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May 20, 2015

The Repudiation of Reconstruction State Debts

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Introduction

> *A State, like a merchant, makes a contract. A dishonest State, like a dishonest merchant, willfully refuses to discharge it. The latter is amenable to a court of justice upon general principles of right. Shall the former, when summoned to answer the fair demand of its creditor, be permitted, Proteus-like, to assume a new appearance, and to insult him and justice by declaring,* **I am a sovereign State*? Surely not!*** - Justice Wilson, *Chisolm v. Georgia*

It was a lot of money, even for 1882. On William Cameron's desk, a short document demanded his attention. If he signed it, millions of dollars would disappear. The state, which had racked up the debt over two generations, would be free of some of it if the Governor signed. Of course, it wouldn't be a costless windfall. Hundreds of savers who had bought the bonds, or accepted them as currency in exchange for goods or services, would lose the same amount of money the state would gain. Critics argued the state's honor would never recover, its credit forever worthless. For Governor Cameron though, it wasn't a hard choice. He was elected to office on the Readjuster ticket, a political coalition forged for the very purpose of erasing part of these state debts. A decade of mobilization had led to this moment, fracturing party systems throughout the South while stoking the fires of populism, race and class conflict. Debt repudiation, the practice of state governments erasing debts they had previously accumulated, was sweeping across the American South.

		1852		**1860**		**1870**
Virginia	$	13,573,355	$	31,779,062	$	47,390,839
North Carolina	$	997,000	$	9,699,000	$	29,900,045
South Carolina	$	3,144,931	$	4,046,540	$	7,665,909
Georgia	$	2,801,972	$	2,670,750	$	6,544,500
Florida	$	2,800	$	4,120,000	$	1,288,697
Alabama	$	8,500,000	$	6,700,000	$	8,478,018
Mississippi	$	7,271,707	$	-	$	1,796,230
Louisiana	$	11,492,566	$	4,561,109	$	25,021,734
Arkansas	$	1,506,562	$	3,092,623	$	3,459,537
Tennessee	$	3,776,856	$	20,898,606	$	38,539,802

Total	**$ 53,067,749**	**$ 87,567,690**	**$ 170,085,311**[1]

Between 1852 and 1870, state debts in the South had increased from $53 million to $170 million. On the face of it, the numbers supported the repudiationists. Debts had more than doubled since the beginning of the Civil War. Many argued that after Emancipation, unprepared, uneducated freedmen cast votes and held office before they were "ready," leading to dramatic waste and scandal. Newly freed slaves, opportunistic carpetbaggers, and radical revolutionaries plunged state governments into corruption, incompetence and waste. This gestalt sense of calamity led some to invoke the odious debt doctrine. A people, under this idea, are not bound by debts of preceding illegitimate governments if they were incurred for wasteful or illegal purposes.[2]

But the debt totals did not tell the full story. Analysis of state government spending shows that the majority of these debts were incurred before any Republican or freedman came to power in the South. Much of the antebellum debt was incurred at high interest rates, and many of the bonds went unpaid before and during the Civil War. Interest and overdue principle payments on these debts actually accounted for more of the 1870 balance than new expenditures incurred by the Reconstruction governments. Nevertheless, factions in favor of deleting these debts (and blaming Republicans for incurring them) won elections throughout the region, and eventually prevailed in the federal courts.

The repudiation question inaugurated a half-century long legal fight over whether a state government could simply erase its own debt, with no recourse to the unhappy bondholders. During Reconstruction, the Supreme Court sided with bondholders who challenged repudiation

[1] R.P. Porter, INTERNATIONAL REVIEW, (Nov. 1880).
[2] *See, e.g.* Lee C. Buchheit, G. Mitu Gulati and Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L. J. 5, 1201-1262 (2007).

on Contract Clause grounds.[3] After the collapse of Reconstruction, courts stood by as Democrats shredded state contractual obligations, allowing states to unilaterally invalidate contacts, shocking contemporary legal writers, especially in light of the U.S. Constitution's Contract Clause.[4] For repudiation's critics, the Court's new posture demeaned "the moral sense of the nation… fraught with the gravest consequences of injustice and wrong, [and] departs from well settled and fundamental principles." Commentators insisted it was "the duty of every lawyer and of every citizen to subject such decision to the closest examination and strictest criticism."[5] They went as far as to connect repudiation to "the *very essence* of destructive theories maintained by the socialists and communists of France and Germany, theories which unfortunately have too many supporters and advocates in our own land."[6] A continuing puzzle in postbellum history is why a supposedly conservative, pro-industrialization Court steeped in rhetoric of fidelity to contract and sympathetic to development allowed states to vitiate their contracts, despite clear precedents that had blocked such actions on Contract Clause and other constitutional grounds in the past.

A revision of the history of repudiation is necessary because the present historiography acquiesces to factual inaccuracies and mischaracterizations of the debts themselves, fails to draw the connection to the unstable theories of sovereignty at work in the aftermath of the Civil War, and does not acknowledge the role repudiation had in compounding Reconstruction's failure and burdening its historical legacy.

The most empirical reason for reexamining postbellum repudiation stems from a fundamental mischaracterization of where the debts came from, what they paid for, and why they

[3] North Carolina R. Co. v. Swasey, 90 U.S. 405 (1874).
[4] State of Lousiana ex rel. Elliott v. Jumel, 107 U.S. 711 (1883).
[5] *The Supreme Court and State Repudiation*, 17 AM. L. REV. 685 (1883).
[6] *Id.* at 712.

were repudiated. It draws on work already done by revisionist and post-revisionists, led by Eric Foner, that points out the falsity in casual generalizations about Reconstruction incompetence and waste. Here, original research and quantitative analysis is offered to better explain what state funds were actually spent on, and what infrastructure and government services were procured for these funds. No historians have attempted a systematic review of the state government fiscal record for the Reconstruction period, due in large part to the problem of sources.[7] Today, states publish consolidated budgets, audit reports, and revenue records, providing rich sources for analysts to evaluate the record. In the 19th century, consolidated documents reflecting state government inflows and outflows are not available. Here I begin the work of describing the state spending in Louisiana by building a database and quantitative analysis based on session laws and audit reports. Louisiana is used as a first case because Reconstruction lasted the longest there and was the most entrenched, leaving behind a record of remarkable black and white officeholders and innovative reform efforts.[8] The analysis calls for a fuller reconsideration of Reconstruction state-level policy. In addition to the better understood accomplishments of federal reconstruction policy as pointed out by revisionists, state-level Republican parties and officials made significant strides in infrastructure, consumer protection, transparency and oversight, and civil service professionalization. Reconstruction governments not only created historical openings for experiments in biracial political participation, but also transformed state and city governments into rich laboratories "in the search for a new… economic order" instituting experiments in

[7] Economists and historians of repudiation in other periods, especially the antebellum movement in the 1840s, have pointed out the same major source problem and lack of aggregation. *See* Wallis, *Sovereign Default and Repudiation: The Emerging-Market Debt Crisis in U.S. States, 1839-1843*, Note on Sources (2004).

[8] Reconstruction experiments began as early as 1862 in Union occupied districts, and continued in some respects for the duration of Dubuclet's tenure as State Treasurer, ending in 1878. Further work on the records of the Louisiana State Auditor, and the State Treasurer housed in Baton Rouge and New Orleans archives could eventually be used to reconstruct something approaching an income statement and balance sheet to truly assess the fiscal actions of the state under Reconstruction.

"truly revolutionary concepts."[9] By examining who incurred what debts in the states, the popular and legal rhetoric advocating repudiation, invoking the odious debt doctrine, and diminishing the accomplishments of Reconstruction can be more critically evaluated.

The repudiation saga also exposes how unstable and contested debates over sovereignty theory remained after their supposed resolution in the Civil War. The compact theory of sovereignty, holding that the federal government was created by contracting sovereign states, rather than the people directly, had supposedly been decisively overturned by battle in the Union's victory.[10] Yet after the war, it remained unclear what construction of sovereignty and federalism would replace the compact idea. The repudiation story shows that even as late as the 1890s, the compact theory was still in heavy use in the legal and popular arenas. The theory was resurrected to help state governments dramatically weaken the Contract Clause, and to expand state sovereign immunity and the power of Eleventh Amendment to block access to justice for citizens against state governments. These new roadblocks to vindicating constitutional rights compounded other developments including the *Civil Rights Cases* and the *Slaughterhouse Cases* that served to expand state power at the expense of individual and group rights.

Third, the repudiation story is a supporting character in the drama of Reconstruction's demise and failure. In the early republic, Hamilton insisted upon the assumption of state debts as a part of his economic development program, seeing it as crucial to success of the new Constitutional government.[11] By reinforcing state credit and insisting on debt payment, the Federalists reinforced their commitment to internal investment. In contrast, when the federal

[9] William Connor, *Reconstruction Rebels: The New Orleans Tribune in Post-War Louisiana,* 21 LA. HIST: J. LA. HIST. ASS'N 2, 161 (1980).
[10] Cynthia Nicoletti, *The American Civil War as a Trial by Battle*, 28 LAW AND HIST. REV. 1, 77-110, (2010).
[11] MELVIN UROFSKY AND PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE U.S., 130-132 (2002).

government allowed state debts to be dishonored and repudiated after Reconstruction, it was another of many betrayals of one of the most important government programs in history. Repudiation compounded Reconstruction's stereotyped depiction as an abject, wasteful failure. Litigators and commentators were allowed to mischaracterize the debts, and through them Reconstruction as a whole, compounding its failure and further damning prospects for similar efforts in the future.

The story of how repudiation served to revitalize discredited sovereignty theories, limited constitutional remedies for citizens, and further tarnished Reconstruction's legacy begins with the origination of the state bonds during Congressional Reconstruction.

Origins of the Reconstruction State Debts

At the end of the Civil War, the federal government embarked on a massive project to rebuild and remake the South. The U.S. Congress, led by the Radical faction of the Republican Party, grew unsatisfied with President Johnson's conservative, conciliatory approach and took control of Reconstruction in 1867 and expanded the scope and ambitions of the project, inaugurating startling new experiments in the political and economic empowerment of freedmen.

