a state was the party plaintiff.[4] So matters stood when Congress, in enacting the Judiciary Act of 1789, without recorded controversy gave the Supreme Court original jurisdiction of suits between states and citizens of other states.[5] *Chisholm v. Georgia* was brought under this jurisdictional provision to recover under a contract for supplies executed with the state during the Revolution. Four of the five Justices agreed that a state could be sued under this Article III jurisdictional provision and that under section 13 of the Act the Supreme Court properly had original jurisdiction.[6]

The Amendment proposed by Congress and ratified by the states was directed specifically toward overturning the result in *Chisholm* and preventing suits against states by citizens of other states or by citizens or subjects of foreign jurisdictions. It did not, as other possible versions of the Amendment would have done, altogether bar suits against states in the federal courts.[7] That is, it barred suits against states based on the status of the party plaintiff and did not address the instance of suits based on the nature of the subject matter.[8]

The early decisions seemed to reflect this understanding of the Amendment, although the point was not necessary to the decisions and thus the language is dictum.[9] In *Cohens v. Vir-*

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[4] The Convention adopted this provision largely as it came from the Committee on Detail, without recorded debate. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 423–25 (rev. ed. 1937). In the Virginia ratifying convention, George Mason, who had refused to sign the proposed Constitution, objected to making states subject to suit, 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 526–27 (1836), but both Madison and John Marshall (the latter had not been a delegate at Philadelphia) denied states could be made party defendants, id. at 533, 555–56, while Randolph (who had been a delegate, as well as a member of the Committee on Detail) granted that states could be and ought to be subject to suit. Id. at 573. James Wilson, a delegate and member of the Committee on Detail, seemed to say in the Pennsylvania ratifying convention that states would be subject to suit. 2 id. at 491. *See* Hamilton, in THE FEDERALIST No. 81 (Modern Library ed. 1937), also denying state suability. *See* Fletcher, *supra* at 1045–53 (discussing sources and citing other discussions).

[5] Ch. 20, § 13, 1 Stat. 80 (1789). *See also* Fletcher, *supra*, at 1053–54. For a thorough consideration of passage of the Act itself, *see* J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOL. 1, ANTECEDENTS AND BEGINNINGS TO 1801 457–508 (1971).

[6] Goebel, *supra*, at 726–34; Fletcher, *supra*, at 1054–58.

[7] Fletcher, *supra*, at 1058–63; Goebel, supra, at 736.

[8] Party status is one part of the Article III grant of jurisdiction, as in diversity of citizenship of the parties; subject matter jurisdiction is the other part, as in federal question or admiralty jurisdiction.

[9] One square holding, however, was that of Justice Washington, on Circuit, in United States v. Bright, 24 Fed. Cas. 1232 (C.C.D. Pa. 1809) (No. 14,647), that the Eleventh Amendment's reference to "any suit in law or equity" excluded admiralty cases, so that states were subject to suits in admiralty. This understanding, *see* Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110, 124 (1828); 3 J. STORY, COMMENTARIES OF THE CONSTITUTION OF THE UNITED STATES 560–61 (1833), did not receive a holding