propose an amendment, and the eventual ratification of the Eleventh Amendment).

⁶⁴ See Massey, *supra* note 14, at 61 (quoting U.S. Const. amend. XI) (emphasis added).

hand, both accounts would view the Amendment as inapplicable to suits brought by an in-state plaintiff against her own state. (Given the absence of “diversity” jurisdiction, in-state plaintiffs must necessarily invoke either federal question or admiralty jurisdiction.) Both diversity and literal theorists agree, in short, that the Court erred in *Hans* and *Seminole Tribe* when it relied on the Eleventh Amendment to block federal question claims brought by in-state plaintiffs.⁶⁵

While we continue to believe that the diversity account best explains the scope of the Eleventh Amendment,⁶⁶ much recent Eleventh Amendment scholarship either defends aspects of the Court’s jurisprudence or puts forward a historical account that departs from the diversity and literal explanations.⁶⁷ All of this work proceeds on the basis that suits against the states were unthinkable given the deep and abiding commitment of the Founding generation to the principle of state sovereign immunity. Often more nuanced than the profound shock theory put forward in *Hans*, this new work justifies a rule of immunity through arguments based on various theories of expansive state sovereignty and limited federal power. While much of this work engages the historical record, revisionist scholars have so far failed to take full account of the Founding-era debates over state suability or to offer a workable account of state immunity and accountability. Consensus remains elusive.

Consider the work of one revisionist scholar, Bradford Clark, who argues that the Framers of the Constitution did not anticipate litigation brought by individuals to enforce a state’s federal obligations.⁶⁸ On

⁶⁵ For a summary of the essentially friendly debate between diversity theorists and literalists, see Fletcher, *The Diversity Explanation of the Eleventh Amendment*, *supra* note 60, at 1276–89; see also Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443, 496 (1989) (describing the debate between the literalist Larry Marshall and diversity theorists as a “friendly” one).

⁶⁶ See Rowe, *supra* note 47, at 459 (arguing that the diversity explanation’s “much greater cleanness in articulation and application than leading alternatives makes a powerful case for its being the most preferable approach, in that it sticks as closely as is sensible to the text while providing a workable and coherent interpretation”).

⁶⁷ See, e.g., Clark, *supra* note 5; Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 Wm. & Mary L. Rev. 1577 (2009); Rappaport, *supra* note 5.

⁶⁸ Clark, *supra* note 5, at 1839. As Clark explained, when the Founders “decided to abandon the Articles and adopt a constitution . . . enforced solely against individuals,” they “did not understand federal question jurisdiction to encompass coercive suits by individuals against states.” *Id.*; see also *id.* at 1824 (reasoning that, during the ratification debates, no one suggested that individuals could sue states under federal question jurisdiction because “the Founders assumed that the Constitution neither imposed—nor empowered Congress to

Clark's view, the Framers subscribed to an anti-commandeering principle, under which federal law duties imposed on the states were to be enforced against officials as individuals rather than against the states.⁶⁹ Just as Congress lacks the power to commandeer state legislatures (under *New York v. United States*)⁷⁰ and state executive branch officials (under *Printz v. United States*),⁷¹ Congress cannot regulate the states as states and impose collective duties on them.⁷² Clark believes that the issuance of federal judgments running against state treasuries was thought to present a risk of violent civil confrontation. Rather than enforcement aimed at the states, Clark argues that the Framers expected individuals to enforce federal law obligations through suits aimed at state officials.⁷³ In effect, then, Clark contends that the Court's current dispensation—foreclosing entity suits under the original Constitution but permitting

impose—obligations on states that would require coercive enforcement”). For a brief discussion of how the Framers' silence during the ratification debates on the potential of individuals suing states under federal question jurisdiction suggests that they did not contemplate such suits, see *id.* at 1863.

⁶⁹ *Id.* at 1838–39 (noting that during drafting and ratification of the Constitution, “prominent Founders consistently maintained that the nature of the Union was such that federal commands could be enforced only against individuals, but not against states,” before ultimately substituting “individuals for states as the objects of congressional power”).

⁷⁰ *New York v. United States*, 505 U.S. 144, 161 (1992) (noting that “Congress may not simply commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program” (alteration in original) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981))).

⁷¹ *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program”).

⁷² Clark, *supra* note 5, at 1838 (noting the “Founders' deeply and widely held understanding that the Constitution did not authorize Congress either to enact legislation for states or to coerce state compliance with federal commands”).

⁷³ For Clark, the presumed availability of officer suits obviated the need for suits against the state. See *id.* at 1904–05. But that was not the view of those members of the Founding generation who supported state suability. Edmund Randolph considered Clark's argument more than two centuries ago in his argument to the Court in *Chisholm*, and rejected it out of hand:

What is to be done, if in consequence of a bill of attainder, or an *ex post facto* law, the estate of a citizen shall be confiscated, and deposited in the treasury of a State? What, if a State should adulterate or coin money below the Congressional standard, emit bills of credit, or enact unconstitutional tenders, for the purpose of extinguishing its own debts? What if a State should impair her own contracts? These evils, and others which might be enumerated like them, cannot be corrected without a suit against the State.

Chisholm, 2 U.S. (2 Dall.) at 422 (argument of Edmund Randolph as counsel to *Chisholm*).

them under the Fourteenth Amendment and relying instead on officer suits—was pretty close to what the Framers had in mind. Clark sees nothing absurd or incongruous about the Amendment’s failure to foreclose the assertion of claims brought on the basis of federal question jurisdiction; no one at the time could have contemplated such litigation.⁷⁴

While it extends the Court’s anti-commandeering jurisprudence, Clark’s argument may not fully come to grips with evidence that the Framers did anticipate the assertion of judicial power over individual suits against the states (rather than only suits directed at state officers).⁷⁵ Article III authorizes the assertion of jurisdiction over suits, by and against the states, on the original docket of the Supreme Court (the nation’s only required federal forum).⁷⁶ After extending the judicial power to all “cases” arising under the Constitution, laws, and treaties of the United States and to certain “controversies” involving the states as parties, Article III gives the Court original jurisdiction of all cases “in which a State shall be party.”⁷⁷ While this language gives the Court original jurisdiction of disputes such as *Chisholm*, brought on the basis of the citizenship of the parties, it also extends to suits brought against the states on the basis of federal law. Indeed, participants in the ratification debates specifically called attention to the prospect of federal law claims;⁷⁸ Edmund Randolph’s authoritative early account of the meaning

⁷⁴ See *supra* notes 68, 73; see also Clark, *supra* note 5, at 1918 (explaining that “the Founders do not appear to have expected federal question jurisdiction to generate any suits by any citizens against any states”); *id.* at 1824 (noting that “not even the most alarmist Anti-federalists suggested during ratification that in-state citizens could sue states using federal question jurisdiction” since “the Founders assumed that individuals could never bring *any* federal question suits against states”).

⁷⁵ James Madison, among others, specifically described the Supreme Court’s original jurisdiction in state party matters as one example in which the Constitution proceeds on a federal rather than national basis. See *The Federalist* No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) (noting that although the Constitution generally operates on individuals rather than on the states in their collective capacities, “[i]n several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only”).

⁷⁶ U.S. Const. art. III, § 2, cl. 1.

⁷⁷ U.S. Const. art. III.

⁷⁸ Charles Pinckney, for instance, a delegate from South Carolina, argued on separation of powers grounds, “for a federal court with power to hear officer suits, litigation over federal laws, and suits by and against the United States as a party.” James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 *Nw. U. L. Rev.* 899, 948–49 (1997) [hereinafter Pfander, *Sovereign Immunity and the Right to Petition*]. Edmund Randolph “took the position in the Virginia ratification debates that the Court’s grant of original jurisdiction plainly

of Article III confirmed that states were suable to remedy violations of federal law;⁷⁹ later, as counsel to Chisholm, Randolph emphasized such suits in explaining Article III's role in enforcing the Constitution;⁸⁰

authorized suits against the states," and in his 1790 report to Congress on the Judiciary Act of 1789 left "no doubt that [he] understood the Original Jurisdiction Clause to trump the states' sovereign immunity under the law of nations and under the common law in all federal question 'cases.'" James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 *Calif. L. Rev.* 555, 637 (1994) [hereinafter Pfander, *Rethinking the Supreme Court's Original Jurisdiction*]. For a summary of the Virginia debate on the subject of the enforceability of federal restrictions in suits brought against the states on the Court's original docket, see *id.* at 633–36.

⁷⁹ See Pfander, *Rethinking the Supreme Court's Original Jurisdiction*, *supra* note 78, at 633–40 (quoting the December 1790 Report of Edmund Randolph on the Judiciary Act of 1789) (providing a statutory framework that was to permit the assertion of federal question claims against the states on the Supreme Court's original docket and that was to deny the lower federal courts power to entertain such claims).

⁸⁰ *Chisholm*, 2 U.S. (2 Dall.) at 423 (argument of Randolph) ("The limitations, which the Federal Government is admitted to impose upon [the States'] powers, are diminutions of sovereignty, at least equal to the making of them defendants."). Randolph explained:

With the advantage of the letter on our side, let us now advert to the spirit of the Constitution, or rather its genuine and necessary interpretation. . . . I resort . . . to the body of it; which sh[ow]s that there may be various actions of States which are to be annulled. . . . [Given the state actions] expressly prohibited by the Constitution[, it] is announced to the world the probability . . . that States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty.

Are States then to enjoy the high privilege of acting thus eminently wrong, without controul; or does a remedy exist? . . . The common law has established a principle, that no prohibitory act shall be without its vindicatory quality; or, in other words, that the infraction of a prohibitory law, although an express penalty be omitted, is still punishable. Government itself would be useless, if a pleasure to obey or transgress with impunity should be substituted in the place of a sanction to its laws. This was a just cause of complaint against the deceased confederation. In our solicitude for a remedy, we meet with no difficulty, where the conduct of a State can be animadverted on through the medium of an individual. For instance, without suing a State, a person arrested may be liberated by habeas corpus; a person attainted and a convict under an *ex post facto* law, may be saved; those, who offend against improper treaties, may be protected, or who execute them, may be punished; the actors under letters of marque and reprisal may be mulcted; coinage, bills of credit, unwarranted tenders, and the impairing of contracts between individuals, may be annihilated. But this redress goes only half way; as some of the preceding unconstitutional actions must pass without censure, unless States can be made defendants It is not denied, that one State may be sued by another; and the reason would seem to be the same, why an individual, who is aggrieved, should sue the State aggrieving. A distinction between the cases is supportable only on a supposed comparative inferiority of the Plaintiff. But, the Framers of the Constitution could never have thought thus. . . . Unfledged as America was in the vices of old Governments, she had some incident to her own new situation: individuals had been victims to the oppression of States.

Members of the Court in *Chisholm* relied on the possibility of federal question claims in defending the propriety of state suability;⁸¹ and the participants in the debate over the Eleventh Amendment expressly argued for the preservation of federal court power to entertain federal claims against the states.⁸² Given this evidence, it is difficult to con-

Id. at 421–23 (emphasis omitted); see also Massey, *supra* note 14, at 100 (“In urging the five justices to find for *Chisholm*, Randolph devoted the bulk of his argument to defending the proposition that the Supreme Court had jurisdiction. He contended that constitutional authority was granted both by the literal text of Article III and by ‘the *spirit* of the constitution, or rather its *genuine and necessary interpretation*.’ Because the Constitution imposes a number of restrictions upon the states, Randolph argued, it was surely contemplated that states be legally accountable for violation of these restrictions.”).

⁸¹ John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 *Yale L.J.* 1663, 1677 (2004). Manning explained:

[S]everal Justices reasoned that even if sovereign immunity survived a republican form of government, the states necessarily ceded a measure of their sovereignty to the nation when they assented to the Constitution. Because the Constitution conferred upon Congress certain powers affecting the states and also imposed various express restrictions on state power, it followed that the judiciary should possess authority sufficient to vindicate such federal laws.

Id.

⁸² For instance, a pamphlet issued early in the debate under the name of “Hortensius”—and thought to have been written by Timothy Ford, a Federalist from South Carolina—argued in favor of state suability in federal question cases. *Hortensius, An Enquiry into the Constitutional Authority of the Supreme Federal Court, over the Several States, in Their Political Capacity* (Charleston, W.P. Young 1792), *reprinted in* 5 *D.H.S.C.*, *supra* note 61, at 36, 36. As explained in an earlier article:

[T]he pamphlet noted the federal constitutional prohibitions on the states in Article I, Section 10, and then argued that the Framers must have contemplated some effective mode of enforcement. Turning to the words of Article III, “Hortensius” identified that mode in the provision that extends the judicial power to all cases arising under the Constitution, laws, and treaties of the United States, as well as in that which confers original jurisdiction on the Supreme Court in State-party cases. Specifically, he argued that states were suable to enforce both constitutional and statutory restrictions.

Pfander, *History and State Suability*, *supra* note 63, at 1332.

John Davis, likewise, speaking before the Massachusetts House of Representatives, clearly believed that, upon ratification of the Constitution, the states had surrendered some of their sovereignty. He wondered, “Had any sovereign state in history . . . ‘bound itself not to coin money, emit bills of credit or lay duties on imports or exports?’” Id. at 1331 (quoting *Account of John Davis’s Speech in the Massachusetts House of Representatives* (Sept. 23, 1793), *reprinted in* 5 *D.H.S.C.*, *supra* note 61, at 431). Though Davis later argued for the curtailment of state suability, “Davis’s speech makes it clear that he regarded the existence of federal restrictions as important to an original understanding of the matter.” Id. (citing 5 *D.H.S.C.*, *supra* note 61, at 433). For an overview of the debate over state suability in federal question cases after *Chisholm*, see id. at 1329–33.

clude, as Clark did, that the Framers did not expect “federal question jurisdiction to generate any suits by any citizens against any states.”⁸³

If Clark’s account fails to consider important evidence of state suability, how then can one explain the failure of the Eleventh Amendment to address federal question claims, a textual wrinkle that lies at the heart of his account? The best answer in our view lies in the nature of the states’ obligations under the (then-new) Federal Constitution. During the ratification debates, the Framers took the view that, while the Constitution would make the states fiscally responsible on a prospective basis, it would have no impact on the states’ existing paper money and debt obligations, all of which had been issued and undertaken *before* the Constitution was ratified in 1788.⁸⁴ On this view, the vice of *Chisholm* consisted of its use of general common law principles to threaten states with a new (and improperly retrospective) rule of state liability that was either not in contemplation when the states incurred their debts or openly avowed when they voted to ratify the Constitution.⁸⁵ By foreclosing di-

⁸³ Clark, *supra* note 5, at 1918.

⁸⁴ As noted in a previous paper, the majority of Federalists “denied that the Constitution would affect existing currency,” arguing instead that the provisions of the Constitution—such as Article I, § 10—“were to have no retrospective effect.” Pfander, *History and State Suability*, *supra* note 63, at 1308; see also *id.* at 1313 (suggesting that “the debate in North Carolina,” one state that had recently issued paper currency, “clearly reveal[ed] the Federalist attitude toward the prospective character of the federal restrictions on state action in Article I, Section 10”). Mr. Archibald MacLaine, for instance, explained:

With respect to our public security and paper money, the apprehensions of gentlemen are groundless. I believe this Constitution cannot affect them at all. In the 10th section of the 1st article, it is provided, among other restrictions, “that no state shall emit bills of credit, make any thing but gold and silver coin a tender in payment of debts, or pass any law impairing the obligation of contracts.” Now, sir, this has no retrospective view. It looks to futurity . . . But it is said that, on adoption, all debts contracted heretofore must then be paid in gold or silver coin. I believe that, if any gentleman will attend to the clause above recited, he will find that it has no retrospective, but a prospective view.

Id. at 1308 (quoting 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution 173–74* (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co., 2d ed. 1876) (remarks of Mr. Archibald MacLaine) (alteration in original)). In fact, “Only [Edmund] Randolph and the Anti-Federalists Brutus, [George] Mason, and [Patrick] Henry believed or feared that the diversity grant created a right to enforce existing obligations against the states.” *Id.* at 1313. For a comprehensive account of the anti-Federalist attack on federal court jurisdiction over retrospective claims against the states, see *id.* at 1304–13.

⁸⁵ Many of *Chisholm*’s critics expressed concern that “the creditors in question had contracted at a time when the state legislatures had complete control over the payment of state obligations.” *Id.* at 1328. For instance, Edmund Pendleton, a Justice of the Virginia Court of Appeals and former President of the Virginia ratifying convention, thought the *Chisholm* Court “went beyond congressional guidance in creating a ‘mode of Proceeding in so new a case, to which no former process would apply,’” by effectively making “‘Parties defend[ant],

versity jurisdiction over claims against the states, the Eleventh Amendment neatly curtailed all forms of retrospective (and prospective) common law liability without posing a threat to federal jurisdiction over any federal constitutional or statutory claims that Congress might one day authorize individuals to mount against the states. In the end, then, the diversity account, as modified to take account of *Chisholm*'s controversial retroactivity, nicely explains the failure of the Eleventh Amendment to address federal question claims. Far from unthinkable, as Clark would have it, federal question jurisdiction was thought to apply to claims arising from state action taken *after* the Constitution's effective date.⁸⁶ The Eleventh Amendment could ignore such future concerns and focus on the task at hand: protecting state treasuries from retrospective suits for money damages.

Revisionist challenges to the diversity account also ascribe some weight to the so-called literal terms of the Eleventh Amendment, which bar "any suit in law and equity" brought by out-of-state citizens and aliens.⁸⁷ Reading this "any suit" provision for all its worth, literalists argue that the Amendment curtails the exercise of both diversity and federal question jurisdiction. (On this literalist view, claims based upon supreme federal law were, *contra* Clark, very much a part of the political reaction to *Chisholm* and the eventual terms of the Eleventh Amendment.) Consider the conclusion of Kurt Lash:

Given that everyone at the time knew the issue of state suability involved the potential enforcement of federal treaties, and given the express rejection of language that would have excepted treaties from the

not made liable by any existing law or Contract.'" *Id.* at 1328 (quoting Letter from Edmund Pendleton, Presiding Judge, Va. Court of Appeals, to Nathaniel Pendleton, U.S. Judge for the District of Ga. (Feb. 3, 1974), in 5 D.H.S.C., *supra* note 61, at 250, 250) (alteration in original). The pamphleteer, "True Federalist," echoed Pendleton's concerns regarding *Chisholm*'s retrospective application in an essay published in the Boston newspaper *Independent Chronicle*:

As to those contracts, which were made before the establishment of the general government, there is no person on earth, who can believe, that when the people of the United America adopted the general government, they expected, that each state would be liable to be sued on each negotiable note, and public security, which had been given by it.

Id. at 1328–29 (quoting Essay, A True Federalist, *Indep. Chron.* (Boston), Mar. 2 & 6, 1797, *reprinted* in 5 D.H.S.C., *supra* note 61, at 629, 631). For additional comments questioning the retrospective liability of states, see *id.* at 1329 nn.269–73 and accompanying text.

⁸⁶ See, e.g., *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 319 (C.C.D. Pa. 1795) (Paterson, J.) (distinguishing between state action taken before and after the Constitution's effective date in judging the legality of certain state laws).

⁸⁷ U.S. Const. amend. XI.

text of the Amendment, it seems reasonable to allow the text full value as applying to both federal questions and diversity cases involving questions of state law.⁸⁸

While the argument deserves respectful attention, it does not ultimately persuade. For one thing, the literalist account would produce an inequity in the enforcement of federal law, allowing in-state citizens to bring federal question claims against states but foreclosing such claims by out-of-staters.⁸⁹ No one has yet offered a good account of why the provision's drafters sought to achieve this dubious result. Some literalists have argued that out-of-staters posed a greater threat to state treasuries because of their ability to buy up state indebtedness and hold states liable for an unconstitutional impairment of contract.⁹⁰ But history shows that state securities were held mostly by in-state citizens, significantly lessening the threat posed by recast claims.⁹¹ In any case, the fact that no federal law restrictions could have applied to state debt instruments in circulation as of the date of the Constitution's ratification substantially undercuts the claim that out-of-staters could have collected on old debt instruments by invoking supreme federal law and a federal question grant of jurisdiction.⁹²

⁸⁸ Kurt T. Lash, *Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction*, 50 Wm. & Mary L. Rev. 1577, 1687 (2009).

⁸⁹ Fletcher, *The Diversity Explanation of the Eleventh Amendment*, *supra* note 60, at 1277–78 (suggesting that barring “federal question suits . . . whenever the suit was between diverse citizens,” while permitting such suits “whenever the suit was between citizens of the same state[.]” would have the “unlikely, even impossible” result of confining federal question suits “to the state courts in precisely those instances where there was the most reason to distrust the state courts”).

⁹⁰ Pfander, *History and State Suability*, *supra* note 63, at 1343–44 & n.331 (identifying arguments of Massey and Marshall to this effect).

⁹¹ In one study, historian James Ferguson explored the residency of state debt holders in the 1790s and uncovered information tending to show that “the securities evidencing state debts, including those large blocks of securities that speculators purchased, were overwhelmingly owned by in-state citizens.” *Id.* at 1357 (citing E. James Ferguson, *The Power of the Purse: A History of American Public Finance, 1776–1790*, at 273–75 (1961)). For instance, Ferguson found that “Boston residents held 61% of the Massachusetts state securities exchanged in Hamilton’s 1790 funding plan.” *Id.* at 1357 n.395 (citing Ferguson, *supra*, at 274). Security ownership in Rhode Island was similar, with 71% of the total securities held in either Providence or Newport. Ferguson, *supra*, at 281. For a more complete discussion of the ownership of state debts at the time of the founding, see Pfander, *History and State Suability*, *supra* note 63, at 1357–58 & nn.394–97.

