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# Article III as a Constitutional Compromise: Modern Textualism and State Sovereign Immunity

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ARTICLE III AS A CONSTITUTIONAL  
COMPROMISE: MODERN TEXTUALISM AND  
STATE SOVEREIGN IMMUNITY

*Steven Menashi\**

*This Article challenges the scholarly consensus that a textualist reading of the Constitution cannot support a broad constitutional principle of state sovereign immunity. In doing so, it develops a fuller account of textualist constitutional interpretation, recognizing that the original public meaning of a text may be informed by commonly held philosophical presuppositions or background political principles. Legislative compromise, moreover, pervaded the whole constitutional design, whether it took the form of precisely worded provisions that enact particular policies or imprecisely worded provisions that invoke abstract political principles.*

*The ratification of Article III contained just such a legislative compromise over abstract principles of state sovereign immunity. A potentially ratification-blocking minority of Antifederalists opposed granting federal courts jurisdiction over suits by individuals against states. In order to win ratification of the Constitution, Federalists gave to Article III a construction that incorporates a background principle of state sovereign immunity. That construction formed the original public understanding of Article III and the compromise struck at ratification. A textualist approach should honor that compromise. The ratification process gave political minorities the right to insist on such a compromise, so it would violate the process values underlying the Constitution to conclude, as most scholars do, that Federalist assurances respecting state sovereign immunity formed no part of the constitutional bargain.*

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*While many scholars have long criticized the Supreme Court's state sovereign immunity jurisprudence as inconsistent with other constitutional values, modern textualism and public choice theory recognize the centrality of compromise in the lawmaking process. The Constitution, too, was the product of a ratification process that involved political compromises. This insight, however, has been applied to constitutional interpretation in only a limited way. The few scholars who have applied the insights of public choice theory to constitutional interpretation have argued that a textualist approach to state sovereign immunity would read the Eleventh Amendment narrowly in order to respect a possible legislative compromise embedded in its precise text. But the limited textualism of scholars such as John Manning and Lawrence Marshall leads to a strained and implausible reading of the Eleventh Amendment because it fails to recognize the original understanding of the initial bargain embedded in Article III.*

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## INTRODUCTION

Given the divergent and conflicting theories of state sovereign immunity, it's no surprise to hear that "the Eleventh Amendment is a mess" that is "inconsistently conceptualized."<sup>1</sup> Yet it still raises eyebrows when the doctrine prompts a battle cry from the professoriate. "The Court's Eleventh Amendment and sovereign immunity case law deserves the condemnation and resistance of scholars,"<sup>2</sup> declared

1 John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47 (1998) (footnote omitted).

2 Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 953 (2000); see also James E. Pfander, *Once More unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 NOTRE DAME L. REV. 817, 819 (2000) (noting extensive scholarly criticism of the Court and expressing hope "that responsible professional comment and criticism may yet . . . restrain judicial arbitrariness at the highest level").

Vicki Jackson in the wake of the Supreme Court's triple volley of *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>3</sup> *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>4</sup> and *Alden v. Maine*.<sup>5</sup> Bellicose pedagogues took to the barricades, pronouncing sovereign immunity "an anachronistic relic . . . [that] should be eliminated from American law"<sup>6</sup> and consigning the Court to the wrong side of history for failing to recognize it as such.<sup>7</sup>

In fact, the conflict over sovereign immunity has been a long-standing and persistent feature of academic and judicial debate. "It is no wonder the Court's Eleventh Amendment case law is incoherent; in law, as in logic, anything can be derived from a contradiction," Akhil Amar wrote two decades ago.<sup>8</sup> Since then, opponents of the Court's broad constitutional principle of sovereign immunity have managed to hold on to four votes,<sup>9</sup> with some pushback from the Court's majority.<sup>10</sup> Thus, while some legal scholars readied their guns

3 527 U.S. 627, 647–48 (1999) (invalidating Congress' abrogation of state sovereign immunity from suit under a provision of the Patent and Plant Variety Protection Remedy Clarification Act).

4 527 U.S. 666, 691 (1999) (invalidating Congress' abrogation of state sovereign immunity from suit under a provision of the Lanham Act).

5 527 U.S. 706, 754 (1999) (holding that state sovereign immunity protects states from suit by private persons in the states' own courts on federal causes of action).

6 Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–03 (2001) ("The [sovereign immunity] doctrine conflicts with too many basic constitutional principles to survive.").

7 Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1067 (2000) ("[T]he Court's attempt to cling to conceptions of state sovereign immunity is not stable [and] history casts serious doubt on the capacity of the Court to stand against the current of the national political process in any sustained way."). *But see id.* ("Such a prediction . . . is more likely eventually to be proven correct if repeated with sufficient frequency.").

8 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1480 (1987).

9 *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting, joined by Breyer & Ginsburg, JJ.); *id.* at 76 (Stevens, J., dissenting); *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting, joined by Marshall, Blackmun, & Stevens, JJ.).

10 *See, e.g., Seminole Tribe*, 517 U.S. at 68 (majority opinion) ("The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events."); *Welch*, 483 U.S. at 478–79 (majority opinion) ("Today, for the fourth time in little more than two years, four Members of the Court urge that we overrule *Hans v. Louisiana* and the long line of cases that has followed it. The rule of law depends in large part on adherence to the doctrine of *stare decisis*. . . . Despite these time-honored principles, the dissenters—on the basis of ambiguous historical evidence—would flatly overrule a number of major decisions of

for combat, others—predicting ceaseless war and heavy casualties—raised the white flag in hope of ending the stalemate.<sup>11</sup>

One source of the controversy is the desire for conceptual coherence in the Constitution. “[T]he American doctrine of sovereign immunity is indefensible upon both theoretical and pragmatic grounds,” writes Clyde Jacobs, calling it “an unfortunate excrescence of a political and legal order which no longer enlists support.”<sup>12</sup> “[S]overeign immunity is in conflict with other fundamental principles of the U.S. constitutional system including the rule of law and the supremacy of federal law,” asserts Jackson.<sup>13</sup> “Sovereign immunity is inconsistent with a central maxim of American government: no one, not even the government, is above the law,” argues Erwin Chemerinsky.<sup>14</sup> “Is the Constitution therefore divided against itself?” asks Amar.<sup>15</sup>

Well, yes it is, to some extent. As James Madison observed, the convention that drafted the Constitution—to say nothing of the state ratifying conventions that adopted it—was marked by disagreement, especially with respect to the interests of states. “We may well suppose that neither side would entirely yield to the other, and consequently that the struggle could be terminated only by compromise,” he wrote.<sup>16</sup> “[T]he convention must have been compelled to sacrifice theoretical propriety to the force of extraneous considerations.”<sup>17</sup> There is no reason to believe that the Constitution does not contain inconsistencies when judged against broad theoretical goals.<sup>18</sup>

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the Court, and cast doubt on others. Once again, the dissenters have placed in issue the fundamental nature of our federal system.” (footnote and citations omitted).

11 See Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 *FORDHAM L. REV.* 2511, 2518 (2006) (“The bottom line is this: The history of the Eleventh Amendment is fundamentally inconclusive.”).

12 CLYDE E. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* 160 (1972); cf. David E. Engdahl, Book Review, 18 *AM. J. LEGAL HIST.* 256, 259 (1974) (reviewing JACOBS, *supra*) (“[A] somewhat more penetrating study would have demonstrated that the contemporary doctrine is indefensible also upon historical and legal grounds.”).

13 Jackson, *supra* note 2, at 956.

14 Chemerinsky, *supra* note 6, at 1202.

15 Amar, *supra* note 8, at 1426 (asking also, “[i]s the way in which it constitutes political bodies at war with the legal rights that it constitutionalizes?”).

16 *THE FEDERALIST* NO. 37, at 229–30 (James Madison) (Clinton Rossiter ed., 1961).

17 *Id.* at 230.

18 See *id.* (“Would it be wonderful if, under the pressure of all these difficulties, the convention should have been forced into some deviations from that artificial structure and regular symmetry which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagina-

Madison even singled out “the trial of controversies to which States may be parties” as an instance of inconsistency in the broader constitutional design.<sup>19</sup>

Like Madison, modern textualists and public choice theorists realize the difficulty of ascribing theoretical coherence to multimember assemblies, where the necessity of bargaining and compromise, as well as the constraints of the legislative process, often define the outcome.<sup>20</sup> To the extent that scholars have applied the insights of public choice theory to constitutional interpretation, they have concluded that courts should read precisely worded constitutional texts narrowly in order to avoid disturbing a possible legislative compromise that, whether recorded or not, may have been essential to its enactment.<sup>21</sup> “[W]hen interpreting a precisely worded constitutional provision like the Eleventh Amendment, the Court must adhere to the compromise embedded in the text,” writes John Manning.<sup>22</sup> For that reason, these

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tion?”); *cf.* THE FEDERALIST NO. 39 (James Madison), *supra* note 16, at 246 (noting that the proposed Constitution “is, in strictness, neither a national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national”).

19 THE FEDERALIST NO. 39 (James Madison), *supra* note 16, at 245 (“On trying the Constitution by this criterion, it falls under the *national* not the *federal* character; though perhaps not so completely as has been understood. In several cases, and particularly in the trial of controversies to which States may be parties, they must be viewed and proceeded against in their collective and political capacities only. So far the national countenance of the government on this side seems to be disfigured by a few federal features. But this blemish is perhaps unavoidable in any plan . . .”).

20 See *infra* Part I.B.

21 See John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1735–36, 1749–50 (2004); see also Randy E. Barnett, *The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1747 (2007) (“To interpret the Amendment more broadly than the language that was actually proposed and ratified is to run a serious risk of overriding the desires of either a majority or a *potential ratification-blocking minority* who would never have consented to a broader claim of state power.”); Jackson, *supra* note 2, at 1000 (arguing that the Eleventh Amendment should be treated as a “compromise or concession” rather than a “principle” because “[t]he precision and specificity of its language lend themselves to (though they do not compel) a narrow reading”); Lawrence C. Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342, 1353–56 (1989) (arguing that the Eleventh Amendment reads as if it “embod[ies] a balance between the competing values of state immunity from federal suit and accountability to the new federal system”).

22 Manning, *supra* note 21, at 1750.

textualists argue, the Court should limit state immunity from suit to the precise text of the Eleventh Amendment.<sup>23</sup>

This Article argues for a textualist approach to the Constitution, and to state sovereign immunity in particular, that does not privilege precisely worded texts over other constitutional provisions. As Madison suggests, compromise pervaded the whole constitutional design, whether it took the form of precisely worded provisions that enact particular policies or broadly worded provisions that invoke abstract political principles. Textualists are right to respect the political compromise on which the authority of the Constitution rests, but singling out some sections of the Constitution for special interpretive techniques may distort rather than honor that compromise. A precisely worded text such as the Eleventh Amendment may contain a political compromise, but so may an imprecisely worded text such as Article III. Reading the former textually and the latter purposively gives force to some compromises and obliterates others. Disagreement, and constitutional compromise, may occur over abstract principles such as sovereignty and justiciability as well as over particular policies and rules. A sounder textualist approach would respect all political compromises behind the Constitution's provisions. The original understanding of a constitutional doctrine such as state sovereign immunity may have depended on both.

Part I sketches the debate over state sovereign immunity and the relevant insights of modern textualism and public choice theory. Part II provides an account of Article III, an imprecisely worded constitutional text, as a legislative compromise. Part III explains how the failure to respect the compromise behind an imprecisely worded

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23 Even among those who accept this principle, however, there is no agreement on what the precise text of the Eleventh Amendment means. See Manning, *supra* note 21, at 1680–81 n.68 (noting that both the diversity theory and the literal theory “represent a plausible reading of the Amendment’s text”); Jackson, *supra* note 2, at 1000 n.151 (“Although diversity theorists differ from Marshall on whether the Amendment bars out-of-state citizens from suing a state in federal court under the ‘federal question’ jurisdiction, both theories read the Amendment (far more narrowly than does the Court) not to bar suits by in-staters or by foreign states.”); Marshall, *supra* note 21, at 1347–48 (arguing that diversity and congressional abrogation theories “completely . . . ignore the operative words of the amendment”); see also William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1276–78 (1989) (“The problem is that the text does not clearly mean what Professors Marshall and Massey think it does.”); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 115 (1989) (“[T]hose who construe the amendment as only a narrow limitation upon Article III’s diversity jurisdiction are required to amend its text in order to deliver their desired meaning.”).

provision such as Article III produces a strained and implausible reading of a precisely worded text such as the Eleventh Amendment. Together, these Parts show that a compromise over state sovereign immunity shaped the public understanding of Article III, and that the Eleventh Amendment, in turn, depended on that understanding. Contrary to the scholarly consensus, then, a textualist approach to constitutional interpretation supports the Court's finding a principle of sovereign immunity rooted in Article III.

## I. STATE SOVEREIGN IMMUNITY AND MODERN TEXTUALISM

Ambiguities in the text and history of Article III and the Eleventh Amendment have yielded an array of competing theories over the status and scope of state sovereign immunity under the Constitution. Modern textualism, drawing on insights from public choice theory, provides a method for understanding and resolving such ambiguities.

### A. *Reading Article III and the Eleventh Amendment*

"When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated," wrote James Madison of the problem of interpretation.<sup>24</sup> Uncertain meaning, he explained, proceeds not only from the inadequacies of language, but also from the imperfection of human faculties and the indistinctness of novel or complex ideas (such as a written constitution or a federal government). "Any one of these must produce a certain degree of obscurity. The convention, in delineating the boundary between the federal and State jurisdictions, must have experienced the full effect of them all."<sup>25</sup>

So, evidently, it did—and nowhere more acutely than in the area of state sovereign immunity. Article III of the Constitution extended the jurisdiction of the federal courts to cases involving the states as parties:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—*between a State and Citizens of another State*;—between Citizens of different States;—between

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24 THE FEDERALIST NO. 37 (James Madison), *supra* note 16, at 229.

25 *Id.*



Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.<sup>26</sup>

The text alone did not specify whether states could be impleaded as defendants,<sup>27</sup> and the possibility of states' susceptibility to suit provoked some controversy in the ratification debates.<sup>28</sup> Despite the assurances of Madison and other supporters of the Constitution that the states' sovereign immunity would survive ratification,<sup>29</sup> the Supreme Court quickly concluded that it did not.<sup>30</sup> An alarmed pub-

26 U.S. CONST. art. III, § 2 (emphasis added).

27 See *infra* Part II.B; see also JACOBS, *supra* note 12, at 21 ("Textual analysis of various provisions of Article III, then, suggests contradictory answers as to whether the states were to retain immunity from suit by individuals; that is, the language of that provision, by itself, yields no answer.").

28 See, e.g., 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 527 (Jonathan Elliot ed., Phila., J.B. Lippincott Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES] (statement of George Mason) ("Is this state to be brought to the bar of justice like a delinquent individual? Is the sovereignty of the state to be arraigned like a culprit, or private offender? Will the states undergo this mortification?"); see also Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527-36 (1978) (examining the debates over the status of sovereign immunity when the Constitution was ratified); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1045-54 (1983) (detailing the ratification debates, including alternative proposals for the state-citizen diversity clause of Article III); Alfred Hill, *In Defense of Our Law of Sovereign Immunity*, 42 B.C. L. REV. 485, 494 (2001) ("The debate among the leading statesmen of the time centered almost exclusively on whether the states, without their consent, were suable in the federal courts, in light of the provision in Article III extending the federal judicial power to controversies 'between a State and Citizens of another State . . . and between a State . . . and foreign States, Citizens or Subjects.'" (alteration in original) (quoting U.S. CONST. art. III, § 2, cl. 1)).

29 See *infra* Part II.C; see also *Alden v. Maine*, 527 U.S. 706, 716 (1999) ("The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity."); *Seminole Tribe v. Florida*, 517 U.S. 44, 70-71 & n.13 (1996) ("[W]hat is notably lacking in the Framers' statements is any mention of Congress' power to abrogate the States' immunity."); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323-24 (1934) (explaining Madison's view that the purpose of the Eleventh Amendment was "to provide for adjudication in such cases if consent should be given but not otherwise"); *Hans v. Louisiana*, 134 U.S. 1, 12-14 (1890) (offering statements from Hamilton and Madison).