After the war, the South was by far the most impoverished region of the country; a dramatic fall for places like the South Carolina low country which only decades previously been the richest society in the Americas.[12] Defeat brought a small fiscal consolation; the Union was adamant (and the 14th Amendment required) that all debts incurred by Rebel governments in

[12] B.U. RATCHFORD, AMERICAN STATE DEBTS 162 (1941).

furtherance of war be repudiated.[13] Even given this helpful write-off of war debt, the Southern states had very shaky credit at the start of Reconstruction.[14]

At Congress' direction, the Southern states drafted new state constitutions to comply with post-emancipation realities. Emphasizing fiscal restraint from the start, the Reconstruction constitutions featured strong restrictions on the use of state credit and bonds. The first legislatures under these new constitutions met in 1868, and began fashioning social and fiscal policy in line with the national program of reform. With the support of the newly enfranchised freedmen, Republicans dominated the early Reconstruction legislatures. Historians, especially in the early 20th century, have been remarkably critical of these men: often in racist terms, they charged state officers and legislatures with rampant incompetence, waste, and corruption. B.U. Ratchford did not hide his antipathy towards the new state governments; to him the primary purpose of "almost all the Reconstruction bonds" that they issued was to gin up funds for the "corrupt Rings" surrounding the freedmen and carpetbaggers. With no source documentation, Ratchford alleges bond proceeds were used to buy chips in New York casinos, to hire prostitutes, and to speculate on the stock exchanges in New York. He relies on reports from state repudiation committees for further such characterizations, despite that these political bodies were installed in the late 1870s for the sole purpose of justifying and carrying out repudiation.[15] During the period, Democrat-leaning commentators alleged widespread bribery in the bond votes, "fraud and criminal carelessness." These accusations became part of the political argument underlying the legal battles over "adjusting" (repudiating) state debt in the 1870s and 1880s. Overall, there

[13] "[N]either the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void." AMEND 14, SEC 4, U.S. CONST.
[14] George Gilliam, *Building a Modern South: Political Economy in Nineteenth-Century Virginia*, Doctoral Dissertation, UVA (2013).
[15] RATCHFORD at 174.

is a surprising dearth of scholarship challenging the extent to which Reconstruction spending was mired in corruption and waste, as compared to antebellum and Redemption-era governments. Indeed, much of the rhetoric during the 1870s and in later scholarship derives from ideological opposition to political Reconstruction. A detailed analysis tends to support a revision of this widely accepted theory of Reconstruction as a period of waste and graft.[16]

Treasurer Dubuclet and Louisiana under Reconstruction

Congressional Reconstruction came to Louisiana in June 1868 with the inauguration of Governor Warmoth and Antoine Dubuclet's as State Treasurer, the first African American to hold such office in any state in American history. The two were immediately confronted with the economic destruction left by Democratic Party rule. According to Dubuclet:

> Taxes for the years [1860-1867] were in arrears. The city and state were flooded with state and city shin-plasters which had been issued to meet current expense. [17]

The state deficits for 1867 and 1868 totaled $1,477,415.64. Dubuclet proposed several reforms, including a mandate to the General Assembly that limited all unnecessary expenditures and "put a stop to all extraordinary appropriations not absolutely necessary, so as to confine the expense." He recommended currency reforms, including a law setting greenbacks as the only legal tender for public debts. The legislature enacted several of Dubuclet's proposals over his three-term tenure.[18]

Dubuclet personifies the forgotten competence and fiscal stewardship of Republican state government during Reconstruction. One startling example stemmed from his service on the Levee Board, which oversaw bonds related to levee construction and maintenance. Two of his

[16] Joe Taylor, *New Orleans and Reconstruction*, 9 LA. HIST: J. LA. HIST. ASS'N 3, 199 (1968).
[17] Charles Vincent, *Aspects of the Family and Public Life of Antoine Dubuclet: Louisiana's Black State Treasurer, 1868-1878*, 66 J. NEGRO HIST. 1, 29 (1981).
[18] Vincent, 66 J. NEGRO HIST. 1, 29.

colleagues on the board members did not exactly cover themselves in glory. State Representative Lee and Senator Lynch travelled to New York to solicit investors. There, they exercised considerable "discretion," selling state bonds at extreme discounts, including $200,000 at 68% of face value, and $84,000 at 47%, potentially allowing them to pocket the difference. Dubuclet refused to accept the corruption and adjourned the commission.[19] He even took the matter to court, earning praise from even the conservative Democratic press:

> It is a noticeable incident that only white men were engaged in this nefarious transaction, whilst the only honest and faithful person who stood by the interest of the state… was a colored man.[20]

The *Tribune* remarked on the bipartisan acclamation for Dubuclet, praising "character, not color" and the pleasure the public should take from

> these instances of reason triumphing over prejudices… we trust that henceforth we may hear no more twaddle about this being a white-man's Government.[21]

Dubuclet won three statewide elections, and received endorsements from Democratic newspapers in addition to his reformist Republican base. In his final years in office, Louisiana enacted a crucial voluntary bond exchange program, fully refunding the state debt with new 40 year bonds. At the end of his term, Treasurer Dubuclet and his partners in the legislature had reduced the state debt by more than $5 million without any recourse to repudiation.[22]

Because of the staggered terms of Treasurer, Dubuclet served out the final two years of his term after all the other Republicans had "lost" to Redeemers in the disputed 1876 election and national Compromise of 1877 which handed the state to the Democrats under conditions of terrorism and electoral fraud. During these final years, Democrats tried to tar Dubuclet

[19] The board was composed of Governor Warmoth, Representative A.L. Lee, Senator Lynch, and Treasurer Dubuclet, all *ex officio.*
[20] Vincent at 30.
[21] NEW ORLEANS TRIBUNE (Jan. 29, 1869).
[22] *Id. See also* MATHEW LYNCH, BEFORE OBAMA: A REAPPRAISAL OF BLACK RECONSTRUCTION ERA POLITICANS, VOLUME 1, 115-120 (2012).

personally with their corruption propaganda, going as far as to appoint a five-man commission to investigate his tenure. The commission's attempts backfired and was unable to condemn Dubuclet, observing that he "deserves commendation for having accounted for all money coming into his hand, being in this particular remarkable." Even after exoneration and praise, in context of rising political violence and electoral fraud, Dubuclet declined to run against the Redeemers in 1878. His Democratic successor, E.A. Burke, served in the position for over a decade and stole at least $1,267,905 from the treasury.[23]

Acts of the Louisiana General Assembly

While Dubuclet modeled financial stewardship and oversight while defying racial stereotypes, Louisiana's biracial General Assembly also blazed new ground. Its accomplishments have rarely been acknowledged by historians. Analysis of the acts of the Louisiana General Assembly between 1879 and 1881 reveals a set of patterns that overturn conclusions offered in contemporary pro-Repudiation rhetoric as well as historiography up to the present. After personal laws and judicial reform, the most numerous category of enacted laws dealt with transportation. Louisiana would guarantee bonds or provide initial seed investments through bond issuance.[24] Democrats attacked the bonds, arguing they funded corruption and compromised the state's solvency. In reviewing these bond issuances, one instead finds a remarkable range of check and balances, audits and control measures that mitigated the risks to the state, not seen in antebellum spending measures.[25] In exchange for the bonds, the Assembly

[23] Vincent at 32-33.
[24] The plurality of the laws passed by the Republican legislature were so called personal laws, touching on a concern or an expense effecting one or two people. Many of these were name changes, corrections state contractor spending, and provisions of small amounts of relief for widows and retired officials. After this amorphous category, the next major occupation of the Louisiana legislature was judicial reform. The Republicans restructured the state court system, increased judges, districts, and justices of the peace. They extended terms of the court and increased the ease of access to justice throughout the state, with special attention to rural areas.
[25] *See, e.g.,* 1868 La. Acts No. 13. Oversight measures included establishment of a committee to investigate the use of funds by the New Orleans Drainage commission since 1861. 1868 La. Acts No. 55. *Compare, e.g.,* the

nearly always demanded a mortgage on all of a company's property. Conservative milestones were required for tranches of funds to be released and independent audits were typically required in the authorizing statute.[26]

In laws relating to municipal organization and regulation, the theme persists. Acts are replete with measures of control and fiscal discipline, requiring audited balanced budgets, statutory limits on municipal debt, and police jury votes before major expenses. Government operating expenditures were also tightly regulated by the Assembly during Reconstruction.[27] Reconstruction governments also set up some of the first health boards in the country, including in Virginia and Alabama. These programs were not richly funded, but Radical Reconstruction legislatures had laid the groundwork for the administrative state expansion championed by the future Progressive movement. Notably, even in the seemingly banal matters of regulatory oversight, enemies of Reconstruction organized mass resistance. A state agency was established in North Carolina to supervise charitable and penal institutions, and a Board of Public Charities was tasked with investigating the conditions of the impoverished and those organizations providing services for them.

> Many of the most influential people of the state were opposed to the Board's very existence because it had been created by a so-called Radical Reconstruction legislature. The hostility increased by the month, and the unwillingness of the more affluent taxpayers to support its program literally drove the Board into inactivity in 1872… until [redemption].[28]

authorizing acts for the antebellum North Carolina bonds saved from Repudiation by the Supreme Court that had no such features with those repudiated with the Supreme Court's acquiesce in *Hans.*

[26] State contracts from the Board of Public Works were awarded only to the "lowest responsible bidder." Majority board approval and full bonding for all contracts was required. Contracts had to be advertised for at least 20 days before being awarded, broadening the universe of potential bidders. Institutional features included a five-member staggered term board, all members of the board were required to be bonded for $10,000, and they were required to meet quarterly in meetings open to the public. In directing the geographic bounds of a project, identifying the key personnel, and the funding method, the legislature evinced an interest in maintaining hands-on management of even relatively small infrastructure undertakings.

[27] Fees paid for contractors like state printers were highly regulated. Authorizing statutes typically specified exact per-page prices payable for session laws, house journals, and even blank paper provided to the government. 1868 La. Acts No. 8, §12. ("The printer was directed by law to submit his bills to the Auditor of Public Accounts each month, who would check the bills and then authorize payment by the Treasurer.") . A committee was authorized to assess whether the workforce of the House and Senate could be reduced. 1868 La. Acts No. 36.

[28] Franklin at 385.

Given that nearly no money was at stake, the Democratic opposition to the Republicans in state legislatures in matters like these stemmed from an overreaction to a rationalizing, competent administrative state. Such a government undercut the Democracy's argument that freedmen rule would be a corrupt incompetent calamity. Rather that attacking the substance of the Republicans state policies, the Democrats would attack the whole fiscal edifice of Reconstruction through repudiation.