⁹² During the ratification debates, Archibald MacLaine repeatedly urged that any clause limiting the states could not “possibly have a retrospective view,” since retrospectivity would be “contrary to the universal principles of jurisprudence . . . unless [the constitutional

Nor can one sensibly interpret the Eleventh Amendment as barring treaty-based federal question claims by aliens, as literalists contend.⁹³ To be sure, a British loyalist named William Vassall had initiated a high-profile suit against the Commonwealth of Massachusetts to recover property seized during the American Revolutionary War.⁹⁴ While the litigation helped to spur the Eleventh Amendment's adoption, and implicated the Treaty of 1783, Vassall's was not a claim that *arose under a treaty* of the United States for jurisdictional purposes. Vassall brought suit in equity on the basis of alienage; while he planned to use the treaty to challenge the state's expected reliance on its forfeiture law, such a federal treaty-based reply to an expected defense did not make the case one arising under federal law for *original* jurisdiction purposes.⁹⁵ Indeed, without a provision in the treaty itself or in federal implementing

provision] expressly provided that it shall." Pfander, *History and State Suability*, supra note 63, at 1308 (quoting 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 84, at 181 (remarks of Mr. Archibald MacLaine)) (alteration in original). William Davie, a North Carolina delegate to the Philadelphia Convention, likewise touted the prospective nature of the prohibitions. As one of us noted:

Davie explained that members of the Convention knew of the existence of paper money and knew that any provisions threatening a circulating medium would preclude ratification. Since the events of the past could not be repaired, he said, the Framers decided to "form some limitation to this great political evil" by placing "bounds to this growing mischief." Because the Framers "could not put an immediate end to it, [they] were content with prohibiting its future increase, looking forward to its entire extinguishment" through future actions of the state. Davie closed with the now-familiar claim that the limits contemplated were to have no "retrospective operation."

Id. at 1308–09 (quoting 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 84, at 183–84 (remarks of Mr. Davie)) (alteration in original). And Federalist James Iredell argued for a purely prospective interpretation of restrictions on state authority, noting that not only is "[t]here . . . nothing in the Constitution which affects our present paper money," but "[t]here is an express clause which protects it," the provision prohibiting *ex post facto* law. Id. at 1309 n.177 (quoting 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 84, at 185).

⁹³ See Lash, supra note 88, at 1687; Lawrence Marshall, supra note 14, at 1356–60 (describing the concern with the assertion of treaty-based claims by aliens as one justification for the literal theory).

⁹⁴ Vassall's claim, sounding in equity, apparently sought to recover the value of his Boston home (mortgaged for a time and later sold) and its furniture (which was sold at auction during the war). See 5 D.H.S.C., supra note 61, at 354, 357 (describing the war-time sale of Vassall's furniture, the mortgage of his home, the eventual recovery of good title to his home, and the final sale of his home in 1789).

⁹⁵ See Harrison, supra note 8, at 1012 (explaining that plaintiff's federal law replication to a state law defense at the "third stage of pleading" was not thought to supply original federal question jurisdiction).

legislation that authorized individuals to bring suit in federal court, original federal cognizance of treaty-based claims by aliens would invariably depend on the existence of alienage jurisdiction. Preclusion of alienage jurisdiction in the Eleventh Amendment would have thus foreclosed claims by Vassall and others in the same situation, without any need to curtail jurisdiction over an alien's claims arising under federal treaties.⁹⁶ In the end, then, the literal explanation does not fit well with the surrounding jurisdictional landscape.

One can also question the literal theory's supposed linguistic superiority over the diversity account. Literalists have emphasized the fact that the Eleventh Amendment prohibits "any suit," rather than curtailing jurisdiction over "controversies."⁹⁷ This choice of words has been read to suggest that the Amendment seeks to do more than foreclose jurisdiction over controversy-based claims against states by the two diverse plaintiffs. But the "any suit" formulation may have been the best way to draft a narrow restriction on diversity or controversy jurisdiction that would target only the claims of individuals. Elimination of jurisdiction over *all* diverse-party "controversies" between individuals and states was not a viable option: The states wanted to block suits "commenced or prosecuted" *by* individuals while retaining their right to bring suit *against* individuals in federal court. Indeed, having brought such a diversity suit in the Supreme Court,⁹⁸ Georgia—through its legislature—openly argued

⁹⁶ The diversity account achieves the purpose underlying the Eleventh Amendment without the collateral damage that the literal interpretation would inflict. Suppose Vassall sued in Massachusetts state court, seeking to recover his property and tendering a treaty-based reply to the state's legal defense. Suppose that the Massachusetts court rejected Vassall's argument, adopting a narrow view of the Treaty of 1783. Ordinarily, § 25 of the Judiciary Act of 1789 or modern analogues would enable Vassall to petition the Supreme Court for review of his rejected federal claim; such an appeal would arise under the federal treaty for jurisdictional purposes. Yet the literal interpretation would apparently foreclose such appellate jurisdiction on the theory that an alien was "prosecut[ing]" a suit in equity against one of the states. See Jackson, *supra* note 52, at 17. Kurt Lash ascribes some significance to the failure of a proposal, offered by Senator Gallatin, that would have expressly preserved treaty-based claims. See Lash, *supra* note 88, at 1679–80. But others in the chamber may have quietly persuaded Gallatin and his supporters that the change was unnecessary, given the failure of the Eleventh Amendment to threaten treaty-based claims.

⁹⁷ Fletcher, *The Diversity Explanation of the Eleventh Amendment*, *supra* note 60, at 1276 (noting that, according to Lawrence Marshall and Calvin Massey, an amendment that "precludes federal jurisdiction over 'any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State,'" acts as a "party-based *denial* of jurisdiction to the federal courts that sweeps across all the jurisdictional heads of Article III" (quoting Marshall, *supra* note 14, at 1346, and Massey, *supra* note 14, at 65)).

⁹⁸ See *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 402 (1792).

that any constitutional amendment should preserve the states' right to initiate claims against individuals.⁹⁹ Nor would it have made good drafting sense to foreclose any "controversy" in law and equity commenced or prosecuted by individual plaintiffs; plaintiffs bring "suits" in court, they do not bring "controversies."¹⁰⁰ A logical choice, then, was to refer to "any suit in law or equity" brought by diverse plaintiffs as a way to curtail only a part of the broader grant of controversy jurisdiction that Article III had conferred. One can, in short, literally interpret the Eleventh Amendment as restricting jurisdiction only where the two disfavored plaintiffs proceed on the basis of party alignment, thereby leaving federal question jurisdiction unaffected (as diversity theorists contend) and leaving one-half of the controversy head of jurisdiction intact to permit the states to pursue claims against noncitizen defendants.

Other revisionist accounts similarly fail to persuade. Michael Rappaport argues that the term "state" provides a textual predicate for the Court's immunity jurisprudence, but he draws on definitions of that term that the Framers had rejected.¹⁰¹ To be sure, in the immediate aftermath of independence, the states enjoyed a measure of sovereignty and inde-

⁹⁹ Having recently commenced its own action against an out-of-state citizen, see *Brailsford*, 2 U.S. (2 Dall.) at 402, Georgia did not argue for repeal of the extension of judicial power to controversies between states and individuals. Its resolution explained that it viewed Article III, § 2 as "only giving a power to the said supreme court to hear and determine all causes commenced by a state as plaintiff against a citizen as defendant" and directed its representatives to seek a constitutional amendment to that effect. Proceedings of the Georgia House of Representatives, *Augusta Chron.*, Dec. 14, 1792, reprinted in 5 D.H.S.C., supra note 61, at 161, 161–62.

¹⁰⁰ The drafters of the Judiciary Act of 1789 often referred to "suit" to describe a civil process initiated by a plaintiff. See, e.g., Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (conferring jurisdiction on circuit courts over all "suits" of a civil nature between citizens of different states); see also *id.* § 13, 1 Stat. at 80 (conferring exclusive jurisdiction on the Court to hear "suits or proceedings" brought *against* foreign envoys and concurrent jurisdiction over "suits" brought *by* foreign envoys). By contrast, in § 13, the Act uses the term "controversy" to describe the Court's symmetric jurisdiction over disputes in which either the individual or the state was authorized to bring suit as plaintiff. *Id.* The Eleventh Amendment abandoned this statutory construct of jural symmetry in curtailing "suits" against state parties by the two natural persons identified in § 13. But the Eleventh Amendment did not abrogate the § 13 provision for jurisdiction over controversies involving states. So long as the state was bringing the suit, then, § 13's statutory grant of jurisdiction over controversies survived the ratification of the Amendment. The drafters of the Amendment can thus be seen as having acted to curtail only a portion of the state-party controversies originally encompassed in Article III and § 13.

¹⁰¹ See Rappaport, supra note 5, at 821.

pendence, both as a matter of the law of nations¹⁰² and as contemplated in the specific terms of the Articles of Confederation.¹⁰³ What is more, these proclamations of sovereignty and independence were thought to immunize states from suit in the courts of a sibling state.¹⁰⁴ Indeed, in a well-known pre-Constitution case, *Nathan v. Virginia*, the courts of Pennsylvania invoked the law of nations in refusing to assert jurisdiction over a suit against the Commonwealth of Virginia.¹⁰⁵ But the Framers learned the lesson of *Nathan* and made appropriate changes. Thus, the Constitution does not describe the states as sovereign and independent and does not block the exercise of implied powers by the central government.¹⁰⁶ Moreover, Article III of the Constitution, unlike the confederation government under the Articles, created one Supreme Court with jurisdiction over claims against the states as parties.¹⁰⁷ Such an express grant of judicial power was fashioned (and understood) to override the states' law of nations immunity from suit in federal court.¹⁰⁸ Thus, contemporary commentators dismissed the law of nations as irrelevant to

¹⁰² See *id.* at 832–33 (citing Emmerich de Vattel, *The Law of Nations* (Philadelphia, T. & J.W. Johnson & Co. 1883) (1758)).

¹⁰³ See *id.* at 832 (quoting the Articles of Confederation and its statement that “[e]ach State retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States”).

¹⁰⁴ See Pfander, *Rethinking the Supreme Court’s Original Jurisdiction*, *supra* note 78, at 587 & n.127 (discussing two cases—*Nathan v. Virginia*, 1 U.S. (1 Dall.) 77 n.(a) (Pa. C.P. 1781), and *Moitez v. The South Carolina*, 17 F. Cas. 574 (Adm. 1781) (No. 9697)—in which courts rejected the notion of state suability in the courts of other states).

¹⁰⁵ 1 U.S. (1 Dall.) at 77 n.(a). For an account, see Pfander, *Rethinking the Supreme Court’s Original Jurisdiction*, *supra* note 78, at 585–88; see also *Moitez*, 17 F. Cas. 574 (dismissing, in Pennsylvania state court, sailors’ libel action against a South Carolina warship for the recovery of wages due, citing the vessel’s ownership by a “sovereign independent state”).

¹⁰⁶ See Pfander, *Rethinking the Supreme Court’s Original Jurisdiction*, *supra* note 78, at 584–85 (contrasting the Declaration of Independence (1776) and Articles of Confederation (1781), which characterized the states as “free,” “sovereign,” and “independent” and which limited congressional power to matters “expressly delegated to the United States,” with the Constitution (1788), which contains no such descriptions of the states as sovereign and permits the exercise of both delegated powers and powers “necessary and proper” to carry them into execution).

¹⁰⁷ U.S. Const. art. III, §§ 1–2.

¹⁰⁸ On the drafting of the provision for state suability in the Original Jurisdiction Clause of Article III, see Pfander, *Rethinking the Supreme Court’s Original Jurisdiction*, *supra* note 78, at 617–36.

the assessment of the states' immunity from suit in federal court.¹⁰⁹ States were no longer sovereign and independent in that sense.

Nor does it make sense, we think, to remodel the law of state sovereign immunity as a law of personal, rather than subject matter, jurisdiction.¹¹⁰ Caleb Nelson offers such an account, arguing that early notions of government immunity have some features in common with personal jurisdiction. As he observes, a state government's immunity is subject to waiver and that seemingly makes it more like a doctrine of personal, rather than of subject matter, jurisdiction.¹¹¹ But one can capture the notion of waiver with a model of immunity as procedural, and as rooted in the failure of the common law to develop a writ that runs against the government as an entity. (Commonwealth countries accordingly distinguish between procedural and substantive notions of immunity.¹¹²) This procedural conception of immunity has more in common with latter-day notions of service of process than with personal jurisdiction. Nelson may have chosen to characterize these procedural limits as a matter of personal jurisdiction because we have come to view them as imposing a more substantial barrier to the exercise of judicial power.¹¹³

¹⁰⁹ Thus, Edmund Pendleton invoked the law of nations in explaining to the Virginia ratifying convention why the Framers chose to confer original jurisdiction in state-party cases. See 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, supra note 84, at 549 (remarks of Mr. Pendleton) ("The impossibility of calling a sovereign state before the jurisdiction of another sovereign state, shows the propriety and necessity of vesting this tribunal with the decision of controversies to which a state shall be a party."); see also id. at 573 (remarks of Edmund Randolph) ("I think, whatever the law of nations may say, that any doubt respecting the construction that a state may be plaintiff, and not defendant, is taken away by the words *where a state shall be a party*.").

¹¹⁰ See Nelson, supra note 5, at 1565–66 (treating the background doctrine of immunity as a matter of personal jurisdiction, subject to waiver and perhaps statutory override, but regarding the Eleventh Amendment as creating a type of sovereign immunity, "which sounds in subject matter jurisdiction and which therefore cannot be waived").

¹¹¹ Id. at 1565.

¹¹² See, e.g., Jenny Steele, *Tort Law: Text, Cases and Materials* 446 (2d ed. 2010) (distinguishing between substantive Crown immunity and procedural Crown immunity and treating the latter as more readily defeasible in conflict with Britain's obligations to the European Community under the Human Rights Act of 1998).

¹¹³ In any case, the Supreme Court's territorial or personal jurisdiction to issue process clearly extends throughout the country, and it was the court to which Article III and the Judiciary Act of 1789 assigned litigation involving the states as parties. With the Court's broad nationwide jurisdiction, no one would have imagined modern notions of personal jurisdiction as a restriction on state amenability to suit on the Court's original docket. Nelson's account reads modern ideas of personal jurisdiction back into the Framers' conception of immunity as a procedural limit on amenability to suit. While the Supreme Court has come to regard the construct of due process as imposing limits on the power of state courts to exercise jurisdic-

One comes away from this collection of revisionist scholarship convinced that the diversity theorists still have the better of the textual, historical, and structural arguments. Alternative accounts fail to explain key elements of the Eleventh Amendment's proposal and ratification. Yet history and practice teach us that the enforcement of judgments, especially those involving the government (state or federal) as a party defendant, requires cooperation between the judicial and the political branches.¹¹⁴ In the next Part, we describe the institutional elements of interbranch cooperation at the federal level as a prelude to a discussion of the way our declaratory model of accountability would facilitate similar cooperation at the federal-state level.

II. TOWARD A DECLARATORY THEORY OF STATE ACCOUNTABILITY

Our declaratory theory of state accountability proposes to embrace the power of a federal court to articulate federal law norms through litigation of federal question claims against state officials (in keeping with the diversity account of the Eleventh Amendment). At the same time, our declaratory theory would accept limits on the power of federal courts to enter judgments for money payable out of state treasuries (in keeping with the Court's view in *Hans v. Louisiana* and subsequent cases that the Eleventh Amendment blocks many suits for money).¹¹⁵ Instead of direct federal judicial money judgments, the declaratory theory would rely on state processes of law to secure payment, subject to the possibility of Supreme Court review in the event of state discrimination against federal creditors. The state court duty would bear some resemblance to its existing obligation, imposed as a matter of federal common law, to recognize and enforce federal judgments.¹¹⁶

In this Part, we present the structural, institutional, historical and doctrinal case for a declaratory approach to state accountability. We begin with the problem of interbranch cooperation that arises in connection

tion over nonresidents, see *Pennoyer v. Neff*, 95 U.S. 714 (1877), *Pennoyer* was the first case to hold that the Due Process Clause of the Fourteenth Amendment imposed such limits. *Id.* at 733–34.

¹¹⁴ See *infra* Part II.

¹¹⁵ *Hans v. Louisiana*, 134 U.S. 1, 10–11, 20–21 (1890); see also *Edelman v. Jordan*, 415 U.S. 651, 665 (1974) (barring suit against a state official for the retroactive payment of benefits).

¹¹⁶ See *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001) (recognizing the federal common law duty that required a Maryland state court to enforce a judgment of a California federal district court).

with the enforcement of any judgment and then explore the specific problems associated with judgments against the government. We next show that history and practice point with surprising clarity to reliance on a declaratory model of government accountability. With the groundwork in place, we explain how we would operationalize the theory, drawing on rules of claim and issue preclusion and the existing corpus of state and federal law that bears on the recognition and enforcement of judgments.

A. On the Role of Political Branches in Enforcement of Judgments

To explain our declaratory theory of state government accountability, we begin with familiar features of the separation of government powers as they apply to the enforcement of judgments involving government parties.¹¹⁷ Courts, as a general matter, do not play a direct role in the *execution* of their judgments; they resolve disputes in accordance with law and announce their decision in the form of a judgment. Once the judgment issues, the task of execution falls to the executive branch.¹¹⁸ All of this works quite well in the case of private litigation. Either the parties comply with the judgment or, in the case of non-compliance, the task of execution falls to a federal marshal. To satisfy a money judgment, the creditor obtains a writ of execution that empowers and directs the marshal to seize and sell the assets of the debtor;¹¹⁹ to enforce an injunctive decree, parties may ask the court to order the marshal to imprison an individual for contempt of court.¹²⁰

¹¹⁷ The separation of powers argument suggests that, while the executive has the duty to enforce the law, the Judiciary has the “power to resolve disputes with absolute finality.” Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 *Iowa L. Rev.* 1267, 1319 (1996).

¹¹⁸ See *infra* note 119; see also *The Federalist* No. 78, at 394 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that the judiciary exercises “neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”); Lawson & Moore, *supra* note 117, at 1314 (noting that the “‘executive Power’ . . . includes the power to carry into execution federal statutes and federal court judgments”).

¹¹⁹ See 28 U.S.C. § 3203(c)(2)(B) (2012) (“[T]he writ shall direct the United States marshal to satisfy the judgment by levying on and selling property in which the judgment debtor has a substantial nonexempt interest, but not to exceed property reasonably equivalent in value to the aggregate amount of the judgment, costs, and interest.”); Fed. R. Civ. P. 69(1) (“A money judgment is enforced by a writ of execution.”).

¹²⁰ 18 U.S.C. § 401(3) (2012) (“A court of the United States shall have power to punish by fine or imprisonment, or both, at its direction, such contempt of its authority, and none other,

One might suppose that the task of execution would grow more complex in litigation against government parties, such as the federal government.¹²¹ Federal marshals work in the executive branch; perhaps the President or the Department of Justice could order the marshal to refrain from executing a judgment with which the Executive disagreed.¹²² Yet as a practical matter, such executive branch disobedience does not occur.¹²³ If the court grants declaratory relief against the government, its order presumptively binds relevant federal actors.¹²⁴ Compliance occurs routinely: Departmental officials tend to express their disagreement with judicial decrees by filing a petition for appellate review rather than through civil disobedience.¹²⁵ Recent scholarship confirms that compliance tends to be the norm: Federal courts rarely threaten to hold government officials in contempt and even more rarely do so.¹²⁶

At least two features of the Constitution serve to foster this culture of compliance. First, the Constitution obligates every member of the executive branch to promise by oath or affirmation to support the Constitution.¹²⁷ This oath encompasses support for the exercise of the judicial

as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.”).

¹²¹ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 478 (1793) (Jay, C.J.) (acknowledging that the exercise of judicial power in a suit against the federal government could pose an enforcement problem in light of the dependence of the courts on the assistance of the political branches).

¹²² See James E. Pfander, *The Chief Justice, the Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 Nw. U. L. Rev. 1125, 1153 (2013) (noting that the federal marshal’s office has long been viewed as housed within the executive branch and now operates as a division of the Department of Justice).

¹²³ In the history of the United States, “[n]o President other than Lincoln . . . has defended . . . [the] power” to refuse to enforce court rulings. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217, 344 (1994); cf. Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, Mil. L. Rev., 8–12 (forthcoming Summer 2016) (arguing that in *Ex parte Merryman*, Taney did not order Lincoln to produce Merryman, thus undercutting claims that Lincoln defied a court order).

¹²⁴ On the culture of compliance within the executive branch and the role of the Office of Legal Counsel (“OLC”) in ensuring constitutional compliance on matters that may not reach the courts, see Trevor Morrison, *Constitutional Alarmism*, 124 Harv. L. Rev. 1688, 1698–1701 (2011) (book review) (describing the role of OLC in securing executive branch compliance with the law).

¹²⁵ *Id.* at 1701 (depicting Bush administration responses to the Court’s enemy combatant cases as displaying “no hint” of any direct refusal to comply with a judicial decision).

¹²⁶ See Nicholas Parrillo, *Federal Agencies in Contempt of Court: A Preliminary Inquiry* 3 (Oct. 28, 2014) (unpublished manuscript, on file with author).