30 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 452 (1793) (opinion of Blair, J.) ("[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty."); *id.* at 476 (opinion of Jay, C.J.) ("If the Constitution really meant to extend these powers only to those controversies in which a State might be *Plaintiff*, to the exclusion of those in which citizens had demands against a State, it is inconceivable

lic repudiated the Court's decision by calling for a constitutional amendment,<sup>31</sup> but the Eleventh Amendment's text left the scope of that rejection unclear.<sup>32</sup> Accordingly, the Eleventh Amendment has been read variously to contain a range of meanings. The prevailing judicial interpretation, the "immunity theory," takes the Amendment to restore the background principle of state sovereign immunity that existed in the Constitution prior to *Chisholm v. Georgia*<sup>33</sup>—namely, that a state is not amenable to suits by individuals without its consent.<sup>34</sup> A second reading, the "jurisdiction theory," recognizes such a traditional principle but argues that the Eleventh Amendment introduces a new restriction on federal subject matter jurisdiction. Thus, while traditional state sovereign immunity is waivable by states (and perhaps modifiable by Congress), Eleventh Amendment immunity is not.<sup>35</sup> A third reading, the "congressional abrogation theory,"

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that it should have attempted to convey that meaning in words, not only so incompetent, but also repugnant to it . . .").

31 See *Hans*, 134 U.S. at 11 (noting that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the eleventh amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the states").

32 U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); see also Gordon C. Post, Book Review, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Sept. 1973, at 206, 206 ("The Constitution being a document of many ambiguities—a source of its strength—one ambiguity was replaced with another.").

33 2 U.S. (2 Dall.) 419 (1793).

34 *Seminole Tribe*, 517 U.S. at 72 (recognizing a "background principle of state sovereign immunity embodied in the Eleventh Amendment"); see also Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("Despite the narrowness of its terms, since *Hans v. Louisiana*, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty; and that a State will therefore not be subject to suit in federal court unless it has consented to suit . . . ." (citations omitted)); Hill, *supra* note 28, at 489–90 ("[T]he Eleventh Amendment, in the cases to which it applies, is merely an embodiment of the original understanding underlying the Constitution . . . ."); cf. *Alden*, 527 U.S. at 728 ("These holdings reflect a settled doctrinal understanding, consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." (citing *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267–68 (1997))).

35 Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 *HARV. L. REV.* 1559, 1566 (2002) ("When given its most natural reading, the Eleventh Amendment creates a second type of sovereign immunity, which sounds in subject matter jurisdiction and which therefore cannot be waived."); see also KARL SINGEWALD, *THE DOCTRINE OF NON-SUABILITY OF THE STATE IN THE UNITED STATES* 30 (1910) ("The

reads the Amendment to reinstate an extraconstitutional common law doctrine of state sovereign immunity that restrains courts but which Congress may override.<sup>36</sup> A fourth reading, the “diversity theory,” holds the Amendment only to repeal federal diversity jurisdiction over suits against states while leaving states subject to suit under federal question and admiralty jurisdiction.<sup>37</sup> A fifth reading, the “literalist”

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effect [of the Eleventh Amendment] was just as if the judicial power had never been extended to such cases. It would seem clear, therefore, that consent of the States cannot confer jurisdiction.”); William D. Guthrie, *The Eleventh Article of Amendment to the Constitution of the United States*, 8 COLUM. L. REV. 183, 188 (1908) (“[I]t is difficult to perceive how the consent or waiver of a State can, in any case and under any circumstances, confer upon the federal courts jurisdiction of a suit against it by a citizen of another State or a citizen or subject of a foreign State in the face of the imperative mandate of the amendment . . . .”); *cf.* *Employees of the Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare*, 411 U.S. 279, 321 (1973) (Brennan, J., dissenting) (“I had always supposed that jurisdictional power to entertain a suit was not capable of waiver and could not be conferred by consent.”).

36 *United States v. Union Gas Co.*, 832 F.2d 1343, 1354 (3d Cir. 1987), *aff’d sub nom.* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (“The eleventh amendment reflects our system of checks and balances by limiting the power to abrogate sovereign immunity to the freely elected legislative branch.”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 228 n.89 (1980) (“[T]he Eleventh Amendment was intended merely to make clear that Article III did not by itself grant federal courts jurisdiction in cases where states were defendants, not to bar Congress from creating such jurisdiction.”); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States*, 126 U. PA. L. REV. 1203, 1279 (1978) (“Historical materials suggest that the correct interpretation is that the established doctrine of sovereign immunity survived the adoption of the Constitution and of the eleventh amendment, but that the doctrine is not constitutionally required.”); *see also* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413, 1422–30 (1975) (arguing that the history of Article III and the Eleventh Amendment reveals the Federalists’ belief that Congress could abrogate sovereign immunity); Laurence H. Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682, 693–99 (1976) (arguing that the congressional abrogation theory is “[t]he only satisfying reconciliation of the [Supreme Court] cases”).

37 *See Seminole Tribe*, 517 U.S. at 110 (Souter, J., dissenting); *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 497 (1987) (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 259 (1985) (Brennan, J., dissenting) (“There simply is no constitutional principle of state sovereign immunity, and no constitutionally mandated policy of excluding suits against States from federal court.”); Amar, *supra* note 8, at 1475 (“The party alignments specified by the Eleventh Amendment would no longer provide an *independent basis* for jurisdiction (as they had in *Chisholm*), but the existence of such an alignment would not *oust* jurisdiction that was independently grounded—for example, in federal question or admiralty cases.”); Fletcher, *supra* note 28, at 1130; John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 2004 (1983); Vicki C.

or “textualist theory,” reads the Amendment according to its precise terms to preclude all suits against a state by citizens of a foreign state or aliens—irrespective of the asserted grounds for jurisdiction—while implicitly authorizing jurisdiction over suits of any other party alignment possible under the literal terms of Article III.<sup>38</sup>

### B. Modern Textualism

The literalist or textualist contribution to the Eleventh Amendment debate is important because it—perhaps for the first time<sup>39</sup>—begins the discussion of the Amendment’s meaning with its text, divorced from the presumption that all elements of the Constitution must logically cohere. “The fallacy of the current eleventh amendment theories lies in their relentless demand for a single theoretical principle that can coherently explain the amendment, and even better, also explain how the amendment is consistent with the principles

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Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 44–51 (1988).

38 See Barnett, *supra* note 21, at 1743; Manning, *supra* note 21, at 1680 n.68; Marshall, *supra* note 21, at 1346–47 & n.14. As noted, *supra* note 23, Manning explicitly reserves judgment as to whether the literalist or diversity reading is best—but his textualist methodology justifies his inclusion here. These authors might also appropriately be grouped with those in note 35, *supra*, since their textualist approach would presumably lead them to conclude that the Eleventh Amendment represents a mandatory limit on subject matter jurisdiction. Yet while Manning and Marshall consider the possibility that Eleventh Amendment immunity is not waivable, neither endorses the idea. See Manning, *supra* note 21, at 1745 n.314; Marshall, *supra* note 21, at 1348 n.26. More importantly, these authors ascribe to the Eleventh Amendment a negative implication, such that it exhaustively specifies the available classes of state sovereign immunity in federal court and displaces any residual authority to develop further jurisdictional sovereign immunity principles. See Barnett, *supra* note 21, at 1746; Manning, *supra* note 21, at 1723–24; Marshall, *supra* note 21, at 1347. This distinguishes their views from those of Nelson and Singewald, who argue that the Eleventh Amendment’s nonwaivable immunity added to—but did not displace—an already extant waivable immunity acknowledged in Article III and incorrectly ignored by the *Chisholm* Court. See Nelson, *supra* note 34, at 1580–92. For Manning, Barnett, and Marshall, the Amendment represents a political decision on the extent to which states should be protected from suit, made against the legal baseline of *Chisholm*. See also Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 65–67 (1989) (arguing that the Eleventh Amendment represents an “unflinchingly political” decision “to create a party based *denial* of jurisdiction to the federal courts that sweeps across all the jurisdictional heads of Article III” and not a “broad grant of immunity” (quoting Gibbons, *supra* note 37, at 2003)).

39 See Coan, *supra* note 11, at 2511 (“Courts and commentators have debated the original meaning of the Eleventh Amendment for more than 100 years. This debate has a peculiar characteristic, however. It has paid remarkably little attention to the text of the Eleventh Amendment.”).

that gave rise to the Constitution," writes Lawrence Marshall. "This may be a fascinating exercise, but it surely fails to reflect the realities of the political process."<sup>40</sup>

The literalist reading thus builds on the insights of modern textualism and public choice theory.<sup>41</sup> In contrast to interpretive approaches that focus on legislative purpose, "modern textualism suggests that the complexities of the legislative process make it meaningless to speak of a legislative 'intent' at odds with the intent expressed by the clear social meaning of the enacted text."<sup>42</sup> This insight rests on two empirical propositions. First, legislators' preferences frequently cannot be aggregated into a coherent collective preference.<sup>43</sup> A multimember body may have intransitive preferences, which could lead to endless cycling without some mechanism for forcing a final vote. Legislative outcomes therefore turn on the particulars of the legislative process, especially the order in which proposals are considered.<sup>44</sup> In fact, whoever controls the legislative agenda can manipulate the process so that the legislature will adopt a proposal that only a

40 Marshall, *supra* note 21, at 1353.

41 See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388, 2408–19 (2003) (discussing the intersection of modern textualism and public choice theory); see also DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 88–115 (1991) (examining possible applications of public choice theory to problems of statutory interpretation); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–47 (1983) [hereinafter Easterbrook, *Statutes' Domains*] (same); Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 15 (1984) [hereinafter Easterbrook, *Economic System*] (same); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276–77 (1988) (same); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–44 (1990) (same).

42 Manning, *supra* note 41, at 2408; see also Easterbrook, *Statutes' Domains*, *supra* note 41, at 547 ("Because legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes.").

43 See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 2–8 (2d ed. 1963) (introducing his theorem on "passing from a set of known individual tastes to a pattern of social decision-making"); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 34–38 (1994) ("[E]ven text-based interpretation is hard to link up with majority preferences because there may be several equally plausible majority-based preferences in the legislature."); FARBER & FRICKEY, *supra* note 41, at 38–42 (discussing Arrow's Theorem); AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* 161–72 (1970) (discussing the problem of cyclical majorities).

44 Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126–27 (1989) ("[Arrovian public choice] suggests that the outcomes of collective decisions are probably meaningless because it is impossible to be certain that they are not simply an artifact of the decision process that has been used.").

minority supports.<sup>45</sup> Legislators may counteract the effects of agenda manipulation through strategic voting and logrolling, in which case votes for or against a measure will not necessarily reflect support or opposition to it.<sup>46</sup> One struggles mightily, then, to ascribe “purpose” to a law when its content reflects the incidental effect of strategic behavior and procedural rules.

Second, and most important here, legislation that emerges from a multimember assembly is typically the result of bargaining and compromise. Legislators themselves possess different goals, interests, and ideologies. Legislation often reflects not simply their own compromises, but bargaining among interest groups.<sup>47</sup> Laws that emerge from a process of compromise “may be awkward precisely because they attempt to split the difference between competing principles.”<sup>48</sup> Textualists, however, respect the awkward lines in order to honor the underlying compromise:

While textualists acknowledge that legislation may appear over- or underinclusive in relation to its background purpose, they also emphasize that a seeming lack of fit may reflect the fruits of an unrecorded legislative compromise or the byproduct of complicated legislative bargaining, rather than a reflection of imprecisely expressed legislative intent.<sup>49</sup>

“Many laws are compromises,” according to Judge Easterbrook, “going thus far and no further in pursuit of a goal.”<sup>50</sup> It would upset the legislative balance to push the deal in either direction: “When a court observes that Congress propelled Group X part way to its desired end, it cannot assist Group X farther along the journey without undoing the structure of the deal.”<sup>51</sup> Thus, when a judge is asked to extend the scope of a back-room deal, he refuses unless the proof of the deal’s scope is compelling. Omissions are evidence

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45 Easterbrook, *Statutes’ Domains*, *supra* note 41, at 547; see also Michael E. Levine & Charles R. Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 561 (1977) (“[T]here probably is no single nondictatorial method of aggregating the preferences of an electorate that will reliably produce a choice which satisfies minimal consistency and rationality standards.”).

46 Easterbrook, *Statutes’ Domains*, *supra* note 41, at 548 (“[W]hen logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body’s design.”).

47 Easterbrook, *Economic System*, *supra* note 41, at 15 (“One of the implications of modern economic thought is that many laws are designed to serve private rather than public interests.”).

48 Manning, *supra* note 41, at 2411.

49 Manning, *supra* note 21, at 1689–90.

50 Hrubec v. Nat’l R.R. Passenger Corp., 49 F.3d 1269, 1270 (7th Cir. 1995).

51 Easterbrook, *Economic System*, *supra* note 41, at 46.

that no bargain was struck: some issues were left for the future, or perhaps one party was unwilling to pay the price of a resolution in its favor. Sometimes the compromise may be to toss an issue to the courts for resolution, but this too is a term of the bargain, to be demonstrated rather than presumed. What the parties did not resolve, the court should not resolve either.<sup>52</sup>

Respecting the bounds of legislative compromise accords not only with the judiciary's role as faithful agent of the legislature, but also with the structural features of the Constitution. The requirements of bicameralism and presentment<sup>53</sup> aim to counteract the influence of faction by dividing legislative power among three institutions that represent different constituencies.<sup>54</sup> This structure *demand*s compromise among competing factions precisely to prevent any particular "Group X," in Easterbrook's terms, from getting everything it wants. It protects political minorities by assigning them the power to block legislation and therefore the ability to demand compromise as the price of their assent. If a partial victory in the legislature could be completed in the courts, this constitutional protection would disappear and the distinctive features of Article I, Section 7 would lose their significance.

Given that a statute may contain an indeterminate purpose or a compromise, textualism adheres to the original public meaning of the text. This inquiry is not limited to the four corners of the document, however:

[I]t is now well settled that textual interpretation must account for the text in its social and linguistic context. Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.<sup>55</sup>

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52 *Id.* at 15.

53 U.S. CONST. art. I, § 7.

54 Manning, *supra* note 41, at 2437.

55 *Id.* at 2392-93; see also Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 23-24 (Amy Gutmann ed., 1997) ("Textualism should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means. . . . [T]he good textualist is not a literalist . . .").

Textualism accepts the proposition that “language is intelligible by virtue of a community’s shared conventions for understanding words in context,” so that one judge’s “particular interpretations of words in context [are] correct or incorrect as measured by the relevant interpretive community’s practices” and assumptions.<sup>56</sup> Thus, the Bolognian criminal statute “that whoever drew blood in the streets should be punished with the utmost severity” would not reach the surgeon who performed an emergency operation on someone who collapsed in the street.<sup>57</sup> While the phrase “draw blood” might describe the doctor’s activity when employed in some contexts, in the criminal code the phrase denotes a *violent* piercing of the skin.<sup>58</sup> Being a textualist does not require one to be obtuse.<sup>59</sup> Similarly, “background legal conventions,”<sup>60</sup> or “those assumptions that a reasonable member of the legal subcommunity would bring to a statute in context,”<sup>61</sup> may also define the original public meaning. “[M]odern textualists unflinchingly rely on legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies,” says Manning. “For example, in the absence of clear congressional direction to the contrary, textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial

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56 Manning, *supra* note 41, at 2396–97; see also JEREMY WALDRON, *LAW AND DISAGREEMENT* 129 (1999) (arguing that legislatures approve statutory language on the assumption that “members of [the] community commonly use such words to produce a certain effect or response in their audience”).

57 *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1869); see also Manning, *supra* note 41, at 2461–62 (“[U]nder a modern understanding of textual interpretation, dismissing the charges against [a] surgeon [in this situation] would comport with the ordinary meaning of the statute in context.”).

58 Manning, *supra* note 41, at 2461–62 (noting that “a modern textualist . . . would place different glosses on the phrase ‘drew blood’ in different contexts”); see also Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 61 (1994) (“Words take their meaning from contexts, of which there are many—other words, social and linguistic conventions, the problems the authors were addressing. Texts appeal to communities of listeners, and we use them purposively. The purposes, and so the meaning, will change with context, and over time.”).

59 See Manning, *supra* note 41, at 2398 (“[T]he Court’s plain meaning presumption is best understood as an evidentiary rule of thumb. Specifically, if a statutory text is clear by virtue of a perceived social consensus about the meaning of its words in context, that conventional meaning may supply the most reliable evidence of what a multimember legislative body collectively ‘intended.’”).

60 *Id.* at 2465.

61 *Id.* at 2470; see also WALDRON, *supra* note 56, at 129 n.33 (“Legislation may also rely on certain quasi-linguistic conventions common to legislative draftsmen and the legal/judicial community.”).



practice calls for interpreting such statutes in light of common law mental state requirements.”<sup>62</sup> Similarly, “a criminal statute’s meaning is properly qualified by the background defense of necessity” or a federal statute of limitations may be read implicitly to incorporate the doctrine of equitable tolling.<sup>63</sup> Likewise, remedies for constitutional violations under § 1983 are implicitly limited by absolute or qualified immunity.<sup>64</sup> Or a grant of judicial power, as explored in the next Part, may be limited by sovereign immunity.

