

## THE UNSETTLED NATURE OF THE UNION

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In *The Eleventh Amendment and the Nature of the Union*,<sup>1</sup> Professor Bradford Clark makes a narrow claim and a broad claim about the Founders' understanding of the nature of the Union they were creating. The narrow claim is that the Founders understood that the federal obligations of the states would be enforced in court in suits against individual state officers rather than the states themselves. The broad claim is that the Founders understood that the federal government would lack the power to impose obligations on the states as states. Clark's narrow claim is important and well supported, though not entirely novel. The broad claim is novel insofar as it would place limitations on the federal legislative power beyond those already recognized in cases such as *New York v. United States*<sup>2</sup> and *Printz v. United States*,<sup>3</sup> but Clark's argument for it is not entirely convincing. Most of the evidence that he musters for the broad claim could be read to support the narrower claim instead.

Clark's article is framed as a defense of a literal interpretation of the Eleventh Amendment.<sup>4</sup> One of the few propositions on which critics and defenders of the Court's current Eleventh Amendment jurisprudence agree is that a literal interpretation makes no sense. Why bar suits against states when brought by citizens of other states or of foreign states but permit such suits when brought by the state's own citizens? Defenders of the Court's current Eleventh Amendment jurisprudence argue that the amendment's text is underinclusive, while critics argue that the text is overinclusive. Either the amendment bars suits against the states when brought by in-state plaintiffs, as the Supreme Court held in *Hans v. Louisiana*,<sup>5</sup> or it permits such suits even when brought by out-of-state plaintiffs, as *Hans*'s critics argue.

Clark maintains that it did make sense to the amendment's framers to exclude only suits by out-of-state plaintiffs. Under Article III, the

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<sup>1</sup> Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 HARV. L. REV. 1817 (2010).

<sup>2</sup> 505 U.S. 144 (1992).

<sup>3</sup> 521 U.S. 898 (1997).

<sup>4</sup> The Amendment provides in full that "[t]he 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." U.S. CONST. amend. XI.

<sup>5</sup> 134 U.S. 1 (1890).

federal courts could have jurisdiction over suits against the states by in-state plaintiffs only if the suits arose under federal law, and Clark argues that the Framers established a Union in which *there would not be any* suits against states arising under federal law. If so, then suits against states could fall within Article III only if brought by out-of-state plaintiffs under the diversity provision of Article III, which the Supreme Court had construed in *Chisholm v. Georgia*<sup>6</sup> to permit such suits. If the amendment's purpose was to ensure that states could not be sued in federal courts at all, then it did make sense to limit the amendment's reach to cases covered by the diversity provision.

According to Clark, the Founders assumed that there would be no cases against states arising under federal law because they understood that the Union they were establishing was one in which (a) the obligations imposed on the states by the Constitution would be enforced only through suits between individuals, including suits against individual state officers, and (b) the federal government would lack the power to impose additional obligations on the states by statute. To the extent that Clark seeks to defend a textual reading of the Eleventh Amendment, his second, more controversial point adds nothing to his first, less novel point. If followed today, however, the second claim would significantly contract Congress's substantive legislative powers.

But the evidence that Clark offers in support of the second claim is equivocal. Most of the statements of the Framers that he cites in support of the broader claim can be understood to support instead the first, narrower claim. In other words, rather than saying that the federal government lacked the power to enact laws operative on states, the Framers were likely saying only that the federal government lacked the power to *enforce* the federal obligations of the states through coercive suits against the states themselves. This would leave Congress with the power to enact laws operative on states and to provide for the enforcement of such laws in suits between individuals (including state officers).

### I. CLARK'S NARROWER POINT

As Clark acknowledges, the Constitution itself imposes obligations on the states as states. For example, it prohibits states from enacting ex post facto laws or bills of attainder, or from impairing the obligation of contracts.<sup>7</sup> As Clark notes, it is well established that these and other constitutional obligations of the states can be enforced in suits against individual state officers.<sup>8</sup> Indeed, it is a commonplace that our

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<sup>6</sup> 2 U.S. (2 Dall.) 419 (1793).

<sup>7</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>8</sup> Clark, *supra* note 1, at 1851.