¹²⁷ See U.S. Const. art. VI, § 1, cl. 3 (obligating all executive Officers to take an oath to “support this Constitution”); *id.* art. II, § 1, cl. 8 (requiring the President, upon taking office,

power, which Article III vests in the federal courts.¹²⁸ Second, Article II of the Constitution specifically obligates the President to “take Care that the Laws be faithfully executed.”¹²⁹ Most scholars interpret these obligations—in conjunction with separation of powers principles—as encompassing a duty to carry judicial decrees into execution.¹³⁰ (Some argue that the President has an independent power to interpret the laws on which a judgment rests and, if in disagreement with the federal courts, to refrain from executing an unlawful judgment.¹³¹ In most cases, however, the executive duty to ensure due execution of the laws will entail enforcement of any resulting judgment.) Although the government can appeal from judgments and decrees, final judgments bind the executive

to take an Oath of Affirmation, in which he swears to do his best to “preserve, protect and defend the Constitution of the United States”). On the significance of the oath requirement, see Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. (forthcoming 2016).

¹²⁸ See U.S. Const. art. III, § 1 (“The judicial [p]ower of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”).

¹²⁹ Id. art. II, § 3.

¹³⁰ See, e.g., Lawson & Moore, *supra* note 117, at 1271 (“The one context in which the President must give legal rather than epistemological deference to the views of other actors concerns the enforcement of *specific court judgments*—the raw determinations of liability or nonliability (as opposed to the explanations for those determinations embodied in judicial opinions) rendered in specific cases. We conclude, as have *almost all modern legal commentators* who have addressed the subject, that the President is generally obliged to obey and enforce federal court judgments.” (emphasis added)); see also Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 Colum. L. Rev. 507, 532 (2012) (“[T]he President must faithfully execute judicial judgments because the power to decide who wins or loses a case rests with those who wield the judicial power. This obligation to enforce judgments exists as an implication of the separation of executive and judicial power.”); Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926–27 (1990) (distinguishing between the binding force of a decision—the dispositive judgment executives are obligated to enforce—and the rule of decision, which executives may choose to ignore); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 Tul. L. Rev. 991, 993 (1987) (arguing that “once the Supreme Court . . . enunciates a settled rule of law . . . [the U.S.] system of government [legally] obliges executive officials to comply with the law as judicially declared”).

¹³¹ Michael Stokes Paulsen, who advances a theory based on the coordinacy of the government branches, stands as a notable exception. Specifically, Paulsen argues that the “Take Care” Clause, far from obliging the President to blindly enforce federal court judgments, requires the “President to give precedence to *his* settled conclusion as to the law’s meaning and constitutionality.” Paulsen, *supra* note 123, at 276–77. Paulsen contends that since “[j]udgments are rarely self-executing” and often require executive action to guarantee enforcement, it is, contrary to popular belief, “the *executive*, not the judiciary, [who] has the last interpretive word.” Id. at 277; cf. Lawson & Moore, *supra* note 117, at 1324–25 (criticizing Paulsen’s theory of unlimited presidential review for failing to “adequately account for the existence of the judicial power”).

branch officials to whom they are directed.¹³² Only in the rarest of cases have Presidents claimed or exercised the power to refuse to enforce a federal court order or judgment.¹³³

Institutional arrangements support the constitutional order. Decisions about whether to appeal from federal judgments have been centralized in the Office of Legal Counsel (“OLC”).¹³⁴ OLC also coordinates federal government activity to assure compliance with federal law. In the absence of clear precedent, OLC acts somewhat like an administrative tribunal in resolving open questions and in umpiring disputes between agencies.¹³⁵ OLC helps to foster executive branch compliance with law and to support a culture in which final judicial decrees enjoy both decisional and precedential respect.¹³⁶ Coupled with the relative dearth of in-

¹³² In addition to the aforementioned textual and structural arguments, numerous historic materials “suggest that judgments are *absolutely* binding,” as they “have always been thought of as final between the judicial department and the political departments.” Lawson & Moore, *supra* note 117, at 1319–20 (emphasis added).

¹³³ See *id.* (underscoring that the “only clear example of presidential defiance of a court judgment” came in response to *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), in which Lincoln has been said to have failed to comply with a writ of habeas corpus from Chief Justice Taney); cf. *United States v. Nixon*, 418 U.S. 683 (1974) (ordering the release of the presidential tapes). Recent scholarship suggests that the report of Lincoln’s defiance may have been exaggerated. See Tillman, *supra* note 123.

¹³⁴ OLC derives its authority from the authority of the Attorney General, codified at 28 U.S.C. §§ 511–13 (2012). See 10 Opinions of the Office of Legal Counsel of the United States Department of Justice Consisting of Selected Memorandum Opinions Advising the President of the United States, the Attorney General and Other Executive Officers of the Federal Government in Relation to Their Official Duties, 1986, at v (1993), available at <http://www.loc.gov/law/find/nominations/alito/10opolc115.pdf>, archived at <http://perma.cc/MF4R-JZ99>. Pursuant to 28 U.S.C. § 510, the Attorney General delegated to OLC “responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice.” *Id.* (citing 28 C.F.R. § 0.25 (2010)); see also Morrison, *supra* note 124, at 1713–23 (detailing OLC’s roles and institutional value).

¹³⁵ Off. Legal Counsel, Department of Just., <http://www.justice.gov/olc> (last visited Feb. 15, 2015) (explaining that OLC often provides “its own written opinions and oral advice in response to requests from the Counsel to the President, the various agencies of the Executive Branch, and offices within the Department” on issues “of particular complexity and importance or about which two or more agencies are in disagreement”); see also 28 C.F.R. § 0.25(a) (tasking OLC with “rendering informal opinions and legal advice to the various agencies of the Government”); *id.* § 0.25(c) (authorizing OLC to render “opinions to the Attorney General and to the heads of the various organizational units of the Department on questions of law arising in the administration of the Department”).

¹³⁶ See, e.g., 28 C.F.R. § 0.25(b) (fostering executive branch legal compliance by “preparing and [revising] . . . proposed Executive orders and proclamations, and *advising as to their*

tra-agency litigation authority, the supervisory arm of OLC helps to ensure compliance with court orders.¹³⁷

Complications may arise in connection with suits seeking the payment of money from the federal treasury. The Constitution assigns the power to tax and spend to the legislative branch of government,¹³⁸ all expenditures of federal money require the passage of an appropriations bill.¹³⁹ In theory, one might suppose that the Constitution's oath requirement, which applies to legislators as well as to executive branch officials,¹⁴⁰ might serve to obligate Congress to appropriate the funds necessary to pay all federal judgments. On that view, a federal court might order Members of Congress to pay a disputed judgment and threaten with contempt sanctions any legislator who refused to go along. Alternatively, courts might issue writs of execution that directed the marshal to sell federal property in satisfaction of a federal money judgment.¹⁴¹ Such

form and legality prior to their transmission to the President" (emphasis added)); id. § 0.25(d) ("Approving proposed orders of the Attorney General, and orders which require the approval of the Attorney General, as to form and legality and as to *consistency and conformity with existing orders and memoranda*." (emphasis added)).

¹³⁷ OLC—whose opinions have long been treated as conclusive and binding, "to promote uniformity and stability in executive branch legal interpretation[] [and] to avoid the personal risk of being subject to the imputation of disregarding the law as officially pronounced"—has stated that the Department:

[B]elieve[s] that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution.

Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 *Admin. L. Rev.* 1303, 1319–20, 1326 n.87 (2000) (citing Memoranda from the Office of Legal Counsel on *The Constitutional Separation of Power Between the President and Congress* 3 (May 7, 1996), <http://www.usdoj.gov/olc/1996opinions.htm>, archived at <http://perma.cc/G8GQ-TU9E>) (citation omitted) (internal quotation marks omitted); see also id. at 1325 (noting that "[o]verwhelming executive branch practice and precedent support the conclusion[] that the executive branch should, and will, treat final judicial judgments as binding in particular cases").

¹³⁸ U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").

¹³⁹ U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .").

¹⁴⁰ Id. art. VI, § 1, cl. 3 (requiring "Senators and Representatives, . . . and the Members of the several State Legislatures" to take an oath to "support this Constitution").

¹⁴¹ In Australia, for example, the Crown enjoys a procedural immunity from execution on its property to pay judgments; however, that immunity is linked to a firm obligation that the

execution would ensure payment of the judgment and might encourage recalcitrant legislators to vote the necessary appropriation.¹⁴²

Yet our constitutional tradition has not embraced these sorts of enforcement measures, developing instead a tradition of deference to congressional control that reflects both constitutional structure and pragmatic adaptation. It would be quite awkward for a federal court to hold Members of Congress in contempt for failure to pay a judgment; a long (but not necessarily dispositive) tradition of legislative immunity frees Members of Congress from most obligations to appear in court in response to civil claims that implicate their official duties.¹⁴³ Executive branch officials, called upon to enforce such decrees, might think twice before jailing members of a coordinate branch of government. In any

treasury must pay all final judgments against the Crown. See Bede Harris, *A New Constitution for Australia* 120 (2013).

¹⁴² On the difficulties that federal courts have faced in enforcing lawful money judgments against the states, see *Virginia v. West Virginia*, 206 U.S. 290 (1907). The litigation dragged on for some twelve years, with frequent trips back to the Supreme Court, before West Virginia finally arranged to pay the debt in 1919. For an account, see Henry Hart & Herbert Wechsler, *The Federal Courts & the Federal System* 322–23 (3d ed. 1988); see also Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 *Hastings L.J.* 475 (1999) (recounting the difficulty of funding a desegregation decree that required payments from the state treasury); cf. *Alden v. Maine*, 527 U.S. 706, 749 (1999) (expressing regret that decisions subjecting states to suit in federal court would require that the state “defend or default” and “face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public’s behalf”).

¹⁴³ See, e.g., *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (extending legislative immunity to local legislators for their “legislative activities” in § 1983 cases); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (holding that, in the § 1983 context, legislative immunity—an absolute immunity—applies when the legislator is “acting in a field where legislators traditionally have power to act”); see also U.S. Const. art. I, § 6, cl. 1 (providing that, “in all cases, except Treason, Felony and Breach of the Peace, [Senators and Representatives shall] be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place”). The rationale underpinning such immunity may have best been explained by James Wilson, an influential member of the Committee of Detail—the Committee responsible for drafting the Speech or Debate Clause:

In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

Tenney, 341 U.S. at 373 (quoting 2 *Works of James Wilson* 38 (James D. Andrews ed., Philadelphia, Callaghan & Co. 1896)). Ultimately, the courts enforce legislative immunity “not for [the legislators’] private indulgence but for the public good.” *Id.* at 377.

case, the decision to appropriate money entails a number of considerations apart from the perceived legitimacy of the judgment in question. For instance, Congress might have other pressing fiscal obligations to balance against the need to pay court judgments. Performing that balancing act would appear to lie at the very heart of the appropriations process, lessening the willingness of courts to interfere by issuing an order to pay a specific obligation.¹⁴⁴

As a result, the Supreme Court has taken a cautious approach to the adjudication of claims for money payable by the federal treasury. First, the Court has developed a fairly demanding doctrine of sovereign immunity from suit that applies to the federal government, even in the absence of evident constitutional compulsion.¹⁴⁵ To waive that immunity, Congress must provide for suit against the government in a clearly drafted statute.¹⁴⁶ Second, the Court has articulated a rule of judicial finality that immunizes judicial decrees from review by the political branches of government.¹⁴⁷ While serving nominally as a limit on the matters that

¹⁴⁴ Cf. *Alden*, 527 U.S. at 751 (observing that many demands, in addition to those of judgment creditors, “compete for access to the public fisc” and emphasizing that delicate judgments must be made as legislators strike a balance between competing interests).

¹⁴⁵ See, e.g., *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992) (requiring an unequivocal expression in statutory text to effect a waiver of federal sovereign immunity); *Library of Cong. v. Shaw*, 478 U.S. 310, 311 (1986) (holding the federal government immune from interest awards in the absence of a clear waiver); *United States v. Sherwood*, 312 U.S. 584, 590–91 (1941) (construing the statutory language of the Tucker Act to find that it only waived the sovereign immunity of the United States in suits that could be maintained in the Court of Claims); *Price v. United States*, 174 U.S. 373, 375–76 (1899) (declaring it an “axiom of our jurisprudence” that the “[federal] [g]overnment is not liable to suit unless it consents thereto”); *Schillinger v. United States*, 155 U.S. 163, 166 (1894) (finding that the “United States cannot be sued in their courts without their consent”).

¹⁴⁶ See, e.g., *Price*, 174 U.S. at 376 (noting that, even when the United States consents to suit, “its liability in suit cannot be extended beyond the plain language of the statute authorizing it”); *Schillinger*, 155 U.S. at 166 (“[I]n granting such consent [to suit] Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be, their possession of a larger jurisdiction over the liabilities of the Government.”).

¹⁴⁷ See, e.g., *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864) (finding that the court lacked jurisdiction because the act of Congress did not authorize the court to issue a final judgment). Chief Justice Taney explained:

This precise point was decided . . . in *Hayburn’s Case*, 2 Dall. 409, and this decision has ever since been regarded as a constitutional law, and followed by every department of the government. . . . The case of *Hayburn* arose under an Act of Congress of March, 1792, which required the Circuit Courts of the United States to examine into the claims of the officers, soldiers and seamen of the Revolution, to the pensions

federal courts can hear, the rule of finality also forbids Congress from relying on the adjudicative power and legitimacy of the federal courts unless it first establishes a framework for the payment of any judgment those courts issue against the government.¹⁴⁸ Although it took a century and a half to work out the particulars, today's "judgment fund"—a standing appropriation—serves to authorize payment of judgments against the United States rendered by the "courts of the United States."¹⁴⁹

We believe the model of federal government suability may teach lessons applicable to the very different problems that arise in connection with efforts to enforce federal law through the imposition of money liability on state governments. With twin doctrines of sovereign immunity and finality, the Court has virtually ensured that any money claims against the federal treasury have the support of both the legislative and executive branches of the federal government. By contrast, when Congress acts to subject the states to liability under federal regulatory schemes, as it does when it abrogates state sovereign immunity under

granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court. . . . [The Court held] that the law was unconstitutional and void, and that when the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power, and could not therefore be executed by the Court.

Id. at 703.

¹⁴⁸ See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 *Geo. Wash. Int'l L. Rev.* 521, 595–96 (2003) (noting that in *Glidden v. Zdanok*, 370 U.S. 530 (1962), Justice Harlan held that even though the Claims Court could not "provide execution on a money judgment," it could exercise Article III judicial power because "notwithstanding the possibility of Congress enacting new legislation prohibiting the use of any amounts previously appropriated to a specific purpose, the standing appropriation sufficiently assured the enforceability of those judgments"); see also id. at 598 (suggesting that *Glidden* and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), have "settled that the ability to execute a judgment through judicial process is not essential for the exercise of article III power over claims against the United States, if there is sufficient empirical reason to believe the judgment will ultimately be paid").

¹⁴⁹ The statutory authority for the Judgment Fund, 31 U.S.C. § 1304, provides that "[n]ecessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law" in the specified circumstances. On the importance of finality in authorizing judicial review of agency decisions involving benefit claims, see James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 *Harv. L. Rev.* 643, 746–47, 759–62 (2004) (arguing that Congress's willingness to pay clears the way for obligatory judicial review of benefit and other public right decisions).

laws adopted pursuant to the commerce (or other) power, specific state legislative and executive authorities will have played no direct role in the legislative process and may view the threat of liability as an *alien imposition*.¹⁵⁰

To address the problem, one might imagine a two-step process in which federal courts apply federal law to state action and issue injunctive and declaratory relief in appropriate cases. When the federal judgment necessarily implies that a violation of federal law has occurred, resulting in a loss of money, individuals may pursue their claim through whatever machinery the state has established to resolve money claims against the state.¹⁵¹ Such a two-step approach would preserve a measure of state control over the state purse strings comparable (but not identical) to that Congress exercises over the federal purse. State law would control the manner in which an individual pursued such a claim. The state legislature would retain control over funds in the state treasury, permitting their disbursement only as state law provides. Eventually, state legislatures may come to prefer a world of routine payment much like that Congress has arranged through the judgment fund.¹⁵² If so, they could adopt legislation to that effect, either waiving their immunity from

¹⁵⁰ See Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*, at 26–31 & passim (2013) (describing some government regulations as familiar to the citizenry and others as proceeding on the basis of alien imposition and explaining, albeit in a different context, that alien imposition may require more forceful means of enforcement).

¹⁵¹ See *infra* Sections III.B and III.C for a brief discussion of current enforcement mechanisms states use to resolve money claims against themselves.

¹⁵² Such a notion is not far-fetched, as some states have already created “Tort Claims Trust Funds” or similar appropriations solely for the payment of judgment and settlement awards for state tort violations. See, e.g., Ga. Code Ann. § 50-21-34 (2013) (requiring judgments and claims to be paid from the State Tort Claims Trust Fund or insurance policies); Kan. Stat. Ann. § 75-6117 (Supp. 2014) (establishing the “tort claims fund which shall be administered by the attorney general”); Miss. Code Ann. § 11-46-19(1)(b) (1972) (requiring the Tort Claims Board to approve any award made from the “Tort Claims Fund”); Neb. Rev. Stat. § 81-8,224(1) (2014) (requiring that “[a]ny award to a claimant and any judgment in favor of a claimant under the State Tort Claims Act . . . be certified by the Risk Manager or State Claims Board to the Director of Administrative Services who shall promptly issue a warrant for payment of such award or judgment out of the Tort Claims Fund or State Insurance Fund,” unless the award exceeds \$50,000, at which point it must “be reviewed by the Legislature and specific appropriation made”); *id.* § 81-8,225 (creating the “Tort Claims Fund” in the state treasury); N.J. Stat. Ann. § 59:12-1 (West 2015) (establishing a fund in the custody of the State Treasurer for the “payment of claims against the State arising out of tort”).

suit in federal court or creating a streamlined state mechanism for the enforcement of federal judgments.

Together, the combination of federal declaratory relief and state processing of money claims would secure a federal judicial role in matters that implicate supreme federal law, in keeping with the diversity account of the Eleventh Amendment. At the same time, the preservation of state legislative control over payments from the treasury would vindicate one of the central values of modern judge-made Eleventh Amendment law: protection of the state treasury. This goal lay at the heart of the Court's decision in *Alden*:

Private suits against nonconsenting States—especially suits for money damages—may threaten the financial integrity of the States. It is indisputable that, at the time of the founding, many of the States could have been forced into insolvency but for their immunity from private suits for money damages. Even today, an unlimited congressional power to authorize suits in state court to levy upon the treasuries of the States for compensatory damages, attorney's fees, and even punitive damages could create staggering burdens, giving Congress a power and a leverage over the States that is not contemplated by our constitutional design. The potential national power would pose a severe and notorious danger to the States and their resources.¹⁵³

In our declaratory account, state legislators would retain control over the timing and amount¹⁵⁴ of any payments from the treasury and could ad-

¹⁵³ *Alden*, 527 U.S. at 750. One can certainly question the premise of the Court's concern that state suability would pose a "severe and notorious" threat to state resources. Even small states, such as Arkansas, have annual budgets of \$5 billion. California's budget for fiscal 2015 exceeded \$100 billion. See Nat'l Ass'n of State Budget Officers, Summaries of Fiscal Year 2015 Proposed and Enacted Budgets 4–5 (July 2014), <http://www.nasbo.org/sites/default/files/pdf/2015%20Proposed-Enacted%20Budgets.pdf>, archived at <http://perma.cc/7FN9-JS4F>. Even assuming that state liability for violation of federal standards could in theory amount to a material percentage of state resources, states in compliance with federal standards face no obligation to pay.

¹⁵⁴ Though most states recognize a moral obligation to redress individuals' injuries at the hands of the state—particularly in the realm of tort law—this moral obligation is not without limit. See, e.g., W. Va. Code § 14-2-28 (2014) (describing the court of claims' recommendation to the Legislature that a money award be granted as a "finding of moral obligation"); About Us, Ala. Board of Adjustment, http://bdadj.alabama.gov/pages/about_us.aspx, archived at <http://perma.cc/54HS-6FQ4> (last visited Nov. 22, 2015) (permitting payment by the State to "persons for injuries to person or property or for death occasioned by the State . . . where in law, justice or good morals the same should be paid" (emphasis added)). States routinely cap the recovery of actual damages, bar punitive or other exemplary damag-

dress pressing state fiscal concerns as they arose. By retaining state control, state officials could manage state funds as they see fit, subject to the obligation to treat claims rooted in violations of federal law no less favorably than those rooted in violations of state law.¹⁵⁵ Just as the Maine state legislature ultimately paid compensation to the employees in the *Alden* litigation,¹⁵⁶ we suspect that the state legislators will face some internal political pressure to honor the claims of their own citizens. By giving the state a measure of responsibility for providing compensatory relief to deserving claimants, our approach would invite a stronger degree of state engagement with the task of securing the supremacy of federal law. Just as Congress came to recognize the importance of the routine payment of judgments against the federal government, so too might the states come to take greater responsibility for the payment of federal money claims against the states.

es, or shorten statute of limitations periods in which an individual can file for relief. See, e.g., Ga. Code Ann. §§ 50-21-29 & 50-21-30 (2015) (capping damages awards at \$1 million and barring punitive damages); Ind. Code Ann. § 34-13-3-4 (West 2015) (setting the limits for damages recovery in suits against the State between \$300,000 and \$5 million, and barring punitive damages); N.H. Rev. Stat. § 541-B:14(I) (2015) (capping awards at \$475,000 per claimant and \$3,750,000 per incident and barring punitive damages); N.M. Stat. Ann. § 41-4-16(A) (West 2003) (requiring individuals to file their tort claims with the appropriate body “within ninety days after an occurrence giving rise to a claim for which immunity has been waived”), preempted in part for claims falling under the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1994), as discussed in *Godwin v. Memorial Medical Center*, 25 P.3d 273, 280–82 (N.M. Ct. App. 2001); Va. Code Ann. § 8.01-195.3 (West 2015) (limiting damages awards against the State to between \$25,000 and \$100,000, depending on the date the cause of action accrued).