The Repudiation Movement

Then as now, populist-leaning rhetoricians bemoan the size of government debt, and often blame the full balance on the incumbent government. A political movement developed in the 1870s to 'readjust' (repudiate) state debts through unilateral legislative action. The repudiation project swept the region, and spurred several Supreme Court contests over the legality of a state disowning its contractual obligations. Repudiators, usually political enemies of the Republicans, conveniently forgot that most of the accumulated state debts were actually incurred by the preceding Democratic governments. The repudiation debate was in the context of a larger, long-term financial realignment of economic arrangements in the South. Legal historians of the period typically hold that state governments privileged the rights of investors over others primarily in response to the dire scarcity of capital, especially pronounced in the aftermath of war and emancipation. [29] One of C. Vann Woodward's characterizations of the period holds that business interests overthrew the planter aristocracy and established a "New South" which sought to "out-Yankee the Yankees."[30] The repudiation saga challenges this

[29] *See e,g.* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 63 (1956).
[30] Gilliam at 6, *see* Woodward at 291. Woodward sees this move as another "sharp break" in the history of the South marketed by dramatic discontinuities. The New South moment also created an opening for colonization by the

characterization, and shows the commitment to a privileged place for capital was not always the controlling priority.

Recent scholarship has also challenged the extent to which actual troop activity during the Civil War destroyed Southern resources, excluding the loss of "capital" in the form of owned human lives erased by emancipation. This data undercuts the repudiationist argument that the state debts were completely unaffordable, making repudiation the only possible solution. Paul F. Paskoff argues that the physical destruction of capital "was far less extensive and intensive than has generally been thought." The idea of rampant war-related destruction of the Southern tax base and economic growth prospects is "part of the mythology of the Civil War and not its history."[31] This literature undermines both the arguments made by repudiationists during the period as well as the historiographical mischaracterization of Republican rule in the states.

Within ten years of the start of Reconstruction, the Democratic Party and its program of white supremacy took control of all Southern states and effectively ended Reconstruction.[32] Democrats presented themselves as Redeemers, on a mission to restore "home rule" and order by ending the despotic Republican administrations. Redeemers accused Republican government of hopeless and dramatic corruption, lawlessness, and rampant wasteful spending. As part of their program to destroy and discredit Reconstruction, the Redeemers aggressively pushed for repudiation. Debts incurred by "carpetbagger Republicans" and "ignorant freedmen" were

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North, given the underdeveloped state of financial capitalism in the South. Gilliam disputes both the discontinuity argument and the Northern colonization account.

[31] Paskoff, "Measures of War: A Quantitative Examination of the Civil War's Destructiveness in the Confederacy," 55 Comparing declines in reported capital values in "war counties" against counties that did not see troop movement, "the value of such capital declined in in war and nonwar counties by almost identical proportions," tending to show low levels of capital destruction as a result of war. Livestock investments however were substantially affected, typically in the range of a 30 to 40% decline from 1860 levels. *See* Sellers, *Economic Incidence* 184-185.

[32] See, e.g. "This is a white man's country… and white men must control and govern it." State Democratic Executive Committee, THE DEMOCRATIC HANDBOOK (1898), in DOCUMENTING THE AMERICAN SOUTH, The University of North Carolina at Chapel Hill (2002).

illegitimate, and successor governments had a moral obligation to eliminate these debts.[33] Repudiation was one of an arsenal of strategies to permanently tarnish Reconstruction, erase its legacy, and prevent anything like it from resurging in the near term.

Everyone knew repudiation would eventually come before the courts. Repudiators prepared an odious debt argument based on their willful mischaracterizations of the debts. They alleged bribery, fraud and carelessness in the bond authorization acts and in their sales.[34] They pled that states "received no adequate return" for the "bonds fraudulently issued by carpet-bag Administration" under the years of "radical misrule."[35] They also made solvency claims: states had been so burdened with debt during Reconstruction, compounded with the impoverishing effects of the Civil War and emancipation, the debts were simply unmanageable and had to be 'adjusted.' Populists joined in, claiming that profits from the debts were captured largely by outside speculators at the expense of yeoman taxpayers. More radically, Repudiators sometimes maintained that because the Reconstruction acts were unconstitutional, the Republican state governments had illegally contracted debts on a behalf of citizens without their consent and all the actions of the Reconstruction states were void as a matter of law.[36]

To support all of these arguments for repudiation, Readjusters deployed theories of sovereignty that supported repudiation and immunity for federal court supervision. Crucially, litigants in repudiation suits and commentators resurrected the apparently discredited compact theory of Union. Sovereign states had never consented to being liable for suit in federal courts, so those federal courts simply had no power to interfere with sovereign governments

[33] C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913 (1981) 89. . In some states, the Readjuster controversy was not a simple Democrat versus Republican split, but in fact fractured state party systems, creating third parties and temporary fusions. Opponents of repudiation, called Funders, argued honor and rule of law demanded all state debts be paid Funders were also known as the Debt Payers or State Credit fraction.
[34] *Id.*
[35] *Democratic Repudiation*: *The Disgraced Government of Louisiana,* NEW YORK TIMES (Jan 18 1879).
[36] WOODWARD at 87.

restructuring debts that they found illegitimate. The lawfully elected Redeemer governments had every right to pass statutory and constitutional measures that terminated payment on bonds they determined were issued for wasteful purposes. Bondholders should have been aware of this risk, and part of the bargain between the states and investors was the possibility that repudiation would happen, especially given the controversy surrounding the Reconstruction Acts.

The North was firmly against repudiation, and press reports attacked both the odious debt argument and the appeal to sovereignty theory. Successive governments are responsible for the public debts of preceding governments, as shown when Hamilton led the federal government to assume state debts incurred before the ratification of the Constitution. Other comments focused on more practical fiscal considerations. The *Chicago Tribune* called on Virginia to resist "open and dishonorable repudiation" and to learn from Illinois' experience with repudiation from the 1840s. During that period, the people of Illinois flirted with the idea

> that is was better to repudiate than to pay taxes to meet old debts. Of course, Illinois lost her credit, and her people lost character. They could not buy goods on credit, nor borrow a dollar for any purpose. No persons wanted to deal with them on any terms. Immigration stopped. Emigrants passed through the State to Missouri, Iowa, and Wisconsin. [37]

Eventually, Illinois reversed itself on repudiation and made investors whole, but the episode caused years of unnecessary damage in the state. Further, the *Tribune* attacked the solvency argument made by repudiators. Despite their protests of bankruptcy, the state governments were no worse off than Illinois was during her debt crisis. Illinois got control of its debt with the right policies without resort to repudiation, and so could the South. Fulfilling state contracts was a moral imperative wherever "honesty and good faith govern the conduct of the community." A few years later, in the context of growing support for repudiation, the *Tribune* waxed poetic on

[37] *Repudiation in Virginia,* THE CHICAGO TRIBUNE (Jan 12 1872), *See also Repudiation,* CHICAGO DAILY TRIBUNE 4 (July 10, 1874).

the sorry state of public credit and industry in the South. Crucially, it connected repudiation and lack of discipline among white Democrats to the growing racist backlash against Reconstruction:

> The American mind is no longer shocked at the idea of repudiation, and in the South the white American mind is shocked at the idea of labor. As long as Southern whites refrain from working and try to sponge a living, ante-bellum fashion, off the blacks, so long will Southern wealth and credit be small.[38]

Historians have tended to forget the magnitude of opposition to repudiation. Ratchford, writing in 1941, wrote more like a pro-repudiation editorialist responding to Northern criticism. Decrying the debts incurred by state legislatures dominated by "[n]egroes and carpetbaggers" Ratchford claimed Republican state legislators "were the most ignorant, corrupt, and venal lawmakers ever to hold office in this country… Those in control were out to loot and plunder."[39] Yet even enemies of Reconstruction differentiated between state regimes, providing a relative ranks of misrule and corruption. For Ratchford, Louisiana and South Carolina were the "worst of the lot," though North Carolina was "little better;" Virginia, Texas, Georgia and Mississippi on the other hand evaded the worst of Reconstruction's excesses.[40] Strikingly, these categories match up with the federal legal treatment of repudiation. Louisiana and North Carolina successfully repudiated millions and won Supreme Court lawsuits challenging their actions. Virginia, where Reconstruction was supposedly the most reasonable and least corrupt, was forced by the Supreme Court to honor state debts it had tried to cancel.[41] Despite the factual inaccuracy of the claim that Reconstruction governments accumulated extravagant, unprecedented debts, pro-Repudiation campaigners were successful in winning the rhetorical argument, influencing historiography up to the present day.

[38] *Repudiation by the States*. THE CHICAGO TRIBUNE (June 29, 1875).
[39] RATCHFORD at 169.
[40] *Id.* at 170.
[41] McGahey v. Virginia, 135 U.S. 662 (1890).

Readjusters quickly translated their electoral victories into actual repudiation. As soon as state treasurers refused to pay interest due on some classes of bonds, bondholders responded with litigation.

The First Case: *Swasey* and Anti-Repudiation Precedent

North Carolina Railroad v. Swasey (1874) was the first postbellum repudiation case that reached the Supreme Court.[42] Though heard during the rise of Repudiation movement, the bonds in *Swasey* actually were issued by antebellum legislatures in 1849 and 1855 for railroad construction. As a result, much of the pro-repudiation rhetoric related to the corruption of Republican governments, the inexperience and naiveté of American's first black legislators, and the odious debt doctrine were inapplicable. But the sovereignty theory arguments were the same, so *Swasey* was a good first test of whether repudiation as a general matter violated various federal constitutional rights, including the Contact Clause and due process protection.

The case was born when Redeemers took control of the North Carolina government in 1870. By 1873, the state had passed a constitutional amendment repealing the ban on repudiation. The next year, the legislature barred the state treasurer from making payments on bonds. Though their rhetoric focused on Reconstruction's excesses, the legislature repudiated older state debts as well.