Constitution establishes an officer-liability regime, rather than a government-liability regime.<sup>9</sup> Most commentators who have made this point have done so in describing the Supreme Court's post-*Hans* Eleventh Amendment jurisprudence. It has been less often noted that this officer-liability regime appears to have been intended by the Framers, but, as Clark recognizes, I made this point in 1997. Relying on some of the same sources cited by Clark, I noted then that

[t]here is . . . significant support in the statements of the Framers of the original Constitution for the proposition that they contemplated that the obligations of the state governments would be enforced in court by means of suits against state officials, not against the states themselves. After discussing the methods by which the Constitution would provide for the efficacy of federal obligations, the Founders decided not to retain the scheme set up by the Articles of Confederation, under which federal norms were enforceable only against the states as political bodies. . . . The Founders rejected the prevalent system because they believed that duties could be enforced against political bodies only through military force. Against individuals, by contrast, duties could be enforced through the courts . . . .<sup>10</sup>

My point was that the Framers' understanding that the constitutional obligations of states could be enforced in suits against state officials shows that sovereign immunity is not incompatible with judicial enforcement of the substantive legal obligations of government.<sup>11</sup> The Framers' experience under the Articles of Confederation taught them that the Constitution could not leave the efficacy of the states' legal obligations to the good faith of the states. Because they understood that the judicial power must be coextensive with the legislative, they would not have adopted a Constitution imposing legal obligations on the states while at the same time leaving states with an immunity that would have precluded judicial enforcement of such obligations. Yet there is evidence that they embraced the doctrine of sovereign immunity. The key to this puzzle, I argued, is the Framers' understanding that the legal obligations of the states were to be enforced in suits against individual state officers rather than the states themselves. Clark's article provides valuable additional support for this argument.

<sup>9</sup> See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RES. L. REV. 396 (1987).

<sup>10</sup> Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1780 (1997) (citing 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 197 (photo. reprint 1987) (Jonathan Elliot ed., 1888) [hereinafter ELLIOT'S DEBATES] (statement of Oliver Ellsworth); William Samuel Johnson, Speech in the Connecticut Ratifying Convention (Jan. 4, 1788), in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 248-49 (John P. Kaminski & Gaspare J. Saladino eds., 1984) [hereinafter DHRC]); cf. Clark, *supra* note 1, at 1856-57 (citing same sources).

<sup>11</sup> See Vázquez, *supra* note 10, at 1689.

Whether the article sheds significant light on the Eleventh Amendment's text, however, is debatable. Clark succeeds in explaining otherwise strange omissions from the text of the Eleventh Amendment (principally, its failure to mention suits against states by their citizens), but only by relying on propositions about the "nature of the Union" that themselves have no basis in the constitutional text. His explanation is not much of an advance over the one proffered by the current Supreme Court majority, which is also based on the existence of a background assumption having no basis in the text — the states' entitlement to sovereign immunity.<sup>12</sup> Indeed, the two unwritten propositions would appear to be two sides of the same coin. If the Founders did assume that the constitutional obligations of the states would be enforceable only in suits against individuals, their assumption (and the resulting observations about the nature of the Union) would appear to have been grounded on the doctrine of sovereign immunity. Clark's narrower claim thus does not offer insights into the Eleventh Amendment's text that differ dramatically, if at all, from the view of the current Supreme Court majority.<sup>13</sup>

## II. CLARK'S BROADER CLAIM

In my 1997 piece, I argued that the Framers contemplated that the federal obligations imposed by Congress on the states would similarly be enforced in suits against state officials. Clark argues instead that the Founders intended to deny the federal government altogether the power to impose obligations on the states by statute. I consider Clark's evidence for this broader proposition below. But first, it is worth noting that Clark's broader argument provides no additional ammunition for his defense of a textual reading of the Eleventh Amendment. Without denying that the Constitution imposes obligations on states, Clark argues that a literal reading of the Eleventh Amendment would have made sense to the Framers if those obligations were enforceable only in officer suits. The same would presumably be true for the federal statutory obligations of the states. Thus, Clark's textual defense of the Eleventh Amendment derives all the

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<sup>12</sup> See *Alden v. Maine*, 527 U.S. 706 (1999); and *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), where the majority dismissed arguments based on text on the ground that the Founders assumed the existence of a background principle of immunity.

<sup>13</sup> In at least one respect, Clark's narrower claim goes beyond current Eleventh Amendment doctrine. Current doctrine permits suits against the states by the federal government. The Founders' statements on which the narrow claim is based do not distinguish between suits by individuals and suits by the federal government. Indeed, some of these statements strongly suggest that the Founders did not envision coercion by the federal government against states (as distinguished from state officials). Like Clark, I do not take a position on whether the Founders' intent on this or other points should be followed today. See Clark, *supra* note 1, at 1915–16.

support it gets from Clark's analysis from the narrower proposition on which he and I agree. Clark's broader proposition, even if true, would shed no additional light on the Eleventh Amendment.