¹⁵⁵ See, e.g., *Howlett v. Rose*, 496 U.S. 356, 380–81 (1990) (holding that a state court’s refusal to entertain a federal § 1983 claim against a school district, when state courts routinely heard similar state law actions against state defendants, violated the Supremacy Clause because such a refusal represented no more than “disagreement with substantive federal law or simple refusal to take cognizance of the federal cause of action”); *Clafin v. Houseman*, 93 U.S. 130, 137 (1876) (noting that because a state is also subject to the laws of the United States, it “is just as much bound to recognize [federal laws] as operative within the State as it is to recognize the State laws”); see also U.S. Const. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

¹⁵⁶ See Fiscal Note, Appropriations/Allocations, CA (H-1076), to LD 2530 (Me. 2000), available at http://legislature.maine.gov/legis/bills/bills_119th/billtexts/ld253002-3.asp, archived at <http://perma.cc/KEX2-A6TQ> (“This bill provides a General Fund appropriation of \$282,894 in fiscal year 2000–01 to pay employees and former employees for overtime and to reimburse for certain litigation costs in the cases of *Mills v. Maine* and *Alden v. Maine*.”).

B. Historical Coherence

Turning from the interbranch dynamics of money judgment enforcement, we now consider a surprisingly rich body of historical support for our declaratory approach. We will briefly describe the way Anglo-American law over the past several centuries has accepted a growing role for the courts in assessing the legality of government action, even in areas once dominated by notions of Crown or sovereign immunity. Much of this litigation proceeds in the form of a declaration of the rights of the parties, which executive branch officials have (rightly) come to accept as conclusive. Indeed, the growing acceptance of the judicial role both explains and reinforces our earlier structural point: that the Constitution obligates all officials, state and local, to support the Constitution, thus laying the foundation for acceptance of the conclusive quality of federal judicial determinations of legality.

1. Historical Evidence of a Declaratory Role

It may seem odd to suggest that we find a declaratory role for courts rooted in Anglo-American legal history. After all, the English superior courts in the eighteenth century did not grant injunctive relief against the Crown and did not develop a declaratory judgment action until the second half of the nineteenth century.¹⁵⁷ Moreover, English practice upon the so-called petition of right, which called upon the subject who wished to interplead with the Crown to seek formal leave to do so, would seem to confirm the Crown's immunity from suit except in cases where consent was granted.¹⁵⁸ Yet a thriving practice in the declaration of rights developed nonetheless, both in England and in Scotland (where the de-

¹⁵⁷ Such an action first appeared in 1883, as Rule 5 of Order 25. The rule provided, "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and *the Court may make binding declarations of right whether any consequential relief is or could be claimed or not.*" Edson R. Sunderland, *A Modern Evolution in Remedial Rights,—The Declaratory Judgment*, 16 Mich. L. Rev. 69, 74 (1917); see also C.L.G., *Constitutionality of the Declaratory Judgment Act as Affected by the Scope of Judicial Functions*, 11 Va. L. Rev. 473, 474 (1925) (noting that settled English doctrine permits courts to issue a declaratory judgment, even if consequential relief is not available).

¹⁵⁸ For an account of petition of right practice in England and the often-fictional quality of the consent conferred, see Pfander, *Sovereign Immunity and the Right to Petition*, *supra* note 78, at 923–26 (reviewing Crown immunity in England in light of petition of right practice and explaining Blackstone as having treated the immunity as largely a matter of fiction).

claratory judgment action had long been a mainstay of practice before the Court of Session).

Blackstone's *Commentaries* provide a convenient vantage point on the growth of an effectively declaratory practice in Anglo-American law. Blackstone reports that the petition of right, while nominally limited to cases in which the Crown consented to suit, had evolved into a routinely available form of remediation by the seventeenth century.¹⁵⁹ Thus, applications for leave to sue were submitted to the Attorney General and approved as a matter of course in any colorable case.¹⁶⁰ To supplement petition of right practice, Parliament introduced a variety of mechanisms by which parties could interplead with the Crown in matters of escheat and forfeiture and in connection with the Crown's debt-collection proceedings in the Court of Exchequer.¹⁶¹ Many of the cases arose from disputes over property ownership: The Crown claimed title to land, to a stream of income, or to an asset, and others were permitted to assert conflicting claims. Courts resolved these conflicting claims through such tools as the traverse of office and *monstrans de droit*, issuing decrees that obliged the Crown to "remove its hands" from the property.¹⁶² Practice evolved to the point where the parties (both government and private) understood the judicial role and agreed to accept the final determination of the courts (of equity or exchequer) as binding.¹⁶³

In Scotland, meanwhile, the Court of Session developed a declaratory judgment proceeding in the sixteenth century and used it to resolve questions of law in disputes involving the government. Unlike English legal doctrine, Scottish law did not embrace Crown immunity.¹⁶⁴ The

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 972 n.275; see also Pfander, *History and State Suability*, *supra* note 63, at 1327 n.261 ("suggesting that although Blackstone sought to portray Crown suability as a matter of grace, such relief really entered as a matter of course").

¹⁶¹ Pfander, *Sovereign Immunity and the Right to Petition*, *supra* note 78, at 912–14 (describing practice under the procedures of *monstrans de droit* and traverse of office as modes by which individuals could interplead with the Crown over contested property ownership issues).

¹⁶² On the remedy of *amoveas manus*, which required the Crown to remove its hands from disputed property, see *id.* at 993.

¹⁶³ *Id.* at 994 (observing that remedies against the Crown were available to "all subjects" who claimed an interest in the property before the court).

¹⁶⁴ J.R. Philip, *The Crown as Litigant in Scotland*, 40 *Jurid. Rev.* 238, 246 (1928). Prior to 1707, the English maxim, "the King can do no wrong" had not even appeared in Scottish law. Instead, "early Scots' statements of the right to convene the Crown as defender appear[ed] to set no such limit upon the general competency of [such] actions." *Id.* In particu-

Court of Session permitted individuals who wished to interplead with the Crown to name as defendant or “defender” a high officer of state, such as the head of the department or the Attorney General. More importantly, the Court of Session authorized individuals to seek *declaratory relief*, more or less along the lines of the modern day declaratory judgment actions.¹⁶⁵ Such “declarator” proceedings were available to suitors seeking relief against the Crown in public law litigation,¹⁶⁶ and since its inception, the declarator has, “in respect of official acts and omissions, . . . established itself as a valuable remedy.”¹⁶⁷

In Scotland, “declaratory actions [we]re those, wherein the right of the pursuer [was] craved to be declared, but nothing [was] claimed to be done by the defender.”¹⁶⁸ Individuals could pursue such actions for “instructing and clearing any kind of right relating to liberty, dominion or obligation.”¹⁶⁹ A declarator could be “sought prospectively to establish a

lar, the Court of Sessions “did not treat the Crown as immune from actions founded on delict or negligence.” *Id.* at 248.

Additionally, the Scottish aversion to traditional notions of sovereign immunity extended so far that in 1921, the Lord Chancellor and Solicitor General agreed that the position of the Crown as a litigant should be amended to explicitly provide:

- (1) The Crown, within certain reservations, would be placed in the same position as the subject as regards power to sue and liability to be sued in the County Court.
- (2) The Crown would become liable to be sued in tort.
- (3) The Crown would have the same capacity to recover, and the same liability to pay costs, as the subject litigant.

Id. at 238.

¹⁶⁵ C.L.G., *supra* note 157, at 474 (underscoring that the “action of declarator had existed for hundreds of years”); see also Scottish Law Comm’n, Memorandum No. 14: Remedies in Administrative Law § 7.1 (n.d.) (noting that “the declarator is one of the oldest Scottish remedies [and] is of very broad scope throughout the law”).

¹⁶⁶ *Id.* § 7.7 (suggesting that “[a]part from the question of interim relief, there do not seem to be any particular problems relating to the declarator which restrict its usefulness as a remedy against official acts and omissions”). On the refusal of the Court of Session to recognize a doctrine of Crown immunity, see Lord Murray, *Rex Non Potest Peccare*, 55 *Scot. L. Rev.* 1, 40–43 (1939) (describing the practice of allowing officers of state to sue and be sued for the Crown in matters in which the government was interested and distinguishing Scots’ practice from that in England). On the session’s role in relation to local government, see Robert Bell, *Treatise on the Election Laws As They Relate to the Representation of Scotland in the Parliament of United Kingdom of Great Britain and Ireland* 475–94 (London, George Ramsay & Co. 1812) (describing forms of judicial oversight).

¹⁶⁷ Scottish Law Comm’n, *supra* note 165, § 7.1.

¹⁶⁸ 2 Viscount Stair, *The Institutions of the Law of Scotland Deduced from Its Originals, and Collated with the Civil, Canon, and Feudal Laws and with the Customs of Neighboring Nations* bk. IV § 3.47 (John S. More ed., Edinburgh, Bell & Bradfute 1832) (1693). The declaratory action essentially sought a binding determination of rights prior to the defendant party committing any wrong. C.L.G., *supra* note 157, at 474.

¹⁶⁹ Scottish Law Comm’n, *supra* note 165, § 7.2.

legal principle which[,] thereafter[,] should be followed by the tribunal or agency concerned.”¹⁷⁰ Declarators could also operate on a retrospective basis in conjunction with other remedies, such as an interdict¹⁷¹ or award of damages. Pursuers would, however, have to prove (1) that the question presented was real, and not theoretical; (2) that the pursuer had a real interest in the outcome of the proceeding;¹⁷² and (3) that a declaration would have “practical effect in settling a dispute between the parties.”¹⁷³ In addition, and again in contrast to English law, Scottish law permitted injured individuals to seek declaratory redress against the government and government officials. As in England, however, tort liability generally ran against the responsible official, rather than against the Crown itself.¹⁷⁴

English and Scottish law thus furnished examples on which the newly independent states could draw in fashioning modes of individual litigation with the government. While most colonial assemblies retained firm control over the purse strings, using their leverage over taxation to secure concessions from royal governors,¹⁷⁵ many members of the founding generation would come to recognize a declaratory role for the courts of the independent states. Consider the language of a 1785 Virginia stat-

¹⁷⁰ Id. § 7.51. Such prospective relief, however, was generally discouraged. Id. Additionally, “[N]o declarator [could] be granted where an alternative remedy exist[ed] which the court consider[ed] should be exhausted before recourse to the Court of Session [was] sought.” Id.

¹⁷¹ An interdict operates like an injunction to stay execution and prevent injury to any right. Id. § 8.1. However, pursuant to § 21 of the Crown Proceedings Act of 1947, individuals may not pursue “interdict against the Crown,” or, “in certain circumstances[,] against officers of the Crown,” even if such interim relief would be available in suits against private persons. Id. § 8.4. The legislatures assume that the Crown and Crown officers will give effect to declaratory judgments. Id. Prior to 1947, however, an interdict against the government might have been available. Id.

¹⁷² C.L.G., supra note 157, at 474; see also Scottish Law Comm’n, supra note 165, § 7.52 (stating that no declarator would “be granted of abstract, academic or hypothetical questions” because the court would “not declare an abstract proposition of law”).

¹⁷³ Scottish Law Comm’n, supra note 165, § 7.53.

¹⁷⁴ See, e.g., *Innes v. Magistrates of Edinburgh* (1798) Mor. 13189 (imposing liability on public officials who failed properly to fence a public work leading to severe injury to a pedestrian). In addition to damages and interdict, Scottish law provided for reduction (a remedy in which the Court of Session could reduce the decree of any inferior court which had acted in excess of its statutory power) and suspension (an order that would preserve the status quo pending the resolution of the parties’ dispute). Scottish Law Comm’n, supra note 165, §§ 6.1, 11.3.

¹⁷⁵ On the role of colonial assemblies in the movement toward American independence, see Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (1963). For a study of the lower houses of assembly in the South and their demand for control over money matters, see id. at 49–125.

ute, drafted by Thomas Jefferson and guided through the assembly by James Madison. After authorizing a board of auditors to pass on individual claims against the Commonwealth, the law provided as follows:

Where the auditors . . . shall disallow or abate any article of demand against the commonwealth, and any person shall think himself aggrieved thereby, he shall be at liberty to petition the high court of chancery or the general court, according to the nature of his case, for redress, and such court shall proceed to do right thereon; and a like petition shall be allowed in all other cases to any other person who is entitled to demand against the commonwealth any right in law or equity.¹⁷⁶

This provision, incorporating English practice on the petition of right, authorized individual suits against the Commonwealth for money claims against the treasury and for any other “right in law or equity.”¹⁷⁷ Knowledgeable observers explained the provision as a logical outgrowth of the separation of powers. While the legislature was “to form rules for the conduct of the citizens,” courts were expected to “decide all questions which may arise upon the construction of laws or contracts, as well between the government and individuals, as between citizen and citizen.”¹⁷⁸

Similar laws cropped up in other states. For instance, in New York, the assembly adopted a statute in 1781 empowering any person aggrieved by the auditors’ denial of a claim against the state to petition the Court of Chancery for relief and directing the chancellor to decree in accordance with “equity and good conscience.”¹⁷⁹ In Pennsylvania, the Assembly provided in 1785 for judicial review of the comptroller’s decisions by the Supreme Court, installing a trial by jury of the facts and providing for the determination of questions of law in a court of record.¹⁸⁰ A Georgia statute, adopted in 1790, authorized “any person hav-

¹⁷⁶ 9 William Waller Hening, *The Statutes at Large: Being a Collection of the Laws of Virginia* 540 (Richmond, Va., J. & G. Cochran, 1821).

¹⁷⁷ *Id.*

¹⁷⁸ *Commonwealth v. Beaumarchais*, 7 Va. (3 Call) 122, 168 (1801) (Pendleton, C.J.).

¹⁷⁹ An Act Directing a Mode for the Recovery of Debts Due to, and the Settlement of Accounts with, This State, March 30, 1781, *reprinted in* 1 *Laws of the State of New York* 374, 376 (Albany, N.Y., Weed, Parsons & Co., 1886).

¹⁸⁰ Pfander, *Sovereign Immunity and the Right to Petition*, *supra* note 78, at 941 n.147 (citing Act of February 12, 1785, ch. 1122, *in* 3 *Laws of the Commonwealth of Pennsylvania* 9 (Philadelphia, John Bioren, 1810)).

ing a claim or demand against the State, where (in like cases) one citizen might sue and maintain an action against another . . . to file a bill or petition in the superior court” setting out the terms of the claim for determination there.¹⁸¹ Several states adopted laws during the war that transferred the estates of British loyalists into the state treasury, but many of these laws followed English exchequer practice in protecting the rights of third party claimants and creditors to interplead with the state.¹⁸²

Apart from these developments at the state level, Congress under the Articles of Confederation had been assigned a modest judicial role as the umpire of disputes between the states. Under Article IX, Section 2, Congress was declared the last resort on appeal for “all disputes and differences” between two or more states.¹⁸³ Aggrieved as to matters of “boundary, jurisdiction, or any other cause whatever,” states were free to petition Congress for the appointment of a panel of judges to resolve the dispute.¹⁸⁴ Once the panel convened (following a surprisingly intricate selection process), the judgment was declared to be “final and conclusive” and was said to bind the parties even if they refused to accept the authority of court and refused to enter an appearance in the proceedings.¹⁸⁵ Aimed primarily at boundary disputes between the states, the provision also authorized congressional resolution of disputes between private individuals who claimed the same land under grants from different states.¹⁸⁶ The Articles of Confederation thus provided the precursor for the provisions in Article III of the Constitution that authorize federal

¹⁸¹ An Act to Amend, Explain and Continue the “Act for Regulating the Judiciary Departments of This State,” No. 438 (Dec. 9, 1790), *reprinted in* 2 *The First Laws of the State of Georgia* 422, 422 (Michael Glazier, Inc., photo. reprint 1981) (1800). The law called for service on the Governor and specified that either the Attorney General or Solicitor General of the state shall defend the claim. *Id.* at 422–23. It further provided that if

either party . . . be dissatisfied with the determination, an appeal shall be entered and tried before a special jury; and the final decision of the jury, if in favor of the plaintiff, shall be transmitted to the succeeding legislature, who may provide, as they may think proper, for payment of such judgment or judgments.

Id. at 423.

¹⁸² See Pfander, *Sovereign Immunity and the Right to Petition*, *supra* note 78, at 991–1012 (describing the role of the courts in hearing escheat and forfeiture claims in the newly independent state courts and showing that roughly half of the thirteen original states, mainly in the mid-Atlantic, installed modes of judicial review).

¹⁸³ Articles of Confederation of 1781, art. IX, para. 2. For an account of the activities of this court, see Charles Warren, *The Supreme Court and Sovereign States* 31–51 (1924).

¹⁸⁴ Articles of Confederation of 1781, art. IX, para. 2.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* para. 3.

judicial determinations of “Controversies between two or more states” and controversies between “Citizens of the same State claiming Lands under Grants of different States.”¹⁸⁷

While these early provisions for government suability envisioned a role for the courts in declaring the rights of the parties, they did not treat the judicial decree itself as a warrant for the payment of money from the treasury. In England, petition-of-right and *monstrans* practice contemplated the issuance of a judicial decree resolving the dispute over property, but Parliament retained control of the purse and would conduct its own assessment of any money claims on the treasury.¹⁸⁸ Similarly, in the United States, early state practice typically treated the judicial decision as advisory to the assembly, which retained authority over the appropriation process.¹⁸⁹ To be sure, some states experimented with laws that authorized the courts to make determinations binding against the treasury¹⁹⁰ and many observers viewed such judicial control as a desirable goal.¹⁹¹ But state assemblies generally declined to surrender their traditional control of the treasury. Thus, the Georgia law mentioned earlier expressly provided for the transmission of the judicial decree to the members of the legislature, “who may provide, as they may think prop-

¹⁸⁷ U.S. Const., art. III, § 2.

¹⁸⁸ See 9 William S. Holdsworth, *History of English Law* 33 (1924) (explaining that successful petitioners were obliged to seek an appropriation from Parliament to pay any money award). For a thorough analysis of retained parliamentary control, see Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 *Mich. L. Rev.* 1207, 1227–38 (2009) (reporting on the rise of Parliamentary control over appropriations in the eighteenth century and the inability of individuals to enforce judicial decrees directly against the treasury).

¹⁸⁹ Such state practice was likely influenced by the declaratory nature of the remedy against the Crown in England. See, e.g., Letter from Sydney to Crito, *Indep. Chron.*, Aug. 15, 1793, reprinted in 5 *D.H.S.C.*, supra note 61, at 407–08 (referring to the declaratory character of litigation involving the Crown in England and noting the absence of compulsory process).

¹⁹⁰ See Pfander, *Sovereign Immunity and the Right to Petition*, supra note 78, at 1013 (reporting that Pennsylvania, New York, and New Jersey regarded judicial decrees as a warrant for treasury payments).

¹⁹¹ See *Commonwealth v. Beaumarchais*, 7 Va. (3 Call) 122, 169–79 (1801) (Pendleton, C.J.) (describing his pleasure in discovering that the Virginia assembly had authorized the courts, secure in tenure and emoluments of office, to hear “all claims against the public”); 1 Blackstone’s *Commentaries* 362–63 (St. George Tucker ed. 1803) [hereinafter Tucker’s Blackstone] (criticizing the Commonwealth for its refusal to treat judicial decrees as payable from the treasury).

er, for payment of such judgment or judgments.”¹⁹² Even in Virginia, where the recognition of a judicial role in assessing the legality of state action was celebrated as a corollary of the separation of powers,¹⁹³ the treasurer could not pay a judgment until the assembly adopted an appropriation bill.¹⁹⁴

2. *The Declaratory Role in the Early Republic*

It appears that declaratory judgments, viewed as binding on executive branch officials, were more acceptable in the early Anglo-American law of state suability than were judgments directed specifically at the treasury. A similar lesson emerges from the debate over state suability that unfolded before and after the Supreme Court’s decision in *Chisholm v. Georgia*. It does not make sense to canvas the terms of that debate in detail; others (including one of us) have told the story of Article III’s ratification,¹⁹⁵ of the resulting discord over the suability of the states,¹⁹⁶ of the Supreme Court’s eventual 4-1 decision in favor of state suability,¹⁹⁷ and of the relatively expeditious response of the states and their representatives in the Senate in proposing and ratifying the Eleventh Amendment.¹⁹⁸ Rather than retell the story in depth, we will concentrate on certain overlooked features of the debate that seem to anticipate a declaratory approach to state accountability.

¹⁹² See An Act to Amend, Explain and Continue the “Act for Regulating the Judiciary Departments of This State,” No. 438 (Dec. 9, 1790), *reprinted in* 2 *The First Laws of the State of Georgia*, supra note 181, at 422.

¹⁹³ See *Beaumarchais*, 7 Va. (3 Call) at 170–71; 1 Tucker’s *Blackstone*, supra note 191, at 364.

¹⁹⁴ See 1 Tucker’s *Blackstone*, supra note 191, at 362–63 (reporting on Virginia practice in an American edition of the Commentaries that featured extensive notes on the law applicable in the courts of the United States).

¹⁹⁵ See, e.g., Clark, supra note 5, at 1853–62; Fletcher, *A Historical Interpretation of the Eleventh Amendment*, supra note 60, at 1045–46; Pfander, *History and State Suability*, supra note 63, at 1299–1304.