## II. ARTICLE III AS A LEGISLATIVE COMPROMISE

The Constitution does not rest on a unitary theory, but represents a series of political compromises over fundamental principles as well as particular policies. State sovereign immunity was among those principles debated during ratification. The plain text of Article III does not resolve the question of state sovereign immunity under the Constitution, but *Chisholm* illustrates competing approaches. The majority position in *Chisholm* relied on theories about the status of sovereignty under the Constitution to conclude that Article III had eliminated state sovereign immunity. Justice Iredell’s dissenting view—that a reasonable observer would expect an explicit provision if such a major change in federal power was intended—follows from fidelity to constitutional text. Behind the ambiguity of Article III lies a compromise struck at ratification. A potentially ratification-blocking minority of Antifederalists opposed granting federal courts jurisdiction over suits by individuals against states. In order to win ratification of the Constitution, Federalists gave to Article III a construction that incorporates a background principle of state sovereign immunity. That construction formed the original public understanding of Article III.

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62 Manning, *supra* note 41, at 2465–66; see also *Staples v. United States*, 511 U.S. 600, 605 (1994) (“[W]e must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded.” (citation omitted)).

63 Manning, *supra* note 41, at 2471; see also *Wis. Dep’t of Revenue v. William Wrigley, Jr. Co.*, 505 U.S. 214, 231 (1992) (“[T]he venerable maxim *de minimis non curat lex* (‘the law cares not for trifles’) is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”).

64 See *Harlow v. Fitzgerald*, 457 U.S. 800, 806–07 (1982).

A. *The Constitution as a Product of Compromise*

Traditionally, even among those who insist on a textualist approach to statutes, constitutional interpretation has been distinguished as requiring greater flexibility.<sup>65</sup> The greater difficulty of altering the Constitution legislatively, the evolving needs of society, and the enthusiastic invocation of Justice Marshall's shopworn catchphrase ("[W]e must never forget that it is a constitution we are expounding"<sup>66</sup>) have been taken to justify more purposive, atextual interpretation in the constitutional realm. But constitutional texts may involve even greater compromise than ordinary statutes. The constitutional amendment process of Article V, for example, requires supermajorities of two-thirds of both houses of Congress and three-fourths of the states<sup>67</sup>—establishing even greater safeguards for political minorities than the legislative process of bicameralism and presentment in Article I.<sup>68</sup> Article V was understood at the time of ratification to protect the states—especially the smaller states—from easy changes in the terms of the union. States submitted to the constitutional plan "only on the premise that Article V's requirements would make it very difficult to change the terms according to which the states came together."<sup>69</sup> Thus, one-fourth of the states are given the power to block constitutional change<sup>70</sup>—or, correspondingly, to exact compromise as the price of their assent. Article V grants the same power to political minorities in the national constituency as

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65 See, e.g., Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 282 (1982) ("[V]irtually everyone who writes on the question thinks that constitutional provisions should not be construed as strictly as statutory provisions."). But see Scalia, *supra* note 55, at 37 (noting that constitutional interpretation is distinctive "not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text").

66 See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

67 U.S. CONST. art. V.

68 Manning, *supra* note 21, at 1718.

69 Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 129–30 (1996) ("Article V was a vital part of a larger design that ensured that, in the new constitutional order, the individual states would remain independent and important political communities, and that the terms of their union with one another could be altered only if substantial obstacles were overcome.").

70 See *id.* at 156 (noting Patrick Henry's observation that "a 'bare majority' in 'four small States' containing 'one-twentieth part of the American people'" might prevent constitutional amendment (quoting Patrick Henry, Remarks at the Virginia Convention (June 5, 1788), in 9 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 943, 956 (John P. Kaminski & Gaspare J. Saldino eds., 1984))).

well—that is, those represented by one-third of either the House or Senate.<sup>71</sup>

Manning observes that “similar but not identical process considerations also apply to original provisions of the Constitution, whose methods of proposal and ratification also assigned disproportionate weight to political minorities—particularly the residents of small states.”<sup>72</sup> Equal representation of states at the Philadelphia Convention “self-evidently gave small states’ residents a disproportionate voice in shaping the Convention’s political compromises” and “it almost surely accounts for some of the Constitution’s most important features,” he explains. “[O]ne might safely conclude that the process for adopting the original Constitution, although rather improvised, also assigned political minorities (mainly small states’ residents) a disproportionate right to insist on compromise.”<sup>73</sup> Ratification of the Constitution ultimately required a supermajority of two-thirds of the states.<sup>74</sup> Manning’s argument about reading constitutional texts applies equally to the Constitution’s original provisions as to amendments.<sup>75</sup> In fact, he acknowledges that compromise marks the adoption of all constitutional texts, whether about particular policies or broad principles.<sup>76</sup>

Lawrence Marshall invokes even more explicitly political compromise as the key to understanding *any* constitutional provision:

If the history of the Constitution (not to mention modern legislation) tells us anything, it tells a story of constant political compromise between dramatically opposed ideological, economic, and regional factions. To understand the “intent” or “purpose” behind any piece of legislation, including a constitutional provision or amendment, it is necessary first to understand the goals and powers of the various factions that competed to have their views enacted into law. It is then important to consider whether any one faction prevailed on the measure, or whether the provision represents a

71 Manning, *supra* note 21, at 1719.

72 *Id.* at 1701–02.

73 *Id.* at 1702 n.143.

74 See U.S. Const. art. VII.

75 Manning, *supra* note 21, at 1702 (“Given the relevant similarity between Articles V and VII, I rely below on both the original provisions of the Constitution and its amendments to illustrate the role of compromise in reading constitutional texts.”).

76 *Id.* at 1715 (“[I]t seems quite likely that the adoption of constitutional texts, like the enactment of statutes, entails bargaining and compromise over the reach and structure of the policy under consideration.”). “This conclusion holds, moreover, whether or not the text represents, at one extreme, a closely divided legislative vote over a matter of economic self-interest or, at the other, a broad social consensus over a question of high constitutional principle.” *Id.* at 1715 n.190.

rough compromise with which no one was entirely happy, but which most everyone could accept.<sup>77</sup>

The notion that the Constitution enacts a series of political compromises has long been recognized. Max Farrand famously called the Constitution a “bundle of compromises,” a conclusion so uncontroversial it has become a widely used cliché.<sup>78</sup> Still, it is striking to note how Farrand’s account of the Convention corresponds to the assumptions of public choice:

The document which the convention presented to congress and to the country as the proposed new constitution for the United States was a surprise to everybody. No one could have foreseen the processes by which it had been constructed, and no one could have foretold the compromises by which the differences of opinion had been reconciled, and accordingly no one could have forecast the result. . . . Out of what was almost a hodge-podge of resolutions they had made a presentable document, but it was not a logical piece of work. No document originating as this had and developed as this had been developed could be logical or even consistent.<sup>79</sup>

One could scarcely contrive a better account of the “unintentional legislation” that public choice theorists predict will emerge from multimember bodies.<sup>80</sup> Modern textualists have recognized the centrality of compromise to the Constitution.<sup>81</sup>

77 Marshall, *supra* note 21, at 1353 (footnote omitted).

78 MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 201 (1913); *see also* JACK N. RAKOVE, *ORIGINAL MEANINGS* 15 (1996) (characterizing the constitutional convention as “a process of bargaining and compromise” rather than an “advanced seminar in constitutional theory”); R.L. Schuyler, *Agreement in the Federal Convention*, 31 *POL. SCI. Q.* 289, 289 (1916) (“Every American schoolboy has learned about the ‘compromises’ of the Constitution, for they are set forth in every elementary text-book of American history.”).

79 FARRAND, *supra* note 78, at 200–01; *see also* Max Farrand, *Compromises of the Constitution*, 9 *AM. HIST. REV.* 479, 482 (1904) (“[I]n that part of the plan of government which provided for the organization of a federal judiciary, the provision that ‘Congress may . . . establish’ inferior courts was phrased in this way to render it acceptable to those who favored the establishment of such courts, and to those who insisted that such tribunals would interfere with the rightful jurisdiction of the state courts” (quoting U.S. CONST. art. III, § 1)); *cf.* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. REV.* 875, 933 n.220 (2003) (describing “the public choice account of lawmaking, in which the law is rarely more than an incoherent bundle of compromises”).

80 *See* WALDRON, *supra* note 56, at 124–29; *see also* Schuyler, *supra* note 78, at 289 (observing that many constitutional provisions “which are seemingly straightforward and artless rest in reality upon compromises, often labored and tortuous”).

81 *See, e.g.*, Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1125 (1998) (“The Constitution itself is not based on a unitary theory; the

In applying these insights, then, what accounts for Manning and Marshall's singular focus on "precise" constitutional texts? One answer is by analogy to a rule of thumb for statutory interpretation which holds that textual detail signals narrow interest group compromise.<sup>82</sup> Manning takes the specificity of constitutional language as an indicator that a particular amendment "addresses a specific question and resolves it in a precise way."<sup>83</sup> The problem, however, is that the context of the Constitution is different from ordinary legislation.<sup>84</sup> Constitutional provisions cannot be considered in isolation as easily as different pieces of legislation. All provisions, after all, form a single constitutional scheme. Specific provisions modify broad ones, and they may have been understood precisely in light of their effect on larger principles.<sup>85</sup> One cannot reach the original understanding of the Eleventh Amendment, for example, without an understanding of the provision it modified, Article III.<sup>86</sup> To read one textually and the other more liberally distorts an original understanding in which the two provisions had a combined effect. Moreover, there is little cause in the constitutional context for taking a detailed text to trump a broadly worded one simply because the former is more easily parsed. As textualists acknowledge, the presuppositions and background conventions of interpretive communities often affect the common understanding of a text's plain language.<sup>87</sup> The drafting and ratification of

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Framers did not share a single vision but reached a complex compromise."); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (describing the Constitution as an imperfect "political compromise").

82 See Easterbrook, *Economic System*, *supra* note 41, at 16 ("One way to approach the problem is to ask whether the statute is specific or general. The more detailed the law, the more evidence of interest-group compromise and therefore the less liberty judges possess. General-interest statutes, on the other hand, are designed to vest discretion in courts, to transfer the locus of decision . . .").

83 Manning, *supra* note 21, at 1736.

84 See Scalia, *supra* note 55, at 37 (noting that "[i]n textual interpretation, context is everything, and the context of the Constitution" is distinctive).

85 See Jackson, *supra* note 2, at 997 ("Since the entire Constitution of 1787 was in a sense founded on compromises, the effort to distinguish among its provisions and associated amendments on such a basis [as the distinction between compromise and principle] may be one doomed to failure.").

86 And this understanding may depend, for that matter, on an original understanding of how *Chisholm* affected Article III. See *infra* Part III.

87 See Coan, *supra* note 11, at 2519 n.52 ("Widely held political and philosophical presuppositions are often more significant determinants of meaning than dictionary definitions. Thus, especially in interpreting historically remote constitutional provisions, it makes little sense to accord text the kind of presumptive weight that Marshall and Manning argue for.").

the Constitution surely involved compromise over political and philosophical precepts, and judges ought to honor those bargains as well.<sup>88</sup>

Broadly worded provisions are as likely as any other constitutional text to embody a legislative compromise that requires continued respect. For that reason, the “bundle of compromises” behind the Constitution—often invoked as an argument *against* originalism<sup>89</sup>—actually counsels its more consistent application.

### B. Article III as an Ambiguous Text

If Article III is not ambiguous, however, no interpretive work is necessary because a textualist would simply “accept the plain meaning of the language used.”<sup>90</sup> This is Lawrence Marshall’s reading of Article III.<sup>91</sup> Indeed, a scholarly consensus maintains that the plain language of Article III supports the holding of *Chisholm*, at least with respect to the question of jurisdiction. “[F]rom a textual standpoint,” writes John J. Gibbons, “the suggestion that states were immune from suit in federal court seems preposterous on its face.”<sup>92</sup>

But how preposterous is it, really? As Manning writes, “communication inevitably draws on established (but unstated) assumptions shared by the relevant linguistic community.”<sup>93</sup> These can take the form of exceptions to a general policy. “When exceptions to an imperative are part of an antecedent understanding between speaker and listener that limits conditions of application, the exceptions are part of the meaning of the imperative,” explains Kent Greenawalt.<sup>94</sup> As noted above, a textualist would read an unqualified criminal statute’s plain meaning to be qualified by the background defense of

88 See Jackson, *supra* note 2, at 998 (“Compromise is important; compromise between competing principles is often essential to constitution making and maintenance; security in enforcement of compromises may be important for future bargaining; and compromises may have become embedded in a legal landscape and require continued enforcement in order to promote stability and coherence.”).

89 See, e.g., RAKOVE, *supra* note 78, at 6 (“Both the framing of the Constitution in 1787 and its ratification by the states involved processes of collective decision-making whose outcomes necessarily reflected a bewildering array of intentions and expectations, hopes and fears, genuine compromises and agreements to disagree.”).

90 JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 28 (1987).

91 See Marshall, *supra* note 21, at 1346.

92 Gibbons, *supra* note 37, at 1895; see also ORTH, *supra* note 90, at 28 (“The safest course would seem to be to accept the plain meaning of the language used.”); Amar, *supra* note 8, at 1469 (calling the *Chisholm* Court’s interpretation of Article III “impeccable”); Jackson, *supra* note 37, at 49 (“*Chisholm* was in all likelihood correctly decided as to the question of jurisdiction . . .”).

93 Manning, *supra* note 41, at 2470.

94 Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 10 (1990).

necessity because legislatures “enact criminal and tort statutes in light of established norms of defense, which frame the background social understanding of such statutes among the legal community.”<sup>95</sup> By the same token, “[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law.”<sup>96</sup>

Marshall insists that without an explicit textual provision for state sovereign immunity, it cannot be a constitutional doctrine. Article III contains “absolute language that admit[s] no exception for suits against states,” he writes. “[I]t cannot seriously be suggested that article III, or any other part of the body of the Constitution, lends support to the Court’s creation of a constitutional doctrine of state sovereign immunity that extends beyond the narrow dictates of the eleventh amendment.”<sup>97</sup> But there is no textual warrant for *federal* sovereign immunity, either, and yet almost no one questions its existence.<sup>98</sup> That’s because there is little doubt that the United States is sovereign (even though that presupposition, too, lacks a textual basis) and immunity from suit is an attribute of sovereignty.<sup>99</sup> The question for states, then, is to what extent they too are sovereign under the “plan of the convention.” As Alexander Hamilton wrote:

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; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States . . . .<sup>100</sup>

Theories about the status of state sovereignty under the Constitution abound. One theory holds that the federal and state governments are sovereign in their respective spheres.<sup>101</sup> Others argue that

95 Manning, *supra* note 41, at 2468.

96 Brogan v. United States, 522 U.S. 398, 406 (1998).

97 Marshall, *supra* note 21, at 1347.

98 See, e.g., Coan, *supra* note 11, at 2534 (calling federal sovereign immunity “a doctrine with an impeccable historical pedigree that is very rarely questioned by courts”).

99 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 16, at 487–88.

100 *Id.*

101 See, e.g., THE FEDERALIST NO. 9 (Alexander Hamilton), *supra* note 16, at 76 (arguing that the Constitution “leaves in [the states’] possession certain exclusive and very important portions of sovereign power”); THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 16, at 198 (“[A]s the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States.”); THE FEDERALIST NO. 39 (James Madison), *supra*

sovereign immunity is a relic of monarchical rule; since sovereignty in the United States resides with the people, state governments cannot invoke its privileges.<sup>102</sup> On the other hand, under a system of popular sovereignty, suits against a state can be seen as suits against the sovereign people of the state in their collective capacity—making immunity appropriate.<sup>103</sup> Still others might argue that, in adopting the Constitution, states surrendered their sovereignty entirely to the union<sup>104</sup> or that they retained it in full.

This appears to be a question of principle or political theory, but it is not. The creation of a “partly federal and partly national” democratic government under a written constitution was an unprecedented undertaking.<sup>105</sup> No formal precepts dictated its form. Some doctrines—separation of powers, judicial review, individual rights—became part of the structure, but there is no reason to presume that they all proceeded from a single conceptual framework. Thus, when Amar condemns state sovereign immunity as “an inexplicable throwback to the jurisdictional regime of the Articles of Confederation,”<sup>106</sup> it may in fact be such a throwback, explained by the necessity of Federalist compromise with the Antifederalists. The only relevant questions are whether and in what way it was understood to limit Article III.

The status of state sovereign immunity prior to the Constitution was clear. “Whatever the framers’ understanding of Article III,” writes Christopher T. Graebe, “there seems to have been general agreement

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note 16, at 245 (“[Federal] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects.”).

102 See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 302 (1985) (Brennan, J., dissenting) (characterizing state sovereign immunity as “an anachronistic and unnecessary remnant of a feudal legal system”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (opinion of Wilson, J.) (“To the Constitution of the *United States* the term SOVEREIGN, is totally unknown.”); Amar, *supra* note 8, at 1480 (“[T]he Supreme Court’s vision of state sovereign immunity warps the very notion of government under law.”); Barnett, *supra* note 21, at 1758 (“If nothing else, *Chisholm* teaches that the concept of sovereignty as residing in the body of the people, as individuals, was alive at the time of the founding . . . .”); Chemerinsky, *supra* note 6, at 1201 (“Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law.”).