On the other hand, Clark's claim that the Founders intended to deny Congress the power to impose obligations on the states as states would, if followed today, significantly contract the federal legislative power. The Supreme Court has already begun narrowing Congress's power to legislate with respect to the states, relying on some of the sources cited by Clark (and relied upon by me in support of the narrower point). In *New York v. United States*, the Court cited some of these sources in holding that Congress lacks the power to commandeer state legislatures.<sup>14</sup> But the Court in *New York* declined to overrule *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>15</sup> in which it had upheld a federal minimum wage law insofar as it applied to state and local governments. The Court in *New York* interpreted *Garcia* to stand for the proposition that Congress may regulate the states as part of a broader group that includes private parties.<sup>16</sup> If Clark's analysis is correct, then *Garcia* conflicts with the Founders' understanding of the nature of our Union.<sup>17</sup>

In my 1997 article, I argued that the Supreme Court was mistaken in *New York* to read these sources as authority to limit Congress's power to impose obligations on the states. After all, the Constitution itself places obligations on the states, so "[i]t is . . . difficult to interpret these statements as contemplating that there would be no federal obligations operative on states as political bodies."<sup>18</sup> Instead, I argued:

The Framers' statements are best taken as statements about remedies and enforcement, not the existence *vel non* of legal obligations. The Framers' concerns support the conclusion that the federal obligations of the

<sup>14</sup> 505 U.S. 144, 165–66 (1992) (citing 2 ELLIOT'S DEBATES, *supra* note 10, at 197; 4 *id.* at 256; 2 *id.* at 56; 2 *id.* at 233; 4 *id.* at 153).

<sup>15</sup> 469 U.S. 528 (1985).

<sup>16</sup> *New York*, 505 U.S. at 160.

<sup>17</sup> Clark remains agnostic on whether the Court should reverse *Garcia*, see Clark, *supra* note 1, at 1915–16, but presumably he has bothered to make the argument because he believes that such a move would be consistent with the Framers' intent. Although Clark is generally agnostic regarding the present-day doctrinal implications of his argument, he does maintain that his argument supports the Court's current doctrine permitting abrogation of state sovereign immunity pursuant to the Fourteenth Amendment but not pursuant to antecedent provisions of the Constitution, such as the Commerce Clause. See *Seminole Tribe v. Florida*, 517 U.S. 44, 57–73 (1996). Clark argues that the changes in the nature of our Union wrought by the Civil War justify this distinction. Clark, *supra* note 1, at 1909. In my view, Clark's agnosticism should extend to this issue as well. See Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 893 (2000) (noting that changes wrought by Civil War could conceivably justify an interpretation of the Fourteenth Amendment as retroactively broadening the federal government's power to authorize suits by individuals against states under antecedent constitutional provisions).

<sup>18</sup> Vázquez, *supra* note 10, at 1781.

states — those imposed by the Constitution and those imposed on the states by Congress — are, as a constitutional matter, to be enforced in suits against the individual state officials who violate federal law.<sup>19</sup>

Clark has come forward with additional statements by the Framers that, in his view, establish that the Founders intended to deny the federal legislature the power to impose legal obligations on the states. Most of these additional statements, however, are equally consistent with the narrower proposition that the Founders contemplated that the federal obligations of the states would be enforceable only through suits against individual state officials. Most of them establish that the Founders did not mean to establish a system in which the federal government could coerce the states as political bodies through suits against states.<sup>20</sup> Because these statements focus on *the methods of en-*

<sup>19</sup> *Id.* at 1781–82.