¹⁹⁶ See, e.g., Clark, supra note 5, at 1862–75; Fletcher, *A Historical Interpretation of the Eleventh Amendment*, supra note 60, at 1047–53; Pfander, *History and State Suability*, supra note 63, at 1329–33 (discussing the debate over state suability in federal question cases).

¹⁹⁷ See, e.g., Clark, supra note 5, at 1878–86 (explaining the Justices opinions in *Chisholm*); Fletcher, *A Historical Interpretation of the Eleventh Amendment*, supra note 59, at 1054–58.

¹⁹⁸ See, e.g., Clark, supra note 5, at 1886–91; Fletcher, *A Historical Interpretation of the Eleventh Amendment*, supra note 60, at 1058–59; Pfander, *History and State Suability*, supra note 63, at 1324–29 (exploring the states’ fear of retrospective liability as an impetus for the proposal and passage of the Eleventh Amendment).

We think the debate reveals substantial concern with the threat of federal judicially imposed liability payable in specie from state treasuries. There was, as we have seen (and as Justice Iredell's opinion confirms), no common law vehicle for the assertion of such claims and the creation of such a mode of proceeding would undercut the state assemblies' traditional primacy in managing the appropriations process. In offering qualified denials of state suability in the ratification debates, such figures as Alexander Hamilton, James Madison, and John Marshall all offered versions of this concern for the state treasury.¹⁹⁹ Justice James Iredell's now iconic dissenting opinion in *Chisholm* also highlighted the threat to state treasuries posed by the recognition of jurisdiction over assumpsit claims. As he explained:

I believe there is no doubt that neither in the State now in question, nor in any other in the Union, any particular Legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed.²⁰⁰

The Justices in the *Chisholm* majority did not share this concern. For them, the clear text of Article III, with its provision for jurisdiction over state-party cases, together with the terms of the Judiciary Act of 1789, overcame any obstacles to the recognition of state suability.²⁰¹ Thus, the

¹⁹⁹ For the iconic comments of these three Founders, see Martin H. Redish, Suzanna Sherry & James E. Pfander, *Federal Courts: Cases, Comments, and Questions* 361–62 (7th ed. 2012) (quoting comments by Hamilton in *The Federalist Papers* and by Madison and Marshall during the ratification debate in Virginia).

²⁰⁰ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 434–35 (1793) (Iredell, J., dissenting).

²⁰¹ *Id.* at 450 (Blair, J.) (stressing that Article III of the Constitution extends jurisdiction “to controversies between a State and citizens of another State” and expressing “no doubt” that such controversies include those in which the State is a defendant); see also *id.* at 467 (Cushing, J.) (focusing on the language of Article III of the Constitution and finding that a non-citizen suit against a State “seems clearly to fall within the letter of the Constitution”); *id.* at 475–77 (Jay, C.J.) (exploring the language of Article III and reasoning that if the Framers had intended to prohibit courts from adjudicating controversies in which the state is a defendant, “it is inconceivable that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it; if it meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the Constitution”). Justice Wilson similarly explained:

[T]his doctrine rests not upon the legitimate result of fair and conclusive deduction from the Constitution: It is confirmed, beyond all doubt, by the direct and explicit declaration of the Constitution itself. “The judicial power of the United States shall extend, to controversies between two States.” . . . Can the most consummate degree of

majority emphasized the fact that both the Constitution and its implementing statutes authorized suits against the states as parties on the Court's original docket.²⁰² In addition, Congress in Section 14 of the Act had conferred on all federal courts the power to issue all writs necessary for the exercise of their respective jurisdictions.²⁰³ For Justice Wilson and Justice Blair, Section 14 expressly empowered the Court to fashion writs necessary to implement its jurisdiction in state-party cases.²⁰⁴ For Justice Iredell, these congressional signals were far too ambiguous to warrant the judicial recognition of suits for money judgments that were not part of the existing fabric of Anglo-American law.²⁰⁵ Justice Iredell and others, as Clark has shown, were concerned with the mode by which such money judgments were to be enforced and feared the prospect of violent clashes over attempts to levy on state property.²⁰⁶

professional ingenuity devise a mode by which this "controversy between two States" can be brought before a Court of law; and yet neither of those States be a Defendant? "The judicial power of the United States shall extend to controversies, between a state and citizens of another State." Could the strictest legal language; could even that language, which is peculiarly appropriated to an art, deemed, by a great master, to be one of the most honorable, laudable, and profitable things in our law; could this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal? Causes, and not parties to causes, are weighed by justice, in her equal scales: On the former solely, her attention is fixed: To the latter, she is, as she is painted, blind.

Id. at 466 (Wilson, J.).

²⁰² Id. at 451 (Blair, J.) (noting that "if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a State is a party"); see also supra note 201 and accompanying text (highlighting the majority's insistence on the constitutionality of state suability).

²⁰³ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82.

²⁰⁴ See *Chisholm*, 2 U.S. (2 Dall.) at 452–53 (Blair, J.) (suggesting that, though likely "too incompatible with the dignity of a State," the court could issue a default judgment and writ of enquiry of damages); id. at 464 (Wilson, J.) (explaining that "[i]t would be superfluous to make laws, unless those laws, when made, were to be enforced" (internal quotation marks omitted)).

²⁰⁵ Id. at 449–50 (Iredell, J., dissenting) (reasoning that "every word in the Constitution may have its full effect without" permitting individuals to sue the states, and "that nothing but express words, or an insurmountable implication (neither of which [he] consider[ed], c[ould] be found in this case) would authorise the deduction of so high a power"); see also id. at 449 (explaining that even if the Constitution would permit such suits against states, "a new law is necessary for the purpose, since no part of the existing law applies").

²⁰⁶ Clark, supra note 5, at 1879 (noting that Justice Iredell "construed Article III narrowly in light of the Constitution's failure to grant Congress coercive power over states and its broader purpose to avoid a civil war"); see also id. at 1855 (explaining that Hamilton, in "The Federalist No. 16," felt "coercive force against states was impracticable and likely to

The Justices displayed a remarkably sophisticated view of the problems associated with the enforcement of judgments, the possibility of declaratory relief, and the likelihood that the oath taken by other state and federal officials would serve to ensure eventual effectuation of any judgment they rendered. Edmund Randolph, counsel for the plaintiff (as well as a leading member of the Virginia delegation to the constitutional convention and the nation's first Attorney General), was the first to sound declaratory themes in discussing the problem of execution:

But, after all, although no mode of execution should be invented, why shall not the Court proceed to judgment? It is well known, that the Courts of some States have been directed to render judgment, and there stop; and that the Chancery has often tied up the hands of the common law in a like manner. Perhaps, if a Government could be constituted without mingling at all the three orders of power, Courts should, in strict theory, only declare the law of the case, and the subject upon which the execution is to be levied; and should leave their opinions to be enforced by the Executive. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact, and character.²⁰⁷

Here we find a remarkably complete declaratory account: Let the courts render judgment and rely on the other branches (and the good faith of the states themselves) to ensure the effectuation of the decree.

Justice Blair appeared to echo Randolph's declaratory theory of state accountability in his separate opinion:

Nor does the jurisdiction of this Court, in relation to a State, seem to me to be questionable, on the ground that Congress has not provided any form of execution, or pointed out any mode of making the judgment against a State effectual Let us go on as far as we can; and if, at the end of the business, notwithstanding the powers given us in the 14th section of the judicial law, we meet difficulties insurmountable to us, we must leave it to those departments of Government which have higher powers; to which, however, there may be no necessity to have recourse: Is it altogether a vain expectation, that a State may

cause the 'violent death of the Confederacy'" (quoting *The Federalist* No. 16, at 114 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

²⁰⁷ See *Chisholm*, 2 U.S. (2 Dall.) at 427–28 (argument of plaintiff's counsel).

have other motives than such as arise from the apprehension of coercion, to carry into execution a judgment of the Supreme Court of the United States, though not conformable to their own ideas of justice?²⁰⁸

Here, Blair gave voice to the hope that the states would conform to the decisions of the Supreme Court in recognition of their constitutional duty. If that failed, then the task of execution would fall to other branches of the government.

There was, needless to say, an unspoken assumption underlying the combined confidence of Randolph and Blair in the executive's enforcement powers. The two Virginians may have been relying on the considerable reputation and influence of the nation's first President, George Washington. One cannot say for sure how President Washington would have proceeded in the face of a state's refusal to pay a federal judgment: Early judgments rendered against the states on the Court's original docket before the Eleventh Amendment took effect were quickly paid, thereby obviating any enforcement necessity.²⁰⁹ We do know that Washington was later to lead the federal militia into battle to quell the Whiskey Rebellion in western Pennsylvania, after concluding that the federal writ no longer ran in that part of the state.²¹⁰ But one cannot confidently say that the task of enforcing judgments against the states would have occasioned an equally impressive display of federal force. Blair's reference to those "departments" with higher powers suggests, in any case, that he may have envisioned enforcement assistance from Congress as well as from the President.

²⁰⁸ Id. at 451–52 (Blair, J.). Justice Blair's and Mr. Randolph's belief that states would conform to Supreme Court judgments was not merely wishful thinking: States had previously agreed to pay—even in the absence of Supreme Court judgments—substantial sums to settle disputes or satisfy jury verdicts. See, e.g., Letter from Shearjashub Bourne to Robert Treat Paine (Feb. 16, 1793), in 5 D.H.S.C., supra note 61, at 163 (reporting that Maryland had agreed to pay \$400,000 in settlement of litigation brought against it). The Documentary History reports that, before the Eleventh Amendment was ratified, the State of New York appropriated funds to pay a \$5,315 judgment that the Court entered against it following a jury's verdict in favor of an individual litigant. See 5 D.H.S.C., supra note 61, at 119–21.

²⁰⁹ See supra note 208 and accompanying text (recounting payments by New York State and others to settle judgments rendered against them by juries convened as part of the Court's original jurisdiction).

²¹⁰ Federal law empowered the President to call out the militia to ensure the execution of federal law. See Militia Act of May 2, 1792, ch. 28, §§ 1–2, 1 Stat. 264. For an account of the Whiskey Rebellion, see Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 134–39 (2009).

The perception that Congress and the President might help to ensure the enforcement of decrees running against the states may also help to explain why the Justices in *Chisholm* viewed the assertion of money claims against the federal government as presenting a greater enforcement challenge than that against the states. Acknowledging the possibly differential treatment of state and nation for suability purposes, Chief Justice Jay offered the following explanation:

It is this: in all cases of actions against States or individual citizens, the National Courts are supported in all their legal and Constitutional proceedings and judgments, by the arm of the Executive power of the United States; but in cases of actions against the United States, there is no power which the Courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view.

I wish the State of society was so far improved, and the science of Government advanced to such a degree of perfection, as that the whole nation could in the peaceable course of law, be compelled to do justice, and be sued by individual citizens. Whether that is, or is not, now the case, ought not to be thus collaterally and incidentally decided: I leave it a question.²¹¹

Chief Justice Jay makes clear that he supports government suability in general and would extend the doctrine to suits against the nation as well as the states. But doubts about the willingness of Congress and the President to appropriate the funds in the event of a disagreement led the Chief Justice to proceed cautiously, thus anticipating the circumspection the Court later displayed.

Needless to say, the Eleventh Amendment did not respond to the Court's opinions in *Chisholm* by adopting an explicitly declaratory theory of state government accountability. It forecloses the federal courts from construing the grant of judicial power to extend to suits against the states brought by two disfavored plaintiffs. But the Amendment supplied the states at the time with a complete defense against federally decreed

²¹¹ *Chisholm*, 2 U.S. (2 Dall.) at 478 (Jay, C.J.).

treasury liability for preconstitutional state debts and obligations.²¹² The Court has since expanded that principle to protect state treasuries from a wider range of federal law claims, transforming Justice Iredell's dissent into a majority opinion.²¹³ We propose to interpret this judicial gloss on the Eleventh Amendment in keeping with the declaratory theory as the best way to give effect to the treasury-protective impulse that underlay Justice Iredell's dissent. At the same time, our approach would preserve the federal judicial role in declaring the meaning of federal law as it applies to state action. We next consider how that theory fits with current law.

C. Doctrinal Coherence and the Declaratory Theory

Several features of current law confirm the viability of a declaratory theory. First, contrary to the appearance created by the Court's unbending refusal to embrace the diversity theory of the Eleventh Amendment, the lower federal courts routinely entertain federal question claims against the states. Relying on the *Ex parte Young* fiction and Section 1983, individual litigants routinely file federal court claims attacking state action as a violation of supreme federal law.²¹⁴ While state officials act as nominal defendants in such proceedings, the resulting decrees (often for injunctive and declaratory relief) effectively bind the state by compelling responsible state officials to comply with the norms declared in the proceeding.²¹⁵ In these proceedings, all hands recognize both that the federal courts have the power to hear the claim and that state officials have a federally enforceable duty to comply with the decree. We

²¹² See Pfander, *History and State Suability*, supra note 63, at 1352 (observing that the Eleventh Amendment restored state control over pre-Constitution state debts by foreclosing the jurisdictional provisions by which those debts could have been placed in suit).

²¹³ As the Court explained in *Alden v. Maine*:

The Court has been consistent in interpreting the adoption of the Eleventh Amendment as conclusive evidence "that the decision in *Chisholm* was contrary to the well-understood meaning of the Constitution," and that the views expressed by Hamilton, Madison, and Marshall during the ratification debates, and by Justice Iredell in his dissenting opinion in *Chisholm*, reflect the original understanding of the Constitution. 527 U.S. 706, 727 (1999) (citation omitted) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 69 (1996)).

²¹⁴ See H&W VII, supra note 8, at 931 (noting the importance of *Ex parte Young* litigation).

²¹⁵ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 667 (1974) (noting that "[t]he injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions").

have reached a point, happily in our view, where the states accept this law-declaration role of the federal judiciary and, in particular, of the Supreme Court.

Second, despite the power of the federal courts to entertain suits for injunctive and declaratory relief, the Court has been quite reluctant to allow federal judgments to award damages-like relief payable from state treasuries. That was the lesson of *Edelman v. Jordan*,²¹⁶ which held that the Eleventh Amendment barred equitable restitution to the extent that it served as the functional equivalent of an order to pay damages for past violations of a federal law that specified certain standards of timeliness for states to follow in processing welfare claims.²¹⁷ That was the lesson too of *Alden v. Maine*, which held that the limits on Congress's power to abrogate the states' immunity from suit apply with equal force to suits brought in state and federal court.²¹⁸ So while federal (and state) courts have power to entertain suits for declaratory and injunctive relief against ongoing violations of federal labor standards, federal courts cannot entertain the employees' claim for backpay under commerce-based legislation and the state courts have no federal duty to entertain such claims.²¹⁹

Third, while the Court refrained in *Edelman* and *Alden* from authorizing a compulsory suit for retrospective relief to remedy state violations of federal norms, the Court did not bar states from providing such relief as a matter of state law and process. Thus, in the aftermath of *Edelman*, the Court assumed that the members of the plaintiff class could recover back welfare payments by pursuing remedies available as a matter of state law.²²⁰ While the remedy was doubtless more cumbersome from the perspective of the lawyers for the class, the Court viewed the damages portion of the remedy as a matter for state institutions to handle.²²¹ Similarly, in *Alden*, the Court stopped well short of foreclosing the payment of backpay. Indeed, the majority opinion of Justice Kennedy recognized that the good faith of the states might well contribute to secur-

²¹⁶ 415 U.S. 651 (1974).

²¹⁷ *Id.* at 678.

²¹⁸ *Alden*, 527 U.S. at 754.

²¹⁹ *Id.*

²²⁰ See *Quern v. Jordan*, 440 U.S. 332, 349 (1979) (authorizing the issuance of notice relief to ensure that welfare benefit claimants could seek recovery of funds under state processes).

²²¹ *Id.* at 346–48 (upholding issuance of notice relief because the state—not the federal government—ultimately retained the power to grant or deny retroactive benefits).

ing the supremacy of federal law.²²² While it took some persistence, the employees eventually obtained payment from the state of Maine: They successfully petitioned the state legislature for the adoption of private legislation appropriating the funds in question.²²³

Finally, the Court's decision in *Alden* ironically creates an opportunity to revisit the states' Eleventh Amendment immunity. In one sense, *Alden* serves to perfect a state immunity from suit that the Court had previously recognized in *Seminole Tribe v. Florida*;²²⁴ it ensures that plaintiffs shut out of federal court by the Eleventh Amendment cannot switch to state court and enforce federal law money claims there.²²⁵ But in another sense, *Alden* makes the Eleventh Amendment machinations of *Seminole Tribe* unnecessary. If Congress lacks power, due to the structural considerations invoked in *Alden*,²²⁶ to authorize an individual to bring an unconsented suit for damages against the states in either state or federal court, then individuals cannot mount such claims as a matter of federal law regardless of the scope of state sovereign immunity and the breadth of federal jurisdiction. At the same time, *Alden* leaves in place the power of Congress to regulate the states as states under the Com-

²²² See *Alden*, 527 U.S. at 754–55 (“The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance [of federal supremacy].”).

²²³ See Fiscal Note 2000-01, Appropriations/Allocations, H. Rep. 119-1803, 2nd Sess., CA (H-1076), item 2 to LD 2530 (Me. 2000), http://legislature.maine.gov/legis/bills/bills_119th/billtexts/ld253002-3.asp, archived at <http://perma.cc/KEX2-A6TQ>.

²²⁴ 517 U.S. 44 (1996).

²²⁵ *Alden*, 527 U.S. at 754 (holding that states “retain immunity from private suit in their own courts,” as well as in federal courts, an immunity that is “beyond the congressional power to abrogate by Article I legislation”).

²²⁶ In *Alden*, the Court reiterated that the states' sovereign immunity derived “not from the Eleventh Amendment but from the structure of the original Constitution itself.” *Id.* at 728. The Court then went on to explain that because the “Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle[,] . . . the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.” *Id.* at 728–29. States thus retained their sovereign immunity, “save where there ha[d] been ‘a surrender of this immunity in the plan of the convention.’” *Id.* at 730 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23 (1934)). And Congress could, therefore, only subject the states to private suits in their courts if there was “‘compelling evidence’ that the States were required to surrender this power to Congress pursuant to the constitutional design.” *Id.* at 730–31 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 781 (1991)).

merce Clause and to impose duties on the states that individuals can enforce through actions for declaratory and injunctive relief.²²⁷

We suggest that the Court make it clear that *Ex parte Young* allows the federal courts to entertain actions against state officials to declare the meaning and application of federal law and to issue injunctive and declaratory relief in all proper cases.²²⁸ We would, in particular, expect the Court to overturn or limit that portion of *Seminole Tribe* which held that *Ex parte Young* relief was unavailable to enforce the State's obligation to bargain with the tribe over the siting of a casino.²²⁹ While scholars have advanced various accounts of this much-criticized portion of *Seminole Tribe*,²³⁰ one can read the decision as foreclosing *Ex parte Young* relief in circumstances where Congress has regulated the states and has attempted to subject the states to suit as parties of record.²³¹ We would reject the result in *Seminole Tribe*, empowering federal courts to grant injunctive and declaratory relief to enforce federal law in circumstances where Congress has acted to subject the states to suit for violations of federal law. When an attempted abrogation fails under the Court's juris-

²²⁷ See *id.* at 747 (discussing the *Ex parte Young* exception to state sovereign immunity which permitted private suits against state officers for declaratory or injunctive relief).

²²⁸ By ensuring access to an all-purpose *Ex parte Young* proceeding in cases like *Alden* and *Seminole Tribe* where Congress has specifically attempted to authorize suit against the states as states, the approach proposed here would avoid any need to make the states as states fully subject to federal suits along the lines suggested by the diversity theory. As we note below, states control the litigation in applications for *Ex parte Young* relief and the usual rules of non-party preclusion make clear that a decree in such a proceeding would bind the state.

²²⁹ See *Seminole Tribe*, 517 U.S. at 74–76 (noting that Congress authorized a suit against the State of Florida as a state and viewing that provision as implicitly foreclosing reliance on the *Ex parte Young* remedy in a suit against the state governor).

²³⁰ See *supra* note 21 (discussing the Meltzer and Jackson critiques of the *Ex parte Young* component of *Seminole Tribe*).