103 See Nelson, *supra* note 35, at 1584 & n.115.

104 *Chisholm*, 2 U.S. (2 Dall.) at 452 (opinion of Blair, J.) (“[W]hen a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the *United States*, she has, in that respect, given up her right of sovereignty.”).

105 See THE FEDERALIST NO. 39 (James Madison), *supra* note 16, at 246.

106 Amar, *supra* note 8, at 1477.



that the states had enjoyed sovereign immunity under the Articles.”<sup>107</sup> Federalists and Antifederalists alike concurred in the judgment that immunity to suit is an inherent attribute of sovereignty. Even Attorney General Edmund Randolph, who represented Chisholm against Georgia, acknowledged that under “the confederation . . . the States retained their exemption from the forensic jurisdiction of each other, and . . . of the *United States* themselves.”<sup>108</sup> Randolph even asserted that the principle of sovereign immunity retained continuing force under the Constitution. The national government, he argued, still enjoyed sovereign immunity from suit: “I assert, that it will not follow, from these premises, that the *United States* themselves may be sued. For the head of a confederacy is not within the reach of the judicial authorities of its inferior members. It is exempted by its peculiar pre-eminencies.”<sup>109</sup>

Randolph concluded that the principle of sovereign immunity could not logically apply to states because they had surrendered the relevant part of their sovereignty in joining the union. “I acknowledge, and shall always contend, that the States are sovereignties,” he said. “But with the free will, arising from absolute independence, they might combine in Government for their own happiness. . . . The limitations, which the Federal Government is admitted to impose upon their powers, are diminutions of sovereignty, at least equal to the making of them defendants.”<sup>110</sup> In support of this assertion, Randolph adverted to “the spirit of the Constitution” and argued that its purpose would be frustrated if compulsive suits against states were disallowed.<sup>111</sup> The Constitution, he noted, contains prohibitions on state action that would violate individual rights, harm other states, or act in derogation of the general sovereignty. If states were to act in this fashion, he argued, “redress goes only half way,” and some “unconstitutional actions must pass without censure, unless States can be made defendants.”<sup>112</sup>

Randolph, then, read Article III in light of a background principle of sovereign immunity. But he gave to that principle a purposive interpretation, concluding that the states did not possess the relevant sort of sovereignty and therefore fell outside the principle. “[T]here is nothing in the nature of sovereignties, *combined as those of America*

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107 Christopher T. Graebe, *The Federalism of James Iredell in Historical Context*, 69 N.C. L. REV. 251, 256 (1990).

108 *Chisholm*, 2 U.S. (2 Dall.) at 423 (argument of counsel).

109 *Id.* at 425.

110 *Id.* at 423.

111 *Id.* at 421–22.

112 *Id.* at 422.

*are*, to prevent the words of the Constitution, if they naturally mean, what I have asserted, from receiving an easy and usual construction.”<sup>113</sup> Thus, the background principle of sovereign immunity does not qualify the language of Article III with respect to states (“in which a State shall be Party”), and “party” must mean either plaintiff or defendant. On the other hand, according to Randolph, the background principle of sovereign immunity *does* qualify the language of Article III with respect to the United States (“to which the United States shall be a Party”), and “party” must mean plaintiff *but not* defendant.<sup>114</sup>

Justice Iredell, the lone dissenter in *Chisholm*, concluded that it was unnecessary to reach the constitutional question of Article III’s reach in order to dispose of the case, though he pronounced himself

strongly against any construction of [the Constitution], which will admit, under any circumstances, a compulsive suit against a State for the recovery of money. I think every word in the Constitution may have its full effect without involving this consequence, and that nothing but express words, or an insurmountable implication (neither of which I consider, can be found in this case) would authorise the deduction of so high a power.<sup>115</sup>

In this way, Iredell also read Article III in light of a background principle of sovereign immunity. But unlike Randolph’s purposive interpretation, Iredell did not evaluate its scope or purposes—nor did he analyze the substantive merits and conceptual fit of applying the principle to states. He simply acknowledged that prior to the Constitution, states’ amenability to suit was generally understood to be limited by sovereign immunity.<sup>116</sup> If the Constitution overturned so significant and widely recognized a prerogative of states, a reasonable observer would expect it to do so expressly. Iredell would not infer such a dramatic alteration of legal norms from a purported lack of fit between the Constitution’s scope and its putative purposes.

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113 *Id.* at 423 (emphasis added).

114 *Id.* at 421.

115 *Id.* at 449–50 (opinion of Iredell, J.) (“So far as this great question affects the Constitution itself, if the present afforded, consistently with the particular grounds of my opinion, a proper occasion for a decision upon it, I would not shrink from its discussion. But it is of extreme moment that no Judge should rashly commit himself upon important questions, which it is unnecessary for him to decide. My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case.”).

116 *Id.* at 433.

This approach corresponds to textualist statutory interpretation.<sup>117</sup> That Iredell was interpreting not a statute, but an ambiguous constitutional provision and a background legal norm, makes the approach no less applicable. When an ambiguous constitutional provision such as Article III addresses the scope of a substantive power (federal jurisdiction) or procedural concept (state amenity to suit), its public meaning likely proceeds as much from generally understood principles as its particular language.

As it happens, Iredell wrote an initial draft of his *Chisholm* dissent that more clearly addresses Randolph's constitutional arguments and illustrates his textualist approach to Article III.<sup>118</sup> Iredell declined to infer constitutional purpose from the legislative history where it could also be used to justify a contrary result. Instead, he inferred from the subject matter what use of language would be reasonably expected:

The A.G. observed, The Convention had twice the opportunity to speak expressly, but they did not. What if the Conv. had twice an opportunity to convey this authority expressly, & did not. Are we to force such a construction upon them? Really, this is treating the subject as of very little consequence. But if ever there was a case, where the Convention should have spoken out explicitly, if they meant what is ascribed to them, this certainly was the case. Where whole Sovereignties are to be brought to a Bar of Justice in the very same manner, & without any distinction, as single Individuals. . . . We must shew our Voucher for the exercise of so high an authority.<sup>119</sup>

Moreover, he declined to embrace the suggestion that the word "party" has different meanings within the same article by virtue of Randolph's political theory of sovereignty. The fact that such a theory would make nonsense of the text suggests its invalidity:

The word "Party" was mentioned. This it was said was as clear as day light. Admit it to be so, in the sense of this observation. The

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117 See Manning, *supra* note 21, at 1689–90 (noting that textualists "emphasize that a seeming lack of fit may reflect the fruits of an unrecorded legislative compromise or the byproduct of complicated legislative bargaining, rather than a reflection of imprecisely expressed legislative intent").

118 James Iredell, Observations on "this great Constitutional Question" (Feb. 18, 1793), in 5 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 186, 186–87 (Maeva Marcus ed., 1994) [hereinafter THE DOCUMENTARY HISTORY]. Iredell may have read this draft opinion from the bench. *Id.* at 186 n.AD. This source shows the original text and replicates Justice Iredell's editing marks on that text. The quotes from this source in this Article omit the editing marks; instead, the quotes reflect the final text Justice Iredell intended, as evidenced by his edits.

119 *Id.* at 188–89 (emphasis removed) (footnotes omitted).

meaning of that undoubtedly is, that Party must mean either [Plaintiff] or [Defendant]. The same word is used as to the U.S. The U.S. therefore may be either [Plaintiff] or [Defendant]. [No,?] says the Atty Gen, I once thought so, but am now convinced it cannot be applied to the U.S. since they cannot be sued in their own courts, without consent, from the very nature of a superior Sovereignty. Why then is the same word used as to both? Before this Constitution was passed, a State was no more liable to be sued in this manner than the U.S. Its Sovereignty equally protected it. The Convention therefore either meant the same thing as to both, or they used words idly & at random . . . . [T]he very same word applied to one Sovereignty must have the same construction as applied to another. . . . If they did not, by one expression, convey this authority by implication as to one, they did not to be sure, by the very same expression, as to the other.<sup>120</sup>

As to Randolph's theory of state sovereignty post-ratification, Iredell took it as mere assertion. "I admit that a Sovereign Power may yield a part of its Sovereignty," Iredell wrote with respect to Randolph's contention about states' surrender of sovereignty. "Shew that the separate States have done this[,] the point is settled. The Fact here assumed is the very thing in question."<sup>121</sup> Iredell would not presume, on the basis of speculation about the theory behind the Constitution, that the states had surrendered their sovereignty. Some actual evidence that this was the import of their decision to ratify would be required. Iredell declined to extend the scope of constitutional provisions to accord with an apparent purpose:

But the A.G. has taken very high ground, when speaking of the Spirit of the Constitution.

. . . I shall not attempt to follow him in the whole of his argument as to this point. So far as his argument went to shew the importance of Nations, as well as Individuals, observing moral sanctions, I heard him with pleasure. But, alas! such is the situation of Mankind, we cannot find a remedy for every thing. We must bear evils as well as we can that we can find no means of redressing but by introducing greater Evils. I do not believe that the Conv. had in its view to remedy such as the A.G. described in such strong colours. A State doing injury to the Citizens of other States or Foreigners is to be sure a supposable case, but it is scarcely supposeable, I think (if at all) but by means of some act of the Legislature (for no inferior authority I think can bind a State), in which case we are involved in this dilemma. If the act be consistent with the Const. of the par-

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120 *Id.* at 189–90 (fifth alteration in original) (emphasis removed) (footnotes omitted).

121 *Id.* at 191.

ticular State, & the U.S., it is binding upon all, and this Court hath no means of redressing it. If it be inconsistent with either, the act is utterly void, and can operate as no bar to the Individual right. This, I take it, is the very manner in which the Const. intended all Laws of the U.S. (except in the peculiar instance of a Controversy between 2 or more States & perhaps one or two other instances) should operate—upon Individuals & not States.<sup>122</sup>

Iredell aimed to preserve the balance the Constitution struck between the sovereignty of the states and the rights of individuals. He would not alter the terms of the bargain because the remedies, in this case, seemed incomplete or not fully satisfactory. Individual rights still had effect as defenses to state action, and the intuition that redress would “go[] only half way”<sup>123</sup> in some cases did not justify the conclusion that the Constitution must intend a fuller or more complete remedy. The Constitution, after all, may “go[] thus far and no further in pursuit of a goal”<sup>124</sup>—especially where, as here, it balances competing goals. A more “complete” remedy could “introduce[e] greater Evils.” Thus, the mention of a right or limitation on state action in the Constitution does not demand the conclusion that “the Conv. had in its view to remedy” by every possible means.<sup>125</sup>

The next subpart argues that understanding Article III as the product of legislative compromise supports Iredell’s cautious approach to constitutional interpretation. Whatever conclusion one draws about the meaning of Article III, however, its text is not unambiguous on its face. Randolph insisted that the word “between” refers to two parties.<sup>126</sup> But, as Iredell noted, the word is given its full meaning by referring to any controversy between the two parties that may come before a court. It need not change the judicial power to reach cases previously thought to be beyond the reach of courts.<sup>127</sup> In this

122 *Id.* at 190 (emphasis removed) (footnotes omitted). Note that Iredell, responding to Randolph’s concern that states may violate individual rights, imagines that federal jurisdiction can only reach a “State doing injury to the Citizens of other States or Foreigners” and does not include citizens of their own states. *Id.*

123 *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 422 (1793) (argument of counsel).

124 *Hrubec v. Nat’l R.R. Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir. 1995).

125 Iredell, *supra* note 118, at 190.

126 *Chisholm*, 2 U.S. (2 Dall.) at 419, 420–21.

127 See 3 ELLIOT’S DEBATES, *supra* note 28, at 533 (statement of James Madison) (arguing that jurisdiction “will not go beyond the cases where they may be parties”); *Charles Jarvis’s Speech in the Massachusetts House of Representatives*, INDEP. CHRON. (Boston), Sept. 23, 1793, reprinted in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 436, 437 (“Is it not then most natural to infer, that the Constitution was not intended to create occasions upon which its power was to be exerted, but to operate simply upon those which had an actual existence.”).

respect, Caleb Nelson has argued that, as originally understood, a “case” or “controversy” did not exist unless the court had personal jurisdiction over both parties—which, of course, it lacked over non-consenting states.<sup>128</sup>

Nelson provides a textual hook for a background presumption of state sovereign immunity. Indeed, broadly worded provisions may often have a more limited meaning than their literal terms suggest by virtue of established terms of art. Yet people and legislatures always communicate in light of “settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language.”<sup>129</sup> If a school principal, say, were to announce that he will punish “any fighting between students” with suspension—and that “any party to a fight” should be taken to his office immediately—one would not naturally take him to include students boxing in gym class, or students at other schools, or fights that occur off campus. At least, if he did mean that, one would expect him to say so explicitly.

The authorization of jurisdiction “between two or more States” did not present the same problem for Iredell, since that had already existed under the Articles of Confederation.<sup>130</sup> As Randolph acknowledged in his argument, under the Articles “the States retained their exemption from the forensic jurisdiction of [the United States] except under a peculiar modification . . . .”<sup>131</sup> If the Constitution meant to change that distribution of authority, Iredell reasoned, one would expect a clear statement to that effect.<sup>132</sup>

Randolph, as noted, was comfortable modifying the literal language of Article III with a background presumption of sovereign immunity for the United States—he only argued it didn’t apply to states.<sup>133</sup> One would naturally read Article III, of course, to be limited

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128 Nelson, *supra* note 35, at 1565–66.

129 Manning, *supra* note 41, at 2393.

130 ARTICLES OF CONFEDERATION art. IX, cl. 2 (U.S. 1781); *see also* 3 ELLIOT’S DEBATES, *supra* note 28, at 532 (statement of James Madison) (“The next case, where two or more states are the parties, is not objected to. Provision is made for this by the existing Articles of Confederation, and there can be no impropriety in referring such disputes to this tribunal.”). Suits between sovereignties also seem to have been understood differently than suits by individuals against sovereigns. *See, e.g.*, Letter from James Madison to Spencer Roane (May 6, 1821), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 217, 221 (Phil., J.B. Lippincott & Co. 1865) (expressing wonder that the Supreme Court determined that “the dignity of a State was not more compromised by being made a party against a private person than against a co-ordinate Party”).

131 *Chisholm*, 2 U.S. (2 Dall.) at 423 (argument of counsel).

132 *Id.* at 449–50 (opinion of Iredell, J.).

133 *See supra* notes 107–14 and accompanying text.

by other background principles of justiciability.<sup>134</sup> No one expected Article III's grant of jurisdiction "to all cases affecting ambassadors, other public ministers, and consuls" to eliminate or waive the diplomatic immunity of those parties.<sup>135</sup> The plain language of Article III, similarly, did not entail the elimination of sovereign immunity.<sup>136</sup>

Indeed, the other Justices in *Chisholm*, like Randolph, depended on a purposive reading of the Constitution to conclude—despite no mention of state sovereignty in the text—that the Constitution had eliminated the sovereignty states previously enjoyed and all its attributes. Iredell, on the other hand, required a textual basis for that judgment.<sup>137</sup>

The contrast between Iredell's textualist reading and the majority's purposive account of Article III should give partisans of the literalist approach to the Eleventh Amendment pause. To conclude, as Marshall does, that "all indications in the body of the Constitution are against state immunity from federal jurisdiction,"<sup>138</sup> one must either read it purposively to conform to some nontextual political theory or else read it literally to exclude those established background assump-

134 See, e.g., 3 ELLIOT'S DEBATES, *supra* note 28, at 533 (statement of James Madison) ("A subject of a foreign power, having a dispute with a citizen of this state, may carry it to the federal court; but an alien enemy cannot bring suit at all.")

135 See JACOBS, *supra* note 12, at 21.

136 In an analogous case, the Court has inferred that "the jurisdiction conferred by the constitution upon this court, in cases to which a state is a party, is limited to controversies of a civil nature" not only from the use of "cases" and "controversies" as terms of art, but also from the background common law doctrine that one state does not enforce the penal law of a foreign state. *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 287–89, 297 (1888) (holding that "notwithstanding the comprehensive words of the constitution, the mere fact that a state is the plaintiff is not a conclusive test that the controversy is one in which this court is authorized to grant relief against another state or her citizens" and that the grant of "judicial power" is limited by "settled principles of public and international law"); see also *Huntington v. Attrill*, 146 U.S. 657, 666 (1892) (citing "the fundamental maxim of international law . . . 'The courts of no country execute the penal laws of another'"). *Pelican* has been partially overruled on the grounds that "the obligation to pay taxes is not penal." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 271 (1935). See generally Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 961 (2006) (discussing the "sovereign prerogative of a state to exclusively enforce its own penal laws").