<sup>20</sup> Clark, *supra* note 1, at 1843–44 (quoting Letter from James Madison to George Washington (Apr. 16, 1787), in 2 THE WRITINGS OF JAMES MADISON 344, 348 (Gaillard Hunt ed., 1901)); *id.* at 1844 (quoting James Madison, Notes on the Constitutional Convention (May 30, 1787), in 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 33, 34 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS]); *id.* at 1844–45 (quoting James Madison, Notes on the Constitutional Convention (May 31, 1787), in 1 FARRAND'S RECORDS, *supra*, at 47, 54); *id.* at 1846 (quoting James Madison, Notes on the Constitutional Convention (June 16, 1787), in 1 FARRAND'S RECORDS, *supra*, at 249, 255–56); *id.* at 1846 (quoting James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND'S RECORDS, *supra*, at 285); *id.* at 1847 (quoting James Madison, Notes on the Constitutional Convention (June 19, 1787), in 1 FARRAND'S RECORDS, *supra*, at 313, 320); *id.* at 1847 (quoting James Madison, Notes on the Constitutional Convention (June 20, 1787), in 1 FARRAND'S RECORDS, *supra*, at 335, 339–40); *id.* at 1850 n.175 (quoting Edmund Randolph, Reasons for Not Signing the Constitution (1787), in 8 DHRC, *supra* note 10, at 260, 266 (1988)); *id.* at 1854–55 (quoting THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *id.* at 1855 (quoting THE FEDERALIST NO. 15 (Alexander Hamilton), *supra*, at 116); *id.* at 1856 (quoting The Connecticut Convention (Jan. 4, 1788), in 3 DHRC, *supra* note 10, at 541, 546 (Merrill Jensen ed., 1978) (statement of William Samuel Johnson)); *id.* at 1856–57 (quoting The Connecticut Convention (Jan. 7, 1788), in 3 DHRC, *supra* note 10, at 541, 553–54 (Merrill Jensen ed., 1978) (statement of Oliver Ellsworth)); *id.* at 1858 (quoting Francis Corbin, Speech in the Virginia Ratifying Convention (June 7, 1788), in 9 DHRC, *supra* note 10, at 1007, 1009 (1990)); *id.* at 1858 (quoting 9 DHRC, *supra* note 10, at 1007, 1018 (1990) (statement of Edmund Randolph)); *id.* at 1859 (quoting John Marshall, Speech in the Virginia Ratifying Convention (June 10, 1788), in 9 DHRC, *supra* note 10, at 1115, 1121 (1990)); *id.* at 1859 n.223; *id.* at 1858 (quoting Robert R. Livingston, Speech in the New York Ratifying Convention (June 19, 1788), in 22 DHRC, *supra* note 10, at 1682, 1686, 1687 (2008)); *id.* at 1858 n.224 (quoting Robert R. Livingston, Speech in the New York Ratifying Convention (June 23, 1788), in 22 DHRC, *supra* note 10, at 1809, 1809 (2008)); *id.* at 1860 (quoting Alexander Hamilton, Speech in the New York Ratifying Convention (June 20, 1788), in 22 DHRC, *supra* note 10, at 1722, 1724–25 (2008)); *id.* at 1860–61 (quoting William Davie, Address to North Carolina Convention (July 24, 1788), in 4 ELLIOT'S DEBATES, *supra* note 10, at 22); *id.* at 1861 (quoting James Iredell, Address to North Carolina Convention (July 28, 1788), in 4 ELLIOT'S DEBATES, *supra* note 10, at 146); *id.* at 1862 (quoting Samuel Spencer, Address to North Carolina Convention (July 29, 1788), in 4 ELLIOT'S DEBATES, *supra* note 10, at 163); *id.* at 1866 (quoting THE FEDERALIST NO. 81 (Alexander Hamilton), *supra*, at 488); *id.* at 1867 (quoting George Mason, Address to the Virginia Convention (June 19, 1788), in 10 DHRC, *supra* note 10, at 1403, 1406 (1993)); *id.* at 1886 (quoting 4 ELLIOT'S DEBATES, *supra* note 10, at 146 (statement of James Iredell)); *id.* at 1888 (quoting William Widgery's Speech in the Massachusetts House of Representa-

*forcing* federal law against the states, not on the applicability of federal law to the states as a substantive matter, they only support the narrower claim that the federal obligations of the states must be enforced in suits between individuals (including suits against state officials). These statements, which are the most numerous of those that Clark cites, do not support Clark's broader claim that the Framers understood Congress to lack power to pass laws that operate on the states.

Some of the statements cited by Clark do provide somewhat stronger support for the proposition that the Framers meant to deny the federal legislature the power to regulate the states themselves. For a number of reasons, however, these statements fail to establish that there was general agreement among the Founders that the federal legislature would lack the power to impose legal obligations on the states. As discussed below, even if these statements did unambiguously support Clark's broader claim, they would at best show that *some* Framers held the view that Clark attributes to the Founders generally. Moreover, on closer inspection, many of these statements turn out to be ambiguous in relevant respects. All told, the new evidence uncovered by Clark fails to establish that the Founders as a whole held the view that Clark attributes to them.