²³¹ See James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. Rev. 161, 183–87 (1998) (exploring this interpretation of the *Seminole Tribe* decision); see also David P. Currie, *Response, Ex parte Young After Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 549–50 (1997) (treating *Seminole Tribe* as having viewed *Ex parte Young* relief as displaced by the existence of a statutory remedy running against the state as such and characterizing the Court's displacement conclusion as one that "makes no sense"). In the wake of the *Alden* decision, with the state courts unavailable as a forum for the adjudication of compulsory claims under federal statutes, it "makes no sense" to treat the statutory provision for a suit against a state as a bar to federal judicial power to declare the rights of the parties. Indeed, the *Alden* Court's reaffirmation of the viability of *Ex parte Young* relief, see *Alden*, 527 U.S. at 747–48, essentially decides the question.

prudence, we would allow the *Ex parte Young* action to proceed, thus ensuring a measure of federal enforcement.²³²

We should note that we do not share John Harrison's minimalist conception of the *Ex parte Young* decision. In a characteristically thought-provoking paper, Harrison takes on the *Ex parte Young* conventional wisdom. The decision does not, in Harrison's view, create a fictional sovereign immunity exception and it does not recognize a new federal right of action.²³³ Rather, Harrison builds a case that *Ex parte Young* began as a standard form of antisuit injunction, in which the railroad (or its agents) was suing in equity to assert the functional equivalent of an equitable defense to a government enforcement proceeding at law. Harrison views the fundamentally defensive character of the railroad's proceeding as posing no immunity problem; he regards equity's long-standing acceptance of the antisuit injunction as the source of the right to sue.²³⁴ For Harrison, then, *Ex parte Young* may support an anticipatory defense of constitutional nullification but says nothing about the viability of modern suits to compel state officials to take affirmative action to comply with constitutional dictates.²³⁵

²³² To be sure, one might argue that § 1983 provides an alternative vehicle for the enforcement of federal statutory rights against state officials and could fill any remaining *Seminole Tribe* gap. See Jackson, *Seminole Tribe*, The Eleventh Amendment, and the Potential Evisceration of *Ex parte Young*, supra note 21, at 523–27; Meltzer, *The Seminole Decision and State Sovereign Immunity*, supra note 21, at 39–40, 42. Recent restrictions on the use of § 1983 as a vehicle for the enforcement of federal cooperative federalism programs adopted in the exercise of Congress's spending power, however, suggest some reason for caution. See, e.g., *Gonzaga Univ. v. Doe*, 536 U.S. 273, 276 (2002) (curtailing use of § 1983 as a supplemental remedy in spending power cases). Indeed, the Court recently extended *Gonzaga*, ruling that the power of a federal court of equity to enjoin a state violation of federal standards specified in Spending Clause legislation was displaced by Congress's decision to assign enforcement primacy to a federal agency. See *Armstrong v. Exceptional Child Ctr.*, 135 S. Ct. 1378, 1385 (2015) (concluding that the *Ex parte Young* remedy was unavailable to enforce rights under a federal Medicaid statute that specified a funds cut-off remedy for state violations of federal standards). In contrast to Spending Clause legislation, many statutes adopted under the commerce power specifically confer individual rights and authorize suits against the states, perhaps in addition to authorizing some agency enforcement. It seems much harder to argue, in cases such as *Alden*, that Congress's decision to authorize some agency enforcement displaces the individual's right to pursue equitable and declaratory relief on her own behalf.

²³³ Harrison, supra note 8, at 990.

²³⁴ *Id.* at 998–1000, 1022.

²³⁵ *Id.* at 1019–20 (emphasizing the distinction between affirmative relief against government officials and a nullifying defense).

While the argument deserves a more detailed assessment than we can provide here, we question both the historical linkage to the antisuit injunction and the current salience of the history.²³⁶ Equity did not recognize routine antisuit injunctions any time a party claimed that proceedings in another tribunal could cause irreparable harm. Courts of equity exercised concurrent jurisdiction over suits for an injunction to stay proceedings at law to facilitate the assertion of certain well-established equitable defenses such as fraud, mistake, and accident; they exercised ancillary jurisdiction over bills seeking discovery of facts and bills of peace.²³⁷ Irreparable harm was said to arise from the very concrete reali-

²³⁶ Although Harrison treats *Ex parte Young* as an antisuit injunction case, it was not so treated by contemporary observers. For starters, the Court did not invoke the antisuit injunction tradition in defending the injunction being tested in *Ex parte Young*, but instead rested its decision on other authority. See *Ex parte Young*, 209 U.S. at 151–57 (citing *Fitts v. McGhee*, 172 U.S. 516 (1899); *Smyth v. Ames*, 169 U.S. 466 (1898); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *Poindexter v. Greenhow*, 114 U.S. 270 (1885)). Contemporary observers, writing about the decision in law reviews, similarly failed to identify an antisuit injunction connection. See, e.g., LeRoy G. Pilling, An Interpretation of the Eleventh Amendment, 15 Mich. L. Rev. 468, 474 (1917) (treating *Ex parte Young* as an exercise of “the power of a court of equity to protect the constitutional rights of a citizen against government agencies”); Walter H. Buck, Notes of Current Topics, Constitutional Repeal, 43 Am. L. Rev. 770, 773–74 (1909) (treating *Ex parte Young* not as an “epochal” decision but as an outgrowth of earlier decisions such as *Poindexter*, 114 U.S. 270); James Monroe Olmstead, Notes of Current Topics, Constitutional Repeal, 43 Am. L. Rev. 282, 285, 287 (1909) (describing *Ex parte Young* as of “great and startling interest” in that it “modifies if not repeals the Eleventh Amendment”).

²³⁷ Antisuit injunctions were a common feature of practice in divided courts of law and equity, particularly because the courts of law refused to recognize certain equitable defenses. For an account of antisuit litigation in the early republic and its role in the adoption of the Anti-Injunction Act, see James E. Pfander & Nassim Nazemi, The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap, 92 Tex. L. Rev. 1, 1–73 (2013). Treatises in the day did not regard the antisuit injunction category as subject to expansion to encompass any potential defense to a proceeding at law, but limited the category to certain well-defined defenses that courts of law refused to recognize. One leading treatise, for example, regarded the principles by which courts of equity act as “very well settled.” See 1 Joseph Story, Commentaries on Equity Jurisprudence § 20, at 20 (W.H. Lyon ed., 14th ed. 1918) (quoting Lord Redesdale) (internal quotation marks omitted). Those settled principles held that antisuit injunctions fell within the “concurrent” jurisdiction of courts of equity (being an authority over matters of property and contract that was shared with courts of law) and would issue to vindicate three defenses: fraud, mistake, and accident. 2 Story, *supra*, at 562; see also 1 John Norton Pomeroy, A Treatise on Equity Jurisprudence §§ 136–40 (Spencer W. Symons ed., 5th ed. 1941) (affirming that equity sorted proceedings into three categories: concurrent (with jurisdiction shared between courts of law and equity); exclusive (such as matters of trust administration that only courts of equity handled); and auxiliary (including bills of discovery and bills of peace)); *id.* § 188, at 269–70 (including accident, mistake and fraud as the bases for equity’s concurrent jurisdiction over antisuit injunctions). Notably,

ty that these defenses and certain procedural protections were not available in (separate) courts of law.²³⁸ Prior to *Ex parte Young*, equity had no established power to enjoin criminal proceedings on the ground that they would threaten constitutional values (such as substantive due process); courts of law, after all, recognized the defense of unconstitutionality and there was no need for equity to interpose by antisuit injunction. Indeed, equity had no jurisdiction over criminal matters, a gap that explains the frequent dictum that equity has no power to stay criminal proceedings.²³⁹ The Court thus broke new ground in *Ex parte Young*, authorizing a new kind of injunction that was untethered to established antisuit forms (fraud, mistake, accident).²⁴⁰ Having done so, the Court has decided a

while Harrison's catalog of existing, pre-*Ex parte Young* antisuit injunctions comfortably falls within this established category, see Harrison, *supra* note 8, at 998–99 & n.45 (citing examples of antisuit injunctions for cases of “mistake, accident or fraud”) (citation omitted) (internal quotation marks omitted), the action in *Ex parte Young* did not invoke any established antisuit category. The closest analog to the sort of injunction recognized in *Ex parte Young* was a suit to enjoin torts and trespasses to property, the very claim at issue in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 804 (1824). But treatises did not regard these as antisuit injunctions within the concurrent (antisuit) jurisdiction of equity; they were instead viewed as part of equity's “exclusive” jurisdiction and were assigned to a separate category. See 1 Pomeroy, *supra*, § 221a, at 377. In effect, then, the *Ex parte Young* Court ignored the antisuit (concurrent) category and expanded the exclusive category to include tortious invasions as well as non-tortious threats to enforce legislation that burdened a constitutional right, as modern observers have explained. See H&W VII, *supra* note 8, at 933–34. Harrison's account understates the significance of this innovation. See generally David L. Shapiro, *Ex parte Young* and the Uses of History, 67 N.Y.U. Ann. Surv. Am. L. 69, 84–87 (2011) (criticizing Harrison's failure to acknowledge the decision's role in the development of constitutional remedies).

²³⁸ See 2 Story, *supra* note 237, § 1198, at 562 (affirming that not every defense would support an action in equity but only those based on fraud, mistake, and accident, where the court of law does not recognize the defense); 1 Pomeroy, *supra* note 237, §§ 139–40, at 191–94 (identifying the law courts' refusal to recognize defenses of fraud, mistake and accident as the cornerstone of equity's perception that law's remedial inadequacy necessitated the antisuit injunction).

²³⁹ See Henry L. McClintock, *Handbook of the Principles of Equity* 470 (2d ed. 1948) (noting the enforcement of criminal law lies beyond the jurisdiction of a court of equity); 2 Story, *supra* note 237, § 1216, at 572 (courts of equity will not exercise jurisdiction over antisuit injunctions directed at “any criminal matters or in any cases not strictly of a civil nature”).

²⁴⁰ As to *Ex parte Young*'s novelty in recognizing a new right of action, contemporary observers did not explain the Court's decision in terms of antisuit injunctions but offered different theories of what the Court had done. See Robert Bruce Scott, *The Increased Control of State Activities by the Federal Courts*, 3 Am. Pol. Sci. Rev. 347, 354 (1909) (describing *Ex parte Young* as based on “the common law rule that an officer . . . is liable for every act in excess of jurisdiction”). Observers recognized the innovation in *Ex parte Young* as allowing suit to restrain state officials from enforcing an unconstitutional statute, whereas earlier cases

century's worth of cases that build on *Ex parte Young*'s reorientation of the law of government accountability. We think that *Ex parte Young*, as the foundation of this innovative body of law, remains a vital cornerstone of the federal judiciary's declaratory role.²⁴¹

At the same time, we would accept the decisions in *Seminole Tribe* and *Alden* and the barrier to actions for damages brought under federal laws adopted pursuant to the Commerce Clause and other Article I grants of congressional power.²⁴² (We would leave in place the rules that permit Congress to abrogate immunity and institute suits against the states in legislation enacted to enforce the Fourteenth Amendment.²⁴³) While the federal courts, in cases such as *Alden*, could grant injunctive and declaratory relief against ongoing violations of federal law, individuals who wished to secure an award of damages would pursue those claims in state court or through whatever process the state makes available. Of course, if the state were to consent to suit in federal court, the action for damages could proceed there. Similarly, if the state were to adopt legislation (as Illinois and North Carolina have done²⁴⁴) waiving sovereign immunity from suit in federal courts under certain federal laws, the federal courts could freely entertain both the declaratory claim and the damages claim. In the typical case, though, litigants would apply to state courts for the recognition and enforcement of their federal judgment and seek damages in accordance with state law.

By leaving the issue of damages to state law, such a regime would incorporate a key feature of modern state sovereign immunity law and would acknowledge one important historical argument against state sua-

such as *Osborn*, 22 U.S. (9 Wheat.) 738, were suits brought "to restrain an interference with tangible property." H.E. Kilmer, *Federal Injunction of State Officials to Prevent the Enforcement of Laws Claimed to be Confiscatory*, 69 Cent. L.J. 76, 81 (1909).

²⁴¹ In focusing on the power of federal courts to declare that states have violated federal law, we call for a declaratory role that may extend somewhat beyond the nullification power that Harrison would recognize. But because we would leave the availability of money damages to state law and state courts, the federal role we envision does not threaten state sovereignty.

²⁴² *Alden*, 527 U.S. at 754 (holding that Congress lacks power under Article I to abrogate state sovereign immunity in state courts); *Seminole Tribe*, 517 U.S. at 65–66 (finding that Congress lacks power under Article I to abrogate state sovereign immunity in federal court).

²⁴³ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding that the enforcement provisions of § 5 of the Fourteenth Amendment necessarily limited the reach of state sovereign immunity).

²⁴⁴ See, e.g., 745 Ill. Comp. Stat. 5/1.5 (2014) (permitting individual suits against the state in federal court for violations of federal law in the employment discrimination and civil rights context); N.C. Gen. Stat. Ann. § 143-300.35(a) (West 2015) (same).

bility. It was the desire to protect the state treasury that animated critics of the *Chisholm* decision²⁴⁵ and led the Court in *Hans v. Louisiana* to block federal suits to enforce state debt instruments.²⁴⁶ It may be worth noting that critics of *Chisholm* did not claim that states should be free to refuse to pay their just obligations; they argued that individuals seeking payment of funds from the state treasury should invoke the formal processes of state law.²⁴⁷ To be sure, in times of financial stress and crisis, state processes might result in something less than full satisfaction of all creditors; indeed, Louisiana's decision to default on its bonds gave rise to the *Hans* litigation.²⁴⁸ But in the ordinary course of business, states pay their creditors as the bills come due and federal law claims for money might sensibly take their place in the state queue.

Adoption of a declaratory approach might encourage state legislatures to adopt more streamlined models for the payment of federal judgments. Such cooperation does not strike us as entirely fanciful. After all, the State of Maine agreed to pay the employees in the *Alden* litigation, essentially concluding that they had a valid claim for backpay based on a violation of federal law (with which finding Maine apparently

²⁴⁵ See, e.g., Pfander, *History and State Suability*, supra note 63, at 1324–29 (detailing how the fear of retrospective state liability served as an impetus for a constitutional response to *Chisholm*).

²⁴⁶ 134 U.S. 1, 1, 21 (1890) (holding that a state—without its consent—cannot be sued in federal court by one of its own citizens to recover on a debt because, in part, “to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause”).

²⁴⁷ See 5 D.H.S.C., supra note 61, at 127–273 (collecting contemporary newspaper accounts of the *Chisholm* decision that featured claims that the state legislatures were competent to secure the rights of state creditors); see also Letter from The True Federalist to Edmund Randolph, No. III, *Indep. Chron.*, (Feb. 6, 1794), reprinted in 5 D.H.S.C., supra note 61, at 253–57 (describing existing remedies against state officials, observing that the enforcement of public contracts depends on the “interest and the honor of the States,” and arguing that the States have ample incentives to honor their debts without suability in federal court); John Hancock, Governor of Mass., Address to the Mass. Leg., *Indep. Chron.* (Sept. 18, 1793), reprinted in 5 D.H.S.C., supra note 61, at 418 (“I believe that the Commonwealth of Massachusetts . . . will be always ready, as far as the people’s ability shall admit of, to do justice to all men.”); Charles Jarvis, Speech in the Mass. H.R., *Indep. Chron.* (Sept. 23, 1793), reprinted in 5 D.H.S.C., supra note 61, at 436–39 (affirming that justice for the individual suitor will be achieved by “leaving this essential concern to the respective Legislatures [of the States], on the fullest persuasion that they will do right”); Letter from Sydney to Crito, *Indep. Chron.* (Aug. 15, 1793), reprinted in 5 D.H.S.C., supra note 61, at 408 (noting that when “justice is demanded by a citizen, a sense of . . . equity and fair dealing . . . is generally compulsive enough for the purpose”).

²⁴⁸ *Hans*, 134 U.S. at 1–3 (detailing Hans’s claim against the state).

agreed).²⁴⁹ Maine made this payment after the Court had ruled that it had no federal obligation to do so.²⁵⁰ Similarly, the Arkansas Supreme Court—prior to the *Alden* decision—concluded that it was duty-bound to hear the federal claims of the state’s own workers after they were shut out of federal court.²⁵¹ Illinois’s wide-ranging waivers of its sovereign immunity suggest that that state has made its peace with federal adjudication of certain federal obligations.²⁵² These developments reflect two themes that we regard as relatively well accepted: State governments often act to provide recompense to citizens of the state whose rights have been violated, and states perceive federal law as a source of legitimate claims.²⁵³

Finally, by clarifying the way in which states recognize federal declaratory judgments, our suggested approach could improve the prospects that parties foreclosed from seeking money in federal court could nonetheless recover a measure of compensation. Under our approach, the declaratory judgment would bind the state and would set the stage for an action in an appropriate state tribunal for the recognition of that judgment and a follow-on action for damages against the state. For states with a court of claims,²⁵⁴ litigants would file suit there, relying on the federal judgment as the predicate for state law liability. For states that assign money claims to state courts of general jurisdiction, litigants would bring their recognition suits there.²⁵⁵ Federal law would play a limited role in all such proceedings, but it would obligate the state to recognize the federal judgment and give it appropriate effect in the state proceeding. The next Part explores the manner in which litigants can translate their federal declaratory judgments into actions for compensatory relief in state tribunals.

²⁴⁹ See *supra* note 223 and accompanying text.

²⁵⁰ See *Alden*, 527 U.S. at 754.

²⁵¹ See *Jacoby v. Ark. Dep’t of Educ.*, 962 S.W.2d 773, 775–78 (Ark. 1998), vacated and remanded, 527 U.S. 1031 (1999) (remanded in light of *Alden* for further consideration).

²⁵² See, e.g., 745 Ill. Comp. Stat. 5/1.5 (2014).

²⁵³ See *supra* notes 250–52 and accompanying text.

²⁵⁴ See, e.g., Ill. Comp. Stat. 505/1, 505/8 (creating the court of claims for Illinois to handle all claims against the State founded upon any contract entered with the State and any law of the State).

²⁵⁵ See *infra* note 291 and accompanying text.

III. IMPLEMENTING THE DECLARATORY THEORY

The task of implementing the declaratory theory may require some adjustments, but existing law provides a framework within which states recognize and enforce federal judgments. In this Part, we sketch the framework, beginning with a quick overview of the declaratory judgment action. We next describe the machinery that governs the interstate recognition of judgments and obligates state courts to honor federal decrees. While states will operate within the bounds of federal law, they will nevertheless retain control over the translation of federal declaratory judgments into state damage awards.

A. A Brief Introduction to the Declaratory Judgment

Although they arrived on the American litigation scene less than one hundred years ago, suits for declaratory judgments provide a familiar mode of resolving disputes over state compliance with federal law.²⁵⁶ Indeed, requests for a declaration of rights have become increasingly common,²⁵⁷ often supplementing *Ex parte Young* suits brought to enjoin allegedly unconstitutional state action.²⁵⁸ As a consequence, the Court has made clear that many rules governing injunctive relief also apply to suits for a declaration of rights. For instance, the party seeking a declaration must show that she has standing and that she has presented the sort

²⁵⁶ Under the Declaratory Judgment Act, federal courts have the power to declare the rights of the parties in a case of actual controversy. See 28 U.S.C. §§ 2201–02 (2012). On the use of the declaratory judgment in securing the supremacy of federal law in litigation with state actors, see Samuel L. Bray, *The Myth of the Mild Declaratory Judgment Action*, 63 *Duke L.J.* 1091, 1098–102, 1099 n.41 (2014) (discussing the use of declaratory relief in the context of federal-state relations). The Uniform Declaratory Judgment Act (“UDJA”), in force in over 35 states, has similar language. See Unif. Declaratory Judgments Act § 1 (1922), 12 *U.L.A.* 336 (2008); E.H. Schopler, *Annotation, Extent to Which Principles of Res Judicata Are Applicable to Judgments in Actions for Declaratory Relief*, 10 *A.L.R.2d* 782, § 1 n.3 (1950).

²⁵⁷ See Bray, *supra* note 256, at 1111–13 (indicating that over the past 80 years, federal courts have issued thousands of declaratory judgments, with which most losing parties have seemingly complied).

²⁵⁸ See *id.* at 1111–12 (briefly discussing the option to pursue simultaneously declaratory and injunctive relief); see also *J.R. v. Utah*, 261 *F. Supp. 2d* 1268, 1269, 1271 (D. Utah 2002) (jointly asserting claims for injunctive and declaratory relief from an allegedly unconstitutional state law); *Sagan v. Pennsylvania*, 542 *F. Supp.* 880, 880–81 (W.D. Pa. 1982) (same).

of dispute that overcomes ripeness and mootness challenges.²⁵⁹ Moreover, the Court has held that federal court challenges to the legality of a pending state proceeding should often be met with federal judicial abstention, whether they seek an injunction or merely a declaration of rights.²⁶⁰

One consequence of the Court's tendency to equate injunctive and declaratory relief has been to limit the power of lower federal courts to enter declarations in some circumstances. Plaintiffs seeking injunctive relief from state action must show that *existing* practices threaten them with concrete injury; one cannot predicate standing to challenge ongoing practices on the state's violation of the plaintiff's rights in the past.²⁶¹ This provides the state with certain litigation advantages: A state may attempt to moot a claim by bringing its program into compliance with federal law.²⁶² If only the claim for damages remains, and the federal

²⁵⁹ *Steffel v. Thompson*, 415 U.S. 452, 458–60, 462, 475 (1974) (holding that the plaintiff must have standing to pursue a declaratory judgment).

²⁶⁰ *Samuels v. Mackell*, 401 U.S. 66, 69–73 (1971) (applying doctrine of equitable restraint to declaratory judgment action). The Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, permits a federal court to declare the rights of a party whether or not further relief is or could be sought; as a consequence, declaratory relief may be available even though an injunction is not. See *Steffel*, 415 U.S. at 462. The Court, however, has refused to issue declaratory judgments in the following circumstances:

In *Great Lakes Co. v. Huffman*, 319 U.S. 293 (1943), we held that a declaratory judgment was not available to obtain a determination of the constitutionality of a state tax even though the relevant federal statute prohibited federal courts only from issuing injunctions against the collection of such taxes. *Id.*, at 299. We held in *Samuels v. Mackell*, *supra*, that a declaratory judgment declaring a state criminal statute unconstitutional was unavailable where it would have much the same effect as an injunction prohibiting enforcement of the statute, and the latter was barred by traditional principles of equity, comity, and federalism. *Id.*, [401 U.S.] at 69–73. In *Wycoff*, we held that it was inappropriate to issue a declaratory judgment deciding whether the plaintiff's business was interstate commerce and therefore potentially immune from state regulation. [*Pub. Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 241, 244, 247–249 (1952).] We reasoned that if the federal judgment were res judicata in subsequent state proceedings, then the federal court will have lifted the case out of the state court before the state agency or court can hear it. *Id.*, at 247. On the other hand, if the federal judgment would not have such an effect, then it would “serv[e] no useful purpose as a final determination of rights.” *Ibid.*

Green v. Mansour, 474 U.S. 64, 72–73 (1985).