137 In addition to the assumptions of modern textualism, Iredell's reading could be justified by reference to rules of construction given by the Ninth and Tenth Amendments. See Kurt T. Lash, *A Textual-Historical Theory of the Ninth Amendment*, 60 STAN. L. REV. 895, 919 (2008) ("Embedded in text of the Ninth, thus, are two separate forbidden rules of construction: First, the fact of enumeration must not be read to imply the necessity of enumeration. Second, the fact of enumeration must not be read to suggest the superiority of enumeration.")

138 Marshall, *supra* note 21, at 1346.

tions against which it was originally understood. The ratification debates (and *Chisholm*, for that matter) may reveal disagreement over the implications of Article III for state suability, but partisans on both sides of the question understood the Article in connection with a well-established background principle of state sovereign immunity. Reading the Article literally, apart from those background conventions that informed its meaning, misses the original understanding. Textualists should at least consider the background assumptions against which the text was originally understood. How to think about the disagreement over Article III's implications is the subject of the next subpart.

### C. *Article III as a Constitutional Compromise*

It is ironic that the textualist case against a broad constitutional principle of sovereign immunity rests on honoring a possible "unrecorded legislative compromise" that may have been essential to the adoption of the Eleventh Amendment.<sup>139</sup> In fact, the evidence suggests that the recognition of such a principle was part of a compromise that was essential to the ratification of the Constitution.

The statements of Hamilton, Madison, and John Marshall with respect to state sovereign immunity under the Constitution have often been taken to be probative of original intent.<sup>140</sup> These statements include Hamilton's assurances in the *Federalist Papers*.<sup>141</sup> Madison, at the Virginia ratifying convention, said of Article III:

Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. *It is not in the power of individuals to call any state into court.* The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court. This will give

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139 See Manning, *supra* note 21, at 1690; Marshall, *supra* note 21, at 1353–54.

140 See, e.g., *Alden v. Maine*, 527 U.S. 706, 716–18 (1999) (citing Hamilton, Madison, and Marshall as evidence of the importance of state sovereign immunity to the ratification of the Constitution); *Seminole Tribe v. Florida*, 517 U.S. 44, 70–71 & n.13 (1996) (citing Madison and Hamilton as evidence of the intent to include state sovereign immunity in the Constitution); *Monaco v. Mississippi*, 292 U.S. 313, 323–24 (1934) (outlining the clear intentions of Hamilton, Madison, and Marshall with regard to sovereign immunity); *Hans v. Louisiana*, 134 U.S. 1, 12–14 (1890) (same).

141 THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 16, at 487–88 ("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; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.")



satisfaction to individuals, as it will prevent citizens, on whom a state may have a claim, being dissatisfied with the state courts. . . .

. . . It appears to me that this can have no operation but this—to give a citizen a right to be heard in the federal courts; and if a state should condescend to be a party, this court may take cognizance of it.<sup>142</sup>

He noted, furthermore, “I do not conceive that any controversy can ever be decided, in these courts, between an American state and a foreign state, without the consent of the parties. If they consent, provision is here made.”<sup>143</sup> John Marshall provided a similar reading:

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.* The intent is, to enable states to recover claims of individuals residing in other states. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a state cannot be defendant—if an individual cannot proceed to obtain judgment against a state, though he may be sued by a state. *It is necessary to be so, and cannot be avoided. I see a difficulty in making a state defendant, which does not prevent its being plaintiff.*<sup>144</sup>

In cases between states and foreign states, he said, “[t]he previous consent of the parties is necessary.”<sup>145</sup>

Scholars have responded to these statements by insisting that, while they “certainly convey[] an endorsement of state sovereign immunity,” Madison and Marshall were “merely dissembling”<sup>146</sup> and their arguments were “disingenuous.”<sup>147</sup> Lawrence Marshall, too, refers to “Madison’s probably disingenuous attempt to convince the Virginia convention that sovereign immunity was not affected by certain portions of article III.”<sup>148</sup> Manning, meanwhile, writes, “Although important figures in various ratifying debates—including Hamilton (*qua* Publius), Madison, and Marshall—gave broadly worded assurances that states would retain their traditional immunity from unconsented suits after Article III’s adoption, opinion on that question was hardly uniform.”<sup>149</sup> He also regards those assurances as

142 3 ELLIOT’S DEBATES, *supra* note 28, at 533 (statement of James Madison) (emphasis added).

143 *Id.*

144 *Id.* at 555–56 (statement of John Marshall) (emphasis added).

145 *Id.* at 557.

146 Gibbons, *supra* note 37, at 1906.

147 Jackson, *supra* note 37, at 47.

148 Marshall, *supra* note 21, at 1371.

149 Manning, *supra* note 21, at 1674.

probably disingenuous: “For me, in any case, scattered remarks in the ratifying debates demand a heavy discount: One cannot know . . . to what extent the utterers shaped their contributions in light of strategic concerns in decidedly political ratification contests.”<sup>150</sup>

Why this should matter is unclear. The states did not ratify Madison and Marshall’s *beliefs* about the Constitution. Nor did Hamilton’s theories about the “plan of the convention” pass unadulterated into law.<sup>151</sup> Statements by Hamilton, Madison, and Marshall are compelling not because they *meant* them, but because they provide a reading of Article III—and of state sovereign immunity under the Constitution more generally—that may represent the ratifiers’ understanding of the text they passed into law.<sup>152</sup>

Indeed, it would be less probative of the meaning of the Constitution that Madison and Marshall believed what they said than that they felt they *needed to say it to win ratification*. Manning writes of the constitutional amendment process, “By design, this process seeks to ensure that a small minority of society or, more accurately, several distinct small minorities have the right to veto constitutional change or to insist upon compromise as the price of assent.”<sup>153</sup> He notes that “the process for adopting the original Constitution, although rather improvised, also assigned political minorities (mainly small states’ residents) a disproportionate right to insist on compromise.”<sup>154</sup>

So the view that sovereign immunity survived Article III need not have been widely held or even genuinely believed by Madison, Hamilton, or Marshall to be authoritative. If there was a ratification-blocking *minority* that would not have assented to ratification of Article III without the assurance that state sovereign immunity remained intact, then state sovereign immunity must be taken to be part of the original compromise that was essential to Article III’s ratification.<sup>155</sup>

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150 *Id.* at 1674 n.42.

151 *See supra* note 100 and accompanying text.

152 *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 98–99 (2004) (explaining that the “public meaning of the words of the Constitution, as understood by the ratifying conventions and the general public” should prevail over the intentions of the framers); Scalia, *supra* note 55, at 38 (explaining that the writings of framers are probative as indications of original understanding, not of intent).

153 Manning, *supra* note 21, at 1671.

154 *Id.* at 1702 n.143.

155 *Cf. id.* at 1720 (“At a minimum, before ascribing a broader legally effective intention to the carefully drawn language of the Eleventh Amendment, the Court must ask whether it is conceivable that one-third of either house (or, less likely, one-quarter of the state legislatures) might have preferred the narrower immunity embedded in the text.”).

Statements at the ratification debates *obviously* involved strategic behavior:

[T]he proposed Constitution faced serious ratification obstacles. In four states, New Hampshire, Massachusetts, North Carolina, and New York, the ratifying conventions contained a significant majority of Anti-Federalist sentiment. A fifth state, Rhode Island, did not even bother to call a convention; the Constitution was submitted directly to—and rejected by—an electorate known to be overwhelmingly hostile. Had the ratification proceedings moved along a different sequence, our Constitution might not have been ratified. . . .

. . . The Constitution's opponents most feared "consolidated" national government. For these critics, the states [were] primary, . . . they [were] equal, and . . . they possessed the main weight of political power. . . .

. . . *Responding quickly to Anti-Federalist sentiment, the Federalists deflected the state-centered attack by, in effect, embracing it. Generally, they acknowledged the political and legal priority of the states . . .*<sup>156</sup>

In the debate over the Constitution, Antifederalists at first hewed to a strictly confederal principle because they believed that dual or coordinate sovereignty, *imperium in imperio*, was impossible. The "characteristic Federalist position was to deny that the choice lay between confederation and consolidation and to contend that in fact the Constitution provided a new form, partly national and partly federal."<sup>157</sup> That was the argument of the *Federalist Papers* and Madison at the Virginia ratifying convention.<sup>158</sup> "[T]he Federalists had the usual motive of the political debater to take as much as he can of his opponent's ground. Nevertheless, it is striking how widely the Federalists adopted the view of the Union as a coming together of sovereign states."<sup>159</sup> In this way, "the *nationalists* who met at Philadelphia became *federalists* as they sought to translate their vision of national power and prosperity into a politically acceptable constitutional design."<sup>160</sup> The Antifederalist position also shifted. Under the influence of Federalist arguments, the Antifederalists "urged the importance of a strict division of power and even something like a divided sovereignty, the possibility of

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156 Monaghan, *supra* note 69, at 148–49 (some alterations in original) (emphasis added) (footnotes omitted) (internal quotation marks omitted).

157 HERBERT J. STORING, *WHAT THE ANTI-FEDERALISTS WERE FOR* 12 (Murray Dry ed., 1981).

158 See *supra* note 18.

159 Herbert J. Storing, *The 'Other' Federalist Papers: A Preliminary Sketch*, in *TOWARD A MORE PERFECT UNION* 77, 84–85 (Joseph M. Bessette ed., 1995).

160 CATHY D. MATSON & PETER S. ONUF, *A UNION OF INTERESTS* 101 (1990).

which their early strictly federal argument had denied.”<sup>161</sup> To assume away this compromise—and, for example, to read the Constitution according to a purist form of Federalist “popular sovereignty”—dishonors the bargain struck at ratification.<sup>162</sup>

The four state ratifying conventions dominated by Antifederalists—New Hampshire, Massachusetts, North Carolina, and New York—plus the staunchly antifederalist Rhode Island represent a ratification-blocking minority in a process that required the assent of nine states. In Virginia, the Antifederalists had a slight advantage.<sup>163</sup> The margin of approval of the Constitution was exceedingly close: “ten votes in Virginia (89-79) and New Hampshire (78-68), and only three in New York (30-27).”<sup>164</sup> Massachusetts ratified by nineteen votes (187-168).<sup>165</sup>

Two states, at least, ratified the Constitution on the understanding that state sovereign immunity survived Article III. To its resolution ratifying the Constitution, New York attached a declaration of understanding. “We, the delegates of the people of the state of New York,” it read, “[d]o declare and make known . . . [t]hat the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state.”<sup>166</sup> For good measure, the New York convention also noted its understanding “[t]hat the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by the Congress, is not in any case to be increased, enlarged, or extended, by any faction, collusion, or mere suggestion . . . .”<sup>167</sup> And New York explicitly made its ratification contingent on this understanding:

Under these impressions, and declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution, and in confidence that the amendments which shall have been proposed to the said Constitution will receive an early and mature consideration,—

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161 STORING, *supra* note 157, at 33.

162 See Amar, *supra* note 8, at 1426–27; cf. Alden v. Maine, 527 U.S. 706, 751 (1999) (noting that the Constitution “split[] the atom of sovereignty” (quoting Saenz v. Roe, 526 U.S. 489, 504 n.17 (1999))); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869) (“[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”).

163 JACOBS, *supra* note 12, at 32.

164 Monaghan, *supra* note 69, at 149 n.154.

165 JACOBS, *supra* note 12, at 30.

166 1 ELLIOT’S DEBATES, *supra* note 28, at 327–29.

167 *Id.* at 329.

We, the said delegates, in the name and in the behalf of the people of the state of New York, do, by these presents, assent to and ratify the said Constitution.<sup>168</sup>

The assurances of Madison and other Framers must have traveled widely, for in its ratification resolution (submitted to Congress in 1790), Rhode Island also declared this understanding of Article III. Among its proposed amendments, the Rhode Island convention included this:

It is declared by the Convention, that the judicial power of the United States, in cases in which a state may be a party, does not extend to criminal prosecutions, or to authorize any suit by any person against a state; but, to remove all doubts or controversies respecting the same, that it be especially expressed, as a part of the Constitution of the United States, that Congress shall not, directly or indirectly, either by themselves or through the judiciary, interfere with any one of the states, in the redemption of paper money already emitted, and now in circulation, or in liquidating and discharging the public securities of any one state; that each and every state shall have the exclusive right of making such laws and regulations for the before-mentioned purpose as they shall think proper.<sup>169</sup>

Virginia and North Carolina, meanwhile, proposed more extensive amendments that would have entirely eliminated the provisions of Article III creating federal jurisdiction over states and citizens of other states as well as cases arising under the Constitution and the laws of the United States.<sup>170</sup> North Carolina, unlike Virginia, made adoption

168 *Id.*

169 *Id.* at 336.

170 The Virginia amendment read:

That the judicial power of the United States shall be vested in one Supreme Court, and in such courts of admiralty as Congress may from time to time ordain and establish in any of the different states. The judicial power shall extend to all cases in law and equity arising under treaties made, or which shall be made, under the authority of the United States; to all cases affecting ambassadors, other foreign ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, and between parties claiming lands under the grants of different states. In all cases affecting ambassadors, other foreign ministers, and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction; in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, as to matters of law only, except in cases of equity, and of admiralty, and maritime jurisdiction, in which the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations, as the Congress shall make: but the judicial power of

of its amendments a precondition of its ratification of the Constitution—even though it did actually ratify a year later.<sup>171</sup> Other states, notably Massachusetts and New Hampshire, may have adopted resolutions in support of state sovereign immunity.<sup>172</sup> Records of the Massachusetts convention's debate on Article III are sparse, but later newspaper accounts report that state amenity to suit was a primary concern of the delegates, and the convention ratified the Constitution only on the assurances of Rufus King and other Federalists that Article III did not authorize suits by individuals against states.<sup>173</sup> "On the

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the United States shall extend to no case where the cause of action shall have originated before the ratification of the Constitution, except in disputes between states about their territory, disputes between persons claiming lands under the grants of different states, and suits for debts due to the United States.

3 *id.* at 660–61; *see also* 4 *id.* at 246 (detailing North Carolina's amendment which had minor, nonsubstantive differences).

171 JACOBS, *supra* note 12, at 38.

172 According to St. George Tucker, Massachusetts and New Hampshire also proposed amendments "dissent[ing]" from state suability, ST. GEORGE TUCKER, *View of the Constitution of the United States*, in BLACKSTONE'S COMMENTARIES app. at 352 & n.\* (St. George Tucker ed., Phila., William Young Birch & Abraham Small 1803), but the text of these amendments seems to have been lost. *See* Fletcher, *supra* note 28, at 1052 n.78.

173 BRUTUS, INDEP. CHRON. (Boston), July 18, 1793, at 1, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 392, 392 (noting that the possibility of suits against states by individuals "was apprehended by many of the Members of the Massachusetts Convention, when deliberating on that very clause of the Federal Constitution, respecting the judiciary power, but which apprehensions were said to be groundless by the advocates of the Constitution, and the jealousies of the Members on that subject, were laughed at, and treated as ridiculous by KING and others"); Democrat, MASS. MERCURY (Boston), July 23, 1793, at 1, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 393, 393 ("In convention, when the Federal Constitution was discussed, some of the members who had discernment to discover, and honesty to expose the art used, by the constructors thereof, to gild over an article, which at once destroys the SOVEREIGNTY of the states, and renders them no more than corporate towns. A great civilian rose; and, in an harangue, of two hours length, endeavoured to prove that, the article in debate, could not possibly bear the construction put upon it by gentlemen . . . ." (footnotes omitted)); Marcus, MASS. MERCURY (Boston), July 16, 1793, at 1, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 389, 389 ("The power which the Federal Government has, to call into *their* Courts, a *Commonwealth* or a State, to answer to the demand of a foreigner . . . was *powerfully opposed* in the Convention of this and other Commonwealths and States *in the Union*. It was debated in our Convention with great strength and propriety . . . . This power in the Federal Government, would not have been consented to by this *commonwealth*, but for Rufus King, Esq. who 'pledged his honour,' in the *State* Convention, 'that the Convention at Philadelphia never discovered a disposition to infringe on the Government of an individual State . . . ." (quoting Senator Rufus King)); A Republican, *The Crisis*, No. XIII, INDEP. CHRON., July 25, 1793, at 2, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra*

strength of this gentleman's opinion, the Article in the Constitution was assented to but by a small majority."<sup>174</sup>

Was there, then, at least a ratification-blocking minority that depended on a construction of Article III as including state sovereign immunity? New York and Rhode Island clearly and explicitly ratified on the basis of that understanding. Virginia and North Carolina, while plainly opposed to state amenity to suit, probably cannot be taken to have expressed a view of Article III's meaning. Nevertheless, one would have a ratification-blocking minority with only five vote switches in Virginia, five in New Hampshire, and ten in Massachusetts.