Perhaps the strongest support for Clark's broader thesis comes from a colloquy at the Constitutional Convention relating to representation in the federal legislature. According to Clark:

In the course of a protracted and heated debate, a few delegates suggested that equal suffrage was appropriate because the government would sometimes act on states. For example, William Davie remarked that "We were partly federal, partly national in our Union. And he did not see why the Govt. might (not) in some respects operate on the States, in others on the people." Madison denied that the "Govt. would (in its operation) be partly federal, partly national." If true, the observation would favor the following compromise: "In all cases where the Genl. Govt. is to act on the people, let the people be represented and the votes be proportional. In all cases where the Govt. is to act on the States as such, in like manner as Congs. now act on them, let the States be represented & the votes be equal." Madison, however, denied the premise underlying such a compromise. "He called for a single instance in which the Genl. Govt. was not to operate on the people individually." In addition, he stressed that "[t]he

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tives, INDEP. CHRON., Sept. 23, 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 427–29 (Maeva Marcus ed., 1994); *id.* at 1889 (quoting Account of John Davis's Speech in the Massachusetts House of Representatives (Sept. 23, 1793), INDEP. CHRON., Oct. 7, 1793, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra*, at 433).

practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands.”<sup>21</sup>

Statements like these support Clark’s broader claim insofar as they assert that federal law was not expected to “act on” or “operate on” the states as states, but rather only on individuals.<sup>22</sup>

Even if these statements did unequivocally support Clark’s broader claim, however, the statements are few and far between. Given the numerous statements cited by Clark that support the narrower proposition, the most that can be said is that *some* Framers understood that the federal government would not operate on the states as states.<sup>23</sup> Clark suggests that the Federalists’ claims at the ratifying conventions to the effect that the states would continue to enjoy immunity from suit are entitled to special weight because they were made by Federalists to assuage the concerns of the Antifederalists regarding state su-

<sup>21</sup> *Id.* at 1848 (alteration in original) (footnotes omitted) (quoting James Madison, Notes on the Constitutional Convention (June 30, 1787), in 1 FARRAND’S RECORDS, *supra* note 20, at 481, 488; James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 FARRAND’S RECORDS, *supra* note 20, at 2, 8; *id.* at 8–9; *id.* at 9).

<sup>22</sup> See also *id.* at 1854 (“The great and radical vice in the construction of the existing Confederation is in the principle of legislation for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist. . . . [W]e must extend the authority of the Union to the persons of the citizens — the only proper objects of government.” (quoting THE FEDERALIST NO. 15 (Alexander Hamilton), *supra* note 20, at 108–09) (internal quotation marks omitted)); *id.* at 1855 (“[R]egulating individuals and enforcing such regulations through ‘the courts of justice’ would avoid the need . . . to rely on the ‘exceptionable principle’ of ‘legislation for States’ . . . .” (quoting THE FEDERALIST NO. 16 (Alexander Hamilton), *supra* note 20, at 116, 113)); *id.* at 1856 n.207 (“[A] legislation for communities, as contradistinguished from individuals, . . . is subversive of the order and ends of civil polity, by substituting *violence* in place of the mild and salutary *coercion* of the *magistracy*.” (alteration in original) (quoting THE FEDERALIST NO. 20 (Alexander Hamilton), *supra* note 20, at 138) (internal quotation marks omitted)); *id.* (“[I]f we are in earnest about giving the Union energy and duration we must abandon the vain project of legislating upon the States in their collective capacities.” (quoting THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 20, at 154) (internal quotation marks omitted)); *id.* at 1857 (“[L]aws to be effective . . . must not be laid on states, but upon individuals.” (second alteration in original) (quoting Massachusetts Convention Debates (Jan. 21, 1788), in 6 DHRC, *supra* note 10, at 1282, 1285 (2000) (statement of Rufus King)); *id.* at 1857 n.211; *id.* at 1861 & n.236 (“[T]he Convention [was convinced] to depart from that solecism in politics — the principle of legislation for states in their political capacities.” (quoting William Davie, Address to North Carolina Convention (July 24, 1788), in 4 ELLIOT’S DEBATES, *supra* note 10, at 22) (internal quotation marks omitted)).