Swasey owned North Carolina bonds issued under acts from 1849 and 1855. These bonds were originally issued to finance the purchase of stock in the North Carolina Railroad Company (NCRR).[43] The railroad would pay dividends to the state, which were supposed to

[42] North Carolina R. Co. v. Swasey, 90 U.S. 405 (1874).
[43] *Swasey*, 90 U.S. at 406. The state issued bonds to fund its purchase, pledged its full faith and credit, and a collateral interest in the NCRR stock. The hope was that the dividends, and stock sales if needed, would be enough to cover the interest and principle on the bonds. "[To] pay for this stock she borrowed money and issued her bonds… with coupons for interest, redeemable in thirty years, with interest, payable semi-annually."

cover interest due to bondholders. Instead, the state "appropriated the money to purposes other than the payment of interest" and the bonds went into default. Swasey sued, asking the court to force the NCRR to pay the pledged dividends.[44] Chief Justice Waite, then riding circuit, first heard the case in Raleigh. Swasey won, and Waite issued an injunction against North Carolina's attempt at repudiation.[45] Dividends were received and used to make interest payments as per the original deal.[46] Unfortunately, the dividends were not enough to cover the interest payments. Swasey then moved to compel the sale of some NCRR stock to cover the payments, and after appeal, the case was heard by the Supreme Court.[47]

The Chief Justice cited *Osborn v. Bank of United States* for the principle that sovereign immunity doctrine did not prohibit jurisdiction in cases related to property in the hands of state government agents: in "such cases the courts act through the instrumentality of the property or the agent."[48] Based on *Osborn*, Waite held that North Carolina was not protected by sovereign immunity from its obligations under the Contract Clause and again sided in favor of the bondholder. Realizing the Court was not favorably disposed towards repudiation, North Carolina did not take up further litigation, and the attempted repudiation of the *Swasey* class of bonds failed.[49] *Swasey* was the first post-Reconstruction decision to test whether litigants could

[44] *Id*.
[45] Swasey v. North Carolina R. Co., 1874 U.S. App. LEXIS 1913 (1874).
[46] 90 U.S. at 406.
[47] Ruling on the motion, the lower court made several findings of fact, including: "the shares of the stock in [NCRR belong] to the State of North Carolina," "the shares and all dividends thereon are pledged as security for the payments of the certificates of debt," "owners of such… bonds, or of coupons detached therefrom, now hold large amounts of past due coupons" and finally that the bondholders were entitled to have "their respective proportions of the stock, or so much.. as may be necessary, sold, in order to pay such past due interest." *Id.* at 407. To operationalize this ruling, the receiver was ordered to research the unpaid interest due to all claimholders (conduct an "accounting"), report to the court on the accounting, and then sell as much of the state's NCRR stock as would be needed to make the payments, unless North Carolina arranged to pay its obligations through taxes or other revenues."
[48] 22 U.S. 738 (1824)
[49] *Swasey* at 409-410. The Court found that because the amount North Carolina owed on the bonds had not been calculated by the receiver, the decree was not final: "[the amount] must be settled before the litigation can be said to be at an end."

challenge repudiation of state bonds without incurring sovereign immunity obstacles. To opponents of repudiation, it looked as though courts would indeed protect them against the states' attempts at abridging the Contract Clause.[50]

Louisiana Repudiation Begins

Several years passed after *Swasey* before a true Reconstruction-era bond repudiation case reached the Court. The moment arrived in 1883 with *Louisiana ex rel. Elliott v. Jumel*.[51] In a stunning reversal, Chief Justice Waite wrote the 7-2 majority opinion in *Jumel* reaching the opposite disposition he had reached in *Swasey*.

The road to *Jumel* begins back in Louisiana in 1874. The assembly, guided by Treasurer Dubuclet, refunded the entire state debt by issuing new bonds with extended maturities.[52] Louisiana followed up with a constitutional amendment, affirming the 1874 act and declaring any transaction involving the bonds to be "valid contracts" which the state "shall by no means and in no wise impair."[53]

[50] There is a potential concern that Swasey can be distinguished from other repudiation cases because of the special bond structures used in that case. Because the bonds were backed by a mortgage on a pool of equities, courts could readily order distributions from the equities to pay repudiated state bonds. In some of the repudiation cases dealing with Reconstruction-era debt, there was no collateral pool for courts to exercise control over; it is a more difficult move for the judiciary to order a state legislature to levy a tax or sell assets to pay for repudiated bonds. On the other hand, very similar bond structures used in *Swasey* are also found in the subsequent repudiation cases where sovereign immunity barred jurisdiction.

[51] State of Lousiana ex rel. Elliott v. Jumel, 107 U.S. 711 (1883).

[52] 17 ALR 684 at 699, *Jumel* at 712-713.

[53] *Jumel* at 714. Because this was a refinance, the underlying debts were not new, and in fact a majority of the refinanced debt was incurred before Republican Party control in the state. The bonds at issue had a 40 year duration and paid a 7% coupon. The act levied a 5.5 millage on real and personal property to fund the payments, directing that the tax proceeds be "set apart and appropriated to that purpose and no other" and held that "each provision of this act shall be and is hereby declared to be a contract between the State of Louisiana and each and every holder of the bonds." La. Acts, 1874, p 42. The amendment was ratified in November 1874. It reiterated that the bonds were "contracts" and went on to protect the dedicated tax proceeds for the bonds by providing that "To secure such levy, collection and payment the judicial power shall be exercised when necessary." The treasurer of the State was specifically directly to pay the proceeds of the special tax as principle and interest payments come due. *See* John Norton Pomeroy, The Supreme Court and State Repudiation, 17 AM. L. REV. 684 at 701 (1883). More than $12 million (by face value) old bonds were exchanged through the voluntary program into the consolidate bonds.

Near the end of the 1870s, the legal community grew increasingly attentive to the reemerging issue of state debt repudiation, even though *Swasey* had shown courts would step in to block it if necessary. In 1878, a report by the American Law Review reaffirmed the enforceability of the Contact Clause, arguing no matter what theory of sovereignty or appeal to odious debt theory states raised, they "cannot get around their duty, nor evade [the Contract Clause's] force." Most postbellum commentary agreed that states could not legally discharge or impair obligations, though many states disregarded the law and did "omit to pass laws to comply with [their obligations]… they can and *do* let that duty remain unfulfilled."[54] Moreover, repudiation imposed external costs for other states as it would raise the expense and difficulty of borrowing for all of them. "Public policy and necessity alike" demanded a national legal policy against state debt repudiation.

Exposing the core connection to sovereignty theory central to repudiation, commentary analyzed the hypothetical situation in which the Union had not been formed, and individual states had every power of sovereignty, including treaty-making and war, which could be used to enforce broken contracts. When the states gave up these powers, they gained the valuable right of appeal to a supreme federal power. Interstate disputes were channeled through the right to appeal to Congress, an appeal to the Supreme Court, and even the right to make war against the offending state with the permission of Congress.[55] This logic connected directly to the supposedly dead compact theory of sovereignty, and would remain central to the legal briefs and court opinions to come. As the repudiation litigation continued, it was clear that the compact

[54] Bradley T. Johnson, *Can State be Compelled to Pay Their Debts?* 12 AM. L. REV. 625-626 (1878).
[55] Johnson at 627-629. The Civil War confirmed Congressionally-approved war was possible, so this remedy and more pacific permutations like blockade of state ports, were less outlandish than they appear at first.

theory remained viable. It was even used by avid unionists like Thomas Cooley to endorse sovereign immunity's dominance over the Contract Clause.

Literature discussing sovereign immunity frequently drew on international examples, reminiscent of the antebellum debates over state sovereignty. Seemingly outlandish cases like *The Nabob of the Carnatic v. The East India Company* were cited for the principle that a king could not be sued for acts done in "his character of sovereign prince."[56] No court had jurisdiction over claims resulting from acts of a sovereign that injured a subject of another sovereign; the second government had seek redress as a sovereign against the first on the citizen's behalf.[57]

In 1879 at its inaugural annual meeting, American Bar Association President Benjamin Bristow gave an address decrying the legal developments in the repudiation saga. Citing a deprivation of property of approximately $100 million through repudiation, he exclaimed "no right-minded man can contemplate this wholesale confiscation of private property, this inexcusable spoliation of individual rights, without a sense of mortification and shame for the dishonor which it brings the American name and credit."[58]

Back in Louisiana, the Democrats passed a new constitution in 1880 including a repudiation provision called the Debt Ordinance.[60] The Ordinance commanded the state to default on its January 1880 interest payments, and the dedicated tax for the bonds was "hereby transferred to defray the expenses of the state government." Banner headlines in the *New York*

[56] Other such cases included and *The Queen of Portugal, Wadsworth v. The Queen of Spain* and *The Duke of Brunswick v. The King of Hanover.*
[57] Even the famously flexible English Court of Chancery could not order the seizure of Peruvian fertilizer in stored in a British port that had been pledged to a British bondholder after Peru confirmed it would not honor its secured loan. Smith v. Weguelin, L. R. 8 Eq. 198 cited in ALR.
[58] Quoted in 14 Am L Rev 720, at 731 (1880).
[60] "The interest to be paid on the consolidated bonds of the state of Louisiana be and is hereby fixed at 2 per cent per annum for 5 years from the first day of January 1880, 3 percent… for 15 years, and 4%... thereafter, payable semiannually." "[H]olders of consolidated bonds may, at their option, demand, in exchange for the bonds… at the rate of 75 cents on the dollar… the said new issue to bear interest at the rate of 4%."

Times decried "how the white league leaders try to excuse a shameless breach of faith." It railed against Democrats' "false statements" made to justify "efforts to swindle confiding creditors" while their accomplices in Washington sought to "palliate and excuse the maladministration" of the Redeemers while scapegoating Reconstruction-era debt.[61] The *Times* undertook a forensic examination of Louisiana's debt records, reporting the following schedule:

Antebellum Debt	$ 10,157,882.00
Bonds Issued by Democratic Legislature 1866-7	530,800.00
Bonds authorized by the same Legislature, and issued by Gov. Warmoth	2,091,500.00
Other liability incurred prior to Gov. Warmoth's Administration	1,700,000.00
Bonds funded by the Warmoth issues	3,659,400.00
Bonds authorized by Warmoth Legislature and issued by Gov. Kellogg	625,000.00

Only $4,284,400 of the $13,791,500 debt was attributable to Republican Reconstruction governments, with the remainder accrued under the Democrats. Given this analysis, the Democratic argument that "a large portion of the exiting State debt represents bonds illegitimately issued by Radical State Government falls hopelessly to the ground."[62] This study debunks the narrative of extravagant and wasteful debts racked up by radical Reconstruction governments, and agrees with my own research on the authorizing acts and structures of the state bonds. Despite the claims of repudiators, Republicans handed over Louisiana to the Democrats with the "debts of the State and city reduced and limited, taxation lowered one-third, the taxes collected, the interest on the debt paid, and a balance of $300,000 in the State Treasury."[63]

[61] *Democratic Repudiation: The Disgraced Government of Louisiana*, NEW YORK TIMES (Jan 18, 1879). *See also Repudiation of Louisiana's Debt*. CHICAGO TRIBUNE (June 11, 1879), 6.
[62] *Supra* note 16.
[63] *Supra* note 37.