The ratification votes were closest (or ratification was initially rejected) in those states that actually held debates on Article III,<sup>175</sup> which is where the Madison-Marshall reading of Article III was advanced to counter Antifederalist attacks. In those states, Article III "was made the subject of violent attacks by the opponents of the constitution, attacks that were successfully met only by the solemn assurances of its friends—Hamilton, Madison, Marshall—that such an unheard of thing as a suit by an individual against a State was never contemplated."<sup>176</sup>

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note 118, at 395, 396 ("Every person that attended the debates, knows that this question was agitated in the Convention, and that it was treated as a visionary, *antifederal* idea; and that both parties *mutually* and *cordially* consented, that the 'suability' of the States was not contemplated by the framers of the Constitution; that it never could be exercised, and in fact could *never* bear that construction.").

174 Marcus, *supra* note 173, at 389–90.

175 See JACOBS, *supra* note 12, at 28 ("In at least six states—Pennsylvania, Massachusetts, Virginia, New York, North Carolina, and Rhode Island—the provision received attention."). Records of the Pennsylvania convention only contain one speech—by James Wilson—on state suability rather than extended debate. See 2 ELLIOT'S DEBATES, *supra* note 28, at 515–45 (statement of James Wilson at the Pennsylvania ratifying convention on December 11, 1787). For New Hampshire, where one would also expect such a debate, there are almost no records of the convention; only one speech from the New Hampshire convention has been preserved. See Monaghan, *supra* note 69, at 151 n.173.

176 SINGEWALD, *supra* note 35, at 18; see also JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA (1791), reprinted in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 21, 22 ("[T]here were great difficulties, in the minds of many, respecting the construction of the judiciary powers contained in the system then offered to the public. There were, however, men of learning and ingenuity, who gave that part of the Constitution a construction which made many easy with it . . . . It seemed then to be agreed, that the states, as states, were not liable to the civil process of the supreme judicial of the Union . . . ."); Letter from an Anonymous Correspondent, INDEP. CHRON. (Boston), Apr. 4, 1793, at 2, reprinted in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 228, 228 ("When the persons in opposition to the acceptance of the new Constitution hinged on the article respecting the power of the Judiciary Department being so very extensive and alarming as to comprehend

In truth, New York's rejection alone would have sunk the Constitution—so important was its participation in the new government that it was necessary to its success. Virginia, where Madison and Marshall spoke, was similarly essential.<sup>177</sup> It is no surprise, then, that Federalists publicly gave Article III a construction that would placate the Constitution's opponents. "[R]atification opponents generally interpreted the provision as constituting a dangerous extension of federal judicial authority," explains Jacobs, "but most Federalists, commenting upon the matter, denied this meaning."<sup>178</sup>

In advancing his argument for a narrow reading of the Eleventh Amendment, Manning writes:

"The more basic question . . . is whether it is conceivable that process considerations flowing from Article V's structure may have given the Amendment's supporters strategic reasons for putting forward such a precise amendment. Perhaps the political forces responsible for shaping the Amendment's text believed, rightly or not, that a more encompassing amendment might have passed less surely or been ratified more slowly."<sup>179</sup>

This logic applies equally to the construction given Article III in the ratification debates. Some observers have concluded that "it may be taken for granted that the constitution could never have been adopted if it had been understood to contain the doctrine of *Chisholm v. Georgia*."<sup>180</sup> But whether it would have been adopted or not—and it seems likely that it would not have—there is no question that process considerations flowing from Article VII's structure gave the Constitution's supporters strategic reasons to put forward an immunity-friendly construction of Article III. Rightly or wrongly, Federalists *believed* that a ratification-blocking minority would have rejected a more nationalist construction of the Constitution—and they shaped the public understanding of Article III (along with other provisions) in light of the ratification process.

It violates the process values underlying Article VII to conclude that the Federalists were simply dissembling and pulled a "fast one" over on their opponents at the ratifying conventions. Regardless of the intent behind them, Federalist assurances became part of the

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even the State itself, as a party on an action of debt; this was denied perem[p]torily by the Federalists, as an absurdity in terms").

177 Article VII, of course, does not give New York or Virginia, on their own, a right of veto. But their importance further explains the Federalists' strategic behavior in insisting that state sovereign immunity was implicit in Article III.

178 JACOBS, *supra* note 12, at 28.

179 Manning, *supra* note 21, at 1721.

180 SINGEWALD, *supra* note 35, at 18–19.



political compromise that led to passage of the Constitution. What's more, the Article VII process seems to have produced a *genuine* compromise: partisans of exclusive state sovereignty and partisans of exclusive national or popular sovereignty converged on a system of divided sovereignty.<sup>181</sup> “[T]he *nationalists* who met at Philadelphia became *federalists* as they sought to translate their vision of national power and prosperity into a politically acceptable constitutional design.”<sup>182</sup> The structure of Article VII is designed to produce just this sort of compromise—a mutually agreeable constitutional framework. Courts should

aspire to a theory of adjudication that at least does not contradict the apparent structural aims of a fairly carefully designed and elaborately specified lawmaking process—whether it be the legislative process of bicameralism and presentment or the processes prescribed by Articles V and VII for the adoption of constitutional texts.<sup>183</sup>

Courts that did so aspire would be compelled to preserve the compromise underlying Article III—recognizing the qualification of state sovereign immunity—“lest they disturb some unrecorded concession insisted upon by the minority or offered preemptively by the majority as part of the price of assent.”<sup>184</sup>

The process considerations of Article VII—which gives a veto power to a minority of states, and aims for a compromise between national and state interests—justify Justice Iredell’s clear statement rule: if the Constitution was to alter radically the relative authorities of nation and state, one would expect it to do so explicitly. Articles VII and V together aim, essentially, to make sure states know what they’re

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181 See *supra* notes 156–61 and accompanying text. Some Federalists and Framers advanced a state sovereignty view even in conventions that were not highly contentious. See, e.g., 2 ELLIOT’S DEBATES, *supra* note 28, at 197 (statement of Oliver Ellsworth) (arguing before the Connecticut ratifying convention that “[t]his Constitution does not attempt to coerce sovereign bodies, states, in their political capacity” but “acts only upon delinquent individuals”). Ellsworth’s view echoes Iredell’s notion that laws of the United States operate “upon *Individuals & not States*.” See *supra* note 122 and accompanying text; see also Letter from James Madison to Spencer Roane, *supra* note 130, at 222 (“It is particularly incumbent, in taking cognizance of cases arising under the Constitution, and in which the laws and rights of the States may be involved, to let the proceedings touch individuals only.”). Iredell, too, was a Federalist and supporter of the Constitution.

182 MATSON & ONUF, *supra* note 160, at 101.

183 Manning, *supra* note 21, at 1694.

184 *Id.* at 1736.

getting into and that the bargain can't be changed after the fact. The Court has invoked this sort of principle before.<sup>185</sup>

It might be objected that there could have been an opposite ratification-blocking faction that would not have ratified if they believed state sovereign immunity *was* constitutional. There is no evidence of such a faction, however, and it is not clear that the historical record could have developed as it did if there had been. If proponents of the Constitution had been evenly divided on the question one would expect more debate between them on its meaning.<sup>186</sup> In this case, proponents of the measure gave it one reading and opponents another.<sup>187</sup> In such a case of ambiguity between two competing understandings of an ambiguous provision, it is perhaps appropriate for the Court to invoke a modified version of the canon that the views of sponsors of legislation are more authoritative than opponents<sup>188</sup>: the public understanding of the supporters is more authoritative because it is more likely to represent the compromise at which the lawmaking process aims while the opponents, obviously, reject the

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185 See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 296 (1936) ("It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified.").

186 James Wilson's speech at the Pennsylvania convention is sometimes taken to be a rare example of a Federalist advancing the suability view of Article III, see, e.g., Gibbons, *supra* note 37, at 1902–03, but—whatever he may have thought about the question—that's not what he says. Wilson only praises the Article for providing a neutral forum for disputes between states and citizens of other states; he does not say which such disputes can arise. 2 ELLIOT'S DEBATES, *supra* note 28, at 491 ("Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another state, there ought to be a tribunal where both parties may stand on a just and equal footing."); cf. Fletcher, *supra* note 28, at 1051 (arguing that Wilson's "words are probably best understood as referring only to the neutrality of the federal forum, for he made no reference to the clause imposing liability on an unwilling state"). Edmund Randolph seems to be the only advocate of ratification publicly to contemplate Article III as authorizing compulsive suits by individuals against states. See, e.g., Rogers M. Smith, *Constructing American National Identity: Strategies of the Federalists*, in *FEDERALISTS RECONSIDERED* 19, 27 (Doron Ben-Atar & Barbara B. Oberg eds., 1998) (stating that Randolph and Wilson "urged ratification while arguing for the suability of the states").

187 See *supra* notes 175–76 and accompanying text.

188 *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 585 (1988) ("We have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (quoting *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58, 66 (1964) (internal quotation marks omitted)).

compromise. Such a rule of thumb at least promotes the underlying purposes of Articles V and VII. However that may be, the analogy to Manning's textualist method is clear: if the proponents of a provision construe it to include an established background principle in order to win ratification (or to do so more easily), that background principle becomes part of the legislative compromise.<sup>189</sup>

These considerations do not resolve the character of the sovereign immunity principle in Article III. Nelson has argued that state sovereign immunity survived Article III as a common law doctrine that Congress could alter (though he equivocates on the latter point).<sup>190</sup> This Article, in contrast, holds that state sovereign immunity became part of the constitutional bargain and therefore qualifies Article III jurisdiction. Whether consistent with previous understanding or not, sovereign immunity at ratification was understood as an inherent attribute of sovereignty and states were understood to be "sovereignties" under the constitutional compromise.<sup>191</sup> Whether there were some limits requires additional consideration. The amendment proposed by Virginia and North Carolina, for example, seems to contemplate compulsive suits against states in admiralty and under treaties.<sup>192</sup> The important point, however, is that there is no reason to expect the immunity to match an abstract theory of sovereignty or the Constitution since the Constitution was, above all, a compromise.<sup>193</sup> One might therefore have expected the contours of state sovereign immu-

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189 Cf. Manning, *supra* note 41, at 2465-66 ("[M]odern textualists unflinchingly rely on legal conventions that instruct courts, in recurrent circumstances, to supplement the bare text with established qualifications designed to advance certain substantive policies. For example, in the absence of clear congressional direction to the contrary, textualists read mens rea requirements into otherwise unqualified criminal statutes because established judicial practice calls for interpreting such statutes in light of common law mental state requirements.").

190 See Nelson, *supra* note 35, at 1565-67.

191 This may have been a relatively recent idea. See Graebe, *supra* note 107, at 257 ("That Hamilton and the Virginia delegates presupposed the sovereign immunity of the states prior to the Constitution is remarkable in light of the scant historical justification for such a belief.").

192 See *supra* note 170. The contemplation of compulsive suits is apparent if one assumes that "a State shall be a Party" means either plaintiff or defendant, which is what the author of the amendment, George Mason, purported to believe in the context of Article III. *But cf. Ex parte New York*, 256 U.S. 490, 494 (1921) (applying state sovereign immunity to admiralty proceedings).

193 See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995) (arguing that "people who accept the principle need not agree on what it entails in particular cases" and vice versa).

nity under the Constitution to be shaped by early practice<sup>194</sup> and judicial elaboration, except that *Chisholm* and the Eleventh Amendment intervened.

### III. READING THE ELEVENTH AMENDMENT

The leading textualist accounts of the Eleventh Amendment produce a strained and implausible understanding of state sovereign immunity because they fail to appreciate the original understanding of the compromise behind Article III. Both John Manning and Lawrence Marshall miss those background presuppositions that were commonly held at the time of the amendment and replace them with anachronistic assumptions. Manning reads the Eleventh Amendment as carving out a limited exception from the legal baseline of the *Chisholm* majority. But given the view of legal precedent at the time, only the decision of *Chisholm*, not the Justices' opinions, represented the law. The Eleventh Amendment was designed to prevent such a decision from recurring, not to overturn its rationale. Lawrence Marshall argues, along with Chief Justice Marshall's opinion in *Cohens v. Virginia*,<sup>195</sup> that the Eleventh Amendment is inconsistent with a broad principle of state sovereign immunity because it allows suits against states by other states. This view, however, ignores the common understanding of sovereign immunity at the time, which shielded a state against suits by individuals but not other sovereigns. Instead, Professor Marshall relies on an unconvincing historical explanation and anachronistically attributes contemporary notions of state liability under federal law to the Eleventh Amendment's Framers.

#### A. Manning

For Manning, the Eleventh Amendment changed everything. “[I]n the Amendment’s absence,” he writes, “the Court might legitimately have generated a rather elaborate doctrine of state sovereign immunity based on general authority derived from Article III or the constitutional structure as a whole”<sup>196</sup> or “engaged in a gradual com-

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194 See Letter from James Madison to Spencer Roane, *supra* note 130, at 222 (“A liberal and steady course of practice can alone reconcile the several provisions of the Constitution literally at variance with each other . . .”); THE FEDERALIST NO. 37 (James Madison), *supra* note 16, at 229 (“All new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

195 19 U.S. (6 Wheat.) 264 (1821).

196 Manning, *supra* note 21, at 1723.

mon law elaboration of the ways in which state sovereign immunity fits or does not fit, in different contexts, with our structure of government.”<sup>197</sup> The Court *has* done that of course, but illegitimately in Manning’s view because the Eleventh Amendment got there first:

*Chisholm*, however, altered the legal environment. It caused American society to focus explicitly on the question that Article III had left unanswered: What kind(s) of immunity should the states enjoy from suit in federal courts? Accordingly, it is necessary to ask whether one should read the Amendment’s specific resolution of that question to displace whatever general authority the Court previously may have had to address the same question in common law fashion.<sup>198</sup>

In answering that question, Manning applies the *expressio unius* canon to conclude that the Eleventh Amendment’s specific enumeration of immunities precludes finding other immunities implied in Article III’s more general, broadly worded text. He emphasizes that *expressio unius* is not a “mechanical or acontextual solution to any interpretive problem.” Rather, the canon “directs interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive.”<sup>199</sup> Manning’s reasonable person, however, can’t reach a conclusion based on the text, though he narrows it down to two possibilities:

[B]ased on the text alone, one cannot confidently determine whether the Amendment’s several exclusions of jurisdiction from Article III represent (1) a comprehensive but pointedly circumscribed judgment about the proper scope of state sovereign immunity in general, or (2) a narrower judgment about the (un)desirability of allowing federal court diversity actions against states. In the absence of additional facts, either position reflects a plausible way to read the text.<sup>200</sup>

Ultimately, Manning’s reasonable person is persuaded by two pieces of contextual evidence. First, the legal baseline of *Chisholm*: despite the narrow question presented, the majority opinions in *Chisholm* spoke in broad terms, reasoning that the whole doctrine of state sovereign immunity had not survived the adoption of Article

197 *Id.* at 1731.

198 *Id.* at 1732–33.

199 *Id.* at 1725. In a footnote, Manning quotes one commentator as saying that the canon “properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast with that which is omitted that the contrast enforces the affirmative inference.” *Id.* at 1725 n.229 (quoting EARL T. CRAWFORD, *THE CONSTRUCTION OF STATUTES* 337 (1940)).

200 *Id.* at 1743.

III.<sup>201</sup> A reasonable person, therefore, would expect the Eleventh Amendment to provide an answer to the broad question of the status of state sovereign immunity presented by the opinions rather than confine itself to the narrow case of diversity jurisdiction presented by *Chisholm's* facts.<sup>202</sup> Given that expectation, Manning reasons, "the Eleventh Amendment might well have been perceived as a carefully circumscribed answer to that broader question."<sup>203</sup> Second, the resolutions of state legislatures that prompted the Amendment's adoption:

[M]uch of the direct impetus for the Amendment's proposal came from a series of resolutions by state legislatures instructing their senators to "fix" the problem perceived to exist in *Chisholm's* aftermath. . . . The spate of broadly worded state resolutions—calling for the removal of "any clause or article of the constitution" that "[could] be construed" to authorize suits against states—perhaps reinforced the comprehensive sense in which *Chisholm* framed the immunity question. Certainly, this historical backdrop negates any contention that the amendment process in fact focused solely upon the narrower question of citizen-state diversity presented by *Chisholm's* precise facts.<sup>204</sup>

Manning's reasonable person, then, does not read the Eleventh Amendment so much as the national mood. The Amendment would have an entirely different meaning for him if *Chisholm* had not been decided, or if its opinions had been written differently; or if the state legislatures had said or done different things. The previous Part argued that constitutional provisions could be understood in light of established background principles.<sup>205</sup> But Manning's reasonable person imports what amounts to legislative history into his analysis.<sup>206</sup>

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201 See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 450–51 (opinion of Blair, J.).