²⁶¹ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983) (finding that plaintiff lacked standing to challenge city's chokehold policy as a prospective matter, although plaintiff could pursue a claim for damages against the city for a past injury).

²⁶² A simple unilateral change might be dismissed as voluntary cessation, an exception to the mootness doctrine. See *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (“It is well settled that a ‘defendant’s voluntary cessation of a challenged practice

court lacks power to adjudicate such a claim, then the Court has required dismissal of the action.²⁶³ Perhaps the most far-reaching such case was *Green v. Mansour*.²⁶⁴ There, a federal statute mooted the claims of the plaintiff class for prospective relief, but left open the question of relief for past violations under prior law. The Court held that the Eleventh Amendment barred the lower court from granting a declaratory judgment as to past violations; such relief was said to fall on the retrospective side of the *Edelman v. Jordan* line.²⁶⁵

The *Green* decision does not defeat our suggested approach. To begin with, *Green* applies by its terms only to situations in which the plaintiffs' claims for injunctive and declaratory relief against an ongoing violation of federal law have been mooted by a change in federal law.²⁶⁶ So long as an intervening change in law or practice does not moot the claim for prospective relief, the federal court has the power to issue the requested declaration.²⁶⁷ What is more, the *Green* decision addresses itself only to a situation in which the states were administering a federal welfare program pursuant to federal law and were obliged by federal law to provide the benefits in question. In our contemplated framework, the decision by the state courts to translate the federal judgment into a right to damages will remain a matter of state law. State law will thus control the ultimate decision about whether and how much to award as damages to remedy the violation implicit in federal issuance of declaratory relief. Finally, the *Green* decision has been vigorously criticized as the unprincipled product of "faulty reasoning";²⁶⁸ the decision may be ripe for reconsideration and should not, in any case, be extended beyond the federal Spending Clause context in which it was decided.

does not deprive a federal court of its power to determine the legality of the practice.") (citation omitted). But formal changes in state law or regulatory policy would not necessarily implicate the voluntary cessation exception to mootness.

²⁶³ See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 658–59 (1974) (denying federal court the power to issue retrospective relief); cf. *Mills v. Maine*, 118 F.3d 37, 48 (1st Cir. 1997) (dismissing damages claim after finding that it was barred by the doctrine of sovereign immunity).

²⁶⁴ 474 U.S. 64 (1985).

²⁶⁵ *Id.* at 73 (describing the declaratory relief sought as a partial end run around *Edelman*).

²⁶⁶ *Id.*

²⁶⁷ See, e.g., *Quern v. Jordan*, 440 U.S. 332, 334, 346–49 (1979) (allowing the district court to order, ancillary to the grant of injunctive and declaratory relief against a pending violation, notice to members of the plaintiff class of the prospect of pursuing relief in state tribunals).

²⁶⁸ Jackson, *supra* note 52, at 69 (arguing that the result in *Green* "cannot be sustained as a reasoned and principled interpretation of the Constitution").

B. Follow-On Actions for Damages in State Court

Assuming, then, that federal courts retain power to issue declaratory judgments as to state violations of federal law, it seems clear that those judgments enjoy issue preclusive effect in subsequent proceedings. At the same time, the pursuit of declaratory relief in federal court does not claim-preclude a subsequent action for damages or other coercive relief. In other words, current law contemplates a two-step process through which the plaintiff might initially secure a declaration of rights and then bring a follow-on suit for damages that uses the declaratory judgment as the predicate for an award. Consider the following statement from a leading source on the effect of judgments:

A valid and final judgment in a suit solely for declaratory relief has two sorts of *res judicata* effects in a subsequent civil action. First, it is conclusive between opposing parties as to the matters declared, but it has no further claim preclusion effect and so does not preclude a later action for damages or other coercive relief. Second, a litigant is subject to issue preclusion, under the normal rules of that doctrine.²⁶⁹

Such an understanding of its issue preclusive effect makes the declaratory judgment action a promising vehicle for the initial federal judicial determination of a claimed violation of federal law.²⁷⁰ Assuming the feder-

²⁶⁹ Robert C. Casad & Kevin M. Clermont, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice* 190 (2001); see also Restatement (Second) of Judgments § 33, at 332 (1982) (“A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.”); 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4446, at 308 (2d ed. 2002) (“Matters actually litigated by the parties and determined by a declaratory judgment are thus precluded from further litigation . . .”).

²⁷⁰ Although the Court has frequently assumed the issue preclusive effect of a federal declaration in subsequent state court proceedings, it has not had occasion to explore the issue in detail (perhaps because state courts share that assumption). See, e.g., *Steffel v. Thompson*, 415 U.S. 452, 482 (1974) (Rehnquist, J., concurring) (doubting the binding effect of a declaratory judgment); *id.* at 477 (White, J., concurring) (upholding the binding effect of a declaratory judgment); *Pub. Serv. Comm’n v. Wycoff Co.*, 344 U.S. 237, 241–43 (1952) (appearing to assume the binding effect of a declaration on pending state court proceedings and on that basis expressing concern with issuance of such a declaration). See generally Bray, *supra* note 256, at 1113–20 (persuasively rejecting the argument that declaratory judgments enjoy reduced preclusive effect).

al court finds a violation, the successful party may pursue a subsequent claim for damages.²⁷¹

Existing law frames the follow-on action for damages in state court. By hypothesis, the plaintiff has succeeded in securing a declaratory judgment against a state's ongoing violation of federal law. As in *Edelman*, that judgment implies that the state had been violating federal law up to the point of federal judicial intervention. But under *Edelman* and *Alden v. Maine*, Congress lacks power to subject the state to suit to recover such retrospective relief as a matter of federal law. Instead, the federal plaintiff must pursue the money claim as a matter of state law through whatever remedial avenues the state makes available. In the course of that state law proceeding, the state will face a federal obligation to give issue preclusive effect to the federal declaration insofar as it establishes a violation of federal law. But the nature and extent of the monetary relief will remain subject to state control.

In the course of processing claims for monetary relief, state courts will owe a federal common law obligation to recognize and give effect to the federal judgment.²⁷² That was the explicit message of the Court's decision in *Semtek International v. Lockheed Martin Corp.*, holding that a Maryland state court was obligated to give effect to a prior federal court decision in California, even in a diversity context.²⁷³

It is true that for some purposes and within certain limits it is only required that the [diversity] judgments of the courts of the United States shall be given the same force and effect as are given the judgments of the courts of the States wherein they are rendered; but it is equally true that whether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which

²⁷¹ Another doctrine ensures the availability of the follow-on action for damages. The inability of the federal court to exercise jurisdiction over a damages claim against the state means that no claim preclusive effect attaches to the plaintiff's failure to assert such a claim in the context of the declaratory judgment proceeding. See Restatement (Second) of Judgments § 33, at 335–36.

²⁷² For statements of the rule in cases involving federal court judgments in matters governed by federal law, see *Stoll v. Gottlieb*, 305 U.S. 165, 171–72 (1938); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 290–91 (1906); *Deposit Bank v. Frankfort*, 191 U.S. 499, 514–15 (1903); cf. *Jordache Enters. v. Nat'l Union Fire Ins. Co.*, 513 S.E.2d 692, 701 (W. Va. 1998) (according full faith and credit to another state's declaratory judgment).

²⁷³ *Semtek Int'l v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001).

will determine for itself whether such judgment has been given due weight or otherwise.²⁷⁴

While the task of defining the effect owed to the earlier federal judgment can be complex,²⁷⁵ everyone agrees that the state must give the federal judgment the same effect it would have in the federal system.²⁷⁶

In assessing the nature of this same-effect treatment, we begin by observing that state courts recognize their own obligation to evaluate the effect of a federal judgment by reference to the issue and claim preclusive effect it would have in federal court.²⁷⁷ Turning then to consider the issue preclusive effect of federal declaratory judgments on subsequent actions for damages in the federal system, we find that federal law tracks the Second Restatement of Judgments.²⁷⁸ Thus, the Second Circuit has explained that the preclusive effect of the declaratory judgment is limited to the “subject matter of the declaratory relief sought,” and permits the plaintiff or defendant to “continue to pursue further declaratory or coercive relief.”²⁷⁹ In other words, the preclusive effect of a declaratory judgment action applies only to the “matters declared” and to “any issues actually litigated . . . and determined in the action.”²⁸⁰ Of course, if the plaintiff were to assert a claim for coercive relief in the context of the declaratory judgment proceeding, claim preclusive effect could ap-

²⁷⁴ Id. at 507 (quoting *Deposit Bank*, 191 U.S. at 514–15).

²⁷⁵ Id. at 508 (requiring reference to state law to govern the effect owed in most cases to the judgments of federal courts sitting in diversity).

²⁷⁶ See, e.g., *Gannon v. Am. Home Prods.*, 48 A.3d 1094, 1104 (N.J. 2012) (evaluating the preclusive effect of a federal judgment by reference to the rules of federal law). See generally Patrick Carrick, Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts*, 46 S. Cal. L. Rev. 803, 825–31 (1973).

²⁷⁷ See *Silver Eagle Mining Co. v. State*, 280 P.3d 679, 682, 685 (Idaho 2012) (applying federal law of claim preclusion in holding that federal agency decision was entitled to claim preclusive effect in state court); *Knox v. State ex rel. Otter*, 223 P.3d 266, 280 (Idaho 2009) (“Under federal law, ‘a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.’” (citation omitted)). See generally David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 Nw. U. L. Rev. 759 (1979) (exploring the preclusive effect of declaratory judgments in the context of litigation over the constitutionality of state action).

²⁷⁸ Restatement (Second) of Judgments § 33 (1982).

²⁷⁹ *Harborside Refrigerated Servs. v. Vogel*, 959 F.2d 368, 372 (2d Cir. 1992); see also 18A Wright et al., *supra* note 269, § 4446, at 313 (noting that “[m]atters actually litigated by the parties and determined by a declaratory judgment are . . . precluded from further litigation,” even though “further coercive relief may be had within the framework of the declaratory action itself”).

²⁸⁰ Restatement (Second) of Judgments § 33.

ply to the determination of that claim.²⁸¹ But because federal courts cannot exercise jurisdiction over certain coercive claims against the states for money damages,²⁸² the parties to the federal action would have no occasion to join issue on the merits of the coercive claim. As a result, the follow-on claim for damages in state court would remain viable, and the state court would owe a federal duty to give issue preclusive effect to the federal declaratory judgment.

Notably, however, the issue preclusive effect of the federal declaratory judgment would extend only to the finding of liability for a violation of federal law. The federal judgment would, by virtue of the limits of federal judicial power, say nothing about the state's obligation to remedy the retrospective effects of such a violation. As a result, the state would remain free to apply its own state law rules and machinery in determining what amount of damages would be payable as a matter of state law to compensate the plaintiff for the violation at issue. Such a mode of analysis would necessarily require the plaintiff to seek recognition and enforcement of the federal judgment through the processes of law that the state makes available to those mounting money claims against the state. While *Alden* makes clear that the states owe no federal duty to provide a forum,²⁸³ many states have created state law processes for the assertion of money claims against the state.

²⁸¹ See *Duane Reade v. St. Paul Fire & Marine Ins. Co.*, 600 F.3d 190, 196–97 (2d Cir. 2010) (reaffirming the view that declaratory judgments may have issue preclusive effect in a subsequent proceeding, but ordinarily do not block a follow-on claim for damages except when claims for coercive relief were actually submitted and litigated in the context of the declaratory judgment action); see also 18A Wright et al., *supra* note 269, § 4446, at 313–14 (“So long as the request for declaratory relief is combined or followed with coercive relief, the claim-preclusion rules that apply to actions for coercive relief apply with full force.”).

²⁸² See, e.g., *Edelman*, 415 U.S. at 665–66 (barring a citizen suit against a state official for the retroactive payment of benefits because the Eleventh Amendment barred monetary awards against the State itself). The inability of the federal court to exercise jurisdiction over a damages claim against the state means that no claim preclusive effect attaches to the plaintiff's failure to assert such a claim in the context of the declaratory judgment proceeding. See 18A Wright et al., *supra* note 269, § 4446, at 313 (explaining that “it is clear that [further coercive] relief is available even though it was not requested before the initial judgment”).

²⁸³ 527 U.S. 706, 712 (1999) (holding that Congress could not require that state courts be held open to adjudicate damages claims alleging state violations of the Fair Labor Standards Act).

C. Recognition and Enforcement: Money Claims Against the States

States contemplating recognition and enforcement of federal declaratory judgments will face a number of questions in deciding whether and how to permit individuals to recover damages for the violation of federal law adjudged in the declaratory judgment. States will first face the surprisingly tricky question of whether to recognize a right in individuals to recover money for the state's breach of a federal law adopted under the Commerce Clause. Consider the situation in *Alden*. There, a group of state employees brought suit under the federal Fair Labor Standards Act ("FLSA"), alleging that their pay violated federal standards that Congress clearly meant to apply to state employees.²⁸⁴ While the federal court has power to enforce the FLSA prospectively, it could not entertain a claim for backpay or money damages, and the state courts owe no federal obligation to make available a forum for the money claim.²⁸⁵ Though one might argue that the absence of a forum for the private enforcement of the FLSA means that federal law imposes no obligation on the states to provide a money remedy,²⁸⁶ that is not quite right: The Department of Labor can bring a federal court enforcement action against the state under the FLSA and, if successful, secure a federal backpay judgment.²⁸⁷ This suggests that Congress retains the power to "impose valid and binding legal obligations on the states."²⁸⁸ The point of *Seminole Tribe* and *Alden* was not to free the states from congressionally imposed restraints, "but only to exempt them from unconsented suits in [state and] federal court to enforce their federal legal obligations."²⁸⁹

State law then provides two potential vehicles for the recognition and enforcement of a declaratory judgment under a federal statute, like the

²⁸⁴ Id. at 711–12.

²⁸⁵ Id. at 712.

²⁸⁶ See Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity?, 106 Yale L.J. 1683, 1708–44 (1997) (exploring the nature of Eleventh Amendment immunity as an immunity from jurisdiction and as an immunity from liability); see also id. at 1742 (suggesting that the *Edelman* "Court treated the absence of original federal jurisdiction as the equivalent of denying the states' obligation to afford such relief").

²⁸⁷ See *Alden*, 527 U.S. at 756, 759 (recognizing that 29 U.S.C. § 216(c) authorizes the federal government to bring suit against the states to enforce the FLSA and noting that such suits remain a viable mechanism for enforcing federal law in the wake of its decision); cf. *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (observing that the federal government may bring suit against a state in federal court on behalf of an individual who has been discriminated against in violation of a federal law enacted under the commerce power).

²⁸⁸ See H&W VII, supra note 8, at 957.

²⁸⁹ Id.

FLSA, that also proposes to subject the state to suit for damages but fails to overcome the constitutional barrier to unconsented suits. First, state law might provide consent to suit, thereby permitting the individual claimant to pursue a federal claim for compensatory relief through the ordinary processes of state law. Not surprisingly, the modes by which individuals can mount money claims against the state treasury differ from state to state. Some states, like Illinois, have established a specialized state court of claims in which individuals can pursue money damages.²⁹⁰ Other states permit suits for money damages to be filed in superior courts of general jurisdiction.²⁹¹ Still other states make no special provision for suits against the state, preferring instead to manage such claims through the legislative process.²⁹² Virtually all states impose some sort of limit on the amount of damages that their courts may award: Illinois, for example, caps damages for most cases sounding in tort at \$100,000.²⁹³ Similarly, most states make provision for a degree of legislative oversight of the awards made by their courts of claims.²⁹⁴

²⁹⁰ 705 Ill. Comp. Stat. 505/8 (2014) (authorizing suit in all claims against the State founded upon “any law of the State of Illinois[,] . . . any regulation adopted thereunder,” or any contract entered into with the State of Illinois). The West Virginia legislature, likewise, has established a “court of claims” to handle tort suits against the state, in an effort “to provide a simple and impartial method for the consideration of claims against the state that because of the provisions of section thirty-five, article VI of the Constitution of the State, and of statutory restrictions, inhibitions or limitations, cannot be determined in the regular courts of the state. . . .” W. Va. Code § 14-2-1 (2014).

²⁹¹ See, e.g., Mass. Gen. Laws ch. 258, § 12 (2014) (“Claims against the commonwealth, except as otherwise expressly provided . . . may be enforced in the superior court.”); N.H. Rev. Stat. Ann. § 541-B:9 (IV) (LexisNexis 2014) (“Except as otherwise provided, the superior court shall have original and exclusive jurisdiction of all claims in excess of \$50,000 against any agency.”); N.H. Rev. Stat. Ann. § 491:8 (2015) (“The superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon any express or implied contract with the state.”).

²⁹² See, e.g., S.C. Code Ann. § 15-78-80 (1976).

²⁹³ 705 Ill. Comp. Stat. 505/8. That does not necessarily mean that individuals cannot recover more; rather, it simply means that they may have to file a petition with the legislature. In North Dakota, for instance, the liability of the state in a claim sounding in tort is technically “limited to a total of two hundred fifty thousand dollars per person and one million dollars for any number of claims arising from a single occurrence.” N.D. Cent. Code Ann. § 32-12.2-02(2) (West 2010). However, “[a] claimant may present proof of [a judgment in excess of this cap] to the director of the office of management and budget who shall include within the proposed budget for the office of management and budget a request for payment for the portion of the judgment in excess of the limit . . . at the next regular session of the legislative assembly . . .” *Id.*

²⁹⁴ See, e.g., Ariz. Rev. Stat. Ann. § 12-826 (2014) (mandating that the director of the department shall not draw the warrant for payment of the judgment “until an appropri-

Many states also refuse to allow the award of punitive damages against the state.²⁹⁵ All of these state limits on recovery would—or could be easily adapted to—apply to the follow-on money claim envisioned here and thus would pose relatively little threat of the kind of alien imposition that the Court feared in *Alden v. Maine*.

It may require some cutting and pasting to make the consent effective in particular cases. Many states follow the general outline of the federal Tucker Act²⁹⁶ in permitting individuals to pursue money claims against the government for breach of contract and for conduct in violation of statutes or regulations.²⁹⁷ Illinois, for example, proclaims that the state

tion . . . is made by the legislature”); Cal. Gov’t Code § 965 (West 2014) (noting that if there is no sufficient appropriation for the payment of a judgment, the “Attorney General shall report the claims, settlements and judgments to the Chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Appropriations, who shall cause to be introduced legislation appropriating funds for the payment of the claims, settlements, or judgments”); Ind. Code Ann. § 34-13-1-6 (West 2014) (requiring that the General Assembly make an appropriation for the payment of the judgment); Me. Rev. Stat. Ann. tit. 14, § 8115(1) (West 2014) (should the State have insufficient insurance and no appropriated funds, “the claim or judgment *must* be paid from the next appropriation to the state instrumentality whose action or omission . . . gave rise to the claim” (emphasis added)); Mont. Code Ann. § 2-9-315 (West 2014) (same); 9 R.I. Gen. Laws Ann. § 9-31-5 (West 2014) (permitting the general assembly to make any appropriations it deems proper for the payment of claims against the state “provided . . . that there is . . . appropriated out of any money in the treasury not otherwise appropriated a sum sufficient to pay claims against the state settled pursuant to the provisions of this chapter,” while authorizing the state controller to draw her orders “upon the general treasurer for payment of that sum”); Wash. Rev. Code Ann. § 4.92.040 (West 2014) (providing for executive payment of judgment awards from the liability account on any claims arising out of tortious conduct, while requiring legislative approval before payment of “[f]inal judgments for which there are no provisions in state law for payment”). Though these statutes largely pertain to the payment of claims sounding in tort, they all illustrate that states understand the importance of balancing individual redress and the protection of the state treasury.

²⁹⁵ For examples of statutory provisions that bar punitive damages, see Ala. Code § 6-11-26 (West 2014); Alaska Stat. § 09.50.280 (West 2014); Ariz. Rev. Stat. Ann. § 12-820.04 (2014); Ark. Code Ann. § 21-9-203(a) (West 2014); Fla. Stat. § 768.28 (West 2014); Ga. Code Ann. § 50-21-30 (West 2014); Idaho Code Ann. § 6-918 (West 2014); 745 Ill. Comp. Stat. Ann. § 10/2-102 (West 2014); Mass. Gen. Laws Ann. ch. 258, § 2 (West 2014); Nev. Rev. Stat. Ann. § 41.035 (West 2014); Tenn. Code Ann. § 9-8-307(3)(d) (West 2014); Utah Code Ann. § 63G-7-603(1)(a) (West 2014).

²⁹⁶ 28 U.S.C. § 1491 (2012) (authorizing suit in the court of claims “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”).