Jumel

With the tailwinds of a lively public discourse over repudiation at its back, *Jumel* was the first case to test repudiation of debts partially incurred under Republican-led governments. In 1880, the plaintiffs sued for payment on repudiated Louisiana bonds, challenging the Debt Ordinance under the Contract Clause.[64] Surprisingly, in a marked departure from *Swasey*, the federal circuit court denied relief, holding that Louisiana's officers were constitutionally forbidden from paying on the bonds.[65] It also held that such a suit presented a political question which "could not be adjudicated without calling the state to the bar of the court and subverting its entire financial basis, no matter how unjustly adopted and ordained." Plaintiffs appealed to the Supreme Court, which took the case in 1883.

While the case awaited hearing, commentators continued to observe that the Supreme Court "is not accustomed to lend its sanction to acts of repudiation." Believing (or hoping) that the Supreme Court would turn back any further efforts at repudiation, observers reiterated that repudiation was "a direct violation of the obligations of contracts" and pointed out how the Contract Clause had been used many times before to stomp out "many a scheme of repudiation that, otherwise, would have been successful."[66] The legal community was generally convinced that the Supreme Court would overturn repudiation. "[I]t was confidently anticipated that the court would… sustain and enforce the rights of creditors, and would render such repudiation practically impossible in the future."[67]

[64] Louisiana v. Jumel, 107 U.S. 711 (1883).
[65] In January 1880, the plaintiffs petitioned the state court for a *mandamus* requiring the state officers to both collect the tax authorized in the 1874 statute and to pay the receipts towards the overdue bond payments. The writ was appealed, and the case was moved from state court to Federal Circuit Court. 107 U.S. at 719.
[66] *Repudiation Rebuked*, 34 INDEPENDENT at 17 (Apr 27, 1882).
[67] John North Pomeroy, *The Supreme Court and State Repudiation,* 17AM. L. REV. 685-686 (1883).

When the Supreme Court took up *Jumel*, it considered both the Contract Clause issue as well as the political question problem raised in the lower court. As in *Swasey*, Chief Justice Waite held that in Louisiana's 1872 actions there was "unmistakably a design to make these promises and these pledges so far contracts, that their obligations be protected by the constitution of the United States against impairment."[68] Even so, the Supreme Court could never take jurisdiction over the case, as

> there is no way in which the state, in its capacity as an organized political community, can be brought before any court of the state, or of the United States, to answer a suit in the name of these holders to obtain such a judgment.

Explaining his holding, Waite pointed to the Eleventh Amendment which provided that "no state can be sued in the courts of the United States by a citizen of another state."[69] But what distinguished this case from *Swasey?* There, bondholders successfully sued to distribute the state's property that was pledged as security for the bonds. How did the Chief Justice come to completely reverse himself given the parallel facts in *Swasey* and *Jumel*? In spirited dissent, Justice Field remarked on how the decision effectively nullified the Contract Clause.

Reaction to *Jumel* in the legal community was impassioned and insistent. Much of it seized on the implications of the Court's acceptance of discredited sovereignty theories. A note in the American Law Review expressed shock: did the Chief Justice "appreciate the meaning and results of this language? It justifies secession, it condemns all that has been done in preserving the integrity of the Union…"[70] All those except sovereignty extremists "have long been convinced that a sufficient power was lodged in the general government… to prevent the national disgrace" of state repudiation. It was beyond doubt that the Supreme Court had

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[68] *Jumel* 107 U.S. at 720. Chief Justice Waite observed "about $300,000 is the treasury of the state, collected under the levy imposed by the act of 1874 to meet the coupons falling due January, 1880, but the treasurer refuses to apply it to the payments of the coupons, and claims to hold it only for the purposes… of the new constitution."
[69] *Id.* at 720.
[70] 17 AM. L. REV. 684 at 728 (1883).

jurisdiction sufficient "to thwart and defeat any scheme of repudiating its public debt which may be contrived by an individual State." The court had "abrogated its high powers, has left the creditors… absolutely without remedy, and has made future repudiation… not only possible, but easy" What had happened to the cannon of interpretation granting broad scope to constitutional safeguards "invoked by citizens generally for the protection of their persons or their property against injurious State legislation"?[71]

Repudiation's victory in *Jumel* meant bondholders were on the defensive, and that they would have to devise a new strategy to avoid Eleventh Amendment challenges to their lawsuits. In their next move, the foes of repudiation enlisted the help of Northern state governments.

New York and New Hampshire Intervene

As holders of Southern debt grew increasingly anxious at the prospect of widespread repudiation along with a new Eleventh Amendment interpretation that barred relief, investors looked to Northern state governments to intervene. Relying on Article III federal jurisdiction over "controversies between two or more states," New Hampshire and New York passed statutes setting up such a controversy.[72] Any citizen holding a state bond "past due and unpaid, may assign the same" to New York or New Hampshire.[73] The state attorneys general would then sue the repudiating states for recovery. If they won, proceeds would be distributed back to the bondholders. The authority to act as *parens patria* on behalf of assigned claims against states was understood to parallel the state sovereignty enshrined by the Eleventh Amendment. If New York was an independent country, plaintiffs argued, "then under the law of nations, it might demand of any other state the payment of debts to its citizens from such state, and enforce the

[71] *Id.* at 691.
[72] Art III, Cl 4.
[73] NYS Statutes at Large (1880)

demand by war, if necessary."[74] In this way, the compact theory of sovereignty was used offensively for the first time by those challenging repudiation. The suits resulting from these statutes were heard by the Supreme Court in 1883 as *New Hampshire vs. Louisiana*.[75] By design, the litigation was structured to avoid Louisiana's Eleventh Amendment sovereign immunity defense. How could such a case be found *not* to be a controversy between two states?

Chief Justice Waite, consistent with *Jumel* but again at odds with his *Swasey* decision, ruled in favor of the repudiating states. The Court dismissed the northern states as "mere collection agents;" the true party in interest remained citizens of another state suing for recovery from a sovereign state. As such, the Eleventh Amendment and *Jumel* controlled. The failure of the *New Hampshire* strategy and the continued march of expanded sovereign immunity again sparked outrage in legal literature.[76]

For several years, the repudiation simmered, and more states began experimenting, testing whether courts would continue to allow them to cancel their debts. North Carolina, inspired by the apparent overruling of *Swasey*, reinvigorated its own repudiation program. A court battle culminated in *Christian v. Atlantic & North Carolina Railroad* (1890). The facts closely paralleled *Swasey*, so the plaintiffs hoping to halt repudiation had some hope they could win, as the decision had not been formerly overruled. In *Swasey* and *Christian*, the state bonds at issue were collateralized by railroad equity.

The bondholders were again disappointed and repudiation continued its sweep of victories in the courts. *Christian* held that North Carolina was immune from suit under the

[74] *A Remedy for Repudiation*, THE INDEPENDENT 32.1644, 15 (Jun 3, 1880).
[75] New Hampshire vs. Louisiana, 108 U.S. 76 (1883).
[76] JOHN ORTH, THE JUDICIAL POWER OF THE UNITED STATES – THE ELEVENTH AMENDMENT IN AMERICAN HISTORY, 70 (1987).

Eleventh Amendment as interpreted in *Jumel*. It was becoming clear that Contract Clause claims would often lose out to the expanded Eleventh Amendment and sovereign immunity doctrines.

Hans vs. Louisiana

While *Christian* was being decided, the more important *Hans v. Louisiana* was also being argued. It presented the question of whether a citizen could sue his *own* state government or its officers for violating the Contract Clause. The case, even more than the other repudiation suits, implicated theories of sovereignty and the legacy and failure of Reconstruction. The decision would make new constitutional law, expanding the Eleventh Amendment far beyond its text, shrinking Article III judicial power, and magnifying the problem of constitutional rights without remedies.

The bonds in *Hans* were originated in 1874 under the same facts as *Jumel.* Following the state's refusal to make its payment, Hans, a citizen of Louisiana, sued Louisiana in federal circuit court in December 1884.[77] In his brief, lawyers for Hans argued the 1879 repudiation provisions were

> in contravention of [a] contract… their adoption was an active violation thereof… said State thereby sought to impair the obligation thereof… in violation of article I, section 1 of the Constitution of the United States.[78]

Louisiana appeared in court to not to defend against Hans, but instead to assert that federal courts were

> without jurisdiction ratione personae. Plaintiff cannot sue the State without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the State, and its jurisdiction is respectfully declined.

The circuit court agreed, dismissing the suit. Hans appealed to the Supreme Court on a writ of error over the jurisdictional holding.

[77] 134 U.S. 1 (1890).
[78] *Id*, quoted from Circuit Court brief.

According to Hans' brief, Louisiana entered into a contract when it issued the bonds. By ratifying a new constitution that repudiated its 1874 contract, Louisiana committed a straightforward violation of the Contract Clause. In contrast, Louisiana framed the case as a suit "on simple debts… brought by persons who are members, citizens and subjects of their respective states." Louisiana thought such cases were precluded by precedent:

> The court has ruled many times that neither the several Sates nor their union can be sued without their consent, and indeed has never seemed to think otherwise.

Emphasizing the 'unthinkability' of such a suit, the brief did not even provide citations for its immunity argument: it would be absurd "to argue and cite authorities to show the court to be right."[79] Instead its brief introduced a five step argument to show how Hans' action was not maintainable. It argued

> 1. That there can be no jurisdiction over the governing power or its case without its consent.
> 2. That in our system, all intended jurisdiction is written, and the parties designated.
> 3. That it seems fatal in these cases that the Supreme Court has original jurisdiction, in all cases in which a State shall be a party. The option given by Congress to States and ambassadors to sue in inferior federal courts affects not the question.[80]
> 4. That in the nature of things, the court (or judicial agency,) instituted by the governing power, can have no jurisdiction over it.
> 5. That Chisholm vs. Georgia is not citable.[81]

The plaintiff's brief did cite cases where states were hauled into courts as defendants without waiver of immunity. In one such case, *Cohens v. Virginia*, Chief Justice Marshall held that Article III judicial power extended to

> all cases of every description arising under the constitution… From this general grant of jurisdiction no exception is made of those cases in which a State may be a party.