202 Manning, *supra* note 21, at 1743–44. ("Although *Chisholm's* facts presented the discrete question whether one could bring a diversity action against a state, the majority opinions reasoned that such suits were permissible because state sovereign immunity had simply not survived the adoption of Article III. . . . With the issue so framed, a reasonable person would likely have thought of the problem of diversity jurisdiction against states as part and parcel of the larger question of state immunity against Article III jurisdiction more generally.")

203 *Id.* at 1744.

204 *Id.* at 1746–47 (second alteration in original) (citations omitted) (quoting state resolutions).

205 See *supra* Part II.B.

206 Compare Manning, *supra* note 41, at 2472 n.312 ("[T]he absurdity doctrine stands in sharp contrast to the more specific and tailored conventions, such as reading established defenses into criminal statutes or applying equitable tolling principles to statutes of limitations. Although those background conventions (like all legal con-

Manning uses the reasonable person to infer Congress' *purpose* in drafting the Eleventh Amendment. His reasonable person knows about *Chisholm* and assumes that Congress would have wanted to confront its broad principle on its own terms—according to his own conjecture, not some shared background assumption of the interpretive community. The fact that Manning is using a hypothetical “reasonable person” to read Congress' mind makes the approach no less purposive.

What's more, channeling the process of imaginative reconstruction through an objective “reasonable person” makes the interpretation even less reliable than direct examination of legislative history. Manning's reasonable person knows enough contextual information to see what everyone is doing, but he lacks any information about why they are doing it. Instead, he attributes purposes to them. As a consequence, he misreads history as well as text.

First, he anachronistically reads a modern notion of textual precedent back into the *Chisholm* era. It is by no means clear that many people even read the *Chisholm* opinions. Volume 2 of *United States Reports*, which contains the opinions, was not published until 1798—four years after the ratification of the Eleventh Amendment.<sup>207</sup> A pamphlet containing the opinions was available, though the cost was prohibitive for many.<sup>208</sup> The opinions were not widely published in newspapers; only those of Chief Justice Jay and Justice Cushing ever did appear.<sup>209</sup> “[A] more effectual mode could not have been adopted . . . to prevent these important opinions from being read by

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structs) leave judges with more or less discretion, they at least provide some sense of the range of possibilities and the framework for choosing among them.”), *with* Manning, *supra* note 21, at 1745 n.314 (“Given *Chisholm*'s broad reasoning, a reasonable person reading the Amendment's text might well have understood it as a response to the more inclusive question defined by the Court's majority opinions.”).

207 John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 139 (1999).

208 See A Citizen of the United States, NAT'L GAZETTE (Phila.), Aug. 10, 1793, at 326, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 231, 232 (“A large pamphlet, price 50 cents, was made of [the opinions], and claimed as a copyright . . . : Whereas they ought to have been public property, that they might be published in a six-penny pamphlet, and in all the news-papers, in order that the great body of citizens might be informed . . .”).

209 *Id.* at 232 n.1 (editorial note indicating that Chief Justice Jay's opinion appeared in Philadelphia's *Gazette of the United States* in August 1793); *see also* Veritas, COLUMBIAN CENTINEL (Boston), July 17, 1793, at 1, *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 390, 391 n.1 (noting that Justice Cushing's opinion appeared in Boston's *Columbian Centinel* in July 1793).

the great body of the people,” complained one citizen in August 1793.<sup>210</sup>

It should not be surprising, however, that the public debate over *Chisholm* proceeded without its text being widely available. During the latter half of the eighteenth century and the first half of the nineteenth, the American conception of precedent followed the English model, in which “[t]he cases were merely evidence of the law, which existed independently.”<sup>211</sup> The *decision* of the case, not the *opinion* of the judge, served as precedent. The holding was deduced by reasoning from the facts and the outcome of the case rather than by analysis of the text. Indeed, there need not be any opinion at all in such a system;<sup>212</sup> and, even if there is, it does not constitute binding precedent. “[I]t is not the rule of law *set forth* by the court, or the rule *enunciated* . . . which necessarily constitutes the principle of the case. There may be no rule of law set forth in the opinion, or the rule when stated may be too wide or too narrow.”<sup>213</sup> In the early Supreme Court—and in *Chisholm* specifically—opinions were delivered seriatim and orally, sometimes without a prepared text or notes.<sup>214</sup> The practice of delivering a single opinion on behalf of the Court began only with Chief Justice Marshall’s appointment in 1801.<sup>215</sup> Congress did not even authorize the Supreme Court to appoint an official reporter until 1817.<sup>216</sup> The English view of precedent persisted in the United States through the mid-1800s.<sup>217</sup>

Given this conception of legal precedent, it makes sense that the Justices did not always devote the utmost care to the preparation of their opinions.<sup>218</sup> And it also makes sense that a public would express

210 A Citizen of the United States, *supra* note 208, at 232.

211 Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1225 (2007).

212 See, e.g., *Raffles v. Wichelhaus* (The Peerless Case), (1864) 159 Eng. Rep. 375, 376 (Exch. Div.) (“There must be judgement for the defendants[.]”).

213 Tiersma, *supra* note 211, at 1216 (omission in original) (quoting Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 165, 167 (1930)).

214 *Id.* at 1223. During *Chisholm*, Justice Iredell took notes on his colleagues’ opinions as they read them, implying he lacked access to any authoritative text. See James Iredell, *Notes on the Justices’ Opinions*, in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 214, 214–17.

215 Kelsh, *supra* note 207, at 143.

216 Tiersma, *supra* note 211, at 1227.

217 *Id.* at 1232.

218 See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) (“The Judges agreeing unanimously in their opinion, I presumed that the sense of the Court would have been delivered by the president; and therefore, I have not prepared a formal argument on the occasion.”); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 415, 417–18 (1793) (opinion of Blair, J.) (“My sentiments have coincided, ’till this



its opposition to *Chisholm* by focusing on the decision itself rather than the text of the opinions. The opinions of the Justices were not law; the Constitution alone was. Because his reasonable observer fails to appreciate the status of judicial precedent at the time, Manning also misreads the state resolutions. The Massachusetts resolution, which inspired similar resolutions from six other states, read:

Whereas a decision has been had in the Supreme Judicial Court of the United States, that a State may be sued in the said Court by a citizen of another State; which decision appears to have been grounded on the second section of the third article in the Constitution of the United States:

*Resolved*, That a power claimed, or which may be claimed, of compelling a State to be made defendant in any Court of the United States, at the suit of an individual or individuals, is in the opinion of this Legislature unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States, and repugnant to the first principles of a Federal Government: Therefore

*Resolved*, That the Senators from this State in the Congress of the United States be, and they hereby are instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power, to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.<sup>219</sup>

The Massachusetts General Court's resolution clearly expressed opposition to *Chisholm*'s broad rationale as "repugnant to the first principles of a Federal Government." But the resolution did not ask for a constitutional amendment that repudiated the whole philosophy of the *Chisholm* majority. Rather, it asked for the removal of "any clause or article" that could justify such a decision in the future. Other states, indicating their belief that *Chisholm* proceeded from a misreading of the Constitution, asked even more modestly to "remove or explain" any such provision, or otherwise to "prevent the possibility of a construction" that denies the states' immunity from suit, or to

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moment, with the sentiments entertained by the majority of the Court; but a doubt has just occurred, which I think it my duty to declare."); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 407 (1792) (opinion of Wilson, J.) ("I confess that I have not been able to form an opinion which is perfectly satisfactory to my own mind, upon the points that have been discussed.").

219 Resolution of the Massachusetts General Court (Sept. 27, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 440, 440.

alter those provisions on which the decision “is supposed” to be founded.<sup>220</sup> The Virginia House of Delegates explicitly declared its understanding that the original Constitution as ratified did not include such a power:

*Resolved*, That a state cannot, under the constitution of the United States, be made a defendant at the suit of any individual or individuals, and that the decision of the Supreme Foederal Court, that a state may be placed in that situation, is incompatible with, and dangerous to the sovereignty and independence of the individual states, as the same tends to a general consolidation of these confederated republics.<sup>221</sup>

The North Carolina General Assembly invoked the constitutional bargain it had struck at ratification:

Resolved that such a power however it might have been contemplated by some was not generally conceived by the representatives of this State in the Convention which adopted the Foederal

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220 See Proceedings of a Joint Session of the New Hampshire General Court (Jan. 23, 1794), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 618, 618 (calling on the state’s senators and representatives to procure “such amendments in the Constitution of the United States, as to prevent the possibility of a construction which may justify a decision that a State is compellable to the suit of an individual or individuals in the Courts of the United States”); Resolution of North Carolina General Assembly (Jan. 11, 1794), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 615, 615 (calling on the state’s senators and representatives to “obtain such amendments in the Constitution of the United States as will remove or explain any clause or article of the said Constitution which can be construed to imply or justify . . . a decision that a State is compellable to answer in any suit by an individual or individuals in any Court of the United States”); Proceedings of the Maryland House of Delegates (Dec. 27, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 611, 611 (calling on the state’s senators and representatives to seek such amendments “as will remove any part of the said constitution which can be construed to justify a decision that a state is compellable to answer in any suit by an individual or individuals in any court of the United States”); Proceedings of the Virginia House of Delegates (Nov. 28, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 338, 338–39 (calling for “such amendments in the constitution of the United States, as will remove or explain any clause or article of the said constitution, which can be construed to imply or justify a decision, that a state is compellable to answer in any suit, by an individual or individuals, in any court of the United States”); Resolution of the Connecticut General Assembly (Oct. 29, 1793), *reprinted in* 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 609, 609 (requesting that its congressional delegation secure “an alteration of the Clause or Article in the Constitution of the United States on which the decision of the said Supreme Court, is supposed to be founded so that in future no State can on any Construction be held liable to any such Suit, or to make answer in any Court, on the Suit, of any Individual or Individuals whatsoever”).

221 Proceedings of the Virginia House of Delegates, *supra* note 220, at 338 (footnote omitted).

Constitution as a power to be vested in the Judiciary of the General Government and that this General Assembly view the same as derogatory of the reserved rights and sovereignty of this State.<sup>222</sup>

And the Georgia House of Representatives, upon the commencement of *Chisholm*, invoked the Madison-Marshall reading of Article III:

Be it resolved by the Senate and House of Representatives of the state of Georgia in General Assembly met, that they do not consider the 2d section of the 3d article of the federal constitution to extend to the granting power to the supreme court of the United States, or to any other court having jurisdiction under their authority, or which they may at any period hereafter under the constitution, as it now stands, constitute; to compel states to answer to any process the said courts or either of them may sue out the said constitution agreeably to the construction thereof by this legislature *only giving a power to the said supreme court to hear and determine all causes commenced by a state as plaintiff against a citizen as defendant*, or in cases where two states are parties or between the United States and an individual state: The contrary construction thereof submitting the territory of the states and the treasuries thereof to the distresses or levies of a Foederal Marshal, which is totally repugnant to the smallest idea of sovereignty.<sup>223</sup>

The resolution instructed Georgia's representatives to "apply for an explanatory amendment" that would restore this construction.<sup>224</sup> Indeed, the Eleventh Amendment as adopted did not purport to change the Constitution, but only to provide a rule of construction for further interpretation of Article III.<sup>225</sup>

Manning assumes that the states did not get what they wanted because he does not believe that the Eleventh Amendment can possibly be read to include the sort of sovereign immunity that the states evidently endorsed. But Manning fails to notice—strangely, for a textualist—the apparent mismatch in the text of each resolution between the broad principles of sovereignty, federalism, and original meaning that states invoke and the relatively modest remedy they seek: to excise or clarify whatever clause could be construed to authorize suits by individuals against states.

<sup>222</sup> Resolution of North Carolina General Assembly, *supra* note 220, at 615.

<sup>223</sup> *Proceedings of the Georgia House of Representatives*, AUGUSTA CHRON., Dec. 14, 1792, reprinted in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 161, 161–62 (emphasis added).

<sup>224</sup> *Id.* at 162.

<sup>225</sup> U.S. CONST. amend. XI ("The Judicial power of the United States *shall not be construed* to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (emphasis added)).

Since Manning takes *Chisholm* as the “legal baseline” against which the Eleventh Amendment was adopted, and *Chisholm* rested on a broad holding that the states were not sovereign under the Constitution, he believes that establishing the sort of sovereignty the states desired would require an affirmative constitutional amendment explicitly declaring that the states are sovereign and possess full immunity from suit by individuals. “With the issue so framed [by *Chisholm*],” he writes, “a reasonable person would likely have thought of the problem of diversity jurisdiction against states as part and parcel of the larger question of state immunity against Article III jurisdiction more generally.”<sup>226</sup>

Against this interpretation, however, stand the resolutions of the actual ratifiers of the Amendment—the states—which plainly did not take *Chisholm* as their legal baseline.<sup>227</sup> They ask for removals and explanations of constitutional provisions, not additions. Their proposed amendments thus imply what their resolutions say explicitly (*right there, on the face of the text*): that the states *already* possess sovereign immunity under the Constitution and all they need to do is correct an erroneous construction. This view accords with the general background understanding of the time that judicial opinions did not in themselves alter the law. But Manning replaces that understanding with his own assumptions about precedent and what *he* would do if faced with an identical situation today. It should go without saying that this represents unsound textualist methodology.<sup>228</sup>

Manning insists that the state resolutions in fact confronted *Chisholm*'s broad reasoning rather than its narrow holding. Two of the *Chisholm* opinions, he observes, “asserted that state sovereign immunity was flatly incompatible with the premises of our republican form of government” and the states must have aimed to resolve that question.<sup>229</sup> What construction, then, could he possibly give to the language of the resolutions—“remove any clause or article of the said Constitution”?<sup>230</sup> That Massachusetts wanted to repeal the Guarantee Clause?

The states clearly had different background assumptions in mind. Manning is right that “to evaluate the Amendment’s limited enumeration of exceptions, it is helpful to know the legal baseline against

226 Manning, *supra* note 21, at 1744.

227 The New York, South Carolina, and Pennsylvania legislatures drafted resolutions expressing similar ideas, but were stalled by disagreements over wording and procedural factors. See JACOBS, *supra* note 12, at 65.

228 See *supra* note 55 and accompanying text.

229 Manning, *supra* note 21, at 1744.

230 Resolution of the Massachusetts General Court, *supra* note 219, at 440.

which the adopters acted.”<sup>231</sup> The adopters here—three-fourths of the states—acted against a baseline understanding that they enjoyed sovereignty, including immunity, under the Constitution. What they wanted to do was exactly what they said: remove any clause that could lead to a different construction. Manning insists that “American society had had no previous occasion to confront the question squarely, one way or the other,”<sup>232</sup> but the textual basis of *Chisholm*, the provision that extends federal jurisdiction over controversies “between a State and Citizens of another State” had long been a subject of debate as to whether it qualified or was qualified by state sovereign immunity.<sup>233</sup> The only other clause that mentions states and individuals is the provision for suits “between a State . . . and foreign . . . Citizens or Subjects.” This language had been read in *Chisholm* to expose states to suits by individuals.<sup>234</sup> The states announced their intention to remove any clause that could be construed to expose them to such suits. It appears that’s exactly what they did.<sup>235</sup>

The Eleventh Amendment did not address suits by an individual against his own state because no clause in the Constitution addresses suits by an individual against his own state. It is true that the Amendment did not address suits between states or between a state and a foreign state. But jurisdiction over suits between states was already accepted—it existed under the Articles and was understood to be part of the constitutional compromise.<sup>236</sup> Plus, the states themselves, in their instructions to their representatives, announced that they were concerned about suits by individuals only. It may be that suits between states and foreign states, as well as federal question suits,

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231 Manning, *supra* note 21, at 1743 (citing *W. Va. U. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991)).

232 *Id.* at 1748.

233 See *supra* Part II.B.

234 See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 451 (1793) (opinion of Blair, J.) (“After describing, generally, the judicial powers of the *United States*, the Constitution goes on to speak of it distributively, and gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a *party*; but is not a State a party as well in the condition of a Defendant as in that of a Plaintiff? And is the whole force of that expression satisfied by confining its meaning to the case of a Plaintiff-State? It seems to me, that if this Court should refuse to hold jurisdiction of a case where a State is Defendant, it would renounce part of the authority conferred, and, consequently, part of the duty imposed on it by the Constitution; because it would be a refusal to take cognizance of a case where a *State is a party*.”).

235 See Nelson, *supra* note 35, at 1603–04 (“It may have seemed natural for an amendment responding to *Chisholm* to address the very grants of subject matter jurisdiction on which members of the *Chisholm* majority had relied.”).