<sup>23</sup> Indeed, the outcome of the colloquy quoted above leaves it ambiguous whether the other delegates agreed with the statements by Madison on which Clark relies. The Convention, of course, settled on a compromise in which one of the houses of Congress would be chosen through equal representation of the states. It is also worth noting that Justice Wilson, himself a Founder, expressly affirmed in *Chisholm* that the federal government possessed the power to enact laws operative on states. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 464 (1793) (opinion of Wilson, J.). Although, in light of the subsequent adoption of the Eleventh Amendment, Justice Wilson’s opinion is properly discounted today insofar as it concludes that states can be sued, the opinion remains relevant as an indication of the lack of consensus among the Founders on whether federal laws could operate on states.



ability.<sup>24</sup> But insofar as the statements cited by Clark suggest that the federal legislature would lack the power to regulate the states, they go well beyond providing the sought-for assurance. Thus, even if the statements regarding sovereign immunity were entitled to special weight,<sup>25</sup> the statements regarding lack of legislative power would not be.

More importantly, many of the statements cited by Clark are, on closer inspection, ambiguous regarding the choice between the narrower and the broader claim. Some of the statements assert that the new Union would differ from the old in that the federal government would for the first time act upon individuals.<sup>26</sup> These statements do not necessarily suggest that the federal government would not *also* act upon the states. Other statements indicate that the federal *government* would not operate on states as states.<sup>27</sup> This does not necessarily mean

<sup>24</sup> See Clark, *supra* note 1, at 1894–95.

<sup>25</sup> For a skeptical view on whether similar assurances (on a different point) deserve special weight in the interpretive enterprise, see Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2163–68 (1999).

<sup>26</sup> See Clark, *supra* note 1, at 1845 (“Under the existing Confederacy, Congs. represent the *States* not the *people* of the States: their acts operate on the *States* not on the individuals. The case will be changed in the new plan of Govt.” (quoting James Madison, Notes on the Constitutional Convention (June 6, 1787), in 1 FARRAND’S RECORDS, *supra* note 20, at 132, 133 (statement of George Mason)) (internal quotation marks omitted)); *id.* at 1846 (“[T]he Virginia Plan ‘departs itself from the *federal* idea, as understood by some, since it is to operate eventually on individuals.’” (quoting James Madison, Notes on the Constitutional Convention (June 18, 1787), in 1 FARRAND’S RECORDS, *supra* note 20, at 282, 283 (statement of Alexander Hamilton))); *id.* at 1859 (“[T]he radical vice in the old confederation is, that the laws of the Union apply only to States in their corporate capacity.” (quoting Alexander Hamilton, Speech in the New York Ratifying Convention (June 20, 1788), in 22 DHRC, *supra* note 10, at 1722, 1723 (2008)) (internal quotation marks omitted)); *id.* at 1860 (“It is admitted that the powers of the general government ought to operate upon individuals to a certain degree. How far the powers should extend, and in what cases to individuals is the question.” (quoting Melancton Smith, Address to New York Convention (June 21, 1788), in 22 DHRC, *supra* note 10, at 1748 (2008))); *id.* at 1860 (“Another radical vice in the old system, which was necessary to be corrected . . . was, that it legislated on states, instead of individuals . . .” (quoting William Davie, Address to North Carolina Convention (July 24, 1788), in 4 ELLIOT’S DEBATES, *supra* note 10, at 21–22)); See also THE FEDERALIST NO. 15, *supra* note 20, at 105 (“[W]e must *extend* the authority of the Union to the persons of the citizens” (emphasis added)).

<sup>27</sup> *Id.* at 1852 (“Hence was embraced the alternative of a *Government* which instead of operating, on the States, should operate without their intervention on the individuals composing them . . .” (emphasis added) (quoting Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 3 FARRAND’S RECORDS, *supra* note 20, at 131, 131–32)); *id.* at 1858 (“[T]he necessity of having a *government* which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present.” (emphasis added) (quoting 4 ELLIOT’S DEBATES, *supra* note 10, at 256 (statement of Charles Pinckney)) (internal quotation marks omitted)); *id.* at 1861 (“[T]he *government* was not to operate against states, but against individuals.” (emphasis added) (quoting Samuel Spencer, Address to North Carolina Convention (July 29, 1788), in 4 ELLIOT’S DEBATES, *supra* note 10, at 163)) (internal quotation marks omitted)); *id.* at 1900 & n.483 (“[T]he Constitution ‘embraced the alternative of a *Government* which instead of operating, on the States, should operate without their intervention on the individuals composing them.’” (emphasis added) (quoting Letter from James Madison to Thomas Jefferson (Oct. 24,