Reading in an implicit state immunity from suit in federal courts was impermissible:

[79] Defendant's brief at 1 (authored by B.J. Sage and A. Porter Morse).
[80] In an abbreviated discussion, the brief indicates North Carolina and Louisiana maintained that the Supreme Court has original jurisdiction in any case in which a State shall be a party "and so refused to be sued in federal Circuit Court. Federal statute that allows suits to be brought by States and ambassadors in Circuit Court do not affect cases in which states do not so consent." *Id.*
[81] Defendant's brief at 2.

> Are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not.[82]

Ames v. Kansas (1884) was one of the first cases to test the relationship between expanded jurisdictional legislation and state immunity.[83] Chief Justice Waite, writing for the majority in *Ames,* found there was federal jurisdiction even if a state is involuntarily brought into court. *Ames* relied primarily on *Cohens v. Virginia.* [84]

Instead of arguing against the applicability of *Ames* and *Cohens*, Louisiana's brief pointed to English common law precedents.[85] Louisiana conceded the crown could be sued as a defendant, but such cases "also show the consent of the crown to be a condition precedent to jurisdiction." The first five cases discussed in the Louisiana brief are English decisions on this question, which were said to show consent was required to sue the sovereign as a defendant.[86] Louisiana's citations involved obscure colonies, hybrid civil/common law regimes, and diplomatic concerns. They all contained an outsider element, as is found in the Eleventh Amendment: suits against "another or foreign" states are barred by its text. The notion of an interloping outsider suing a government was objectionable, but distinct from the issue of a citizen suing his own state government for violations of federal law.

[82] Plaintiff's Brief at 30.
[83] Congress passed the Jurisdiction and Removal Act in March of 1875. It extended "arising under" jurisdiction for civil matters concerning more than $500 to the U.S. circuit courts.
[84] Cohens v. Virginia, 19 U.S. 264 (1821).
[85] This was done in the form of a response to the plaintiff's brief in made in the North Carolina v. Temple. The discussion in Louisiana's brief for Hans suggests it was written in response to both Hans' brief and at least one other bond case, North Carolina v Temple. Modern sources to not indicate these cases were jointly argued, but perhaps this aspect of the bond cases has been overlooked.
[86] Defendant's Brief at 4, citing In re Ware's Trusts, 23 Law Times 737, Atkinson v The Queen's Proctor, 25 Law Times 164, Queen v. Commissioners, English Law Reports, 7 Queen's Bench, 894, Hettihewage Appu v. Queen's Advocate, 9 Appeal Cases, 571, Twycross v. Dreyfus, 5 Ch. Div, 605.

Judicial Power of the United States

The plaintiff's brief aimed to show that the Article III grant of "judicial power of the United States" is to be interpreted as broadly as possible; it "has always been held to include all that the fullest scope given to the language requires."[87] Hans again cited *Osborne* for the principle that jurisdiction should be interpreted broadly "when any question respecting [the constitution or federal law] shall assume such a form that the judicial power is capable of."[88] Louisiana seized on this second part of *Osborne*, and argued forcibly that the judicial power was simply incapable of ordering a remedy that could bind state sovereigns in controversies like bond repudiations where tax collection and cash outflows would be required.

Supplementing *Osborne*, Hans inevitably turned to *Chisholm v. Georgia* for a broad interpretation of Article III power. Chief Justice Jay's opinion noted that canons of construction showed how the federal judicial power extended to cases between a state and a citizen of another state:

> [T]his extension… is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise and good that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled.[89]

The specific result in *Chisholm* was reversed by the Eleventh Amendment. Yet Hans insisted the Amendment only limited the ability of citizens of one State or a foreign country to sue another state. *Chisholm* was still good evidence of the founding generation's intent on state immunity. Though foreign nations as "sovereign states may not be sued without their consent," in the United States, state governments had through the Constitution "submitted themselves to the judicial power of the Union in many named cases." Here, even an anti-repudiation brief

[87] Plaintiff's brief at 5.
[88] Cohens v. Virginia, 19 U.S. 264 (1821).
[89] Chisholm v. Georgia, 2 U.S. 419 (1793).

references the purportedly discredited compact theory of sovereignty, showing its multiple possibilities and viabilities long after its repudiation in the Civil War.

A textual analysis appeared to be on Hans' side, as supported by Jay's opinion in *Chisholm*. "It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no *controversy* between them." Jay agreed that the alternate construction, barring citizens from suing states

> would contradict and do violence to the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all – to the few against the many, as well as to the many against the few. It would be strange indeed that the joint and equal sovereigns of this country should, in the very constitution by which they professed to establish justice, so far deviate from the true path of equality and impartiality as to give the collective citizens of one state the rights of suing individual citizens of another State, and yet deny those citizens a right of suing them.[90]

Like the plaintiff, Louisiana argued something as important as sovereign immunity would have to be based on explicit written authority in the Constitution. Reversing Hans' argument that if state immunity was intended, it would have been explicit in in Constitution (especially given the Contract Clause), Louisiana instead argued that if federal jurisdiction over states as defendants was intended, it would have been expressly written into the Constitution.

Federal Question/Arising Under Jurisdiction

To obtain federal jurisdiction, Hans had to show that his claim "arose under" the Constitution. His brief cited *Cohens,* where Marshall explained that jurisdiction existed "where a case arises under the constitution and laws of the United States the power extends to it, whoever may be the parties." Louisiana's brief argued instead that even where there was arising under jurisdiction, courts could hear cases where there was not also personal jurisdiction, impossible

[90] 2 U.S. 419, 477 (1793). Jay also cited language from the first Judiciary Act which referred to cases where a State is "a party." That Judiciary Act made separate provisions for cases where an ambassador was a plaintiff and those where he was a defendant; Jay reasoned that Congress could have easily indicated if States were to be treated differently if they were the defendant party or plaintiff. It chose not to.

because states did not fall under the personal jurisdiction of courts as defendants.[91] Decades earlier in *Cohens,* Marshall dismissed this same argument, noting that if it were true, the arising under clause of Article III "would be mere surplusage. It is to give jurisdiction where the character of the parties could not give it that this very important part of the clause was inserted." In fact, this argument obviates the idea of subject matter jurisdiction entirely. Modern scholars have shown that subject matter was a separate and commonly-employed category as early as the Marshall Court and certainly alive as a legal category during the time of the Hans litigation.[92]

Partially conscious of this problem, the Louisiana brief notes "a feeble attempt… is made by asserting that *the subject-matter gives jurisdiction,* irrespective of parties" because the judicial power extends to "all cases in law or equity" arising under this Constitution.

> Evidently, our opponents do not reflect that 'the subject-matter' must be in a case of law or equity, that a case must be between parties, and that the parties must be specified in the constitution.[93]

But the same problem recurs – there is no right of parties within the same state to sue in federal court for violations of the federal Constitution. The issue of how to construe Article III power and federal question jurisdiction in the context of state governments as parties would be a key determinant of the *Hans* decision. Equally important would be the question of how the Eleventh Amendment applied and how it interacted with the Contract Clause.

Eleventh Amendment and the Contract Clause

Both briefs anticipated that the Eleventh Amendment would be invoked in the case, despite the lack of a clear textual application. Hans's brief noted that the Court "has ever been careful to confine the effect of the eleventh amendment to the cases named therein," namely not

[91] Defendant's brief at 5.
[92] Caleb Nelson, Sovereign Immunity as a Doctrine of Personal Jurisdiction, 115 HARV. L. REV. 1559 (2002).
[93] Defendant's brief at 5.

cases in which a plaintiff sued his own state.[94] The brief relied heavily on *Poindexter v. Greenhow,* an 1885 case which hinged on whether the suit was effectively a suit against a state by a citizen of another, and thus barred by the Amendment.[95] The *Poindexter* court held that a concept of state immunity from suit "is undoubtedly a part of the constitution, of equal authority with every other, but no greater…" and it was to be construed "in harmony with all the provisions" of the Constitution. In *Hans* as in *Poindexter,* the other relevant provision was the Contract Clause. *Poindexter* held that "immunity… does not exempt the State" from the operation of the Contract Clause. The ratification of Eleventh Amendment, however, created a situation such that

> no remedy for a breach of contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open … by a direct suit against the State itself, on the part of the injured party, *being a citizen of another State or citizen.*[96]

And yet it was equally true that

> the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences to the rights of the litigants may be the result of the determination.[97]

Poindexter held the Amendment only blocked jurisdiction in cases brought against a state by citizens of another. "Nothing else is touched." Anything else would require "a new amendment which would not forbid any State from passing laws impairing the obligation of its own contracts."[98]

Hans also relied on the Contract Clause analysis in Justice Wilson's seriatim *Chisholm* opinion. Wilson analyzed the interaction between the "establish justice" objective in conjunction with the Contract Clause. "We shall probably think that this object [establish justice] points in a

[94] Plaintiff's brief at 15.
[95] Poindexter v. Greenhow, 114 U.S. 270 (1885).
[96] *Id,* emphasis in brief.
[97] *Id.* The court went on to note that "the cases establishing these propositions, which have been decided by this court since the adoption of the eleventh amendment… are numerous."
[98] Plaintiff's Brief at 15.

particular manner *to the jurisdiction of the court over the several States.*" Wilson wondered at what purpose the Contract Clause would serve "if a State might pass a law impairing the obligation of *its own* contracts, and be amendable for such a violation of right to no controlling power?" Left unsaid in the Wilson opinion as well as the plaintiff's brief is the possibility that the Contract Clause created a right with no judicial remedy. This rights without remedy argument appears to be the most neglected in the *Hans* litigation, potentially suggesting this jurisprudential dilemma was comparatively less interesting over the period.[99]

Louisiana's brief understandably made elaborate use of the Eleventh Amendment. It argued the Amendment replaced the narrow interpretation of sovereign immunity in *Chisolm* with a broad construction. The brief thus claimed *Chisolm* is "not citeable," and asked for its repudiation "in all its parts, by bar and bench, because it was adjudged and condemned as usurpatory by the political people."[100]

The Postbellum Cases

As chronicled here, during and after Reconstruction, the Supreme Court issued several rulings unfavorable to repudiated bondholders. Hans' brief addressed each in turn, implicitly agreeing with the holding in *New Hampshire v. Louisiana* that the case was really an action against a state by citizens of another state, textually barred by the Eleventh Amendment. The plaintiffs in *Jumel* were likewise citizens of other states. None of the recent cases dealt with suits against a state brought by one of its own citizens. Hans' brief also made clear the state court route was totally foreclosed by the Louisiana Supreme Court decision of *State ex rel. Hart v Burke*. His only avenue for relief was the federal court. Though the plaintiff's brief did tangle

[99] Plaintiff's Brief at 15.
[100] Defendant's Brief at 11.

with the difficult pro-repudiation cases, Louisiana's brief did not even cite them. Instead, it lingered on broader notions of sovereignty and political theory.