236 See *supra* note 130 and accompanying text.

were thought to be covered by the sovereign immunity states retained under the Constitution. The states did not exist in a federal union with foreign states, after all, in the same way they do with each other and each other's citizens. The general understanding of state sovereign immunity, as precluding all suits by individuals against states, did not seem to make an exception for federal laws.<sup>237</sup> There was also an idea that federal laws would apply to individuals only.<sup>238</sup> It may be, however, that there was no agreement on the question of foreign states. Alternatively, American society may simply not have considered the possibility of federal question jurisdiction.<sup>239</sup> In such cases, would it really make sense for one to consider the question resolved by the Eleventh Amendment?

Manning assumes that because a law seems "precise," it must have resolved all the relevant background legal questions and the Court should read its limited provisions as such. That is, the Amendment's silence with respect to other "kind(s) of immunity" should be read as an affirmative rejection of them.<sup>240</sup> But here Manning's warning—to wit, "shifting a statute's level of generality to conform to its [supposed] background purpose dishonors an evident congressional choice to legislate in broader or narrower terms"<sup>241</sup>—applies equally to himself. If Congress did not actually resolve those broader questions, assuming that the Amendment did resolve them dishonors a congressional choice to address only one limited question at a time (or at all).

Manning's assumption that precise constitutional texts resolve all related constitutional questions conflicts with the thrust of his argument about why such texts are precise in the first place: because there was no agreement on the more sweeping, general, or speculative questions. If one accepts Manning's contention that the limited scope of the Eleventh Amendment plausibly reflects a situation in which a majority may have supported a more sweeping Amendment, but a *supermajority* could only agree on its limited terms, it makes little

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237 3 ELLIOT'S DEBATES, *supra* note 28, at 533 (statement of James Madison) ("It is not in the power of individuals to call any state into court."). *But see supra* note 100 and accompanying text.

238 *See supra* note 181.

239 *See Seminole Tribe v. Florida*, 517 U.S. 44, 69–70 (1996) ("[I]n light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States.").

240 Manning, *supra* note 21, at 1732.

241 *Id.* at 1691.

sense to read the Amendment as affecting anything beyond the agreed-upon terms. Indeed, it is natural to allow the minority to *limit the scope* of the Eleventh Amendment in accordance with the political compromise reached in the ratification process. But reading the Eleventh Amendment not only to prohibit the suits it specifies but also to authorize unspecified suits would be to allow the minority to *define* the Amendment's scope and effectively eliminate state sovereign immunity. Compromises may be sustainable precisely because they leave broader or more difficult issues unresolved.<sup>242</sup> To enlarge the stakes of such a compromise—to make it, in effect, all-or-nothing—would prevent compromises from forming in the first place.

Imagine the Eleventh Amendment is just the sort of compromise Manning assumes it is. A majority of confederalists, who want complete immunity for states, compromises with a ratification-blocking minority of dual-sovereignists, who oppose only federal question immunity. If the Eleventh Amendment were taken to preclude federal question immunity, the confederalists would not vote for it and no amendment would be possible even though both would find it desirable. The confederalists would abandon legislative compromise and focus on winning judicial nominations.

A precise constitutional text might result from a compromise in which the relevant actors decide precisely to defer such larger open questions for future resolution. A broadly worded text might result from a compromise in which they defer more specific open questions for future resolution. Either way, courts ought to facilitate and honor—rather than prevent and distort—legislative compromise. Giving a purposive reading to either type of text disrupts that compromise.

### B. *Two Marshalls*

Professor Lawrence Marshall embraces Chief Justice Marshall's reading of the Eleventh Amendment in *Cohens v. Virginia*.<sup>243</sup> Both of them claim to derive its meaning from the text. "That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment," according to Chief Justice Marshall. "It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the Court still extends to these cases: and in these

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242 See Sunstein, *supra* note 193, at 1735–38; see also *supra* notes 50–52 and accompanying text (discussing the use of compromises in lawmaking and judicial action).

243 See Marshall, *supra* note 21, at 1354.

a State may still be sued."<sup>244</sup> From this reasoning alone, Chief Justice Marshall concludes, "We must ascribe the amendment, then, to some other cause than the dignity of a State."<sup>245</sup>

The problem with this reading is that it is transparently dishonest. As Lawrence Marshall puts it, Chief Justice Marshall concluded that a sovereign immunity "theory of the amendment . . . was inconsistent with the amendment's terms."<sup>246</sup> But Chief Justice Marshall judges the Eleventh Amendment against a theory of sovereign immunity to which no one at the time of the Eleventh Amendment subscribed. Jurisdiction between states had existed even under the Articles, when states indisputably held sovereign immunity.<sup>247</sup> And the Article III provision that continued this "state v. state" jurisdiction was uncontroversial at the ratification of the Constitution, even in conventions where disputes arose over Article III.<sup>248</sup> During the proposal and ratification of the Eleventh Amendment, the States—repeatedly and vociferously—expressed their understanding of sovereign immunity as shielding a state from suit *by individuals*.<sup>249</sup> The ratifiers of the Eleventh Amendment—the States—would not have understood state sovereign immunity to be violated by cases between sovereigns, especially not between states.

Thus—just as Manning's rational actor reads the Eleventh Amendment against anachronistic background assumptions—Chief Justice Marshall reads it against antiquated ones. Chief Justice Marshall attributes a purist and alien theory of sovereign immunity to the American states and, finding the text underinclusive for those purposes, concludes that the Eleventh Amendment must mean something else. This is not a textualist reading.<sup>250</sup> It is purposive in an underhanded way. Instead of understanding state sovereign immunity as the ratifiers of the Eleventh Amendment understood it, Chief Justice Marshall gives it a fixed and abstract definition. He uses the

244 *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

245 *Id.*

246 Marshall, *supra* note 21, at 1354.

247 ARTICLES OF CONFEDERATION art. IX, cl. 2 (U.S. 1781).

248 See, e.g., 3 ELLIOT'S DEBATES, *supra* note 28, at 532 (statement of James Madison) ("The next case, where two or more states are the parties, is not objected to. Provision is made for this by the existing Articles of Confederation, and there can be no impropriety in referring such disputes to this tribunal.").

249 See *supra* notes 219–24 and accompanying text; see also Letter from James Madison to Spencer Roane, *supra* note 130, at 221 ("Nor is it less to be wondered at that it should have appeared to the court that the dignity of a State was not more compromised by being made a party against a private person than against a co-ordinate party.").

250 See *supra* note 55 and accompanying text.



mismatch between his theoretical notion of state sovereignty and the actually prevalent one at the time in order to strip the Amendment of its most natural reading.

The state sovereignty view would be the most natural reading of the Eleventh Amendment because the Article III clauses it modifies were understood—ever since the proposal of the Constitution—as a threat to state sovereign immunity; because *Chisholm*, to which the Amendment was a response, was a denial of state sovereign immunity; and because the state legislatures that proposed and ratified the Eleventh Amendment explicitly spoke of it as a protection of state sovereign immunity. Neither Chief Justice Marshall nor anyone else need give the Eleventh Amendment a strong and purposive reading on account of this evidence—it is possible that the Article V process compromised the states' original intentions—but to say that it has no relationship to state sovereignty strains credulity.

Chief Justice Marshall, who argued that state sovereign immunity would survive the Constitution at the Virginia ratifying convention, was—whether he believed them or not—at least familiar with the common assumptions about state sovereign immunity prevailing at the time. He might also have recognized the capacity of states to compromise—to recognize state sovereign immunity to some extent but not completely.

Nevertheless, Chief Justice Marshall replaced the state sovereignty explanation by arguing that states actually ratified the Eleventh Amendment to avoid payment of debts. He provided an historical account of a financial crisis—one that may not have actually happened. Professor Marshall argues, “This account of the amendment’s fiscal origins has been accepted by virtually all who have researched the background of the amendment.”<sup>251</sup> Yet, as Clyde Jacobs writes, “[T]here is practically no evidence that Congress proposed and the legislatures ratified the Eleventh Amendment to permit the states to escape payment of existing obligations.”<sup>252</sup> By 1794, over two-thirds of the states’ debts had been assumed by the federal government, and “the state governments, for the most part, were able and willing to meet their remaining obligations.”<sup>253</sup> In 1790, Secretary of the Treasury Alexander Hamilton estimated the total state debt at \$25 million and, of that amount, he proposed that the federal government assume

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251 Marshall, *supra* note 21, at 1355.

252 JACOBS, *supra* note 12, at 70. See generally *id.* at 69–72 (evaluating the state-debts explanation of the adoption of the Eleventh Amendment).

253 *Id.* at 69.

\$21 million.<sup>254</sup> According to Jacobs, total state indebtedness was probably about \$26 million, and the amount actually subscribed was less than that authorized: about \$18 million.<sup>255</sup> “[B]ut, at most, remaining state debts amounted to approximately \$8 million. Moreover, during the 1790s and the ensuing decade, practically all of this indebtedness was discharged, partly out of state revenues and partly from federal credits, as wartime accounts between the states and the central government were settled.”<sup>256</sup> Even if that were not the case, the Federalists who controlled Congress in 1794 believed in the satisfaction of public debts and would not have supported a constitutional amendment to enable states to repudiate their obligations.<sup>257</sup>

Professor Marshall, like the Chief Justice, refuses to take sovereign immunity advocates at their word. He quotes extensively from George Mason’s speech before the Virginia ratifying convention about land disputes,<sup>258</sup> and he cites a portion of Mason’s proposed amendment to the Constitution limiting the judicial power of the United States.<sup>259</sup> The implication is that Mason advanced a pragmatic argument about states’ amenability to suit in light of financial concerns. Professor Marshall leaves out, however, the full text of Mason’s proposed amendment, which would have eliminated federal diversity jurisdiction and federal question jurisdiction entirely.<sup>260</sup> Professor Marshall quotes only that part of Mason’s proposal that would exclude preratification causes of action. He does not quote Mason’s explanation of the *source* of Virginia’s proposed immunity from suit: its sovereignty. “Is the sovereignty of the state to be arraigned like a culprit, or private offender?” thundered Mason at the Virginia ratifying convention. “Will the states undergo this mortification?”<sup>261</sup> The principle of state sovereignty seems rather central to Mason’s argument.

Of the supposed financial worries that prompted the Eleventh Amendment, Professor Marshall writes,

The decision in *Chisholm* confirmed the worst fears of Virginia and other similarly situated states. The preface to the relevant volume of *The Calendar of Virginia State Papers* declares that “[n]o event probably in the history of the State ever so shocked the public sensi-

254 *Id.*

255 *Id.*

256 *Id.* (footnote omitted).

257 *See id.* at 70.

258 *See* Marshall, *supra* note 21, at 1363–64.

259 *Id.* at 1364 n.99.

260 *See supra* note 170.

261 3 ELLIOT’S DEBATES, *supra* note 28, at 527 (statement of George Mason).

bility” as the Supreme Court’s assertion of jurisdiction in *Hollingsworth*.<sup>262</sup>

But why were they so surprised? According to Professor Marshall, “all indications in the body of the Constitution are against state immunity from federal jurisdiction.”<sup>263</sup> Moreover, upon ratifying the Constitution, Professor Marshall maintains, everyone had acknowledged a constitutional principle of “preserving as much accountability as politically possible”<sup>264</sup> and state sovereign immunity would be inconsistent with such a principle:

Just five years before the eleventh amendment was passed, the Constitution had been ratified, complete with multiple restrictions on state power. Supporters of the Constitution had stressed the importance of federal jurisdiction to ensure state compliance with these provisions. Hamilton, for example, argued that “[n]o man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.” The method the framers chose to accomplish this, Hamilton continued, was to vest “authority in the federal courts to overrule such as might be in manifest contravention” of the Constitution.<sup>265</sup>

One might note that vesting “‘authority in the federal courts to overrule such as might be in manifest contravention’” of the Constitution does not necessarily entail suits against states.<sup>266</sup> But, in any case, if it were true that the original public meaning of the Constitution involved the understanding that states were to be subject to suit in federal court so as to remain “accountable,” then it is difficult to see why the courts’ entertaining suits against states would be so shocking—or why claims against states would be regarded as so outrageous. Professor Marshall lacks a full account of the public understanding because he ignores the background understandings that shaped the debate. He takes Article III literally rather than as it came to be understood during the ratification process.

Instead, Professor Marshall anachronistically attributes more contemporary impulses to the actors of the period:

[I]t is helpful to consider the potential adverse public reaction that might have greeted an amendment that constitutionalized state

262 Marshall, *supra* note 21, at 1364 (alteration in original).

263 *Id.* at 1346.

264 *Id.* at 1367.

265 *Id.* (alteration in original) (footnotes omitted) (quoting THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 16, at 475–76; *id.* at 476).

266 *Id.* (quoting THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 16, at 476); see also *supra* notes 122–24 and accompanying text.

immunity from all suits, even those brought by a state's own citizens. As elected officials, the congressmen and senators who voted for the bill proposing the eleventh amendment were probably conscious of their constituents' anticipated response to the amendment. In any event, they certainly wanted to create an amendment that would be ratified by the states.<sup>267</sup>

But, in fact, at least seven state legislatures publicly endorsed just such an amendment constitutionalizing state immunity from all suits brought by individuals.<sup>268</sup> And state governors actively lobbied the other states and Congress to support an amendment preventing, as Samuel Adams put it in a message to other governors, "[t]he claim of a Judiciary authority over a State possessed of sovereignty."<sup>269</sup> The Georgia House openly declared its refusal to be made susceptible to suit. "[T]his legislature are of the opinion," it resolved, "that the state of Georgia will not be bound by any decree or judgment of the said supreme court subjecting the said state to any process, judgment or execution it may issue, award, pronounce or decree against the same."<sup>270</sup> States expressed such defiance because federal suits against states "would effectually destroy the retained sovereignty of the states"<sup>271</sup> or, as the Massachusetts legislature put it, "a Government being liable to be sued by an individual Citizen . . . is inconsistent with that sovereignty which is essential to all Governments, and by which alone any Government can be enabled, either to preserve itself, or to protect its own members."<sup>272</sup>

The States declared their objective of sovereign immunity—from all suits by individuals—not only publicly, but *in the name of the public*. Professor Marshall's suggestion that Americans in 1794 were not jealous of their states' sovereignty, but would have been outraged by limitations on (then-nonexistent) federal question jurisdiction, ignores reality.<sup>273</sup>

Ultimately, Professor Marshall's point is that one should stick to "the precise and determinate words" of a provision whenever a plausi-

267 Marshall, *supra* note 21, at 1369–70.

268 See *supra* notes 219–24 and accompanying text.

269 Letter from Samuel Adams to the Governors of the States (Oct. 9, 1793), in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 442, 442 (emphasis omitted).

270 *Proceedings of the Georgia House of Representatives*, *supra* note 223, at 162.

271 *Id.* at 161.

272 *Report of a Joint Committee of the Massachusetts General Court*, INDEP. CHRON. (Boston), June 27, 1793, at 2, in 5 THE DOCUMENTARY HISTORY, *supra* note 118, at 230, 230 (alteration in original) (emphasis omitted).

273 But see Marshall, *supra* note 21, at 1368–69 (addressing the charge "that preserving federal jurisdiction to promote state accountability is anachronistic").

ble explanation for its being so drafted can be devised.<sup>274</sup> That's good advice, but Professor Marshall, like the Chief Justice, divests those precise words of the general understanding they held at the time. Especially when it comes to constitutional texts, which often involve compromises over abstract matters of principle, one ought to read the text in light of common background understandings. Professor Marshall reads the text literally.<sup>275</sup> It remains unclear why one should embrace a literalist reading of the text simply because one can imagine a plausible scenario in which it would be drafted that way—especially, as here, where it seems to be a rather implausible plausibility. If one struggles to construct a plausible sequence of events to explain a text, one might also ask whether one is missing some background assumption or rule against which it was originally understood. Often, as here, that will involve an understanding of a broadly worded provision that it modifies. Understanding the compromise behind Article III provides the simplest and most coherent explanation for the Eleventh Amendment, since the two clauses it modifies are the ones that had always been at issue.

#### CONCLUSION

Sovereign immunity may or may not be a desirable doctrine, but it is a constitutional one.<sup>276</sup> Appreciating it as a product of compromise leads one to recognize that sovereign immunity—or any constitutional doctrine, for that matter—“is not a brooding omnipresence in the sky.”<sup>277</sup> It has no necessary form or theory, but depends on the bargain struck at ratification. The terms of constitutional compromise may be embodied in broadly worded provisions as well as precise ones. Either way, courts ought to read the text in a way that respects the underlying bargain. By design, the Constitution empowers political minorities to force compromise, and it subverts those process values to alter those compromises in the interest of theoretical coherence or by privileging literalism over original understanding.

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274 *Id.* at 1345.

275 *See supra* notes 39–40 and accompanying text.

276 *Cf.* David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 SUP. CT. REV. 149, 168 (“Sovereign immunity is an unattractive doctrine that does not belong in an enlightened constitution. Unfortunately, however, it is a part of ours.”).

277 *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).