²⁹⁷ Michigan, for example, created a statewide, limited jurisdiction Court of Claims “[t]o hear and determine any claim or demand, statutory or constitutional, liquidated or unliquidated, ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief

court of claims shall have exclusive jurisdiction over claims “founded” on a contract with the state and claims “founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency.”²⁹⁸ Illinois might conclude that claims growing out of public employment contracts, such as those to enforce rights under the Age Discrimination in Employment Act²⁹⁹ or the Americans with Disabilities Act³⁰⁰ (both federal laws that failed the abrogation test of *Seminole Tribe*³⁰¹) were “founded” on an employment “contract” with the state. Alternatively, Illinois might find that the federal statutes in question, inasmuch as they operate as supreme law within the state, qualify as a “law” of the State of Illinois for purposes of making the court of claims an appropriate forum in which to proceed.³⁰² Finally, one might contend that the limiting reference to the “exclusive” jurisdiction of the court of claims does not rule out the assertion of jurisdiction over other money claims on a nonexclusive basis. Exclusivity, on

or any demand for an extraordinary writ against the state or any of its departments or officers. . . .” Mich. Comp. Laws § 600.6419(1)(a) (2015). The Michigan Supreme Court has interpreted the legislature’s grant of limited jurisdiction to the Court of Claims to constitute a waiver of sovereign immunity for those claims specified in Mich. Comp. Laws § 600.6419. In re Request for Advisory Opinion Enrolled Senate Bill 558, 254 N.W.2d 544, 547 (Mich. 1977). For other state statutes permitting individuals to seek redress against the state for breach of contract, see N.J. Stat. Ann. § 59:13-3 (West 2015) (waiving sovereign immunity from “liability arising out of an express contract or a contract implied in fact” and consenting to have the state’s liability “determined in accordance with the rules of law applicable to individuals and corporations”); N.D. Cent. Code § 32-12-02 (2013) (permitting “[a]n action respecting the title to property, or arising upon contract, [to] be brought in the district court against the state the same as against a private person”); Utah Code Ann. 1953 § 63G-7-301(1)(a) (LexisNexis 2015) (“Immunity from suit of each governmental entity is waived as to any contractual obligation.”).

²⁹⁸ 705 Ill. Comp. Stat. Ann. 505/8(a), (b) (West 2014).

²⁹⁹ 29 U.S.C. § 621 *et seq.* (2006).

³⁰⁰ 42 U.S.C. § 12101 *et seq.* (2006).

³⁰¹ See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment bars suits against a state for its failure to comply with the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that even though “the ADEA does contain a clear statement of Congress’ intent to abrogate the States’ immunity, . . . the abrogation exceeded Congress’ authority under § 5 of the Fourteenth Amendment”).

³⁰² North Carolina, in enacting the State Employee Federal Remedy Restoration Act, has essentially adopted specified federal statutes as law of the state, thus permitting state employees to maintain lawsuits in state and federal court against the state under the FLSA, the Age Discrimination in Employment Act, 29 U.S.C. § 621 (2006), the Family and Medical Leave Act, 29 U.S.C. § 2601 (2006), the Americans with Disabilities Act, and 42 U.S.C. § 12101 (2006). N.C. Gen. Stat. Ann. § 143-300.35(a) (West 2015).

this view, serves to foreclose the exercise of jurisdiction in the circuit courts of Illinois over the matters in question,³⁰³ rather than to define the outer limits of the powers of the court of claims.

Aside from finding that the state's own statutory waiver of sovereign immunity operates as consent to suit on a claim under federal law, the state might conclude that one or more sources of state law pick up the federal rule and translate it into an enforceable right under state law.³⁰⁴ In evaluating the question, we observe that state courts often treat rights conferred by statute as enforceable through the vehicle of a common law action in debt or assumpsit. Courts frequently recognize these "actions on a statute" to ensure the enforcement of statutory rights in circumstances where the statute in question clearly contemplates the right to a money remedy.³⁰⁵ State courts might justifiably invoke the action-on-a-

³⁰³ Illinois has a doctrine of exclusivity that seeks to preserve the primacy of the court of claims in hearing money claims against the state. When the claim seeks injunctive and declaratory relief against a state official and operates as a state law analog to the federal *Ex parte Young* action, it does not trigger the exclusive jurisdiction of the court of claims, even though all recognize that it seeks to test the legality of state action. See, e.g., *PHL, Inc. v. Pullman Bank & Trust Co.*, 836 N.E.2d 351, 357 (Ill. 2005) (quoting *Schwing v. Miles*, 11 N.E.2d 944, 947 (Ill. 1937)) (explaining that, in applying the officer suit exception, "[t]he presumption obtains that the State, or a department thereof, will not, and does not, violate the constitution and laws of the State, but that such violation, if it occurs, is by a State officer or the head of a department of the State, and such officer or head may be restrained by proper action instituted by a citizen"); see also *Smith v. Jones*, 497 N.E.2d 738, 740 (Ill. 1986) ("An action against a State official for conduct in his official capacity will withstand a motion to dismiss the complaint on sovereign immunity grounds if the complaint alleges that the official is enforcing an unconstitutional law or violating a law of Illinois and thus acting beyond his authority.").

³⁰⁴ See *German v. Wis. Dep't of Transp.*, 589 N.W.2d 651, 653 (Wis. Ct. App. 1998) (effectively enforcing the FLSA through Wisconsin state law provisions); *Babinecz v. Mont. Highway Patrol*, 68 P.3d 715, 716, 720–21 (Mont. 2003) (unpublished opinion) (holding that state highway patrol employees, effectively excluded from FLSA coverage by *Alden*, could recover under state law).

³⁰⁵ See Restatement (Second) of Torts § 286 (1965) (setting out the circumstances under which a court may adopt the requirements of a legislative enactment or administrative regulation as the standard of conduct of a reasonable man); W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 36, at 220 (W. Page Keeton et al. eds., 5th ed. 1984) ("When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which it is negligence to deviate."); see also Alfred Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1134 (1969) ("[T]he common law did not accommodate itself to paramount positive law only in allowance of a new right to overcome a defense. Actions directly upon statutes were quite common."). See generally Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1, 18 (1968) (defining the "action on the statute" as "a cause of action in tort resulting from activity in violation of a

statute tradition in agreeing to recognize an action to enforce rights embedded in federal law.³⁰⁶ Under such an approach, state (rather than federal) law would provide the vehicle for enforcing the right in question. To the extent that the state authorized such claims to proceed against the state itself, the state's violation of federal law would provide the trigger for a state law claim for damages. Failing either such approach, the state legislature could adopt either a broader consent to suit or could fashion a state law right of action meant to secure the enforcement of federal law.

D. What's in It for the States?

State courts (and legislatures) deciding such questions of state law should, we think, uphold the viability of money claims, thus permitting affected individuals to seek compensation for the violation of federal statutes that impose liability on the state. While we recognize that the states will have a choice to make in deciding this question, three factors argue in favor of state recognition of the federal judgment and enforcement of that judgment through a money remedy. First, we think that a principle of nondiscrimination suggests that states should make the same remedy available for claims based on federal law that they make available for claims based on state law. Longstanding federal law establishes the principle that states must open their courts to the assertion of claims without any discrimination against federal rights of action. The Court has made clear that this principle, as enunciated in *Testa v. Katt*,³⁰⁷ applies in circumstances where the state defines the limit of its power in

legislatively created duty or standard" and tracing its origins); Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. Pa. L. Rev. 509, 538–39 (2013) (tracing the development of the action on a statute in English law and its incorporation into the law of the states).

³⁰⁶ See, e.g., *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (treating a state law quiet title claim that incorporated a federal ingredient as one arising under federal law for purposes of original federal jurisdiction); cf. *Gunn v. Minton*, 133 S. Ct. 1059, 1068 (2013) (refusing to treat a state law malpractice claim with an embedded federal patent issue as one arising under federal law). Although private federal defendants often seek to remove state law claims that incorporate federal ingredients, removal to a court without power to proceed would make little sense in this context. Cf. *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 616 (2002) (treating the state's removal of an action as a waiver of its sovereign immunity from suit in federal court).

³⁰⁷ 330 U.S. 386, 394 (1947) (finding that a state cannot refuse enforcement of a federal law cause of action, where the same action under state law would be enforceable).

jurisdictional terms.³⁰⁸ True, the Court did not view the principle as applicable in the context of state sovereign immunity, concluding in *Alden v. Maine* that the state of Maine was free to close its courts to claims under the FLSA even though it would permit similar claims to proceed as a matter of state law.³⁰⁹ Yet the appearance of discrimination against the federal rights of in-state citizens remained, *Alden* notwithstanding, and doubtless helped to encourage the Maine legislature to pay the compensation in question.

A second principle of nondiscrimination informs the interpretation of the Full Faith and Credit Clause³¹⁰ and the related federal common law duty of the states to recognize and enforce federal judgments.³¹¹ In general, the states must provide a mechanism for the recognition and enforcement of the prior judgments of the courts of other jurisdictions. (We will follow convention in speaking of the court that rendered the judgment as F1 and the court called upon to recognize and enforce it as F2.) At a minimum, the F2 court must allow the successful party to bring suit to enforce the F1 judgment. If successful, such an enforcement action produces a new judgment that the F2 court system treats as one of its own. Many states have gone further, adopting some version of the uniform laws on recognition and enforcement of judgments³¹² that permits parties to file a certified copy of the F1 judgment with the F2 state court and proceed to enforce it on the basis of the certification.³¹³ Once

³⁰⁸ See *Haywood v. Drown*, 556 U.S. 729, 740–41 (2009) (holding that, “having made the decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, [a state] is not at liberty to shut the courthouse door to federal claims that it considers at odds with its local policy,” and underscoring that the Court had “never treated a State’s invocation of ‘jurisdiction’ as a trump that ends the Supremacy Clause inquiry”).

³⁰⁹ 527 U.S. 706, 712 (1999).

³¹⁰ The Full Faith and Credit Clause provides, “Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. Const. art. IV, § 1.

³¹¹ See *supra* note 24 and accompanying text.

³¹² Uniform Foreign Money Judgments Recognition Act § 1 *et seq.* (1963), www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf.

³¹³ See, e.g., N.J. Stat. Ann. § 2A:49A-27 (West 2014) (noting that when a “foreign judgment authenticated in accordance with an act of Congress or the statutes of this State [is] filed in the office of the Clerk of the Superior Court of this State,” “[t]he clerk shall treat the foreign judgment in the same manner as a judgment of the Superior Court of this State”); 42 Pa. Cons. Stat. Ann. § 4306 (2014) (same); Tex. Civ. Prac. & Rem. Code Ann. § 35.003 (West 2013) (explaining that “[a] copy of a foreign judgment authenticated in accordance with an act of congress or a statute of this state may be filed in the office of the clerk of any

this procedural machinery has been properly invoked, various defenses become available to the party seeking to resist recognition and enforcement.³¹⁴ But F2 courts cannot generally withhold recognition and enforcement on the basis that they disagree with the policy underlying the F1 judgment.³¹⁵

Under current law, this rule of recognition and enforcement apparently applies to judgments entered against the states themselves in the courts of other states. Thus, when an F1 state court properly enters a judgment against the F2 state, the F2 state cannot refuse to enforce that judgment. We say apparently because that is the clear implication, if not the direct holding, of *Nevada v. Hall*.³¹⁶ The Court there rejected Nevada's claim of sovereign immunity in the courts of California; while it did not squarely hold that Nevada was obliged to recognize and enforce any resulting California judgment, its decision clearly implied as much. State courts, moreover, have adopted that reading of the decision.³¹⁷ We take

court of competent jurisdiction of this state," and "[t]he clerk shall treat the foreign judgment in the same manner as a judgment of the court in which the foreign judgment is filed").

³¹⁴ Parties can, in general, defend against recognition and enforcement on the basis that the F1 court lacked subject matter or personal jurisdiction over the proceeding. See Fed. R. Civ. P. 12(b)(1), (2). Defenses based on public policy fare less well. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233–34 (1998) (observing that the constitutional requirement that states afford full faith and credit to one another's decrees does not permit a state to refuse enforcement to a judgment deemed offensive to local public policy).

³¹⁵ See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230, 239 (1908) (White, J., dissenting) (explaining that the majority "reverse[d] on the ground that the due faith and credit clause obliged the courts of Mississippi, in consequence of the action of the Missouri court, to give efficacy to transactions in Mississippi which were criminal, and which were against the public policy of that State").

³¹⁶ *Nevada v. Hall*, 440 U.S. 410 (1979). The Court explained that though "[i]t may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability[. . .] [t]hey are free to do so." *Id.* at 426. Instead, the Court reasoned that:

if a federal court were to hold, by inference from the structure of our Constitution and nothing else, that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States—and the power of the people—in our Union.

Id. at 426–27. For an assessment of the suggestion that *Alden* may have undermined the continuing vitality of *Hall*, see H&W VII, *supra* note 8, at 976 & n.2.

³¹⁷ See *Kent Cnty. v. Shepherd*, 713 A.2d 290, 301–04 (Del. 1998) (holding that the state of Maryland was liable for damages resulting from negligent operation of a police car in Delaware and finding that its decision was entitled to full faith and credit in Maryland); cf. *Boudreaux v. La. Dep't of Transp.*, 897 N.E.2d 1056, 1057–58 (N.Y. 2008) (recognizing that a Louisiana judgment against that state was entitled to full faith and credit, but concluding that Louisiana itself did not regard the judgment as payable without legislative action). States may, in general, assert judicial jurisdiction over their sibling states and enter judgments

no position here on the continuing viability of *Hall*, noting that the Court has granted certiorari to decide whether to overrule that decision.³¹⁸ We simply observe that in situations where the F1 court has constitutional power to proceed to judgment against the state or its officials, the obligation of the F2 court to respect that judgment necessarily follows.

One can imagine other arguments against the recognition and enforcement of the federal declaratory judgment. States might argue that the declaratory judgment, to the extent it binds only a state official, does not bind the state as such in subsequent proceedings. But such an argument does not strike us as terribly persuasive. In *Ex parte Young* litigation, the state official appears as a federal court party in her official capacity and the state typically controls the litigation on her behalf.³¹⁹ Rules of preclusion recognize that judgments bind nonparties in circumstances where they exercise control over the litigation.³²⁰ Applying this rule, state courts have viewed the state as bound by a federal judgment entered against state officials sued in their official capacity.³²¹ On the

against them. See *Hall*, 440 U.S. at 414–18 (explaining that the sovereign immunity doctrine does not support a claim of sovereign immunity in another sovereign's courts); *McDonnell v. Illinois*, 748 A.2d 1105, 1108 (N.J. 2000) (upholding the assertion of jurisdiction in New Jersey over claims brought against the state of Illinois). They can also recognize sibling state immunity as a matter of inter-state comity, though the Constitution does not demand that they do so. See, e.g., *Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002) (affording a Florida agency immunity from a defamation claim brought in the District of Columbia courts). But cf. *Faulkner v. Univ. of Tenn.*, 627 So.2d 362, 366 (Ala. 1992) (citing the desire to protect Alabama citizens in refusing to extend comity to Tennessee state agency sued in Alabama court). For a criticism of the practice and the decision in *Nevada v. Hall*, see Ann Woolhandler, *Interstate Sovereign Immunity*, 2006 Sup. Ct. Rev. 249, 251, 285–95.

³¹⁸ See *Franchise Tax Bd. of Cal. v. Hyatt*, 135 S. Ct. 2940 (2015) (granting cert. to decide if *Hall* shall be overruled).

³¹⁹ See, e.g., *Hutto v. Finney*, 437 U.S. 678, 714 (1978) (in an action for prospective relief against state officials, upholding an award of attorney's fees against the state Department of Corrections and noting that the state bore responsibility for defending the litigation and for paying the fees).

³²⁰ See *Taylor v. Sturgell*, 553 U.S. 880, 895 (2008) (explaining that a nonparty may be bound by a judgment "if she 'assume[d] control' over the litigation in which that judgment was rendered" (citation omitted)); *Montana v. United States*, 440 U.S. 147, 153–54 (1979) (federal government bound by judgment in prior litigation that was brought by a contractor at the government's institution and under its control). The Supreme Court has recognized that the state, as such, may be subject to liability for attorney's fees awarded in connection with *Ex parte Young* litigation brought against state officers. See *Hutto v. Finney*, 437 U.S. 678, 691–92 (1978) (upholding fee award made payable out of state departmental funds).

³²¹ See, e.g., *Alicea v. Commonwealth*, 993 N.E.2d 725, 726–27 (Mass. 2013) (federal court judgment accorded preclusive effect in subsequent state court matter, even though the federal action was brought against state officials and the state court action involved the state as a par-

other hand, when the federal action proceeds against the state official in her personal capacity, as in an action brought under Section 1983, state courts have been understandably reluctant to treat any resulting order as binding on the state as a party.³²² In implementing this distinction, state courts treat official-capacity federal decrees against state officials as binding on the state.

In light of the array of doctrines that states might invoke in refusing to give effect to a federal declaratory judgment action, one might plausibly ask why (as a matter of *realpolitik*) they would agree to make such remedies available. After all, states typically oppose the imposition of federal liability and often oppose new forms of state suability. One might predict reflexive state opposition to such a scheme rather than the application of an accommodating body of state law (whether judge-made or statutory) that aims to facilitate the payment of money to federal claimants. But the fact remains that most claimants, as individual citizens of the state in question, can make strong fairness claims for compensation. Instead of treating the payment of money as an *alien imposition*,³²³ states might sensibly choose to implement federal rights by adapting existing state institutions to provide a measure of appropriate compensation.

We observe that states often agree to give effect to the judgments of sibling states, even where the Full Faith and Credit Clause does not compel them to do so. Consider, for example, a modifiable support judgment rendered by a court of equity in the state of marital domicile.³²⁴ The modifiability of the decree means that it has no Full Faith

ty); see also 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.40(3)(e)(ii)(A) (Daniel R. Coquillette et al. eds., 3d ed. 2008) ("A government official sued in his or her official capacity is considered to be in privity with the government.")

³²² Compare *Lin v. State*, 41 Ill. Ct. Cl. 80, 82–83 (1989) (entering judgment in court of claims for the amount specified in a federal decree that was viewed as binding the state through its officials), *Newhouse v. State*, 37 Ill. Ct. Cl. 319, 320 (1984) (entering judgment to pay attorney's fees previously awarded in federal court litigation involving state officer), and *Coppotelli v. State*, 35 Ill. Ct. Cl. 328, 330–31 (1981) (authorizing entry of judgment to pay amount decreed as owed by the state to resolve federal court litigation), with *Fowler v. State*, 44 Ill. Ct. Cl. 341, 343 (1992) (concluding that liability imposed on state officials under § 1983, which may trigger a right to indemnity under applicable state law, does not create liability running against the state), and *Murphy v. State*, 43 Ill. Ct. Cl. 354, 356–57 (1990) (refusing to enter judgment in court of claims to pay a federal court judgment in an action brought against a state official in his personal capacity).

³²³ See *supra* note 150.

³²⁴ For a discussion of the operation of interstate recognition and enforcement of support decrees, see *Yarborough v. Yarborough*, 290 U.S. 202, 212–13 (1933) (distinguishing between modifiable support decrees, which enjoyed no full faith and credit effect, and final

and Credit effect; it's not final in the F1 state where it was rendered and thus may be modified as well in the F2 state of recognition.³²⁵ But many states treat such a decree as enforceable nonetheless, taking it up and making it their own as a matter of interstate comity.³²⁶ With a similar comity-based approach, state courts could give effect to an F1 federal declaratory judgment and afford a money remedy, even though not compelled to do so by federal law.

Apart from fair treatment of mostly in-state claimants, state courts confronted with petitions to enforce federal declaratory judgments might understandably wish to improve the machinery by which the state manages the payment of judgments based on federal law. Such a strategy could prove advantageous in the long run. After all, the states remain subject to suit in federal court on a variety of claims, including claims arising under statutes that lawfully abrogate state immunity and subject the state to suit for money damages in federal court. If the states could demonstrate that their internal systems effectively ensure payment of such claims, perhaps the Supreme Court would consider directing the parties to place greater reliance on such mechanisms in abrogation cases. More to the point, litigants convinced of the adequacy of state remedies might mount their claims in state courts in the first instance, eschewing reliance on the federal forum altogether.

CONCLUSION

Scholars and jurists may never reach consensus as to the historical meaning of Article III and the Eleventh Amendment and the proper balance of immunity and accountability. Certainly we find little in revisionist accounts of that history that disproves the diversity theory. But even in a world where sovereign immunity prevails, perhaps all will agree that the federal courts have a legitimate role to play in evaluating claims that the states have violated supreme federal law in the context of actions for declaratory relief. Perhaps, too, all will agree that the states'

support decrees, which were entitled to preclusive effect in subsequent proceedings). See generally Eugene F. Scoles, Enforcement of Foreign "Non-Final" Alimony and Support Orders, 53 Colum. L. Rev. 817 (1953) (discussing the problem created by the absence of finality and calling for recognition of such orders nonetheless).

³²⁵ *Yarborough*, 290 U.S. at 210 n.12.

³²⁶ See *Worthley v. Worthley*, 283 P.2d 19, 21–22, 25 (Cal. 1955) (holding that California would enforce modifiable New Jersey support decree, subject to modification in California to take account of changed circumstances).

willingness to hear claims for money damages in respect of any such declaratory judgments offends no principle of existing law. In this Article, we propose to fuse these elements together into a declaratory theory of state accountability. Rather than viewing such decisions as *Seminole Tribe* and *Alden* as immunizing states from liability, we think the states should invite federal law claimants to pursue their money claims by invoking the ordinary processes of state law.

Such a cooperative approach to the vindication of federal claims has a good deal to recommend it. By channeling federal claimants into state law processes, the declaratory approach would preserve state control of the treasury and obviate the concern that exorbitant federal awards might drain state coffers. At the same time, the declaratory approach maintains federal judicial engagement with questions of state compliance with federal law. Finally, the declaratory approach places some responsibility on the states for ensuring the effectiveness of remediation. With time, the states may establish the sort of routine mode of money claim payment that now characterizes practice at the federal level under the judgment fund. After all, supporters of state immunity offered assurances in the wake of *Chisholm* that the states could be trusted to do right by money claimants.³²⁷ As an acceptance of that offer, the Eleventh Amendment calls upon the states to entertain money claims in the wake of a federal declaratory judgment that the state has violated federal law.

³²⁷ See *supra* note 247.