Political Theory and Philosophy of Sovereignty

Definitions of sovereignty, especially the compact theory, the co-equal model and divided sovereignty idea, were dealt with in both briefs, but featured more prominently in Louisiana's. Hans' brief held that states were less than full sovereigns, relying heavily on the implications of the move from confederation to constitutional union.[101] Some precedent indicated that States had surrendered "all the rights of the States as independent nations… to the United States."[102] As part of this surrender "the States waived their exemption from judicial power, as sovereigns"[103] But there existed certain other rights belonging to "sovereigns" that were not "independent nations," and these remained with the individual states. Still, cases warned of broadly construing state immunity from federal courts:

> If, whenever… a case arises under the constitution… of the United States, the national government cannot take control of it… its judicial power is at least temporarily silenced instead of being at all times supreme…. The broadest language is used. "All cases" so arising are embraced.[104]

Louisiana's position was that sovereignty was "the sum of authority, it being the plenary right of Government which delegates all ruling power." The people are both

> atop and the people at the bottom – each man being a subject, and indeed voting only as a subject, at the bottom, while each man is a part of the governing power, this two-fold capacity being a necessity of self-government. [105]

The sovereign people, as "master and sovereign" could not be subjected to "a citation, *capias, fleri facias, mandamus*, or any other coercive process issued by his judicial servant." In the most sweeping version of its argument, the brief stated

[101] Plaintiff's Brief 7-9, citing Webster's Works vol. 3. The brief quoted speeches by John Webster which emphasized the diminishment of state power accomplished through the ratification of the Constitution
[102] New Hampshire v. Louisiana, 108 U.S. 76 (1883).
[103] Rhode Island v. Massachusetts. 37 U.S. 657 (1838).
[104] Tennessee v. Davis, 100 U.S. 257 (1879). *See also* Mayor v. Cooper, 73 U.S. 247 (1868).
[105] Defendant's Brief at 7.

> Neither naturally nor lawfully can the political people or sovereign power, whether nation or States, be subjected to the jurisdiction coercion of its judicial servants, and that this tribunal can but use the very language of the English cases, viz This court cannot claim, even in appearance, any power to command the crown… over the sovereign we can have no power. [106]

Such a theory, taken to its logical conclusion, would have gone further than any previous attempt at narrowing of the province of the judiciary. Complementary to these discussions of sovereignty, both briefs addressed the policy reasons for and against expanding state immunity from suit in federal courts.

Policy Reasons for and against State Sovereign Immunity

Hans relied on Jay's *Chisholm* opinion to make the policy points against expanded state immunity doctrine in Contracts Clause cases.[107] Still, broader notions of domestic peace, "free republican national government," equal footing for all citizens, and sovereignty of the people were all put forward by plaintiff through Jay's opinion as reasons to maintain State suability by citizens:

> Fellow-citizens and joint-sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined.[108]

Louisiana offered in opposition a creative argument that the idea of sovereign immunity was part of the contractual bargain between the bondholder and the state.

> [N]on-coercion was agreed to beforehand – the holder of a State bond… accepting the good faith of the obligor as the obligation of the contract.[109]

Louisiana also reiterated the argument that because of the limitations of the judicial power, "no means exist to make a state pay. The people have never delegated their judicial agency… any authority or machinery whatever to compel the political people to pay their public debts." Combining these two concepts, Louisiana essentially argued that Hans had no claim because all

[106] Defendant's Brief at 7-8.
[107] Hans' brief did not address the deprivation of property angle by invoking the 14th Amendment. This could be either a blunder in their litigation, or a resignation to the *Slaughterhouse* narrowing of the Amendment's potential.
[108] *Chisolm*, 2 U.S. at 479.
[109] Defendant's Brief at 8.

he had bargained for was the good faith of the state to make payments on the bonds, and not also a right to sue should the state ever decline to make good on its promise.

Justice Bradley's Opinion and the Harlan Dissent

Oral argument for *Hans* was held on January 22, 1890. Justice Bradley wrote the opinion of the court, and Justice Harlan wrote the lone dissent, issued March 3.[110] Justice Bradley began by acknowledging that the former state constitution acknowledged the bonds as valid contracts that the state would never impair, and that constitution even authorized judicial power to ensure bond payment. But he then pointed to the new 1879 constitution, which repealed the protection of the bonds and ordered their repudiation.[111] Bradley acknowledged Hans's argument that the new constitution "does impair [the 1874] contract," but the jurisdictional problem remained. For ordinary private parties, a Contract Clause claim was surely within the federal question jurisdiction of the Court. But "the question now to be decided is whether it is true where one of the parties is a state, and is sued as a defendant by one of its own citizens."[112] Clearly, recent cases insisted that where a citizen sued another state, even if raising a Contract Clause claim, jurisdiction was precluded by the Eleventh Amendment. [113] Bradley agreed with the plaintiff that a textual reading of the Amendment would not have it apply in the *Hans* case. But this reading would lead to an

> anomalous result, that in cases arising under the Constitution… a State may be sued in the federal courts by its own citizens, though it cannot be sued for a like cause of action by citizens of other State.[114]

[110]All sources, including this paper, treat the decision as an 8-1 ruling. It is possible the practice of silent acquiesce masks a higher degree of dissent on the court. See G.E. White, Toward a Historical Understanding of Supreme Court Decision-Making, 91 DENVER L. REV 201, 208. ("In the Waite and Fuller Courts, the "opinion of the Court," noncirculation, and silent acquiescence persisted.")
[111] 134 U.S. 1 at 2.
[112] *Id.* at 9-10.
[113] Louisiana v. Jumel, 107 U.S. 711. Hagood v. Southern, 117 U.S. 52, In re Ayers, 123 U.S. 443.
[114] 134 U.S. 1 at 10.

Drawing on the political reaction to *Chisholm*, Bradley expressed concern that

> If suits by citizens against their own states were allowed to be heard in federal court… the result is no less starling and unexpected than was the original decision of this court, that… a State was liable to be sued by a citizen of another State[115]

When *Chisolm* was announced, it created "such a shock of surprise throughout the country that [the Eleventh Amendment] was almost unanimously proposed, and was in due course adopted by the legislatures of the States." The Amendment expressed "the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts."[116] Justice Bradley read the Amendment as constitutionalizing a construction of "judicial power" that did not include suits against state governments. In the Court's view, the majority opinion in *Chisolm* was thus replaced with Justice Iredell's *Chisholm* dissent. Iredell had held that the constitutional grant of judicial power had no "intention to create new and unheard of remedies." According to Bradley, Iredell had shown "conclusively" that sovereign states were never subjected to suits brought by individuals.

Bradley, like Louisiana's brief, cited Hamilton's Federalist 81 that eerily predicted the *Hans* controversy:

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind… [T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith…[117]

[115] *Id.* at 11.
[116] 134 U.S. 1 at 11.
[117] Alexander Hamilton, FEDERALIST PAPERS No.81

Bradley endorsed both Hamilton's analysis and Iredell's dissent, and insisted their views were ratified by the Eleventh Amendment. [118] Bradley, like Louisiana's brief, also cited John Marshall's comments at the Virginia ratification convention.

> I hope that no gentleman will think that a State will be called at the bar of the federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court.[119]

Of course, if Marshall held such views, why did he never repudiate the holding of *Chisholm* during his Chief Justiceship? The Eleventh Amendment obviated some of the need, but the fact that *Chisholm* was never overruled by a Supreme Court decision was noted even in Louisiana's brief, which called for such action here.

Hans was arguing from "the letter... as a ground for sustaining a suit brought by an individual against a State." Justice Bradley instead prioritized his idea of the spirit of the Amendment, whereas Hans' view was "an attempt to strain the Constitution… to a construction never imagined or dreamed of."[120] Dealing the final blow to Hans, Bradley held that the suit was impermissible as sovereign states could not be sued in federal courts without their consent, based on all the above analysis of the Eleventh Amendment as well as the inherent sovereignty remained unchanged by the Constitution.

Justice Harlan in a "concurrence" (more in the style of dissent) argued that suits against state officers should continue to be permitted, a view he would further articulate in his *Temple* dissent. Harlan also disowned Bradley's comments on *Chisholm*, noting that he was "of opinion that the decision in that case was based upon a sound interpretation of the Constitution as that instrument then was."[121]

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[118] 134 U.S. 1 at 14.
[119] Quoting 3 ELLIOTT'S DEBATES 2ed. 533. Many antifederalists including Patrick Henry and George Mason argued that Article III did in fact grant jurisdiction over suits against states by their citizens, citing this as a reason to vote No in the ratification conventions.
[120] 134 U.S. 1 at 15.
[121] *Id.* at 21.

The *Hans* decision struck down the ability of citizens to seek redress in federal courts against state governments and expanded the importance of state sovereign immunity. More broadly, it continued to underscore the problem famously addressed in *Marbury v. Madison*, whether there could be constitutional rights without matching judicial remedies. And yet this rights without remedy argument appears to be the most neglected in the *Hans* litigation, suggesting this dilemma was less interesting to legal thinkers in the post-Reconstruction period. The case also demonstrated a lack of a coherent theory of sovereignty in the aftermath of the Civil War, with both sides referencing the purportedly discredited compact theory of sovereignty to make their arguments.