that federal *laws* would not operate on states. These speakers may have just been asserting that the federal government would lack the power to enforce federal laws in suits or other coercive acts directed against the states as collective bodies, as opposed to their officials. Other statements make the compound assertion that federal laws would not operate on states *and* be enforceable against them.<sup>28</sup> These statements are consistent with the view that federal laws would operate on the states and be enforceable only against state officials. Some of the statements are themselves qualified, leaving open the possibility that the federal government or federal laws could operate on the states in some circumstances.<sup>29</sup> Finally, many of the statements merely questioned the wisdom or effectiveness of legislating for states and accordingly may reflect an intent to leave the decision to Congress.<sup>30</sup>

Clark himself ultimately appears to agree that the statements he cites are consistent with the narrower claim that the federal obligations of the states were understood to be enforceable only in suits between

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1787), in 3 FARRAND'S RECORDS, *supra* note 20, at 131, 132)). See also colloquy quoted *supra* p. 85 ("He called for a single instance in which the Genl. Govt. was not to operate on the people individually.").

<sup>28</sup> For example, as cited above, Madison stated at the Convention that "[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 FARRAND'S RECORDS, *supra* note 20, at 9. This leaves open the possibility of making laws operative on states but lacking coercive sanctions for the states (as opposed to state officials). Similarly, Hamilton in *Federalist No. 16* "dismiss[ed] as idle and visionary any scheme which aims at regulating [the] movements [of states] by laws to operate on them in their collective capacities and to be executed by a coercion applicable to them in the same capacities." THE FEDERALIST NO. 16, at 111 (Alexander Hamilton) (Clinton Rossiter ed., 2003). This view leaves open the possibility that federal laws might operate on the states in their collective capacities and be executed by coercion applicable to state officials in their individual capacities.

<sup>29</sup> See, e.g., Clark, *supra* note 1, at 1874 ("[T]he national government 'in its ordinary and most essential proceedings' would operate 'on the individual citizens . . . in their individual capacities,' rather than 'on the political bodies composing the Confederacy, in their political capacities.'" (emphasis added) (quoting THE FEDERALIST NO. 39 (James Madison), *supra* note 20, at 245)); *id.* at 1883 ("The powers of the general Government . . . do for the most part (if not wholly) affect individuals, and not States . . ." (emphasis added) (quoting *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (opinion of Iredell, J.)); *id.* at 1884–85 (stating that federal laws should operate on individuals and not states "except in the peculiar instance of a Controversy between 2 or more States & perhaps one or two other instances." (emphasis added) (quoting James Iredell's Observations on "This great Constitutional Question" (Feb. 18, 1793), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, *supra* note 20, at 190)).

<sup>30</sup> See *id.* at 1855 ("[R]egulating individuals and enforcing such regulations through 'the courts of justice' would avoid the need . . . to rely on the 'exceptionable principle' of 'legislation for States' . . ." (footnotes omitted) (quoting THE FEDERALIST NO. 16, *supra* note 20, at 111, 108)); *id.* at 1857 ("[L]aws to be effective . . . must not be laid on states, but upon individuals." (second alteration in original) (quoting Massachusetts Convention Debates (Jan. 21, 1788), in 6 DHRC, *supra* note 10, at 1287)); *id.* at 1848 ("The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands." (quoting James Madison, Notes on the Constitutional Convention (July 14, 1787), in 2 FARRAND'S RECORDS, *supra* note 20, at 9)).

individuals (including suits against state officials). After discussing the debates at the Philadelphia convention, including the colloquy quoted above, Clark considers whether his claim is contradicted by the fact that the Constitution itself clearly contains provisions operative on the states. He writes:

If these prohibitions could be enforced only through coercive suits against states, then Article I, Section 10 would contradict Madison's repeated assertions that the Constitution neither conferred nor required coercive power over states. This apparent contradiction disappears, however, if these prohibitions could be effectively enforced either by suits between individuals (including suits against state officers) or through the assertion of federal defenses in suits initiated by states. The Founders were familiar with these mechanisms, and reliance on such indirect means of enforcement was consistent with background notions of sovereign immunity and the Founders' decision to avoid reliance on federal power to coerce states.<sup>31</sup>