Professor Orth, writing in the 1980s, notes that though *Hans* is remembered as an Eleventh Amendment case, it is "nothing of the sort." In fact, *Hans* was a radical interpretation of Article III's grant of jurisdiction to cases arising under the federal Constitution or a judicial rewriting of the Amendment. Law treatises published immediately preceding *Hans* indicated the Eleventh Amendment was generally accepted to alter only diversity jurisdiction, while 'arising under' jurisdiction remained available to federal courts even in cases brought by a citizen against a state.[122]

Reaction to *Hans*

The *Hans* decision was handed down just as American legal periodicals were growing in circulation and quality. Writers were surprised by and unanimously hostile to *Hans'* doctrinal innovations.[123] The only praise for *Hans* related to its announcement of a clear new rule, though scholars would have preferred the opposite outcome:

[122] ORTH at 70.
[123] The sample size is small; only eight articles have been located that address the issue. Yet some of these pieces reference more widespread criticism of *Hans:* "This conclusion forcibly appears in the case of Hans v. Louisiana,

> It is perhaps the one good that has come of the repudiation of State debts in the South, that with the litigation it has invited, it has developed and settled judicial opinion very rapidly on an important branch of constitutional law.[124]

It was cold comfort for the *Hans* plaintiffs "to know that they have made law if they have not made their money." Not until *Hans* could it be said that "the doctrine of the publicists that a sovereign State is not liable to suit without its own consent could be said, in all its phases, to be part of our constitution law."

The commentary observed that the Marshall Court maintained a narrow interpretation of the Eleventh Amendment. During Reconstruction, the Court continued in this direction; articles noted that in *Davis v. Gray* (1872), less than twenty years prior to *Hans*, the Court issued an injunction against the Governor and Land Commissioner of Texas in their official capacity stemming from a suit by a private railroad.

> It is true that under the constitution no suit can be maintained in the federal courts by a private citizen against a State. This prohibition, however, only extends to cases [where the State] is made a party defendant. From the leading case of Osborn v. United States Bank, in the time of the great chief Justice Marshall, down through a hitherto unbroken line of decision to our own day, the doctrine has been established that suits may be maintained and reliefs granted against the executive officers of a State of every degree, for the protection of private rights.[125]

At the same time, writers had trouble coming to terms with a relatively unstable line of cases. Commentators saw Marshall expressing the opposite view on Eleventh Amendment in several other cases.[126] *Cunningham v. Macon & Brunswick RR* (1883) appeared to some as overruling *Davis.* Others thought that only Justice Harlan continued to believe the *Osborn* decision, and the rest were ready to overturn it.[127]

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the judgment in which, although entered by aunanimous Court, has not been received without criticism." A.H. Wintersteen, *The Eleventh Amendment and the Nonsuability of the States*, 39 AM. L. REGISTER 14 (1891)

[124] *Id.*

[125] John Norton Pomeroy, 17 AM. L. REV. 684 at 733.

[126] Governor of Georgia v. Madrazo (1828), Ex parte Madrazo (1833).

[127] "Harlan dissents in Louisiana v. Jumel, Antoni v. Greenhow, Cunningham v. Macon & Brunswick RR. Co. and In re Ayers are interesting protests against the restatement of the law of the earlier cases" Wintersteen at 16.

Other writers made much of the statutory and constitutional text that acknowledged the bonds as binding contracts. Echoing Hans' brief, an article argued that "[i]t is impossible to conceive of a contract more thoroughly binding and more solemnly ratified," and covered by subject matter jurisdiction of federal courts, regardless of what the Justices said in *Hans.*[128]

Commentators worried that the enforceability of the Contract Clause was in doubt after the decision. "[T]hat most important provision of the National Constitution, that no State shall make a law impairing the obligation of contracts, is inoperative in many cases." Without recourse to federal courts, the Constitution failed to "secure one of the great benefits which its framers had in view, namely, the establishment of justice." Before the Constitution, states enacted laws overturning existing contracts, "a crying evil, and its existence was doubtless one of the causes that led to [ratification]." Commentators agreed "it has often been laid down and acknowledge by the courts that a State cannot be sued without her consent. But these rulings always apply to suability in the State's own courts." State sovereign immunity was never meant to make the Contract Clause unenforceable.

> How can it be that a State can enlarge or diminish, at its pleasure, the judicial power of the General Government? How can it be that the United States may not use *its own courts* without asking permission from any State? And use them to sustain its own Constitution?

Making a similar point, another observer asserted that sovereign immunity doctrine "makes the government the judge in its own cause, in violation alike of natural justice and of the rule of law."[129] The ancient policy of sovereign immunity was related to the notion that "the king can do no wrong," but post-*Hans* writers insisted that doctrine was thoroughly repudiated by American legal culture.[130] In light of all this post-Hans commentary, it may have been a strategic

[128] *A Strange Decision by the United States Supreme Court*, 30 AM. L. REGISTER 16 (1891).
[129] George A. King, *Claims Against Governments*, 41 AM. L. REG. AND REV 11 at 64 (1893). This article was originally delivered as a speech at the World's Congress on Jurisprudence and Law Reform, Chicago.
[130] For this proposition, many cited Langford v. United States, 101 US 341 (1880).

error for the plaintiff to concentrate so much on the Eleventh Amendment original intent, without equal discussion of the intent and purposes of the Contract Clause.[131]

The idea of permanent consent is also present in the legal commentary, which again drew on the supposedly dead compact theory of sovereignty. Writers asked whether States had not "practically given consent by coming into the Union, and adopting the Constitution" including the exercise of all judicial power conferred therein on the federal government. Critics of Hans argued that Louisiana had given irrevocable consent that federal courts "shall have the power and right to try and adjudicate all cases, without exception, arising under the Constitution… such as the case of *Hans*, even though she may not have consented to be sued in the State courts."[132] Some commentary questioned whether there were sound reasons for even having the Eleventh Amendment, let alone the newly broadened sovereign immunity doctrine. A.H. Wintersteen thought "the wisdom of the Amendment seems doubtful at this day in the light of recent history of shameless repudiation of State debts in the South.[133] Critics quoted from decisions like United States v. Klein which gave policy reasons for prioritizing the Contract Clause over sovereign immunity policy. Chief among these was a belief in the duty of government, as of individuals, to fulfill its obligations.[134]

As a counterpoint, advocates of state sovereign immunity often pointed to the unsuability of the federal governments in its courts, a condition that existed until 1855. Justice Story noted that though this might be thought of as a "serious defect" in the judiciary,

> It is not, however an objection to the Constitution itself, but it lies, if at all against Congress for not having provided, as it is clearly within their constitutional authority to do, an adequate remedy for all private grievances of this sort in the Courts.[135]

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[131] *Id*.
[132] *Id*. at 19.
[133] A.H. Wintersteen, *The Eleventh Amendment and the Nonsuability of the States*, 39 AM. L. REGISTER 14 (1891).
[134] 13 Wall. 28, 144. Quoted in King, 998.
[135] Commentaries on the Constitution §1678, see King at 999, Wintersteen at 5.

In sum, with the doctrine decided as it was in *Hans*, critics believed

> one of the most valuable provisions of the Constitution is at the mercy of the State – the last barrier against State repudiation is swept away, and the rankest injustice is rendered easy and remediless.[136]

Perhaps like *Erie v. Tompkins*, over time the *Hans* opinion came to be understood as a consensus interpretation of the Eleventh Amendment as well as the unwritten constitutional doctrine of sovereign immunity preserved in the States, obscuring the controversy it provoked when first announced. In reality, *Hans* was a deeply innovative, controversial opinion subject to much contestation before and after the opinion was issued. The reflection in *Hans* of the continuing intellectual challenge of reconciling sovereign immunity with federal rights has not received the attention it has deserved, and the sovereignty theories at work in *Hans* should be deeply questioned.

Conclusion

The generation-long debate over the repudiation of states debts tells three stories at once. The narrative about the debts themselves shows the mythmaking and manipulation of history at work in Reconstruction history in microcosm. Lost Cause historians and their successors were able to use unsourced generalizations and fabricated anecdotes to destroy the historical memory of Reconstruction and help foreclose reform projects baring any resemblance to it for generations. Historians have "sharply… angrily criticized the methods and motives of Republican Reconstruction… condemned them virtually without trial." [137] The financial piece of

[136] Anonymous at 19.

[137] *See, e.g.* Larry Kincaid, *Victims of Circumstance: An Interpretation of Changing Attitudes Toward Republican Policy Makers and Reconstruction*, 57 J. AM. HIST. 48 (1970). Revisionism of this attitude surged between 1930-1950, including works by Simkins, Taylor, Bond, Donal, Wharton, and Beale which demonstrated "Reconstruction had not been so cruel, disruptive, expensive, long lasting, or traumatic as members of the New South School had believed. They also learned that the prevailing impressions of the freedman, carpetbagger, and scalawag were largely inaccurate stereotypes born in political controversy and kept alive by the political and economic needs of conservative white southerners." Id at 60.

Reconstruction's demise was the repudiation debate. The attacks against the fiscal record of state governments during Reconstruction, and the apparent judicial endorsement of these views by the high court served in major part to substantiate claims of Reconstruction's utter failure. Future work on the financial records of the states can help correct this history, and move closer to redeeming what accomplishments these governments were able to produce despite overwhelming headwinds. We already know that despite the rhetoric of repudiators, the debts in question were accumulated mainly by non-Republican governments. The plurality of debts were incurred before the Civil War after accounting for accumulated unpaid interest from the war years.

Second, the popular and legal debates over repudiation show how unstable theories of sovereignty were, despite the belief that some resolution had come with the Union victory in the Civil War. In fact, ideas like the compact theory of sovereignty were still cognizable by courts in the 1890s, despite its apparent repudiation by battle decades earlier.

Third, repudiation comprised a final piece of Reconstruction's failure. It marked a judicial endorsement, if indirectly, of the odious debt argument that saw Republican and biracial rule as somehow illegitimate. Moreover, it represented the final step of federal abandonment of Reconstruction's legacy in the states. Repudiation also showed the retreat of courts' commitment to operationalizing remedies for constitutional rights. Just as the *Civil Rights Cases* and the *Slaughterhouse Cases* vitiated the practical power of grand promises made in the Civil War Amendments, the repudiation cases fortified the power of the Eleventh Amendment and sovereign immunity to cut off access to justice for litigants alleging states had abrogated their constitutional rights. It was difficult to see how any citizen could draw comfort from the Contract Clause after the repudiation decisions were handed down. In this way, the post-Reconstruction

court meted out another blow against individual and group rights through a strained interpretation of the Constitution's limits.