If Clark is saying here that the mechanism the Founders contemplated for enforcing the constitutional obligations of the states was consistent with *all* of the Founders' statements that he cites, then he is conceding that these statements say no more than that the federal obligations operative on states would be enforced only through officer suits (which is the narrower claim). If Clark is saying that the officer-liability regime is consistent with *only one* of the Founders' claims (that is, that the federal government would lack coercive power against the states), then he has failed to dispel the "apparent contradiction" between their other statements and the plain text of the Constitution, which includes provisions that clearly operate on the states.<sup>32</sup>

Clark may seek to dispel this remaining contradiction by claiming that, although the Founders imposed certain obligations directly on the states, they meant to deny the federal government the power to impose *additional* obligations on them. But this claim falls apart when one considers that the Constitution itself expressly invalidates state laws that conflict with federal statutes. By virtue of the Supremacy Clause, all federal enactments operate on the states by nullifying any conflicting state laws, an aspect of federal statutes that today is commonly enforced in suits against state officers.<sup>33</sup> In addition, as Clark recognizes, treaties of the United States clearly operate on the states as states. Clark convincingly argues that the Founders did not contemplate that the obligations imposed by treaties could be enforced in suits against

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<sup>31</sup> *Id.* at 1850–51.

<sup>32</sup> See provisions cited *supra* p. 80.

<sup>33</sup> See, e.g., *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 109–10 (1989).

the states.<sup>34</sup> The dismissal of William Vassall's suit against Massachusetts after the adoption of the Eleventh Amendment is evidence that the Eleventh Amendment was not intended to permit suits against the states arising under treaties.<sup>35</sup> But Clark does not deny that the treaty on which Vassall relied, the Treaty of Peace with Great Britain, operated on the states when it, for example, prohibited future confiscations.<sup>36</sup> Clark's own discussion of treaties thus contradicts any claim that the Founders meant to deny the federal government the power to create legal obligations operative on the states as states and supports instead the narrower proposition that the federal obligations of the states were intended to be enforceable only in suits between private individuals or against state officials.

Clark might claim instead that the Founders meant to deny the federal government the power to impose *affirmative* obligations on the states, as distinguished from the negative obligation not to enforce state laws that conflict with federal statutes or treaties. But the line between affirmative and negative obligations has not been easy to draw in related contexts.<sup>37</sup> I do not claim here that such a line cannot feasibly be drawn. My point is merely that the claim that the Founders envisioned such a line is unsupported by the evidence that Clark offers. Reading an affirmative-negative distinction into the Founders' occasional statements that the federal government or federal law would not operate on the states as political bodies would be a far greater stretch of the Founders' language than interpreting those statements as claiming that enforcement of the federal obligations of the states, whether based on the Constitution, statutes, or treaties, would be accomplished through suits against state officials rather than against the states themselves. This is not to say that the federal power to impose obligations on states is unlimited; it is merely to say that the limits are not illuminated by the statements about the nature of the Union that Clark brings to our attention.

### CONCLUSION

Professor Bradford Clark has uncovered valuable additional support for the narrow claim that the Founders understood that the federal legal obligations of the states would be enforceable only in suits between individuals (including actions against state officers). The point is important in showing that sovereign immunity does not pre-

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<sup>34</sup> Accord Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713, 715 (2002).

<sup>35</sup> See Clark, *supra* note 1, at 1894.

<sup>36</sup> Definitive Treaty of Peace, U.S.-Gr. Brit., art. VI, Sept. 3, 1783, 8 Stat. 80.

<sup>37</sup> See Carlos Manuel Vázquez, *Breard, Printz, and the Treaty Power*, 70 U. COLO. L. REV. 1317, 1344-45 (1999).

vent the judicial enforcement of the legal obligations of the states. As an explanation of the particular wording of the Eleventh Amendment, however, Clark's thesis does not get us much further than the current Supreme Court majority's explanation based on state sovereign immunity.

Clark's broader claim that the Founders meant to deny the federal government the power to impose obligations on the states as states, for its part, does not get us any further in understanding the Eleventh Amendment's text than does his narrower thesis. The broader thesis does have significant implications for the scope of Congress's power to enact legislation operative on the states as states, but Clark's evidence fails to make out his broader claim. Most of the new evidence that Clark brings to our attention supports only the narrower thesis or is ambiguous as between the narrower and the broader theses. The rest of the evidence cannot be said to establish that the Founders generally agreed on the broader thesis. In sum, Clark's evidence for the broader proposition can and should be read to support instead the narrower claim on which he and I agree.